

Incentives for eco-sustainability: proposals for a landscape-integrated approach

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Abstract: *The protection of the landscape is not usually considered relevant in EU “green” policies. For this reason, the paper aims to define what kind of impact eco-incentives have on the features of landscapes (not only natural ones, but also cities and villages, industrial sites, infrastructure settings etc.), to suggest the integration of this element within other policies, especially if they concern human activities that may significantly alter the “shape” of the territory.*

Contents: 1. Premise: eco-incentives and the side effects on landscape quality – 2. Landscape versus Environment: complementary but different interests – 3. A case of convergence: the Common Agricultural Policy (CAP) example – 4. A case of conflict: the incentive programs for the production of renewable energy – 5. Conclusions.

1. Premise: eco-incentives and the side effects on landscape quality

Since the 1960s, many States and supranational institutions have recognised the devastating repercussions on environmental resources (air, water, soil etc.) caused by economic development processes. Despite encouraging economic growth, phenomena, such as intensive crops, deforestation, urbanisation, soil covering, and the construction of huge infrastructures, induce a massive waste of environmental resources and permanently affect its multifunctioning. Consequently, the urgency to combine efficiency and competitiveness targets with eco-sustainable standards has gradually entered both international and European institutions' agendas and national policies.

To reach these objectives, the European Union has tried to overcome the traditional *command and control* approach and has based a wide part of its action on various incentive-based programs¹.

¹ In literature, *inter alia*, A.L. BOVENBERG, L.H. GOULDER, *Environmental Taxation and Regulation*, in *Handbook of public Economics*, n. 3, 2002; S. BREYER, *Regulation and its reform*, Harvard University Press, Cambridge 1984, *passim* and p. 261 ff.; M. CLARICH, *La tutela dell'ambiente attraverso il mercato*, in *Dir. Pubbl.*, n. 13, 2007,

Economic incentives², such as *green payments* and other types of help, in fact, turned out to be more capable than regulation and authorisations in successfully encouraging national institutions and economic actors to move towards a *green transition*.

The need to accelerate the achievement of environmental goals has recently led the European Commission to set out a *New Green Deal for the European Union*³, with the purpose of coordinating and implementing European and national strategies in many different environmental areas (food security, air pollution etc.). The recently adopted *EU Recovery Plan (EuRP)*, with its huge investment plan boosted by *Next Generation EU*

p. 219 ff.; P. DELL'ANNO, *Diritto dell'ambiente*, VI ed., Cedam, Padova 2021; C.S. HOLLING, G.K. MEFFE, *Command and control and the pathology of Natural Resource Management*, in *Conservation biology*, n. 2., 1996, p. 328 ff.; R. PARTAIN, *Coordinating Public and Private Sustainability. Green Energy Policy, International Trade Law, and Economic Mechanisms*, Routledge, London 2020; R.B. STEWART, *Markes versus environment?*, European University Institute, Jean Monnet Chair Papers, n. 19, 1995; ID., *A new generation of environmental regulation?*, in *Cap. U. L. Rev.*, n. 29, 2001, p. 21 ff.; ID. *Il diritto amministrativo nel XXI secolo*, in *Riv. trim. dir. pubbl.*, 2004, p. 18 s. In this perspective, S. MORATTI, *Green Deal Europeo: nuove prospettive per la fiscalità dell'energia nelle politiche di gestione dei rischi climatici*, in *Rivista di diritto finanziario e scienza delle finanze*, n. 1, 2020, p. 439 ff., highlights that the impact of human activity on climate change is significant: according to recent studies of the *Intergovernmental Panel on Climate Change (IPCC)*, human activity can be traced back to current phenomena such as global warming, the sea-level rising and the intensification of extreme weather events. See also, G.F. CARTEI (ed), *Cambiamento climatico e sviluppo sostenibile*, Giappichelli, Torino 2013.

² About the incentive measures in the Italian legal framework, see L. BENADUSI, *Attività di finanziamento pubblico: aspetti costituzionali ed amministrativi*, in *Riv. trim. dir. pubbl.*, 1966, p. 890 ff.; E. CROCI, G. PERICU, *Sovvenzioni (dir. amm.)*, in *Enc. Dir.*, XLIII, Giuffrè, Milano 1990; G. PERICU, *Le sovvenzioni come strumento di azione amministrativa*, Giuffrè, Milano 1967; D. SERRANI, *Lo Stato finanziatore*, Franco Angeli, Milano 1971; G.P. MANZELLA, *Gli ausili finanziari*, in S. Cassese (ed) *Trattato di diritto amministrativo. Diritto amministrativo speciale*, IV, Giuffrè, Milano 2003, p. 3752 ff., V. SPAGNUOLO VIGORITA, *Problemi giuridici dell'ausilio finanziario pubblico a privati*, Editoriale Scientifica, Napoli 1964, p. 119 ff.

³ The *Eu Green Deal* acts, starting from the Communication of the Eu Commission COM(2019) 640, adopted in Brussels, 11 December 2019, can be found and read at eur-lex.europa.eu/legal-content/EN/TXT/?qid=1576150542719&uri=COM%3A2019%3A640%3AFIN. See also, G. SEVERINI, U. BARELLI, *Gli atti fondamentali dell'Unione europea su "transizione ecologica" e "ripresa e resilienza": prime osservazioni*, in [giustiziaamministrativa.it](https://www.giustiziaamministrativa.it), 2021.

(described as «the largest stimulus package ever financed in Europe»)⁴, will perform a key role in its implementation.

The above-mentioned measures and strategies will have a relevant impact on national policies: in Italy, for example, a new Ministry for Ecological Transition has been established and the *Italian Recovery and Resilience Plan* (It-RRP), submitted to the EU Commission on May 2021, addresses a high percentage of its resources (almost 37%) to ecological transition⁵. Thanks to the *Recovery and Resilience Facilities* and to the ambitious incentive-based programs supported by the EU, a *green revolution* is about to take place in the coming years.

