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Essays

From a Siloed Regulation to a Holistic Approach? Labour and Environmental Sustainability Under EU Law

Paolo Tomassetti* and Alexis Bugada**

Abstract

Drawing on a progressive interpretation of the principle of sustainable development, this article reviews, compares and analyses the channels for interaction and integration between labour and environmental sustainability in two EU normative domains: social policy and environment policy. While a siloed approach is still evident in both domains, with few exceptions, recent EU legislation on the economic pillar of sustainability has promoted horizontal policies on labour and environment. Social and environmental clauses have been enacted in EU financial law and public procurement law. The same goes for corporate law when the proposal for a directive on due diligence of multinational companies is adopted. The analysed examples of horizontal policies to advance labour and environmental sustainability present risks and opportunities. Arguably, the main risk is that such policies end up in accentuating rather than overcoming the competition between labour and the environment as 'fictitious commodities'.

I. Introduction

Over the last decade, sustainable development has rapidly become a broadly shared goal in policy setting and legislation, for which a degree of consensus among international institutions, states and stakeholders is visible. Yet, in spite of its apparent clarity, sustainable development conceals many pitfalls and legal hurdles. Firstly, the concept has been mainstreamed and lost its specificity: while nobody argues in favour of 'unsustainable development', different stakeholders advocate it with conflicting interests and goals in mind.[1]

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While this article is the result of shared ideas and analysis of the two authors, Sections II, III, IV, IV(1), V, V(1), V(2) and V(3) should be attributed to Paolo Tomassetti. Sections IV(2) and V(4) should be attributed to Alexis Bugada. Sections I and VI have been developed in tandem by the two authors.

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[1] M. Kullmann, 'Promoting social and environmental sustainability: what role for public procurement?' 40 *Comparative Labor Law & Policy Journal*, 109, 111-112 (2018).

Although sustainable development has been championed in recent legislation and orthodox scholarship, critical scholars from different disciplines highlight the perils that such 'oxymoron' brings about, claiming that it risks reproducing the traditional rationality of capitalism, and the multiple contradictions attached to it.[2] Secondly, there is consensus that a progressive interpretation of sustainable development should question conventional policy and regulatory techniques in which normative goals are pursued separately, within different areas of regulations. The potential of sustainable development to advance social and environmental justice, within and beyond the legal foundations of capitalism, lies in its capacity to break silos. And to create channels for integration and solidarity among different (and apparently contrasting) goals, in a such way as to construe sustainability as an element that conditions development, and not vice versa.[3] This is the main concern of this article.

Consider for example labour law and environmental law, two critical domains for sustainable development. A progressive interpretation of sustainable development would not just imply juxtaposing labour and environmental sustainability. Nor such would it involve a simplistic choice on whether priority be given to labour or environmental justice. Although labour standards have 'distinctive merit as a facet of social sustainability', in real-life they interact 'dynamically with the realization of environmental and economic objectives'.[4] Linking social rights with environmental objectives appears as a way forward for both international and domestic regulations, while such an approach must not lead to a dissolution of the specific features of labour law and environmental law.[5] Taking sustainable development seriously,[6] therefore, would involve long-term, complex choices on how to shift from a linear to a systemic type of regulation in which labour and environmental values are balanced and pursued simultaneously. A regulation that

> 'can achieve a fair and sustainable balance between the opposing

[2] For discussion on this aspect, see the classical essay of M. Redclift, 'Sustainable Development (1987-2005): An Oxymoron Comes of Age' 13 *Sustainable Development*, 212 (2005).

[3] E.K. Rakhyun and K. Bosselmann, 'Operationalizing Sustainable Development: Ecological Integrity as a Grundnorm of International Law' 24 *Review of European, Comparative & International Environmental Law*, 194, 197-198 (2015). For broader discussion of this argument, see K. Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (London: Routledge, 2016), 79, where the author argues that in terms of goals, the principle of sustainability 'aims to protect ecological systems and their integrity. Its subject matter is ecological processes. However, social processes determine to what extent and how ecological systems should be sustained. This way sustainability becomes a social issue'.

[4] T. Novitz, 'Engagement with sustainability at the International Labour Organization and wider implications for collective worker voice' 159 *International Labour Review*, 463, 465 (2020).

[5] E. Pataut and S. Robin-Olivier, *White paper on the future of labour law* (Paris: ILA, 2022), 61.

[6] B. Sjåfjell, 'The Legal Significance of Article 11 TFEU for EU Institutions and Member States', in B. Sjåfjell and A. Wiesbrock eds, *The Greening of European Business under EU Law. Taking Article 11 TFEU Seriously* (London: Routledge, 2015), 51-72.

> interests of the world of work and business in the mutually shared context of the ecological protection of the planet'.[7]

Such regulatory shift is far from happening. An illuminating report of the European Political Strategy Centre notes that, despite the European Union (EU) has taken pioneering action to promote social and environmental sustainability,

> 'it has also often been the case that its policies remained overly constrained within silos, or rooted in traditional economic premises based on linear development approaches and a prevalence of short-term concerns'[8]

– thereby failing to address the root causes of labour and environmental injustice. Arguably, a similar claim could be made for national legislations and policies. Not only domestic labour laws and environmental laws exist in silos, but lack of coordination between these two normative domains often comes with negative externalities for labour and the environment as 'fictitious commodities',[9] thus undermining sustainable development as a normative principle and in real-life.

This article addresses such dilemmas by analysing how the principle of sustainable development is construed and operates in EU policy setting and legislation. After reviewing the antecedents of sustainable development in a multi-level perspective (section two), it looks at how far EU law and policy making have embraced a holistic approach to the regulation of labour and environmental sustainability. By focusing on the evolution of EU social and environment policy, section three highlights the parallel development of these policy areas, which have historically been subject to a siloed approach to regulation. While such approach is still evident in contemporary EU social policies, section four shows how a new generation of environmental policies have addressed labour concerns by embracing the principle of 'just transition'. However, it will be argued that EU reference to the normative goal of justice in the transition away from fossil fuels is made in a reductionist manner – one that is based on procedural aspects only, without substantial consideration of the role of social partners in shaping the outcomes of the transition and the resulting idea of justice. Section five and the following subparas analyse how labour and environmental sustainability (fails to) interact in EU horizontal

[7] B. Caruso, R. Del Punta and T. Treu, *"Manifesto" for a sustainable labour law* (Catania: Centre for the Study of European Labour Law 'Massimo D'Antona', 2022), 6.

[8] Europlanet Science Congress (EPSC), *Europe's Sustainability Puzzle. Broadening the Debate* (Brussels: EPSC, 2019), 2.

[9] K. Polanyi, *The great transformation: the political and economic origins of our time* (New York: Farrar & Rinehart, 1944). For discussion of labour and the environment as fictitious commodities, in the perspective of sustainability, see T. Novitz, 'Past and Future Work at the International Labour Organization: Labour as a Fictitious Commodity, Countermovement and Sustainability' 17 *International Organizations Law Review*, 10 (2020).

policies, focussing on financial law, public procurement law and corporate law. The last section draws conclusions.

II. Contextualising Sustainable Development

Despite the social implications of sustainable development being already acknowledged since the Brundtland Report of 1987 and the Rio Declaration of 1992, sustainability has barely been construed as a normative principle beyond environmental law. For decades, sustainable development has been a core guiding principle for policy making and legislation in environmental law, without much direct consideration in other legal domains.

One can argue that, indirectly, any regulation of the market economy is attuned with sustainable development.[10] This is acceptable for many reasons. Labour law, for example, plays a market constitutive role: instead of limiting economic development and growth as such, labour standards justify the market economy by making the labour market sustainable, while guaranteeing the fundamental principle that 'labour is not a commodity'.[11] Furthermore, sustainable development in labour relations resonates with the notions of balancing and proportionality among the different interests underpinning the employment contract. This implies that workers' and firms' interests are to be in equilibrium.[12]

On closer inspection, however, orthodox labour law justifications[13] do not entirely fit sustainable development.[14] Firstly, except for social security law and the regulation of pension systems,[15] labour law tends to underestimate the

[10] S. Deakin et al, 'Legal Institutionalism: Capitalism and the Constitutive Role of Law' 45 *Journal of Comparative Economics*, 188 (2017).

[11] S. Deakin, 'The Contribution of Labour Law to Economic and Human Development', in G. Davidov and B. Langille eds, *The Idea of Labour Law* (Oxford: Oxford University Press, 2011), 156.

[12] This is how labour lawyers tend to construe the concepts of sustainable development and sustainability: see for example the debate on labour law and sustainability that took place at the XX national congress of the Italian Association of Labour Law and Social Security (AIDLaSS), '*Il Diritto del lavoro per una ripresa sostenibile*', held at the University of Bari, 'Jonico' Department, in Taranto, on 28-30 October 2021. The keynote speeches of M. Marinelli, L. Fiorillo, M. Marazza and S. Renga, and the related comments by the audience are published in D. Garofalo et al, *Il diritto del lavoro per una ripresa sostenibile. XX Congresso Nazionale AIDLaSS. Taranto, 28-30 ottobre 2021* (Piacenza: La Tribuna, 2022).

