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REDIRECTING THE REGULATORY FOCUS OF LABOUR LAW – FROM THE CONTRACT TO THE ORGANIZATION? THE EXAMPLE OF NON-FINANCIAL REPORTING IN THE EU**

Abstract:

In a wide sense, the paper deals with the shifting regulatory character of labour law (more particularly, labour-related regulation in a wider context). The paper strives to highlight how the effectiveness of labour law is increasingly related to the activation of market-based incentives for compliance and what kind of innovative regulatory mechanisms might support such aspirations.

More concretely, a particular, EU-linked innovative 'regulatory case study' is conceptualized in a complex theoretical framework: the link between labour law and non-financial ('social') reporting. In this context, the paper analyses Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings and groups amending the Accounting Directive 2013/34/EU both from the perspective of regulatory theories and labour law doctrine. The theoretical pillars of our analysis are rooted, among others, in the new governance, decentred regulation, reflexive law, regulated self-regulation and light-touch regulation literature. The paper also draws insights from the 'law and economics' study of labour law and attempts to relate all these regulatory theories to non-financial reporting in the context of labour law.

The main goal of the contribution is to identify how these relatively new legal 'channels' might be able to bring new forces of compliance into labour law, and how the role of law is changing. The essence of associated EU-level (and national-level) legal developments is analysed in a theoretical context, with a broad view on the possible future of labour regulation. Even though these regulatory methods are still rather on the periphery of labour law (in strong intersections with other branches of law, such as company law), they have the potential to become more integral building

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blocks of a modern labour law architecture. These new regulatory methods can contribute to improved compliance with labour laws and can foster responsible, decent employment practices.

Keywords: *EU law, labour law, Accounting Directive, law and economics*

I. INTRODUCTION

In a broad sense, the paper intends to deal with the changing character of labour law (more particularly, labour-related regulation in a wider meaning). To underline our broad theoretical arguments about the shifting character of labour law, one - especially European and EU-linked - novel 'regulatory case study' is conceptualized in a comprehensive theoretical framework.

The underlying, exemplary regulatory 'case study' is the relationship between labour law and non-financial (social) reporting. In our context, non-financial[1] corporate disclosure and reporting refers to the practice of giving public information about environmental, social and governance performance. This corporate activity is mostly voluntary, as part of the CSR (Corporate Social Responsibility)-strategy[2], but, to some extent, in some jurisdictions (e.g. France, UK, Denmark) it is also obligatory. The disclosure may take many forms, such as sustainability / CSR / ESG[3] / 'triple bottom line' / social reports. Information about working conditions and employment practices are usually vital elements of the 'social' part of the report. The main idea of social reporting is to structurally inform the market and the public about working and employment conditions with a view to boost comparison and a positive, image-based competition among companies. The fundamental idea of non-financial reporting can also be described by a well-known quote[4]: "sunlight is the best disinfectant." This refers to the benefits of openness and transparency[5], what is also very crucial in terms of labour law.

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[1] Non-financial indicators are measures that are not directly linked to financial performance but still impact a company or organisation's overall performance – and in many cases even the financial performance.

[2] According to the most recent definition of the European Commission, CSR is "the responsibility of enterprises for their impacts on society" (EU Commission, 2011).

[3] Environmental, social and governance reporting (ESG). The term describes environmental, social and governance issues that investors are considering in the context of corporate behaviour. In order to maximize the sustainable value of a business, the company should be able to understand and consider the Environmental, Social and Governance (ESG) factors that determine its extra financial performance. They must also be able to measure them and to provide evidence on how they impact on financial drivers, so that these factors can be recognized and evaluated by the market.

[4] From U.S. Supreme Court Justice Louis Brandeis.

[5] Transparency: the disclosure of all material information and the capability to measure its results in a quantitative way through key indicators.

The public transparency of labour practices and the increased accountability for them might facilitate compliance and create a positive, upward spiral (as a so-called 'pulling force'). Employers might be involved in a positive, image- and market-based, self-regulatory competition based on the quality of their employment standards and CSR-practices (see the idea of the "race to the top").[6] Such information strategies might also have a wide educational role as they can encourage the adoption of decent employment practices by demonstrating best practices. Furthermore, not less importantly, non-financial information is increasingly essential for the persuasion of investors and for the engagement of other stakeholders (such as regulators, public authorities, the general public, consumers, NGOs, trade unions, business partners, local communities, potential and current employees). On a more abstract level, social reporting can help to increase public trust in enterprises.

The aim of the paper is to identify how this relatively innovative legal 'channel' might be able to indirectly bring new forces of compliance into labour law, and how the role of law is changing. The new EU-Directive on non-financial reporting[7] is analysed in a theoretical context, with a broad view on the possible future directions of labour regulation in general. Even though information disclosure as regulatory strategy is still immature and situates rather on the side-lines of labour law (in strong intersection with other branches of law, such as company law), it can have the potential to become more integral building block of a modern labour law architecture. At the end of the day, information disclosure as regulatory strategy might contribute to enhanced compliance with labour laws and can also foster responsible, decent employment practices.

The main purpose of the paper is to point out that such 'fresh', non-legal, market-based forces, energies of labour law compliance as public transparency are emerging, and these energies might be effectively triggered and catalysed by innovative, well-targeted regulatory mechanisms. The paper highlights that even if these regulatory ideas are grounded in soft law and CSR (Corporate Social Responsibility), they are on a so-called "hardening" way of progression and can be conceptualised as promising fields of legal development. The nature of statutory law is presumed to alter in the context of these regulatory terrains: the law should play a triggering, activating role in relation to corporate self-regulation, instead of a "policing" approach. Legal interventions should rather be well-directed, forceful 'semaphores' instead of purely hard-hitting 'truncheons'. The ultimate goal of information disclosure as regulatory strategy is in fact to effectuate a behavioural change on the side of employers, in order to uphold decent working conditions.

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[6] B. Hepple, *Labour laws and global trade*, Oregon, Hart Publishing, Oxford and Portland, 2005, p. 85.; Murray and Jill, „Corporate Social Responsibility Discussion Paper", *Global Social Policy* Vol. 4 (2), 2004, p. 174; Simon Zadek, „Responsible competitiveness: reshaping global markets through responsible business practices." *Corporate Governance*, vol. 6. no. 4, 2006, p. 334.

[7] Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings and groups amending the Accounting Directive 2013/34/EU.

The paper starts with a general, introductory description of the idea and the development of non-financial reporting (Chapter 1). As we presume that this innovative regulatory technique echos some overall contemporary trends in modern regulatory theory, Chapter 2 points out the main theoretical streams of thoughts that - in our view - might back up these regulatory trends (including the idea of non-financial reporting). Chapter 3 briefly describes Directive 2014/95/EU from a basically labour law perspective. Directive 2014/95/EU is about disclosure of non-financial and diversity information by certain large undertakings and groups amending the Accounting Directive 2013/34/EU. Furthermore, this Chapter aims to show how the general regulatory concepts and ideas (described briefly in Chapter 2) are reflected in the Directive's approach. Chapter 4 reflects on the main features of this regulatory concept and its possible effects on and interplays with the generally changing character of labour regulation.

II. NON-FINANCIAL REPORTING: THE IDEA AND ITS DEVELOPMENT IN BRIEF

The paper intends to describe and put into context one illustrative example for innovative regulatory ideas on the periphery of labour law.[8] The paper strives to highlight some relationships between labour law and this related - but distinct - regulatory method in order to conceptualise innovative enforcement strategies for labour law. Non-financial reporting as a regulatory technique is clearly outside the conventional, 'mainstream' scope of labour law, but it can have direct impact on the behaviour of employers and as a consequence, on working conditions and labour standards. Even if non-financial reporting, as a regulatory technique is not 'labour law' in a strict sense, it might also serve various labour law-related ends. This Chapter aims to describe the way of evolution of the idea of non-financial reporting as a regulatory technique: the cranky, but still obvious road from voluntarism, soft law (and self-regulation) towards hard law (with a particular focus on EU-law).