The starting point of this paper is that the incentivised activities, while positively impacting the environment (the so-called externalities)⁶, can also have a huge impact on the features of landscapes (not only natural ones, but also cities and villages, industrial sites, infrastructure settings etc.).

The side-effects on landscape do not seem to be distinctly considered at a European level, as evidenced by the circumstance that the *eco-conditionality* clause and the *do no significant harm* principle, which Member States must comply with for admission to EURP's next steps, do not include the achievement of specific goals related to landscape quality. Moreover, landscape does not represent a subject of harmonisation⁷, and Eu policies consider the renovation of natural capital (such as biodiversity)

⁴ See: ec.europa.eu/info/strategy/recovery-plan-europe_it. For an overview about the topic, see A. PADOA SCHIOPPA, A. IOZZO, *Globalizzazione e Unione Europea, sfide e strategie. Profili istituzionali del Green Deal*, Torino, Centro studi sul federalismo, 2020; T. ROSEMBUI, *Climate Change and the New Green Deal*, in *Ambientediritto.it*, n. 4, 2019.

⁵ The Italian Plan (available on www.governo.it/it/articolo/piano-nazionale-di-ripresa-e-resilienza/16782) is divided into six missions, articulated in components and lines of intervention. To accelerate the «green revolution» (second mission, dedicated to the “*Green Revolution and Ecological Transition*”), the Plan allocates 59.5 billion euros, almost 70 billion if considering the resources of React-Eu (1.31 billion) and the contribution of the Complementary Fund (9.16 billion).

⁶ The well-known definition was used by J. STIGLITZ, *Economics of the public sector*, II ed., Norton, New York 1988.

⁷ The European Court of Justice (6th March 2014, judgment no. 206), distinguishing environment from landscape, considered the latter extraneous to its competencies. For a deeper analysis of the relevance of the landscape among the International legal framework, see A. STRECKER, *Landscape Protection in International Law*, Oxford University Press, Oxford 2018.

or natural landscapes simply as additional (and merely consequential) externalities of the execution of environmental strategies.

Nevertheless, in the Italian legal framework, the landscape is globally relevant in its cultural, historical and identity assets, and its management must respect the sustainability principle (according to art. 3 *quater* of the Italian Environmental Code). Therefore, the impact caused on its elements by the incentivised activities must be accurately taken into account; in fact, contrary to popular belief, even best environmental practices can affect landscape quality (for instance, as it will be shown in par. 4, wind farms or solar panels are known for their negative visual impact).

Moving from these premises, the questions leading this study are the following: How can incentives to be granted for eco-sustainability purposes be shaped in order to integrate landscape quality targets and avoid the loss of cultural values, without hampering the achievement of Eu environmental goals?; Are there any existing examples of landscape integrated approaches (LIA) which can be used as leading and repeatable pattern?; How can the management of environmental information be improved in order to consider landscape information?; What role could regions perform, both in the management of aid and the monitoring of its results?

In the following paragraphs, the difference between the notions of *environment* and *landscape* in the Italian legal system will be preliminarily reconstructed. Subsequently, an example of incentives that produce positive externalities for both the environment and the landscape at the same time (par. 3) and an example of incentives positively impacting the environment but with negative repercussions for the landscape (par. 4) will be taken into consideration.

In the final paragraph some proposals will be articulated in order to systematically integrate cultural landscape in environmental policies and to grant incentives for eco-sustainability.

2. Landscape versus Environment: complementary but different interests

First of all, it is necessary to recall the distinction between the notion of *landscape* and the notion of *environment* in the Italian legal system in order to explain why these two interests do not necessarily coexist harmoniously and may collide with each other when a best

environmental practice is subsidised or tax facilitated.

Although the Italian Constitutional Court, in recent judgments, tends to consider them as complementary and overlapping⁸, the two above-mentioned notions are linked to different interests and subject to specific and separated disciplines (i.e., Legislative Decree no. 152/2006, known as *Environmental Code*, and Legislative Decree no. 42/2004, *Code of Cultural Heritage and Landscape*). The related administrative functions are also devolved to different administrative authorities at state level (Ministero per la Transizione Ecologica for the environment, and Ministero della Cultura for the landscape).

This distinction, which has historical origins, is currently highly argued among Italian scholars and within the jurisprudence⁹, can be summarised as follows: while the environmental discipline considers the space in its ecological dimension and aims at preserving the biosphere through «*the prudent and rational use of natural resources*» (soil, water,

⁸ In some judgments, the Italian Constitutional Court defined landscape as the “*form of the territory and the environment*” (judgment no. 196/2004), which protection must therefore be intended “*in the broad sense of ecological protection and conservation of the environment*” (see judgments no. 391/1989; and no. 430/1990).

⁹ In one of the first studies on the subject, M.S. Giannini pointed out that the expression “environment” is polysemantic and, from a legal point of view, may indicate three complexes of regulations and movements of ideas: those relating to the landscape, those relating to ecological protection, those relating to urban planning (Id., «*Ambiente*»: *saggio sui diversi suoi aspetti giuridici*, in *Riv. trim. dir. pubbl.*, 1973 and in Id., *Scritti*, I, Giuffrè, Milano 2005, p. 447 ff., esp. p. 455 ff.). See also, M.S. GIANNINI, *Difesa dell'ambiente e del patrimonio naturale e culturale*, now in Id., *Scritti*, VI, Giuffrè, Milano 2005, p. 247 ff. About the distinction between environment and landscape, see also P. CARPENTIERI, *Paesaggio, ambiente, urbanistica: interrelazioni e distinzioni*, in (7) *Ambiente e sviluppo*, 2003, p. 635 ff.; S. FOÀ, *Paesaggio e discipline di settore*, in G. CUGURRA, E. FERRARI, G. PAGLIARI (eds.), *Urbanistica e paesaggio*, Editoriale Scientifica, Napoli 2006; L. PERFETTI, *Premesse alle nozioni giuridiche di ambiente e paesaggio. Cose, beni, diritti e simboli*, in *Riv. giur. amb.*, 2009, p. 1. In a recent paper, P. CARPENTIERI, *Paesaggio, ambiente e transizione ecologica*, in www.giustiziainsieme.it, 2021, affirms the need to keep the two goods distinct to prevent the stronger one (almost always the environment) from “engulfing” the other.

air and climate)¹⁰, the discipline relating to the landscape¹¹ considers the space in its aesthetic and cultural dimension. The former implies the use of objective criteria and canons belonging to scientific fields such as chemistry, physics, biology etc.; the latter concerns the sphere of human perception and implies knowledge in the field of literature, history, anthropology, semiotics etc.