[13] For systemic analysis of different labour law justifications, see G. Davidov, *A purposive approach to labour law* (Oxford: Oxford University Press, 2016).

[14] Overall, there is consensus that labour law should be reconsidered in the light of sustainable development, despite the positions of labour law scholars tend to diverge when it comes to establish the goals and the means of such normative and epistemological adjustment. Contrast, for example, B. Caruso, R. Del Punta and T. Treu, n 7 above, 111-118. For a broader conceptualization of labour law in the light of sustainable development, see V. Cagnin, Labour law and sustainable development (Alphen aan den Rijn: Wolters Kluwer, 2020).

[15] For discussion of this topic, see the special issue published in the issue no 1 *Diritto delle relazioni industriali* (2019) on 'La solidarietà intergenerazionale nella tutela pensionistica

interests of future generations – a core normative value for sustainable development.[16] The popular definition of the Brundtland report points exactly in that direction: '(s)ustainable development seeks to meet the needs and aspirations of the present without compromising the ability to meet those of the future'.[17] Although this is a major difference with sustainable development, this article will focus on a second set of reasons: the lack of environmental consideration in the classical labour law normative domain.[18] This holds true the other way around: traditionally, the fundamental goal of environmental law was to render development compatible with the preservation of the environment, without any consideration for workers' material interests. This reductionist idea of sustainable development reproduced the binary conception of regulating labour and the environment as fictitious commodities, whose 'double-movement'[19] was articulated in silos, underestimating the potential externalities that siloed regulation brings about in terms, for example, of cost-based competition between the two normative domains.

Although the problem of cost-based competition in the regulation of labour and the environment as fictitious commodities is underestimated in labour law discourses, Italian scholarship is not unfamiliar with it. Antonio Vallebona, for example, argues that since legislation on labour and the environment affects production costs, labour law should consider the environmental effects of labour regulation and *vice versa*.[20] He maintains that in a globalised economy, environmental and labour standards in Western jurisdictions might have the effect to incentivize the outsourcing of the most polluting production activities where labour and environmental costs are lower. Riccardo Del Punta made a similar claim in a pioneering article of 1999.[21] He observed that the two values – labour and the environment – in capitalist economies and societies tend to be considered as costs, therefore they are put in competition. Legislators and trade

pubblica e privata', with essays of G. Arconzo, G. Ludovico, G. Canavesi and M. Squeglia.

[16] Cf T. Novitz, 'The Paradigm of Sustainability in a European Social Context: Collective Participation in Protection of Future Interests?' 31 *International Journal of Comparative Labour Law and Industrial Relations*, 243 (2015).

[17] World Commission on Environment and Development, *Our Common Future* (Brundtland Report) (1987).

[18] For exceptions, see the special issue published in the 40(1) *Comparative Labor Law & Policy Journal* (2018), with essays of A. Zbyszewska, S. Routh, P. Tomassetti, C. Chacartegui and M. Kullmann) and the special issue published in the issue no 1 *Lavoro e diritto* (2022), with essays of A. Lassandari, S. Laforgia, W. Chiaromonte, G. Natullo, V. Brino, R. Bin and G. Centamore, as well as in the issue no 2 *Lavoro e diritto* (2022), with essays of A. Baylos, S. Buoso, F. Martelloni, C. Carta, P. Pascucci, P. Tullini, D. Castronuovo, V. Pinto, F. Grazzini, L. Corazza and C. Faleri. Cf also P. Tomassetti, *Diritto del lavoro e ambiente* (Bergamo: Adapt University Press, 2018).

[19] K. Polanyi, n 1 above.

[20] A. Vallebona, *Lavoro e spirito* (Torino: Giappichelli, 2011), 16.

[21] R. Del Punta, 'Tutela della sicurezza sul lavoro e questione ambientale'*Diritto delle relazioni industriali*, 151, 160 (1999).

unions have historically embraced productivism as a goal for regulation, underestimating the implications that raising labour standards and growth might have on environmental sustainability. The author made the case for rethinking the value of labour and its regulation in the light of other social values and interests, among which environmental sustainability should be given primacy.

The year 2015 was a turning point to rethink the idea of sustainable development. The United Nations (UN) 2030 sustainable development agenda set the policy framework to promote social, environmental, and economic sustainability at regional and state level. Goal no 8 of the UN agenda seeks to 'promote inclusive and sustainable economic growth, employment and decent work for all', by improving 'progressively, through 2030, global resource efficiency in consumption and production and endeavour to decouple economic growth from environmental degradation'. The UN Framework Convention on Climate Change (UNFCCC), the so-called Paris Agreement, emphasises 'the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty'. The same year, the International Labour Organization (ILO) adopted the Guidelines for a just transition towards environmentally sustainable economies and societies for all, putting the four pillars of the Decent Work Agenda – social dialogue, social protection, rights at work and employment – at the core of sustainable development.[22] The ILO intended to raise awareness of the intimate nexus between economic, social, and environmental pillars. The centenary declaration outlines the horizon of the ILO's action, with a focus on protection of work as inseparable from the economic, social, and environmental dimensions of development.[23] As clearly put in the 'White paper on the future of labour law', therefore, 'the future of work is tightly connected with the notion of 'sustainable development'.[24]

The antecedents of a systemic approach to sustainable development were already visible at European level, despite the set of norms set forth in the fundamental acts of the EU not having found appropriate implementation at a both policy and regulatory level. Art 11 of the Treaty on the Functioning of the EU is instructive in this respect. It provides that 'Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development'. A similar provision is laid down by Art 37 Charter of fundamental rights of the EU, according to which 'A high level of environmental protection and the improvement of the quality of the environment must be

[22] ILO, Guidelines for a just transition towards environmentally sustainable economies and societies for all (Geneva: International Labour Office, 2015).

[23] See para II, A, 1 of the ILO Centenary Declaration for the Future of Work, 21 June 2019.

[24] E. Pataut and S. Robin-Olivier, n 5 above, 61.

integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'. While a reasonable interpretation of such provisions would imply that environmental concerns should inform all the EU policies and activities, including social policy and legislation, a reductionist idea of sustainable development has prevailed, leaving the three dimensions of sustainability often addressed in silos.[25]

In parallel to the promotion of environmental sustainability at international level, the principle of sustainable development has been constitutionalised in core EU member States. France and Italy are notable examples in this regard. Adopted in 2004, and incorporated in the Constitution in 2005,[26] the French 'Charter of the Environment' completed the *long durée* list of constitutional rights that began with the 1789 Declaration.[27] Art 6 of the Charter provides that 'Public policies shall promote sustainable development. To this end they shall reconcile the protection and enhancement of the environment with economic development and social progress'. Despite sustainable development not being explicitly mentioned in the 2022 amendment of the Italian Constitution, indirect reference to such principle stands out in the revised versions of Arts 9 and 41.[28] While Art 9 provides that the Republic 'protects environment, biodiversity and ecosystems, also in the interest of future generations', Art 41 makes it clear that private economic initiative cannot take place when damaging health and the environment. Moreover, Art 41 mandates that the law shall provide

> 'appropriate programs and controls, so that public and private economic activities can be directed and coordinated for social and environmental purposes'.

These provisions have elevated environmental sustainability and sustainable development from the status of having simple protection through legislation, to constitutional rights. In both jurisdictions, case law had already recognized the protection of the environment as a core and primary value. On this basis, both the French and Italian Constitutions provide standards for legislators and policy makers to make substantial contents of legislation attuned with environmental sustainability. If those standards are not respected, in terms of balance with

[25] EPSC, n 8 above.

[26] Loi constitutionnelle 2005-205, 1 March 2005 (Loi constitutionnelle relative à la Charte de l'environnement (1)), JORF 2 March 2005, esp 3697.

[27] D. Marrani and S.J. Turner, 'The French Charter of the Environment and Standards of Environmental Protection', in S.J. Turner et al eds, *Environmental Rights. The Development of Standards* (Cambridge: Cambridge University Press, 2019), 309-322, and D. Bourg and K.H. Whiteside, 'France's Charter for the Environment: Of Presidents, Principles and Environmental Protection' 15(2) *Modern & Contemporary France*, 117 (2007).

