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Tracing the Social Sustainability Discourse within EU Law: the Success of the “Labour-Rights-as-Human-Rights” Approach*

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1. Introduction

This essay aims at tracing the tortuous path of the social sustainability discourse¹ within EU Law² against the background of the integrated social-green transition³, originating from a different awareness of their inextricable entanglement, fed by a renewed interest for human rights, which seem to prevail as interpretational code of the employment/social issues, above all in a globalized economy. Actually, undertakings and financial operators are confronted with a growing engagement of the EU in favor of individuals as

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¹ LY, COPE, *New Conceptual Model of Social Sustainability: Review from Past Concepts and Ideas*, in *IJERPH*, 2023, 20, p. 5350.

² MCGUINN, FRIES-TERSCH, JONES, CREPALDI, MASSO, KADARIK, SAMEK LODOVICI, DRUFUCA, GANCHEVA, GENY, *Social Sustainability. Concepts and Benchmarks*, 2020, <http://www.europarl.europa.eu/supporting-analyses>.

³ ALES, *Never too Late? The Integrated EU Social-Green Commitment towards a Just Transition*, in ALES, ADDABBO, CURZI, FABBRI, SENATORI (eds.), *Green Transition and the Quality of Work. Implications Linkages Perspectives*, Palgrave, forthcoming.

members of the society, workers, investors and costumers, whose social, employment & human rights shall be protected and guaranteed. At the same time, it is apparent that undertakings and financial operators play a key role in pursuing environmental and social objectives when they conduct sustainable economic activities and investments. An interdependence that, if properly regulated, may activate a virtuous circle to the advantage of the whole humankind.

2. *Financial and Non-financial Statements: point of Origin*

Adopted on the juridical basis of Article 50 TFEU⁴, Directive 2013/34⁵ introduced coordination measures of national provisions regarding the *annual financial statement*, the *management report* and the *corporate governance statement* of public and private companies, limited by shares or by guarantee, as well as for partnerships, limited partnerships and unlimited companies. Such intervention was triggered by the Commission's communication *Single Market Act*⁶, of 2011 and referred to the presentation, the contents, the measurement bases and the publication of those documents, with the view of protecting shareholders, members of the undertaking and third parties, due to the limited liability of such public and private entities.

In particular, according to the Dir. 2013/34, the *annual financial statement* shall provide information to the investors, give account of past transactions and enhance corporate governance, through balance sheets, profits and losses accounts and notes, which shall provide a true and fair view of assets, liabilities, financial position, profit and losses of the undertaking. The *management report*, at turn, shall provide a fair review of developments and performance of undertaking's business, describing its principal risks and uncertainties, including information on environmental and social aspects but also employees matters (Recital 26 and Article 19(1)). This was the first, feeble attempt towards the accounting of non-financial key performance indicators (KPI).

⁴ Freedom of establishment.

⁵ Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings (Accounting Directive).

⁶ COM(2011) 206 final 13.4.2011, *Single Market Act. Twelve levers to boost growth and strengthen confidence*.

On the other hand, inspired by the idea of disclosure, Directive 2014/95⁷, also adopted on the juridical basis of Article 50 TFEU and triggered by the *Single Market Act*, focused on the provision of non-financial and diversity information in order to rise to a similar level the transparency of social and environmental commitments of undertakings in all sectors, within the framework of a new definition of Corporate Social Responsibility (CSR) in terms of “responsibility of enterprises for their impact on society”, as stated by the Commission’s communication *A renewed EU strategy 2011-14 for Corporate Social Responsibility*⁸. Against that trend, in 2013, the European Parliament adopted two resolutions emphasizing the importance of business disclosing non-financial information, i.e., on sustainability such as social and environmental factors, relegating CSR in the background.

Consistently, according to Directive 2014/95, which amends Directive 2013/34, *non-financial statements* shall refer at least to environmental, social and employee related, respect for human rights, anticorruption and anti-bribery matters (Recital 6). Such a statement is due by public-interest entities, meaning undertakings falling within the scope of Directive 2013/34 which are (a) governed by the law of a Member State and whose transferable securities are admitted to trading on a regulated market of any Member States; (b) credit institutions or (c) insurance undertakings, both in the meaning of EU Law; (d) designated as such by Member States, for instance because of the nature of their business, their size or the number of their employees (Article 19a).

Those public-interest entities, which exceeds the average number of 500 employees during the financial year, shall include in the *management report* a *non-financial statement*, which shall contain information necessary to understand undertaking’s development, performance, position and impact of its activity at least on the just mentioned matters. The *non-financial statement* shall include: (a) a brief description of the undertaking’s business model; (b) a description of the policies pursued by the undertaking in relation to those matters, including *due diligence processes* implemented; (c) the outcome of those policies; (d) the *principal risks* related to those matters linked to the under-

⁷ Directive 2014/95/EU of 22 October 2014, as regards disclosure of non-financial and diversity information by certain large undertakings and groups (Non-financial Reporting Directive).

⁸ COM(2011) 681 final 25.10.2011. See, in a broad perspective, LAZZERONI, *Responsabilità sociale d’impresa 2.0 e sostenibilità digitale. Una lettura giuslavoristica*, Firenze-Siena, 2024.

taking's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause *adverse impacts in those areas*, and how the undertaking manages those risks; (e) other non-financial key performance indicators relevant to the particular business.

To be emphasized, as it is in the text, a first reference, within EU secondary Law, to *due diligence processes, principal risks and adverse impacts* on environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, taking the center stage of *non-financial disclosure*, echoing the *OECD Guidelines for Multinational Enterprises* (1976), the *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (1977) and the *UN Guiding Principles on Business and Human Rights* (2011). We will come back on this at the end of the essay.