There seems to be an emerging legal development - especially on the EU level -, in which non-financial reporting, as a regulatory technique is increasingly manifested on the regulatory agenda. This part illustrates how the soft law (and CSR)-based innovative regulatory idea of non-financial reporting might progressively seep into hard law.[9] At first,

[8] Other innovative regulatory ideas (not discussed in this paper) could be: socially responsible public procurement, subcontracting liability etc. See for more details: A. Kun, *A munkajogi megfelelés* ösztönzésének újszerű *jogi eszközei*, Budapest, L'Harmattan Kiadó-KRE, 2014.

[9] The core debate in CSR concerns the 'voluntarism versus regulation' track. See for more details: Kun, Attila &Hajdú, József, ´Conceptualization of Corporate Social Responsibility in the context of Labour Law´in: R. Blanpain and W. Kluwer, *Rethinking Corporate Governnance, From Shareholder Value to Stakeholder Value´*, 2011. pp. 175-194; A.C. Neal, ´Corporate Social Responsibility: Governance Gain or Laissez-Faire Figleaf?´*Comparative Labor Law & Policy Journal*, vol. 29, no. 4, 2008.

we give some hints about the private, self-regulatory, soft law roots of the regulatory idea, then we demonstrate the perceived process of 'juridification'.

Corporate non-financial / sustainability reporting has a long history going back to environmental reporting.[10] Social reporting is a rather recent trend. Many companies voluntarily produce annual reports (for e.g. as part of their CSR-strategy) and there are a wide array of private auditing, screening, rating and reporting standards around. Some organisations do not have stand-alone social reports, but prefer to report their non-financial performance through other existing reporting mechanisms. The key drivers and patterns for the quality of sustainability reports are the guidelines of the Global Reporting Initiative (GRI)[11], various award schemes or rankings. The simple dissemination of voluntary codes of conducts is also an alternative – rather immature – form of disclosure. During the 2000s non-financial (including social) reporting has become increasingly widespread and kind of an expected part of business.

Social reporting is about providing useful, transparent information for companies, investors and society at large. According to experiences, companies that already publish information on their financial and non-financial performances typically take a longer term perspective in their decision-making.[12] Social reporting helps organizational transparency, internal self-reflection (and self-regulation), improves compliance (and responsibility beyond compliance) and boosts stakeholder engagement. As one metaphoric saying describes the essence of reporting, "people who are forced to undress in public will presumably pay some attention to their figures."[13] According to Estlund, the benefits of information disclosure can be described along three dimensions: "improving the efficiency of employment contracts and labour markets, improving compliance with existing substantive mandates, and inducing employers to reach 'beyond compliance' toward evolving norms of good employment practices and standards of social responsibility."[14] As one report about reporting observes: "The obedience of private enterprises to the law

[10] The first environmental reports were published in the late 1980s by companies in the chemical industry which had serious image problems.

[11] The GRI enable all organizations worldwide to assess their sustainability performance and disclose the results in a similar way to financial reporting. GRI is a non-profit organization that pioneered sustainability reporting; released in 2013, G4 is the fourth generation of its renowned sustainability reporting framework. In 2014, more than 5,000 organizations across more than 90 countries have used the GRI Guidelines for their sustainability reporting, and 25 countries or regions have referred, mentioned, or recommended the Guidelines in their policies, regulations, or other instruments. https://www.globalreporting.org/Pages/default.aspx (accessed on 11 February 2015)

[12] For further details: D. Hess, *The Three Pillars of Corporate Social Reporting as New Governance Regulation: Disclosure, Dialogue and Development*, Ross School of Business Working Paper No. 1112, July 2008.

[13] L. Loss, cited by: D.J. Doorey, „Who made that?: Influencing foreign labour practices through reflexive domestic disclosure regulation", *Osgoode Hall Law Journal* Vol. 43, No. 4, 2005, p. 372.

[14] C. Estlund, „Just the facts: the case for workplace transparency", *Stanford Law Review*, Vol. 63 January 2011, p. 357.

rests on institutional preconditions: systematic guarantees of compliance with standards require organisational structure within each company that integrates respect for labour law regulations and translates it into personnel policy instruments."[15] The transparency of non-financial (in our case: social) information might indirectly improve the quality of such institutional preconditions for compliance.

The main general, possible benefits and risks of transparency (non-financial reporting) are summarized in the table below (both for companies and for the public / society).

The main benefits and risks of transparency (non-financial reporting) for companies and for the public (society)		
	Companies	**Public (society)**
Benefits	- improved public image, social legitimacy and acceptance - promotion, marketing, PR - risk-management - better, more responsive self-regulation, internal self-reflection - improved institutional preconditions for compliance	- comparable, transparent, easily available public information about companies - open communication and fair competition - "race to the top" - improved (legal) compliance - mobilisation of stakeholders - improved accountability of companies
Risks	- increased public scrutiny, pressure and demand for accountability - reporting is a kind of administrative and financial burden - the danger of non-well-targeted reporting - possible loss of social acceptance	- reporting might remain a box-ticking exercise, or simple PR-activity - non-well-targeted, unstructured, non-comparable, confusing, inaccurate etc. reporting - misleading reporting

Table 1 The Author's own summary.

Besides the voluntary, CSR-based developments, social reporting is increasingly appearing on the legislative agenda. The European Commission has announced in 2011 that the EU is preparing a legislative proposal on the transparency of the social and environ-

[15] Kocher, Klose, Kühn, Wenckebach, ´No Accountability without Transparency - Legal Instruments for Corporate Duties to Disclose Working and Employment Conditions´, *FES*, June 2012, p. 5.

mental information provided by companies in all sectors.[16] Some Member States (like France[17], Denmark[18], UK[19], Sweden[20]) have already introduced progressive non-financial disclosure requirements that in some cases even go beyond existing EU legislation. However, as the Commission observes, legislative requirements on non-financial reporting are not widespread through Member States but this is more common in countries with an established tradition of CSR or state-owned enterprises. Other countries are starting the process by conducting pilot activities or using the international guidelines.[21]

The antecedent of the new Directive (Directive 2014/95/EU about disclosure of non-financial and diversity information) is the so-called Modernisation Directive 2003/51/EC which requires enterprises to disclose in their annual reports environmental and employee-related information 'to the extent necessary' for an understanding of the company's development, performance or position. The requirements of this piece of EU-legislation have proved to be unclear and ineffective and applied in different ways in different Member States.[22] Nevertheless, there is a general trend towards more government-driven, regulatory initiatives related to reporting.[23] In the EU, most Member States have implemented some kind of measures for disclosure or provided companies with guidance or incentives to start reporting.[24] In this context, the new Directive is a logical next step.

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[16] A renewed EU strategy 2011-14 for Corporate Social Responsibility, Brussels, 25.10.2011; COM(2011) 681 final, p. 12.

[17] France was the first country to make public company reporting mandatory. The Act of 15 May 2001 on new economic regulations (the "NER" Act) requires public companies to include information on a series of topics in their annual report: status of employees, mobility of staff, work hours, social relations, health and safety, training, health policy, profits distribution and the amount of outsourcing. They must also describe the ways in which their sub-contractors respect ILO standards. M. Doucin, *France's policy for reporting corporate social responsibility undertakings*, French Ministry of Foreign and European Affairs, 2009.

[18] In Denmark, the 1,100 biggest companies, as well as state-owned companies, institutional investors, mutual funds and listed financial businesses must provide information about their CSR policies on a "comply or explain" basis in their annual financial reports. *CSR – National Public Policies in the European Union*, European Commission, 2010. p. 26. For further details: K. Buhmann, *Company law as an agent for migration of CSR-related international law into companies self-regulation? The case of the Danish CSR reporting requirement*, University of Oslo, Faculty of Law, Legal Studies Research Paper Series No. 2011-05, Oslo, 2011.