[28] V.M. Cecchetti, 'Virtù e limiti della modifica degli articoli 9 e 41 della Costituzione' *Corti supreme e salute*, 127 (2022); E. Mostacci, 'Proficuo, inutile o dannoso? Alcune riflessioni a partire dal nuovo testo dell'art. 41' 52(2) *DPCE Online*, 1123 (2022); C. Sartoretti, 'La riforma costituzionale "dell'ambiente": un profilo critico' *Rivista giuridica dell'edilizia*, 119 (2022).

economic and other social rights, the constitutional courts may declare that statutory regulation fails to comply with the Constitution. Yet, how to pursue sustainable development in practice, balancing the three pillars of sustainability and making them convergent, is much more controversial, as recent 'hard cases' in France, Italy and elsewhere demonstrate.[29] Many challenges arise when it comes to turn the normative proposition of sustainable development into regulation and policies, even considering that the great majority of national legislation in the fields of labour law and environmental law derives from EU law.

III. Siloed Regulations and Policies

Instead of a convergent pattern, the evolution of EU environmental and social policies followed a *parallel* development, while remaining compartmentalised.[30] In both domains, the old-time Commission played the 'legal basis game' in order to advance its own proactive goals before a proper legal competence had been entrusted to her. It was with the Single Act and later the Maastricht Treaty (1993) that the EU obtained a legislative power to start exerting some actual influence upon recalcitrant Member States. While the Treaty of Maastricht made the environment an official EU policy area, introducing the co-decision procedure and making qualified majority voting in the Council the general rule, the Treaty of Amsterdam (1999) established the duty to integrate environmental protection into all EU sectoral policies with a view to promoting sustainable development. The Nice Treaty (2001) was a disappointment for activists and supporters of a more interventionist Europe in both social and environmental areas as the promise of enlarged competences were denied and key areas continued to be subject to the unanimity rule, which meant in fact that no Directives could be passed if a single Member State exercises its power of veto (for instance, taxation policies in the environmental domain or individual dismissals in the labour domain).

The most dynamic period for common regulation was the nineties and early years of the new century. Since the 2004 enlargement, there has been a growing trend to halt new legislation and to replace hard law by softer means of persuasion also in view of the difficulty to enforce current legislation. The costs for business and the drive for competitiveness have been branded in an inflated manner as arguments against new legislation or strict enforcement of existing legislation in both domains, not only by individual Member States but also

[29] The reference is to Cons. Const. déc. DC n° 2022-843, 12 August 2022 (France) and to Corte Costituzionale 9 May 2013 no 85, available al www.cortecostituzionale.it: see section IV(2) below, for discussion.

[30] J.P. Lhernould, 'Une Europe sociale durable en 2030 ? Petit exercice de futurologie' *Semaine juridique éd. Sociale*, 1315 (2021).

internally to the Commission.[31]

Such a parallel development between the environmental and the social branches of EU law and policy were not sufficient to shape a more integrated approach between the two. There are several reasons for that. The functional separation and specialization of policy makers and advisory groups both internally to the Commission and in each country's administration is one such reason.[32] Different legal bases in the Treaty make policy objectives more difficult to embed in regulation as it increases the number of players and makes the procedural steps even more complex and cumbersome than they already are. Active opponents of a proactive environmental policy would welcome this opportunity to join forces with opponents of social regulation to block the legislative adoption procedure.[33]

There is one policy field where the interaction between social and environmental objectives is clearer. That is occupational health and safety. The 1989 framework directive[34]and the technical directives that complement it put the responsibility for the health and safety of workers on the employer and assigns to him the obligation of evaluating and preventing the risks through a formal risk assessment procedure. It also imposes on the employer the obligation of informing and discussing with workers or their representatives about any risk and providing them with specific training. While literal interpretation of the text clearly points to risks that are limited to environmental conditions affecting the health and safety of workers, a purposive approach to the analysis of the directive is perhaps less restrictive than it seems. For example, the directive requires prevention planning to take account of 'environmental factors' at work. This notion does not distinguish between internal and external factors, and it appears to be porous to broader environmental risks that can affect workers' health. On the other hand, it is difficult in many contexts to distinguish between employee's health, public health, and environmental concerns. For instance, when workers are not assigned to a specific or closed workplace, or in the case of work involving chemical agents. Surprisingly, though, the distinction between internal working environment and the natural environment did not exist before mid-eighties; this separation was the result of a political choice made during the intergovernmental conference of 1984-1985, when nuclear issues and those related to work environment were extrapolated from the general EU environmental policies.

Joint consideration of environmental and social aspects should have led to more compatible legislation on the protection of health and safety of workers

[31] P. Tomassetti, n 18 above, 159.

[32] M. Hartlapp, J. Metz and C. Rauh, *Which Policy for Europe? Power and Conflict Inside the European Commission* (Oxford: Oxford University Press, 2014).

[33] P. Tomassetti, n 18 above, 160.

[34] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L 183.

and environmental protection in the case of hazardous chemical substances. The Seveso directives,[35] the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) regulation[36] and the Occupation Safety and Health (OSH) directives on chemical agents and carcinogens were developed separately with the result that now both impose requirements on the use of hazardous chemical substances in the workplace and employers find themselves faced with two sets of duties. Their requirements overlap to some extent, and this has the potential to give rise to inconsistencies in their application. Moreover, although the goal of the Seveso directives was not to hinder competitiveness and industrial innovation, in many cases they have prompted an increase in production costs. When the first Seveso directive was passed, some chemical companies were simply put out of the market, while other outsourced the most polluting production activities in non-EU countries, with negative effects on both vulnerable workers and communities.[37] This problem of effectiveness should not be underestimated by future EU legislation in this field, which has been announced within the European Green Deal (EGD),[38] in order to increase the level of protection and intensify substitution of chemicals by safer and more sustainable products.[39] Beyond such problems of effectiveness, both the Seveso directives and the REACH regulation have contributed to improve knowledge of chemical substances to achieve a higher level of protection for human health and the environment. In this connection, they

[35] Also known as the 'Seveso Directive', after the Seveso disaster, Council Directive 82/501/EEC of 24 June 1982 on the major-accident hazards of certain industrial activities [1982] OJ L 230, was aimed at improving the safety of sites containing large quantities of dangerous substances. It was superseded by the Seveso II Directive (Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances [1996] OJ L 10) and then by Seveso III directive (Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC Text with EEA relevance [2012] OJ L 197).

[36] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC [2006] OJ L 396.

[37] For discussion of this problem, see P. Tomassetti, 'Ambiente di lavoro e di vita: fonti regolative e standard di prevenzione' *Rivista giuridica del lavoro e della previdenza sociale*, 160, 165-166 (2021).

[38] European Commission, Chemical Strategy for Sustainability. Towards a Toxic-Free Environment, COM(2020) 667 final.

[39] The reform proposal aimed at changing the prevention mechanism by imposing a risk assessment carried out no longer on a case-by-case basis, but on the ground of categories of substances for greater intelligibility. A public consultation was launched. However, the energy crisis linked to the war in Ukraine and the resistance of the oppositions to the reform process have both conspired against the revision proposal. The recast of the text has been postponed at the end of 2023 or, more likely, after the next European elections.

have led to tighter control of products and better information, forcing employers to better assess chemical substances and prevent the risks attached to them for the environment, workers, and communities.[40]

Another area of normative intersection between the two fields is the so-called 'Whistleblowing Directive',[41] which lays down common minimum standards for the protection of persons reporting breaches of Union law, including directives and regulations concerned with the protection of the environment and nuclear safety. According to Art 4, the directive should apply to reporting persons working in the private or public sector who have obtained information in a professional context about the violation of EU environmental, or public health legislation including radiation protection (nuclear safety) and product safety and compliance among others. The Directive requires states to protect workers who have reported such violations from reprisals by also providing them with support measures in the form of active and passive protection.

However, out of these specific normative domains, EU social policy is muted when it comes to deal with environmental sustainability. Except for the 2004 European social partners framework agreement on telework, all the directive's preambles in the field of employment fail to consider even indirectly any reference to environmental concerns that would justify an interpretation of the EU social policy in the light of the principle of sustainable development as governed in Art 11 of the Treaty on the Functioning of the EU. The European Commission has recently lost an opportunity to do so when drafting the EU Pillar of Social Rights (EPSR), as this document does not mention environmental sustainability among its objectives or policy goals. Besides a vague reference to the sustainability of the growth model in recital 11, the socio-ecological nexus was largely missing in the principles of the EPSR, a partial exception being the recognition of the right to access good quality essential services, including water, sanitation, and energy (Principle 20).

This is unfortunate since, conversely, in the majority of communications and working documents falling within the EU environmental policy, the Commission compulsively accounts for the positive impact of the transition to a law carbon economy on the labour market.[42] In this connection, the EPSR has

[40] C. Vanuls, *Travail et environnement. Regards sur une dynamique préventive et normative à la lumière de l'interdépendance des risques professionnels et environnementaux* (Paris: PUAM, 2014), spec para no 437.

[41] Directive (EU) 2019/1937 of the European parliament and of the Council of 23 October 2019, on the protection of persons who report breaches of Union law [2019] OJ L 305.