If the undertaking does not pursue policies in relation to one or more of those matters, the *non-financial statement* shall provide a clear and reasoned explanation for not doing so. Member States may allow information relating to impending developments or matters in the course of negotiation to be omitted in exceptional cases where, in the duly justified opinion of undertakings' governing bodies, the disclosure of such information would be seriously prejudicial to its commercial position, provided that such omission does not prevent a fair and balanced understanding of the undertaking's condition concerning those matters.

Public-interest entities, which exceeds 500 employees are obliged, already under Directive 2013/34 to include a *corporate governance statement* in their management report, as a specific section. According to Dir. 2014/95, the *corporate governance statement* shall contain a description of the *diversity policy* applied in relation to the undertaking's governance bodies with regard to aspects such as, for instance, age, gender, or educational and professional backgrounds, the objectives of that diversity policy, how it has been implemented and the results in the reporting period. If no such policy is applied, the statement shall contain an explanation as to why this is the case (Article 20 (1)(g)).

Article 2 Dir. 2014/95 commits the Commission to prepare *non-binding guidelines* on methodology for reporting non-financial information, including non-financial KPI, general and sectoral, with a view to facilitating relevant, useful and comparable disclosure of non-financial information by undertakings. In doing so, the Commission shall consult relevant stakeholders.

Consistently, in 2017, the Commission adopted the *Guidelines on non-fi-*

ncial reporting (methodology for reporting non-financial information)⁹. In 2019, the *Supplement on reporting climate-related information*¹⁰, which testifies an enhanced interest for the environmental matters. More in general, the 2017 Guidelines are deeply influenced by the 2030 Agenda adopted by the General Assembly of the United Nations in September 2015 and by the Paris Agreement of the same year, to which the Commission corresponded in 2016 publishing its Communication *The next steps for a sustainable European future*¹¹.

3. *From Non-financial Reporting to the Sustainability Discourse: the Environmental (E) and Social (S) Factors*

Thus, the non-financial reporting discourse started to be superseded by the sustainability one, as confirmed, some years later, by Directive 2022/2464¹², adopted on the combined juridical base of Article 50 and 114 TFEU, the latter adding the approximation of laws perspective to freedom of establishment.

Before that, however the Commission issued the *Action plan on financing sustainable growth*¹³ setting measures to reorient capital flows towards sustainable investment in order to achieve sustainable and inclusive growth, manage financial risks stemming from climate change, resource depletion, environmental degradation and social issues, as well as foster transparency and long-termism in financial and economic activity. According to the Commission, the disclosure of relevant, comparable and reliable sustainability information is a prerequisite for meeting those objectives. Implementing the *Action Plan*, the Parliament and the Council have adopted, among the others, Regulation (EU) 2019/2088¹⁴, governing disclosure of sustainability information to end

⁹ Communication from the Commission 2017/C 215/01.

¹⁰ Communication from the Commission 2019/C 209/01.

¹¹ COM(2016) 739 final 22.11.2016, *Next steps for a sustainable European future. European action for sustainability*. See, in a broad perspective, MUCCIARELLI, *Perseguire un diritto societario «sostenibile»: un obiettivo sincero?*, in *RGL*, 2021, I, p. 520.

¹² Directive (EU) 2022/2464 of 14 December 2022, as regards corporate sustainability reporting (Corporate Sustainability Reporting Directive (CSRD)).

¹³ COM(2018) 97 final 8.03.2018.

¹⁴ Regulation (EU) 2019/2088 of 27 November 2019 on sustainability-related disclosures in the financial services sector (Sustainable Finance Disclosure Regulation (SFDR)).

investors and asset owners by financial market participants and financial advisers. We will come back on it in a while.

Furthermore, in the *Green Deal*¹⁵, the Commission committed to review the provisions concerning *non-financial reporting* of Dir. 2013/34, in order to develop, as solicited by the Council and the Parliament, within what has been qualified as a *sustainable corporate governance perspective*, a mandatory Union non-financial reporting standard, preferably referred to as *sustainable reporting* on sustainable information.

In the same vein, Dir. 2022/2464 amends Dir. 2013/34, spotlighting the ultimate beneficiaries of its provisions, i.e., individual citizens as savers and costumers, investors but also civil society actors as NGOs and social partners, specifically differentiated from trade unions and workers representatives. The latter shall be adequately informed so to be able to better engage in social dialogue (Recital 9).

On the background of the amendments, one can find the growing investors awareness of the financial implications of climate related risks as well as risks resulting from health and social issues, such as child and/or forced labour. Therefore, points 17 and 18 are added to the definitions list provided by Article 2 Dir. 2013/34, clarifying a very broad notion of “sustainability matters”, which includes “sustainability factors” as defined in Article 2 point (24) of Regulation (EU) 2019/2088, meaning, also in this case, environmental, social and human rights, employee, anti-corruption and anti-bribery matters. Where social and human rights, employee matters should have been provided with a clearer meaning.

More significantly, as already mentioned, Dir. 2022/2464 substitutes the Sustainability to the Non-financial reporting as regulated by Article 19a Dir. 2013/34, in the sense of obliging public-interest entities to include in their *management report* information necessary to understand the undertaking’s impacts on *sustainability matters*, and, at turn, how sustainability matters affect the undertaking’s development, performance and position. This is a virtuous circle that should protect the interests of all the ultimate beneficiaries.

