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In memory of Marco Biagi and Lammy Betten

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# The Paradigm of Sustainability in a European Social Context: Collective Participation in Protection of Future Interests?

Tonia NOVITZ\*

*The treatment by the European Union (EU) of sustainable development, whether concerning economic, social or environmental protection (or some combination of the three) is normally viewed in the context of EU external relations. The aim of this article, however, is to consider the implications of the EU's internal commitment to sustainability, as required by Article 3(3) of the Treaty on European Union (TEU), addressing the extent to which this provision is capable of being realized in the social context of labour relations. It is argued that sustainable development is an inherently dynamic process requiring broad-based participatory processes, including collective bargaining by trade unions. However, to fulfil this participatory function, trade unions must be allowed to address and bargain over social policy for the future. Unfortunately, what emerges is the lack of positive support in EU and European Convention on Human Rights (ECHR) case law for workers' collective voice which looks forward in the way that sustainable development necessitates. This is evident from judicial determinations on the scope of entitlements to participation in information and consultation mechanisms and collective bargaining. It is also apparent from case law concerning the extent of legitimate aims for collective action and the enforceability of dynamic clauses in collective agreements. Further, the outlook for a future policy shift in the EU does not look promising. More needs to be done at European level to promote workers' collective participation in building sustainable solutions for the future.*

## 1 INTRODUCTION

Sustainability or 'sustainable development' is understood to consist of 'three pillars': economic, social and environmental.<sup>1</sup> In the European Union (EU), sustainability has both an internal and an external aspect. My focus, perhaps unusually, is on the EU's internal promotion of social development and the role that trade unions could play in furthering sustainable labour conditions. This study considers whether there is support for such activity at the European level,

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<sup>1</sup> See, *Johannesburg Declaration on Sustainable Development 2002*, para. 5 of which states that we have 'a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars'.

whether in the emergent jurisprudence of the Court of Justice and Court of Human Rights or in the political sphere.

### 1.1 INTERNAL AND EXTERNAL ASPECTS TO EU COMPETENCE REGARDING SUSTAINABILITY

Article 3(3) of the Treaty on European Union (TEU) states that ‘the Union shall [...] work for the sustainable development of Europe based on balanced economic growth and price stability’ (the economic pillar), ‘a highly competitive social market economy, aiming at full employment and social progress’ (a blend of the economic and social pillars) ‘and a high level of protection and improvement of the quality of the environment’ (the environmental pillar which will have effects on both the economic and the social).<sup>2</sup> Nevertheless, while the EU has long been concerned with the economic aspects of development and has taken an increasingly significant incremental approach to environmental protection,<sup>3</sup> there would seem to have been neglect of the social aspects of sustainability at European level. For example, there is little mention of labour standards in tandem with sustainability in EU Commission policy documentation except, as we shall see, in relation to enhancement of access to employment and modernization of labour markets, both of which arguably have a more economic than social flavour.<sup>4</sup>

The EU has arguably been more proactive in relation to the external (or international) aspect of sustainable development, paying there what might seem to be due attention to labour standards, albeit only in relation to third countries. An example was EU introduction of the Generalised Scheme of Preferences (GSP+), which is described in Article 9 of the current 2012 Regulations as ‘the special incentive arrangement for sustainable development and good governance’. States become eligible for additional tariff preferences by ratifying and implementing Conventions listed in Annex VIII, including the most fundamental International Labour Organisation (ILO) Conventions that set out core labour standards, such as those relating to freedom of association and collective

<sup>2</sup> See also, for the external responsibilities of the EU to other States, see Art. 3(5) of the Treaty on European Union (EU), which is also to aim at ‘social progress’. See further, Art. 21 TEU.

<sup>3</sup> Traced by B. Sjøråfjell, *The Very Basis of Our Existence: Labour and the Neglected Environmental Dimension of Sustainable Development*, in *The Role of Labour Standards in Development: From Theory to Sustainable Practice?* (T. Novitz & D. Mangan eds, British Academy/Oxford U. Press 2011). See, for e.g., Art. 11 TFEU, previously Art. 6 TEC.

<sup>4</sup> Commission Communication, *Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth*, COM(2010) 2020 final, 6, 17, 18 and 32. See also, R. Hyman, *Trade Unions, Lisbon and Europe 2020: From Dream to Nightmare*, LEQS Paper No. 45/2011.

bargaining.<sup>5</sup> This is consistent, it would seem, with Article 3(5) of the TEU which states that, *inter alia*, the EU shall contribute to ‘the sustainable development of the Earth’. It should be noted that various commentators have been critical of the operation of GSP+ in terms of its capacity to promote labour standards and development.<sup>6</sup> While I have written elsewhere on this aspect of EU external relations, my focus here is on the treatment of sustainability *in* the EU, while being very much aware that how the EU approaches sustainability internally will have ramifications abroad.

## 1.2 THE DYNAMIC AND PARTICIPATORY ASPECTS OF SUSTAINABLE DEVELOPMENT

Sustainable development involves looking *forward*. As such, I have argued previously that sustainable development cannot be understood as a static endpoint ascertained through expert advice. Rather, it is a dynamic process with a future orientation looking towards improved economic, social and environmental conditions. Further, it is a participatory process, for we cannot have sustainability (or its synonym, durability) without social engagement and commitment to the conditions we seek to achieve and the means of their realization.<sup>7</sup> The danger with the treatment of sustainable development, as it now stands in the EU, is that objectives can be directed by economic interests oriented towards a very narrow sector of the population. We have to think about how to invigorate democratic participatory processes which go beyond that reduced interest base. My proposal is that trade unions could play a significant role, but that they can only do so if there is legal recognition that *future interests* come within the sphere of their legitimate concerns.

Article 1(1) of the UN Declaration on the Right to Development stresses that not only is development a human right, but that it is one ‘by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized’. This is because, as Article 2(1) of the UN Declaration established, ‘the human person is the central subject of development and should be the active participant and

<sup>5</sup> Regulation (EU) No. 978/2012.