[19] 'Business Review', Companies Act 2006.

[20] Starting in 2007, state-owned companies in Sweden were legally required to publish sustainability reports according to the Global Reporting Initiative (GRI) framework.

[21] *CSR – National Public Policies in the European Union*, Compendium, European Commission, 2014. p. 38.

[22] J. Cremers, *Non-financial reporting beyond the strict minimum: is the workforce a well-informed stakeholder?*, ETUI Working Paper 2013., Brussels, 2013.

[23] See also: Proposals for "*Establishing Mandatory Environmental and Social Reporting*", European Coalition For Corporate Justice (ECCJ) Legal Proposals to Improve Corporate Accountability for Human Rights Abuses (2008).

[24] *CSR – National Public Policies in the European Union*, European Commission, 2010, p. 26.

Richard Howitt, *European Parliament Rapporteur on Corporate Social Responsibility*, first proposed stricter rules on reporting in a European Parliament report as long ago as 1999. After long discussions[25], the European Commission adopted on 16 April 2013 a proposal for a new directive enhancing the transparency of certain large companies on social and environmental matters.[26] The adopted Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings and groups amends the Accounting Directive 2013/34/EU. The Directive entered into force on 6 December 2014. EU Member States have two years to transpose it into national legislation. The concrete nature of the required disclosures will become clearer once national implementation has been drafted in 2016. Reporting must start with business year 2017. In this context, the European Commission is organising informal transposition workshops to assist national authorities. The Directive has a 'built-in' review clause (Art. 3), according to which the Commission shall submit a report to the European Parliament and to the Council on the implementation of the Directive, including, among other aspects, its scope, particularly as regards large non-listed undertakings, its effectiveness and the level of guidance and methods provided. The report shall be published by 6 December 2018 and shall be accompanied, if appropriate, by legislative proposals. This provision ensures that the idea will remain on the agenda.

Before analysing the Directive from a regulatory and a labour law perspective, the paper briefly highlights the most important recent streams of regulatory concepts which might be relevant both in terms of the Directive's unique regulatory approach and of the future of labour-related regulation in general.

III. UNDERLYING THEORETICAL CONCERNS[27]

From the perspective of regulatory theories, the following regulatory features and strands can be highly relevant to analyze the new Directive's regulatory approach and to draw some wider conclusions concerning the trends of labour-related regulation in general. For the sake of simplicity, these regulatory concerns are addressed in ten points.

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[25] For instance, the European Coalition for Corporate Justice (ECCJ) – a broad coalition representing NGOs, consumer groups, trade unions and academics - has been heavily urging the legislative reform.

[26] Proposal for a Directive of the European Parliament And the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups, COM/2013/0207 final.

[27] This Chapter heavily draws on the author's paper: Attila Kun, The Semaphore Versus the Truncheon - New "Energies" in Labour Regulation?, In: Proceedings of the Twelfth International Conference in Commemoration of Prof Marco Biagi, *"Labour And Social Rights. An Evolving Scenario"*, T. Addabbo, W. Bromwich, T.M. Fabbri, I. Senatori, (eds.), Marco Biagi Book Series, n. 6, Giappichelli, Torino, 2015.

a) The idea of CSR (Corporate Social Responsibility) as an ideological root.

b) Enhanced compliance with labour laws as a decisive goal of regulation.

c) The broad, expanding understanding of labour law / labour regulation as a link to labour law.

d) Indirect way of regulation: furthering the aims of labour law via non-labour law mechanisms.

e) New governance and the concept of de-centred regulation as a doctrinaire foundation of regulation.

f) Reflexive law and responsive regulation as the dynamics of regulation (see also: regulated self-regulation).

g) From soft law to hard law, as a way of development.

h) Employers' organizational culture (governance structure) as the ultimate object of regulation.

i) Non- or extra- legal forces as regulatory incentives.

k) Enhanced market-conformity of regulation (as an expectation of "law & economics").

Below, the paper briefly reflects on these general theoretical baselines.

3.1. The idea of CSR (Corporate Social Responsibility) as an ideological root.

Information disclosure as a regulatory strategy finds its roots in soft law, mostly in the concept and practice of Corporate Social Responsibility (CSR).[28] It is possible to view CSR as an innovative, inspirational background-ideology, catalyst or guiding principle for such regulatory ideas. As an illustration, we can observe that the most recent, authoritative international standards and policies of CSR - on one way or another - are all referring to such innovative regulatory concepts as reporting. For instance, reporting as a concept is clearly manifested in the European Commission's Communication "A renewed strategy 2011–2014 for Corporate Social Responsibility" issued in October 2011 and in the UN "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" proposed by UN Special Representative John Ruggie.[29]

[28] D. McBarnet, A.Voiculescu, T.Cambell, (eds.): *The new Corporate Accountability – CSR and the law*, Cambridge University Press, 2007.

[29] http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed on 11 February 2015)

Information disclosure as a regulatory strategy represents a sound combination of hard and soft law approaches. It tends to mix state regulation (e.g.: mandatory reporting) and private self-regulation (e.g.: reporting schemes). In this regard, the concepts of co-regulation and meta-regulation[30] might also be called upon. These regulatory strategies might step into the enforcement gap left open by traditional, 'hard' labour laws.

3.2. Enhanced compliance with labour laws as a decisive goal of regulation.

Compliance (in general) has increasingly become a prevalent concern of both corporate management and academics.[31] On the one hand, compliance is a status of being in accordance with established guidelines or legislation. As such, it is a complex combination of the fulfilment of legal (hard and soft) and non-legal expectations. On the other hand, compliance is also a process of becoming 'compliant'. As such, it is dynamic and process-oriented. From a pure legal point of view, compliance usually refers to behaviour in accordance with legislation. As such, the ultimate goal of compliance is a behavioural transformation. Ideally, it is not a 'box-ticking' exercise. Compliance is both about internal corporate attitude and 'responsive' reflection to external expectations, such as market-based influences.

The increasing need for compliance stems from the widely recognized fact that there is a so-called crisis in labour law[32] and the obvious limitations of traditional labour law mechanisms. Moreover, some scholars also bring into question the very survival of labour law[33], others simply state that the implementation of labour law suffers from a structural

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[30] M.M. Rahim, ´Meta-regulation Approach of Law: A Potential Legal Strategy to Develop Socially Responsible Business Selfregulation in Least Developed Common Law Countries´, 40 *Comm. L. World Rev.,* 2011, pp. 174-206.

[31] About compliance in labour law, see: R. Pires, 2008: Promoting sustainable compliance: Styles of labour inspection and compliance outcomes in Brazil, *International Labour Review*, Vol. 147, No. 2–3, 2008; *Compliance with labour legislation: its efficacy and efficiency = respect de la législation du travail : effectivité et impact* / edited by G. Casale, A. Perulli; International Labour Office, Labour Administration and Inspection Programme (LAB/ADMIN), Geneva: ILO, 2010, Working document; No.6; F. Maschmann, *Corporate Compliance und Arbeitsrecht*, Mannheimer Arbeitsrechtstag 2009; A. Mengel, *Compliance und Arbeitsrecht*, Implementierung, Durchsetzung, Organisation, Verlag C.H.BECK, München, 2009; J.T.Lelley, *Compliance im Arbeitsrecht*, Leitfaden für die Praxis, 1. Auflage, Luchterhand, 2010; P. Macklem, M.Trebilcock, *New Labour Standards Compliance Strategies: Corporate Codes of Conduct and Social Labeling Programs*, Faculty of Law, University of Toronto, A Research Report prepared for the Federal Labour Standards Review, 2006.