Since they coexist in the same domain (i.e., the physical space taken into consideration), the two interests are often simultaneously involved in the same cases and may relate to each other either in terms of convergence or, because of their distinction, in terms of conflict.

The following study aims at showing that incentive programs must carefully recognise the features of this relationship.

In particular, in the first case (i.e. convergence), positive externalities for the quality of the landscape should be addressed and maximised. The importance of this aspect is underlined by the fact that the Italian discipline of landscape protection is mainly based on a conformative model (recalling the traditional *command and control* pattern) and is often unable to counteract phenomena linked to omissive conducts, such as cultivation abandonment, depopulation of inland areas, physiological erosion of materials, or desertification, which may cause a deterioration of the landscape. The incentives provided for other purposes (such as the environmental ones) but with positive returns for the landscape, can therefore fill this regulatory gap and contribute to the

¹⁰ See article 2 (1) of the Italian Environmental Code. However, it should be considered that art. 5 defines “environmental impact” as the “*significant effects, direct and indirect, of a plan, programme or project, on the following factors: population and human health; biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC; territory, soil, water, air and climate; tangible property, cultural heritage, landscape*” therefore, referring to a broad and all-encompassing notion of environment.

¹¹ According to the European Landscape Convention (Florence, 2000), “Landscape” means “*an area, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors*”. About the definition of «landscape» in the Italian legal system, starting by the article 9 of Constitution, a key role has been performed by a well-known paper of A. PREDIERI, *Paesaggio (voce)*, in *Enc. Dir.*, XXXI, Milano, Giuffrè 1981. See also, for an overview, P. CARPENTIERI, *La nozione giuridica di paesaggio*, in *Riv. trim. dir. pubb.*, n. 2, 2004, p. 363 ff.; S. AMOROSINO, *Introduzione al diritto del paesaggio*, Laterza, Roma-Bari 2010, p. 37 ff.; E. BOSCOLO, *Appunti sulla nozione giuridica di paesaggio identitario*, in *Urbanistica e appalti*, n. 7, 2008, p. 797 ff.

achievement of the quality targets established in the landscape planning acts¹².

On the other hand, if the incentivised activities produce positive externalities for the environment but lead to a significant decrease of landscape quality (the second case considered in this paper), the impact should be carefully analysed and, as far as possible, minimised, in order to prevent irreversible damages.

Below, we will consider some examples of incentives with significant externalities for the landscape in order to highlight existing patterns of integrated approach. We will show those to be replicated and some dysfunctions, as well.

3. A case of convergence: the Common Agricultural Policy (CAP) example

An example of incentives that may have positive repercussions on the landscape is represented by agricultural aid.

Agricultural practices, in fact, significantly impact the configuration of landscapes, imprinting on them special features which are strictly related to Italian identity, history and traditions (shaping a particular category of landscape, generally defined *farmed* or *rural*)¹³. Consequently, the rural policies developed at different government levels (European, national, and regional) and the financial aids granted to farmers, affecting the quantity and techniques of production¹⁴, have several repercussions on the “appearance” of rural landscapes.

¹² For example, Article 143(para. 8) of the Cultural Heritage and Landscape Code expressly states that the landscape plan may identify “*incentive measures*” for the implementation of projects aiming at conservation, recovery, redevelopment, enhancement and management of regional areas, with particular reference to areas “*significantly compromised or degraded*”. About the role of landscape planning in the Italian legal system, see G.D. COMPORI, *Piani paesaggistici (ad vocem)*, in *Enciclopedia del Diritto*, Annali, V, Giuffrè, Milano 2012, p. 1047 ff.

¹³ According to the well-known definition of Emilio Sereni, a rural landscape represents “*the form that man, in the course and for the purposes of his agricultural production activities, consciously and systematically imprints on the natural landscape*” (E. SERENI, *Storia del paesaggio agrario italiano*, Laterza, Bari 1982, p. 29). See also E. DEL MASTRO, *La tutela del paesaggio rurale: tendenze evolutive a livello nazionale e comunitario*, in *Aedon*, n. 2, 2005.

¹⁴ It has to be considered that farmers generally orientate their decisions on the basis of economic reasons, i.e. the exchange price of the goods and the subsidies on which they can rely on.

It should be noted that the above-mentioned impact is not necessarily positive, as demonstrated by a brief recap of the historical evolution of the related discipline.

In fact, in the beginning, the Common Agricultural Policy (CAP, instated in 1962)¹⁵, pursuing the objective of maximising production, encouraged the specialisation and simplification of the cultivation systems, with the extension of monoculture and livestock. Viticulture, olive, fruit, and vegetable cultivation, animal husbandry and dairy production have all been involved in this intensification of production, impoverishing the quality of the landscape¹⁶.