In the same sense, Dir. 2022/2464 details the information to be disclosed in relation to *sustainability matters*: (a) the undertaking’s business model and strategy; (b) the time-bound targets; (c) the role, expertise and

¹⁵ COM(2019) 640 final 11.12.2019, *The European Green Deal*.

skills of the governance bodies, as well as the existence of incentive schemes which are offered to them; (d) the undertaking's policies; (f) the *due diligence process* implemented by the undertaking; the principal actual or potential *adverse impacts* connected with the undertaking's own operations and within its value chain, together with actions taken to identify and monitor those impacts; any actions taken by the undertaking to prevent, mitigate, remediate or bring an end to actual or potential *adverse impacts*, and the result of such actions; (g) the *principal risks* to the undertaking, including a description of the undertaking's principal dependencies on those matters, and how the undertaking manages those risks; (h) indicators relevant to the disclosures.

Rather hastily, a par. 5 added to Article 19a by Dir. 2022/2464 provides that the management of the undertaking shall inform the workers' representatives at the appropriate level and discuss with them the relevant information and the means of obtaining and verifying *sustainability information*. The workers' representatives' opinion, apparently stemming from a consultation, shall be communicated, where applicable, to the relevant governance bodies. Sanctions for the violation of that obligation shall imposed by the Member States.

The contents of *corporate governance statement* too are modified by Dir. 2022/2464, in the sense that the description of the diversity policy applied to the undertaking's governance bodies shall refer to gender first and then to other aspects such as, age, disabilities or educational and professional background.

Most significantly, Dir. 2022/2464 adds Chapter 6a to Dir. 2013/34. In particular, Article 29b and 29c commit the Commission to adopt delegated acts supplementing Dir. 2013/34 in order to provide for European Sustainability Reporting Standards (hereinafter ESRS), respectively for public-interest entities and small and medium-sized undertakings. ESRS shall specify the forward-looking, retrospective, qualitative and quantitative information, as appropriate, to be reported by undertakings. They shall, at least, include the information that financial market participants subject to the disclosure obligations of Regulation 2019/2088 need in order to comply with those obligations.

The ESRS shall ensure that information is understandable, relevant, verifiable, comparable and represented in a faithful manner. They shall avoid imposing a disproportionate administrative burden on undertakings, including

by considering, to the greatest extent possible, of the work of global standard-setting initiatives for sustainability reporting.

For the first time in a binding Eu Law instruments, Environmental (E), Social(S) and Governance(G) factors (ESG) are recalled as such, understanding S as including also the Human Rights factors (SHR), which, at turn, encompasses the employment matters.

In fact, as for SHR, ESRS specify the information that undertakings have to disclose on: (i) equal treatment and opportunities, including gender equality and equal pay for work of equal value; training and skills development; the employment and inclusion of people with disabilities; measures against violence and harassment in the workplace; diversity; (ii) working conditions, encompassing secure employment, working time, adequate wages; social dialogue, freedom of association, existence of works councils, collective bargaining, including the proportion of workers covered by collective agreements; workers information, consultation and participation rights; work-life balance; health and safety; (iii) respect for the HR, fundamental freedoms, democratic principles and standards established in the *International Bill of Human Rights*¹⁶ and other core conventions, such as the *UN Convention on the Rights of Persons with Disabilities*, the *UN Declaration on the Rights of Indigenous Peoples*, the *ILO Declaration on Fundamental Principles and Rights at Work* and the ILO fundamental conventions, the *European Convention for the protection of Human Rights*, the *European Social Charter*, and the *Charter of Fundamental Rights of the European Union*.

Quite a lot to be effectively and realistically reported on.

Relevant too for the S(HR) are the information that undertakings have to disclose about G, i.e., (i) the role of the undertaking's governing bodies with regard to *sustainability matters*, and their composition, as well as their expertise and skills in relation to fulfilling their role or the access such bodies have to such expertise and skills; (ii) the main features of the undertaking's internal control and risk management systems, in relation to the sustainability reporting and decision-making process; (iii) business ethics and corporate culture, including anti-corruption and anti-bribery, the protection of whistle-

¹⁶ The Universal Declaration of Human Rights (UDHR), the International Covenant on Economic Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR).

blowers and animal welfare; (iv) activities and commitments of the undertaking related to exerting its political influence, including its lobbying activities; (v) the management and quality of relationships with customers, suppliers and communities affected by the activities of the undertaking, including payment practices, especially with regard to late payment to small and medium-sized undertakings.

A lot more on top of the already quite a lot.

Generously, ESRS shall consider the difficulties that undertakings may encounter in gathering information from actors throughout their value chain, especially from those which are not subject to the *sustainability reporting*, and from suppliers in emerging markets and economies. ESRS shall specify disclosures on value chains that are proportionate and relevant to the capacities and the characteristics of undertakings in value chains, and to the scale and complexity of their activities. ESRS shall not impose disclosures that would require undertakings to obtain information from small and medium-sized undertakings in their value chain that exceeds the information to be disclosed pursuant to the sustainability reporting standards for small and medium-sized undertakings.

When adopting delegated acts on ESRS, the Commission shall, to the greatest extent possible, take account of, among the others: (a) the work of global standard-setting initiatives for sustainability reporting, and existing standards and frameworks for responsible business conduct, corporate social responsibility, and sustainable development; (b) the information that financial market participants need in order to comply with their disclosure obligations laid down in Reg. 2019/2088 and the delegated acts adopted pursuant to that Regulation; (c) the criteria, indicators and methodologies set out in the delegated acts adopted pursuant to Regulation (EU) 2020/852¹⁷, including the Technical Screening Criteria (TSC) and the reporting requirements set out in the delegated act adopted pursuant to that Regulation; (d) the disclosure requirements applicable to benchmark administrators in the benchmark statement and in the benchmark methodology and the minimum standards for the construction of EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks in accordance with Commission Delegated Regulations (EU) 2020/1816, (EU)

¹⁷ Regulation (EU) 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment (Taxonomy Regulation).