[32] *Cf.:* G. Davidov, ´The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions´, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 26, 2010, pp. 61-82; R.Zahn, *'Crisis in Labour Law'*, University of Kingston, 11th May 2012: (with N. Busby) 'European Labour Law in Crisis: the Demise of Social Rights?' etc.

[33] *Cf.: M.* Rigaux, J.Buelens, A.Latinne, *From Labour Law to Social Competition Law?* Intersentia, Cambridge - Antwerp - Portland, 2014. pp. 9-11.

deficiency in effectiveness.[34] In general, labour law is widely considered to be in crisis: the ineffectiveness of traditional labour law is often recognized both by labour law scholars[35] and practitioners. In other words: all over the world, a constantly growing, large number of employers fail to comply with labour laws. It is also clear that there is a growing divergence between the law and the reality of the employment relationship.[36] As Davidov and Langille give their justification, "one of the most salient aspects of the crisis in labour law is its inability in an increasing number of cases to deliver the necessary rights and entitlements to workers".[37]

Many new normative, regulatory approaches – also in accordance with contemporary regulatory theories – prefer procedural rules over substantive rights.[38] To put it differently: they do not provide for new protective rights, they just focus on the innovative ways of stirring up compliance with existing standards. Furthermore, instead of guaranteeing new rights, they tend to facilitate internal corporate reflection and self-regulation. Information disclosure as a regulatory strategy totally fits into these tendencies.

3.3 The broad, expanding understanding of labour law / labour regulation as a link to labour law.

As a starting point, the broadening and expanding view of labour law and the growing plurality and the hybridization of labour law's regulatory mechanisms are to be mentioned.[39] Nowadays, more and more labour law scholars are arguing in favour of a broader, extended view of labour law. It is not at all easy to clearly define the ideas of labour law in a changing world.[40] Even if we treat labour law as an ideologically stable, independent and coherent branch of law, there is a continuous and vital need to explore innovative ways of regulation and enforcement. Thus, the plurality and the hybridization of labour law's regulatory mechanisms are recognized by many. Harry Arthurs, for example, states that "labour law itself is likely to evolve into a broader, more inclusive and perhaps more efficacious regime of social ordering, field of intellectual inquiry and domain of professional

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[34] Kocher, Klose, Kühn, Wenckebach, 2012, p. 5.

[35] G. Davidov and B.Langille (eds.), 2011, Introduction.

[36] *The Employment Relationship*, International Labour Conference, ILO, 95th Session, 2006, Report V(1). p. 15.

[37] G. Davidov and B.Langille, *Understanding Labour Law: A Timeless Idea, a Timed-Out Idea, or an Idea Whose Time has Now Come*, In G. Davidov and B.Langille (eds.), *The Idea of Labour Law, Oxford,* Oxford University Press, 2011, pp. 1-13.

[38] *Cf.: A.* Goldin, Global Conceptualizations and Local Constructions, in Davidov, Guy & Langille, p. 74.

[39] *Cf.: U.* Mückenberger, *Hybrid Global Labour Law*, cited in R.Blanpain, F.Hendrickx (eds.), *Labour Law Between Change and Tradition, Liber Amicorum Antoine Jacobs*, Alphen aan de Rijn: Kluwer, 2011, pp. 99-116.

[40] See in details about the various contemporary ideas of labour law: G. Davidov and B.Langille (eds.)

practice". He also acknowledges that "labour law scholarship will have to extend its reach to all policy domains that influence work relations or labour market outcomes".[41] Similarly, Vosko argues for "broadening labour law's focus from employment relations to work or labour market relations" in general.[42] Karl Klare also envisages a colourful and vibrant regulatory terrain for labour law when he states that the law regulating work cannot be fitted into a single overarching paradigm and labour law must pursue many different approaches.[43] Langille also believes in the expansion of labour law's justificatory horizons.[44] While Manfred Weiss does not see a vital need for a change of paradigm in labour law, he also recognizes some need for adaptation and the necessity for labour law to respond to the new realities in the area of employment in its broadest sense.[45] As we have seen before, regulators are under pressure to explore innovative ways to create facilitators for businesses for more general and systematic compliance with labour laws. In line with the pluralist concept of labour regulation, Howe states that a "broader view of what constitutes labour law is crucial to the future health and vitality of labour law scholarship."[46]

The broadening scope of labour law can also be conceptualised in the mirror of regulatory theory.[47] According to this thinking, labour law can be seen as a broad 'regulatory space' instead of a narrowly defined branch of law. A 'regulatory space' is defined by the wide array of issues belonging to a given area of regulation. This 'space' may be filled by a range of various regulatory methods and approaches, among which hard and soft law measures, traditional and innovative regulatory concepts are combined. In this context, information disclosure as a regulatory strategy might be a part of an extended concept of labour law, even if it doesn't rely on the traditional mechanisms of labour law, but follows an alternative concept. Information disclosure as a regulatory strategy is one example of these alternative concepts.

3.4. Indirect ways of regulation: furthering the aims of labour law via non-labour law mechanisms.

New methods of enforcement strategies are needed, and these strategies often can be found beyond the conventional borders of labour law, sometimes in other fields of law.

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[41] H. Arthurs, Labour Law after Labour, in G. Davidov and B. Langille (eds.), pp. 27, 29.

[42] V. F. Leah, *Out of the shadow?*, in G. Davidov and B. Langille (eds.), p. 368.

[43] K. Karl, *The Horizons of Transformative Labour Law and Employment* Law, in J. Conaghan, M Fischl, and K. Karl (eds.), *Labour Law in the Era of Globalization*, Oxford University Press, 2002, pp. 3-29.

[44] B. Langille, *Labour Law's Theory of Justice*, in G. Davidov and B. Langille (eds.), p. 102.

[45] M.Weiss, Re-Inventing Labour Law, in G. Davidov and B.Langille (eds.), pp. 43-57.

[46] *Cf.: J.*Howe, The Broad Idea of Labour Law, in G. Davidov and B.Langille (eds.), pp. 299-300.

[47] C.Fenwick and T. Novitz, Conclusion: Regulating to Protect Workers' Human Rights, *Human Rights at Work,* Oregon, Hart Publishing, 2010, pp. 585-617.

Thus, one of the several possible ways of broadening the scope of labour law is the building up of more strategic and organic, more coherent links with other, related branches and fields of law. This idea is also in line with Mitchell and Arup's theory: they argue for the reformulation of labour law as the 'law of labour market regulation', dismantling disciplinary boundaries among work-related distinctive areas of law (such as company law, for instance).[48] Indeed, the Labour Code in a country (if any as such) is far from comprising all labour-related regulation. Without doubt, the regulatory terrain and the complexity of labour law are expanding. This argument is also in line with the concept of the so-called legal homogeneity. As Rigaux formulates it, in a comprehensive legal perspective, "law is considered to form a homogenous entity within which legal rules of a different nature and of a different origin interact."[49]

Information disclosure as a regulatory strategy is clearly outside the conventional, 'mainstream' scope of labour law, but it can have direct impact on the level of working conditions. Mandated transparency of company-related social information might have the potential to contribute to the enhanced compliance with labour laws. Innovative regulatory strategies as social reporting might also serve various labour-related ends, even if they are not 'labour laws' in a strict sense (such as socially responsible public procurement law, company law dealing with non-financial reporting etc.). The original, to a large extent still valid - but heavily discussed - basic purposes and values of labour law (i.e. 'protection', redistribution of powers etc.) can be followed through different regulatory mechanisms. Among these mechanisms, other branches of law (such as public procurement law, company law, consumer protection law etc.) can also play a fruitful role.

