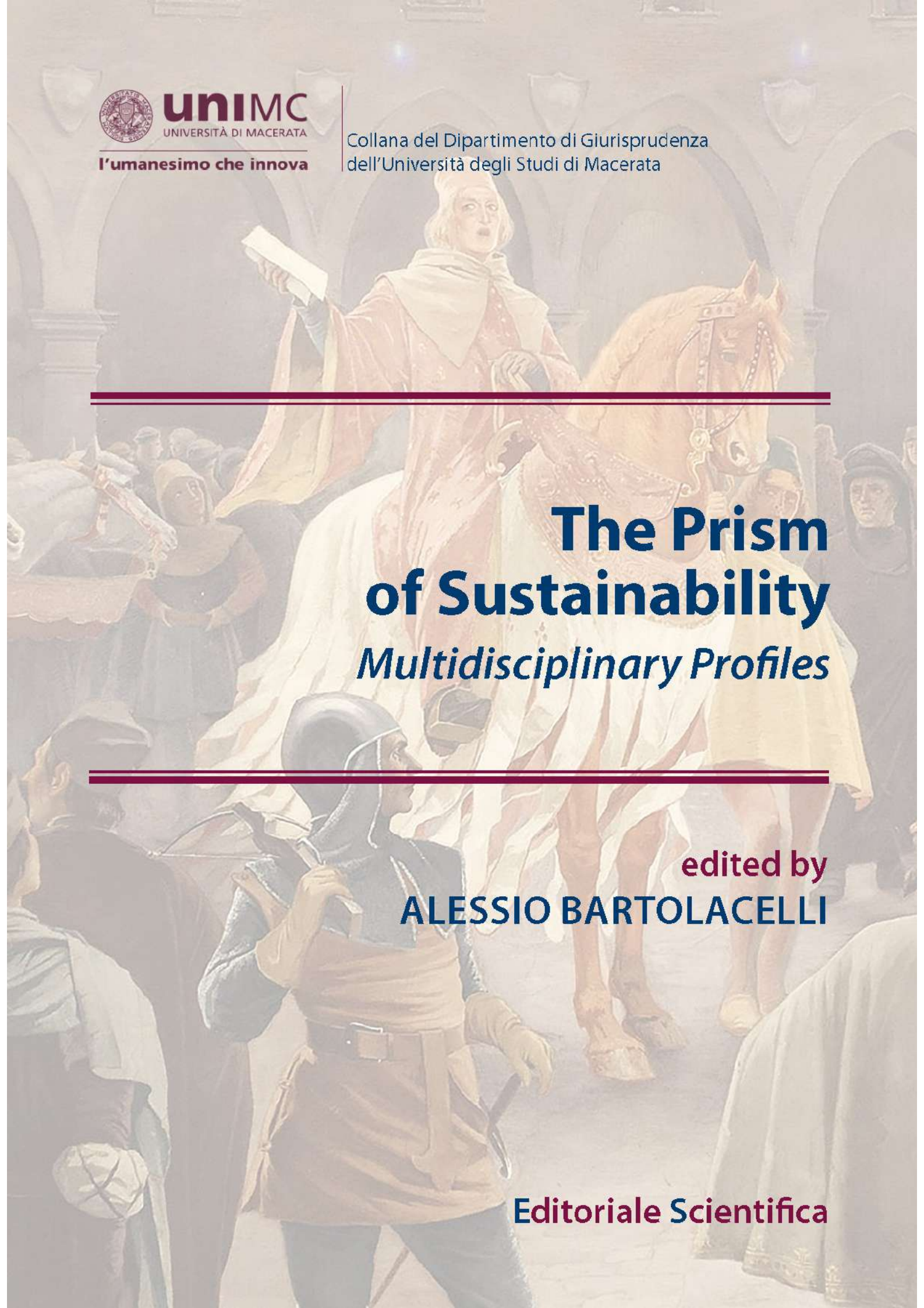

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The Prism of Sustainability

Multidisciplinary Profiles

edited by
ALESSIO BARTOLACELLI

Editoriale Scientifica

THE PRISM OF SUSTAINABILITY

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Editoriale Scientifica
Napoli

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FOREWORD

The vast majority of the essays included in this edited collection are the outcome of the research activities carried out by the authors for the international conference 'The Prism of Sustainability', which took place at the University of Macerata, on March 30 and 31, 2023.

The conference was the final event of the Jean Monnet Chair Business Law in the European Union and Sustainable Economy (BLEUSE) that I had the honour to hold at the University of Macerata, Department of Law, from September 2020 to August 2023. Over the 36 months of its lifespan, the Chair organised more than 100 teaching and research activities. A comprehensive list of all of them can be found on the website of the Chair: www.unimc.it/bleuse.

The final conference embodied the spirit that animated the Chair over its entire duration. The key idea is that sustainability, and sustainable development, are topics to be investigated in a holistic way, with no boundaries. Dealing with these concepts from the juridical standpoint only is a limitation that does not help us to understand the notion of sustainability correctly. Of course, this is even truer if the standpoint is limited to one of the branches of the legal sciences, especially when it is an extremely relevant one, such as Business Law. For this reason, the Chair took the opportunity offered to count on the participation of Key Teaching Staff members from different legal areas, and beyond. Profs *Chiara Bergonzini* (Constitutional Law), *Ninfa Contigiani* (Legal History), *Chiara Feliziani* (Administrative Law), *Benedetta Giovanola* (Moral Philosophy), *Pamela Lattanzi* (Food and Agricultural Law), *Francesca Spigarelli* (Applied Economics) and *Laura Vagni* (Comparative Private Law), all from the University of Macerata, joined me in this adventure. In addition, profs *Janet Dine* (International Development Law, Queen Mary – University of London, UK) and *Christopher M Bruner* (Business Law, University of Georgia, USA) were on board in the Key Teaching Staff. They all carried out personally activities within the Chair, and organised further events that also served as follow-up activities. To all of them, invaluable colleagues and friends, goes my personal gratitude, and the praise for the great job they did in their respective fields of teaching and investigation.

This is also mirrored in the programme of the final conference, and therefore in the content of this book.

The key topic, a sustainable economy, was analysed from different perspectives proper to diverse legal areas. In order to be consistent with the idea of the holistic approach to sustainability already referred to above, in designing the conference we decided to avoid segmenting the topics according to an area-by-area division; after the keynote speech, we preferred to subdivide the entire work into four rather general sections, whose subjects were covered by scholars belonging to different legal areas and with diverse and often complementary points of view. The final two sections were devoted to a case study and to the investigations carried out by early-stage researchers active at the university of Macerata.

Beate Sjåfjell (University of Oslo and College of Europe, Bruges, Sustainability Law), one of the most well-known legal scholars in the field of sustainability worldwide, presents her ideas on sustainability law as an emerging and cross-cutting branch of law in the general introduction to the book. In her chapter, Beate offers a compelling vision of how sustainability studies in the legal area will develop in the coming years, strongly advocating an interdisciplinary approach.

In the first section, the authors debate the interaction of sustainability with legal foundation. The concept of legal foundation we adopted encompasses both public and private law. *Daniele Porena* (University of Perugia, Constitutional Law) provides a meaningful report on how the issues linked to sustainability are dealt with in many Constitutions worldwide, thereby paving the way to the analysis of the 2022 reform of the Italian Constitution that introduced references to environmental sustainability in Arts 9 and 41. This topic is subsequently examined by *Francesco De Leonardis* (Third University of Rome, Administrative Law), with particular attention paid to Art. 41, which in Italy provides for the constitutional framework for the freedom to conduct entrepreneurial activities. Moving on from public to private law, *Christopher M Bruner* (University of Georgia, Business Law) investigates the foundations of the corporation as an institution, in particular considering risk-taking incentives, and how they can be used to promote corporate sustainability. The author focuses in particular on capital regulations and assessable stocks, mainly considering the US corporation.

The second section provides insights into the area of governance, the G of ESG, and reports, with a more specific emphasis on Business Law aspects. However, this part too opens with a contribution by a public law

scholar, *Marco Brocca* (University of Salento, Administrative Law), who considers the relationship between the public and private sectors, examining the paradigm shift currently present in the regulatory prescriptions, and on the opportunities that the circular economy might provide for exploring the cooperation between public and private parties. *Florian Möslein* (University of Marburg, Private and Company Law) opportunely centres his essay on the relationship between sustainability in the governance of a company, and the digitalisation of our societies. The author underlines in particular the way in which companies are currently dealing with sustainability and digitalisation in exactly the same way as society in general, within a framework of a twin transition; as for the companies, he specifically considers the digital aspects that are present in the Corporate Sustainability Due Diligence Directive at the time under discussion in the European Institutions and recently passed. *Deirdre Ahern* (Trinity College Dublin, Corporate Law) copes with another European piece of legislation, i.e. the Sustainability Reporting Directive. She focuses specifically on the implications of the rules included therein for small and medium-sized enterprises, including those that would in principle be excluded by its direct scope of application. She proposes to adopt a regulatory approach that requires a limited amount of information from the SMEs present in the value chain, as acting otherwise would be detrimental to them and, therefore, to their fundamental role in the economy. The section concludes with a piece by *myself* (currently: University of Modena e Reggio Emilia, Italian and European Company Law), on the different strategies for involving stakeholders in a company's governance, depending on their participation in the company's financial structure. It highlights how the shareholders should in any case be in the position to define the pervasiveness of the stakeholders' involvement.

The three contributions of the third section address in particular the social dimension of sustainability, specifically considering topics linked to social rights. *David Monciardini* (University of Turin, Business, Law and Sociology) considers the social foundations of sustainability, focussing on the relationship between sustainability compliance and corporate law, using a socio-legal approach. *Pedro Oliveira* (Business Europe, Director for Legal Affairs) describes in particular the Enterprises' perspective with reference to the Corporate Sustainability Due Diligence Directive. In this respect, *Sophie Schiller* (University Paris-Dauphine, Private and Company Law) explains one of the most relevant national predecessors of the European proposal, i.e.: the French Act on the duty of vigilance of parent com-

panies, also providing case law evidence of the application of this piece of legislation.

In the fourth section, the attention is directed to the environmental profile of sustainability and looks at the green transition. *Andrea Giordano* (Italian Supreme Audit Institution, Italian Ministry of Health) considers the general topic of climate justice, focussing on the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights, on the International Conventions and Protocols on climate change, and on a description of the different models for the promotion of climate justice present in selected States shining the spotlight on the recent Italian *Giudizio universale* case. *Paola Chirulli* (Sapienza – University of Rome, Administrative Law) tackles the issue carefully looking at European energy policies and provisions and at the effects of their downfall on Italian Law. Finally, *Daniele Calisti* (European Commission, Directorate General for Competition) examines the sustainability debate, looking at it from the Antitrust point of view. He discusses the role of state aid (with a specific reference to the revised rulebook), sustainability agreements and merger enforcement, also with a view to the correction of market failures and the promotion of sustainability.

The fifth section is devoted to investigating a specific field of application for sustainability in action, concentrating on different types of urban environments. *Marco Calabrò* (University of Campania "Luigi Vanvitelli", Administrative Law) discusses the participatory role of the community in shaping the urban environment, and how this can be seen as a way to implement an inclusive dimension of sustainability. A meaningful case of sustainable revitalisation of small abandoned villages in Sicily is considered by *Alessandra Pera* and *Nicoletta Patti* (University of Palermo, Comparative Law), who first examine the solidarity dimension of social sustainability, and the relationship of sustainability with soil consumption, and then focus on the promotional measures like "one house for one euro" for achieving better governance of abandoned properties. *Simona Mariani* (University of Macerata, Food Law) explores the aspects of urban agriculture, in particular looking at European plant variety protection and at how this can foster a real innovation in the field of sustainable agriculture even outside rural areas. Finally, *Simona Tiribelli* (University of Macerata, Moral Philosophy) and *Naroa Coretti Sánchez* (Massachusetts Institute of Technology, City Sciences) provide a description of the phenomenon of the use of artificial intelligence in an urban environment and the ethical aspects of this situation,

focussing on sustainability as an ethical value, that would effectively shape sustainable smart cities.

The final section is a miscellany of contributions by early-stage researchers at the university of Macerata, who are currently working on subjects linked to sustainability. *Elena Codoni* (Joint PhD in Business Law, with UPEC – University Paris-Est Créteil) examines the Italian *Società benefit* and the French equivalent *Sociétés à mission*. *Clara De Chirico* (PhD candidate in Business Law, joint doctorate with the University of Ottawa) considers aspects of sustainability in Canadian law, with a specific focus on indigenous communities. *Davide Clementi* (PhD candidate in Private Comparative Law) copes with the topic of environmental courts in Asian countries, focussing in particular on India and China. *Giacomo Menegus* (Assistant Professor of Constitutional Law) specifically investigates the key critical profiles of the legal frameworks of sustainable tourism in Italy. Finally, *Cristiana Lauri* (Research Fellow in Administrative Law) considers the governance of smart sustainable cities, with a specific focus on urban mobility.

In shaping the content of both the conference and this book, we tried to cover the widest possible variety of perspectives in the broad area of sustainability, arousing curiosity about topics that had not been extensively investigated before, and trying to establish a dialogue between different legal areas and between the academia and the world outside it. The idea behind 'prism' in the title of this book is exactly this: the concept of sustainability enters as a single beam of white light, and exits as a wide spectrum of colours, each of them signifying a different legal profile. I personally hope that by means of this collection of essays, the original white light has been at least partially re-established; and re-established just to be dispersed again, with new forthcoming research.

My deep gratitude goes to all the speakers at the conference and to all the authors that agreed to submit essays for publication in this collection. The extremely high level of the contributions is the best added value and an enduring legacy for the Jean Monnet Chair BLEUSE; and, naturally, a new starting point for further investigation.

Finally, I must acknowledge the people that made the implementation of the Jean Monnet Chair BLEUSE, and this very collection, possible. First of all, my family who tirelessly supported me, and indulged my recurring physical and mental absences, over these three years: thank you so much.

Many priceless thanks to the wonderful members of the Key Teaching Staff: Benedetta, Chiara, Chiara, Christopher, Francesca, Janet, Laura, Nin-

fa, Pamela. Thank you very much indeed for all what you have done, for the continuous support and for the ideas. Thanks a lot for your time, and thanks a lot for your friendship. When we decided to submit an application for the Jean Monnet Chair, the idea was that this demanding challenge could only be met if the activities were carried out together with people who, besides having the highest scientific qualification, also had exceptional human skills. At the end of this adventure, I can convincedly confirm that famous statement that if you love your job, and the people you work with, you will never work a day in your life. This of course does not mean relaxing all the time, but to enjoy every single day and its struggles.

Many thanks to the Department of Law of the University of Macerata and to its then Dean, Stefano Pollastrelli, who provided valuable support for the entire duration of the Jean Monnet Chair. And many thanks to the PhD course in Law and Innovation (then coordinator: Massimo Meccarelli), for hosting many activities organised by the Chair. The Chair and the PhD course mutually took advantage of such activities, developing a dialogue that really contributed to a dissemination of scientific reflection regarding law and sustainability.

I am also deeply grateful to Elena Codoni and Clara De Chirico for their valuable support in the editing of this book; many thanks also to Sarah Jane Barnard for the English proofreading of the essays.

This being said, it is now time to allow the book to speak for itself, hoping that it may really inspire new endeavours in its readers.

Castelvetro di Modena, March 2025 Alessio Bartolacelli

Beate Sjåfjell*

GENERAL FRAMEWORK
FROM SUSTAINABILITY IN LAW TO SUSTAINABILITY LAW

1. *An emerging new field*

This thought piece sketches out a preliminary conceptualisation of 'sustainability law', as an emerging new field.[1] My aim with this is to contribute to the discussion of how we as legal scholars can respond constructively to the fragmentation, silo thinking and lack of policy coherence, which I have seen in my research specifically in the context of European Union (EU) law. In this piece I will concentrate on EU law and regulation of business as my examples throughout,[2] while sustainability law is relevant to all jurisdictions, all areas of law and all societal issues.

The concept of sustainability, that I use it in my work with colleagues, is research-based, and not limited to dealing with any one of the crises of our time. Climate change, often referred to as the greatest challenge of our time, has been declared as 'code red' for humanity.[3] Yet, sustainability science – specifically the planetary boundaries framework – presents a whole range of 'code reds', of ecological limits that are being transgressed, with generally

* My warmest thanks to Alessio Bartolacelli for inviting me to give a keynote presentation with the title of this paper, which has very much inspired this work, and to participants at the conference for their stimulating and thought-provoking questions and comments. I am also grateful to my colleagues and friends with whom I have developed much of my thinking reflected in this piece, especially and most recently, Sarah Cornell, Eelke Heemskerk, Jukka Mähönen, and the participants of the Daughters of Themis workshops 2022, 2023 and 2024.

[1] While I draw on the work in the Research Group Sustainability Law at the Faculty of Law, University of Oslo, and various collaborative research efforts, the views presented in this thought piece are my own and do not necessarily reflect those of my colleagues.

[2] I go deeper into my area of specialty in what may be seen as an emerging field within an emerging field, in Beate Sjåfjell, 'Conceptualising Corporate Sustainability Law' (2024) <https://papers.ssrn.com/abstract=4865659> accessed 13 July 2024.

[3] 'IPCC Report: "Code Red" for Human Driven Global Heating, Warns UN Chief' (*UN News*, 9 August 2021) <https://news.un.org/en/story/2021/08/1097362> accessed 27 December 2021.

worsening trends.[4] Sustainability is also about social justice,[5] about securing the very bases for good lives and well-functioning societies now and for the future.[6] Sustainability is about safe *and* just.[7] Working towards sustainability in a European context also entails confronting Europe's colonial history and its contribution to the unsafe and unjust conditions in many parts of the world, historically and through its current neocolonialism.[8] In the context of business, my concern is confronting European businesses' neocolonialism through its globalised activities.[9]

[4] Johan Rockström and others, 'A Safe Operating Space for Humanity' (2009) 461 Nature 472 <https://www.nature.com/articles/461472a> accessed 22 November 2020; Will Steffen and others, 'Planetary Boundaries: Guiding Human Development on a Changing Planet' (2015) 347 Science 1259855 <https://science.sciencemag.org/content/347/6223/1259855> accessed 22 November 2020; Linn Persson and others, 'Outside the Safe Operating Space of the Planetary Boundary for Novel Entities' (2022) Environmental Science & Technology <https://doi.org/10.1021/acs.est.1c04158> accessed 18 January 2022; Lan Wang-Erlandsson and others, 'A Planetary Boundary for Green Water' (2022) Nature Reviews Earth & Environment 1 <https://www.nature.com/articles/s43017-022-00287-8> accessed 27 April 2022; Katherine Richardson and others, 'Earth beyond Six of Nine Planetary Boundaries' (2023) 9 Science Advances eadh2458 <https://www.science.org/doi/10.1126/sciadv.adh2458> accessed 14 September 2023.

[5] Sarah E Cornell, 'We Need to Talk About Gender in the "Safe Operating Space for Humanity"' in Beate Sjåfjell, Carol Liao and Aikaterini Argyrou (eds), *Innovating Business for Sustainability: Regulatory Approaches in the Anthropocene* (Edward Elgar 2022).

[6] Kate Raworth, 'A Safe and Just Space for Humanity: Can We Live within the Doughnut' (2012) Oxfam Discussion Papers <https://www-cdn.oxfam.org/s3fs-public/file_attachments/dp-a-safe-and-just-space-for-humanity-130212-en_5.pdf>. Leaving no-one behind is set out as a universal value in Agenda 2030,

'Ultimately, leaving no one behind requires the transformation of deeply rooted systems — economic, social and political, governance structures and business models at all levels, from local to global', United United Nations, 'Leaving No One Behind' (*United Nations*) <https://www.un.org/en/desa/leaving-no-one-behind> accessed 27 March 2024.

[7] Melissa Leach, Kate Raworth and Johan Rockström, 'Between Social and Planetary Boundaries: Navigating Pathways in the Safe and Just Space for Humanity' in *World Social Science Report 2013: Changing Global Environments* (OECD Publishing 2013) <https://steps-centre.org/blog/wssr/> accessed 22 November 2020.

[8] Malcolm Ferdinand, *Decolonial Ecology: Thinking from the Caribbean World* (Wiley 2021). Neocolonialism may be defined as 'the control of the economic and political system by foreign actors despite formal decolonization', Aram Ziai, 'Postcolonial Critique of Economic Development' in *Handbook on Critical Political Economy and Public Policy* (Edward Elgar Publishing 2023).

[9] Jason Hickel, *The Divide: A Brief Guide to Global Inequality and Its Solutions* (William

In Section 2, I discuss how law has failed – and how law still can be a key piece in the jigsaw puzzle for sustainability. In Section 3, I sketch the contours of Sustainability Law as an emerging new field. Section 4 presents concluding reflections.

2. *Law has failed – and law can redeem itself*

Law can, and often does, set out overarching objectives for society, as we see in many national constitutions and in the EU Treaties. Law is also amongst society's most powerful tools for achieving overarching objectives.

The aim here is not to contribute to the literature on the role of law or theoretical approaches to law,[10] but rather to illustrate the significance of law, and concurrently, the importance of critical and teleological analyses of law.

Law's significance includes its constitutive role, establishing legal positions and rights and duties. Law further has a conceptualising role – law's conceptualisations of 'human rights', and 'companies', as two examples, influences, to some degree or other, how these concepts are perceived. This is not to say that law regulates behaviour or perceptions alone, as I will return to below. Indeed, changes in law may only come about – or be effective – if there is a societal readiness for the change, and through support by civil society or specific actors. Yet, law can also change social norms, even moral norms.[11]

Law, accordingly, has its limitations, which go beyond law not being omnipotent. Law is not value-neutral; it never can be. Yet discussions of law and how to use law tend to be framed within often unacknowledged path-dependent contexts, forgetting, it seems, that law is not a neutral societal tool. The choices of what law is used for (legislative objectives), which behaviours, parties, or relationships to regulate, and how to regulate (soft, enabling approaches or hard law with severe enforcement at two ends of a

Heinemann 2017).

[10] Eg, Simon Deakin and others, 'Legal Institutionalism: Capitalism and the Constitutive Role of Law' (2017) 45 Journal of Comparative Economics 188 <https://www.sciencedirect.com/science/article/pii/S0147596716300087> accessed 27 February 2024.

[11] Jon Elster, *Explaining Social Behavior: More Nuts and Bolts for the Social Sciences* (2nd edn, Cambridge University Press 2015).

spectrum), are all decisions that are influenced by overarching societal goals as perceived through the lens of the worldviews, and explicit and implicit values, of the decision-makers. Law tends to be a tool for the powerful in the specific time and place. It can be and has been used to distribute power, to create and to enforce new rights, to rectify old and current wrongs. Yet, only when those in power have been at least to some extent ready to let law do this. This has always been clear for those not being in power and not being prioritised by decision-makers.[12]

Indeed, in addition to law having a mechanistic and siloed approach, and tending to be rigid and backward-looking,[13] law used uncritically, is a tool for path-dependent perpetuation of inequalities. The regulation of business exemplifies this. As Baarts et al. set out: 'legal entitlements impact the relative power of social actors, and as a consequence, the distribution of present and future resources among such actors'.[14] The authors also highlight how 'law resides at the heart' of global value chains structuring of globalised business,[15] to which I return below (Section 3.2).

As Capra and Mattei highlight, the discussions of societal approaches to the grand challenges of our time are often framed as being a choice between private and public – between business and markets, on the on the hand, or state on the other. But these are just two sides of the same coin; both sides are about property and power, and profits.[16] And indeed, the social norm of profit maximisation on the company level, and of infinite economic growth on the state level, are key barriers to the transformation to sustainability.[17] Alternative approaches concentrate on commons, community and collaboration.[18]

[12] Ferdinand (n 8).

[13] Eg Fritjof Capra and Ugo Mattei, *The Ecology of Law: Towards a Legal System in Tune with Nature and Community* (Berrett-Koehler Publishers 2015).

[14] The IGLP Law and Global Production Working Group, 'The Role of Law in Global Value Chains: A Research Manifesto' (2016) 4 London Review of International Law 57, 68 with further references.

[15] Ibid 61.

[16] Capra and Mattei (n 13).

[17] See further in Section 3.2. below.

[18] Capra and Mattei (n 13); Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press 1990); Elinor Ostrom, 'Polycentric Systems for Coping with Collective Action and Global Environmental Change' (2010) 20 Global Environmental Change 550 <http://www.sciencedirect.com/science/article/pii/S0959378010000634> accessed 11 June 2020.

Currently, there is an inverted relationship between competence of law and need for regulation. A growing international body of law aims to promote corporate sustainability, but it is fraught with the weaknesses of international law: often strong on goals and vague on detailed responsibilities, addressing not the business actors directly but the nation states, and often lacking enforcement possibilities. International law depends on regional actors and nation states to fulfil these roles. Breaking down horizontal as well as vertical silos, and rethinking the power, the significance and the roles taken by or allocated to the individual actors in globalised business,[19] are crucial steps towards law that actively and coherently works towards sustainability.

Sustainability as an overarching global societal goal, with its inherent requirement for a fundamental transformation, can, in the best case, break through such established constrains of how to think about law – and how to regulate. It is easy to say that law has failed; with its silo-thinking, path-dependency and perpetuation of inequality. And yet, law has potential to redeem itself. The silos are beginning to crack, as the regulatory ecology analysis below in Section 3.2 illustrates.

3. *Sustainability law*

3.1. *Sustainability Law as an emerging new field*

Over the last years, 'sustainability law' has increasingly become used as an umbrella term for various research activities, as well as by consultancies; the latter especially in light of EU law developments regulating finance, business and products for sustainability.[20] Contributions discussing sustainability law as a (potential) distinct field of law, appear often to concentrate on environmental law and usually global (international) law.[21] Sustainability law and related terms are used to present normative approaches to how law

[19] Milan Babic, Jan Fichtner and Eelke M Heemskerk, 'States versus Corporations: Rethinking the Power of Business in International Politics' (2017) 52 The International Spectator 20 <https://www.tandfonline.com/doi/full/10.1080/03932729.2017.1389151> accessed 10 June 2021.

[20] Further below in Section 3.2.

[21] Eg Marco E Grasso, *Resilience and Sustainability in Law: Theoretical and Critical Approaches - Cambridge Scholars Publishing* (Cambridge Scholars Publishing 2021). Grasso also speaks about sustainable development law, and resilience law.

should be shaped and understood, usually concentrated on environmental aspects of sustainability.[22]

The approach that we have taken in the Research Group Sustainability Law, based at the Faculty of Law in Oslo, is to see sustainability law 'an emerging field of law that aims to identify, analyse and propose normative solutions to the fundamental environmental, social and governance problems of our time'.[23] Specifically, our objective is to 'conduct interdisciplinary analyses of law with the aim of identifying normative solutions that contribute to global sustainability'.[24]

Recognising the varieties of use and abuse of 'sustainability' (and 'sustainable development'), we explicitly take as our entry point the research-based concept of sustainability briefly introduced above (Section 1). We therefore position our understanding of sustainability law within the conceptualisation of 'safe and just' as the goal; mitigating pressures on planetary boundaries and securing social foundations for humanity now and for the future.[25] As Sarah Cornell and I discuss elsewhere, this understanding of sustainability with roots going back at least to 1975,[26] entails finding out how to deal justly with unsafe conditions, and safely with the unjust ones.[27]

[22] Geoffrey Garver, 'The Rule of Ecological Law: The Legal Complement to Degrowth Economics' (2013) 5 Sustainability 316 <https://www.mdpi.com/2071-1050/5/1/316> accessed 28 March 2024. Garver discusses several such approaches, including Berry's 'ecological law', Boyd's 'sustainability law', and Cullinan's 'wild law', and presents 'ecological law' as a normative rule of law approach, a 'rule of ecological law', as a complement to degrowth, and in light of the shortcomings of environmental law, ibid, p. 318 with further references. See further Kirsten Anker and others (eds), *From Environmental to Ecological Law* (Routledge 2021).

[23] Research Group Sustainability Law, University of Oslo, <https://www.jus.uio.no/sustainabilitylaw/> accessed 28 March 2024.

[24] ibid.

[25] Leach, Raworth and Rockström (n 7).

[26] UNEP/UNCTAD, 'The Cocoyoc Declaration: Adopted by the Participants in the UNEP/UNCTAD Symposium on "Patterns of Resource Use, Environment and Development Strategies"' (Cocoyoc, Mexico, 8-12 October 1974), *International Organization* 29/3 (1975) 893-901.

[27] Beate Sjåfjell and Sarah Cornell, 'What the Actual ….? Tensions in the Science-Business-Policy Interface for Global Sustainability' European Law Open 3, no. 3 (2024): 529–60. https://doi.org/10.1017/elo.2024.34.

Figure 1. Sustainability Law, University of Oslo

By setting out an explicit aim of contributing to sustainability, we are positioning sustainability law as a teleological field. This also reflects my own position as a sustainability scholar and stands in contrast to the often masculinist idea of an 'objective' scholar as one that is 'neutral'; un-interested. It also, and connectedly, stands in contrast to the legal positivism that has been so dominant over the decades, including in my own home base of Scandinavia.[28] A specific mono-disciplinary form of legal dogmatic research still appears to be regarded as the most valid approach to legal analysis, and positioning legal analysis within an overarching objective of global sustainability is often regarded with suspicion, quick to be labelled as 'political', 'value-based' or 'activistic'.[29] With often little distinction in legal academia between the role of a legal practitioner and a legal scholar,[30] discussing whether the law in a specific area is good or just, is something that at best (if not excluded) should be

[28] For an introduction to modern legal positivism, see Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (6th edn, Oxford University Press 2021) ch 4.

[29] This is based on anecdotal evidence over the more than twenty years that I have worked at the Faculty of Law, University of Oslo, from my doctoral thesis onwards through major international projects, and as a scholar, supervisor and mentor.

[30] Hans Petter Graver, 'Vanlig Juridisk Metode? Om Rettsdogmatikken Som Juridisk Sjanger' (2008) 121 Tidsskrift for Rettsvitenskap 149 <https://www.idunn.no/doi/abs/10.18261/ISSN1504-3096-2008-02-01> accessed 15 July 2024.

delegated to a separate section at the end of a thesis or article on 'legal policy' or 'legal-political' reflections.[31]

However, law can never be value neutral and legal scholarship should not pretend that it is. An aim of being 'objective' and un-interested may unintentionally lead to perpetuating value choices in the theoretical underpinnings and policy strategies of any area of law, without conscious reflection. Specifically in my area of business law, as I wrote in my doctoral thesis published in 2009:

> company law scholars who regard companies as the shareholders' property, with the only purpose being to maximize returns for shareholders, and who use this position as a basis for their research, have either made some unsubstantiated value choices, or – more likely – have, without reflection, accepted these postulates as facts, devoid of normative content. However, such postulates are neither facts nor value neutral.[32]

In my own research, I do not see it as sufficient to analyse the underlying value choices and legislative objectives. I go beyond that. Considering the convergence of crises in our time, with extreme exploitation of people and destruction of the environment, I take the overarching, research-based goals of a safe and just space as my research compass. This requires a reflective approach, where I position myself as a sustainability-oriented, feminist scholar, with awareness of my privileged position as a white European law professor.[33] It also entails continuous striving to be clear on when my conclusions of interdisciplinary legislative analysis are based on what the law is and when it (also) includes my suggestions on how law should change. This is, however, no more than any legal scholar does – or should do.

A teleological approach, with contributing to sustainability as the overarching aim, fits well with EU law analyses. Sustainability is amongst the

[31] This advice is so deeply internalised in students at the Faculty of Law in Oslo that it often takes a lot of encouragement and mentorship for students writing master theses to take an alternative approach to this rather old-fashioned way of distinguishing between *de lege lata* and *de lege ferenda*.

[32] Beate Sjåfjell, *Towards a Sustainable European Company Law: A Normative Analysis of the Objectives of EU Law* (Kluwer Law International 2009) 4.

[33] See Sarah E. Cornell and Beate Sjåfjell, 'Feminist Theory in the Regulatory Ecology' (November 05, 2024). University of Oslo Faculty of Law Research Paper *No. 2024-11*, Available at SSRN: https://ssrn.com/abstract=5010031; Carla Rice, Elisabeth Harrison and May Friedman, 'Doing Justice to Intersectionality in Research' (2019) 19 Cultural Studies ↔ Critical Methodologies 409 <https://doi.org/10.1177/1532708619829779> accessed 11 May 2023.

overarching objectives for the EU, as set out in the EU Treaties, to achieve the EU's aim of promoting 'peace, its values and the well-being of its peoples'.[34] The EU is to 'work for the sustainable development of Europe',[35] and in its 'relations with the wider world', the EU 'shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter'.[36]

In my analysis, I see sustainability as the overarching objective – encompassing a range of interconnected goals of environmental, social, and economic development. EU legal method is teleological and dynamic,[37] and Treaty objectives have direct legal relevance.[38]

In a mono-disciplinary legal analysis, what sustainability entails as an overarching EU law objective would be found primarily through an analysis of legal sources. In an interdisciplinary analysis, law does not give the answers alone to what sustainability means; rather the understanding of sustainability as a legal concept must also draw on sustainability science and sustainability research.[39] This is also for me about taking law seriously. An analysis of over-

[34] Consolidated Version of the Treaty on the European Union (TEU) [2016] OJ C202/1, art 3(1), with the values set out in art 2: 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.' Peace is historically also a foundational aim of that which is now the EU. For the interconnectedness between peace and sustainability, see Beate Sjåfjell, 'No Peace Without Sustainability, No Sustainability Without Peace. The Implementation of EU Treaty Goals' in Inge Govaere, Sacha Garben and Eleanor Spaventa (eds), *The Impact of War (in Ukraine) on the EU* London: Hart Publishing, in print 2025, Chapter 5. To be available at https://www.bloomsbury.com/uk/impact-of-war-in-ukraine-on-the-eu-9781509986088/. Chapter on file with current author.

[35] TEU, art 3(3).

[36] TEU, art 3(5).

[37] The EU 'shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties', art 3(6) TEU; Anthony Arnull, *The European Union and Its Court of Justice* (2nd edn, Oxford University Press 2006), 620-621 on the European Court of Justice's teleological, contextual and dynamic method of interpretation.

[38] My analysis of the case law of the Court of Justice of the European Union in my doctoral thesis, further confirmed this; Sjåfjell, *Towards a Sustainable European Company Law* (n 32).

[39] See eg Beate Sjåfjell and Jukka Mähönen, 'Interdisciplinarising Legal Theory: Towards a Reconceptualisation of Business Law in an Era of Complexity' (2020) University of Oslo Faculty of Law Research Paper, 2020-36 <https://ssrn.com/abstract=3731289> accessed 22

arching legislative objectives should not be constrained through inadequate policy follow-up. Rather, taking seriously overarching legislative objectives, is a basis for a critical analysis of policy follow-up. Any area of EU law and policy is intended, as a matter of EU law, to also contribute to EU's overarching Treaty objectives. This is reflected in EU Treaty law, which sets out duties for EU institutions and, to a more limited extent, for Member States, to work towards the achievement of EU Treaty aims and objectives.[40] As set out explicitly in case law, a Member State's duty of loyalty according to the Treaty cannot be constrained with reference to lack of action by other Member States or EU institutions.[41] The loyalty is owed to the EU Treaties and to the overarching objectives set out there, not to EU institutions or other Member States.

Further, law cannot exist in a vacuum – law is also about regulating actors, institutions and actions in the world, with legislative objectives. Assessing whether law is achieving its objectives, requires empirical analysis, which cannot be disconnected from what, for example, environmental science has identified as ecological limits for human prosperity on this planet.[42]

Contributing to sustainability as the goal and as the entry point to the analysis, entails taking an objective-oriented approach with strong—or rather real—sustainability as the legislative goal. This requires a policy-coherence approach that embraces complexity and uncertainty, as well as employing evidence-based law in context.[43]

The EU-funded project Sustainable Market Actors for Responsible Trade (SMART, 2016-2020),[44] exemplifies such an approach. We mapped,

November 2020, where we cite Dershowitz on there being 'no season for law shorn of other disciplines', A M Dershowitz, 'The Interdisciplinary Study of Law: A Dedicatory Note on the Founding of the NILR Introduction' (2008) 1 Northwestern Interdisciplinary Law Review 3.

[40] TEU, arts 3(6) and 4(3). Article 4(3) sets out that each institution of the EU and each Member State is obligated to do what they can to 'assist each other in carrying out tasks which flow from the Treaties' and refrain from doing anything that may 'jeopardise the attainment of the Union's objectives.'

[41] John Temple Lang, 'Article 10 EC: The Most Important "General Principle" of Community Law' in Ulf Bernitz, Joakim Nergelius and Cecilia Cardner (eds), *General Principles of EC Law in a Process of Development* (Kluwer Law International 2008), Chapter 1.4.

[42] Eg, Sjåfjell and Cornell (n 27).

[43] Hanna Ahlström and Beate Sjåfjell, 'Why Policy Coherence in the European Union Matters for Global Sustainability' (2023) 33 Environmental Policy and Governance 272 <https://onlinelibrary.wiley.com/doi/abs/10.1002/eet.2029> accessed 2 September 2023.

[44] Sustainable Market Actors for Responsible Trade (SMART, 2016-2020) <www.smart.uio.no/> accessed 15 July 2024.

analysed and identified barriers and possibilities for more sustainable market actors,[45] and on that basis, we drew up and submitted reform proposals to the European Union.[46] The reform proposals were not an add-on to our interdisciplinary research project; they were explicitly set out as 'deliverables' when we submitted our funding proposal, and have contributed to academic debates, to further research activities, as well as to policymaking.[47]

The overarching theme and academic goals of the Research Group Sustainability Law (2022-2027) are also a part of the SMART legacy, reflecting our desire to continue working towards contributing to sustainability. The field of sustainability law is, as we see it, not constrained by established fields of law and their theoretical underpinnings and assumptions, nor by perceived boundaries between public law and private law, nor those between international law, regional and national law, nor between areas of law such

[45] Beate Sjåfjell and others, 'Obstacles to Sustainable Global Business. Towards EU Policy Coherence for Sustainable Development' (2018) SSRN Scholarly Paper ID 3354401 <https://papers.ssrn.com/abstract=3354401> accessed 30 September 2019.

[46] For an overview of the reform proposals, see Beate Sjåfjell and others, 'Supporting the Transition to Sustainability: SMART Reform Proposals' (2019) SSRN Scholarly Paper ID 3503310 <https://ssrn.com/abstract=3503310> accessed 2 February 2020; for the detailed proposals see Beate Sjåfjell and others, 'Securing the Future of European Business: SMART Reform Proposals' (2020) University of Oslo Faculty of Law Research Paper No 2020-11 <https://ssrn.com/abstract=3595048> accessed 16 September 2024; Eléonore Maitre-Ekern, Mark B Taylor and Maja van der Velden, 'Towards a Sustainable Circular Economy. SMART Reform Proposals' (2020) University of Oslo Faculty of Law Research Paper No 2020-12 <https://ssrn.com/abstract=3596076> accessed 16 September 2024; Marta Andhov and others, 'Sustainability Through Public Procurement: The Way Forward – Reform Proposals' (2020) University of Oslo Faculty of Law Research Paper No 2020-09 <https://ssrn.com/abstract=3589168> accessed 11 April 2023. This work also formed the basis for a range of publications during the SMART Project (see www.smart.uio.no/publications/) and in the years after SMART was concluded, including my own contributions, eg Beate Sjåfjell, 'A General Corporate Law Duty to Act Sustainably' in Hanne S Birkmose, Mette Neville and Karsten Engsig Sørensen (eds), *Instruments of EU Corporate Governance: Effecting Changes in the Management of Companies in a Changing World* (Kluwer Law International 2023) <https://ssrn.com/abstract=4224255> accessed 20 March 2023.

[47] SMART legacy research activities include several new research projects and the activities of the SMART Research Network, see <www.jus.uio.no/english/research/areas/sustainabilitylaw/networks/the-smart-network/> accessed 31 August 2024 (under History of the Network and at the time of the writing, under Call for papers).

as company law, intellectual property law and consumer law.[48] As outlined above, this resonates with the EU's policy coherence approach and its teleological, dynamic method.

In the Research Group Sustainability Law, we have chosen to concentrate on the three areas of sustainable business, sustainable finance, and sustainable circular economy, based on the expertise and research interests of our members. For us these are accordingly broad and interdisciplinary categories, integrating different fields as law. In the next section I briefly present the evolving 'regulatory ecology' (explained below) for sustainable business.

3.2. *The evolving regulatory ecology for sustainable business in EU law*

Taking the current integration of sustainability in EU law as a case study, we can see that the unprecedented efforts of the European Union to promote sustainable business, are world-leading – and yet clearly insufficient. The continued silo-thinking and lack of policy coherence that hinders the achievement of the EU's overarching sustainability goals, can be understood through employing a regulatory ecology approach, as can the hope for breaking down silos and achieving policy coherence. I illustrate this below with two examples: the EU's Sustainable Finance initiative and its Sustainable Corporate Governance initiative.

Regulatory ecology may be understood as an analytical lens for analysing the interactions between and influence of different modes of regulation, in a very broad sense of 'regulation'.[49] The approach draws on the work of Lawrence Lessig.[50] The term 'regulatory ecology' was apparently first coined by Ian Hosein et al.[51] and developed further by Maja van der

[48] Research Group Sustainability Law, University of Oslo <https://www.jus.uio.no/sustainabilitylaw/> accessed 28 March 2024.

[49] See also Christine Parker, 'The Pluralization of Regulation' (2008) 9 Theoretical Inquiries in Law 349 <https://www.degruyter.com/document/doi/10.2202/1565-3404.1189/html> accessed 26 April 2024.

[50] Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books 1999).

[51] Ian Hosein, Prodromos Tsiavos and Edgar A Whitley, 'Regulating Architecture and Architectures of Regulation: Contributions from Information Systems' (2003) 17 International Review of Law, Computers & Technology 85 <https://doi.org/10.1080/13600860320000631 47> accessed 27 December 2021. Maja van der Velden (2006), A license to know: Regulatory tactics of a global network, in F. Sudweeks / H. Hrachovec / C. Ess, eds, *Cultural Attitudes Towards Communication and Technology*, Tartu, Estonia: Murdoch University, 2006, 555–563.

Velden,[52] and myself together with Mark B. Taylor.[53] Regulatory ecology was an important boundary object, connecting scholars from different disciplines already from the proposal-writing stage of the SMART Project, and throughout the life of the project.[54] In the work I have been involved in, we have sought to position this intrinsically interdisciplinary approach within a teleological systems-theoretic understanding of the interconnectedness of the social-ecological systems of this world, based on the ontological view that the world consists of interdependent systems of ecosystems and human society, which is crucial to understanding what societal goals of sustainability should entail and what it will take to achieve them.[55]

[52] Maja van Der Velden, 'Design as Regulation: Opportunities and Limitations for Sustainable Mobile Phone Design' in J Abdelnour-Nocera, M Strano, C Ess, M van der Velden and H Hrachovec (eds), *Culture, Technology, Communication. Common World* (Springer International Publishing 2016) 32–54.

[53] Beate Sjåfjell and Mark Taylor, 'Planetary Boundaries and Company Law: Towards a Regulatory Ecology of Corporate Sustainability' (2015) University of Oslo Faculty of Law Research Paper No 2015-11 <https://ssrn.com/abstract=2610583> accessed 8 January 2018; Beate Sjåfjell and Mark B Taylor, 'Clash of Norms: Shareholder Primacy vs. Sustainable Corporate Purpose' (2019) 13 International and Comparative Corporate Law Journal 40 <https://ssrn.com/abstract=3444050> accessed 26 January 2020.

[54] Maja van der Velden and Beate Sjåfjell, 'Thinking with Care: Exploring Interdisciplinarity in a Global Research Project' in Beate Sjåfjell, Roseanne Russell and Maja van der Velden (eds), *Interdisciplinary Research for Sustainable Business: Perspectives from Women Business Scholars* (Springer 2022).

[55] Hanna Ahlström, 'Systems Thinking and the Law in the Age of the Anthropocene', *Innovating Business for Sustainability: Regulatory Approaches in the Anthropocene* (Edward Elgar 2022); Hanna Ahlström and Sarah E Cornell, 'Governance, Polycentricity and the Global Nitrogen and Phosphorus Cycles' (2018) 79 Environmental Science & Policy 54 <https://linkinghub.elsevier.com/retrieve/pii/S1462901117307670> accessed 4 November 2022; Carl Folke and others, 'Social-Ecological Resilience and Biosphere-Based Sustainability Science' (2016) 21 Ecology and Society 41 <https://www.ecologyandsociety.org/vol21/iss3/art41/> accessed 14 April 2020; Donella Meadows, *Thinking in Systems: A Primer* (Chelsea Green Publishing 2008); Rika Preiser and others, 'Social-Ecological Systems as Complex Adaptive Systems: Organizing Principles for Advancing Research Methods and Approaches' (2018) 23 Ecology and Society <https://ecologyandsociety.org/vol23/iss4/art46/> accessed 18 November 2019.

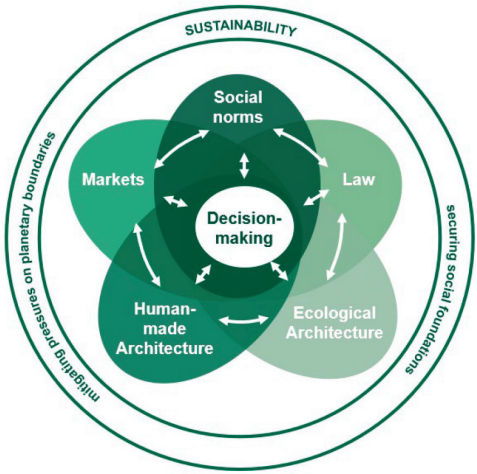

Figure 2. Credit: Sarah E. Cornell, Cornell and Sjåfjell, 'Feminist Theory in the Regulatory Ecology' (n 33)

Regulatory ecology can be used to analyse the regulatory effects of *law* on decision-making in business and how these are undermined or reinforced through the other regulatory modalities: *social norms, market* pressures and '*architecture*'[56] (the regulatory effect of the natural word ('*ecological architecture*') and human-made elements of the world ('*human-made architecture*').[57] In current work-in-progress, we position the regulatory ecology within a research-based approach to sustainability. We analyse the interactions between and within the regulatory modalities, to identify opportunities for sustainable business.[58]

Regulatory ecology can be used to analyse regulatory developments, to identify what made a particular regulatory development possible, what is preventing the realisation of its potential, and – also conversely – what are the possibilities in the evolving regulatory ecology.[59]

Regulatory ecology is a lens that helps identify the interconnections between actors in and across regulatory modalities, highlighting that regulation often does not happen only through law in a linear, top-down process.

[56] Sjåfjell and Taylor (n 53).
[57] Work-in-progress together with Sarah Cornell and Eelke Heemskerk.
[58] Work-in-progress together with Sarah Cornell and Eelke Heemskerk.
[59] ibid

Regulation is the result of interactions, inactions, tensions, clashes and power struggles between actors seeking to regulate and between them and actors sought being regulated. Drivers in these interconnections are explicit and implicit value-choices in the theoretical underpinnings as well as in the legislative, corporate and societal actors' aims and efforts.

The EU's unprecedented efforts at channelling financial market actors' decision-making towards sustainability, and the limitations of these efforts, illustrate these interconnections. The ecological architecture of climate change with its delayed and slow regulatory effect, is increasingly materialising, with financial market actors' response in the influential Recommendations from the Task Force for Financial Risks of Climate Change of 2017.[60] The EU's Sustainable Finance initiative of 2018, reflects the recognition that climate change and other transgressions of planetary boundaries have financial risks. Yet its Action Plan does not engage with the planetary boundaries framework or with the ecological limits of our planet – rather it sees sustainable finance as being about financing 'sustainable growth'.[61] Financial risks must be mitigated, without changing finance-as-usual, business-as-usual, and indeed the economy-as-usual.[62] This limiting financially-driven approach has constrained the EU's range of legislative instruments under the Action Plan, including the Sustainable Finance Disclosure Regulation of 2019, the Taxonomy Regulation of 2020 and the Corporate Sustainability Reporting Directive (2022) with its European Sustainability Reporting Standards. Groundbreaking and world-leading, the EU's legislative initiatives still illustrate continued silo-thinking and the power of vested interests, with an overreliance on disclosure – as opposed

[60] TCFD, 'Final Report: Recommendations of the Task Force on Climate-Related Financial Disclosures' (TCFD 2017) <https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf> accessed 16 September 2024.

[61] European Commission, 'Action Plan on Financing Sustainable Growth' (Communication) COM/2018/097 final.

[62] Patrick W Keys and others, 'Anthropocene Risk' (2019) 2 Nature Sustainability 667 <http://www.nature.com/articles/s41893-019-0327-x> accessed 10 April 2020; Beatrice Crona, Carl Folke and Victor Galaz, 'The Anthropocene Reality of Financial Risk' (2021) 4 One Earth 618 <https://www.sciencedirect.com/science/article/pii/S2590332221002359> accessed 9 September 2021; Beate Sjåfjell, 'Taking Finance Seriously: Understanding the Financial Risks of Unsustainability' in Kern Alexander, Matteo Gargantini, and Michele Siri (eds), *The Cambridge Handbook of EU Sustainable Finance: Regulation, Supervision and Governance* (Cambridge: Cambridge University Press, 2025), Chapter 2. Preprint available at SSRN: <https://ssrn.com/abstract=4294693>, accessed 3 December 2024.

to mandating change – and on greening, rather than a fundamental transformation towards sustainability.[63]

Companies are creatures of national law, as the Court of Justice has repeatedly reiterated, and 'law resides at the heart' of global value chains structuring of globalised business.[64] Yet a specific interaction between social norms and markets constrains legislative creativity and thereby law's possibility for regulating companies as key elements of globalised business. This law-and-economics inspired, Anglo-Saxon-based idea of 'shareholder primacy', dictates that companies are vehicles for shareholders' profit maximisation, and claims, contrary to company law, that boards are agents for the shareholders as principals, and that boards – and by extension senior executive management – have a duty to maximise returns for shareholders. This is a main barrier to sustainable business, and there have been increasing strong calls for company law to clarify this and take back and use its power to set out explicitly a modern, sustainability-oriented purpose of the company, with corresponding duties for the boards.[65]

[63] Hanna Ahlström and David Monciardini, 'The Regulatory Dynamics of Sustainable Finance: Paradoxical Success and Limitations of EU Reforms' (2022) 177 Journal of Business Ethics 193 <https://doi.org/10.1007/s10551-021-04763-x> accessed 25 April 2024; Hanna Ahlström and Beate Sjåfjell, 'Complexity and Uncertainty in Sustainable Finance: An Analysis of the EU Taxonomy' in Timothy Cadman and Tapan Sarker (eds), *De Gruyter Handbook of Sustainable Development and Finance* (De Gruyter 2022); Beate Sjåfjell, 'Revisiting Agency Theory: A Radical Rethinking of Allocation of Responsibility, Accountability and Liability', in Nicolas Chevrollier, Aikaterini Argyrou, and Ronald Jeurissen, eds, *Radical business perspectives for sustainability transitions*, Cheltenham: Edward Elgar, 2025, Chapter 9.

[64] '—it is the vehicle through which value is generated, captured and distributed within and between organisational and jurisdictional domains, and diverse and geographically disparate business operations are coordinated and governed', The IGLP Law and Global Production Working Group (n 14) 61.

[65] Christopher M Bruner, *Corporate Governance in the Common-Law World: The Political Foundations of Shareholder Power* (Cambridge University Press 2013); Beate Sjåfjell and others, 'Shareholder Primacy: The Main Barrier to Sustainable Companies' in Beate Sjåfjell and Benjamin J Richardson (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press 2015) <https://papers.ssrn.com/abstract=2664544> accessed 11 July 2017; Christopher M Bruner and Beate Sjåfjell, 'Corporate Law, Corporate Governance and the Pursuit of Sustainability' in Beate Sjåfjell and Christopher M Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (1st edn, Cambridge University Press 2019); Lynn A Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (Berrett-Koehler Publishers 2012); Andrew Johnston and others, 'Corporate Governance for Sustainabil-

The EU's Sustainable Corporate Governance initiative, launched in 2020, was the first time that the EU included company law in its sustainability-oriented regulatory toolbox, stating explicitly that its aim was 'to improve the EU regulatory framework on company law and corporate governance', to 'enable companies to focus on long-term sustainable value creation'.[66] The launch of the initiative resulted in extreme push-back, mainly by shareholder primacy proponents.[67] One of the issues that caused the most controversy was the attempt in the proposal for a Corporate Sustainability Due Diligence Directive (CSDDD) to integrate aspects of sustainability into the duties of the corporate board, with market forces mobilising to protect shareholder primacy.[68] The result was that the very limited inclusion of company law was taken out in the December 2023 consensus between the legislators. The tensions within social norms were illustrated by the mobilisation in favour of the CSDDD and in favour of strengthening its due diligence requirements to be more in line with internally endorsed sets of social norms, notable the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, and the UN Guiding Principles for Business and Human Rights. Reflecting the evolving regulatory ecology, the spring of 2024 saw public expressions of support by civil society, academics, and businesses themselves,[69] while certain Member States continued to seek to undermine the political consensus achieved between the Parliament and the Council in December

ity' (2019) SSRN Scholarly Paper ID 3502101 <https://papers.ssrn.com/abstract=3502101> accessed 29 March 2020.

[66] European Commission, 'Sustainable Corporate Governance Initiative' (2020) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en> accessed 16 September 2024.

[67] Beate Sjåfjell and Jukka Mähönen, 'Corporate Purpose and the Misleading Shareholder vs Stakeholder Dichotomy' (2024) 34 Bond Law Review 69 <https://blr.scholasticahq.com/article/94050-corporate-purpose-and-the-misleading-shareholder-vs-stakeholder-dichotomy> accessed 15 March 2024.

[68] ibid.

[69] Business & Human Rights Resource Centre, 'Businesses Make Urgent Call for Support for EU Due Diligence Law Ahead of Council Vote' (*Business & Human Rights Resource Centre*, 27 February 2024) <https://www.business-humanrights.org/en/latest-news/eu-csddd-company-statement/> accessed 15 March 2024; 'Joint Statement by UNDP, UNEP, UNICEF and OHCHR on the EU Corporate Sustainability Due Diligence Directive' <https://www.unicef.org/eu/press-releases/joint-statement-undp-unep-unicef-and-ohchr-eu-corporate-sustainability-due-diligence> accessed 19 February 2024.

2023. The CSDDD was finally adopted in June 2024, after one of the most controversial processes in the legislative history of the EU.[70]

The controversy illustrates the still powerful reach of the social norm of shareholder primacy, and the underlying assumptions and prioritised values. The intent may originally be seen as a good one: the idea was that prioritising shareholders and maximising their returns is an efficient way of maximising societal welfare.[71] This thinking continue to dominate in spite of the lacking empirical evidence and the overwhelmingly strong empirical basis for the problematic effects of continued business-as-usual, which illustrates the power of vested interests – of actors that have become rich and powerful through globalised business and do not wish to entertain the thought of fundamentally changing the system.[72]

Held up against the overarching aim of global sustainability, the constraining effect on the EU as legislator of path-dependent ideas concerning the necessity of prioritising maximisation for returns to investors (shareholder primacy) and continued economic growth, is clear. Environmental issues are regulated using disclosure, with the aim of greening finance and the economy more broadly. Illicit financial flows are not challenged, with business continuing to structure their enterprises in ways that undermine the economic and governance bases for well-functioning societies. People, especially people outside of the EU, do not matter enough to warrant real change. The EU's approach does not challenge the core business-as-usual approaches; it does not mandate the transformation from unsustainable, linear businesses, to more sustainable, circular ones.[73]

[70] Nicolas Bueno and others, 'The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise' (2024) Business and Human Rights Journal 1 <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/eu-directive-on-corporate-sustainability-due-diligence-csddd-the-final-political-compromise/9731DFA73A2D98D2B8B71BEDF68CEDD1> accessed 31 May 2024.

[71] John Armour and others, 'What Is Corporate Law?', *The Anatomy of Corporate Law* (3rd edn, Oxford University Press 2017) 23-24 <https://oxford.universitypressscholarship.com/10.1093/acprof:oso/9780198739630.001.0001/acprof-9780198739630-chapter-1> accessed 27 December 2021.

[72] Eg Hickel (n 9).

[73] See further Sjåfjell, 'Revisiting Agency Theory' (n 63); see also Ahlström and Monciardini (n 63); Ahlström and Sjåfjell (n 63); Eléonore Maitre-Ekern, 'Re-Thinking Producer Responsibility for a Sustainable Circular Economy from Extended Producer Responsibility to Pre-Market Producer Responsibility' (2021) 286 Journal of Cleaner Production 125454 <http://www.sciencedirect.com/science/article/pii/S0959652620355001> accessed 4 Janu-

And yet, the evolving regulatory ecology shows that the horizontal and vertical silos are beginning to crack, because of a changing balance in the tensions within and between social norms, markets, and law – stimulated, amongst other things, by the ever-clearer consequences of continued extreme unsustainabilities. In the internationally and nationally endorsed sets of social norms for corporate governance, often referred to as corporate governance codes, sustainable value creation is beginning to emerge as a competing value to that of shareholder primacy.[74] In EU law regulating finance and business, international human rights and labour law is being directly integrated, often through references to the OECD Guidelines and the UN Guiding Principles.[75] The international trend of sustainability-oriented lawsuits against states and business, banks, and boards, also show how horizontal and vertical silos are cracking through new interconnections and new kinds of regulatory creativity in the evolving regulatory ecology.[76] Currently, this is all too weak and the emphasis on greening and maintaining business as usual is still clear – but the potential for further and deeper change has been embedded into law. Certainly, yesterday's legal analysis of the duties of a board or the boundaries of company's responsibility may have little value in tomorrow's courtroom.

ary 2021; David Monciardini and others, 'Circular Economy Regulation: An Emerging Research Agenda' in Allen Alexander, Stefano Pascucci and Fiona Charnley (eds), *Handbook of the Circular Economy: Transitions and Transformation* (De Gruyter 2023) <https://www.degruyter.com/document/doi/10.1515/9783110723373-016/html> accessed 11 March 2023.

[74] Beate Sjåfjell and Georgina Tsagas, 'Integrating Sustainable Value Creation in Corporate Governance: Company Law, Corporate Governance Codes and the Constitution of the Company' in Beate Sjåfjell, Georgina Tsagas and Charlotte Villiers (eds), *Sustainable Value Creation in the European Union: Towards Pathways to a Sustainable Future through Crises* (Cambridge University Press 2023).

[75] Briefly discussed in Sjåfjell, 'Revisiting Agency Theory' (n 63).

[76] Eg Mark B Taylor, 'Counter Corporate Litigation: Remedy, Regulation, and Repression in the Struggle for a Just Transition' (2021) 13 Sustainability 10742 <https://www.mdpi.com/2071-1050/13/19/10742> accessed 2 October 2021; Peggy Hollinger, 'Investors Raise Pressure over "Forever Chemicals" amid Growing Litigation' *Financial Times* (14 November 2023) <https://www.ft.com/content/ee955487-3e7c-4c7b-9bcb-89001507cee0> accessed 18 November 2023; Yusra Suedi and Marie Fall, 'Climate Change Litigation before the African Human Rights System: Prospects and Pitfalls: Practice Note: GNHRE Climate Litigation in Global South Project' (2023) Journal of Human Rights Practice <https://doi.org/10.1093/jhuman/huad024> accessed 19 July 2023; Christina Voigt, 'The Power of the Paris Agreement in International Climate Litigation' (2023) 32 Review of European, Comparative & International Environmental Law 237 <https://doi.org/10.1111/reel.12514> accessed 25 July 2023.

4. *Change is possible*

Ensuring sustainability may as a normative matter be seen as law's objective and greatest challenge. In the context of EU law, it is the overarching objective and a legal duty. EU Treaty law, interpreted using EU law's own teleological and dynamic method, sets our requirements for the EU institutions and its Member States to work towards the overarching objectives, to promote policy coherence, and to integrate sustainability into all policies and activities.

Establishing sustainability law as a field can contribute to developing legal research and education of future lawyers and legal scholars in ways that may contribute to mitigating weaknesses of law as a discipline. Firstly, the problem with law's mechanistic world-view compared to the development of natural science, which gradually has encompassed a systems-based understanding of the ecology of our earth and its interaction with societal institutions.[77] Secondly, law's tendency to be siloed (horizontally as well as vertically), rigid and static in a rapidly changing society, while reflecting values and interests of those with power.[78] Thirdly, the limited inclusion of interdisciplinary approaches also in legal research and education.[79]

What the future will be depends on all of us. None of us have the full answers – and yet those of us who are in positions to do so, can work together across and beyond academia, through new and more open ways of collaborating, of reassessing underpinning values, and rethinking how we see the world,[80] and our own contributions to the world. If we concentrate only on the negative news, the seemingly self-fulfilling prophecies of humanity being selfish and unable to change, informed by economic efficiency ways of thinking, we will remain on a very certain path towards a very uncertain future.[81] Conversely, if many enough believe in the possibility for a fundamental tran-

[77] Capra and Mattei (n 13).

[78] Hickel (n 9); Ferdinand (n 8).

[79] Sarah Cornell and others, 'Opening up Knowledge Systems for Better Responses to Global Environmental Change' (2013) 28 Environmental Science & Policy 60 <http://www.sciencedirect.com/science/article/pii/S1462901112002110> accessed 2 February 2019.

[80] Starting by reading, for example, Robin Wall Kimmerer, *Braiding Sweetgrass* (1st edn, Milkweed Editions 2013).

[81] Rutger Bregman, *Humankind: A Hopeful History* (Bloomsbury Publishing 2021).

sformation towards sustainability and work for that, the chances increase for that transformation to happen.[82]

Sustainability law's contribution to sustainability entails challenging established conceptualisations in laws and policies. What are the boundaries of a business? What is the relationship between a business and society? What are the duties of a corporate decision-maker? How can we work within the current system for change, while acknowledging its limitations and the need for a fundamental transformation? How can we challenge the neo-colonialism of globalised business? What are our roles as scholars?

The calls for change are increasing, from school children, students, civil society, policymakers, business, investors, and academics. It is my hope that this thought piece can stimulate further discussion on law's contribution to a safe and just space for humanity and other species on this one beautiful planet we call home.

[82] ibid.

SECTION ONE.
LEGAL FOUNDATIONS AND SUSTAINABILITY

Daniele Porena

SUSTAINABILITY IN THE FUNDAMENTAL CHARTERS, WITH A FOCUS ON ITALY

The title of my paper entails an explanation of how the concept of sustainability has been implemented in the last 30-40 years in various constitutions and especially in that of Italy.[1]

However, before making a brief comparison that comprises the most significant examples that regard this matter, we need to spend a few minutes on the concept of sustainability itself.[2] This we must do in order to grasp its exact scope and also to be able to understand its relationships with the legal issues appertaining to it that are aimed at the protection of future generations.

After examining the context of the constitutions of other States through some significant examples, I will look, in more detail, into the issue of sustainability in the Italian constitution, also in light of its recent revision.

[1] Part of the studies that led to this paper were pursued for the purpose of the publication Daniele Porena, *Il principio di sostenibilità. Contributo allo studio di un programma costituzionale di solidarietà intergenerazionale*, (Giappichelli 2017); Daniele Porena, 'Anche nell'interesse delle generazioni future. Il problema dei rapporti intergenerazionali all'indomani della revisione dell'art. 9 della Costituzione' (2022) 15 Federalismi.it 121; Daniele Porena, 'On the concept of sustainability and future generations. A brief constitutional overview', (2022) 18 (1) Revista Brasileira de Direito.

[2] In particular, on the principle of sustainable development see, among others Boleslaw A Boczek, *International Law* (Lanham 2005) 219; Maurizio Cafagno, *Principi e strumenti di tutela dell'ambiente* (Giappichelli 2007) 61; Beniamino Caravita, *Diritto dell'ambiente* (Il Mulino 2005) 75; Paolo Dell'Anno, *Principi del diritto ambientale europeo e nazionale*, (Giuffrè 2004) 75; Paolo Diman, 'I principi della tutela ambientale' in Giampiero Di Plinio (ed), *Principi di diritto ambientale* (Giuffrè 2008) 53; Ludwig Kramer, *Manuale di diritto comunitario dell'ambiente* (Giuffrè 2002) 71; Vincenzo Pepe, *Lo sviluppo sostenibile tra governo dell'economia e profili costituzionali* (La Tribuna 2002); Marco Politi, 'Tutela dell'ambiente e «sviluppo sostenibile». Profili e prospettive di evoluzione nel diritto internazionale alla luce della Conferenza di Rio de Janeiro' in Giuseppe Barile (ed), *Scritti degli allievi in memoria di Giuseppe Barile* (CEDAM 1995) 464; Daniele Porena, *La protezione dell'Ambiente tra Costituzione italiana e Costituzione globale* (Giappichelli 2009); Porena, *Il principio di sostenibilità* (n 1); Filippo Salvia, 'Ambiente e sviluppo sostenibile' (1998) Rivista giuridica dell'ambiente 235.

Finally, I will try to draw some conclusions on the ways in which the principle of sustainability is affirmed, in general, within the context of the most recent constitutional trends.

As is well-known, the first definition of the concept of sustainability dates back to 1987 and owes its conception to the Brundtland Report.

More specifically, it is the document entitled "Our common future" that proposes the definition, according to which development is deemed sustainable only when it satisfies the needs of present generations without compromising the similar needs of future generations.[3]

The concept of sustainability was therefore born within the framework of international environmental law.[4]

However, over the years, the concept of sustainability has demonstrated a considerable expansive potential. We have confirmation of this particularly nowadays, when its economic and social dimensions have been growing in importance alongside the environmental aspect.[5]

[3] The document "Our Common Future" was drawn up by the World Commission on Environment and Development, chaired by Gro Harlem Brundtland and published on March 20, 1987. The document elaborates on the definition of sustainable development that has become a standard, also offering a description of its main components. For example, the document proposes the idea that sustainable development is closely connected to population growth and that, therefore, the goal is more easily achievable when demographic quantities stabilize at levels that are consistent with the productive capacity of the ecosystem.

[4] The principle of sustainability, as well as the related duty to protect future generations, is now widespread, being present in a plurality of international legal acts. In particular, the principle in question has now established itself in all of its various dimensions: political, social, economic and environmental. The constant reference to the principle of sustainability is a factor that appears to be decisive in attributing to it a customary quality, in the framework of internal relations within the international community. On this aspect, see Laura Pineschi, 'Tutela dell'ambiente e assistenza allo sviluppo: Dalla Conferenza di Stoccolma (1972) alla Conferenza di Rio (1992)' (1994) Rivista giuridica dell'ambiente 145, according to which the principles affirmed at the Stockholm Conference «hanno acquisito carattere di norme consuetudinarie di diritto internazionale». See also Raffaele Bifulco, Diritto e generazioni future. Problemi giuridici della responsabilità intergenerazionale (Giuffrè 2008) 113. For Giuliana Ziccardi Capaldo, Diritto globale: il nuovo diritto internazionale (Giuffrè 2010) 57, «uno dei modi di formazione delle norme consuetudinarie consiste nella trasformazione di norme originariamente pattizie in norme generali. In tal caso, la diuturnitas, piuttosto che dai comportamenti degli Stati, si ricava da accordi internazionali che uniformemente (nel tempo) regolano una certa materia».

[5] As is well-known, the principle of sustainability originated in the field of environmental law. However, over time, it has extended its range of action to include economic and social

In practical terms, the issue of sustainability has come to impact the organization and functioning of most of the social infrastructures set up by legal systems: from health care systems[6] to social security

factors. On an economic level, sustainability aims to guarantee, among other things, the best living conditions by promoting the stability of social systems and of the labor market. On a social level, the principle of sustainability is aimed at providing each and every individual with the best conditions for an effective participation in the community and, therefore, is aimed at providing safety, education, healthcare and democratic participation. With regard to the environmental sphere, the principle of sustainability is mainly oriented towards guaranteeing the protection of future generations through the conservation of natural resources. On this aspect, see Massimiliano Montini, 'Profili di diritto internazionale' in Paolo Dell'Anno and Eugenio Picozza (eds), *Trattato di diritto dell'ambiente* (CEDAM 2012) 40: the concept of sustainable development has been reviewed and integrated «dalle disposizioni contenute nella Dichiarazione politica del vertice di Johannesburg, nel 2002. In tale contesto, venne infatti ribadito e sottolineato che il principio dello sviluppo sostenibile si basa su tre pilastri interdipendenti che si supportano vicendevolmente, costituiti dallo sviluppo economico, dallo sviluppo sociale e dalla protezione ambientale. Tale concezione tripartita dello sviluppo sostenibile tende a superare la tradizionale dicotomia tra ambiente e sviluppo, recuperando una maggiore centralità per le esigenze sociali, accanto a quelle ambientali ed economiche». As noted by Antonio Sassu, 'Sviluppo economico e tecnologie per un futuro sostenibile' in Manuela Ciani Scarnicci and others (eds), *Economia, ambiente e sviluppo sostenibile* (FrancoAngeli 2014) 106, by social sustainability we mean «la capacità di assicurare il benessere umano nelle diverse dimensioni della sicurezza, della salute e dell'istruzione. Include l'equità, la partecipazione, l'identità culturale e la stabilità istituzionale».

[6] There are many factors contributing to the progressive weakening of the outlook related to the sustainability of healthcare systems. Among others, the progressive aging of the population as well as the goals progressively achieved by technological innovation, the related increase in the costs of services and, again, the progressive prevalence of chronic-degenerative pathologies in the variation of epidemiological dynamics. The major innovations introduced in healthcare systems have contributed, over time, to the desirable goal of increasing life expectancy. Obviously, this has been matched by the significant aging of the population which, in Western countries, is also partly caused by lower birth rates.

systems,[7] from public finances[8] to the planning of economic development.[9]

In recent years, in all the large systemic sectors required to ensure prospects of durability, the need to guarantee their sustainability has also emerged.

[7] On 8 June 2013, the Hygiene and Health Commission of the Italian Senate approved the proposal to carry out a survey on the sustainability of the National Health Service with particular reference to the principles of universality, solidarity and equity that characterize it. The economic and juridical doctrine has devoted extensive in-depth analysis to this topic. Among these, see Gemma Abio, Holger Bonin and Concepció Patxot Cardoner, 'El impacio intergeneracional de la reforma de las pensiones en Espana: un enfoque de Contabilidad Generacional' (1999) 65 Cuadernos Económicos del JCE 101; Holger Bonin, Joan Gil and Concepció Patxot Cardoner, 'Beyond the Toledo Agreement: The Intergenerational Impact of the Spanish Pension Reform' (2001) 3 Spanish Economic Review 111; Joan Costa-Font and Concepció Patxot, 'The Intergenerational Impact of Long-term Care Financing Alternatives in Spain' (2004) 29 4 The Geneva Papers of Risk and Insurance: Issues and Practice 599; Christian Hagist and others, 'Social Health Insurance – the Major Driver of Unsustainable Fiscal Policy?' (2005) CESifo Working Paper 1574, 1 <https://www.cesifo.org> accessed 28 January 2025; Helle Wallach Kildemoes and others, 'The Impact of Population Ageing on Future Danish Drug Expenditure' (2006) 75 Health Policy 298; Ajal Mahal and Peter Berman, 'Health Expenditures and the Elderly: A Survey of Issues in Forecasting, Methods Used, and Relevance for Developing Countries' (2000) The global burden of disease 1; Ciaran O'Neill and others, 'Age and proximity to death as predictors of GP care costs: Results from a study of nursing home patients' (2009) 9 Health Economics 733; Concepció Patxot Cardoner and Joan Gil, 'La revisión de la ley de reforma del sistema de la seguridad social: una aproximación de contabilidad generacional' (2000) Hacienda Pùblica Espanola 55; Zhou Yang, Edward C Norton and Sally Stearns, 'Longevity and Health Care Expenditures: The Real Reasons Older People Spend More' (2003) 58 The Journals of Gerontology 2; Peter Zweifel, Stefan Felder and Andreas Werblow, 'Population Ageing and Health Care Expenditure: New Evidence on the Red Herring' (2004) 29 The Geneva Papers of Risk and Insurance – Issues and Practice 625-52.

[8] On this topic, see Luca Bartolucci, *La sostenibilità del debito pubblico in Costituzione. Procedure euro-nazionali di bilancio e responsabilità verso le generazioni future* (CEDAM 2020).

[9] It is common knowledge that the principle of sustainability was originally conceptualized within the context of economic development prospects. In this regard, it is specifically within the relationship between the environment and economic development that we are witnessing one of the most classic constitutional balancing operations. On this matter, see Luisa Cassetti, 'Riformare l'art. 41 della Costituzione: alla ricerca di "nuovi" equilibri tra iniziativa economica privata e ambiente?' (2022) 4 Federalismi.it 200, which underlines how, well before the revision of Art. 41, paragraphs 2 and 3 of the Constitution, «esempi nella giurisprudenza costituzionale di applicazioni concrete del bilanciamento tra interventi pubblici di regolazione/programmazione pubblica (…) e protezione dell'ambiente» were already available.

The expansive capacity of the principle mentioned above, which is widely traceable in numerous constitutional texts, has led the legal doctrine to identify the concept of sustainability as a post-national paradigm, capable of republicanizing globalization.[10]

Moreover, in order to bring this reasoning even more up to date, 'sustainability' is among the most mentioned words in the context of the Next Generation EU program.[11]

In conclusion, the ethical force encompassed within the concept of sustainability – which is connected, essentially, to that of preservation for future generations - seems to have affirmed itself in more generalized and progressively higher terms.

Going back for a moment to the definition offered by the previously mentioned Brundtland Report, the intergenerational projection assumed by the concept of sustainability seems to emerge very clearly.

[10] See Paolo Márcio Cruz and Zenildo Bodnar, *Globalização, Transnacionalidade e sustentabilidade* (UNIVALI 2012) 41 and Paolo Márcio Cruz and Zenildo Bodnar, 'O novo paradigma do direito na pós modernidade' (2011) 1 Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito 75, 76 who argue that «a partir desse contexto de insuficiência da liberdade, enquanto paradigma do direito moderno para enfrentamento dos novos riscos globais, o que se propõe è análise da sustentabilidade enquanto novo paradigma indutor do direito na pós-modernidade em coabitação com a liberdade».

[11] Furthermore, Art. 2 of the Treaty on European Union, as amended by the Amsterdam Treaty, states that «The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance». More recently, the principle of sustainable development was enunciated in the European Landscape Convention (Florence, 2004). This Convention, in Art. 1 and Art. 5, states that in relation to the social, economic and environmental development processes that are the cause of landscape transformations, all interventions aimed at these transformations must be adopted in accordance with the principle of sustainable development. On this topic, see Domenico Sorace, 'Paesaggio e paesaggi della Convenzione europea' in Gian Franco Cartei (ed), *Convenzione europea del paesaggio e governo del territorio* (Il Mulino 2007) 22-23. On the principle of sustainability in the context of the European integration process, see Michele Francaviglia, 'Le ricadute costituzionali del principio di sostenibilità a dieci anni dal Trattato di Lisbona. Spunti ricostruttivi alla luce della giurisprudenza europea e costituzionale' (2020) 19 Federalismi.it 54.

It appears to me that the principle of sustainability represents a practical application of the philosophical-legal concern for future generations.[12]

Rights and interests of future generations or from another perspective, responsibility towards future generations actually represent the fundamental values within which a debate on the concept of sustainability may take place.[13]

Therefore, the comparison between the different constitutional systems, in order to be complete, must not only include the clauses on sustainability, but also the rules and principles that are set out with reference to future generations.

In fact, the broadening of the debate on the principle of sustainability from just environmental issues to social and economic ones, has the potential to incorporate most of the directions in which future generations will fulfil themselves.

[12] On the idea that the principle of sustainable development works in two perspectives, both inter-generational and intra-generational, see Dell'Anno (n 2) 74; of the same opinion Elena Frumento, 'Lo stato ambientale e le generazioni future: per una tutela del diritto fondamentale dell'ambiente' (*AmbienteDiritto.it*) < https://www.ambientediritto.it/dottrina/Diritto%20internazionale%20ambiente/stato_ambientale_generazioni_future.htm> accessed 28 January 2025. In addition, see also Marco Gestri, 'Ambiente (diritto internazionale)' in Sabino Cassese (ed), *Dizionario di diritto pubblico* (Giuffrè 2006) 220.

[13] Among the most debated problems in legal philosophy is whether or not and how to "legalize" the relationship between already existing individuals and future ones, in particular, considering that the latter are devoid not only of legal subjectivity but also of identity. The theme is addressed, in particular, by Derek Parfit, *Reasons and Persons* (Oxford University Press 1984) 351: «if we choose High rather than Low Consumption, the standard of living will be higher over the next century (…). Given the effects of (…) such policies on the details of our lives, different marriages would increasingly be made. More simply, even in the same marriages, the children would increasingly be conceived at different times (…) this would in fact make them different children. (…). If we choose high consumption, the quality of life will be lower more than a century from now. But the particular people who will then be alive would never have existed if instead we had chosen low consumption. Is our choice of high consumption worse for these people? Only if it is against their interest to have been born (…) we can suppose that it would not go as far as this. We can conclude that if we choose high consumption, our choice will be worse for no one». See also Gerard Keijzers, *Business, Government and Sustainable Development* (Routledge 2005) 57, who argues that «when the planet is plundered and thus provides future generations with an existence that is extraordinarily sparing, but which they nevertheless consider worth living, then, in Parfit's opinion, no harm, ac-cording to utilitarian reasoning has been done. The alternative is that they would not exist at all – an alternative that they would not prefer».

Therefore, the debate on future generations is increasingly equivalent to that on sustainability.

We will now try to make a quick comparison between some examples of sustainability and future generation clauses included in different constitutions.

The abundance of references mentioned in the different constitutional texts, as well as the short space of time at our disposal, requires me to select, among the numerous examples, those that I deem most significant.

A very challenging reference to the theme of future generations is contained in Art. 11 of the Japanese Constitution, which states the principle according to which «the fundamental human rights, guaranteed to the people by this Constitution, are recognized to both the people and future generations as eternal and inviolable rights».[14]

A very detailed clause devoted to the concept of sustainability and future generations is included in Art. 27 of the 1976 Constitution of Cuba, which specifies that «the state protects the environment and natural resources of the country. It recognizes their close connection with a sustainable economic and social development, to make human life more rational and to ensure the survival, well-being and security of current and future generations».

The French Charte de l'environnement identifies, among the purposes of its provisions, that «to ensure sustainable development, choices made to meet the needs of the present must not compromise the ability of future generations to satisfy their own needs».[15]

The principle enunciated by Art. 20a of the Grundgesetz must also be mentioned.

It specifies that «it is the duty of the State, also with regard to its responsibilities toward future generations, to protect the natural foundations of life».[16]

[14] Following the urgency of the need to proclaim the beginning of a new era, after the end of the Second World War, the principle assumed a particular relevance and scope. In particular, it not only makes a significant reference to future generations, but also has the merit of reaffirming the eternal, universal and inviolable significance of fundamental rights.

[15] In general, from the reference to humanity as a whole to the conditions for the evolution of mankind, from sustainability to the needs of future generations, the entire lexicon of the intergenerational theme has been acquired - through the *Charte de l'environnement* - within the "block" of French constitutionality.

[16] The principle in question makes a significant reference to posterity but it does not limit its range of action to the environmental dimension. There is no doubt that environmental issues have a place within the "natural foundations of life". However, the principle seems to include, among others, the right to health, the protection of conception as well as the set of fundamental juridical positions connected to existence.

The Constitution of the United States, as is very well-known, does not contain direct sustainability clauses, however the "We the people" contained in the Preamble in some way includes the goal of promoting the general well-being as well as safeguarding the benefits of freedom, for us and for posterity.[17]

More technical references to the principle of sustainability also appear in a significant number of constitutions. According to research carried out by Tania Groppi, in 2016 there were already 54 constitutions that contained the words "sustainability" or "sustainable".[18] Among these and to ensure a full breadth of perspective, we must also mention the Belgian constitution, whose Art. 7 bis refers to a «sustainable development in its social, economic and environmental aspects».

Moreover, the Portuguese Constitution makes a direct reference to the principle of sustainable development in Art. 66, according to which the State is burdened with a series of duties aimed at «guaranteeing the right to the environment, within the context of sustainable development».

The reference to sustainability, with regard to public finances, is also contained in the Spanish Constitution: Art. 135 contains a reference to the economic and social sustainability of the State[19] and, as we will see in more detail shortly, in Articles 81 and 97 of the Italian Constitution.

As mentioned before, nowadays there are dozens of constitutions that include the concept of sustainability in its various forms, so that it would be impossible and - especially in this short space of time - to present an exhaustive list.

The title of my paper also includes, as anticipated, a focus on the most relevant examples included in the Italian Constitution. In this regard, the

[17] The Preamble of the American Constitution, and its inclination towards natural law, makes a clear reference to posterity. In fact, the general aims of the constitutional pact are specifically assured to the latter. In general, the Preamble shows a marked tendency in favor of a distinctly "timeless dimension" of fundamental rights. Again, the reference to posterity strengthens the claim to durability of the Constitution: this, also by "entrenching" future generations behind the defenses erected by the Constitution.

[18] See Tania Groppi, 'Sostenibilità e costituzioni: lo Stato costituzionale alla prova del futuro' (2016) Diritto pubblico comparato ed europeo 1.

[19] In particular, paragraph 4 of the Art. 135 provides that «The limits of the structural deficit and of the volume of public debt can be exceeded only in the event of natural catastrophes, economic recession or extraordinary emergency situations which escape the control of the State and which seriously jeopardize the financial situation or the economic or social sustainability of the state, declared by an absolute majority vote of the members of the Congress of Deputies».

principle of sustainability appeared for the first time with the constitutional reform of 2012.[20]

The progressive and serious deterioration of macroeconomic conditions, recorded in recent years not only in Italy, has emphasized the weak prospects that national finances possess in terms of sustainability.[21]

The economic crisis in particular has greatly contributed to both the internal and international debate on the specificities, in terms of sustainability, of the public financial situation.

Based on the provisions of the new Art. 81 of the Italian Constitution, the content of the budget law, the fundamental rules and the criteria aimed at ensuring the sustainability of the debt of public administrations, must be

[20] On the constitutional reform of 2012, among others, see Monica Bergo, 'Pareggio di bilancio "all'italiana": qualche riflessione a margine della legge 24 dicembre 2012, n. 243 attuativa della riforma costituzionale più silenziosa degli ultimi tempi' (2013) 6 Federalismi.it 1; Raffaele Bifulco, 'Jefferson, Madison e il momento costituzionale dell'Unione. A proposito della riforma costituzionale sull'equilibrio di bilancio' (2012) 2 Rivista AIC 1; Antonio Brancasi, 'La nuova regola costituzionale del pareggio di bilancio: effetti sui rapporti Parlamento-Governo e sugli indirizzi delle politiche sociali. Il caso italiano' (2012) Rivista telematica dell'Associazione "Gruppo di Pisa"; Paolo Canaparo, 'La legge costituzionale n. 1 del 2012: la riforma dell'articolo 81, il pareggio di bilancio ed il nuovo impianto costituzionale in materia di finanza pubblica' (2012) 13 Federalismi.it 4; Marcello Cecchetti, 'Legge costituzionale n. 1 del 2012 e Titolo V della seconda parte della Costituzione: profili di controriforma dell'autonomia regionale e locale' (2012) 24 Federalismi.it 6; Tommaso F Giupponi, 'Il principio costituzionale dell'equilibrio di bilancio e la sua attuazione' (2014) 1 Quaderni Costituzionali 51; Nicola Lupo, 'La revisione costituzionale della disciplina di bilancio e il sistema delle fonti' (2011) Il Filangieri 89; Nicola Lupo, 'Costituzione europea, pareggio di bilancio ed equità tra le generazioni. Notazioni sparse' (2011) Amministrazione in cammino 1; Daniela Morgante, 'La costituzionalizzazione del pareggio di bilancio' (2012) 14 Federalismi.it 16; Andrea Morrone, 'Pareggio di bilancio e stato costituzionale' (2014) 1 Rivista AIC 1; Giulio M Salerno, 'Equilibrio di bilancio, coordinamento finanziario e autonomie territoriali' (2011) Il Filangieri 145; Claudio Tucciarelli, 'Pareggio di bilancio e federalismo fiscale' (2012) 4 Quaderni costituzionali 799.

[21] See Raffaele Bifulco and Antonio D'Aloia, 'Le generazioni future come nuovo paradigma del diritto costituzionale' in Raffaele Bifulco and Antonio D'Aloia (eds), *Un diritto per il futuro. Teorie e modelli dello sviluppo sostenibile e della responsabilità intergenerazionale* (Jovene 2008), who argue that «un debito eccessivo ed incontrollato, nel momento in cui scarica irresponsabilmente oneri economici sulle generazioni successive, sottraendo alla loro discrezionalità decisionale enormi flussi finanziari (…), finisce col rappresentare una sorta di tassazione iniqua, perché "without representation" (…), e perché sganciata da qualsiasi presupposto di responsabilità».

established by law and approved by an absolute majority of the members of each Chamber.

Art. 97 of the Constitution, on the other hand, establishes, in its re-edited first paragraph, that all public administrations, in line with the European Union legal system, must ensure the balance between budgets and the sustainability of the public debt.

As is well-known, these provisions constitute the transposition of the commitments undertaken with the signing of the "Treaty on stability, coordination and governance in the economic and monetary union" (so-called Fiscal Compact), especially in Art. 3 that states the obligation, for signatory countries, to balance their budgets.

The scope of these recent innovations, in their systematic and combined meaning, consequently calls for the need for the financial performance of public administrations to be assessed also in terms of future sustainability.

The close correlation between the principle of financial sustainability of public spending and that of the protection of the interests of future generations has likewise recently found confirmation in the jurisprudence of the Constitutional Court.

The implementation of the new principles - the Court observed – and, more specifically, with reference to the sustainability of the public debt, implies a responsibility which, in implementation of the "founding" principles of solidarity and equality, is not only a duty that must be carried out by institutions but also by each and every citizen, thereby including future generations.[22]

[22] Increasing attention to future generations is a trend that has established itself over time within constitutional jurisprudence. See, in particular, Corte cost, sent 10 April 2014, no 88, where the Court stated that the implementation of the principle of public debt sustainability «implica una responsabilità che, in attuazione di quelli «fondanti» di solidarietà e di eguaglianza, non è solo delle istituzioni ma anche di ciascun cittadino nei confronti degli altri, ivi compresi quelli delle generazioni future». More recently, the Corte cost, sent 14 February 2019, no 18 observed that «l'equità intergenerazionale comporta, […] la necessità di non gravare in modo sproporzionato sulle opportunità di crescita delle generazioni future, garantendo loro risorse sufficienti per un equilibrato sviluppo. È evidente che, nel caso della norma in esame, l'indebitamento e il deficit strutturale operano simbioticamente a favore di un pernicioso allargamento della spesa corrente. E, d'altronde, la regola aurea contenuta nell'art. 119, sesto comma, Cost. dimostra come l'indebitamento debba essere finalizzato e riservato unicamente agli investimenti in modo da determinare un tendenziale equilibrio tra la dimensione dei suoi costi e i benefici recati nel tempo alle collettività amministrate». With ruling no 115/2020, the Constitutional Court (Corte cost, 23 June 2020, no 115) has highlighted that the constitutional perimeter drawn by the provisions «consiste nella funzionalità

The concept of sustainability has now been relocated, in the Italian Constitution, to its theoretical place of origin, that is to say environmental protection.

Specifically, thanks to the amendment introduced in Art. 9 of the Constitution, the Italian Republic is now required to protect "the environment, biodiversity and the ecosystems, also in the interest of future generations".[23]

As can be inferred, the constitutional legislator has renounced making an express statement on the principle of sustainability, preferring instead to address the broader concept of future generations. This choice was proba-

della procedura a ridurre il deficit fino ad azzerarlo nel tempo prescritto. Ciò mediante la scansione del percorso attraverso i risultati conseguiti nei singoli esercizi attinenti al piano e la definizione di una proporzione accettabile dei sacrifici imposti alle future generazioni di amministrati affinché l'oneroso rientro dal disavanzo sia comunque compensato dal traguardo dell'equilibrio, presupposto necessario per la sana amministrazione». Again, with the ruling no 228/2021, the Court highlighted that «la dichiarata connotazione dei domini collettivi come «comproprietà intergenerazionale» (art. 1, comma 1, lettera c, della legge n. 168 del 2017) mostra una chiara proiezione diacronica affinché l'ambiente e il paesaggio siano garantiti anche alle future generazioni».

[23] On the reform of Art. 9 of the Italian Constitution, see Raffaele Bifulco, 'Primissime riflessioni intorno alla l. cost. 1/2022 in materia di tutela dell'ambiente' (2022) 11 Federalismi.it; Cassetti (n 9) 188; Marcello Cecchetti, 'La revisione degli articoli 9 e 41 della Costituzione e il valore costituzionale dell'ambiente: tra rischi scongiurati, qualche virtuosità (anche) innovativa e molte lacune' (2021) 3 Forum di Quaderni Costituzionali 286; Marcello Cecchetti, 'Virtù e limiti della modifica degli articoli 9 e 41 della Costituzione' (2022) 1 Corti supreme e salute 127ff; Giampiero Di Plinio, 'L'insostenibile evanescenza della costituzionalizzazione dell'ambiente' (2021) Federalismi.it; Rosanna Fattibene, 'Una lettura ecocentrica del novellato articolo 9 della Costituzione' (2022) 3 Nomos; Fabrizio Fracchia, 'L'ambiente nell'art. 9 della Costituzione: un approccio in "negativo"' (2022) 1 Il diritto dell'economia 15; Tommaso E Frosini, 'La Costituzione in senso ambientale. Una critica' (2021) Federalismi.it; Ylenia Guerra and Riccardo Mazza, 'La proposta di modifica degli articoli 9 e 41 Cost.: una prima lettura' (2021) 4 Forum di Quaderni Costituzionali 110; Riccardo Montaldo, 'La tutela costituzionale dell'ambiente nella modifica degli artt. 9 e 41 Cost.: una riforma opportuna e necessaria?' (2022) 13 Federalismi.it 187; Andrea Morrone, 'La Costituzione del lavoro e dell'ambiente. Per un nuovo contratto sociale' (2022) 4 Giornale di diritto del lavoro e di relazioni industriali 513; Ida A Nicotra, 'L'ingresso dell'ambiente in Costituzione, un segnale importante dopo il Covid' (2021) Federalismi.it; Francesca Rescigno, 'Quale riforma per l'articolo 9' (2021) Federalismi.it; Leonardo Salvemini, 'Dal Cambiamento Climatico Alla Modifica Della Costituzione: I Passi Per La Tutela Del Futuro (Non Solo Nostro)' (2021) 20 Federalismi.it 63. Finally, allow me to recall Daniele Porena, 'Sull'opportunità di un'espressa costituzionalizzazione dell'Ambiente e dei principi che ne guidano la protezione. Osservazioni intorno alle proposte di modifica dell'articolo 9 della Carta presentate nel corso della XVIII legislatura' (2020) 14 Federalismi.it 312.

bly based on the decision to exclude an extensive listing of the set of principles regulating environmental protection from the provision. However, the direct reference to future generations, that the Constitution recognizes as having a real interest,[24] captures the deepest core of the concept of sustainability.[25]

In fact, the principle of sustainability seeks an intergenerational balancing technique between the needs, rights and interests of the different generations as well as requiring each generation to set aside a fair number of potential opportunities in favor of those that will follow.

The safeguarding of the interest of future generations indeed assumes a relationship with present generations. Therefore, it seems to me that the reference to future generations includes the very concept and definition of sustainability.

As we are reaching the conclusion of my paper, I will now try to present a brief reasoning on the ways in which the principle of sustainability asserts itself in contemporary constitutions.

The principle of sustainability is often criticized, mainly because of the excessively evanescent nature of the concept of sustainability itself, which is said to undermine the normativity of its content.

In my opinion, this criticism does not properly take into account the noted constitutional and legal-philosophical debate that has been going on for some decades with regard to the distinction between rules and principles.

It seems to me that the distinction between principles and rules plays a decisive role in understanding the legal phenomenon. In extreme synthesis, rules and principles both belong to the categories of the normative phenomenon, but with some fundamental distinctions.

[24] In other constitutions, the issue of future generations has not been introduced in terms of the rights that they could claim but, rather, in terms of the duties of the present generations that weigh in their favor. The deontic ethics of duties and responsibilities, as reconstructed by Hans Jonas, or even the idea of a "just saving", as expressed by John Rawls, among others, seems in fact to find confirmation in some constitutional provisions, such as that of the Grundgesetz, aimed at establishing a general duty of responsibility on those currently present but in favor of future generations.

[25] As recently observed by Bifulco (n 23) 8, «la costituzionalizzazione delle generazioni future recupera implicitamente tutto l'acquis legato alla sostenibilità, stabilendosi che l'uso delle risorse deve tener conto anche di chi viene dopo di noi. E questo non è un principio scontato all'interno di una costituzione che nasce, come ho già ricordato, in un contesto di economia industriale orientata alla crescita».

First of all, we must consider the degree of generalization, which is higher in the case of principles that are called upon to guide the development of legal systems through a wide variety of fields.

Furthermore, principles constitute the reasons behind the rules: in a nutshell, the normative scope of the principles is aimed at the construction of the rules, whereas the latter are aimed at the actual discipline of conduct.

Hence, following the reasoning of Robert Alexy,[26] the fundamental difference between principles and rules appears to be that the latter are "all or nothing" provisions, requiring to be thoroughly observed. Whereas, principles constitute "optimization provisions", that is to say, guidelines in this case that are not final and that need to be implemented to the fullest possible extent on the basis of both real and juridical possibilities.

As is widely known, the limit of the juridical possibilities in implementing the aforementioned principles is therefore represented by their relationship with other, and by potentially conflicting principles of equal rank.

Lastly, the clash between principles raises the issue of their respective weight and must be resolved through the mechanism of balancing.

The quick reference we have made to the ongoing debate on the distinction between rules and principles can support a conclusion in favor of the full normativity of the concept of sustainability as a principle.

I really do not think we can doubt the generality and breadth of the principle of sustainability, especially given the extent of the issues pertaining to sustainability. And there is no doubt, in my opinion, that the principle of sustainability is aimed, among other things, at inspiring the practical regulatory discipline of the vast systemic sectors that I have just briefly mentioned.

The concept of sustainability would therefore identify a principle, with a very high axiological content, aimed at preserving the fundamental rights as well as the essential needs of future generations. As such, the principle of sustainability cannot escape the balancing mechanisms existing between fundamental principles.[27]

[26] See Robert Alexy, *Theorie der Grundrechte* (Suhrkamp 1994).

[27] With regard to the provisions that make a reference to future generations in various constitutions, this topic has been introduced by Bifulco (n 4) 127, who observes that «la presenza di riferimenti alle generazioni future all'interno di disposizioni costituzionali che mirano alla disciplina di un oggetto determinato rafforza l'obbligo dei destinatari di quella disposizione di tener conto, nel momento del bilanciamento, degli interessi degli uomini che verranno».

Francesco de Leonardis

ITALIAN CONSTITUTIONAL REFORM: THE AMENDED ART 41 AND THE CIRCULAR ECONOMY

The original text of the Italian Constitution – adopted in 1948 – contained no reference to the environment and the need to protect it, as mature environmental awareness had not yet developed at that time.[1] Thus, the constitutional relevance of the environment has emerged jurisprudentially, mainly, but not only,[2] through the interpretive work of the Constitutional Court. The Court derived the environmental value from the combined provisions of Articles 9[3] and 32[4] Const., respectively dedicated to the protection of the landscape and personal and public health. The process has been long and can be roughly summarised in three main phases.

At an early stage – during the 1960s and the 1970s – the Court began to promote environmental protection, even though the environment did not yet enjoy an autonomous constitutional dignity. In this phase, the environment was indirectly taken into consideration through the protection and conservation of landscape and natural beauty, parks and wildlife.[5]

Subsequently – during the 1980s – the environment was qualified as a primary constitutional value along with health and landscape, and environmental protection became a fundamental individual right and a collective

[1] Among the works of Italian doctrine written in English about environmental protection in the Italian Constitution before the reform of 2022, see Fabrizio Fracchia, *Environmental Law. Principles, Definitions and Protection Models* (Editoriale Scientifica 2015) 105-112.

[2] The "Corte di Cassazione" has played an active role in this respect, too (eg, Cass, sent 9 March 1979, no 1463 and Cass, sent 6 October 1979, no 5172).

[3] Art 9 Const. in its original version stated that "*The Republic shall promote the development of culture and of scientific and technical research. It shall safeguard the natural beauties and the historical and artistic heritage of the Nation*".

[4] Art 32(1) Const. states that "*The Republic shall safeguard health as a fundamental right of the individual and as a social interest and shall guarantee free medical care to the indigent*".

[5] For instance, see the following rulings of the Constitutional Court: Corte cost, sent 19 December 1959, no 65; Corte cost, sent 6 July 1965, no 59; Corte cost, sent 24 April 1967, no 50; Corte cost, sent 9 June 1967, no 71; Corte cost, sent 27 June 1972, no 30; Corte cost, sent 4 July 1974, no 203.

interest to be protected from the public powers.[6] From this moment on, the environment acquires constitutional significance in the interpretation of jurisprudence and turns into a general principle of the legal system that public authorities must implement.

Following the 2001 constitutional reform,[7] the environment "enters" the Italian Constitution. However, it does not emerge as a principle or value, but as a matter of legislative competence: Article 117 Const., as revised after the reform, provides that the legislative competence for "protection of the environment" is exclusively up to the State, while the legislative competence for "enhancement of environmental goods" is shared with the Regions. Since the subject of environmental protection is so broad that it includes and overlaps other constitutional matters, the Court was called upon to establish the boundaries of this competence between the State and the Regions.[8]

[6] The Constitutional Court attempts for the first time to define the term environment in its judgement (Corte cost, sent 22 December 1982, no 232) stating that environmental protection, understood in a broad sense, includes not only environmental protection linked to the urban planning of the territory, but also the protection of the landscape, the protection of health as well as the defence of soil, air and water from pollution. The real quantum leap in the reconstruction of the legal system of environmental protection took place from 1985 onwards: starting with ordinance (Corte cost, ord 22 June 1983, no 184), in which the Court spoke in explicit terms of protection of the environment, and after a series of decisions in which it spoke of protection of the environment alongside that of the landscape, we come to judgement Corte cost, sent 28 May 1987, no 210 in which the Court makes explicit reference to constitutional values, such as the environment and health, that fall within the competence of the State. From judgements Corte cost, sent 15 May 1987, no 617 and Corte cost, sent 30 December 1987, no 641 onward, the environment is qualified as a primary good and an absolute value constitutionally guaranteed to the community. The qualification of the environment as a constitutional value from this point onwards will be an established point in the jurisprudence of the court of laws. See in doctrine: Marcello Cecchetti, *Principi costituzionali per la tutela dell'ambiente* (Giuffrè 2000) 1ff.

[7] l cost 18 ottobre 2001, no 3 'Modifiche al titolo V della parte seconda della Costituzione'.

[8] According to an initial orientation of the Court, the State should have guaranteed uniform standards of environmental protection throughout the territory, while the regions could have generally raised the level of protection (*ex multis,* see the following judgements of the Court: Corte cost, sent 26 July 2002, no 407; Corte cost, sent 20 December 2002, no 536; Corte cost, sent 26 July 2003, no 222; Corte cost, sent 7 November 2003, no 331). This interpretation has been revised since 2007: despite its complexity, the object of environmental protection is unique, the biosphere, and it is up to the State to regulate it organically. Thus, the regional legislative intervention in environmental matters could only be justified within the scope of their competence (*ex multis,* see the following judgements of the Court: Corte cost, sent 14 November 2007, no 378; Corte cost, 18 April 2008, no 104). On this topic,

Finally, the 2022 constitutional reform[9] has definitively raised the environmental protection within the general principles of the legal system, by amending Articles 9 and 41 Const. As a result, the environment is now formally included among the fundamental principles of the Constitution and becomes crucial in the Italian economic Constitution.

Article 9 now states (in italics the 2022 amendments) that: "[I] The Republic shall promote the development of culture and scientific and technical research. [II] It shall safeguard the natural beauties and the historical and artistic heritage of the Nation. [III] *It shall safeguard the environment, bio-*

see: Beniamino Caravita di Toritto, *La Costituzione dopo la riforma del Titolo V. Stato, regioni e autonomie locali fra Repubblica e Unione europea* (Giappichelli 2002); Barbara Pozzo and Mauro Renna, *L'ambiente nel nuovo Titolo V della Costituzione* (Giuffrè 2004); Paolo Maddalena, 'La giurisprudenza della Corte Costituzionale in materia di tutela e fruizione dell'ambiente e le novità sul concetto di "materia", sul concorso di più competenze sullo stesso oggetto e sul concorso di materie' (2010) Rivista Giuridica dell'Ambiente 685; Domenico Amirante, 'Profili di diritto costituzionale dell'ambiente' in Paolo Dell'Anno and Eugenio Picozza (eds), *Trattato di diritto dell'ambiente* (CEDAM 2012) 239.