2020/1817 and (EU) 2020/1818¹⁸; (g) Directive 2003/87/EC¹⁹; (h) Regulation (EU) 2021/1119²⁰.

ESRS have been adopted by Commission Delegated Regulation 2023/2772²¹, a 284 pages document supplementing Dir. 2013/34, to be applied from 1 January 2024 for financial years beginning on or after 1 January 2024. The deadline for the adoption of further ESRS specifying the information that undertakings have to report with regard to sustainability matters and the reporting areas specific to the sector in which an undertaking operates has been wisely postponed to 30 June 2026²².

4. *The Sustainability Discourse and the Financial Sector: taking Human Rights (HR) on Board*

Recalled more than once in the above, Reg. 2019/2088 anticipates Dir. 2022/2464 in opening the sustainability discourse in relation to disclosures in the financial sector. Adopted on the juridical basis of Article 114 TFEU, it is strictly related to the *2030 UN Agenda* and the *Sustainable Development Goals* as well as to the implementation of the *Paris Agreement* as explicated by the Commission in its Communication *European action for sustainability*²³.

Disclosures to end investors in the investment decisions making process

¹⁸ Commission Delegated Regulation (EU) 2020/1816 of 17 July 2020 as regards the explanation in the benchmark statement of how environmental, social and governance factors are reflected in each benchmark provided and published; Commission Delegated Regulation (EU) 2020/1817 of 17 July 2020 as regards the minimum content of the explanation on how environmental, social and governance factors are reflected in the benchmark methodology; Commission Delegated Regulation (EU) 2020/1818 of 17 July 2020 as regards minimum standards for EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks.

¹⁹ Directive 2003/87/EC of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community.

²⁰ Regulation (EU) 2021/1119 of 30 June 2021 establishing the framework for achieving climate neutrality ('European Climate Law').

²¹ Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards.

²² Directive (EU) 2024/1306 of 29 April 2024 amending Directive 2013/34/EU as regards the time limits for the adoption of sustainability reporting standards for certain sectors and for certain third-country undertakings.

²³ COM(2016) 739 final 22.11.2016.

shall refer to: (i) the integration of *sustainability risks*; (ii) the consideration of *adverse sustainable impact*; (iii) *sustainable investment* objectives; (iv) the promotion of E or SHR characteristics. Such disclosures need the definition of harmonized requirements in order to make the principal-agent relationship between end investors and *financial market participants* or *financial advisors* transparent during the precontractual and ongoing phases.

Against that background, definitions provided by Reg. 2019/2088 are crucial to understand the very purpose of such a legislative instrument.

Sustainability risk means an ES(HR)G event or condition that, if it occurs, could cause an actual or a potential material negative impact on the value of the investment (Article 2 point 22).

Sustainable investment means an investment in: (i) an economic activity that contributes to an E objective, as measured, for example, by key resource efficiency indicators; (ii) an economic activity that contributes to a S objective, in particular by tackling inequality or fostering social cohesion, social integration and labour relations; (iii) human capital or economically or socially disadvantaged communities. Such investments can be deemed to be sustainable as long as do not significantly harm any E&SHR objectives and provided that the investee companies follow good G practices, in particular with respect to sound management structures, employee relations, remuneration of staff and tax compliance (Article 2 point 17).

Financial market participant (FMP) means: (a) an insurance undertaking which makes available an insurance-based investment product (IBIP); (b) an investment firm which provides portfolio management; (c) an institution for occupational retirement provision (IORP); (d) a manufacturer of a pension product; (e) an alternative investment fund manager (AIFM); (f) a pan-European personal pension product (PEPP) provider; (g) a manager of a qualifying venture capital fund registered under EU Law; (h) a manager of a qualifying social entrepreneurship fund registered under EU Law; (i) a management company of an undertaking for collective investment in transferable securities (UCITS); (j) a credit institution which provides portfolio management (Article 2 point 1).

Financial adviser (FA) means: (a) an insurance intermediary which provides insurance advice with regard to IBIPs; (b) an insurance undertaking which provides insurance advice with regard to IBIPs; (c) a credit institution which provides investment advice; (d) an investment firm which provides investment advice; (e) an AIFM who provides investment advice in accor-

dance with EU Law; or (f) an UCITS which provides investment advice in accordance with EU Law (Article 2 point 11).

Even if Reg. 2019/2088 does not contain a definition of *adverse sustainable impact*, it requires FMPs to publish and maintain on their website a *statement on due diligence policies* with respect to the Principal Adverse Sustainable Impact (PASI) of investments decision on *sustainability factors*, considering their size, the nature and scale of their activities and the types of financial products they make available (Article 4). That statement shall provide information on policies on identification and prioritization of PASIs, actions taken or planned towards them, but also on FMP adherence to responsible business codes of conduct and internationally recognized due diligence and reporting standards as well as on the degree of alignment to the Paris Agreement objectives. This is the so called transparency of PASI at entity level.

Transparency is also required, as for the precontractual disclosure phase, on the integration of *sustainability risks* into FMPs investment decisions and into FA investments or insurance advice as well as on the results of the assessment of the likely impacts of *sustainability risks* on the returns of the financial products FMPs make available (Article 6). Biunivocally, transparency is required in terms of clear and reasoned explanation of whether and how a financial product considers PASIs on *sustainability factors*, to be understood in the meaning already mentioned in the above (Article 7). This is the so called transparency of PASI at financial product level.