<sup>6</sup> See, for e.g., J. Orbie & F. de Ville, *Core Labour Standards in the GSP Regime of the European Union: Overshadowed by Other Considerations*, in *Human Rights at Work: Perspectives on Law and Regulation* (C. Fenwick & T. Novitz eds, Hart Publishing 2010); also L. Bartels, *The WTO Legality of the EU’s GSP+ Arrangement*, 10(4) *JIEL* 869 (2007).

<sup>7</sup> T. Novitz & D. Mangan, *Introduction* in Novitz & Mangan (eds.) (2011), n 4 above. See also T. Novitz, *Core Labour Standards Conditionalities: A Means by which to Achieve Sustainable Development?* in *International Economic Law, Globalization and Developing Countries* 235–237 (J. Faundez & C. Tan eds, Edward Elgar 2010).

beneficiary of the right to development'. Principle 10 of the Rio Declaration likewise observed that 'environmental issues are best handled with participation of all concerned citizens, at the relevant level'. This perspective was reiterated again in paragraph 26 of the Johannesburg Declaration on Sustainable Development 2002, which recognized 'that sustainable development requires a long-term perspective and broad-based participation in policy formulation, decision-making and implementation at all levels'. The draft UN General Assembly resolution on the 'Organization of the UN summit for the adoption of the post-2015 development agenda' seeks to enhance participation by non-governmental and civil society organizations.<sup>8</sup> In the European Union, we come close to such a determination in Article 11 of the TEU, which says that the EU institutions shall by appropriate means give citizens and 'representative associations' the opportunity to make known and exchange views. There is to be 'open, transparent and regular dialogue with representative associations and civil society'.

### 1.3 THE ROLE OF TRADE UNIONS IN DEVELOPING SUSTAINABLE INDUSTRIAL RELATIONS

If sustainability requires participatory engagement and dialogue then, in the context of work, representative associations are likely to be trade unions. Indeed, collective bargaining through trade unions offers one of the best prospects of achievement of such engagement and dialogue. This may not be the only prospect, and certainly the views of NGOs and specific women's organizations could be significant, especially in the field of what is commonly called atypical or informal market labour.<sup>9</sup> However, trade unions continue to offer workers a voice independent from their employers and have organizational means, as well as expertise and know-how which can boost such voice.<sup>10</sup> And yet, in order for trade unions to fully engage in policy-making on matters of 'sustainability', they must have the capacity to do so. In other words, they must be enabled by EU law to address and bargain over the significance of economic, environmental and social policy for the future. Sustainability inherently involves looking ahead and we want all actors engaged within the process of dialogue to be able to do so.

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<sup>8</sup> UNGA, 16 Dec. 2014, A/69/L.43, paras 10–11 and Annex IV.

<sup>9</sup> UNGA, Open Working Group on Sustainable Development Goals, *Compendium of Technical Support Team (TST) Issues Briefs* 215–244 October 2014.

<sup>10</sup> When surveyed in 2013, almost 80% of the British public agreed that trade unions are essential to protect workers' interests. Ipsos Mori (2013) *Attitudes to Trade Unions 1975 – 2013*. See, for a fuller explanation, L. Hayes & T. Novitz, *Trade Unions and Economic Inequality* (CLASS/Institute of Employment Rights 2014).



It might not seem easy for trade unions to represent citizens for sustainable development purposes especially in the environmental sphere. There are potential clashes between short-term interests of trade union members, for example over retention of jobs in a particular industry, and the longer term interests of a wider range of society in environmental protection from pollutants emanating from that industry.<sup>11</sup> Yet, the European trade union movement has been eager to demonstrate their interest in ‘just transition’ to a low-carbon greener European market and are requesting:

Dialogue between governments and key stakeholders; green and decent jobs through investment in (new) low-carbon technologies; green skills by active government training strategies; a respect for human and labour rights; and strong and effective social protection systems.<sup>12</sup>

Nor is it just the European Trade Union Confederation, which is determined to act at a policy level, there are also unions on the ground, like the Norwegian LO,<sup>13</sup> the Danish Confederation of Trade Unions<sup>14</sup> and the British Trades Union Congress (TUC) who are seeking to be proactive on green issues.<sup>15</sup> The problem is that trade unions can be hampered legally (and thereby institutionally) from doing so, because their need to look to the future is not recognized by case law or legislation at the European level.

Domestically, writing from the perspective of a UK labour lawyer, this can raise acute problems. Indeed, the British TUC point to the lack of any ‘legal obligation on employers to consult unions on the issue’<sup>16</sup> and argue for legal recognition of ‘union environmental reps’,<sup>17</sup> and this is vital. However, my concern is with the legal barriers to constructive trade union engagement in sustainability that operate under EU law which are more profound than that.

My argument is that, in order to enable trade union engagement with sustainability, we need recognition of the entitlement to voice concerns not only relating to present current workers’ immediate needs, but those of the future

<sup>11</sup> See, for discussion B. Galgoczi, *The Changing Role of Trade Unions in the Sustainable Development Agenda*, 24 *Intl. Rev. Soc.* 59, 63 (2014); and H. L. Lund, *Strategies for Sustainable Business and the Handling of Workers’ Interests: Integrated Management Systems and Worker Participation*, 25 *Econ. & Indus. Democracy* 41, 45–48 (2004).

<sup>12</sup> See European Trade Union Confederation (ETUC), *Resolution on a Sustainable New Deal for Europe and Towards Cancun* (ETUC 2010) drawing on International Labour Organisation (ILO), *Cancun Agreement: ILO highlights call for a ‘Just Transition’ with Green Jobs and Decent Work* (ILO 2010).

<sup>13</sup> See Sjøråfjell, *supra* n. 3.

<sup>14</sup> Lund, *supra* n. 11, at 61–66.

<sup>15</sup> TUC, *The Union Effect: Greening the Workplace* (London: TUC, 2014), which offers six case studies in which trade unions have assisted in enabling environmental change in the workplace. For an overview of union activity globally, see N. Räthzel & D. Uzzell (eds.), *Trade Unions in the Green Economy* (Routledge 2013).

<sup>16</sup> TUC, *supra* n. 15, at 7.

<sup>17</sup> *Ibid.* at 46.

workers we envisage and their needs – our younger colleagues, our future colleagues and indeed, our children and those not yet born. At a time when European law is constraining solidarity, it is time to think about expanding its remit across generational divides and thereby endorsement of the legitimacy of trade union action.