[9] l cost 11 febbraio 2022, no 1 'Modifiche agli articoli 9 e 41 della Costituzione in materia di tutela dell'ambiente'. On this constitutional reform about the environment, see: Giovanni Cocco, 'Ordinamento costituzionale' in Stefano Nespor and Luca Ramacci (eds), *Codice dell'Ambiente, Profili generali e speciali* (Giuffrè 2022) 152; Marcello Cecchetti, 'Virtù e limiti degli articoli 9 e 41 della Costituzione' (2022) 1 Corti Supreme e Salute; Andrea Morrone, 'L'«ambiente» nella Costituzione. Premesse di un nuovo «contratto sociale»' in *La riforma costituzionale in materia di tutela dell'ambiente. Atti del Convegno (28 gennaio 2022)* (Editoriale Scientifica 2022) 91; Raffaele Bifulco, 'La legge costituzionale 1/2022: problemi e prospettive' (2022) Federalismi.it; Edoardo Chiti, 'In motu. L'Unione europea e la trasformazione della costruzione giuridica della sostenibilità' in *La riforma costituzionale in materia di tutela dell'ambiente. Atti del Convegno (28 gennaio 2022)* (Editoriale Scientifica 2022) 183; Aristide Police, 'Il diritto costituzionale dell'ambiente in Europa. Discorrendo con Edoardo Chiti e Massimo Monteduro' in *La riforma costituzionale in materia di tutela dell'ambiente. Atti del Convegno (28 gennaio 2022)* (Editoriale Scientifica 2022) 211; Massimo Monteduro, 'Riflessioni sulla "primazia ecologica" nel moto del diritto europeo (anche alla luce della riforma costituzionale italiana in materia ambientale)' in *La riforma costituzionale in materia di tutela dell'ambiente. Atti del Convegno (28 gennaio 2022)* (Editoriale Scientifica 2022) 221; Monica Delsignore, Alfredo Marra and Margherita Ramajoli, 'La riforma costituzionale e il nuovo volto del legislatore nella tutela dell'ambiente' (2022) 1 Rivista giuridica dell'ambiente 1; Alessia-Ottavia Cozzi, 'La modifica degli artt. 9 e 41 Cost. in tema di ambiente: spunti dal dibattito francese sulla Carta dell'ambiente del 2004 tra diritti e principi' (2021) 4 DPCE online 3391ff. Finally, see Francesco de Leonardis, 'La riforma "bilancio" dell'art. 9 Cost. e la riforma "programma" dell'art. 41 Cost. nella legge costituzionale n. 1/2022: suggestioni a prima lettura' (2022) ApertaContrada.

diversity and ecosystems, also in the interest of future generations. State law shall regulate the methods and means of safeguarding animals."

The revised Article 41 provides (in italics the 2022 amendments) that: "[I] Private economic enterprise shall have the right to operate freely. [II] It cannot be carried out in conflict with social utility or in such a manner as may harm health, *the environment*, safety, liberty and human dignity. [III] The law shall determine appropriate programmes and checks to ensure that public and private economic enterprise activity be directed at and co-ordinated for social and *environmental* purposes."

Although the most obvious novelty of the reform concerns the inclusion of the environment in Article 9, perhaps the most important and ambitious achievement is the amendment of Article 41(3), which sets out a key concept: the economic model must change to reach the goal of protecting the environment. It ties in with the approach adopted by international reports such as the 2019 "Global Resources Outlook" and the 2015 "Agenda 2030", which very clearly express that only by changing the trajectory of the economy, can effective environmental protection be achieved.[10]

The addition of environmental purposes in Article 41(3) clearly mirrors this shift. On closer examination, the entire structure of the new Article 41 reflects the evolution of the economy towards better environmental protection. Using a conventional American "coloured" classification, Article 41 now takes into consideration the economic models of the "brown economy", the "green economy" and the "blue economy".[11]

Article 41(1) is the only paragraph not amended by the 2022 reform and refers to the "brown" economy. The philosophy behind this economic model is "produce what you want with no limits", thus implying that production is linear and free to produce without any concern about resource regeneration and environmental issues.

Article 41(2), by imposing a very important negative limitation, represents the "green" economy: economic activities cannot conflict with envi-

[10] International Resource Panel, 'Global Resources Outlook 2019: Natural Resources for the Future We Want' (2019). The General Assembly of the United Nations adopted the "Agenda 2030" through the Resolution of the Assembly A/RES/70/1 of 21st October 2015 (United Nations General Assembly, 'Transforming our world: the 2030 Agenda for Sustainable Development' (2015)).

[11] Rosario Ferrara, 'Brown economy, green economy, blue economy: l'economia circolare e il diritto dell'ambiente' in Francesco de Leonardis (ed), *Studi in materia di economia circolare* (EUM 2019) 39.

ronmental protection.[12] In this case, the trajectory of the economy is still linear, so the economy remains free to produce what it wants, but can no longer ignore the environmental effects of its production. Hence, it could be argued that the new paragraph 2 introduces a limitation and an extra cost for businesses, according to the philosophy "produce what you want, so long as you protect the environment without harming it".

Article 41(3) is the real game-changer and depicts the "blue" economy, or circular economy. The imposition of a positive limitation of the economic initiative, both public and private, is the real novelty of the constitutional reform. It implies that the economic system can be steered through planning towards environmental protection, according to the philosophy of "produce to improve the environment". It is clear that the "blue" or "circular" paradigm overturns the previous perspective and makes use of the economy as a valuable tool for achieving environmental protection, for "regenerating" or improving environmental conditions. The new economic model is not only 'designed' not to pollute, but also to improve the environment. Materials and energy used to manufacture products retain their value for as long as possible, waste is reduced to a minimum and as few resources as possible are used.[13]

In this sense, it can be observed that Article 41(3) introduces the principle of public ecological conformation of the economy, which addresses sustainability issues beyond mere conservation of the environment, moving towards regeneration, in order to implement the ecological transition. Therefore, the environment is no longer regarded as a cost or a limitation but, on the contrary, as a profit opportunity for businesses and a "driver" for eco-

[12] The previous version of Article 41(2) already provided that economic activity could not be exercised affecting social utility or harming security, freedom and human dignity. According to case law and doctrine, the limitation of environmental protection was included in the social utility, which should be balanced anyhow with economic interest (see Corte cost, sent 13 March 1990, no 127; Corte cost, sent 9 May 2013, no 85; see also in doctrine: Massimo Luciani, *La produzione economica privata nel sistema costituzionale* (CEDAM 1983) 77; Margherita Ramajoli, 'Attività economiche, poteri pubblici e tutela dell'ambiente nel nuovo art. 41 della Costituzione', in *La riforma costituzionale in materia di tutela dell'ambiente. Atti del Convegno (28 gennaio 2022)* (Editoriale Scientifica 2022) 169.

[13] Francesco de Leonardis, 'Economia circolare: saggio sui suoi tre diversi aspetti giuridici. Verso uno stato circolare?' (2017) Diritto Amministrativo 163; Francesco de Leonardis, 'Economia circolare (diritto pubblico)' in *Digesto delle discipline pubblicistiche* (Utet 2021) 166.

nomic development.[14] This is the functioning core of the Circular Economy model, that requires a positive synergistic relationship between environment and development: as the protection of one increases, so does the strengthening of the other, and vice versa.

On closer examination, environmental protection also becomes a "driver" for expanding the role of public authorities in the national economy and making businesses, consumers, and the market responsible and proactive for the necessary change.[15] As recent case law has observed, constitutional reform has brought with it a rebalancing or rearrangement of the constitutional values involved in Article 41 such that economic policies must include environmental protection within them.[16]

Article 41(3) is not only intended to influence the legislative level, but also reshapes the roles of public administrations, which are called upon to guide production by influencing its multiple regulatory aspects. For instance, in addition to national and regional administrations, the disposition could involve independent public agencies (i.e., AGCM – the Italian Antitrust Authority – which deals with competition and the market[17]; ARERA, – the Italian Regulatory Authority – which deals with the regulation of the energy, waste, and water sectors[18]), or public financial institutions (i.e., Cassa depositi e prestiti – the Italian development bank – whose mission-oriented policies can steer investments towards the ecological transition).[19] On the other hand, economic national planning is the instrument for engaging businesses, markets, and

[14] Giampaolo Rossi, 'L'ambiente per lo sviluppo: strumenti per il nuovo paradigma' in Giampaolo Rossi and Massimo Monteduro (eds), *L'ambiente per lo sviluppo. Profili giuridici ed economici* (Utet 2020) 17; Giampaolo Rossi, 'La "materializzazione" dell'interesse all'ambiente' in Giampaolo Rossi (ed), *Diritto dell'ambiente* (Giappichelli 2021) 21-23.

[15] Francesco de Leonardis, *Lo Stato ecologico. Approccio sistemico, economia, poteri pubblici e mercato* (Giappichelli 2023) 150.

[16] Cons Stato, sent 23 September 2022, no 8167, s 3.5.

[17] Established by l 10 ottobre 1990, no 287 'Norme per la tutela della concorrenza e del mercato.

[18] Established by l 14 novembre 1995, no 481 'Norme per la concorrenza e la regolazione dei servizi di pubblica utilità. Istituzione delle Autorità di regolazione dei servizi di pubblica utilità'.

[19] Originally established by Law of the Sardinian Reign 18th November 1850, no 1097, and more recently revised by d l 30 settembre 2003, no 269, converted into l 24 novembre 2003, no 326 'Conversione in legge, con modificazioni, del decreto-legge 30 settembre 2003, n. 269, recante disposizioni urgenti per favorire lo sviluppo e per la correzione dell'andamento dei conti pubblici'.

consumers, without which it would be impossible to achieve environmentally challenging goals. The affirmation of the Circular Economy model through the principle of the ecological conformation of the economy makes it clear that the public intervention for environmental protection is not just a negative limitation, but a positive constraint, and it is not only suggested, but necessary.

The innovations introduced in the Italian Constitution found a solid basis at the European level. Although the European Treaties have no reference to the protection of the environment as an element to which the economy and production must conform,[20] recent European legislation and macroeconomic planning is increasingly very influenced by "green" goals and ecological transition choices.[21] Indeed, legal doctrine is currently discussing the need to revise the European Treaties.[22]

[20] Before the Single European Act [1986] OJ L 169/01, there was not even a reference to the environment as an asset to be protected. Subsequently, the environment entered the Treaty system as a policy of action of the EU institutions. According to Consolidated version of the Treaty on European Union [2016] OJ C 201/01, art 3(3), sustainable development is one of the aims on which the Union was founded. Sustainable development lies in the protection and improvement of the quality of the environment, which must be translated into policies and actions, whose general regulation is contained in the Treaty on the Functioning of the European Union [2016] OJ C 202/01, art 191ff. In the Treaty system, economic and environmental policies are sectoral and remain formally separate, even though they should unite in common efforts towards sustainable development.

[21] The transition to the Circular Economy and the Blue Economy can be identified with the following acts: European Commission, 'Towards a circular economy: A zero waste programme for Europe' (Communication) COM(2014) 398 final; European Commission 'Closing the loop – An EU action plan for the Circular Economy' (Communication) COM(2015) 614 final; Council Directive 2018/849/EC 30 May 2018 amending Directives 2000/53/EC on end-of-life vehicles, 2006/66/EC on batteries and accumulators and waste batteries and accumulators, and 2012/19/EU on waste electrical and electronic equipment [2018] OJ L150/93; Council Directive 2018/850/EC of 30 May 2018 amending Directive 1999/31/EC on the landfill of waste [2018] OJ L150/100; Council Directive 2018/851/EC of 30 May 2018 amending Directive 2008/98/EC on waste [2018] OJ L150/109; Council Directive 2018/852/EC of 30 May 2018 amending Directive 94/62/EC on packaging and packaging waste [2018] OJ L150/141; European Commission, 'A new Circular Economy Action Plan. For a cleaner and more competitive Europe' (Communication) COM(2020)98 final.

[22] Francesco de Leonardis, 'Sustainable production as a driver for rewriting European Treaties' (2023) 1 Il diritto dell'economia I; Edoardo Chiti, 'Introduction to the Symposium: Managing the Ecological Transition of the European Union' (2021) 1 Rivista quadrimestrale di diritto dell'ambiente 9; Giancarlo Montedoro, 'Il ruolo di Governo e Parlamento nell'elaborazione e nell'attuazione del PNRR' (2021) www.giustiziaamministrativa.it 8; Carlo Colapietro, 'La forma di Stato e di governo italiana alla "prova" del Piano Nazionale di Ripresa e Resilienza' (2022) 3 Rivista AIC.

Therefore, Article 41(3) represents the most recent stage in the long process of emergence that has taken the environment from being generically recognised within the Constitution to becoming the driver of profound changes in the economic Constitution. Protecting the environment now means ensuring a system approach for the public powers to direct and coordinate the economy towards a high protection of ecosystems, a carbon-free or net-zero production. As a result, this path is going to lead to a new vision of the State, which can be defined as a "Circular State", "Environmental State" or "Ecological State".

Hence, it is precisely the ecological conformation of the economy that added value to the 2022 Italian constitutional reform. If the amended Article 9 added the Italian Constitution to the group of third-generation Constitutions – those that include the environment among their general principles – the amended Article 41 goes further and places it among the fourth-generation Constitutions, which modify the Economic Constitution[23]. This innovation is not common yet, as it can be seen by a brief comparison with other European experiences. Though environmental protection is included among the fundamental principles of 15 Constitutions out of 27 Member States, there are few European Constitutions with a specific disposition that pushes towards such a green conformation of the economy, by implementing a systemic approach.[24]

[23] On the evolution of the environmental constitutionalism and a comparative approach, see: David R Boyd, *The environmental rights revolution. A study on Constitutions, Human Rights and Environment* (UBC Press 2012); Giovanni Cordini, 'Diritto ambientale comparato' in Paolo Dell'anno and Eugenio Picozza (n 8) 101; Claudia Sartoretti, 'La tutela dell'ambiente nel diritto comparato: modelli costituzionali a confronto' in Rosario Ferrara and Maria Alessandra Sandulli (eds), *Trattato di diritto dell'ambiente* (Giuffrè 2014) 337; Domenico Amirante, 'La reformette dell'ambiente in Italia e le ambizioni del costituzionalismo ambientale' (2022) 2 DPCE V; Domenico Amirante, *Costituzionalismo ambientale. Atlante giuridico per l'Antropocene* (Il mulino 2022) 89.

[24] French and Croatian Constitutions contain an example of ecological conformation. *Loi* constitutionnelle n° 2005-205 du 1er mars 2005 relative à la Charte de l'environnement (Charte de l'environnement), art 6 states that public policies must promote sustainable development and, to this end, policies must consider the conservation and enhancement of the environment, economic development, and social progress equally important. More similar to the Italian Constitutional experience is the choice made by the Croatian Constitution, art 50 which provides that business and property can be exceptionally restricted by law to protect, among other interests, nature and the environment.

A few examples of fourth-generation constitutions can also be found in the rest of the world, such as the Colombian Constitution[25] and the Panamanian Constitution.[26]

To conclude, the reform of Article 41 of the Italian Constitution by Constitutional Law 11th February 2022, no 1, is historical, as it introduces not only a rule but an entire model of economic development in a circular sense. What happened in Italy should also be inspiring for the revision and update of the economic Constitution of the European Union, which is increasingly concerned with solving environmental issues towards a circular economy. This reform could also represent a valuable model for other European countries to redesign their economic Constitutional framework from an environmental perspective.

[25] The Colombian Constitution, art 334(1) placed in Title XII "On the Economic and Public Finance Regime", provides that "The general management of the economy is the responsibility of the State. By mandate of an Act, the state shall intervene in the exploitation of natural resources, land use, the production, distribution, use, and consumption of goods, and in the public and private services to rationalize the economy to achieve, at the national and regional level and within the framework of fiscal sustainability, the improvement of the quality of life of the inhabitants, the equitable distribution of opportunities, and the benefits of development and conservation of a healthy environment".

[26] The Panamanian Constitution, art 120 placed in Chapter 6 "Health, Social Security and Social Welfare" envisages that "The State shall regulate, supervise, and apply, at the proper time, the measures necessary to guarantee a rational use of, and benefit from, land, river and sea life, as well as forests, lands, and waters, to avoid their misuse, and to ensure their preservation, renewal, and permanence".

Christopher M. Bruner

BUSINESS RISK, CAPITAL MARKETS, AND SUSTAINABLE COMPANIES

1. *Introduction*

Corporate sustainability is inherently bound up with corporate risk, and particularly with risk-taking incentives of various corporate actors – including directors and officers who manage the business, and shareholders who can exert pressure upon corporate governance in various ways.[1] This article sets out a framework for thinking about corporate risk-taking incentives and how they might be reformed to curb excessive risk and externalization of costs, thereby improving corporate sustainability.

Section 2 describes the corporate form's structural flexibility, focusing on the relationship between two important mechanisms for incentivizing corporations to manage risks and internalize their full costs of production – assessable stock and capital regulation. Section 3 considers tradeoffs between these alternatives, highlighting various factors affecting how a given jurisdiction amenable to sustainability-oriented reform should evaluate potential approaches. Section 4 briefly concludes.

2. *Liability Exposure and Risk-Taking*

This section describes the corporation's structural flexibility and how its various features can affect risk-taking incentives in corporate decision-making. It then describes the relationship between assessable stock and capital regulation, two important regulatory mechanisms that substantially impact corporate risk-taking.

[1] Christopher M Bruner, *The Corporation as Technology: Re-Calibrating Corporate Governance for a Sustainable Future* (Oxford University Press 2022) 124-133.

2.1. *Levers of Corporate Governance*

In recent work I have suggested that policymakers, practicing lawyers, and scholars alike have tended to view the corporate form as if it were fixed and unchangeable, and I have argued in response that we should reject that approach in favor of a more dynamic view.[2] It is often claimed that corporations in all jurisdictions involve the same core set of fundamental attributes – legal personality, limited liability for shareholders, unfettered share transferability, centralized management through a board of directors, and exclusive voting power in the hands of shareholders.[3] This is just one approach, however, and not necessarily the optimal one.

Rather, we should think of the corporation as a flexible form of legal technology. Specifically, I have suggested that we can conceptualize the corporation as a set of governance-related 'levers' that can be set in many different ways. Governance power could be more or less centralized; directors could face more or less liability exposure, which affects their risk incentives; board composition could be determined by shareholders alone, or others could have representation as well; boards could be required to focus only on shareholders, or they could be given flexibility to consider other interests and values; shareholders could have more or less ability to pursue their own interests through lawsuits; shareholders could have more or less investment liquidity, with differing effects on management; and shareholders could face more or less liability exposure, affecting their risk incentives as well.[4] These flexible capacities can be described as a set of governance levers that policymakers could choose to set in different ways, and in different combinations, depending on the circumstances – either through generally applicable corporate law, or through industry-specific regimes.

The critical threshold point is that corporate law does not inherently require any particular configuration of the levers of governance – notably, it does not require prioritizing financial returns above all else, and it does not legitimize unlimited risk-taking and externalization of costs onto society and

[2] See generally ibid. See also Christopher M Bruner, 'Corporate Governance Reform and the Sustainability Imperative' (2022) 131 Yale Law Journal 1217.

[3] Eg John Armour and others, 'What Is Corporate Law?' in Reinier Kraakman and others (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press 2017) 5-15.

[4] Bruner, *The Corporation as Technology* (n 1) 91-110.

the environment.[5] In reality, the corporation is a dynamic set of flexible capacities – and if those capacities are thoughtfully used, they could help promote corporate sustainability. Achieving this, however, requires broadening how we think and speak about corporate governance reform to recognize the full range of possibilities.[6]

Described in this manner, the typical US publicly traded company has a strong board elected exclusively by shareholders; focuses intensely on financial returns for shareholders, who can further advance their own interests through corporate lawsuits; provides substantial investment liquidity; and sharply limits liability exposure for both shareholders and boards.[7] There is nothing inevitable about this approach, however, and indeed the levers of governance have been set in different ways at different times to achieve different goals – including to constrain risk-taking and cost externalization. The prevailing explanation for shareholders' limited liability focuses on promoting comfort with entrepreneurial risk-taking in large capital-intensive businesses,[8] and this is reinforced by structures such as the business judgment rule, which make managers comfortable taking the greater risks that shareholders with limited liability prefer.[9] Less widely acknowledged, however, is the corollary – if we want less risk-taking, then rethinking how we set the levers impacting shareholder and board liability is the natural place to start. It stands to reason that carving back at limited liability protection, and thereby raising shareholders' exposure for corporate harms, would curb shareholders' risk appetite, and perhaps inspire monitoring to constrain corporate risk-taking.[10]

History provides vivid examples of these dynamics. For much of the nineteenth and early twentieth centuries, corporate law sought to limit risk-taking and cost externalization in banks, and in the United States and various other jurisdictions this was achieved by increasing liability exposure for sha-

[5] ibid 124-33.

[6] Bruner, 'Corporate Governance Reform' (n 2) 1275-1277.

[7] Bruner, *The Corporation as Technology* (n 1) 114.

[8] Frank H Easterbrook and Daniel R Fischel, *The Economic Structure of Corporate Law* (Harvard University Press 1991) 41-44.

[9] ibid 99-100. See also Patricia A McCoy, 'A Political Economy of the Business Judgment Rule in Banking: Implications for Corporate Law' (1996) 47 Case Western Reserve Law Review 1, 11-12.

[10] Bruner, *The Corporation as Technology* (n 1) 112-114.

reholders and boards alike.[11] For shareholders, this took the form of assessable stock, the terms of which permitted shareholders in a struggling bank to be assessed for additional funds beyond the amount initially invested.[12] The aim was to stabilize the banking system, and the core mechanism was enhanced monitoring of management by shareholders themselves to constrain risk-taking to a level that shareholders facing greater liability exposure could accept.[13] In this respect, assessable shares are essentially tantamount to partially paid-up shares,[14] which have likewise figured prominently in the past.[15]

2.2. *Structural Means of Internalizing Costs*

The foregoing suggests that, to promote corporate sustainability, we might revisit shareholder liability as a means of limiting socially and environmentally harmful risk-taking and cost externalization – and not just in financial firms.[16] Other categories of businesses for which such reforms might reasonably be considered include essential non-financial firms that involve similar moral hazard dynamics because they are too big or too important to be allowed to fail – for example, large 'national champion' companies[17] or those that 'fill key societal roles' by providing critical infrastructure or public services.[18] Such reforms might also be beneficial for businesses in

[11] Jonathan R Macey and Geoffrey P Miller, 'Double Liability of Bank Shareholders: History and Implications' (1992) 27 Wake Forest Law Review 31; McCoy (n 9).

[12] Macey and Miller (n 11) 35-39.

[13] ibid 53-58. Similar regimes were adopted in other jurisdictions, including Australia, Canada, and the United Kingdom. Bruner, *The Corporation as Technology* (n 1) 153; Brian R Cheffins, *Corporate Ownership and Control: British Business Transformed* (Oxford University Press 2008) 233; Charles AE Goodhart and Rosa M Lastra, 'Equity Finance: Matching Liability to Power' (2020) 6 Journal of Financial Regulation 1, 29-40.

[14] Bruner, *The Corporation as Technology* (n 1) 70-71. For example, assessable stock in a double liability regime is essentially tantamount to shares that are 50 percent paid-up at issuance; in either case, the investor faces a residual liability equal to the amount initially paid.

[15] Eg Cheffins (n 13) 171-174 (describing frequent use of partially paid-up shares in nineteenth-century British industrial companies).

[16] Bruner, *The Corporation as Technology* (n 1) 152-177.

[17] Oscar Couwenberg and Stephen J Lubben, 'Not a Bank, Not a SIFI; Still Too Big to Fail' (2019) 35 Emory Bankruptcy Developments Journal 53, 54.

[18] Shlomit Azgad-Tromer, 'Too Important to Fail: Bankruptcy versus Bailout of Socially Important Non-Financial Institutions' (2017) Harvard Business Law Review 159, 161.

inherently hazardous industries – notably, those 'engaged in highly risky activities' for which 'net present value to society as a whole is negative' (yet which shareholders might nevertheless favor if limited liability shields them from bearing the full costs).[19]

Some have argued that abandoning such structures contributed to the reckless risk-taking that led to the global financial crisis,[20] and scholars have advanced creative proposals to revive them in response[21] – yet such proposals have not gained much political traction. To understand why that is, recall why assessable stock for bank shareholders died out in the first place. Jonathan Macey and Geoffrey Miller, in their study of the US regime, note the extremity of bank failures during the Great Depression, which triggered widespread assessments of retail shareholders who 'were already in serious financial difficulty' themselves, and who may have 'purchased their shares in prosperous times without serious consideration of their potential liability in the event of bank failure'.[22] These rules were gradually repealed across the United States in the subsequent couple decades in favor of reliance on publicly funded deposit insurance,[23] which provides an effective response to bank runs yet does so at the cost of greater moral hazard, encouraging more risk-taking.[24]

Against this background, concerns about the effects of reintroducing assessable stock should not be lightly dismissed – because just as history shows that assessable stock provided an effective mechanism for curbing risk-taking, history also shows that the underlying mechanisms for shareholder monitoring are imperfect, and could result in real pain for retail shareholders in extreme circumstances. These are valid concerns that have to be taken seriously. However, there are good reasons to think that the prospects for mitigating corporate risk-taking through liability structures may actually be more favorable today.

Understanding why requires examining the fundamental regulatory strategy more closely. In essence, the idea is to require maintenance of a fund

[19] Henry Hansmann and Reinier Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100 Yale Law Journal 1879, 1882-1883.

[20] Eg Christopher M Bruner, 'Conceptions of Corporate Purpose in Post-Crisis Financial Firms' (2013) 36 Seattle University Law Review 527, 560-561.

[21] Bruner, *The Corporation as Technology* (n 1) 159-162.

[22] Macey and Miller (n 11) 37-38.

[23] ibid 38-39.

[24] ibid 32-33. See also Bruner, 'Conceptions of Corporate Purpose' (n 20) 549; McCoy (n 9) 14-15.

for external harms that corporate risk-taking could generate, which inherently requires internalization of costs that would otherwise be externalized to those harmed.[25] If shareholders were forced to bear greater exposure in this way, then they would rationally discount how much they would pay for the stock to reflect the risks involved.[26] Higher-risk businesses would face higher costs for equity capital, and lower-risk businesses would benefit from cheaper equity capital – deterring abuses and incentivizing corporate directors and officers to carefully manage risk.[27]

This is an elegant economic story, but it raises a number of practical questions. How much liability exposure should there be, and when should it be triggered? How do we avoid swinging to the opposite extreme, leaving investors so risk averse that they are not willing to invest at all? More generally, where should the fund be located – with shareholders, or elsewhere?

It is critical to recognize that assessable stock is itself a flexible structure capable of accommodating many different design features.[28] Shareholder liability is too often characterized as an on-off switch, as if shareholders either face full liability or none at all.[29] In reality, however, there is plenty of room for fine-tuning. Indeed, proposals advocating a return to assessable stock identify several means of precisely calibrating exposure to avoid excessive risk aversion. Exposure could be keyed to a multiple (or fraction) of the initial stock investment,[30] limited by a cap or asset exemption,[31] or imposed pro rata.[32] Likewise, such exposure need not apply to all shareholders – for

[25] Macey and Miller (n 11) 36-37.

[26] Easterbrook and Fischel (n 8) 44. See also Peter Conti-Brown, 'Elective Shareholder Liability' (2012) 64 Stanford Law Review 409, 436-437; Hansmann and Kraakman (n 19) 1903, 1933.

[27] Bruner, *The Corporation as Technology* (n 1) 113-114.

[28] ibid 164-165.

[29] On this tendency, see Hansmann and Kraakman (n 19) 1887; Conti-Brown (n 26) 455.

[30] Alessandro Romano, Luca Enriques and Jonathan R Macey, 'Extended Shareholder Liability for Systemically Important Financial Institutions' (2020) 69 American University Law Review 967, 994-997; Stephen L Schwarcz, 'The Governance Structure of Shadow Banking: Rethinking Assumptions About Limited Liability' (2014) 90 Notre Dame Law Review 1, 23, 29.

[31] Claire Hill and Richard Painter, 'Berle's Vision Beyond Shareholder Interests: Why Investment Bankers Should Have (Some) Personal Liability' (2010) 33 Seattle University Law Review 1173, 1191, 1194.

[32] Conti-Brown (n 26) 433-434; Hansmann and Kraakman (n 19) 1880, 1892-1894. See also Macey and Miller (n 11) (noting that bank shareholders were assessed pro rata under US double liability rules).

example, it might apply solely to those with control or significant influence in corporate governance.[33] Similarly, such exposure need not apply to all corporate entities – for example, it might apply solely to particular types of entities, or particular industries, where concerns about risk loom largest.[34]

At the same time, we should not overlook the impact of indirect investment through institutions,[35] which directs us to the question of where such a fund should be located. Assessable stock locates the fund with shareholders – historically, retail shareholders[36] – but the fund could just as readily reside with the company itself, which is essentially what capital regulation represents.[37] This reflects the fact that assessable stock and capital regulation are related strategies – the difference simply being that one places the fund with shareholders, by relaxing limited liability, while the other places it in the company's own accounts, preserving limited liability. In this sense, as Alessio Bartolacelli suggests, a company's capital could be characterized 'as the "price" to be paid for access to limited liability',[38] gesturing toward the fundamental tradeoff involved. This is empirically reflected in the fact that US banks subject to double liability rules were able to hold less capital, suggesting both that creditors took comfort in the fact that assessments could be sought in case of financial distress and that 'they believed the threat of assessment would deter managers from taking undue risks with bank assets, thus reducing the risk of insolvency in the first place'.[39] This tradeoff is also legally reflected in identification of inadequate capitalization as a factor

[33] Goodhart and Lastra (n 13) 13-14; Hill and Painter (n 31) 1190, 1193; Schwarcz (n 30) 24.

[34] Conti-Brown (n 26) 412-413; Goodhart and Lastra (n 13) 1; Hill and Painter (n 31) 1189-1190, 1193; Romano, Enriques and Macey (n 30) 993-994; Schwarcz (n 30) 1-2.

[35] Hansmann and Kraakman (n 19) 1904-1905; Romano, Enriques and Macey (n 30) 984, 1009.

[36] Macey and Miller (n 11) 37.

[37] William T Allen, Reinier Kraakman and Vikramaditya S Khanna, *Commentaries and Cases on the Law of Business Organization* (Wolters Kluwer 2021) 131-132; John Armour, Gerard Hertig and Hideki Kanda, 'Transactions with Creditors' in Kraakman and others (n 3) 109, 124-127; Paul L Davies and Sarah Worthington, *Gower and Davies' Principles of Modern Company Law* (Sweet & Maxwell 2012) 280-283.

[38] Alessio Bartolacelli, 'Capital Requirements and the Abuse of Companies' in Hanne S Birkmose, Mette Neville and Karsten Engsig Sørensen (eds), *Abuse of Companies* (Wolters Kluwer 2019) 179, 180. See also ibid 184, 192.

[39] Macey and Miller (n 11) 61.

militating in favor of piercing the corporate veil to expose shareholders to liability.[40]

All of this reflects the fact that assessable stock and capital regulation amount to two potential locations for the fund to protect those harmed by corporate risk-taking – either with the shareholders in the former approach or with corporate management in the latter. And this is itself reflected in reform proposals that present corporations with a choice – either issue assessable stock or maintain a larger capital buffer.[41] Here, I pose a similar though distinct question for policymakers evaluating these approaches for broader regulatory application – for example, across an industry of particular concern. How should policymakers evaluate these competing approaches from a broader regulatory perspective? As the next section discusses, the rise of indirect investment through institutions could significantly impact the regulatory viability of assessable stock in contemporary capital markets.

3. *Assessable Stock versus Capital Regulation*

How should jurisdictions amenable to sustainability-oriented reform evaluate such possibilities? While both approaches offer real potential to reduce corporate risk-taking and cost externalization, both prompt significant concerns. Leaving the fund with shareholders through assessable stock raises fears of traumatic assessments like those experienced during the Great Depression.[42] Yet leaving the fund with corporate management through capital regulation raises fears that the integrity of the fund will not be respected.[43]

[40] Easterbrook and Fischel (n 8) 59-61. It is possible, although rare, to build shareholder liability exposure for inadequate capitalization into capital regulation itself. See Bartolacelli (n 38) 200 (discussing the Belgian regime); Christoph van der Elst, '21st Century Company Law in Belgium' (2020) 17 European Company Law Journal 25, 28.

[41] Conti-Brown (n 26) 429-431; Goodhart and Lastra (n 13) 23; Romano, Enriques and Macey (n 30) 1001-1002.

[42] Macey and Miller (n 11) 37.

[43] Allen, Kraakman and Khanna (n 37) 131 (observing that 'even if companies cannot dip into minimum capital to pay shareholders, normal business activity can easily dissipate a company's capital, leaving nothing on the books or in the kitty for its creditors'). Capital regulation has also been criticized for its inflexibility. See Davies and Worthington (n 37) 282-283; Hansmann and Kraakman (n 19) 1927.

In evaluating assessable stock, in particular, it is important to recognize that the rise of indirect investment through institutions could render this approach more feasible today than Depression-era traumas suggest. Over recent decades, institutional investors have become increasingly dominant, now representing 68 percent of the US equity market and 43 percent of global market capitalization.[44] Although 62 percent of US adults own stock, most of their holdings are indirect, through institutions.[45] So if assessable stock were revived in the United States, it would not generally be held by retail investors – it would mainly be held by various types of large institutions. And if assessable stock were mainly held by institutions, then the sorts of concerns noted above might not trouble us to the same degree, because institutional investors are typically more sophisticated and engaged than retail investors are.[46] Accordingly, sophisticated institutions may present a regulatory opportunity to constrain corporate risk and force internalization of costs without raising the problems noted above.[47]

Were we to adopt this approach, we would in essence be transferring a substantial element of corporate risk management to such institutions, which would presumably respond through their own risk management strategies. They might seek to manage such risks internally through their own capital buffers, which could be conceptualized as a form of self-insurance, or they might seek to manage them externally through (actual) insurance or through derivatives, which have insurance-like effects when used for hedging.[48]

Viewed this way, the regulatory challenges in a given jurisdiction might not be entirely novel. If assessable stock were held mainly by large institu-

[44] Alejandra Medina, Adriana de la Cruz and Yun Tang, 'Corporate Ownership and Concentration' (2022) OECD Corporate Governance Working Papers 27/2022, 7-8, 31-40 <https://dx.doi.org/10.1787/bc3adca3-en> accessed 28 January 2025. See also Allen, Kraakman and Khanna (n 37) 192-193, 229-231; Stephen J Choi and AC Pritchard, *Securities Regulation: Cases and Analysis* (Foundation Press 2019) 12.

[45] Jack Caporal, 'How Many Americans Own Stock? About 162 Million – But the Wealthiest 1% Own More than Half' (*Motley Fool*, 27 December 2024) <https://www.fool.com/research/how-many-americans-own-stock> accessed 28 January 2025.

[46] Romano, Enriques and Macey (n 30) 1009. See also Allen, Kraakman and Khanna (n 37) 192-193, 229-231; Choi and Pritchard (n 44) 12.

[47] Hansmann and Kraakman (n 19) 1904-1905; Romano, Enriques and Macey (n 30) 984, 1009.

[48] The critical difference is that derivatives such as credit default swaps 'do not require proof of actual loss', permitting them to be used for speculation as well. Stephen J Lubben, *Corporate Finance* (Wolters Kluwer 2021) 516.

tions that were themselves subject to capital regulation, such as banks and insurance companies, then the challenge would become determining how the introduction of assessable stock should affect their existing capital requirements.[49] Other types of institutional holders, then, might use alternative risk management tools – notably insurance and derivatives markets, as some have suggested in connection with proposals to reintroduce assessable stock.[50]

Much turns, however, on the prevailing market structure and legal context in a given jurisdiction. I have implicitly assumed a context where assessable stock would mainly land with a range of large institutions, but this might not be the case everywhere. Relaxing that assumption reveals several factors that any jurisdiction inclined toward such reforms should consider (in addition to the means of fine-tuning the assessable stock itself discussed above). Although I cannot catalog every significant consideration for any particular jurisdiction, I describe here some significant factors that illustrate the sort of contextual policy analysis that would be required.

First, what are the prevailing modes of corporate lawmaking? Does the corporate statute already contemplate such structures, or would assessable stock – or capital regulation, for that matter – represent a legal novelty? For example, US corporate law and securities regulation already contemplate assessable stock,[51] but US businesses generally are not subject to minimum

[49] Eg 12 Code of Federal Regulations ss 3.10-3.11 (US) (detailing capital requirements and buffers for national banks); Board of Governors of the Federal Reserve System, 'Annual Large Bank Capital Requirements' (*Federal Reserve*, 28 August 2024) <https://www.federalreserve.gov/supervisionreg/large-bank-capital-requirements.htm> accessed 28 January 2025; National Association of Insurance Commissioners, 'Risk-Based Capital' (*NAIC*, 9 May 2024) <https://content.naic.org/cipr-topics/risk-based-capital> accessed 28 January 2025.

[50] Conti-Brown (n 26) 438-440; Hansmann and Kraakman (n 19) 1926; Romano, Enriques and Macey (n 30) 1003-1005.

[51] Regarding corporate law, see Delaware Code title 8 ss 156, 162-164 (US); R Franklin Balotti and others, *Balotti and Finkelstein's Delaware Law of Corporations and Business Organizations* (Wolters Kluwer 2022-2 supp) s 5.14. Regarding securities regulation, see 17 Code of Federal Regulations s 230.136 (US); Securities and Exchange Commission, *24th Annual Report of the Securities and Exchange Commission: Fiscal Year Ended June 30, 1958* (United States Government Printing Office 1959) 16-17. See also Form S-1, Registration Statement under the Securities Act of 1933, SEC 870 (07-24) item 9 (US); Form S-3, Registration Statement under the Securities Act of 1933, SEC 1379 (09-23) item 9 (US); 17 Code of Federal Regulations s 229.202 (US) (requiring description of the terms of stock registered for issuance in a public offering).

capital requirements and face only weak constraints on distributions.[52] If, however, the opposite were true in a given jurisdiction, then it might be more straightforward, both politically and legally, to proceed through capital regulation. At the same time, imagine a system where shareholder liability and capital regulation are not governed by the same statutory structures – for example, because capital regulation is addressed through industry-specific regulation, as is common with banking.[53] In such circumstances, idiosyncratic structural features of the domestic regulatory environment might favor one approach over another, as a practical matter.[54]

Second, do retail investors tend to invest in stocks directly or indirectly? In suggesting that circumstances appear different today, relative to the Depression-era experience described above, I have assumed highly intermediated capital markets, but that is not the case everywhere – in fact, there is enormous jurisdictional variation in terms of direct versus indirect investing patterns.[55] If a given jurisdiction has a high degree of direct investment in stocks, then that would naturally raise concerns with assessable stock along the lines discussed above, which would in turn require more nuanced inquiry. In the United States, most individuals hold stocks indirectly,[56] so the question becomes who the remaining direct shareholders actually are and what their degree of vulnerability might be. Presumably they are generally affluent, given that the richest 1 percent of the population hold 50 percent of stocks and the richest 10 percent hold 87 percent of stocks, whereas the bottom 50 percent hold just 1 percent of stocks.[57] In such circumstances, the advent of assessable stock might prompt little concern on the assumption that more affluent people are better advised and more capable of bea-

[52] Allen, Kraakman and Khanna (n 37) 129-132. See also Delaware Code title 8 ss 151, 154, 170 (US); Model Business Corporation Act (American Bar Association 2020 revision) s 6.40 (US).

[53] See n 49 and accompanying text regarding capital regulation for US national banks.

[54] For discussion of the extraordinary variation globally in terms of modes of corporate lawmaking, see Christopher M Bruner, *Corporate Governance in the Common-Law World: The Political Foundations of Shareholder Power* (Cambridge University Press 2013) 28-107, 225-242; Bruner, *The Corporation as Technology* (n 1) 49-62; Beate Sjåfjell and Christopher M Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press 2020) (presenting numerous national case studies).

[55] Medina, de la Cruz and Tang (n 44) 7-10, 47-50; Barbara Novick and others, *Europe's Listed Companies: Their Governance, Shareholders and Votes Cast* (BlackRock 2020) 1-2, 4-7.

[56] Caporal (n 45).

[57] ibid.

ring losses.[58] In a jurisdiction where investment patterns differ substantially, however, policymakers might reasonably be more concerned about individual retail stockholders.

Third, in jurisdictions where direct investment predominates, are controlling shareholders prevalent and, if so, who are they? Although corporate governance literature on listed companies has largely focused on dispersed ownership systems, controlling shareholders are in fact the norm globally, and they take many different forms – including corporate groups, founding families, and governments.[59] The desirability of assessable stock could vary depending on which type of controller predominates in a given jurisdiction. If corporate groups predominate, then imposing greater shareholder liability through assessable stock might draw support from the widely accepted view that the argument in favor of limited liability is weaker as applied to parent companies.[60] If founding families predominate, then the effects of assessable stock might be thought to resemble the sort of personal guarantee often required of shareholders in closely held companies,[61] and draw further support relative to capital regulation for reasons typically cited in the literature – including fears of deliberate undercapitalization,[62] depletion of initial capital through business activities,[63] and the general inflexibility of capital requirements.[64] If governments predominate, on the other hand, then assessable stock might be regarded as a de facto public guarantee, potentially raising political concerns about shifting the costs associated with corporate risk-taking to taxpayers.[65]

[58] This is the logic motivating securities law exemptions that accept high net worth or income as proxies for investor sophistication. Choi and Pritchard (n 44) 677-681.

[59] Bruner, *Corporate Governance in the Common-Law World* (n 54) 3-4, 225-242. See also Medina, de la Cruz and Tang (n 44) 7-8; Novick and others (n 55) 1, 3, 7-8.

[60] Easterbrook and Fischel (n 8) 56-57. See also Bruner, *The Corporation as Technology* (n 1) 194-206; Medina, de la Cruz and Tang (n 44) 16.

[61] William A Klein, John C Coffee Jr and Frank Partnoy, *Business Organization and Finance: Legal and Economic Principles* (Foundation Press 2010) 226.

[62] Easterbrook and Fischel (n 8) 59.

[63] Allen, Kraakman and Khanna (n 37) 131.

[64] Davies and Worthington (n 37) 282-283; Hansmann and Kraakman (n 19) 1927.

[65] On the 'perceived state guarantee' with state-owned enterprises, see Medina, de la Cruz and Tang (n 44) 26. Ironically, potential concerns with assessable stock in this context resemble concerns about bailouts of financial institutions regarded as 'too big to fail', motivating proposals to adopt assessable stock in order to shift the burden back to private-sector shareholders. Eg Conti-Brown (n 26) 427 (observing that implicit public guarantees of financial institutions 'privatize the benefits of bank behavior while socializing the costs').

Fourth, in jurisdictions where indirect investment predominates, what sorts of institutions are prevalent? This can also vary considerably from one jurisdiction to another.[66] I suggested above that the regulatory challenges might not be entirely novel if assessable stock landed with large institutions that were themselves subject to capital regulation, but for other types of institutions this might be more complicated and require market innovations for effective risk management – for example, the development of novel and sophisticated derivatives and associated market structures.[67] The nature and feasibility of innovations required could be important factors varying from one jurisdiction to another.

Fifth, in jurisdictions where indirect investment predominates, how concentrated are the major institutional shareholders? I have assumed that assessable stock would land with a range of large institutions, but jurisdictions vary significantly in terms of institutional stock ownership concentration.[68] In jurisdictions with a high level of concentration, this should prompt policymakers to study what would happen if too much assessable stock landed in the hands of a small number of market-dominant institutions. In that case, we might reasonably fear that a small number of institutions could become sinks for the corporate sector's risks, which would naturally prompt systemic-risk concerns[69] – the failure of such institutions could have dire consequences for the whole financial system and perhaps the whole economy.[70] Presumably managers of such institutions would recognize this, creating moral hazard in a new setting – the institutions would be considered too big to fail, and their own risk management would deteriorate because they would know that the government would have to bail them out regardless.[71] In reality, it seems unlikely that assessable stock would in fact pose systemic

[66] Bruner, *Corporate Governance in the Common-Law World* (n 54) 242-250; Medina, de la Cruz and Tang (n 44) 9, 47; Novick and others (n 55) 4-7.

[67] See n 48-50 above and accompanying text.

[68] Medina, de la Cruz and Tang (n 44) 9-10, 49 (reporting considerable variance across jurisdictions in stock ownership concentration by the top three institutional investors).

[69] Systemic risk refers to 'the risk posed to the entire financial system by the collapse of one major player'. Felix B Chang, 'The Systemic Risk Paradox: Banks and Clearinghouses Under Regulation' (2014) Columbia Business Law Review 747, 749.

[70] ibid 755-775 (describing such dynamics with banks and clearinghouses).

[71] On systemic risk, bailouts, and moral hazard generally, see ibid 749-753; Christopher M Bruner, 'Corporate Governance Reform in Post-Crisis Financial Firms: Two Fundamental Tensions' (2018) 60 Arizona Law Review 959, 965-969.

risk concerns, given the various strategies for fine-tuning the stock itself and capacity to limit its issuance to particularly risky industries, but it is certainly possible. Were there a substantial risk of that sort of situation arising – with highly concentrated institutional shareholders holding large amounts of assessable stock – it might appear preferable to focus on capital regulation at the portfolio company level.

4. *Conclusion*

Corporate sustainability is inherently bound up with corporate risk, yet the dynamics and potential reform options discussed in this article are, for the most part, assumed off the table by current orthodoxy, which holds that generating financial returns for shareholders ought to prevail over all else.[72] The corporation is in fact capable of much more, and we will not be able to harness this entity form as an engine for sustainability until we recognize the full range of its flexible capacities – particularly how corporate risk-taking incentives might be reformed to curb excessive risk and externalization of costs.

Assessable stock and capital regulation are both critical mechanisms for incentivizing corporations to manage risks and internalize their full costs of production. Evaluating their benefits and costs requires close attention to the prevailing market structure and legal context in a given jurisdiction, and the tradeoffs involved are complex. To the extent we are actually committed to achieving corporate sustainability, however, these are the sorts of difficult questions that are most worthy of our time and attention.

[72] Bruner, *The Corporation as Technology* (n 1) 124-133.

SECTION TWO.
SUSTAINABILITY: GOVERNANCE AND REPORTING

Marco Brocca

GOVERNING THE RELATIONSHIP BETWEEN PUBLIC AND PRIVATE IN A SUSTAINABLE WAY

1. *The Public-Private Partnership: The Public Component between Administrative Power and the Reasons of the "Center"*

The relationship between the public and private sectors represents a significant observation point for understanding some of the most complex and still unresolved issues related to environmental policies. First and foremost, there is the institutional question, which involves the pursuit of optimal levels of environmental governance. This issue intersects with and is conditioned by another functional question: the pursuit of the best approaches and tools for environmental protection.

This perspective highlights the initial and still, in some ways irreplaceable, dominant approach of public intervention, expressed by the so-called "command and control" model, which translates into the organizational primacy of the public sector and, functionally, the predominance of administrative powers in various forms: constraints, plans, standards, authorizations, controls, and sanctions.

These two dimensions intersect because the preference for authoritative, coercive, and unilateral measures involves the public sector and raises the question of "who" should exercise the relevant powers.

The issue is particularly relevant in our legal system, characterized by a defined and polycentric administrative structure. Moreover, in environmental matters, it becomes more complex due to the multi-level nature of territorial administrations and the presence of numerous technical administrations with administrative functions (river basin authorities, park authorities, port authorities, etc.). In other words, defining administrative powers for environmental management intersects with the search for an optimal organizational structure, and environmental matters end up becoming a "laboratory of institutional engineering" in which the legislature strives to balance the different institutional levels, often with inevitable "checks and balances". The regulation of landscape authorizations is a peculiar example. It is a terminal instrument and a "last bastion" of landscape protection that has un-

dergone an extensive history regarding competencies: from state attribution with Law No. 1497/1939 to devolution to the regions, with delegability to municipalities in the 1970s (Presidential Decree No. 616/1977). Then, the state administration regained control through the Galasso Law (Law No. 431/1985) by assigning it a control power over landscape authorizations. This situation changed with the introduction of the Code of the Cultural and Landscape Heritage (Legislative Decree No. 42/2004), and has been repeatedly modified. Currently, the authorization function is attributed to the regions, which can delegate it to local entities (individual municipalities or associated forms or provinces or even park authorities within protected natural areas), but only if two conditions are met: the administrative differentiation between urban-planning functions and landscape protection activities and an adequate level of technical-scientific expertise in landscape matters. On the other hand, the role of the state has been modified so as to be included within the issuance process of the assent act in the form of an opinion, which has undergone several changes: from merely mandatory to binding *tout court*, to binding but "degradable" in binding under certain conditions (approval of the landscape plan, "dressing" of landscape constraints, adaptation of municipal urban planning instruments to the landscape plan), and now even dismissable in case of failure to meet the legal deadline.

Although this regime applies to a specific administrative function and sector, it reflects the legislative direction taken in environmental matters: the laborious definition of the organizational structure, resulting in a substantial allocation of administrative functions to higher levels, primarily between the state and regional levels. This option is formally based on two arguments: the availability of technical-scientific expertise within state and regional administrations due to the presence of specific structures and resources (dedicated ministry, Ispra, environmental protection agencies, etc.), and the issue of localism. The latter refers to the fact that the entity closest to the territory, such as the municipality, could either succumb to economic pressures at the expense of environmental protection or, conversely, opt for hyper-environmental protection, thus consistently opposing any territorial transformations.[1] These peculiar considerations must be balanced with general and systemic ones, primarily of a constitutional nature, which lead decision-makers to tendentially favor entities closer to the territory (principle of

[1] Mauro Renna, 'L'allocazione delle funzioni normative e amministrative', in Giampaolo Rossi (ed), *Diritto dell'ambiente* (Giappichelli 2021) 148ff.

subsidiarity) and allow for a differentiated and non-uniform administrative system (principle of differentiation) based on an entity's ability to best exercise administrative functions (principle of adequacy). These principles are impervious to the legislator and are reflected, inevitably, by the perspective and concept of the entity applying them in an area where the legitimacy belongs to the state legislature. This is due to the constitutional option that assigns exclusive legislative power over "environmental protection" to the state (Article 117, paragraph 2, letter s). Furthermore, confirming the specificity of environmental matters, legislative power takes on a structured and additional dimension compared to the mere textual provisions. According to well-established constitutional jurisprudence, the principle of greater environmental protection allows for regulatory action at the regional level, although these openings concern the functional rather than the organizational level. From a structural perspective, the Constitutional Court has already stated that it violates constitutional provisions if a regional authority, based on the principle of subsidiarity, reassigns a function that the state legislature has attributed to the regional level. This is because «exclusive legislative power over the matters indicated in Article 117, paragraph 2, of the Constitution legitimizes only the national legislature to define the organization of the corresponding administrative functions, including the allocation of competences to entities other than municipalities – generally attributed according to the criterion expressed by Article 118, paragraph 1, of the Constitution – whenever the need for the unitary exercise of the function goes beyond this territorial scope of governance»[2].

2. *The Private Component: from Participation to Environmental Co-Decision*

The role of private entities in environmental policies has been considered and valued by environmental law since its genesis, although it has been influenced by the prevailing public-oriented approach. Traditionally, it has been addressed in terms of the participation of private actors in decision-making processes. This refers to the contribution that private entities can make in the process and mechanisms of public decision-making. It encompasses both the stages preceding the adoption of a decision and the subsequent implementation phase, or from another perspective, it relates

[2] Corte cost, sent 7 ottobre 2021, no 189.

to safeguards. Following this direction, the theme of participation has been elevated to the status of a fundamental principle (Rio Declaration of 1992; Aarhus Convention of 1998, etc.) and has been translated into institutes (environmental information, procedural standing of environmental associations, advanced forms of investigation such as public inquiries, etc.) that have characterized environmental law. These principles and institutes have also been transplanted into other sectors (urban planning, public contracts, cultural heritage, etc.) or into general laws (first and foremost, the general law on administrative procedures, Law No. 241/1990).

This advanced approach has traditionally stopped at the threshold of the decision-making phase, as it was considered the exclusive prerogative of the public authorities. Nevertheless, even from this perspective, certain decision-making spaces recognized or more commonly shared by both the public and private sectors can be identified in environmental legislation. This perspective calls into play the consensual model, which is well-established in public administration law and is based on a solid general regulatory framework (Article 11 of Law No. 241/1990, Article 2, paragraph 203 of Law No. 662/1996, Article 119 of Legislative Decree No. 267/2000, etc.), and environmental law also looks to it.

2.1. *The Private Economic Operator*

The analysis of the role of the private sector in the decision-making phase must begin with the fundamental environmental legislation, namely Legislative Decree No. 152/2006. Alongside the predominant range of authoritative tools, this legislation includes modules and solutions based on the consensual principle, particularly concerning the private sector as an economic operator. In the regulation of key instruments such as Environmental Impact Assessment (VIA) and Integrated Environmental Authorization (AIA), this principle and its translation into the agreement module are present. Article 9, paragraph 3, includes the possibility of concluding an agreement between the competent authority and the project proponent subject to VIA, "to regulate the performance of activities of common interest for the purpose of simplifying and enhancing the effectiveness of procedures". The AIA regulation also allows, under certain conditions, the conclusion of agreements related to the authorization procedure, identifying in this module an additional effect beyond the authorization itself. This effect is related to "compliance with the fundamental interests of the communi-

ty, the harmonization between the development of the national production system, territorial policies, and business strategies" (Article 29-quater, paragraph 15).

The consensual principle is also present in the subsequent part of the legislation dedicated to environmental sectors. Its relevance is particularly significant in waste regulations, where shared responsibility is a general principle, and the use of agreements serves as the ordinary *modus agendi* for improving environmental performance (Article 206).

If we expand our view to regulations contiguous to the strictly environmental ones, we can identify further relevant elements. For example, in the agriculture sector, there is now a well-established awareness of its correlation with environmental policies and its role in serving environmental objectives. This sector was among the first to introduce modules of administrative action based on consensual and voluntary approaches, as part of its modernization perspective (Legislative Decree No. 228/2001, entitled "Orientation and Modernization of the Agricultural Sector"). These modules include collaboration contracts and agreements between agricultural entrepreneurs and public administrations. Collaboration contracts, expressly derived from the model outlined in Article 119 of the Consolidated Law on Local Authorities (t.u.e.l.), aim to promote the productive potential of the territory and protect high-quality productions and local food traditions (Article 14, paragraph 1). They can also include specific measures to ensure adequate consumer information about the origin of raw materials and the characteristics of the products. From these agreements, measures to support and develop local agricultural entrepreneurship arise, albeit without precise definition (Article 14, paragraph 2). In the case of promotion contracts, which are a specific form of collaboration contracts, there is a clear commitment on the part of the entrepreneur to "ensure the protection of natural resources, biodiversity, cultural heritage, and agricultural and forestry landscapes" (Article 14, paragraph 3). Conventions (Article 15) aim to encourage active involvement of agricultural entrepreneurs in significant functional areas, such as land management and maintenance, safeguarding agricultural and forestry landscapes, the care and maintenance of hydrogeological systems, and the protection of the productive potential of the territory. In this type of negotiation, the obligations of the administrations are better defined, such as financial support, administrative concessions, tariff reductions, or the implementation of public works.

Another sector in which the consensual principle has recently been strengthened is forest management. The article 35-bis of Decree-Law No.

77/2021, converted with modifications into Law No. 108/2021, introduced the institute of the forest agreement, configured as a "tool for the development of business networks," whether private or public-private, aimed at the economic-productive enhancement of forest ownership. Furthermore, these agreements serve additional objectives related to forest assets, expressing their recognized multifunctionality (conservation and provision of ecosystem services, promotion of complementary activities in the tourism, social, cultural fields, etc.).

The negotiating perspective considered so far, evocative of the "active" role of economic operators, is mirrored in the field of environmental certifications. This refers to environmental regulation marks, both public (Emas, Ecolabel, etc.) and private (ISO 14000, etc.), which certify the compliance of a product or an entire environmental management system of a company with stringent environmental parameters that exceed ordinary standards. These tools are activated through voluntary adherence by interested parties, with the public sector playing a role primarily in control through both preventive and subsequent verifications. The public sector may also adopt an additional role as an incentive (with various economic and administrative support measures) for economic operators who choose to undertake the demanding path of obtaining environmental certification. A more recent experience, although still limited at the national level, outlines an additional role, where public entities strive to lead by example by directly seeking environmental certification, subjecting their entire organizational structure and activities to evaluation (so-called territorial certification).

2.2. *The Private Citizen*

In recent years, the environmental sector has witnessed various forms of citizen involvement in decision-making processes through experiences known by different names (agreements, pacts, contracts, etc.). These initiatives initially lacked a solid legal basis, but the promoters relied directly on international law acts or constitutional provisions, and their significant outcomes prompted and anticipated legislative choices.

An example of this is the concept of "river contracts," which originated at the local level through the initiative of public entities (local authorities, river basin authorities, regions, etc.) and private actors (industry associations, environmental associations, citizens' committees, etc.). These contracts are based on the principle of participation established by the Water Framework

Directive (Directive 2000/60/EC), which emphasizes the involvement of communities and local institutions in water management policies. River contracts have been supported by a series of soft-law provisions, good practices, guidelines, and policy documents (such as the National Charter of River Contracts, signed by several regions in 2010). Eventually, they were officially recognized by regional and then national legislation. Currently, river contracts are regulated by Article 68-bis of Legislative Decree No. 152/2006, which defines them as "voluntary strategic and negotiated planning instruments aimed at protecting and managing water resources, enhancing river territories, and safeguarding them from hydraulic risk while contributing to the local development of these areas." The underlying idea is to promote a renewed, shared, and project-based vision of river territories. It integrates the traditional prescriptive and maintenance-oriented approaches to prevention and management of hydrogeological emergencies with integrated management and valorization based on an ecosystemic view of the multiple underlying interests: safety, risk mitigation and prevention, climate balance, biodiversity, landscape enhancement, sustainable tourism, agri-food chains, and the promotion of water culture.

The landscape contract, which is a more recent and incipient form of landscape management, follows a similar model to the river contract. However, it has yet to be officially recognized at the legislative level. The first experiences directly invoke the European Landscape Convention (Florence, October 20, 2000) and its participation principle, which also emphasizes the involvement of the public and local institutions. The constitutional principle of subsidiarity (Article 118 of the Constitution), both in its vertical (paragraph 1) and horizontal (paragraph 4) dimensions, is also invoked. The landscape contract is another consensual and voluntary model based on the awareness of the identity and cultural value of the territory. It includes a project-based action method that emphasizes community participation and consultation as creators and producers, rather than just users, of the landscape.

Urban environments have been a privileged field for successful experiences of public-private partnerships at the local level. One example is the "collaboration pacts" (patti di collaborazione). These are contractual agreements, often preceded and authorized by specific municipal regulations on the management of civic assets. These regulations derive their legitimacy from the organizational and functional regulatory powers granted to municipalities by Article 117, paragraph 6 of the Constitution. The collaboration

pacts involve citizens and the administration in specific interventions for the conservation, management, and enhancement of public or privately-owned spaces used for public purposes. They aim to restore or improve their quality and usability, with private actors actively participating from the planning phase to the implementation phase.

Experience shows the aptitude of these tools for flexibility and scalability based on needs and the reference context. There are many fields of action, including education, health, cultural policies, sports, urban design, and social integration. The environmental dimension is central due to its underlying social and cultural implications. Environmental interventions range from the care of public green spaces to the restoration of parks and gardens, the creation of urban gardens or forests, the restoration of mountain trails, the development of hiking routes, and the management of river environments. These manifestations of shared administration of civic assets have found regulatory support in the Public Contract Code (Legislative Decree No. 50/2016). Among the forms of public-private partnership, the code regulates "horizontal subsidiarity interventions" (Article 189), and the promotion of shared administration models "implementing the principles of social solidarity and horizontal subsidiarity" is elevated to a general option and guiding principle of the regulation of public contracts by the new code (Article 6, Legislative Decree No. 36/2023).

3. *A New Approach and the "Opportunity" of the Circular Economy*

The experiences mentioned, along with others,[3] denote a renewed approach compared to the traditional one: an approach that implies voluntary action, a bottom-up origin and a consensual framework, profiles diametrically opposed to those that characterize the traditional approach composed of coercive and authoritative instruments that come from above. The promotion of this approach requires a clarification: it does not pose as an alternative or antagonist to the traditional one, therefore it does not seek to

[3] For further reference on these experiences, see Marco Brocca, *Interessi ambientali e decisioni amministrative. Profili critici e nuove dinamiche* (Giappichelli 2018) 249ff.; Marco Brocca, 'Nuovi modelli di amministrazione del paesaggio. La rilevanza del paesaggio agrario' in Nicoletta Ferrucci and Marco Brocca (eds), *Il paesaggio agrario: dal vincolo alla gestione negoziata* (Franco Angeli 2019) 111ff.

abolish or replace it, but it can accompany and integrate with it to enrich the range of environmental policies and tools. Moreover, this approach evokes a preliminary reflection on the conception of the environment, which shows its polyhedral and multidimensional nature. It is not only an objective of the public sector that imposes constraints and limits on private activities, but also an element of identification and differentiation for economic operators in the market, as well as for the public entity in the territory. Therefore, it is a resource and a factor of economic and institutional development.

This approach can find fertile ground in the current trend of implementing the so-called circular economy, a new model of economic and institutional development (known as the "circular state"[4]), which draws its rules from the functioning laws of natural ecosystems based on the sense of the finiteness of resources and their reusability. In this model, key words include the "limit" of resources and the "relationship" between the parts of the system, as what may be waste and unusable residue for one component can be a useful element for others. These distinctive profiles require a rethinking of the concept of the value chain of goods and services along interrelated lines that aim for temporal extension, environmental sustainability, and integration of phases and the involved parties. In this renewed context, economic operators are called on to take an active and propulsive role in the search for circular-oriented solutions, such as in the design phase, with considerations of durability and reparability of goods, choice of raw materials, and other aspects that concern the beginning rather than the end of the life cycle of goods. At the same time, local communities can also be active participants in promoting circular forms of territorial management because it is evident that, from the perspective of the circular economy, it is necessary to start with the resources available locally, avoiding the costs and impacts associated with obtaining them from elsewhere (known as zero-kilometer sustainable economy[5]). An induced effect and assumption of this involvement is the acquisition or maturation of awareness by local communities that each

[4] Francesco De Leonardis, 'Economia circolare: saggio sui suoi diversi aspetti giuridici. Verso uno Stato circolare?' (2017) Diritto amministrativo163; Francesco De Leonardis, 'Il diritto dell'economia circolare e l'art. 41 Cost.' (2020) Rivista Quadrimestrale di Diritto dell'Ambiente 70; Francesco De Leonardis, 'Economia circolare (diritto pubblico)', in Raffaele Bifulco, Alfonso Celotto and Marco Olivetti (eds) *Digesto delle discipline pubblicistiche* (UTET 2021) 180.

[5] Francesco De Leonardis, *Economia circolare* (n 4) 182.

territory possesses unique and identified (environmental, cultural, productive, etc.) resources that can serve as socio-economic development factors.

This path evokes a reflection on the dynamics of relationships between the public and private sectors, which leads to renewed solicitation. For the private component in terms of enhancing the role of private entities, whether they are economic operators or community subjects, in decision-making processes, especially at the constitutive moment of decisions. For the public component, it implies that public decision-makers are called on to adopt different and additional approaches and modalities of interaction with private entities compared to the traditional authoritative and coercive ones: supporting and incentivizing virtuous conduct or engaging in negotiation and seeking forms of co-decision.

New scenarios are emerging for environmental law, which is still expected to fulfill the function that in the 90s Federico Spantigati recognized and defined as "probing law" as a branch of law ready to identify critical points, deficits, and critical issues within the system, and to translate them into original options and tools necessary to address the complexity of environmental matters and contribute to the progress of the entire legal system.[6]

[6] Federico Spantigati, 'Le categorie giuridiche necessarie per lo studio dell'ambiente' (1999) Rivista giuridica dell'ambiente 236. In this sense, contemporary and subsequent doctrine recognizes in environmental law the function of a «research laboratory and lever of the system», Rosario Ferrara, *Introduzione al diritto amministrativo. Le pubbliche amministrazioni nell'era della globalizzazione* (Laterza 2005) 259; more recently, the same author expressed that «environmental law can be defined as the "good parlor" of public law, in which themes and institutions are born that later spill over into other sectors», Alessandro Cioffi and Rosario Ferrara, 'Ambiente e Costituzione' (*giustiziainsieme.it*, 7 April 2022) <https://www.giustiziainsieme.it/it/le-interviste-di-giustizia-insieme/2279-ambiente-e-costituzione-2?hitcount=0> accessed 1 September 2024; Giuseppe Morbidelli, 'Il regime amministrativo speciale dell'ambiente' in *Scritti in onore di Alberto Predieri* (Giuffré 1996) 1164, speaks of it as the "respiratory organ" of the legal system,; Francesco De Leonardis, 'Le organizzazioni ambientali come paradigma delle strutture a rete' (2006) Foro amministrativo 273, refers to it as a "precursor law".

Florian Möslein

THE CHALLENGES OF SUSTAINABILITY COMPANY MANAGEMENT IN A DIGITALIZING SOCIETY

1. *Introduction*

Digitalization and sustainability are among the key challenges of our time. Both are powerful drivers of fundamental societal change. They foster business innovation and economic transformation.[1] On the one hand, digital technologies open up completely new opportunities for shaping society, science, and the economy. The central phenomena of digitalization include online platforms, algorithms and artificial intelligence building on the data economy as well as decentralized communication systems based on blockchain distributed ledger technologies.[2] Each one of these phenomena is changing the way people interact with each other in very fundamental ways. The platform economy, which has spawned powerful new intermediaries for key information society services, is just one example of this fundamental potential for change.[3] Moreover, these different digital innovations are increasingly intertwined, for example when autonomous vehicles recharge their batteries automatically via blockchain transactions.[4] Sustainability, on the other hand, is seen as a 'development that meets the needs of the present without compromising the ability of future generations to meet their

[1] For a recent report, highlighting the practical convergences of these two guiding discourses cf Anne-Christin Mittwoch, 'Digitalisierung und Nachhaltigkeit – Praktische Konvergenzen zweier Leitdiskurse im Unternehmensrecht' (2023) 78 JuristenZeitung 376.

[2] Similar, for instance, Florian Möslein, 'Towards corporate digital responsibility' in Martin Petrin and Christian A Wittig (eds), *Research Handbook on Corporate Liability* (Edward Elgar Publishing Ltd 2023) 411.

[3] Geoffrey G Parker, Marshall W Van Alstyne and Sangeet Paul Choudary, *Platform Revolution: How Networked Markets Are Transforming the Economy - and How to Make Them Work for You* (WW Norton & Co 2016); for a summary of the resulting legal challenges cf Lucie E Cohen, 'Law for the Platform Economy' (2017) 51 UCD Law Review 133.

[4] Florian Möslein and Moritz Renner, 'Systemic failure and systemic change in private and business law: An Introduction' (2023) 34 European Business Law Review 6.

own needs'.[5] Building on this understanding, which the Brundtland Commission had already formulated as a concept of sustainable development for the United Nations in 1987, the international community agreed on a model of sustainable development at the Rio de Janeiro Summit in 1992, which was subsequently differentiated in the form of 17 globally valid Sustainability Development Goals (SDGs).[6]

To address the major environmental, social, and governance risks we face, digitalization and sustainability are also among the European Commission's current priorities: the European Commission's political guidelines for 2019-2024 focus on six headline ambitions for Europe, and both a Europe fit for the digital age and the European Green Deal form an integral part of this strategy: 'Europe must lead the transition to a healthy planet and a new digital world'.[7] Accordingly, the EU Commission is not only pursuing its strategy for the Digital Single Market, which it presented back in 2015 based on the Digital Agenda for Europe of 2010,[8] but also a holistic approach for sustainability which integrates the UN SDGs into all Commission proposals, policies and strategies.[9] According to this comprehensive approach, the SDGs correlate with the headline ambitions announced in the European Commission's political guidelines.

[5] United Nations General Assembly, 'Report of the World Commission on Environment and Development: Our Common Future' (1987), ch 2 24. Cf also the 2009 Review of the European Union Strategy for Sustainable Development which is based on a 'long-term vision of sustainability in which economic growth, social cohesion and environmental protection go hand in hand and are mutually supporting', European Commission, 'Communication on Mainstreaming sustainable development into EU' (Communication) COM (2009) 400 final p 2.

[6] United Nations General Assembly, 'Rio Declaration on Environment and Development' (1992); United Nations General Assembly, 'Transforming our world: the 2030 Agenda for Sustainable Development' (2015).

[7] Ursula von der Leyen, 'A Union that strives for more: My agenda for Europe, Political guidelines for the next European Commission 2019-2024' (2019) p 4 <https://commission.europa.eu/system/files/2020-04/political-guidelines-next-commission_en_0.pdf> accessed 23 August 2023.

[8] European Commission, 'Digital Single Market Strategy for Europe' (Communication) COM (2015) 192 final; European Commission, 'Digital Agenda for Europe' (Communication) COM (2010) 245.

[9] Cf 'EU 'whole-of-government' approach' (*European Commission*) <https://commission.europa.eu/strategy-and-policy/sustainable-development-goals/eu-whole-government-approach_en> accessed 23 August 2023.

As fundamental as these two concepts are in political, social and economic discourse, their interactions have remained largely unexplored. David Kiron and Gregory Unruh's observation, published in the MIT Sloan Management Review in 2018, that the intersection of these two trends 'remains largely unexplored territory' still rings true today.[10] Yet there are many examples of how these two phenomena can be contradictory, but also mutually supportive. On the one hand, the energy consumption of distributed ledger technologies, which is continuously tracked in the Cambridge Bitcoin Electricity Consumption Index, comes to mind: Among the many comparative examples - besides the usual country comparisons - it is worth noting that the electricity consumed by the bitcoin network each year would be enough to power the University of Cambridge for 1038 years.[11] On the other hand, digital twin projects such as those at the Port of Rotterdam are enabling significant reductions in environmentally harmful emissions by improving the use of port resources, facilities and operations.[12] Despite this ambivalence, it was not until mid-2022 that the European Commission's Joint Research Centre published a study focusing on the so-called 'twin transitions' of digitalisation and sustainability, based on the observation that the green and digital transitions interact but can also clash.[13] In order to ensure that both transitions mutually enforce each other, the report establishes key requirements that need to be met to succeed in managing the twin transitions. On this basis, the European Commission, in its recent Strategic Foresight Report 'Twinning the green and digital transitions in the new geopolitical context', has identified ten key areas for action to maximize synergies and coherence between climate and digital ambitions.[14]

[10] David Kiron and Gregory Unruh, 'The Convergence of Digitalization and Sustainability' (2018) MIT Sloan Management Review <https://sloanreview.mit.edu/article/the-convergence-of-digitalization-and-sustainability/> accessed 23 August 2023.

[11] Cf 'Cambridge Bitcoin Electricity Consumption Index' (*Cambridge Centre for Alternative Finance*) <https://ccaf.io/cbnsi/cbeci/comparisons> accessed 23 August 2023; for more details see Alexander Neumueller, 'A deep dive into Bitcoin's environmental impact' (*Judge Business School*, 27 September 2022) <https://www.jbs.cam.ac.uk/2022/a-deep-dive-into-bitcoins-environmental-impact/> accessed 7 February 2025.

[12] In more detail: Robert Klar, Anna Fredriksson and Vangelis Angelakis, 'Digital Twins for Ports: Derived from Smart City and Supply Chain Twinning Experience' (2023) IEEE Access <https://doi.org/10.48550/arXiv.2301.10224> accessed 23 August 2023.

[13] Stefan Muench and others, *Towards a green and digital future* (Publications Office of the European Union, Luxembourg 2022).

[14] European Commission, 'Twinning the green and digital transitions in the new geopolitical context', (Communication) COM (2022) 289 final.

The report concludes that 'better understanding the interactions between the green and digital transitions is key for successful twinning, amidst various future megatrends and unforeseen events'.[15]

This chapter aims to contribute to the understanding of the convergence - or divergence - of sustainability and digitalization. It focuses on a specific but central area, namely the choices made by business leaders in this area of tension: How can management navigate between the green and digital transitions? With this focus on management, the research question, formulated in more legal terms, is how these two transitions are reflected in the duties of directors. We will address this question in three steps. First, we will outline the increasing emergence of sustainability duties, in particular due to the recent proposals in the draft directive on corporate sustainability due diligence (see below, II.). On this basis, we will then ask whether and how corporate sustainability can be promoted through digital tools (see below, III.). These considerations ultimately lead to the development of directors' twin transition duties (see below, IV.).

2. *The Emergence of Sustainability Duties*

While the pursuit of sustainability is high on the general political agenda in an era of climate change and threats to biodiversity, the economic importance and environmental footprint of companies means that there is a particular focus on corporate behavior. The key challenge is to reconcile sustainability considerations with the fundamental purposes and objectives of companies.[16] The corporate law debate about the ultimate purpose of corporations goes to the heart of the concept of modern capitalism.[17] In addition to the substantive antagonism between the shareholder primacy

[15] ibid 17

[16] Cf Beate Sjåfjell, 'Reforming EU Company Law to Secure the Future of European Business' (2021) European Company and Financial Law Review 190; see also Anne-Christin Mittwoch, *Nachhaltigkeit und Unternehmensrecht* (Mohr Siebeck 2022).

[17] The German discussion, eg, traces back to the 1920s when Walther Rathenau tried to separate shareholders' interests from the interests of the corporation as such ('Unternehmen an sich'), see Frank Laux, *Die Lehre vom Unternehmen an sich: Walther Rathenau und die aktienrechtliche Diskussion in der Weimarer Republik* (Duncker & Humblot 1998); cf also Gunther Teubner, 'Unternehmensinteresse – das gesellschaftliche Interesse des Unternehmens "an sich"' (1984) 148 Zeitschrift für das gesamte Handelsrecht 470.

model and more stakeholder-oriented theories,[18] the fundamental question concerns the competence to define corporate purpose. In line with private autonomy, corporate law tends not to provide for an explicit definition of the purpose of private companies, but rather leaves the competence to define it to the corporate actors themselves.[19] Legislators are reluctant to introduce binding and strict rules on corporate purpose. Instead, they pursue more subtle regulatory strategies by trying to 'nudge' corporate actors toward sustainability.[20] The development of corporate social responsibility, for example, has moved from a purely voluntary exercise to the introduction of complementary regulation designed to encourage responsible corporate behavior.[21]

[18] In more detail see, for instance, on the one hand Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2011) 89 Georgetown Law Review 439, 468 ('triumph of the shareholder-oriented model of the corporation is now assured'); Jeffrey N Gordon, 'The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices' (2007) 59 Stanford Law Review 1529, 1530 ('by the end of the 1990s, the triumph of the shareholder value criterion was nearly complete'); also Stephen M Bainbridge, 'Director Primacy: The Means and Ends of Corporate Governance' (2003) 97 Northwestern University Law Review 547; on the other hand Margaret M Blair and Lynn A Stout, 'A Team Production Theory of Corporate Law' (1999) 85 Virginia Law Review 247; Lynn A Stout, *The Shareholder Value Myth* (Berrett-Koehler Publishers 2012); Paddy Ireland, 'Company Law and the Myth of Shareholder Ownership'(1999) 62 Modern Law Review 32.

[19] Cf for instance, in the United Kingdom, Companies Act 2006 (UK) s 31(1); in the United States, Delaware General Corporation Law s 102(a)(3). On the other hand, German law requires at least a stipulation of the corporate objective, see Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG) para 3(1) no 2 and Aktiengesetz (AktG) para 23(3) no 2.

[20] For a company-law oriented overview see Florian Möslein and Karsten Engsig Sørensen, 'Nudging for Corporate Long-Termism and Sustainability: Regulatory Instruments from a Comparative and Functional Perspective' (2018) 24 Columbia Journal of European Law 393; on the general concept of nudging, see Richard H Thaler and Cass R Sunstein, *Nudge – Improving Decision About Health, Wealth, and Happiness* (Penguin 2008); Cass R Sunstein, *Why Nudge?: The Politics of Libertarian Paternalism* (Yale University Press 2014).

[21] See, for instance, the CSR strategy adopted by the Commission in 2011 (arguing for the need to '…acknowledge the role that complementary regulation plays in creating an environment more conducive to enterprises voluntarily meeting their social responsibility'): European Commission, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility' (Communication) COM (2011) 681 final, 5. Comprehensively Deirdre Ahern, 'Turning Up the Heat? EU Sustainability Goals and the Role of Reporting under the Non-Financial Reporting Directive' (2016) European Company and Financial Law Review 599.

2.1. *Sustainability as Management Discretion*

Because of its responsibility and authority for managing the company and overseeing its operations, the board of directors plays a central role in corporate conduct: Its decisions have a direct impact on the company's behavior and affect employees, customers, or the environment. However, because of the separation of ownership and control, directors do not enjoy unfettered discretion in making business decisions; rather, they act as agents of the company and can be removed (at least indirectly) by shareholders. In addition, they are bound by the company's charter and purpose as defined by the shareholders, and are subject to specific directors' duties. Directors' duties constrain managers' actions and are therefore a key component of regulatory strategies to guide corporate behavior. As a result, their (re)definition plays an important role in discussions on corporate sustainability.

Discussions of corporate law have traditionally focused on whether fiduciary duties prevent directors from considering long-term interests and sustainability. For example, the shareholder-value approach that dominates U.S. corporate law requires directors to serve the interests of shareholders and makes profit maximization the primary corporate goal, with correspondingly less weight given to the interests of other stakeholders.[22] However, even U.S. corporate law does not categorically prevent directors from considering sustainability.[23] The business judgment rule gives directors broad discretion.[24] In addition, corporate bylaws may provide for alternative social objectives.[25] Many US states (but not Delaware) have also enacted 'constituency statutes' that explicitly allow the board to consider non-shareholder

[22] See reference above, n 18.

[23] Similar Möslein and Sørensen, 'Nudging for Corporate Long-Termism and Sustainability' (n 20) 398.

[24] See Franklin A Gevurtz, *Corporation Law* (2nd ed, West Academic Press 2010) 322 (stating that US courts 'almost invariably accept some rationale as to how business decisions were in the long range interest of the shareholders'). For an extensive comparative account cf Florian Möslein, *Grenzen unternehmerischer Leitungsmacht im marktoffenen Verband* (De Gruyter 2007) 126-184.

[25] In this sense, eg, Jonathan R Macey, 'A Close Read of an Excellent Commentary on Dodge v. Ford' (2008) 3 Virginia Law & Business Review 177, 185: 'The goal of profit maximization is the law, but it is only a default rule. If the shareholders and the other constituents of the corporate enterprise could agree on some other goal for the corporation, then the law clearly should not interfere'.

interests in its decisions.[26] UK law has followed a similar pattern, introducing the concept of 'enlightened shareholder value' with the Company Law Reform Bill 2005.[27] These examples illustrate that company law does not necessarily prevent directors from considering sustainability issues.

Avoiding the consideration of non-shareholder interests does not require or encourage directors to prioritize sustainability over shareholder profit. However, because of the position of shareholders as the sole risk-bearers, most corporate laws avoid mandating the prioritization of non-shareholder interests.[28] Only in very specific circumstances do company laws impose duties to consider non-shareholder interests, such as in the run-up to a takeover bid or in the event of impending insolvency.[29] Similar to these specific duties to consider the interests of creditors and employees, the law could try to require directors more generally to consider non-shareholder interests and sustainability concerns. So far, however, such a solution has only been adopted for social enterprises. As a result of their social purpose, which is necessarily different from the purpose of making a profit for shareholders, short-term shareholder interests are no longer the primary goal for directors of such companies to pursue.[30] Accordingly, the definition of a social purpo-

[26] See inter alia Stephen M Bainbridge, 'Interpreting Nonshareholder Constituency Statutes' (1992) 19 Pepperdine Law Review 971; William J Carney, 'Does Defining Constituencies Matter?' (1990) 59 University of Chicago Law Review 385; Ronn S Davids, 'Constituency Statutes: An Appropriate Vehicle for Addressing Transition Costs?' (1995) 28 Columbia Journal of Law and Social Problems 145; James J Hanks Jr, 'Playing with Fire: Nonshareholder Constituency Statutes in the 1990s' (1991) 21 Stetson Law Review 97; Jonathan R Macey, 'Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective' (1999) 84 Cornell Law Review 1266; Eric W Orts, 'Beyond Shareholders: Interpreting Corporate Constituency Statutes' (1992) 61 George Washington Law Review 14.

[27] Extensively, for instance, Andrew R Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge 2013).

[28] In detail (and with further arguments): Stefan Grundmann, *European Company Law* (2nd ed, Intersentia 2012) 336f.

[29] More extensively, in particular, Council Directive 2004/25/EC of 21 April 2004 on takeover bids [2004] OJ L 142/12 (European Takeover Directive), art 9(5) and with regard to the proposal for a directive on restructuring frameworks: Möslein and Sørensen, 'Nudging for Corporate Long-Termism and Sustainability' (n 20) 400ff.

[30] For instance, Model Benefit Corporation Legislation s 201 describes the purpose as 'a material positive impact on society and the environment, taken as a whole'; cf also Florian Möslein and Anne-Christin Mittwoch, 'Soziales Unternehmertum im US-amerikanischen Gesellschaftsrecht' (2016) 80 Rabels Zeitschrift für ausländisches und internationales Privatrecht 399, 401ff.

se has some impact on the duties of directors. Under UK law, for example, the regulations governing community interest companies (CICs) do not contain specific provisions on directors' duties, but since these companies are required to pursue community interests, directors have an implicit duty to pursue the chosen purposes.[31] Similarly, it has been suggested that the purpose of ordinary companies should be reformulated to ensure that directors pursue long-term and sustainable objectives.[32] Without clear guidance on how directors should balance different interests, however, it is left to their discretion to strike that balance. Given the position of shareholders in appointing management and enforcing directors' duties, shareholder interests are likely to prevail even if a duty to balance interests is introduced.[33] These problems could only be overcome if company law were able to provide precise guidance on how to balance the various interests. However, except for specific situations such as takeover and insolvency scenarios, legislators have been reluctant to regulate these issues on a broader scale. In fact, because of the business judgment rule, redefining the purpose of corporations may even have the negative effect of immunizing directors from liability.[34]

2.2. *Sustainability as Management Imperative*

Sustainability is evolving from a voluntary option to a mandatory management responsibility. Particularly at the European level, there is a growing

[31] Cf Office of the Regulator of Community Interest Companies: Information and Guidance Notes, 'Chapter 4: Creating a Community Interest Company (CIC)' (May 2016) s 4.6.

[32] See, for instance, Andrew Johnston and Paige Morrow, 'Towards long-termism in corporate governance: the Shareholder Rights Directive and beyond' in Sigurd Vitols (ed), *Long-term investment and the Sustainable Company: a stakeholder perspective* (ETUI 2015) 19, 40ff (suggesting that the purpose of the company is changed through either the company constitution or the national company legislation); cf also Beate Sjåfjell and others, 'Shareholder Primacy: The Main Barrier to Sustainable Companies' in Beate Sjåfjell and Benjamin J Richardson (eds), *Company Law and Sustainability. Legal Barriers and Opportunities* 79, 147 (Cambridge University Press 2015) (calling for change of national company law to state the societal purpose of the company).

[33] In a similar vein Möslein and Sørensen, 'Nudging for Corporate Long-Termism and Sustainability' (n 20) 404.

[34] Cf Frank H Easterbrook and Daniel R Fischel, *The Economic Structure of Corporate Law* (Harvard University Press 1991) 38 stating: '[A] manager told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is answerable to neither'; similar J Haskell Murray, 'Choose Your Own Master: Social Enterprise, Certifications and Benefit Corporation Statutes' (2012) 2 American University Business Law Review 1.

body of regulation that requires boards to consider sustainability issues. Disclosure requirements have led the way, but with the recent proposal for a Directive on Corporate Sustainability Due Diligence, more substantive sustainability duties are already on the horizon.

2.2.1. Procedural Disclosure Obligations

The most prominent and far-reaching sustainability reporting requirement was introduced into European law by Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (Non-Financial Reporting Directive).[35] Within its scope, companies are required to publish a (consolidated) non-financial statement, typically included in their annual report, containing information "relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters" (Article 19a(1) Non-Financial Reporting Directive). While disclosure is usually seen as a means of informing its addressees and thereby helping them to act rationally and on an informed basis, Article 19a of the Non-Financial Reporting Directive is a regulatory instrument that is, conversely, designed to nudge those that are subject to the disclosure requirement.[36] While this effect of disclosure requirements may seem counterintuitive at first glance, disciplinary effects on managers who have to ensure non-financial disclosure are not implausible: Individuals who must disclose their own behavior are likely to make it conform with the expectations of those to whom the disclosure is made.[37] Disclosed information also makes it

[35] On that directive in general, for instance, Dániel Gergely Szabó and Karsten Engsig Sørensen, 'New EU Directive on the Disclosure of Non-Financial Information (CSR)' (2015) 12 European Company and Financial Law Review 307-340. See also Patrick Hell, *Offenlegung nicht-finanzieller Information* (Mohr Siebeck 2020).

[36] More extensively Möslein and Sørensen, 'Nudging for Corporate Long-Termism and Sustainability' (n 20) 414. Generally on the various considerations to use disclosure as a regulatory tool see Karsten Engsig Sørensen, 'Disclosure as a regulatory tool' in Brigitte Egelund Olsen and Karsten Engsig Sørensen (eds), *Regulation in the EU* (Wolters Kluwer 2006) 287, 289-300.

[37] Cf Cass R Sunstein, *Simpler – The Future of Government* (Simon&Schuster 2013) 211 ('important regulatory tool'), discussing its relevance for the choice architecture of its addressees; see also Paul G Mahoney, 'Mandatory Disclosure as a Solution to Agency Problems' (1995) 62 University of Chicago Law Review 1047.

easier to compare managerial behavior on that basis, so managers will have incentives to improve their respective efforts, at least in competitive market situations. Managers will also be concerned about liability risks if it becomes transparent that they have not performed well relative to certain standards, and non-financial disclosure provides just such transparency.

2.2.2. Substantive Sustainability Duties

Disclosure requirements, however, do not compel management to consider sustainability issues in corporate decision-making. As a procedural tool, they may have some nudging effects, but they do not impose substantive legal obligations that can be enforced in state courts. The Commission's recent proposal for a Directive on Corporate Sustainability Due Diligence (CSDDD)[38] takes this crucial step further by leaving the 'cradle of disclosure' and moving in a more forceful direction.[39] In particular, it does so by proposing three core provisions in Articles 15, 25 and 26 which will be described below. At the time of writing, however, it is not clear whether these provisions, at least in an adapted form, will come into force as a result of the political process. The proposal is currently moving through the European Union legislative process. In its final position, the European Council deleted the original proposal from the Commission on due diligence falling under the directors' duty of care, criticizing the 'inappropriate interference with national provisions regarding directors' duty of care' and the potential to undermine their 'duty to act in the best interest of the company'.[40] Instead, the Council proposes that due diligence processes be integrated into risk management systems and company policies. The European Parliament, on the other hand, has voted to retain Article 25 CSDDD which requires directors to have an overarching duty of care for sustainability issues but has argued for changes to Article 15 and the deletion of Article 26.[41] Subsequent

[38] European Commission, Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive 2019/1937/EU COM (2022) 71 final (CSDDD).

[39] António Garcia Rolo, 'From the Cradle of Mandatory Disclosure to More Forceful Steps' in Paulo Câmara and Filipe Morais (eds), *The Palgrave Handbook of ESG and Corporate Governance* 191 (Palgrave Macmillan 2022).

[40] European Council, 'Interinstitutional File 2022/0051(COD)' (30 November 2022) 10 (para 31).

[41] European Parliament, 'Amendments on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and

to the final vote in the European Parliament in June 2023, the three legislative institutions have started trilogue negotiations with the aim of reaching a political agreement on the final directive by the end of 2023. Given their fundamentally different approaches, the outcome of these negotiations is difficult to predict. We will briefly describe the Commission's original proposal, taking into account the differing views of the other two institutions.

2.2.2.1. Combating Climate Change (Article 15 CSDDD)

To combat climate change, Article 15 CSDDD provides that Member States shall require companies to adopt a plan to ensure that the company's business model and strategy are compatible not only with a sustainable economy but also, and in particular, with limiting global warming to 1.5°C in accordance with the Paris Agreement. In particular, the plan shall identify, on the basis of information reasonably available to the company, the extent to which climate change is a risk to, or an impact of, the company's operations. Member States shall also ensure that, where climate change is or should have been identified as a significant risk to, or a significant impact of, the company's operations, the company includes emission reduction targets in its plan.

Several concerns have been raised about this proposal. For example, there is concern that the regulator could determine emission reductions instead of the company, effectively dictating the company's business model and strategy. In particular, the European Company Law Experts Group (ECLE) has expressed serious doubts as to whether such a disproportionate measure is compatible with the freedom of enterprise protected by the Charter of Fundamental Rights of the European Union and the constitutions of the Member States.[42] It is also argued that the 1.5°C benchmark should be replaced by a net-zero transition target. Such an approach would have the advantage that the net-zero target would require reduction targets even if global warming exceeds the 1.5°C benchmark, which some expect to happen before

amending Directive (EU) 2019/1937 (COM(2022)0071-C9-0050/2022-2022/0051(COD)' (P9_TA(2023)0209, 1 June 2023) <https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html#def_1_2> accessed 7 February 2025.

[42] European Company Law Experts Group (ECLE), 'Why Article 15 (combating climate change) should be taken out of the CSDD' (*ECGI blogpost*, 2 August 2022) <https://www.ecgi.global/blog/why-article-15-combating-climate-change-should-be-taken-out-csdd> accessed 7 February 2025.

2030.[43] Another concern relates to the provision in Article 15(3) CSDDD, which links the company's climate plan to its remuneration policy and requires companies to take into account their climate-related commitments in their variable remuneration schemes, insofar as these are linked to a director's contribution to the company's business strategy and long-term interests and sustainability. It is argued that the Shareholder Rights Directive already contains rules on say on pay in listed companies. Adding another remuneration clause to the CSDDD would therefore create regulatory overlap and therefore regulatory incoherence.[44]

Both the European Council and the European Parliament have echoed some of these criticisms, calling for an amendment to Article 15 CSDDD, inter alia by establishing a link to the transparency obligation under Article 19a of the Non-Financial Reporting Directive.[45] Notwithstanding these proposals, however, it seems likely that the core of the Article 15 CSDDD requirement will remain in place, subjecting companies to a strict obligation to determine the extent to which climate change poses a risk to or impacts on the company's operations, based on information reasonably available to the company.

2.2.2.2. Directors' Duty of Care (Article 25 CSDDD)

For companies within the scope of the Directive, Article 25 CSDDD modifies the nature of the general duty of care of company directors. The provision requires Member States to ensure that directors, 'when fulfilling their duty to act in the best interest of the company, […] take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term.' The consequence of Article 25 CSDDD would be that the interest of the company can no longer be

[43] In more detail on net-zero plans: Wolf-Georg Ringe, 'Net-Zero Plans under the Proposed CSDD' (*Oxford Business Law Blog*, 28 April 2022) <https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/04/net-zero-plans-under-proposed-csdd> accessed 23 August 2023.

[44] Cf also Paul Krüger and others, 'Response to the Proposal for a Directive on Corporate Sustainability Due Diligence by Nordic and Baltic Company Law Scholars' (2022), LSN Research Paper Series No 22-01, para 2.5.

[45] Cf European Parliament, 'Amendments on the proposal for a directive' (n 41) Amendment 247.

equated with the interest of shareholders alone, understood as pure profit maximization. Instead, in a meaningful step toward stakeholder capitalism, the provision clarifies that stakeholder interests must be an integral part of directors' fiduciary duties to the company.[46] In contrast to the current legal situation in most company law jurisdictions, it would become mandatory to consider the consequences of management decisions on sustainability issues.[47] The business judgment rule would still be likely to apply, but directors would be required to demonstrate that they took such considerations into account. It is also noteworthy that the provision specifies the notion of sustainability matters by enumerating human rights, climate change and environmental impacts. Moreover, by emphasizing that short-, medium-, and long-term considerations must be taken into account, the provision requires a kind of multidimensional balancing: The board must balance shareholder and stakeholder interests over different time horizons in each decision.

Management decisions will therefore require that the sustainability impacts in question can be assessed in very concrete terms: 'Article 25 CSDDD provides a very strong signal that it is no longer tolerable for directors of companies to hide behind excel spreadsheets and justify their decisions based on only profits'.[48] In fact, the provision goes far beyond a mere 'clarification' (as argued by the European Commission),[49] as it would imply legal changes in the legislation of at least some Member States, thereby modifying deeply rooted concepts of national company law.[50] Article 25 is, therefore,

[46] Stephane Brabant and others, 'Enforcing Due Diligence Obligations: The Draft Directive on Corporate Sustainability Due Diligence (Part 2)' (*Verfassungsblog*, 16 March 2022) <https://verfassungsblog.de/enforcing-due-diligence-obligations/> accessed 23 August 2023.

[47] For a comparison of CSDDD, art 25 with the Companies Act 2006 (UK) s 172, cf Federica Agostini and Michele Corgatelle, 'Article 25 of the Proposal for a Directive on Corporate Sustainability Due Diligence: Enlightened Shareholder Value or Pluralist Approach?' (2022) 19 European Company Law 92.

[48] Wojtek Baginski, cited in Lucia Baruzzi, 'The case to save Article 25: Directors' Duty of Care', (*Blog post B Lab Europe*) <https://bcorporation.eu/blog_post/the-case-to-save-article-25-directors-duty-of-care/> accessed 23 August 2023.

[49] European Commission, 'Proposal for a Directive on Corporate Sustainability Due Diligence' (n 38) Recital 63.

[50] European Company Law Experts Group (ECLE), 'The proposed Due Diligence Directive should not cover the general duty of care of directors' (*ECGI blogpost*, 2 August 2022) <https://www.ecgi.global/publications/blog/the-proposed-due-diligence-directive-should-not-cover-the-general-duty-of-care-of> Accessed 7 February 2025.

one of the most controversial provisions of the Directive, not only in legal academia and among lobby groups, some of which are pushing very hard to 'save Article 25'.[51] As the positions of the European Parliament and the European Council are completely contradictory, it is particularly difficult to foresee whether the provision will ever enter into force.

2.2.2.3. Setting Up and Overseeing Due Diligence (Article 26 CSDDD)

Article 26 CSDDD imposes an additional duty on directors, namely to establish and oversee the implementation of corporate sustainability due diligence processes and measures, and to align corporate strategy with due diligence. This provision makes directors 'responsible for putting in place and overseeing the due diligence actions referred to in Article 4 and in particular the due diligence policy referred to in Article 5'. They must take relevant input from stakeholders and civil society organizations into consideration, and they are required to report to the board of directors in that respect. According to Article 26(2) CSDDD directors are also required to 'take steps to adapt the corporate strategy to take into account the actual and potential adverse impacts identified pursuant to Article 6 and any measures taken pursuant to Articles 7 to 9'.

Article 26 CSDDD refers to the responsibility to establish, implement and monitor the company's due diligence policy as set out in other provisions of the Directive. In contrast to Article 25 CSDDD, it therefore has a much more focused scope, which is more closely linked to the general approach of the Directive. The provision is intended to pursue two distinct objectives.[52] On the one hand, it gives the board of directors the responsibility for establishing and monitoring the due diligence policy, thereby removing this task from the hands of lower-level employees. According to the UN Guiding Principles on Human Rights, due diligence policies should in fact be 'approved at the most senior level of the business enterprise'.[53] However, in contrast to the conventional division of powers within companies, the first

[51] See Baruzzi (n 48).

[52] Similar European Company Law Experts Group (ECLE), 'The proposed Due Diligence Directive should not cover the general duty of care of directors' (n 50).

[53] United Nations, 'Guiding Principles on Business and Human Rights' (2011), Policy Commitment No. 16, lit a. In more detail, Maddalena Neglia, 'Guiding Principle 16' in Barnali Choudhury (ed), *The UN Guiding Principles on Business and Human Rights – A commentary* (Edward Elgar Publishing 2023) 118, 120 (para. 16.06).

paragraph of Article 26 CSDDD refers to (individual) directors instead of designating the board of directors as the body responsible for the due diligence policy.[54] The second paragraph, on the other hand, goes beyond the due diligence policy and requires directors to adapt the company's strategy itself. Adjustments are likely to be necessary if monitoring of the implementation of the due diligence policy reveals shortcomings in reducing adverse human rights and environmental impacts along the company's value chain. However, it is debatable whether the board of directors should be given a somewhat broader discretion, for example by including the obligation in Article 10 CSDDD.[55]

3. *Supporting Corporate Sustainability by Digital Devices*

Although the final version of the CSDDD is still unclear, the legal and political developments clearly point in the direction of more intensive sustainability obligations for corporate boards. The proposed provisions require companies to integrate sustainability due diligence into their corporate policies, to ensure that they identify and prevent potential adverse impacts of their business activities on human rights and the environment, and to remediate actual violations. This development can be seen not only at the European level, but also in many Member States: The EU initiative complements national laws or legislative proposals in France, Italy, Germany and the Netherlands.[56]

From a company law perspective, it is remarkable that the sustainability duties in the CSDDD proposal are manifold, including the duty to act on an informed basis (assessment of sustainability risks on the basis of information

[54] This is criticized, for instance, by the European Company Law Experts Group (ECLE), 'The proposed Due Diligence Directive should not cover the general duty of care of directors' (n 50).

[55] The European Company Law Experts Group (ECLE), 'The proposed Due Diligence Directive should not cover the general duty of care of directors' (n 50), therefore propose to add a sentence end of Art 10 that would read as follows: 'The due diligence policy, and when necessary the company strategy, shall be updated in accordance with the outcome of those assessments.'

[56] See, for instance, Chantal Mak, 'Corporate sustainability due diligence: More than ticking the boxes?' (2022) 29 Maastricht Journal of European and Comparative Law 301, with further references in fn 4-8.

reasonably available to the company, according to Article 15 CSDDD), the substantive duty to take into account a broad range of stakeholder interests (need to consider the consequences of decisions on sustainability matters, according to Article 25 CSDDD), the result-oriented duty to adapt the business model and strategy of the company (according to Articles 15 and 26 CSDDD), and a monitoring duty (need to oversee due diligence actions and policy, according to Article 26 CSDDD). Taken together, these obligations go far beyond the requirements of the traditional business judgment rule, both procedurally and substantively. While this intensification is viewed differently depending on the political perspective, digital tools may prove helpful or even necessary to meet the more stringent requirements: Digitalization can help the board meet its emerging sustainability obligations. This supportive role can be demonstrated with respect to each of the central phenomena of digitalization listed above – online platforms, decentralized communication systems based on distributed ledger technologies, and data analytics and artificial intelligence.

3.1. *Online Platforms*

To begin with, online platforms can make it easier for boards of directors to meet their sustainability obligations. In particular, online platforms that focus on business-to-business transactions allow companies to replace multiple transactions through various intermediaries with direct transactions with suppliers, for instance for raw materials. One example of such a platform is Knowde, an online marketplace for producers and buyers of ingredients, polymers and chemicals: With more than 100,000 products and thousands of manufacturer storefronts (including DuPont, Dow and Unilever), Knowde is the largest marketplace of its kind.[57] The elimination of intermediaries through the use of marketplaces ultimately shortens supply chains, making it easier for companies to control, monitor and document their supply chain transactions. Due to this shortening, online platforms make it easier for companies to manage the disclosure obligations to which they are subject in accordance with the provisions of the CSDDD.

[57] More information at 'The easiest way to source ingredients, polymers and chemistry' (*Knowde*) <https://www.knowde.com/> accessed 7 February 2025; see also Amit Basu and Steve Muylle, 'Digital Intermediaries' in Amit Basu and Steve Muylle (eds), *Competitive Digital Innovation. Palgrave Executive Essentials* (Palgrave Macmillan 2023) 121.

In addition, the typical characteristics of online platforms can facilitate quality assurance of sustainability issues. As a means of disseminating product information, online platforms are typically complemented by online reviews.[58] These online reviews have an important impact on supply chain decisions and also enable companies to check the quality of their respective suppliers. More specifically, the review mechanism can also provide a trusted tool to help ensure the quality of supply from a sustainability perspective. In this way, online platforms can contribute to sustainability compliance. Similarly, the newly revamped Raw Materials Information System (RMIS) serves as a tool to provide knowledge on raw materials, both primary (mined/harvested) and secondary (e.g. from recycling).[59] It provides information on specific materials, countries, and for different sectors and technologies. In short, digital technologies can not only shorten supply chains and thereby reduce the breadth of sustainability obligations, but also facilitate compliance by providing boards with the information they need.