Since the 1990s, however, the Common Agricultural Policy has begun to recognise the so-called multifunctionality of agriculture (recognised for the first time in 1992 during the *Earth Summit* in Rio and merged into *Agenda 2000*), which consists in the capacity of agriculture to produce not only food but also additional utilities, such as ecosystem services (ES) and, for what is relevant for the purpose of this study, the

¹⁵ About the CAP, in general terms, see D. BIANCHI, *La politique agricole commune*, Bruylant, Bruxelles 2006, p. 30 ff.; L. COSTATO (ed), *Trattato breve di diritto agrario italiano e comunitario*, Cedam, Padova 2003, p. 201 ff.; A. FIORITTO, *Agricoltura (amministrazione della)*, in *Dig. disc. pubbl.*, vol. I, UTET, Torino 1987, p. 115 ff.; A. FORTI, *Sulla adeguatezza delle misure ambientali contenute nella Pac2014-2020 rispetto all'obiettivo della tutela dell'ambiente e del territorio agrario: una questione di punti di vista*, in *Studi in onore di Luigi Costato*, I, *Diritto agrario e agroalimentare*, Jovene, Napoli 2014, p. 369 ff.; A. SORRENTINO, L. CACCHIARELLI, M. RONCHINI, *I profili economici della nuova Politica Agricola Comunitaria*, in I. CANFORA, L. COSTANTINO, A. JANNARELLI (eds), *Il Trattato di Lisbona e la nuova PAC. Atti del convegno di Bari 27-28 marzo 2014*, Cacucci, Bari 2014.

¹⁶ As noticed by M. BROCCA, *Paesaggio e agricoltura a confronto. Riflessioni sulla categoria del paesaggio agrario*, in *Riv. giur. ed.*, 2016, n. 1, p. 1 ff., and D. SALPINA, *How sectoral policy can benefit the protection of multi-functional cultural heritage? The case of agricultural landscape and the EU rural development policy*, in *Aedon*, 2019. An analytical description of the changes that the rural landscape has undergone since the Second World War, also due to the alternation of different policies is reported in the *Primo Rapporto sullo stato del Paesaggio Rurale*, realised by Osservatorio Nazionale dei Paesaggi Rurali, delle pratiche agricole e conoscenze tradizionali, Laboratorio del Paesaggio e dei Beni Culturali (CULTLAB), Università degli Studi di Firenze, settembre 2018. See also the *Rapporto sullo stato delle politiche per il paesaggio, Osservatorio nazionale qualità del Paesaggio*, in www.beniculturali.it, p. 254 ff.

care of rural landscapes, which generally do not have market value¹⁷ but are susceptible of integration into the local economy, contributing to the overall well-being of an area¹⁸.

As a consequence of this change of perspective, the conservation and enhancement of the rural landscape, initially considered as an indirect and accidental product of agricultural activity, has been progressively included in the objectives to be achieved within the CAP¹⁹ and expressly incorporated into financial aid planning.

In this direction, the traditional price support measures – which characterised the first phase of the CAP – have been substituted with direct payments to farmers, aiming at remunerating them for the production of additional services, which includes the care of rural landscapes²⁰. This

¹⁷ Landscape is sometimes classified as “public good”, other times “common good”, while it is generally accepted that landscape is an “out-of-market” good, and it is not spontaneously produced for economic purposes. For example, the Report *Public Goods and Public Intervention in Agriculture* (European Network for Rural Development, www.enrd.ec.europa.eu) states that, when the market is unable to meet the demand for environmental goods such as biodiversity or cultural landscapes, “*public policies must be implemented to encourage the necessary action. This requires the establishment of clear rules as the starting point of an eligible action or, in many cases, the use of public funds to incentivise supply*”.

¹⁸ See A. FARINA, *The cultural landscape as a model for the integration of ecology and economics*, in *Bioscience*, n. 50 (4), 2000, p. 313 ff.; L. SCHALLER, S. TARGETTI, *Agricultural landscapes, ecosystem services and regional competitiveness. Assessing drivers and mechanisms in nine European case study areas*, in *Land Use Policy*, n. 76, 2018, p. 735; J. SAYER, T. SUNDERLAND et al., *Ten principles for a landscape approach to reconciling agriculture, conservation, and other competing land uses*, in *Pnas*, n. 110 (21), 2013, in www.pnas.org; I. ZASADA, *A conceptual model to integrate the regional context in landscape policy, management and contribution to rural development: Literature review and European case study evidence*, in *Geoforum*, n. 82, 2017, p. 1. About the multifunctionality of agriculture, see R. HENKE (ed), *Verso il riconoscimento di una agricoltura multifunzionale. Teorie, politiche, strumenti*, Edizioni Scientifiche Italiane, Napoli 2004; G.A. PRIMERANO, *Il carattere multifunzionale dell'agricoltura tra attività economica e tutela dell'ambiente*, in *Dir. Amm.*, n. 4, 2019, p. 837 ff.

¹⁹ See, for example, the EEC Regulation no. 2328/1991, which empowers States to grant aid in sensitive areas from the point of view of the protection of the environment, the conservation of the countryside and the landscape. See also EEC Regulation No. 2078/1992, which aims at promoting the use of agricultural production methods which reduce the polluting effects of agriculture, a land management in a manner compatible with environmental protection and the care of abandoned agricultural and forest land.

²⁰ G.A. PRIMERANO, *Il carattere multifunzionale dell'agricoltura*, cit., p. 837 ff.

remuneration is no longer tied to the volume of production (the so-called decoupling) and is contingent on compliance with the conditionality clause²¹ (first pillar of the CAP). In particular, the Eu Regulation (n. 1307/2013), embraced a “*targeted approach*”, introducing seven multifunctional payments, each one with specific objectives; among them, the “green” component is relevant, which is a form of compensation for providing environmental public goods that are not remunerated by the market²².

Moreover, within the framework of the second pillar of the CAP (rural development policy), various incentive measures with potential benefits for the landscape are envisaged, such as investments in fixed assets, agri-environment-climate payments and village renewal services in rural areas. These measures must be structured through national plans, and cascading, from the regions, through the regional strategic plans, which play a pivotal role in the management of aid²³. A systematic analysis of the measures foreseen in regional plans and of their impact on the landscape was carried out in 2018 by the *Italian Institute of Services for the Agricultural Food Market* in collaboration with the Ministry of Agricultural, Food and Forestry Policies²⁴.