I begin by considering two key cases decided by the Court of Justice of the European Union (CJEU) which relate to what might be termed ‘future workers’, namely those atypical workers who now represent an increasing sector of the labour market. Arguably, it was open to the CJEU to have boosted the scope of atypical workers to participate in information and consultation and effective collective bargaining, but instead the Court reveals a reluctance to promote such engagement. The facts addressed in these cases seem indicative of ongoing significant changes in the nature and organization of work, which have the capacity to prevent access to forms of trade union representation. If the Court responds in this fashion, it may be that workers of the future are unduly excluded, limiting their capacity to influence a sustainable development agenda in the workplace and beyond.

I then turn to the narrow view taken by both the European Court of Human Rights (ECtHR) and the CJEU of the ambit of legitimate collective bargaining and strike objectives. These judgments again reveal a reluctance to endorse the entitlement of unions to address future risks associated with employer’s decisions. The failure of European courts to intervene so as to enable effective bargaining over highly probable contingencies has an impact on trade union capacity in those States, like the UK, which take a restrictive approach to promotion of trade union rights. This hinders the capacity of trade unions in such States to conclude collective agreements which address longer term, sustainable social solutions.

A third concern, which I raise, is the enforceability of collective agreements in the light of recent findings made in respect of the Acquired Rights Directive (ARD).<sup>18</sup> Recent case law indicates that a dynamic clause which refers to future collective agreements will not bind an employer, at least after the transfer of an undertaking. In so doing the CJEU has apparently limited scope for durable agreements to be bound by procedural mechanisms for collectively negotiated outcomes, which again has implications for trade union engagement in sustainable development issues.

I end by considering recent and proposed EU legislation. Provisions regarding collective agreements in the new public procurement directives broadly

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<sup>18</sup> Council Directive (EC) 23/2001 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16.

follow the model established with respect to the sustainable development approach utilized in the EU GSP Regulation regarding labour standards, but these instruments do not address current constraints on the ability of workers to conclude collective agreements under EU case law. Further, Commission proposals for Europe 2020 indicate little support for workers' collective participation in sustainable development.

## 2 THE SCOPE OF INFORMATION AND CONSULTATION OR COLLECTIVE BARGAINING: ENGAGEMENT WITH FUTURE WORKERS?

In the context of austerity measures taken across Europe (whether as part of bailout packages or otherwise), we are witnessing the emergence of the worker who is not a worker. Labour is progressively hired under contracts specifically designed to ensure that those doing the work are no longer subject to standard protections under national employment law.<sup>19</sup> By 2011, Mark Freedland and Nicola Kountouris had identified as a potential problem the 'denormalization' of personal workplace relations, whereby we see a fracturing of standard contractual links and development of atypical employment.<sup>20</sup> They have advocated a 'European Legal Framework' for personal work relations, observing the 'patchy' attempts of the CJEU to address disguised employment relationships, such as the EU definition of a 'worker' offered in *Allonby*.<sup>21</sup> In the meantime, it seems that the trend towards atypical employment contracts continues apace, such that it is almost becoming the dominant mode of work.<sup>22</sup> If, as I have argued above, participation is essential to the forward looking and dynamic process of sustainable development, then inclusion of all working people whether formally designated a 'worker' or not becomes important. In this respect, the findings of the CJEU where atypical work is involved have become increasingly significant.

<sup>19</sup> For this general austerity-related trend, see J. Peters, *Neoliberal Convergence in North America and Western Europe: Fiscal Austerity, Privatization, and Public Sector Reform*, 19 Rev. Int'l Pol. Economy 208, especially 218 et seq. (2012). See also, R. Torres, *European Labour Markets in Crisis*, 152 Int'l Lab. Rev., 167, 168 (2013). S. Clauwert & I. Schömann, *The Crisis and National Labour Law Reforms: A Mapping Exercise* 10 et seq. (ETUI Working Paper 2012.04).

<sup>20</sup> M. Freedland & N. Kountouris, *The Legal Construction of Personal Work Relations* 10 et seq. (Oxford U. Press 2011).

<sup>21</sup> *Ibid.* at 392. See Case C-256/01, *Allonby v. Acrrington and Rosedale Community College* [2004] ECR I-873, para. 67: 'For the purposes of that provision [Article 141(1) EC, there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration ...'

<sup>22</sup> So W. Eichhorst & V. Tobsch ask *Has A typical Work Become Typical in Germany?* Institute for the Study of Labor (IZA), Research Paper Series No. 7609 (2014). See also Max Koch & Martin Fritz (eds), *Non-Standard Employment in Europe: Paradigms, Prevalence and Policy Responses* (Palgrave MacMillan 2013).

My focus here is on two cases: one concerned ostensibly with EU information and consultation requirements and the other with the immunity of collective agreements from EU competition law.

## 2.1 ACCESS TO EU INFORMATION AND CONSULTATION: THE SCOPE OF CHARTER RIGHTS

The exclusion of those hired under atypical contracts was an issue which came before the CJEU in the *AMS* case, alongside the scope and status of rights to information and consultation.<sup>23</sup> Article 27 of the EU Charter of Fundamental Rights makes provision for ‘workers or their representatives’ to ‘be guaranteed information and consultation in good time’. But this is not a freestanding right – it only applies ‘in the cases and under the conditions provided for by Union law and national laws and practices’. Article 3 of Directive 2002/14/EC which establishes a general framework for informing and consulting employees requires that information and consultation thresholds apply in ‘undertakings employing at least 50 employees in any one Member State’ or ‘establishments employing at least 20 employees in any one Member State’.

*AMS* concerned a French association (*Association de Mediation Sociale*) operating as a non-governmental and non-profit-making organization, which assisted the unemployed in gaining access to work. Under the French Labour Code where an undertaking or establishment has fifty employees or more, trade unions must designate a union representative and create a works council. However, certain employees are excluded under French law from calculation of staff numbers, such as those on fixed-term contracts or agency workers. *AMS* had only eight employees employed on indefinite contracts, but over a hundred on what were termed ‘accompanied-employment contracts’. The relevant union (CGT) nevertheless considered that the threshold was met for appointment of a union representative and did indeed appoint as representative one of the permanent employees, a Mr Laboubi, who was then suspended by his employer while the employer sought to oppose the appointment.