3.5. New governance and the concept of de-centred regulation as a doctrinaire foundation of regulation.

The regulatory theory, in its conventional understanding, responds to the above mentioned enforcement crisis existing in contemporary law, in our closer perspective, especially in labour law. As Fenwick and Novitz formulate it, "regulation theory is to explore the weakness in practice of such a 'command and control' (hereinafter: CAC) approach to regulation, and of how regulators might respond to those limits in innovative ways."[50] This broader approach to regulation captures a wider range of regulatory ideas and techniques. In terms of labour law, the scope and regulatory strategies of labour law should be deployed in different ways than might conventionally be understood. A clear experimentalist tendency is detectable as the idea and the style of regulation moves away from purely con-

[48] Cited by: J.Fudge, Labour as a 'Fictive Commodity': Radically Reconceptualizing Labour Law, G. Davidov and B. Langille (eds.), p. 125.

[49] Rigaux, Buelens, Latinne (eds.), *op. cit*, p. 2.

[50] C. Fenwick and T. Novitz, p. 605.

tract-oriented, command and control employment regulation to more innovative methods of regulation. Some authors use the notion of 'new governance'[51] and/or the concept of de-centred regulation[52] as umbrella terms for such modern regulatory ideas.[53] These regulatory approaches are trying to reflect changes in society and growing complexities of the regulated subjects. In brief, new governance regulation is collaborative, participatory, innovative, complex (i.e. public and private mix), experimental, process-oriented, flexible, expansive and decentralized.[54] As Estlund formulates it, new governance is "one umbrella term for a range of post-command-and-control strategies for social control of economic organizations and activity."[55]

3.6. Reflexive law and responsive regulation as the dynamics of regulation (see also: regulated self-regulation).

The new regulatory approaches described above are in line with Teubneriean logic of reflexive law[56], because they are trying to influence the internal decision-making processes of employers. Furthermore, in the framework of such innovative regulatory ideas, top-down state regulation is combined with market-based measures and initiatives. For example, disclosure / reporting measures may induce internal reflection of enterprises about their own employment practices and social policies. In this sense, such a legal strategy is also responsive to the needs of economic actors.[57]

To put it differently: such regulatory approaches can be considered to be one tool for reflexively and responsively implementing the values and ends of labour law. In these reg-

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[51] O. Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, Legal Studies Research Paper Series, Research Paper No. 07-27, University of San Diego, December 2005.

[52] J. Black, Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory World, *Cur. Leg. Problems, vol. 53, no.* 103, 2001

[53] B.P. Haar, *Open method of coordination. An analysis of its meaning for the development of a social Europe*, Amsterdam, Leiden University, 2012, pp. 24-28.

[54] *Cf.:* D. Doorey, A Model of Responsive Workplace Law, *Osgoode Hall L. J., vol.* 50, 2012, p. 47.

[55] C. Estlund, Just the facts: the case for workplace transparency, *Stanford Law Review*, Vol. 63, January 2011, p. 354;

[56] About reflexive law, see: G. Teubner, 'Substantive and reflexive elements in modern law', *Law & Society Review*, Vol. 17. No. 2, 1983; G. Teubner, '*Corporate Responsibility as a Problem of Company Constitution',*1983 EUI Working Paper No. 51, Badia Fiesolana, San Domenico (FI); R. Rogowski, T.Wilthagen (eds.), '*Reflexive Labour Law'* Kluwer Law and Taxation Publishers; C. Barnard, S. Deakin, R. Hobbs, '*Reflexive law, Corporate Social Responsibility and the Evolution of Labour Standards: The Case of Working Time*' (2004) ESRC Centre for Business Research, University of Cambridge Working Paper No. 294, CBR research Programme on Corporate Governance.

[57] About responsive regulation: I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate,* New York, Oxford University Press, 1992.

ulatory ideas the conventionally reactive (sanctioning) nature of labour laws is replaced by a rather proactive attitude. As Hess points out, "the ultimate goal of a reflexive law - and New Governance - approach is to ensure that corporations are meaningfully thinking 'critically, creatively, and continually' about their social performance and how to improve it."[58] This is also one of the main goals of mandatory social reporting.

3.7. From soft law to hard law, as a way of development.

Many innovative regulatory methods find their roots in soft law[59] and in the concept and practice of Corporate Social Responsibility (CSR). For example, responsible procurement, social reporting, or supply chain controlling practices are all well grounded and proliferated in - especially transnational - private, non-governmental soft regulation. Normally, these practices are applied under public social pressure rather than as a result of state regulation. However, one of the classical functions of soft law is the so-called 'pre-law' function: soft law measures may have the capacity for 'hardening', since they can be a first step in the process of legislation.[60] Soft law measures can also be a so-called 'testing field' of innovative regulatory concepts and source of inspiration or pattern for regulators. As such, ideas in soft law may pave the path for the adoption of hard laws in the future. This phenomenon can also be labelled as the 'spill over' function of soft law[61] and can represent the dynamic of a given field of law (in our case, the dynamic of labour law as a widely interpreted 'space' of regulation). However, it must be mentioned that hard law is generally lagging behind changes in self-regulatory practices and regulatory ideas. Furthermore, in these specific regulatory terrains (e.g. procurement, reporting, supply chain responsibility) extensive legal regulation could significantly undermine respective competitive market dynamics (thus, hard regulation is not always and not in all aspects necessarily needed). Social reporting is obviously a good example for this 'hardening' process. It seems to be a tendency that voluntary best practices are gradually becoming 'the regulatory norm'.

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[58] D. Hess, Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability through Transparency, *Business Ethics Quarterly*, Volume 17, Issue 3., 2007, p. 470.

[59] See for the general description of the role of soft law in labour law: I. Duplessis, Soft international labour law: The preferred method of regulation in a decentralized society, In: *Governance, International Law & Corporate Social Responsibility*, International Institute for Labour Studies, Research Series 116., ILO, 2008; R. Blanpain, and M. Colucci, *The Globalization of Labour Standards, The Soft Law Track*, Kluwer Law International.

[60] *Cf.:* Senden, *Soft Law in European Community Law*, Oxford, Hart Publishing, 2004.

[61] *Cf.:* M.A. Alhambra, B. Ter Haar and A. Kun, 'Soft on the Inside, Hard on the Outside: An Analysis of the Legal Nature of New Forms of International Labour Law'. *The International Journal of Comparative Labour Law and Industrial Relations,* vol. 27, no. 4, 2011, pp. 337–363.

3.8. Employers' organizational culture and corporate attitude as the ultimate object of regulation.

The nature of state intervention is presumed to alter in the context of these innovative regulatory concepts: the law should play a triggering, activating role in relation to corporate self-regulation, instead of a "policing" approach. Legal interventions should rather be well-directed, forceful 'semaphores' instead of purely hard-hitting 'truncheons'. In other words, the state (the regulator) should rather be a 'chorus-master' than a 'policeman'. The ultimate goal of these innovative regulatory practices is in fact to effectuate a behavioural change on the side of employers, in order to progressively uphold decent working conditions. On the one hand, compliance with applicable (labour) laws is the absolute minimum. On the other hand, truly socially responsible - CSR-conscious - attitude is the desired other end of this attitudinal transformation. The behavioural change leading to compliance and to social responsibility might be motivated by way of various regulatory mechanisms. In such cases the state tries to steer and guide internal corporate governance mechanisms to capture certain public policy goals (such as enhanced compliance with labour laws).

3.9. Non- or extra- legal forces as regulatory incentives.

The main purpose of the paper is to point out that 'fresh', non-legal, market-based forces, energies of labour law compliance are emerging, and these energies might be effectively triggered and catalysed by innovative regulatory mechanisms. Even if these regulatory mechanisms (such as non-financial disclosure) are grounded in soft law and CSR, they are on a so-called "hardening" way of progression and can be conceptualised as promising fields of legal development.

The perceived new energies and powers furthering labour law compliance are, among others, the following: market-based, financial, relational, risk-based and reputational incentives. All of these drivers can be found behind the idea of information disclosure as a regulatory strategy. Accompanying legal interventions (such as the obligation to report, as in the new EU-Directive analysed below) should have the goal to reflexively embed these market-based incentives into corporate self-regulatory practices, and to guide, intensify and guarantee related corporate policies.