[42] See, for example, European Commission, *A Roadmap for moving to a competitive low carbon economy in 2050*, COM (2011) 112 def, 13; European Commission, *Roadmap to a Resource Efficient Europe*, COM (2011) 571 def; European Commission, *Improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness*, COM (2012) 95 def, 3; European Commission, *A 2030 framework for climate and energy policies*, COM(2013) 169 def; European Commission, *A policy framework for climate and energy in the period from 2020 to 2030*, COM(2014) 15 def; European Commission,

gradually became the normative framework and benchmark for the EU 'just transition' to climate neutrality, while active labour market policies, education, training and skills-development policies are considered as key enablers of this major shift of the EU economy. An example of this is a Communication from the Commission stating that:

> 'the European Pillar of Social Rights is the European answer to these fundamental ambitions. It is our social strategy to make sure that the transitions of climate-neutrality, digitalisation and demographic change are socially fair and just'.[43]

IV. The EU 'Just Transition' Era

After the publication of the EGD, the link between the EPSR and the green transition was made more explicit. The Communication 'A Strong Social Europe for Just Transition' is clear in stating that the EPSR is the EU's 'social strategy to make sure that the transitions of climate neutrality, digitalisation and demographic change are socially fair and just'. Two areas of intervention relating to the governance of socio-ecological challenges are emphasized: a) equipping people with the skills needed for the green transition; and b) addressing energy poverty and the distributional consequences of the energy transition.

EU policy responses to the Covid-19 crisis have further enhanced the link between the EPSR and the transition to a green economy. While emphasizing the Covid-19 crisis as a 'unique opportunity to accelerate the green transition', the Commission invited Member States 'to factor in', across green policy areas, the need to ensure a just and socially fair transition and to adopt measures ensuring equal opportunities, inclusive education, fair working conditions and adequate social protection 'in the light of the European Pillar of Social Rights'.[44] Moreover, in order to assess the adequacy of the National Recovery and Resilience Plans to be adopted within the Next Generation EU recovery programme, a set of criteria have been established by Regulation (EU) 2021/241 of the European Parliament and of the Council, including their contribution to the implementation of the EPSR (recital 42).[45]

In this policy framework, labour market policies, education, training and skills development are strongly highlighted and explicitly linked to the green

Green Employment Initiative: Tapping into the job creation potential of the green economy, COM(2014) 446 def.

[43] European Commission, *A strong social Europe for Just Transitions*, COM(2020) 14 final.

[44] European Commission, *Annual Sustainable Growth Strategy 2021*, COM(2020) 575 final, 8.

[45] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L 57.

transition. The emphasis on labour market policies is also emphasized in EU policy documents that specifically address the social and economic implications of the green transition, including the establishment of a Just Transition Mechanism and of a Just Transition Fund.[46]

Beyond the narrow coverage of the Just Transition Fund, whose focus is on the regions, industries and workers most affected by decarbonisation, other EU policy areas have established transitionary tools to anticipate and mitigate the employment effects of the transition to climate neutrality. On 21 December 2021, for example, the European Commission endorsed new Guidelines on State aid for climate, environmental protection and energy (the Guidelines).[47] The Guidelines are intended to bring state aid rules in line with the objectives of the EGD, which will require very significant investment, public as well as private.[48]

Despite state aid being prohibited by Art 107(1) of the Treaty on the Functioning of the EU, where it threatens to distort competition in the internal market by favouring certain undertakings or the production of certain goods, and affects trade between Member States, permitted state aids include costs linked to the closure of power plants using coal, peat or oil shale and of related mining operations (see point 4.12 of the Guidelines). In line with the principle of just transition, state support to mitigate the social (and environmental) implications of such closure is exceptionally allowed to cover, among the others, labour-related costs (see Annex II of the Guidelines), including the payment of social welfare benefits resulting from the pensioning-off of workers, as well as residual costs to cover former workers' health insurance. Other exceptional expenditure is allowed to support workers who lose their jobs, along with the costs covered by the undertakings for the re-qualification of workers in order to help them find new jobs, especially for training purposes.

1. From Justice to Fairness?

A major shift in EU policy language is visible in policy documents dealing with the employment implications of the energy transition. While this transition was originally meant to be just, reflecting the trade unions demand for climate justice and the ILO guidelines on a just transition,[49] the European

[46] Regulation (EU) 2021/1056 of the European Parliament and of the Council of 24 June 2021 establishing the Just Transition Fund [2021] OJ L 231.

[47] European Commission, *Guidelines on State aid for climate, environmental protection and energy 2022*, 2022/C 80/01. These guidelines were formally adopted in January 2022.

[48] See K. Arabadjieva and P. Tomassetti, 'Commission guidelines on environmental state aids: A 'Just Transition' perspective' 11 *Etui.greennewdeal Newsletter*, 1-3 (2022).

[49] For discussion on the origins of the principle of 'just transition', see D.J. Doorey and A. Eisenberg, 'The Contested Boundaries of Just Transitions', in C. Chacartegui eds, *Labour Law and Ecology* (Cizur Menor: Thomson Reuters-Aranzadi, 2022), A.R. Harrington, *Just Transitions and the Future of Law and Regulation* (London: Palgrave Macmillan, 2022) and D.J. Doorey, 'Just Transitions Law: Putting Labour Law to Work on Climate Change' 30 *Journal of Environmental Law and Practice*, 201 (2017).

Commission has now switched to the concept of fairness, by proposing a Council recommendation on ensuring a fair transition towards climate neutrality.[50] The recommendation was adopted on 16 June 2022 without substantial changes from the Commission's proposal.[51]

The word 'just' and the concept of justice almost entirely disappeared from this recommendation, except for reference purposes when previous policies are recalled. Now the emphasis is all on fairness, to the point of misciting the content of existing policy documents. In several sentences, indeed, the (proposed) Council recommendation recalls that the EGD 'stresses that the transition must be fair and inclusive'.[52] It states that 'the need for a fair transition is an integral part of the Green Deal'.[53] But this is inaccurate.

The EGD clearly affirms that the transition 'must be just and inclusive'.[54] In this framework, a Just Transition Mechanism was launched – and the Just Transition Fund was established –with the aim 'to leave no one behind'. Further EU policy documents have reproduced the concept of justice in the transition to EU climate neutrality. For example, on 17 December 2020 the European Parliament adopted a Resolution on 'A strong social Europe for just transitions'.[55] The emphasis on justice is also evidenced in the 'European Pillar of Social Rights Action Plan',[56] while the measures presented in the Communication on 'Tackling rising energy prices: a toolbox for action and support'[57] are expected 'to contribute to achieving a socially just and sustainable energy transition'.

It is true that this conceptual shift may only be a nominal one, as fairness and justice are interchangeable. But looking at the conceptual difference between the two words, it is at least reasonable to argue that this change is far from being unintentional. The issue at stake with the energy transition is whether the idea of justice regarding the outcomes of this process is to be socialised or imposed.[58] Depending on this, the debate on fairness can be accepted or challenged. Point 8(c) of the recommendation, which refers to social dialogue and collective bargaining as cross-cutting elements for policy actions, is ambivalent in this respect. Member States are invited to 'Involve social

[50] European Commission, Proposal for a Council recommendation on ensuring a fair transition towards climate neutrality, COM(2021) 801 final.

[51] Council of the European Union, Recommendation on ensuring a fair transition towards climate neutrality, 16 June 2022.

[52] ibid 16.

[53] ibid 14.

[54] European Commission, *The European Green Deal*, COM(2019) 640 final, 2.

[55] European Parliament, A strong social Europe for Just Transitions, 2021/C 445/11.

[56] European Commission, The European Pillar of Social Rights Action Plan, 2021.

[57] European Commission, Tackling rising energy prices: a toolbox for action and support, COM(2021) 660 final.

[58] C. Chacartegui, 'Workers' Participation and Green Governance' 40 *Comparative Labor Law & Policy Journal*, 89 (2018).

partners at national, regional and local levels in all stages of policy-making foreseen under this recommendation, including through social dialogue and collective bargaining where adequate'. Apparently, this provision entitles social partners to be involved in a wide range of policy making areas, at different levels. On closer inspection, however, this Council recommendation is restricted to measures aimed at addressing the employment and social implications of industrial policies that, ultimately, have already been decided elsewhere by someone else and, usually, without any democratic participation.

2. Justice, Fairness, and Equity Under the EU 'Climate Law'

In this connection, the idea of participation underpinning the EU 'climate law'[59] might also be questioned. EU Regulation 2021/1119 emphasises the need to ensure that the transition to climate neutrality is fair and socially equitable for all.[60] While fairness and equity remain vague concepts, this regulation endorses the principle of participation in environmental law. Art 9 expressly refers to public participation, which means a dialogue with all components of civil society aimed at empowering stakeholders, citizens, and communities. The need for an inclusive process on the part of civil society resonates with Principle 10 of the 1992 Rio Declaration,[61] as well as with Art 6, para 4, of the 1998 Aarhus Convention.[62] Both provisions echo the idea that stakeholders should have a voice in environmental decisions, which in turn implies access to information, public awareness and, most importantly, involvement in the decision-making process when all policy options are still viable.