Both the Advocate-General (AG) Cruz Villalón and the CJEU considered that Article 27 had specific status as a right parasitic on EU legislation and was not capable of giving rise to individual entitlements. However, while the AG construed the provision as a ‘principle’ which should be regarded as effective in national proceedings where implemented under EU law by virtue of Article 52(5) of the Charter,<sup>24</sup> the Court regarded the provision as one which does not

<sup>23</sup> Case C-176/12 *Association de mediation sociale (AMS) v. CGT*, Judgment of 15 Jan. 2014 (*AMS*).

<sup>24</sup> *AMS*, AG Opinion, paras 43–56 and 63.

confer rights on an individual and cannot be invoked in disputes between individuals. Article 27 could not be used to disapply French legislation even if in breach of EU law. Instead, Mr Laboubi could apply for damages for breach of EU law under the *Francovich* principle of state liability, independently of any claim under the Charter.<sup>25</sup>

This case is troubling in various respects. The first is that the facts demonstrate the capacity to exclude ‘flexible’ or ‘atypical’ workers from the scope of information and consultation rights. This is worrying given the ever-increasing numbers of such workers following ‘austerity’ policies implemented in various countries, but also from a sustainable development perspective. After all, this approach precludes these types of workers from being consulted over the future development of key workplace matters which affects their livelihoods and their communities. Their contribution to consultation could aid sustainability, but is instead being overlooked.

The *AMS* case also shows us that the effects are also more far reaching than the exclusion of the non-standard precarious workers, for even the ‘normal’ traditional-style worker on a standard form of contract, such as Mr Laboubi, loses his voice within the enterprise when there are not enough so-called ‘workers’ to be counted – to form a collectivity. That Article 27 of the Charter lacks individual relevance seems a peculiar conclusion, since voice is an individual right (under Article 10 of the European Convention on Human Rights and Article 11 of the Charter), which Article 27 indicates can be exercised collectively at work.

Moreover, if certain provisions of the Charter setting out ‘principles’ are not rights-conferring, like Article 27, these presumably acquire secondary status. It would seem that individual employment rights such as those regarding non-discrimination receive a higher status.<sup>26</sup> This may indicate that it will be easier for ‘individual’ rights such as ‘the freedom to conduct a business’ to be claimed by a single business entity under Article 16 of the Charter to prevail over the right to collective bargaining under Article 28. The participatory element of sustainable development is thereby undermined by both the Court’s determination to overlook the palpable effects of recent trends concerning categorization of workers and the judicial refusal to acknowledge the status of

<sup>25</sup> *AMS*, para. 49. Cf. Cases C-6/90 and C-9/90 *Francovich and Bonafaci and others v. Italy* [1991] ECR I-5357. Also see discussion in E. Frantziou, *Case C-176/12 Association de Médiation Sociale: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Rights in the European Union* 10 Eur. Const. L. Rev. 332, 336 (2014).

<sup>26</sup> See discussion further at n. 58 below; also N. Lazzarini, *(Some of) the Fundamental Rights Granted by the Charter May Be a Source of Obligations for Private Parties*, 51 CML Rev. 907 (2014). Cf. Case C-144/04 *Mangold v. Rüdiger Helm* [2005] ECR I-9981; and Case C-555/07 *Kücükdeveci v. Swedex GmbH & Co. KG* [2010] ECR I-365.

collective representation. It is hard to see this as consistent with the application of ‘democratic principles’ to EU activity espoused under Article 11(1) of the TEU.

## 2.2 ACCESS TO COLLECTIVE BARGAINING: THE SCOPE OF THE EXEMPTION TO EU COMPETITION LAW

There is a further potential flow-on effect here, which relates to the protection of entitlements of workers and their organizations, not only to engage in information and consultation, but also in collective bargaining. In terms of not just having a ‘voice’ but being listened to, workers seek to act collectively through trade unions to achieve collective agreements with employers. Those agreements were given particular status in the case of *Albany International*, so that they are exempt from competition law.<sup>27</sup>

That exemption is notably dependent on whether the purpose of the agreement is one which contributes ‘directly to improving one of [the employees’] working conditions’. It is unclear whether the workers in a case like *AMS* on what were described as ‘accompanied-employment contracts’ count as ‘employees’ for the purpose of the *Albany* exclusion. We certainly know from the later *Pavlov* case that ‘members of the liberal professions’ as independent contractors cannot claim the exception when seeking a pension agreement outside the sphere of collective bargaining.<sup>28</sup> It is now evident from the result of the reference from the Netherlands to the CJEU in *FNV Kunsten*, decided in December 2014,<sup>29</sup> that where a collective agreement confers entitlements on self-employed persons, this will fall outside the *Albany* exception, unless these are ‘false self-employed’ persons who should properly be called employees.

The test for ‘employee’ given in the judgment of the CJEU in *FNV Kunsten* is more extensive than that in *Allonby*, as it encompasses those ‘who do not share in the employer’s commercial risks’ and who ‘for the duration of the relationship, [form] an integral part of that employer’s undertaking’. Arguably, in this way the Court adds additional criteria, further limiting the scope of those who qualify for the exemption from competition law. It thereby remains possible, as British labour lawyers have long observed, for employers to craft contractual arrangements so as to place commercial risks on the person doing the work and to treat them in ways whereby they supply their own equipment and are

<sup>27</sup> Case C-67/96 *Albany International* [1999] ECR I-5751, especially para. 63.

<sup>28</sup> Case C-180/98 *Pavlov* [2000] ECR I-6451, especially paras 68 and 69.

<sup>29</sup> Case C-413/13 *FNV Kunsten Informatie en Media v. Staat der Nederlanden*, unrep. Judgment of 4 Dec. 2014 (*FNV Kunsten*).

distinguished from those more integral to the enterprise.<sup>30</sup> In so doing, the hiring of these workers in ways which allow them to be genuinely designated ‘self-employed’ has the capacity to lower the going wage paid to normal ‘employees’. This was clearly the concern of the musicians whose organizations concluded the collective agreement at issue in *FNV Kunsten*. The argument of Advocate General Wahl regarding the implications of this treatment of independent contractors for standard employees, phrased in terms of the potential for ‘social dumping’,<sup>31</sup> was entirely overlooked by the CJEU in the final judgment.