3.10. Enhanced market-conformity of regulation (as an expectation of "law & economics").

These new regulatory ideas typically aim to create positive incentives as an attempt to solve the deep compliance problems. Such innovative enforcement strategies are typically not intruding into the market as harshly as conventional labour laws, they rather have a

market-friendly regulatory approach and a 'market constituting' / 'market-creating' role.[62] In other words: these regulatory methods often create a 'business case' for compliance, what is apparently an important added-value and facilitator for employers. The 'business case' can be manifested, for instance, in image (brand)-based incentives (such as in the case of non-financial disclosure and reporting). The 'business case' behind these regulatory techniques might have the potential to appease the classical economic critiques of the field of labour law.[63] Such regulatory approaches are trying to find a better, more responsive balance between regulatory (social) goals and the logic of routine business practices (such as information disclosure). In other words: regulation - indirectly and smoothly - tries to implant some social dimension into customary business practices (such as reporting). These regulatory methods can also be interpreted as more business-friendly, softer advancements of labour law's original values. They permit employers to experiment and comply proactively and creatively.

Harry Arthurs acknowledges that "market dynamics are often a more powerful determinant of decent labour standards than regulatory legislation."[64] It means that in some cases private, market-based, self-regulatory (soft law) mechanisms can also be a source of innovation in terms of compliance. Furthermore, regulatory methods can utilize and catalyze such market dynamics. Owing to their market-friendly nature, such regulatory approaches are also often labelled as 'light-touch' regulation.[65]

IV. DIRECTIVE 2014/95/EU - CONTENT, CONTEXT AND CONCEPTUALISATION FROM A LABOUR LAW PERSPECTIVE

This Chapter describes the main features of Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings and groups amending the Accounting Directive 2013/34/EU from a labour law perspective. Furthermore, this Chapter aims to show how the general regulatory concepts and ideas (described briefly in Chapter 2) are reflected in the Directive's approach.

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[62] *Cf.: S.* Deakin, The Contribution of Labour Law to Economic and Human Development, in: G. Davidov and B.Langille (eds.), pp. 156-179.

[63] *Cf.: R.* Del Punta, The Economic Challenge to Labour Law, in: *Compliance with labour legislation: its efficacy and efficiency*, ILO LAB/ADMIN, Working Document No. 6., Jan. 2010. About Law & Economics: Bouckaert, Boudewijn & De Geest, Gerrit (eds.), *Encyclopedia of Law and Economics, Volume I. The History and Methodology of Law and Economics*, Cheltenham, Edward Elgar, 2000.

[64] H. Arthurs, p. 18.

[65] J. Howe, *The Regulatory Impact of Using Public Procurement to Promote Better Labour in Corporate Supply Chains*, Legal Studies Research Papers No. 528, Melbourne Law School, 2010, p. 4.

The Directive is not a labour law Directive. Nevertheless, mandatory reporting might indirectly influence labour law-related issues, as described above (see: Chapter 2, d.). The Directive is closely linked to regulations concerning financial disclosure. In fact, it amends an earlier directive that regulates corporate annual financial statements, consolidated financial statements, and related reports.[66]

The objective of the new Directive is to enhance the relevance, consistency and comparability of non-financial information disclosed throughout the Union in order to increase EU companies' transparency and performance on environmental and social matters, and, therefore, to contribute effectively to long-term economic growth and employment. In the EU Directive the management report is specified as the default part of corporate reporting where the non-financial statement should be included. However, it also allows companies to issue the non-financial statement as a separate report if it covers the same financial year as the management report. The directive also requires that the statutory auditor or audit firm verify whether the non-financial statement has been provided.[67]

The new Directive requires companies concerned to disclose in their management report, information on policies, risks and outcomes as regards environmental matters, social and employee aspects, respect for human rights, anti-corruption and bribery issues, and diversity in their board of directors. The non-financial statement should also include information on the due diligence processes implemented by the undertaking, also regarding, where relevant and proportionate, its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts. As such, materiality assessment is extended to include the supply chain. In sum, the Directive requests the same points of disclosure for each sustainability matter:

- a description of the policy pursued by the undertaking in relation to those matters, including due diligence processes implemented;
- the outcome of those policies;
- the principal risks related to those matters linked to the undertaking'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;
- non-financial key performance indicators relevant to the particular business.

It should be possible for Member States to exempt undertakings which are subject to this Directive from the obligation to prepare a non-financial statement when a separate report corresponding to the same financial year and covering the same content is provid-

[66] B. Kasemir, Impact of the EU Directive on Non-Financial Reporting, http://www.environmentalleader.com/2015/08/06/impact-of-the-eu-directive-on-non-financial-reporting/ (accessed on 12 December 2015)

[67] http://ec.europa.eu/internal_market/accounting/non-financial_reporting/ (accessed on 15 May 2015)

ed. The core idea of the Directive is that such reporting should provide investors and other stakeholders with a more comprehensive picture of a company's performance. This is a legislative initiative with relevance for the European Economic Area (EEA).

The new rules will only apply to some large companies with more than 500 employees. This includes listed companies as well as other public-interest entities (PIE), such as banks, insurance companies, and other companies that are so designated by Member States because of their significant public relevance, activities, size or number of employees. According to estimations, the scope includes approx. 6 000 large companies and groups across the EU. As such, this regulatory strategy is rather experimentalist in this stage (as most 'new governance'-type regulatory strategies), but it might have the potential to further expand in the future.

There are some exceptional rules in the Directive, which further increase its flexibility. For instance, it contains a rather broadly formulated, optional 'Safe Harbour Clause': 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 the members of the administrative, management and supervisory bodies, acting within the competences assigned to them by national law and having collective responsibility for that opinion, the disclosure of such information would be seriously prejudicial to the commercial position of the undertaking, provided that such omission does not prevent a fair and balanced understanding of the undertaking's development, performance, position and impact of its activity. (Art. 1, par. 1).

Furthermore, a subsidiary undertaking may be exempted from the reporting obligation if its parent entity includes the non-financial statement in the consolidated management report (Art. 1, par. 3). Accordingly, companies that are not headquartered in the EU will also be impacted by mandatory reporting requirements: the non-EU headquartered corporations that do business in EU Member States via local subsidiaries that fall under the Directive's requirements. The Directive specifies that subsidiary undertakings shall be exempt from mandatory reporting if they are covered in a consolidated non-financial statement of their parent group that meets the Directive's requirements. According to some opinions, many corporate group and holding companies will likely elect to publish a non-financial report that meets the EU requirements, probably at the strictest Directive implementation level from within those member states where they do business, rather than invest in having each of their subsidiaries do their own reporting.[68]

As the Recital specifies it, as regards social and employee-related matters, the information provided in the statement may concern the actions taken to ensure gender equality, implementation of fundamental conventions of the International Labour Organisation, working conditions, social dialogue, respect for the right of workers to be informed and

[68] B. Kasemir, 2015

consulted, respect for trade union rights, health and safety at work and the dialogue with local communities, and/or the actions taken to ensure the protection and the development of those communities (Recital, Para. 7). One general problem with social reporting is that it can mainly focus on empirically, objectively observable circumstances and thus can never give a full picture of companies' social performance. Furthermore, the objectivity, validity and practicability of social indicators can always be doubted.[69]

The Directive - in line with reflexive regulatory approaches, new governance considerations and Law & Economics concerns - strives to ensure that administrative burdens are kept to a minimum. Reporting is mandatory, but wide margin of flexibility is given to companies. The Directive has been designed with a non-prescriptive mind-set, and leaves significant flexibility for companies to disclose relevant information in the way that they consider most useful (one might also call it as 'light touch' regulatory approach, as described above). In this context, this Directive is a good example of reflexivity and responsiveness in regulation (as it is also an important feature of reflexive law that law must realise its systemic limits with respect to regulation of other social systems, such as the economy[70]). The Recital plainly emphasizes the need to respect the "freedom to conduct a business" (Para. 22), while, at the same time, the whole idea of the Directive is about softly regulating the routine business practice of reporting with a 'social' view. As such, the Directive is a good example of balancing between the interventionalist and 'laissez fair' approaches towards the market. The Directive - in any case - intends to send a strong signal to the market. However, the intention of the Directive might be watered down to various degrees in different Member States, as the Directive regulatory approach is extremely flexible.