3.2. *Decentralized Communication Systems Based on Distributed Ledger Technologies*

In addition to obtaining the necessary information on sustainability criteria, companies seeking to use sustainable materials face the challenge of ensuring and proving that suppliers are acting in accordance with the sustainability information they provide. Tracking sustainability performance with individual suppliers, using paper records, and auditing are very time-consuming tasks. In addition, data is relatively easy to falsify. Decentralized communication systems based on Distributed Ledger Technologies (DLT), which allow information to be recorded in a single, chronological, and unalterable record, promise to be a powerful tool to counter this threat.[60] An example of this use of technology is Veritree, which uses blockchain technology to provide planting organizations with an integrated planting

[58] Cf Song Shi and Guilin Liu, 'Supply chain operations with online platform: Impacts of online reviews and manufacturer competition' (2023) 176 Computers & Industrial Engineering 108913.

[59] Tamas Hamor, Eleonora d'Elia and Simone Manfredi, 'JRC Technical Report: RMIS Roadmap 2021' (Publications Office of the European Union, 2021) <https://rmis.jrc.ec.europa.eu/uploads/library/JRC126612.pdf> accessed 23 August 2023.

[60] Munir M Adeel and others, 'Blockchain Adoption for Sustainable Supply Chain Management: Economic, Environmental, and Social Perspectives' (2022) 10 Frontiers in En-

management platform: The Veritree system allows planting organizations to collect data at the ground level, manage their projects more effectively, and provide a better experience for sponsors.[61]

Similarly, DLT systems can be developed to measure and report greenhouse gas emissions and compliance with ESG standards along global supply chains, making them verifiable. By leveraging the properties of blockchain technology - the immutability of once-confirmed tokens, the high security against irregular changes, and the electronic accessibility of the ledger - such systems can operate in a legally secure, effective, and efficient manner by tokenizing relevant information and certificates. Digital product passports can be used as a tool to implement and scale the circular economy.[62] Implementing measures to combat climate change by reducing greenhouse gas emissions and complying with environmental, social and governance standards along global supply chains requires monitoring. Supply chain governance obligations as well as the Carbon Border Adjustment Mechanism[63] can only be enforced if methods are available to accurately measure, report and verify CO2 emissions and compliance with ESG standards when importing products and services.

3.3. *Data Analytics and Artificial Intelligence*

Finally, data analytics and artificial intelligence are also digital tools that can be used effectively to protect the environment, combat climate change, and promote sustainability.[64] Specifically, these digital technologies can accurately track and predict consumption trends, identify changes that need

ergy Research <https://www.frontiersin.org/articles/10.3389/fenrg.2022.899632> accessed 7 February 2025.

[61] More information at (*Veritree*) <https://www.veritree.com/> accessed 7 February 2025; see also Grammateia Kotsialou, Karlygash Kuralbayeva and Timothy Laing, 'Blockchain's potential in forest offsets, the voluntary carbon markets and REDD+' (2022) Environmental Conservation 49.3, 137-145.

[62] Joerg Walden, Angelika Steinbrecher and Maroye Marinkovic, 'Digital Product Passports as Enabler of the Circular Economy' (2022) 93 Chemie Ingenieur Technik 1717-1727 <https://doi.org/10.1002/cite.202100121> accessed 23 August 2023.

[63] Cf Regulation (EU) 2023/956 of 10 May 2023 establishing a carbon border adjustment mechanism [2023] OJ L130/52.

[64] For a good overview, see the contributions in Margherita Pagani and Renaud Champion (eds), *Artificial Intelligence for Sustainable Value Creation* (Edward Elgar Publishing Ltd 2021).

to be made, and automatically fine-tune systems to increase sustainability. They can improve sustainable resource management, reduce pollution, and protect biodiversity.[65] The transformative potential of artificial intelligence (AI) to help achieve the goals of a green transition has been increasingly and prominently highlighted, for example, in the European Green Deal.[66] There are also many different applications within companies. For example, data analytics and artificial intelligence can improve supply chain visibility and traceability to quickly and accurately identify sustainability issues where they arise, or enhance the ability to measure, analyse and take decisive action on carbon emissions. As another example, the use of predictive analytics with weather data can help identify peak power generation times to optimize the use of distributed energy storage systems.[67]

Overall, artificial intelligence may outperform other approaches in its ability to implicitly recognize complex structures in large data sets and its applicability to addressing issues of sustainable business management. For example, the technology can help to digest non-financial data to improve sustainability reporting.[68] One of the reasons for the recent increase in machine learning research is the availability of large amounts of data from various sources in the marketplace, especially machine-generated, non-personal data.[69] Sustainability regulation encourages companies to carefully consider the factors that affect their long-term performance. Identifying these factors enables companies to incorporate them into their business management

[65] Cf for example United Nations Environment Programme, 'How artificial intelligence is helping tackle environmental challenges' (7 November 2022) <https://www.unep.org/news-and-stories/story/how-artificial-intelligence-helping-tackle-environmental-challenges> accessed 7 February 2025.

[66] European Parliament, 'The role of Artificial Intelligence in the European Green Deal' (Study Requested by the AIDA committee, May 2021) <https://op.europa.eu/en/publication-detail/-/publication/2c3de271-525a-11ec-91ac-01aa75ed71a1> accessed 23 August 2023.

[67] In more detail Tanveer Ahmad and others, 'Data-driven probabilistic machine learning in sustainable smart energy/smart energy systems: Key developments, challenges, and future research opportunities in the context of smart grid paradigm' (2022) 160 Renewable and Sustainable Energy Reviews 112128 <https://doi.org/10.1016/j.rser.2022.112128> accessed 23 August 2023.

[68] Michele Galeotti and others, 'Big data and sustainability reports: the current approach to non-accounting data management' (2022) Management Control Special Issue 2239 <http://digital.casalini.it/10.3280/MACO2022-002-S1005> accessed 23 August 2023.

[69] Cf Alexandra Giannopoulou, 'Access and Reuse of Machine-Generated Data for Scientific Research' (2019) 12 Erasmus Law Review 155.

strategy, performance evaluation, marketing analysis, and reporting. Data analytics and artificial intelligence thus facilitate sustainable business management, guide business operations in a world of precious and limited resources, and add value to the business by promoting resource conservation.

4. *The Emergence of Directors' Twin Transition Duties*

If digital technologies are therefore a useful or even necessary tool for fulfilling the sustainability obligations that are increasingly provided for in European company law, the 'twin transitions' of digitization and sustainability[70] interact intensively and even converge: The duty for company directors to act sustainably promotes the use of digital tools.

In order to meet their sustainability obligations, directors are arguably even required to use such tools. As a limitation to the business judgment rule, the duty of care includes the duty to act on an informed basis. Most, if not all, corporate law jurisdictions provide for such obligation,[71] which has, in turn, important implications for the corporate use of digital technologies. If, for example, section 93(1) of the German Stock Corporation Act (Aktiengesetz, AktG) establishes an obligation to obtain information by stating that members of the board must make business decisions 'on the basis of appropriate information', this requirement clearly prohibits a categorical refusal of the corporate use of digital technologies.[72] Such technologies can process large amounts of data much better than humans, and they are therefore, at least under certain conditions, able to provide better information than exclusively human expertise.[73] The board does not have to exhaust all available sources of information, though, but

[70] Muench and others (n 13).

[71] For US (Delaware) corporate law, see eg *Cede & Co v Technicolor Inc* 634 A 2d 345, 367 (Delaware 1993): 'The duty of directors to act on an informed basis, as that term has been defined by this Court numerous times, forms the duty of care element of the business judgment rule.'

[72] Florian Möslein, 'Towards Corporate Digital Responsibility' in Martin Petrin and Christian Witting (eds), *Research Handbook on Corporate Liability* 409, 432 (Edward Elgar Publishing Ltd 2023).

[73] Similarly, with regard to the use of AI technologies: Florian Möslein, 'Robots in the Boardroom: Corporate Law and Artificial Intelligence' in Woodrow Barfield and Ugo Pagallo (eds), *Research Handbook on the Law of Artificial Intelligence* (Edward Elgar Publishing Ltd 2018) 649, 661.

may weigh the costs and benefits of obtaining information against each other: 'The amount of information that is prudent to have before a decision is made is itself a business judgment of the very type that courts are institutionally poorly equipped to make'.[74] As opposed to the business judgment itself, this weighing is, however, subject to judicial control. Most corporate law jurisdictions stipulate certain minimum requirements to gather information, even though the precise standards of care differ.[75] The more accurate and affordable digital technologies become, and the more widespread their use in business practice, the more difficult it will therefore be for directors to justify not taking advantage of such technologies. The emergence of a corporate law duty to make appropriate use of digital technologies is, therefore, to be expected in times of 'big data',[76] even if its intensity, scope and reach still require intensive debate.[77]

Such a duty can be justified all the more if specific rules explicitly formulate corresponding requirements, for example, if Article 15(1) CSDDD requires companies to 'identify, on the basis of information reasonably available to the company, the extent to which climate change is a risk for, or an impact of, the company's operations.' Assuming that digital technology provides appropriate and affordable solutions, the expectation in this provision that directors use all information reasonably available to the company frictionlessly translates into a requirement to use AI technologies to track sustainability risks. Under the same assumption, the requirement of Article 25(1) CSDDD that directors 'take into account the consequences of their decisions for sustainability matters' can be understood as an expectation that they use predictive analytics to reduce resource consumption.

Beyond information-based requirements, the need to 'adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy' as provided for in Article 15(1)

[74] *In Re RJR Nabisco, Inc Shareholders Litigation* (1989) WL 7036 para 19 (per Chancellor Allen).

[75] In detail and with further references: Florian Möslein, 'Robots in the Boardroom: Corporate Law and Artificial Intelligence' in Barfield and Pagallo (n 73) 649, 661ff.

[76] Similarly, Andrew McAfee and Erik Brynjolfsson, 'Big Data: The Management Revolution' (2012) 90 Harvard Business Review 3; cf also Roland Müller, 'Digitalization Decisions at the Board Level' in Michael Hilb (ed), *Governance of Digitalization* (Haupt 2017) 43-50: 'additional tasks of information governance'.

[77] For references on the controversial debate in Germany, see Florian Möslein, 'Corporate Digital Responsibility: Eine aktienrechtliche Skizze' in Stefan Grundmann, Hanno Merkt and Peter O Mülbert (eds), *Festschrift für Klaus Hopt* (De Gruyter 2020) 805, 813, fn 43.

CSDDD may well be interpreted in the sense that it requires the use of online platforms to shorten supply chains. However, as opposed to the duty to act on an informed basis, directors enjoy broader discretion with regard to substantive business decisions. Their margin of discretion is therefore likely to be larger with regard to their design of the business model and strategy of the company. If there are better alternatives to the use of online platforms to deal with the sustainability risks within supply chains, directors are therefore not limited to such specific digital devices. However, the better and more effective particular digital technologies are becoming at addressing sustainability risks, the harder it is to justify not using them.

Moreover, the duty to monitor requires directors to engage in basic risk management.[78] They must establish a system to monitor compliance with applicable laws and standards and take appropriate measures to identify in a timely manner developments that could jeopardize the continued existence of the company. In the CSDDD, the duty to monitor pursuant to Article 26(1) requires directors to implement and monitor due diligence measures and the due diligence policy. As a consequence, they need to implement trustworthy systems to monitor compliance, and this requirement may translate into an expectation to use digital technologies that promise effective oversight, such as using distributed ledger technology solutions to ensure that suppliers act in accordance with the sustainability requirement by storing the relevant information in a single, chronological and unalterable record. The duty of oversight, therefore, embodies an obligation to implement effective, arguably digital systems to monitor the company's sustainability performance and compliance.[79]

5. *Conclusion*

The contribution has shown that corporate boards are facing key challenges similar to those of our society as a whole: They have to reconcile the

[78] With regard to US law, see references (n 47); with regard to German law, see the Aktiengesetz (AktG) s 91 (2). Cf in more detail: Florian Möslein, 'Artificial Intelligence and Corporate Law' in Larry di Matteo, Christina Poncibò and Michel Cannarsa (eds), *The Cambridge Handbook of Artificial Intelligence: Global Perspectives on Law and Ethics* (Cambridge University Press 2022) 74, 81.

[79] Similar, with regard to US law, *Marchand v Barnhill* 212 A 3d 805 809 (Delaware 2019); in more detail: Elizabeth Pollman, 'Corporate Oversight and Disobedience' (2019) 72 Vanderbilt Law Review 2013, 2024ff.

two transformation processes of sustainability and digitalisation. More specifically, the legal obligations of sustainability go hand in hand with the duty to take advantage of digital tools. Ideally, the "twin transitions" are thus converging. This observation correlates with the *Leitmotif* that the European Commission recently proclaimed for Europe as a whole: 'A successful twinning will support a new, regenerative, and climate-neutral economy, cutting the levels of pollution, restoring biodiversity and natural capital, enabled by sustainable digital and other technologies. It will help to position the EU as a champion of competitive sustainability and strengthen its resilience and open strategic autonomy. This will go hand in hand with a just transition benefitting all people, communities, and territories, in Europe and beyond'.[80]

[80] European Commission, 'Twinning the green and digital transitions' (n 14).

Deirdre Ahern*

THE SUSTAINABILITY REPORTING RIPPLE: DIRECT AND INDIRECT IMPLICATIONS OF THE EU CORPORATE SUSTAINABILITY REPORTING DIRECTIVE FOR SME ACTORS**

1. *Introduction*

Demand for ESG metrics is driven by market, societal and regulatory sensitivities. With the first iteration of EU sustainability reporting having taken place under the Non-Financial Reporting Directive),[1] the momentum for a new and improved second iteration arose as an integral part of the European Union's grand plan for a just transition to a fair and sustainable economic system. The European Green Deal[2] and the Sustainable Finance Action Plan,[3] acting as mutually reinforcing forces, have propelled the European Commission's legislative agenda in the field of corporate sustainability including sustainability reporting. To influence private financial flows in the right direction towards sustainable investment requires being able to separate the wheat from the chaff in terms of companies' ESG records. Furthermore, although it is perhaps too early in the life of sustainability reporting to demonstrate a solid correlation between corporate sustainability performance and profitability, the two are being linked to form a virtuous circle.[4]

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** This chapter reflects developments as of 30 June 2023.

[1] European Parliament and Council Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance [2014] OJ L330/1 (Non-Financial Reporting Directive or NFRD).

[2] European Commission, 'The European Green Deal' (Communication) COM (2019) 640; European Commission, ' Commission Work Programme 2020 A Union that strives for more' (Communication) COM (2020) 37 final.

[3] European Commission, 'Action Plan: Financing Sustainable Growth' (Communication) COM (2018) 97.

[4] Marco Taliento, Christian Favino and Antonio Netti, 'Impact of Environmental, Social, and Governance Information on Economic Performance: Evidence of a Corporate

The availability of meaningful reporting on sustainability data that provides appropriate insights about companies and financial institutions is pivotal to allow sustainable financial decision-making and investments to be made on a sound footing. However, at a policy level, defining reporting requirements for sustainability statements that are both meaningful and manageable represents a very big nut to crack.

The journey which the European Union has been on from its first engagement with corporate social responsibility as a concept to sustainability reporting is legislatively bookended by the adoption of the Non-Financial Reporting Directive providing for non-financial reporting on the one hand, and on the other, by its eventual replacement with upgraded sustainability reporting in the Corporate Sustainability Reporting Directive (the 'Corporate Sustainability Reporting Directive').[5] The Corporate Sustainability Reporting Directive's provision for sustainability reporting comes with the clear objective of replacing the Non-Financial Reporting Directive's reporting framework in the Accounting Directive[6] with one of far greater ambition. Indeed, a key objective of the Corporate Sustainability Reporting Directive is to lay down a framework that will enable sustainability reporting concerning corporate environmental and societal impact to achieve equivalence with financial reporting. Once sustainability reporting under the Directive is up and running, in line with objectives also seen in the Taxonomy Regulation[7] and the Sustainable Finance Disclosure Regulation,[8] stakeholders including

'Sustainability Advantage' from Europe' (2019) 11(6) Sustainability 1738. See generally Kate Raworth, *Doughnut Economic: Seven Ways to Think Like a 21st Century Economist* (Chelsea Green Publishing 2017).

[5] European Parliament and Council Directive 2022/2464/EU amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU as regards corporate sustainability reporting [2022] OJ L322/15 (Corporate Sustainability Reporting Directive or CSRD).

[6] European Parliament and Council Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC [2013] OJ L182/19 (Accounting Directive).

[7] European Parliament and Council Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2020] OJ L198/13 (Taxonomy Regulation).

[8] European Parliament and Council Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector [2019] OJ L317/1 (Sustainable Finance Disclosure Regulation or SFDR).

lenders and investors will benefit from being able to access standardised digitally tagged data within the planned European Single Access Point Database.[9] Central to the Corporate Sustainability Reporting Directive will be the associated adoption of European Sustainability Reporting Standards.

As well as providing some overall impressions of the Directive's significance, the more particular objective is to bring within the frame some contextualised perspectives on what the Corporate Sustainability Reporting Directive and its roll-out of sustainability reporting mean within the context of the impact on small and medium sized enterprises ('SMEs' in the European Union. An assessment of SME-related implementation issues concerning the Corporate Sustainability Reporting Directive is timely as Member States work to transpose the Directive by 6 July 2024[10] and companies are working to prepare processes to handle the arrival of reporting under European Sustainability Reporting Standards.[11] The SME context is significant. It would be a mistake to regard the expanding prism of sustainability in the Corporate Sustainability Reporting Directive as confined to larger undertakings. It is true that the Directive will only directly affect SME companies that have securities listed on regulated markets. However, the indirect impacts of the

[9] Electronic reporting feeds into a broader objective to introduce digital tagging of reported information so that it is machine readable. This in turn feeds into the EU's desire to realise a single access point for reporting which is a component of Capital Markets Union Action Plan. However, to realise this the EU must formulate a digital taxonomy that will apply to EU Sustainability Reporting Standards. Provisional agreement on the European Single Access Point ('ESAP') was reached by the Council and the European Parliament on 23 May 2023. This will provide freely available digital access to financial and sustainability information. It is envisaged that the platform will be made available on a phased basis in 2027. Council of the EU, 'Easy access to corporate information for investors: Provisional agreement reached on the European Single Access Point (ESAP)' (*Press release*, 23 May 2023) <https://www.consilium.europa.eu/en/press/press-releases/2023/05/23/easy-access-to-corporate-information-for-investors-provisional-agreement-reached-on-the-european-single-access-point-esap/> accessed 28 January 2025.

[10] Member States will have to set up mechanisms for national supervision of sustainability reporting.

[11] Staggered reporting under the Corporate Sustainability Reporting Directive begins with reporting in 2025 on 2024 financial year for companies already subject to the Non-Financial Reporting Directive. Then large companies not currently within the Non-Financial Reporting Directive must report in 2026 on their 2025 financial year. Listed SMEs (along with small and non-complex credit institutions and captive insurance undertakings) begin simplified reporting in 2027 on their 2026 financial year. Lastly, non-EU companies meeting certain thresholds begin reporting on their 2028 financial year in 2029.

ripples cast by the Corporate Sustainability Reporting Directive are far wider. Consequently it is not only companies that are directly within the scope of the Corporate Sustainability Reporting Directive and obliged to report under it that will be impacted by it. As discussed below, the introduction of value chain reporting means that information will be requested by in scope actors from their upstream and downstream suppliers and business partners. In the European Union many of these will be SMEs and micro-undertakings. This means that the Corporate Sustainability Reporting Directive will exert a wide circle of indirect influence that will act as a catalyst for value chain and supply chain actors to also examine their part in the sustainability equation. It is argued here that the indirect, trickle-down impacts of the Directive on SMEs value chain actors upstream and downstream from regulated reporting companies will be momentous and costly to respond to or ignore. As such, assistance and understanding from other regulatory actors and states is crucial.

Part B contextualises the EU momentum towards sustainability. It begins with some reflection on the evolution of corporate social responsibility ('CSR') and how CSR over time became a policy matter for the EU amid a journey towards the sustainability imperative. From that vantage point we move to look at the impact and perceived shortcomings of the Non-Financial Reporting Directive. From there the journey to the adoption of the Corporate Sustainability Reporting Directive as the conduit for new and improved sustainability reporting amid building EU momentum is examined. Part C contextualises the commercial importance of SMEs in the European Union, preparing the ground for subsequent consideration of how the European Union's expansive policy revisions on sustainability reporting will impact on SMEs. Part D considers the Corporate Sustainability Reporting Directive's widening regulatory net in relation to the undertakings required to engage with sustainability reporting. From there, Part E engages with the sustainability matters that must be reported on and the likely impact on the SME sector. Parts F and G explore the implications of the evolving development of European Sustainability Reporting Standards including both mandatory standards for the listed SME sector and voluntary standards being developed for the broader non-listed SME sector. Part H reflects upon the challenges for EU SMEs as value chain actors while the Conclusion offers some general observations on the likely impact of the EU's sustainability reporting regime.

2. *EU Momentum Towards Sustainability*

The Non-Financial Reporting Directive was always set to have its effectiveness reviewed, but the evolving EU sustainability policy backdrop against which its revision took place ultimately shaped the overall motivation of the Corporate Sustainability Reporting Directive. Understanding the impetus behind the advancing reach of sustainability reporting in the European Union involves an appreciation of how EU ambition in this field has gradually expanded over time. The concepts in question have been around for a long time and are familiar territory to business ethics scholars who have been talking about corporate responsibility matters and reporting for a long time.[12] Then sustainability reporting emerged in the market to provide 'triple bottom line reporting' – on people, planet and profit. While sustainability reporting became commonplace in larger companies, the absence of regulation led to a *laissez-faire* approach to the existence and content of such reports by companies that permitted greenwashing.[13]

EU company law and corporate governance policy has played an incrementally expanding role in mainstreaming sustainability as core to mission over time. In this regard, there has been a considerable shift in policy approach at EU level over time. A number of distinct phases are identifiable. During the 'Voluntary Phase' the EU's stance on corporate social responsibility ('CSR') regarded it as entirely voluntary for companies.[14] Subsequently, in the 'Moral Responsibility Phase', dating from the Commission's renewed CSR strategy in 2011,[15] the European Commission moved on from

[12] The pre-eminent among these is RE Freeman in his championing of stakeholder theory including his seminal work, Robert Edward Freeman, *Stakeholder Theory: The State of the Art* (Cambridge University Press 2010).

[13] William S Laufer, 'Social Accountability and Corporate Greenwashing' (2003) 43 Journal of Business Ethics 253; Wolfgang Breuer and Manuel Hass, 'All That Glitters is Not Gold: Performance Impact of Corporate Greenwashing' (2022) <http://dx.doi.org/10.2139/ssrn.4096853> accessed 30 June 2023. The problem also extends to consumer claims: Gabriella Marcatajo, 'Green Claims, Green Washing and Consumer Protection in the European Union" (2023) 30(1) Journal of Financial Crime 143 <https://doi.org/10.1108/JFC-11-2021-0240> accessed 28 January 2025.

[14] European Commission, 'Green Paper - Promoting a European Framework for Corporate Social Responsibility' COM(2001) 366.

[15] European Commission, 'Green Paper - A Renewed EU Strategy for Corporate Social Responsibility' COM(2011) 681, 6.

regarding CSR as voluntary and instead emphasised both the moral and the legal responsibility of companies for their impact on society. This dovetailed with the post-financial crisis EU policy narrative on sustainability as a long-term driver of the social market economy as the financial crisis had showed everything that was broken with a short-term profit corporate agenda. Reflecting this, the objective of the Non-Financial Reporting Directive was to improve transparency and accountability around ESG matters so as promote sound business models and investor confidence.[16]

We are now in phase three of the European Union's regulatory policy approaches, the 'Green Deal and Sustainable Finance Policy Phase'. In this phase, the sustainable corporate governance and sustainable finance agenda has been building momentum and continues to do so.[17] In 2015 the adoption of the United Nations 2030 Agenda and its Sustainable Development Goals[18] expressed the urgent need to move towards sustainable development. We also had the seismic Paris Agreement on Climate Change in the same year.[19] Then in 2019 the European Green Deal set out the European Commission's commitment to tackling climate and environmental-related challenges as being 'this generation's defining task'.[20] In line with this, the EU has forged ahead with a sustainable finance agenda.

In the 'Green Deal and Sustainable Finance Policy Phase', the Commission has stepped up to go full throttle on sustainability, the culmination of which will be the adoption of the Corporate Sustainability Due Diligence Directive. While the intricacies of the landslide policy movement in the EU towards sustainable finance are composed of many moving parts, for present purposes what matters most is that the economic, corporate and financial risks of continued unsustainability have been laid bare and have driven an ambitious EU sustainability policy agenda. Within this movement, compa-

[16] Deirdre Ahern, 'Turning Up the Heat: CSR Reporting, Sustainability and the Parameters of Regulated Autonomy in the European Union' (2016) 13(4) European Company and Financial Law Review 599.

[17] See further Iris HY Chiu, 'The EU Sustainable Finance Agenda: Developing Governance for Double Materiality in Sustainability Metrics' (2022) 23 European Business Organization Law Review 87.

[18] United Nations General Assembly, 'Transforming our world: the 2030 Agenda for Sustainable Development' (2015).

[19] United Nations Framework Convention on Climate Change, 'Paris Agreement' (12 December 2015).

[20] The European Green Deal (n 2), Introduction.

nies and boards as their fiduciary agents are seen as having an instrumental role in the transition to sustainable finance. A number of significant legislative landmarks in the EU sustainable finance agenda are worthy of mention. These include the adoption in 2019 of the Sustainable Finance Disclosure Regulation[21] to enhance credibility and transparency in the market for sustainable investment products. The Sustainable Finance Disclosure Regulation requires sustainability disclosures from financial market participants including asset managers and financial advisors which in turn means that they need to obtain relevant sustainability information from investee companies. The arrival of the Taxonomy Regulation[22] has provided a means of indicating the extent to which financial products are environmentally sustainable in nature. This has led to the publication of a number of delegated Acts including the EU Taxonomy Climate Delegated Act, a delegated act being adopted on sustainable activities for climate change adaptation and mitigation objectives.[23]

This regulatory policy phase has coincided with the revision of the Non-Financial Reporting Directive and negotiations on the Proposal for a Corporate Sustainability Due Diligence Directive.[24] It is within this expansive phase that both the substantive obligations on companies and their indirect impact on many other supply and values chain actors are set to increase exponentially. In the Commission's Communication on the European Green Deal, the Commission pledged to review the Non-Financial Reporting Directive as an integral part of the strategy to strengthen the backdrop for

[21] SFDR.

[22] Taxonomy Regulation. See also European Parliament and Council Regulation (EU) 2019/2089 amending Regulation 2016/1011/EU as regards EU Climate Transition Benchmarks, EU Paris-Aligned Benchmarks and sustainability-related disclosures for benchmarks [2019] OJ L317/17 (the 'Low Carbon Benchmarks Regulation').

[23] European Commission Delegated Regulation 2020/2139/EU supplementing Regulation 2020/852/EU by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives [2021] OJ L188/1 (the 'Climate Delegated Act'). On 27 June 2023, the European Commission adopted a Taxonomy Environmental Delegated Act in relation to non-climate-related environmental objectives: Commission Delegated Regulation (EU) 2023/43 [2023] OJ L2023/2486.

[24] European Commission, Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive 2019/1937/EU COM [2022] 71 final (the 'Corporate Sustainability Due Diligence Directive' or 'CSDD').

sustainable investment in the Union. The Sustainable Finance Action Plan[25] also provided a mandate for reviewing the operation of the Non-Financial Reporting Directive, emphasising that a suitable balance had to be struck between giving flexibility to businesses and the need for standardisation of disclosures. For the EU Green Deal to successfully propel the markets for green investments, investors need reliable sustainability information to make green investments and to meet their disclosure requirements under the Sustainable Finance Disclosure Regulation. Thus the Corporate Sustainability Reporting Directive dovetails well with a suite of EU measures such as the Sustainable Finance Disclosure Regulation and the Taxonomy Regulation also designed to aid transparency and comparability of sustainability information.

The Corporate Sustainability Reporting Directive emerged from the Commission's mandated fitness review of the Non-Financial Reporting Directive.[26] This author has previously contended that the primary success of the Non-Financial Reporting Directive was 'to mainstream sustainability disclosures within broadly defined parameters'[27] for large public interest entities. This is indeed important. The Non-Financial Reporting Directive started small and is best viewed as a starting point on the road to sustainability reporting, not an end point. This explains in part why a number of shortcomings around its operation were evident. It was expected that reporting would include a description of the business model, policies and related due diligence and that it would outline principal risks and how they are managed. It was also expected that policy outcomes would be discussed.[28] However, at its core, the minimum content in terms of ESG matters that companies needed to report on was

[25] European Commission, 'Action Plan on Financing Sustainable Growth' (Communication) COM (2018) 097. See also European Commission Strategy for Financing the Transition to a Sustainable Economy (Communication) COM (2021) 390. On 23 June 2023, the European Commission published a sustainable finance package of measures to build upon the existing EU stainable finance framework: European Commission, 'Sustainable finance package' (13 June 2023) <https://finance.ec.europa.eu/publications/sustainable-finance-package-2023_en> accessed 28 January 2025.

[26] European Commission, 'Staff Working Document - Fitness Check on the EU framework for public reporting by companies Accompanying the document Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the review clauses in Directives 2013/34/EU, 2014/95/EU, and 2013/50/EU' (2021) 81 final.

[27] Ahern (n 16) 628.

[28] Accounting Directive, art 19a(1) (as inserted by art 1(1) of the NFRD (n 1)).

quite vaguely outlined in the Directive. Companies were required to include material internal and external impacts on 'environmental, social and employee matters, respects for human rights, anti-corruption and bribery matters'.[29] The Non-Financial Reporting Directive's functionality was also impaired by it not seeking to be prescriptive in terms of drilling down to provide actual standards to be complied with. Further weaknesses surrounded the lack of mandatory external assurance (auditing).[30]

Significantly, a fundamental regulatory design choice made in the Non-Financial Reporting Directive was that non-financial reporting would not be mandatory.[31] The regulatory design was based on report or explain disclosure that lay between mandatory and voluntary regulation as companies could choose not to disclose and simply provide an explanation as to why they did not have a policy in the relevant area. 'Comply or explain' regimes, familiar in corporate governance codes are famously open to corporate governance actors choosing uninformative boilerplate responses and spurious explanations for why compliance does not seem relevant to a company's position. Indeed, companies who are averse to sustainability reporting rather than embracers have been shown to use boilerplate disclosures as a tactical avoidance mechanism.[32]

There was a desire by EU institutional actors to plug gaps, including those identified by stakeholders during the Commission's consultation on the Non-Financial Reporting Directive.[33] The clear message from that was

[29] ibid.

[30] There was no mandatory obligation on Member States to provide for verification by an independent assurance services provider.

[31] Accounting Directive, art 19a(1) (as inserted by art 1(1) of the NFRD (n 1)). The NFRD contained the following statement: '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'.

[32] Ries Breijer and René P Orij, 'The Comparability of Non-Financial Information: An Exploration of the Impact of the Non-Financial Reporting Directive (Non-Financial Reporting Directive, 2014/95/EU)' (2022) 19(2) Accounting in Europe 322 <10.1080/17449480.2022.2065645> accessed 29 September 2023. See also Simone Pizzi, Andrea Venturelli and Fabio Caputo, 'The "Comply-or-explain" Principle in Directive 95/2014/EU. A Rhetorical Analysis of Italian PIEs' (2020) 12(1) Sustainability Accounting, Management and Policy Journal 30 <https://doi.org/10.1108/SAMPJ-07-2019-0254> accessed 29 September 2023.

[33] European Commission, 'Summary Report of the Public Consultation on the Review of the Non-Financial Reporting Directive' (2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=PI_COM:Ares(2020)3997889> accessed 28 January 2025.

that the quality and comparability of reporting needed to be improved, a message that was emphasised by the Council when in 2019 it requested the European Commission to look at developing a European non-financial reporting standard which is now framed by the Corporate Sustainability Reporting Directive. Following momentum to revise the Non-Financial Reporting Directive, the Commission's Proposal for a Corporate Sustainability Reporting Directive[34] was published in 2021 and after the legislative process, the Corporate Sustainability Reporting Directive entered into force on 5 January 2023. Framed upon reflection on the shortcomings of the Non-Financial Reporting Directive, the Corporate Sustainability Reporting Directive was designed to better empower investors and other stakeholders such as NGOs to assess sustainability risks. As a consequence, the previous reporting framework is replaced with one of greater breadth, depth and rigour in terms of undertakings within scope and the nature of reporting requirements imposed.

The Corporate Sustainability Reporting Directive's arrival ought to be contextualised in terms of its replacement of non-financial reporting under the Non-Financial Reporting Directive with mandatory European sustainability reporting in accordance with European Sustainability Reporting Standards. The associated recharacterization as sustainability reporting rather than 'non-financial reporting' speaks to the significance of sustainability matters in financial terms as well as in ESG terms. The change of terminology is culturally significant; the move from using the term 'non-financial information' reporting, to 'sustainability reporting' is made with a view to, firstly, placing sustainability reporting on an equal footing with financial reporting, and secondly, recognising that sustainability has both financial risk and opportunity implications. This fits with the regulatory decision to situate mandatory sustainability statements in the management report. The reporting regime will be beefed up by the addition of a mandatory audit of reported information. However, in accordance with Article 26a[35] at the outset this will commence with a 'limited' assurance requirement for the first 6 years. This is less onerous and less costly for companies than a full rea-

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

[35] Accounting Directive, art 26a (as inserted by CSRD, art 1(15)).

sonable assurance requirement would be. In the meantime it is hoped that the market for sustainability audit services will evolve and that associated standards will be developed.

3. *The Commercial Importance of SMEs in the European Union*

The Corporate Sustainability Reporting Directive has (i) significant direct impacts on listed SMEs and (ii) inestimable indirect impacts on a vast swathe of SME value chain actors. SMEs constitute around 99 percent of all enterprises by number in the European Union,[36] and as such their specific circumstances matter when evaluating the impact of the Corporate Sustainability Reporting Directive in terms of both direct and indirect impacts. Before examining the implications for SME actors, this Part seeks to contextualise the commercial significance of these economic actors within the single market.[37] The European Union has approximately 25 million SMEs that are at the epicentre of the EU's economy, accounting for more than 50 per cent of the region's GDP and providing around 100 million people with employment.[38] The markets in which SMEs are involved is diverse and there has been increasing internationalisation of SMEs in reaching export markets, not just in the EU but also third country markets outside it, often benefiting from Free Trade Agreements that eliminate tariffs.[39] In short, SMEs are the heart of entrepreneurship and key drivers of the EU economy. The diversity and breadth within the SME population maintains relevance when it comes to judging capacity to adapt to the green transition and the challenges presented by the Corporate Sustainability Reporting Directive and the wider green deal agenda.

The European Union has set down rules to determine which undertakings qualify as micro, small and medium-sized enterprises ('SMEs'). These use

[36] See the 'SME definition' (*European Commission's webpage*) <https://single-market-economy.ec.europa.eu/smes/sme-definition_en> accessed 28 January 2025.

[37] A consideration of SME actors in third countries lies outside the scope of this work.

[38] European Commission, 'An SME Strategy for a Sustainable and Digital Europe' (Communication) COM (2020) 103, Introduction.

[39] Lucian Cernat, Ana Norman-Lopez and Ana Duch T-Figueras, 'SMEs Are More Important Than You Think! Challenges and Opportunities for EU Exporting SMEs' (2014) Chief Economist Notes Series DG TRADE <http://dx.doi.org/10.2139/ssrn.3777681> accessed 28 January 2025.

average number of employees, net turnover[40] and balance sheet total in the financial year as objective indicators to classify entity size. For the purposes of sustainability reporting, regard must be had to Article 3 of the Accounting Directive[41] which classifies undertakings by size. Following a 2008 non-legislative resolution of the European Parliament requesting the Commission to review the impact of EU accounting requirements on small and medium-sized companies, but especially micro-undertakings given the associated administrative burden imposed.[42] Categorisation of undertakings progressively by size derives from the benchmarks contained in Article 3 of the Accounting Directive. Under this framework, a micro-undertaking must not exceed the limits of two out of the following three criteria: a balance sheet total of €350,000, a net turnover of €700,000, and an average employee headcount of 10.[43] A small undertaking must not exceed the limits of two out of the following three criteria: a balance sheet total of €4 million, a net turnover of €8 million, and an average employee headcount of 50.[44] A medium-sized undertaking must not exceed the limits of two out of the following three criteria: a balance sheet total of €20 million, a net turnover of €40 million, and an average employee headcount of 250.[45] Meanwhile to qualify as a large undertaking, an undertaking must exceed at least two of the following three criteria: a balance sheet total of €20 million, a net turnover of €40 million, and an average employee headcount of 250.[46] Within the broad limits of these thresholds for SMEs vastly diverse enterprises shelter, from the tiny to the well-resourced.

Clearly SMEs will need to be responsive to consumer preferences around sustainability, whether they are organically demand-led or regulation-led. A competitiveness issue may arise that cannot be ignored without risking business and end user consumers moving to producers and suppliers who are better able to be transparently green and to supply ESG data that regulation and society is demanding.[47] Attitudes and approaches may differ substan-

[40] Revenue from sale of products and supply of services less any sales taxes or sales rebates that apply.

[41] Accounting Directive.

[42] [2010] OJ C 45 E, 58.

[43] Accounting Directive, art 3(1).

[44] Accounting Directive, art 3(2).

[45] Accounting Directive, art 3(3).

[46] Accounting Directive, art 3(4).

[47] European Commission, 'An SME Strategy for a Sustainable and Digital Europe' (n 38) 2.

tially where sustainability reporting is undertaken by SMEs on a voluntary as opposed to mandatory basis. Companies who are purpose- driven with a sustainable value creation model will embrace and commit holistically and responsibly to a transparent reporting landscape. Policies, risk management, measurement against meaningful targets and due diligence are key to this. It is also worth considering that opportunities do exist to create value in line with a low carbon economy and many SMEs already offer green products or services.

EU regulatory policy decisions have taken a view of sustainability reporting as being driven largely by larger companies as champions. However, regulatory policy is also being masterfully wielded by EU institutional actors to create trickle-down effects. These impacts are largely unavoidable for SMEs who play an important role in servicing the needs of larger companies without disrupting existing commercial arrangements. The genius of the Directive's stealth approach to value chains (which will be reinforced with the substantive due diligence obligations contemplated by the Corporate Sustainability Due Diligence) is that, over time, knock-on sustainability data requests made to SMEs (both on the single market and in third countries) who have value chain relationships with regulated actors will form the collective glue that delivers real behavioural change. This obliges us to consider specific challenges in relation to sustainability reporting for both listed SMEs who are within the scope of the Corporate Sustainability Reporting Directive and other SMEs who present as a cog in the wheel of a larger entity to which goods or services are supplied. The Impact Assessment for the Directive demonstrated an intention that it would be in lock step with the Corporate Sustainability Due Diligence Proposal, to 'ensure coherence and maximum alignment.'[48] However, inconsistencies in the treatment of SMEs between the two are stark. The inclusion of listed SMEs as regulatory actors mandated to provide sustainability reporting under the Corporate Sustainability Reporting Directive but with the listed SME sector having no direct obligations for SMEs under the Corporate Sustainability Due Diligence Proposal seems anomalous. That said, the knock-on impact on supply and value chain SMEs in relation to both EU measures will be nothing short of staggering.

[48] European Commission, 'Staff Working Document - Impact Assessment on the Proposal for a Directive as regards corporate sustainability reporting' (2021) 150, 1.2.2.

4. *The Widening Net of Sustainability Reporting and Why It Matters for SMEs*

The Non-Financial Reporting Directive suffered from a scope problem which became in increasingly apparent as the framework matured. The scope was intentionally relatively limited, being designed to start the ball rolling by covering large public interest undertakings with more than 500 employees. In effect this meant that its application was confined to large, listed companies as well as large banks and insurance companies meeting that employee threshold. The Non-Financial Reporting Directive only applied to about 11,000 companies. The base level of entities within the scope of the Non-Financial Reporting Directive is around ,1956 (this excludes exempted subsidiaries) comprising 1,604 listed companies, 278 banks and 74 insurance companies).[49] However, Member States were permitted to extend the reach further during national transposition and this expansion led to 11,500 companies being within scope.[50]

The Corporate Sustainability Reporting Directive's widening net as compared to its legislative predecessor has both direct and indirect and indirect impacts which together will hugely extend the reach of its impact on a vast range of undertakings, and not just those who now must report under it. This means that SMEs should ignore it at their peril. Having got sustainability reporting off the ground with the Non-Financial Reporting Directive, the Corporate Sustainability Reporting Directive manifests the EU's policy desire to considerably expand the scope of entities expected to engage in sustainability reporting.[51] As sustainability reporting under the Directive is rolled out, it is expected to more than quadruple the number of companies reporting as compared with the Non-Financial Reporting Directive to include around 50,000 companies.[52] How is this achieved? First of all, the Corporate Sustainability Reporting Directive widens the net for sustainabili-

[49] European Commission, 'Study on the Non-Financial Reporting Directive: Final Report' (2020) 8.

[50] ibid. Other entities have chosen to voluntarily comply.

[51] This coheres with the tenor of the public consultation undertaken in connection with the review of the Non-Financial Reporting Directive which showed public support for widening the reporting net in terms of in scope undertakings: European Commission, 'Summary Report of the Public Consultation' (n 33) 50-62.

[52] This is a European Commission estimate: 'Corporate sustainability reporting' (*European Commission's webpage*) <https://finance.ec.europa.eu/capital-markets-union-and-fi-

ty reporting beyond 'public interest entities', bringing large companies within scope to include all large undertakings[53] (even where not publicly trading their shares. Second, publicly traded companies[54] including listed SMEs, (but not listed micro-undertakings) will fall within scope due to trading on a regulated market in the EU.[55] An issue of regulatory coherence jumps out when considering the parallel Corporate Sustainability Due Diligence Proposal.[56] The intention was that the Corporate Sustainability Reporting Directive and the Corporate Sustainability Due Diligence Proposal would be closely aligned. However, in practice there are some significant differences. One of these is that no class of SMEs (not even listed SMEs) is included within scope of the Corporate Sustainability Due Diligence Proposal. One may rightly question how this can be rationalised given the professed close inter-relationship envisaged for these two directives with the Corporate Sustainability Reporting Directive providing the reporting framework to the Corporate Sustainability Due Diligence Directive's planned substantive due diligence duties.[57]

The European Union has cut its cloth for now such that for the most part, SMEs will not fall directly within the scope of the sustainability reporting regime. The exception relates to one particular category of SMEs – SMEs (including third country undertakings) that have securities listed on a regulated market in the EU who are within scope alongside large undertakings listed on EU markets. An SME with securities traded on a regulated market of any Member State, will qualify as a 'public interest entity', meeting the public interest rationale for inclusion. The rationale for mandating listed SMEs trading on EU markets to engage in sustainability reporting is to give SMEs equal access to financial markets and investments, bearing in mind the ever increasing demand by investors for sustainability information. That is entirely justifiable. The bigger rationale here in terms of sustainable finance

nancial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en#related-links> accessed 30 June 2023.

[53] See further Accounting Directive, art 1(4).

[54] The Corporate Sustainability Reporting Directive applies to companies established outside the EU but with subsidiaries listed on an EU-regulated market.

[55] Accounting Directive, art1(3), art 2(1)a (inserted by CSRD art 1(1)).

[56] CSDD Proposal.

[57] While falling outside the direct line of regulatory sight, SMEs would nevertheless fall within the peripheral vision of the CSDD Proposal through participation in larger companies' chain of activities.

and investing ensures that financial market participants with a sustainability agenda can be inclusive in relation to smaller undertakings by requiring them to disclose relevant sustainability information that the market needs. SMEs make up a significant proportion of listed companies on EU regulated markets and therefore sustainability information is of interest to their investors. Their inclusion within the sustainability reporting net is designed to create a level playing field for them in relation to access to financial markets and capital and to avoid them being treated less favourably by investors who require sustainability information to comply with their own sustainability disclosure requirements laid out in the Sustainable Finance Disclosure Regulation.[58] As discussed below, in recognition of their size, qualifying listed SMEs who are required to engage in sustainability reporting under the Corporate Sustainability Reporting Directive are afforded an accommodation in the form of reporting using simplified reporting standards in order to ease the regulatory burden and are given additional lead-in time as compared to other in scope companies, namely large public interest entities and large EU undertakings and parent undertakings of large groups.[59] By contrast, all non-listed SMEs (and micro-undertakings) by virtue of their size are outside direct regulatory scope and thus will have no direct obligation to publishing sustainability disclosures.

Should the Directive have gone further to include disclosure obligations for more SMEs? It has been argued that sustainability should matter for all companies irrespective of whether they are raising capital or not.[60] It has also been cogently argued that it would have been preferable for the Corporate Sustainability Reporting Directive to have expanded its remit to cover either all SMEs, all SMEs above a certain size or all SMEs in designated high impact sectors.[61] Indeed, the European Commission did consider the option of adding non-listed medium sized undertakings into the regulatory mix which would have had a direct regulatory impact upon approximately 160,200 medi-

[58] SFDR. This is framed in CSRD, Recital 21 as enhancing market access and preventing discrimination by other market participants against smaller undertakings as compared with their larger counterparts.

[59] See further (n 11).

[60] Chiu (n 17) 107.

[61] Mathilde Bossut and others, 'Why it Would be Important to Expand the Scope of the Corporate Sustainability Reporting Directive and Make it Work for SMEs' (2021) Sustainable Finance Research Platform Policy Brief 8/2021 <https://wpsf.de/wp-content/uploads/2021/09/WPSF_PolicyBrief_8-2021_Scope.pdf> accessed 28 January 2025.

um-sized undertakings.[62] Ultimately, the European Commission did not proceed with this option. It has been argued that the decision to exclude unlisted SMEs from mandatory sustainability reporting was disappointing given that in certain sectors SMEs are responsible for substantial negative environmental impacts and in some sectors a majority of the relevant economic activity.[63] However, at the time of the Impact Statement, the Commission noted that demand for sustainability information was lower in the case of non-listed medium-sized companies as compared with their larger counterparts and their sustainability impacts were regarded as lower.[64] This may well change. There is the interesting question of whether competitive advantage or disadvantage may result compared to competitors who are not drawn into the net of sustainability reporting under the Corporate Sustainability Reporting Directive. On the one hand, investment in compliance is resource-intensive, particularly in the early years, which may adversely affect the bottom-line; on the other, a company that has transparent green and digital credentials may prove more appealing to the market in the medium to long-term.

It would be a mistake for non-listed SMEs to simply watch from the side-lines as larger players put their house in order. A major consequence of the broad framing of sustainability reporting obligations in the Corporate Sustainability Reporting Directive is that the indirect impact will create ripples that fan out far more broadly than its direct impact on those large and listed entities who are obligated to report under it. Article 19a(2)(f) of the Accounting Directive (as amended)[65] initiates mandatory extended value chain reporting by a company concerning its upstream sourcing of raw materials and downstream use of its products or services to end of life.[66] Data is central to the sustainability reporting model, and it will force suppliers to level up and come on board. This regulatory lever banks upon creating a

[62] European Commission, 'Staff Working Document - Impact Assessment on the Proposal' (n 48) 6.3.5.

[63] Bossut and others (n 61).

[64] European Commission, 'Staff Working Document - Impact Assessment on the Proposal' (n 48) 6.3.5.

[65] Accounting Directive, art19a(2)(f) (as substituted by CSRD, art 1(4)).

[66] This understanding is confirmed by the expansive definition of 'value chain' in European Commission, 'Draft Delegated Regulation as regards sustainability reporting standards: European Sustainability Reporting Standards' (6 June 2023), <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13765-European-sustainability-reporting-standards-first-set_en> accessed 28 January 2025, annex II, 30.

massive cascade or waterfall effect. The indirect impact flows down from the reporting company right across the upstream and downstream value chain as a whole.[67] The cascade effect is predicated upon the need for actors in the value chain to supply relevant information to the reporting company in order for it to carry out an impact materiality assessment, creating pressure on suppliers to reporters to level up. So, for example, within the garment industry, a large clothing company who is obliged to carry out EU sustainability reporting will need to be asking relevant ESG questions of their suppliers of fabric as raw material irrespective of their size, and of the factories they have chosen to contract with to manufacture the clothing sold by the reporting company. This will assist in creating a flow of sustainability information that will aid decision-making by stakeholders. However, the cascade effect of the Directive creates practical challenges for upstream and downstream parties, particularly SMEs and micro-undertakings.

5. *Sustainability Matters Reported on and Direct and Indirect Impacts on SMEs*

This Part considers the nature of sustainability reporting interfaces under the Corporate Sustainability Reporting Directive and implications for listed SMEs and other actors who fall directly within scope and includes a consideration of the ramifications of extended value chain reporting on SME value chain actors.[68] The discussion on direct reporting is of particular relevance to the listed SME sector. However, its ambition and the strategic approach that companies are expected to play in relation to ESG matters and the just transition, as well as the nature of value chain reporting should be carefully considered by the boards of SMEs and their advisors in deciding upon their own strategy.

5.1. *Direct Reporting by In Scope Actors*

The Non-Financial Reporting Directive required information to be reported in the annual report, but individual Member States could permit

[67] Notably this is not limited to contract-based business relationships in the value chain and the relationships covered go beyond the first tier of an undertaking's value chain.

[68] More particularised aspects of reporting and standards are dealt with in subsequent Parts.

publication as a separate document. The Corporate Sustainability Reporting Directive indicates that the appropriate place for mandatory sustainability reporting is in a clearly identifiable part of the management report,[69] most likely to be termed the sustainability report. This means that sustainability reporting will need to be labelled as such and that there is less chance of burying the 'information necessary to understand how sustainability matters affect the undertaking's development, performance and position'.[70] It is also expected to be publicly available on the company's website. The Corporate Sustainability Reporting Directive's double materiality perspective overtly expands the Non-Financial Reporting Directive's approach in i looking inward at its impacts on the company and its performance and outward at its impacts (both positive and negative) on the wider world.[71] Companies and their advisors are adjusting to this changing landscape.[72]

In terms of progression from the Non-Financial Reporting Directive, the ESG areas that need to be covered in sustainability reporting are much more finely detailed. There is a clear setting out of environmental factors, social factors[73] and governance factors[74] including some sub-topics within ESG areas for reporting on. To ensure coherence with other developments, these are based on how sustainability factors are defined in the Sustainable Finance Disclosure Regulation,[75] but with the addition of governance matters. While the Non-Financial Reporting Directive had included broadbrush references

[69] Accounting Directive, art 19a(1) (as substituted by the CSRD, art 1(4)).

[70] ibid.

[71] The double materiality perspective covers financial, environmental, social and governance angles and it is entirely possible though not required for matters, for example, for environmentally material matters to also assume financial materiality. See further Josef Baumueller and Karina Sopp, 'Double Materiality and the Shift from Non-Financial to European Sustainability Reporting: Review, Outlook and Implications' (2022) 23(1) Journal of Applied Accounting Research 8 <https://doi.org/10.1108/JAAR-04-2021-0114> accessed 28 January 2025.

[72] Tiziana De Cristofaro and Carmela Gulluscio, 'In Search of Double Materiality in Non-Financial Reports: First Empirical Evidence' (2023) 15(2) Sustainability 15 < https://doi.org/10.3390/su15020924> accessed 28 January 2025.

[73] Social issues have been coming strongly to the fore in divestments by companies of assets in connection with the Russian invasion of Ukraine. For example, Shell made the decision to cease to purchase Russian oil and pull its service stations from Russia while BP announced a $25 billion writedown asociated with divesting its stake in Rosneft, the Russian energy company.

[74] By contrast, governance factors were not evident in the NFRD (n 1).

[75] SFDR.

to environmental matters as constituting part of the expected non-financial reporting regime,[76] the Corporate Sustainability Reporting Directive delves deeper to cover a wide ranges of isses from combating climate change, to climate protection, pollution, biosdiversity and circular economy objectives.

One of the perceived shortcomings of the Non-Financial Reporting Directive was that it did not specify whether the reporting approach should be backward-looking or forward-looking and this led to less of a focus on future planning. The Corporate Sustainability Reporting Directive objective is that companies will disclose a dynamic, forward-looking strategy not just a backward-looking focus on compliance performance. So for example, it is necessary to describe how resilient the company's business model and strategy is to sustainability risks including physical and transition risks (and any sustainability dependencies) and how it is planning its sustainable transition.[77] Companies must take steps to ensure that their business model and strategy are compatible with the green transition and with the limiting of global warming to 1.5 degrees in line with the Paris Agreement[78] so as to protect against the occurrence of extreme weather events and the ambitious EU commitment to attaining carbon neutrality by 2050.[79] The Corporate Sustainability Reporting Directive underpins the need for finances to flow in a manner that pays attention to pathways towards climate neutrality and climate resilience. Companies are being expected to set sustainability targets e.g. on reducing greenhouse gas emissions and to report against them.[80]

5.2. *Value Chain Reporting and Trickle-Down Effects*

The EU has demonstrated global leadership with the Corporate Sustainability Reporting Directive's, not just through the mandatory requirement to report on sustainability due diligence processes,[81] but also through its rad-

[76] Accounting Directive, art 19a(1) (as inserted by NFRD, art(1)).

[77] Accounting Directive, art 19a(2)(a) (as substituted by CSRD, art 1(4)).

[78] Paris Agreement (n 19).

[79] As established in European Parliament and Council Regulation (EU) 2021/1119 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 [2021] OJ L243/1 ('European Climate Law').

[80] Accounting Directive, art 19a(2)(b) (as substituted by CSRD, art 1(4)).

[81] Accounting Directive, art19a2(f)(i) (as substituted by CSRD, art 1(4)). This will work alongside the creation of substantive due diligence duties in the proposed Corporate Sustainability Due Diligence Directive.

ical inclusion of value chain reporting as a key component of sustainability reporting, its reach offers a major push towards global value chain governance and accountability for large companies. [82] Large in scope companies must describe the principal risks or potential risks connected not only with the company's own operations, but with 'its value chain, including its products and services, its business relationships and its supply chain' including how it monitors these impacts as part of any requirement to conduct a due diligence process.[83] This will encompass describing the principal actual or potential impacts, not just in the company's own operations, but right across its entire upstream and downstream value chain. Large reporting companies will therefore need to capture and review how other partners in their value chain (including SMEs) impact on achievement of the company's sustainability strategy. Therefore these matters need to also be taken seriously by value chain SMEs and appropriate lines of communication opened.

Scope 3 emissions provide an example of an intractable challenge presented for SME value chain actors. Reducing carbon impact is front and centre in the Corporate Sustainability Reporting Directive with the Directive forcing attention on Scope 3 emissions in the context of climate-related disclosures. Scope 3 emissions have particular relevance in an SME value chain actor context since they cover indirect emissions that occur in a company's upstream and downstream value chain and form part of value chain sustainability reporting. This means that value chain actors must unlock the relevant emissions data. If larger actors help to hold SMEs to account behavioural change around decarbonising will happen quicker. Collaboration and lending of resources by larger entities would be hugely beneficial to the SME sector. In time we are likely to see supplier codes of conduct and standards around greenhouse gas emissions. However, there has been a corporate backlash against having to engage in Scope 3 carbon reporting from a company's suppliers and its clients in part because getting detailed data is very difficult including where suppliers are small enterprises in developing countries.[84]

[82] A company's value chain outside the European Union within third countries is also within scope: see the discussion in CSRD, Recital 33.

[83] Accounting Directive, art 19a(2)(f)(ii) (as substituted by CSRD, art 1(4)).

[84] Gillian Tett, Simon Mundy and Andrew Jack, 'The Key Debates at WEF 2023' *Financial Times* (23 January 2023) <https://www.ft.com/content/8afc3516-8162-4b75-8793-4dd66b7c2336> accessed 28 January 2025.

There is an understanding that companies may have considerable difficulty in getting all the information that they need in relation to their value chain to report on actual or potential key adverse sustainability impacts, so the Corporate Sustainability Reporting Directive builds in an understanding that this can be explained during the first three years of reporting. There is some leeway on value chain reporting for the first three years in acknowledgment that it might not prove possible for a company to get all the necessary information about its value chain.[85] Notably, the draft European Reporting Standards also expressly acknowledge that it could be challenging for large companies to obtain value chain information from SMEs and other entities in their value chain that do not have direct reporting obligations under the Directive.[86] The Commission's draft text incorporates EFRAG's suggestion that in certain cases it may be expedient to simply provide broad sector estimates as a proxy in relation to the undertaking's upstream and downstream value chain.[87] This illustrates the possibility of a chasm between ambition and reality in the context of value chain reporting, something that has led the European Commission to suggest further dilution of timelines and obligations in its consultation on the reporting standards.[88] Indeed, pragmatically the Commission took the opportunity in June 2023 to formally state that it 'encourages large corporates and financial intermediaries to apply the principle of proportionality when engaging with SMEs and to exercise restraint when requesting information from SME value chain partners.[89]

This may allow the SME sector some respite while getting their house in order to capture and analyse relevant data. There is a marker set down in the European Commission's draft ESRS, that from year 4 (when it is no longer possible to limit information on impacts in the company's upstream or downstream value chain) the information that in scope undertakings are expected to report on in relation to the SMEs in their value chain, 'will not

[85] Accounting Directive, art 19a(3) (as substituted by CSRD, art 1(4)).

[86] EFRAG, 'Draft European Sustainability Reporting Standards ESRS 1: General Requirements' (23 November 2022), para 74.

[87] ibid para 73; European Commission, 'Draft Delegated Regulation as regards sustainability reporting standards' (n 66) (annex I, European Sustainability Reporting Standards ESRS 1, General Requirements) para 68-72.

[88] European Commission, 'Draft Delegated Regulation as regards sustainability reporting standards' (n 66).

[89] European Commission, 'A Sustainable Finance Framework that Works on the Ground' (Communication) COM [2023] 317.

exceed' what will be expected of listed SMEs under their lesser reporting obligations in the yet to be drafted ESRS standard for listed SMEs.[90] There will be real challenges in tracking supply chains and measuring impacts. Although reporting is once a year, in practice dialogue with industry partners and suppliers will need to be ongoing. Furthermore, capturing and managing data will be crucial. Technology can assist.[91]

More broadly, behavioural adjustments in the SME sphere are the likely to result from regulatory trickle-down as regulatory drivers upstream or downstream influence market behaviour. Apart from reporting, analysis of data gathered may lead to changes in procurement behaviour in the short, medium and long-term given the associated requirement to report on actions to prevent and mitigate harm. In effect we are seeing large actors becoming stewards of their value chain which make shake up path dependencies in the supply chain. Although there will be instances where a company will justifiably have to report on its unavoidable dependency associated with a sustainability risk, market adaptations will inevitably mean that trickle-down effects will begin to occur whereby SMEs begin to adjust their market behaviour so as to be competitively attractive even though they are not mandated to do so. It is not difficult to imagine that SMEs may experience moral suasion in the form of market pressure to follow best practice voluntarily.

6. *The Advent of European Sustainability Reporting Standards*

Mandatory EU sustainability reporting standards are a key deliverable envisaged by the Corporate Sustainability Reporting Directive. The Non-Financial Reporting Directive's *laissez-faire* approach, allowing party autonomy in relation to choice of reporting frameworks led to fragmentation in how reporting was approached.[92] Companies could choose to rely on national, European or international reporting frameworks at their discretion, something which does not make for usability for third party users of disclo-

[90] European Commission, 'Draft Delegated Regulation as regards sustainability reporting standards' (n 66) (annex I, European Sustainability Reporting Standards ESRS 1, General Requirements) para 134. This message is reinforced in European Commission, 'A Sustainable Finance Framework' (n 89).

[91] Digital twinning and distributed ledger technologies are particularly useful.

[92] Ahern (n 16) 602.

sures where comparability as well as reliability are key tenets. Sustainability information disclosed was often not user-friendly; it could be vague, buried in information overload, making impression management and greenwashing entirely possible. This made it challenging for stakeholders who wanted clear and comparable data. The European Commission's publication of non-binding guidelines on reporting under the Non-Financial Reporting Directive [93] (rather than standards) was not viewed as having had the desired effect on improving disclosures.[94] Consequently, at the heart of the Corporate Sustainability Reporting Directive is the objective of delivering on mandatory common reporting standards with sufficient granularity to address the significant deficit of the Non-Financial Reporting Directive regime that led to perceived 'challenges regarding comparability, reliability and relevance of information.'[95] A policy decision was made that the European Union needs to be at the vanguard of standard setting rather than simply leaving this to other actors at national and supranational level.[96] The need for EU sustainability reporting standards is also underscored by the increasing demand for sustainability information from asset managers, financial advisors, lenders and other stakeholders. The standards area is a crowded space and there is no denying that transnational approaches would be valuable in the long run.[97] However, this remans a bigger fish to fry.

[93] European Commission, 'Guidelines on Non-Financial Reporting (methodology for reporting non-financial information)' (Communication) C (2017) 4234; European Commission, 'Guidelines on Non-Financial Reporting: Supplement on reporting climate-related information' (Communication) C (2019) 4490. The climate reporting guidelines sought to reflect the recommendations of the Task Force on Climate-related Financial Disclosures: Task Force on Climate-related Financial Disclosures, 'Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures' (2017).

[94] European Commission, 'Summary Report of the Public Consultation' (n 33) 28.

[95] ibid.

[96] A popular reporting framework is the Global Reporting Initiative (GRI), 'The Global Standards for Sustainability Reporting' (2022) <https://www.globalreporting.org/standards/> accessed 28 January 2025.

[97] See, for example, the work of the Task Force on Climate-related Financial Disclosures, the Global Sustainability Standards Board and the International Integrated Reporting Council. On the profusion of different reporting standards see Georgina Tsagas and Charlotte Villiers, 'Why "Less is More" in Non-Financial Reporting Initiatives: Concrete Steps Towards Supporting Sustainability' (2020) 10(2) Accounting, Economics, and Law: A Convivium 20180045 <https://doi.org/10.1515/ael-2018-0045> accessed 28 January 2025.

As the level of principle, Article 29b(2) of the new Chapter 6b on the European Sustainability Reporting Standards[98] indicates that the information reported must be 'understandable, relevant, verifiable, comparable' and accurate. Work on the European Sustainability Reporting Standards ('ESRS') has drawn on existing international standards and EU work on the Sustainable Finance Disclosure Regulation[99] and Taxonomy Regulation[100] with view to ensuring consistency. The ESRS will provide detailed, prescriptive guidance in relation to the disclosure that companies must make under the Corporate Sustainability Reporting Directive E including on environmental matters such as climate change, biodiversity and ecosystems, use of resources and the circular economy. They will also cover disclosure of scope 1, scope 2 and scope 3 emissions. In short, the ESRS will assist companies with the finer details of preparing reporting. Following drafting work by EFRAG (previously known as the 'European Financial Reporting Advisory Group') in consultation with stakeholders on draft European sustainability reporting standards dealing with general requirements (ESRS 1),[101] and a public consultation by the European Commission on its revised text of a draft delegated Act,[102] the European Commission is expected to adopt the first set of general (sector agnostic) ESRS applicable to all sectors in 2023.[103] This will take the form of cross-cutting standards for the disclosure of ESG matters. The Corporate Sustainability Reporting Directive's implementation timelines are tight and even given the phasing in of reporting are ambitious given the need to allow business time to respond meaningfully and to implement the necessary systems to capture and analyse data as well as strategy setting for the yet to be finalised standards. Reflecting this, the Commission took the opportunity in its June 2023 public consultation on the general ESRS to propose additional phasing in of aspects of sustainability reporting which would assist all companies, and in particular smaller companies

[98] Accounting Directive, art 19a(1) (as substituted by CSRD, art 1(9)).

[99] See n 9.

[100] SFDR.

[101] EFRAG, 'Draft European Sustainability Reporting Standards ESRS 1' (n 86).

[102] The European Commission revised draft of EFRAG's draft of the reporting standards was published on 6 June 2023 as a draft Delegated Act (n 66) for consultation. The draft standards comprise 12 draft standards on ESG matters consisting of 2 general standards, 5 environmental standards, 4 standards on social matters and 1 standard on governance.

[103] The Commission will reflect on feedback received from its public consultation in mid-2023 to finalise the text of the standards.

that are directly subject to sustainability reporting requirements for the first time, to adjust and prepare.[104]

Seemingly influenced by international developments, somewhat controversially, the Commission's version of the draft standards saw the Commission giving companies far more freedom to omit information including on climate unlike the mandatory approach taken by EFRAG. The draft sector-agnostic ESRS[105] show that the Commission has been willing to make certain concessions in relation to when aspects will become operational by phasing in some requirements.[106] This will be of particular benefit to smaller companies. Thus, for example, companies with less than 750 employees can omit Scope 3 GHG emissions reporting and those related to value chain workers for the first two years of their reporting. Other environmental issues can be omitted for one year. More controversially, the Commission is proposing that companies be given the freedom to self-determine without providing an explanation what is considered 'material' for the purposes of sustainability double materiality.[107] This would represent a significant volte face in ambition concerning the realisation of the sustainable finance agenda. However, the fact that this is being consulted on, perhaps speaks more than anything to the complex, expensive and protracted minefield that putting in place the systems for sustainability reporting entails, and to an awareness of the wider international policy climate around sustainability reporting.[108]

Further sector-specific standards must be adopted by 30 June 2024, and it is within this work programme that we can expect to see standards for listed SMEs being published. EFRAG's Community Working Group for Listed

[104] European Commission, 'Draft Delegated Regulation as regards sustainability reporting standards' (n 66).

[105] ibid.

[106] ibid 5.

[107] European Commission, 'Draft Delegated Regulation as regards sustainability reporting standards' (n 66) (annex I, European Sustainability Reporting Standards ESRS 1, General Requirements).

[108] The International Sustainability Standards Board is expected to publish its general requirements standard (IFRS S1) and its climate-related disclosure standards (IFRS S2) in 2023 with a potential effective date of reporting periods from 1 January 2024. These will also have a knock-on effect on small companies in the supply chain of larger in-scope companies. However, the focus is different, being on internal financial risk rather than adopting a broader double materiality perspective. It seems that this may also be the approach that will ultimately be adopted by the United States Securities and Exchange Commission to climate disclosures.

SMEs' Standards is developing scaled-down technical standards for listed SMEs in relation to their sustainability reporting for submission to the European Commission. Furthermore, as discussed in Part G below, voluntary standards for SMEs who do not fall within scope are also being developed by EFRAG to assist them given their significant role in the value chain.

7. *SME Reporting*

The European Sustainability Reporting Standards will guide undertakings in relation to the type of information that they will need to seek from their suppliers and value chain. This will in turn have trickle-down effects on those in their supply and value chain including SMES who will need to supply that information. Reporting will help to mainstream sustainability policies and disclosures. On the other hand, real hurdles may be experienced in gathering information from smaller suppliers in the value chain. There are real implications in terms of time and cost for SMEs who find themselves within the supply chain or value chain of a large company within the scope of the Corporate Sustainability Reporting Directive. Therefore a proportionate approach to the development of EU sustainability reporting standards is vital. The discussion which follows examines the implications of listed SME reporting standards and the development of voluntary sustainability reporting standards for other SMEs who are not obliged to report.

7.1. *Listed SME Reporting*

Listed SMEs will be expected to comply with special-scaled down reporting standards. The Commission has given the cue that these standards will be proportionate and focus on 'the financing-relevant information needed by financial institutions'.[109] Although listed SMEs' economic activity and environmental impact are significant, there is a recognition that it will be more challenging for SMEs to comply not least due to their more limited resources. It is important that they be given sufficient time to adapt to the arrival of sustainability reporting. This led to a number of concessions being given to listed SMEs in relation to when the reporting obligation would kick in. First, additional lead-in time until 2026 is afforded them as compared to

[109] European Commission, 'A Sustainable Finance Framework' (n 89).

other in scope undertakings (namely large public interest entities and large EU undertakings and parent undertakings of large groups). Secondly, under Article 19a(7) during a transitional two year period from 2026, listed SMEs can choose to opt out of sustainability reporting entirely for financial years commencing before 1 January 2028.[110]

Reflecting the outcome of the Commission's stakeholder consultation, listed SMEs that are within scope will be able to report using simplified standards.[111] It is to be hoped that simplified reporting will alleviate some of the not insignificant burden associated with reporting. The reporting expectations of listed SMEs are vastly truncated as compared with larger entities reporting under the Corporate Sustainability Reporting Directive. Listed SMEs have a derogation in Article 19a(6)[112] that permits them to have a limited sustainability reporting regime of far less detail and breadth than that which applies to other undertakings.[113] Articles 19a(6)[114] and 29c[115] establish this simplified SME sustainability reporting for listed SMEs. The main reporting responsibility is to provide a brief description of their business model and strategy and a description of the company' sustainability policies.[116] They also must detail 'the principal actual or potential adverse impacts of the undertaking on sustainability matters' and 'any actions taken to identify, monitor, prevent, mitigate or remediate such actual or potential adverse impacts.'[117] In terms of risks, information must be provided on 'the principal risks to the undertaking related to sustainability matters and how the undertaking manages those risks.'[118] Furthermore, Article 19a(6) specifies that information must be provided on key indicators applicable to these

[110] In this case a brief justification must be provided in the management report for why sustainability reporting was not provided.

[111] Public consultation undertaken in connection with the review of the Non-Financial Reporting Directive showed 74 percent of respondents supported having simplified reporting for SMEs: European Commission, 'Summary Report of the Public Consultation' (n 33) 4.8.

[112] Accounting Directive, art 19a(6) (as substituted by CSRD, art 1(4)).

[113] This carve-out is also provided to small and non-complex financial institutions (essentially, smaller banks) and captive insurance undertakings and captive reinsurance undertakings.

[114] Accounting Directive, art 19a(6) (as substituted by CSRD, art 1(4)).

[115] Accounting Directive, art 29c (as inserted by CSRD, art 1(8)).

[116] Accounting Directive, art 19a(6)(a) and (b) (as substituted by CSRD, art 1(4)).

[117] Accounting Directive, art 19a(6)(c) (as substituted by CSRD, art 1(4)).

[118] Accounting Directive, art 19a(6)(d)(as substituted by CSRD, art 1(4)).

disclosures. Indirect value chain due diligence reporting is noticeably absent for listed SMEs, considerably reducing the compliance burden.

By contrast, much fuller information is requested for other public interest undertakings in this context including as regards, the resilience of the business model and strategy as regards sustainability risks, the sustainability opportunities presented for the undertaking, details of the plans including financial and investment plans to meet the Paris Agreement limiting global warming to 1.5 degrees and net zero 2050 objective. They are also required to provide targets and timeframes in this regard and to report progress against them. Tying in with the aspirations of the CSDD, other public interest entities must also provide a description of principal actual or potential adverse impacts in their own operations, and within their value chain, their business relationships and supply chain and their sustainability due diligence processes and to report on actions taken 'to prevent, mitigate, remediate or bring an end to actual or potential adverse impacts'.[119]

The objective of bringing listed SMEs within the net is to enable listed SMEs to report information that would be of meaningful to financial institutions and investors in the transition to sustainable finance and investing. Obviously the watered down reporting expectations of listed SMEs represent the outcome of a political balancing act in terms of agreeing what was proportionate for SMEs. The adequacy of their reporting requirements will be a matter for reflecting upon down the line once sustainability reporting has bedded down, potentially enabling the level of ambition in terms of scope to be scaled up.

Much rests on the publication by the Commission of draft standards for SMEs listed on a regulated market in the EU. Currently EFRAG's Community Working Group for Listed SMEs' Standards is developing a draft for delivery to the Commission (the 'draft LSME ESRS').[120] Unlike the case for larger undertakings within the scope of the Corporate Sustainability Reporting Directive who may also be subject to sectoral standards as well as the general standard, listed SMEs will simply have one composite reporting standard to get to grips with. The tall order for this process is to deliver reporting standards for SMEs that are proportionate for the context and do

[119] Accounting Directive, art 19a(2)(f)(iii) (as substituted by CSRD, art 1(4)).

[120] EFRAG has consulted with those falling within its remit as well as other stakeholders such as accountants who may be involved in the preparation of such reports and banks and value chain partners who may be interested in engaging with such reports.

not impose an undue burden. In the meantime we can speculate about what to expect.

Drafting work on listed SME reporting has begun with the text of the ESRS General Requirements adding in a proportionality lens.[121] EFRAG defines proportionality in terms of 'the relation between the sustainability report's scope and complexity compared to the undertaking's resources and know-how.'[122] However, there are large differences of approach needed between reporting standards required for listed SMEs and larger actors given that the Corporate Sustainability Reporting Directive's watered down approach to disclosures for listed SMEs focuses on qualitative statements over quantitative inputs and is not value chain focused. While there is broad equivalence in overall reporting areas, the Directive expressly lays out a more limited menu for listed SMEs in terms of detailed disclosures as compared with their larger cousins, leading EFRAG to wonder if that precluded the addition of wider scope items.[123] Presumably it does. Of course listed SMEs may also voluntarily choose a values-driven approach which goes beyond a minimum compliance approach to engaging with and reporting on environmental and human rights matters. A further question arises as to whether the Commission may decide to further dilute what is required of SMEs or impose additional phase-in time before adopting the LSME ESRS.[124]

7.2. *Voluntary Reporting Standards for Non-Listed SMEs*

It is a matter of considerable significance that many SMEs who are not within the scope of the undertakings required to engage in sustainability reporting under the Corporate Sustainability Reporting Directive will nonetheless inexorably be drawn into its web as suppliers of goods and servic-

[121] A decision was made by EFRAG to hive off specific requirements applicable to the classes other than listed SMEs to a sector-specific layer of standards to be subsequently drafted: EFRAG, 'Approach to the Development of European Sustainability Reporting Standards for Listed SMEs – Issue Paper' (2022) 3 <Issues Paper> accessed 28 January 2025.

[122] ibid 4.

[123] EFRAG, 'Approach to the Development of European Sustainability Reporting Standards for Listed SMEs' (n 121).

[124] In this regard, it is instructive that on 6 June 2023 the Commission launched a public consultation that included additional carve-outs in the sector-agnostic standards in June 2023: European Commission, 'Draft Delegated Regulation as regards sustainability reporting standards' (n 66).

es to undertakings within the reporting regime. Thus they will need to be prepared to provide relevant and accurate sustainability information. These entities could choose to voluntarily engage in sustainability reporting in respect of their operations based on a values-driven approach to engaging with ESG matters and reporting on them. Such a mindset would accordingly voluntarily embrace transparent reporting. In any event, all SMEs should undertake an assessment to determine if and to what extent they fall within the value chain of in scope entities under the Corporate Sustainability Reporting Directive so that they can prepare to collect and provide relevant data. At the very least, a pragmatic, adaptive approach would be sensible for an SME undertaking that lies in the value chain of an undertaking that has reporting obligations under the Corporate Sustainability Reporting Directive. Separately, some SMEs may independently wish to take advantage of planned standards for voluntary reporting SMEs with a view to making a case for gaining access to sustainable or transition finance to assist in their green transition.

Reflecting the large elephant in the room which is the 'trickle-down' effect of the Corporate Sustainability Reporting Directive on SME value chain actors, the European Commission proposed developing proportionate separate standards that non-listed SMEs could voluntarily use to engage with ESG matters.[125] Voluntary sustainability reporting standards will allow the SME sector to have a framework for providing needed disclosure to stakeholders and also allow them to engage in strategically monitoring and managing their sustainability journey as part of a wider transition to a low carbon economy. It will also leverage their ability to access sustainable finance. Accordingly, EFRAG is working to develop proportionate and simplified voluntary sustainability reporting standards ('VSRS SME') for SMEs that are not within the scope of the Corporate Sustainability Reporting Directive.[126] EFRAG's work on the draft VSRS SME used the reporting standards for listed SMEs as a base and the understanding is that information

[125] The desirability of doing so was identified by the Commission in the Corporate Sustainability Reporting Directive's Impact Assessment: European Commission, Staff Working Document - Impact Assessment on the Proposal' (n 48) 5.2.1*,* option 1.

[126] See EFRAG, 'Draft Sustainability Reporting Standards (SVRS) for Small and Medium Sized Enterprises (SMEs)' (21 July 2022) ('draft VSRS') in EFRAG, *EU Voluntary Sustainability Reporting Standard for Non-Listed SMEs that are outside the scope of the Corporate Sustainability Reporting Directive – Issue Paper* (2022) <Non-listed SMEs Issues Paper> accessed 28 January 2025, appendix I, 2.

that goes beyond what is expected in the LSME reporting standards should not be expected of SMEs in a value chain. That provides a useful backstop.

Under the draft VSRS, SMEs provide 'a statement about the relevance of the business operations related to positive and negative effects on people, the environment and the financial performance. The statement also describes the strategy to pursue its commitment to reach its goals.'[127] SMEs are also expected to disclose whether they have a sustainability strategy and if so targets set and progress achieved against targets set. They would also be expected to provide an overview of the businesses in the value chain e.g. their suppliers, sellers and distributors. The ramping up of trickle-down ambition is evident in Disclosure Principle 13 of the draft VSRS which asks voluntarily reporting SMES to disclose whether their suppliers are also using voluntary sustainability standards.

While the draft ESRS for listed SMEs include disclosure requirements deriving from the Sustainable Finance Disclosure Regulation and the Taxonomy Regulation, with an eye to proportionate burden, these are omitted from the draft VSRS SME. Likewise, the draft VSRS SME do not add a further layer related to sector-specific requirements. Furthermore, reflecting the breadth of the SME landscape, digitisation of relevant voluntary disclosures is wisely presented as optional for non-listed SMEs who choose to report. This makes sense given that relevant industries represented would range from agriculture to manufacturing to technology to transport and moreover smaller entities in traditional industries may not readily embrace technology.

As the VSRS emerge as a pathway into sustainability reporting for companies that are not directly within the Corporate Sustainability Reporting Directive, flexibility has to be the name of the game. Crucially, draft general principle 2.a. of the draft VSRS states:

'The undertaking is using this Standard on a voluntary basis. The undertaking is expected to complete all disclosures described in the standard or explain which of them are not relevant, significant or available for disclosure by the undertaking. The accessibility of data will override the obligation to report.'

There is an intrinsic understanding that data might not be easy to collect. Thus, for example, if it is not possible for an SME to collect data on scope 3, that can be declared. This type of 'reporting-lite', which is not overly bur-

[127] ibid para 18.

densome, is probably essential to encouraging meaningful voluntary take-up in the non-listed SME sector. Nonetheless, EFRAG has been consulting on a number of issues such as whether adopting a 'comply or explain' approach in the draft VSRS SME would potentially undermine the Corporate Sustainability Reporting Directive framework and goals.[128] It remains to be seen how this will play out in the draft VSRS ultimately sent to the Commission and the approach that the Commission will take to what is after all voluntary reporting albeit particularly relevant for SME actors that lie in the value chain of a regulated actor under the Directive.

8. *Reflections on the SME Context*

Businesses of all sizes are beginning to recognise that they can play a real part in achieving global, regional and national climate targets. Challenges arise nonetheless for EU SMEs in contributing to the green transition and the reduction of carbon footprint. Asymmetries of information are higher while resources are lower in this grouping compared to larger entities. It is well known that the costs of compliance (even where sustainability reporting requirements are diluted and where reporting is voluntary) will often have a disproportionate effect on smaller companies relative to larger ones. As such, new demands for sustainability data and policies may present a barrier to both intra-EU and extra-EU trade. Transformational change is costly and requires considerable set-up costs. It is particularly challenging for SMEs (even those listed SMEs within scope) to develop the necessary frameworks, processes and systems to gather data inputs from across the organisation as a whole and to determine where ownership of the sustainability function will sit within the organisation. This begs the question of how European SMEs can be assisted.

Public support for SMEs on this journey is advocated, as they need to be supported to gain the knowledge and expertise and to take the necessary practical steps to capture relevant data and to compile it in a meaningful fashion. The European Commission rightly sees the green transition and the digital transition as working alongside each other with digitalisation constituting a key enabler to attaining the EU's vision of competitive sustainability amid the transition to a green and circular economy. The Commission's

[128] ibid.

SME strategy for a sustainable and digital Europe is designed to facilitate their transition to both a green and a digital economy.[129] As part of this, the Enterprise Europe Network is expected provide access for SMEs to sustainability advisors. European SMEs have been found to be 'very diverse in terms of business models, size, age, and entrepreneurs' profiles.'[130] That heterogeneity needs to be borne in mind. Some SMEs may be technology related start-ups, au fait with digital technologies and their potential to support sustainability endeavours, others may be traditional and have very little in way of technology or automation in their systems. The problem of technological lag is real: only 17 percent of SMEs have integrated digital technologies (which would assist with reliable data collection and management) as compared with 54 percent of large companies.[131].

With the Non-Financial Reporting Directive, the Commission's vision was that large companies would act as the pioneers of sustainability reporting and would provide support to SMEs down the line through sharing their expertise and experience.[132] This should apply all the more to reporting actors under the Corporate Sustainability Reporting Directive assisting partners in the value chain to prepare by indicating early on what inputs they would like. It is hoped that Member States will also provide sufficient support to SMEs to ensure that the burden on them is not disproportionate. Some Member States are establishing green transition funds to assist companies on the journey towards decarbonisation and energy reduction and also providing practical assistance for SMEs. For example, Ireland has provided a Climate Toolkit that is designed to assist non-listed SME businesses to assess the level of their carbon footprint and environmental impacts with a view to creating a tailored sustainability strategy. Further challenges relate to the preparedness of SMEs located outside the European Union to engage, including those in developing countries.

[129] European Commission, 'An SME Strategy for a Sustainable and Digital Europe' (n 38). See also the work of the (*European Digital SME Alliance*) <https://www.digitalsme.eu/sustainable-digitalisation/> accessed 28 January 2025.

[130] European Commission, 'An SME Strategy for a Sustainable and Digital Europe' (n 38), Introduction.

[131] ibid 3.

[132] Explanatory Memorandum to European Commission, 'Proposal for a Directive of the European Parliament and of 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 (the 'NFRD Proposal').

9. *Conclusion*

The roll-out of European sustainability reporting under the Corporate Sustainability Reporting Directive is an integral part of what has been termed here as the EU's Green Deal and Sustainable Finance Policy Phase. At a micro-level, it will lead to changes in processes and systems; on a larger plane, it may valuably nudge real changes in mindset around sustainability values. In a real sense value chain accountability is upon us and the ripples it will cast will be ever greater. Improving market access to quality, comparable data could encourage a race to the top on the road to decarbonisation. All entities including SMEs have the opportunity to be part of the virtuous circle whether they have direct reporting obligations under the Directive or not. The unique regulatory lens of the Corporate Sustainability Reporting Directive challenges affected companies, not just to mechanically report on, but to qualitatively consider how other partners in their value chain (including SMEs) impact on achievement of the company's sustainability goals. This may motivate behavioural shifts from SME value chain actors anxious to avoid market freeze out due to either information asymmetries or poor sustainability scorecards. Therefore, although the Corporate Sustainability Reporting Directive has not imposed any new reporting requirements on SMEs, except for those with securities listed on regulated markets in the EU, the indirect impact on the SME sector can be expected to be far broader. Many EU SMEs will be flagbearers for the green transition. Others will step up to meet the expectations of supply chain partners on matters such as their climate impact. If SMEs fail to step up, they may lose competitive advantage as suppliers of goods and services within the European Union as trade flows become increasingly influenced by sustainability concerns.

The adoption by the European Commission of European Sustainability Reporting Standards standardisation holds the prospect of raising the quality and comparability of disclosures. Credible reporting standards will bring flesh to the bones of the Corporate Sustainability Reporting Directive. A proportionate approach is important. The signal that the information required from value chain SMEs should be no more onerous that under the simplified reporting standards for listed SMEs is important to ensure regulatory coherence, feasibility, and to reduce the administrative burden on regulated actors and SMEs in the value chain.

Looking to the future, an argument that will most likely gather strength over time as part of a deepening sustainability and sustainable finance agen-

da in the Union is that more SMEs should join listed SMEs within the regulatory net for scaled sustainability reporting. However, for now, a step by step approach to extending the regulatory net is sensible while reporting standards and systems bed down. In the short to medium term, it will be prove interesting to observe how the direct and indirect regulatory influences of EU sustainability reporting under the Corporate Sustainability Reporting Directive ripple out to drive positive change among undertakings of all sizes and sectors.

Alessio Bartolacelli

PROMOTING SUSTAINABILITY BY MEANS OF CORPORATE FINANCE INSTRUMENTS WITH INFLUENCE ON GOVERNANCE: SOME OBSERVATIONS*

1. *Introduction*

Combining company law and sustainability is not an easy task. The literature on the topic is immense,[1] but there is a lack of homogeneity even regarding the most basic concepts.

In several cases, authors believe that sustainability should just be a possible option among the many that a company's shareholders or directors are free to adopt; in other cases, the debate on sustainability is strongly influenced by an inherent and only apparently inevitable conflict between shareholders and stakeholders.[2] Over the years - but particularly in less recent times – many authors have considered sustainability solely in its environmental dimension[3] while others simply argue that promoting sustainability should not be a company law task as company law should be more focused on profit-making.[4]

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[1] The most comprehensive contribution to the topic is, Beate Sjåfjell and Christopher M Bruner (eds), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP 2019). In it the reader can find extensive references to all the most important contributions on the topic.

[2] Beate Sjåfjell and Jukka Mähönen, 'Corporate Purpose and the Misleading Shareholder vs Stakeholder Dichotomy' (2024) 34 Bond Law Review 69.

[3] Julian Agyeman, 'Towards a 'just' sustainability?' (2008) 22 Continuum: Journal of Media & Cultural Studies 751.

[4] See, in particular with reference to the shareholder primacy theory and the social norm of profit maximisation, Beate Sjåfjell and others 'Shareholder primacy: the main barrier

It is of the utmost importance to define immediately what sustainability is, and the role of company law in promoting it. Given those foundations, we will then illustrate how company law, and the common rules on a company's financial structure in particular, might be a good driver to promote and signal a company's actual commitment to sustainability.[5]

The very first key assumption of these pages is that sustainability must be seen as a categorical imperative, and not just as an option.[6] There are countless studies showing how the situation of the planet requires that strong measures to protect the environment be immediately taken in order to fight climate change and reduce pollution.[7]

Nevertheless, sustainability is to be seen as a holistic concept.[8] This means that when taking into consideration its different areas of development, environmental, social and governance – classically abbreviated to ESG – economic players should ideally ensure that they promote all of them jointly.[9] If they do not do so and promote just one of them, then this promo-

to sustainable companies' in Beate Sjåfjell and Benjamin J Richardson (eds), *Company Law and Sustainability. Legal Barriers and Opportunities* (CUP 2015) 79.

[5] We refer to the common rules as this contribution does not specifically tackle those corporate forms that should be inherently dealing with sustainability, eg benefit corporations. On these topics see Livia Ventura, 'The Social Enterprise Movement and the Birth of Hybrid Organisational Forms as Policy Response to the Growing Demand for Firm Altruism' in Henry Peter, Carlos Vargas Vasserot and Jaime Alcalde Silva (eds), *The International handbook of Social Enterprise Law. Benefit Corporations and Other Purpose-Driven Companies* (Springer 2023) 9.

[6] Among many others, see: Mads Greaker, Per Espen Stoknes, Knut H Alfsen, Torgeir Ericson, 'A Kantian approach to sustainable development indicators for climate change' (2013) 91 Ecological Economics 10; Pankojini Mulia, Ajit Behura, and Sarita Kar, 'Categorical Imperative in Defense of Strong Sustainability' (2016) https://ssrn.com/abstract=2858188 accessed 28 January 2025; Kathleen Wallace, 'A Kantian Perspective on Individual Responsibility for Sustainability' (2021) 24 Ethics, Policy & Environment 44.

[7] See, for instance, Beate Sjåfjell and Christopher M Bruner, 'Corporations and Sustainability' in Sjåfjell and Bruner (n 1) 6.

[8] ibid 7.

[9] In spite of not having a *legal* definition of sustainability, we can nevertheless refer to a European piece of legislation – Regulation (EU) 2019/2088 of 27 November 2019 on sustainability disclosure in the financial sector, which supplies a definition of the sustainable investment [2019] OJ L317/1, art 2 no 17, that fully embraces the holistic vision we have just referred to: 'an investment in an economic activity that contributes to an environmental objective […], or an investment in an economic activity that contributes to a social objective

tional activity should be carried out without harming the remaining two.[10] Even if the social and governance dimensions of sustainability are not as immediately perceivable as that of the environment, a really sustainable general approach requires that all of these factors be considered.[11]

Starting from this standpoint, the second general observation deals with the role of the different players in the system, with a specific reference to companies.

The issue is particularly critical: if we agree that sustainability is a goal that *must* be promoted, this implies that companies are just a part of the picture. Of course, they are extremely relevant due to their role in the economy; nevertheless, it makes very little sense to argue that a duty to promote sustainability must be imposed on companies only, leaving the other economic and non-economic actors free from specific duties and responsibilities.

Sustainability must be taken seriously; if this is true, the boundaries between public and private law should fade consistently.[12] Or, in other words, it should be up to the public power to set more appropriate thresholds and limits – to polluting emissions, to exploitation of natural and human resources, and so on – in order to define a consistent and homogeneous policy in terms of sustainability. Within such a framework, naturally companies should be called on to play their specific role.

The situation we have just depicted, however, is far from being enacted, for numerous reasons. On the one hand, in a globally connected economic system, no single national government has the power to pursue such a task. If an individual country decides to set stricter boundaries on its own, imposing them on the economic players that are regulated by its rules, this

[…], *provided that such investments do not significantly harm any of those objectives and that the investee companies follow good governance practices* […]'.

[10] This is the meaning of the principle "do no significant harm" present in the definition referred to in the previous n 9, and even more importantly in the so-called Taxonomy Regulation (Regulation (EU) 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment (Taxonomy Regulation) [2020] OJ L198/13). The principle is currently explained by specific EU Commission notices.

[11] More precisely, according to the point made above (n 9) the governance factor should be seen as the medium by means of which the social and environmental aspects of sustainability are enacted. In this sense, we can argue that this whole chapter deals with the way in which the 'G' of ESG might be implemented in a corporation, by internalizing the stakeholders' positions to different degrees.

[12] Cf Beate Sjåfjell, 'From Sustainability in Law to Sustainability Law' in this edited collection, § 3.1.

might trigger the emigration of the latter towards countries with a looser legal framework.[13] This would happen not necessarily because the given company is ideologically against the sustainability-promoting rules in force in the country of origin but even an "enlightened" company would still have to face additional costs linked to the promotion of sustainability which its competitors based in a less sustainability-friendly country would not have to bear. This would harm the competitiveness of the company on a market based mainly on the price levels, and – if we look at the larger picture – the competitiveness of the country itself.[14] In addition, the company would have very poor inducement to keep its headquarters in a "virtuous" country: in terms of reputation, operating in an economic environment where all the companies should act in a more sustainable way would only lead to damage to the noncompliant enterprises and there would be no meaningful business advantage for those that simply complied with the legal requirements.[15] The only specifically positive motivating force would consist in the actual personal commitment of the company's shareholders and directors, which is nevertheless just one of the possible drivers for achieving a more sustainable society, and it is too person-centred to be the leading actor in this movie.[16]

[13] See, for instance: David M Konisky, 'Regulatory Competition and Environmental Enforcement: Is There a Race to the Bottom?' (2007) 51 American Journal of Political Science 853; Neal D Woods, 'An Environmental Race to the Bottom? "No More Stringent" Laws in the American States' (2023) 51 Publius: The Journal of Federalism 238. We must nevertheless point out that, at least when it comes to the environmental issues, this conclusion is widely debated among scholars, in particular when it comes to the EU; see: Katharina Holzinger and Thomas Sommerer, "Race to the Bottom' or 'Race to Brussels'? Environmental Competition in Europe' (2011) 49 Journal of Common Market Studies 315 (but, for a recent Chinese perspective, see Andrea Ascani, Lakshmi Balachandran Nair and Simona Iammarino, 'Racing to the bottom or seeking legitimacy? National environmental performance and the location strategies of Chinese MNEs' (2023) 29 Journal of International Management Article 100993.

[14] But see Valeria Andreoni and Apollonia Miola, 'Competitiviness and Sustainable Development' (EUR 28316 EN 2016) <doi:10.2788/64453> accessed 28 January 2025.

[15] Some advantages might be achieved – at least reputationally – by those companies that decide to walk the extra mile and find a way to effectively signal that to the market. This seems to be the main hallmark of benefit corporation all over the world: Alessio Bartolacelli, 'To B or not to B, that is the question. A few unsolicited remarks for the Spanish lawmaker (but not only) regarding the establishment of the sociedades de beneficio e interés común' in Maria Concepción Chamorro Dominguez (ed), *Creación de valor sostenible en sociedades cotizadas y pymes* (Editorial La Ley 2024) 401.

[16] See, nevertheless, the considerations by Wolf-Georg Ringe, 'Investor-led Sustainability in Corporate Governance'(2021) European Corporate Governance Institute – Law Work-

On the other hand, even a more widespread movement, with a series of countries coordinating equally effective and strict sustainability-friendly measures in their respective jurisdictions would not be safe from the opportunistic behaviour of a neighbouring – or not so neighbouring – country with no sustainability-friendly measures in place. This would attract the companies willing to expatriate, with a view to escaping the more expensive pro-sustainability regulations in force in the state of origin.

The only solution would therefore be a completely utopistic global approach that promoted sustainability with the same general criteria worldwide. If we look at the poor outcomes of the most recent Conferences of the Parties (COPs) of the United Nations Convention on Climate Change, which deal with the environmental aspects,[17] to contemplate effective and comprehensive global solutions that also encompass the social and governance dimensions, it seems completely unrealistic not just in the short but also in the medium term.

This being the situation, the only viable way to promote an increased sustainability-friendly approach seems to be developing good practices[18] which – if adequately widespread – in the medium term might pave the way for legislative interventions progressively setting down increasingly sustainable boundaries, from environmental, social and governance points of

ing Paper No 615/2021 < https://ssrn.com/abstract=3958960> accessed 28 January 2025; LawFin Working Paper No. 36; (2022) 7 Annals of Corporate Governance 93 http://dx.doi.org/10.1561/109.00000038 accessed 28 January 2025, where the author argues that investors' initiatives and engagement are the primary tool to promote sustainability orientation in the market. As we are going to see, however, these assumptions are perfectly in line with the ideas suggested in this essay.

[17] See, for instance, with reference to COP28 (UAE, 2023): Mala Balaji, 'Decoding COP 28 - Breaking ground or broken promises?' (*Citizen consumer and civic Action Group*, 17 January 2024) <https://www.cag.org.in/blogs/decoding-cop-28-breaking-ground-or-broken-promises> accessed 28 January 2025.

[18] The increasingly interesting sustainability-related provisions in corporate governance codes are a clear example of this: Michele Siri and Shanshan Zhu, 'Integrating Sustainability in EU Corporate Governance Codes' in Danny Busch, Guido Ferrarini and Seraina Grünewald (eds), *Sustainable Finance in Europe* (Palgrave Macmillan 2021) 175; Beate Sjåfjell, 'When the Solution Becomes the Problem: The Triple Failure of Corporate Governance Codes' in Jean Jacques Du Plessis and Chee Keong Low (eds), *Corporate Governance Codes for the 21st Century: International Perspectives and Critical Analyses*, (Springer 2017) 23; and Dániel G Szabó and Karsten E Sørensen, 'Integrating Corporate Social Responsibility in Corporate Governance Codes in the EU' (2013) 24 European Business Law Review 781.

view.[19] According to this roadmap, private economic players, and companies in particular, could be frontrunners of sustainability, contributing to the change in the general mindset that, in the long run, would make it politically acceptable for the governments to consider the drawing up of sustainability-promoting legal frameworks in their jurisdictions. They might act this way either due to the beliefs and commitments of their shareholders or directors, or because they perceive it to be economically profitable. For the purposes of our discussion, the actual driver is irrelevant.[20]

In this paper, we will consider a possible set of best practices in the area of the financial structure of companies and how this might effectively serve sustainable purposes according to the different degrees of commitment that each company could and would like to enact, in particular focusing on equity, debt and hybrid financial instruments, and their interaction with the governance of the company.

2. *The pre-conditions*

The following remarks are not linked to a specific jurisdiction, and must be intended as general. For this reason, it is important to set down some pre-conditions, even though we are aware that not all of them are necessarily present in every country.

We consider here the possibility for a company to promote sustainability factors using its own financial structure and some governance implications that this would entail. The observations that we will make require a series of prerequisites. In our opinion, all of them have to do with a truly liberalistic approach to companies and their purposes.[21] They can be summarized with

[19] For some extremely interesting remarks on the movement towards the shaping of an International Corporate Law, see Mariana Pargendler, 'The Rise of International Corporate Law' (2021) 98 Washington University Law Review 1765 <https://ssrn.com/abstract=3728650> accessed 28 January 2025.

[20] For a more developed reasoning, see below, n. 79.

[21] The debate is huge and enduring. For a general summary, see Holger Fleischer, 'Corporate Purpose: A Management Concept and its Implications for Company Law' (2021) 18 European Company and Financial Law Review 161 <https://doi.org/10.1515/ecfr-2021-0008> accessed 28 January 2025; Klaus J Hopt, 'Corporate Purpose and Stakeholder Value - Historical, Economic and Comparative Law Remarks on the Current Debate, Legislative Options and Enforcement Problems' (2023) European Corporate Governance Institute –

the statement that as complex private organisations, they are a creation of the founding shareholders and the shareholders should be free to use them for any lawful purposes they choose, irrespective, among other things, of profit-making and commercial activity.[22] This being the general condition, the company would be understood to be a neutral-cause organisation, allowing the shareholders to adjust their ultimate preferences depending on market conditions and the possible changes in the majority. In addition, such an approach does not look to be harmful for any of the constituencies entering into contact with the company, insofar as they know the ultimate purpose of the organisation might change over time if the shareholders so decide and will also have evaluated this prospect while deciding whether to contract with the company, or not.

More specifically when considering the financial aspects, the remarks that follow are applicable to companies which, in the appropriate legal framework, are free to issue different types of financial instruments. Namely, besides shares, including shares belonging to different classes with different attached rights, they should be enabled to issue also bonds, and ideally also hybrid securities.[23] In the following pages, we are going to consider exactly if and how these instruments might have an impact on a company's govern-

Law Working Paper No 690/2023 <https://ssrn.com/abstract=4390119> accessed 28 January 2025. In the US literature, see Jill E Fisch and Steven Davidoff Solomon, 'Should Corporations Have a Purpose?' (2021) 99 Texas Law Review 1309.

[22] Of course, one could argue that the founding members might decide to establish a non-profit organisation instead of a company if they are interested in pursuing activities not aimed at producing a profit. This is of course true; the solution here envisaged, however, allows the organisation to modify its final purpose (for-profit or not-for-profit) smoothly, for instance year by year, with no need to change the legal form from association to company, to association, if this is required by the final purpose. In brief, the solution here envisaged would allow a more flexible approach in the dynamic phase of the business, led by clear statements by the shareholders which might conveniently drive directors' managerial choices over the entire lifespan of the company also by means of the basic decision on the corporate purpose.

[23] The hybrid securities we mainly refer to here have economic and/or administrative rights although they are not shares. The reference models are the so-called *strumenti finanziari partecipativi* present in Italian Company Law (art 2346, para 6, Italian Civil Code). This model has been cross-referenced in the EMCA, ch 6, part 4, s 6.16: Paul K Andersen and others, 'European Model Company Act', first edition (2017) Nordic & European Company Law LSN Research Paper Series No 16-26, 123 <https://ssrn.com/abstract=2929348> accessed 28 January 2025.

ance, and how this might be used to promote a more sustainable approach by the company itself.

Of course, the entire discourse put forward here is applicable only when and insofar as a company's shareholders are interested in developing a more sustainable attitude for their company. The liberalistic approach that we defined as the first pre-condition naturally also allows the shareholders/members to completely disregard the issues dealing with sustainability, by promoting a full-for-profit, highly polluting, socially insensitive company, as far as this is permitted by the law.

It might be debated whether the suggestions present in this chapter are actually valuable with a view to promoting a more sustainable attitude in the field of company law. In our opinion, the answer is, however, affirmative.

On the one hand, in the best scenario, the promotion of sustainability should already be pursued by the public power, by means of normative instruments. An increased sustainability-friendly attitude by a specific company should therefore be seen as the desire by this company to walk the extra mile on the path of sustainability, while the companies not interested in that minimum threshold of sustainability would be guaranteed by their compliance with the norms. However, we have already observed that this scenario is unrealistic at least in the short to medium term.

On the other hand, then, in a general situation where sustainability is not promoted by means of normative mandatory rules, the actual commitment of a company to the advancement of a more ESG-respectful approach should be fostered by means of market instruments. Of course, specific promotional norms might be present in this case as well,[24] but they are not the most important instruments, and perhaps not even the most desirable.[25] The key driver is to be seen in the fact that the customers are currently modifying

[24] See, for instance, Joana Costa, Manuela Castro Silva and Tânia Freitas, 'The role of public policy in the promotion of sustainability by means of corporate social responsibility: The case of the chemicals sector worldwide' (2022) Circular Economy and Sustainability 293.