This narrow approach of the Court in *FNV Kunsten*, when taken alongside the *AMS* decision, would seem to profoundly affect the extent to which contemporary workers may be able to participate in workplace negotiation over key issues relating to sustainable economic, environmental and social development. At a time when the need for the input of those engaged in paid work is increasing, the pool of those whom the Court contemplates should be represented by trade unions in information or consultation, let alone collective bargaining, is shrinking.

### 3 THE SCOPE OF FREEDOM OF ASSOCIATION AND THE RIGHT TO STRIKE: ENGAGEMENT WITH FUTURE EFFECTS OF EMPLOYERS’ ACTIONS?

A further problem is the extent to which trade unions can represent their members, but also take collective action, in respect of their concerns regarding sustainable development. It is widely acknowledged that, without a right to strike, collective bargaining would amount merely to ‘collective begging’.<sup>32</sup> So the scope of the legitimate aims recognized in respect of lawful industrial action is crucial in terms of workers’ capacity to participate in long-term workplace decisions. What trade unions want is to take action with reference to the likely effects of employers’ actions, addressing anticipated results and related policy-based concerns, so that deals struck now are sustainable. Unfortunately, this need has not been recognized, as yet, by the European Court of Human Rights or the European Court of Justice.

<sup>30</sup> For example, B. Hepple, *Restructuring Employment Rights*, 15 *Indust. L. J.* 69 (1986); and H. Collins, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, 10 *Oxford J. Leg. Stud.* 353 (1990).

<sup>31</sup> *FNV Kunsten*, AG Opinion at paras 74–79.

<sup>32</sup> See for the origins of this term and its influence, which stretch back to at least 1921, E. Tucker, *Can Worker Voice Strike Back? Law and the Decline and Uncertain Future of Strikes*, in *Voices at Work: Continuity and Change in the Common Law World* 456 (A. Bogg and T. Novitz eds., Oxford U. Press 2013).

Two cases are illustrative of the problem. The first relates to the jurisdiction of the European Court of Human Rights and is indicative of considerable latitude given to the State Contracting Parties. While not precluding Contracting Parties from allowing broader access to industrial action, States like the UK are permitted to impose restrictive strike laws which prevent engagement with the future effects of employers' action in the context of transfers of undertakings. The second is a case determined by the CJEU which indicates that policy-oriented objectives linked to potential future consequences of 're-flagging' activities are not likely to be regarded as promoting 'protection of workers'. As such, collective action regarding 're-flagging' is unlikely to be defensible when collective action is called which limits EU employers' cross-border movement.

### 3.1 *UNISON VERSUS UK*: FUTURE CONSEQUENCES OF A TRANSFER OF AN UNDERTAKING

In *UNISON v. UK*,<sup>33</sup> industrial action was called by UNISON in order to influence the terms of a transfer of an undertaking in the health service. The UK courts prevented the strike from taking place on the basis that the relevant statutory immunity could not apply, because this was a dispute relating to future terms and conditions with an as-yet-unspecified future employer.<sup>34</sup>

When the matter came before the ECtHR, it was acknowledged that the guarantees sought by the union calling the strike would not only extend to protect hypothetical future employees, but would also have provided existing members with additional protection of their interests. 'The proposed strike must be regarded therefore as concerning the occupational interests of the applicant's members in the sense covered by Article 11 of the Convention.' Moreover, the prohibition of the strike was considered to be a restriction on the union's legitimate interest in protecting those interests. In this respect, the approach of the ECtHR in *UNISON* can be seen to correlate to the appreciation of the dynamics of collective bargaining evident in the reasoning of Advocate General Wahl in *FNV Kunsten*.<sup>35</sup>

However, the prohibition of the industrial action called by UNISON was found by the ECtHR to be justified under Article 11(2). The prohibition pursued a legitimate aim, namely the 'rights of others', that is, the right of the employer to pursue the most effective delivery of health service. The necessity of the measure was not established by the Court. Instead, the ECtHR merely stated

<sup>33</sup> Application No. 53574/99, Decision of 10 Feb. 2002 [2002] IRLR 497.

<sup>34</sup> *University College London Hospital NHS Trust v. UNISON* [1999] IRLR 31.

<sup>35</sup> See text accompanying *supra* n. 31.



that it did not believe the legislative restriction on the aims of industrial action had affected the future potential for these workers to engage in collective bargaining over terms and conditions of employment. Workers had not been placed ‘at any real or immediate risk of detriment or of being left defenceless against future attempts to downgrade pay or conditions’; even though downward pressure on terms and conditions of new workers hired could have palpable effects on their bargaining position. They could always take industrial action later when this became a genuine threat. The fact that, at a later stage, the ability of the union to challenge any changes might be undermined by combination with another non-unionized workforce was not considered relevant. In other words, workers and their organizations were not considered to have a compelling claim to anticipate a threat and to act in advance to address this when they were best positioned to do so. The Court therefore concluded that the UK had not exceeded the margin of appreciation accorded to Contracting Parties and determined that UNISON’s claim would not succeed.

### 3.2 VIKING: LONGER TERM POLICY CONSIDERATIONS FOR THE ‘PROTECTION OF WORKERS’

*UNISON v. UK* was, not entirely coincidentally, cited by counsel before the Court of Appeal in the notorious *Viking* case,<sup>36</sup> which is my second example of the problem. The point being made there was that the judgment of the ECtHR had established that industrial action aimed at placing a future obligation on an employer to enter into a collective agreement was not covered by ‘freedom of association under Article 11 of the ECHR’, since that entitlement did not include a right for a union to require ‘that an employer enter into or remain in any collective bargaining arrangement’.<sup>37</sup>

In the *Viking* case,<sup>38</sup> the Viking Line APB, a Finnish company, sought to transfer a vessel (the *Rosella*) to its Estonian subsidiary, thereby justifying ‘re-flagging’ and enabling potential replacement of a Finnish crew with a less costly Estonian crew.<sup>39</sup> The Finnish Seamen’s Union (FSU) had previously threatened industrial action to prevent Viking doing exactly this. The FSU would

<sup>36</sup> See Case C-438/05 *International Transport Workers’ Federation (ITF) and Finnish Seamen’s Union (FSU) v. Viking Line* [2006] IRLR 58, para. 59.