The Directive's regulatory concept is substantially process-oriented inasmuch as it strives to boost the change-managing potential of affected companies (*cf.* Recital, Para. 3). Accordingly, the Directive's regulatory concept is also reflexive, inasmuch as it tries to influence the internal decision-making processes of companies (in our context: employers). The encouragement of 'due diligence processes' (Art. 1, par. 1, b.) also reflects the procedural nature of the regulatory concept applied. The reporting process is supposed to be embedded in the heart of the organization's business strategy and it shouldn't be a simple tick box exercise. Similarly, the responsiveness of the Directive's regulatory concept is reflected in the goal to help the measuring, monitoring and managing of undertakings' performance and their impact on society by information disclosure (*cf.* Recital, Para. 3). This concern also reveals that reporting is not only valuable for stakeholders (to make more informed decisions and hold companies accountable), but - as a management tool - it has advantages for companies too (e.g. to identify risks). In other words, there is

[69] Kocher, Klose, Kühn, Wenckebach, p. 10.

[70] R. Rogowski, *Reflexive Labour Law in the World Society*, Edward Elgar, Cheltenham, UK, 2013, p. 39.

a business case in reporting (which is important from a "law and economics" perspective, see Chapter 2. j.).

The Directive's regulatory concept is 'risk-based' as it assumes that information disclosure might help identifying sustainability risks and increasing investor and consumer trust (Recital, Para. 3). Furthermore, as regards the content of the reports, companies should provide "adequate information in relation to matters that stand out as being most likely to bring about the materialisation of principal risks of severe impacts, along with those that have already materialised" (Recital, Para. 8). This approach is the concept of materiality. As such, reporting should be based on a risk-oriented approach.

The Directive applies a public and private mix of regulatory mechanisms and it strives to find a delicate balance between the stability of regulation and the flexibility of mandated self-regulation.[71] As the Recital formulate this: the Directive allows "for high flexibility of action, in order to take account of the multidimensional nature of corporate social responsibility (CSR) and the diversity of the CSR policies implemented by businesses matched by a sufficient level of comparability to meet the needs of investors and other stakeholders as well as the need to provide consumers with easy access to information on the impact of businesses on society." (Recital, Para. 3) Thus, the Directive sets the 'floor' for reporting and creates a level playing field, while leaves companies wide margin to innovate towards higher self-regulatory standards. After all, the Directive intends to steer self-regulation: by complying with the requirements, companies will have a better understanding of the risks they face, and will be pressured internally and externally to act (and to self-regulate) to reduce these risks.[72]

The Directive offers many instances for innovatively combining hard and soft regulatory approaches. For instance, when reporting, companies may use recognised international or national guidelines which they consider appropriate (for instance, the UN Global Compact, ISO 26000, the Guiding Principles on Business and Human Rights implementing the UN 'Protect, Respect and Remedy' Framework, the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, the International Organisation for Standardisation's ISO 26000, the International Labour Organisation's Tripartite Declaration of principles concerning multinational enterprises and social policy, the Global Reporting Initiative[73], or other recognised international frame-

[71] *Cf.:* "smart mix" between regulation and voluntarism in the Ruggie-framework.

[72] Assessment of the EU Directive on the disclosure of non-financial information by certain large companies, ECCJ briefing, May 2014, p. 3.

[73] The GRI have also played an important role during the development of the Directive by providing expertise. Furthermore, GRI G4 is fully aligned with the requirements of the Directive, so it can be a fundamental tool for companies during the implementation. The GRI might enhance the spill-over effect of the Directive, also beyond the EU. See for further details: Making Headway in Europe**:** Linking G4 and the European Directive on non-financial and diversity disclosure, GRI https://www.globalreporting.org/resourcelibrary/GRI_G4_EU%20Directive_Linkage.pdf (accessed on 1 June 2015)

works, see Recital, Para. 9). As such, the Directive explicitly builds on the CSR-related roots and practices. Furthermore, according to Article 2, "the Commission shall prepare non-binding guidelines on methodology for reporting non-financial information, including non-financial key performance indicators, 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. The Commission shall publish the guidelines by 6 December 2016. This kind of 'soft', supplementary guidance on reporting also reflects a mixed, hybrid (hard and soft) regulatory approach.

The Directive clearly applies techniques developed in the realm of CSR. For instance, the so-called 'comply or explain' principle is clearly manifested in the Directive: "Where 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." (Art. 1, par. 1). Furthermore, the Directive motivates private auditing when it recalls in its Recital (Para. 16.) that statutory auditors and audit firms should only check that the non-financial statement or the separate report has been provided. In addition, it should be possible for Member States to require that the information included in the non-financial statement or in the separate report be verified by an independent assurance services provider (Art. 1, par. 6).

The Directive's regulatory concept is also expansive and innovative in a sense that the required non-financial statement should also include information on the due diligence processes implemented by the undertaking, also regarding, where relevant and proportionate, its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts. The references to due diligence and to the supply chain are important, but rather symbolic achievements. On the one hand, there is no clear guidance on what due diligence should really mean. On the other hand, reporting on supply chain is only required 'where relevant and proportionate', which formulation might lead to diverging interpretation.

The Directive's regulatory concept is also participative inasmuch as it relies on and empowers stakeholders (NGOs, communities, workers, consumers etc.) to pressure companies to produce more robust reports and to hold companies accountable for negative impacts.

As we have already mentioned, the Directive is rather experimentalist in its current form (similarly to most 'new governance'-type regulatory strategies), as its scope is quite limited (approx. 6 000 large companies). However, it might have the potential to further expand its scope in the future (see the above-mentioned 'built-in' review clause). According to some experts, the number of companies ultimately affected may be much higher than initially expected (because of various approaches of national implementation). Furthermore, if those companies required to report start asking their suppliers to provide them non-financial (social etc.) information for their reports, all companies doing busi-

ness with them will feel the pressure of increasing CR disclosure expectations as well.[74] These are possible spill-over effects of the Directive.

It could be a next step to ensure that misleading information provided by companies in non-financial reports can be effectively challenged and sanctioned. Certain consumer protection law, unfair competition law mechanisms are in principle applicable in this sense, but further clarification is needed in this respect. Other prospects for development for the future can be to supplement the duty to disclosure with mandatory auditing and assurance, to systematically test the correctness and validity of the disclosed data, to extend the personal scope of the reporting obligation, to institutionalize the rights of associations (NGOs, trade unions) for class action and to organize structural public support for reporting (e.g. governmental guides, promotional activities, guidelines, incentives etc.). One might suspect that regulating the duty to report as such in not necessarily sufficient in itself. As one study about social reporting in general concludes, "without influential procedures for enforcing the duties of disclosure, a new regulation is in danger of remaining ineffective."[75] This might also be true for the new EU-Directive, even if it represents a promising idea, as described above.

V. CONCLUSIONS - THE CHANGING CHARACTER OF LABOUR REGULATION?

On the one hand, the Directive might be far from being perfect and far from being a 'miracle'. There are many regulatory options about this Directive owing to its tremendously flexible regulatory approach. Its ultimate added-value will largely depend on the methods of implementation on the level of Member States and, at the end of the day, on affected firms' willingness to meaningfully comply. On the other hand, the Directive's main, strong message - mandatory reporting - might mark an important initial step in the 'juridification' (or positivization) of CSR-related soft laws. Furthermore, it might mirror some important, on-going paradigm-shifts in labour law (or in labour-related regulation in a wider sense) in general and might open the door for similarly innovative legislative developments.