The implementation of such inclusive participatory process, though, cannot be taken for granted. As recent social conflicts over the energy transition and climate litigation demonstrates, a minimalistic idea of participation has prevailed. Based on the wrong idea that there is a dichotomy between fossil fuels and renewable energy,[63] EU policies continue to focus on the process rather than on

[59] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') [2021] OJ L 243.

[60] Art 4.

[61] Principle 10 of 'The Rio Declaration on Environment and Development' of 1992 provides that 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided'.

[62] Art 6, para 4, of the 'Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters', provides that 'Each Party shall provide for early public participation, when all options are open and effective public participation can take place'.

[63] A. Dunlap, 'Spreading "green" infrastructural harm: mapping conflicts and socio-ecological

the outcomes of the transition towards carbon neutrality. This is unfortunate since the outcomes of the energy transition are not neutral in terms of labour power and social sustainability. While decarbonization policies are welcome and much needed to meet the goals of the Paris agreement, the transition to renewables will not necessarily lead to social-ecological justice. Regardless of critical problems of distributive justice and inequality, in fact, renewables risk reproducing the hierarchical and undemocratic architecture of the fossil-fuel political economy.

In short, democratic participation in the transition away from fossil fuels should not be idealized. Lack of substantial participation is the rule rather than the exception when it comes to take core environmental decisions. This is also evidenced by climate litigation. In most climate litigation suits against governments that failed to take adequate actions to meet climate targets, plaintiffs include Non-governmental organizations (NGOs) and civil society, with no trade unions involved. Although the suits focus on violation of human rights, including the right to a stable and safe climate, no reference to the social implications of greenhouse gas emissions cut is visible, except for some cases in which the job opportunities of the green economy are mentioned. This approach to climate litigation risks bringing governmental defences to manipulate the 'just transition' principle so to justify delays in the implementation of climate policies, just like employers tend to do when they advocate the idea of justice in the transition away from fossil fuels.

The Ilva case in Italy is instructive in this respect.[64] Despite evidence on the environmental disaster produced by the giant steel corporation, legal arguments behind the Italian Constitutional court decision to maintain Ilva's operations in line with the then Governmental decision, were based on a construct through which the safeguard of health and the environment as fundamental rights[65] was (put in competition and) balanced with the right to work upon which the constitutional order is founded,[66] instead of balancing the right to health with the economic freedom.[67] Business interests and the right to work were therefore considered as a hendiadys, and occupation served as a shield to counterbalance health and environmental protection, thus justifying the continuation of Ilva's activities.[68]

Similarly, a recent decision of the French Constitutional Council ruled on

disruptions within the European Union's transnational energy grid' *Globalizations* (2022).

[64] M. Meli, 'The Environment, Health, Employment. Ilva's Never Ending Story' 6(2) *The Italian Law Journal*, 477 (2020).

[65] Art 32 Costituzione.

[66] Arts 1 and Art 4 Costituzione.

[67] Art 41 Costituzione.

[68] See P. Tomassetti, 'From Treadmill of Production to Just Transition and Beyond' 26 *European Journal of Industrial Relations*, 439 (2020) and P. Tomassetti, 'Labor law and environmental sustainability' 40 *Comparative Labor Law & Policy Journal*, 61, 82-83 (2018).

the constitutionality of a law allowing for the acceleration of the installation of a floating LNG tanker in a major French harbour (Le Havre), implying derogations to certain standards laid down by the environmental code.[69] In addition, the law provided for an increase in the greenhouse gas emission ceiling for certain fossil-fuel based facilities for electricity generation. The judges made extensive use of the 'Charter of the Environment', indicating that the Council will fully implement it in its future decisions. The decision is remarkable since it recalls several fundamental rights: the right to live in an environment that respects health, the right to information and citizen participation, and respect for the ability of future generations and other peoples to meet their needs. It begins with the very strong assumption that humanity is inseparable from its natural environment. It then mandates that the promotion of sustainable development shall lead to the balancing of environmental protection, economic development, and social progress. Finally, the Constitutional Council carries out a control of finality and proportionality by specifying that the preservation of the environment must be construed in the same way as the other fundamental interests of the nation. Despite this, though, the decision ultimately legitimised the derogations of the environmental code for energy security reasons linked to the current energy crisis.

V. Labour and Environmental Sustainability in EU Horizontal Policies

Beyond the EU sectoral competences on social and environment policies, labour and environmental sustainability have been promoted in different policy domains falling within the economic pillar of sustainable development, including finance, public procurement, and corporate governance. Labour and environmental standards have come to acquire relevance in the EU internal market regulation through incentive norms and conditionality rules aimed at enhancing sustainable development. The next three sections provide examples of such regulatory techniques, analysing horizontal policies in the fields of 'Socially Responsible Investments' and pension funds, public procurement and concession contracts, as well as corporate sustainability due diligence.

1. EU Regulations on Sustainability-Related Disclosures and Taxonomies

In the wake of the Paris Agreement and the UN 2030 Agenda, the EU is rapidly building a legal framework to reorient capital flows towards sustainable investments. EU law introduced transparency-related obligations in two EU

[69] Cons. Const. déc. DC n° 2022-843, 12 August 2022, https://www.conseil-constitutionnel.fr/decision/2022/2022843DC.htm.

Regulations applicable to financial services. Regulation 2019/2088[70] establishes the rules on sustainability-related disclosures in the financial services sector (referred to as the 'Disclosure' regulation). Regulation 2020/852, instead, establishes a framework to facilitate sustainable investment (known as the 'Taxonomy' regulation).[71]

The Disclosure regulation seeks to achieve more transparency regarding how financial market participants – including pension funds –[72] integrate sustainability risks into their investment decisions along with investment or insurance advice.[73] The Taxonomy regulation is intended to shape the criteria for determining whether an economic activity qualifies as environmentally sustainable for the purposes of establishing the degree to which an investment is environmentally sustainable.[74]

Based on a shared language across the EU, this regulation can certainly help to steer private funding towards responsible finance. The Taxonomy regulation does not prohibit investments. It exposes them to transparency on societal and environmental risks by reinforcing existing rules on extra-financial information, which also makes it possible to offer a benchmark to fight against greenwashing.

Art 6 of the Disclosure regulation states that financial market participants shall include descriptions of the manner in which sustainability risks are integrated into their investment decisions along with the results of the assessment of the likely impacts of sustainability risks on the returns of the financial products they make available. According to Art 8 and Art 9 of the Regulation, the sustainability risk assessments and relative pre-contractual disclosures by financial market participants should feed into pre-contractual disclosures by financial advisers. In turn, financial advisers should disclose how they take sustainability risks into account in the process of selecting the

[70] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector [2019] OJ L 317.

[71] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2020] OJ L 198.

[72] See Art 2, para 1, letters c), d), f).

[73] The guiding principle of this regulation is clarified in para 15 of the preamble: 'Where the sustainability risk assessment leads to the conclusion that there are no sustainability risks deemed to be relevant to the financial product, the reasons therefore should be explained. Where the assessment leads to the conclusion that those risks are relevant, the extent to which those sustainability risks might impact the performance of the financial product should be disclosed either in qualitative or quantitative terms'.

[74] The proposition behind this regulation is expressed in para 11 of its preamble: 'Making available financial products which pursue environmentally-sustainable objectives is an effective way of channelling private investments into sustainable activities'. Para 12 of the same preamble, instead, sets the overall rational of the regulation: harmonisation at Union level, 'in order to remove barriers to the functioning of the internal market with regard to raising funds for sustainability projects, and to prevent the future emergence of barriers to such projects'.

financial product presented to end investors before providing their advice, regardless of the preferences for sustainability. In particular, para 3 of Art 9 sets out that 'where a financial product has a reduction in carbon emissions as its objective, the information to be disclosed pursuant to Arts 6(1) and (3) shall include the objective of low carbon emission exposure in view of achieving the long-term global warming objectives of the Paris Agreement'.