<sup>37</sup> *Ibid.*

<sup>38</sup> Case C-438/05 *International Transport Workers’ Federation (ITF) and Finnish Seamen’s Union (FSU) v. Viking Line* [2007] ECR I-10779 (*Viking*). See T. Novitz, *Resistance to Re-flagging: A Restricted Right to Strike: ITF v. Viking*, *Lloyds Maritime and Com. L. Q.* 66.

<sup>39</sup> Discussed by A.C.L. Davies, *The Right to Strike versus Freedom of Establishment in EU Law: The Battle Commences*, 35 *Indus. L.J.* 76 (2006); and T. Novitz, *The Right to Strike and Re-flagging in the European Union: Free Movement Provisions and Human Rights*, *Lloyd’s Mar. & Com. L. Q.* 242 (2006).

most probably have done so again upon the expiry of the collective agreement, had such action not been anticipated by the employer, Viking, and been subjected to legal challenge, given Estonia's recent admission to the EU. The employer also challenged the issue of a 'circular' by the International Transport Workers Federation (ITF) which had been sent out to members indicating that Viking was acting in breach of the ITF's policy on 'flags of convenience' and that it was not therefore advisable to have dealings with this employer.

Viking brought an action in the High Court in the UK, on the basis that the ITF had its headquarters in London, requesting an injunction preventing further industrial action (by either the FSU or ITF) which was alleged to be contrary to the right to free establishment protected under what was then Article 43 of the EC Treaty.<sup>40</sup> Judgment was initially given in Viking's favour,<sup>41</sup> but on appeal, the Court of Appeal lifted the injunction referring a series of questions to the Court of Justice.<sup>42</sup>

The Court of Justice (for the first time) acknowledged the existence of a right to take collective action.<sup>43</sup> Further, the judgment drew upon ECtHR jurisprudence, stating that 'it is common ground that collective action, like collective negotiations and collective agreements, may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members'.<sup>44</sup> Nevertheless, the actions of the unions were found to be an interference with the right to freedom of establishment and had to be justified.<sup>45</sup>

Two crucial criteria, usually applicable to the defence of the conduct of Member States, were applied to the requirement of justification. One was the pursuit of 'a legitimate aim' justified by 'overriding reasons of public interest'; in respect of which it was clear that 'protection of workers' would suffice. Secondly, the unions had to satisfy the requirement of proportionality, demonstrating that their actions were 'suitable for securing the attainment of the objective pursued' and did not 'go beyond what is necessary in order to attain it'.<sup>46</sup>

For present purposes, it is appropriate to focus on what 'protection of workers' can be understood to entail. Broadly interpreted, this could address

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<sup>40</sup> EC Treaty, Art. 43.

<sup>41</sup> *Viking Line ABP v. International Transport Workers' Federation and Another* [2005] EWHC 1222; QBD Commercial Court, 16 Jun. 2005).

<sup>42</sup> *Viking Line ABP v. International Transport Workers' Federation and Another* [2005] EWCA Civ. 1299, [2006] 1 Lloyd's Rep. 303, [2006] IRLR 58.

<sup>43</sup> *Viking*, paras 42–44.

<sup>44</sup> *Ibid.* at para. 86.

<sup>45</sup> For further elaboration on this point, see P. Syrpis & T. Novitz, *Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation*, 33 Eur. L. Rev. 411, 420–422 (2008).

<sup>46</sup> See *Viking*, para. 75.

issues of sustainability, or the future welfare of workers as well as their present or immediate needs. However, the Court was not prepared to go so far as this.

In *Viking*, the ‘protection of workers’ appears to amount only to the protection of particular jobs or concrete terms and conditions of employment for an affected group of workers, as opposed to broader and future-oriented policy objectives that might benefit workers more generally within an occupation. The Court observed that the actions of the national union, the FSU, would not be for the protection of workers ‘if it were established that the jobs or conditions of employment were not seriously under threat’.<sup>47</sup> In this respect, the Court seems to have been inspired by the employer’s early undertaking, at the initial stages of conciliation proceedings in 2003, that reflagging would not lead to redundancies.<sup>48</sup> The employer’s undertaking in that instance does not seem altogether consistent with an ambition to achieve a reduction in wage costs,<sup>49</sup> and the Court conceded that it would need to have some form of binding effect to undermine the legitimacy of the collective action in question.<sup>50</sup> Nevertheless, it is a reminder that the Court appears to require a high threshold to be set – namely, an immediate threat to the terms and conditions of current workers, rather than a more general threat to working conditions likely to follow from the change of ownership aimed at cutting expenditure.

As regards the ITF ‘flags of convenience’ policy, the Court did not have any objection to secondary action or sympathy strikes per se,<sup>51</sup> but expressed concerns on other grounds, namely that if reflagging (in a jurisdiction other than that of the ship’s owner) did not have immediately obvious harmful effects on a particular group of workers, the ITF could not logically rely on the ‘protection of workers’ justification to take collective action opposing all reflagging.<sup>52</sup> The Court did not consider the argument that flags of convenience are a means by which ship owners have progressively eroded seafarers’ terms and conditions of employment. Given the incentives to reduce the costs of hired labour, evident in *Viking*, it is highly tempting for a ship owner to reflag in a state which had not enacted legislation which protects seafarers or which does not do so in an effective manner. Moreover, where the ship owner has no link with the jurisdiction, the assets to compensate seafarers for any breach of their rights will

<sup>47</sup> *Ibid.* at para. 81.

<sup>48</sup> *Ibid.* at para. 19.

<sup>49</sup> *Ibid.* at para. 18.

<sup>50</sup> *Ibid.* at para. 82.