[25] See, for some antitrust fallouts, Daniele Calisti, 'Sustainability as a Driver for Industrial Transformation: The Challenges for Antitrust' in this edited collection. We might also think about the possibility of the other side of the coin, i.e. detrimental policies for unsustainable companies, from which the generated revenues might be used for the creation of public or semi-public tools to promote more efficient sustainability. We develop this idea in Alessio Bartolacelli, 'Fifty shades of Coops: An Italian perspective on sustainability and cooperative societies (with a few suggestions on private companies)' (forthcoming) Journal of Co-operative Organization and Management.

their preferences, focusing more and more intensely on sustainability, and frequently choosing the products manufactured and traded by companies that (claim or) prove to be more sustainable than their competitors, even if this entails, for instance, higher prices to be paid for the same class of goods.[26] This means that, even when a normative disincentive for unsustainable companies is lacking, these companies would be harmed by the market itself on account of their business model as they would lose market quotas in favour of their more virtuous competitors.[27] From this point of view, the key

[26] Or, better, they choose not to pay less for products coming from unsustainable companies: Sungchul Choi and Alex Ng, 'Environmental and Economic Dimensions of Sustainability and Price Effects on Consumer Responses' (2011) 104 Journal of Business Ethics 269.

[27] Naturally, this implies that green- or social-washing attitudes are duly identified and prosecuted. To this extent, see the recent Directive (EU) 2024/825 of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU [2024] as regards empowering consumers for the green transition through better protection against unfair practices and better information.

The assumption that we advance here is not against the findings of Ringe (n 16) 12, where the author highlights the dramatic increase in the number of investors interested in purchasing ESG-oriented financial products, particularly among millennials. The demand side we consider here, however, is not related to investors but to consumers and their preferences. The situation looks radically different: when it comes to investors, they consider the financial performance of the financial instruments in the market, also considering the impact of the business on overall society (external materiality). They might accept lower remuneration for their investment due to their values oriented towards non-pecuniary utilities. This is particularly true for the millennial generation, as Ringe points out.

If we look at the consumers' perspective, however, there are several surveys that underline that higher prices are the main reason preventing consumers from purchasing more sustainable products: *Deloitte* <https://www.deloitte.com/ie/en/Industries/consumer/research/the-cost-of-buying-green.html> (2023) accessed 28 January 2025; and, in a more developed way, again *Deloitte* <https://www2.deloitte.com/us/en/insights/industry/retail-distribution/consumer-behavior-trends-state-of-the-consumer-tracker/sustainable-products-and-practices-for-green-living.html> (2022) accessed 28 January 2025. According to other surveys, while over 80% of consumers are open to paying (generically) more for sustainable products, only "some" consumers would be willing to spend 9.7% more, on average, for sustainably produced or sourced goods: *PWC* <https://www.pwc.com/gx/en/news-room/press-releases/2024/pwc-2024-voice-of-consumer-survey.html> (2024). The point is that, according to another research, sustainable products tend to be 75% to 85% more expensive than non-sustainable ones (*Kearney* <https://www.kearney.com/documents/291362523/291369552/Why+todays+pricing+sabotages+sustainability.pdf/38b0b917-886d-3d47-c7b7-74dc6d89c636?t=1599751848000> (2020)), with remarkable differences from sector to sector. The consequence of these data is that even though "some" consumers are willing to pay a price,

feature of this approach should therefore be the promotion of education on sustainability[28] – to real, and proven sustainability[29] – which might lead to a very widespread preference for sustainable products.[30]

3. *Shareholders, stakeholder governance and stakeholder-contributed governance*

When we deal with the issue of stakeholder governance, we usually envisage a situation where the company's managerial decisions are taken actively bearing in mind the constituencies other than the shareholders, as the directors' duty of loyalty should be a moral obligation not just towards the

say, 10% higher for sustainable products, this would nevertheless not be enough to offset the price differences between sustainable and non-sustainable products.

[28] And naturally universities play a momentous role in this. See, for instance, Remigijus Čiegis and Dalia Gineitienė, 'The Role of Universities in Promoting Sustainability' (2006) 48 Engineering Economics 56; but also the video-intervention by Olena Liack, 'Strategies for sustainability change management at universities' at the conference The Prism of Sustainability, Macerata (*Youtube*, 30 March 2023) <https://www.google.com/search?q=the+prism+of+sustainability+youtube&oq=the+prism+of+sustainability+youtube&gs_lcrp=EgZjaHJvbWUyCQgAEEUYORigATIGCAEQRRhAMgYIAhBFGEDSAQg5Mjc2ajBqN6gCALACAA&sourceid=chrome&ie=UTF-8#fpstate=ive&vld=cid:2f812183,vid:6B7gGMTcZQs,st:0> 8h37'15" accessed 28 January 2025.

[29] The real issue is therefore the certification and disclosure of sustainable practices. As for disclosure, the most important current reference is Directive (EU) 2022/2464, that amends the so-called "Non-Financial Reporting Directive", Directive 2014/95/EU (Directive (EU) 2022/2464 of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022] OJ L322/15). For more information, with a specific focus on SMEs (as the Directive is primarily addressed to large corporations), see Deirdre Ahern, 'The Sustainability Reporting Ripple: Direct and Indirect Implications of the EU Corporate Sustainability Reporting Directive for SME Actors' in this edited collection.

With reference to certification, Florian Möslein, 'Certifying 'Good' Companies: A Comparative Study of Regulatory Design' in Sjåfjell and Bruner (n 1) 669.

[30] Of course, customers are in a situation of scarce resources too, and the possibly higher price to be born for the purchase of sustainable goods when compared to non-sustainable ones might turn out to be a barrier to the functioning of the entire system. See, for instance, Jon Dean, 'Sustainable choices cannot be an option only for the wealthy' *Financial Time Adviser* (21 February 2024) <https://www.ftadviser.com/opinion/2024/02/21/sustainable-choices-cannot-be-an-option-only-for-the-wealthy> accessed 28 January 2025.

members, but also towards a (more or less undisclosed)[31] series of parties traditionally not involved in the company's governance mechanisms.[32]

One of the key problems is precisely the fact that these stakeholders are not always homogeneous in their nature and they do not always have a common final interest. On the contrary, the most problematic issue is when the final interests of the different constituencies are divergent. In this case, in the usual situation in which a company's resources are by definition scarce, the selection of the interests to be pursued or preferred is fundamental, and defining the corporate body entitled to make such a decision is naturally crucial.[33]

According to the general approach depicted above, the decision on the interest to be pursued should be allocated in first instance to the shareholders, as they – as residual claimants and substantively "owners" of the organisation[34] – should always be put in the position to make the decisions dealing with the organisation's ultimate interests.[35] Such an approach might be chal-

[31] From this point of view the solution developed by a Spanish soft law document for the *sociedades de beneficio y interés común* (the *Código de buenas práticas para las sociedades de beneficio e interés común*) looks interesting. In the *Código* they envisage that the articles mention both the general company's stakeholders, and those that are more affected by the company's activities towards the common benefit – the direct beneficiaries. See Bartolacelli (n 15), in particular 446 ss.

[32] We use the definition of "stakeholderism" supplied by Lucian A Bebchuk and Roberto Tallarita, 'The Illusory Promise of Stakeholder Governance' (2020) 106 Cornell Law Review 91, 94: 'an alternative approach that relies on and encourages corporate leaders to make choices that would on their own protect stakeholders'.

As for the stakeholder governance theory, see, among others, Lynn Stout, *The Shareholder Value Myth* (Berrett-Koehler, 2012); Simon Deakin, 'The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise' (2012) 37 Queen's Law Journal 339; Colin Mayer, *Prosperity* (OUP 2018); Alex Edmans, *Grow the Pie* (CUP 2022).

[33] In this case, the system referred to above (n 31) is extremely useful. The issue is raised also by Bebchuk and Tallarita (n 32) 121, stating that the stakeholderist solution usually consists in leaving the decision to the directors. We do not completely support this conclusion, as we believe that the directors should be guided by a clear definition of preferences made by the shareholders.

[34] With a strong caveat when it comes to the concept of "owning", however: Charles Korsmo, Minor Myers, 'What Do Stockholders Own? The Rise of the Trading Price Paradigm in Corporate Law' (2022) 47 Journal of Corporate Law 389, 397.

[35] This assumption might be seen as trivial; we are convinced that it isn't, as in some cases, legal or social constraints prevent shareholders from using the business for activities that,

lenged, by arguing that, by reasoning this way, the shareholders would be granted a managerial function that is only proper to the directors of larger companies, at least in the majority of European jurisdictions.[36]

Actually, this is not the case. In fact, although it is true that the directors are entitled to manage the company, their powers derive from the shareholders, who should always be in the position to select the company's ultimate purpose, and therefore the goals that the directors must consider in managing the company.[37] The shareholders, in a direct or indirect way,[38] have the power to appoint and to remove the management of the company; it is reasonable therefore that they can also define a general framework for the exercise of this managerial function, i.e. the criteria with which the directors shall be compliant when managing the company.[39]

This means, in other words, that according to the picture outlined above the shareholders do not replace the directors in the management of the organisation, but simply define their powers, as is completely natural for the appointing body with respect to the appointees. The power to manage the company is therefore still in the hands of the directors, who have simply to

despite being completely lawful, are considered incompatible with the purpose of a company. Legal or social norms, in these cases, are intended as devices to protect the spirit defining the organisations from their own members. In this sense, please consider again the case of the benefit legal models developed to carry out activities that were not considered lawful for common companies: Bartolacelli (n 15) 408.

As for a strong US contractarian approach, which is the foundation of the assumption we adopt in this essay, see Frank H Easterbrook and Daniel R Fischel, *The Economic Structure of Corporate Law* (Harvard University Press 1991), and, more recently, the reading of Edward B Rock, 'Easterbrook and Fischel on Corporate Purpose' (2022) 1 The University of Chicago Business Law Review 397.

[36] See Andrea Vicari, *European Company Law* (De Gruyter 2021) 84; Marco Ventoruzzo and others, *Comparative Corporate Law* (West Academic 2015) 276.

[37] This situation recalls what happens in French companies who decide to include in their articles the so-called *raison d'être*, included at art 1835 French Civil Code by the *loi* n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises (loi PACTE). The *raison d'être* is intended as an indication from the shareholders to the directors showing the latter the path the shareholders want the organization to follow: see Sophie Schiller and others, 'La raison d'être' (2021) 180 Actes Pratiques et Ingénierie Sociétaire 14.

[38] Naturally depending on the corporate governance system which is direct in the case of one-tier systems, and indirect (as the directors are appointed in the latter by the supervisory board, and not directly by the shareholders) in the case of two-tier systems. For a general overview on domestic approaches in European jurisdictions, see Vicari (n 36) 76.

[39] See Rock (n 35) 402.

act within the perimeter drawn (originally, and possibly amended at a later stage) by the shareholders.

Now, the shareholders, in defining this perimeter which is likely to include also issues related to sustainability, simply specify their interest and thereby offer the directors a valuable instrument for deciding how to manage the company.[40] In the completely liberalist system we hypothesize, there should be no doubt that in defining the aforementioned perimeter, shareholders are perfectly entitled to include also aspects that are likely to prevent the directors from pursuing a full profit maximisation. This will happen, reasonably in most cases,[41] when the shareholders' preferences are in favour of sustainability-linked features: a power plant with lower polluting emissions will plainly be more expensive than a classic one;[42] the acknowledgment of better rights, for instance higher salaries, to the employees of the company entails more costs for the organisation;[43] and so on. Such additional costs are naturally likely to prevent the maximisation of the profits for the shareholders, at least in the short term.[44] The question must be, however, if in this

[40] This is the idea of the above-mentioned (n 37) *raison d'être*. Another potentially interesting instrument is the preamble to the articles that the *Código de buenas práticas para las sociedades de beneficio e interés común* suggests including in the Spanish benefit companies: references to this in Bartolacelli (n 15) 446 ss.

[41] But not necessarily: there are cases where the pursuit of a more sustainable business conduct might even lead to (direct) higher revenues for the enterprise. An example might be the reuse of hotel towels which reduces the number of loads of laundry, permitting the enterprise to save money (but see the observations by Sara Bynoe, 'Does Reusing Hotel Towels Save the Planet or Just Money?' *Asparagus Magazine* (27 August 2020) <https://www.asparagusmagazine.com/articles/environmentalist-from-hell-looks-into-hotel-housekeeping-greenwashing> accessed 28 January 2025. And other possibilities deal with inherently sustainable companies whose existence itself combines profit and sustainability, with no possibility of removing the sustainable features to increase the profits.

[42] And in the overall picture we must underline that this classic plant must in any case be compliant with the environmental rules. In the case that it is not, its replacement by one that is would not be a *free* choice by the management of the company, but simply the consequence of the *duty to comply* with a rule, and this has nothing to do with the sustainability of the enterprise: at best, it deals with the sustainability of the public policies regarding the environment.

[43] On sustainability and labour law see Tonia Novitz, 'Social Sustainability, Labour and Trade: Forging Connections' in Margherita Pieraccini and Tonia Novitz (eds), *Legal Perspectives on Sustainability* (Bristol University Press 2020) 159.

[44] Bebchuk and Tallarita (n 32) 120. Nevertheless, we must always consider that the more sustainable approach adopted by the company, which entails higher costs in the short term, might bring more revenues in the long term due to the enhanced reputation on the market.

situation we are really looking at a non-maximisation of the shareholders' interests, or value.

The key point of the entire issue is precisely that while considering the shareholders' interests, the assumption that such an interest *must* deal with wealth maximisation is absolutely ideological and anything but definitively proven.[45] It is incomprehensible why profit maximisation for the shareholders should be the only, or even the main purpose of the company – and therefore the lighthouse guidance for the directors' activity. If we are *really* libertarians in the approach to the idea of what a company is, should we not recognise that the people involved in setting up the organisation – its members – should also have the opportunity to define *autonomously* what their ultimate interest is? In other words: just profit, mainly profit, partly profit and partly more widespread well-being. This means without legal constraints from the black letter of the law regarding the ultimate purpose of the company, insofar as it is legitimate. The members should be given the broadest freedom to decide what their organisation is for, and – if they want – to change the ultimate goal at will, for instance every third or fifth or tenth year, or never.[46]

[45] See, for instance, Katherina Pattit and Jason Pattit, 'The case for a thick shareholder concept' (2019) 124 Business and Society Review 497, 505. Sceptical regarding the enlightened shareholder in terms of empowerment of the stakeholders is Lorenzo Benedetti, 'La governance by stakeholders: an illusory promise (o una chimera)? Spunti per la sua implementazione nell'ordinamento nazionale' (forthcoming), paragraph 4.

[46] A problem in this line of reasoning might potentially arise with the question as to whether the shareholders have the right to decide if the company is lawfully allowed not to produce any profits whatsoever in a systematic way, or even to operate in a continuous situation of losses. The two cases cannot be discussed in depth here, but they must be kept separate.

The company operating in a situation of systematic losses should not be allowed on the basis of the fact that the organisation must be, at least in its physiological phase, in a condition of self-sufficiency, to avoid bankruptcy. If it is not, because the management faced too high costs linked to sustainability-friendly activities or approaches that harmed the financial situation of the company, then the directors should be held liable. This should happen also if the directors acted this way by complying with the framework provided for by the shareholders. In terms of precedence, the existence of the organisation has a priority even over the will of the shareholders; the directors have therefore the duty to preserve the existence of the company – due to the negative fallouts that this might have for the community and the business environment where the company operates – and if the shareholders decide to dismiss them for their non-compliance with the framework they had established, such a dismissal should be considered as having no legal grounds.

As for the case of a systematic lack of profits, this situation does not appear to be very different – from the shareholders' point of view – from the case of those companies that, even if a

In this general framework, the shareholders will appoint directors who intend to pursue the interest they have specified in the articles. The choice of the appropriate directors is naturally a crucial decision, and the shareholders consider carefully who, in the market of the corporate managers, is most entitled or suitable to best promote their complex interests, and balance profits and sustainability. The personal composition of the board might also be a combination of different expertise, with some directors more focused on the profit-making activity, and others with profiles more linked to sustainability issues; by this means, shareholders substantively choose to leave the fine-tuning of how to achieve the goals defined in the framework to debates within the board.[47] Of course, again, this will happen with a higher de-

profit has been produced, systematically decide not to distribute dividends to their shareholders. One might argue that the two cases are different, as in the latter, since a profit had been actually produced, even if the company did not distribute it, the company's overall wealth would have increased, and therefore also the value of the quota of the patrimony ideally belonging to each shareholder; while in the former situation an increase in wealth would not occur. This assumption is, again, ideological. If we agree that the shareholders' interest does not necessarily have a patrimonial nature, then it is possible to assume that its satisfaction has been achieved precisely by means of the sustainability-friendly approach adopted by the company. For this reason, a systematic lack of profits that does not harm the existence of the company should be held as completely lawful.

A problem might arise if we consider the possibility of the company's shareholders amending the articles with majority decisions only, causing potential harm for those minority shareholders that might be interested in receiving profits. In this case, however, granting the dissenting minority shareholders a right of exit from the company seems reasonable, and might also serve to prevent too frequent changes of approach by the majority shareholders, as they would be aware of the fact that a change of purpose would be likely to trigger the exit of these minority shareholders, and therefore potentially an impoverishment of the company's patrimony. This last circumstance is similar to the appraisal right that might be given the dissenting shareholder when a company either becomes or ceases to be a benefit company. See again the Spanish *sociedades de beneficio y interés común*, where the *Guía orientativa de las especialidades de los estatutos sociales de una sociedad de capital de beneficio e interés común* and the model articles present in the *Código de buenas práticas para las sociedades de beneficio e interés común* suggest the inclusion of a specific clause in the articles: see Bartolacelli (n 15), in particular 446ss. But see also the 2020 amendments to Delaware Public Benefit Corporations which deleted the statutory appraisal rights in connection with PBC Conversions (see: Michael R Littenberg, Emily J Oldshue and Brittany N Pifer, 'Delaware Public Benefit Corporations – Recent Developments' (*Harvard Law School Forum on Corporate Governance*, 31 August 2020) <https://corpgov.law.harvard.edu/2020/08/31/delaware-public-benefit-corporations-recent-developments/> accessed 28 January 2025).

[47] The general topic of diversity on the board is examined by Maretno Harjoto, Indrarini Laksmana and Robert Lee, 'Board Diversity and Corporate Social Responsibility' (2015) 132 Journal of Business Ethics 641.

gree of probability if shareholders opt for introducing in the articles stricter or looser preferences for the promotion of a sustainability-friendly approach by the company. Such a decision, however, will not be a radical one in most cases, and the number of potential nuances is countless. In other words, it is possible that the shareholders may simply opt for a limited involvement of the company in the field of sustainability, or no involvement at all; but they might conversely value a specific commitment to one or more aspects of sustainability, with a focus on more or less defined specific goals.[48]

With a view to doing this, there might be different techniques, but it is fundamental to underline once again how the key role in all the decisions must be played by the shareholders: there is no doubt that other stakeholders are involved in the company's activities, but they can play an active role in the company only if and insofar as the shareholders have decided to allow them to do so,[49] by also identifying, at least in general terms, if not the specific stakeholders, at least the classes of stakeholders that the company should provide for in pursuing its business.[50] By this means, we can argue that such a company should not be seen as a stakeholder-governed organisation, as it is left up to the shareholders, and the shareholders only, to define the perimeter for the advantage that the company is allowed to grant the different

[48] Which, again considering the domain of benefit corporations as a benchmark, corresponds to the specific benefit purpose: Roxanne Thorelli, 'Providing Clarity for Standard of Conduct for Directors within Benefit Corporations: Requiring Priority of a Specific Public Benefit' (2016-2017) 101 Minnesota Law Review 1749.

[49] Of course, besides the degree of relevance that the lawmaker has decided, and that is the outcome of a political choice with reference to the role of corporations in the society. We are naturally referring to the co-determination system, present in German company law, where the employees are actively involved in the management by having their representatives on the supervisory board: Alexander Schall, 'Stock corporations: corporate governance' in Andrea Vicari and Alexander Schall (eds), *Company Laws of the EU* (Nomos, Beck, Hart 2020), 256, 284; see also Jens Dammann and Horst Eidenmueller, 'Codetermination: A Poor Fit for U.S. Corporations' (2020) European Corporate Governance Institute – Law Working Paper No 509/2020 <https://ssrn.com/abstract=3565955> accessed 28 January 2025.

[50] The notion of a sustainable company and the principle of do no significant harm (see above, n 10, and corresponding text) should nevertheless be always taken into consideration when the company presents itself as being sustainable (or equivalent). In other terms, while working explicitly in the best interest of a class of stakeholders belonging to one of the sustainability categories, the directors must not make decisions that would have as a fallout the harm of other classes of stakeholders included in the same category, or other sustainability factors. Similar terms are used to deal with the different classes of stakeholders in the Spanish *Código de buenas práticas para las sociedades de beneficio e interés común* (n 15 above).

stakeholders, and in principle with no need whatsoever for the stakeholder to have their direct representatives on the board.

Even if there is no necessity for the company's management to include people directly chosen by the relevant stakeholders, it nevertheless seems interesting to examine why and how such an option could be pursued.

The advantages of having one or more representatives of the stakeholders on the board of directors might be twofold, but certainly useful for several purposes. Specifically, the company might greatly benefit from their expertise, and their presence on the board might ensure a consistent and continuous dialogue between the company and its stakeholders of reference. Again, embedding the stakeholders on the board sends a strong signal to the market: the fact that the company has made the decision to include the stakeholders in the governing structure of the organisation makes the sustainability-oriented commitment of the company clearly evident at least with reference to that particular class of stakeholders.[51]

Of course, there is a downside. More specifically, it might be argued that the different interests present on the board, with a potentially diverging approach to what the ultimate purpose of the company should be, might trigger more conflictual and therefore less effective meetings.[52] In other words, the company's management would be hindered rather than improved by this diversification. This, of course, might be true; at the same time, we must point out very clearly that there is no *duty* to include stakeholders' representatives on the board. On the contrary, it must be seen as a possibility, and a possibility that can only usefully be taken advantage of not as a sort of an "entry-level stage" of a company's commitment towards sustainability, but perhaps as the most advanced instrument of effective dialogue between shareholders and selected stakeholders within a company. Advocating for a widespread and large-scale sudden use of this instrument does not seem to be advisable precisely because it might lead to a counter-productive effect for the sound management of a company.

If we agree with this general view, then the different sets of expertise present on the board would become an additional value for the company's

[51] The situation closely resembles what happens in those company law systems where co-determination systems are in place, as the most pervasive instrument for ensuring employees' involvement in the company's governance; see above n 49.

[52] In this sense, Benedetti (n 45) paragraph 3.

business.[53] Even if it would not always be easy to accommodate the different views and priorities, the previous experience in the area of sustainability that the company possibly had in its earlier stages of commitment should make it possible to reach agreements in a better and more reasoned way, thus enhancing its overall sustainability. In addition to this, we must also consider that the presence of these different interests in the management body would be by itself one of the key factors for the achievement of the sustainability in its "governance" dimension. An increased rate of sustainability commitment would be therefore achieved by this means, naturally provided that, on the one hand, the contribution to the company's governance offered by the stakeholders is actual and, on the other, that it really serves the purpose of an enhancement of the sustainability of the company.[54]

In any case, it is up to the company to define how pervasive the contribution of the stakeholder representatives will be on the board. This has to do with the number of stakeholder representatives that are going to sit on the board, again to be defined by the shareholders and with the actual functions that these directors are called upon to play on the board. At the very least, stakeholder representatives might serve in the function of independent directors in order to monitor how the company is doing with issues related to the satisfaction of the stakeholders they represent – and therefore of that specific profile of sustainability;[55] however, nothing prevents them from being given also executive functions, focused in particular on specific activities which the company is expected to carry out[56], activities that are more closely related to the benefitted stakeholders.

[53] See, for instance, Whitney Douglas Fernandez and Yannick Thams, 'Board diversity and stakeholder management: the moderating impact of boards' learning environment' (2019) 26 The Learning Organization 160.

[54] ibid.

[55] On non-executive or independent directors as a "means of protecting the interests of shareholders and other stakeholders" see the European Commission Recommendation 2005/162 of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board [2005] OJ L52/51, Recital 7. Also see Ventoruzzo (n 36) 258. For a US perspective Jeffrey N Gordon, 'The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices' (2007) 59 Stanford Law Review 1465.

[56] Considering again the domain of the benefit corporations, we can bear in mind the so-called "benefit director" mentioned by the Model Benefit Corporation Legislation, § 302.

4. *Stakeholders' involvement in the governance: how to achieve it by means of finance*

The appointment of stakeholder-linked directors to a company may take place using different legal instruments. These directors might be appointed directly by the shareholders; or the appointment might be made by a different body[57], by means of the usual mechanisms. This is certainly the

[57] We are naturally referring to the German-style two-tier system, in which the management board is appointed by the supervisory board; in this case, however, a specific characteristic is to be taken into consideration: see above (n 38). In fact, we have so far considered the hypothesis of the appointment of stakeholder representatives to the board as a decision made by the shareholders, who have the final say on the issue. In the hypothesis we are referring to now, as the management board is not directly appointed by the shareholders, it might be debated whether the supervisory board is actually entitled, from a theoretical point of view, to appoint stakeholder representatives to the management board. As a matter of principle, as the supervisory board is generally freely entitled to choose the members of the management board, nothing prevents the rule from being applied also when it comes to those related to stakeholders. There is no doubt, then, that the supervisory board must include among the members of the management board stakeholder-focused directors where the shareholders included in the articles a specific provision stating this as a part of the company's sustainability commitment. However, one might ask if such a competence by the supervisory board is present, not as a duty but just as a possibility, even when no specific reference to sustainability issues has been advanced by the shareholders in the articles. In this case, again, it seems that the supervisory board maintains a fully discretional power in deciding on the members of the management board; this means that stakeholders' representatives might be chosen in any case. Naturally, when this appointment causes the shareholders' financial (but also non-financial) expectations harm, the consequences will be the same as when equal harm is caused by members of the management board appointed without considering sustainability issues.

Another aspect, which is related to the one just examined, is also relevant. As we have observed, nothing prevents the stakeholder representatives from being appointed as members of the board; the same conclusion is valid also in the eventuality that representatives of some stakeholders are chosen as members of the supervisory board. In addition, this contingency is also particularly interesting both in the case when the appointment of further stakeholder representatives to the management board is required by the articles, and irrespective of it.

In the former case, the stakeholder-related members on the management board might be more effectively chosen by the stakeholders' representatives on the supervisory board, by virtue of their specific expertise. In addition, where the interests of more classes of stakeholders are to be taken into consideration according to the company's articles, but only one member representing them is to be appointed to the management board, the different classes might be represented on the supervisory board, and the supervisory board might also serve as the place where the settlement of the diverging interests of these different classes of stakeholders

most straightforward solution, and implies that the directors are chosen, generally, by all the shareholders, in the general meeting, via the usual deliberation.[58] Obviously, this situation does not raise specific problematic issues. Nevertheless, we can also conjecture that the appointment of the stakeholder-related directors might take place by means of other systems, if and where the company is free to put them in place, and that these systems also have to do with its financial structure.

If we consider the modalities in which a director can be appointed, the shareholders' general meeting is for sure the most frequent case; however, the appointment in the general meeting does not necessarily mean that all the directors are appointed by all the shareholders, as reserved quotas for some categories of shareholders – e.g.: minority ones – are nevertheless possible;[59] furthermore also the holders of a specific class of shares might be given the right to appoint one or more directors.[60] And, again, there are also cases in

is enacted. This would make it possible to appoint only one joint representative to sit on the management board.

In the latter case, the stakeholder representatives on the supervisory board would however perform an effective and in-depth monitoring function that would naturally allow the company to have a continuous overview of how the sustainability-related aspects of the business are actually dealt with, perfectly in line with the monitoring function proper to the supervisory board.

In both cases depicted above, however, insofar as the competence for the appointment of the supervisory board belongs to the shareholders, they retain the possibility to impart a direction to the company's business. Naturally, where the competence for the appointment of the supervisory board members is shared between the shareholders and other parties (for instance the workers under the German *Mitbestimmung* system: above, n 49), the actual modality for the appointment of stakeholder representatives shall be agreed by the appointers, in accordance with the applicable legislative framework.

[58] When a one-tier system is in place; with a two-tier system, the shareholders appoint the members of the supervisory board, who, in turn, appoint the directors (*recte*, the members of the management board): Vicari (n 36) 76, also references the national laws.

[59] This is the case of the so-called "slate voting" or "list voting" present in the Italian listed companies. References to this in Marco Ventoruzzo and Piergaetano Marchetti, 'Italian Boards and The Strange Case of the Minority Becoming Majority' (*Harvard Law School Forum on Corporate Governance*, 23 May 2016) <https://corpgov.law.harvard.edu/2016/05/23/italian-boards-and-the-strange-case-of-the-minority-becoming-majority/> accessed 28 January 2025; Giovanni Strampelli, 'Institutional Investor Stewardship in Italian Corporate Governance' in Dionysia Katelouzou and Dan W Puchniak (eds), *Global Shareholder Stewardship* (CUP 2022) 130.

[60] Vicari (n 36) 114. In general, against the appointment of directors by the stakeholders, Benedetti (n 45) paragraph 4, where he also carefully describes alternative and allegedly more effective models (paragraph 6); likewise Marco Cian, 'I comitati rappresentativi degli

which the designation of one or more directors is a specific right given to a single member as a person and not by virtue of the rights attached to the shares that s/he owns, in particular when we consider private companies.[61] On the other hand, mechanisms might exist by means of which the directors are designated by people that are not shareholders;[62] in some jurisdictions, this is the case of the hybrid securities issued by the company.

Both hypotheses referred to above would allow specific categories of people or organisations to select one or more directors within a company; naturally, such categories can easily be the stakeholders, and therefore these modalities of appointment might be used to guarantee that – if the shareholders so decide – the stakeholder-related director is also directly selected and appointed by them.

Of course, the hypothesis advanced here is clearly intrusive in the usual dynamics of how a company is run; nevertheless, the idea – which is a purely normative idea, at this point, not constrained by the legal provisions of any jurisdiction unless specifically stated – is that if the shareholders so decide, the stakeholders should be admitted to participation in the governance of the company, not just via a dedicated member on the board, but by directly designating who such a member shall be. Naturally, this is *not* mandatory in any case: what we are discussing here are the different ways possible for a direct involvement of the stakeholders in the governance, and the different degrees of commitment towards the stakeholders that the use of each of these modalities shows. Therefore, the processes drafted here are on a strictly voluntary basis, and are enacted and governed by the shareholders to whose competence the decision regarding so pervasive an involvement of the stakeholders in the company ultimately belongs.

4.1. *Specific class(es) of shares for the stakeholders*

The most manifestly invasive case of stakeholder involvement in the company occurs when the stakeholders – or at least some of them – are given

stakeholders e l'organizzazione societaria' (2023) 76 Banca Borsa Titoli di Credito 380, even if just referred to the appointment of a director by a stakeholder committee.

[61] For instance, see art 2468, para 3, Italian Civil Code; but – for public companies, § 101 *Aktiengesetz* is also interesting (paragraph 2: "Solely the by-laws may establish a right to delegate members to the supervisory board, and this only *for certain stockholders* or for the respective holders of certain shares of stock").

[62] See below, § 4.2.

the possibility to add to their current status also that of shareholders.[63] This happens if, by virtue of an agreement between them and the current shareholders, the latter decide, for instance, a capital increase by means of the issuance of a specific class of shares,[64] allocated to the selected stakeholders, thus endowing the class with administrative rights held as more appropriate for the stakeholders, e.g.: increased rights of information on sensitive business operations; multiple voting rights on specific sustainability-related subjects; and above all the possibility to designate one or more members of either – or both – to the management and audit boards.[65]

[63] Due to a well-known series of cases held before various national courts in recent years, this possibility might seem rather naive. We are, of course, referring to cases in which various NGOs have brought derivative actions against the directors of companies that were deemed to have violated specific obligations, especially related to environmental issues. On this point, please see Hans De Wulf, 'The failed derivative action by ClientEarth against Shell's directors: minority shareholders should not try to determine a corporation's climate change strategy through the courts' (2023) 1 European Company Case Law 189.

Now, without taking any position with respect to the merits of the issues, the legal basis for such actions was precisely the fact that the aforementioned NGOs had acquired shares in the company they would later sue in order to be able to bring the derivative action. One might therefore ask whether, in such a framework, it makes sense to directly provide stakeholders with a weapon that could be used against the company itself. In our view, the answer – perhaps counterintuitively – is *a fortiori* affirmative. Indeed, on the one hand, especially in larger companies, stakeholders would still be able to obtain the necessary amount of shares to bring an action against the directors, should they be interested in doing so, by acquiring them on the market. On the other hand, and complementarily, through an explicit willingness to involve the stakeholders, the shareholders would signal their not only non-conflictual, but even collaborative position with them. In other words, a potentially more efficient situation of cooperation between the company and its stakeholders would be produced. Provided, of course, that the company is in fact interested in such cooperation and what follows from it, also in terms of the possibility of non-maximisation of shareholders' profits.

[64] On this topic, Marco Ventoruzzo, 'Issuing New Shares and Preemptive Rights: A Comparative Analysis' (2013) 12 Richmond Journal of Global Law and Business 517; in Italy: Alessandra Daccò, 'Fortune e sfortune delle categorie di azioni' in Piergaetano Marchetti, Sara Pietra Rossi, Giovanni Strampelli, Federico Urbani, Marco Ventoruzzo (eds), *La s.p.a. nell'epoca della sostenibilità e della transizione tecnologica* (Giuffrè 2024) 967. On the European rules, see Jan P Brosius, 'Art. 68' in Peter Kindler and Jan Lieder, *European Corporate Law. Article-by-Article Commentary* (Nomos, Beck, Hart 2021) 330, 335.

[65] Due to the nature of the present essay, we are here considering the administrative rights the stakeholders might be granted once they become shareholders, but of course the financial rights are also possible. Or, more properly, they are not just possible, but even mandatorily due, as a complete lack of profit distribution to a category of members would be seen

The option outlined above has several variables, depending on the pervasiveness of the rights the stakeholders are granted by means of the composition of the set of rights embedded in the class of shares to which they will be subscribing. Before describing them, however, we need to point out the most important variable, namely the mutual will of both the shareholders and the stakeholders to have the latter included in the "owners'" team.

From the pre-existing shareholders' point of view, letting the stakeholders into the company might have several implications. It certainly signals the company's very strong commitment towards them,[66] and allows the organization to present itself on the market accordingly. The fact that the stakeholders might also take part in the general meeting – if allowed by the share class they will own[67] – makes it possible to have a fruitful debate among the shareholders, thus settling any possible divergent positions in the meeting.

On the other hand, letting the stakeholders in as members of the company means that they pass from being somehow "distinguished guests" to "co-owners".[68] This situation triggers a natural change in the relationships

as a violation of the general prohibition of the *societas leonina*, which is in place in several jurisdictions (See Vicari (n 36) 115).

Naturally, stakeholders would take advantage of the profits that the company distributes to them by virtue of their being also shareholders. However, the financial participation does not seem to be the main driver for adopting the strategy described here. The organized stakeholders we are contemplating in this chapter usually need a constant cash flow to carry out their activities, particularly when they are charities. This means that the money that might come to the shareholders/stakeholders as dividends is certainly likely to be useful. However, due to its inherent uncertainty, it cannot be seen as their main financial resource as the sum – if any – necessarily varies year by year. In other words, the annual profits can be seen just as ways to *improve* the financial situation of the stakeholders, but not to systematically sustain it.

[66] In general terms, we might ask ourselves whether this peculiar focus on the stakeholders necessarily means a focus on sustainability. In this chapter, we treated these two concepts as inherently integrated, but of course this depends on the decision of the shareholders when determining which of the relevant stakeholders to internalise in the company.

[67] Some classes of shares might not give their owners the right to participate in every general meeting, limiting it to some meetings, or even excluding it completely. This is the case of the Italian non-voting shares (art 2351 Italian Civil Code), whose owners are not entitled to participate in the general meeting. More in general on the topic, Dorothy S Lund, 'Nonvoting Shares and Efficient Corporate Governance' (2019) 71 Stanford Law Review 687.

[68] In our opinion, this is precisely the key point of this chapter: if we think that the stakeholders are to be seen as "guests" of the company, we deny their fundamental role in the business. The only way to walk the talk (for instance the very well-known business roundtable statement of August 2019: Business Roundtable, 'Statement on the Purpose of a Corporation'

between the shareholders and the stakeholders, as the latter logically will be acquiring increased power or at least a right of say within the company. This shows clearly that the solution imagined here is to be held viable only when a close connection between the company and its stakeholders is already well-established and developed, as this might prevent the emergence of eventual harsh conflicts between the two groups in the meeting.

The hypothesis of the stakeholders being included among the shareholders is to be assessed also from the stakeholders' perspective. Naturally, the fact that they would assume the quality of shareholder is subject to a contribution to be given to the company as the "price" for the shares;[69] if we consider the hypothesis of the stakeholders entering the company by subscribing shares of a new class issued within a process of capital increase,[70] they will also have to pay the premium on the shares which might be quite costly. It is true that, to be given rights within the company, the stakeholders will not be asked to subscribe to a large share of the capital; the desired rights would be awarded by virtue of the rights attached to the *class* of shares that the shareholders would be given, and not the *amount* of their shares.[71] If the share number is relatively small, this would naturally also reduce the amount to be paid (at least in joint stock companies, in accordance with Art. 69, Directive (EU) 2017/1132)[72] as premium on the share. With reference to the

(19 August 2019) <https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationOctober2020.pdf> accessed 28 January 2025) is to treat stakeholders seriously, given the applicable legal framework. What we propose in this chapter is a contribution to that.

[69] Unless we imagine a for-free issuance of shares, for instance like that which occurs under Italian Company Law (cf art 2349 Italian Civil Code) when the shares are issued for free to the employees, using non-distributed and retained profits as a contribution to raise the company's capital. It seems possible to argue that a company might create and maintain a reserve with this specific purpose, even if the beneficiaries of the new shares are not the employees but (other) stakeholders.

[70] As we are here facing a limitation or even an exclusion of the pre-emptive rights, this possibility must be checked against the applicable national law. On the topic, Ventoruzzo (n 64) *passim*. For a comment on the European rules with reference to considerations in cash (Directive (EU) 2017/1132 of 14 June 2017 relating to certain aspects of company law (codification) [2017] OJ L169/46, art 72) see Jan P Brosius, 'Art. 72' in Kindler and Lieder (n 64) 353.

[71] It is important to recall that several domestic company laws allow companies to issue shares non-proportionally to the contributions the shareholders made to the capital: Vicari (n 36) 120, with examples from Spain (but not for public companies) and Italy.

[72] But we must consider that art 84(1) of Directive (EU) 2017/1132 allows the Member States to set down national laws derogating from this rule exactly when the exception is 'nec-

contributions, the same principle is valid; naturally, in joint stock companies within the EU, the rules on the contributions set down in Directive (EU) 2017/1132 must be complied with.[73] Therefore, the contributions permitted in that case will only be cash and in-kind, while the well-known prescription of Art. 46 forbids work and – even more importantly, in our case – service inputs.[74] Naturally, where these latter forms of contributions are allowed by domestic law in private companies, these are likely to be the preferred means for the entrance of the stakeholders into the company, as they would simply provide the company with their own specific expertise as contributions.[75]

Anyway, irrespective of the amount of the contribution and premium on the shares which the stakeholders will have to pay the company,[76] what must be underlined is the symbolic meaning of having stakeholders that are so confident on a company's commitment to sustainability that they accept – and pay – to bind themselves to the business organisation in such a pervasive way. Naturally, we have already observed that the company will logically take advantage of this symbolic connection for reputational purposes. The entire issue is nevertheless whether the advantage of this implicit advertisement for the company's commitment is worth the "price" of having the stakeholders as counterparts in the general meeting.[77] This is to be considered especially

essary for the adoption or application of provisions designed to encourage the participation of employees, or other groups of persons defined by national law, in the capital of undertakings'. For a commentary on this provision, see Jan P Brosius, 'Art. 84' in Kindler and Lieder (n 64) 382.

[73] See Directive (EU) 2017/1132, arts 44 to 55.

[74] Jan P Brosius, 'Art. 46' in Kindler and Lieder (n 64) 233.

[75] For a possibility to have such an asset supplied to a joint-stock company, of course not as a formal capital contribution, see the next § 4.2 on the stakeholders' participation via hybrid financial instruments.

[76] Apart from the case that we have already examined, and which is not to be considered very frequent, that of the of shares being issued with no cost to bear for their subscribers.

[77] And we must also underline a very relevant aspect. The shares will be issued not to natural persons, but to organizations representative of the stakeholders – and which will therefore be selected by the company, i.e.: by the shareholders on the suggestion of the directors – whose role is to protect the interests of (at least a specific class) the stakeholders. Naturally, these underwriters should have a due legitimization, and this has to do with the selection phase. What is more interesting within the limits of this chapter, however, is the fact that these organizations express their vote through the usual mechanisms of decision-making and representation that will be applicable to them by virtue of their domestic law.

In a medium-term perspective, this means that there is no certainty at all regarding the fact that the internal vicissitudes of the organizations involved (both the company and the entity representing the stakeholders) will ensure the maintenance over time of the same equi-

when the company must make hard decisions that are likely to damage some stakeholders and in any case, we should not treat it as a moral issue.[78] The fact that some decisions have a potentially adverse impact on stakeholders deeply influences the specific features in terms of rights that the special classes of shares assigned to the stakeholders will have in reality.

The set of rights embedded in a class of shares might have potentially limitless combinations.[79] In a situation like the one that we are considering here, the degree of actual commitment of the shareholders towards the stakeholders is easily measurable by looking at the rights that the special class of shares confers on their owners. From the administrative point of

librium, policies and visions. This might be a problem because a conflictual situation is likely to be detrimental to the company; however, everything depends on the mechanisms that the company sets down in the articles to minimise any conflicts that are additional to the more usual disagreements between different types of shareholders.

[78] This means that whether the shareholders decide to embed the stakeholders in the company due to a merely opportunistic business strategy, or because of their real commitment to sustainability is not really important. We might say that this dichotomy has been present from the dawn of the world: is it not, in practice, the difference between performing good actions, and being virtuous?

In any case, the shareholders must be completely aware that letting the stakeholders into the company also means that they will obviously benefit from an increased visibility, which they might even use *against* the company. If we envisage a situation in which the stakeholders' requests for sustainability were not accommodated – legitimately – by the company's remaining shareholders (when dealing with their competences) or (more frequently) directors, it is reasonable to argue that the stakeholders will take advantage of their privileged inner position to publicly stigmatise the company's business behaviour. Of course, they might act this way to offload from themselves the moral and "political" responsibility for such an activity which is inconsistent with their beliefs and role; but also, to exert increased public pressure on the company, to have its position reconsidered. Taking this situation into account, it is evident that the inclusion of the stakeholders among the company's shareholders can be twofold. This is the case particularly when the relationships between the constituencies are already conflictual, or not completely straightforward. This might lead the reputational advantages of this action to suffer a sort of a boomerang effect.

[79] With very few limitations, like that of the *societas leonina* which we have referred to above (n 65). See however Gladriel Shobe and Jarrod Shobe, 'The Dual-Class Spectrum' (2022) 39 Yale Journal on Regulation 1343, 1358 who affirm that several rights are nevertheless granted not via a special class, but 'through separate contractual arrangements'.

For very interesting observations based on Italian Law, and looking at the market perspective (in the field of benefit companies, but with a reasoning that can be extended to most of the cases we deal with in this chapter), see Chiara Picciau, 'Categorie di azioni e apertura al mercato nelle società *benefit*' (2022) 45 Le Nuove Leggi Civili Commentate 917.

view, these rights might deal with the following: information – for instance, increased information on the sustainability-related activities carried out by the company; increased voting rights – or even veto rights – on specific topics;[80] the appointment of one or more auditors, or one or more members of the board, eventually also defining the specific competences of those directors – whether executive or non-executive, or whether they will be in charge of some sustainability-linked operations.[81] Again, the owners of the shares belonging to the relevant special class might be able to appoint a specific officer of the company who might be the link between the stakeholders and the directors, without being a director himself.[82] These are just a few examples of the rights which might be attached to the shares belonging to the special class allocated to the stakeholders by the company's directors on the mandate of the shareholders. Naturally, the creativity of the shareholders, combined with the specific needs and peculiarities of the company itself might lead to the detection and formalisation of many more groups of rights with different degrees of pervasiveness.

A last issue must now be considered. In the general approach to the situation depicted here, the special class of shares, the characteristics of which have just been envisioned, is only assigned to the stakeholders selected on the basis of the shareholders' preferences.[83] The shares belonging to this class, however,

[80] For the Italian situation, see Marco Ventoruzzo and Giulio Sandrelli, 'Classes of shares and voting rights in the history of Italian corporate law' in Harwell Wells (ed), *Research Handbook on the History of Corporate and Company Law* (Edward Elgar 2018) 269.

[81] See above, n 55.

[82] This is the case of the benefit officer in the benefit corporations, when the company does not require him to be a director (above, n 56): see Model Benefit Corporation Legislation, § 304.

[83] In general, this could be achieved through a specific clause in the articles of association identifying the criteria for the allocation of newly issued shares. As should be clear from the discussion so far, stakeholder involvement does not necessarily have a pro-ESG connotation, so such clauses could be either sustainability clauses, or neutral (or even negative) clauses in terms of sustainability promotion.

The topic of sustainability clauses to be included in a company's articles is well developed in the Italian literature: see Marco Cian, 'Clausole statutarie per la sostenibilità dell'impresa: spazi, limiti e implicazioni' (2021) 66 Rivista delle società 475; Mario Stella Richter *jr*, 'Il «successo sotenibile» del Codice di Corporate Governance e le possibili modificazioni statutarie conseguenti' (2021) 73 Vita notarile 739; Marco Ventoruzzo, 'Osservazioni sulle conseguenze applicative dell'adozione di clausole statutarie (e di autodisciplina) sul «successo sostenibile»' (2024) 69 Rivista delle società 129.

are in principle transferable like any other share of the company. This means that, if there are no blocking mechanisms, stakeholders could decide to transfer the shares to third parties, that will not necessarily have the same specific sustainability-related features and focus that drove the shareholders to the creation of the class of shares.[84] On the contrary, if the rights attached to the special shares are particularly pervasive, these shares will be especially attractive for "classic" investors, with a view to strongly influencing the governance of the company even if they are in a minority position. For these reasons, when the company opts for the issuance of specific classes of shares to be subscribed by the stakeholders, it seems eminently desirable to also develop security systems in order to have a reasonable certainty that the shares will always be in the hands of the stakeholders selected by the shareholders, or at least will only be legitimately transferred to other stakeholders with the same characteristics and degree of reliability as the previous ones.[85] Naturally, the usual consent and first-refusal clauses might serve the purpose, but what might also be investigated is the hypothesis of clauses stating the complete non-transferability of the shares. In addition, a possible sell-out in case of noncompliance of the sustainability-related duties, if any, could be other option.[86]

This final remark is helpful when reflecting on a specific case of stakeholders/shareholders that might take place particularly in private companies. In fact, in some jurisdictions, domestic rules on private companies allow some specific members to be given special administrative or financial rights within the company.[87] As far as the final outcome is concerned, the envisaged situation is similar to the establishment of different classes of shares; nevertheless, here no issuance of shares is needed: the member has these specific rights by virtue

[84] This would mean losing the connection between the company and its stakeholders. In the unfortunate case where the stakeholder/shareholder is a natural person, we would also have this problem in the case of his/her death, as there is no certainty that the heirs would share their same position towards the company.

[85] An interesting perspective comes to us again from the Spanish *sociedades de beneficio y interés común*, where the *Guía orientativa de las especialidades de los estatutos sociales de una sociedad de capital de beneficio e interés común* and the model articles in the *Código de buenas práticas para las sociedades de beneficio e interés común* suggest the inclusion in the articles of a specific clause requiring the consent of the general meeting (possibly even with reinforced majorities) in the case of a transfer of shares when this is likely to hinder the regular pursuit of the purpose stated in the articles: see Bartolacelli (n 15), in particular § 6.2.2.

[86] Vicari (n 36) 126.

[87] See above, n 61.

of the fact that s/he is a member of the company, by recognition of all the other members in the articles of the company. However, as the rights – which can be the same as those linked to the classes of shares – are granted to the member as a person, and not to the shares, this creates far fewer problems when it comes to the transferability of the rights. Should the member transfer the participation, the beneficiary will only receive the "normal" participation, proportionate to the share of the capital subscribed by the seller, without any of the special rights that the seller enjoyed. In other terms, the specific rights are only given to a person, the seller, and they extinguish when the participation is sold.

4.2. *Hybrid instruments for the stakeholders*

The goal to include the stakeholders in the company's structure can also be achieved by using hybrid financial instruments, where they are allowed in the domestic jurisdiction.[88] In principle, this hypothesis should be less

[88] Besides the Italian *strumenti finanziari partecipativi*, regulated by the Italian Civil Code mainly in art 2346, para 6 and better explained below, forms of hybrid securities are also present in other jurisdictions.

In Germany, see § 221 AktG, which requires the General Meeting of the shareholders to make the decision to issue the securities with *Genußrechten* (so-called *Genußscheine*). However, the hybridity of these securities is generally deemed as limited to the financial aspect (the *Genußscheine* holder can take advantage of the company's profits along with the shareholders), therefore excluding the administrative dimension. Cf Claus Luttermann, *Unternehmen, Kapital und Genussrechte: Eine Studie über Grundlagen der Unternehmensfinanzierung und Zum Internationalen Kapitalmarktrecht* (Mohr Siebeck 1998).

The Swiss *Partizipationsscheine* (art 656a, Swiss Code of obligations) are similar to the German securities, even if some amendments introduced in 2020 allow minor administrative rights to be attached to these securities if the articles so state (but never the voting rights: art 656c, Swiss code of obligations) However, the *Partizipationsscheine* holders can have a representative on the board of directors, if this possibility is stated in the articles (art 656e, Swiss Code of obligations). Nevertheless, in this case contributions and separate capital are always needed (art 656a, Swiss code of obligations). Cf, recently, but mainly on cooperatives: Adriano R Huber and Hans Caspar von der Crone, 'Zulässigkeit von Partizipationsscheinen bei Genossenschaften Entscheid des Schweizerischen Bundesgerichts 4A_363/2013 vom 28. April 2014 i.S. Eidgenössisches Amt für das Handelsregister gegen Genossenschaft X' (2014) Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht 445.

Moving to hybrid securities awarding other administrative rights, the French *parts de fondateur* or *parts bénéficiaires* (*Loi du 23 janvier 1929 sur les parts de fondateur émises par les sociétés*) and the Belgian *parts bénéficiaires* (arts 7:58 ss of the *Code des sociétés et des associations*) are especially interesting.

impacting on the company than internalising the external constituencies as shareholders, even if once again everything depends on the actual set of rights the securities would confer on their owners.

As the financial instruments here considered are defined as hybrid, they cannot be unambiguously described in all-embracing terms, as is possible to a larger extent for shares and bonds. Just to have a general idea, in the best interest of the exposition, we can affirm that hybrid financial instruments are securities that incorporate a series of rights that usually only the shareholders/members are given, even if these securities are not representative of a part of the company's share capital – and therefore are not shares (or membership interests, in the case of private companies[89]) and do not grant their owners the qualification of members, properly speaking.

The key factor in this respect is that the hybrid security holders are given rights that usually only shareholders are granted, without making a capital contribution to the company. Again, everything depends on the applicable

Like the German and the Swiss *Scheine*, these *parts* can grant financial participative rights. Furthermore, the French *parts de fondateur* award the holders some specific information rights that are as comprehensive as that of the shareholders (art 11, *Loi 23 janvier 1929*), but no right to vote with the shareholders. They can only vote in the separate meeting (art 6).

As for the Belgian *parts bénéficiaires* they can have voting rights (in listed companies no more than one vote per security: art 7:58 *Code des sociétés et des associations*), provided that they do not exceed, considered as a whole, the 50% of the voting rights awarded to shareholders, nor can they exceed this limit in the course of a given meeting (and if they do, the excess has to be reduced proportionally).

Very similar securities are also present in Luxembourg Company law, also under the denomination of *parts bénéficiaires*: cf arts 430-1 (*Société anonyme*), 710-5 (*Société à responsabilité limitée*), 812-9 (*Société coopérative*) of the *Loi du 10 août 1915, concernant les sociétés commerciales*. In all these cases, the articles are free to determine the content of these securities. See Jacques Graas, 'Les parts bénéficiaires en droit luxembourgeois' in *Mélanges offerts en l'honneur du professeur Michel Germain* (LexisNexis 2015).

[89] We mean for membership interests, for instance, in Italian s.r.l.: *quota di partecipazione* (even if the most recent legislative developments lead to the conclusion that the Italian *quote* are far closer to *azioni* – shares – than they used to be); in German GmbH: *Geschäftsanteil*; in Spanish SL: *participación social*; in Portuguese SQ, *quota*; in French SàRL: *part social*; in Polish Sp.zo.o.: *udzialu*. The common feature is the fact that in these organizations, each member is the owner of just one membership interest, irrespective of the amount of participation they hold, as the membership interests do not have a standard par value as shares do. For instance: a 30% shareholder in a public company owns 30% of the outstanding shares; a 30% member in a private company without shares owns one membership interest corresponding to 30% of the company's capital and rights.

national legislation, but in general terms we can observe that, theoretically speaking, there is not even the need for an asset contribution to the company's patrimony, as we are about to observe.

As the concept of hybrid security is, by definition, at least blurred, it is important to clarify what we mean by hybrid security in this essay, i.e.: financial instruments *not* issued against a *share capital contribution*. If they were, the securities would be classified as *shares* – or membership interests for those private companies where there is no share issuance pursuant to the applicable law. This means that, from the financial point of view, the instruments we are considering might be issued against either an equity (but not share capital) contribution, which would be irredeemable; or a debenture, whose terms (in particular amount and time for the payment of the interest and the payback of the loan) might be either pre-determined, or variable, for instance, linked to the company's performances.

If an equity contribution is required pursuant to the applicable domestic legal framework,[90] then in general terms it will not be subject to the rules laid down for capital contributions, not even for joint-stock companies indirectly subject to European company law rules. In fact, the effectiveness of the share capital is not at stake here, and this effectiveness is the main ground for the European norms on contributions to capital.[91] If this is true, the "price" for the (issuance by the company and) acquisition of a hybrid security by one or more stakeholders does not encounter strict legal boundaries. The company might possibly receive from the stakeholder any kind of asset, also including the possibility of performing work or providing services;[92] as specific legal provisions in these circumstances are in most cases lacking, we can argue that the provided assets – both material and immaterial – will not necessarily

[90] In this respect, we must declare that in this paragraph we mainly consider the framework for hybrid financial instruments present in Italian Company Law, using it – and its interpretation offered by the Italian literature – as a sort of benchmark for a general idea of hybrid securities.

[91] For instance, Directive (EU) 2017/1132, art 49: see Jan P Brosius, 'Art. 49' in Kindler and Lieder (n 64) 246, 247.

[92] As for Luxembourg, see Alain Steichen, *Précis de droit des sociétés* (5th edn, Editions Saint Paul 2017) 558. For Italy, explicitly art 2346, para 6, Italian Civil Code, and Alessio Bartolacelli, *La partecipazione non azionaria nella s.p.a.* (Giuffrè 2012) 153.

We have already underlined the role of hybrid securities with a view to the entrance of external constituencies within the company in Alessio Bartolacelli, 'The Unsuccessful Pursuit for Sustainability in Italian Business Law' in Sjåfjell and Bruner (n 1) 300 n 70.

have to be capable of an economic assessment.[93] And, naturally, the same remarks are *a fortiori* applicable in case of hybrid securities issued against a debenture.

Therefore, we might reason that if an asset not capable of an economic assessment can be lawfully supplied to the company against the issuance of hybrid securities, there would be no reason for preventing such an issuance against no contribution at all, economically speaking – naturally where the applicable national law allows it.[94] In fact, even if it is true that – paying due respect to the continental theories, which emphasise the need for an exchange of economic utilities in establishing the shareholding relationship[95] – in this case there would be no synallagmatic/exchange relationship between the increase in company's assets and the issuance of the hybrid security, it must also be pointed out that the situation is the same as when a contributed asset is present, but it is not capable of economic assessment. In these cases, the acquisition of the security by the stakeholders is simply not to be seen as an exchange (contributed asset against security), but essentially as a donation.[96]

[93] This applies to public companies, but even more to private ones, as the European rules on the effectiveness of the share capital are only applicable to the former.

[94] This reasoning is in line with the previous observation that the expectations and interests of the shareholders are not necessarily just patrimonial: see above, n 46. If the shareholders/members can have a non-patrimonial interest that leads to admitting the non-maximization of their own profits, they might also accept letting the stakeholders' representative into the governance structure essentially free of charge.

[95] See, for instance, the approach adopted by Stefan Grundmann, *European Company Law* (2nd edn, Intersentia, 2012) 218 ff.

[96] Again, from the financial point of view, the hybrid securities might have very different features. They could embed a right to payback, partially or entirely, conditioned or complete, as the bonds do or, on the contrary, they might be structured as irredeemable financial instruments, with no duty on the company to pay back the contributing party. Or again, as we have just observed, there might be hybrid instruments issued "for free" by the company.

Regarding the concept of donation, a couple of words are perhaps useful now, even if this topic will be discussed again in the text. A company's directors are undoubtably entitled to donate company assets (money or in kind) to third parties in their managerial capacity; they will possibly have a liability for that, exactly as they have for any other act of management. The donation we are referring to here, on the contrary, cannot be decided by the directors, as the "donated" hybrid instruments incorporate rights that might even have a reductional impact on the shareholders' rights. For this reason, it seems appropriate to think that this act should nevertheless be decided by the shareholders. Naturally, they might decide to delegate the decision to the directors, but the natural area of competence for the issuance

This being the general framework, these instruments might be issued by the company to certain stakeholders, for instance just against their specific expertise on one or more areas of sustainability,[97] with a view to the assumption that internalising them in the company, awarding them with a certain set of rights – which is definitely the most relevant substantive aspect – might be a valuable asset for the company, without the possible downfalls present when the stakeholders also acquire the qualification of members.[98] However, this solution might be preferable from the stakeholders' point of view, too; in fact, by getting hybrid securities, they might have a set of rights hypothetically similar to those that they would have as shareholders, but with no need to make a contribution to the company's capital in order to acquire the shares and becoming fully fledged shareholders.

Naturally, this reasoning implies that the hybrid securities considered here confer a meaningful set of rights on their owners; this profile is the most interesting feature linked to hybrid securities when it comes to corporate governance. These rights are usually financial and/or administrative. As far as this essay is concerned, the financial rights do not seem to be extremely relevant; actually, besides the right to the payback, they can also deal with the interest rate to be paid to the contribution paid for the instrument as a loan,[99] which might be fixed or depend on the company's revenues, for in-

is that of the shareholders. This is also mirrored by some national provisions, for instance Belgium (art 7:155, Code des sociétés et des associations: 'L'assemblée générale peut, (…) approuver l'émission de nouvelles classes d'actions ou de parts bénéficiaires'); Swiss (art 656a, Swiss Code of obligations: 'The articles of association may provide for participation capital divided into specific amounts (participation certificates)'). In Italy, the Law does not provide for a clear solution, but the Authors agree that the competence for the issuance lies with the shareholders: Bartolacelli (n 92) 147 ff. and below in this paragraph.

[97] Again, we mean here, ideally, organizations representing one or more categories of stakeholders. See above, n 77.

[98] See above, the immediately previous paragraph.

[99] In fact, as we have already pointed out, given the extreme diversity of their content the securities we are now considering might have a very different regime of redemption of the contributions, if any. Should they be subject to return, they will be normally accounted for as loans; if not, they might be considered equity. These aspects are theoretically speaking detached from the rights incorporated in the security: in other words, we might have both debt and equity hybrid securities awarding their owners the same administrative rights. The case we are referring to in the text deals with debt hybrid securities, also present for instance in Italian Law (art 2411, para 3, Italian Civil Code), but very similar to the German *Genußscheine* (above, n 88).

stance; or to the fact that the hybrid security owners might benefit from the company's profits along with the members, on the basis of a specific rate to be agreed as of the issuance of the securities.

However, administrative rights are far more interesting. Once again, everything is dependent on the boundaries that national legislations might impose on these hybrid securities. In fact, the inherent risk is that if the hybrid securities grant too many administrative rights to their owners, the latter might become, or at least be considered as the ultimate owners of the company, and this would be the case even if they had made no contribution to the capital, as we have just observed. Although there are no legal boundaries,[100] the interpreters should nevertheless avert the risk of this type of hidden external control by means of a restrictive exegesis of the financial instrument.[101]

Besides this specific issue, the administrative rights incorporated in the hybrid securities might have the same nature as those already considered for the specific class of shares, and therefore deal with increased information rights, or special voting rights, or again the appointment of members of the audit or boards of directors.

In this matter, the Italian company law reform back in 2004 was a front-runner,[102] and also served, for comparative purposes, as the reference for the

[100] We might, for instance, refer to the cases of domination agreements present in German company law, which allow a party external to a given company to exert a dominating influence on that company. Based on this situation, we might infer that the external party could be considered the ultimate "owner" of the company, despite not being a shareholder. We must nevertheless underline that these kinds of agreements have strong countermeasures to protect the shareholders and create what is called an enterprise agreement, giving birth to a *Konzern* (group). See Andreas Cahn and David C Donald, *Comparative Company Law* (2nd edn, OUP 2018) 835 ff. and Jan Lieder, 'Groups of companies', in Vicari and Schall (n 49) 387 f. It is, however, highly debatable whether this outcome might be achieved by means of hybrid securities.

[101] See, for instance, the Belgian rule on the voting cap already referred to (above, n 88); or the Italian rule which states that the owners of *strumenti finanziari partecipativi* are entitled to 'vote on topics specifically identified' (and therefore not on any topic, as the shareholders can) and to appoint 'one independent member of the board of directors, or of the supervisory board, or of the board of auditors' (art 2351, para 5, Italian Civil Code). See Bartolacelli (n 92) 249 ff.

[102] If we consider the European panorama we have outlined above (n 88), Italian hybrid securities combined patrimonial and administrative aspects in rather an original way, even if the regulation is probably too confused and is therefore likely to lead to uncertainty, also in the courts. Probably for this reason, this legal instrument has so far not been used a great deal.

relevant section of the EMCA proposal.[103] If we consider the regulation of hybrid securities that Italian public companies are entitled to issue,[104] the security holders have just a few meaningful limitations. The securities may grant voting rights, but not in the general meeting of the shareholders,[105] and in any case just on selected and specific topics, as we have already pointed out;[106] and they can designate an *independent* member of the auditors' committee, or of the board of directors. Evidently, these limits are intended to prevent the security holders from predominating over the shareholders in the company's top management.

They are nevertheless interesting to the specific extent considered here: the stakeholders might be given limited voting rights just on selected topics and might have more insightful monitoring rights on the company's management by means of the auditor or the director whose appointment is reserved to them,[107] or even through different and direct mechanisms to be carefully detailed in the company's documents.

[103] See above, n 23.

[104] However, also some private companies in the field of innovation (innovative start-ups and incubators for start-ups, both incorporated as s.r.l., i.e.: Italian private companies) have been given the possibility to issue *strumenti finanziari partecipativi*: cf art 26, dl 18 ottobre 2012, n 179 'Ulteriori misure urgenti per la crescita del Paese'.

[105] The provision is rather obscure in its *ratio*, and the literature is not unanimous in the interpretation. In our personal belief, and even if this is apparently against the black letter of the law, the prohibition to vote in the general meeting means that the hybrid securities cannot grant their holders the right to vote on all the subjects that the shareholders have the right to vote on. On the selected topic they are entitled to vote for, the security holders' votes should be computed along with those of the shareholders', on the basis of a rate to be established as of the issuance of securities. Cf Bartolacelli (n 92) 251, where the reader can also find bibliographic references on the opposing opinion. Benedetti (n 45) paragraph 11 argues that hybrid securities holders might be granted the right to authorise some directors' operations.

[106] Above, n 102.

[107] According to Italian law, however, the appointment of either a director or an auditor is to be intended as an alternative, and, even more important, is permitted for *all* hybrid security owners: if the company issues more hybrid securities, all entitling their owners to appoint either a director or an auditor, and, for instance, only some of them are addressed to the selected stakeholders, the latter will have to negotiate with the other entitled parties the nomination of a single auditor or director, to be jointly appointed according to the rules laid down in the articles. This means that, if more hybrid securities, or classes of hybrid securities, are issued, these limits are to be read as to be applied to all the hybrid financial instruments jointly. Cf Bartolacelli (n 92) 262 ff.

A last but extremely relevant topic deals with the entitlement to issue the hybrid securities, i.e. the company body having the competence to create them. Of course, the possible options are that these hybrid securities might be issued either by the directors – in principle by means of a decision by the board – or by the shareholders – with a resolution by the general meeting.

Of course, the applicable national legislation is sovereign in defining the body entitled to issue the securities; in general, however, it is dependent on the very nature of these financial instruments. In fact, if their issuance is considered as a "normal" managerial activity, then the capacity should lie with the directors; if, on the contrary, we focus on the fact that the rights granted by these securities to their owners are in concurrence with those the shareholders are given, then it is much more reasonable to argue that the capacity for the issuance should also lie with the shareholders.

In our opinion, the latter argumentation is by far preferable.[108] In fact, the general assumption behind the whole reconstruction is that the decision to somehow include the stakeholders in the company's governance – although with different rights and degrees of actual impact – must be made by the shareholders, in their capacity as residual claimants from the financial point of view, and as the party at least primarily entitled to make the key foundational decisions from the administrative side. This being the case, when the hybrid securities are equipped with rights that usually belong to the shareholders – information, voting, appointment of directors – or when their rights are likely to have an impact on those that the shareholders are

From a dynamic point of view, this might even become detrimental to the stakeholders, if the company decides, at a given moment, to reduce their influence within the company. Let us assume that originally only the stakeholders had been given the right to subscribe hybrid securities issued by the company and granted the right to appoint a director; and that, at a later stage, the company issues more classes of hybrid securities, equally entitling their owners to designate a director. Originally, the stakeholders were the only party entitled to appoint the member of the board, while later this competence is shared with the owners of the newly issued securities. The later issuance, actually, might be decided and enacted by the company with the specific purpose of reducing the stakeholders' influence over the company, and it might be debatable whether this should be possible without the specific consent of the pre-existing security holders. Under Italian Law, the hybrid security owners have the right to approve or reject, in a special meeting, those resolutions taken in the shareholders' general meetings that are causing damage to the hybrid security holders; this rule is likely to serve as a guarantee for the stakeholders not to have their position diluted without their agreement. Cf art 2376, Italian Civil Code.

[108] Bartolacelli (n 92) 145 ff., spec. 151-152.

granted, like a veto right on some decisions, then it is fairly obvious that this substantive restriction of the shareholders' prerogatives can only be agreed by the shareholders themselves. They are therefore entitled not only to issue the securities, but naturally to also define the set of rights embedded in them, thus making a determining decision on the actual allocation of the decisional powers distributed between the parties, i.e.: shareholders and hybrid security holders.

This, at least, should be the default rule. It looks nevertheless possible to have a delegation of powers from the shareholders to the directors, certainly with respect to the issuance of the hybrid securities, in accordance with the same rules in force regarding the possibility to delegate the issuance of new shares on the occasion of a capital increase,[109] and with the – advisable – possibility of setting a time and quantity-related limitation. On the contrary, considering the wide range of powers that the owners of hybrid securities might be granted, it does not seem possible for the shareholders to completely delegate to the directors the power to actually define the content of these financial instruments. If the directors had this capability, they might be in the position to issue hybrid financial instruments, distributing them to parties of their choice and trust and by this means obtaining the power to control some decisions that should belong to the shareholders, de facto expropriating them of some of their prerogatives.[110]

4.3. *And what about bonds?*

We have so far considered capital and quasi-capital instruments (or, more properly, shares and quasi-shares); is it possible to imagine forms of stakeholder-linked governance when dealing with merely debt instruments, such as bonds?[111]

[109] See Directive (EU) 2017/1132, art 68(2), as far as public companies are concerned. For a commentary: Brosius (n 64) 334 and 338.

[110] Such a statement should nevertheless be investigated more in depth with reference to those jurisdictions where the possibility for an external control, not based on shareholding, is present, for instance the so-called domination contract (*Beherrschungsvertrag*, cf § 308 AktG) in German company law, as already referred above at n 100.

[111] Again, for the sake of clarity, we must remind that the hybrid securities we have just discussed might be structured, financially speaking, as bonds too. The bonds we are discussing in this paragraph, however, are those that do not grant their holders any specific administrative right.

In classical company law terms, for a company that is not insolvent or likely to be declared insolvent shortly, the answer is negative, as the creditors, as bond holders of course are, do not have any specific power in the area of a company's governance.[112] Again, the development of solutions in the field of sustainability with respect to debt instruments also makes for an interesting reflection on this hypothesis.

We can consider in particular the green-, sustainability-, and sustainability-linked bonds. Their key features are quite well known, and therefore an in-depth description is not needed here.[113] We just need to point out that the general applicable framework is that we should distinguish between green and sustainability bonds on the one hand, and the sustainability-linked bonds, on the other.[114]

As for the former, the green and/or social aspects are to be taken into consideration in the use of the proceeds from the bonds.[115] The company commits to using the funding underlying the issuance of the bonds for green, social and/or governance activities, within a specific framework. This should ensure the adherence of the actual activities to the original project,

[112] Except the right to appoint their joint representative who, in some jurisdictions, has the right to be present during the shareholders' meetings. See, for instance, art 2418, Italian Civil Code. Cf also Vicari (n 36) 142-143. Naturally, the situation might be dramatically different in case of crisis of the enterprise, but this essay cannot focus on this specific aspect. But see Benedetti (n 45) paragraph 12 extensively on lender governance.

[113] Cf Stephen Kim Park, 'Green Bonds and Beyond: Debt Financing as Sustainability Driver' in Sjåfjell and Bruner (n 1) 596; Gino Beteta Vejarano and Laurens Swinkels, 'Social, Sustainability, and Sustainability-Linked Bonds' (2024) 4 Journal of Impact & ESG Investing 71; Dorothy S Lund, 'Corporate Finance for Social Good' (2021) 121 Colum. L. Rev. 1617.

[114] At the European level, the most relevant policy document is certainly the European Commission's Action Plan: Financing Sustainable Growth issued in March 2018. Subsequently, the European Union has focused more intensively on the Green bonds, first with the European Green Deal (December 2019), then with the EU Taxonomy on green activities (Taxonomy Regulation) and its implementing acts, and finally with the Regulation (EU) 2023/2631 of 22 November 2023 on European Green Bonds and optional disclosures for bonds marketed as environmentally sustainable and for sustainability-linked bonds (EU Green Bond Standards) [2023].

[115] For Green Bonds, see EU Green Bond Standards, Recital 11: 'Proceeds of bonds that use the designation "European Green Bond" or "EuGB" should be allocated to economic activities that are either environmentally sustainable, and therefore aligned with the environmental objectives set out in the Taxonomy Regulation, or that contribute to the transformation of activities so that they can fulfil the criteria in order to become environmentally sustainable'.

to assure the founders that their money has really been used to pursue sustainable activities.[116]

The sustainability-linked bonds operate in a different way: the proceeds do not have to be used directly for sustainable activities. They serve to improve the company's general degree of sustainability, to be measured using some Key Performance Indicators that must be improved in a given timespan.[117]

The difference between the two approaches is quite clear. The former does not imply, per se, a general commitment towards sustainability by the issuing organisation; what is sufficient is that the company uses the proceeds of the bonds for developing green and/or social aspects of its business. This means that all the remaining activities carried out by that company do not need to be qualifiable as "sustainable": the focus is only on the line of business, and even more so on the activities themselves that are realized utilizing the proceeds.[118]

The latter approach has perhaps a less visible impact in the short run, but is more efficient in the long term: there are no specific and precise requirements when it comes to the actual destination of the proceeds, but the idea is that they must be used to allow the company to improve in a meaningful way some key performance indicators that the company itself defines

[116] For instance, with reference to the European rules, with a system of internal control and disclosure of the issuer by means of a specific report, and an external review: cf arts 11, 12, 22 ff., Annex IV (on the content of the reviews) EU Green Bonds Standards.

[117] In this respect, the European rules are only partial. Despite its official denomination, the EU Green Bond Standards considers sustainability-linked bonds only from the environmental standpoint: cf Recital 9: 'Since this Regulation covers only environmental sustainability, the definition of sustainability-linked bonds for the purposes of this Regulation should include only bonds whose financial or structural characteristics vary depending on whether the issuer achieves predefined environmental sustainability objectives'.

A more comprehensive standard-setting is supplied by the International Capital Markets Association (IMCA), which issued and regularly updates Guidelines and Principles for Green Bonds, Social Bonds, Sustainability Bonds and Sustainability-Linked Bonds: 'The Principles & related guidance' (*International Capital Market Association*) <https://www.icmagroup.org/sustainable-finance/the-principles-guidelines-and-handbooks/> accessed 28 January 2025. However, it must be underlined that the general principles of the EU Green Bond Standards are largely aligned with the IMCA documents.

[118] This is the reason for the focus used by the EU in drafting a detailed Taxonomy (above, n 114), with even more detailed delegated acts for its implementation, which include the list of the activities held as environmentally sustainable, and that therefore can be funded by the proceeds.

upon issuance of the bonds.[119] It also determines the consequences in case of non-compliance. By using these financial instruments, then, the company should generally enhance its sustainability rating by deploying the proceeds for self-improvement in different sectors and carrying out internal activities with a measurable impact.

As we have already anticipated, we are not going to give an in-depth description here of the process behind the functioning of these bonds, nor the aspects linked to the need to prevent green- and social- washing malpractices. What seems rather interesting is to contemplate whether an issuing company might develop some internal mechanisms in its governance systems to promote a better achievement of the goals envisaged by the bonds.

In principle, even in the most demanding of the hypotheses, i.e. sustainability-linked bonds, there is not a specific requirement for the appointment of a special body within the company to be in charge of the enactment of the activities required by the bonds.[120] Nevertheless, there is naturally no prohibition regarding this possibility either. Therefore, a company is free to designate an internal body to be in charge of activities linked to the issued bonds, and this might even have positive reputational outcomes, as this company could be seen as more trustworthy and reliable when it comes to the actual enactment of the sustainability performance improvement by the prospective bond subscribers.[121]

[119] Of course, the key aspect to take into consideration is the freedom to set down the indicators. The IMCA's 'Sustainability-Linked Bond Principles. Voluntary Process Guidelines' (June 2024), 3 specify a series of requirements for the KPIs (relevant, core and material to the corporate issuer's overall business; consistent with the overall issuer's sustainability strategy or policies; measurable; externally verifiable, able to be benchmarked), and the IMCA's website itself supplies an Illustrative KPIs Registry ('Sustainability-Linked Bond Principles (SLBP)' (*International Capital Market Association*) <https://www.icmagroup.org/sustainable-finance/the-principles-guidelines-and-handbooks/sustainability-linked-bond-principles-slbp/> accessed 28 January 2025). However, the adoption of such standards by the corporate issuer is voluntary, so there is no certainty that the issuer will actually follow these principles in defining the KPIs.

Regarding the Sustainability-Linked Bonds and in particular their environmental positive fallout, see: Gregor Vulturius, Aaron Maltais and Kristina Forsbacka, 'Sustainability-linked bonds – their potential to promote issuers' transition to net-zero emissions and future research directions' (2024) 14 Journal of Sustainable Finance & Investment 116.

[120] As it might be the benefit officer (above, n 82) or the benefit director (above, n 56) in a benefit corporation.

[121] Actually, another possibility for involving the stakeholders is to let them enter the body responsible for the external reviewer who in turn is in charge of the assessment of the

Nevertheless a few additional features need to be pointed out, at least with reference to the nature and qualification of these internal bodies, and their actual powers.

As for the qualification of the internal body and its members, in principle it is debatable if they can be directors. Once again, we must point out that the rules might diverge significantly across different jurisdictions; therefore, the discussion here is intended mainly as a normative reflection. In fact, usually the directors have the competence for issuing bonds;[122] if we argue that the internal monitoring body, including stakeholders' representatives, should be made up of directors, these stakeholders' representatives should be appointed as directors after the bond issuance, unless in the marginal case they are already directors at that time. When it comes to the appointment of the members of the new body we are envisaging, however, we must distinguish whether they should be directors themselves, or not. In the former case, it must be pointed out that the existing directors do not always have the power to appoint new ones; this very much depends on the applicable domestic legislation, which in some cases allows co-opted directors.[123] In any case, pursuant to the general approach we have adopted, the decisions regarding sustainability and that have an impact on the governance structure of the company should be decided by the shareholders, and not autonomously by the directors. Nevertheless, when discussing the case of bonds, most of the decisions are in the hands of the directors. The directors make the decision to issue the bonds, and the actual type of bonds; the directors oversee the management of the proceeds; the directors have to take care of the separate accounts relating to the sustainable activities to be undertaken, and so on. The role of the shareholders, in this case, is minimal. They might, for instance, give the directors instructions – either embedded in the articles, or during the general meeting, or even in a more informal way –, to "suggest" that they issue sustainably targeted bonds; however, as these

bonds via a pre-issuance review of the factsheet and a post-issuance review of the allocation (Cf EU Green Bond Standards, Recital 23). However, on the one hand, this is not in the power of the issuer, as the external reviewer is independent; and on the other, this does not deal with the internal governance of the issuer, and therefore this possibility is outside the scope of this Chapter.

[122] Vicari (n 36) 141.

[123] Whose efficiency in terms of monitoring is rather debated: Jeffrey L Coles, Naveen D Daniel and Lalitha Naveen, 'Co-opted Boards' (2014) 27 Review of Financial Studies 1751.

instructions are not always to be held as binding,[124] the final word on the financing strategy generally belongs to directors: they can decide whether to issue bonds, what kind of bonds, what kind of activities are to be performed with the proceeds, and so on. In this general framework, the directors are also free to decide whether they want to manage the entire project related to the bonds on their own, or if they would prefer to have one or more professionals devoted explicitly to the implementation of the activities required by the bonds.

This being the case, besides those very limited hypotheses where the directors can and want to include one or more newly co-opted colleagues for this management, the officers in charge of these activities are not directors. They might form an informal body – such as an advisory committee – with the specific function of advising the board, which has the main – or exclusive – competence for the management of the company and its financial resources.

The selection of these professionals is naturally among the functions of the directors; however, again nothing prevents them from implementing systems that permit the designation to be (at least partially) made by those selected stakeholders that would benefit most from the sustainable activities the company is held to implement within the bond-issuance framework. The directors will have in this case the specific duty to define how such a designation should take place; if it is directly enacted by the stakeholders, or – as seems far preferable, also with a view to possible liability issues – if the latter only propose names to be actually appointed to the task by the directors; how these advisors communicate with the board of directors; and so on. The most relevant aspect, however, is the set of rights and powers invested in the members of such a body.[125]

[124] Binding instructions are possible, in some jurisdictions for instance in German Law, with a specific consideration in the case of groups of companies: see Adrian FM Dorresteijn and others, *European Corporate Law* (3rd edn, Wolters Kluwer 2017) 198, 336; for a similar case in Dutch Law, Vicari (n 36) 178, who also emphasizes this possibility in the company laws of Nordic Countries, even when groups are not concerned (86). The EMCA also follows this line of reasoning: see s 15.09.

For the opposite approach, denying the shareholder's possibility to give binding instructions to the directors, see the Polish approach, as mentioned by Vicari (n 36) 87 f.

[125] Even if we are here generically referring to a "body", it must nevertheless be clear that it might also be just one advisor/officer. More professionals are likely to be useful in those cases where more stakeholders of different nature are involved in the implementation of the activities linked to the bonds, and a specific committee might serve as a place for the discussion for a joint strategy among them and the settling of divergent opinions. See Benedetti (n 45) paragraph 11; Cian (n 60).

Again, as these officers in most cases are not directors, it is not possible to argue that they will be in charge of the actual implementation of the general or specific projects that the proceeds of the bonds should fund. If the company's management is in the hands of the directors, then the management of these proceeds will also be their duty. At the same time, we cannot deny that if the directors oversee the management, they can however rely on the company's higher-ranking employees to have their decisions transposed into actual management activities. Therefore, the company might take advantage of the issuance of target bonds to establish a sustainability committee, whose members might be appointed by either the directors only, or by the directors on recommendation of the interested stakeholders. This committee is specifically intended to implement and monitor the activities the proceeds of the bonds must be used for.[126]

Even if in this case there is not a direct, in-depth impact by the stakeholders in the company's governance, we have just observed that they can nevertheless be given – either directly or indirectly – specific powers dealing with the implementation of the company's activities from which they are supposed to benefit (i.e.: those linked to the use of the proceeds of the bonds)[127]. However, also in this case, the ability to have a greater or lesser

[126] Naturally, the fact that the company decides to issue target bonds is not a necessary precondition for the establishment of a special body like the one envisaged here. A committee, or a designated officer, might be appointed by a company at any time, as a way of indicating its specific commitment in the field of sustainability. In this case, however, there is a meaningful risk that its possible scope of activity is so broad that it prevents it from exercising truly pervasive powers within the company. On the contrary, if the body is in charge of the implementation/monitoring of a series of precisely defined activities – i.e.: those connected with the target bonds – then the ability to effectively affect the company's line of action most favourable to the interested stakeholders seems much more likely.

Regarding sustainability committees and their effectiveness, see Chow Kah Yong, Ervina Alfan and Mohd Zulkhairi Mustapha, 'Sustainability Committee And Environmental, Social And Governance (ESG): A Systematic Literature Review' (2024) 25 International Journal of Business and Society 484.

[127] The identification of the most appropriate stakeholders will be easier for the green bonds, as the underlying interests appear to be fairly homogeneous and comprehensible *ex ante*. In the case of the sustainability-linked bonds (but perhaps also of the social bonds, albeit for different reasons), the identification should very much depend on the key performance indicators the company intends to consider, as only once they have been clarified, do the most appropriate stakeholders become discernible. The fact that the KPI are to be clearly stated before the issuance should be a help in this detection.

impact on the company depends on the set of rights and powers the newly designated body is given; and even before this, also on whether the stakeholders are actually given a right of say on the designation of the members of the body when the appointment is made by the directors alone, as would be completely acceptable in principle. The most significant difference that we are facing in this case, when comparing this situation to those previously considered, is that here the possibility to have a director appointed by the stakeholders is far more marginal. In addition, this body, if appointed, would have *ad hoc* functions, limited to advising on the implementation of the activities required by the nature of the bonds. In principle, if the company issues sustainability-linked bonds, whose function is to enhance the sustainability of the company overall, the powers granted to the designated body will be broader than those when green-, social- or sustainability- bonds are issued, as sustainability-linked bonds should have a broader impact on the enterprise considered overall.

The points made above, however, are valid only in principle. In fact, once again the key aspect to consider is the set of rights and powers that these stakeholder representatives might be given. And, again, the difference that we have here is that this set of rights and powers is in this case defined not by the shareholders, but by the directors, as an act of management.

From a general point of view, this last circumstance is likely to prevent a widespread diffusion of such a practice, for several reasons.

On the one hand, the establishment of a new – and, after all, not-absolutely-necessary – corporate body would entail higher costs, both in economic and internal regulatory terms.[128]

On the other hand, this newly established body might not be always aligned with the directors' ideas; this would then trigger conflicting goals in the management that would not be desirable.[129]

[128] Not absolutely necessary in the sense that, as we have already pointed out, there is no regulation that requires this body to be created. The decision for its establishment, therefore, like any other managerial resolution should be made on the basis of a balance between the costs to bear and the possible advantages deriving from this choice.

[129] Or, on the contrary, the members of the committee might always be in line with the directors, de facto abdicating their very function (which is also the risk of the co-opted directorship: see above, n 123). Even if this circumstance does not imply managerial conflicts, it does not seem to be less undesirable than the one mentioned in the text above, as the committee would in this case be just a drain on resources, without an appreciable promotional function, and de facto (self-)legitimizing the management.

In addition, we have already observed that the appointment of the committee, and the definition of its members' powers, are a competence of the directors; this means that the latter will also be liable for the establishment of this body if it causes damage to the company. Of course, the creation of the advisory body lies among the organisational powers held by the directors; however, such powers are to be assessed according to the business judgment rule. In other words, if having a sustainability advisory committee is unreasonable or illogical, or if the powers the members of such a committee are given are deemed to be so, the directors will be held liable. This reasonability assessment should be performed by the judge with an ex ante prognostic reasoning; nevertheless, due to the broad range of vicissitudes that might affect the company in the field of sustainability,[130] this does not always seem to be simple, and might increase the possibility of holding the directors liable in some blurred situations. If this is true, the above-mentioned circumstance might be the toughest obstacle to the creation of sustainability advisory committees by a company's board of directors.

5. *Conclusions*

In this essay, we have observed how stakeholders might be incorporated within a company using different financial instruments. If we see the company as a technique for systematically collecting financial means to conduct a business activity, it is perfectly understandable that the involvement of the stakeholders can arise by means of the organisation's financial structure and its impact on the governance. This stakeholder involvement will hopefully lead to a more direct and visible impact on sustainability.

We have highlighted that the actual manner and measure of the stakeholders' involvement in the governance can only be decided by the shareholders when this involvement is likely to have a meaningful impact on the company's governance, and above all when the stakeholders are entitled to appoint one or more directors.

[130] This is also due to the uncertainty of the definition of sustainability itself, and all its related fallouts. For instance, possible scientific discoveries might have oriented the activity of the committee differently if they had been known when the decision was made. This chronological circumstance should be evaluated in the trial, but the assessment is not always very straightforward.

The stakeholders' involvement can be designed according to a wide range of pervasiveness, which closely reflects the type of financial commitment made by the stakeholders.

When both they and the shareholders agree on the most potentially systematic way of interpenetration of stakeholder interests in the structure of the company, the former may be allowed to enter the organisation as shareholders by being given shares. Ideally, these shares would belong to a specific class thus allowing the stakeholders to have some administrative rights in the company. The pre-existing shareholders will have the opportunity to clearly define the set of rights the stakeholders will be granted. These can range from mere information to an active cooperation in the management. In this case, however, as a general rule – subject to some possible exceptions – the stakeholders should be willing to contribute assets to the company capital, this being the formal condition of compliance to become shareholders. This circumstance, however, might not always be welcome to the stakeholders' internal constituencies, who might be preoccupied by the overstrong boundary between them and the company, and by the possibility of a company's eventual insolvency, leading to the risk of losing the contributed assets.

The intermediate form of participation takes place by means of hybrid financial instruments, where such securities are allowed in the legal framework of the domestic company. The set of rights the stakeholders might be granted is again freely definable by the shareholders, but for the stakeholders this solution has the advantage that they are not necessarily called upon to have a financial participation in the company's equity, and therefore their risk might be minimised in case of a company's insolvency. The downside, however, is that as the hybrid instrument holders are not shareholders, the set of rights they are given might be limited, not just by the shareholders, but also by the domestic lawmaker to prevent them from substantially replacing the members as the ultimate decision makers in the company, which is not acceptable in principle. This solution might nevertheless be welcomed by the shareholders, as they could in this way include the stakeholders in the governance, without sharing their shareholding status with them, with the obvious consequences in terms of the company's hierarchy.

The final hypothesis of participation, the most undemanding one, regards the issuance of target bonds or debt securities by the company; in this case, the stakeholders might have an advisory or monitoring function, cooperating with the board of directors in the implementation of the activities for which the proceeds of the bonds must be used. Naturally, in this

last hypothesis the stakeholders' impact would be limited to those activities linked to the bond issuances, with extremely little room to have an impact on the sustainability of the remaining activities carried out by the company; hypothetically, they would operate within an optional and new internal body, whose competences must be defined by the directors. In this last case, we have observed that not only might the role of the stakeholders be definitely narrower than in the cases previously referred to, but also that of the shareholders, as they would have limited or even no weight in the decision of embedding the stakeholders in the company structure.

As is fairly evident, the set of possibilities described here is just a rough sample. Even so, the potentially limitless range of nuances of the rights the stakeholders might be awarded, and therefore the degree of their internal involvement within the company, makes it possible to design a perfectly tailor-made participation of the stakeholders in the company's governance, even without having them as the "leaders" of the company, which would be completely undesirable in general terms.

In fact, the entire scenario depicted here is subject to the preliminary remark that the final word must always be that of the shareholders who shall always have the possibility to decide the key elements of the involvement. The exception is for the target bonds, which is however the most undemanding of the hypotheses considered.

The key elements include the identification of the relevant stakeholders, by what means they should represent the sustainability commitment that the company wants to carry out, whether they have or do not have the capability to enter the company management, to what extent the shareholders/members are available to share a part of their own decision-making power with the stakeholders, and therefore what kind of rights the stakeholders should be given, and so on. The actual definition of each of these aspects is going to be crucial for understanding the company's (better: the company's ultimate owners') actual degree of commitment towards its stakeholders and therefore, at least ideally, towards sustainability. In addition, the fact that the company might grant the stakeholders a real and effective power of intervention within the company's policies might serve to both reduce the risks of green- or social-washing. It would also allow a closer cooperation between the company and its stakeholders, within a general framework that we can still define as shareholder primacy, in that the primacy of their will, which specifically wants the stakeholders more actively involved in the company, is preserved and even enhanced beyond mere profit-making purposes.

In fact, the decision to empower the stakeholders is in any case made by the shareholders; it is up to them, and only to them, to decide whether, how, when, and to what extent the external constituencies of the company can be internalised in the organisation's governance. If we think that shareholders should be left free to decide how to structure what can be called *their* organisation, then the real purpose of their primacy cannot be defined by an external party – i.e.: the lawmaker, or, worse, the lawyers when interpreting the law – as a monetary value only. Of course, in most cases, the shareholders' (monetary) value maximisation is likely to be the driver for the company's management; the system depicted above does not prevent this from happening. However, it also allows a different scenario: if the shareholders are agreeable to a non-maximisation of their own profits, if this is needed to have the company more involved in sustainable issues, why should they be *legally* prevented from acting this way? After all, in this latter case, the shareholders would retain their primacy: simply its actual definition would not be (only) in terms of profit-making. After all, the success of this broader-view possibility – and the consequential decrease in importance of "just-for-maximum-profit" companies – would depend on the approbation of the market for more sustainable companies. And, once again, the final driver is therefore educating the consumer about sustainability.

SECTION THREE.
HUMAN RIGHTS, SOCIAL FOUNDATIONS AND SUSTAINABILITY

David Monciardini

ORGANIZATIONAL COMPLIANCE WITH CORPORATE SUSTAINABILITY LAW. A SOCIO-LEGAL APPROACH

1. *Introduction. Explaining Compliance with Corporate Sustainability Law*

We are witnessing, particularly in the EU policy arena, a wave of corporate sustainability regulatory initiatives aimed at driving greater corporate accountability and due diligence in global supply chains.[1] This trend is particularly strong in the area of business and human rights (BHR). These include the 2011 United Nations (UN) Guiding Principles on Business and Human Rights (UNGPs); the 2012 California Transparency in Supply Chains Act; the 2017 French Duty of Vigilance Law; the 2015 UK Modern Slavery Act; the European Union Directive 2013/34/EU, which mandates large companies to disclose nonfinancial information, including human rights due diligence. The latter has been amended and expanded by the Corporate Sustainability Reporting 2022/2464 Directive (CSRD), entered into force on 5 January 2023. At the EU level, on 23 February 2022, the European Commission also adopted a proposal for a Directive on corporate sustainability due diligence. This phenomenon is attracting scholarly attention and debate.[2] However, the literature to date is taking a rather descriptive

[1] For a comprehensive review see Beate Sjåfjell and Christopher M Bruner, *Cambridge handbook of corporate law, corporate governance and sustainability. Corporate Governance and Sustainability* (Cambridge University Press 2019). Other recent publications include: Karin Buhmann, 'Public regulators and CSR: the 'social licence to operate' in recent United Nations instruments on business and human rights and the juridification of CSR' (2016) Journal of Business Ethics 136, 699-714.; Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The new corporate accountability. Corporate social responsibility and the law* (Cambridge University Press 2007); Nicola Phillips, Genevieve Lebaron and Sara Wallin, 'Mapping and measuring the effectiveness of labour-related disclosure requirements for Global supply chains' (2016) ILO Research Department Working Paper No 32.

[2] see, for example, Rajiv Maher, David Monciardini and Steffen Böhm, 'Torn between legal claiming and privatized remedy: Rights mobilization against gold mining in Chile' (2021) 31(1) Business Ethics Quarterly 37-74; Radu Mares, 'Corporate transparency laws: a hollow victory?' (2018) 36(3) Netherlands Quarterly of Human Rights 189-213; David Monciardini and Guido Conaldi, 'The European regulation of corporate social responsibility: the role of

approach to understanding business responses to corporate sustainability law, lacking theoretical depth. As recently outlined by Gond and colleagues, the motivations for and explanations of different forms of government and business interaction need to be better understood.[3]

I argue that developing a theory on compliance with corporate sustainability law is difficult due to two sets of issues. First, law and business are distinct social fields. They frame problems related to sustainability, such as legal compliance with modern slavery law, in different ways. Rightly, Gold et al. stressed the challenge of defining human rights corporate compliance and called for managerial studies to consider insights from other disciplines, including law.[4] From a business perspective, human rights violations tend to be perceived as a relatively new issue, often framed as a question of corporate responsibility and governance[5] —like other societal issues such as environmental protection—or as management of extended supply chains.[6] Spe-

beneficiaries' intermediaries' (2019) 13(2) Regulation and Governance 240-259; Genevieve LeBaron and Andreas Rühmkorf, 'Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance' (2017) 8(S3) Global Policy 15-28; Jette Steen Knudsen and Jeremy Moon, *Visible Hands: Government Regulation and International Business Responsibility* (Cambridge University Press 2017); Arno Kourula and others, 'New Roles of Government in the Governance of Business Conduct: Implications for Management and Organizational Research' (2019) Organization Studies <https://doi.org/10.1177/0170840619852142> accessed 28 January 2025.

[3] Jean-Pascal Gond and others, 'Call for Papers for a Special Issue. Governing for Sustainability: Theorizing Business and Government Interactions' (2023) Journal of Management Studies <https://onlinelibrary.wiley.com/pb-assets/assets/14676486/JMS%20Call%20for%20Papers%20Governing%20for%20Sustainability-1686731353597.pdf> accessed 28 January 2025.

[4] Stefan Gold, Alexander Trautrims and Zoe Trodd, 'Modern slavery challenges to supply chain management' (2015) 20(5) Supply Chain Management: An International Journal 485-494.

[5] Andrew Crane, 'Modern slavery as a management practice: exploring the conditions and capabilities for human exploitation' (2013) 38 Academy of Management Review 49-69; Andrew Crane and others, 'Governance gaps in eradicating forced labor: from global to domestic supply chains' (2019) 13 Regulation and Governance 86-106; Steve J New, 'Modern slavery and the supply chain: the limits of corporate social responsibility?' (2015) 20(6) Supply Chain Management: An International Journal 697-707.

[6] Genevieve LeBaron, Jane Lister and Peter Dauvergne, 'Governing global supply chain sustainability through the ethical audit regime' (2017) 14(6) Globalizations 958-975; Elcio M Tachizawa and Chee Y Wong, 'Towards a theory of multi-tier sustainable supply chains: a systematic literature review' [2014] 19(5/6) Supply Chain Management: An International Journal 643-663.

cifically, its relevance is due to regulatory and reputational risks that need to be managed in increasingly complex global value chains.[7] By contrast, in law, those are marginal concerns. Far from being a recent or overlooked issue, domestic legislation prohibiting human rights violations, such as slavery, dates back to the early 19th century. Then, it became entrenched in international and human rights law. Today, the prohibition of slavery is one of the most fundamental norms of international law. It is a *jus cogens* norm, a super-norm of customary law that cannot be derogated from, even by treaty.[8] Similarly, legislative efforts to address the negative environmental and social impact of business are nothing new. For instance, the UK passed sweeping public health legislation (1875) in response to the consequences of rapid industrialisation, such as air and water pollution, and waste disposal.[9] This was then followed first by powers and then duties placed on municipal authorities to plan their neighbourhoods in ways that would alleviate such harm.[10] What has now become more complex is the way in which the dynamics of society have changed with consequential effects. The problem has now changed to one that has a global effect in addition to its localised impact. From a legal perspective, various issues arise, including how to ensure that victims have access to justice and effective remedy? How to regulate the extraterritorial activities of businesses?[11] How to overcome obstacles to holding corporations liable for social and environmental violations? Inevitably, the language and frameworks used in business and legal studies can be very different when they address compliance with corporate sustainability law.[12] The question becomes how do we account for, and potentially reconcile,

[7] Gold, Trautrims and Trodd (n 4).

[8] Yasmine A Rassam, 'Contemporary forms of slavery and the evolution of the prohibition of slavery and the slave trade under customary international law' (1999) 3 Virginia Journal of International Law.

[9] Rosalind Malcolm and John Pointing, *Statutory nuisance: Law and practice* (2nd ed, Oxford University Press 2011); Karl Marx, 'The state of British manufacturing industry' *New-York Daily Tribune No. 6016* (London, 10 July 1860) in *Marx and Engels Collected Works* vol 17 (Progress Publishers 1980) 410-420.

[10] Parliament of the United Kingdom, The Housing and Town Planning in Great Britain Act (1909); Anthony Sutcliffe, 'Britain's first town planning act: A review of the 1909 achievement' (1988) 59(3) Town Planning Review 289-303 <https://doi.org/10.3828/tpr.59.3.x-275553ul404k728> accessed 28 January 2025.

[11] Nadia Bernaz, 'Enhancing corporate accountability for human rights violations: is extraterritoriality the magic potion?' (2013) 117(3) Journal of Business Ethics 493-511.

[12] Manuel C Branco, *Economics versus human rights* (Routledge 2008).

the two perspectives? To what extent the often-disappointing response of business stems from lawmakers' efforts being "lost in translation" between legal and business rationales? These questions become ever more critical as sustainability issues, ranging from environmental protection to human rights violations, in international supply chains are increasingly addressed through business self-regulation rather than traditional state-based regulation.[13]

The second set of issues that makes developing a theory on compliance with corporate sustainability law difficult is that, despite the burgeoning literature on business and human rights, corporate accountability and corporate sustainability standards, both legal and managerial studies tend to "black-box" (intra)organizational responses to legislation. Law is treated as an exogenous force and compliance is mapped and measured rather than explained. The focus is typically on problematic monitoring and enforcement mechanisms, through traditional police investigations and workplace inspections; private multi-stakeholder initiatives to enforce sustainability standards through social auditing; or hybrid and co-regulatory approaches.[14] Although monitoring and enforcement are crucial, further research is needed to investigate the other side of enforcement: compliance. How do companies make sense of corporate sustainability law? Why do some companies engage more in preventing possible social and environmental incidents while others try to circumvent the law?

Motivated by the will to confront these two sets of issues, the following pages will highlight a socio-legal approach to compliance with corporate sustainability law that has implications across a wide range of regulatory modes and levels of governance. At the core of this essay is the quest for theorization of the relationship between corporate sustainability law and business organizations. I found a convincing theoretical framework in the socio-legal literature, particularly the work developed by Lauren Edelman.[15] Edelman's work has focused mainly on Equal Employment Opportunity (EEO) legislation in the United States. She has shown how managerial ways

[13] Fabrizio Cafaggi, 'New foundations of transnational private regulation' (2011) 38(1) Journal of law and society 20-49; Crane and others (n 5).

[14] Alex Balch, 'Regulation and enforcement to tackle forced labour in the UK: a systematic response?' (JRF Programme Paper, February 2012) <http://aa.ecn.cz/img_upload/6334c0c7298d6b396d213ccd19be5999/forced-labour-regulation-full.pdf> accessed 28 January 2025; Gold, Trautrims and Trodd (n 4); New (n 5).

[15] Lauren B Edelman, *Courts, Corporations, and Symbolic Civil Rights* (University of Chicago Press 2016).

of thinking reconfigure legal ideals in that particular area. In this paper, I draw on prior empirical and exploratory papers that I have published over the last five years and related to business and human rights and corporate accountability.[16] The aim is to consolidate this emerging theoretical contribution and enhance our understanding of the way corporate organisations are constructing the meaning of compliance with corporate sustainability law.

2. *A Socio-Legal Approach to Corporate Sustainability Law*

To develop a more critical, substantive, and contextual approach to corporate sustainability law, I have suggested in prior work that it is productive to borrow insights from socio-legal research.[17] In particular, this essay draws on decades of socio-legal research that has studied the problematic enforcement of US antidiscrimination laws following landmark social reforms promoted, since the 1960s, by the civil rights movement.[18] Specifically, this stream of research has been concerned with explaining why discrimination in the workplace is still diffused despite the adoption of antidiscrimination policies being widespread in the corporate world. I originally apply this body of work to corporate sustainability law, stricken by the similarity with corporate sustainability – i.e. sustainability discourses have been embraced by corporate entities and yet we see very little progress.