Such innovative regulatory methods as mandatory non-financial reporting are clear examples of the fact that the legal sources of labour law in a wide sense and the legal strategies aimed at the advancement of labour law-compliance can be increasingly multifaceted, dispersed and decentred and can also be found beyond the conventional 'brackets' of labour law. Taken into account the well-known recent low willingness and ability

[74] B. Kasemir

[75] Kocher, Klose, Kühn, Wenckebach, p. 27.

of the EU to pass 'direct' social policy, labour law legislation[76], such 'indirect', innovative ways of regulating 'social' matters - as it is the case with mandatory non-financial reporting - should be appreciated. If there seems to be a 'moratorium' on any EU legislation in the fields of 'classical' labour law[77], such indirect ways of regulation should be especially valued as promising supplementary regulatory mechanisms. The strategy to creatively implant and 'smuggle' some 'social' dimension into routine business practices as reporting seems to replace 'direct' social regulatory expectations.

As we have seen, information disclosure as a basically company law-related regulatory strategy has some evident links to labour law, especially from a compliance-oriented perspective. However, at the same time, such innovative regulatory methods alter and challenge some classical pillars of regulating labour law matters. Among others, the focus (object) of regulation, the method of regulation, as well as the force of regulation are re-conceptualized and innovated.

Firstly, if we analyze the main *focus (object) of regulation*, it is fair to generalize that traditional labour law takes the contract (i.e. the employment contract) as the basic pillar and the main point of reference for regulation. This concept is often labelled as the 'Vertragsprinzip', symbolizing the civil law origins of labour law.[78] It is apparently one of the most topical focal points of contemporary discussions of labour law scholarship, how the nature, the scope and the function of the employment contract are changing in modern times.[79] As for information disclosure as a regulatory strategy, it takes the employer - and its market position, organizational culture and self-regulatory potential - as the most important target of regulation. It tries to boost and build on the 'social responsibility' of employers[80] instead of focusing on the contract. In other words, such methods

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[76] As Schlachter formulates it in general: "The probability of convincing the European Council into social policy legislation has become more difficult the more members are present, and due to a striking economic crisis, social policy in many Member States tends to be among the first items to be reduced." M. Schlachter, *Transnational collective bargaining and the institutionalized "social dialogue" at EU level*, Conference Paper, MTA-PTE Research Group of Comparative and European Employment Policy and Labour Law, Recent Developments in Labour Law, Pécs, Hungary, 2012, pp.25-26, http://mta-pte.ajk.pte.hu/index.php?lang=hu&link=konferencia (accessed on 1 May 2015)

[77] *Cf.*: T.Müller, H.Platzer, Wolfgang, Rüb, *Transnational company agreements and the role of European Works Councils in negotiations, A quantitative analysis in the metalworking sector*, ETUI, Report 127, Brussels. p. 14.

[78] *Cf.: R.* Richardi, Der Arbeitsvertrag im Zivilrechtssystem, *Zeitschrift für Arbeitsrecht* 1988/7, p.231.

[79] Cf.:M. Freedland and N. Kountouris, The Legal Characterization of Personal Work Relations and the Idea of Labour Law, In:, G. Davidov and B. Langille (eds.), pp. 190-209; M. Freedland and N. Kountouris, The Legal Construction of Personal Work Relations, *Oxford Monographs in Labour Law*, 2012; A. Perulli, *Economically dependent / quasi-subordinate (parasubordinate) employment: legal, social and economic aspects*, Committee on Employment and Social Affairs of the European Parliament and DG Employment and Employment and Social Affairs, Brussels, 2003; Gyulavári Tamás, A foglalkoztatásijogviszonyokújdimenziója, *Esély*, 22. évf. 1. sz., 2011, pp. 3-23.

[80] See the links to the above-described concept of CSR (Chapter 1.).

of regulation become relatively independent of the contract and try to concentrate on employers' responsibility. With this approach, it is possible to relieve labour regulation of analyzing the nature of the contract, while putting targeted regulatory pressure directly on employers' attitude (for instance, how employers manage their 'branding' and its credibility via social reporting). In this context, regulation strives to give some risk-based 'legal signals'[81] for employers with the ambition of motivating compliance, self-regulation and social responsibility.

Secondly, *the method of regulation* is also under fundamental reconstruction in the ambit of innovative regulatory ideas. As we have already seen, a general tendency is detectable as 'hard-hitting' command and control (CAC) regulation is increasingly rolled back in many fields of labour regulation while reflexive, responsive, softer and light-touch styles of regulation are gradually coming to the forefront. The emerging regulatory terrain of mandatory social reporting is among the best examples for such a paradigm-shift in regulation. It endeavours to bring together hard and soft law approaches, or regulation and self-regulation. It doesn't intend to regulate with full force and in full details, but it leaves a large (but, to some extent, regulated) margin for self-regulation.[82] In other words, regulation tries to express some targeted signals for responsible self-regulation. In this context, regulation is more of a shepherding rather than of a directing nature. Social reporting regulation aims to steer responsible self-regulation by mandating a comparable, transparent public image. Smart, indirect techniques of influencing corporate behaviour step into the place of traditional enforcement.

Thirdly, the *force of regulation (power, 'energy' of compliance)* is also unusual under the innovative regulatory ideas. As a rough generalization, normative state regulation and the various tools of collective voice are the two basic traditional regulatory powers of labour law. These two classical powers are to be used for protecting employees and influencing employers' behaviour. These classical regulatory powers are harshly intruding into the market-logic or at least correcting the market.[83] On the other hand, information disclosure as a regulatory strategy (and other innovative regulatory ideas, such as responsible public procurement, subcontracting liability etc.) is increasingly building on market-based incentives of compliance. In other words, these regulatory concepts try to utilize the market-based fact that employers can be motivated to comply with labour standards and be 'responsible' not only under administrative, regulatory control and collective pressure, but also under some forms of market-based pressure. The market-based pressures and incentives are widespread, fluctuating and dynamic. Such regulatory methods basically build on market-based incentives, reputational incentives (such as better 'branding' and

[81] D. Doorey, (2012): A Model of Responsive Workplace Law, *Osgoode Hall L. J., vol. 50, no.* 47, 2012

[82] See the concept of 'regulated self-regulation'. C. Estlund, Rebuilding the Law of the Workplace in an Era of Self-Regulation; *Columbia Law Review* Vol 105. No. 2., March 2005.

[83] As for the discussion of the relationship between labour law and the market, see especially: S. Deakin

more transparent corporate image) and relational incentives (such as better, more transparent relationship with stakeholders). All of these incentives are generated - normally and originally - by the market, but can be activated, steered and catalyzed by regulation as well. All in all, the function of regulation is to enhance these market-based incentives by boosting self-regulation (or sanctioning the lack of proper self-regulation).

As an overall conclusion, the paper argues that such innovative regulatory methods as mandatory non-financial disclosure can add to a multi-coloured and vibrant regulatory arena for labour law, symbolizing that the law regulating labour cannot be fitted into a single concept. These regulatory mechanisms - as complementary tools - might contribute to overcome the current limitations of traditional labour law mechanisms, however, they can never fully replace the traditional regulatory mechanisms of labour law.[84] Such regulatory strategies might help to fill the gap where traditional labour laws have remained largely ineffective. In general, these regulatory ideas may contribute to the re-vitalization and opening up of the horizon of labour regulation.

[84] One of the main critiques to be raised against such regulatory innovations is that the state intends to shift certain parts of law-enforcement to private actors.