While the social and governance aspects of sustainability have not yet been defined in the Taxonomy regulation,[75] economic activity is understood as being environmentally sustainable where it contributes substantially to one or more of the environmental objectives set out in the regulation: that is to say, it does not significantly harm any of the environmental objectives set out in the regulation; it is carried out in compliance with the minimum safeguards laid down in the regulation; and, it complies with the technical screening criteria that the Commission establishes in accordance with the regulation.[76] Art 9 of the Taxonomy regulation identifies the following environmental objectives: (a) climate change mitigation; (b) climate change adaptation; (c) the sustainable use and protection of water and marine resources; (d) the transition to a circular economy; (e) pollution prevention and control; (f) the protection and restoration of biodiversity and ecosystems. Each of these objectives is further specified in the subsequent articles of the regulation, which provide extensive details on how sustainability goals and taxonomies should be articulated.[77]

Despite the lack of a definition of social sustainability, para 35 of the Taxonomy regulation's preamble embeds a clear principle of integration between social and environmental sustainability, clarifying that compliance with minimum labour standards and safeguards – including those established by the European Pillar of Social Rights – 'should be a condition for economic activities to qualify as environmentally sustainable'. For this reason, the regulation states that economic activities should only qualify as environmentally sustainable to the extent that:

> 'they are carried out in alignment with the OECD Guidelines for Multinational Enterprises and UN Guiding Principles on Business and Human Rights, including the declaration on Fundamental Principles and Rights at Work of the International Labour Organisation (ILO), the eight fundamental conventions of the ILO and the International Bill of Human Rights. The fundamental conventions of the ILO define human and labour rights that undertakings should respect. Several of those international standards are enshrined the Charter of Fundamental Rights of the European

[75] For discussion about the reasons behind such exclusion, see C.H.A. Oostrum, 'Sustainability Through Transparency and Definitions: A Few Thoughts on Regulation (EU) 2019/2088 and Regulation (EU) 2020/852' 18 *European Company Law Journal*, 15, 15-18 (2021).

[76] See Art 3.

[77] See Arts 10-17.

> Union, in particular the prohibition of slavery and forced labour and the principle of non-discrimination. Those minimum safeguards are without prejudice to the application of more stringent requirements related to the environment, health, safety and social sustainability set out in Union law, where applicable'.

Despite the integration between social and environmental sustainability being formally declared, the substantive part of the Regulation only partially reflects the general principles set forth in the preamble. Reference to the European Pillar of Social Rights and to the Charter of Fundamental Rights of the EU, for example, has not been reproduced in the mandatory part of the Taxonomy regulation. Indeed, Art 18 declares that the minimum safeguards are to be intended as procedures implemented by an undertaking that is carrying out an economic activity to ensure alignment with the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights, including the principles and rights set out in the eight fundamental conventions identified in the Declaration of the International Labour Organisation on Fundamental Principles and Rights at Work and the International Bill of Human Rights.

Although the social and governance aspects of sustainability remain undefined and thus references to these dimensions are incomplete in the substantive part of the regulation, such shortcomings may potentially be addressed in the future. On the one hand, market entities and governments could develop their own framework for the definition of social and governance aspects of sustainability, although this might lead to fragmentation and even undermine transparency and comparability of financial products.[78] On the other hand, the Taxonomy regulation includes mechanisms to further define sustainability criteria at EU level. This could happen in two contexts. Firstly, when complying with the minimum social and governance safeguards laid down in the Taxonomy regulation, undertakings should adhere to the principle of 'Do No Significant Harm' referred to in Regulation (EU) 2019/2088 and take into account the regulatory technical standards adopted pursuant to that Regulation in further specifying this principle. To this aim, para 36 of the Taxonomy regulation's preamble states that Regulation (EU) 2019/2088 should be amended to mandate the European Supervisory Authorities[79] (ESAs):

[78] C.H.A. Oostrum, n 75 above, 21.

[79] Established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC [2010] OJ L 331; Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC [2010] OJ L 331; Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European

> 'to jointly develop regulatory technical standards to further specify the details of the content and presentation of the information in relation to the principle of 'Do No Significant Harm'. Those regulatory technical standards should be consistent with the content, methodologies, and presentation of the sustainability indicators in relation to adverse impacts as referred to in Regulation (EU) 2019/2088. They should also be consistent with the principles enshrined in the European Pillar of Social Rights, the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights, including the ILO Declaration on Fundamental Principles and Rights at Work, the eight fundamental conventions of the ILO and the International Bill of Human Rights'.

Secondly, in addition to establishing a set of minimum standards that should be respected,[80] the Taxonomy regulation expects the European Commission to establish a Platform on Sustainable Finance (the 'Platform'), composed in a balanced manner of various groups, including representatives of EU agencies (such as the European Environment Agency) together with experts representing private stakeholders, civil society and academia.[81] The Platform has advisory, technical assistance and monitoring functions to support the Commission in further establishing and updating the technical screening criteria.

2. Rules on Institutions for Occupational Retirement Provision

In December 2016, the EU adopted a recast version of the so-called IORP (Institutions for Occupational Retirement Provision) directive[82] to encourage long-term investment through occupational pension funds.[83] Among other goals, the recast Directive aims to encourage occupational pension funds to invest in long-term economic activities that enhance growth, environmental sustainability and employment. IORPs are encouraged to consider environmental, social and governance risks in their investment decisions and to document such risks in their three-yearly Statement of Investment Policy Principles. More specifically, Art 19 of the recast Directive stipulates that Member States shall require IORPs registered or authorised in their jurisdictions to invest in line with the 'prudent person' rule, according to which the assets shall be invested in the best long-term interests of members and beneficiaries as a whole. Within

Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC [2010] OJ L 331.

[80] Art 19.

[81] Art 20.

[82] Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision [2003] OJ L 235.

[83] Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (recast) [2016] OJ L 354.

the 'prudent person' standard of fiduciary conduct, Member States shall allow IORPs to take into account the potential long-term impact of investment decisions on environmental, social and governance factors. Although the question of what precisely lies in the interests of beneficiaries remains unclear and should be assessed on a case-by-case basis, this provision is significant, given the fact that the 'prudent person' rule should now be interpreted in the sense that, in principle, taking into account non-financial criteria (such as environmental, social, and governance factors) in investment decisions does not constitute an infringement of the fiduciary duty. Shareholder activism for social and environmental purposes thus has greater and clearer legitimation when it comes to deciding on the financial investments of pension funds in the EU.

As part of their risk management system, IORPs are also expected to produce a risk assessment for their activities relating to pensions. This risk assessment should also be made available to the competent authorities and should, where relevant, include, risks related to climate change, the use of resources, and the environment, as well as social risks and risks concerning the depreciation of assets due to regulatory changes ('stranded assets'). Within the IORPs, however, Socially Responsible Investments are not mandatory – they become relevant in potential terms, provided that they have an impact on members' and beneficiaries' interests. In other words, social and environmental concerns are relevant as long as they make sense financially, meaning that the returns on investment are reasonable for future retirees to maintain an adequate retirement income and a good standard of living.

So long as environmental, social and governance factors are considered in investment decisions, Art 28 provides that Member States shall ensure that the risk assessment includes new or emerging risks related to climate change, the use of resources and the environment. IORPs' own-risk assessment would allow them to be more aware of their commitments to their members and beneficiaries and thus make better-informed decisions about investments in long-term, sustainable assets. According to Art 41, in fact, Member States shall require IORPs to ensure that prospective members are informed about whether and how environmental, climate, social and corporate governance factors are considered in the investment approach (paras 1 (c) and 3 (c)).

This provision is noteworthy since transparency about sustainability is an essential condition in enabling workers to assess the long-term value creation of pension funds and the management of sustainability risks. More transparency is also needed because, as non-professional investors workers are currently often investing contrary to their own beliefs and values. Since this attitude-behaviour gap is largely due to a lack of communication and information by financial service providers,[84] designing effective obligations regarding transparency is necessary, as is forming a common understanding of language on sustainability, given that

[84] C.H.A. Oostrum, n 75 above, 15-16.

meanings are often disputed and subject to manipulation. Although the recast IORP directive remains muted about the criteria on assessing and disclosing environmental, social and governance risks, pension fund investment policies are subjected to rules applicable to financial services as a whole.

3. Public Procurement and Concession Contracts

Consistent with the developments observed in financial law, EU public procurement and concessions law has been subjected to significant revisions 'to enable procurers to make better use of public procurement in support of common societal goals',[85] including labour and environmental sustainability objectives. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 provides general principles for the integration of environmental, social and labour requirements into public procurement. This makes procurement no longer an instrument for equal treatment of tenderers and transparency in the procurement process but also a channel to deliver social and environmental objectives.[86]

This approach is evidenced by Art 18(2) of the Directive, according to which:

> 'Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X'.[87]

Observance of the obligations referred to in Art 18(2) is made relevant also for subcontractors. According to Art 71(1), compliance with obligations in the fields of environmental, social and labour law is ensured through appropriate action by the competent national authorities acting within the scope of their responsibility and remit (eg, labour inspectors).

Contract award criteria are regulated too. Directive 2014/24/EU provides that contracting authorities shall award public contracts on the basis of the 'most economically advantageous tender'. This includes evaluating the price or cost, using a cost-effectiveness approach, and may also comprise the best price-quality ratio, which

> 'shall be assessed on the basis of criteria, including qualitative,

[85] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94, preamble (2).