Thus, this socio-legal approach draws on a number of important socio-legal concepts: "rights mobilization", "legal consciousness", "legality", "managerialization of law" and "legalization of a business organisation". Applying them in the current debate about corporate sustainability law ultimately entails a more dynamic conceptualisation of corporate compliance in this emergent area of law.

[16] Maher, Monciardini and Böhm (n 2); Monciardini and Conaldi (n 2); David Monciardini, Nadia Bernaz and Alexandra Andhov, 'The organizational dynamics of compliance with the UK Modern Slavery Act in the food and tobacco sector' (2021) 60(2) Business & Society 288-340.

[17] Monciardini, Bernaz and Andhov (n 16); Maher, Monciardini and Böhm (n 2).

[18] John Brigham, *The constitution of interests: Beyond the politics of rights* (NYU Press 1996); Edelman (n 15); Michael McCann, 'Litigation and legal mobilization' in Keith E Whittington, R Daniel Kelemen and Gregory A Caldeira (eds), *The Oxford handbook of law and politics* (Oxford University Press 2010) 522-540.

2.1. *Right Mobilization, Legal Consciousness, and Legality*

The phenomenon of rights mobilization was first explored in a host of empirical studies that emerged in the United States beginning in the 1960s and 1970s.[19] For the scope of this essay, I prefer this term to the popular, yet narrower, concept of legal mobilization. According to Zemans's definition, "The law is … mobilized when a desire or a want is translated into a demand as an assertion of rights".[20] Rights mobilization provides an important "bottom-up" contribution to the corporate sustainability law debate by emphasizing that laws, norms, or even corporate policies are of very limited use if rights are not mobilized by the affected communities or individuals. Thus, it responds to frequent calls for rights-based, place-based, and bottom-up approaches to corporate sustainability regulation.[21] Its main focus is on ordinary people's response to (un)perceived injurious experiences because of the activities of corporations. Rights mobilization has been theorized as a longitudinal, dynamic, multistage process of disputing among various parties. To mobilize rights, individuals or communities must first recognize a rights violation (naming), then attribute the violation to a legally responsible party (blaming) – typically a corporate entity – and, lastly, take action to seek redress for the violation (claiming). This widely adopted three-step process, known as "naming, blaming, and claiming",[22] is often perceived by the rightsholders as complex and daunting. There is extensive evidence that the vast majority of individuals whose rights are violated take no formal action to redress those violations, particularly if they have limited social power or economic resources.[23] In fact, many individuals do not even recognize when

[19] McCann (n 18).

[20] Frances K Zemans, 'Framework for analysis of legal mobilization: A decision-making model' (1982) 7(4) Law & Social Inquiry 989-1071, 700.

[21] Jonathan Kaufman and Katherine McDonnell, 'Community-driven operational grievance mechanisms' (2016) 1(1) Business and Human Rights Journal 127-132; Tim Bartley, 'Transnational governance and the re-centered state: Sustainability or legality?' (2014) 8(1) Regulation & Governance 93-109; Tim Bartley, *Rules without rights: Land, labor, and private authority in the global economy* (Oxford University Press 2018).

[22] William L Felstiner, Richard L Abel and Austin Sarat, 'The emergence and transformation of disputes: naming, blaming, claiming...' (1980) 15 Law & Society Review 631.

[23] Marc Galanter, 'Why the "haves" come out ahead: Speculations on the limits of legal change' (1974) 9(1) Law & Society Review 95-160; Richard E Miller and Austin Sarat, 'Grievances, claims, and disputes: Assessing the adversary culture' (1980) Law & Society

a violation of their rights has occurred, or they may believe that recurring to legal redress could lead to retaliation or is simply futile. In other words, rights mobilization depends at least in part on a second key element: legal consciousness.

Legal consciousness can be defined as the understanding of the meaning of law and rights by individuals or groups as they engage, avoid, resist, or just assume the law and legal meanings.[24] In particular, Brigham identifies "rights, rage, and remedy" as three significant forms of how legal conventions prefigure, frame, and express the aspirations and world-views of social movements.[25] Subaltern groups and relatively powerless citizens often have limited capacity to engage with legal discourses, knowledge, and language against more powerful groups and corporate organizations. Thus, they are less likely to successfully mobilize their rights or even perceive injurious experiences. This is particularly significant because the literature on dispute processes between communities and corporations has gradually shifted towards alternative dispute resolution (ADR), dialogue, and conflict resolution.[26] Following this trajectory, corporate sustainability discourses tend to focus on corporate-led due diligence and non-judicial grievance mechanisms, to identify and address "any legitimate concerns" before they "may over time escalate into more major disputes and human rights abuses" (UNGPs: 32). Firm-community dialogue and voluntary corporate participatory processes are encouraged as means to prevent and resolve corporate liability disputes.[27]

Review 525-566; Laura B Nielsen, Robert L Nelson and Ryon Lancaster, 'Individual justice or collective legal mobilization? Employment discrimination litigation in the post civil rights United States' (2010) 7(2) Journal of Empirical Legal Studies 175-201.

[24] Brigham (n 18); Patricia Ewick and Susan S Silbey, 'Conformity, contestation, and resistance: An account of legal consciousness' (1991) 26 New England Law Review 731.

[25] Brigham (n 18).

[26] Carrie Menkel-Meadow, 'Can they do that-legal ethics in popular culture: of characters and acts' (2000) 48 UCLA Law Review 1305; Carrie Menkel-Meadow, 'From legal disputes to conflict resolution and human problem solving: legal dispute resolution in a multidisciplinary context' (2004) 54(1) Journal of Legal Education 7-29.

[27] James Gathii and Ibironke T Odumosu-Ayanu, 'The turn to contractual responsibility in the global extractive industry' (2016) 1(1) Business and Human Rights Journal 69-94; Irit Tamir and Sarah Zoen, 'Human rights impact assessments in a brazil land conflict: Towards a hybrid approach' (2017) 2(2) Business and Human Rights Journal 371-377; Benjamin Thompson, 'Determining criteria to evaluate outcomes of businesses' provision of remedy: Applying a human rights-based approach' (2017) 2(1) Business and Human Rights Journal 55-85; Kaufman and McDonnell (n 21).

Lastly and relatedly, understanding law not just as formalised doctrine but as *legality* helps explain the social structures within which rights mobilization and legal consciousness evolve over time.[28] In particular, my theoretical understanding (Figure 1) draws on Edelman's idea of legality.[29] As explained by Edelman & Stryker "The idea of legality suggests that formal legal "rules on the books," for example, statutes, directives, executive orders, and judicial opinions, are important, but cannot be understood fully apart from their social context".[30] Edelman's endogenous theory of legality offers two relevant insights to the study of corporate sustainability law. First, she has developed a comprehensive theory of the interplay between law and business organizations, based on her research on courts, corporations, and civil rights.[31] Building on the bottom-up approach taken by rights mobilization and legal consciousness research, the author stresses the "endogeneity of law." That is, "the meaning of law is shaped by widely accepted ideas within the social arena that law seeks to regulate".[32] Thus, deploying a sociological theory of fields, she conceptualizes law and organizations as overlapping social fields,[33] which she calls the "legal field" and the "business organizational field" (see Figure 1).

[28] Patricia Ewick and Susan S Silbey, *The common place of law: Stories from everyday life* (University of Chicago Press 1998).

[29] Laura B Edelman and Robin Stryker, 'A sociological approach to law and the economy' in Neil J Smelser and Richard Swedberg (eds), *The Handbook of Economic Sociology* (2nd ed, Princeton University Press 2005).

[30] Edelman and Stryker (n 29) 530.

[31] Edelman (n 15).

[32] ibid 12.

[33] Pierre Bourdieu and Loic J D Wacquant, *An invitation to reflexive sociology* (University of Chicago Press 1992); Paul J DiMaggio and Walter W Powell, 'The iron cage revisited: institutional isomorphism and collective rationality in organizational fields' (1983) 48(2) American Sociological Review 147-160; Neil Fligstein and Doug McAdam, *A theory of fields* (Oxford University Press 2012).

Figure 1: Theoretical framework (adapted from Edelman, 2016)

This approach differs from the focus on actors—NGOs, corporations, public authorities, etc.—taken by most of the corporate sustainability and corporate social responsibility (CSR) literature. By stressing that there are fundamental tensions between the different core logics of legality and business fields, this approach contributes to our understanding of the interplaying rationalities, languages, and social structures deployed by business organizations and legal institutions to frame compliance with corporate sustainability law.[34] Specifically, drawing on Edelman[35] it is possible to provide a significant contribution to the emerging literature on counter-rights mobilization, corporate backlash, and corporate-based resistance[36] by finding that one important reason for slow progress in corporate sustainability is a process that she calls "managerialization of law". This is defined as "the infusion of managerial or business values into law", and it is spurred as a reaction to social movement activity and perceived legal threats that promise to increase corporate social and environmental accountability. She shows that—as a compliance response to such perceived legal threats – that here I

[34] Branco (n 12); Florian Wettstein, 'CSR and the debate on business and human rights: bridging the great divide' (2012) 22(4) Business Ethics Quarterly 739-770.

[35] Edelman (n 15).

[36] cf. Harriet Bulkeley, Matthew Paterson and Johannes Stripple (eds), *Towards a cultural politics of climate change: devices, desires and dissent* (Cambridge University Press 2016) 173-188.

call "legalization of the business organization"—business organizations typically create law-like "symbolic" structures that "demonstrate attention to law and, therefore, lend legitimacy to organizations in the eye of the law" while "maintaining sufficient flexibility to preserve managerial prerogatives and practices that are seen as advancing business goals".[37] This is relevant for the scope of this essay because these corporate law-like structures include the typical "new governance" mechanisms supported by some of the current wave of corporate sustainability laws, such as human rights due diligence, that look like legal norms, as well as grievances mechanisms and corporate appeal procedures that are similar to judicial and law enforcement systems.

I argue that the Endogeneity of Law explanatory framework offers valuable insights to explain corporate compliance with corporate sustainability law seen as the interplay between law-like business structures and multi-level legal regulatory initiatives. I will now expand on these compliance dynamics in the following section.

2.2. *Constructing the Meaning of Compliance with Corporate Sustainability Law*

As Parker and Nielsen pointed out, there are two fundamentally different approaches to the study of *compliance*.[38] The first is objectivist research which characterizes most of the legal and managerial analyses of compliance: "much of this research is implicitly or explicitly aimed at normative, policy-oriented evaluation and critique of regulatory design, implementation and enforcement: what 'produces' compliance?" The second instead "is research aimed at interpretative understanding of organizational responses to regulation, and of the processes by which compliance is socially constructed".[39] Lauren Edelman is one of the leading promoters of the latter approach. Drawing on her comprehensive endogeneity of law theory, we aim to challenge overly deductive and objectivist models of business compliance with corporate sustainability law. Edelman argues that the binary question "compliance" or "noncompliance" is misleading because it frames law as

[37] Edelman (n 15) 31-32.

[38] Christine Parker and Lehmann V Nielsen (eds), *Explaining compliance: business responses to regulation* (Edward Elgar 2011) 103-122.

[39] ibid 3.

exogenous to organizations. Instead, her approach encourages to discuss how organizations construct the meaning of compliance.[40]

The endogeneity of law "offers the first systematic theory of the relationship between law and organizations".[41] Drawing on neoinstitutional theory in sociology, Edelman conceptualizes law and organizations as separate yet overlapping social fields, which she calls legal fields (or "legality") and organizational fields.[42] The former includes legal institutions, legal actors, formal or informal legal norms and ideas. The latter includes the subset of an environment that is most closely relevant to a given organization (e.g., suppliers, customers and competitors, flows of influence or innovations). Edelman questions how these two partially overlapping spheres interplay. She posits that the two social fields have "different core logics".[43] Legal logic "is centred on rules and rights and involves a commitment to the rule of law," whereas managerial logic "is centred on market rationality, organizational efficiency and managerial control".[44]

Managerial logic holds that managers "have legitimate authority to set workplace rules, to control workers, and to resolve disputes that arise within organizations".[45] Because there are multiple opportunities for exchange, Edelman contends the interaction between the legal and organizational fields engenders both a process of "legalization of organizations" and one of "managerialization of law". The first covers the idea that organizations adopt a variety of policies and affirmative action plans in compliance with the introduction of new laws and in response to right mobilization dynamics. However, most of Edelman's original contribution lies in the concept of managerialization of law. This is defined as "the infusion of managerial or business values into law, and it is spurred by the legalization of organizations".[46]

[40] Lauren B Edelman and Shauhin A Talesh, 'To comply or not to comply – that isn't the question: how organizations construct the meaning of compliance' in Parker & Nielsen (n 38) 103.

[41] Edelman (n 15) 235.

[42] Edelman and Stryker (n 29) 527-551.

[43] Edelman (n 15) 23.

[44] ibid.

[45] ibid.

[46] ibid 25.

2.3. *The Risks of Mangerialization of Corporate Sustainability Law*

Managerialization "occurs as legal rules are filtered through managerial lenses, which tends to involve a reconceptualization of law so that it is more consistent with general principles of good management"[47]. On the basis of extensive empirical research in the area of anti-discrimination corporate laws, Edelman argues that the way managers understand and interpret the law may come to impact the legal field itself, which in certain areas has embraced managerialized visions of law. To the extent that those interpretations have invaded the legal field, law has become endogenous, "or constructed within the social fields that it seeks to regulate".[48] Specifically, Drawing on Edelman's work, legal endogeneity evolves through six stages or steps that I have illustrated in Figure 2. Each stage is summarized in more detail below.

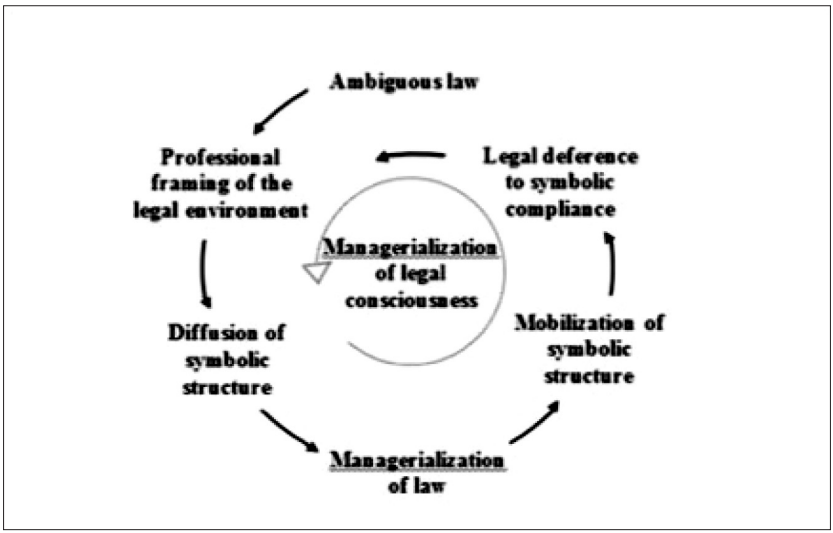

Figure 2: The Stages of Legal Endogeneity. From Edelman (2016, p. 28)

The first step is concerned with *ambiguous corporate sustainability laws*. Rules that regulate organizations tend to be broad and ambiguous and, in some cases, subject to considerable controversy. This is certainly the case for various corporate sustainability laws, such as the UK Modern Slavery Act or the EU rules on corporate sustainability due diligence. As for the EU rules

[47] ibid 26.
[48] ibid.

on corporate sustainability reporting, governments may issue "guidelines" and standards aimed at clarifying such ambiguity but that are themselves quite ambiguous, leaving organizations wide latitude to fill in the gaps or construct the meaning of compliance.

Second, *professional framing of the legal environment*. Organizational actors learn about law not by reading legal acts or cases but through compliance professionals who work within the organization (e.g., HR professionals) or external consultants (e.g., lawyers and management consultants). New compliance professions may emerge in response to or in anticipation of regulatory changes. They become interpreters of the legal environment, influencing managers' knowledge and organizational response to the law. Typically, they frame new legal requirements as risks. Often, they highlight what companies "need to know" and question whether companies are ready for regulatory change. Over time, through their interactions in and around organizations, professionals tend to share and advocate a risk framing of the legal environment. Risks can be emphasized by firms providing social and environmental compliance services to encourage change, gain organizational power, or gain a market for their services. When they are committed to legal ideals, they can render organizational responses more substantive. Conversely, they can also contribute to render compliance with corporate sustainability laws merely symbolic and cosmetic.

Third, the *diffusion of symbolic forms of compliance*. Faced with ambiguous law translated for them by compliance professionals, organizations may devise forms of compliance that symbolically demonstrate attention to corporate sustainability law while maintaining sufficient flexibility to preserve managerial prerogatives and practices that are seen as advancing business goals. Those forms of compliance include policies, offices, and grievance mechanisms that mimic the legal order. Sometimes, those structures are substantive, but often they are merely symbolic. The latter does little or nothing to effectuate legal ideals within organizations. They tend to spread quickly among organizations.

Fourth, can be defined as '*managerialization of law*'. Once symbolic structures are set up, compliance professionals start operating them. As they confront daily issues of organizational governance, they may fill in the gaps in ways that incorporate managerial logic, goals, and ways of understanding the world. This is often a gradual and unintentional process, thus difficult to address. Edelman identifies four mechanisms of managerialization: (a) internalizing dispute resolution; (b) contracting or managing away legal risk;

(c) decoupling legal rules from organizational activities; (d) rhetorically reframing legal ideals.

Fifth, the *mobilization of symbolic structures*. Symbolic compliance gives the illusion of an organization that truly complies with the law. Edelman shows that in the context of EEO legislation, this has become an obstacle to rights mobilization. The adoption of merely symbolic structures prevents rights mobilization (a) by leading people to view the organization as fair, and (b) by allowing organizations to challenge rights mobilization through the countermobilization of symbolic structures. Victims are less likely to complain. If they do, lawyers are less likely to take on the case. If a formal complaint is nevertheless filed, company lawyers can point to symbolic compliance as evidence that their client is law-abiding.

Finally, in the sixth stage, it is possible to detect *legal deference to symbolic compliance*. The final stage of the endogeneity of law theory happens when legal actors such as courts and Parliament "endorse" and "mandate" merely symbolic structures without questioning their lack of effectiveness. When legal institutions incorporate symbolic structures into their formal rulings, law becomes endogenous. Edelman emphasizes that the first stage, the adoption of ambiguous law, may itself be the result of legal deference to symbolic compliance, making the Endogeneity of Law theory circular rather than linear.

Although Edelman's empirical focus is on EEO law in the United States, I argue that her analytical framework on the relationship between law and organizations could also provide a powerful tool to address questions of corporate sustainability law compliance. This is so despite important differences between EEO and corporate sustainability law cases. Although companies hold direct contractual responsibility and have considerable influence in EEO cases, sustainability regulation is typically wider and more indirect, hidden in complex business operations and supply chains[49]. Thus, compliance with corporate sustainability laws requires a tailored and more innovative response by business[50]. Furthermore, given that the current wave

[49] Stephanie Barrientos, Uma Kothari and Nicola Phillips, 'Dynamics of unfree labour in the contemporary global economy' (2013) 49(8) The Journal of Development Studies 1037-1041; Gold, Trautrims and Trodd (n 4).

[50] Mark Stevenson and Rosanna Cole, 'Modern slavery in supply chains: a secondary data analysis of detection, remediation and disclosure' (2018) 12(3) Supply Chain Management: An International Journal 81-99.

of corporate sustainability laws is much more recent than EEO legislation in the United States, it is easier to apply Edelman's analytical framework on the early stages of the endogeneity of law process (Stages 1–4) than to empirically assess whether symbolic structures can become a strong barrier to rights mobilization (Stage 5). Said that, many corporate sustainability law initiatives could be also seen in the first place as examples of legal deference to symbolic compliance, whereby lawmakers mandate merely symbolic structures without questioning their lack of effectiveness. This opens interesting research questions about the extent to which ambiguous corporate sustainability laws are already the result of a process of so-called cognitive regulatory capture of lawmakers.[51] This is the case when the regulator begins to think like the regulated industry without the need for financial capture and political corruption (i.e. materialist capture).

2.4. *Legalization of Business Organizations versus Managerialization of Law*

Building on Edelman, business constructs the meaning of compliance along two alternative, but co-existing, processes: the managerialization of law and the legalization of organizations. The endogeneity of law theory suggests that organizations continuously face a compliance dilemma: legal ideals imply a need to change business practices, while the business logic commands to minimize the capacity of law to intrude into business goals and managerial prerogatives. The theory predicts that legal ambiguities can help solve the dilemma, thus allowing professionals and organizations to "fill in the details that the law has left ambiguous".[52] They may decide to do this in ways that introduce business logic in the meaning of law, devising forms of compliance that mimic the public legal order in form - therefore symbolically demonstrating attention to law - while maintaining sufficient flexibility to preserve managerial prerogatives and practices. If that occurs, corporate sustainability law compliance becomes managerialized within organizations, and symbolic structures are predicted to move further away from substance and closer to pure symbolism.[53] In the literature, one can find evidence of

[51] Daniel Carpenter and David A Moss (eds) *Preventing regulatory capture: Special interest influence and how to limit it* (Cambridge University Press 2013).

[52] Edelman (n 15) 34.

[53] ibid.

the processes in which the managerialization of law occurs.[54] While they can be the result of intentional efforts to circumvent legal requirements, they may simply result from attempts to address everyday problems.

However, in my analysis, I have also expanded on Edelman's work, investigating whether we could find traces of legalization of organizations mechanisms. To provide a more balanced and comprehensive picture of corporate sustainability compliance, Monciardini and colleagues expand on Edelman's framework by adding to the four mechanisms of managerialization of law four counter-mechanisms through which the activism of compliance professionals renders symbolic structures more substantive.[55] I illustrate these mechanisms and counter-mechanisms below using excerpts from prior empirical studies.

Internalizing or Legalizing Dispute Resolution? Our data show that Internal Dispute Resolution (IDR) is a common mechanism adopted by corporations to respond to possible occurrences of corporate sustainability and human rights law violations. It entails the use of internal grievances procedures and mechanisms to deal with cases in which situations of environmental crimes, forced labour, or other human rights violations are found. IDR processes allow corporations greater control over the resolution of such conflictual situations than is the case when they are handled through the formal legal system. Overall, something that emerged from our data is that the IDR procedures set up by the organizations seem disconnected from the legal system and from external monitoring processes, including monitoring by trade unions and NGOs representatives.[56] Conversely, compliance professionals can advocate for the legalization of dispute resolution by allowing external scrutiny handled through the formal legal system or by independent authoritative third parties such as trade unions and NGOs.

Managing Away Modern Slavery Risks or Fully Acknowledging Responsibility? We found that managing or contracting away legal risks is another widespread managerialization mechanism. It refers to the devising of strategies that allow an organization to "navigate around legal assumptions or

[54] LeBaron and Rühmkorf (n 2); Onna M van den Broek and Robyn Klingler-Vidra, 'The UN Sustainable Development Goals as a North Star: How an intermediary network makes, takes, and retrofits the meaning of the Sustainable Development Goals' (2022) 16(4) Regulation & Governance 1306-1324; Maher, Monciardini and Böhm (n 2); Monciardini and Conaldi (n 2); Monciardini, Bernaz and Andhov (n 16).

[55] Monciardini, Bernaz and Andhov (n 16).

[56] Maher, Monciardini and Böhm (n 2); ibid.

standards"[57] in order to shift their legal responsibility away. That way they avoid tackling human rights and corporate sustainability law violations, such as illegal timber trade or human trafficking in their supply chain head-on and fully acknowledge responsibility. This can be achieved by outsourcing or heavily relying on an external organization that offers a comprehensive due diligence and risk assessment package. Another subtle way of managing away legal risks consists in introducing carefully drafted provisions in the contracts between buyers and suppliers, whereby the final buyer shifts the responsibility for adherence to, and enforcement of, its (buyer's) policies and rules to its suppliers. Thus, it becomes the duty of suppliers to oversee that the other suppliers down the supply chain follow the buyer's policies and codes. On the contrary, companies can decide to fully acknowledge responsibility by not using contracts as a means to shift the responsibility down their supply chains and by engaging with suppliers to improve environmental and working conditions. For instance, Monciardini and colleagues found that some companies updated their standard supplier contractual terms for new suppliers to include obligations on Modern Slavery Act risk assessment, controls, and notification of Modern Slavery findings.[58]

Decoupling or Embedding Legal Rules in Organizational Activities? Decoupling entails the disconnection between organizational policies and practices. This means that even when organizational policies and rules appear to closely adhere to the law, this is not followed by substantial changes to everyday organizational practices. By contrast, embedding occurs when the commitment against modern slavery is consistently translated into organizational activities, even if those activities do not seem to be aligned with business interests. These mechanisms can be difficult to assess by using only a desk research analysis of corporate statements and documents produced, and some fieldwork research and interviews can allow researchers to fill in the gaps. By juxtaposing the legislative texts and guidelines issued by the government as a framework for the analysis, it is possible to observe a more or less pronounced gulf between corporate policies, principles and standards and what companies are doing as they are called to back words with facts, instances and actions. Typically, scant information can be found about the actions undertaken by corporate actors (e.g. number and nature of violations identified and the actions taken to handle them), despite the fact that

[57] Edelman (n 15) 34.

[58] Monciardini, Bernaz and Andhov (n 16).

the governments encourage companies to be as open and transparent as possible. On the contrary examples of embedding legal rules in organisational activities include recruitment practices tailored to reduce the risks of human trafficking or action plans aimed at systematically addressing specific issues with suppliers which may cause or contribute to environmental and human rights violations. For instance, Monciardini and colleagues found that a well-known British supermarket chain reviewed all their service providers based on contract type, skills, wages, and visibility.[59] The company identified and reported to the UK Authority Gangmasters and Labour Abuse Authority (GLAA) three cases that are detailed in their annual modern slavery statement. They also prohibited their service providers from actively recruiting outside the UK without their prior agreement.

Rhetorically Reframing or Adhering to Legal Ideals? According to Edelman, the managerialization of law is a gradual process that rarely involves conscious decisions to circumvent the law. In this sense, rhetorically reframing legal ideals is the subtlest mechanism of managerialization of corporate sustainability law. It consists in reshaping ambiguous or politically charged legal ideals on modern slavery in ways that render them less challenging to business ideals, traditional organizational practices and managerial prerogatives. Although by its nature it is a difficult mechanism to detect, in prior studies I found evidence of this mechanism. Conversely, I have also found instances in which companies and professionals acknowledged the radical prohibition expressed in the corporate sustainability law and obligations to respect human rights. We considered the latter as examples of the legalization of organizations. Two examples can be mentioned to illustrate this mechanism. First, companies tend to dissociate their practices from being subject to legal liability. They rather portray themselves as enforcers of human rights or environmental protection in relation to their suppliers. For instance, large multinationals tend to talk about "a zero-tolerance approach" and the claim that they "do not condone forced, bonded or involuntary labour, or the exploitation or unlawful use of immigrant labour" as if they were above the law. Secondly, the rhetorical reframing of legal ideals is at play in the area of managing risks associated with corporate social and environmental crimes. Here corporate statements tend to play with the ambiguity between risks for the organization and risks for the victims of corporate abuses. In reality, the two are distinct. However, in the statements of many companies, these

[59] ibid.

boundaries are blurred. In other instances, corporate adherence to a legal ideals is more explicit, where risks are framed as a crime and violation of fundamental human rights. To further analyze this subtle dynamic, research can be conducted on external guidance materials offered by compliance professional service organisations that are frequently cited by companies in their annual statements[60]. It is possible to note how some guides are particularly adherent to legal ideals about the absolute prohibition of human rights and environmental law violations to help businesses understand key concepts, legal definitions and their responsibility. These are primarily designed to help law enforcement agencies tackle corporate offences and enhance protection for victims. Other guides look at sustainability and human rights violations primarily from a business perspective. They reshape the corporate discourse away from legal ideals by de-emphasising the focus on business liability and exploitation and replacing it with the rhetoric of the "business case" for "responsible sourcing" and "ethical procurement". Typically, the latter emphasises the many benefits for suppliers taking part in responsible sourcing, including protecting reputation, reducing the risk of supply disruptions, increased worker retention and productivity and cost saving. For instance, the Chartered Institute of Procurement and Supply starts its guide to modern slavery compliance by stressing that modern slavery is relevant for business because,

"Organisations will suffer reputational damage and bear the risk of loss of both consumer confidence and market share [...]. Companies and supply staff may face legal sanctions [...]. Organisations naturally want to avoid these negative impacts. On the other hand, a track record of ethical procurement activity can encourage investment and improve employee morale as well as exceed legal requirements."[61]

This is a good example of how "compliance professionals who are steeped in the logic of organizational fields are likely to resolve conflicts between legal and organizational logics in ways that introduce business logic into the meaning of law".[62] This appealing rhetoric suggests a win-win

[60] For examples, see the guiding materials prepared by Stronger Together, Sedex, Aim Progress, and the Ethical Trading Initiative on compliance with human rights and modern slavery laws.

[61] Walk Free Foundation & CIPS, 'Modern Slavery in Supply Chains: An Introduction for Procurement Professionals' <https://www.cips.org/Documents/About%20CIPS/Ethics/CIPS_ModernSlavery_Broch_WEB.pdf> accessed 28 January 2025.

[62] Edelman (n 15) 34.

situation where organizational interests and risks coincide with those of modern slavery victims. However, I argue this is a dangerous approach that may encourage a managerialization of corporate sustainability law. Various studies point towards the fact that the business case is weak and limited to a limited number of primary stakeholders.[63] In reality, most companies embrace a "risk averse" approach and are more focused on avoiding liability and responsibility than tackling the risks of human rights and environmental violations. On the other hand, corporate adherence to legal ideals counter-mechanism consists in shaping ambiguous corporate sustainability legal requirements in ways that render them challenging to business ideals, traditional organizational practices and managerial prerogatives. These are instances in which companies, compliance officers and corporate sustainability professionals acknowledge and embrace the spirit expressed in the legal requirements, such as the radical prohibition expressed in the current wave of human rights corporate due diligence laws.

3. *Conclusions*

Our study has discussed how corporate organisations respond to the recent wave of corporate sustainability laws. The socio-legal approach taken in this article helps to counterbalance corporate attempts to cognitively capture and reframe the meaning of these legislative initiatives by taking the perspective of rights-holders and the affected community that mobilized its rights in relation to both the transnational business organization and the domestic legal field. I was motivated by two shortcomings in the existing literature on corporate sustainability law compliance. First, law and business are distinct social fields. The extant literature does not fully acknowledge the extent to which they frame problems related to sustainability, such as legal compliance with modern slavery law, in different ways. This requires a more dynamic approach that interrogates, in a specific context, the linkages between organisational voluntary initiatives, domestic governance structures and affected local communities. Second, the literature tends to adopt a formalistic and exogenous approach to corporate sustainability law. By

[63] New (n 5); Michael L Barnett, 'The business case for corporate social responsibility: a critique and an indirect path forward' (2019) 58(1) Business & Society 167-190; Barrientos, Kothari and Phillips (n 49).

deploying a set of socio-legal concepts – rights mobilization, legal consciousness and legality – I have provided a more critical and contextual analysis of the dynamics of firm-community environmental and human rights disputes. Taking the perspective of the affected local community, I have been particularly focused on how rightsholders mobilize their rights in the interplay between the differing logics of the business and legal fields.

The main contribution of this paper lies in the attempt to adapt Edelman's Endogeneity of Law theory from its original application mainly on EEO legislation in the United States to apply it to the field of corporate sustainability law. According to Edelman, corporations adopt organizational structures that symbolize attention to sustainability law and legal principles. Sometimes these structures can be "merely symbolic" (cosmetic compliance). They do little or nothing to effectuate legal ideas within organizations. Structures that are both symbolic and substantive instead do, to a variable extent, bring organizations closer to legal ideals.[64] Thus, the key question that emerges from this approach is how to make sure that substantive corporate structures emerge through a process of 'legalization of organizations', which is not discussed in detail by Edelman but arise when "compliance professionals are committed to legal ideals and adopt an activist stance", thus "render[ing] symbolic structures more substantive".[65] Building on prior work I have done in this area, in this paper I have highlighted four counter-mechanisms that can be implemented to foster the emergence of substantive responses to corporate sustainability law.

[64] Edelman (n 15) 32.
[65] ibid 36.

Pedro Oliveira

HOW BUSINESS VIEWS THE UPCOMING EU DUE DILIGENCE FRAMEWORK

1. *Background and the Business Case for EU Due Diligence*

BusinessEurope[1] has been following the due diligence debate since more than 7 years from the time of the adoption of the Devoir de Diligence in France. The current proposal is an important initiative from two perspectives: the harmonisation exercise it represents and the enormous impact due to the obligations and red tape that it will inevitably impose on European companies of all sizes. European companies fully understand the importance of becoming more sustainable and of addressing risks that can occur in their supply chains. Companies do recognise the advantages of a harmonised EU framework on due diligence, which is also applicable to third-country companies operating in the EU. However, key conditions must be met related to workability, proportionality, legal certainty and level playing field.

One of the main advantages that business identified was the opportunity to act preventively and avoid legal fragmentation from arising throughout Europe in the due diligence space. Companies need predictability and legal certainty when operating across borders. Usually, harmonisation via EU law is a great way to provide this, coupled with good alignment between the European Commission and the Member States on the interpretation of the rules. Value chains by their nature extend most of the times beyond the borders of a country so having similar rules is a must. Also, due diligence is meant to tackle risks that are not of a pure regional, national or even conti-

[1] BusinessEurope is the leading advocate for growth and competitiveness at European level, standing up for companies across the continent and actively campaigning on the issues that most influence their performance. We speak for all-sized enterprises in a broad number of sectors in 36 European countries whose national business federations are our direct members. Business supports the EU Green Deal and the Sustainable Finance agenda and is committed to the transition to a climate-neutral economy by mid-century, and that this commitment also means leveraging private investments. See <https://www.businesseurope.eu/> accessed 16 September 2024. For BusinessEurope's positions on due diligence, see <https://www.businesseurope.eu/policies/corporate-and-legal> accessed 16 September 2024.

nental nature but are global which requires a harmonised approach at least at European level.

There is also the business case for due diligence. Sustainability is also becoming pervasive in companies' strategies and operations. It has become a *must have* rather than a *nice to have*. Nowadays company owners (shareholders) have higher expectations beyond financial sustainability as well as companies' customers who seek products and services that are not produced or developed on the back of human rights' and environmental abuses. Other stakeholders such as workers, banks, insurances and other investors also scrutinize companies' actions more thoroughly; and reporting under the recent Corporate Sustainability Reporting Directive is no longer sufficient as there is an expectation of a behavioural change from the side of companies.

The other side of the coin is European competitiveness. As all the three EU institutions acknowledge competitiveness cannot be overlooked. An EU directive cannot lead to a situation where European companies have no choice but to leave other markets. This would harm local communities and leave the room to other players that do not abide by the same human rights and environmental high standards that we have in Europe. Too strict rules could either lead to a box ticking exercise or place European companies under the rock and a hard place. Taking for example recent legislation that has been taken in one major Asian country[2] whereby conducting mere due diligence could lead to be criminally sanctioned under anti-espionage rules.

2. *Required Conditions for a Workable and Proportionate Due Diligence*

For an EU due diligence framework to be acceptable and effective it needs to meet the standards of workability, harmonisation and proportionality. The expectations that are put on companies and their processes need to remain reasonable. Companies do not have the same function of states nor are equipped to fulfil purely authority tasks that they are not equipped to fulfil, nor do they have a nature or structure to do so. This is perfectly framed by well accepted international principles of responsible business

[2] James Gong, Harry Qu and Fengming Jin, 'What You Need to Know about China's Counter-Espionage Law' (*Bird & Bird*, 8 November 2023) <https://www.twobirds.com/en/insights/2023/china/what-you-need-to-know-about-chinas-counter-espionage-law> accessed 16 September 2024.

clearly state that companies have the duty respect not the duty to protect human rights. The later is a strict function of States.

For the past 2 years BusinessEurope has consistently being putting forward a certain number of conditions that would be necessary to have in place for the rules to be implementable by companies and help meeting the objectives of such initiative. These conditions have been subscribed by at least 36[3] other European business organisations in May 2023 and since then several other organisations have been making similar requests. Here are some of the key conditions:

- A EU mandatory framework needs to aim at a level playing field in its different dimensions. If we want European companies to remain competitive on a global arena, while at the same time enabling them to promote sustainability and human rights in an impactful manner, the framework needs to be more (fully) harmonised between Member States and ensure a better level playing field in relation with third-country companies. In the absence of a regulation form (which was actually the nature of the force ban initiative) we would call for a single market clause to be included. 27 different due diligence models will not work. Europe needs one alone.
- The Commission proposal includes a lot of complex, unwieldy, unclear and, to some extent, completely new terminology compared to existing international frameworks and guidelines (UN/OECD) that companies have worked with the last ten years. Legal certainty and a clear view on legal responsibilities and expectations are essential to enable companies to work for sustainability and keep applying a long-term perspective to their operations.
- The material norms listed (in the Annex of the proposal) which help defining the notion of adverse impacts, and make up a key element of the proposal, should be revisited to make them applicable and to avoid mixing the role of states and companies.
- Corporate governance (directors' duty of care) provisions should be deleted as these will disrupt well-functioning national corporate governance systems.

[3] Joint-business statement signed by 37 European umbrella or sectoral business associations from May 2023: 'Joint Business statement on the Corporate Sustainability Due Diligence Directive (CS3D)' <https://www.businesseurope.eu/publications/corporate-sustainability-due-diligence-directive-cs3d-joint-business-statement> accessed 16 September 2024.

- Full alignment with the Corporate Sustainability Reporting Directive is essential to avoid duplications.

3. *Substantive Impact on SMEs*

The nominal exclusion of SMEs from the direct scope does not mean that they will not be very substantially impacted by key provisions, which several sections of the proposal also acknowledge. The limited threshold does not determine which companies have to execute due diligence and which not, as all companies in the supply chain are expected to do due diligence, but only which companies can be subject to administrative supervision and fines. Therefore, SMEs clearly will be affected and hence will face massive challenges, both as they are suppliers in the supply chain but also since they can be subject to contractual fines with their larger business partners. It must be considered that SMEs have less influence on supply chains due to limited resources and less market power. It is important to avoid unnecessary bureaucracy and burdens for SMEs in the concrete implementation. The best way to protect European SMEs is in BusinessEurope's view to ensure workable and harmonised rules. This way when there is a spillover of the obligations they are better equipped to cope, also with the help of other supporting measures that we also call for.

4. *Conclusion*

An efficient EU due diligence law is possible but further work is needed to address unresolved issues in this directive to make sure all the right conditions are there to enable European companies to give a strong contribution to more sustainable value chains.

Sophie Schiller

COMPANIES AND HUMAN RIGHTS: THE FRENCH EXPERIENCE WITH THE ACT ON THE DUTY OF VIGILANCE OF PARENT COMPANIES

1. *Introduction*

On 28 March 2017, one of the most controversial texts of recent years was published in the *Official Journal of the French Republic*: the 'Law on the duty of vigilance of parent companies and ordering companies'.[1] The tragic circumstances that led to the writing of this law are sadly known. On 24 April 2013, Rana Plaza, a building in Bangladesh, collapsed due to the overcrowding of garment workers within its walls. 1,129 people died and almost 2,500 were injured. The labels of many French and foreign brands were found among the ruins of the building. This horrific tragedy, among many others, triggered a strong reaction. Some sectors are particularly problematic, such as the extractive sector, which alone would be responsible for 28% of the human rights violations committed by companies, according to Professor John Ruggie, former special representative of the UN Secretary-General on Human rights and transnational corporations. Nowadays, many large companies in developed countries have their goods manufactured by their supplier, subcontractor or subsidiary in southern countries. The entire world reacted to these human tragedies and questioned both the responsibilities involved and the prevention method to be put in place, thus reviving considerations that were already under way in many countries about the necessity to improve the respect of human rights in all companies. In France, two successive bills were tabled by members of parliament, one on 6 November 2013 and the other on 11 February 2015, to 'tackle human rights violations and corruption in supply chain companies'. After nearly four years of debates, arguments, lobbying from businesses and NGOs, par-

[1] *loi* n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre ('Publication de la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre' (2017) 13-14 La Semaine Juridique Entreprise et Affaires 250).

liamentary exchanges and successive amendments, the text was finally adopted by the National Assembly on 21 February 2017 and the Constitutional Council partially censored it by Decision No. 2017-750 of 23 March 2017.[2]

Jurists were required assistance to implement these new restrictions and try and obtain the best possible results. Their help was essential given the difficulty in understanding the wording, starting with the title. Of course, the concept of duty of vigilance already existed in French law. In banking law, it requires banks to check that a customer's transactions are consistent with what is known of them, but without imposing any investigation. The duty of vigilance is also part of the labour law since the law of 14 July 2014 against unfair competition caused by posted workers.[3] It compels any principal or ordering company to provide collective accommodation for its employees whenever it learns of an incompatibility with human dignity, and without having to search for or identify the violations committed by its contractors or subcontractors. In banking law, the duty of vigilance imposes controls but no investigation, while in labour law, there is no obligation to carry out controls, only to react to any alert issued by a state agent. The terms 'parent companies' and 'ordering companies' used in the title of the law were equally difficult to define and were fortunately clarified by the text itself, which was a very satisfactory development compared to the initial bill of 6 November 2013. However, this development was not satisfactory enough for the Constitutional Council, which declared a fine for 'a breach defined in such insufficiently clear and precise terms' to be unconstitutional, precisely for the sake of 'broad wording' and because of the 'broad and indeterminate nature' of some words. Despite this partial censorship, the obligations imposed by the text remained accompanied by heavy penalties. A company that did not comply with these new obligations would not be fined, but its reputation and civil liability would be seriously put at risk. However, censorship did not address the vagueness of the text at the time, and many uncertainties remained regarding its scope (1), the content of the obligations (2) and the penalties incurred (3). Six years later, following a number of legal disputes, several of these points have been clarified (4).

[2] Conseil Costitutionnel, décision 23 March 2017, no 750 (OJ 28 March 2017 text no 2).

[3] *loi* n° 2014-790 du 10 juillet 2014 visant à lutter contre la concurrence sociale déloyale ('Lutte contre la concurrence sociale déloyale' (2014) 31-34 La Semaine Juridique Entreprise et Affaires 572; 'Renforcement de la lutte contre la concurrence sociale déloyale et le travail dissimulé' (2014) 35 La Semaine Juridique Entreprise et Affaires 1431).

2. *Scope of the Law*

2.1. *Companies Compelled to Establish and Implement a Vigilance Plan*

Many companies are affected by this law. The French Commercial Code now includes two new articles, L. 225102-4 and L. 225-102-5. They therefore apply not only to *SA* (joint-stock companies) but also, by reference, to *Sociétés en Commandite par Actions* (limited partnerships by shares) (*Supreme Court, Commercial Chamber, Art. L. 226-1)* as well as to *SAS* (simplified joint-stock companies). Indeed, Article L. 227-1 refers to all laws relevant to *SA* (joint-stock companies), 'except for Articles *L. 225-17 to L. 225-102-2, L. 225-103 to L. 225-126',* implying that these two new provisions are binding on the *SAS* (simplified joint-stock companies). The law applies to *'any company employing, at the end of two consecutive financial years, at least five thousand employees including in its direct or indirect subsidiaries whose registered office is located in France, or at least ten thousand employees including in its direct or indirect subsidiaries whose registered office is located in France or abroad'*. The wording is quite unfortunate, as it is not clear whether the expression *'whose registered office is located'*, either *'in France'* or *'in France or abroad'*, refers to the registered office of the parent company or to the registered office of the group's subsidiaries. The singular would refer to the parent company, but both logic and analogy dismiss this analysis. If the registered office in question is that of the parent company, the first part of the sentence would apply to parent companies located in France, which employ 5000 people including in their subsidiaries, and the second part would apply to groups whose parent company is located in France or abroad and employ 10,000 people. The category referred to in the first part of the sentence would be integrated with that of the second part and would therefore have no purpose or meaning whatsoever. Moreover, this wording had already been used in Act No. 2013-504 of 14 June 2013 on employment security[4] regarding the obligation to appoint directors representing the employees. The French Government had to further modify the implementation of the law. In its report, the Government explained that only French companies were

[4] *loi* n° 2013-504 du 14 juin 2013 relative à la sécurisation de l'emploi (Sylvie de Vendeuil et Olivia Rault-Dubois, 'Représentation des salariés au conseil d'administration ou de surveillance de grandes entreprises' (2013) 26 La Semaine Juridique Entreprise et Affaires 1379).

affected, because 'companies (…) whose registered office is not in France [a list of companies is given] are not concerned' by this text.[5] Consequently, it appeared that only companies which have their registered office in France and which employ 5,000 employees in the whole group if all their subsidiaries are in the French territory, or 10,000 employees in the whole group if some subsidiaries are abroad, are affected by the law. This was confirmed by the Constitutional Council, which refers to 'companies having their registered office in France and which, at the end of two consecutive financial years, employ at least five thousand employees within their own company and their French subsidiaries, or at least ten thousand employees within their own company and their French and foreign subsidiaries'. This scope is quite unfortunate. The criteria chosen by the drafters to enforce the law dissatisfy both companies and victims' advocates. All structures that flood the French market but whose parent company is located abroad are concerned by these obligations only if they have a subsidiary employing more than 5,000 employees in France. Neither Nike nor Zara are legally obliged to draw up a duty of vigilance plan while French companies are regularly condemned by the English, or the Americans based on local texts when they conduct part of their business or use their currency in these countries. For example, the Bribery Act, a British law, applies to any company that has committed an act of corruption, whenever it exercises all or part of its 'business activity on the territory of the United Kingdom'. Similarly, the German law of 16 July 2021 applies to all German companies with 3,000 employees, even if their head office is located abroad. Applying these obligations to all companies operating in the French territory would have placed national companies on an equal footing with others and would have greatly improved the protection of victims by allowing them to charge far more companies. This is what the directive currently under discussion aims to achieve.

2.2. *Companies Exempted from the Obligation to Implement a Vigilance Plan*

Even though a company meets the requirements in terms of legal form, location, registered office and workforce, it can be exempted from the obli-

[5] Ministère du travail, 'Bilan de la loi de sécurisation de l'emploi du 14 juin 2013 au 03 avril 2015' (2015) <https://travail-emploi.gouv.fr/IMG/pdf/CONFERENCE_THEMATIQUE_DU_3_AVRIL_2015_-_Bilan_de_la_loi_de_securisation_de_l_emploi.pdf> accessed 21 September 2024.

gation to draw up and implement a vigilance plan if another company in its group already does so. This provision was introduced to the latest version of the text and follows the logic established by Act No. 2016-1691 of 9 December 2016, known as the Sapin II Law,[6] which was welcomed by companies. They do not have to implement as many plans as subsidiaries. Depending on the group's structure, either the parent company or one of the subsidiaries may be the best choice. Nevertheless, the plan must be carefully adapted to any change in the composition of the group.

3. *Imposed Obligations*

3.1. *Vigilance Plan Content*

3.1.1. *Companies Included in the Scope of the Vigilance Plan*

Despite the reference to a minimum workforce of 5,000 employees, smaller companies are affected by this law because the scope of the vigilance plan is far broader than that of a group compelled to draw up a plan. Even temporary employment business or small and medium-sized enterprises are affected if they work with a group of more than 5,000 employees. The plan thus involves a collaboration with three categories of partners that need to be identified: *'subsidiaries, subcontractors or suppliers with whom an established commercial relationship is maintained'*.

First, the plan includes reasonable duty of vigilance measures to identify and prevent the risk of violating some of the rights arising from the activities of the company and from those of *'companies controlled by it within the meaning of Article L. 233-16, directly or indirectly…'*. It is therefore the accounting consolidation criterion that is used here. According to this definition, control is assessed as a decision-making power exercised over a company, generally through the exercise of voting rights, but also, as the case may be, by other means (such as the appointment of management bodies or a convention). The companies concerned are those controlled directly, but

[6] *loi* n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption e à la modernisation de la vie économique (*loi* n° 2016-1691), art 17, I, 2° para 2. See particularly on this law Myriam Roussille, 'Loi Sapin 2 et droit des sociétés' (2017) 4 La Semaine Juridique Entreprise et Affaires 1048.

also indirectly, that is to say those, without limit in the chain of custody, on which a company exercises the decision-making power, whether they be its daughters, granddaughters, great-granddaughters, etc.

In addition, the plan must consider the *'activities of subcontractors and contractors with which the company has established a commercial relationship'*. Again, other areas of law can be involved to identify the categories. According to Article 1 of Act No. 75-1334 of 31 December 1975 on subcontracting, *'subcontracting is defined as the operation by which an entrepreneur entrusts, by means of a subcontract and under his responsibility, to another person, called the subcontractor, all or part of the fulfilment of the corporate contract or public contract signed with the principal'*. The definition has been clarified by a wealth of case law in sales law, construction law, labour law, and so on. Numerous cases have further clarified the definition of an '*established commercial relationship'* in respect to Articles L. 420-2 and L. 442-6, I, 5° of the French Commercial Code which penalises *'the breakdown of established commercial relationships'*. It was deemed *'sufficiently accurate'* by the Constitutional Council. The Court retained the extensive interpretation of both terms *'relationship',* to encompass all the assumptions, and *'commercial'*, which does not imply that the parties are qualified as retailers. As to the established nature of the relationship, it is determined by two criteria: the duration and the intensity of the commercial relationship.[7] When a partner meets these criteria, the plan must focus on activities related to the company only. The limit allows the text to meet the requirements previously laid down by the Constitutional Council, which admitted the constitutionality of Article L. 4231-1 of the French Labour Code on condition that the obligation to bear the expense of collective accommodation is only intended for employees who are *'employed for the execution of a Contract (…) for the account of the ordering company and intended for the contracting authority'*[8]. It stated that *'the principle of liability would be disregarded if the provisions referred to imposed an obligation on employees other than those employed in the performance of the direct contract or subcontract and for a*

[7] Laurence Nicolas-Vullierme, 'Rupture brutale des relations commerciales établies' (2012) 300 JurisClasseur Concurrence - Consommation.

[8] Regarding the decision of 22 January 2016 Sophie Schiller, 'Message clair du Conseil constitutionnel: la responsabilité d'un maître d'ouvrage ou d'un donneur d'ordre pour les faits d'autrui n'est validée qu'avec réserves et conditions' (2016) 5 La Semaine Juridique Edition Générale 113.

period exceeding that of the execution of the contract'. Since the adverbs *'directly and indirectly'* have only been used for controlled companies, they do not seem to concern subcontractors and trading partners. The distinction is quite logical. Companies have a genuine power over their subsidiaries. On the other hand, it is more difficult for them to impose constraints on their subcontractors and their partners. Difficulty turns into impossibility in the absence of an alternative or if an indirect link was seen as the umpteenth link in a subcontracting chain. Only subcontractors or direct partners are thus included in the scope of the plan. Despite all these details, the Constitutional Council noted that the *'perimeter of companies, businesses and activities falling within the scope of the vigilance plan'* was *'broad and indeterminate'*, and incompatible with the payment of a 10 million euros fine. Nevertheless, it considered the perimeter as sufficiently accurate to define the scope of the duty of vigilance plan.

3.1.2. *Violations Covered by the Vigilance Plan*

The text refers to all *'serious violations of human rights and fundamental freedoms, the health and safety of people and of the environment'*. Although several of the expressions used are commonly recognised, the Constitutional Council described them as too *'broad and indeterminate'* for their violation to be sanctioned by a fine. Human rights and fundamental freedoms have been defined by judicial, administrative, constitutional, European and conventional case law. Some of them are set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms, which refers to *'human rights and fundamental freedoms'*: prohibition of slavery and forced labour;[9] right to liberty and security;[10] right to respect private and family life;[11] freedom of thought, conscience and religion;[12] freedom of assembly and association;[13] prohibition of discrimination;[14] protection of property,[15] etc. The list of human rights and fundamental freedoms men-

[9] European Convention on Human Rights, art 4.
[10] European Convention on Human Rights, art 5.
[11] European Convention on Human Rights, art 8.
[12] European Convention on Human Rights, art 9.
[13] European Convention on Human Rights, art 11.
[14] European Convention on Human Rights, art 14.
[15] European Convention on Human Rights, art 1 of Protocol No 1.

tioned by the ECPHR is long, and it has been further complemented by case law, even if only a few examples have been chosen for their impact on professional life. The act does not simply refer to this vast content. It also refers to *'the health and safety of people'*. The term is somewhat redundant in relation to human rights and fundamental freedoms, but occupational safety and health now constitute a set of specific requirements set out in Part IV of the French Labour Code and derived from the ordinary rules of the French Criminal Code.[16] A specific provision urges employers to take *'all necessary measures to ensure safety and protect the physical and mental health of workers'* (French Labour Code, Article L. 4121-1) and even, according to the following articles, assess and prevent risks. The approach is therefore well known. This text also refers to environmental damage, which is also well-defined by earlier texts. The French Environmental Code, in Articles L. 160-1 et seq., describes the preventive actions in terms of environmental damage, defined in Article L. 162-1, to which the economic damage defined by Article 1247 of the Civil Code may be added. Each of the expressions used is therefore well known, even more so since the area covered overall corresponds to that of several previous non-binding behavioural standards. For example, the OECD Guidelines for Multinational Enterprises, adopted in 1976 and revised several times since, require companies from all branches of the 46 adhering countries to respect human rights, employment, industrial relations and the environment. The ISO 26000 standard, which is a standardised risk management system, i.e. an organisational procedure, covers the same subjects. The law of 27 March 2017 managed to combine a perimeter of companies and rights, which requires to identify and prevent all these risks not only within the company itself but also in its subsidiaries, even indirect subsidiaries, subcontractors and suppliers with whom it has established a commercial relationship in France or abroad. If the terms used are construed in reference to their earlier meaning, it follows that suppliers or subcontractors in Bangladesh or Sri Lanka must observe Part IV of the French Labour Code, as well as some chapters of the French Civil Code and the Labour and Environment Codes. The ambition seems as dizzying as unrealistic.

[16] Marc Segonds, 'Santé et sécurité au travail' (2014) Répertoire de droit pénal et de procédure pénale.

3.1.3. *Procedure Imposed by the Text*

The procedure imposed by the text is also well known. The duty of vigilance plan should describe the different stages of any *compliance* process, such as that recommended by foreign guidelines, the OECD or the ISO[17] standards, but also the Sapin II Law. First, it is necessary to identify, analyse and prioritise risks in order to present them as risk mappings. This first step is described using the same terms as the Sapin II Law. The risk mappings will enable the second stage, which is the evaluation of the situation of these risks throughout the scope of the plan, i.e. within the subsidiaries, subcontractors and suppliers with which the company maintains a commercial relationship. Contrary to the Sapin II Law, which stops at this stage, the duty of vigilance plan requires to go further and to describe in a third stage the '*actions taken to mitigate risks or prevent severe damage'.* The meaning of this expression is hard to catch. Take the example of a French textile distribution company that manufactures products in Bangladesh. First step: it identifies a serious threat to the right to strike. Second stage: it notes that striking workers have been fired and arrested as a result of protests. To meet the third stage, it decides to boycott the annual Dhaka Apparel Summit and solemnly calls on *'the Government of Bangladesh to take immediate actions to ensure the protection of workers' rights, with special attention paid to the legitimate representatives of the workers who were arrested.'*[18] This was the reaction of several hundred companies in the sector at the beginning of 2017. However, no action was taken as a result by the government, which can be explained by the fact that 10% of the legislators themselves are directly involved in the textile industry. Despite the lack of results, will these actions be considered appropriate? This is to be hoped since the Act only imposes *'reasonable'* vigilance measures in the plan. Otherwise, Western companies should stop doing business with Bangladesh as long as the authorities are

[17] For example, see United States Sentencing Commission, 'Guidelines Manual' (Nov 2012) §3E1 1 <https://www.ussc.gov/guidelines/guidelines-archive/2012-federal-sentencing-guidelines-manual> accessed 22 September 2024; U.S. Department of Justice and U.S. Securities & Exchange Commission, 'A Resource Guide to the U.S. Foreign Corrupt Practices Act' (July 2020) <https://www.justice.gov/criminal/criminal-fraud/file/1292051/dl> accessed 22 September 2024; UK Ministry of Justice, 'Risk Assessment Guidance' (2017) Principe 2; ISO 37001:2016.

[18] A statement made to the AFP by Thorsten Rolfes, spokesperson of C&A, on 2 February 2017 (Mutatio Watch, strategic newswatch by Affectio Mutandi).

plagued by corruption and conflicts of interest. Local workers may wait a long time before they find a job again.

3.1.4. They must also describe an '*alert and collection of signatures system regarding the existence or the realisation of risks, drawn up in consultation with the representative trade union organisations in that company'*. The Sapin II Law also provides for an alert system to be set out in a code of conduct incorporated in the internal rules, which, therefore, also entails negotiating with the organisations representing the company's employees. One may question the utility of this intrinsic contradiction, given that whistleblowers have been the subject of a global definition and a general protection regime, precisely since the Sapin II Law.[19] In addition, the wording is once again puzzling. According to the labour law, negotiations must be initiated with all the employees' representatives providing recommendations. Representative organisations are nothing but signing authorities. The text refers to a *'concertation'* with *'representative organisations'*, which is a surprising combination, scarcely compatible with the logic of collective representation.

3.1.5. The similarity of this approach with the Sapin II Law is to be found in the last stage of *compliance* to be described in the plan: the *'system for monitoring the measures implemented and for evaluating their effectiveness'*. This is essential to prevent the plan from being reduced to overly broad formal declarations or unnecessary pre-emptive commitments. Companies should not simply take steps to ensure that their subsidiaries and partners respect human rights, fundamental freedoms, health, personal safety and the environment. They must ensure the effectiveness of these measures. Several control devices can be considered. As the objective is to control the behaviour of companies that are often distinct from that of the plan drafter, the monitoring of the measures should certainly be entrusted to an external organisation. The law does not use the adjective '*internal*' to talk about evaluation, contrary to the Sapin II Law. Non-financial external controls are the so-called social audits that emerged during the anti-sweatshop fight

[19] On this topic, see Éric Alt, 'De nouvelles protections pour les lanceurs d'alerte - À propos de la loi n° 2016-1691 du 9 décembre 2016' (2017) 4 La Semaine Juridique Édition Général 90.

led in the 1990s by activists against the giants in the textile industry.[20] In the United States, they are generally entrusted to auditing companies whereas in Europe they are part of the quality audit. The market experiences a strong growth. Nevertheless, social audits have been criticised.[21] Although some dispute their independence from the ordering company, this objection can be ignored in view of the status of other auditors, accounting auditors in particular, whose independence is guaranteed by an adapted status. The items to be checked are labelled as questions grouped together in a grid, and the auditor, as a mere executor, answers yes or no. This approach was considered too simplistic, especially since, unlike auditing, it does not imply a faithful representation of reality, which is difficult to consider without making a very time-consuming and therefore expensive audit. Moreover, the points to be checked are very diverse and a real control would involve the auditor's proficiency and multiple skills to appreciate not only the construction plan and the location of the fire extinguishers, but also the reality faced by trade unions, etc. Unfortunately, several disasters revealed the limits of audits. The Spectrum plant (Dhaka, Bangladesh) that collapsed in April 2005, causing 64 deaths, the Ali Enterprises (Karachi, Pakistan) and Tazreen (Dhaka, Bangladesh) plants that burnt down in 2012, causing 300 and 112 deaths respectively, as well as the Rana Plaza, had been audited before the accidents.[22] New initiatives allow for a better balance between cost and efficiency. As a result, some 20 brands created the 'Social Clause Initiative' which developed a common methodology that ensures a complete control of the audit process by all of its members.[23] It would also be possible to consider a certification of certifiers, close to what already exists in the pharma-

[20] About social audits, see Pauline Barraud de Lagerie, 'Les patrons de la vertu : entrepreneurs de morale et instruments de mesure dans la construction de la responsabilité sociale des entreprises' (DPhil thesis, Institut d'études politiques Paris 2010).

[21] Guillaume Delalieux, 'Audit et certification : une véritable industrie' (*Revue Projet*, 30 September 2016) <https://www.revue-projet.com/articles/2016-09-delalieux-audit-et-certification-une-veritable-industrie/8176> accessed 18 September 2024.

[22] The Rana Plaza building was audited by the TÜV Rheinland company according to the BSCI standard, a year before the tragedy. A complaint was lodged by several NGOs: European Center for Constitutional and Human Rights <http://www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia/bangladesh-tuev-rheinland.html> accessed 22 September 2024.

[23] Initiative for Compliance and Sustainability <http://www.ics-asso.org/index.php?id=2> accessed 22 September 2024.

ceutical field for medical devices. Their CE marking is subject to compliance with many constraints verified by *'notified bodies'*, which are responsible for applying the conformity assessment procedures. Member states are responsible for their own notification. They shall choose organisations based on their technical expertise, independence, impartiality and integrity, which shall themselves be audited on a regular basis. The implementation of such audits could have strengthened the reliability of the approach.

3.1.6. The act provides that the duty of vigilance plan *'should be elaborated in association with the stakeholders'*. Even though the health and safety of employees are a priority, the representative organisations are not given the ability to contribute to a dialogue on social issues. The drafting is the result of a difficult consensus reached between NGOs that wanted to impose themselves in the negotiations, and companies that wanted to preserve their autonomy and freedom. People in favour of constraints must be pleased with the solution chosen because the *'incentive effect'* of the intervention, as observed by the Constitutional Council, helped the text to take into account, in its own words, *'the objective of constitutional value in terms of accessibility and intelligibility'*. The intervention of *'stakeholders (parties prenantes)'* is therefore foreseen, but not imposed. The expression used is the translation of the Anglo-Saxon notion of *stakeholder*, but the meaning is not as precise. It primarily refers to NGOs, but also to trade unions, consumer protection associations, associations for the defence of shareholders, etc. The text then states that the plan can be developed *'where appropriate, as part of multiparty initiatives to be undertaken within sectors or on a territorial scale*'. This type of initiative is becoming more common and one of the most successful is the agreement on security measures regarding fires and buildings signed in Bangladesh on 13 May 2013.[24] It is commonly referred to as the Agreement and is the result of an agreement between two international trade unions, several Bangladeshi trade unions and nearly 200 companies from more than 20 countries in Europe, North America, Asia and Australia. It applies to 1594 of the 3498 Bangladeshi workshops producing clothes for export. Its content is extremely detailed. It includes a series of commitments aimed at

[24] For a very detailed description of the Agreement, see Lydie C. Belporo, 'Les enjeux contemporains de l'encadrement de la responsabilité des entreprises en matière de droits humains dans la chaîne d'approvisionnement : le cas de la tragédie au Bangladesh' (2016) 11 Revue de droit du travail 722.

improving working conditions, preventing fires by securing the buildings in which the employees work and providing trainings. It describes a five-year program, structured around predetermined stages of development. It provides for inspections which could lead to action plans, all of which must be disclosed. In three years, nearly 800 inspections were carried out. Any necessary renovation may be funded by a contribution paid by the companies based on their annual output volume. The Agreement is legitimised by the joint signatures of companies and trade unions, all of which are represented on the steering committee chaired by the International Labour Organisation (ILO). Its effectiveness is guaranteed by the possibility for the signatory parties to resort to final and binding arbitration in the case of a conflict over its implementation. As an instrument of strictly private initiative, it was approved by most of the players in the territory concerned, and it satisfies all parties involved: both employees who see their condition improving and companies that do not fear a competitive disparity. It is then hardly surprising that French legislators want to promote such instruments.

3.1.7. Although the law describes in detail how the vigilance plan is to be drawn up and much of its content, it provides for a decree complementing the vigilance measures and specifying the procedures for implementing this plan. Unfortunately, this decree was never published. Although it was not necessary for the application of the law, it could have been useful for a better understanding of the expected requirements.

3.2.*Promoting the Vigilance Plan and its Follow-up*

3.2.1. The vigilance plan and the report concerning its effective implementation were *'made public and included in the report mentioned in Article L. 225-102'*. Extra-financial annual information on companies is split into many reports. The development of societal information can be explained by its virtues, as evidenced by the evolution of governance practices.[25] Each year, the publication of two state-of-the-art reports confirms this. On the one hand, AFEP and MEDEF have been producing since 2009 an annual report on the implementation of their code by the top 120 companies listed in the

[25] Sophie Schiller and Véronique Magnier, 'Le nouveau Code AFEP-MEDEF de juin 2013' (2013) 134 Actes Pratiques et Ingénierie Sociétaires §70 ff.

SBF 120 index. On the other hand, AMF conducts an external evaluation producing each year a report on corporate governance and executive compensation in listed companies, based on Article L. 621-18-3 of the French Monetary and Financial Code. The reports show a steady progress, both in the quality of the information provided and, in the practices, described. The same observation was made for all extra-financial information, the publication of which is already compulsory. According to the Observatory on Extra-Financial Information for companies of the SBF 120, 62% of the companies observed in 2016, 5 years after the introduction of an obligation to disseminate CSR information, have integrated CSR issues in their risk mapping and 70% have defined a quantitative strategy and objectives after 3 and 5 years.[26] This observation is shared by AMF in each of its published reports on social, societal and environmental information, based on the study of the 60 listed companies.[27] In light of this feedback, and once the information published, the companies immediately comply with non-binding provisions so as not to scare shareholders, investors and partners away. Nevertheless, such a mechanism is only effective under some conditions. A reflection is needed to give transparency to all stakeholders, as well as players concerned with their image, reputation and relationships with third parties. The companies covered by the law share these characteristics. In an efficient capital market, advertising increases everyone's vigilance and gives issuers and investors a sense of responsibility. The advertising effectiveness depends on the maturity of the market considered, but also on the clarity of the message conveyed. Every year, the AMF's report on corporate governance and executive compensation of listed companies highlights this requirement while also observing advancements in practices. In its third report on social, societal and environmental information published in November 2016, the AMF also encouraged companies to improve their communication skills by providing concise and hierarchical information. The publication of the full duty of vigilance and of the reports on its implementation has made this request even more difficult to comply with.

[26] See <www.ey.com/Publication/vwLUAssets/ey-observatoire-de-l-information-extra-financire-des-entreprises-du-sbf120/$FILE/ey-sbf-120-presentation-des-resultats.pdf> accessed 22 September 2024.

[27] For example, AMF, 'Communiqué 17 novembre 2016' (Louis-Nicolas Ricard, 'AMF: bilan de l'information publiée par les sociétés cotées en matière de RSE et rapport annuel sur le gouvernement d'entreprise' (2016) 6 Revue de Droit bancaire et financier, 82).

3.2.2. The publication of the duty of vigilance plan and of its reports in the management report also has an impact on the consumers' information. The law of 4 August 2008[28] created a presumption of deceptive commercial practice when a professional claims to be the signatory to a code of good practice whereas he or she is not, or asserts that the code has been approved by an inspection body when it has not (Consumer Code, Article L. 121-4, 1° and 3°). Contrary to the Sapin II Law, which imposed all its anticorruption compliance procedures in a 'Code of Conduct', the law of 27 March 2017 did not move in that direction. The consumer cannot, therefore, rely on the presumption of deceptive commercial practice in the absence of a duty of vigilance plan, but he or she may be informed of its content. The Law of 31 July 2014 on social and solidarity economy[29] added Article L. 113-1 to the Consumer Code according to which *'The manufacturer, the producer or the distributor of a good marketed in France shall transmit to the consumer who requests it and who is aware of serious elements challenging the fact that the goods have been manufactured in conformity with international conventions on fundamental human rights, any information available to them on one of the following elements: geographical origin of the materials and components used in manufacturing, quality control and audits, structure and identity of the production chain, geographical location and qualities of the manufacturer, its subcontractors and suppliers'*. The same logic was followed by the Climate and Resilience Act of 22 August 2021, which stepped up the fight against 'greenwashing' in advertising using the terms 'carbon neutral' by requiring companies to back up their claims with documented and quantified arguments. Once informed, the consumer might decide not to buy the product, which is the most effective sanction for companies trying to hit their targets.

4. *Penalties for Breach of Obligations*

4.1. The initial text stated that a breach of these obligations would result in multiple sanctions, incurred by the groups covered by the law only, if the

[28] *loi* n° 2008-776 du 4 août 2008 de modernisation de l›économie (Gérard Notté, 'Loi de modernisation de l›économie' (2008) 31-34 La Semaine Juridique Entreprise et Affaires 381).

[29] *loi* n° 2014-856 du 31 juillet 2014 relative à l›économie sociale et solidaire (Gérard Notté, 'Loi n° 2014-856 du 31 juillet 2014 relative à l›économie sociale et solidaire' (2014) 36 La Semaine Juridique Entreprise et Affaires 605.

plan was not effectively implemented or in case of a damage. Although the Constitutional Council abolished civil fines, sanctions remain in place, preserving the binding nature of the text.

4.2. *Penalty for Failing to Implement the Vigilance Plan*

4.2.1. If a company fails to comply with the *'obligations provided for in I'*, that is to say if the plan is non-existent, incomplete, or inadequate, the company may receive a *'formal notice'*. The text requires the infringement to be clearly established prior to sending the notice. It therefore meets a previous requirement of the Constitutional Council, which imposed the obligation to provide collective accommodation to its subcontractors' employees only when the obligating event is verified and subject to reliable evidence.[30] The text does not specify who the author of the formal notice must be. This situation is very unfortunate and explains most of the disputes that have arisen on this subject. It was hard to determine who would be in charge of its drafting and sending. The Sapin II Law, which provided for a similar procedure, logically entrusted it to the French Anticorruption Agency. The company has 3 months to comply with the requirements contained in the formal notice. Failing that, any person with an interest may file an application to the *'competent court'* or to *'the president of the Court'* which may order the company under penalty to respect them. The law thus provides for the widest referral, with the only limit being the interest to act inherent in any legal action.

4.2.2. The original text then stated that '*the judge may order the company to pay a civil fine of up to 10 million euros'*. The sanction provided for was particularly vague and questionable and one can only applaud the Constitutional Council's censorship. Nothing in the preceding paragraph suggests that the injunction was a prerequisite for the fine. In addition, the amount of the fine was set according to three criteria: the seriousness and the circumstances of the breach and the 'personality of the author'. It was difficult to understand what was meant by the personality of a legal entity, necessarily at the origin of that breach. The text showed its proximity to criminal law by using a phrase commonly used to determine natural persons' sanctions. 'For

[30] Schiller (n 8).

groups, only the criminal history (i.e. the existence of previous convictions)[31] seems to be considered.' As some author rightly pointed out, 'if the text provides for sanctions by way of a fine, the elements taken into consideration to determine its amount and the methods of calculation, as compared to the competition law which has developed a true science of sanction, remains vague; what is particularly surprising is that the ceiling is expressed in absolute value, i.e. EUR 10 million, and not in proportion to the turnover, while once again the entity's activity is at the root of the risks and their consequences'.[32] To establish fines, competition law uses four criteria: the seriousness of the alleged offences, the extent of the economic damage caused, the situation of the company sanctioned and the possible reiteration of the practice. The law of 9 December 1966[33] standardised and detailed the elements to be implemented in stock exchange law by setting out 8 elements of assessment to determine the amount of the fine (*Monetary-Financial Code, Article L. 621-15 III ter*). By choosing not to follow any of the decisions taken for decades to determine the amount of the fine, the law imposed on the judges a delicate and unnecessary task of creation, exposing sanctioned companies to a severe uncertainty, which perfectly justified the censorship of the article.

4.3. *Penalty for Injury*

Article L. 225-102-5 of the Commercial Code provides for a civil liability mechanism based on Articles 1240 and 1241 of the Civil Code, which describe fault-based liability. The operative event is a *'breach of the obligations defined in Article L. 225-102-4',* that is to say the absence of a plan or a plan considered inconsistent with the constraints imposed. If an injury is proven, the victim may seek reparation provided it can be shown that a proper implementation of the plan "would have prevented the damage". The victim must prove that if the plan drafted by Auchan had included a risk analysis that was more in line with the text, the Dhaka building would not have burnt down. Given the French legal requirements regarding the direct and

[31] Jocelyne Leblois-Happe, 'Individualisation des peines', (2019) 20 JurisClasseur Pénal Code.

[32] Sylvaine Poillot Peruzzetto, 'Le droit de la concurrence et le droit de la responsabilité sociale des entreprises' (2017) Magazine Concurrences 1.

[33] *loi* n° 2016-1691.

certain nature of the damage, these actions are unlikely to succeed, and it is not surprising that none has yet been initiated with this goal in mind. The Constitutional Council confirmed the need to establish *"a direct causal link (…) between these actions and the damage"* and deduced that *"the impugned provisions therefore did not establish a vicarious liability, as parliamentary works reveal",* to finally conclude that there was no breach of the accountability principle.

4.3.1. According to the second subparagraph of Article 2 of the Law, "*in such cases, the amount of the fine provided for in Article L. 225-104-4 may be increased up to three times, depending on the seriousness and circumstances of the failure and damage*". Contrary to the practices described above, the victim's prejudice was considered when determining the amount of the civil penalties rather than the perpetrator's profit. Let us take the example of a company who made children work with their parents to cut production expenses. If the building collapsed and the whole family was killed, because there was no beneficiary left, no damage was established, and the fine was not tripled. On the other hand, if one of the family members survived and the damage was compensated, the increased fine benefited the Public Treasury. For centuries, French law had maintained a clear separation between repressive punishment, based on the behaviour of the perpetrator of the damage, and damages, which compensate the victim for his or her loss. This concept had long been trampled upon and it is fortunate that the Constitutional Council chose to censor this other provision. Thanks to its decision, the duty of vigilance is now part of the French law, improving the physical protection of potential victims, without infringing the legal certainty of the French companies. In order to better understand the scope of this law, it is interesting to consider the controversies that have arisen from its application.

5. *Disputes Relating to the Enforcement of the Duty of Vigilance Law*

5.1. The first rulings to determine the competent court have been issued. Two lawsuits have been filed against Total, the first stating that the firm violated human and environmental rights by attempting to develop oil fields in a protected natural region in Uganda, and the second alleging that Total's activities caused substantial damage to the climate system. There was

a lot of back and forth over which court should have jurisdiction. Several decisions were delivered in 2020 and 2021. Some conferred jurisdiction to the Commercial Court's jurisdiction, while others conferred jurisdiction to the Court of First Instance's. Legal arguments struggled to settle the issue.[34] The debate was fierce, with companies defending the Commercial Court's jurisdiction while the plaintiffs, mostly NGOs, invoked the Court of First Instance's jurisdiction. The legislator ultimately resolved this issue. A bill passed on 22 December 2021 "conferred jurisdiction exclusively to the Paris Judicial Court to hear actions relating to the duty of vigilance, based on Articles L. 225-102-4 and L. 225-102-5 of the French Commercial Code".

5.2. In parallel with this debate on jurisdiction, a number of measures have been taken in various areas. Most of them are still in progress.

On 3 March 2021, the Casino Group was summoned to appear before the Saint-Étienne judicial court by representatives of the indigenous peoples of the Brazilian and Colombian Amazon, as well as French and American non-governmental organisations (NGOs), for its sales of beefbased products in South America. Between 2008 and 2020, Casino purchased cattle from three slaughterhouses that received animals from 592 suppliers responsible for at least 50,000 hectares of deforestation. The cattle were raised on ancestral lands owned and managed by the Uru Eu Wau Wau community of Rondônia, Brazil. The retailer is accused of failing to assess its vigilance measures to guarantee that no human rights or environmental violations occur along its supplier chain. It is also accused of failing to include Colombia in its vigilance plan, despite the fact that this country has one of the highest rates of deforestation in the world, with cattle being the primary cause, according to a large number of official reports, and of continuing to source from these suppliers.

BNP Paribas was also served with a writ of summons on 23 February 2023 before the Paris Magistrates' Court, following an unsuccessful formal notice dated 26 October 2022. The action highlighted the bank's continued financing of companies pursuing new oil and gas projects, while demanding its clients to adopt a plan to transition away from fossil fuels. A few days before the formal notice was delivered, BNP made new commitments, includ-

[34] Sophie Schiller, Paul Bignebat and Jean-Michel Lepetre, 'Revirement de position sur la compétence juridictionnelle pour l'application de la loi sur le devoir de vigilance' (2021) 25 La Semaine Juridique Entreprise et affaires 1323.

ing a 30% reduction in outstanding linked to gas extraction and production and an 80% reduction for oil by 2030.

In January 2023, Danone was also summoned under the French Duty of Vigilance Law for its contribution to plastic pollution. Several NGOs have asked the company to publish a new vigilance plan that would include a 'deplastification trajectory'. In total, approximately ten companies have received formal notice for failing to take sufficient action to reduce the risks associated with plastic pollution (Auchan, Carrefour, Casino, Danone, Lactalis, McDonald's, Les Mousquetaires, Picard and Nestlé).

5.3. In recent months, several actions have been successful, and decisions have been delivered.

SUEZ (now Véolia) was sued following the health crisis in Osorno (Chile). 2,000 litres of oil were released in the Caipulli drinking-water treatment plant, operated by the Suez subsidiary, contaminating the whole drinking water network and leading to a 10-day city-wide water cut. The spill also reached two local rivers, the Rahue and Damas. The resulting failure to respect the physical and mental integrity of the residents of Osorno, and thus their right to health, also violated their right to live in a healthy environment and their right to water. FIDH, the Ligue des droits de l'Homme (LDH), the NGO Observatorio Ciudadano and the community organisation Red Ambiental Ciudadano de Osorno met for discussions with SUEZ on two occasions to try to obtain a modification of the vigilance plan that would take their concerns into account and thus avoid a repetition of such a health crisis in the future. They then summoned the company to appear before the civil court in Nanterre on the grounds that the 2021 Vigilance Plan, published by Suez on 29 April 2021, did not meet the expectations voiced by the four organisations. The matter was heard again before the Paris Judicial Court, which now has jurisdiction. A hearing was held before the Paris Judicial Court in April 2023. Suez put forward three procedural arguments: Suez SAS had been sued instead of the parent company Suez SA, a plan was published in 2022 that takes this risk into account, and the action brought by NGOs was contested. The Paris Judicial Court dismissed the NGOs' case on 1 June 2023, ruling that the defence's objection was 'admissible' and their action was 'inadmissible'. It agreed with the company's argument that it had 'no standing to defend, as it did not draw up the vigilance plan'.

Similarly, the French energy company EDF was targeted for building a wind farm in Oaxaca, Mexico. Unión Hidalgo, a Zapotec town in the south-

ern state of Oaxaca, has a population of 12,000. NGOs have criticised the French electricity company for failing to seek the community's prior consent, as required by Mexico's constitution, the United Nations and the International Labour Organisation (ILO), all of which grant these 'indigenous peoples' special prerogatives. There would be a violation of human rights. The plaintiffs' claim was rejected on 1 December 2021 by the Paris Judicial Court because the action did not refer to the appropriate vigilance plan.

Finally, a summary judgement was delivered on 28 February 2023 against Total Energie in the Total Uganda case. The judgement provides a number of very interesting answers. It shows the importance of formal notice in the legal system, which, in the words of the Court, 'concretises the legislator's desire for a collaborative process' and 'pursues an objective of legal certainty and the development of amicable alternatives for resolving disputes'. It confirms the need to aim for the most recent plan, which makes any legal action extremely difficult given the time taken by the courts. It explains limited powers of the judge hearing applications for interim relief when a plan has indeed been drawn up, as assessing its relevance requires in-depth examination.

5.4. Given the impossibility of actually convicting the companies being sued, several authors argue that this law is stillborn. This conclusion is overly pessimistic, because even if no company has yet been convicted, several actions are still pending on the merits and, most importantly, the pressure exerted by this law encourages changes in behaviour. The experience is therefore unquestionably significant, even though all French stakeholders, whether companies or NGOs, are very interested in discussions around the vote of an upcoming directive on this subject.

SECTION FOUR.
ENVIRONMENTAL SUSTAINABILITY AND ECONOMIC DEVELOPMENT

Andrea Giordano

CLIMATE JUSTICE AT A TIME OF ECOLOGICAL TRANSITION*

1. *Introduction: The Basic Premise*

The climate[1] belongs to each of us and to all of us.

Its importance within the kaleidoscope of individual rights demands a legal response that provides effective protection.

There has indeed been no lack of responses when we look at the number and range of climate obligations that have been created by supranational law and by the dedicated national laws passed by the various States.

It also goes without saying that urgent and appropriate measures need to be adopted to combat greenhouse gas emissions and the global warming that they create; and it is equally obvious that failure to adopt these measures, and the (supposed) ineffectiveness of the measures that have been adopted, have in several cases led to claims brought 'in the name of climate change'.[2]

We may however legitimately wonder whether legal action of this kind can in fact produce climate stability.

* The text reproduces the conference speech given by Andrea Giordano on March 30, 2023.

[1] See for example: Francesco Scalia, 'La giustizia climatica' (2021) Federalismi.it 269 <https://www.federalismi.it/nv14/articolo-documento.cfm?artid=45188> accessed 31 august 2024; Maria Alessandra Sandulli, 'Cambiamenti climatici, tutela del suolo e uso responsabile delle risorse idriche' (2019) Rivista giuridica dell'edilizia 291; Stefano Nespor, 'L'adattamento al climate change: breve storia di un successo e di una sconfitta '(2018) Rivista Giuridica dell'Ambiente 29; Massimiliano Montini, 'La disciplina settoriale sulla protezione dell'ambiente' in Paolo Dell'Anno and Eugenio Picozza (eds), *Trattato di diritto dell'ambiente* (Giuffrè 2015) 43; Valentina Cavanna, 'Il climate change globale: il Quinto Rapporto IPCC' (2014) Rivista giuridica dell'ambiente 425; Fabrizio Fracchia and Massimo Occhiena (eds), *Climate change: la risposta del diritto* (Editoriale Scientifica 2010).

[2] See: Marco Schirripa, 'Climate Change Litigation and the Need for 'Radical Change" (2022) Federalismi.it 184 <https://federalismi.it/nv14/articolo-documento.cfm?artid=46640> accessed 31 august 2024; Barbara Pozzo, 'La climate change litigation in prospettiva comparatistica' (2021) Rivista giuridica dell'ambiente 271; Scalia (n 1); Stefano Nespor, 'I principi di Oslo: nuove prospettive per il contenzioso climatico' (2015) Giornale di diritto amministrativo 750.

This is the question that underlies this investigation, which seeks to relate the *Giudizio Universale* case pending before the Court of Rome[3] to: firstly, the particular characteristics of Italian law, and secondly to the new frontiers of climate law.[4]

2. *Climate Protection*

Since climate is justiciable, it merits protection.

The answer to the question of *whether* this is enforceable comes first of all from the ECHR.

While article 1 ECHR states that the contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section I of the Convention, article 2 states the right to life, implicitly rendering it the basis for all other rights.[5]

The declaration that violations of the right to life are irreversible and that protection for this 'value of values'[6] is essential to the enjoyment of all other rights and confers a wide scope on protection as a concept[7] and impos-

[3] Giudizio Universale, 'La Causa Legale. Facciamo causa allo Stato italiano' <https://giudiziouniversale.eu/la-causa-legale/> accessed 31 August 2024.

[4] For a definition, see: Michele Carducci, 'La ricerca dei caratteri differenziali della "giustizia climatica"' (2020) DPCE Online 1345 <http://dx.doi.org/10.57660/dpceonline.2020.965> accessed 31 august 2024.

[5] See: Sergio Bartole, Pasquale De Sena and Vladimiro Zagrebelsky, *Commentario breve alla Convenzione Europea per la salvaguardia dei Diritti dell'Uomo e delle libertà fondamentali* (Giappichelli 2012) 36, 'The right to life is the first of the ECHR provisions concerning substantive rights in that, as the ECtHR has repeatedly stated, it enshrines one of the fundamental values of the democratic societies that make up the Council of Europe. The right to life enjoys a special position within the Convention and failure to respect it is one of the most serious violations of human rights since if the right to life is not protected, there can be enjoyment of any of the other rights and liberties secured by the ECHR'; C Russo, 'Le Droit à la vie dans le décisions de la Commission et la jurisprudence de la Cour Européenne' in René-Jean Dupuy (ed), *Mélanges en l'honneur de Nicolas Valticos* (Genève B.I.T. 1999) 509.

[6] In similar terms see: *Isayeva, Yusupova and Bazayeva* App no 57947/00, 57948/00 and 57949/00 (ECtHR, 24 February 2005), 168. On life as the main focus of the ECHR, see: Roberto Conti, *I giudici e il biodiritto* (Aracne 2014) 254.

[7] Subject of course to article 2(2) being mandatory and therefore subject to close interpretation (see: Angela Allegria, Domenico Di Leo and Federica Federici (eds), *Commentario alla Convenzione Europea dei diritti dell'Uomo* (Primiceri 2019) 8-9, 'Firstly, the list of exceptions is exhaustive and each requires close interpretation. Secondly, the interpretation

es on States not just negative obligations to abstain from anything that might deliberately cause the death of anyone subject to their jurisdiction,[8] but also a positive obligation to protect and repress.[9]

As in the case of the right to life, the right to a personal life, which is protected under article 8 (that, like article 2, uses wide terms such as *respect*, *private and family life* and *interference*), implies the coexistence of both negative and positive obligations. Arbitrary interference by public authorities and consequently laws, administrative orders and actions that restrict the exercise of guaranteed rights are prohibited and there are positive obligations to ensure the prerogatives secured under the Convention can be exercised and to protect them from interference by third parties.[10]

While it is true that the term 'environment' does not appear in the Convention, respect for life and for the right to a personal life cannot exist unless such a significant asset is protected.[11]

of 'absolutely necessary' must be even stricter and more tightly binding in the case of articles 8-11 ECHR. ECHR uses the term 'absolutely necessary' rather than simply 'necessary' deliberately. Finally, interpretation must take account not only of the limit imposed by 'absolute necessity' but also of the proportion required in the force used to achieve the purposes stated in the Convention, i.e. a 'use of force which is no more than absolutely necessary …in order to effect a lawful arrest or to prevent escape of a person lawfully detained').'

[8] Bartole, De Sena and Zagrebelsky (n 5) 36.

[9] ibid 41-42, 'The first sentence of article 2 ECHR creates an obligation to protect life and it is from this requirement that Strasbourg has drawn a set of obligations upon Member States to adopt positive measures to implement in concrete and effective terms the values that article 2 protects. These obligations are not specified in the article but are implicit in article 2 when taken together with the general obligation created in article 1 ECHR to secure the rights and freedoms defined in the ECHR'.

[10] See: *Ilaşcu and others v Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004) 313. For doctrine, see for example: Sergio Bartole, Benedetto Conforti and Guido Raimondi, *Commentario alla Convenzione Europea per la tutela dei Diritti dell'uomo e delle libertà fondamentali* (Cedam 2001) 308, '…interference occurs not only when a State takes positive action with respect to an individual but also when its failure to take such action that could harm protected legal positions.'

[11] See here: Roberto Conti, Interview with Nicola Lipari, 'CEDU e cultura giuridica italiana. 5. La Convenzione Europea dei Diritti dell'Uomo e i civilisti' (2020) www.giustiziainsieme.it <https://www.giustiziainsieme.it/it/le-interviste-di-giustizia-insieme/835-cedu-e-cultura-giuridica-italiana-5-la-convenzione-europea-dei-diritti-dell-uomo-e-i-civilisti> accessed 31 August 2024, 'Of course and however, the European Convention on Human Rights is gradually becoming a living entity that enables both the Court and national courts to extend protection to include rights that are not explicitly stated in the Convention.' On

This has been many times stated by the ECtHR, which has not only ruled that the State is generally liable for human rights violations caused by damage to the environment[12] but has not hesitated to state this with specific regard to natural disasters, the occurrence of foreseeable risks and failure by the State concerned to use its best efforts to prevent them.[13]

Recognition of the individual's rights and liberties, as secured under the Convention, depends however on effective remedies[14] and the ability of the individual to bring private actions before the European Court of Human Rights if those remedies prove ineffective. Where international charters and European sources are generally directed at States and an international community made up of governors rather than the governed,[15] the Convention[16] breaks with tradition in its focus on directly protecting the individual.[17]

The merits of climate protection would seem to flow from the various conventions on the fight against climate change.

Where the ECHR provides States with a basic framework that does not specify how strategies are to be applied, the other conventions flesh out the details to increase protection.

The Rio de Janeiro UN Climate Change Convention (United Nations Framework Convention on Climate Change – UNFCCC) has assumed a central role thanks to its aim of stabilising the concentration of greenhouse

the environment as a value in European law, see: Paolo Dell'Anno and Eugenio Picozza (eds), *Trattato di diritto dell'ambiente. Principi generali* (Cedam 2012); Mauro Renna, 'I principi in materia di tutela dell'ambiente' (2012) Rivista quadrimestrale di diritto dell'ambiente 62.

[12] See: *López Ostra v Spain* App no 16798/90 (ECtHR, 9 December 1994).

[13] On foreseeability of risk and the best efforts requirement, see: *Budayeva and others v Russia* App no 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008); *Kolyadenko* App no 17423/05, 20534/05 and 20678/05 (ECtHR, 28 February 2012).

[14] Such as the 'right to effective State protection' of material rights (Rosario Sapienza, 'Il diritto ad un ricorso effettivo nella Convenzione europea dei diritti dell'uomo' (2001) Rivista diritto internazionale 281.

[15] Benedetto Conforti and Massimo Iovine, *Diritto internazionale* (Editoriale Scientifica 2006) 20.

[16] Which is an international treaty *sui generis* (see eg Silvia Mirate, *Giustizia amministrativa e Convenzione europea dei diritti dell'uomo: l'"altro" diritto europeo in Italia, Francia e Inghilterra* (Franco Angeli 2007) 169).

[17] As required under article 1 ECHR. On the ECHR aim of not satisfying particular State interests but of protecting the rights of injured individuals, see: Bartole, De Sena and Zagrebelsky (n 5) 11. For the general international personality of the individual, see also: Conforti and Iovine, (n 15) 20.

gases in the atmosphere in order to prevent damaging human interference with the climate.[18]

The means of achieving this was a (political only) undertaking given by the parties to the Convention to reduce CO2 emissions to 1990 levels. Mitigation policies – based on the view that since global climate change depends on the amount of greenhouse gas released into the atmosphere, reducing emissions will slow and eventually stop that change – prevailed over adaptation policies.

To the international framework was then added the Kyoto Protocol of 11 September 1997,[19] that legally bound the signatories to reducing, in the period 2008-2012, total greenhouse gas emissions to 5.2% below 1990 levels.[20]

The Protocol is based on three fundamental pillars: International Emissions Trading (IET), which enabled signatories with a surplus of reduced emissions to sell that surplus to other countries;[21] Joint Implementation (JI) that allowed groups of countries that had given the undertaking, including countries named in Annex I to the Protocol, to work together to hit the targets by agreeing a different distribution of obligations, so long as the overall obligation was met; and the Clean Development Mechanism (CDM) assisting signatories not in Annex I to reduce their emissions.[22]

[18] See here: Benedetta Pozzo, *Il nuovo sistema di* emission trading *comunitario. Dalla Direttiva 2003/87/CE alle novità previste dalla Direttiva 2009/29/CE* (Giuffrè 2010) 1; Massimo D'Auria, 'L'emission trading e la negoziazione policentrica' in Sabino Cassese and Martina Conticelli (eds), *Diritto e amministrazioni nello spazio giuridico globale* (Giuffrè 2006) 247.

[19] On the Kyoto Protocol see for example: Wybe Th Douma, Leonardo Massai and Massimiliano Montini (eds), *The Kyoto Protocol and Beyond* (TMC Asser Press 2007); Micheal Bothe and Eckard Rehbinder, *Climate Change Policy* (Eleven International Publishing 2005); David Freestone and Charlotte Streck (eds), *Legal Aspects of Implementing the Kyoto Protocol Mechanisms: Making Kyoto Work* (Oxford 2005).

[20] 8% for Europe. The undertaking was later shared differently among individual States under the Burden Sharing Agreement of 16 June 1998 (Italy undertook to cut its emissions by 6.5% from 1990 levels in the period 2008-2012).

[21] On emissions trading see also: Valentina Jacometti, *Lo scambio di quote di emissione. Analisi di un nuovo strumento di tutela ambientale in prospettiva comparatistica* (Giuffrè 2010).

[22] Private citizens and governments of the countries in Annex I that provide this assistance can obtain certified emission reductions (CERs) for the cuts achieved by developing countries and can then use the CERs as offsets in their target-related calculations.

The doubts expressed in the second report of the *Intergovernmental Panel on Climate Change* (IPCC) about the ability to stabilise emissions,[23] the problems with the Kyoto Protocol (especially developing countries' exemption from the obligation to contain emissions, the huge costs facing developed countries and the impossibility of regulating global emissions through an international treaty),[24] the refusal by the USA (then responsible for 36% of all global emissions)[25] to ratify the Protocol, and its delayed entry into force, gradually shifted policy towards adaptation or at least towards synergistically integrating mitigation with adaptation strategies.[26]

Increasing promotion of adaptation strategies culminated in the UN's 2030 Agenda for Sustainable Development, which was unanimously adopted by all 193 of the organisation's member states on 25 September 2015, and with the 12 December 2015 Paris Agreement (at the end of COP21[27]) that set itself the goal of strengthening the response to climate change by holding 'the increase in the global average temperature to well below 2°C above pre-industrial levels' (while pursuing efforts 'to limit the temperature increase to 1.5°C above pre-industrial levels'[28]) and promoting adaptation.[29]

And finally it is EU law that holds that the climate merits protection.

The EU has signed the Rio Convention and in 1998 implemented the Kyoto Protocol with the Burden Sharing Agreement.[30]

[23] James P Bruce, Hoesung Lee and Erik F Haites (eds), *Climate change 1995: Economic and Social dimensions of Climate Change* (Cambridge University Press 1996) 183, 187-188.

[24] On these limits, see: Richard Cooper, 'The Kyoto Protocol: A Flawed Concept' (2001) FEEM Working Paper No 52.2001 <https://ssrn.com/abstract=278536> accessed 31 August 2024.

[25] Nespor (n 1) 41.

[26] ibid 42-47.

[27] On the Paris Agreement see: Stefano Nespor, 'La lunga marcia per un accordo globale sul clima: dal Kyoto Protocol all'Accordo di Parigi' (2016) Rivista trimestrale di diritto pubblico 81.

[28] Article 2.1 a), 'Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change'.

[29] 'Each Party should, as appropriate, submit and update periodically an adaptation communication, which may include its priorities, implementation and support needs, plans and actions, without creating any additional burden for developing country Parties'.

[30] With the Burden Sharing Agreement agreed by the Environment Council 16-17 June 1998, the EU's target of reducing greenhouse gases by 8% below their 1990 levels over the

The Agreement was followed by: the Communication on Climate Change, which was adopted by the Commission, the Green Paper on greenhouse gas emissions trading within the European Union; ratification of the Kyoto Protocol; and Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading.[31]

More specifically, and in line with international treaty law, the Directive introduced a system that gives facilities to the operators that do not exceed the cap placed on their total permitted emissions 'emission credits', which can be sold to States that have exceeded their own caps. Operators unable to cut their emissions have to buy credits from those that can, and may then use them to offset the excess emissions that caused them to break through their own cap.[32]

The updated Emissions Trading System forms part of the wider 2020 Climate and Energy Package and therefore the 2030 Climate and Energy Framework, with which the EU has undertaken to reduce greenhouse gases emissions by at least 40% below their 1990 levels by 2030.[33]

The target has recently become even more ambitious in the light of the growing importance of climate stability.

As the Commission announced in its 28 November 2018 Communication and outlined in greater detail in its 11 December 2019 Communication (the Green Deal), we are now moving towards net zero greenhouse gas emissions by 2050, a target that is expressly mentioned in Regulation (EU) 2021/1119 of 30 June 2021.

The Regulation establishes a framework 'for the irreversible and gradual reduction of anthropogenic greenhouse gas emissions by sources and enhancement of removals by sinks regulated in Union law', setting a binding target of climate neutrality 'by 2050'.

period 2008-2012, in accordance with the Kyoto Protocol, was shared on a fair and proportionate basis among the then fifteen EU Member States.

[31] See especially: C Fraterrigo, *Il diritto dell'energia in un sistema multilivello: legislatori e prassi a confronto* (2015) 42; Valentina Jacometti, 'La direttiva Emissions Trading e la sua attuazione in Italia: alcune osservazioni critiche al termine della prima fase' (2008) Rivista giuridica dell'ambiente 273; D'Auria (n 18) 247.

[32] See finally: Directive 2018/10 regulating the EU Emissions Trading System (EU-ETS) in phase IV of the System (2021-2030).

[33] Https://ec.europa.eu/clima/policies/strategies/2030_it; see also: Sandulli (n 1) 291 ff.

In line with international trends, this major mitigation plan is supplemented by the European Strategy on Adaptation to Climate Change,[34] which aims to minimise the economic, environmental and social impact of climate change[35] and has recently been updated by the new EU strategy on adaptation to climate change as part of the above plan to achieve climate neutrality.

3. *Climate Justice Models*

The question of the merits of climate protection is linked to that of the remedies 'in the name of climate change' that are actually available.

Of particular note is the controversial ability of the individual to enforce obligations created under international and EU law through the courts.

US and Indian law offer examples of how this might be applied in an innovative climate justice system.

Long-standing US practice is here significant as since the 1970s American lawyers practising public interest law have been representing the weakest sections of society in order to protect their rights and to give a voice to the voiceless.

The need for protection that is both effective and as wide as possible has given judges significant powers to make general and 'abstract' orders that overlap legislation,[36] and has also broken through the 'two-party affair'[37]

[34] ibid 291 ff.

[35] See also the European Commission, *Green Paper of 29 June 2007 on adapting to climate change in Europe - options for EU action* <http://eur-lex.europa.eu/legal-content/IT/TXT/?uri=LEGISSUM:l28193> accessed 31 August 2024, which states in its introduction, 'A certain degree of climate change is however inevitable, with significant impacts owing to increased temperatures and rainfall, water scarcity and more frequent storms. Therefore, for these impacts to be dealt with, mitigation measures must be complemented by adaptation efforts. Adaptation must revolve as much around current changes as around future and anticipated changes.'

[36] Abram Chayes, 'The Role of Judge in Public Law Litigation' (1976) Harvard Law Review 1281. For a more general view, see: Neal C Tate and Torbjorn Vallinder, *The Global expansion of judicial power* (New York University Press 1997).

[37] See: Mauro Cappelletti, 'Vindicating the Public Interest through the Courts: a Comparativist's Contribution' (1976) 25 Buffalo Law Review 647-648: '[…] more and more frequently the complexity of modern societies generates situations in which a single human action can be beneficial or prejudicial to large numbers of people, thus making entirely inadequate the traditional scheme of litigation as merely a two-party affair. […] the individual

framework by extending the effect of judgments to apply *ultra partes*. While the plaintiff remains the holder of the enforced right and retains his own personal, real and current interest in the claim, the judgment itself affects society as a whole through orders that apply directly to the legislator.[38]

Public interest litigation[39] is common in India and allows cases to be brought before the high courts of the various states and the Supreme Court of the Republic if the government violates rights[40] or performs actions or behaviours that are contrary to those rights.[41]

These forms of protection rely on two main pillars: wide waiver of the ordinary rules on the bringing of legal actions, and equally significant judicial activism.

The need to protect classes that are disadvantaged or of different cultures and have been deprived of any real access to the law led the Indian superior courts to radically review the common law rules on the bringing of legal actions.[42]

alone is unable to protect himself efficiently against such injuries. Even if he has a legal cause of action, other factors may preclude judicial relief: his individual right may be too "diffuse" or too "small" to prompt him to seek its protection; excessive costs may obstruct his legal action in court; he may fear the powerful violator; he may even be unaware of his right. It is necessary to abandon the individualistic, essentially laissez-faire, 19th-century concept of litigation, a concept which awards the right to sue, if at all, solely to the subject personally aggrieved in his own narrowly-defined individual rights-for example, to the owner of a neighbouring property in a case of pollution or of a zoning violation. The new social, collective, "diffuse" rights and interests can be protected only by new social, collective, "diffuse" remedies and procedures. Indeed, the quest for these new remedies and procedures is, in my judgment, the most fascinating feature in the modern evolution of judicial law'.

[38] Mia Caielli, *Cittadini e giustizia costituzionale. Contributo allo studio dell'actio popularis* (Giappichelli 2015) 27.

[39] Chayes (n 36) 1281.

[40] Which are fundamental and, according to increasingly consolidated case law, also social (Domenico Amirante, 'Giustizia ambientale e green judges nel diritto comparato: il caso del National Green Tribunal of India' (2018) DPCE Online 960 <https://www.dpceonline.it/index.php/dpceonline/article/view/584> accessed 31 August 2024).

[41] See: P M Bakshi, *Public Interest Litigation* (Ashoka Law House 2006).

[42] Shyam Divan and Armin Rosencranz, *Environmental law and policy in India. Cases, Materials and Statutes* (Oxford University Press 2001) 120. On case law see: *Bandhua Mukti Morcha v Union of India* [1984] AIR SC (India) 802, 813, 'When a person or class of persons to whom legal injury is caused by violation of a fundamental right is unable to approach the Court for judicial redress on account of poverty or disability or socially or economically disadvantaged position, any member of the public acting bona fide can move the Court for relief

The result has been recourse to representative standing on behalf of persons belonging to classes suffering discrimination and citizen standing. While representative standing allows third parties to bring actions to protect the lowest Indian castes, citizen standing permits judges to denounce government abuses, without regard to the direct injury suffered by the plaintiff.