<sup>51</sup> For discussion of controversy over this issue, see P. Germanotta & T. Novitz, *Globalisation and the Right to Strike: The Case for European-Level Protection of Secondary Action*, 18 Int’l J. Comp. Lab. L. Indus. Rel. 67 (2002); also see the excellent analysis by A. Bogg & K. D. Ewing, *The Implications of the RMT Case* 43(3) Indus. L.J. 221, 235–244 (2014).

<sup>52</sup> *Viking*, para. 89.

not be available.<sup>53</sup> Such issues concerning the sustainability of ‘reflagging’ were not addressed.

What these two cases (*UNISON* and *Viking*) tell us is that neither the Strasbourg nor the Luxembourg Courts are willing to treat as legitimate (and deserving of protective intervention) industrial action aimed at addressing anticipated consequences of an employer’s actions or broader policy-based considerations. This suggests that the bargaining power of trade unions when seeking longer term recognition of broader worker interests is much reduced. If unions are to be able to play an active role in sustainability decisions – to be a part of Europe’s sustainability paradigm – this has to change.

#### 4 THE SCOPE OF COLLECTIVE AGREEMENTS: FUTURE COVERAGE?

My third point is that if sustainable development issues are to be regarded as the legitimate subject of collective bargaining and collective action, then we might expect collective agreements (which reflect collective engagement in designing policies for development) to have longer-term effects and coverage. In the UK, this has been possible, due to the dynamic ways in which collective agreements (and other documents) can be incorporated into the individual contracts of employment, by an express or implied ‘bridging term’. This mode of incorporation of future terms has not always necessarily operated to the advantage of workers as evidenced by the controversial case of *Bateman v. Asda Stores*,<sup>54</sup> but has the capacity to do so.

That capacity is illustrated by the facts of *Alemo-Herron v. Parkwood Leisure Centre*.<sup>55</sup> Alemo-Herron and others, were hired under contracts of employment in the leisure department of a London borough council. Those contracts contained a ‘bridging term’, in other words, they made specific reference to the terms and conditions externally set from time to time by the Joint Council for Local Government Services (NJC). When the Council’s leisure services were contracted out, the new transferee did not want to abide by the terms set by the NJC.

<sup>53</sup> See A. Couper, *Historical Perspectives on Seafarers and the Law* and R. Churchill, D. Fitzpatrick & U. Khaliq, *Seafarers’ Rights at the National Level*, in *Seafarers’ Rights* (D. Fitzpatrick & M. Anderson eds, Oxford U. Press 2005).

<sup>54</sup> *Bateman and Others v. Asda Stores Ltd* [2010] IRLR 370, which enabled Asda to amend pay and work structures via reliance on a staff (or ‘Colleague’) handbook, which stated that Asda ‘reserved the right to review, revise, amend or replace the contents of this handbook’ which contained details of pay and other conditions of employment.

<sup>55</sup> Case C-426/11 *Alemo-Herron and others v. Parkwood Leisure Ltd* [2013] IRLR 744, Judgment of 18 Jul. 2013 (*Alemo-Herron*). Note implementation by the Transfer of Undertakings (Protection of Employment) Regulations 2014, Reg. 7.

There had been previous German litigation brought by an employee, which had come to the Court of Justice, in the case of *Werhof*. There, the employee had claimed coverage under subsequent collective agreements, but there had been no explicit contractual clause to this effect, and it was less surprising that his claim had been declined by the Court.<sup>56</sup> However, in *Alemo-Herron*, the existence of the express contractual term raised fresh issues.

Ultimately, the CJEU ruled in *Alemo-Herron* that, upon a transfer of an undertaking, the transferee as the new employer cannot be bound by the terms of any subsequently concluded collective agreement, even where a term to this effect had been incorporated expressly into the contracts of employment of the transferred employees. With regard to Article 16 of the EU Charter of Fundamental Rights, which sets out ‘the freedom to conduct a business’, the CJEU ruled that dynamic clauses incorporating future collective agreements in a transfer situation placed an unacceptable constraint on employers, emphasizing the importance of contractual freedom (as the new employer would not be able to participate in the deliberations of the NJC).<sup>57</sup> As a result a Member State is precluded from providing that dynamic clauses are enforceable against the transferee ‘where that transferee does not have the possibility of participating in the negotiation process of such collective agreements concluded after the date of the transfer’.<sup>58</sup>

This seems at odds with Article 3(3) of the ARD which states that:

Following the transfer, the transferee shall continue to observe the same terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Further, Article 8 of the ARD states that the Directive does not ‘affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees’.<sup>59</sup> What *Alemo-Herron* indicates is that these provisions are to be very narrowly construed, such that a collective agreement made binding in this way cannot be considered to include outcomes of subsequent negotiations to which the employer is not subsequently

<sup>56</sup> See *Alemo-Herron*, per Advocate General Cruz Villalón who noted at para. 31 that the Court in *Werhof* had not made ‘a general ruling to the effect that it is *incompatible* with the Directive to preserve the effects of dynamic clauses referring to future collective agreements’.

<sup>57</sup> *Alemo-Herron*, paras 32–33 and 35.

<sup>58</sup> *Alemo-Herron*, para. 37. Notably, the transferee would not have that ‘possibility’ because of the transferee’s choice not to participate in collective bargaining, the latter being protected as a species of an employer’s negative freedom of association. See for further comment, P. Syrpis & T. Novitz, *The EU Internal Market and Domestic Labour Law – Looking Beyond Autonomy*, in *The Autonomy of Labour Law* 301 (A. Bogg, A.C.L. Davies and J. Prassl eds, Hart 2014).