The transparency principle in the precontractual disclosure phase applies also to the prominent kinds of financial products considered by Reg. 2019/2088, i.e.: (i) a financial product that promotes, among the others, E or/and SHR characteristics, provided that the investee follows good G practices; (ii) a financial product that has *sustainable investment* objective, provided that an *index* has been designated as a *reference benchmark*. As for the former, information have to be disclosed on how E or/and SHR characteristics are met and if an *index* consistent with those characteristics has been designated as a *reference benchmark*. As for the latter, on how the *designated index* is aligned with that objective and why and how the designated index aligned with that objective differs from a *broad market index*. Where no *index* has been designated as a *reference benchmark*, the information to be disclosed shall include an explanation on how that objective is to be attained (Article 8 and 9).

The transparency principle applies to FMPs and FAs that make available those financial products in terms of a description of the E or/and S characteristics or of the sustainable investment objective and of information on the methodologies used to assess, measure and monitor those characteristics or the impact of the sustainable investments selected for the financial product, including its data sources, screening criteria for the underlying assets and the relevant sustainability indicators used to measure those characteristics or the overall sustainable impact of the financial product (Article 10).

As required by Article 10(2), the Commission, elaborating on a draft provided by the Joint Committee of the European Supervisory Authorities (ESAs), has adopted Regulatory Technical Standards (RTS) in order to detail the content of that information and its presentation requirements²⁴.

In their periodic reports, FMPs & FAs that make available those financial products shall include, for each one promoting E or/and SHR characteristics, a description of the extent to which those characteristics are met; for each one having *sustainable investment* objective, its overall *sustainability-related impact* by means of relevant *sustainability indicators* or, where an *index* has been designated as a reference benchmark, a comparison between the overall *sustainability-related impact* of the financial product with the impacts of the *designated index* and of a *broad market index* through *sustainability indicators*.

For those purposes, where appropriate, FMPs may use the information in management reports in accordance with Article 19 Dir. 2013/34 or the information in Sustainability reporting in accordance with Article 19a of that Directive.

Member States shall designate competent authorities monitoring the compliance of FMPs and FAs with the requirements mentioned in the above. Those authorities shall have all the supervisory and investigatory powers necessary for the exercise of their functions. No reference is made to sanctioning powers of those authorities (Article 14).

²⁴ Commission delegated regulation (EU) 2022/1288 of 6 April 2022 on regulatory technical standards, as amended and corrected by Commission Delegated Regulation (EU) 2023/363 of 31 October 2022.

5. *Facilitating Sustainable Investment by Qualifying Economic Activities as Sustainable*

In order to further enhance the sustainability discourse, shortly after Reg. 2019/2088 and before Dir. 2022/2464, the EU Institutions adopted Regulation (EU) 2020/852, establishing a framework to facilitate sustainable investment (so called Taxonomy Regulation), by introducing a unified classification system of sustainable economic activities. The intention was and still is to shift capital flows towards them, underpinned by an understanding of the E sustainability of those activities and investments. Therefore, guidance has to be provided towards activities that qualify as contributing to E objectives (E Sustainable Activities) as well as towards investments that fund these activities (E Sustainable Investments). The same guidance should be provided, at a later stage, for activities that qualify as contributing to S objectives (S Sustainable Activities). That stage is still to come. However, as we will see, the same definitions of E Sustainable Activities and E Sustainable Investments provide some promising elements.

The focus on E Sustainable Activities & Investments is motivated by the desire to fight *greenwashing*, defined as “the practice of gaining an unfair competitive advantage by marketing a financial product as environmentally friendly, when in fact basic environmental standards have not been met” (Recital 11). Therefore, the Taxonomy Regulation aims to establish criteria for determining whether an economic activity qualifies as E Sustainable for the purposes of establishing the degree to which an investment is E Sustainable, defined, at turn, as an investment in one or several economic activities that qualify as E sustainable. Against this background, the disclosure obligations attached to the Taxonomy Regulation supplement those laid down by Reg. 2019/2088, in order to enhance transparency and to provide an objective point of comparison by financial market participants to end investors on the proportion of investments that fund E Sustainable Activities.

In the same vein, Reg. 2019/2088 has been amended in order to mandate the ESAs to jointly develop RTS to further specify the details of the content and presentation of the information in relation to the principle of “do no significant harm”. RTS should be consistent with the *adverse impacts sustainability indicators* as referred to in Reg. 2019/2088 as well as with the so called *minimum safeguards*, which we will get back later to.

For the purposes of establishing the degree to which an investment is

E Sustainable (E Sustainable Investment), an underlying economic activity that shall qualify as E Sustainable (E Sustainable Activity) is needed. This happens if: (a) it contributes substantially to one or more of the E objectives defined by the Taxonomy Regulation; (b) does not significantly harm any of those objectives, in accordance with the criteria laid down by the Taxonomy Regulation; (c) is carried out in compliance with the *minimum safeguards* referred to by the Taxonomy Regulation; (d) complies with Technical Screening Criteria (TSC) the Commission is mandated to establish in accordance with the Taxonomy Regulation.

All those criteria shall be used by Member States to qualify an economic activity as E Sustainable when adopting measures providing requirements for FMPs or issuers in respect of financial products or corporate bonds that are made available as E sustainable, in order to guarantee a E Sustainable Investment (Article 4).

Undertakings obliged to non-financial reporting (now, as already illustrated, Sustainability reporting) under Dir. 2013/34 shall include in their relevant statements information on how and to what extent their activities are associated to E Sustainable Activities.