[86] C. Barnard, 'To Boldly Go: Social Clauses in Public Procurement' 46 *Industrial Law Journal*, 208, 211 (2017).

[87] An identical provision is provided by Art 30(3) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L 94.

environmental and/or social aspects, linked to the subject-matter of the public contract in question' (Art 67(2), Directive 2014/24/EU).

Reference to the best price-quality ratio is not mandatory, and so are the assessment criteria based on environmental and/or social consideration. Moreover, the 'and/or' drafting technique is rather ambiguous, leaving the possibility to assess social or environmental criteria alternatively. The same technique is used by Directive 2014/23/EU: Art 41(2) provides that the award criteria of concessions 'may include, inter alia, environmental, social or innovation-related criteria'.

Most importantly, despite the emphasis on social and environmental concerns, both directives fail to address the issue of integration and balance between these two dimensions. Art 18(2) and Art 67(2) of Directive 2014/24/EU are certainly positive developments for the enforcement of labour law and environmental law. And so are Art 30(3) and Art 41(2) of Directive 2014/23/EU. It is, nonetheless, unfortunate that both directives hardly consider the potential conflicting relationship between labour and environmental sustainability. The critical issue with procurement and concessions, in fact, is the competition between labour and environmental costs of the bid.

As correctly noted by Miriam Kullmann, 'in order to participate in a tender, it may occur that budget for labour conditions and environmental conditions may shift to one side or the other, that is increased labour protection may reduce environmental protection and vice versa'.[88] Environmental costs might include energy and raw material prices, for example. Rising prices for greener technologies risk putting pressures on the labour side of the bid, both in terms of occupation and wage levels. The opposite is also true: compliance with more protective labour law standards risks being offset with poor investments in environmental sustainability. The directive does not provide any rule to foresee and possibly prevent this risk. While such a hurdle might be addressed in the call for tender, this would still be based on the voluntary decision of the contracting authority.

4. Corporate Sustainability Due Diligence

The EU aspiration to promote responsible capitalism has recently been relaunched in the draft directive on due diligence that the European Commission announced at the beginning of 2022.[89] The general sources of inspiration behind such proposals are the 2011 UN Guiding Principles on Business and Human Rights, the OECD's work on due diligence, and the ILO's

[88] M. Kullmann, n 1 above, 116.

[89] European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 23 February 2022, COM(2022) 71 final.

Declaration on Multinational Enterprises.[90] Like the proposal for a directive on sustainability reporting of 21 April 2021,[91] the EC normative action on due diligence is not only horizontal, but cross-sectoral. It seeks to complement, indeed, the two existing sectoral regulations in the same normative area: the regulation that fights illegal harvesting and aims to ensure the traceability of timber;[92] the regulation concerning imports of tin, tantalum and tungsten, their ores and gold from conflict or high-risk areas.[93] A third proposal is under consideration concerning sustainable electric batteries, an issue that is known to have a high energy and environmental impact, especially in exporting countries where minerals and raw materials are extracted to fuel the parallel energy and digital transitions.

The legal bases of the directive proposal are freedom of establishment (Art 50 TFEU) and the functioning of the internal market (Art 114 TFEU). Such legal bases highlight the horizontal nature of this political project for the EU, under which social and environmental are considered as critical elements of a broader development policy. The aim of the directive proposal is to establish a legal requirement for companies to identify, prevent, mitigate and manage potentially adverse social and environmental effects that may arise from business operations. It creates a policy of vigilance, prevention and mitigation of the negative impacts of company activity, the establishment of complaints procedures and the periodic evaluation of monitoring measures in order to guarantee the effectiveness of the human, social and environmental rights referred to in the annex to the proposed directive.

The rationale of the project is also evident in the annex of the directive proposal, which targets three categories of fundamental international standards: those relating to environmental law, those specific to human rights and those concerning fundamental social rights. Twelve strictly environmental conventions are in fact linked to other international texts relating to human rights in the broad sense. The major social rights range from the Universal Declaration of Human Rights to the International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights. This covers fair

[90] J.G. Ruggie and J.F. Sherman, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights' 28 *European Journal of International Law*, 921 (2017).

[91] European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, 21 April 2021, COM(2021) 189 final.

[92] Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market [2010] OJ L 295.

[93] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L 130.

remuneration, decent work, child labour prohibitions and freedom of association. The ILO's core-labour standards are also covered. These include the eight fundamental conventions, but also the declaration on fundamental social rights and the one on principles applicable to multinationals.

Despite the broader reference to international standards, the proposed directive lacks any consideration of EU law or domestic legislation. In this perspective, the proposal for a directive is not conceived as a lever to advance EU social and environmental laws. The EU is rather mobilising towards the enforcement of international human rights and environmental standards. While this is reasonable in view of the broader scope of the directive proposal and the need to reach sufficient political consensus to adopt it, the due diligence obligations risk creating social and environmental dumping due to uneven levels of protection across the global value chains.

The duty of care that the directive proposal establishes, indeed, is applicable to certain companies registered in the EU, depending on their size and turnover. Precisely, the Directive targets the following economic operators: EU limited liability companies with 500 employees and a worldwide net turnover of more than EUR 150 million; Other limited companies operating in high-impact sectors that employ more than 250 people and have a turnover of EUR 40 million; Third country companies that meet the above thresholds as long as their turnover is achieved in the EU. While these thresholds are relatively high, and many EU companies fall outside the scope of the directive, small and medium-sized enterprises will indirectly be affected as long as due diligence obligations are correctly implemented. Targeted companies, indeed, should be concerned with their 'established commercial relations' (power of influence). In addition, certain small and medium-sized enterprises remain targeted if they are listed on the stock exchange or if they operate in high-risk sectors (eg, textile manufacturing, mineral resources, aquaculture, fisheries and forestry).

Due diligence must be integrated into the strategy of companies, requiring a proactive attitude in providing and implementing planning and correction mechanisms. This means that the evolving nature of risk requires permanent monitoring and internal self-assessment. It is a question of imposing a strategy of due diligence on the companies concerned as a highly structured obligation of means. Drawing up a code of conduct or a due diligence plan will not be enough. A pragmatic way of ensuring the effectiveness of such an internal process has also been to involve directors directly. These are expressly targeted by the text, which uses the lever of their remuneration, which is supposed to include a variable component based on the due diligence criterion.

Surprisingly, the 2015 Paris Agreement does not appear in the annex listing the basic texts that make it possible to qualify, in the event of a violation, the actual or potential harm as deserving protection. However, the text refers to it in the following way for the largest companies subject to the most onerous

obligations (Art 15): they must establish a plan to ensure that 'the company's business model and strategy are compatible with the transition to a sustainable economy and with limiting global warming to 1.5°C in accordance with the Paris Agreement'.[94] Based on the reasonably available information to the company, this plan shall determine the extent to which climate change represents a risk for the company's activities or an impact on them. If such a risk is identified, then Member States must ensure that the company includes emission reduction targets in its plan.

There is no doubt that the proposed directive meets a need for harmonization. Some European countries have led the way, particularly in response to the exemplary and dramatic case of the Rana Plaza (2013).[95] Firstly, the French law of 27 March 2017 on the duty of care of parent companies and contractors.[96] This is a general law on vigilance oriented towards human rights and environmental protection. Others have followed in Europe, such as the Dutch law (2019) or the Swiss law (2020), but these are more focused on child labour. Some countries have adopted more general legislation such as Germany (2021) and Norway (2021).

Compared to the French law that preceded it, the EU approach to due diligence appears even more ambitious. First, the scope of the directive proposal is broader than the French one because the thresholds are lower in terms of number of employees. Moreover, it does not only cover companies registered in a Member State but also companies from third countries. Vigilance involves the entire value chain (companies, subsidiaries and their established commercial relations), although this notion of value chain is still vague, and will require further clarification. The proposal also provides for more extensive obligations since the European text retains the notion of actual or 'potential' negative impacts of the activities subject to monitoring by reference to the corpus of international texts in the annex.

Furthermore, stakeholders should be involved in risk assessment, monitoring, and mitigation. The directive proposal defines stakeholders as: 'employees of the company, employees of its subsidiaries and other individuals, groups, communities or entities whose rights or interests are or could be

[94] An important French independent authority, the National Consultative Commission on Human Rights, issued an opinion on the subject, regretting 'the weakness of climate obligations, disconnected from vigilance obligations', CNCDH, *Declaration for an ambitious European Union directive on the duty of care of companies with regard to human rights and the environment in global value chains*, JORF, 3 April 2022.

[95] D.J. Doorey, 'Lost in Translation: Rana Plaza, Loblaw, and the Disconnect Between Legal Formality and Corporate Social Responsibility' (2018), available at https://tinyurl.com/3j5hrcuw (last visited 31 December 2022).