<sup>59</sup> On the social objectives of the TUPE Directive, see B. Hepple, *The Crisis in EEC Labour Law*, 16 *Indus. L.J.* 77 (1987).

a party. In so doing, as Jeremias Prassl has eloquently put it, EU norms change from a ‘floor’ to a ‘ceiling’, so that national labour laws more favourable to workers cannot operate.<sup>60</sup>

We do now know that rescinded collective agreements may still be effective where incorporated into individual contracts of employment and not replaced by any subsequent collective agreement or contractual alteration to an individual agreement. This would seem to be because these are past (extinct) agreements preserved until changed by a meeting of the minds for the parties.<sup>61</sup> Further, scholarly debate may prompt a change of stance, judging from the attempt of the German Landesarbeitsgericht Berlin-Brandenburg to uphold the effect of a dynamic clause after a transfer.<sup>62</sup>

For the time being, however, the established position under CJEU case law would seem to be that trade unions cannot agree on a future procedure for addressing economic, social or environmental issues within the workplace, the outcomes of which will then become binding on future employers subsequent to transfers of undertakings. Rather, any particular transferee has to be given the choice whether to participate in those processes every time there is a business transfer; and given the nature of current commercial practice, changes in notional employers will take place frequently. This is, in short, a disaster for participation by trade unions in the contemporary ‘sustainability’ paradigm. Constructing collective agreements which are binding for the future through established procedural mechanisms becomes exceedingly difficult, given the scale of contemporary sale and purchase of undertakings.

## 5 A VISION FOR THE FUTURE – THE LINK BETWEEN COLLECTIVE LABOUR LAW AND SUSTAINABILITY?

Case law within the EU and the Council of Europe has so far failed to promote trade union engagement in sustainability projects for Europe. Given this, what prospect is there for legislative initiative at the European level?

On the one hand, we might regard the recent public procurement directives adopted at EU level as a success. The European Trade Union Confederation (ETUC) had argued that:

<sup>60</sup> J. Prassl, *Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law* 42 *Indus. L.J.*, 434, 444–445 (2013).

<sup>61</sup> See Case C-328/13, *Österreichischer Gewerkschaftsbund v Wirtschaftskammer Österreich – Fachverband Autobus-, Luftfahrt- und Schifffahrtsunternehmen*, unreported judgment of 11 Sep. 2014.

<sup>62</sup> 24 Sa 1126/14, March 2015. I am grateful to the anonymous referee for pointing me in the direction of this case.

EU procurement rules should encourage contracting authorities to choose products and services on the basis of social and sustainable development considerations... Value for money cannot do without sustainability and social benefits. The governance of public funds must make the respect for social principles and conventions (compliance with the ILO's fundamental rights, human rights etc.) and environmental principles and conventions a prerequisite for obtaining contracts.<sup>63</sup>

Indeed, this would seem to be what has come to pass in the new Directive on concession contracts<sup>64</sup> and also revised Directives on procurement.<sup>65</sup> The provisions in these Directives enable Member States to 'take appropriate measures' to ensure that in the performance of concession contracts or the award of public contracts that '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 the Annex to each Directive.<sup>66</sup> This formula seems nicely consistent with the type of approach used for sustainable development external relations measures in respect of EU GSP.<sup>67</sup> However, given the jurisprudence that I have outlined, it remains unclear what scope there will be in the European Union for *collective agreements* to lay down those environmental, social and labour standards in any meaningful way.

One might look to the Commission's policy vision for 2020 to bolster trade unions participatory capacity as regards sustainability, but there is no sign of this in the Commission Communication. This is notably: 'A strategy for smart, *sustainable* and inclusive growth' (my emphasis).<sup>68</sup> The importance of sustainability is stressed throughout, but is primarily referred to in economic terms. As regards the social dimension of EU policy, stress is placed on getting young people into work,<sup>69</sup> training and developing skills so as enable supply to

<sup>63</sup> ETUC Submission to the European Commission's Public Consultation on the Modernisation of EU Public Procurement Policy. See also, Commission Green Paper on the modernisation of EU procurement policy – Towards a more efficient European Procurement Market.

<sup>64</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 Feb. 2014 on the award of concession contracts [2014] OJ L94/1.

<sup>65</sup> Directive 2014/25/EU of the European Parliament and of the Council of 26 Feb. 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L94/243; Directive 2014/24/EU of the European Parliament and of the Council of 26 Feb. 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65.

<sup>66</sup> Directive 2014/23/EU, Art. 30(3); Directive 2014/24/EU, Art. 18(2) and Directive 2014/25/EU, Art. 36(2).

<sup>67</sup> See Regulation (EU) No. 978/2012, Art. 9 and Annex VIII. Cf. Orbie & de Ville (2010), *supra* n. 6.

<sup>68</sup> Commission Communication, 'Europe 2020: A strategy for smart, sustainable and inclusive growth' COM(2010) 2020 final.

<sup>69</sup> *Ibid.* at 5.

meet labour demand,<sup>70</sup> and combating poverty and social exclusion.<sup>71</sup> In this context, repeated reference is made to ‘modernizing’ labour markets,<sup>72</sup> a term which has come to be associated with their liberalization and deregulation away from longer-term protection of labour standards. As Richard Hyman has observed: ‘Modernisation is itself a deeply ambiguous goal, customarily a euphemism for cutbacks and privatisation.’<sup>73</sup> Further, in terms of actual participatory engagement with the process of ascertaining sustainability, reference is made to consultation with trade unions on an equal footing with ‘stakeholders in different sectors’ – defined as ‘business, trade unions, academics, NGOs, consumer organizations’.<sup>74</sup> However, the capacity and significance of trade union bargaining over sustainability issues is not considered.

This article has made the case for trade unions to play a participatory role in sustainability issues concerning the economy, environment and society. It has been argued that there is insufficient European level support (under either EU market law or human rights law) at present to enable greater collective engagement on issues involving future workers, future employers and future policy objectives. Moreover, despite lip-service continuing to be paid to ‘collective agreements’, we find little policy-based or institutional support for trade union action or collective bargaining which would lead to such collective agreements in the EU. Given the governance issues raised by the financial crisis, it is timely to place social dialogue and the role that collective bargaining plays within this at the forefront of our sustainability paradigm. If we want sustainable labour standards in a European social context, we have to change the status quo. Moreover, in adopting such a narrow approach to the role of workers’ collective engagement in sustainability, the EU is hardly acting as a desirable role model. This does not bode well for EU initiatives more broadly concerned with ‘the sustainable development of the Earth’.

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<sup>70</sup> *Ibid.* at 6.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.* at 6, 17, 18 and 32.

<sup>73</sup> Hyman (2011) *supra* n. 4, at 5–6; see also 11–12.

<sup>74</sup> COM(2010) 2020, 16 and 17.



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