²¹ As highlighted by M. BROCCA, *Paesaggio e agricoltura a confronto*, cit., the “*minimum level of landscape maintenance*” appears in the specification of the statutory management requirements under which the conditionality rule is based (reg. n. 1306/2013). About the conditionality clause, see L. RUSSO, *La condizionalità da condizione a fine*, in *Riv. dir. agr.*, 2007, I.

²² It is stated that member States must allocate 30% of their national envelope of direct payments to the financing of the green component.

²³ The European Union’s rural development policy was introduced as the second pillar of the CAP under the *Agenda 2000* reform. It is co-financed by the European Agricultural Fund for Rural Development (EAFRD) and regional or national funds. In the 2014-2020 multiannual financial framework, some EUR 100 billion were allocated to rural development in the EU budget, with an additional EUR 61 billion being provided by the Member States as national co-financing for such measures. In the context of the CAP reform the July 2020 agreement on the multiannual financial framework foresees a 19% decrease in Pillar II appropriations compared to the previous period; the *Next Generation EU* Fund will reinforce the EAFRD budget by EUR 8 billion to help rural areas make the necessary structural changes to achieve the objectives of the European Green Deal and the Digital Transition Pact. For more details, see: <https://www.europarl.europa.eu/factsheets/en/sheet/1110/il-secondo-pilastro-della-pac-la-politica-di-sviluppo-rurale>

²⁴ Report *Le principali misure che impattano sul paesaggio rurale: un’analisi dei bandi regionali 2014-2020* (available on www.reterurale.it).

It should also be noticed that the reform of the Common Agricultural Policy (CAP 2023-2027, which has been the object of a provisional political agreement signed in June 2021 between the negotiators of the European Parliament, the EU Council, and the European Commission), shows an increasing attention to the needs of landscape protection. In fact, in accordance, not only with the *Green Deal* but also with the new *European Biodiversity Strategy 2030*, the protection of the landscape is one of the nine *specific objectives* of the future CAP, as proposed by the European Commission²⁵.

The above-mentioned example represents an interesting and strong model of landscape integrated approach, namely not simply aware of the potential positive repercussions that the incentivised activities may have on the landscape but also finalised to incorporate these externalities in the granting of aid, in order to support and maximise the benefits for landscape quality.

This model can be replicated with reference to other incentive programs that, in various ways, encourage activities which may potentially have a positive impact on the landscape, for example, reforestation, bonification or the recovery of abandoned industrial sites, the so-called brownfields (*infra*, para. 5).

4. A case of conflict: the incentive programs for the production of renewable energy

As previously mentioned, it is important to acknowledge that the environment and landscape represent similar yet different interests. This leads to the consideration of an opposing hypothesis to the one discussed earlier, namely that economically incentivised activities, even if they produce positive externalities for the environment, are at the same time detrimental to the landscape quality.

A paradigmatic example of such a conflict is represented by the incentives aimed at supporting the construction of plants for the production of renewable energy: eolic, photovoltaic, biomass, mini-hydroelectric and so on.

The construction and activation of these plants are essential to achieving the objectives of reducing emissions of climate-changing gases. These objectives have been in place since 1997, marked by the signing of

²⁵ See the summary at: ec.europa.eu/info/sites/default/files/food-farming-fisheries/key_policies/documents/cap-specific-objectives-brief-6-biodiversity_en.pdf.

the *Kyoto Protocol*, and have been progressively reinforced over time, until arriving at the recently-approved *European climate law*²⁶, which aims to reduce emission levels from 40%²⁷ to almost 55% by 2030 (compared to 1990' levels) and to achieve climate neutrality by 2050. In order to reach these goals and to foster the development of the *green sector*, several programs have been enforced since the 1980s to encourage private investments, through the provision of different incentive tools, such as Green or White Certificates, the all-inclusive tariff, the so-called “Energy Account” and European, national and regional contributions²⁸.

However, the quick and disordered spread of such plants has soon revealed its impactful attitude on the morphology of the territory. Photovoltaic plants, for example, are known for their negative impact on rural areas or on city views (if placed on the roofs of houses); similarly, offshore wind farms are highly contested because they may alter the views of the skyline that can be enjoyed from the sea and vice versa²⁹. Another significant example is represented by onshore wind farms: entrepreneurs, in fact, tend to locate these plants on the top of mountains or hills that constitute areas with higher wind speed, but, at the same time, these

²⁶ See www.europarl.europa.eu/news/it/press-room/20210621IPR06627/legge-ue-sul-clima-approvato-l-accordo-sulla-neutralita-climatica-entro-il-2050.

²⁷ The EU is also party to the Paris Agreement on climate change (submitted in 2015), which aims to keep global warming well below 2°C, while making efforts not to exceed 1.5°C. The EU's “nationally determined contribution” aims at a 40% reduction of greenhouse gas emissions by 2030, compared to 1990 levels. See G. ROSSI, *Diritto dell'ambiente*, 4th ed., Giappichelli, Torino 2017; M. CAFAGNO, *Principi e strumenti di tutela dell'ambiente*, Giappichelli, Torino 2007.

²⁸ The characteristics of these different tools and the evolution of the related discipline, starting from the process of liberalisation of the renewable energy market (Italian law no. 308/1982) and the regulation of the access to incentive tariffs (Law no. 9/1991, strengthened by Legislative Decree n. 79/1999), are summarised by G.M. CARUSO, *Fonti energetiche rinnovabili*, in G. ROSSI (ed), *Diritto dell'ambiente*, 4th ed., Giappichelli, Torino 2017, p. 408 ff. As evidenced, a key role was performed by the Legislative Decree no. 28/2011 (transposing the Directive EEC/ 2009/28), subsequently amended by the Decree-Law no. 91/2014 (so-called “Incentive Decree for renewables”), which marked a reversal of the trend, providing with retroactive effect the remodulation of economic incentives, considered too burdensome. See also F. FRAYSSE, *Fra protezione e competitività: le politiche pubbliche in campo ambientale*, in E. CASTORINA (ed), *Lezioni di diritto comparato dei servizi pubblici*, Editoriale Scientifica, Napoli, 2017, p. 19 ff.