Judicial activism has made these forms of protection especially appealing. Far from simply imposing financial compensation orders, the Indian courts have gone further by imposing orders that are in fact rules of conduct intended to prohibit and correct.[43]

These models and the principles that underlie them have produced the first, experimental notions of climate justice.

One basis for these legal initiatives lies not only in international conventions but also in the 1 March 2015 Oslo Principles on Global Climate Change Obligations.[44]

The Oslo Principles, which were developed by a group of international experts from several countries, declare that, subject to binding treaties and the margin of discretion States enjoy in deciding how they will fulfil their obligations, international law – and the precautionary principle above all – and national laws require governments to take all necessary action to prevent

under Article 32 […] so that the fundamental rights may become meaningful not only for the rich and the well-todo who have the means to approach the Court but also for the large masses of people who are living a life of want and destitution and who are by reasons of lack of awareness, assertiveness and resources unable to seek judicial redress'.

[43] Zachary Holladay, 'Public Interest Litigation in India as a Paradigm for Developing Nations' (2012) Indiana Journal of Global Legal Studies 562, 'The remedies stage of a PIL suit is the most contentious stage of the dispute, as the courts have afforded themselves extensive leeway in deciding which remedies are appropriate. Some of the remedies the courts construct include the creation and implementation of regulations, the establishment of free legal services, and the formation of administrative bodies to oversee the remedies ordered. It is this stage of the PIL suit that attracts criticism that the courts are usurping the authority of the legislature by creating laws'. On case law see: *MC Mehta v State of Tamil Nadu* [1997] AIR SC (India) 699,'It is often argued that the Supreme Court should maintain restraint and should not violate the legitimate limits in the exercise of powers. However, this argument fails to recognize the constant failures of governance taking place at the hands of other organs of State, and that it is the function of the Court to check balance and correct any failure arising out of any other State organ'.

[44] In <https://globaljustice.yale.edu/sites/default/files/files/OsloPrinciples.pdf> accessed 31 August 2024.

climate change rising increasing global warming by more than 2°C above pre-industrial levels.[45]

The actions announced[46] and brought[47] against governments include the Dutch proceedings before the Dutch Supreme Court whose recent ruling on the question of climate emergency[48] ordered the Dutch government to cut CO2 and other greenhouse gas emissions by 25% below 1990 levels by 2020.[49]

Despite the Ministry's contention that an order to create legislation would be inadmissible and would impact the separation of powers,[50] the Court found that the State has a very real and positive obligation to protect the life and health of its citizens.

[45] 'No single source of law alone requires States and enterprises to fulfil these Principles. Rather, a network of intersecting sources provides States and enterprises with obligations to respond urgently and effectively to climate change in a manner that respects, protects, and fulfils the basic dignity and human rights of the world's people and the safety and integrity of the biosphere. These sources are local, national, regional, and international and derive from diverse substantive canons, including, inter alia, international human rights law, environmental law and tort law'.

[46] See: 'Declaration on Climate Justice issued by the representatives of the six Pacific countries (Philippines, Fiji, Vanuatu, Kiribati, Tuvalu and the Solomon Islands)' <www.greenpeace.org> accessed 31 August 2024, 'As the people most acutely vulnerable to the impacts of climate change, we will not let the big polluters decide and assign our fate. Our rights and ability to survive must not be dictated by the continued addiction to the burning of fossil fuels. We refuse to accept the "new normal" and demand for climate justice by holding the big polluters and their respective governments to account for their contribution to the climate crisis. Our people and our environment must be preserved for the generations to come'.

[47] See the action brought in Pakistan by a farmer against the inadequate measures adopted by the State to combat climate change that led to a judgment from the *Leghari v Federation of Pakistan* [2015] Lahore High Court WP no 25501. The court held that the State's delay in taking the necessary measures had violated constitutional rights to life, a healthy environment and human dignity. Of particular moment in Europe is the French 'case of the century' (<https://laffairedusiecle.net> accessed 31 August 2024) and the German case concerning the Federal Climate Protection Act (*Klimatschutzgesetz*) that led to a Federal Constitutional Court ruling on 24 March 2021 (see <https://www.bundesverfassungsgericht.de> accessed 31 August 2024).

[48] *Hoge Raad der Nederlanden* [2019] SC (Netherlands) case no 19/00135.

[49] See Maria Francesca Cavalcanti and Matthijs Jan Terstegge, 'The Urgenda case: the Dutch path towards a new climate constitutionalism' (2020) DPCE Online 1403 <http://dx.doi.org/10.57660/dpceonline.2020.966> accessed 31 August 2024.

[50] See para 2.2.2 of the decision.

More specifically, the Court held that articles 93 and 94 of the Dutch constitution[51] place a duty on the State to comply with every provision of the European Convention on Human Rights, which is binding in its entirety. As the Netherlands fall within the jurisdiction of the European Court of Human Rights, Dutch courts must interpret the articles of the Convention using the same parameters as the Court of Strasbourg.[52] The guarantees enshrined in articles 2 and 8 ECHR (the rights to life and to a private and family life) imply a duty, particularly under the precautionary principle, to implement measures that will prevent the damage associated with climate change.[53]

The logic behind the Court's ruling was therefore that since there is a need for mitigation measures[54] able to cut greenhouse gas emissions by at least 25%, the Court has the right to order adoption of such measures. Were this not the case, a fundamental rule of constitutional democracies and also the right to an effective remedy under article 13 ECHR[55] would be violated.

An order to create legislation was admissible because there is no general prohibition on interference by the courts in the political decision-making process and because of the need – imposed under article 94 of the Dutch constitution – to disapply laws contrary to international obligations.

The Dutch Supreme Court ruled that conflicts with the separation of powers principle can only arise from an order requiring specific content to

[51] Article 93, 'Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.' Article 94: 'Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions'.

[52] para 5.6.1 of the decision, 'Pursuant to Articles 93 and 94 of the Dutch Constitution, Dutch courts must apply every provision of the ECHR that is binding on all persons. Because the ECHR also subjects the Netherlands to the jurisdiction of the ECtHR (Article 32 ECHR), Dutch courts must interpret those provisions as the ECtHR has, or interpret them premised on the same interpretation standards used by the ECtHR'.

[53] para 5.6.2 of the decision.

[54] On mitigation, see: Nespor, 'L'adattamento al climate change' (n 1) 30, 'Climate change can be faced using two different strategies: mitigation or adaptation. Mitigation works on the causes of climate change through actions to contain and reduce human greenhouse gas emissions until sustainable emission levels have been reached. Adaptation involves actions to reduce the impact and negative consequences of climate change and to exploit the positive consequences'.

[55] para 8.2.1 of the decision.

be included in legislation.[56] Stating an aim of cutting greenhouse gas emissions does not affect the legislator's freedom to create the best and most efficient means of achieving that aim.[57]

4. *The* Giudizio Universale *Case: an Initial Examination*

The above examples of climate justice mean that we must now extend the scope of our investigation to include Italian law.

A case was recently brought before the Court of Rome for a declaration that the Italian State is liable for failing to adopt an appropriate climate policy.

The Prime Minister was summonsed to appear before the Court on a charge that the Italian State was liable, within the meaning of articles 2043,[58] 2051,[59] 1173 and 1218 Italian Civil Code,[60] for failing to make sufficient efforts to achieve climate stability targets.

The plaintiffs, that include associations and individuals, are seeking an order requiring the State to 'take all necessary action to reduce artificial domestic CO2-eq emissions by 92% with respect to 1990 levels by 2030, or by any higher or lower level that might be ascertained during the proceedings.'[61]

The first question is whether the action is admissible.

There is no equivalent in Italian law for the US and Indian public interest litigation we have discussed, and there are no positive bases for the extensive judicial powers that exist in these countries.

A claim for the State to be specifically ordered to adopt particular measures risks undermining the separation of powers principle if, as in the Italian legal system, judges who invade the political sphere are exceeding their jurisdictional powers.

The admissibility of another application in the summons - for a review of the National Integrated Energy and Climate Plan (PNIEC) - is also dubious since such a challenge can only (theoretically) be made through the administrative courts.

[56] para 8.2.4.
[57] para 8.2.7.
[58] Giudizio Universale, 'La Causa Legale' (n 3) 69.
[59] ibid 86.
[60] ibid 89.
[61] ibid 97.

That leaves the question of the plaintiff's *locus standi*.

While Italian law does not deny the *locus standi* of sufficiently stable and representative collective entities,[62] it does not recognise any such standing for associations claiming ecological damage.[63]

There is no formal equivalent for representative standing or citizen standing in Italian law and the differences between the Italian legal system and those of other even European nations (see Dutch law and article 3:305a Dutch Civil Code,[64] and French law and article 1248 Civil Code combined with article 142-1 Environmental Code[65]) make it hard to import the results other systems achieve.

The grounds for claims also depend on a number of variables.

Generally speaking, despite the positive action on climate taken by the Italian State, we must wonder whether, given long-term climate targets - with respect to which States can adjust their policies at their own discretion (setting their own reduction targets through voluntary improvements[66] and combining mitigation and adaptation policies[67]) – and 'common' but 'differentiated'[68] liability as in the case of climate law, State actions can indeed be reviewed and precisely targeted by using convictions handed down by a court of law as the method.

[62] That also have a connection with the invoked asset. The meeting of all these conditions must however be properly proved by the plaintiff. These views have recently been confirmed by the Cons St, Ad pl, 20 febbraio 2020, no 6 <www.giustizia-amministrativa.it> accessed 31 August 2024.

[63] Adapted from article 1248 French Civil Code ('Claims for ecological damage may be brought by anyone with the capacity and interest to sue, such as the State, the French Biodiversity Office, local authorities and their local groups, public institutions and associations that are either accredited or were created at least five years before the case was brought and whose purpose is the protection of nature and the defence of the environment.').

[64] Which protects interests that are similar to those of other persons ('A foundation or association with full legal capacity can institute legal proceedings for the protection of similar interests of other persons, insofar as it promotes these interests under its articles of association and these interests are sufficiently safeguarded.').

[65] A comparison is also useful with German law that, unlike Italian law, permits individuals themselves to bring claims before the Federal Constitutional Court for violation of their fundamental rights.

[66] This is the bottom-up principle created by the Paris Agreement in action.

[67] See 2 above.

[68] See 2 above.

Furthermore, legal actions must exist within the legal framework of the State being sued.

The specifics of claims involve complex balancing of the need for protection alleged in the claim against the actual ability of the courts to provide it. Judicial powers themselves reflect complex interactions in which the powers of the State play an equal part.

The boundaries of the case - a 'magic circle'[69] unable entirely to contain the full complexity of the problem (and can only represent it) - are set by inevitably scarce resources and cannot be extended for a particular claim. The balance of powers lies at the heart of the law and it is that balance that provides full protection to the individual (including in the face of climate change).

Climate stability can be achieved not through unorthodox compulsion of the State but through the synergy of legislation (setting targets that are in line with international and EU parameters), the administration (which must achieve those targets), supervision of the bodies involved (monitoring implementation) and civil society itself (which is involved in the decision-making process through democratic participation). The jurisdiction of the courts must not overarch or invade that synergy but instead support and promote it.

[69] See: Johan Huizinga, *Homo ludens* (Einaudi 1938) 91. See also Franco Cordero, *Riti e sapienza del diritto* (Laterza 1981) 310, and more recently: Antoine Garapon, *Del giudicare. Saggio sul rituale giudiziario* (Feltrinelli 1997) 7.

Paola Chirulli

ECONOMIC DEVELOPMENT AND THE GREEN TRANSITION: THE CASE FOR MORE RENEWABLE ENERGY

1. *Introduction*

The need to combine the making of profit with the pursuit of social and environmental goals has long been a feature of our economies and a source of inspiration for public policies and legislation, both at European and national level. We can mention corporate social and environmental responsibility,[1] the expansion of the circular economy and of eco-design for environmentally sustainable products,[2] the reduction of emissions through market incentives,[3] the promotion of green and social

[1] Social and environmental corporate responsibility involve integrating social, environmental, ethical, consumer, and human rights concerns into business strategy and operations. They have long been in the international and EU policy agenda: see the United Nations General Assembly, 'Transforming our world: the 2030 Agenda for Sustainable Development' (2015), ISO 26000:2010 Social responsibility <https://www.iso.org/iso-26000-social-responsibility.html> accessed 23 August 2023, and European Commission 'A renewed EU strategy 2011-14 for Corporate Social Responsibility' (Communication) COM(2011) 681 final, and European Commission 'Next steps for a sustainable European future, European action for sustainability' (Communication) COM(2016) 739 final. In the literature, see Tracy Dathe and others, *Corporate Social Responsibility (CSR), Sustainability and Environmental Social Governance (ESG)* (Springer 2022).

[2] Eg, see Directive 2019/904/EU of 5 June 2019 on the reduction of the impact of certain plastic products on the environment [2019] OJ L155/1, European Commission 'Closing the loop – An EU action plan for the Circular Economy' (Communication) COM(2015) 614 final; European Commission 'A new Circular Economy Action Plan' (Communication) COM(2020) 98 final. On ecodesign, the EU is launching a new regulation on requirements for more sustainable products: European Commission, 'Ecodesign for Sustainable Products Regulation' <https://commission.europa.eu/energy-climate-change-environment/standards-tools-and-labels/products-labelling-rules-and-requirements/sustainable-products/ecodesign-sustainable-products-regulation_en> accessed 28 January 2025.

[3] An example is the Emission Trading System: see Directive 2023/959/EU of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system (2023) OJ L130/134.

procurement,[4] the duty not to do significant harm to the environment in financial investments and activities,[5] the favourable treatment of sustainability agreements under competition law (including state aid[6]) and, more recently, the protection of the environment as a driver for monetary policy, to name but a few.[7]

In this context, the recent acceleration of the green transition towards decarbonisation and renewable energy, prompted by significant developments in EU policy following the pandemic, the energy crisis and the tragic events of the war in the Ukraine, represents a unique chance to channel economic initiatives and entrepreneurial efforts into the achievement of sustainability goals.

The promotion of renewable energy is among the key objectives of EU energy policies, as enshrined in the Treaty of Lisbon, and resting on the co-operation between Member States:[8] Article 194 TFEU states that:

In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

[4] There is extensive literature on green public procurement. Among the many scholarly contributions, see Chiara Feliziani, 'Circular Economy and the "New" Green Public Procurement Law. May the Realization of a "Smart, Sustainable and Inclusive Growth" Be Closer?' (2017) 1 Agricoltura Istituzioni Mercati 65.

[5] See the EU "taxonomy" legislation (n 37).

[6] European Commission, 'Guidelines on State aid for climate, environmental protection and energy 2022' (Communication) COM (2022) C 80/1. On sustainability agreements, see European Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' (Communication) COM (2023) 3445 final.

[7] On the ECB's agenda on climate change, see European Central Bank, 'ECB Wide Climate Agenda' (2022) <https://www.ecb.europa.eu/press/pr/date/2022/html/ecb.pr220704_annex~cb39c2dcbb.en.pdf?e1cc4f3420e8e9f906855410f40e73b5> accessed 28 January 2025. In the literature, see, among others, Louis-Philippe Rochon, Sylvio Kappes, Guillaume Vallet (eds) *Central Bank, Monetary Policy and the Environment* (Edward Elgar 2022); Lena Boneva, Gianluigi Ferrucci, Francesco Paolo Mongelli, 'Climate Change and Central Banks: what Role for Monetary Policy?' (2022) 22 Climate Policy 770.

[8] Energy is not an exclusive competence of the EU. On the increasing power of the EU over energy policy and the compatibility of the climate and energy governance with the Treaties after the European Green Deal, see Filippo Donati, 'Il Green Deal e la governance europea dell'energia e del clima' (2022) Rivista della Regolazione e dei mercati 13.

(a) ensure the functioning of the energy market;

(b) ensure security of energy supply in the Union;

(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and

(d) promote the interconnection of energy networks.

In 2015 the EU Commission launched a new strategy, setting the goal of establishing an Energy Union to promote a sustainable, low-carbon and climate-friendly economy, with the aim of becoming the 'number one' in renewable energy.[9]

The aim of steadily increasing the production of renewable energy as a means to achieving decarbonisation was more recently set by the European Commission through the 2019 Communication on the European Green Deal, as part of a much broader plan, aimed at achieving climate neutrality through the promotion of the circular economy, sustainable mobility, the protection of biodiversity and, more generally, the integration of sustainability into all EU and Member States' policies.[10]

The Green Deal, together with the Next Generation EU recovery project,[11] was followed in 2021 by a more comprehensive programme of propos-

[9] European Commission, 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy' (Communication) COM (2015) 80 final: 'the European Union is committed to becoming the world leader in renewable energy, the global hub for developing the next generation of technically advanced and competitive renewable energies.' Among the action points set in the Communication, there was the one to ensure the meeting of the 27 % share of renewable energy consumed in the EU by 2030.

[10] European Commission, 'The European Green Deal' (Communication) COM (2019) 640 final. Para 2.1.2 of the Communication is devoted to clean energy transition, where a key role should be played by renewable energy and especially offshore wind production. On *Green Deal* and the European economic constitution, see Eugenio Bruti Liberati, 'Politiche di decarbonizzazione, costituzione economica europea e assetti di governance' (2021) Diritto pubblico 415; Edoardo Chiti, 'Managing the Ecological Transition of the EU: the European Green Deal as a Regulatory Process' 59 (2022) Common Market Law Review 48.

[11] Regulation (EU) 2021/241 of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L57/17. Article 3 sets the green transition as the first of the "six pillars" of the policy areas established for the achievement of recovery and resilience of the Union and of its Member States. Recital (11) stipulates that 'The green transition should be supported by reforms and investments in green technologies and capacities, including in biodiversity, energy efficiency, building renovation and the circular economy, while contributing to the Union's climate targets, fostering sustainable growth, creating jobs and preserving energy security.'

als, known as 'Fit for 55',[12] aimed at achieving a 55 % reduction in emissions compared to 1990 values, as set out in the so-called European Climate Act.[13]

The energy emergency prompted an acceleration in the realisation of the Energy Union through the approval of the REPowerEU package in spring 2022, which consists of an initial, more general document[14] and a subsequent more detailed plan.[15]

Building on the Fit for 55 Package, the REPowerEU plan put forward an additional set of actions, aimed at saving energy, diversifying supplies, substituting fossil fuels by accelerating Europe's clean energy transition, and combining investments and reforms[16].

The achievement of these objectives relies on the principle of solidarity and sees each Member State called upon to adopt a series of implementing policies and formal acts that have value not only in terms of planning, but also impose precise duties.

The strategy culminated in a subsequent regulation that required the Member States to amend their resilience plans to include the REPowerEU objectives within two months of the entry into force of the regulation.[17] We will return to this point later.

2. Among the objectives of the REPowerEU plan is the development of drastic measures to curb energy consumption, but emphasis is placed, above all, on an acceleration of the transition to clean energy through a faster and more widespread substitution of fossil fuels with renewable energies, such as solar photovoltaics, wind energy, hydrogen, biomethane and bioenergy. The

[12] European Commission, 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality' (Communication) COM(2021) 550 final.

[13] Article 4 of Regulation (EU) 2021/1119 of 30 June 2021, establishing the framework for achieving climate neutrality and amending Regulations (EC) No. 401/2009 and (EU) 2018/1999 ('European Climate Law') [2021] OJ L243/1.

[14] European Commission, 'REPowerEU: Joint European Action for more affordable, secure and sustainable energy' (Communication) COM (2022) 108 final (Communication COM (2022) 108 final).

[15] European Commission, 'REPowerEU Plan' (Communication) COM (2022) 230 final (REPowerEU Plan).

[16] ibid 1.

[17] Regulation (EU) 2023/435 of 27 February 2023 amending Regulation (EU) 2021/241 as regards REPowerEU chapters in recovery and resiliency plans and amending Regulations (EU) No. 1303/2013, (EU) 2021/1060 and (EU) 2021/1755, and 2003/87/EC [2023] OJ L63/1 (Regulation (EU) 2023/435)

transition to a higher proportion of renewables as sources of clean energy thus becomes a key axis of the implementation of the plan, which envisages the acceleration and massive deployment of renewables in power generation, industry, construction and transport, with the further aim of lowering costs for end users.

The plan proposes an upwards revision of the renewables target set just one year earlier in the 'Fit for 55', increasing the goal from 40 to 45% by 2030.

In this specific area, in just a few months, EU institutions have produced a significant number of documents, which have closed in on renewable energy as a priority for the Union. Among renewable energy sources, the plan does not set priorities, but highlights that solar photovoltaic solutions are the most rapidly deployed technology and makes reference to the annexes on solar strategy, introducing the European Solar Roof Initiative, which focuses on a legally binding obligation to install solar panels on the roofs of certain categories of buildings.

EU energy policies also encourage the strong promotion of offshore wind energy, which is already widespread in Europe (although not currently in Italy, despite there being a number of projects under evaluation), for which the committee believes public acceptance is generally easier to obtain. An important space is then proposed to be given to both renewable hydrogen and biomethane, also through the creation of dedicated infrastructure and adequate financing programmes.

Clearly, each source of renewable energy raises distinct issues and requires a different legal framework, particularly with regard to investments, costs of production, planning, permits and environmental impact. Hence, European and national policies deal with each of them separately.

On the whole, the acceleration of the green transition represents a great opportunity for the energy industry; at the same time, these policies will not be able to succeed without private economic initiatives.[18]

Upgrading the regulatory context is the first step that needs to be taken towards achieving this goal. For this reason, the document accompanying the REPowerEU plan identifies the simplification and acceleration of au-

[18] According to the Plan, the achievement of the green transition objectives will require both coordination between action on the demand side, with action on the supply side to create the capacity and framework to roll out and produce renewable energy.

thorisation procedures as an essential precondition for the realisation of renewable energy projects.[19]

Although regulation on permits is important, given that procedures often create a bottleneck in the realization of projects, a first indispensable step is to identify so-called 'go-to areas' or suitable areas for plants, as quickly as possible, in a clear and defined manner, excluding those of particular environmental value.[20]

To this end, the Commission's recommendation to speed up permit-granting procedures for renewable energy projects has prompted Member States to ensure that the planning, construction and operation of plants for the production of energy from renewable sources, (their connection to the electricity, gas and heat grid and the related grid itself and storage assets) qualify for the most favourable procedure available in their planning and permit-granting procedures and are presumed as being in the overriding public interest and in the interest of public safety.[21]

All this inevitably implies finding a new balance between the need to increase the construction of renewable energy plants and the protection of other, often conflicting, public interests. The wide notion of protecting the "environment" encompasses different goals, from the reduction of emissions to the protection of nature and biodiversity, to the preservation of the landscape and heritage. Moreover, actions that might be difficult for current generations to accept, might need to be taken for the sake of those to come.[22] The issue is complex, but, depending on the circumstances, public policies, at an international, European and national level, can set temporary or more long-term priorities so that certain interests preside over others. This is certainly the case with the green transition and the promotion of renewables.

[19] See Communication COM (2022) 108 final, para 2.2.3.

[20] See para 3 of the REPowerEU Plan, but also para 2.2.3 cit. which highlights that the Member States 'should swiftly map, access and ensure suitable land and sea areas that are available for renewable energy projects.'

[21] Europeam Commission, 'Speeding up permit-granting procedures for renewable energy projects and facilitating Power Purchase Agreements' (Recommendation) COM (2022) 3219 final.

[22] For a discussion of this aspect, and for an analysis of the complexities of the relation between energy policies and the protection of environment, see Fabrizio Fracchia and Pasquale Pantalone, *Decider(ci) per la morte: crisi, sostenibilità, energie rinnovabili e semplificazioni procedimentali* (Editoriale Scientifica 2022).

Until recently, however, a certain margin of flexibility was left to the Member States in defining their priorities and giving weight to environmental and conservation issues in the authorization procedures, especially when an environmental impact assessment was required.

The latest EU regulations do not only contain prescriptions on the duration and content of proceedings, but they also deal with the details of decision-making procedures, affecting the weighing up of interests to the point of establishing new hierarchies in their evaluation and providing for a predetermined solution of potential 'intra-environmental' conflicts.[23]

Binding acts, such as regulations and amendments to existing directives, are following soft law provisions, such as communications and recommendations, and an open-method-of-coordination strategy. On 22 December 2022, a Regulation establishing the framework for accelerating the deployment of renewable energies was introduced,[24] and an amendment to the RED II Directive on the promotion of renewable energies has been approved only four years after its entry into force.

3. What emerges from the recent EU legislation is that the margins left to the Member States regarding the balancing of interests are increasingly narrowing. The provisions contained in the new regulation on renewable energies - also motivated by the emergency induced by the exacerbation of the Russian-Ukrainian conflict and its repercussions on energy supply - not only impose a so-called 'horizontal' simplification, prescribing shorter timeframes for authorization procedures, but they also call for a 'vertical' simplification, by giving 'production' interests priority over 'protection' interests.[25]

The recitals of the 2022 regulation on renewables state that the energy emergency justifies the application of its provisions in ongoing proceedings

[23] See Massimiliano Montini, 'La sfida della transizione energetica e l'emergere dei conflitti intra-ambientali: quali possibili soluzioni' (2023) I Post di AISDUE 256 <aisdue.eu> accessed 26 September 2024, who points out that, especially with regard to renewables, a conflict can arise between the environmental goals provided for by Article 191 TFEU and those established by Article 194 in relation to energy policies, which have been reinforced by the recent EU law.

[24] Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy [2022] OJ L335/36 (Regulation (EU) 2022/2577).

[25] This distinction is recalled by Alfredo Moliterni, 'Semplificazione amministrativa e tutela degli interessi sensibili: alla ricerca di un equilibrio' (2017) Diritto amministrativo 705.

and that "in order to eliminate bottlenecks in the permit-granting process and operation of renewable energy plants in the planning and permit-granting process, the construction and operation of energy plants from renewable sources and the development of the related grid infrastructure should be given priority when balancing legal interests in the individual case, at least for projects which are recognised as being of public interest".[26]

The regulation imposes on the Member States the duty to give priority to the construction and operation of facilities, though 'without prejudice to conservation measures that contribute to the maintenance or restoration of species populations to a favourable conservation status and sufficient resources and areas are made available for this purpose.'

One of the temporary measures consists of the introduction of a rebuttable presumption that renewable energy projects are of overriding public interest and serving public health and safety for the purposes of the relevant Union environmental legislation, except where there is clear evidence that those projects have major adverse effects on the environment which cannot be mitigated or compensated for.[27]

The European legislator has thus entered into the heart of the administrative decision-making process, introducing a clear hierarchy in the evaluation of the interests at stake through the wide umbrella of the 'overriding public interest'.

In fact, the principle of overriding public interest, which is now 'codified' and should guide administrations in weighing up the legal interests of individual cases, is not new, but was contemplated by the EU legislation as an exception to the standard of the maximum compliance with environmental standards. The Water Quality Directive 2000/60 stipulated the need to adequately assess (and justify) the downgrading of the quality of a watercourse on the basis of an overriding public interest.[28] The principle of an overriding public interest had also been invoked by the European Court of Justice, in

[26] Recital 9 of Regulation (EU) 2022/2577.

[27] ibid recital 8.

[28] Directive 2000/60/EU of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L327/1. Recital 32 states that "There may be grounds for exemptions from the requirement to prevent further deterioration or to achieve good status under specific conditions, if the failure is the result of unforeseen or exceptional circumstances, in particular floods and droughts, or, for reasons of overriding public interest, of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, provided that all practicable steps are taken to mitigate

a case concerning the authorisation of a hydropower plant which had been contested since it allegedly downgraded the quality of a watercourse.[29]

This rule has now been overturned, since the Member States will have to justify the limitations in the application of the principle of the rebuttable presumption that renewable energy projects are of overriding public interest and serving public health and safety for the purposes of the relevant Union environmental legislation.

The conflict with other environmental interests (such as biodiversity, the protection of endangered species) needs to be dealt with, but unless the project has a significant impact on environment protection and na-

the adverse impact on the status of the body of water", and article 4 (7) of the Directive stipulates that "Member States will not be in breach of this Directive when:

— failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or

— failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities and all the following conditions are met:

(a) all practicable steps are taken to mitigate the adverse impact on the status of the body of water;

(b) the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under Article 13 and the objectives are reviewed every six years;

(c) the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and

(d) the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option.

[29] Case C-346/14 *European Commission v Republic of Austria* [2005] EU:C:2016:322: the Court stated that the Republic of Austria was entitled to consider that the contested project, the aim of which is to promote the production of renewable energy through hydroelectricity, was an overriding public interest. Then, it added: "Moreover, the promotion of renewable energy sources, which is a high priority for the European Union, is justified in particular because the exploitation of those energy sources contributes to environmental protection and sustainable development, and can also contribute to security and diversification of energy supply and make it possible to meet more quickly the targets of the Kyoto Protocol, annexed to the United Nations Framework Convention on Climate Change".

ture conservation objectives or other prioritary land uses, which must already have been assessed, compensatory or mitigating measures should be preferred.[30]

We should not forget that this is an emergency regulation,[31] but the principle of overriding public interest has been included in the reform of the RED II Directive,[32] which, in order to accelerate the rollout of renewable energy has raised the renewable energy target to 42.5%, with the aim of reaching 45% in 2030[33]: the need for prior land and sea planning is emphasised, so that authorisation procedures become more streamlined and predictable in their outcome and environmental impact assessment is carried out in advance.[34] The distinction between projects located within renewable energy 'go-to' areas and outside them is also crucial, since different deadlines for the conclusion of authorisation procedures can apply.[35] The principle of overriding public interest is expressly included in

[30] See European Commission, 'Staff Working Document – Guidance to Member States on good practices to speed up permit-granting procedures for renewable energy projects and on facilitating Power Purchase Agreements' (2022) 149 final, para 5.d.

[31] The validity of the Renewable Energy Regulation is fixed in 18 months following its publication, with a review clause allowing for its extension, if necessary.

[32] See also Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652, OJ L 2023/2413 (31 October 2023).

[33] Article 3 of the amended RED II Directive. Recital 22 clarifies that "A further simplification and shortening of the administrative permit-granting processes in a coordinated and harmonised manner is necessary in order to ensure that the Union reaches its ambitious climate and energy targets for 2030 and the objective of climate neutrality by 2050, while taking into account the "do no harm" principle of the European Green Deal.

[34] Recital 6: "It is appropriate however to make a distinction between projects in areas particularly suitable for the deployment of renewable energy projects, for which deadlines can be particularly streamlined namely renewables acceleration areas, and projects located outside those areas." Recital 10 and 17 highlight the importance of an accurate planning of the sites and of the environmental assessment.

[35] Article 16 of the Directive. Articles 16a and 16b provide for the different deadlines, which in the first case should not last more than one year and in the other should not last more than two years.

the Directive.[36] Although it can only set objectives,[37] it will certainly shape future policies and actions.

Another step in this direction has been taken more recently with the legislation which has amended the RRF regulation in the implementation of the REPowerEU plan, and which requires the Member States to modify their resilience plans accordingly.[38] The national resilience plans had to comply with the provisions of EU legislation on sustainable economic activities, and in particular with the 'do no significant harm' principle introduced by the so-called taxonomy regulation in order to promote environmentally sustainable investments.[39] In particular, the RRF regulation stipulated that the measures contained in the national recovery and resilience plans should comply with the principle of 'do not significant harm',[40] and that for this purpose they had to be specifically assessed and validated by the Commission.

[36] Article 16f providing that : "Member States shall ensure that, in the permit-granting process, the planning, construction and operation of plants for the production of energy from renewable sources, their connection to the grid and the related grid itself and storage assets are presumed as being in the overriding public interest and serving public health and safety when balancing legal interests in the individual cases for the purposes of Articles 6(4) and 16(1)(c) of Directive 92/43/EEC (conservation of natural habitats and wild fauna), Article 4(7) of Directive 2000/60/EC (water quality) and Article 9(1)(a) of Directive 2009/147/EC (conservation of wild birds)."

[37] For a criticism of the ambitious plans of the Commission and of its possibilities to effectively impose on the Member States the obligation to meet the targets in the given frame time, see Gianluca Cavalieri and others, 'The «Fit for 55» unpacked: a multidisciplinary analysis of the tools and objectives of the sectoral proposals for the decarbonization of the European economy' (2022) Rivista della Regolazione dei Mercati 409, 425.

[38] Regulation (EU) 2023/435.

[39] Regulation (EU) 2020/852 of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, [2020] OJ L198/13.

[40] For the purposes of this Regulation, the following shall be environmental objectives: (a) climate change mitigation; (b) climate change adaptation; (c) the sustainable use and protection of water and marine resources; (d) the transition to a circular economy; (e) pollution prevention and control; (f) the protection and restoration of biodiversity and ecosystems. Article 17 states that For the purposes of point (b) of Article 3, taking into account the life cycle of the products and services provided by an economic activity, including evidence from existing life-cycle assessments, that economic activity shall be considered to significantly harm: (a) climate change mitigation, where that activity leads to significant greenhouse gas emissions; (b) climate change adaptation, where that activity leads to an increased adverse impact of the current climate and the expected future climate, on the activity itself or on people, nature or assets; (c) the sustainable use and protection of water and marine resources, where that ac-

As is common knowledge, the regulation's scope was initially limited to investments and thus applied mainly to financial assets and businesses, but it was quickly extended to include investments provided for by the post-pandemic legislation, including those related to renewable energy[41].

The principle is very broad in scope and not easy to define, so strict compliance with this principle could hinder the pursuit of the REPowerEU plan's goals - in particular those aimed at enhancing energy security – particularly during the emergency resulting from the Ukrainian war and the subsequent energy crisis.

Thus, for reasons of energy security and by way of exception, a 'selective' amendment of the RRF regulation has been provided for to allow a temporary derogation from the DNSH principle for certain measures, while fully applying it for others. In the currently available text, exemption from

tivity is detrimental: (i) to the good status or the good ecological potential of bodies of water, including surface water and groundwater; or (ii) to the good environmental status of marine waters; (d) the circular economy, including waste prevention and recycling, where: (i) that activity leads to significant inefficiencies in the use of materials or in the direct or indirect use of natural resources such as non-renewable energy sources, raw materials, water and land at one or more stages of the life cycle of products, including in terms of durability, reparability, upgradability, reusability or recyclability of products; (ii) that activity leads to a significant increase in the generation, incineration or disposal of waste, with the exception of the incineration of non-recyclable hazardous waste; or (iii) the long-term disposal of waste may cause significant and long-term harm to the environment; (e) pollution prevention and control, where that activity leads to a significant increase in the emissions of pollutants into air, water or land, as compared with the situation before the activity started; or (f) the protection and restoration of biodiversity and ecosystems, where that activity is: (i) significantly detrimental to the good condition and resilience of ecosystems; or (ii) detrimental to the conservation status of habitats and species, including those of Union interest. 2. When assessing an economic activity against the criteria set out in paragraph 1, both the environmental impact of the activity itself and the environmental impact of the products and services provided by that activity throughout their life cycle shall be taken into account, in particular by considering the production, use and end of life of those products and services.

[41] Although, not without inconsistencies, the delegated acts implementing the taxonomy regulation, and providing for technical screening criteria for the DNSH test, allow room for the further development of fossil gas and nuclear energy sectors, since they could contribute to decarbonization, without hindering investments in renewables (see Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities [2022] OJ L188/1).

the DNSH principle would only be envisaged for the construction of the infrastructure necessary to increase energy security, subject to a positive assessment by the Commission.[42]

4. The analysis above shows that the recent emergency-driven regulatory shift could boost public and private investments in renewables and promote innovation and employment. The pursuit of the decarbonization goal relies on private economic initiative and on the development of sectoral energy markets.

In Italy, the realization of renewable energy projects as a prioritary means to reduce emissions, implement the international and EU commitments to

[42] Article 21c inserted by Regulation (EU) 2023/435, stipulates that reforms and investments in the REPowerEU chapter shall aim to contribute to at least one of the following objectives:

(a) improving energy infrastructure and facilities to meet immediate security of supply needs for gas, including liquified natural gas, notably to enable diversification of supply in the interest of the Union as a whole; measures concerning the oil infrastructure and facilities necessary to meet immediate security of supply needs may be included in the REPowerEU chapter of a Member State only where that Member State has been subject to the exceptional temporary derogation in Article 3m(4) of Regulation (EU) No 833/2014 by 1 March 2023, due to its specific dependence on crude oil and its geographical situation;

6. By derogation from Article 5(2), Article 17(4), Article 18(4), point (d), and Article 19(3), point (d), the principle of "do no significant harm" shall not apply to the reforms and investments under paragraph 3, point (a), of this Article, subject to a positive assessment by the Commission that the following requirements are met:

(a) the measure is necessary and proportionate to meet immediate security of supply needs in accordance with paragraph 3, point (a), of this Article taking into account cleaner feasible alternatives and the risk of lock-in effects;

(b) the Member State concerned has undertaken satisfactory efforts to limit the potential harm to environmental objectives within the meaning of Article 17 of Regulation (EU) 2020/852, where feasible, and to mitigate harm through other measures, including the measures in the REPowerEU chapter;

(c) the measure does not jeopardise the achievement of the Union's 2030 climate targets and the objective of EU climate neutrality by 2050, based on qualitative considerations;

(d) the measure is planned to be in operation by 31 December 2026. 7. When carrying out the assessment referred to in paragraph 6, the Commission shall act in close cooperation with the Member State concerned. The Commission may make observations or request additional information. The Member State concerned shall provide the requested additional information.

fight climate change and accelerate decarbonisation, has prompted the reform of national legislation on permits,[43] and has long been recognized by the Constitutional Court as a duty of the legislator.[44]

Moreover, the reformed wording of Article 41 of the Constitution, combined with the new text of Article 9, has made it very clear that the pursuit of economic initiative and the protection of the environment (of which the green transition plays a part) are not irreconcilable values but complementary means to cooperate towards a common objective. [45]

[43] See d l 31 maggio 2021, no 77 'Governance del Piano nazionale di ripresa e resilienza e prime misure di rafforzamento delle strutture amministrative e di accelerazione e snellimento delle procedure' and d lgs 8 novembre 2021, no 199 'Attuazione della direttiva (UE) 2018/2001 del Parlamento europeo e del Consiglio, dell'11 dicembre 2018, sulla promozione dell'uso dell'energia da fonti rinnovabili' implementing the so-called RED II Directive; more recently Italy has adopted the d lgs 25 novembre 2024, no 190 'Disciplina dei regimi amministrativi per la produzione di energia da fonti rinnovabili'.

[44] See Corte Cost, sent 23 February 2023, no 27, which stated that the possibility to provide for limits to the permits available for the realization of renewable energy plants by regional legislation is in contrast not only with our constitution, but also with the objective of ensuring the maximum deployment of renewable energy supply systems pursued both by Directive 2009/28/CE of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L140/16 and lately by Directive 2018/2001/EU of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L328/82, which establishes (recital 2) that « the increased use of energy from renewable sources or 'renewable energy' constitutes an important part of the package of measures needed to reduce greenhouse gas emissions and comply with the Union's commitment under the 2015 Paris Agreement on Climate Change following the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (the 'Paris Agreement'), and with the Union 2030 energy and climate framework, including the Union's binding target to cut emissions by at least 40 % below 1990 levels by 2030».

[45] Article 41 stipulates that "Private economic initiative is free. It cannot be carried out in conflict with social utility or in such a way as to be detrimental to health, the environment, security, freedom and human dignity. The law determines the appropriate programmes and controls so that public and private economic activity can be directed and coordinated for social and environmental purposes." Article 9 now states that "The Republic…..protects the environment, biodiversity and ecosystems, also in the interest of future generations." The interpretation of the two provisions has given rise to an intense scholarly debate, since the concept of environment is very wide and could encompass both the green transition (and the promotion of new industrial projects) and conservation; the new wording can certainly both influence public policies and orient private economic initiative towards environmental goals and promote the circular economy: see Francesco De Leonardis, 'Il diritto dell'economia

Yet the full implementation of EU energy policies and the effective completion of projects, especially offshore wind farms, remains a challenge for a number of reasons.

First, the impact of the various different energy plants on the environment (including biodiversity) and the landscape is not the same. Onshore solar and wind projects are easier to undertake from the point of view of authorisations and investments, but the costs related to these projects in terms of land take, landscape and biodiversity is clearly higher. The implementation of the new Directive and the application of the latest renewables regulation, which provide for more simplifications in permit granting, should further reduce bottlenecks.

However, the legislative framework is highly unstable and fragmented. Despite our government's commitment to a uniform regime for authorisation procedures and the replacement of mandatory assessments with silent consent for the evaluation of heritage and other sensitive interests, we still lack a clear and coherent legislation.

Moreover, the whole process of authorization needs to be streamlined. To this end, planning is fundamental: EU documents on renewables clarify that administrative procedures include not only those related to permits, but first and foremost, to those regarding the allocation of spaces.

The identification of the so-called "go-to areas" should be a pre-requisite, which would result in more predictability and less uncertainty for investors and the industry, as well as for the communities and the public.

This is especially true in the planning of offshore renewable plants, which require huge investments and often meet strong opposition not only from communities, but from the local authorities themselves.[46]

Having a sustainable blue economy plays an important role in achieving the objectives of the EU Green Deal.[47] The EU Offshore Renewable Energy

circolare e l'art. 41 Cost' (2020) Rivista quadrimestrale di diritto dell'ambiente 50. On the interpretation of the constitutional amendments, see Marco Benvenuti 'La revisione dell'articolo 41, commi 2 e 3, della costituzione, i suoi destinatari e i suoi interpreti' (2023) Rivista dell'Associazione Italiana dei Costituzionalisti 60.

[46] For an overview of the state of the art of offshore wind farms within the Italian legislative and administrative framework, see Paola Chirulli, 'L'eolico offshore nella prospettiva del PNRR' in Gian Franco Cartei (ed) *Energie rinnovabili e piano nazionale di ripresa e di resilienza* (Editoriale Scientifica 2022) 53.

[47] See the European Commission, *The EU Blue Economy Report 2022* (Publications Office of the European Union 2022), which deals with the different types of Marine Renewable

Strategy aims at an installed capacity of at least 60 GW of offshore wind and at least 1 GW of ocean energy by 2030. By 2050, installed capacity should further surge to 300 GW of offshore wind and 40 GW of ocean energy, respectively. Additionally, marine renewable energy presents a great potential to sustainably generate economic growth and jobs, enhance the security of energy supply and boost competitiveness through technological innovation, although it does require a delicate balancing exercise among different competing protection interests.[48]

While Europe is a leader in offshore wind energy, Italy is still struggling to complete its first wind farms. However, many projects are currently under examination and many should benefit from the shorter terms and derogatory provisions recently introduced by the legislation.[49]

Although Italy has implemented the EU Directive on maritime spatial planning,[50] our recently adopted plans allow for extremely limited areas for renewable energy production through offshore wind farms or other marine renewable energy sources.

This is already an open issue, since, according to the EU Strategy to harness the potential of offshore renewable energy,[51] published maritime spatial planning is an essential tool to anticipate change and prevent and mitigate conflicts between policy priorities, while also creating synergies between economic sectors. According to the Commission, 'this would signal to business and investors the governments' intention with regard to the future development of the renewable offshore sector, helping both the private and the public sector to plan ahead'.[52]

The mobilization of private-sector investment will also be a key factor, alongside the support provided by EU funds and loans from the European

Energy: floating offshore wind, wave and tidal energy, floating solar photovoltaic energy and offshore hydrogen generation.

[48] See Sandra Cassotta, 'Towards a more inclusive, systemic and multi-regulatory Blue Economy: the case of offshore wind energy' in Simone Borg, Felicity G. Attard, Patricia M. Vella de Fremeaux (eds), *Research Handbook on Ocean Governance Law* (Edward Elgar 2023) 267.

[49] So far, many projects are undergoing EIA or its scoping phase, but only few have been approved.

[50] Directive 2014/89/EU of 23 July 2014 establishing a framework for maritime spatial planning [2014] OJ L25//235.

[51] European Commission, 'An EU Strategy to harness the potential of offshore renewable energy for a climate neutral future' COM (2020) 741 final.

[52] ibid 9.

Investment Bank: the Commission, even before the current emergency, had highlighted the need to have a pipeline of mature projects, in close cooperation with companies ready to invest.

Private and public investments in new technologies (also through Public Private Partnerships) are essential for this purpose, as is cross-border cooperation.

Above all, public and private acceptance and consent will play a vital role. To this end, the involvement of communities at an early stage of the process, ideally during the planning phase, is indispensable.

The solidarity obligations that the Union places on the Member States with regard to achieving the decarbonisation targets require a fast and consistent response. The Italian legislature has 'gone ahead' with the provisions contained in the recent legislative acts.[53] However, legislation can only play a limited role. EU regulations advocate fast tracks for litigation concerning renewable energy projects,[54] but the provisions must not prejudice judicial appeals, remedies and other proceedings before a court or tribunal, and alternative dispute resolution mechanisms, which are also protected by the Member States' procedural autonomy clause.

In Italy, almost every project that is assessed positively or is authorised is subsequently subject to litigation before the administrative courts. Due to the lack of expeditious alternative remedies, the conflict between the pursuit of conservation interests and the realization of renewable energy projects often ends up being brought before the courts. Although the case law is now acknowledging the priority of the completion of the projects against the protection of conservation and heritage interests,[55] individuals and associations tend to put up fierce opposition to projects of which they fail to perceive the importance.

[53] d l 24 febbraio 2023, no 13 'disposizioni urgenti per l'attuazione del Piano nazionale di ripresa e resilienza (PNRR) e del Piano nazionale degli investimenti complementari al PNRR (PNC), nonche' per l'attuazione delle politiche di coesione e della politica agricola comune', arts 41 ff provided for more simplifications in the renewable energy permit procedures.

[54] Recital 7 of the RED II amendment of Directive proposal states that "Member States shall ensure that administrative and judicial appeals in the context of a project for the development of renewable energy production plant or its related grid connection, including those related to environmental aspects shall be subject to the most expeditious administrative and judicial procedure that is available at the relevant national, regional and local level."

[55] Eg Cons Stato, sent 23 September 2022, no 8167.

An unstable legislation, long bureaucratic processes and a high litigation rate are a hindrance to the channeling of private investments into the most challenging but also most expensive projects, such as offshore wind farms.

This does not only affect private investments but can also influence the allocation of public national and EU funds. It is no coincidence that the Italian Government has decided to cut funds which had previously been allocated by the national recovery and resilience plan to promote renewable energy (offshore wind farms included), due to the fact that these projects are highly unlikely to be completed within the set timeframe.[56]

If we do not seize the opportunity to move forward in the deployment of renewable energy, especially with the most innovative initiatives, we may well simply place solar photovoltaic panels on every building and carry out renewable projects with a greater impact on our environment, such as agro-photovoltaic and inshore wind plants. However, it is highly unlikely that we will be able to meet the ambitious targets set by the EU, and in doing so, we will miss out on an important opportunity to significantly boost the sustainability of our economy.

[56] Dipartimento per gli affari europei, 'Proposte di revisione PNRR e integrazione RE-PowerEU' (*Dipartimento per gli affari europei*, 27 July 2023) <https://www.politicheeuropee.gov.it/it/ministro/comunicati-stampa/27-lug-23-pnrr/> accessed 16 August 2023.

Daniele Calisti*

SUSTAINABILITY AS A DRIVER FOR INDUSTRIAL TRANSFORMATION: THE CHALLENGES FOR ANTITRUST

1. *Introduction*

The reflection on the role that antitrust rules and enforcement have to play to achieve sustainability objectives has come at the front of the competition debate, enforcement actions, policy initiatives, and soon judicial scrutiny. We are at a moment in time where such a question is pivotal, and will shape efforts of antitrust regulators for years to come.

Europe can claim a leadership of sorts, or a first mover advantage. The Von Der Leyen Commission[1] took office with a decisive effort to advance, as a key priority, a path to transform Europe into the first climate-neutral continent. The central policy development in this respect has been the adoption of a European Green Deal.[2]

The European Green Deal Communication outlined a series of policy initiatives to address climate and environmental-related challenges. Its significance for antitrust however, was not in any single policy initiative, but in a working method that the Commission set for itself: the 'mainstreaming' of sustainability. Thus, in all areas of EU policies a reflection started on how policy initiatives or enforcement actions could achieve the broader Green Deal objectives. Sustainability is not only a parameter for the traditional energy and environmental domains, but requires action and response from all policy levers. The idea of sustainability as a 'prism', the concept at the

* This paper only reflects the views of the author, and it cannot be interpreted as stating or reflecting an official position of the European Commission or of its Directorate General for Competition. The author wishes to thank Eleni Bantiaka for the patient editing, although he retains sole responsibility for its contents and any opinion expressed.

[1] 'Political Guidelines for the next European Commission 2019 – 2024: A Union that strives for more. My agenda for Europe. By candidate for President of the European Commission Ursula von der Leyen' <https://www.europarl.europa.eu/resources/library/media/20190716RES57231/20190716RES57231.pdf> accessed 16 September 2024.

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

core of the conference for which this paper was prepared, well describes this phenomenon.

The aim of this paper is to address the question of how antitrust fits in this picture. It will explore what role sustainability can play among the tools and objectives of EU competition law, as well as the means by which it found an expression in the current debate and in a number of policy initiatives and enforcement actions pursued by the Commission in the current mandate.

2. *The Sustainability Debate Within the Broader Discussion on the Goals of Antitrust Policy*

The reflection on the attainment of sustainability objectives in the general enforcement of antitrust rules is happening at a historic moment when the goals of antitrust are being more widely discussed. Behind the apparent consensus on consumer welfare as the ultimate goal informing the legal and economic analysis of antitrust enforcement, the debate has never been quite settled.[3] From the European perspective, a reason for this may be the different interpretation on a string of judgments, which according to scholars may reaffirm the more traditional view that the 'process' of competition may itself be an objective of competition enforcement, rather than a tool to achieve consumer welfare.[4] Such a discussion has, however, typically taken place within the specialist field of antitrust, underpinning the shared assumption that enforcement objectives were in any event within the realm of economic outcomes that antitrust policy should attain.

In the past decade, however, antitrust enforcement has come to the fore of public debate due to the potential intersection, and alleged conflict, of enforcement outcomes with other and broader public policy objectives. In this context, critics appeared to question whether antitrust law had fallen into a too narrow consensus as to its objectives, as other priorities came to occupy a prominent role in the public debate.

On the one hand, particularly in Europe, there were calls for a 'softening' of enforcement actions, so as to take account of broader global eco-

[3] Herbert J Hovenkamp, 'Is Antitrust's Consumer Welfare Principle Imperiled?' (2019) 45 Journal of Corporation Law 101.

[4] Wouter P J Wils, 'The judgment of the EU General Court in *Intel* and the so called 'more economic approach' to abuse of dominance' (2014) 37 World Competition 405.

nomic trends that required the consideration of industrial policy objectives within the enforcement of EU antitrust rules.[5]

In the meantime, on the other hand, a new wave of literature in the United States, sometimes categorised as a 'new-Brandeis approach', argued that antitrust had fallen into a paralysis, which resulted in a concentration of economic power with adverse impact also on other economic and societal objectives, such as labour rights and income inequality. This stream of thought argued for a stronger antitrust enforcement, also to reduce those imbalances.[6]

In both trends, when other policy objectives were raised as a justification for a stricter or more flexible enforcement, one typical response within the antitrust community has been to advocate a separation between the statutory objectives that antitrust policy can pursue, from other important policy objectives that should instead be achieved through other instruments. In the words of Executive Vice-President Vestager, responsible Commissioner for Competition, *'[antitrust] is a very strong tool. It's a big hammer, but that doesn't make everything a nail.'*[7]

This defence purports to protect a perceived 'classic' approach to antitrust enforcement and its goals, not only from a substantive perspective, but also from an institutional viewpoint. In the EU system of administrative enforcement, which is subject to strict scrutiny by the Courts of the regulator's 'quasi-judicial'[8] or 'quasi-criminal' process, the Commission has a

[5] The debate intensified after the Commission's decision to prohibit the proposed acquisition of Alstom by Siemens in view of their significant positions in the rail industry, and particularly on very-high speed trains, at a time where the political debate focused on the creation of large industrial 'champions' to face off global competition. For contributions on the debate, see 'Which Competition and Industrial Policies for the New EU Commission After Siemens / Alstom?' (2019) 2 Concurrences On-Topic <https://www.concurrences.com/en/review/numeros/no-2-2019/dossier/which-industrial-policies-for-the-new-eu-commission-en> accessed 1 September 2024.

[6] Among many, see Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia 2018); Lina Khan, 'The New Brandeis Movement: America's Antimonopoly Debate' (2018) 9 Journal of European Competition Law & Practice 131.

[7] Franklin Foer, Interview with Margrethe Vestager, 'A Convenient Life and a Good Life May Not Be the Same Thing' (6 April 2019) The Atlantic <https://www.theatlantic.com/ideas/archive/2019/04/franklin-foer-interviews-margrethe-vestager/586573/> accessed 1 September 2024.

[8] Ian Forrester, 'Due process in EC competition cases: A distinguished institution with flawed procedures' (2009) European Law Review 817, 831 ff; Wouter Wils, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC

legal mandate which is specifically defined, so the argument goes. While the Commission enjoys broad discretion in the application of certain concepts, the application of competition rules in the administrative sphere remains an 'enforcement' action, which cannot reconcile antitrust specific goals with other policy objectives. The preservation of competition and of a level playing field in the internal market would be the only goals that can be pursued under the legal mandate the Commission has to enforce.

Based on this premise, when the European Green Deal called for a 'mainstreaming' of sustainability, one could argue that, for competition policy specifically, this created a dichotomy of public objectives which could not be easily reconciled in every case. As a matter of law, the pursuit of sustainability goals through antitrust enforcement could result in the issues that were just mentioned.[9] Even accepting the possibility of such an additional goal as a matter of enforcement, the Commission, as a competition agency, could be exposed to type I and type II dilemmas: when benefits and downsides play on different scales, it may primarily pursue enforcement for lower prices, better quality, choice and innovation, even when this carries significant costs in terms of emissions or pollution;[10] or it may accept a potentially anticompetitive conduct with negative impact on the parameters of competition, to achieve more sustainable objectives.

Such a tension (or dichotomy) is, however, only illusory for three main reasons:

The first (structural impact), is that competition is a means to foster innovation, and a powerful tool to deal with a seismic economic transformation. At heart, competition ensures that, within a broader and, in some cases, legally defined set of objectives, the economic response can happen efficiently.

The second (direct impact), is the realisation that, particularly in the face of market failures that would not enable to achieve such an outcome, competition rules broadly accept and foresee conditions under which certain public policy objectives and societal goals can justify practices that would, otherwise, be prohibited by antitrust law.

Antitrust Enforcement: A Legal and Economic Analysis' (2024) 27 World Competition, Law and Economic Review 201, 202.

[9] See for instance Cristina Volpin, 'Competition enforcement and Sustainability: the odd couple' in Ioannis Kokkoris and Claudia Lemus (eds), *Research Handbook on the Law and Economics of Competition Enforcement* (Elgar 2022).

[10] See eg, Simon Holmes, 'Sustainability and Competition Policy in Europe: Recent Developments' (2023) 14 Journal of European Competition Law & Practice 448.

The third (indirect impact), is that antitrust enforcement in dealing with economic realities, can adapt to a situation in which changes on the demand side (through consumer preference) and the supply side (through the industrial transformation), in response to the epochal challenge posed by climate change, come to shape markets, and thus indirectly request an adaptation in the enforcement action.

3. *Competition Policy Contributing to the EU Green Deal*

In response to the call for a mainstreaming of sustainability in European policies, the Commission advanced early enough to shape the nascent debate on the role that competition rules can play. Shortly after the adoption of the European Green Deal Communication, the Directorate General for Competition launched a call for contributions on the interplay between competition policy and sustainability. The debate was further developed at a high level conference held in 2021 on 'Competition Policy Contributing to the European Green Deal'. In that context, several challenges for the different competition law instruments were highlighted. The themes of discussion were later also set out in a special Competition Brief on the same topic,[11] which set out some main take-aways from these initiatives.

For state aid, respondents to the consultation and participants to the conference showed a consensus on the need for state aid rules to set a framework for the important investment necessary to accompany ambitious sustainability objectives. The need for clear substantive guidance and simple guidelines to apply the rules were pinpointed as key aspects.

In the context of antitrust, the focus was on the extent to which companies can cooperate and align on certain parameters, or exchange information, in order to achieve more sustainable outcomes. This was particularly relevant for cooperation agreements with sustainability objectives, which were meant to mitigate situations of absence of clear rules, of the need to jointly perform R&D, or avoiding a first mover advantage.

As to Merger control, two main themes were addressed. On the one end, in a forward looking context, the need to account for shifting consum-

[11] Alexandra Badea and others, 'Competition Policy in support of Europe's Green Ambition' (Competition Policy Brief no 1/2021) <https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en>.

er preferences when considering market dynamics was highlighted. On the other end, in a context where innovation plays a key role in the industrial transformation to support the Green Deal, innovation should be a key focus of enforcement, through ad hoc theories of harm, particularly when strong incumbents may acquire challengers that threaten their position through greener technologies (one species of so-called 'killer acquisitions').

4. *State Aid: State Investment in Support of Sustainability*

In view of the introductory remarks, it would appear that applying the prism of sustainability to state aid, would be conceptually the easiest. All major economies seem at present intent to provide public support for the most costly investments that are meant to foster technological innovation and industrial transformation, without which achieving climate neutrality goals would be unrealistic.

State aid control is not about an exclusion of a role for State intervention. On the contrary, and particularly in the presence of market failures that make private initiative unlikely to carry the costs and risks of such advancements, it is about ensuring that Member States action, do not pursue those public interest objectives at the expense of the level playing field in the internal market. The Treaty itself defines objectives, in particular those of economic development referred to in Article 107(3)(c) TFEU, which can foster the Green transition pursued by the European Green Deal.

An interplay between state aid rules and broader societal objectives and public policies recognised by the Treaty, particularly regarding environmental protection, was also specifically recognised by the Court of Justice in its recent *Hinkley Point* ruling.[12] In this widely debated judgment, the Court seemed to accept that aid that is found to be in breach of the Treaty's environmental provisions, would be deemed incompatible with the internal market.[13]

As regards the broader analysis on the compatibility of aid aimed at economic development linked to sustainability, and particularly the policies pursued by the Green Deal, the Commission decided to replace its earlier

[12] Case C-594/18 P *Republic of Austria v European Commission (Hinkley Point)* [2020] Court of Justice (Grand Chamber) EU:C:2020:742.

[13] See eg, Leigh Hancher, 'Euratom, State aid and environmental protection: Hinkley Point' (2021) 58 Common Market Law Review 1491.

Guidelines on State Aid for Environmental Protection and Energy,[14] through the adoption of new Guidelines for Climate, Environmental Protection and Energy ('CEEAG Guidelines').[15]

The CEEAG Guidelines specifically refer to the 'top' political priority of the Commission, which found a pivotal moment in the adoption of the European Green Deal. The Guidelines therefore acknowledge that the necessary transformation to achieve those objectives will require adequate support, as the scale of investments necessary to support it is considerable. In order to achieve this they set up a framework for Member States to support the Green Deal objectives, while ensuring that the support does not come at the expense of the level playing field in the internal market. By expanding and updating its Guidelines, the Commission tried to facilitate support measures, not only through procedural updates, but also through substantive guidance meant to assist Member States, as they devise aid measures or schemes.

The most significant aspect, from a substantive viewpoint, is in line with the objective of 'mainstreaming' the sustainability objectives. The European Green deal, in particular, is an umbrella of different initiatives that span across different EU policy areas. When applied to state aid, this consequently requires not only an update of the rules, but also an expansion of the scope covered by the CEEAG Guidelines. The new Guidelines encompass sectors which go beyond renewable energy and energy efficiency, but also cover industrial decarbonisation, the prevention of pollution, aid to the circular economy, biodiversity, and the reparation of environmental damage. In line with specific actions in the European Green Deal, the Guidelines have also rules on the improvement of the energy performance of buildings, and clean and sustainable mobility.

Furthermore, the CEEAG Guidelines maintain a structure that distinguishes in the assessment the positive and negative conditions to be met for aid to be declared compatible, and set out parameters for the balancing of the different aspects. On the positive condition, in line with the Treaty provision, this requires that the aid facilitates the development of an economic activity. The Guidelines set out in general terms, at paragraph 24, that this

[14] European Commission, 'Guidelines on State aid for environmental protection and energy 2014-2020' (Communication) OJ C200/1.

[15] European Commission, 'Guidelines on State aid for climate, environmental protection and energy 2022' (Communication) OJ C80/1.

covers aid that is granted to prevent or reduce the negative effects of economic activities on climate or the environment, as they increase the sustainability of those economic activities. This must obviously happen through an incentive, that would otherwise not be present, to modify the behaviour of economic operators. States should however not bear the costs of what, in the counterfactual scenario, would have happened anyhow, nor should they compensate for the normal business risk of carrying out those activities.[16]

As to the negative condition, the aid should not unduly affect trading conditions to an extent that is contrary to the common interest. This covers an assessment of the necessity, appropriateness, proportionality, and transparency of the aid; as well as an avoidance of its undue negative effects on competition and trade.

The different chapters of the Guidelines provide specific guidance as to how the criteria can be applied to different policy areas. A key role, however, is played by the 'funding gap' analysis within the proportionality test. This is an assessment of the net extra cost that is incurred to achieve the objectives through the aided project, as opposed to alternative projects that would be carried out absent the aid. Such funding gap can be fully covered by the aid. The market can play a role in this respect, because in such circumstances, where the amount of the aid is determined through a bidding process, a detailed analysis of such funding gap will not be required. The Commission will instead accept that the result of the process is a reliable estimate, provided that certain criteria are met, among which the fact that the bidding process is competitive.[17]

Regarding the balancing between positive and negative impacts of the aid, the principle recalled by the guidelines is the *'do no significant harm'* principle (at paragraph 72). The Commission will also assess among the factors, the negative externalities that the activity may carry. Overall, the positive effects have to outweigh the negative effects.

While the CEEAG Guidelines have been the key initiative of the Commission in the state aid field for the scope of this paper, it is important to

[16] Another relevant criterion under the 'positive' condition, is that the aid should not be in breach of any relevant provision of Union law.

[17] para 49(a) clarifies that the competitive nature is established with regards to the process being open, clear, transparent, and non-discriminatory, based on objective criteria, defined ex ante in accordance with the objective of the measure, and minimizing the risk of strategic bidding.

underline that these apply alongside the General framework set out by the Commission, which also has relevant provisions for this analysis. In particular, the General Block Exemption Regulation[18] ('GBER') also underwent an important revision.[19] The objective was, among others, to expand the scope of the GBER to facilitate investments in technologies that are crucial to pursue the Green Deal's objectives, and that span from biodiversity to hydrogen technologies. These measures are meant to afford Member States more flexibility in devising their support schemes, and facilitate the implementation of important projects of common European interest (IPCEIs). In parallel to this initiative, the Commission also adopted a Temporary Crisis and Transition Framework to foster the transition to a net-zero economy.

Beside the revision of the rules set out in the GBER, the Commission also adopted a Communication to provide Guidance on the criteria for the compatibility with the internal market of IPCEIs state aid.[20]

The new rules on IPCEIs[21] are becoming an ever more important tool to foster several objectives of the industrial and energy transition to a sustainable economy. Different from aid measures or schemes by Member States, IPCEIs have the important characteristic that they allow the joint investment in break-through innovation and infrastructure, in response to market failures. This enables an intervention, that is not only broader than what a Member State can deliver, but also allows to address risks which are too big, not only for the companies involved, but also for individual Member States to carry.

[18] Commission Regulation 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L187/1.

[19] Commission Regulation 2023/1315 of 23 June 2023 amending Regulation No 651/2014 of 17 June 2014, declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and Regulation 2022/2473, declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products, compatible with the internal market in application of Articles 107 and 108 of the Treaty [2023] OJ L167/1.

[20] European Commission, 'Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest' (Communication) C/2021/8481 final.

[21] The legal basis for IPCEIs is Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1 art 107(3)(b), which provides that among aid that can be considered compatible with the internal market, there is 'aid to promote the execution of an important project of common European interest (…)'.

IPCEIs have a more European and open character, as they must be devised in a transparent and, most importantly, inclusive fashion. Among others, they need to facilitate the participation of Small and Medium Sized Enterprises, which are an important part of the EU's economic backbone. Moreover, IPCEIs must have positive spillovers, which means that should benefit the EU economy and citizens even beyond the participating Member States.

The increasing relevance of IPCEIs in the face of the very large investment needs of the green transition is best exemplified by many of the examples of approved IPCEIs, and, in particular, the two IPCEIs in the Batteries value chain, totalling more than EUR 6 billion in aid, and the two IPCEIs in the Hydrogen value chain, totalling more than EUR 10 billion of aid.

5. *Antitrust and Sustainability Agreements*

Different from state aid rules, which ultimately concern the action of public bodies for the attainment of public interests, and where the sustainability prism applies to how States can target such an objective without distorting the internal market, antitrust rules, in general, address the conduct of undertakings, which are profit maximising entities. In this respect, the relevant question is to what extent sustainability considerations may mitigate or help assess conduct which could also lead to consumer harm. antitrust rules (in a narrow sense) are a first test case of the apparent tension between the objectives of antitrust and other public policy objectives.

This is particularly significant when considering cooperation between companies. Alongside a prohibition of anticompetitive agreements and the rule that voids those in breach, Article 101 TFEU, the applicable Treaty provision governing such cooperation, also expressly sets out criteria, or rather objectives pursued by such agreements, which may make the prohibition inapplicable. The criteria relate, in particular, to the improvement in the production or distribution of goods, or the promotion of technical or economic progress. Hence, the Treaty itself offers a legal basis under which certain agreements pursuing for instance advancements as to the sustainability of production and distribution chain, or that can more broadly attain progress in the achievement of sustainability goals, can be compatible with EU antitrust rules. In other words, cooperation between undertakings may bring societal benefits under certain circumstances, that can also be accounted for in the application of antitrust rules.

It is important to stress that the main boundaries of such exception are also spelled out in the same Treaty provision, dictating that the agreements must not impose restrictions that are not indispensable to attain the objectives, nor should they afford the undertakings to eliminate competition in respect of a substantial part of the products in question. Moreover, a fair share of the resulting benefit should accrue to consumers.

In light of this, it is not surprising that the most relevant Commission initiative in the field of antitrust to update the rules in line with the objectives of the EU Green deal, has been the adoption of new Guidelines on Horizontal agreements ('the Guidelines').[22] These now include a full chapter on sustainability, which broadly applies to agreements between competitors which pursue sustainability objectives (in the shorthand of the guidelines, 'sustainability agreements').

It is noteworthy that the new section of the Guidelines not only expressly references the EU Green Deal, but also international instruments, and in particular the sustainable development goals set by the United Nations. In interweaving these objectives within the concepts referred to by Article 101(3) of the Treaty, as to technical and economic progress in particular, the Commission refers to the ability of society to consume and use current resources without undue impact on future generations. The sustainability goals obviously refer to the reduction of CO_2 emissions, but also other objectives such as the limitation of the use of natural resources, and the reduction of waste.

Acknowledging that sustainability goals can be attained through agreements that would otherwise be considered restrictive of competition, should not be interpreted as rejecting the fundamental role played by competition between undertakings. More specifically,[23] the Commission clearly states that public goals, including sustainability goals, are best served by effective competition, which is the engine that spurs innovation, growth, and quality. As such, competition between companies can foster more effectively the necessary changes, including in the use of resources, that enable the achievement of the ambitious EU Green Deal objectives. As a result, the notion that, in certain circumstances, restrictive agreements may be necessary to

[22] European Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal co-operation agreements' (Communication) OJ C259/1.

[23] ibid para 318.

attain them, is contingent on the finding of negative externalities, whereby the costs of an individual action are not only borne and internalised by those who cause them, but also by others, for instance through harm to the environment. Even then, the Commission considers that the response to these market failures can occur through regulation, as in the example of the EU's Emission Trading System, or taxation. The role of restrictive agreements is residual, and confined to the situations in which such market failures cannot otherwise be addressed.

Prior to discussing sustainability agreements, and the conditions justifying the restrictions they produce, the Guidelines also stress which types of sustainability agreements do not fall under the scope of the prohibition laid down in Article 101(1) TFEU in the first place. This responds to the uncertainties flagged by market operators during the debate following the adoption of the European Green Deal.

The first category of excluded sustainability agreements is notable, as it covers all agreements, the scope of which is confined to ensuring compliance with precise requirements or prohibitions in binding treaties, agreements and conventions, which are not fully implemented or enforced by a State. The second category covers internal corporate conduct, when it comes to be the object of agreements in the industry (e.g. on the temperature set for offices, or on the avoidance of single-use plastics in corporate premises). Equally, outside the scope of the prohibition, are databases on green and non-green suppliers, etc – this, on the other hand, helps companies identify the suppliers they can work with, while complying with sustainability provisions or practices under national or EU law. Last, agreements on awareness campaigns on the environmental impact of practices or other negative externalities, are not covered by Article 101(1). All other sustainability agreements that do not fall within these four categories, may fall under Article 101(1). In general, one should distinguish between agreements which pursue sustainability objectives, and those that disguise restrictions of certain parameters of competition under a sustainability objective (be it or not a case of 'greenwashing'). The most important example of agreements by which undertakings can cooperate, are sustainability standardisation agreements, which the Guidelines address in detail. The need for such agreement is often explained in different industries by reference to a 'first mover' disadvantage.

Sustainability improvements can be beneficial to companies both in terms of cost savings in the medium term, and as a better qualitative feature for customers. However, a first mover disadvantage may arise in those

circumstances in which the improvements are costly, particularly in the short-medium term. As a result, even if companies are sometimes aware of certain non-sustainable industry features, they may be afraid that by changing those practices first, or without others following, they may carry costs or losses which others do not incur, and ultimately face a loss that would benefit less sustainable players in the industry. To avoid this, and on the back of the recognition of those specific challenges that the transition entails, companies can decide to cooperate. Many examples are possible, such as discontinuing less sustainable products; harmonising packaging practices that facilitate recycling or reduce waste; purchasing sustainable inputs.

To the extent sustainability standardisation agreements can discontinue unsustainable products or manufacturing processes for sustainable ones, they can spur innovation; they can also increase customer awareness, empowering consumers to make informed choices. However, they may restrict competition in certain instances. This is typically the case when they disguise hard-core restrictive practices that restrict competition by object, such as price fixing, customer or market allocations, limitation of output. In other cases, only an analysis of the effects of such agreements can reveal their anticompetitive nature.

As these are more difficult to appreciate, the Guidelines provided six cumulative conditions ('soft harbour') for an agreement not to be restrictive of competition, in order to guide economic operators. The first is that the process to develop the standard at the core of the agreement has to be transparent and open to the participation of all interested competitors. The second is the non-binding nature, i.e. the standard must not impose obligations on undertakings that do not wish to participate. The third is that, to the extent binding criteria apply to participating companies, they must be free to apply higher sustainability standards. Fourth, the parties to the agreement must not exchange commercially sensitive information beyond what is necessary and proportionate for the development, implementation, adoption, or modification of the standard. Fifth, the outcome of the process must be open to the effective and non-discriminatory participation, also, of undertakings that did not participate to the setting of the standard. Last, the standard must not lead to significantly higher prices or lower quality; or in the alternative it should not affect undertakings having a combined share of more than 20% of any market affected by the standard.

When sustainability agreements do not fulfil one or more of the cumulative conditions, they are not automatically deemed restrictive, but will be

subject to individual assessment. To carry out this exercise, the Guidelines provide criteria, such as the competition from alternative standards, as well as the constraint of potential competition outside of the standard.

Finally, for those sustainability agreements that fall under Article 101(1), the Guidelines provide a framework to assess whether countervailing factors justify an exemption under Article 101(3). In line with general rules on the burden of proof, it will be up to the parties to the agreements to show that the standard is met, and in this case through four cumulative conditions: efficiency gains, indispensability, pass-on to consumers, and no elimination of competition.

Indispensability is a condition expressly set out in the Treaty. The agreement cannot impose restrictions that are not indispensable to the attainment of the benefits that it purports to produce. Under this requirement, it may be recalled that often public policy and regulation are a better tool to deploy to deal with negative externalities and market failures at large. When this is the case, restrictions in cooperative agreements cannot be found to be indispensable to attain the objectives, except in certain specific circumstances.[24]

Another Treaty requirement is that consumers should receive a fair share of the benefits resulting from the conduct. This is the most interesting aspect in the new Guidelines, as it takes the analysis closer to the consumer welfare standard and raises the issue as to the capacity in which consumers (or citizens) should be able to benefit from the agreement. Conceptually, it is possible to distinguish individual use value benefits, individual non-use value benefits, and collective benefits.

Individual use value benefits are those that accrue to those who consume the products covered by the sustainability agreement that is being assessed. In this respect, if consumers receive a benefit in this capacity, the trade-offs between the restrictive effects and the efficiencies can be more easily gauged. The Guidelines offer the example of the replacement of plastic with more durable materials. This enhances product quality for the consumers of that product. The Guidelines admit, unsurprisingly, that such benefits can offset the restrictive aspects of the agreement. Similarly, agreements to offset a first-mover advantage and cooperate to sell detergents in a more concentrated format, may create cost efficiencies that benefit the consumers, and

[24] See eg, the situation foreseen at ibid para 565, whereby certain aspect are not covered by regulation.

thus it is appropriate to take these into consideration as individual use value benefits.

Conversely, individual non-use value benefits may accrue to consumers not as they consume the product, but as a result of their appreciation for the benefit of their sustainable consumption choices on others. Consumers often value the consumption of a sustainable product more than they value the consumption of a non-sustainable product. As such, these benefits can be compared to an improvement in quality. Consumers can, for instance, choose a detergent and value it as it pollutes less, rather than because of its cleaning properties. Similarly, consumers may choose sustainable material items over non-sustainable ones, because they value the impact this has on the environment, rather than the impact that it has on themselves as consumers. The benefits are not directly stemming from the use of the product, but they still accrue to those who use the product. In this regard, they can be taken into account to offset potential restrictive effects of an agreement.

A different case concerns collective benefits. These benefit a wider group than the group of users or consumers of the product in question. These benefits typically occur irrespective of the benefit for the individual consumer concerned, and are therefore more difficult to quantify. Conceptually, they can be taken into account, to the extent that the group of consumers affected by the restriction and the group that benefits from the efficiencies, is substantially the same. The Guidelines offer the example of drivers, who purchase less polluting fuel and at the same time benefit from cleaner air. If there is a substantial overlap between the two categories, these benefits can be considered in the assessment. As acknowledged at paragraph 586 of the Guidelines, this means that, in practice, collective benefits will often be accounted only where the market coverage of the agreement is very significant.[25]

The last criterion, no elimination of competition, is also expressly set out in the Treaty, and requires that the agreement must not allow the participating undertakings to eliminate competition in respect of a substantial part of the products in question, i.e. there needs to remain residual competition in the markets, regardless of how big the benefits would be. Paragraph 595 clarifies that this requirement can be met even when competitors restrict the

[25] The issue of evidence will be particularly relevant. To demonstrate collective benefits, the Guidelines also require a clear description of the benefits, and a definition on the beneficiaries.

technologies they use for sustainability purposes, provided that they continue to compete on the price and quality of the final product.

The innovative and timely intervention of the Commission through a sustainability chapter in its Guidelines is a significant example of how sustainability objectives can be 'mainstreamed' in competition analysis, and they are being followed, in different forms, in other jurisdictions.[26]

6. *Merger Enforcement and Sustainability in Action: the Industrial Transformation*

Merger control gives an opportunity to observe a different phenomenon showing how competition policy is adjusting to factor in sustainability objectives. This is what can be defined as the 'indirect' approach to sustainability. Rather than specific new rules or a new approach for the application of the existing rules, no specific instruments have been adopted in the field of mergers. Yet, the enforcement record of the Commission in concrete cases has resulted in several examples, where sustainability considerations were crucial to the outcome. Recently, The Directorate General for Competition covered these developments in an ad hoc merger brief, describing both the framework and significant instances.[27]

Merger control happens *ex ante*, thus it inherently has to gauge the likelihood of potential anticompetitive effects, also in light of dynamics and market developments that may occur in the future. In this context, evolving trends in production and consumption may be reflected in merger control, and play a significant role in the assessment of how a transaction may affect a market in the future. Shifting consumer preferences driven by sustainability objectives may, for instance, affect how markets are defined from a demand-side perspective. Evolving regulatory requirements may affect how important a player is deemed to be, despite its current market presence. Acquisitions of technologies with limited market significance today, may

[26] See eg, the New Guidance published by the UK Competition and Markets Authority on Green Agreements, CMA, *Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements* (12 October 2023) <https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf> accessed 1 September 2024.

[27] Catherine Ellwanger and others, 'EU Green Mergers & Acquisitions Deals – How Merger Control Contributes to a Sustainable Future' (Competition Merger Brief no 2/2023), 2.

have a much bigger impact on competitive dynamics in the future. These few examples illustrate how the ongoing industrial transformation, driven by sustainability objectives at large, has already become an object of merger control.

It is worth looking more in detail at the different parameters of competition that can be affected by sustainability considerations through concrete cases.

The first step of competitive analysis in merger analysis is typically market definition, where demand and supply-side considerations shape the Commission's understanding of the relevant markets, in which the transaction may have effects. Consumer preferences are increasingly factoring in sustainability considerations, both because of general preferences (e.g. end consumers choosing a 'greener' product because of its characteristics), but also in reaction to regulatory requirements or market realities (e.g. companies procuring more sustainable materials to reduce their own carbon footprint to reduce costs, or choosing recycled materials that may, already, be cheaper in certain markets). On the supply side, there are also significant changes, for example in the way undertakings organise their manufacturing processes, or regard by-products of those processes as a source of value in the circular economy. These developments are already happening, and will gain increasing importance in the near future. Consistent with this, they have already featured in the Commission's decisional practice.

The aluminium industry, for instance, has been prominent in multiple recent precedents. This is because aluminium itself have features enabling these industrial developments: it is a lighter metal than others (notably steel), and has a high potential for recycling. As regards market definition, in the Novelis / Aleris case, after an in-depth investigation, the Commission found that aluminium body sheet (for car exterior parts), was not in the same market as steel for similar applications. This is because demand trends point at a specific role for aluminium in 'lightweighting' strategies of carmakers on certain types of vehicles. Manufacturers specifically procure aluminium, which is lighter than steel, for certain vehicles: this reduces carbon footprint, brings companies in line with regulatory requirements, and improves fuel efficiency, a feature appreciated by customers.[28]

[28] *Novelis/Aleris* (Case M.9076) Commission Decision 2021/C 36/08 [2019] OJ C36/10, paras 104–255.

Another important parameter of competition is innovation, which featured more and more prominently in the competitive analysis of the European Commission. As already mentioned in this paper, the industrial transformation necessary to achieve the ambitious objectives of the European Green Deal will require significant R&D efforts. The Commission's analysis in mergers is particularly aware of the potential risks inherent in the acquisition by large incumbent players with an established market position of smaller and promising targets with break-through technologies (so-called 'killer acquisitions'). These transactions, particularly if the turnover of the target is still negligible, do not typically fall within the turnover thresholds which determine the jurisdiction of the Commission to review a deal.[29] This is why the Commission specifically mentioned these situations when issuing guidance on the circumstances in which it will seek a referral of these 'below-threshold' cases from the Member States.[30] The Commission has also recently considered concretely the importance of sustainability-related innovation when assessing the suitability of remedies in markets where R&D efforts played a critical role.[31]

The focus on a more circular economy, has made recycling cases gain a certain prominence. This could be explained both by the fact that the value of such activities in the supply chain is increasing, and by the willingness of economic players to gain control of critical assets also at that level of manufacturing, to 'verticalize' their position. The Commission has considered these aspects in different cases, mostly in metal recycling, with industries as diverse as copper, steel, and lead. However, the most consequential intervention of the Commission concerns the aluminium industry. In the very recent KPS / REAL ALLOY case, the Commission raised concerns on a transaction based on a vertical theory of harm. In essence, the Commission was concerned that, by acquiring a significant player in the recycling segment of the industry, the acquirer would have gained the incentive and ability to foreclose access of competitors to recycling services, with an impact on te downstream industries, and, particularly, in the manufacturing of alumini-

[29] Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings (Merger Regulation) [2004] OJ L24/1, art 1.

[30] European Commission, 'Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases' (Communication) OJ C113/1.

[31] Marianne Auffret and others, 'Sika/MBCC: Cementing Sustainability – Cutting Carbon through Chemistry' (Competition Merger Brief no 2/2023), 10.

um used in beverage cans.[32] This industry offered an interesting example of how an ongoing industrial transformation, prompted by sustainability and cost-efficiency considerations, can have a decisive impact on the outcome of the case. In particular, companies in this industrial segment need access to recycled aluminium not only because of its better footprint, but also as it is the most cost-efficient alternative in certain types of production; so using recycled material is necessary to remain competitive. The Commission ultimately cleared the acquisition only subject to the structural divestiture of production and recycling capacities.

The most recent case in the aluminium industry that triggered an in-depth investigation, also offered a chance for the Commission to examine the issue of closeness of competition in decarbonising industries. In particular, as players transition to more sustainable manufacturing processes, some of them may have an advantage over others, in view of market position, access to inputs, or technological progress. They may therefore compete particularly closely on 'greener' technologies, in such a way that their merger could raise concerns of a negative impact on prices of the clean technology, or on innovation and quality. The Commission tested this in the Norsk Hydro / Alumetal investigation,[33] although it ultimately concluded that the companies in that case were not close competitors. Nonetheless, the case offered the opportunity to explore new tools to assess specifically these features. In particular, alongside traditional market shares, the Commission tried to identify low-carbon suppliers, by relying on 'saved-emissions shares'. These were obtained by considering not only the tonnes of aluminium produced by players in the industry, but also by factoring in the calculation the CO_2 emissions per tonne of production.[34]

7. *Conclusions*

Sustainability can not only play a role in principle, but it Is already a

[32] *KPS CAPITAL PARTNERS/REAL ALLOY EUROPE* (case M.10702) Commission Decision [2022] OJ C1026.

[33] *Norsk Hydro/Alumetal* (case M.10658) Commission Decision [2023] OJ. Published on 16 december, summary in OJ not yet available

[34] See also Irina Alexandru and others, 'Norsk Hydro/Alumetal and KPS Capital Partners / Real Alloy: 'Greening" Aluminium' (Competition Merger Brief no 2/2023), 7.

reality of the competitive analysis carried out by the Commission, under all its statutory instruments.

For state aid, the revised rulebook and the new tools to create a framework for public intervention to address market failures, are shaping the response of Member States in their decisions on how to invest and support the green transition.

In antitrust, to the extent that there is a residual space left for cooperation between undertakings to achieve those objectives through sustainability agreements, particularly in response to market failures, a new set of guidelines has provided guidance on how to devise such cooperation agreements without falling afoul of the prohibition of anticompetitive agreements under Article 101 TFEU.

Finally, the example of mergers is a useful reminder of how, ultimately, competition enforcement needs to take into account market realities. In a context where regulation and private initiatives are already driving an industrial transformation towards a greener economy, it is not only possible, but also necessary for competition enforcers to look through the prism of sustainability to discharge their legal mandate.

SECTION FIVE.
SUSTAINABILITY IN ACTION – THE CASE FOR A SUSTAINABLE URBAN ENVIRONMENT

Marco Calabrò

PARTICIPATORY URBAN REGENERATION MODELS: THE INCLUSIVE DIMENSION OF SUSTAINABILITY

1. *The Notion of the Inclusive City as a "Creature" of the Community*

The following reflections originate from the consideration that when we deal with cities, we have to broaden the concept of sustainability by adding – to the three "classic" dimensions (environmental, social and economic)[1] – a fourth one: inclusiveness.

In 2000, the United Nations, with the Global Campaign for Good Urban Governance, introduced the notion of the "inclusive city", as «a place where everyone, regardless of wealth, gender, age, race or religion, is enabled to participate productively and positively in the opportunities cities have to offer».[2] Even UNESCO, with the Universal Declaration on Cultural Diversity of 2001, underlined that it is impossible to imagine sustainable development without including social and cultural diversi-

[1] Michael Redclift, 'The Multiple Dimensions of Sustainable Development' (1991) 1 Geography 36; Artur Pawlowski, 'How many dimensions does sustainable development have?' (2008) 2 Sustainable Development 81; Giampaolo Rossi, 'Dallo sviluppo sostenibile all'ambiente per lo sviluppo' (2020) 1 Rivista quadrimestrale di diritto dell'ambiente 4; Vincenzo Pepe, 'Lo sviluppo sostenibile tra diritto internazionale e diritto interno' (2002) 2 Rivista giuridica ambiente 209; Fabrizio Fracchia and Scilla Vernile, 'Lo sviluppo sostenibile oltre il diritto ambientale' (2022) 1-2 Le Regioni 15.

[2] <https://alnap.org/documents/2781/habitat-global-campaign-good-urban-governance-pdf>, accessed 28 January 2025; David Westendorff, *From Unsustainable to Inclusive Cities* (UN Research Institute for Social Development 2005); Julia Gerometta, Hartmut Haussermann and Giulia Longo, 'Social Innovation and Civil Society in Urban Governance: Strategies for an Inclusive City' (2005) 11 Urban Studies 2007; Jon Pierre, *The Politics of Urban Governance* (Red Globe Press 2011). On these topics, also see the 'Territorial Agenda of the European Union 2020. Towards an Inclusive, Smart and Sustainable Europe of Diverse Regions' (2011), and European Commission 'Europe 2020. A strategy for smart, sustainable and inclusive growth' (Communication) COM(2010) 2020 final, 16, where the centrality of inclusive growth is underlined, 'to help people anticipate and manage change, and build a cohesive society'.

ties.[3] The Leipzig Charter on Sustainable European Cities is also very relevant, in the part where it highlights that European cities «possess unique cultural and architectural qualities, strong forces of social inclusion and exceptional possibilities for economic development».[4]

Above all, the city is the place where this challenge takes shape, as the maximum collective expression of the human being, the material representation of the cultural identity of a community that is increasingly non-uniform. Finally, Mission 5 of the Italian Recovery and Resilience Plan, in line with Goal 11 of the 2030 Agenda for sustainable development,[5] identifies as central objectives the strengthening of inclusive urbanization and the ability to plan and manage the territory in a participatory and integrated way.[6]

[3] General Conference of the United Nations Educational, Scientific and Cultural Organization at its thirty-first session, 'Universal Declaration on Cultural Diversity' (2 November 2001), art 3 <https://www.ohchr.org/en/instruments-mechanisms/instruments/universal-declaration-cultural-diversity> accessed accessed 28 January 2025: 'Cultural diversity widens the range of options open to everyone; it is one of the roots of development, understood not simply in terms of economic growth, but also as a means to achieve a more satisfactory intellectual, emotional, moral and spiritual existence'. Anne-Marie Laulan, 'The cultural diversity within UNESCO' (2004) 2 Hermès La Revue 44.

[4] Leipzig Charter on Sustainable European Cities (2 May 2007) <https://territorial-agenda.eu/wp-content/uploads/leipzig_charter_2007.pdf> accessed 28 January 2025. This Charter, adopted by the 27 ministers of the EU member States responsible for urban and territorial development, has been a fundamental guide for urban development policies in Europe. In 2002, 'The New Leipzig Charter. The transformative power of cities for the common good' has updated it, emphasizing more forcefully the strategic role of urban inclusiveness <https://www.nationale-stadtentwicklungspolitik.de/NSPWeb/EN/Initiative/Leipzig-Charter/leipzig-charter_node.html> accessed 28 January 2025.

[5] Goal 11 'Make cities and human settlements inclusive, safe, resilient and sustainable', which includes, among other things, the objectives of increasing inclusive and sustainable urbanisation and the capacity for participatory and integrated planning and management of human settlement in all Countries (target 11.3). Jacqueline M Klopp and Danielle L Petretta, 'The urban sustainable development goal: Indicators, complexity and the politics of measuring cities' (2017) 63 Cities 92; Carmela Giannino, 'La costruzione dell'Agenda 2030 per lo sviluppo sostenibile. Questione ambientale e nuove economie urbane nella politica di coesione' (2021) 2-3 Rivista giuridica del Mezzogiorno 701.

[6] Mission 5 (*Cohesion and inclusion*) of the Recovery and Resilience Plan identifies a specific area of intervention (*Urban regeneration and social housing*), within which the allocation of 3.3 billion euros to investment 2.1, i.e. to projects of urban regeneration, aimed at reducing situations of marginalization and social degradation. In particular, the several projects have to be implemented through urban public policies conducted through participatory models and according to bottom-up dynamics. Annalisa Giusti, 'La rigenerazione

The Italian Constitutional Court has underlined on several occasions the strong relationship between the individual and the surrounding environment, as a measure of the projection of the individual's dignity.[7] The territory, in fact, is not merely identified in the set of "physical" goods that exist on an area but represents the collector of the interests and needs of the community.[8] And it is precisely in the complexity of the interests interacting on the territory that a bundle of relationships emerges, whose reference point is the citizens, their life, their goals, their action and their interests. That is why it is necessary that individuals should not limit themselves to using the territory, but take an active role in the development of cities, as well as recognizing themselves in their surroundings.

Also on the basis of these considerations, in 1968 Lefebvre introduced the concept of "Right to the city", a polysemic notion with different implementations (right to accessibility of urban spaces, right to environmental health, right to safety in public places).[9] Lefebrve combined the right to fruition with the right to the *oeuvre*, understood as the possibility of modifying the space to which one belongs as a member of a community and the possi-

urbana come strategia di ripresa e resilienza' (2021) 2 Munus 329; Michele Della Morte, 'Il futuro dei territori (e del Sud). Rilanciare rappresentanza e partecipazione per una migliore attuazione del PNRR' (2021) 2 Costituzionalismo.it <https://www.costituzionalismo.it/il-futuro-dei-territori-e-del-sud-rilanciare-rappresentanza-e-partecipazione-per-una-migliore-attuazione-del-pnrr/> accessed 28 January 2025; Luca Golisano, 'Il PNRR e lo sviluppo sostenibile nel governo del territorio' (2022) 1 Munus 159.

[7] Corte cost, sent 31 July 2020, no 186; Corte cost, sent 28 October 2021, no 202.

[8] Urban planning entails the use of a broadly discretionary power, bordering on arbitrariness. Nor, in this regard, would the principles of reasonableness, equality and impartiality of administrative action act as a limit to differentiated planning of the territory between the different parts that compose it, since the plan itself must enhance some areas and place others at the service of the community, determining, thus, possible situations of profound inequity, illogicality and discrimination among the owners. Tommaso Bonetti, *Il diritto del "governo del territorio" in trasformazione* (Editoriale Scientifica 2011); Fabio Saitta, 'Governo del territorio e discrezionalità dei pianificatori' (2018) 6 Rivista giuridica dell'edilizia 421. The Italian administrative judge repeatedly underlined the wide discretionary power linked to the exercise of the urban planning function (Cons st, IV sez, sent 31 December 2019, no 8917; Cons st, II sez, sent 9 December 2020, no 7821).

[9] 'The right to the city is a superior form of rights, namely the right to freedom, to individualization in socialization, to habitat and to inhabit. The right to the *oeuvre* (to the participating activity) and the right to fruition (very different from the right to property) are implicit in the right to the city', Henri Lefebvre, *Il diritto alla città* (3rd edn, Marsilio 1976) 94.

bility of influencing its function and evolution.[10] With this paper, I intend to investigate this meaning of the right to the city, as the right to participate and be involved in the decision-making processes concerning the development of the territory, with the aim of bringing out its real axiological significance.

Robert Park, a sociologist belonging to the Chicago School, a contemporary of Lefebvre, stated that «the city is the man's most consistent and on the whole, his most successful attempt to remake the world he lives in more after his heart's desire. But, if the city is the world which man created, it is the world in which he is henceforth condemned to live».[11] Thus the importance for the citizen to not be a mere spectator. In this regard, Gerald Frug, in his *The city as a legal concept* - reflecting on the evolution of the city as an object of legal analysis – identifies a dichotomy: the city as «creature of the State» and the city as «creature of the community».[12] In the first hypothesis, the city is the result of authoritative public choices, delivered from above. Whereas, in its second meaning the city belongs to the community and, at the same time, to the individual, who has a claim to actively participate in public decisions connected to the development of the city, as well as to promote initiatives of general interest intended to affect the community.

In this regard, we can observe that the so-called phenomenon "sunset of the public city" is now in decline. It consists of public policies insensitive to supporting actions of identity recognition, with the consequent reduction and abandonment of common spaces.[13] It has now been replaced by a

[10] David Harvey, 'The right to the city' (2008) 53 New Left Review 23; Francesco Chiodelli, 'La cittadinanza secondo Henri Lefebvre: urbana, attiva, a matrice spaziale' (2009) 51 Territorio 103; Andy Merrifield, 'The right to the city and beyond. Notes on a Lefebvrian re-conceptualization' (2011) 3-4 City 473; Neil Brenner, Peter Marcuse and Margit Mayer, *Cities for People, not for Profit. Critical Urban Theory and the Right to the City* (Routledge 2012); Chiara Belingardi, 'Diritto alla città e beni comuni' (2017) 1-2 Contesti. Città, Territori, Progetti 69.

[11] Robert E Park, *On Social Control and Collective Behavior* (University of Chicago Press 1967) 3.

[12] Gerald E Frug, 'The City as a Legal Concept' (1980) 93 Harvard Law Review 1057.

[13] The phenomenon of the sunset of the public city is generally linked to the incapacity of long-term planning by the public decision-maker, with the consequent reduction of attention towards the maintenance and creation of collective spaces, in favour of private spaces, along with the tendency to carry out "architectural" rather than "urban" interventions. Paola Bonora, 'La città pubblica tradita' (2016) 6 Rivista trimestrale di cultura e di politica 958. For critical remarks, see Richard Sennett, *Costruire e abitare* (Feltrinelli 2020); Paolo Urbani, 'Alla ricerca della città pubblica' (2023) 1 Rivista giuridica dell'edilizia 3.

widespread social inclination in the direction of a participatory city, a place felt by everyone as an external ramification of their own habitat and, more generally, of their own aspirations.

2. *Typologies of Participation in Urban Planning Procedure*

There are many ways for local people to get involved in urban decision-making processes. An American public policy expert, Shelley Arnstein, in 1969 designed a "ladder of citizen participation", a model for understanding the degree of citizen involvement in the public procedures:[14] participation in itself is not necessarily an advantage. Only the ways in which it is regulated measure its actual impact: according to Arnstein, we can move from "non-participation", where citizens are substantially manipulated, to the "degree of tokenism", characterized by purely formal consultations, up to the "degree of citizen power", namely that participation which guarantees the effects of a real co-decision.[15]

In particular, focusing on the territorial government sector, we can underline that the Italian state planning law (l. no. 1150/1942) contains generic provisions on participation in planning procedures, referable to the model that we have defined as degree of tokenism: the citizen can

[14] Sherry R Arnstein, 'A Ladder of Citizen Participation' (1969) 35 Journal of the American Planning Association 216.

[15] On the failure of the "decide, announce and defend" scheme and the consequential opening to participatory and inclusive procedural schemes, which constitute the so-called *démocratie de proximitè*, see Russell J Dalton, 'Citizenship norms and the expansion of political participation' (2008) 56 Political Studies 76; Pierre Rosanvallon, *Democratic Legitimacy. Impartiality, Reflexivity, Proximity* (Princeton University Press 2011); Patrice Melè, *Conflits de proximitè et dynamique urbaines* (Presses universitaires de Rennes 2013); Viviana Molaschi, *Le arene deliberative. Contributo allo studio delle nuove forme di partecipazione nei processi di decisione pubblica* (Editoriale Scientifica 2018); Alessandra Valastro, 'Territori, crisi e distanziamenti: la prossimità come trama e alimento della democrazia sociale' (2022) 11 Federalismi.it 218 <https://www.federalismi.it/nv14/articolo-documento.cfm?artid=47022> accessed 28 January 2025. Re-elaborating the concept of the right to the city introduced by Lefebvre, Purcell underlines that one of its pillars is participation, understood as a fundamental right for all inhabitants (and not only for all citizens') to exercise full influence in all decisions made in respect to the production of space and the city, Mark Purcell, 'Excavating Lefebvre: The right to the city and its urban politics of the inhabitant' (2002) 58 GeoJournal 99.

only participate in writing and at a time when the choices essentially have already been made.[16]

Conversely, from the analysis of the regional legislation there emerges a clear attempt to recognize the existence of a principle of effective participation in the urban planning procedures.[17] After all, it is precisely "consensual" planning that satisfies the need for a possible and stable reorganization of the several disciplines for the protection of territorial interests, in order to attempt the maximum effort of coordination and co-planning of the interests at stake in a sort of loyal public-private cooperation.[18]

First of all, I am referring to the fact that in several regional laws the recognition of the right to participate applies not only to those who formally reside in the area of the urban transformation, but to anyone who demonstrates a solid factual link with it.[19] This is a noteworthy signal, which demonstrates the gradual acceptance in this field of a notion of active citizenship, not necessarily correlated to formal belonging to the territory of reference. For example, Veneto Regional Law no. 11/2004 (Norme per il governo del territorio e in materia di paesaggio), states that within 120 days of the publication of the plan «local authorities, mountain communities, territorial autonomies, economic and social organizations and associations, as

[16] Guido D'Angelo, 'Pianificazione urbanistica: presente e futuro' (1999) 2 Rivista giuridica dell'edilizia 51; Pier Luigi Portaluri, 'La partecipazione dei privati al procedimento di formazione del piano' in E Follieri and others (eds), *Scritti in ricordo di F. Pugliese* (ESI 2010). For some reflections on the overcoming of this perspective, see Clemente P Santacroce, 'Prender parte al governo del territorio e prendersi cura del territorio, ovvero della rigenerazione urbana presa sul serio' (2021) 3 Rivista giuridica di urbanistica 511.

[17] Anna Simonati, 'La partecipazione dei privati al governo del territorio nella legislazione regionale: fra tradizione e sperimentazione, per una nuova urbanistica "reticolare"' (2016) 3 Rivista giuridica dell'edilizia 268.

[18] Paolo Urbani, *Urbanistica consensuale* (Bollati Boringhieri 2000); Antonio Barone, 'Urbanistica consensuale, programmazione negoziata e integrazione comunitaria' (2001) 2 Rivista italiana di diritto pubblico comunitario 261; Robert Krueger and Susan Buckingham, 'Towards a 'Consensual' Urban Politics? Creative Planning, Urban Sustainability and Regional Development' (2012) 36 International Journal of Urban and Regional Research 486; Richard Shragger, *City power. Urban governance in a global age* (Oxford University Press 2016).

[19] See: art 6, l reg Sicilia 13 agosto 2020, no 19 'Norme per il governo del territorio'; art 26 l reg Marche 5 agosto 1992, no 34 'Norme in materia urbanistica, paesaggistica e di assetto del territorio'; art 38, l reg Liguria 4 settembre 1997, no 36 'Legge urbanistica regionale'; art 19, l reg Toscana 10 novembre 2014, no 65 'Norme per il governo del territorio'.

well as anyone with an interest, may submit observations and proposals to the Regional Council» (Art. 25).

I am referring to the fact that in many regions the presentation of observations by interested parties is not (only) effective for the protection of individual interests, but is a tool for collaboration with the administration in order to identify the best solution for the whole community.[20] In this regard, particularly meaningful is the Calabria Regional Law no. 19/2002 (Legge urbanistica della Calabria), which states that «The Municipalities, to promote the broader participation of citizens in the definition of urban planning tools and development and governance policies of the municipal, area as well as to encourage a real activity of collective participation and sharing also for the project activities related to important works and of public interest and in the compliance with the principle of sustainability, set up and manage with adequate personnel, specific "participation workshops" which can be organized, according to specific needs and situations, also in a widespread but coordinated and networked manner, in the city and more generally in the territorial context and inter-municipal» (Art. 11).

But the most significant element is probably represented by the "time" of participation. Several regional planning laws provide for two participatory moments: the traditional one, before the formal adoption of the plan; and an earlier one, concerning the strategic choices of land management.[21] For example, Lombardy Regional Law no. 12/2005 (Legge per il governo del territorio) – beyond the participatory moment after the publication of the adopted plan – states that before conferring the task of drafting the

[20] See art 20, l prov Trento 4 agosto 2015, no 15 'Legge provinciale per il governo del territorio' (l prov Trento 15/2015); art 15, l reg Piemonte 5 dicembre 1977, no 56 'Tutela e uso del suolo'.