[96] V. Monteillet, 'Devoir de vigilance des sociétés mères et entreprises donneuses d'ordre' 256 *Droit de l'environnement*,195 (2017). For discussion about the implementation of this law, see E. Savourey and S. Brabant, 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption' 6(1) *Business and Human Rights Journal*, 141 (2021).

affected by the products, services and activities of this company, its subsidiaries and its business relationships'.[97] Accordingly, workers' unions should be involved in the construction of these vigilance processes (as it is, in principle, in France). The proposed directive details the responsibility of individuals to hold companies accountable through whistleblowing and claims for remedies.[98]

Finally, the directive proposal does not limit itself to envisaging jurisdictional avenues for triggering the civil liability of the company in the event of a lack of vigilance. Upstream, it calls for the creation of an independent administrative authority in the States, which are expected to cooperate within a European network. Their role would be to supervise and accompany companies, and even to sanction them in a dissuasive but proportionate manner. Downstream, in a very original way, a complaint procedure should be established, similar to a form of mediation. The aim would be to hear complaints and process compensation for victims who have suffered damage as a result of a lack of vigilance (Art 9). Claims could be made by any person concerned, including by NGOs or even workers' unions or any other person representing workers in the related value chain.

VI. Discussion and Conclusions

This article has explored channels for interaction and integration between labour and environmental sustainability in two EU normative domains: social policy and environment policy. Within the first domain, the principle of sustainable development is underdeveloped. Except for the so-called whistleblowing directive, there are no social policies nor directives that explicitly address the environmental implications of work organization. The focus remains on the protection of the workers and of the work environment, without any consideration for the effects of work organization on the 'natural' environment. Hence the principle of sustainable development, as laid down by Art 11 of the Treaty on the Functioning of the EU, is largely ignored within EU social policy.

While EU social policies are not informed by the principle of sustainable development, they contribute to shape sustainability within other policy domains. Although the focus on environment policy was restricted to new generation policies enhancing the major shift of the EU away from fossil-fuels, considerations of social and employment aspects become visible as the EU institutions embrace the idea of a just transition as a guiding principle in such policy setting and regulation field. However, the idea of a just transition is adopted in a reductionist manner, with the emphasis being placed on procedural aspects and the reactive role of social partners in addressing the employment

[97] Art 3(n).
[98] See Arts 19 and 23.

effects of the transition away from fossil fuels. Labour market policies are championed as the main policy space to ensure a just transition towards climate neutrality.

In this context, the EU policy language has recently shifted from the concept of justice to the one of fairness, which risks conflicting with the ILO guidelines on a just transition.[99] These guidelines, indeed, outline a wider agenda for social partners in the definition of the outcomes of the energy transition and, more broadly, in the policy pathways to promote sustainable development. This is something that, despite the rhetoric on the role of social partners in promoting a just transition, is actually missing in EU policies to contrast global warming and climate change. In EU law, fairness and justice are general clauses lacking specific indicators to assess their normative propositions. In turn, social justice would require a substantive definition including environmental inequalities, distributional aspects, human well-being, and their relation to development construed as progress.[100] But as long as the scope of workers' voice is restricted to the employment implications of decarbonization policies, unions are powerless in shaping the definition of justice in the transition away from fossil fuels. They are destined to play the role that for centuries the market economy has assigned to them: to relieve or suppress symptoms rather than to cure the underlying disease.[101]

This article's analysis stretched beyond the boundaries of EU policy on labour and the environment. Although secondary EU law has maintained a 'disciplinary compartmentalisation',[102] recent EU legislation on the economic pillar of sustainability has promoted horizontal policies on labour and the environment through several normative channels. Social and environmental clauses have been enacted in EU financial law, public procurement law and corporate law. The analysed examples of horizontal policies to promote labour and environmental sustainability present risks and opportunities. Arguably, the main risk is that such policies end up accentuating rather than alleviating the competition between the two values. This is a competition based on costs, that might arise when labour and environmental sustainability are pursued separately, in a linear relationship with the economic pillar of sustainable development.

EU regulations on sustainability related disclosures and taxonomies are a progressive example of good integration between labour and environmental concerns in a critical policy sector for sustainable development: finance. As opposed to other EU legislation and policies, these regulations define what environmental sustainability is, and social aspects are incorporated in this

[99] n 22 above.

[100] L. Éloi, 'Le *Green Deal* européen : juste une stratégie de croissance ou une vraie transition juste ?', in OFCE Observatoire français des conjonctures économique éd, *L'économie européenne 2021* (Paris: La Découverte, 2021), 94-104.

[101] R. Hyman, Industrial relations. A Marxist introduction (London: Macmillan, 1975), 98.

[102] J.P. Lhernould, n 30 above, 1315.

definition. Coherently, the same development should be reflected in future EU regulation that will address the definition of social sustainability for financial purposes. While the risk of competition between labour and environmental sustainability cannot be excluded, this normative technique creates the basis for an alliance and integration between the two values. An alliance and integration that can be better enhanced through shareholder activism, as positive experiences of sustainable investments of pension funds demonstrate.[103] Sustainable investment policies of pension funds are now legitimated thanks to the new EU rules allowing IORPs to consider environmental, social and governance risks in their investment decisions. This is a positive development since the argument on fiduciary duty has long been used as an expedient to exclude social and environmental objectives from investment policies of pension funds.

The EU effort to steer finance towards sustainability remains a controversial one. The discussion on 'green finance' is currently taking place on a more technical level as the EU taxonomy is supplemented by delegated acts. The first set out the technical examination criteria and excluded natural gas and nuclear energy. After intense debate, natural gas and nuclear energy were eventually included in the taxonomy as participating in the actions to contrast and mitigate global warming, by gradually driving the energy mix away from fossil-fuels. While opposition to such development is comprehensible, it is also true that the objective of a less carbon-intensive union cannot be detached from that of energy independence, which is one of the historical reasons behind the foundation of the European community. In a new shape, the debate on the taxonomy echoes the original concerns of the European Coal and Steel Community (ECSC) Treaty (now expired) and the Treaty establishing the European Atomic Energy Community (Euratom), which is still in force. It should be reminded that the latter was intended, from the outset, to establish uniform safety standards for the population and workers exposed to nuclear risk. The continuation of the nuclear industry should therefore logically lead to the development of labour law based on the sectoral achievements in this sector, especially regarding occupational health and safety and its link to environmental sustainability.

Unfortunately, a positive evaluation of EU financial law can hardly be extended to normative developments in the field of EU public procurement and concessions law. While horizontal procurement policies are welcome, the current formulation of EU directives in this policy area is inadequate and can even be counterproductive since legal mechanisms are not in place to anticipate and possibly eliminate the risk that social and environmental interests are treated as separate dimensions that can easily be traded off against one other. Simply juxtaposing labour and environmental concerns is not sustainable development.

[103] See P. Tomassetti, 'Between Stakeholders and Shareholders. Pension Funds and Labour Solidarity in the Age of Sustainability' forthcoming in *European Labour Law Journal* (2022).

The proposed directive on due diligence is a valuable effort to advance corporate sustainability over the global value chains, by making companies accountable for their actions or inactions to mitigate adverse social and environmental effects of economic activities. Despite explicit integration between labour and environmental sustainability not being visible, the idea of forcing companies and their managers to develop mandatory control, monitoring and correction mechanisms by involving relevant stakeholders is welcome. Through the system of governance that the directive proposal sets around the due diligence obligations, workers and their representative might have a voice, along with other relevant stakeholders, in monitoring the enforcement of both labour *and* environmental standards. This process of stakeholder engagement could lead to a cultural change that will certainly take time to be achieved. Also, political and economic resistance to the adoption of this directive is likely to be strong. But a concrete step towards the construction of an institutional edifice where social and environmental sustainability might converge has now been taken.

While this is a significant step towards an integrated and no longer siloed approach to labour and environmental justice, though, due diligence obligations should not be idealised. Even the more progressive discourses about corporate sustainability come with ambivalent effects on the contested boundaries of labour law and other relevant legal domains, notably of environmental law.[104] Although these disciplines have internalised considerations of the increasing unsustainability of nomad capitalism, they have at the same time legitimised the status quo,[105] marginalising the possibility for more critical scrutiny of how modern corporations, and the globalised division of labour they carry, endanger humans and ecosystems at their invisible roots.

[104] For critical analysis of existing regulatory frameworks for Global Value Chains, see C. Omari Lichuma, '(Laws) Made in the 'First World': A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains' 81 *Heidelberg Journal of International Law*, 497 (2021); P. Okowa, 'The Pitfalls of Unilateral Legislation in International Law: Lessons from Conflict Minerals Legislation' 69 *International and Comparative Law Quartely*, 685 (2020); G.A. Sarfaty, 'Shining Light on Global Supply Chains' 56 *Harvard International Law Journal*, 419 (2015).

[105] For some, the 'imperialistic programme' of Western countries: S. Seck, 'Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?' 46 *Osgoode Hall Law Journal*, 565, 582 (2008).