²⁹ The first project in Italy aiming at building an off-shore plant coast regards the Molise region and, more precisely Termoli.

locations have great landscape value and, in almost all cases, are subject to constraints (called “vincolo paesaggistico *ex lege*”) imposed since 1985 by law no. 431 (the so-called Galasso law).

The construction of wind farms therefore requires a necessary balance between landscape protection and the production of energy from clean and renewable sources³⁰.

Despite its importance, this issue has not been considered systematically in the Italian legal system, and the achievement of a balance between the two interests has been substantially left, on a case-by-case basis³¹, to individual authorisation procedures, currently disciplined by art. 12 of Legislative Decree no. 387/2003 and attributed to the competence of the single region or the State, depending on the power of the installation. It is an integrated procedure, which provides for the participation of all the administrations involved (including those responsible for the protection of the landscape and the release, if necessary, of the landscape authorisation³²) within the framework of a conference model defined *conference of services* (regulated by law n. 241/1990)³³.

Moreover, in order “*to ensure a correct insertion of the plants, with specific regard to the landscape*” the above-mentioned art. 12, par. 10,

³⁰ In the literature, see F. DE LEONARDIS, *Criteri di bilanciamento tra paesaggio e energia eolica*, in *Dir. amm.*, 2005, p. 892 ff. More recently, see M. MELI, *Quando l'ambiente entra in conflitto con sè stesso, fonti energetiche rinnovabili e tutela del paesaggio*, in *Ambienteditto.it*, n. 2, 2021; M. SANTINI, *Ambiente e paesaggio tra conflitti valoriali ed istituzionali*, in *Urb. app.*, n. 3, 2020, p. 301 ff.

³¹ About the need for a synchronic assessment of public interests in the context of an administrative procedure, see Constitutional Court, judg. no. 69/2018 and, more recently, no. 177/2021, where is declared the constitutional illegitimacy of a regional legislation “*that does not respect the reservation of administrative procedure and, therefore, does not allow to operate a concrete balance of interests, strictly adhering to the specificity of the places, prevents the best enhancement of all the public interests involved and, consequently, violates the principle, in accordance with European Union legislation, of the maximum diffusion of plants from renewable energy sources*” (*inter alia*, judg. no. 286/2019, no. 106/2020, no. 69/2018, no. 13/2014).

³² The landscape authorisation, disciplined by art. 146 of lgs. decree n. 24/2004, is required only for those areas which are bounded for landscape purposes.

³³ About the mechanisms disciplined by the Legislative Decree no. 387/2003, M. SANTINI, *Ambiente e paesaggio*, cit., p. 302, underlines that “complexity” has promptly transformed itself into a “complication” from a regulatory and an administrative point of view.

settled the approval of specific guidelines³⁴, on which basis the Regions may indicate areas and sites *not suitable* for the installation of specific types of plants. In particular, par. 17 of the above-mentioned guidelines (adopted, seven years later, by ministerial decree of 10 September 2010) states that each region, on the basis of a specific inquest, proceeds to indicate, in the planning act, the unsuitability of each area in relation to “specific types and/or sizes of plants”, justifying the incompatibilities with reference to the protection objectives pursued. Moreover, it should be noted that the judgement of unsuitability formulated by the Region does not (*recte*, should not) represent an absolute prohibition to the plants but expresses a high probability of a negative outcome of the case-by-case conducted evaluation and, therefore, has the function of “accelerating” the procedure (Guidelines, par. 17.1)³⁵.

In practice, the lack of systematic planning and a prior definition of the areas “*suitable*” for renewable electricity farms, led the superintendent to systematically deny the authorisation of such installations, especially wind farms, considering wind turbines *tout court* harmful to the landscape (without a global and systematic assessment of the different interests coexisting on the territory)³⁶; furthermore, even outside the bounded areas (the so-called buffering areas), these authorities have often expressed negative legal opinions, blocking the construction of the plants (or, in any case, giving rise to numerous contentions) and

³⁴ To be adopted by the Unified Conference, on the proposal of the Minister of Productive Activities, in agreement with the Minister for the Environment and Protection of the Territory (today: Ministero per la Transizione Ecologica) and the Minister for Cultural Heritage and Activities (today: Ministero della Cultura). The guidelines were adopted, seven years later, by ministerial decree of 10 September 2010. As the Constitutional Court has repeatedly specified (most recently, in judgment no. 177/2021; but see also jud. no. 106/2020 and no. 86/2019) these guidelines form expression of the “loyal collaboration” between the State and the Regions and “*constitute, in purely technical sectors, the completion of the primary legislation*”; therefore they “*have mandatory nature and must be applied uniformly throughout the national territory*”.

³⁵ *Inter alia*, TAR Sardegna, II, decision no. 573/2020.

³⁶ During the authorisation procedures, a plant is evaluated individually, often without taking into account other plants already authorised or existent in the same territorial context: as evidenced by the Minister of Culture, this limits the necessary and fundamental evaluation of the cumulative effects, which may be greater than the sum of the impacts individually evaluated (especially if considering projects of different types and sizes).

causing the nullification of several investments³⁷.

The conflict between the two interests, in short terms, has allowed a “hyper protection” of the landscape (accentuating the conflict relating to the environment and between the administrations). Consequently, it has prevented Italy from achieving the objectives of spreading renewable energy and has also paralysed the development of the related market sector.