[21] See art 11, l reg Puglia 27 luglio 2001, no 20 'Norme generali di governo e uso del territorio'; art 36, l reg Basilicata 11 agosto 1999, no 23 'Tutela, governo e uso del territorio'; art 37, l prov Trento 15/2015. Participation in a phase prior to that of the concrete execution of the choice often takes place through the instrument of public debate. On the persisting difficulty of achieving this type of participation in Italy, see Alessandro Di Martino, 'Il dibattito pubblico per la realizzazione delle grandi infrastrutture: quale ruolo per la partecipazione democratica?' (2017) 3 Nuove autonomie 533; Andrea Averardi, 'La decisione amministrativa tra dissenso e partecipazione. Le ragioni del dibattito pubblico' (2018) 1 Munus 129; Nicola Posteraro, 'Grandi opere e partecipazione democratica: alcune riflessioni sul dibattito pubblico italiano "*a la française*"' (2020) 3 Istituzioni del federalismo 607; Raimondo Fabbri, 'PNRR e dibattito pubblico. Prospettive di applicazione per uno strumento di democrazia deliberativa' (2022) 1 Rivista giuridica del Mezzogiorno 99.

documents of the urban municipal plan «the municipality publishes notice of the initiation of the procedure in at least one newspaper or periodical with local circulation and on the normal channels of communication with the citizens, establishing the deadline within which anyone with an interest, also for the protection of widespread interests, can present suggestions and proposals» (Art. 13). In this way, the regional legislator involves citizens not only on "how" but also on "if" a decision concerning the territorial government should be taken.[22]

3. *Urban Regeneration Programmes and Plans as a "Tangible" Expression of the Prism of Sustainability*

However, urban regeneration programmes and plans – more recently introduced into the Italian legal system – are, without any doubt, the context in which citizen involvement finds its fullest expression. The term urban regeneration refers to a coordinated set of recovery interventions intended to be carried out in severely degraded areas, from an urban, building, environmental, economic and social point of view.[23] It is a broader notion than that of mere "recovery", in fact it is a tool primarily aimed at reacting to the environmental emergency, as well as at reducing inequalities and reinforcing social cohesion. The concept in question has passed on from the idea of urban and building "reuse" or "recovery", that assume an eminently conservative connotation, and is instead now projected towards organic interventions of public relevance, through legal tools able to deal

[22] Simonati (n 17); Patrizia Marzaro, 'Partecipazione consapevole e giusto procedimento di pianificazione' (2020) 1 Nuove autonomie 5; Loredana Giani, 'L'amministrazione tra appropriatezza dell'organizzazione e risultato: spunti per una rilettura del dialogo tra territorio, autorità e diritti' (2021) 3 Nuove Autonomie 551. In general, on the centrality of the "time" of the participatory moment in decision-making processes, see Marco D'Alberti, 'La "visione" e la "voce": le garanzie di partecipazione ai procedimenti amministrativi' (2000) Rivista trimestrale di diritto pubblico 1; Andreina Scognamiglio, *Il diritto di difesa nel procedimento amministrativo* (Giuffré 2004); Silvia Tuccillo, *Contributo allo studio della funzione amministrativa come dovere* (Editoriale Scientifica 2016) 78.

[23] Peter Roberts and Hugh Sykes (eds), *Urban Regeneration. A Handbook* (SAGE 2000); Chris Couch and Charles Fraser and Susan Percy (eds), *Urban regeneration in Europe* (Blackwell 2003); Gian Franco Cartei, 'Rigenerazione urbana e governo del territorio' (2017) 3 Le Istituzioni del Federalismo 603; Annalisa Giusti, *La rigenerazione urbana. Temi, questioni e approcci nell'urbanistica di nuova generazione* (Editoriale Scientifica 2018).

with the problems of physical degradation and socio-economic discomfort of the territory[24] and suited to enhancing the local identities which interact with them.

In this context, the 2016 Pact of Amsterdam for the Urban Agenda of the European Union identified the 12 challenges for urban areas, acting as the "guidelines" for urban policy initiatives and contributing to their strengthening, from the city level to that of the European Union.[25] Regarding this subject, urban regeneration can be considered as an element of synthesis and, at the same time, a transversal objective for achieving the goals of integrated sustainable development, through its environmental, social and economic dimension.[26]

From the environmental point of view, regeneration places the recovery of green areas at the focal point of the question, thus overcoming the mere quantitative dimension of urban planning standards.[27] In this way it becomes an essential instrument for the achievement of various sustainable development goals (2030 Agenda - goals 3 and 11 - Good health and well-being;

[24] Ruggiero Dipace, 'La rigenerazione urbana tra programmazione e pianificazione' (2014) 5 Rivista giuridica dell'edilizia 237.

[25] European Commission, 'Urban Agenda for the EU "Pact of Amsterdam"' (30 May 2016) <https://ec.europa.eu/regional_policy/sources/policy/themes/urban-development/agenda/pact-of-amsterdam.pdf> accessed 28 January 2025; Eduardo de Santiago Rodríguez, 'The development process of the Urban Agenda of the EU: from the Toledo Declaration to the Pact of Amsterdam' (2017) 10 Territory of Research on Settlements and Environment 23; Giovanni Comazzetto, 'La città nel processo di integrazione europea' (2021) 3 Diritti fondamentali 478; Brian G Field and Jeroen P R Bakker, 'The evolution of the European Union's Urban Agenda and the morphology of the Pact of Amsterdam' (2021) 15 Journal of Urban Regeneration & Renewal 24.

[26] In this perspective, the Italian administrative judge underlines that «the concept of urban planning is not limited only to the coordinated regulation of land construction, but, by means of the regulation of the use of the areas, it also achieves economic-social purposes of the local community (not in contrast to but rather in harmonious relationship with similar interests of other territorial, regional and state communities), within the framework of respect and positive implementation of constitutionally protected values» (Cons st, IV sez, 1 June 2018, no 3316).

[27] Benedetto Graziosi, 'Il problema degli standard urbanistici "differenziati" e gli interventi di rigenerazione urbana nel territorio urbanizzato' (2018) 6 Rivista giuridica dell'edilizia 529; Elena Marchigiani and Paola Savoldi, 'Sugli standard: questioni e bilanci' (2019) 3 Territorio 21; Marco Calabrò and Claudia de Biase, 'Il verde pubblico nel nuovo contesto urbano post-pandemico' (2021) 1 Contesti. Città, territori, progetti 111.

Sustainable and resilient cities, combating climate change).[28] Furthermore, the direct connection between the interventions aimed at recovering the existing buildings and the need to contain the consumption of new soil is evident: environmental, landscape, geological reasons and, more generally, an eco-systemic development approach, do not allow further exploitation for building purposes of a large part of the Italian territory, with the consequence that the only admissible intervention is that of regeneration.[29]

From an economic and social sustainability perspective, urban regeneration also relates to the recovery of urban suburbs, intended not only as part of the territory located in decentralized areas, but as all those neighbourhoods which - although located at the centre of the urban context - are characterized by phenomena of economic, social and cultural degradation.[30] From this perspective, urban regeneration, intervening on services (schools, hospitals, transports) and sponsoring the start-up of commercial activities,

[28] This topic is linked to that of the so-called "regenerative cities", i.e. those cities which – by investing in the development of green infrastructures – have the objective not only of reducing the impacts of anthropogenic activities on natural resources, but also of establishing restorative relationships between cities and natural systems. See the European Strategy for Green Infrastructure (Communication from the Commission to the Parliament, the Council, the European Economic e Social Committee of the Regions - Green Infrastructure (GI) - Enhancing Europe's Natural Capital / COM/2013/0249); Herbert Girardet, *Creating regenerative cities* (Routledge 2015); Fabio Giglioni, 'La sostenibilità ambientale come vincolo giuridico per la rigenerazione urbana' (2020) Rivista quadrimestrale di Diritto dell'Ambiente 1; Giles Thomson and Peter Newman, 'Green Infrastructure and Biophilic Urbanism as Tools for Integrating Resource Efficient and Ecological Cities' (2021) 6 Urban planning 75.

[29] Paola Chirulli, 'La pianificazione urbanistica tra esigenze di sviluppo e riduzione del consumo di suolo: la riqualificazione dell'esistente' (2015) 4 Rivista giuridica di urbanistica 592; Emanuele Boscolo, 'La limitazione del consumo di suolo' (2020) 2 Rivista giuridica di urbanistica 297; Giorgio Pagliari, 'Governo del territorio e consumo del suolo. Riflessioni sulle prospettive della pianificazione urbanistica' (2020) 5 Rivista giuridica dell'edilizia 325; Giuseppe A Primerano, *Il consumo di suolo e la rigenerazione urbana. La salvaguardia di una matrice ambientale mediante uno strumento di sviluppo sostenibile* (Editoriale Scientifica 2022); Antonio G Pietrosanti, *Consumo di risorse naturali non rinnovabili. Tra diritti della natura, bilanciamento di interessi e tutela giurisdizionale* (Editoriale Scientifica 2023).

[30] Clara Napolitano, 'Un "terzo paesaggio" per le periferie: abbandono, rammendo, pianificazione' (2020) 2 Nuove Autonomie 499; Maria Immordino and others (eds), *Periferie e diritti fondamentali* (Editoriale Scientifica 2020); Enrico Carloni, 'Ripensare le istituzioni ai margini. I limiti della "governance" territoriale, tra specialità urbana e aree interne' (2020) Istituzioni del Federalismo 323; Emanuele Boscolo, 'Le periferie in degrado (socio-territoriale) e i (plurimi) fallimenti dell'urbanistica italiana' (2021) 1 Rivista giuridica di urbanistica 54.

is aimed at "mending" isolated areas, not only in physical terms, but also fighting phenomena of marginalization.[31]

Finally, the social dimension of sustainability is the specific object of those urban regeneration actions aimed at solving situations of vulnerability, which finds its most important expression in immigrant policies. The contemporary city - however intrinsically multi-ethnic - from an urban point of view, risks not recognizing the presence of the foreigner, who is often not the object of differentiated attention by the planner. Apart from the issues of foreigners' access to the Italian territory, related to the security aspect,[32] often not enough attention is paid to the issue of immigrant reception, which however is destined to have a strong impact on the territory.[33] Suffice it to think of: the social right to housing,[34] the constitutionally protected freedom of religion and the related need to allow the building of

[31] The proposal, made by the world-famous architect Renzo Piano, to "mend" the suburbs connecting separate areas of cities through urban micro-projects has sparked a wide debate: Renzo Piano, 'Il rammendo delle periferie' *Il Sole 24ore* (26 January 2014). On the subject of inner areas, see also Antonio De Rossi (eds), *Riabitare l'Italia. Le aree interne tra abbandoni e riconquiste* (Donzelli Editore 2018). More generally, for a notion of urban regeneration as a tool aimed at guaranteeing everyone the right to a habitat, or the right to be able to enjoy adequate public spaces, efficient urban infrastructures, etc., see Annalisa Giusti 'La rigenerazione urbana tra consolidamento dei paradigmi e nuove contingenze' (2021) 2 Diritto Amministrativo 441.

[32] Didier Bigo, 'Security and Immigration: Toward a Critique of the Governmentality of Unease' (2002) 27 Alternatives 63; Carla Bassu, 'Flussi migratori e democrazie costituzionali: tra diritti umani e sicurezza pubblica' (2019) 2 Rivista trimestrale di diritto pubblico 479; Mario Savino, 'Il diritto dell'immigrazione: quattro sfide' (2019) 2 Rivista trimestrale di diritto pubblico 381; Marco Calabrò, 'La possibile rimodulazione del ruolo degli enti locali nella gestione dei flussi migratori' (2020) Ordine internazionale e diritti umani 117; Silvia Tuccillo, 'Il diritto di asilo' (2021) Rivista trimestrale di diritto pubblico 133.

[33] Marco Calabrò, 'Governo del territorio e gestione del fenomeno migratorio: spinte inclusive ed effetti escludenti' (2022) 2 Rivista giuridica di urbanistica 408.

[34] Jill Rutter and Maria Latorre, 'Social housing allocation and immigrant communities' (Equality and Human Rights Commission 2009) <https://www.equalityhumanrights.com/sites/default/files/4_social_housing_allocation_and_immigrant_communities.pdf> accessed 28 January 2025; Elena Vivaldi, 'L'accesso all'abitazione per i migranti. Quadro normativo e prassi' in Francesca Biondi Dal Monte and Emanuele Rossi (eds), *Diritti oltre frontiera: migrazioni, politiche di accoglienza e integrazione* (Pisa University Press 2020) 61; Paola Lombardi, 'Riflessioni sul diritto all'abitazione tra Carta sociale europea, Corte costituzionale e PNRR' (2022) 7 Federalismi.it 126 <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=46870> accessed 28 January 2025.

places of worship,[35] as well as of what has already been observed regarding the so-called intercultural city and, therefore, of the need to avoid phenomena of ghettoization.[36] At the same time, there is the need to highlight, even at the urban design stage, the complex nature of the identity of the contemporary city.[37]

In this context, urban regeneration does not envisage the creation of *enclaves* of cultural diversity through the planning of spaces "dedicated" to the immigrant population; but allows the circulation of the different ethnic groups' cultures, in a path that, starting from knowledge, passes through understanding, and then flows into integration.[38] In this regard, the "Intercultural City Programme", launched in 2008 by the Council of Europe is really important as it stimulates cities to implement urban public policies capable of encouraging intercultural dialogue and interaction between ethnic groups and the local population: for example, through the planning of areas where people are able to witness exhibitions on the history and culture of other countries.[39] In the wake of the European initiative, for example, the

[35] Corte cost, sent 23 February 2016, no 63; Corte cost, sent 5 December 2019, no 254. Marco Parisi, 'Edilizia di culto e pianificazione urbanistica al vaglio della Corte costituzionale' (2021) 1 Politica del diritto 79; Maria Luisa Lo Giacco, 'Religious freedom and places of worship. Religious buildings in Europe and the United States' in Brett G Scharffs, *Religious Freedom and the Law* (Routledge 2019).

[36] Stuart S Rosenthal, 'Old homes, externalities, and poor neighborhoods. A model of urban decline and renewal' (2008) Journal of Urban Economics 816; Terry Wotherspoon, 'Migration, Boundaries and Differentiated Citizenship: Contested Frameworks for Inclusion and Exclusion' (2018) Social inclusion 153.

[37] Gabriella Esposito and Stefania Oppido, 'Inclusive cities for intercultural communities. European experiences' (2016) Procedia - Social and Behavioral Sciences 134; Emanuele Boscolo, 'La città "con gli occhi degli altri": l'integrazione negli spazi territoriali' (2019) <www.adimblog.com> accessed 28 January 2025.

[38] Jürgen Habermas, *The Inclusion of the Other. Studies in Political Theory* (Cambridge 2000); Anna J Kim, 'From the enclave to the city: the economic benefits of immigrant flexibility' (2015) 6 Local environment 706; Peter Scholten, 'Beyond Migrant Integration Policies: Rethinking the Urban Governance of Migration-Related Diversity' (2018) 18 Croatian and Comparative Public Administration 7.

[39] Council of Europe, 'Intercultural cities programme' <https://www.coe.int/en/web/interculturalcities> accessed 28 January 2025. According to this Programme, an Intercultural city is a place where: there is a diverse population, including people of different nationalities and origins, and with different languages, religions/beliefs and backgrounds; real equality is actively sought by preventing discrimination and adapting the city's governance, institutions and services to the needs of a diverse population; political leaders and most citizens

Italian network of intercultural cities was born in 2010. The cities of this network are committed to developing tools and practices for peaceful coexistence and disseminating local governance experiences aimed at improving intercultural dialogue and the participation of migrants in community life.[40]

In the light of the previous observations, it is evident that when considering future challenges affecting cities, urban regeneration, in its triple dimension of sustainability (environmental, economic, social), has a crucial role to play in the future of urban development. It could be the principal actor in renewing the traditional approach, serving the city as a whole and its parts as components of the entire urban organism, balancing the complexity and diversity of urban assets and interests.[41]

4. *The Central Role of an Effective Participation in Urban Regeneration Projects*

Therefore, urban regeneration projects are a "tangible" expression of the prism of sustainability, acting simultaneously on environmental, economic and social aspects. A cross-element that characterizes these actions is precisely the centrality of the participatory stage. In particular, there are two models of participatory urban regeneration: a) the first one, where participation aims at receiving requests from below and involving individuals in the

regard diversity positively, as a resource, and understand that all cultures change as they encounter each other in the public arena; meaningful interaction between diverse individuals and groups is engineered through public policies that promote trust, create connections and transform the public space in a way that it multiplies occasions for encounters, exchange and dialogue; active citizenship and participation is enabled to ensure that no-one is left aside, that even those who do not enjoy formal citizenship have a voice in shaping their local society.

[40] 'Rete delle Città del Dialogo' <https://www.retecittadeldialogo.it/> accessed 28 January 2025. This Italian Network is part of the Intercultural Cities Programme (ICC) of the Council of Europe and currently 30 Italian cities, distributed throughout the national territory, are part of it.

[41] Marco Calabrò and Laura Pergolizzi, 'The promotion of energy transition in view of urban regeneration: towards a perspective of sustainability' in Carmine Gambardella (ed), *World heritage and design for health* (Gangemi Editore 2021) 54. See also the Toledo Declaration on Urban Development (2010), signed by the Ministers of EU Member States responsible for Urban Development <https://www.nationale-stadtentwicklungspolitik.de/NSPWeb/SharedDocs/Downloads/DE/europaeische/toledo-declaration.pdf?__blob=publicationFile&v=2>, accessed 28 January 2025

implementation of public choices; b) the second one, where participation takes on a more proactive dimension, consisting in citizen initiative for the management of public urban assets.

According to the first model, urban regeneration actions are carried out through widely shared decision-making processes, although formally managed by a public authority. The achievement of these actions is essentially due to the fact that goals and operating methods are identified together by public decision-makers and citizens, in a context of a continuous process of participation and identification of needs.[42]

Furthermore, professionals from the various sectors involved in the regeneration programme are often employed in meetings and worktables: architects, cultural mediators, jurists, economists, and sociologists. As has been observed, for effective urban regeneration, «the humility of the comparison between multiple professional experiences is needed, because complex problems need articulated answers»:[43] a constant dialogue between different expertise, a dialogue from which solutions can arise that each of the individual competences would not be able to arrive at on their own.[44]

A further significant aspect of these participation models, is that of creating a multilateral dialogue between interests existing on the territory: citizen involvement is no longer a question of many segments of bilateral dialogue between individual stakeholder and public authority, but of a multi-voiced dialogue through which each inhabitant also listens to the requests of others. In this way, it is possible to reach decisions that represent a real synthesis of the needs of the territory, a synthesis certainly more complex, but perhaps destined to be even more effective.[45]

[42] Stephen Coleman and Jay Blumer, *The internet and democratic citizenship: Theory, practice and policy* (Cambridge University Press 2009); Tony Bovaird and others, 'Activating citizens to participate in collective co-production of public services' (2015) 44 Journal of Social Policy 1.

[43] Mario R Spasiano, 'Riflessioni in tema di rigenerazione urbana' (2022) 2 Rivista giuridica di urbanistica 394.

[44] On the importance of an interdisciplinary approach for identifying solutions suitable for situations with considerable complexity, in general, see Julie Thompson Klein, 'Interdisciplinarity and complexity: An evolving relationship' (2004) 6 E:CO 2; Mario R Spasiano 'Il diritto amministrativo nell'era della transdisciplinarietà' (2021) 4 Diritto e società 657.

[45] Simonati (n 17), speaks of 'reticularity of intersubjective relationships in view of the shaping of the territory'. Giancarlo De Carlo, 'L'architetto e il potere' (1989) Rivista Anarchica, remarks that 'participation is a phenomenon that cannot be programmed, nor systematised in a series of canons, because the diversity of the participants and the participatory

Particularly impactful examples of such urban regeneration actions in Italy are, among many others, the plan "The Gate-living not leaving" in the city of Turin[46] and the "Pact for coexistence" in the station area of the city of Reggio Emilia.[47] In both cases, these were public interventions which - although starting from the need to respond to public safety requests deriving from situations of urban and social degradation - have gone much further, through a model of constant dialogue with the interested parties, with the view to helping to build a sense of community and belonging.

With regard to the participation of minorities, the Superkilen project in Copenhagen is particularly interesting: it consists of the design of an urban park capable of promoting integration in the most multicultural district of Denmark.[48] First of all, the local authority asked the inhabitants of the neighbourhood to indicate some characteristic elements of their country of origin. From the outcomes of this inquiry, items of street furniture, typically present in public spaces of the different countries, were installed (Moroccan mosaic fountain, Brazilian benches, etc.), and the whole community was able to get to know and understand the urban culture of each country, also

moments indicates their peculiarity […] Returning to the real problems and identifying them is not simple: it requires a complex, tiring, difficult participation'.

[46] The project started in 1996 and consisted of a complex programme of interventions for the redevelopment, economic development and improvement of environmental quality, social and cultural initiatives, promotion of the physical transformation of the building heritage, the market, meeting places and the system of collective spaces. The objectives and actions envisaged were based on the concept of direct and coordinated concertation of public decision-makers and private operators, and the comparison of choices with citizens in the context of a continuous process of participation and detection of the request for intervention. Sergio Guercio and Matteo Robiglio Isabelle Toussaint, 'Periferie partecipate. Cinque casi di riqualificazione urbana a Torino' (2004) 8 Ciudades 51.

[47] The project started in 2007 and consisted in the urban redevelopment of the train station area, with interventions aimed at reducing the sense of insecurity and better connecting the area with the city centre. To this end, a process was followed which led to the identification of the stakeholders (residents, institutions and law enforcement agencies, associations, trade unions, merchants, etc.). Around 180 people were contacted and 60 of them involved in active planning work during which an analysis of the problems to be solved and the objectives to be pursued was carried out. Dino Giovannini and others, 'Immigrazione, percezione di sicurezza e mediazione sociale dei conflitti: il caso "zona stazione" a Reggio Emilia' (VII Convegno Nazionale della Società Italiana di Psicologia di Comunità, Roma, 2008) 114.

[48] Henrik Vejre, Jørgen Primdahl and Jesper Brandt, 'The Copenhagen Finger Plan: Keeping a Green Space Structure by a Simple Planning Metaphor' in Bas Pedroli and others (eds), *Europe's Living Landscapes* (KNNV Publishing 2007) 310.

because each of these elements had an information plaque in different languages explaining its origin and essence. Through the active participation of residents, even the most "invisible", it was thus possible to give a voice and represent the city of Copenhagen, seen not as a uniform entity, but as it really is, i.e. a mixture of races, languages and cultures.[49]

European urban regeneration policies also recognize a central role in the active involvement of the beneficiaries of the actions.[50] An effective and not just symbolic participation, capable of allowing the citizen to really influence the final decision. This not only reduces the risk of gentrification,[51] but has the further advantage of avoiding future disputes, often deriving from the absence of an adequate level of awareness of the reasons underlying the urban planning choices.[52]

[49] Patrick Savidan, *Il multiculturalismo* (Il Mulino 2010) 8 points out that 'one of the challenges of multiculturalism is precisely that of defining the mechanisms for restoring cultural difference to equality and this, paradoxically, precisely with the aim of going even further in the establishment of equality and to ensure that equality no longer hides the denial of real differences'.

[50] See documents and reports in <www.urban-initiative.eu/ and in https://urbact.eu/> accessed 28 January 2025.

[51] With the term "gentrification" we refer to that phenomenon for which urban redevelopment interventions - not accompanied by parallel measures of a social nature - improve the conditions of urban degradation of an area but, at the same time, produce an increase in property prices, in the rent and, in general, in the cost of living. This ends up determining the removal from the neighbourhood of the weakest groups (old people, immigrants), and also produces the deconstruction of the local community, forced to break up spatially in search of a new home. In this way we can observe the loss of social identity and the sense of belonging to the group. Marc Augè, *Nonluoghi. Introduzione a un'antropologia sulla surmodernità* (Elèuthera 1993); Loretta Lees, Tom Slater and Elvin Wyly, *Gentrification* (Routledge 2008). In this regard, Harvey writes of "accumulation by dispossession", referring to urban redevelopment processes, implemented through capture of valuable land from low-income populations that may have lived there for many years; David Harvey, *The New Imperialism* (Oxford University Press 2003).

[52] The effective involvement of the community already in the planning phase also has positive effects on the realization of the public decision, avoiding phenomena of *a priori* obstructionism, known as *Not In My Backyard* (N.I.M.B.Y.); Thimoty A Gibson, 'NIMBY and the Civic Good' (2005) 4 City & Community 381; Ferdinando Spina, *Sociologia dei Nimby. I conflitti di localizzazione tra movimenti e istituzioni* (Besa 2009); P Michael Saint, Robert J Flavell and Patrick F Fox, *Nimby Wars: The Politics of Land Use* (Hingham 2009); Michele Roccato and Terri Mannarini, *Non nel mio giardino. Prendere sul serio i movimenti Nimby* (Il Mulino 2012).

4.1 *Urban Commons and the Right of Citizens to Actively Participate in the Design and Development of Cities*

Moving on to the second participatory urban regeneration model, the proactive one, we can underline that urban regeneration has become a profitable experimentation field for studies related to urban commons[53] and for shared administration practices, inspired by the principle of horizontal subsidiarity. According to this principle Public Administration, at any level, must support the autonomous citizens' initiative for the performance of activities of general interest.[54]

Many urban regeneration programmes are not stimulated by public policies, but originate from spontaneous actions by citizens aimed at "re-appropriating" abandoned or degraded public spaces. On closer inspection, this model is the expression of what we have previously defined as the "right to the city", as the right to the *oeuvre*, the right to affect the existing one by modifying it, and not just the right to fruition.

The participation of citizens in the management of urban commons, green areas or abandoned buildings, assumes primary importance. First of all, it allows the emergence of minority needs or, in any case, needs normally not represented at an institutional level. Secondly, the level of citizen involvement is further raised, resulting in the actual management of the common

[53] Christian Borch and Martin Kornberger (eds), *Urban Commons: Rethinking the City* (Routledge 2015); Francesca Di Lascio and Fabio Giglioni (eds), *La rigenerazione di beni e spazi urbani* (Il Mulino 2017); Roberta Bartoletti and Franca Faccioli, 'Civic Collaboration and Urban Commons. Citizen's Voices on a Public Engagement Experience in an Italian City' (2020) 13 Partecipazione e Conflitto 1132; Marco Calabrò, 'Rights of commons in Italy: a different way of owning towards the recognition of an intangible cultural value' (2023) 1 Rivista di Diritti comparati 68. For an analysis of the concept of the right to the city directly connected to the theme of urban commons, and in particular to those places 'which are managed collectively, independently of ownership, or which arise collectively as a reaction to the expropriation of a space, such as claiming the right to use', see Belingardi (n 10).

[54] The Italian Constitution regulates the principle of horizontal subsidiarity in Article 118 last paragraph, according to which the Public Administration, at any level, must favour the autonomous citizens' initiative for the performance of activities of general interest. Antonio D'Atena, 'Il principio di sussidiarietà nella costituzione italiana' (1997) Rivista italiana di diritto pubblico comunitario 603; Gregorio Arena, 'Il principio di sussidiarietà orizzontale nell'articolo 118 ultimo comma della Costituzione' in *Studi in onore di Giorgio Berti* (Jovene 2005).

asset.[55] In this way, we can even see a new role for the local authority, which takes a step back, assuming the part of mere "enabler" of private initiatives.

Several examples of this phenomenon are "small-scale". I am referring to the so-called street furniture micro-projects, nowadays regulated by Art. 201 of the Italian Public Contracts Code D.Lgs. no. 36/2023. The management of part of the territory planned for public urban green areas, addressed to collective social and cultural activities, can be entrusted to groups of inhabitants, to whom - as an incentive - the municipality can grant tax breaks.[56] Initiatives such as "adopt a flowerbed" or "adopt a road" were introduced in many cities; almost symbolic experiences of co-management, but even so very relevant insofar as they convey the idea that the city belongs to each and every one, and is therefore also the responsibility of each and every one.

Moving on to the experiences on a larger scale, they consist in the management of an abandoned urban park or real estate by neighbourhood groups, for the realization of social and cultural initiatives open to citizens. Two sub-models can be listed. The literature defines the first one "model of tolerance", which consists in the illegal occupation of abandoned public buildings, with the aim of using them for purposes of general interest.[57] In

[55] Nicola Dempsey and others, 'The social dimension of sustainable development: Defining urban social sustainability' (2011) 5 Sustainable Development 289; Marie C Shingne, 'The more-than-human right to the city: A multispecies reevaluation' (2022) 44 Journal of Urban Affairs 137.

[56] art 201, d lgs 31 marzo 2023, no 36 'Codice dei contratti pubblici' (Social Partnership) 'The granting entities establish […] the criteria and conditions for the conclusion of social partnership contracts concerning one or more of the following performances: a) management and maintenance of areas reserved for urban public green areas and buildings of rural origin intended for social and cultural activities, transferred to the Municipality in execution of agreements and implementing urban planning instruments; for the conclusion of this contract, there is the right of first refusal of citizens, having residence or domicile in the districts where the assets and areas are located, constituting a consortium of the district which reaches at least two thirds of the ownership of the subdivision; citizens set up in a consortium can also benefit from tax incentives; b) management, maintenance and enhancement of squares and streets or interventions for urban decoration and the recovery of unused areas and real estate, to allocate them for purposes of general interest, on the basis of projects presented by citizens, individuals or associations who, for this purpose benefit from tax incentives directly related to the activity carried out by the individual or by the association, or in any case useful to the local community of reference […]'; Giuseppine Mari, 'Il verde urbano pubblico e la pubblicizzazione del verde privato' (2018) 1 Rivista giuridica dell'edilizia 39.

[57] Fabio Giglioni, 'Il diritto pubblico informale alla base della riscoperta delle città come ordinamento giuridico' (2018) 1 Rivista giuridica dell'edilizia 3; Chiara Mari, 'Rige-

these hypotheses, the right to the city is stated in its most extreme manifestation, understood as the right to appropriation, or the right of citizens to physically access and use the urban space "perceived" as belonging to the community.[58] Public authorities tend to maintain informal relations, of mere tolerance, with these groups of citizens, but this phenomenon is characterized by an intrinsic instability, destined to be resolved either with an evacuation, putting an end to the social experiences, or by switching them to a legal basis.

One of the first experiences, in Italy, occurred in the city of Naples, where an abandoned public building, the "ex Asilo Filangieri", was first illegally occupied by a neighbourhood association, and then given on loan for use free to the occupants with a resolution of the Municipality, which defined the asset as an "urban common good for the use of citizens". Nowadays, in this building, social and cultural activities are autonomously planned and managed by several associations, which regularly organize round-tables with inhabitants who are at the same time protagonists and beneficiaries of the activities; while the Municipality only pays the costs of ordinary maintenance.[59]

In other contexts, we have a different model defined as "of the original legal qualification": the municipality, with a formal provision, declares *ex ante* "urban common goods" several abandoned buildings and areas. Then,

nerazione urbana e città informale nel contesto europeo: profili evolutivi, vantaggi e criticità' (2021) 27 Federalismi.it 56 <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=46281&content=Rigenerazione%2Burbana%2Be%2Bcitt%C3%A0%2Binformale%2Bnel%2Bcontesto%2Beuropeo%3A%2Bprofili%2Bevolutivi%2C%2Bvantaggi%2Be%2Bcriticit%C3%A0&content_author=%3Cb%3EChiara%2BMari%3C%2Fb%3E> accessed 28 January 2025.

[58] 'The right to appropriation subsequently challenges directly the structures of capitalism and therefore both the use of space as a lucrative factor of production and the prioritization of the economic value of space above the use value of its inhabitants as well', RWJ Boer and J de Vries, 'The right to the city as a tool for urban social movements: the case of Barceloneta' (2009) The 4th International Conference of the International Forum on Urbanism 1322. For a notion of the right to the city that focuses on the theme of the appropriation of spaces denied to the community, see Mark Purcell, *Recapturing Democracy: Neoliberalization and the Struggle for Alternative Urban Futures* (Routledge 2008).

[59] Giovanni Laino, 'Community hub a Napoli fra creatività e divari' (2018) 84 Territorio 94; Armando Vittoria and Leandro Mazzarella, 'La recente esperienza napoletana sui beni comuni, tra governance istituzionale e output sociali. Il caso dell'Ex Asilo Filangieri' (2021) 1 Impresa sociale 50.

after listening to the actual needs of the inhabitants, the Municipality by means of open calls entrusts the common goods to citizens' associations, for the realization of socio-cultural activities for the community.[60] In some experiences, this model also entails the drafting of agreements between the administration and citizens' associations, called "collaboration agreements", expression of a concept of shared administration that sees citizens as co-administrators. The bilateral and non-authoritative nature of this agreement allows the parties to redefine the goals to be achieved and the ways of execution in a participatory and non-standardized way, relating them with the concrete needs of the reference community.[61]

Finally, it is interesting to recall the Integrated Urban Plans, recently introduced by the Italian Recovery and Resilience Plan, as tools aimed at recovering degraded areas with specific attention to the profile of environmental sustainability.[62] Also in this case, the involvement of third parties in

[60] Generally, the Municipality adopts a "Regulation on collaboration between citizens and the administration for the care and regeneration of urban commons", through which it regulates the organizational model for implementing the role of enabler of private initiatives of general interest, according to predetermined principles and criteria. In these regulations, among other things, they always specify that the participatory regeneration activity cannot be in conflict with the purposes of the shared use of the asset. Gregorio Arena and Christian Iaione (eds), *L'età della condivisione. La collaborazione fra cittadini e amministrazione per i beni comuni* (Carocci Editore 2015); Fabio Giglioni, 'I regolamenti comunali per la gestione dei beni comuni urbani come laboratorio per un nuovo diritto delle città' (2016) 2 Munus 291.

[61] Paolo Michiara, 'I patti di collaborazione e il regolamento per la cura e rigenerazione dei beni comuni urbani. L'esperienza di Bologna' (2016) Aedon 2; Francesca Di Lascio, 'Quali tendenze in corso nella rigenerazione delle città' (2018) 2 Rivista giuridica dell'edilizia 135; Marco F Errico, 'Common good: an instrument for citizen inclusion and urban regeneration' in Claudio Gambardella (ed), *Beyond all limits* (Università degli Studi della Campania Luigi Vanvitelli 2022) 366.

[62] These plans were introduced by the Italian R.R.P. as part of the "Social infrastructure, families, communities and third sector" Component of the "Inclusion and cohesion" Mission. Among the conditions necessary for access to financing for urban redevelopment projects, a particularly interesting aspect lies in the introduction of the application of the criteria connected with the "Do Not Significant Harm" principle, as specified in the "Taxonomy for sustainable finance" (Regulation (EU) 852/2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (EU Taxonomy Regulation) [2020] OJ L198/13), in order to protect the environment. On the concrete application of the DNSH principle, see Giovanni M Caruso, 'Il principio "do not significant harm": ambiguità, caratteri e implicazioni di un criterio positivizzato di sostenibilità ambientale' (2022) 2 La Cittadinanza europea 151.

addition to the local authorities in the decision-making and implementation phases is envisaged as an essential prerequisite. As has been underlined, «the attitude of openness to the involvement of subjects other than the local authority in the field of planning "actors" is very interesting: private individuals, who can also be involved in participating in financing; public service start-ups can be involved in the project proposal; third sector actors are involved in the co-planning stage».[63]

5. *Conclusions. Citizen Participation in Urban Public Decision-Making Processes as a Tool for Self-Determination*

In conclusion, we can state that the sustainable city is also the city that manages to be a representation of its citizens, who do not just "endure" its development, but participate in it in an aware and active way. Territorial governance choices can have a strong impact on solving situations of discrimination and vulnerability.[64] To this end, it is necessary to reinforce and promote processes of active citizenship, based on a sense of shared social responsibility that also enhances the richness of associative life. Furthermore, participatory urban regeneration can not only receive needs "from below", but can even implement initiatives that the administration alone could not realize, due to a lack of human and organizational resources.[65]

Traditionally, the literature recognizes two souls in the participation in administrative proceedings: a defensive soul (aimed at protecting individual legal positions) and a collaborative soul (aimed at helping with the individual's contributions to the best pursuit of the public interest).[66] On

[63] Laura Pergolizzi, 'Urban regeneration through an integrated urban planning approach: towards a new paradigm. The Italian experience" in Gambardella (n 61) 357.

[64] Peter Tyler and others, 'Valuing the Benefits of Urban Regeneration' (2013) 50 Urban Studies 169; Calabrò, 'Governo del territorio e gestione del fenomeno migratorio' (n 33); Beatrice Manni, 'Sviluppo sostenibile e rigenerazione urbana tra tutela dell'ambiente e inclusione socio-economica' (2022) 1 Diritto pubblico 273.

[65] Enrico Fontanari and Giuseppe Piperata (eds), *Agenda Re-Cycle. Proposte per reinventare la città* (Il Mulino 2017); Paola Chirulli and Christian Iaione (eds), *La co-città. Diritto urbano e politiche pubbliche per i beni comuni e la rigenerazione urbana* (Jovene 2018).

[66] Stefano Cognetti, *"Quantità" e "qualità" della partecipazione. Tutela procedimentale e legittimazione processuale* (Giuffrè 2000); Marco Calabrò, *Potere amministrativo e partecipazione procedimentale. Il caso ambiente* (Editoriale Scientifica 2004).

closer inspection, a third soul of participation arises in urban regeneration processes: the self-determination soul, aimed at allowing citizens to recognize themselves in the territory in which they live and to contribute to its development.[67] The city, therefore, as a reflection of those who live it, in mutual dialoguing diversity.[68] In this regard, the Italian administrative judge observed that urban planning choices must show the «development model that is intended to be given to the places themselves, in consideration of their history, tradition, location and a reflection of the future on their very essence, carried out - by self-representation and self-determination - by the community itself, through the decisions of its elected bodies and, before that, through the participation of citizens in the planning process».[69]

British anthropologist David Harvey says: «The right to the city is far more than the individual liberty to access urban resources: it is a right to change ourselves by changing the city. It is, moreover, a common rather than an individual right since this transformation inevitably depends upon the exercise of a collective power to reshape the processes of urbanization. The freedom to make and remake our cities and ourselves is, I want to argue, one of the most precious yet most neglected of our human rights».[70] The legal instruments for achieving this goal are now quite clear, some have already proven to be effective, and they all revolve around an idea of the city as an object of rights and duties,[71] a "ground" for participatory activities and a place of inclusion. What still needs to be worked on is the sensitivity of pol-

[67] Edoardo Salzano, *La città bene comune* (Milano 2009). In this perspective, the Italian administrative judge underlined that urban planning tools are called on to identify a model of development of the territories 'in consideration of their history, tradition, location and a reflection of the future on their own essence, carried out – for self-representation and self-determination – by the community itself, through the decisions of its elected bodies and, before that, through the participation of citizens in the planning process" (Cons st, IV sez, 8 July 2013, no. 3606).

[68] 'And whoever lives the city, whether indigenous or immigrant, has the right to his own city, for which he is co-responsible, an inhabitant of that city already prefigured by the choices of the community where planning based on urban regeneration acquires the profound meaning of a cultural revision in terms of awareness of one's own individual and relational life' (Spasiano, 'Riflessioni in tema di rigenerazione urbana' (n 43).

[69] Cons st, IV sez, 26 February 2015, no. 960.

[70] Harvey, 'The right to the city' (n 10).

[71] Roberta Bartoletti and Franca Faccioli, 'Civic Collaboration and Urban Commons. Citizen's Voices on a Public Engagement Experience in an Italian City' (2020) 13 Partecipazione e Conflitto, 1135. The authors point out that 'The awareness of a sense of civic duty,

itics to the issues of the right to the city, and the awareness of citizens of the leading role they are called to play.

Then, the use of participatory decision-making models and the involvement in the management of urban commons, become precious tools for guaranteeing the exercise of those rights of active freedom and conscious participation which belong to the "new citizen" theorized by Feliciano Benvenuti.[72] After all, leading citizens, who can recognize themselves in the urban reality in which they live, are citizens who by their very nature are not excluded and, therefore, less vulnerable.

and the presence of a tradition in which civic culture is widespread, create a background of values and shared practices which can facilitate public engagement experiences taking root'.

[72] Feliciano Benvenuti, *Il nuovo cittadino. Tra libertà garantita e libertà attiva* (Marsilio 1994).

Alessandra Pera & Nicoletta Patti*

SUSTAINABLE PRIVATE LAW TOOLS FOR REGENERATION OF ABANDONED PROPERTIES IN SICILY. CASES AND MODELS

1. *Introduction*

In an increasingly urbanized world,[1] we face significant challenges related to the environmental, economic, and social crises.[2] Particularly in the governance of cities, "where the interests connected to these three dimensions are more perceptible, there is a growing urgency to effectively implement the principle of sustainable development".[3] Indeed, issues such as "the reduction of soil use, the management and recovery of the existing building stock, and the redevelopment and regeneration of deteriorated or abandoned urban areas are currently prominent on the political and administrative agenda. The economic crisis has underscored and intensified the im-

* This chapter is the result of a common research and reflection of the two authors. However, only within the scope of research evaluations, Nicoletta Patti drafted Sections 2, 3, 4 while Alessandra Pera drafted Sections 5, 6. The Introduction and the conclusions were co-authored.

[1] Around 3.5 billion people (almost half the population) live in cities and this trend is expected to continue. Worldwide, Europe is the continent with the highest rate of urbanization. Out of more than 500 million inhabitants, around 75% of the European population lives in urban areas (see Report Eurostat <https://ec.europa.eu/eurostat/web/degree-of-urbanisation/background> accessed) and it is estimated that by 2050 the percentage will reach 80% (see United Nations, Department of Economic and Social Affairs, Population Division 'World Urbanization Prospects. The 2015 Revision Highlights. Key findings and advanced tables' (Working Paper No ESA/P/WP.241 2015) <https://esa.un.org/unpd/wpp/publications/files/key_findings_wpp_2015.pdf> accessed 16 September 2024). In Italy more than a third of the country's total population resides in cities.

[2] Luigi F Girard, 'Circular City and Cultural Heritage Interplay' (2017) BDC – Bollettino del Centro Calza Bini 1, 7.

[3] Beatrice Manni, 'Sviluppo sostenibile e rigenerazione urbana tra tutela dell'ambiente e inclusione socio-economica' (2022) 28 Diritto pubblico 273, 284. The English translation is by the author of this paper.

perative to realign traditional technical and legal tools towards a sustainable approach to interventions involving land transformation".[4]

This paper aims to explore the connection between the concept of sustainable development and urban regeneration as a strategic tool for promoting inclusive city development. The objective is to identify potential sustainable private law instruments through the analysis of case studies concerning the regeneration of abandoned properties in Sicily.

The first part of this essay (sections 2 - 3) examines the scientific and regulatory framework, providing the reference context for the present study. Specifically, the concepts of sustainability and the circular economy are explored, as well as their role in urban development, also focusing on limiting land consumption. Throughout this analysis, the importance of linking environmental resources – particularly the soil – to the debated concept of "common goods" becomes evident. In this regard, an investigation into the concept of the "commons" and its salient features is conducted (section 4) with a specific focus on soil and its implications for private property.[5] Additionally, the concept of urban regeneration is proposed as a tool for promoting economic growth while preserving environmental quality and fostering social cohesion (section 5).

Despite the wide availability of literature on the topic,[6] we want to concentrate on the relationship between sustainable development goals and urban regeneration.[7] This paper aims to present the urban regeneration ex-

[4] Paolo Urbani (eds), *Politiche Urbanistiche e gestione del territorio. Tra esigenze del mercato e coesione sociale* (Giappichelli 2016) 7. The English translation is by the author of this paper.

[5] See, for all, Stefano Fanetti, *Ambiente e beni comuni. Contenimento del consumo di suolo e riflessi sulla proprietà privata in un'ottica di diritto comparato* (Giuffrè 2019); Ugo Mattei and Alessandra Quarta, *Punto di svolta. Ecologia, tecnologia e diritto privato. Dal capitale ai beni comuni* (Aboca 2018); Stefano Rodotà, *Il terribile diritto. Studi sulla proprietà privata e i beni comuni* (Il Mulino 2013); Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press 1990); Elinor Ostrom (ed), *The Future of the Commons: Beyond Market Failure and Government Regulations* (IEA 2012).

[6] Among others, see Frank Biermann, Norichika Kanie and Rakhyun E Kim, 'Global governance by goal-setting: the novel approach of the UN sustainable development goals' (2017) 26/27 Current Opinion in Environmental Sustainability 26; Måns Nilsson and others, 'Mapping interactions between the sustainable development goals: Lessons learned and ways forward' (2018) 13 Sustainability Science 1489.

[7] Jacqueline M Klopp and Danielle L Petretta, 'The urban sustainable development goal: Indicators, complexity and the politics of measuring cities' (2017) 63 Cities 92; Valeria Andreoni and Janet Speake, 'Urban Regeneration and Sustainable Housing Renewal Trends' in W Leal Filho and others (eds), *Sustainable Cities and Communities* (Springer 2019).

periences implemented in Gangi, Cammarata and Favara, which are three small villages in Sicily.[8] The project, known as 'Case a 1 euro' (Houses for 1 euro), was launched in 2009 with the objective of preserving abandoned properties in these Sicilian municipalities by putting them up for sale at the symbolic price of 1 euro. Although the interventions and policy choices adopted cannot always be intended as destined for commons because, more often as in Gangi and Cammarata, they relate to private properties, they nevertheless still have some effects on the commons.

Since this strategy has been adopted by other municipalities in Italy and has become a model for revitalizing declining communities, our goal is to explore the functioning of the program, analyze the contractual schemes and determine the involved parties and their rights and obligations.

Over the 14 years since the inception of the initiative, several questions have emerged: is it an appropriate solution for managing abandoned properties, both private and public? Can these properties become resources for collective social, economic, and cultural development? Does the program represent a model for reclaiming cultural identity through the revitalization of abandoned centers in small communities, by promoting inclusion, participation, and environmental sustainability?[9]

The concluding section endeavors to answer these questions by connecting practical experience with the theoretical and normative analysis conducted in the preceding sections and by formulating new and further questions. This approach will enable us to evaluate whether these cases and the private law tools used can serve as paradigmatic models and, consequently, whether they can exert a beneficial impact on the formulation of urban regeneration policies that align with the objectives and aspirations of sustainable development. Although these specific interventions have been carried out at local level, these case studies actually exemplify fundamental aspects, crucial for understanding the activated regeneration processes, thereby acquiring special significance in identifying innovative approaches and strategies for urban development.

Since specialized technical terms will be used in the analysis, to provide the international reader (who is not Italian or a civil lawyer) with a better understanding of these issues, footnotes will be used in which the meanings

[8] Alessandra Pera, 'One House for €1: Case Studies on the Governance of Abandoned Properties in Small Villages' (2021) 21 3 Global Jurist 537.

[9] ibid.

of certain legal concepts, categories, and institutions that cannot be translated directly from Italian into English will be discussed.[10] When referring to those concepts, we either use the Italian term or a roughly equivalent English term. Moreover, we will strive to provide adequate definitions and explanations for each of the categories used, and for the functions of the cited legal concepts.[11]

2. *The Concept of Sustainability and its Solidarity Dimension*

Any discussion on sustainability requires a clear definition of the concept beforehand. However, this task is not without challenges. Indeed, more than 30 years after its initial formulation, sustainability remains one of the most controversial paradigms, with a legal content characterized by indeterminacy and vagueness:[12] "its legal nature is frequently referred to as a principle and sometimes as an objective, leading to indiscriminate and generic use of the concept".[13] Regarding its practical implementation, it is closely associated with soft law instruments, such as programmatic norms that establish mid and long-term objectives, rather than strict rules and constraints.[14]

What is certain is that the emergence of a general need for sustainability, which became apparent in the 1970s, coincided with the emergence of environmental problems caused by the economic development model and the overexploitation of natural resources.[15] What has been challenged is the underlying ideology of capitalism and modernity, which is based on the belief of the "possibility of infinite growth in a finite planet".[16] As Mattei

[10] Susan Sarcevic, *New Approaches to legal translation* (Kluwer Law International 1997) 145.

[11] Valentina Jacometti and Barbara Pozzo, *Traduttologia e Linguaggio Giuridico* (Wolters Kluwer Cedam 2018) 91-117.

[12] In this sense Beate Sjåfjell, 'Sustainability and Law in the Anthropocene' (2022) University of Oslo Faculty of Law Research Paper No 2022-46 <https://ssrn.com/abstract=4212422> accessed 16 September 2024.

[13] Manni (n 3) 275. The English translation is by the author of this paper.

[14] ibid.

[15] Elisa Scotti, 'Poteri pubblici, sviluppo sostenibile ed economia circolare' (2019) 1 98 Il diritto dell'economia 493, 499.

[16] Mattei and Quarta (n 5) 9. On the ecological approach to law, see also: Fritjof Capra and Ugo Mattei, *The Ecology of Law, Toward a Legal System in Tune with Nature and Community* (Berrett-Koehler Publishers 2015).

and Quarta state paradigmatically, "humanity is at a turning point (it has been for a number of years, but the 'points' in history can stretch far back in time), at which it must choose between maintaining the current barbarism or developing an alternative to capitalism (...), a new ecological order supported by a radically immanent, historicist and humanist philosophy of praxis",[17] based on the idea of 'sustainable development'.

While it is not possible to summarize the extensive debate surrounding sustainable development since its inception, certain references are indispensable for understanding its relationship with urban regeneration (see section 5) with which it has a particular link. Therefore, the aim here is to identify the key features of the sustainability concept through the main international declarations and European pieces of legislation, which continue to be the primary legal frameworks for its recognition. Specifically, the first formal recognition of sustainable development occurred in the Stockholm Declaration of 1972: "The earth's non-renewable resources must be used in such a way that there is no risk of their depletion" (principle 5). However, it was in the 1987 Brundtland Report (the outcome of the World Commission on Environment and Development) that this principle was elaborated in greater detail.[18] Specifically, based on the understanding of the finiteness of natural resources and on the unsustainability of current economic models, sustainable development is defined as "meeting the needs of the present without compromising the ability of future generations to meet their own needs".[19] This implies a responsibility for humanity to protect its own interests while considering the impact on others. In other words, "individuals are reminded that they are part of a social context and should evaluate their self-interest considering the overall effects" of their actions.[20]

Turning to Europe specifically, environmental policy and the implementation of sustainable development are incorporated within the EU treaties.

[17] Mattei and Quarta (n 5) 11. The English translation is by the author of this paper.

[18] Manni (n 3) 276.

[19] United Nations General Assembly, 'Report of the World Commission on Environment and Development: Our Common Future' (Brundtland Report) (1987). It is no coincidence that the document containing this definition is emblematically entitled *Our Common Future*. This definition was later adopted in the United Nations Summits held in Rio de Janeiro in 1992 and subsequently in Johannesburg in 2002.

[20] Fabio Giglioni, 'La sostenibilità come vincolo giuridico per la rigenerazione urbana' (2020) 1 Rivista quadrimestrale di diritto dell'ambiente 16, 36-37. The English translation is by the author of this paper.

From the very beginning, the objective of promoting the harmonious development of economic activities and balanced expansion was enshrined in Article 2 of the 1957 Treaty of Rome, which established the European Economic Community. This objective, closely linked to the need for prudent and rational utilization of natural resources, is also reflected in subsequent treaties.[21] The six Community Environmental Action Programs adopted since 1973 outlined a series of principles underpinning sustainable development. The 2000 Charter of Fundamental Rights reaffirmed the integration of a high level of environmental protection and improvement of environmental quality into the Union's policies in accordance with the principle of sustainable development.[22] However, despite the existence of these principles in the European regulatory framework, there is still a lack of clarity and consistency in implementing integrated policies aligned with a strategic vision of the European Union. So, to address the criticism of the previous vagueness of commitments on sustainability and development, the Europe 2020 Strategy adopted a long-term policy based on five specific goals known as Sustainable Development Goals (SDGs), aimed at promoting a more resource efficiency. These goals have been confirmed at the international level with the 2030 Agenda for Sustainable Development, which provides an ambitious model for shared prosperity based on interconnected goals to create a healthy, peaceful, and resilient planet, where universal respect for human rights and equality is ensured.[23] In this context, the accompanying declara-

[21] In particular, with the Maastricht Treaty of 1992, the European Union included among its objectives the promotion of balanced and sustainable economic and social progress. This commitment was also reaffirmed in the European Community Treaty, which emphasized the need for sustainable, non-inflationary and environmentally friendly growth. Along the same lines, the 1997 Treaty of Amsterdam emphasized as early as in its preamble that member states are "determined to promote the social and economic progress of peoples, taking into account the principle of sustainable development in the context of the completion of the internal market and the strengthening of cohesion and environmental protection". Finally, with the Lisbon Treaty of 2007, the European Union pinpointed its willingness to 'foster the sustainable development of developing countries in economic, social and environmental terms, with the primary aim of eradicating poverty' as well as to 'contribute to the development of international measures to preserve and improve the quality of the environment and the sustainable management of the world's natural resources in order to ensure sustainable development'.

[22] See European Union, Charter of Fundamental Rights of the European Union [2000] OJ C364/1, art 37.

[23] Manni (n 3) 280.

tion of the 2030 Agenda explicitly emphasizes the theme of intergenerational inheritance, acknowledging that "the future of humanity and of our planet is in our hands. It is also in the hands of the new generations, who will pass the baton on to future generations".

At national level, the concept of "sustainability" is mentioned in the text of 55 constitutions, very often in relation with the environment or with the rights of future generations.[24]

In Italy, in particular, it is possible to find a specific clause on sustainability in Art. 41 Cost., as supplemented by the constitutional reform of 2022. The Reform operates on the limits of economic initiative by providing that the protection of the environment is an explicit limit to its conduct (Art. 41 paragraph 2) and an objective that justifies the intervention of public powers in a restrictive sense (Art. 41 paragraph 3).[25]

The result is a rewriting of the concept of development - which must be read in conjunction with the idea of social and environmental sustainability - and implies a "duty, deriving from adherence to the social pact, to project human action into the future by asking present generations to hand over the 'national heritage' to future ones".[26]

What emerges from this brief examination, is that - despite the uncertainties that accompany the process of affirming this principle - there is a pivotal element that has characterized sustainable development since its emergence and distinguishes it from other principles of environmental law: its solidaristic dimension which translates, in its operational sphere, into limits and standards for natural resource use and ecosystem carrying capacity,[27] without compromising economic growth.

The significance of this principle should not be underestimated. It requires "a substantial reconsideration of the relationship between economic growth and environmental protection, based on a new logic of duty and solidarity, both in the diachronic context of intergenerational responsibility and in the synchronic context of equitable distribution among peoples of the right to development and enjoyment of the environment".[28] It represents "a

[24] Tania Groppi, 'Sostenibilità e costituzioni: lo Stato costituzionale alla prova del futuro' (2016) 1 Diritto pubblico comparato ed europeo 43.

[25] Valeria De Santis, 'La Costituzione della transazione ecologica. Considerazioni intorno al novellato art. 41 della Costituzione' (2023) 1 Nomos - Le attualità del diritto 1, 5- 6.

[26] ibid 6. The English translation is by the author of this paper.

[27] Manni (n 3) 276.

[28] Scotti (n 15) 502. The English translation is by the author of this paper.

systemic change where sustainability is not an obstacle to economic growth but an essential structural component of it",[29] i.e. a model to ensure that the evolution of human activity takes place in a manner compatible with survival. In other words, sustainability can be regarded as a paradigm through which future development and new models for governing reality and complexity can be defined, combining economic development, social progress, and environmental protection. The balance between these three components is crucial to ensure an adequate quality of life and preserve the planet's resources for future generations.[30]

Within this framework, the process of implementing the new development model seems to have been most comprehensively synthesized in the 2019 European Green Deal, "an ambitious EU action plan that promotes the efficient use of resources through, first and foremost, the affirmation of a concept that appears to be new: that of the circular economy, as an economic model in which growth is decoupled from resource consumption".[31] The imperative to care for the other, inherent as we have seen in the concept of sustainable development, in fact demands a departure from the linear economic model characterized by the production-use-abandonment cycle and advocates the reintegration of materials into the natural or productive cycle after their initial use.[32] The underlying premise is the scarcity of natural resources, aiming for maximum conservation, recovery, and reuse.[33] In this sense, the essential legal features of this new development model share similarities with those recognized for sustainable development, including a strong focus on intergenerational aspects and a systemic and integrated approach, and align with the dynamics of the natural ecosystem, where everything is reused and nothing is wasted, reflecting a system where today's goods become tomorrow's resources.[34] As argued by authoritative doctrine, this new economic model is also

[29] Manni (n 3) 277. The English translation is by the author of this paper.

[30] ibid 278-280.

[31] ibid 281. The English translation is by the author of this paper. See also Giglioni (n 20) 37.

[32] Scotti (n 15) 509.

[33] Giglioni (n 20) 36-37. See also ibid 510.

[34] In May 2015, in the Encyclical Laudato Si', Pope Francis, in redefining the economic model, evoked the need for the imitation of nature with these words: 'We struggle to recognize that the functioning of natural ecosystems is exemplary: plants produce nutrients that feed herbivores; these in turn feed carnivores, which provide large quantities of biological waste, giving rise to a new generation of plants. In contrast, the industrial system, at the end

accepted in the Italian legal system and appears in the recently reformed Art. 41, paragraph 3 of the Constitution. The latter, in fact, in outlining what has been defined as a 'positive constraint on economic activity' recalls the dictates of the circular economy economic system, i.e. a model where environmental protection becomes a parameter that directs production.[35]

3. *Sustainable Development and Soil Consumption: Regulatory Framework*

In the path of sustainability, the topic of land governance plays a crucial role in assessing the practical implications and concrete implementation of the concept. It is here that "the interests associated with the three dimensions (environmental, economic, and social) become more apparent, highlighting the urgent need for effective implementation of the principle of sustainable development".[36]

Unsurprisingly, the importance of sustainable cities is widely recognized in the UN Agenda 2030, specifically under Goal 11: Sustainable Cities and Communities. This goal aims to create inclusive, safe, resilient, and sustainable urban areas, acknowledging that soil is a limited and essentially a

of the production and consumption cycle, has not developed the capacity to absorb and reuse waste and waste products. It has not yet been possible to adopt a circular production model that guarantees resources for everyone and for future generations, which requires maximum utilization of non-renewable resources, moderating consumption, maximizing the efficiency of exploitation, reusing, recycling'. See Gianluca Gardini, 'Alla ricerca della "città giusta". La rigenerazione come metodo di pianificazione urbana' (2020) 24 Federalismi.it 44, 47-48 <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=44014&content=&content_author= > accessed 16 September 2024.

[35] It has been argued that in Article 41 of the Constitution it is possible to identify the three successive definitions of economy. Using a conventional American color classification system, we find in the first paragraph of the article the so-called 'brown economy', i.e., that which is based on totally free, unrestricted economic initiative on the model of the 'throw-away'. Paragraph 2 dictates what has been called the 'negative constraint on economic activity', and expresses the concept of the green economy, i.e., production that must take place in an environmentally friendly manner, which can be summarized in the formula 'produce but do no harm to the environment'. Finally, the third paragraph, as mentioned, recalls the model of the blue economy or circular economy. See, among the others, Francesco De Leonardis, 'Il diritto dell'economia circolare e l'art. 41 Cost.' (2020) 1 Rivista quadrimestrale di diritto dell'ambiente 69, 21-22; De Santis (n 25).

[36] Manni (n 3) 284. The English translation is by the author of this paper.

non-renewable resource that requires protection to preserve its fundamental ecosystem services for future generations.[37]

The issue of soil and its consumption has now become central to the international and local debates, often taking on apocalyptic tones and alarming implications: "soil consumption equals consumption of the future".[38] In this sense, statistics underline the concerning situation and the inadequacy of traditional planning tools in ensuring the preservation of this essential and vulnerable resource. A 2019 report, for instance, indicates that between 2000 and 2014, the area occupied by cities worldwide grew at a rate 1.28 times faster than population growth.[39] In other words, there is no correlation between the growth of degraded land areas and the number of people who should benefit from it. In Europe, urbanized areas have increased by 20% in the last 20 years, compared to a modest 6% increase in population.[40] The situation in Italy is even more surprising: according to the annual reports of ISPRA (Istituto Superiore per la Protezione e la Ricerca Ambientale), soil consumption increased from 2.7% to 7.65% between 1950 and 2017.

The process of 'urban expansion' described above is the result of capitalist individualism and the indifference of the individual to the environment. It tends towards a continuous appropriation of natural space without limits or restrictions, transforming the latter space into urban space, that is necessarily anthropic, i.e. for human use.[41] This, however, implies significant costs for the environment that also immediately translate into costs for society: soil consumption, in fact, leads to substantial damage due to the loss of essential ecosystem services. These services encompass the provision of water, food, and materials, the regulation of natural cycles, the capacity to withstand extreme

[37] Andreoni and Speake (n 7) 1.

[38] In this sense, Stefano Fanetti, in the article 'A proposito di suolo "bene comune"' (2020), Special Issue II, *Rivista Diritti Comparati*, p. 113, which quotes and adopts the phrase by P. Pileri, "Consumo di suolo, consumo di futuro / Consuming land, consuming the future," in *Urbanistica*, 2009, no. 138, p. 81 ff.

[39] The Report is United Nations, 'Goal 11: Sustainable Cities and Communities', United Nations Department of Economic and Social Affairs, available at <https://sdgs.un.org/goals/goal11>. Accessed February 6, 2025.

[40] See the Report by Agenzia per le Protezione dell'Ambiente e per i Servizi Tecnici (APAT), 'Il suolo. La radice della vita' (2008) <https://www.isprambiente.gov.it/it/pubblicazioni/pubblicazioni-di-pregio/il-suolo-la-radice-della-vita> accessed 16 September 2024.

[41] Francesco Anastasi, 'Per un superamento del feudalesimo normativo nella gestione del consumo di suolo' (2020) 4 Ambiente diritto 3.

events and climate fluctuations, as well as cultural and recreational services. Additionally, landscape values are compromised, and land fragmentation occurs, resulting in a decline in ecological connectivity, habitat resilience, and an augmented sense of isolation and vulnerability. Within this framework, however, there is still a lack of an adequate regulatory framework to protect soil and an explicit formulation of a strategy specifically addressing this important resource, outside of statements of principle and communications with objectives to be achieved over time. Undoubtedly, significant steps have been taken at the European level, but they have not achieved the desired results.[42] The European Soil Charter, approved by the Council of Europe in 1972, for the first time formally acknowledged the importance of soil as a "precious asset of mankind' and a "limited resource that is easily destroyed".[43] The Charter emphasizes the relationship between soil and human beings ("it is essential to human life as a means of producing nourishment and raw materials"[44]) and its role in the environment ("it is a fundamental part of the biosphere and, together with vegetation and climate, helps to regulate the circulation and affects the quality of water"[45]). It also outlines a course of action for promoting the sustainable use of soil: "Governments and those in authority must purposefully plan and administer soil resources. Soil is an essential but limited resource. Therefore, its use must be planned rationally which means that the competent planning authorities must not only consider immediate needs but also ensure long-term conservation of the soil while increasing or at least maintaining its productive capacity".[46] Despite this awareness, the outlined program has never been fully implemented. The next intervention came in 2006 with the European Commission's communication, which set the mid-long-term goal of reducing soil consumption to zero by 2050 (i.e. a zero increase in land occupation understood as the balance between occupation of vacant space and restoration of agricultural or semi-natural uses of previously urbanized and sealed areas),[47] recommending that member states prepare suitable measures in the medium term to reduce ongoing soil loss. This goal was reiterated in 2011 with the Roadmap to a Resource Efficient Europe.

[42] Scotti (n 15) 519-520.

[43] European Council, 'European Soil Charter' (June 1972), paras 1 and 2.

[44] ibid, para 1.

[45] ibid.

[46] ibid, para 12.

[47] Anastasi (n 41) 9. See also Duccio Bianchi and Edoardo Zanchini (eds), *Ambiente Italia 2011. Il consumo di suolo in Italia* (Edizioni Ambiente 2011).

In EU law the issue of soil protection and restrictions on its use are more recent. In this regard, it should be emphasized that, in order to regulate this matter, the European Union, unlike other policy areas, has preferred not to make use of directly or indirectly binding regulations, and has instead opted for the use of soft law instruments, aimed at gradually orienting national policies towards an ever-greater limitation of soil consumption until, in the long term, its cessation.

On the other hand, it is clearly arguable that the European Union is legitimized by the founding treaties themselves to deal with this matter, given that implicit references to limiting soil consumption can be traced back to Article 191, c. 1, third indent, TFEU, which identifies the prudent and rational use of natural resources, as well as the preservation and improvement of the quality of the environment, as an objective of European policy. The above provision must be read in conjunction with Article 11 TFEU, which states that the Union's policies and actions aimed at sustainable development cannot disregard the need to protect the environment. The pursuit of these 'ecological' objectives cannot, of course, be separated from the protection of the soil, as a scarce resource that must be preserved, which must be achieved through its rational use and marked by the containment of new sealing. Article 192 TFEU, on the other hand, provides for a special procedure through which the Council can order measures on spatial planning and land use. Although it is undeniable that the Treaties of the European Union reveal a "primary public interest in the correct use of the soil", the provisions quoted above limit themselves to setting general, principled objectives that must inspire the action of European policy and, consequently, that of the member States, characterized by broad discretion. What emerges is a fragmented and incomplete approach to the issue by the European institutions, in contrast to the EU's usual dynamism in environmental matters, while, at the national level, both the absence of legislation on soil consumption and the lack of modern principles on land governance are evident.

Despite the evident hesitancy among national and European legislators, the compilation definitions provided at the European level have undeniably played a role in raising awareness about soil as a limited and irreplaceable resource, deserving of independent legal significance as an environmental good. In this regard, in fact, soil is increasingly being brought back by legal doctrine to the debated category of commons.[48]

[48] Fanetti, 'A proposito di suolo "bene comune"' (n 38) 114.

4. *Soil as a 'Common' and the Social Function of Property*

The commons[49] can be described as "tangible and intangible things which, by their nature or function, fulfil fundamental rights and socially relevant needs, immediately serving the community, which, in the person of its members, is institutionally entitled to enjoy them directly".[50] These are essential resources that should be protected with consideration for intergenerational equity from a sustainable development perspective (see section 1). These formerly abundant goods have, in fact, become increasingly scarce, assaulted by capitalist extraction based on the notions of individual property rights and state sovereignty. In this way, the world has slowly moved towards the accumulation of an impressive amount of capital, coupled with a dramatic shortage of commons.[51]

To better understand what we are talking about when we use the locution commons, it may be useful to refer to the definition proposed by the Italian Commission, chaired by Stefano Rodotà and appointed by the Minister of Justice in 2007 to reform the Civil Code regulations on public assets. According to their definition, commons encompass assets characterized by non-rivalrous but exhaustible consumption, such as rivers, streams and their sources; lakes and other waters; the air; parks as defined by law, forests and wooded areas; high-altitude mountain areas, glaciers and perennial snows; lidos and stretches of coastline declared an environmental reserve; protected wildlife and flora; archaeological, cultural, environmental and other protected landscape areas. These assets, irrespectively of their public or private ownership, serve functional utilities for the exercise of fundamental rights and the free development of individuals. Consequently, the law must ensure the collective function of these assets, considering the interests of future generations.[52] As Fanetti states, the above definition highlights two closely connected aspects: first of all, common goods are not defined on the basis

[49] The issue of the commons was triggered by the essay by Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243.

[50] Fanetti, 'A proposito di suolo "bene comune"' (n 38) 129. The English translation is by the author of this paper.

[51] Mattei and Quarta (n 5) 21-22.

[52] art 1, lett c. Commissione Rodotà. *Proposta di articolato per la modifica delle norme del Codice Civile in materia di beni pubblici*. Ministero della Giustizia, 14 giugno 2007. The manifesto and the theoretical-dogmatic reconstruction of the reform project are contained in Ugo Mattei, Edoardo Reviglio and Stefano Rodotà, *Invertire la rotta. Idee per una riforma del-*

of the owner (public or private), but on the basis of the way in which the latter exercises his control; moreover, the management of these goods must be characterized by accessibility and collective use. Indeed, by their intrinsic nature, they are meant to serve the social interest for the benefit of the community, whether present or future. Consequently, the productive use of such assets could be sacrificed or adjusted according to essential needs attributable to them.[53]

What is surprising is that the list of common goods provided by the Rodotà Commission (although illustrative and not exhaustive) does not include soil, despite the growing recognition of its crucial role in providing essential ecosystem services and its classification as a finite and non-renewable resource, which is highly susceptible to increasing anthropogenic pressures.[54] On the other hand, this resource is present in all the definitions of the environment provided by European legislation (as mentioned in the previous paragraph) and in the context of Italian legislation, an explicit reference to soil as a common good and non-renewable resource can be found in the bill entitled 'Containment of soil consumption and reuse of built-up land', approved by the Chamber of Representatives in 2016, but subsequently blocked in the Senate. Moreover, legal doctrine has long supported the conceptualization of soil as a common good.

Bringing soil back into the realm of the commons implies that irrespective of ownership, it should be accessible to all in accordance with intergenerational equity. Simultaneously, this underscores the inherent risk of depletion faced by this predominantly privately-owned common good, primarily due to the actions taken by individuals seeking to maximize their own utility without adequately considering the detrimental consequences of depleting such a fundamental resource.[55]

This highlights the potential conflict between the individual interests of owners, focused on the exploitation of the soil, and the collective interest in preserving it through a revision of land management methods.[56] In this re-

la proprietà pubblica (Il Mulino 2007); for a more extensive comment see Fanetti, *Ambiente e beni comuni* (n 5) 194 ss.

[53] Fanetti, *Ambiente e beni comuni* (n 5) 195

[54] ibid 123.

[55] ibid 115. In this sense, see also Emanuele Boscolo, 'Beni comuni e consumo di suolo. Alla ricerca di una disciplina legislativa' in Paolo Urbani (eds), *Politiche Urbanistiche e gestione del territorio. Tra esigenze del mercato e coesione sociale* (Giappichelli 2016) 84.

[56] Fanetti, *Ambiente e beni comuni* (n 5) 180-196.

gard, it is important to emphasize that there are two divergent perspectives on governance and urban land management: "one perspective historically prioritizes growth, development, the revitalization of construction, economic freedom, and private property rights. The other perspective primarily emphasizes environmental protection, the historical landscape, the balanced relationship between urban and rural areas, and the agricultural resource (understood in a broad sense beyond pure productivity). The former perspective places a strong emphasis on individual freedom and embraces a liberal interpretation of private property as a natural right inherent to individuals and an expression of personal sovereignty. The latter perspective places a greater emphasis on the general interest and supports a functionalized interpretation of private property".[57]

Although urban planning choices continue to move along these opposing poles, many authors point out how, in the context of the problem of the commons - fueled by "strongly anti-property instances"[58] - it is necessary to adhere to a dominant idea of ownership determined by economic, social and environmental elements.[59] In this sense, the social function of property - which consists in "the owner's obligation to use his property not only for the satisfaction of his own needs, but also for the collective needs of society"[60] - plays a crucial role.

This clause was incorporated into the Italian Constitution of 1948 in Article 42: "private property is recognized and guaranteed by law, which

[57] Paolo Carpentieri, 'Il "consumo" del territorio e le sue limitazioni. La "rigenerazione urbana"' (Report to the XXXV Varenna Conference, 2019) 7 <www.giustizia-amministrativa.it> accessed 16 September 2024; see also Maria Rosaria Marella, 'La funzione sociale oltre la proprietà' (2014) Euronomade <http://www.euronomade.info/?p=2114> accessed 16 September 2024. The idea that the social function of property can legitimize claims to the commons seems at odds with its historical matrix. However, according to Maria Rosaria Marella, a genealogical study of the principle can lead to unexpected results, if one takes the analysis beyond the social function in the light of the public-private relationship, characteristic of the welfare state of the mid-1900s. Thus, in the democratic constitution of the post-war period, the constitutionalizing of property is intended to change the intrinsic content of the subjective situation to the realization of super-individual aims. At the same time, however, the subjective right retains its nature as a device for protecting the individual's freedom.

[58] Alessandra Pera, 'La Casa del Popolo di Palermo: l'ennesimo caso di inerzia politica e amministrativa. Ipotesi di uso dei beni comuni per una buona discussione' (2020) special issue II Rivista Diritti Comparati 146 <https://www.diritticomparati.it/wp-content/uploads/2020/07/6-A.Pera_formattato.pdf> accessed 16 September 2024.

[59] Mattei and Quarta (n 5) 33.

[60] ibid 51-52.

determines the ways in which it may be acquired, enjoyed and its limits for the purpose of ensuring its social function and to make it accessible to all". The formula can be seen as a synthesis of individual and collective, private and public interests.[61] The central idea of this provision, in fact, is to make the content of the property right conform so as to also implement a collective interest and prevent excessively selfish behavior of the owner.[62] Since the right to property is a social construction reflected in laws, it must be integrated into social and ecological relations and, as a result, the owner must take on the interests of the whole community, assuming a duty of responsible environmental management, avoiding extractive behavior and instead incentivizing generative behavior.[63] What emerges is a 'counter-hegemonic interpretation of the right to property' that satisfies the need for the protection of the commons, rather than the uncontrolled production of capital.[64]

Fanetti argues that "especially as far as real estate is concerned, the 'social function' is essentially synonymous with the 'environmental function', in which ownership, associated with a 'logic of responsibility', is aligned to the conservation of nature".[65]

From this perspective, even the possibility of abandoning or not using a material asset must be evaluated according to the principle of sustainability as we understand it. For example, in the situations that are the objects of the case studies here analyzed, if the abandonment and the non-use concern built assets or sealed territorial areas, it can be said that the sacrifice of the environment, in particular soil, is no longer justified. Reasonableness in the use of natural resources requires first and foremost combating their 'wasting' once they have been compromised. In this process of reconsidering the right to property in response to environmental protection objectives - and

[61] Fanetti, *Ambiente e beni comuni* (n 5) 189-190.

[62] Perlingieri speaks precisely of a 'conformist formula' that orients ordinary rules regulating property towards the primary interests established by the Constitution. Pietro Perlingieri, *Il diritto civile nella legalità costituzionale* (Edizioni Scientifiche Italiane 1991) 447. This function as seen is well expressed in Article 41 of the Constitution following the constitutional reform of 2022.

[63] Mattei and Quarta (n 5) 53; Fanetti, *Ambiente e beni comuni* (n 5) 189-190.

[64] Mattei and Quarta (n 5) 60; is an interpretation of private property as part of a broader reconsideration of private law set out in ecological terms. In this sense, Capra and Mattei (n 16).

[65] Fanetti, 'A proposito di suolo "bene comune"' (n 38) 134. The English translation is by the author of this paper.

regarding soil in particular - urban regeneration policies, through active interventions, can bring rationality back into the use of natural resources and reduce the need to waste more of them.[66]

5. *Urban regeneration*

The primary administrative tool aimed at limiting soil consumption encompasses a set of measures summarized in the concept of urban regeneration.[67] Although this term originates from the neoliberal English experience, its meaning is not unequivocal even within our legal system due to the absence of a general definition in state legislation, which leads to various interpretations.[68]

Despite the semantic ambivalence, it is possible to outline a preliminary general definition by capturing its salient features. Urban regeneration can be understood as transformative interventions conducted on already developed land with the dual objective of curbing the deterioration of urban areas and conserving "undeveloped" land through the development and revitalization of previously "compromised" soil.[69] In this context, "limiting soil consumption and valorizing existing land are interconnected and complementary aspects: the reuse and redevelopment of existing land conserve resources and minimize the need for new areas".[70]

The underlying premise of this land-use policy is that the sustainable growth of cities no longer hinges on urban sprawl but rather on preserving soil as a finite and non-renewable resource, regarded as a 'common good' (see section 4).[71] Consequently, also within the real estate realm, efforts have been made to promote the mindset of recovering and reusing resources that underpin the circular economy (Art. 41 Cost.), a pivotal element of sustainable development (see section 2). Urban regeneration begins with the revitalization of compromised resources, incorporating reclamation, reuse,

[66] In this sense also Giglioni (n 20) 39-40.

[67] Giglioni (n 20) 20.

[68] Manni (n 3) 286.

[69] Gardini (n 34) 69.

[70] Federico F Guzzi, 'Rigenerazione urbana e valorizzazione dell'esistente' (2016) 22 Federalismi.it 3 <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=32740> accessed 16 September 2024.

[71] Manni (n 3) 289.

redevelopment, demolition, reconstruction, and replacement of existing buildings. This approach avoids making "difficult-to-reconcile choices"[72] by simultaneously curbing resource consumption while addressing economic growth and housing requirements,[73] thus promoting social inclusion and solidarity for present and future generations.

Given the multifaceted objectives it pursues, regeneration, besides promoting environmental protection, transforms the very concept of environmental preservation, elevating it from a mere parameter of land planning to a catalyst that integrates diverse interests, including cultural, social, and economic considerations.[74] Consequently, it is evident that regeneration is also a pivotal factor in sustainable urban development (section 2). This connection between the paradigm of "sustainable development" and "urban regeneration" policies is also prominently apparent at the European level. Specifically, the 2016 New Urban Agenda, through its action plan, provides financial support for regeneration initiatives in economically and socially marginalized areas, assuming that this strategy is suitable for fostering balanced, sustainable, and inclusive urban development.[75]

At this juncture, it is essential to ascertain the most effective implementation tools for achieving these priority objectives. In the past, urban planning policies were governed by authoritative rules and instruments, adopting a top-down approach that, however, perpetuated continuous land consumption and increased building density. In the current transition from an expansionist culture to one of urban transformation, the value of negotiation and agreement between public and private entities is acknowledged. To attain the defined objectives, it is indispensable to adopt long-term, organic, and structural urban planning choices, that emphasize a public imprint. However, relying solely on the public dimension of initiative and decision-making is insufficient.[76] It is imperative to reestablish the inalienable notion that the "urban territory is primarily a place where the community resides and, as such, subject to public planning powers that must ensure its social function".[77]

[72] The expression 'tragic choices' is taken from Guido Calabresi and Philip Bobbitt, *Scelte tragiche* (Giuffrè 1986) 196.

[73] Scotti (n 15) 524.

[74] Giglioni (n 20) 23.

[75] Manni (n 3) 285.

[76] Gardini (n 34) 79-80.

[77] ibid 80.

Urban planning negotiations must be firmly grounded in democratic participation, employing a bottom-up approach and emancipating itself from the confines of property ownership. Private property rights need to be functionalized—no longer a constraint on spatial planning oriented toward sustainable development—allowing for diverse uses of urban land, curbing land consumption, bridging the gap between the affluent and marginalized, and ensuring that all inhabitants, present and future, regardless of any form of discrimination, can create just, safe, healthy, accessible, affordable, resilient, and sustainable cities and human settlements.

As we have seen, urban regeneration extends beyond restrictions and bans on land consumption and encompasses positive public and private endeavors that prioritize the common interest over purely individual ones. Urban planning can no longer solely cater to the interests of private landowners but must consider a broad range of factors, including environmental protection, health, socioeconomic objectives, and the general well-being of the community inhabiting the land. In this regard, private initiatives must also be effectively oriented toward advancing the collective interest, transcending profit-centric logic. Coordinating and guiding economic activities toward the reuse of existing resources and the preservation of the land's natural character necessitate collaboration between public decision-making bodies and citizens.[78] The revitalized role of these actors, reflecting a shift in the role of local administrations, introduces an innovative dimension to the relationship between public power (at the local level) and citizens in the field of urban regeneration. The public entity assumes the role of a "facilitator" for active citizenship initiatives, giving rise to a "collaborative administration".[79] Consequently, individual and collective citizen initiatives are reintegrated with activities in the public interest, as outlined in Article 118 of the Constitution, particularly in terms of urban planning, which for too long has been influenced by the predatory interests of private owners and excessive control by public planning authorities. This new approach emphasizes the active role of citizens in the preservation of common goods, such as the soil resource.[80]

[78] ibid 80-82.

[79] Manni (n 3) 307.

[80] Gardini (n 34) 63.

6. *One House for €1 as a Tool for the Governance of Abandoned Properties in Small Villages*

To analyze how the concepts outlined have been applied in practice, we present here the urban regeneration experiences implemented in some small villages in Sicily.[81]

The project, known as "Case a 1 euro" (Houses for 1 euro), was launched in 2009 with the aim of stemming the outflow of the population and of revitalizing troubled areas. Thus, the public administrations of these municipalities have been pursuing urban regeneration[82] by seeking to repopulate the picturesque villages through the sale of the properties for the symbolic price of 1 euro. Although the interventions and policy choices adopted cannot always be intended as destined to commons, since, more often as in Gangi and Cammarata, they relate to private properties, they nevertheless still have some effects on the commons. In fact, as seen in the previous section, the reuse of existing real estate assets indirectly makes it possible to save the soil resource as a common good and, at the same time, to respond to economic and social growth in accordance with the objectives of sustainable development, as we understand them. Since this strategy has been adopted by other municipalities in Italy and has become a model for revitalizing declining communities, our goal over several years of research[83] has been to explore the functioning of the program, analyze the contractual schemes, and determine the involved parties, as well as their respective rights and obligations. In particular, the analysis carried out by comparing a number of case studies of municipalities in Italy that have adopted this policy (Cammarata, Cianciana, Sambuca, Gangi, Favara, Itala, Salemi, Regalbuto, Mussomeli, San Piero Patti and Saponara) revealed a recurring model and frame agreements (genotype) - on which we will focus our attention -, with some minor differences in detail (phenotype) that are not relevant for the purposes of our analysis.[84]

[81] This section constitutes a summary reworking of the article: Pera, 'One House for €1' (n 8).

[82] Peter Roberts, 'The evolution, definition and purpose of urban regeneration' in Peter Roberts and Hugh Sykes (eds), *Urban Regeneration: A Handbook* (Sage Publications 2000).

[83] Pera, 'One House for €1' (n 8) 1.

[84] On the distinction between genotype and phenotype and for the use of these concepts in comparative law methodology, for all, see Roberto Sacco, *Trattato di diritto comparato. Introduzione al diritto comparato* (UTET 1992) 35-37.

In particular, in the paradigmatic model, with a public appeal published on the institutional website and publicized through an extensive communication campaign, the municipality provides a list of houses that can be transferred from the owner to a beneficiary at no cost. Thus, these properties are not being sold, but are instead being transferred through a process known as "cessione a titolo gratuito".[85] These are real estate transactions that, although they take place with the intermediation of the municipality, are carried out by private parties, creating a good example of collaboration between citizens and the public entity that assumes the role of facilitator (see paragraph 5). The latter, in particular, has the task of monitoring and checking that the purchaser complies with the established procedures. Each available immovable good that is listed on the municipality's website is indicated with a number and a form, together with the relevant documents and maps. This list can be consulted by the requesting parties (potential "buyers"), and is continuously updated, as houses are made available or are removed because they have been transferred.

The website also provides a model of the frame agreement for the acquisition request, which can be easily downloaded, where the potential "buyer" must indicate the number of the property form s/he has chosen.

[85] Alberto Gianola, *Atto gratuito, Atto Liberale – Ai Confini della Donazione* (Giuffrè 2002); Roberto Sacco and Giorgio De Nova, *Il Contratto* (UTET 2004) "Cessione a titolo gratuito" can be defined as an agreement in which one party – i.e., the transferor – consents to transfer a right to another party – i.e., the transferee – for free. The transferee is not required to pay a price, as would be typical in the sale of goods. In our case, as we are talking about the transfer of property rights, the simple expression by the parties of the willingness to transfer the property and the willingness to accept the transfer are sufficient for the conclusion of the agreement (art 1376 civil code) (Massimo Bianca, *Diritto Civile. Il Contratto* (vol 3, Giuffrè 2000); Massimo Franzoni, 'Degli Effetti del Contratto. Artt. 1374-1381. Vol. 2. Integrazione del Contratto. Suoi Effetti Reali e Obbligatori', in Francesco D Busnelli (ed), *Il Codice Civile. Commentario* (Giuffrè 2013). However, to protect third parties and to ensure that the entitlement to the immovable good has been made public, the agreement must be formalized in a notary deed and recorded in a special public register that records the ownership of and the rights to immovable goods and real estate assets (art 2643, para 1, civil code) (Pietro Boero, *La Trascrizione Immobiliare. I Trasferimenti e i Vincoli,* in Piero Schlesinger (ed), *Trattato di Diritto Civile e Commerciale* (Giuffrè 2021). The property cannot be claimed using a "donazione" (a gift agreement), because, in our case, the transferee has a number of obligations to fulfil, such as handling the administrative procedure for obtaining the license to rebuild and refurbish the property, making the payment for the "polizza fideiussoria," and other minor obligations.

Thus, the parties involved in the transfer are:

a) The owners of the properties, who are willing to transfer their properties for free, and who are obliged to continue to make their properties available to transfer for two years. Thus, the proposals received by the municipality will be included in a special register during this period.

b) The municipality, which is committed to promoting the program through its institutional activities and website, as well as through the media, the internet, and social networks. It prepares the documentation and provides information and clarifications. It manages the assignments and the waiting list, but it is not involved in the contracts through which the properties are transferred.

c) The beneficiaries, who are sometimes incorrectly called "buyers" in the frame agreements and in online communications, probably for marketing reasons. The beneficiaries can be individuals, companies, or agencies involved in the building, sale, or management of real estate for tourism or housing purposes; cultural, music, or sports associations; or other types of non-profit entities who want to use the property for their activities.

The beneficiaries or transferees are obliged to:

- Finalize the purchase within a few months (2-3) of the assignment, and to handle the expenses for the transfer of ownership.
- Secure the building immediately after the acquisition. If this is not done, the municipality will carry out the work while charging the expenses to the new owner.
- Prepare the renovation project within one year from the date of purchase.
- Start the refurbishing work within two months of the issuing of the necessary authorizations and complete the work within three years.
- Ensure that all these obligations are met, and secure a "polizza fideiussoria",[86] which is a guaranty or surety policy that is issued by

[86] A "polizza fideiussoria" is a contract between a person called a guarantor who personally guarantees with his/her assets and that s/he will fulfil the obligations of a debtor in relation to his/her creditor. The surety policies are governed by article 1936 of the civil code, which outlines the main characteristics of and governs the functions, limits, and opportunities associated with the contract. As the definition indicates, the surety policy involves three main parties: 1) the entity that issues the policy (in our case, a bank or an insurance company), and therefore offers the guarantee, also called the guarantor; 2) the contracting party or the applicant for the surety, who is usually the debtor who requests a guarantee for his/her own obligation (in our case, the transferee of the property right); 3) the beneficiary of the surety,

a bank or an insurance company in the interest of the municipality (for the amount of €5,000 in the Ganci phenotype). The "polizza fideiussoria" is valid for three years and is intended to guarantee that the beneficiaries-transferees fulfil their obligations. In the case of non-fulfilment, the municipality might hold onto the sum.[87]

The "buyer" must:

- Purchase the property by providing all the required documentation.
- Provide a brief technical report that explains the refurbishing proposal, the intended use of the property, and the steps needed to rebuild the property.
- Secure a trust guarantee policy for the execution of the work, as noted above.

It must be emphasized that the municipality cannot be considered a party to the property transfer agreement and is indeed not mentioned as a party in the notary public deed, "cessione di diritti reali a titolo gratuito," which gives a formal shape – i.e., a *vestimentum* – to the agreement. The municipality does not sign the deed.

The only aspects of the notary deed that affect the municipality's position are those that may be included when there is a list of the obligations arising from the frame agreement called "modulo per l'acquisizione di immobili vetusti" ("sample for the acquisition of property of old immovable goods"), which can be downloaded from the municipality website, and must be completed by any "buyer-transferee" seeking to express her/his intention to acquire a specific property among those listed. This agreement, expressed with the signature and the sending of the "sample" by the "buyer" to the municipality, obviously affects a procedural phase which comes before the notary deed, that transfers the property.

Thus, our genotype is built up through two contractual schemes: 1) the first between the interested "buyer" and the municipality ("sample for the acquisition of property of old immovable goods"); 2) the second between the owner and the "buyer-transferee", in the form of the notary public deed,

who is the creditor who holds a credit in relation to the debtor, and who requests a guarantee against this contract (in our case, the municipality). Among the English terms that might correspond to these concepts are "guarantee" or "surety policy."

[87] Lavinia Vizzoni, *Fideiussione e Rapporti Giuridici Complessi* (Giappichelli 2020); Alberto Giusti, 'La fideiussione e il Mandato di Credito' in Antonio Cicu and Francesco Messineo (eds), *Trattato di Diritto Civile e Commerciale* (Giuffrè 1998).

"cessione di diritti reali a titolo gratuito". In particular, if the transferee does not fulfil his/her obligations, settled under the first, in Gangi phenotype "the municipality will have the right to appropriate the sum guaranteed by the surety policy (polizza fideiussoria) or to acquire the property of the bargained good".[88]

The municipality is, in any case, a party to the agreement, which is formally binding, with the transferee, who must comply with the obligations enumerated in the "frame-model for the acquisition request." Thus, the municipality has contractual rights, which are the expression of a public interest in the regeneration of properties that are part of the urban texture.[89]

If the transferee does not meet the obligations listed in the "frame-model for the acquisition request," the municipality can choose between two potential remedies: acquiring the property or cashing in the €5,000 surety policy.

In our opinion, the acquisition of the immovable good poses many juridical and technical problems, because, as previously noted,[90] the free transfer of the property is from A transferor ("seller") to B transferee ("buyer"), and the notary deed does not provide any terms and conditions under which the property can be transferred back to A or to the municipality in the case of a breach of contract by B. Moreover, if the property was transferred from A to B in the case of breach of contract by B, the property would have gone back to A if the deed had provided a *pactum de retrovendendo*;[91] or, as would be better in our case, a *de retrocedendo*, as the previous contract was not a contract for the sale of goods.[92] Another potential solution is a *clausola risolutiva*

[88] The English translation is by the author of this paper.

[89] Sally Thomas and Pete Duncan, *Neighborhood Regeneration: Resourcing Community Involvement* (Policy Press 2000).

[90] Pera, 'One House for €1' (n 8).

[91] A *pactum de retrovendendo* is an agreement under which the parties do not provide for the resolution of the original sale, but instead commit to eventually making a new sale in the opposite direction. The back-sale agreement is, therefore, a mandatory component of the overall agreement. In our case, the *pactum de retrocedendo* implies that the original transferor is not required to pay any price for taking back the property from the original transferee.

[92] Massimo Bianca, 'La Vendita e la Permuta' in Filippo Vassalli (ed), *Trattato di Diritto Civile* (vol VII, 1-2, UTET 1993); Paolo Greco and Gastone Cottino, 'Della Vendita (artt. 1470-1547)' in Antonio Scialoja and Giuseppe Branca (eds), *Commentario al Codice Civile* (Zanichelli 1981); Domenico Rubino, 'La Compravendita' in Antonio Cicu and Francesco Messineo (eds), *Trattato di Diritto Civile e Commerciale* (vol XVI, Giuffrè 1971). Giuseppe Mirabelli, 'Dei singoli contratti', in Commentario al Codice Civile (Vol. IV, UTET 1968).

espresso.[93] Nonetheless, both of these remedies have effects that favor A, and that never directly favor the municipality. In addition, in both cases, the intervention of the court is needed, as it is hard to imagine that B would co-operate spontaneously. Moreover, the registration or notation of the judge's decision or of a second deed in the public record for immovable goods will be needed in order notify the general public of who holds the effective title to the property (Art. 2643 cod. civ.).

Thus, we suggest that changes should be made to the frame-model offered by the municipality, and to the notary deeds that we have mapped and read. Indeed, we argue that the municipality has no interest at all in becoming the owner of the assets because of the economic and social costs that would be associated with doing so.

The point we want to stress is that because the property is transferred for free, the transferee has no relevant obligations to the transferor, except to pay the notary's expenses, whereas the municipality has significant obligations, as it seeks to protect the interests of the public by preserving the property, ensuring the revitalization of the urban texture, and promoting urban safety and decorum.[94] Thus, if the private property rights are not ex-

[93] Mauro Grondona, *La Clausola Risolutiva Espressa* (Giuffrè 1998). Under art 1456 of the civil code, the "clausola risolutiva espressa" is the agreement under which the contracting parties expressly agree that the contract will be cancelled due to breach of contract in the event that a specific obligation is not fulfilled according to the terms and conditions provided by the contract. In such a case of rescission, each party must be reintegrated into the juridical situation in which they were before the agreement. The express termination clause gives the contractor the power to obtain the termination of the contract for non-fulfillment by the counterpart without having to prove its importance. In this case, the resolution occurs by law when the non-defaulting party (who has the right to choose between maintaining the contract and terminating it) declares to the other that s/he intends to make use of the termination clause. Whereas, there is a termination condition (Article 1353 of the Italian Civil Code) in which the parties delay the termination of the contract or of a single agreement until a future and as yet uncertain event occurs. If the termination condition occurs, the effects of the deal are considered to have never occurred (see Cass civ, sez 2, sent 2 October 2014, no 20854, commented by Andrea Cecchetto (2014) 10 www.juscivile.it <https://iris.unive.it/retrieve/e4239ddb-cf37-7180-e053-3705fe0a3322/Articolo%20pubblicato%20clausola%20risolutiva%20copia.pdf> accessed 17 September 2024). In our case, this means that A will return the property. In English, the relevant, but not perfectly homologous concepts that can be used to describe this agreement are "termination clause," "avoidance clause," "defeasance clause," and "rescinding clause."

[94] Francesca Di Lascio and Fabio Giglioni, *La rigenerazione di beni e spazi urbani. Contributi al diritto delle città* (Il Mulino 2017).

ercised properly – i.e., fully and plainly – the municipality has the role of ensuring the social function of the property,[95] as provided by Art. 42 of the Italian Constitution.[96]

7. *Conclusions*

The model-genotype we have just analyzed is a paradigmatic example of an urban regeneration initiative, which, as we have seen, currently plays a key role in the governance policies of towns and villages, and thus illustrates the limits and positive results of such programs. The recovery of abandoned buildings and the reuse and valorizations of public and private assets is one of the forms that this regeneration process can take. These interventions can change not only the social relations of entire communities, but also the relations between citizens and public authorities.[97] As we have seen (see section 4), in fact, there are two divergent perspectives on governance and urban land management: the first perspective privileges growth, development, building revitalization, economic freedom and private property rights, without limits. The other perspective mainly emphasizes the protection of the environment, the historical landscape, the balanced relationship between urban and rural areas and the agricultural resource (understood in a broad sense, beyond pure productivity).[98] This research, based on a methodological approach that does not neglect the analysis of cases and practices, suggests that it is necessary to design a system of democratic governance of urban regeneration,[99] in which local government and citizens assume active and conscious roles in looking after the interests of the public and the well-being

[95] Marella (n 57); Luca Nivarra, 'La funzione sociale delle proprietà: dalla strategia alla tattica' (2014) 31(4) Rivista Critica del diritto privato 503.

[96] art 42 of the Italian Constitution states that "Ownership is public or private. Economic assets belong to the State, to entities or to private individuals. Private property is recognized and guaranteed by the law, which determines the methods of acquisition, enjoyment and limits in order to ensure its social function and make it accessible to all people.".

[97] Pera, 'One House for €1' (n 8) 18.

[98] Carpentieri (n 57) 7.

[99] Hellmut Wollmann 'The fall and rise of the local community: A comparative and historical perspective' (2006) 43(20) Urban Studies 1419 <https://doi.org/10.1080/00420980600776491> accessed 17 September 2024.

of the community:[100] urban planning cannot cater exclusively to the interests of private landowners, but, as mentioned above, must consider a wide range of factors, including environmental protection, health, socio-economic goals and the general well-being of the community inhabiting the area.[101] So, the approach adopted in the cases analyzed emphasizes the active role of citizens in the conservation of common goods, such as the soil resource, and is in line with the provision of the new Article 41 of the Italian Constitution, which sees environmental protection as a limitation to the freedom of economic initiative.

This ability of the "Case a 1 €" project to combine public and private interest is probably one of the aspects that has determined its success, making it attractive even outside the Italian legal system. In this sense, it is interesting to note that Professor Chie Nozawa of the University of Tokyo in Japan visited Gangi to study the program (Palermo Today 2019; Giornale di Sicilia 2019) to assess the opportunities to adopt it, albeit with some adjustments, in rural areas of Japan that are currently in danger of being abandoned and that would benefit from repopulation.

There is a huge body of comparative law literature on the reasons why a juridical solution, a legal model, or a rule might circulate and be imitated in other juridical experiences, starting with Alan Watson's studies,[102] and continuing with debates about different theories and approaches. Among these reasons are, generally, the prestige of the imitated model or its economic efficiencies or rhetorical and hegemonic narratives, and the capacity of the imitated model to respond to the underlying social needs. In particular, in Monateri's theory, the main aspects of the import/export of rules and legal categories as crucial points in comparative law and politics are: 1) that normally, the process is not governed by the exporting party, but by the importing actors, and according to local strategies; 2) that because most of the legal systems in the world are "hybrids," "pure" models are isolated historical cases, and are therefore relatively unimportant when considering how law really works in the global legal landscape.[103]

[100] Pera, 'One House for €1' (n 8) 18.

[101] Gardini (n 34) 79-80.

[102] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press 1974).

[103] Pier Giuseppe Monateri, 'The 'Weak Law', Contaminations and Legal Cultures. Borrowing Of Legal and Political Forms' (2003) 13 Transnational Law & Contemporary Problems 575.

The success of the "Case ad 1 €" initiative makes it necessary to assess whether these cases and the private law tools used can serve as paradigmatic models and, consequently, whether they can exert a beneficial impact on the formulation of urban regeneration policies. Let us then try, at this point, to answer the questions posed at the beginning of our analysis and which we report here: is the one-euro houses initiative an appropriate solution for the management of abandoned properties, both private and public? Can these properties become resources for collective social, economic and cultural development? Is the program a model for recovering cultural identity through the revitalization of abandoned centers in small communities, promoting inclusion, participation and environmental sustainability?

Certainly, this long-term strategy produces positive effects. First, from a social point of view, it provides affordable housing and contributes to the social revitalization of degraded areas by reusing existing resources.[104] In this sense, the project is interesting for those who are looking for low-cost real estate investments in Italy, or for those who simply want to restore prestige to Italian villages famous for their extraordinary beauty and historical atmosphere.[105] Proposals have also been made to use the "one-euro houses project" for migrant seasonal workers' accommodation during their stay in small villages close to the fields of the farm where they are temporarily employed. Housing hardship is particularly acute for the migrant population: in addition to economic-financial problems, access to housing is also often hindered by forms of discrimination on the housing market. Moreover, and above all, using this strategy would make it possible to respond to this problem by avoiding spontaneous housing assemblages that occur in conditions detrimental to human dignity.

On the other hand, from an economic point of view, the project can generate market demand, creating opportunities for new local businesses and generating additional tax revenues for municipal finances.[106] The repopulation of these small villages promotes tourism activities, which can help to regenerate the local economies of these areas. To strengthen the tourism industry in these villages, the relocated buildings can be reused as boutique hotels or bed & breakfasts.

Larger projects, involving several properties in the same village, can be undertaken to create multi-building hotels or social housing, as has been

[104] Andreoni and Speake (n 7) 10.
[105] Pera, 'One House for €1' (n 8) 2.
[106] Andreoni and Speake (n 7) 10.

proposed in Gangi and Cammarata; or an open-air museum, as has been done in Favara.

In particular, in the context of the municipality of Favara (phenotype), the "Houses for 1 €" program has contributed to the realization of a more comprehensive strategy for promoting the cultural renaissance of the municipality, largely developed by Andrea Bartoli, a notary in Favara. The latter created the "Seven Courtyards". In just a few years, the project stimulated investment of EUR 20 million and led to the creation of a hundred jobs. Before the onset of the Covid-19 pandemic, the park attracted an average of 120,000 visitors per year.[107] Bartoli's efforts helped in transforming Favara into one of Italy's leading centers for alternative intellectuals, artists, architects and creative professionals.[108]

Thus, the case studies demonstrate how urban policies, together with the advancement of the circular economy, allow not only for the preservation and enrichment of social capital and the creation of more liveable cities, by improving the environmental impact of human activities, but also for the provision of new economic and employment prospects (see Article 41 of the Constitution).

Trying to link the practical experience with the 2030 Agenda, it can be said that some of the objectives listed under Goal 11 can be considered as fulfilled,[109] in particular:

11.1 Ensure access to adequate, safe and affordable housing and basic services for all and rehabilitate slums.

11.3 Improve inclusive and sustainable urbanization and capacity for participatory, integrated and sustainable planning and management of human settlements in all countries.

11.4 Strengthen efforts to protect and preserve the world's cultural and natural heritage.

[107] ibid 10.

[108] This approach is not particularly new. There have been several communities in Sicily that have pursued this strategy over the past 50 years. For example, the municipality of Gibellina, in the Belice Valley area, moved in this direction following a terrible earthquake (1968). The reconstruction of these municipalities was facilitated by the interventions of Giò Pomodoro, Alberto Burri and other important artists. Likewise, Antonio Presti, the patron of the open-air sculpture museum in north-eastern Sicily, Fiumara d'Arte (Tusa - ME), declared his desire to use imagination and beauty to change society. See Richard Florida, *The Rise of the Creative Classes* (Basic Books 2004).

[109] Andreoni and Speake (n 7).

However, urban regeneration encompasses different objectives: "environmental protection should be pursued through solutions that promote energy efficiency, encourage the use of renewable energy sources, improve and expand urban green spaces, promote sustainable mobility, ensure efficient waste management, support urban agriculture, rehabilitate and restore land, and increase biodiversity".[110] Therefore, although the initiative is an example of good practice, there is still much to be done to align with all sustainable development goals.