Recalling that the E objectives are climate change mitigation and adaptation, the sustainable use and protection of water and marine resources, the transition to a circular economy, pollution prevention and control, the protection and restoration of biodiversity and ecosystems, our major point of interest is the definition of the very notion of *minimum safeguards*, as a criteria to qualify an activity as E Sustainable.

According to Article 18 Taxonomy Regulation, *minimum safeguards* have to be understood as *procedures* implemented by an undertaking to ensure the alignment of an economic activity, again, with the OECD *Guidelines for Multinational Enterprises*, the UN *Guiding Principles on Business and Human Rights*, the eight (now ten) fundamental conventions identified in the ILO *Declaration on Fundamental Principles and Rights at Work* and the International Bill of Human Rights.

All instruments already referred to in the above.

When implementing the *minimum safeguards*, undertakings shall adhere to the already illustrated principle of ‘do no significant harm’ referred to in Article 2 point 17 Reg. 2019/2088. In relation to that, the Taxonomy Regulation introduces an Article 2a into Reg. 2019/2088, according to which the ESAs shall, through their Joint Committee, draft RTS detailing content

and presentation of the information in relation to that principle, consistent with those, already mentioned, of the *sustainability indicators* in relation to the PASIs as referred to in Reg. 2019/2088. Drafts have been submitted to the Commission who has adopted RTS by Delegated Regulation 2021/2139²⁵ and 2023/2486²⁶.

6. *The (E)SHR Sustainability Discourse and Consumers Protection against Greenwashing*

The E and SHR dimensions lastly come across in the context of the sustainability discourse within Directive (EU) 2024/825²⁷, which empowers consumers for the green transition through better protection against unfair practices and through better information. Indeed, Dir. 2024/825, to be transposed by Member States by March 2026, amends Directives 2005/29/EC²⁸ and 2011/83/EU²⁹, concerning, respectively, unfair business-to-consumer commercial practices in the internal market and, more in general, consumer rights.

Dir. 2024/825 aims to enable better-informed transactional decisions by consumers to promote sustainable consumption, eliminating practices that cause damage to the sustainable economy and prevent consumers from making sustainable consumption choices, and ensuring a better and consistent application of the Union consumer legal framework.

In particular, as far as the E and SHR sustainability discourse is con-

²⁵ Establishing the TSC for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives.

²⁶ Establishing the TSC for determining the conditions under which an economic activity qualifies as contributing substantially to the sustainable use and protection of water and marine resources, to the transition to a circular economy, to pollution prevention and control, or to the protection and restoration of biodiversity and ecosystems and for determining whether that economic activity causes no significant harm to any of the other environmental objectives.

²⁷ Directive (EU) 2024/825 of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information.

²⁸ Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive').

²⁹ Directive 2011/83/EU of 25 October 2011 on consumer rights.

cerned, Dir. 2024/825 aims to avoid greenwashing, first, in the sense that consumers shall not be misled about E or SHR characteristics through the overall presentation of a product. Consequently, Dir. 2005/29 has been amended by adding, among the others, to the list of the main characteristics of a product in respect of which a trader's practices can be considered misleading, E and S characteristics (Article 6(1)).

Information provided by traders on the S characteristics of a product throughout its value chain can relate, for example, to the quality and fairness of working conditions of the workforce involved, such as adequate wages, social protection, the safety of the work environment and social dialogue. Such information can also relate to respect for HR, to equal treatment and opportunities for all, including gender equality, inclusion and diversity, to contributions to social initiatives or to ethical commitments, such as animal welfare. The E and S(HR) characteristics of a product can be understood in a broad sense, encompassing the E and S(HR) aspects, impact and performance of that product.

Greenwashing may also take the appearance of traders advertising benefits to consumers that are irrelevant and not directly related to any feature of that specific product or business and which could mislead consumers into believing that they are more beneficial to E and SHR than other products or traders' businesses of the same type. Therefore, such a misleading commercial practice has been added to those prohibited by Annex I Dir. 2005/29 as substituted by Dir. 2024/825 (Article 6(2)).

A further form of *greenwashing* is comparing products on their E or SHR characteristics, an increasingly common marketing technique that could mislead consumers, if they are not able to assess the reliability of information. Consequently, traders shall be obliged to provide consumers with information about the method of comparison, the products which are the object of comparison and the suppliers of those products, as well as the measures to keep information up to date (Article 7(7) Dir. 2005/29).

Last but not least, *greenwashing* may hide behind *sustainability labels*, to be understood as any voluntary trust mark, quality mark or equivalent, either public or private, that aims to set apart and promote a product, a process or a business by reference to its E or/and S characteristics, excluding any mandatory label required under Union or national law (Article 2(r) Dir. 2005/29). Therefore, before displaying a *sustainability label*, any trader shall ensure that it meets minimum conditions of transparency and credibility, including the existence of objective monitoring of compliance according to

the publicly available terms of a certification scheme. Such monitoring should be carried out by a third party whose competence and independence from both the scheme owner and the trader are ensured by international, Union or national standards and procedures. Thus, displaying uncertified sustainability labels has been prohibited as misleading commercial practice listed in Annex I to Dir. 2005/29 as substituted by Dir. 2024/825.

7. *The Sustainability Discourse and Corporate Sustainability Due Diligence: a Misleading Title?*

By the adoption of Dir. 2024/825, EU Law seems to have come full circle about the E&SHR sustainability discourse, which, although to different extents, touches undertakings of various kind and size. In fact, the reference to sustainability that can be found within the title of the Corporate Sustainability Due Diligence Directive³⁰ looks more like a formal tribute to it than a substantive enhancement of that discourse. Not by chance, the Preamble of the Directive refers to Article 2 TUE, which emphasizes, among the others, the respect for HR, rather than to Article 3 TUE, advocating for a Union that shall work for the sustainable development of Europe, even if, according to the same Preamble, Union's action on the international scene shall include fostering the sustainable economic, S&E growth of developing countries.