The high number of constraints (including landscape constraints) to the construction of such farms has therefore led to the paradoxical outcome of “discouraging” the use of incentives: between 2020 and 2021, for example, many auctions banned by the Gestore dei Servizi Energetici (GSE) for the allocation of incentives have gone deserted. In addition, according to the *Observatory on renewable electricity sources* created by Anie Rinnovabili (the manufacturers of devices and plants), new photovoltaic, wind and hydroelectric installations reached a total of 181 megawatts of power in the first quarter of 2021, a slight increase of +2% (compared to the 1st quarter of 2020). The results are diversified: positive for photovoltaic (+32%) and highly negative for hydroelectric (-79%) and wind (-31%)³⁸.

To stem this paradoxical effect, the Italian legislator has intervened many times in order to simplify the decision-making process and to reduce the powers of interference and veto of the Soprintendenza in the procedure for the authorisation of electricity plants from renewable sources, especially with regard to not bounded and buffering areas (see, in particular, the changes made by the decree law no. 77/2021, which, among other novelties, has taken away the power to oppose the final determination

³⁷ It should be noticed that the Guidelines provide for the intervention of the Soprintendenze, with the expression of a legal opinion, also in the case of interventions to be carried out in non-bounded areas, but «buffering» (in Italian, “contermini”) to those. The Guidelines qualify as buffering or bordering the areas that fall within a radius of 6/7 kilometers (50 times the height of wind towers) from the plant. As highlighted by S. AMOROSINO, “*Nobiltà*” (dei proclami politici) e “*miseria*” (dell’amministrazione ostativa) in materia di impianti di energia da fonti rinnovabili, in *Riv. giur. ed.*, n. 6, 2020, p. 497 ff. the consolidated practice of Soprintendenze is in the sense of considering the bordering areas equivalent to those bounded, asserting the legal opinion as binding and impeding the positive conclusion of the v.i.a. proceeding.

³⁸ www.anie.it/osservatorio-fer-giugno-2021

of the conference of services from the Ministry of Culture)³⁹.

Nevertheless, while responding to the appreciable need to “unlock” a sector congested by excessive constraints and to foster the reaching of climate goals, such a solution risks radically reversing the situation, preventing a careful consideration of the repercussions on the landscape quality, and avoiding an effective integration of the landscape in environmental protection policies (moreover, it does not appear capable of significantly reducing litigations and, on the contrary, may lead to an increase of them).

In order to ensure a more equitable balance between the two different interests, and to prevent the stronger one from “engulfing” the other, a proposal already formulated by the *Osservatorio nazionale per la qualità del paesaggio* (established at the Ministry of Culture), shall be taken into account. According to this proposal, it is necessary to implement territorial planning within the scope to identify the areas “suitable” for the production of electricity from renewable energy sources (surpassing, therefore, the negative approach of “not suitable” areas currently indicated by the Guidelines of 2010)⁴⁰. The identification of these areas should also

³⁹ The decree law was converted by Law no. 108 of 29 July 2021. In detail, article 30, modifies the regulation of the authorisation procedure for the construction of electricity production plants powered by renewable sources located in areas bordering those protected by landscape legislation. In the first paragraph it is provided that the Ministry of Culture participates in the procedure concerning these plants, including interventions connected and the infrastructures essential for the construction and operation, located in both bounded and buffering areas. In the procedures for authorising plants located in buffering areas, the Ministry of Culture expresses a non-binding legal opinion itself in the context of the conference of services. After the deadline for the delivery of the opinion has elapsed, the competent administration shall in any case decide about the authorization. In all cases, the representative of the Ministry of Culture can no longer activate the administrative remedies in opposition, against the determination of conclusion of the conference. In this regard, M. MELI, *Quando l'ambiente*, cit., highlights how the indication that the location of the plants is allowed even in bounded and buffering areas is imprecise and raises doubts of constitutional legitimacy, considering that the protection of the landscape has an anchor in the art. 117 of the Constitution, with respect for international obligations (i.e., the European landscape convention).

⁴⁰ The proposal is contained in a document from 15 December 2015, and called “*Wind Farms and Landscape – Summary notes on the state of the art and proposals for the definition of Lines of action by the MiBACT*”, available on the Ministry’s website (www.beniculturali.it/mibac/export/MiBAC/sito-MiBAC/MenuServizio/Osservatorio-paesaggio/Documenti/index.html). In the document, the Italian experience is compared with other European countries, where the installation of wind farms is the subject of a set

be integrated with the regional landscape plan⁴¹, which application is subjected to the *Code of Cultural Heritage and Landscape* that provides a concerted procedure between the State and Regions and, therefore, guarantees an adequate dialogue between the different authorities, preventing the Regions from an excessively wide use of the power of location. Environmental and landscape associations should also be involved in this process of planning and identifying areas intended to host the plants.

Furthermore, within the “*suitable areas*”, specific systems of competition between operators should be activated, in order to “reward” those projects better able to reconcile the needs of production with the protection of cultural heritage and landscape (see the case of offshore plants). In this direction, the procedures of “revamping” (general restructuring of the plant) or “repowering” (*i.e.*, upgrading to more efficient machines) of old or lower power producing farms should also be made more effective.

5. Conclusions

According to article 5 of the *European Landscape Convention*, signed in 2000 in Florence, “*each Party undertakes: [...] d) to integrate landscape into its regional and town planning policies and in its cultural, environmental, agricultural, social and economic policies, as well as in any other policies with possible direct or indirect impact on landscape*”⁴².

As shown in the previous paragraphs, the need to integrate the

of rules that concern, in an integrated way, the territorial planning of the plants, the guidelines for their construction and future disposal, the assessment of impacts (on both the environmental and the landscape). It is relevant, for example, the Positionpapier Windenergie of the Swiss Confederation; in Germany, the different levels of territorial planning, from that of the Lan, to large areas and the municipal scale, contain more precise identifications of the areas in which it is possible to propose wind farms, elaborated in collaboration with the Umweltverbaende (the associations representing the different environmental interests). The proposal is also mentioned by M. SANTINI, *Ambiente e paesaggio*, cit., p. 302.

⁴¹ About the landscape plan, see G.F. CARTEI, *Il paesaggio*, in S. CASSESE (ed), *Trattato di diritto amministrativo, Diritto amministrativo speciale*, II, Giuffrè, Milano 2003, p. 2109 ff.; G.D. COMPORTEI, *Piani paesaggistici* (ad vocem), in *Enciclopedia del Diritto*, Annali, V, Giuffrè, Milano 2012, p. 1047 ff.

⁴² The same principle is expressed by the *Carta Nazionale del Paesaggio*, prepared by the *Osservatorio nazionale per la qualità del paesaggio* and presented to the Ministry of Culture in 2018.

landscape within other policies (namely, to carefully consider the specific impacts of any initiative on the landscape quality, even if positive) is relevant not only with regards to the traditional *command and control* pattern (in order to justify the setting of boundaries to individual freedoms or the denials opposed to the granting of authorisations) but even in the case of implementing incentive strategies, especially if it regards human activities that may significantly alter the “shape” of the territory.

The adoption of a landscape-integrated approach in a systematic way appears even more urgent if we consider that many of the massive programs envisaged by the Italian Recovery and Resilience Plan may have severe repercussions on the landscape, which must be carefully analysed, planned and, as appropriate, maximised or minimised, in a short, medium, and long-term perspective.

The intervention programs that not only directly concern environmental policies but also have positive implications for the landscape, some of which are included in Mission 2 (named *Green Revolution and Ecological Transition*) could be considered, providing reforestation and forest protection measures as well as improving the quality of inland and marine waters. Waters and forests, in fact, not only perform extremely important functions for the environment, but also represent significant components of the landscape. Their protection or restoration can therefore contribute to enhancing the quality of the latter. Alongside the measures concerning environmental policies, the It-RRP sets additional measures in other fields that are able to contribute to the improvement of landscape quality, one of which could be considered Mission 5 (named *Inclusion and Cohesion*), which provides investments for the recovery and regeneration of buildings and urban territories, with particular attention to suburbs and internal areas as well as the construction of urban parks, to counteract urban degradation. The first mission of the third component (*Tourism and culture*) may also be considered, which proposes numerous investments in many relevant areas, such as the enhancement of cultural and historical sites of the main metropolitan cities; interventions in small, historic and rural villages; actions in support of slow tourism etc.

In these cases, the article shows an interesting existing pattern of landscape integrated approach, which is able to be replicated, represented by the subsidies provided in the agricultural sector. In the granting of aid, the care of the rural landscape is in fact considered as a relevant element,

to which a part of the subsidy is specifically addressed (*supra*, para. 3).

In contrast, additional programs of the It-RRP show a clear attitude to negatively affect the landscape, for example, a third of the total resources is allocated to incentives for the construction of renewable energy plants in order to generate 70 gigawatts of green energy, a necessary step in achieving a 55% reduction in carbon dioxide emissions currently produced by gas and coal-fired power plants, which make up 60% of the existing plants. Moreover, according to the *Annual Sustainable Growth Strategy 2021(Com2020-575)*, almost 37% of resources must be allocated to the green transition and climate goals, which, as shown in par. 4, do not necessarily reconcile with the needs of landscape protection⁴³.

In similar cases, the adoption of an integrated approach is more problematic, as it implies the acceptance of a sacrifice for one of the different interests. As highlighted in the paper (*supra*, par. 4), such a conflict is accentuated when the search for a balance between the two interests is deferred to decisions and assessments conducted on a case-by-case basis, in the absence of a prior definition of homogeneous criteria and parameters aimed at guaranteeing a more equitable balance.

Therefore, the initiatives that can be taken in this regard require a more intense collaboration between the different administrations, aimed at finding shared intervention strategies and keeping the sacrifice of the opposite interests at a minimum level⁴⁴. In order to reach an effective integration, a key role should be performed by landscape planning. It should contain a series of guidelines and directives to reconcile human activities that take place in a certain area with its landscape features and the pursuit of quality objectives.

Nevertheless, even in these cases, it cannot be excluded (and, indeed, it should be encouraged) that the incentives provided for environmental purposes could be “shaped” in order to “reward” those interventions that, with the same result, involve a lower sacrifice for the landscape.

⁴³ COM(2020) 575 final “*All national recovery and resilience plans will need to focus strongly on both reforms and investments supporting the green transition. To follow the commitment of the European Council to achieve a climate mainstreaming target of 30% for both the multiannual financial framework and Next Generation EU, each recovery and resilience plan will have to include a minimum of 37% of expenditure related to climate*” (eur-lex.europa.eu/legal-content)

⁴⁴ As evidenced by M. MELI, *Quando l'ambiente*, cit., a certain willingness to reach a compromise by the administrations is required but not always present.

In addition to “shaping” the attribution of the benefit in order to consider the impacts on the landscape (and, therefore, to intervene before the event, during the definition of the policies), it is also essential to evaluate after the event. (that is to say, once the incentivised activity has been undertaken) the concrete impacts on the landscape. This is meant to verify if there are deviations from expectations, to collect best practices (to be replicated) and, if necessary, make corrections. In addition to the involvement of technical expertise (normally involved in the landscape authorisation procedure or in environmental procedures), the participation of third sector entities and local communities (through the so-called “crowdsourcing”)⁴⁵ can also offer useful evaluation elements and data on the variation in the landscape perception, facilitating the overall assessment.

⁴⁵ A. COMBER, P. MOONEY, R.S. PURVES, D. ROCCHINI, A. WALZ, *Crowdsourcing: it matters who the crowd are. The impacts of between group variations in recording land cover*, in *PLoS One*, 11 (7), 2016.