HR&E themselves take the center stage of the Directive, which, not surprisingly, recalls Commission Communication *A strong social Europe for just transitions*³¹ rather than the *Sustainable Europe Investment Plan*³² one. The openness to the global dimension of Union companies, relying on global value chains, is confirmed by the reference to the *Decent work worldwide for a global just transition and a sustainable recovery* Communication³³, which stresses

³⁰ Directive of 13 June 2024 ... on corporate sustainability due diligence. See BORELLI, IZZI, *L'impresa tra strategie di due diligence e responsabilità*, in RGL, 2021, I, p. 553; GUALANDI, *Addressing MNEs' Violations of Workers' Rights through Human Rights Due Diligence. The Proposal for an EU Directive on Sustainable Corporate Governance*, in this journal, 2022, I, p. 83; CORDELLA, *The Slow Approval Process of the Due Diligence Directive and the Different Paths for the Involvement of Trade Unions*, in ILLEJ, 2023, II, p. 17.

³¹ COM(2020) 14 final 14.01.2020, *A strong social Europe for just transitions*.

³² COM(2020) 21 final 14.1.2020, *Sustainable Europe Investment Plan*.

³³ COM(2022) 66 final 23.02.2022, *Decent work worldwide for a global just transition and a sustainable recovery*.

the rising concern of consumers and investors regarding HR&E at global level. Therefore, after having recalled, almost casually, the European Pillar of Social Rights, the Preamble focuses on the *UN Guiding Principles on Business and HR*³⁴ and its Foundational Principles. Among them the Exercise of HR Due Diligence stands out (point 15 and 17) in terms of undertaking's obligation to identify, prevent, mitigate and account for how they address their impact on HR. The same value is recognized to the *OECD Guidelines for Multinational Enterprises* as specified by the *Due Diligence Guidance for Responsible Business Conduct*, duly accompanied by the ILO Tripartite Declaration of Principles on Multinational Enterprises and Social Policy and the *UN Sustainable Development Goals*³⁵.

An outward-looking approach by the EU Institutions, which may mitigate the disappointment for an apparently narrow scope of application covering only companies with more than 1000 employees and a net worldwide turnover of more than 450 million in the last financial year. Apparently, since it includes also ultimate parent company of a group that reaches those thresholds as well as, under certain conditions, companies entered into or ultimate parent company of a group that entered into franchising or licensing agreements in the Union in return for royalties with independent third-party companies (Article 4).

The Directive provides for those companies obligations, and liability for their violation, to be mandatorily coped with due diligence processes, in relation to actual and potential *HR adverse impacts* and *E adverse impacts*, with respect to their own operations, those of their subsidiaries, and those carried out by their business partners in companies' chains of activities; but also, the obligation to adopt and put into effect a transition plan for climate change mitigation (Article 1).

As usual, definitions offer the insight needed to understand the essence of the Directive, starting from "*adverse impact*", eventually defined within an EU Law instrument. It means an *adverse E impact* and *adverse HR impact*, which, at turn, refers to an impact on persons resulting from an *abuse* of one or more of the HR listed in the Annex to the Directive, by a company or legal entity, that directly impairs a legal interest protected by the HR instru-

³⁴ Resolution 17/4 of 16.06.2011.

³⁵ SPINELLI, *Regulating Corporate Due Diligence: from Transnational Social Dialogue to EU Binding Rules (and Back?)*, in this journal, 1, 103.

ments listed in the Annex to the Directive. However, an abuse is at stake only if a company could have reasonably foreseen the risk that such HR may be affected, considering the circumstances of the specific case, including the nature and extent of the company's business operations and its chain of activities, characteristics of the economic sector and geographical and operational context. A highly complicated definition that betrays a difficult compromise between HR supporter and the global business.

It falls outside the scope of this essay to investigate the challenging mechanisms of the Directive and their effectiveness. However, among them, it shall purposively be emphasized the obligation for undertakings to establish notification and complaint procedures in favor of people who deem to be victim of an (S)HR abuse, also by participating in collaborative procedures, including those established jointly by companies through industry associations, multi-stakeholder initiatives or global framework agreements. Worth mentioning is also the presence of supervisory authorities, at Member State level, which can impose sanctions on abuse perpetrators.

Although occasionally the same Directive seems to have come full circle about the E&SHR sustainability discourse by providing that the obligation to adopt an annual statement on matters covered by the Directive does not apply to undertakings already subject to sustainability reporting requirements under Dir. 2013/34/EU³⁶.

8. *The very Notion of SHR Sustainability: a Conclusive Reflection on the SHR Sustainable Undertaking*

It could be useful to conclusively reflect upon the very notion of SHR sustainability as understood by the EU Legislator all along its restless effort made through the years.

The point of origin is represented by the obligation, provided by Dir. 2013/34, for undertaking to include in the *management report* information on S aspects and employees matters, in the view of accounting for the non-financial KPI. A generic reference that only allowed speculating on the distinction between employment related issues and an unspecified S dimension.

³⁶ LOFFREDO, *Democrazia industriale e sustainable corporate governance: i soliti sospetti*, in *RGL*, 2021, I, p. 601.

In Directive 2014/95 the EU Legislator moved up a gear by including within the *management report* a *non-financial statement*, which should contain information necessary to understand undertaking's activity development, performance, position and impact at least, once again on S and employee matters, but also as the E dimension and the respect for HR, anti-corruption and bribery matters. A much wider range of factors towards which the undertaking shall provide a self-assessment. Worth to be mentioned, the first appearance of HR among them.

Such a wide range of factors has been confirmed, without any specifications, by Dir. 2022/2464 under the umbrella of "sustainability matters" or "sustainability factors" as qualified by Reg. 2019/2088. However, Dir. 2022/2464 adds Chapter 6a to Dir. 2013/34, mandating the Commission to adopt delegated acts supplementing the latter in order to provide for ESRS.

ESRS specify that undertakings have to disclose information on two areas of *employment matters*.

First, equal treatment and opportunities, including gender equality and equal pay for work of equal value; training and skills development; the employment and inclusion of people with disabilities; measures against violence and harassment in the workplace; diversity. Second, working conditions, including secure employment, working time, adequate wages; but also, the instruments to realize them, such as social dialogue, freedom of association, existence of works councils, collective bargaining, including the proportion of workers covered by collective agreements; the information, consultation and participation rights of workers; work-life balance; health and safety.

Information has to be disclosed by undertakings also on the respect for HR, fundamental freedoms, democratic principles and standards.

Here a generic reference is made to a wide range of international global instruments: the UDHR, the ICESCR, the ICCPR, the UN *Convention on the Rights of Persons with Disabilities*, the UN *Declaration on the Rights of Indigenous Peoples*, the ILO *Declaration on Fundamental Principles and Rights at Work* and the ILO fundamental conventions; but also to regional instruments like the *European Convention for the protection of Human Rights*, the *European Social Charter*; and supranational one, like the *Charter of Fundamental Rights of the European Union*.

Defining *Sustainable investment* Reg. 2019/2088 refers them, among the other, to *economic activities that contributes to a S objective*, i.e., by tackling inequality or fostering social cohesion, social integration and labour relations;

or to human capital or economically or socially disadvantaged communities, as long as those investments do not significantly harm any E&SHR objectives and the investee companies follow good G practices, in particular with respect to sound management structures, employee relations, remuneration of staff and tax compliance (Article 2 point 17).

On the other hand, Reg. 2020/852 defines an *economic activity as sustainable* if, among the other, provides for *minimum safeguards* that have to be understood as *procedures* implemented by undertakings to ensure the alignment of an economic activity with the OECD *Guidelines for Multinational Enterprises*, the UN *Guiding Principles on Business and Human Rights*, the ILO fundamental conventions identified in the *Declaration on Fundamental Principles and Rights at Work* and the International Bill of Human Rights (the UDHR, the ICESCR, the ICCPR) (Article 18). By referring to the Declaration as such, Reg. 2020/852, opens to the amendments introduced in 2022 recognizing Safety & Health and Conventions 155 and 185 as fundamental.

Dir. 2024/825 understands *sustainability labels* as any voluntary trust mark, quality mark or equivalent, either public or private that aims to set apart and promote a product, a process or a business by reference to its E or/and S characteristics, adding that information provided by traders on the S characteristics of a product can relate, for example, to the quality and fairness of working conditions, such as adequate wages, social protection, the safety of the work environment and social dialogue. Such information can also relate to respect for HR, to equal treatment and opportunities for all, including gender equality, inclusion and diversity, to contributions to social initiatives or to ethical commitments, such as animal welfare.

Directive 2024/1760/EU³⁷, abandons, except for the title, any substantive references to the sustainability discourse, emphasizing, in the Annex the SHR dimension as such, with a situational use of the abuse of HR as workers' rights. This happens, for instance, with the prohibition of all forms of slavery and slave-trade, including practices akin to slavery, serfdom or other forms of domination or oppression in the workplace, such as extreme economic or sexual exploitation and humiliation, or human trafficking, interpreted in line with Article 8 ICCPR. Or with the prohibition to restrict workers' access to adequate housing, if the workforce is housed in accommodation pro-

³⁷ See on it, GIOVANNONE, *The European directive on "corporate sustainability due diligence": the potential for social dialogue, workers' information and participation rights*, in IlleJ, 2024, p. 227.

vided by the company, and to restrict workers' access to adequate food, clothing, and water and sanitation in the workplace, interpreted in line with Article 11 ICESCR.

Thus, at the end of the day, a (*SHR*) *sustainable undertaking*³⁸ is an undertaking that integrates a due diligence process into its policies and risk management systems in order to assess, identify, prevent, prioritize, mitigate, end and, in case, remediate actual and potential adverse impacts, to be understood as abuses occurring within the *SHR* dimension³⁹.

³⁸ SPEZIALE, *L'impresa sostenibile*, in *RGL*, 2012, I, p. 494.

³⁹ BAYLOS, *Empresas Transnacionales y Debida Diligencia*, in this journal, 2/2022, p. 3; SANGUINETI RAYMOND, *La Diligencia Debida en Materia de Derechos Humanos Laborales*, in this journal, in this issue.

Abstract

This essay aims at tracing the tortuous path of the social sustainability discourse within EU Law against the background of the integrated social-green transition, originating from a different awareness of their inextricable entanglement, fed by a renewed interest for human rights, which seem to prevail as interpretational code of the employment/social issues, above all in a globalized economy. Actually, undertakings and financial operators are confronted with a growing engagement of the EU in favor of individuals as members of the society, workers, investors and costumers, whose social, employment & human rights shall be protected and guaranteed. At the same time, it is apparent that undertakings and financial operators play a key role in pursuing environmental and social objectives when they conduct sustainable economic activities and investments. An interdependence that, if properly regulated, may activate a virtuous circle to the advantage of the whole humankind.

Keywords

Social sustainability, labour rights, human rights, corporate social responsibility, due diligence.