In conclusion, we want to point out that there is a further need to - always - investigate the legal consequences of regeneration projects. What does it mean to regenerate the spaces and assets of an urban context? What are the most effective tools for carrying out these interventions? How can the sharing of the management of regeneration processes between the administration and private individuals be promoted? Can the tax system provide incentives? At the heart of the reflections on these issues is the desire to design a system of democratic governance of urban regeneration, in which the local administration and the citizens take active and conscious roles in caring for the interests of the public and the welfare of the community.

[110] Giglioni (n 20) 22-23. The English translation is by the author of this paper.

Serena Mariani

NEW PLANT VARIETIES FOR FEEDING THE CITIES MORE SUSTAINABLY. A BRIEF INVESTIGATION INTO THE ROLE OF EU PLANT VARIETY PROTECTION IN FOSTERING URBAN AGRICULTURE

1. *Introduction: Agriculture vis-à-vis Urbanisation*

In light of the urgency regarding sustainability, the agriculture of the third millennium is called on to face numerous challenges posed *inter alia* by overpopulation, climate change, scarcity of natural resources, genetic vulnerability, pollution and soil degradation. Farmers are required to yield positive outcomes and meet the society's demands while adopting environmentally sound practices in terms of resource efficiency, biodiversity conservation and reduction in the use of chemical and hazardous pesticides.

In addition, agriculture must deal with the concerns caused by the impacts of rising urbanisation and the significant complications in supplying the cities. It has been estimated that 55% of the global population resides in urban areas and more than 880 million people live in slums, and by 2050 the number of urban dwellers is expected to increase by an additional 2.5 billion people.[1]

Rapid urbanisation has a critical impact on food systems, for example in terms of longer food chains and inadequate access to food. First of all, food supply chains are elongated by widening the physical, social and mental distance between urban and rural areas, consumers and farmers,[2] and this is increasing the pressure to bring food to congested urban areas. Also, access to food in large cities is characterized by high spatial and socio-economic inequality,[3] making it difficult for vulnerable groups to access nutritionally adequate products,[4] resulting in a higher consumption of processed food-

[1] FAO, 'FAO framework for the Urban Food Agenda' (FAO Rome 2019) 6.

[2] Frans Brom, 'Food, Consumer Concerns, and Trust: Food Ethics for a Globalizing Market' (2000) 12 Journal of Agricultural and Environmental Ethics 127.

[3] FAO (n 1) 8.

[4] FAO and others, 'The state of food security and nutrition in the world 2021. Trans-

stuff with low nutrient value.[5] Therefore, it is fundamental to satisfy the cities' demand for food while considering the growing urban poverty levels.

In this framework, agriculture can play a significant role as long as it is able to revolutionize itself, transforming urbanisation into an opportunity to achieve the sustainability goals. Indeed, agricultural systems based on resource-intensive production and the ever longer food supply chains are not suitable for sustainable development: there is the need to promote other systems capable of decreasing the environmental pressure and tackling the current vulnerabilities. Farmers are thus being required to shift to more sustainable agricultural systems.

The changing characteristics of farming, digitalisation, climate change, environmental degradation and the urgency to adopt more environmentally sustainable forms of farming, are affecting not only the farmers of today but also the farmers of the future. It has been estimated that in the next decade there will be a very diverse agricultural scenario, where emerging challenges, trends and opportunities will shape different farmer profiles: the 'urban farmer' is one of them.[6]

This person is engaged in urban agriculture, carrying on agricultural activities on urban soil and combining his/her life in the city with the implementation of local food production of, mostly, high value crops. In this way, the urban farmer manages to transform urbanisation from a challenge into an opportunity for agriculture, integrating food production in those places where most of the demand for food is concentrated: i.e., cities.

Indeed, the difficulties linked to the increasing urbanisation call for more urban-grown products. In this context, urban farmers are capable of increasing city resilience to crises and reducing urban sprawls, by building sustainable urban ecosystems and contributing to urban biodiversity,[7] thus playing a key role in tackling the sustainability challenges. Moreover, urban agriculture is capable of providing a source of income and addressing

forming food systems for food security, improved nutrition and affordable healthy diets for all' (FAO Rome 2021) 99.

[5] Carlos A Monteiro and others, 'Ultra–processed products are becoming dominant in the global food system' (2013) 14 Obesity review 21.

[6] Anne-Katrin Bock, 'Farmers of the future' (Publications Office of the European Union no 30464 2020).

[7] ibid 60.

poverty reduction,[8] contributing to food security,[9] to dietary diversity[10] and, generally, to the socio–economic development of towns, cities and metropolitan areas.[11]

2. *Definitions and Typologies of Urban Agriculture*

Urban agriculture occurs within and in the proximity of the boundaries of towns, cities and metropolises, in places that range from household, community and school gardens, to rooftops, vertical and indoor farms.[12] It embraces both traditional agricultural activities, including horticulture, livestock, milk production, aquaculture, fishery and even forestry,[13] and innovative production methods such as aquaponics, hydroponics or Led–farming initiatives.[14] The outcomes can be food and non–food products, as well as services, including social and ecological ones.

Even though the term 'urban agriculture' may seem an oxymoron,[15] it actually breaks the rural–urban divide by making the contrast less sharp: cities are no longer only hubs of commerce, trade, finance and education, but also the place where agricultural activities, traditionally located elsewhere, are

[8] Specifically, the data show that urban agriculture appears to be playing a role in poverty alleviation in African countries (such as Ghana, Madagascar and Nigeria), but not so much in other continents. Alberto Zezza and Luca Tasciotti, 'Urban agriculture, poverty, and food security: empirical evidence from a sample of developing countries' (2010) 35 Food policy 265.

[9] The linkage between urban agriculture and food security, in particular concerning children's nutritional status, has been explored by Daniel Maxwell, Carol Levin and Joanne Csete, 'Does urban agriculture help prevent malnutrition? Evidence from Kampala' (1998) 23 (5) Food policy 411.

[10] It has been shown that urban agriculture increases the dietary diversity of urban households. See Alberto Zezza and Luca Tasciotti, *Does urban agriculture enhance dietary diversity? Empirical evidence from a sample of developing countries* (FAO Rome 2008).

[11] UNDP, 'Urban agriculture. Food, jobs, and sustainable cities' (United Nations Development Programme, Publications Series for Habitat II 1996) 3.

[12] James McEldowney, 'Urban agriculture in Europe. In–depth analysis' (European Parliamentary Research Service PE 614.641 2017).

[13] FAO, 'Urban and peri–urban agriculture' (FAO Committee on Agriculture, Fifteenth Session 1999).

[14] McEldowney (n 12) 6.

[15] UNDP (n 11) 4.

carried on.[16] The proximity between producers and consumers is enhanced through the creation of spaces where urban and rural activities can coexist.

Presently, a unique legal definition and a specific regulation of urban agriculture do not exist, arguably because this form of farming is context dependent[17] and has a dynamic nature, which exists within heterogeneous situations, locations and socio–political conditions, and it embraces many forms, going far beyond gardening.

Several definitions have been provided in literature as well as by international and intergovernmental organizations and associations, mainly focusing on the contrast with rural agriculture by identifying the characterising elements that are present or absent in it, in terms of farm and farmer types, livelihood, products, cropping calendar, production factors, farmer organization, social and environmental context, availability of research and credit services, market and land security.[18]

The definitions have different nuances based on distinctive aspects of this system: the spatial dimension, the generated outputs, the nature of the actors, the scale of implementation and the market dimension.

One of the most widely cited interpretations has been provided by Mougeot, who describes urban agriculture as

> the industry located within (intra–urban) or on the fringe (peri–urban) of a town, a city or a metropolis, which grows and raises, processes and distributes a diversity of food and non–food products, (re–) using largely human and material resources, products and services found in and around that urban area, and in turn supplying human and material resources, products and services largely to that urban area.[19]

In this concept, the spatial element is particularly significant: the larger urban system is included in the definition, from intra– to peri–urban, thus including the areas in proximity of a town, a city or a metropolis. The focus is also on the production and market dimension, which embraces the entire

[16] Frank Lohrberg and others (eds), *Urban Agriculture Europe* (Cost Action Jovis 2016) 16.

[17] Cecilia Delgado, 'Contrasting practices and perceptions of urban agriculture in Portugal' (2018) 10(2) International Journal of Urban Sustainable Development 170.

[18] FAO and others (n 4) 12.

[19] Luc JA Mougeot, 'Thematic Paper 1: urban agriculture: definition, presence, potentials and risks' in Nico Bakker and others (eds), *Growing cities, growing foods: urban agriculture on the policy agenda* (Feldafing 2000) 10.

food and non–food chain: products and services should be both locally–sourced and, at least partially, locally–supplied and oriented towards urban dwellers. Consequently, attention is given both to the economic and social aspects of urban agriculture.

Another definition is provided by Adornato, who refers to the same space location but, unlike Mougeot, considers an even broader perspective, focusing on the socio–economic and environmental impacts of urban agriculture as

> a localized activity within an urban and peri–urban area that aims to produce and distribute a wide variety of food products and services, using the substantial human and material resources of that area and concurrently giving substantial quantities of products and services to that same area[20]

also specifying that urban agriculture 'has a fundamental role in the process of sustainable, agricultural and urban development'.[21] In this notion, urban agriculture has this key function because of its multifunctional and multi–ideal contribution, capable of developing new models in economic and social terms, based on the principles of solidarity and subsidiarity.[22]

A different point of view is offered by Roggema, concisely outlining this phenomenon as 'the growing, processing and distribution of food or livestock within and around urban centres with the goal of generating income'.[23] Even though the spatial dimension is the same as that of Mougeot and Adornato, in this case the emphasis is put exclusively on the economic or market–oriented perspective, and the considered output is limited to food products, ignoring services and non–foodstuff.

According to the Cost Association, an international non–profit association of academics and professionals in the areas of urban development and agriculture aiming at enhancing European cooperation in science and technology, the key aspect of this definition is in the spatial and functional elements since urban agriculture

[20] Francesco Adornato, 'Pulsa la vita nel diritto' (2013) 3 Rivista di diritto agrario 490.

[21] Francesco Adornato, 'Problemi giuridici dell'agricoltura urbana' (2015) 66 Intersezioni 1.

[22] ibid.

[23] Rob Roggema (ed), *Sustainable urban agriculture and food planning* (Routledge 2016) 3.

> spans all actors, communities, activities, places and economies that focus on biological production in a spatial context which – according to local standards – is categorized as 'urban'. Urban Agriculture takes place in intra– and peri–urban areas, and one of its key characteristics is that it is more deeply integrated in the urban system compared to other agriculture. Urban Agriculture is structurally embedded in the urban fabric; it is integrated into the social and cultural life, the economics and the metabolism of the city.[24]

Therefore, the local context and functional dimension of urban agriculture are underlined as a piece of the socio–cultural and economic system of a city.

During the 1990s, FAO provided two different definitions of this phenomenon, depending on its urban or peri–urban perimeter. The distinction is framed in the following terms: urban agriculture referred to 'small areas (e.g. vacant plots, gardens, verges, balconies, containers) within the city for growing crops and raising small livestock or milk cows for own–consumption or sale in neighbourhood markets'; whereas, 'peri–urban agriculture [...] refers to farm units close to town which operate intensive semi– or fully commercial farms to grow vegetables and other horticulture, raise chickens and other livestock, and produce milk and eggs'.[25] The two definitions differ not only in relation to the spatial location where the activities take place, whether within cities or in their proximity, but also in terms of farm size, which is generally considered to be smaller and marginally market–oriented in the case of urban agriculture, in sharp contrast to peri–urban agricultural activities characterised by a commercial dimension and, thus, not carried out on an amenity basis.

Recently, FAO has revised its definition, again offering two definitions, one longer than the other, but this time urban and peri–urban agriculture is addressed as a whole. As stated in the short and concise definition, highlighting the essence of the phenomenon, 'urban and peri–urban agriculture can be defined as the production of food and other outputs and related processes, taking place on land and other spaces within cities and surrounding regions'.[26] The longer one encompasses a more comprehensive socio–economic, political and environmental perspective, according to which

> urban and peri–urban agriculture can be defined as practices that yield food and other outputs from agricultural production and related processes (transfor-

[24] Lohrberg (n 16) 21.
[25] FAO (n 13).
[26] FAO and others (n 4) 11.

> mation, distribution, marketing, recycling ...), taking place on land and other spaces within cities and surrounding regions, involving urban and peri–urban actors, communities, methods, places, policies, institutions, systems, ecologies and economies, largely using and regenerating local resources to meet the changing needs of local populations while serving multiple goals and functions.[27]

Despite the sharing of certain elements, all the above–mentioned descriptions frame urban agriculture in a distinctive way and shed light on different dimensions and perspectives: in any case, the spatial element appears to be the key feature. However, the innovation generated by urban agriculture is not solely related to the location where the activities take place, but it refers to benefits of various nature linked to it that go beyond the production and distribution of food to intra– and peri–urban areas, encompassing the social, economic and environmental dimensions of the urban ecosystem.

With regard to the typologies of urban agriculture, Cost recognised two distinctive categories: urban gardening and urban farming.[28] The former refers to 'agricultural activities with generally low economic dependence on material outputs while using the production of food for achieving other, mostly social, goals'; whereas the latter encompasses 'intentional business models taking advantage of proximity to the city by offering local or regional agricultural products or services'.[29]

Urban gardening can be performed on an individual (e.g. family and allotment gardens) or collective basis (e.g. educational, therapeutic and community gardens).

In the case of urban farming, two types of operators can be identified depending upon the chosen business strategy: on the one hand, there are farms providing on–site services (e.g. therapeutic and educational farms); on the other hand, there are local food and non–food farms, orientating their production to local markets, and environmental farms, adopting environmentally friendly practices, for example, by being involved in biodiversity conservation or flood prevention.[30]

Lastly, on the basis of its scale, urban agriculture can be disaggregated into micro, meso and macro production (the latter being more regulated

[27] ibid.
[28] Lohrberg (n 16) 22.
[29] ibid.
[30] ibid.

than micro and meso), and, in relation to the ownership of the land, it can be categorised as private, corporate or public.[31]

3. *A Step Towards Sustainable Development*

This different form of farming contributes to the environmental, social and economic objectives of sustainable urban development.[32] Indeed, locally-sourced food systems have been traditionally linked to the promotion of sustainability and social justice, having the potential to provide environmental, social and economic benefits,[33] shortening the distance between farmers and consumers and contributing to the resilience of cities.[34] The numerous benefits and opportunities of different nature brought by urban agriculture[35] need to be considered in light of the 2030 Agenda,[36] in order to achieve its Sustainable Development Goals (SDGs).[37]

[31] According to the authors, ownership is private when owned by individuals with fully assigned property rights; corporate when owned by shareholders and characterized by collective decision–making; and public when owned by government and managed for social outcomes. Leonie J Pearson, Linda Pearson and Craig Pearson, 'Sustainable urban agriculture: stocktake and opportunities' (2010) 8(1-2) International journal of agricultural sustainability 7, 8

[32] René van Veenhuizen, 'Formulating effective policies on urban agriculture' (2006) 16 Urban agriculture magazine 1.

[33] E Melanie DuPuis and David Goodman, 'Should we go "home" to eat?: toward a reflexive politics of localism' (2005) 21(3) Journal of rural studies 359.

[34] The Covid-19 pandemic has shown that simplified and shorter supply and distribution chains are fundamental for a resilient food system. Cf. FAO, 'Covid–19 and the role of local food production in building more resilient local food systems' (FAO Rome 2020).

[35] Saverio Miccoli and others, *Towards integrated urban agriculture systems: economic and valuation aspects* (XLIII Incontro di studio del Ce.S.E.T. 2016) 53–54.

[36] At the international level, the pressure to develop a global strategy in terms of sustainability has been at the heart of the UN Sustainable Development Summit held on 25 September 2015, when more than 150 world leaders adopted the 2030 Agenda for Sustainable Development. The document represents the world's blueprint on this matter and incorporates a follow–up from the Rio+20 Conference on Sustainable Development. It is characterised by its universality, striving for its application at all levels of government and civil society, and by a holistic and cross–sector approach to ensure that all the relevant challenges are addressed together. Specifically, it aims at promoting globally shared prosperity and well–being for the following 15 years, putting specific emphasis on the objectives of poverty reduction, fighting inequalities and tackling climate change. On the critical role of agriculture in the 2030 Agenda, see Silvia Manservisi, 'Il ruolo emergente del diritto agroalimentare tra economia circolare e Sdgs di Agenda 2030' in Sonia Carmignani

By way of illustration, farming in the city is a strategic tool for achieving SDG no. 2 'Zero hunger', as it contributes to reaching food security by significantly affecting food production and supply. This aspect should be considered keeping in mind that, over the next few years, achieving food security[38] through sustainable production systems is going to be one of the biggest global challenges, in response to the expected growth of the world's population living in more urbanised environments.[39]

Urban agriculture also produces an economic return,[40] and it promotes the professional entrepreneurship of local farmers, who are called upon to adapt their business model to the urban environment and its opportunities,[41] thus creating jobs and business opportunities for small–size food and non–food operators. Meanwhile, it promotes market access for rural farmers (target no. 2.3).

In addition, urban agriculture contributes to target no. 2.4 by ensuring sustainable food production systems and implementing resilient agricultural practices through the preservation of agricultural land in urban areas and the reduction of supply chains.

and Nicola Lucifero (eds), *Le regole del mercato agroalimentare tra sicurezza e concorrenza. Diritti nazionali, regole europee e convenzioni internazionali su agricoltura, alimentazione, ambiente* (Editoriale Scientifica Napoli 2020); Sonia Carmignani, 'SDGs e agricoltura. Una breve riflessione' in Sonia Carmignani and Nicola Lucifero (eds) ibid; FAO, 'Food and agriculture: key to achieving the 2030 Agenda for Sustainable Development' (FAO Rome 2016).

[37] In this sense, FAO (n 1).

[38] FAO, 'Trade reforms and food security: conceptualizing the linkages' (FAO Rome 2003) 25.

[39] The concept of food security has evolved significantly during the past years. In 1974, the World Food Summit provided a first definition based only on the availability and price stability of food supply. In 1983, the FAO defined the term focusing on access, both physical and economic. Later, in 1996, the definition provided by the World Food Summit highlighted the multidimensionality of food security, including access, availability, use and stability; whereas in 2001 the State of Food Insecurity led to a definition emphasizing the importance of food demand, safety and access for vulnerable groups, providing the following internationally–accepted definition: 'Food security [is] a situation that exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life'. The growth of the global population will result in an increased food demand and pressure on the ever longer food supply chain, which has been proven to be extremely vulnerable to shocks, from armed conflicts to droughts and pandemics, as was the case for Covid–19. See FAO and others (n 4).

[40] Joshua Zeunert, 'Urban agriculture up–scaled: economically and socially productive public green space' in Rob Roggema (ed), *Sustainable urban agriculture and food planning* (Routledge 2016) 111.

[41] Lohrberg (n 16) 80–81.

Urban agriculture also offers a promising solution to making cities healthier and more sustainable by aiding in successfully meeting several targets housed under SDG no. 11, such as target no. 11.7 which refers to inclusive green and public spaces, in particular for women and children, older persons and persons with disabilities, and target no. 11.6 relating to the improvement of air quality and waste management.[42]

Producing and selling more fresh food within the city also contributes to SDG no. 13 on climate action in terms of carbon sequestration, increased local biodiversity, waste recycling, temperature moderation and reduced risk of flooding. However, these potential benefits strictly depend on the agricultural methods and practices adopted: urban farmers should respect the local ecosystem and mitigate climate change by opting for sustainable pest–management practices, energy and resource–efficient facilities and transportation, less packaging, planting sites distant from traffic and polluted areas.[43] In this way, urban agriculture contributes to the overarching goal of reducing human impacts on the climate (target no. 13.2).

From a social point of view, urban agriculture promotes social cohesion and interaction, health and mental health, well–being and positive life paths, leisure, and educational activities, as well as inclusion and participation of vulnerable and disadvantaged groups, such as the elderly, unemployed and migrants.[44] It facilitates access to fresh food in urban areas, especially for vulnerable residents, and improves the health status and quality of life of local dwellers,[45] thereby contributing both to SDG no. 3, 'Good health and well–being', and SDG no. 10, 'Reduced inequalities'.

The UN New Urban Agenda,[46] which is closely related to the SDGs of the 2030 Agenda, considers urban agriculture as a tool for sustainable urban

[42] Marc Hernandez, Rosemary Man, *Growing greener cities: urban agriculture and the impact on SDG 11* (Iisd Sdg Knowledge Hub 2018).

[43] ibid 13–14.

[44] McEldowney (n 12) 12–13.

[45] Saverio Miccoli, Fabrizio Finucci and Rocco Murro, 'Feeding the cities through urban agriculture. the community esteem value' (2016) 8 Agriculture and agricultural science Procedia 128.

[46] This Agenda, adopted on 20 October 2016 at the UN Conference on Housing and Sustainable Urban Development (Habitat III) in Quito, Ecuador, and endorsed by the UN General Assembly on 23 December of the same year, has the purpose, in the broad context of the SDGs, to provide a framework of actions for sustainable urban development, by establishing principles for the planning, construction, development, management and improvement of urban areas.

development. It represents a piece of the puzzle depicting the relationship between food and cities, in light of the potential that urban environments have to trigger a transformation towards more sustainable and resilient food systems. The Agenda encourages the coordination of food and agriculture policies in this sector, across urban, peri–urban and rural areas, for example, to facilitate food production and marketing, safeguard human health and the environment, maintain the genetic diversity of seeds, maximize efficiencies and minimize waste.

The Milan Urban Food Policy Pact, an international agreement of Mayors signed on 15 October 2015 in Milan, representing one of the most important legacies of Milan Expo 2015 and providing a recommendation for the definition of innovative food policies (including the promotion of urban agriculture),[47] is emblematic of the role that cities can have in developing urban policies capable of promoting sustainable, inclusive, resilient, safe and diverse food systems.[48]

Urban agriculture also plays an important role in the policies of the European Union, such as the EU Green Deal,[49] in particular in the Farm to Fork (F2F)[50] and Biodiversity Strategies[51] which are interlinked in light of the close relationship between sustainable food systems and biodiversi-

[47] More information on the Milan Urban Food Policy Pact may be found at the following website: (*Milan Urban Food Policy Pact*) <https://www.milanurbanfoodpolicypact.org> accessed 28 January 2025.

[48] In this field, other initiatives exist, such as the WHO 'Healthy Cities' (1988) and the FAO 'Food for the cities programme' (since 2001), as well as international networks (eg Cityfood network, City–Region Food Systems, C40 Food Systems Network,) and European ones (eg Eurocities food working group, Food Smart Cities for Development).

[49] In December 2019, the Commission presented its European Green Deal, which is an integral part of the EU strategy to implement the UN 2030 Agenda and the SDGs. The Green Deal is a growth strategy setting out policy initiatives with the purpose of leading the transition towards a more sustainable, just and inclusive EU economy and society, and to achieving climate neutrality by 2050. It states that in order to mainstream sustainability in all EU policies, it is fundamental to mobilize research and foster innovation: new technologies and sustainable solutions across sectors are critical for achieving the objectives of the Green Deal. For a legal analysis of the EU Green Deal, see Pamela Lattanzi, 'Il "New Green Deal", la Pac 2021–27 e la sostenibilità nelle produzioni alimentari' in Paolo Borghi and others (eds), *Trattato di diritto alimentare italiano e dell'Unione europea* (Giuffrè 2021) 705.

[50] European Commission, 'A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system' (Communication) COM/2020/381 final 2020.

[51] European Commission, 'EU Biodiversity Strategy for 2030 Bringing nature back into our lives' (Communication) COM/2020/380 final 2020.

ty conservation. The F2F Strategy explicitly refers to urban food systems as a field where more research is warranted. The document highlights the important role of research and innovation in this field to accelerate the transition to sustainable, healthy and inclusive food systems. In the context of the Biodiversity Strategy, urban agriculture has a critical role in enhancing sustainable and biodiverse urban environments and greening cities. Indeed, this Strategy promotes 'A new EU Nature Restoration Plan' to reverse biodiversity loss also by greening urban and peri–urban areas in consideration of its benefits, especially for mental health, as lockdowns during the Covid–19 pandemic have shown. For this reason, the Strategy invites EU cities to adopt 'Urban Greening Plans'.

Moreover, since 2016 the EU has supported the implementation of the New Urban Agenda, which has the same vision as the Urban Agenda for the EU (UAEU).[52] Even though the UAEU in its original version did not explicitly mention the role of food or agriculture in urban environments, significant changes in this sense are expected.

This Agenda is linked to the New Leipzig Charter,[53] which recognises the role of urban agriculture for a new model of productive city and states that 'small–scale businesses, low–emission–manufacturing and urban agriculture can be stimulated to re–integrate production into cities and urban areas, enabling and promoting new forms of mixed–use neighbourhoods',[54] and the Ljubljana Agreement,[55] which added the topic of 'food' to the existing list of UAEU priority themes.

In this sense, urban agriculture can be included among the many strategic tools that the EU aims to promote to achieve the objectives of the Green

[52] This document was launched in May of the same year with the Pact of Amsterdam and represents a multi–level tool to promote cooperation among Member States, the Commission, EU cities and other stakeholders to better regulate, fund and know urban needs and practices, in order to stimulate growth, cohesion and innovation.

[53] This document was adopted on 30 November 2020 at the informal meeting of EU ministers responsible for urban and territorial development and intends to guide the next phase of the Urban Agenda for the EU.

[54] EU Ministers responsible for Urban Matters, 'New Leipzig Charter - The transformative power of cities for the common good', 2020, p. 3, available at <https://ec.europa.eu/regional_policy/sources/brochure/new_leipzig_charter/new_leipzig_charter_en.pdf> accessed 28 January 2025.

[55] EU Ministers responsible for Urban Matters, 'Ljubljana Agreement', 2021, available at <https://ec.europa.eu/regional_policy/sources/brochure/ljubljana_agreement_2021_en.pdf> accessed 28 January 2025.

Deal. However, in the future, it will be crucial to understand how to achieve the necessary integration across all EU policy areas in order to strengthen the potential for urban agriculture.[56]

4. *Overcoming the Limitations of Urban Agriculture: The Role of Plant Breeding*

Food production within cities does not necessarily guarantee sustainability: the key problem concerns the adoption of industrial farming methods, including the massive use of chemical products and the major consumption of fossil fuels. Even though the concept of 'local food' is often linked to an environmentally friendly production, this linkage may not be so unquestionable. Decisive factors in determining the sustainability of urban agriculture are the use of farming methods and technologies intended to improve the local ecological conditions and safeguard the urban biodiversity, and the choice of plants adapted to the local environment, capable of being both productive and resistant to pests and stresses.[57]

However, one of the most significant limitations of urban agriculture lies in the low availability of plant reproductive material adapted to the characteristics of the urban environment.[58] Access to adapted material is an important issue faced by urban farmers, since it is usually not readily available in cities, and it can also be of uncertain quality or not adapted to the farming methods or environmental conditions of urban areas. The reproductive material of

[56] McEldowney (n 12) 1. The author underlines that at the EU level the coordination between the different policies regarding urban agriculture is still limited, as proven by the fact that, for example, the Common Agricultural Policy - CAP (2014–2020) neither directly addresses nor allocates specific funds to urban farming. The main criticality was that, for some aspects, urban agriculture may not have a sufficiently agricultural nature to obtain support under Pillar I of the CAP while, for others, it is not considered sufficiently rural to secure support under the rural development programmes. The same considerations can be made for the new CAP.

[57] Fábio Cunha Coelho, Enilce Maria Coelho and Monika Egerer, 'Local food: benefits and failings due to modern agriculture' (2018) 75(1) Scientia Agricola 84.

[58] For insights on the state of the art and advantages in planning genetic improvement for plants for urban destinations, see Silvia Farinati and others, 'The new green challenge in urban planning: the right genetics in the right place' (2022) 8 Horticulturae 761.

plant varieties available on the market may have a lower productivity in urban areas and may be less resistant to local stresses because of poor adaptability.

Therefore, plant breeding (i.e., the scientific and creative process leading to the creation of new plant varieties possessing a set of desired characteristics) is being called upon to develop materials capable of meeting the demands and needs of urban producers, and also to have the characteristics required for sustainable agricultural productions in urban environments.

The Promethean 'creative power' of breeders can assist local farmers by developing urban plant varieties capable of ensuring high–yields, having better pest and disease resistance, decreasing the pressure on the environment by promoting the sustainable use of soil, water and biodiversity, increasing the nutritional content and shelf–life of agri–food products, and achieving a better adaptation to climatic stress. In order to do so, plant breeding needs to be 'urbanised' by taking into specific account the characteristics of engaging in agriculture in the city and the goals of urban gardeners and farmers.

However, efforts have been mostly directed towards meeting the demands of rural agriculture in a non–marginal agricultural environment, directed towards plant varieties having certain features – mostly related to high productivity. In this perspective, cities certainly represent a marginal environment, i.e., an area 'where agriculture is dominated by variation in agro–ecological and socio–economic conditions, resulting in complex stresses and high production risks'.[59] Furthermore, because of the significant unpredictability of urban environments, characterised by different microclimates and growing locations, both outdoor and indoor, they have been overlooked by formal plant breeding.

The needs of urban farmers have often been neglected by plant breeders and, as a result, there is a lack of varieties adapted to the urban environment,[60] whose characteristics differ from rural farming. By way of illustration, urban agriculture is deemed to be relatively smaller than conventional or traditional production[61] and this influences the choice of crops (e.g. by

[59] Conny Almekinders and Anne Elings, 'Collaboration of farmers and breeders: Participatory crop improvement in perspective' (2001) 122 Euphytica 426.

[60] In general, the producers of agribusiness inputs, including seeds of plant varieties, fertilizers and equipment, do not seem to heed the requests of urban farmers, especially the small–scale ones, being typically oriented towards rural farmers. UNDP (n 11) 152.

[61] Greg Keefe, 'Hardware software interface – A strategy for the design of urban agriculture' in Rob Roggema (ed), *Sustainable urban agriculture and food planning* (Routledge 2016) 15.

opting for high–value or specialty market ones), or the preference for new technologies, (e.g. aquaponics and hydroponics). Due to the limits in terms of spatial and natural resources, urban agriculture is required to make the best use of them: it has to be more efficient in land use management and more conservative in water usage, since water in urban environments is usually more expensive and in short supply. The limited space available in urban farms calls also for miniaturisation and determinate growth of plants, regarding for example plant height, branching patterns, foliar density and root systems.[62]

Regarding the farming practices, since the majority of urban farmers are low–income residents, they tend to prefer low–input and organic production, as well as multicrop farming (e.g. by combining horticulture and medicinal herb production) and a vast variety of crops that generate outputs at all times of the year, as opposed to monocropping, which is more widespread among high–income farmers and relies on the heavy use of pesticides and fertilizers.[63] Multicropping is often achieved by adopting a 'layered' model of production which operates on different layers: high trees, low trees and bushes, ground level and root level.[64]

Moreover, urban famers need inputs with specific characteristics because they have to deal with different plant diseases and microclimates, as well as more polluted and depleted soils and water.[65]

Another aspect to consider is the sunlight for plant varieties: on the one hand, farming in the city can take place indoors, in controlled environments, and it is therefore desirable for breeders to develop plant varieties having a short–life cycle suitable for systems that do not need natural sunlight but require low light intensity (e.g. vertical farms).[66] Until today, plant breeders made very little effort to develop varieties specifically for growing in controlled environments.[67] On the other hand, heavy polluted urban areas receive less solar radiation, compared to rural areas, and solar dimming can potentially affect crop productivity in the cities: plant breeding is thus called

[62] Cathryn O'Sullivan and others, 'Strategies to improve the productivity, product diversity and profitability of urban agriculture' (2019) 174 Agricultural Systems, 133, 139.

[63] UNDP (n 11) 54.

[64] ibid 114.

[65] ibid 220.

[66] Hong Yu and Jiayang Li, 'Short– and long–term challenges in crop breeding' (2021) 8(2) National science review.

[67] O'Sullivan (n 60) 139.

upon to develop plant varieties adapted to lower direct solar radiation within cities (i.e., shade–adapted plants).[68]

All these aspects call for urban adapted plant varieties. Limited access to adapted inputs urges urban agriculture to cooperate and strengthen its relationships with other businesses in the agroindustry to bring about the expected benefits and achieve its potential.

As underlined by FAO, sustainable crop production in the context of urban agriculture depends, among other things, on the use of high–yielding adapted varieties. Plants resilient to climate change and suited to local conditions, methods and practices are necessary for urban farmers, who are recommended to cultivate a broad range of varieties and not to rely on a few crops that may be less resistant to pests and diseases.[69] Urban agriculture can indeed have a significant impact on food security only if the offer of urban crops is broadened. Besides increasing food security by breeding varieties with improved performance in the cities, there is a rising interest in high–value urban plant varieties with consumer–driven characteristics including improved taste, nutritional content and modified texture.[70]

In consideration of the above, the main question appears to be how to promote the breeding of these varieties specifically intended for urban agriculture, given that 'new varieties also support the development of urban agriculture'[71] as declared by the World Intellectual Property Organization.

However, plant breeding has so far overlooked the needs of urban agriculture. It has been noted that 'the original assumption that modern plant breeding would ultimately serve all farmers has been found untenable for a number of reasons', from institutional, technical and economic points of view.[72] They range from the limited capacity to address all plants, environments and cropping systems, to the poor understanding of how to breed for a multitude of complex locations, and ultimately to the high economic costs

[68] Nikita Eriksen-Hamel and George Danso, 'Agronomic considerations for urban agriculture in southern cities' (2010) 8(1-2) International Journal of Agricultural Sustainability 87.

[69] FAO and others (n 4) 109.

[70] O'Sullivan (n 62) 141.

[71] Available at the following link: 'Achieving sustainability with Plant Variety Protection' (*WIPO*) <https://www.wipo.int/ip-outreach/en/ipday/2022/toptips/upov.html> accessed 28 January 2025.

[72] JJ Hardon, 'Conservation and use of agro–biodiversity' (1996) 3(3) Biodiversity letters 92, 95.

of breeding activities, which have led to limited investments in minor crops and marginal environments.[73] The problem is that plant varieties developed in high–yielding conditions may fail to satisfy the needs of farmers operating in marginal environments, and this is the reason why breeding programmes should be decentralised.[74]

In this context, research has been done on whether the current intellectual property regime on plant varieties, aimed at promoting the development of new varieties, may foster plant breeding for urban agriculture.[75] Specifically, it is the role of the EU plant variety protection regime established by Regulation (EC) no. 2100/94 that has been explored in encouraging the development of 'urbanised' plant varieties in order to meet the interests of gardeners and farmers in the city.

5. *EU Plant Variety Protection in a Nutshell*

During the first half of the twentieth century the dissemination of Mendel's law of inheritance and the rise of innovation in plant varieties, combined with the massive investments in this sector by public and private actors and the request for effective legal protection of the biological inventions, opened the door to intellectual property rights on plant varieties by the creation of *ad hoc* legal instruments capable of securing a source of revenue for breeders, in order to make a fair return on their investments in terms of time, money, energy and thought.

The 1961 International Convention for the Protection of New Varieties of Plants, also known as the UPOV Convention, was the first international agreement to introduce a legal framework aimed at governing the *sui generis* plant variety protection system by granting breeders of a new plant variety an intellectual property right called 'plant breeder's right'. The UPOV Convention has established an intergovernmental organisation called Union for the Protection of New Varieties of Plants, also referred to as UPOV, with

[73] ibid.

[74] Julie C Dawson, Kevin W Murphy and Stephen S Jones, 'Decentralized selection and participatory approaches in plant breeding for low–input systems' (2008) 160 Euphytica 143.

[75] The complete investigation is available in Serena Mariani, *Urban agriculture and plant variety rights. The legal challenges of "urbanising" plant breeding in the European Union* (Aracne 2022).

headquarters in Geneva, Switzerland, that aims at promoting an effective system of plant variety protection.

Unlike other protectable material, plant varieties could be easily copied because of the self–replicating nature of the relevant biological material. This is the reason why the UPOV introduced the existing concept of plant variety protection as a *sui generis* intellectual property system. Indeed, during the Diplomatic Conference held in 1961, it was stated that

> *des discussions précédentes, il ressort que le droit de l'obtenteur présente des particularités telles qu'il ne correspond exactement à aucun droit existant. […] Le Comité d'experts est d'accord pour reconnaître que le droit porte sur un objet immatériel, résultat du travail du cerveau humain et qu'il entre par conséquent dans le domaine de la propriété intellectuelle.*[76]

The UPOV Contracting Parties agreed to create this protection system for plant variety protection because, as the Experts Committee highlighted, plant variety protection as an intellectual property regime does not correspond to any other existing intellectual property rights, especially not to the dominant legal paradigms which protect inventions and artistic works.

The Convention was revised in 1972, 1978 and lastly in 1991, as provided for in Article 27 of the 1961 Act.[77] The 1972 and 1978 text did not substantially modify the provisions of the Convention. Currently, all the UPOV Members are party either to the 1978 or to the 1991 version of the agreement. The European Union joined the membership of UPOV only on 29 July 2005 and became party to the 1991 Act of the Convention. However, even before being a Member, the EU modelled its legislation on the rules set out by the UPOV Convention[78] with the adoption of Council Regulation (EC) no. 2100/94 of 27 July 1994 on Community plant variety rights, referred to as 'Basic Regulation'. Despite the fact that the European Community was not a UPOV Member at that time, the Preamble states that the

[76] UPOV, 'Actes des conférences internationales pour la protection des obtentions végétales 1957–1961' (UPOV/Pub/316 1972) 36.

[77] According to article 27(1) thereof, the UPOV Convention had to be reviewed periodically in order to improve the working of the Union.

[78] In particular, Council Regulation (EC) 2100/94 on Community plant variety rights (Community plant variety rights Regulation) [1994] OJ L227 states in its Preamble that: 'This Regulation takes into account existing international conventions such as the International Convention for the Protection of New Varieties of Plants (UPOV Convention)'.

Basic Regulation takes into account existing international conventions such as the UPOV Convention.

The Preamble states that the purpose of the Basic Regulation is to stimulate the breeding and development of new varieties, given the importance of safeguarding agricultural production and the need to supply the EU market with products offering specific characteristics. It allows for the grant of a unitary IP right on new plant varieties throughout the European Union upon a single application and under specific conditions: the exclusive right granted to the owner of a certain variety having the characteristics required by the Basic Regulation is called 'Community plant variety right' (CPVR or Community PVR).[79]

Article 1 of the Basic Regulation establishes that the system of Community plant variety rights is the 'sole and exclusive form of Community industrial property rights for plant varieties', thus rejecting other IP protection regimes concerning plant varieties, such as patents. Therefore, according to Article 27(3) (b) of the Trips Agreement, the EU provides for the protection of plant varieties by an effective *sui generis* system, excluding patents or any combination thereof.

CPVRs have uniform effect within the territory of the Union, which means that their grant, transfer, and termination are on a uniform basis, according to Article 2 of the Basic Regulation. The EU plant variety protection system is distinct, independent and alternative from national ones, therefore, it co–exists with national systems, the content of which is not uniform due to the lack of harmonization at the EU level. However, national and EU plant variety protection could not overlap: according to Article 92 paragraph 1 of the Basic Regulation, cumulative protection is prohibited and any cumulative right shall be deemed as ineffective.[80]

The definition of variety set out in Article 5(2) of the Basic Regulation reproduces the wording of Article 1(vi) of the 1991 Act of the UPOV Con-

[79] By means of the Lisbon Treaty, the European Union took the place of the European Community and became its legal successor. Despite this, the regime created by the Community plant variety rights Regulation is still named 'Community plant variety rights' system and its implementation and application are still carried out by the 'Community Plant Variety Office'. In the present contribution the wording 'EU plant variety rights' and 'Community plant variety rights' will be used indifferently to indicate the IP regime for plant varieties established by the Community plant variety rights Regulation.

[80] For further insights on EU plant variety protection, see Gert Würtenberger and others, *European Union Plant Variety Protection* (Oxford University Press 2021).

vention,[81] the meaning thereof being so far undisputed. However, unlike the 1991 UPOV definition of plant variety, Article 5(1) of the Basic Regulation explicitly refers to hybrids as the object of Community PVRs, even though a legal definition of this notion is not given. Therefore, hybrid varieties fall within the scope of the definition of plant varieties under the Regulation (EC) no. 2100/94. The Article also introduces a new expression, i.e., 'variety constituents', as a synonym for 'propagating material'.[82]

In addition, the Basic Regulation states that varieties of all botanical genera and species, including, inter alia, hybrids between genera or species may form the object of Community PVRs.[83] The result is that the protectable subject matter is not limited to a certain number of botanical genera or species.

The extensive protection is consistent with the goal of the 1991 Act of the UPOV Convention, which required Contracting Parties to recognise plant variety protection on all botanical genera and species in order to promote harmonization and prevent infringements.

To implement the rules set out in the Basic Regulation, Article 4 thereof established the Community Plant Variety Office (CPVO), an EU agency governed by European public law, with its own legal personality and its own financial independence. The CPVO is based in Angers, France, and it is managed by its President who is aided by a Vice–President. The tasks of the CPVO include the examination of the applications, the approval of variety denominations, the grant and cancellation of Community plant variety rights. All the decisions of the CPVO are taken under the authority of the

[81] According to art 1 (vi) of the UPOV, '1991 Act of the International Convention for the Protection of New Varieties of Plants', UPOV Publication no: 221 (E), variety means 'a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder's right are fully met, can be - defined by the expression of the characteristics resulting from a given genotype or combination of genotypes, - distinguished from any other plant grouping by the expression of at least one of the said characteristics and - considered as a unit with regard to its suitability for being propagated unchanged'.

[82] PACE van der Kooij, *Introduction to the EC Regulation on plant variety protection* (Kluwer Law International 1997) 13.

[83] Even if most hybrids result from crossing processes within the same taxon (eg maize), the Regulation underlines that even hybrids that are the offspring of breeding between different genera or species are protectable subject matter. Cf. ibid 12. The author emphasizes that also 'varieties of mushroom and other fungi can be protected, although such varieties are not considered to be plant varieties within the usual meaning'.

President, except those made by its Board of Appeal[84] which was established according to Article 45 of the Basic Regulation and which decides on appeals filed against the decisions of the Office.[85]

Pursuant to Article 114 of the Basic Regulation, detailed implementing rules have been adopted for the purpose of applying the Basic Regulation through the Commission Regulation (EC) no. 1239/95 of 31 May 1995, subsequently recast by the Commission Regulation (EC) no. 874/2009 of 17 September 2009, hereinafter referred to as 'Implementing Rules'.

The definition of breeder, as the person entitled to EU plant variety rights, is enshrined in Article 11(1) of the Basic Regulation and it follows the content of Article 1(iv) of the 1991 UPOV Convention,[86] stating that 'The person who bred, or discovered and developed the variety, or his successor in title, both – the person and his successor – referred to hereinafter as 'the breeder', shall be entitled to the Community plant variety right'. In this case, consistent with the interpretation of 1991 UPOV, the term 'person' refers to any physical or legal persons, including farmers.

Article 13 of the Basic Regulation deals with the scope of Community PVRs, indicating the acts that the title holder is entitled to effect. The content of this provision is substantially identical to Article 14 of the 1991 UPOV Convention. The structure is also the same: Article 13 lists the acts the holder of a PVR is entitled to perform, then the following Articles (such as Articles 14, 15 and 16) provide a limitation to the right. Paragraph 2 of Article 13 lists the acts in respect of the material of the variety, i.e., variety constituents or harvested material, that only the CPVR holder, as the person to whom the right has been granted, is entitled to perform. These acts are

[84] ibid 19.

[85] For further insights, see Martin Ekvad, 'The functioning of the Community plant variety office Board of Appeal' in Christophe Geiger, Craig Allen Nard and Xavier Seuba (eds), *Intellectual property and the judiciary* (Eipin series 4, Edward Elgar Publishing 2018).

[86] Unlike art 1(iv) of the 1991 Act, art 11(1) does not include in the notion of breeder the person who is the employer of the person who bred, or discovered and developed the new plant variety, or who has commissioned the latter's work. However, art 11(4) specifies that if the breeder is an employee, the entitlement to the CPVR shall be determined in accordance with the national law applicable to the employment relationship in the context of which the variety was bred, or discovered and developed. In so doing, the Basic Regulation sets an exception to the rule stated in art 11(1), which establishes that only the breeder is entitled to CPVRs.

production or reproduction (multiplication),[87] conditioning for the purpose of propagation,[88] offering for sale,[89] selling or other marketing, exporting from and importing to the EU, stocking for any of the purposes above mentioned.

The performance of any of these acts requires the authorisation of the CPVR holder, who may subject it to conditions and limitations.

In order to be protectable under the CPVR system, a plant variety has to be (a) distinct; (b) uniform; (c) stable and (d) new, according to Article 6 of the Basic Regulation. Furthermore, it has to be designated by a suitable (e) variety denomination.

The first three technical conditions form the so–called DUS requirement and concern the phenotypical characteristics of the candidate plant variety, resulting from a certain genotype. It must be highlighted that, as a general rule, the EU plant variety protection scheme does not require any commercial or cultivation value for the new plant variety.[90]

6. *A Rural-Oriented System?*

Even though the EU plant variety protection system does not exclude plant varieties for urban agriculture from its scope, it is tailored to promote

[87] According to Würtenberger (n 78) 134, 'this is the holder's most important right, because it is almost never affected by the exhaustion rule laid down in Article 16'. Indeed, the importance of this act in respect of the protected material is strictly connected to the nature of said subject matter, which it is naturally self–replicating and could be effortlessly reproduced by third parties.

[88] This includes, for example, the acts of cleaning, application of fungicides or insecticides and coating.

[89] The offering for sale may take place both online and offline.

[90] Conversely, a satisfactory value for cultivation and use (VCU) is required for reproductive material of agricultural plant species in order to be marketed in the European Union, according to Council Directive (EC) 2002/53 on the common catalogue of varieties of agricultural plant species [2002] OJ L193. VCU is tested through field trials but, unlike the DUS examination whose focus is on morphological characters of the variety, in the VCU testing the emphasis is on the assessment of the agronomic traits of the plant. For further insights on the EU seed marketing legislation and about the impacts of these rules on EU plant variety protection, see Serena Mariani, 'Law–driven innovation in cereal varieties: the role of plant variety protection and seed marketing legislation in the European Union' (2021) 13 Sustainability 8049.

a different agricultural paradigm, which can be considered rural-oriented. When it was first developed, this system was designed to promote a specific model which aimed to bring new, distinct, sufficiently uniform and stable plant varieties to high–input agriculture. Therefore, the current EU legal framework on plant variety protection struggles to adapt its provisions to the characteristics of urban agriculture and demands of urban producers: a concrete example concerns the uniformity condition of protection.[91]

Article 8 of the Basic Regulation deals with the uniformity condition of protectable varieties, which have to be 'sufficiently uniform in the expression of those characteristics which are included in the examination for distinctness, as well as any others used for the variety description'. This part emphasizes the role of the expressed characteristics of the candidate variety, on a phenotypic level, when assessing its uniformity.

It should be underlined that a candidate variety is compliant with this requirement even if it is not completely uniform. The use of the word 'sufficiently' entails that limited variation is expected and accepted: this is rooted in the nature of plants as living organisms and connected to the propagation of the variety. The level of uniformity and number of off–types differ from one variety to another, depending on whether the candidate crops are hybrids, as well as on the method of plant propagation in question.[92] In this sense, unless mutation occurs, the offspring produced by means of asexual pollination will be genetically identical to the parent plant, unlike sexually reproduced varieties which differ from the parent plants. Consequently, the uniformity benchmark will be different.

The conditions of distinctness, uniformity and stability are tested during a technical examination of the candidate variety aimed at assessing whether these requirements are met. This technical examination is not conducted by the CPVO itself, which does not have a technical infrastructure. Instead, the examination is carried out by the competent office or offices in at least one of the Member States entrusted with the responsibility for the technical examination of varieties of the species concerned (so–called Examination Office), in accordance with Article 55 of the Basic Regulation.

[91] Other examples and a specific analysis of this topic can be found in Mariani (n 75).

[92] UPOV, 'General introduction to the examination of distinctness, uniformity and stability and the development of harmonized descriptions of new varieties of plants' (Tg/1/3 2002). The DUS Test Guidelines are the standards against which the level of uniformity of CPVRs candidate varieties is usually measured.

The CPVO Technical Unit provides the Examination Offices with technical guidelines and protocols, based on the UPOV guidelines and aimed at harmonizing the DUS testing.[93] The Examination Offices must conduct the test in accordance with those guidelines and follow the instructions given by the Office, as provided for in Article 56 of the Basic Regulation. Detailed protocols adopted by the CPVO Administrative Council exist in each of the four crop sectors, i.e. agricultural, vegetable, ornamental and forestry, and fruit. Every protocol refers to a specific botanical taxon and it describes the technical procedures to be followed during the technical examination.

Upon conclusion of the DUS testing, the Examination Office sends an examination report to the CPVO when requested by the CPVO itself or if the Examination Office considers the results of the test adequate to evaluate the variety, as laid down in Article 57 of the Basic Regulation. If the Examination Office decides that the DUS conditions are met, it sends a description of the variety to the CPVO. Then, the CPVO communicates the results of the examinations and the description of the variety to the applicant, who has the opportunity to comment thereon.

It's the applicant's responsibility to provide suitable plant material for the DUS testing purposes on the date of the application for a Community PVR, as individuated in Article 51 of the Basic Regulation.[94]

Having said that, it is worth emphasizing that the uniformity requirement has been the subject of increasing criticism. In particular, it is believed

[93] It is important to highlight that the CPVO guidelines, even when they are based on the UPOV protocols, are independent of those of other jurisdictions and the CPVO is not obliged to accept their findings, although they are all UPOV-based. The CPVO Board of Appeal has pointed out this aspect in *Probil* (Case A 003/2003) CPVO Board of Appeal [2004], stating that the fact that a plant variety right has been granted in other UPOV Member States 'did not oblige the Office to take over their test reports or their decisions. The Community system is independent – and different – from their systems. The Office has to examine the application in accordance with the provisions of the Council Regulation'.

[94] As stated in ibid, 'the variety applied for must fulfil the conditions for the grant of a community plant variety right at the date of application. This date is relevant for the period of grace. The space of time between the date of application and the testing is not meant to permit further breeding activities for the elimination of any lack of DUS criteria. The original plant material is not replaceable by further developed material'. Therefore, the applicant, after the date of application, cannot carry on further breeding activities aimed at improving the candidate variety with the purpose of resubmitting the plant material, since the basic rule is that the candidate variety must meet the DUS requirements on the date of application, at the latest.

that this condition only addresses the needs of conventional agriculture, neglecting the dangerous consequences in term of genetic homogeneity,[95] since only a broad genetic basis allows plant and animal species to adapt to varying conditions.[96]

Furthermore, the uniformity requirement discourages the development of heterogeneous groupings of plants, not taking into account the interests of local communities, low–input farmers and organic producers. Uniformity is closely linked to high–input agriculture, which adapts the environment to the requirements of the crops, instead of adapting the plants to the surrounding environment.

In this system,

> genetic diversity within crops is replaced by genetic uniformity within crop varieties primarily selected for high yield potential. The general consequences of modern agriculture therefore are monocultures, the use of a limited set of uniform varieties per crop, reduction of number of different crops grown and hence reduction of the crop rotation. All this leads to a higher vulnerability of crops to pest and diseases and greater dependence on chemical control.[97]

Said approach does not take into consideration the specific needs of non–conventional systems, such as organic agriculture.[98] In addition, farmers who opt for multicrop farming do not value uniformity like conventional producers. At the same time, an excessive use of uniform plant varieties can jeopardise genetic diversity in agriculture and increase crop vulnerability. This situation leads to the paradox that plant breeding, while depending on the availability and access to genetic diversity, is developing plant varieties the use of which is a major threat to biodiversity.[99]

In this scenario, regulatory constraints are found in the legal framework of EU plant variety protection, which could hinder the possibility for plant breeders to provide innovation for different agricultural paradigms. Specif-

[95] Dan Leskien and Michael Flitner, 'Intellectual property rights and plant genetic resources: options for a sui generis system' (1997) 6 Issues in genetic resources 77.

[96] Alain Santandreu, Alberto Perazzoli and Marielle Dubbeling, 'Biodiversity, poverty and urban agriculture in Latin America' (2002) Urban agriculture magazine 9, 10.

[97] Hardon (n 70) 93.

[98] It has been noted that organic crop production in and near cities is challenging for many reasons and one of them is the lack of locally adapted plant varieties capable of thriving in such farming and environmental conditions. For further insights, see Klaus Lorenz, 'Organic urban agriculture' (2015) 180(4/5) Soil science 146, 148.

[99] Hardon (n 70) 93.

ically, the plant variety protection regime does not allow plant breeders to move away from this 'uniformity standard' if they aim to seek IP protection for their innovation: uniformity is indeed one of five conditions that a candidate variety must meet in order to qualify for plant variety rights in UPOV Contracting Parties. Plant varieties that do not meet this requirement cannot be protected.

This is particularly relevant in the context of urban agriculture, where the demands of urban gardeners and farmers do not appear to be directed towards uniform plant varieties, because of their preference for organic and multicrop farming. In such a scenario, plant breeders are not encouraged to pursue innovation for different farming systems, knowing that they will not obtain IP protection for their creation.[100]

7. *Final Remarks*

Urbanisation represents a challenge for the agriculture of the third millennium, as well as an opportunity, as proven by the rising phenomenon of urban agriculture, which is able to achieve social and environmental goals, offering the chance to urban dwellers to become more self–sufficient in terms of food production, and leading the transition towards more sustainable and resilient food systems. The rise of urban agriculture has demonstrated that it is possible to break the rural–urban divide, by extending agricultural activities beyond their traditional locations.

Nevertheless, engaging in agriculture in the city faces challenges and limitations. One of them is represented by the shortage of plant varieties with urban–oriented features, adapted to the local environment. The reasons lie

[100] It has been suggested that in specific cases the requirements of uniformity and stability should be waived, and replaced by the condition of 'identifiability', as in the Malaysian Plant Variety Protection Act for traditional varieties and varieties developed by the local community. In these cases, the material is not required to be uniform and stable but only identifiable by any person skilled in the art. For further insights on this topic, see, *inter alia,* Michael Blakeney and Siddique Kadambot (eds), *Local knowledge, intellectual property and agricultural innovation* (Springer Nature 2020); Carlos Correa, Sangeeta Shashikant and François Meienberg, *Plant variety protection in developing countries: a tool for designing a sui generis plant variety protection system: an alternative to UPOV 1991* (Apbrebes 2015); Achim Seiler, 'Sui generis systems: obligations and options for developing countries' (1998) 34 Biotechnology and development monitor 2; Leskien (n 95).

in the high costs of plant breeding activities, in terms of time, specialised manpower, land and equipment, which lead to low investment in plant varieties intended for marginal environments that might not ensure profitability. Indeed, breeders need to recoup expenses and have a return on investments in order to pursue further breeding activities.

Therefore, innovation is much–needed but, at the same time, it must be encouraged.

There are different tools to promote innovation of an economic and technical nature, which range from increasing public funding to ensuring proper training and facilitated access to the latest technologies, from attracting private investments to promoting public–private partnerships and technology transfers.

The law can also work as a tool to support and drive innovation. As a matter of fact, the promotion of a plant breeding model capable of developing suitable solutions beyond the traditional rural and high–input paradigm, in order to support the transition towards more sustainable agricultural systems, depends largely on a favourable regulatory framework able to protect the interests of both innovators and users, in terms of an effective intellectual property protection.

In the case of new plant varieties in the EU, this framework is represented by plant variety protection, which was established in the European Union by Regulation (EC) no. 2100/94. This system has been designed to protect the interests of the breeder of a new plant variety, in order to foster further innovation in plant breeding while safeguarding agricultural production.

At the time when it was first developed, this system was tailored to promote a specific rural high-input paradigm. However, despite the increase in alternatives, the prerogatives of other forms of farming, such as urban agriculture, have been neglected by the EU legislation on intellectual property protection of plant varieties. Therefore, promoting innovations specifically intended for different farming systems has not been a priority for the European legislator, but the increasing urgency for sustainability and resource efficiency calls for greater commitment to encouraging innovation beyond the conventional model, which cannot serve all farmers or address all environments.

The promotion of urban agriculture depends on 'urbanising' plant breeding: as a matter of fact, the creation of new varieties supports the development of agriculture in urban environments. The emergence of gardening and agricultural activities in numerous cities of the world, which is playing a

fundamental role in tackling the sustainability challenges, requires breeders to develop genetic material adapted to the local conditions.

In this sense, plant breeding has to shift its purposes and targets, to also address a different urban and low–input paradigm: the breeding of plant varieties suitable for urban agriculture should take into consideration the unpredictability of urban environments, characterised by different microclimates, farming conditions and locations, both outdoor and indoor, and the smaller scale of implementation compared to rural agriculture, affecting the choices of crops (e.g., high–value and specialty market ones), technologies (e.g., aquaponics, hydroponics and Led-farming) and farming practices (e.g., organic, low–input and multicrop).

However, the current EU legal framework on plant variety protection has not been designed to promote urban agriculture. For example, with regard to the protectable subject matter, the EU plant variety protection regime provides that only new, distinct, sufficiently uniform and stable varieties can be protected.

It has been already pointed out that the uniformity requirement is tailored for the high–input agriculture paradigm, based on monocultures and the use of a limited set of uniform varieties, which ignores the dangerous consequences of genetic homogeneity. Unlike in rural agriculture, urban low–input and organic farmers, as well as multicrop producers, are not particularly interested in uniform plant varieties. Nevertheless, protectable material must be uniform in order to be considered for plant variety protection. This requirement may represent a regulatory constraint to innovation, because it neglects the needs of other farming systems and jeopardises the possibility for plant breeders to protect new non–uniform reproductive material.

Therefore, the EU plant variety rights system established by Regulation (EC) no. 2100/94 does not appear to play any particular role in encouraging the development of plant varieties suitable for urban agriculture, adapted to its farming peculiarities, environmental, agroecological, or economic and social conditions. Nor does it seem to play any role in meeting the interests of the involved actors.

On the contrary, to a certain extent, the Basic Regulation may represent a regulatory constraint to urban agriculture, implicitly creating barriers to the development of an 'alternative' agricultural paradigm. In order to overcome these barriers, it is indispensable to 'de–ruralise' the relevant legal framework on plant variety protection to extend it to new agricultural paradigms, especially when they can play a significant role in tackling sustainability challenges, as is the case of urban agriculture.

Simona Tiribelli & Naroa Coretti Sánchez

THE ETHICS OF SUSTAINABILITY FOR URBAN AI

1. *Introduction*

The phenomenon of "Urban AI",[1] that is, the design and pervasive use of artificial intelligence (AI) systems *in* and *for* urban environments – i.e. urban life, spaces, places, infrastructures, services, and practices – has grown tremendously over the last decades.[2] AI systems, such as sensors and machine learning (ML) and deep learning (DL) algorithm-based technology, are indeed deployed in cities at a growing pace to optimize and/or automatize an increasing number of tasks, decisions, and key choices in the fields of *urban design* and *city management*.[3] Such decisions concern a wide range of sectors: those of transport and mobility, which can leverage the opportunities offered by AI systems such as pervasive sensors and cameras and their real-time collection of huge amounts of urban data, ML and DL algorithms with their capacity to inference and analyze predictive patterns of spatial behaviors in cities, and/or autonomous vehicles;[4] that of urban security (examples include ML-based criminal data mining and processing and/or facial recognition technology for an improved police patrol allocation); and those of primary urban services such as housing and healthcare (e.g., leveraging the gathering and analysis of urban and geospatial data to boost investment planning and rationalize access to facilities) – just to mention a few.

However, along with opportunities, these AI systems integrated into urban environments (i.e., urban AI systems) have also already unveiled a number of ethical risks. Examples of such risks range from urban surveillance leading to privacy infringements to phenomena of urban discrimination,

[1] Aale Luusua and Johanna Ylipulli, 'Urban AI: understanding the emerging role of artificial intelligence in smart cities' (2022) AI & SOCIETY; Michael Batty, 'The emergence and evolution of urban AI' (2022) AI & SOCIETY.

[2] Luusua and Ylipulli (n 1).

[3] Marta Ziosi and others, 'Smart cities: reviewing the debate about their ethical implications' (2022) AI & SOCIETY.

[4] Batty, 'The emergence and evolution of urban AI' (n 1).

marginalization, or exclusion of people belonging to certain categories, due to unfair biases in the design of urban AIs, training, and use, and finally to the potential increase in urban pollution in the long run because of the high energy consumption of AI systems training and data centers.[5] Nevertheless, although the corpus of ethical literature and initiatives on Urban AI is growing (e.g., see the "Atlas of Ethical Initiatives" developed by the Global Observatory on Urban AI[6]), such ethical issues, risks, and challenges have not been sufficiently and/or systematically considered thus far, nor have specific ethical frameworks been developed for the design, development, and governance of Urban AI.[7]

This lack is problematic as it might hamper the trustworthy deployment of AI systems into the urban fabric, and in a way to properly respond to citizens' diversified needs and characteristics, leading to potentially negative externalities for urban inhabitants and the urban ecosystem as a whole. If that were the case, we would also face a huge societal opportunity loss, that is, harnessing AIs for developing *better* cities or, recalling the definition of the International Telecommunication Union (ITU) focus group on the topic, *sustainable smart cities* (SSCs): cities that, beyond being more efficient, are also and especially *environmentally sensitive* and *human-centered*, that is, more inclusive, just, and fairer.[8]

In this paper, we aim to contribute to filling this gap by proposing an AI ethics compass for the ethical design and development of Urban AI grounded on the AI ethics principle of sustainability. To do so, in the following section, we first show the need for AI ethics and more specifically for an AI ethics compass for the ethical development of Urban AI towards SSCs. Then, we claim that such a compass can be elaborated on the AI ethics principle of

[5] ibid; Dean Curran and Alan Smart, 'Data-driven governance, smart urbanism and risk-class inequalities: Security and social credit in China' (2020) 58(3) Urban Studies 487; Aimee van Wynsberghe, 'Sustainable AI: AI for sustainability and the sustainability of AI' (2021) 1(3) AI and Ethics 213; Roy Schwartz and others, 'Green AI' (2020) 63(12) Communications of the ACM 54.

[6] 'Global Observatory of Urban Artificial Intelligence' <https://gouai.cidob.org> accessed 17 September 2024.

[7] Otello Palmini and Federico Cugurullo, 'Charting AI urbanism: conceptual sources and spatial implications of urban artificial intelligence' (2023) 3(1) Discover Artificial Intelligence.

[8] International Telecommunication Union, 'Smart Sustainable Cities' (*ITU* 2016) <www.itu.int/en/ITU-T/focusgroups/ssc/Pages/default.aspx> accessed 15 July 2023.

sustainability if the latter is understood from an ethical perspective. Hence, drawing on insights developed in AI ethics, we analyze and unpack the AI ethics principle of sustainability and show that it encompasses two normative dimensions. We show that sustainability articulates into an ecological dimension and the dimension of social justice, and conclude by pinpointing a few ethical criteria with which each dimension needs to comply in order to promote sustainability in AI. In the third section, we apply theory to practice focusing on the case of shared autonomous vehicles as a key example of urban AI systems and show how the sustainability-driven AI ethics compass enables us to shed light on a series of pivotal ethical aspects that ought to be considered if we aim to leverage Urban AI for developing SSCs.

2. *AI Ethics for Urban AI*

The concept of Urban AI refers to a stratified techno-social phenomenon: i.e. the rapid design and deep integration of interconnected AI systems such as sensors and ML and DL algorithms in urban environments – i.e., life, spaces, places, geographies, infrastructures, services, and practice; ii. the growing human reliance on urban big data and specifically on urban (often: predictive) patterns inferred or discovered from the collection and the algorithmic combined processing of different types of urban data to optimize urban multi-level decision-making; and therefore, iii. the reshaping action carried out by AI systems on how cities are conceived, planned, managed, and hence lived by their inhabitants – from a design-oriented perspective.

The influential role played by AI systems and ML and DL algorithms in urban environments is indeed today increasingly clear. Defined as "interactive, self-learning, smart, and (semi-) autonomous reservoir of agency on tap",[9] they probabilistically learn how to achieve a certain goal in the most efficient way. The growing degree of our reliance on urban datasets and their processing along with our (semi-)delegation to algorithms of more and more urban tasks and decisions, makes it evident that how urban AI systems and algorithms work (i.e., elaborate data, produce outputs, complete tasks, and

[9] Luciano Floridi, 'What the Near Future of Artificial Intelligence Could Be' (2020) Philosophy and Technology <https://ssrn.com/abstract=3570424> accessed 17 September 2024.

make decisions), that is, *how* they are *designed*, is of paramount importance for the *well-being* of the urban ecosystem and its inhabitants.[10]

This influence is acknowledged in the literature on AI and urbanism, where the term 'Urban AI' was first coined. It consistently uses this concept to underline AIs as one of the most powerful means for rethinking contemporary urbanism and (smart) cities in an unprecedented, more *efficient*, and *sustainable* way.[11] Examples of using AIs in this sense and toward achieving the United Nations Sustainable Development Goals (SDGs) abound in the above-mentioned literature.[12] Opportunities and benefits include the optimization of resource management, cost reduction, and energy distribution, enhanced transportation mobility and traffic management along with reduced congestion and CO_2 emissions, augmented urban planning and efficient land use, administrative efficiency through task automation and ameliorated digital civic participation via apps, and improved urban service provision such as police security controls and healthcare – just to mention a few.[13]

[10] In this paper, we use the term 'Urban AI' to refer to this stratified phenomenon, which includes the pervasive use of AIs and ML- and DL-based systems in the urban ecosystem as well as the structuring of a network of interconnected AI systems in urban spaces (or urban AI systems). It might be relevant to question whether it is already appropriate to talk about the rise of algorithmic urban governance and what further implications it might raise. The increasingly influencial role acquired by such systems indeed is rapidly opening the urban scenario to completely new kinds of autonomous and semi-autonomous urban "agents" and/or decision-makers which are artificial or algorithmic. We will not zoom into this phenomenon, but for an in-depth analysis of the rise of the "algorithmic governance" in contemporary informational societies, see Simona Tiribelli, *Moral Freedom in the Age of Artificial Intelligence* (Mimesis International 2022).

[11] Luusua and Ylipulli (n 1); Palmini and Cugurullo (n 7); Tim Heinrich Son and others, 'Algorithmic urban planning for smart and sustainable development: Systematic review of the literature' (2023) 94 Sustainable Cities and Society 104562.

[12] Especially considering the SDGs more relevant for urban contexts such as water and wastewater treatment (SDG 6), energy and technology development (SDG 7, 8 and 9), inequality reduction (SDG 10), sustainable consumption and production (SDG 12), and climate change actions (SDG 13). See Changchang Zhou and others, 'Urban scaling patterns for sustainable development goals related to water, energy, infrastructure, and society in China' (2022) 185 Resources, Conservation and Recycling 106443. Thomas W Sanchez and others, 'The prospects of artificial intelligence in urban planning' (2022) International Journal of Urban Sciences 1.

[13] Prithwish Basu and Imdat As, *Artificial Intelligence in Urban Planning and Design* (Elsevier 2022); Silvio Carta, *Machine Learning, Artificial Intelligence and Urban Assemblages:*

In parallel, AI systems embedded in cities have been shown to generate also a wide number of ethical risks and challenges. Among them, for instance, the delegation of small tasks such as traffic optimization decisions to algorithms can lead to choices privileging the efficiency with which a task is completed (e.g., taking someone the fastest way to a destination) over the path chosen to meet that goal, causing negative externalities, for example, by redirecting the traffic to offshoots or residential neighborhoods at the expense of urban residents and pedestrians.[14] Furthermore, for the sake of optimizing urban services (e.g., transport, security, etc.), many deeply intrusive AI-based surveillance tools such as facial recognition technology can be silently introduced, reinforcing a data-and-algorithmic driven urban management approach that has been disclosed to be vulnerable to unfair bias, in this way strengthening the existing phenomena of discrimination and exclusion (known also as "geographies of algorithmic violence").[15] This is the case of some algorithmic policing tools that were revealed to allocate police patrol resources disproportionally in the black or poorest urban areas because trained on biased historical data imbued with socioeconomic and racial disparities.[16] As a result, biased urban AI tools, under the illusion of

Applications in Architecture and Urban Design (Wiley and Sons 2022); Michael Batty, 'Geocomputation' (2017) 44(4) Environment and Planning B: Urban Analytics and City Science 595; Michael Batty, 'Artificial intelligence and smart cities' (2018) 45(1) Environment and Planning B: Urban Analytics and City Science 3; Antonia Hadjimichael, Joaquim Comas and Lluís Corominas, 'Do machine learning methods used in data mining enhance the potential of decision support systems? A review for the urban water sector' (2016) 29(6) AI Communications 747; Tan Yigitcanlar and others, 'Can Building "Artificially Intelligent Cities" Safeguard Humanity from Natural Disasters, Pandemics, and Other Catastrophes? An Urban Scholar's Perspective' (2020) 20(10) Sensors 2988; Kwok Tai Chui, Miltiadis D Lytras and Anna Visvizi, 'Energy Sustainability in Smart Cities: Artificial Intelligence, Smart Monitoring, and Optimization of Energy Consumption' (2018) 11(11) Energies 2869.

[14] Eran Fisher, 'Do algorithms have a right to the city? Waze and algorithmic spatiality' (2020) Cultural Studies 1.

[15] Sarah Holder, 'San Diego, 'Smart' Streetlights Spark Surveillance Reform' (*Bloomberg*, 2020) <www.bloomberg.com/news/articles/2020-08-06/a-surveillance-standoff-over-smart-streetlights> accessed 16 July 2023; Sara Safransky, 'Geographies of Algorithmic Violence: Redlining the Smart City' (2019) 44(2) International Journal of Urban and Regional Research 200.

[16] Andrew Guthrie Ferguson, 'Predictive Policing Theory' in *The Cambridge Handbook of Policing in the United States* (Cambridge University Press 2019); Ross Beveridge and Philippe Koch, 'The post-political trap? Reflections on politics, agency and the city' (2016) 54(1) Urban Studies 31.

data objectivity, actually reinforced the data-driven assessment of these areas as the most dangerous ones, thus hindering their social and economic growth. Similar examples of biased algorithmic decision-making tools have also been exposed with respect to the access to and provision of key urban services such as housing, credit landing, and healthcare (and many others), showing the way in which they discriminate or exclude people on the basis of sensitive or protected attributes such as age, gender, and/or ethnicity.[17]

Clearly, if such challenges and risks are not addressed by the design of urban AI systems, they might easily end up worsening the ethical issues, such as unfair inequalities, they were intended to repair.[18] In this regard, another central ethical issue concerns who can effectively use urban AI systems, and what skills they need to possess (e.g., AI-based platforms, autonomous vehicles, etc.) to be used effectively. Research on urban AI systems indeed shows that training is often lacking on some data (a problem known as *minority bias*),[19] for example, as there is less data available on say, the elderly, ethnic minorities, and or vulnerable groups broadly (e.g., people affected by some health and physical constraints), the needs and characteristics of these internally heterogeneous groups are not taken into consideration. This leads to their exclusion from enjoying AI benefits or accessing certain basic services – a phenomenon that can be due also to a lack of updated technologies, digital literacy skills, and/or lower socio-economic conditions.[20]

Ethical risks of injustice posed by Urban AI also concern the environment. This sounds paradoxical, considering how the use of technology in/for cities has been extensively justified by the claim that, enabled by the

[17] Solon Barocas and Andrew D Selbst, 'Big Data's Disparate Impact' (2016) 104 California Law Review 671 <https://ssrn.com/abstract=2477899> accessed 17 September 2024; Cathy O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (Crown Publishing Group NY 2016); Geoff Boeing and others, 'Housing Search in the Age of Big Data: Smarter Cities or the Same Old Blind Spots?' (2020) <https://ssrn.com/abstract=3528765> accessed 17 September 2024.

[18] Tan Yigitcanlar and others, 'Contributions and Risks of Artificial Intelligence (AI) in Building Smarter Cities: Insights from a Systematic Review of the Literature' (2020) 13(6) Energies 1473.

[19] Lucia Migliorelli and others, 'Accountable Deep-Learning-Based Vision Systems for Preterm Infant Monitoring' (2023) 56(5) Computer 84; Benedetta Giovanola and Simona Tiribelli, 'Weapons of moral construction? On the value of fairness in algorithmic decision-making' (2022) 24(1) Ethics and Information Technology.

[20] Maria Sourbati and Frauke Behrendt, 'Smart mobility, age and data justice' (2020) 23(6) New Media & Society 1398.

digital transition, it would increase sustainability.[21] However, more and more available urban AI systems have also been labeled as "red AI",[22] as they generate substantial environmental costs, especially related to energy consumption for AI training and the cooling of urban data centers – costs that are often difficult to measure due to the opacity of AI providers.

Recently, scholars in the field claimed that at the core of such issues there is a techno-centric approach, replacing a human-centered one, which fails to consider and meet the needs of a diversified population, privileging instead human and environmental adaptation to technology criteria.[23] Rooted in the very first idea of a smart city, this approach advances a techno-solutionism for the most pressing urban challenges and ends up reducing the city to an element to optimize, oversimplifying the multidimensionality of its urban character. However, as stressed by Green, looking at urban life just via the lens of technology leads to "cities that appear smart but under the surface are rife with injustice and inequality";[24] cities shaped by urban AI systems that are flawed and unfairly biased, often conceived based on idealized and/or high-skilled individuals (i.e., who are the smart people the smart city paradigm targets?), while excluding *by design* those that do not fall into this category.[25]

The importance of restoring a human-centered approach to cities and of considering the ethical aspects and risks of Urban AI highlighted above has also motivated the ITU focus group on the topic to add sustainability to the classical definition of the 'smart city' and to shift the focus of smart city research towards that on 'smart and sustainable city' (SSC) to indicate the use of technology not only for more optimized and efficient cities but especially for more just and fairer ones.[26] However, despite the acknowledgment of the need for a systematic consideration and management of the ethical risks posed by urban AI systems as crucial for SSCs, this effort and therefore the shift toward human-centered Urban AI seem to be hampered, both by the

[21] Yigitcanlar and others (n 18).

[22] Schwartz and others (n 5).

[23] Sanchez and others (n 12); Ben Green, *The smart enough city: putting technology in its place to reclaim our urban future* (MIT Press 2019).

[24] Green (n 23).

[25] Simona Tiribelli, 'The AI Ethics Principle of Autonomy in Health Recommender Systems' (2022) Argumenta.

[26] International Telecommunication Union (n 8); Heinrich Son and others (n 11).

multiplicity of such risks, as well as by the absence of a specific and unified AI ethics framework for Urban AI.[27]

Indeed, while hundreds of ethics frameworks have been proposed for responsible and trustworthy AI to date,[28] they are high-level and do not refer to or offer specific ethical guidance for Urban AI.[29] Furthermore, these lists of AI ethics principles are very often vaguely described and risk disorienting instead of informing institutional decision-makers, urban planners, engineers, and/or those called upon to responsibly design and assess the deployment of certain AI systems into and for the development of better urban ecosystems. What seems to be missing is the detection and conceptual unpacking of specific AI ethical principles, concepts, and/or criteria that steer the development of Urban AI for SSCs.

In the next section, we aim to contribute to filling this gap by proposing the AI ethics principle of sustainability as a benchmark in the development of a unified AI ethics compass for Urban AI. However, to do so, sustainability needs to be ethically grounded and adequately conceptually substantiated. This is what we try to do in the following section, so as to introduce a normatively grounded sustainability-driven AI ethics framework to ethically steer and assess the design and deployment of Urban AI.

3. *The AI Ethics Principle of Sustainability*

Beyond being a key theme and prominent goal in the context of contemporary urbanism and smart city development,[30] sustainability has also recently gained increasing centrality in AI Ethics and more specifically in currently globally benchmarking AI ethics frameworks, which refer to it as one of the most prominent AI ethics principles or requirements for

[27] Palmini and Cugurullo (n 7).

[28] Anna Jobin, Marcello Ienca and Effy Vayena, 'The global landscape of AI ethics guidelines' (2019) 1(9) Nature Machine Intelligence 389.

[29] Palmini and Cugurullo (n 7).

[30] Chao Gao and others, 'Research on Sustainable Design of Smart Cities Based on the Internet of Things and Ecosystems' (2023) 15(8) Sustainability 6546; Rob Roggema, 'The future of sustainable urbanism: a redefinition' (2016) 3(1) City, Territory and Architecture; Ziosi and others (n 3).

the ethical, human-centered, and trustworthy design, deployment, and use of AIs.[31]

Despite such growing centrality, sustainability as an AI ethics principle has been poorly explored thus far. This dearth of ethical analysis deprives the principle of its "teeth"[32] and normative ground, and hence hinders the attempt made by many scholars to place it at the core of AI ethics.[33]

However, defining sustainability as an AI ethics principle is not an easy task. This is also because, although it commonly takes on an ethical significance nowadays, it is not intrinsically an ethical concept. As has been pointed out, indeed, sustainability refers more "to a particular characteristic of the systems as they change over time"[34] (however, we could argue something similar for autonomy, especially in the light of AIs). However, as Owe and Baum stress, this ethical significance that the concept takes on (that is, sustainability as an *ethical value*), which is at the foundation of many ethical initiatives in a wide variety of sectors today, such as those of urbanism and AI, needs ethical analysis, and specifically, the analysis of its ethical dimensions.[35] To put it another way: substantiating sustainability from an ethical standpoint requires bringing out its normative dimensions. These dimensions can be defined as such in the light of their *normative* (or *prescriptive*) valence: they shed light on what we *should* do in order to pursue something valuable or good *per se*, namely, they raise normative claims for us. Nevertheless, thus far, these dimensions have been poorly explored. Owe and

[31] Jobin, Ienca and Vayena (n 28); Simona Tiribelli and others, 'Ethics Principles for Artificial Intelligence-Based Telemedicine for Public Health' (2023) 113 American Journal of Public Health 577; UNESCO, 'Recommendation on the Ethics of Artificial Intelligence' (SHS/BIO/PI/2021/1 November 2022); WHO, 'Ethics and governance of artificial intelligence for health' (June 2021); European Commission, High-Level Expert Group on AI, 'Ethics Guidelines for Trustworthy Artificial Intelligence' (April 2019).

[32] Anaïs Rességuier and Rowena Rodrigues, 'AI ethics should not remain toothless! A call to bring back the teeth of ethics' (2020) 7(2) Big Data & Society <https://doi.org/10.1177/2053951720942541> accessed 17 September 2024.

[33] van Wynsberghe (n 5); Larissa Bolte, Tiji Vandemeulebroucke and Aimee van Wynsberghe, 'From an Ethics of Carefulness to an Ethics of Desirability: Going Beyond Current Ethics Approaches to Sustainable AI' (2022) 14(8) 4472 Sustainability 5.

[34] Andrea Owe and Seth Baum, 'The Ethics of Sustainability for Artificial Intelligence' (Proceedings of the 1st International Conference on AI for People: Towards Sustainable AI, CAIP 2021, 20-24 November 2021 Bologna Italy) (EAI 2021), 1; Tom Kuhlman and John Farrington, 'What is Sustainability?' (2010) 2(11) Sustainability 3436.

[35] ibid.

Baum bring up this key issue. In particular, they criticize the three widely adopted pillars of sustainability, that is, the social, the economic, and the environmental dimensions, on which the majority of ethical literature and initiatives are based, also in the field of AI (see, for example, "AI for People: Towards Sustainable AI" initiative),[36] as partial, fuzzy, and overlapping and hence a weak foundation for sustainability in AI.[37]

However, insights on such ethical dimensions can be nonetheless found in the AI ethics literature. In a benchmarking piece on Sustainable AI, Wynsberghe defines it as an ethical movement to "foster change in the entire lifecycle of AI products (i.e., idea generation, training, re-tuning, implementation, governance) towards greater ecological integrity and social justice".[38] In her definition two *normative dimensions* seem to emerge as ethically substantiating sustainability in AI: an *ecological dimension* and that of *social justice*. They are normative insofar as they prescribe for us what sustainability demands and hence what we should do to promote sustainability in AI, that is, designing and assessing AI systems according to the ethical lenses of ecological integrity and social justice. These two ethical dimensions remain however mostly unexplored, draining the concept of its ethical significance and leading to a disorienting patchwork of fragmented definitions. While some of these definitions refer to or mention such ethical dimensions, the concept emerging in AI ethics and specifically in its policy space (consider benchmarking recommendations, guidelines, etc.) does not truly ethically account for them, and as scholars have pointed out, it ends up being vague, opaque, and inadequate for providing ethical guidance. These scholars seek instead an ethical concept of sustainability that is capable of unifying the fragmented space of ethical principles and requirements under a unique conceptual umbrella instead of adding further conceptual scattering.[39] However, they conclude by providing just a descriptive concept (i.e.,

[36] 'International Conference on AI for People: Democratizing AI' <https://aiforpeople.org/conference/> accessed 17 September 2024.

[37] Owe and Baum, 'The Ethics of Sustainability for Artificial Intelligence' (n 34).

[38] van Wynsberghe (n 5). See, for example, Thaddeus Metz, 'Environmental Ethics' in *A Relational Moral Theory* (Oxford University Press 2021). On the need for decolonizing AI ethics through a relational approach, see Sábëlo Mhlambi and Simona Tiribelli, 'Decolonizing AI Ethics: Relational Autonomy as a Means to Counter AI Harms' (2023) Topoi; Virginia Dignum, 'Relational Artificial Intelligence' (2022) ArXiv.

[39] Bolte, Vandemeulebroucke and van Wynsberghe (n 33).

sustainability as a property of complex systems),[40] and call for further ethical research on a normative one so as to complement it: "if 'sustainability' is to hold promise for AI ethics – they state – we must be able to derive normative claims from it".[41]

We maintain that the difficulty of providing a normative concept of sustainability and unpacking its main ethical dimensions can be related to a more foundational problematic issue in AI ethics.

As has been criticized recently, AI ethics is mainly grounded on ethnocentric and mainstream moral philosophy, leaving non-Western (e.g. African philosophy) and non-mainstream (e.g., feminist ethics) ethical accounts at the outskirts of the debate.[42] Adopting a mainly Western and mainstream or standard (i.e., liberal approach) to AI ethics means principally embracing a rationality-based ethical theory for AI. However, such a rationality-based approach has been revealed to be limited, partial, and on its own inadequate both in moral philosophy and in AI ethics for promoting the operationalization of ethical values and principles.[43] As scholars point out, there is an increasing need for a shift in AI ethics from rationality to relationality.[44] By focusing on relations instead of (isolated) individuals and the relative rational capacities, this approach would also allow a shift from anthropocentric to

[40] Specifically, sustainability is defined as a property of complex systems, where complex systems are in turn defined as composed of "a great number of single elements (eg, organisms, natural environments, technologies) and actors (eg, individuals, organizations, industries, political institutions) in interaction, capable of exchanging information between each other and with their environment, and capable of adapting their internal structure in reaction to these interactions. Sustainability is then a measure to maintain the organization and the structure of a system with multiple pathways of evolution". ibid 9.

[41] ibid 10.

[42] Mhlambi and Tiribelli (n 38); Dignum (n 38).

[43] To expand, see Abeba Birhane, 'Algorithmic injustice: a relational ethics approach' (2021) 2(2) Patterns 100205.

[44] ibid; Mhlambi and Tiribelli (n 38); Dignum (n 38); Sábëlo Mhlambi, 'From Rationality to Relationality: Ubuntu as an Ethical and Human Rights Framework for Artificial Intelligence Governance' (2020) Carr Center for Human Rights Policy Discussion Paper Series. Mhlambi uses the relational Sub-Saharan African philosophy of Ubuntu to show that the harms caused by AI are in essence violations of ubuntu's relational personhood and relational model of the universe. If we aim at expanding the paradigm at the core of AI for people AI for the universe, as recommended for sustainability by Andrea Owe and Seth Baum, such relationality should ground the redesign and assessment of AI technology. Seth Baum and Andrea Owe, 'From AI for people to AI for the world and the universe' (2022) AI & Society.

non-anthropocentric approaches to AI ethics, already advocated by some scholars,[45] which in turn seems pivotal to understanding and grounding sustainability as an AI ethics principle. Indeed, scholarship, especially in environmental ethics, often criticizes forms of ontological (but also ethical) anthropocentrism (or human/nature dualism) that considers humans as distinct from nature and leads them in the end to damage nature and themselves.[46] Without denying key differences between humans and nonhumans, non-anthropocentric approaches consider them in interdependent relations as part of nature.

This AI ethics turning point, which posits relational duties and therefore commonality or solidarity, over rationality at the core of the ethical design and assessment of AI, might be particularly helpful to ethically ground sustainability. Indeed, sustainability in common ethical discourse raises normative claims for us of *respect*, respect for people, communities (cultures), and the environment as a whole, not for their instrumental value, but for their own sake, as being party to a communal relationship.[47] The two dimensions are rooted in the ethical value of respect for the environment, communities, and people, which are respect-worthy *per se*, as being part of this commonality.[48] In this communal relationship between people and the environment we can promote sustainability. Indeed, in these relationships we should in-

[45] Owe and Baum, 'The Ethics of Sustainability for Artificial Intelligence' (n 34); Baum and Owe, 'From AI for people to AI for the world and the universe' (n 44).

[46] Timothy Morton, *Dark ecology: for a logic of future coexistence* (Columbia University Press 2016).

[47] Due to the nature this paper, we leave an in-depth analysis of this point to other works. However, it is relevant to consider that many arguments have been developed to account for what ethically justifies the respect we owe to nonhumans. An agreed-upon argument is that that the true grounds for moral worth and recognition respect are other than or wider than rationality. See Metz (n 38).

[48] The ethical value of respect for non-humans such as natural ecosystems and animals (i.e., avoiding their exploitation for their instrumental value for humans) is at the core of many movements like the ecological movement and animal rights movements, also defined as instances of moral progress towards which our society is moving. To expand this point in relation to AI ethics, see Andrea Owe and Seth Baum, 'Moral consideration of nonhumans in the ethics of artificial intelligence' (2021) AI and Ethics. Expanding the ethical value of respect to ground sustainability in other branches of applied ethics, such as research ethics, in the light of AI, consider Gabrielle Samuel and Cristina Richie, 'Reimagining research ethics to include environmental sustainability: a principled approach, including a case study of data-driven health research' (2022) Journal of Medical Ethics.

vestigate both phenomena undermining social justice, such as unfair power asymmetries and discrimination, and ecological integrity, such as forms of unfair exploitation and environmental colonization. As mentioned above, the two dimensions are grounded on the normative value of respect, and particularly, by drawing on theories of relational ethics (see feminist ethics), of care respect: a specific form of recognition respect that involves both regarding those entitled to respect in their concreteness and particularity, and respecting them as having profound or unique value, and/or perceiving them as fragile or calling for special care and so acting out of feelings of benevolent concern for them.[49]

We cannot further expand the philosophical dimension of sustainability, as it would lead us astray. However, we hope to have provided some relevant elements to normatively substantiate sustainability as an AI ethics principle, grounded on the ethical value of respect. To return to our key ethical dimensions, i.e., social justice and the ecological dimension, having clarified the normative basis for sustainability, we might now be able to unpack them to clarify what sustainability as an AI ethics principle demands.

Let us start with one of the (at least) two key ethical dimensions of sustainability: social justice. Here we can rely on prior works of philosophers in AI ethics who zoomed in on its ethical significance, grounding it on the ethical value of respect for persons as persons and as particular individuals. This ethical analysis helps overcome a widespread conception and operationalization of social justice and fairness in AI ethics overlapping with a state of 'formal equality' ensured by the elimination of unfair biases, often obtained via the removal of sensitive attributes.[50] Such a notion is not particularly useful for designing AIs to transition towards greater social justice, i.e., the creation of a society of equals, insofar as it does not help mitigate the deep social inequalities in agency conditions affecting people in our society. Whereas drawing on theories of moral philosophy, these studies show, from an ethical perspective, how social justice articulates into both distributive

[49] Robin S Dillon, 'Respect and Care: Toward Moral Integration1' (1992) 22(1) Canadian Journal of Philosophy 105.

[50] Giovanola and Tiribelli, 'Weapons of moral construction?' (n 19); Benedetta Giovanola and Simona Tiribelli, 'Beyond bias and discrimination: redefining the AI ethics principle of fairness in healthcare machine-learning algorithms' (2022) AI & SOCIETY. Sensitive attributes have been shown to not only be particularly useful, but necessary for the accurate functioning of ML and DL in many sectors such as healthcare (accurate predictions depend on aspects such as gender, ethnicity, age, etc.).

justice and socio-relational justice and how considering them by AI design provides a more substantial ethical guidance for promoting more just societies (and cities).

The former ethical component necessitates a fair distribution of resources in a way that creates *fair equality of opportunity* as real chances for each individual, that is, to organize the distribution in a way that not only prevents discrimination, but also creates the conditions that enable people's personal agency and self-realization. Therefore, it entails a criterion of *distributive justice* as *proportionality*. Such a criterion in AI ethics for social justice requires designing and deploying AIs in a way that not only prevents them from perpetuating or strengthening unfair inequalities (by removing unfair bias), but and more specifically, designing AIs in order to *compensate* for this inequity. Put differently: distributive justice requires the developing and deploying of AIs in order to create real fair opportunities for *each* individual to access and reap the benefits offered by AI, namely, to develop adequate conditions for people to enjoy them, especially for the most vulnerable. This means using the powerful capabilities and data of AI systems to investigate what unfair socio-economic (and other) factors negatively affect the condition of people's agency and then developing solutions to mitigate them.

However, we mentioned previously how social justice also articulates into socio-relational justice. Socio-relational justice necessitates creating fair socio-relational conditions for mutual recognition between people, which enables the possibility for solidarity, civic friendship, and shared agency to move towards common goals, namely, the creation of a society of equals, where no wrongful discrimination occurs. A society of equals cannot exist if people do not recognize each other fairly or behave as separate individuals. Therefore, socio-relational justice as a criterion in AI ethics needs to foster these fair conditions for mutual recognition, for example, by favoring the socio-relational dimension, encounters, and spaces for shared practices. More specifically, socio-relational justice requires the dismantling of those forms of unfair biases and historical power asymmetries at the root of the phenomena of social discrimination and structural injustice, which in turn undermine the possibility for some individuals to be properly recognized. Such unfair biases and asymmetries are deeply nestled into social relations. Therefore, socio-relational justice pinpoints the need to use AIs to investigate social relations and discover what can undermine the possibility of fair consideration and recognition. This would mean, for example, leveraging AIs to investigate why unfair biases emerge in certain contexts, what his-

torically asymmetrical relations of power they reflect, and what and who continue to nurture them and thus hamper fair conditions for mutual recognition. Furthermore, for the creation of a society of individuals who feel that their voice and actions are justly recognized and who are able to effectively understand how their chances and agency conditions are influenced by AI systems, the criteria highlighted above implies the precondition of informing subjects when they interact or are subject to AI systems. This means that they should be designed so as to guarantee their output and the way in which they are produced should be explainable, accessible, and intelligible to the subjects involved.

The first dimension of sustainability helped us to zoom in on a few ethical criteria that ought to be respected and promoted for a fairer and more just society (SSC). We shall now turn our attention to the other key ethical dimension highlighted in the literature: the *ecological dimension*. This is of particular import in the AI ethics debate. Indeed, amongst the many risks posed by AIs there is the substantial i. carbon footprint it can generate due to AI training and data elaboration centers, ii. land and water usage for extracting the material for this technology and cooling data centers, and iii. the electronic waste caused by infrastructures that are no longer needed – just to mention a few. This ecological dimension, however, has not been explored from a normative perspective in AI ethics thus far, despite many scholars suggesting the need for it.[51]

Here we claim that the ecological dimension of sustainability is also grounded on the ethical value of respect (i.e., respect for the environment) as care respect, a form of recognition respect that acknowledges the uniqueness of our planet as well as its fragility, and therefore needs a *fair and proportional use of environmental resources*. This concept raises normative claims with respect to AIs. It necessitates setting a minimum standard for the ecological footprint we can justify for each of the AI systems with respect to i. a global scenario of pollution which their entire life cycle can produce and ii. the ethical relevance or urgency of the goal the system should achieve. This is however just a "negative" consideration of ecological sustainability as prevention or minimization of harm. Whereas a positive appraisal demands the assessment of the use of what environmental resources we can employ (i.e., land use, extraction of materials, etc.) with respect to the development and implementation of AI in order to comply with ecological sustainability

[51] Bolte, Vandemeulebroucke and van Wynsberghe (n 33).

and ensure and promote ecological integrity. We should then establish the ethical criteria for this fair use of environmental resources (i.e., *proportionality* criteria). Prior works on AI ethics for public health have unpacked this proportionality on the basis of a series of ethical questions:[52] are such AI solutions and the relative environmental costs necessary (e.g., a global emergence)? Are the adopted systems the best solution for minimizing these costs (or are there more environmentally friendly options to consider?) Are these costs recoverable in the long run insofar as they substitute more polluting ways of doing things? Do the resources exploited belong to special categories that deserve protection for the production of further social goods? Further work on these ethical questions might be useful for identifying key ethical criteria for the fair use of environmental resources (including for the ethical justification of some environmental costs).

To sum up, the two ethical dimensions of sustainability appear to respond perfectly to the concept of *sustainable smart cities* that is increasingly used in the field of urbanism and AI for steering the design and use of urban AI systems. It follows that sustainability when grounded as an AI ethics principle might provide a valid AI ethics compass for the design and use of Urban AI as a force for SSCs.

This AI ethics principle and the related framework need a great deal more research in order to make clearer to diverse stakeholders what sustainability for Urban AI demands and how to realize it practically if we want to steer innovation ethically through urban AI systems, that is, prevent them from remaining locked into an unstainable future.

In this section, we have tried to shed light on the ethical dimensions entailed by sustainability, as defined in benchmarking literature and frameworks in the field of AI ethics, that is, human and environmental sustainability. Thanks to prior works in the field, we have introduced some key conceptual elements in order to ethically ground and better substantiate the AI ethics principle of sustainability in a way that considers other principles and therefore might overcome tensions and potential tradeoffs amongst them. This first conceptual ethical compass might help to elicit multiple considerations in practice, especially for those called on to design, assess, and deploy urban AI systems transitioning toward SSCs. In the next section, by examining a practical case of urban AI, we try to show the numerous ethical considerations that a sustainability-driven ethical compass might help to raise

[52] Tiribelli and others (n 31).

in the process of designing innovative sustainable (environmentally sensitive and human-centered) urban AI systems such as shared autonomous vehicles.

4. *From Theory to Practice: The Case of Shared Autonomous Micro-Mobility as a Sustainable Urban AI System*

4.1. *The Legacy of Car-Centric Development*

Throughout history, cities have been centers of knowledge sharing and innovation.[53] Prior to the advent of cars, cities thrived as compact and walkable spaces that provided access to opportunities and fostered social encounters. However, the introduction of automobiles brought about a significant shift in urban development, prioritizing cars over people.[54] Highways were built to optimize traffic flow, cutting through vibrant city districts and disrupting urban street life.[55] While these interventions aimed to improve traffic efficiency, they undermined urban walkability and community vitality, isolating and deteriorating cities over time.[56]

As commuting became easier and urban vibrancy declined, urban growth shifted to suburban areas.[57] These low-density areas often lack viable options for walking and public transit, forcing residents to rely heavily on cars, even for basic tasks like grocery shopping.[58] This dependence on automobiles further fuels the demand for more road infrastructure, contributing to urban sprawl and perpetuating a cycle of increasing car reliance.

In addition to negatively impacting urban liveliness and quality of life, suburban development has resulted in well-known environmental challeng-

[53] Edward Glaeser, *Triumph of the city: How our greatest invention makes us richer, smarter, greener, healthier, and happier* (Penguin 2012).

[54] Jane Jacobs, *The death and life of great American cities* (Vintage 2016); Green (n 23); Peter Norton, *Autonorama: the illusory promise of high-tech driving* (Island Press 2021).

[55] Jacobs (n 54).

[56] ibid; Peter Calthorpe, *The next American metropolis: Ecology, community, and the American dream* (Princeton architectural press 1993).

[57] Glaeser (n 53); Hank Dittmar and Gloria Ohland, *The new transit town: Best practices in transit-oriented development* (Island Press 2012).

[58] Calthorpe (n 56); Green (n 23); Gereon Meyer and Susan Shaheen, *Disrupting Mobility* (Springer 2017).

es.[59] The transportation sector is indeed a major contributor to greenhouse gas emissions, accounting for 25% of total emissions in the European Union and 29 % in the United States (US).[60] In sprawling suburban settings, people live farther away from their workplaces and necessary amenities, leading to increased vehicle miles traveled and associated negative externalities.[61] Despite efforts to mitigate the environmental impact of transportation, emissions from the sector continue to rise at a faster rate than any other.[62]

4.2. *Opportunities for Change: Walkable Cities and Autonomous Vehicles*

Despite the challenges posed by decades of car-centric development, we have a crucial opportunity for change driven by two key factors. First, there is a growing emphasis on compact human-centered development, often referred to as "15-minute cities".[63] This approach aims to create walkable cities where residents have convenient access to jobs and amenities within a 15-minute walk. By improving accessibility and reducing reliance on commuting, this urban planning concept significantly mitigates the negative impacts associated with car dependency. It also encourages the use of sustainable transportation alternatives like public transit, walking, and micro-mobility solutions by increasing urban density and walkability.[64]

Second, the advent of AI-based autonomous vehicles (AVs) offers significant possibilities for reimagining transportation systems. AVs are vehicles capable of operating with minimal or no human intervention. They utilize

[59] Michael P Johnson, 'Environmental impacts of urban sprawl: a survey of the literature and proposed research agenda' (2001) 33(4) Environment and planning A 717.

[60] Environmental Protection Agency (EPA), 'Inventory of U.S. Greenhouse Gas Emissions and Sinks 1990–2021' (EPA 430-R-23-002 2023); European Environment Agency (EEA), 'Transport and mobility' (2023).

[61] European Environment Agency (EEA), 'Urban sprawl in Europe' (Report no 11/2016).

[62] Benjamin Leard, Joshua Linn and Clayton Munnings, 'Explaining the evolution of passenger vehicle miles traveled in the United States' (2019) 40(1) The Energy Journal; EPA (n 60).

[63] Calthorpe (n 56); UN-Habitat, 'Envisioning Future Cities' (World Cities Report 2022).

[64] Todd Goldman and Roger Gorham, 'Sustainable urban transport: Four innovative directions' (2006) 28(1-2) Technology in society 261; Lake Sagaris, Ignacio Tiznado-Aitken and Stefan Steiniger, 'Exploring the social and spatial potential of an intermodal approach to transport planning' (2017) 11(10) International Journal of Sustainable Transportation 721.

sensors to perceive their surroundings and algorithms to determine the appropriate course of action. While the proliferation of privately-owned AVs may contribute to increased travel demand and perpetuate car-dependent sprawl, the integration of autonomy into shared mobility systems presents a promising avenue toward sustainable and human-centered cities.[65] Shared autonomous vehicles (SAVs) indeed have the potential to offer enhanced convenience, reduce vehicle ownership, and support the transition to more efficient electric vehicles.[66] While uncertainties remain regarding cost, induced demand, and mode substitution, SAVs appear as a potentially more sustainable alternative to current private vehicles.[67]

As will be outlined in the following sections, by embracing an ethical, human-centered design approach driven by the principle of sustainability to cities and harnessing the potential of autonomous vehicles, we can reshape urban environments and transportation systems. Prioritizing sustainability enables the creation of vibrant, people-centric cities while simultaneously reducing the environmental footprint of transportation.

4.3. *Shared Micro-Mobility in Walkable Cities*

In the pursuit of walkable cities, many urban centers are actively promoting walking and the use of micro-mobility systems such as bicycles and scooters. The European Union (EU), as outlined in the European Urban Mobility Framework, and international organizations like the Institute for Transportation and Development Policy (ITDP) and the International Transport Forum (ITF) at the OECD recognize the critical role of micro-mobility in transitioning towards more sustainable urban transportation.[68]

[65] Meyer and Shaheen (n 58); Fabio Duarte and Carlo Ratti, 'The impact of autonomous vehicles on cities: A review' (2018) 25(4) Journal of Urban Technology 3; Santhanakrishnan Narayanan, Emmanouil Chaniotakis, and Constantinos Antoniou, 'Shared autonomous vehicle services: A comprehensive review' (2020) 111 Transportation Research Part C: Emerging Technologies 255.

[66] Santhanakrishnan, Chaniotakis, and Antoniou (n 13); Jeffery B Greenblatt and Samveg Saxena, 'Autonomous taxis could greatly reduce greenhouse-gas emissions of US light-duty vehicles' (2015) 5(9) Nature Climate Change 860.

[67] Santhanakrishnan, Chaniotakis, and Antoniou (n 13).

[68] European Commission, 'The New EU Urban Mobility Framework' (Communication) COM (2021) 811; Dana Yanocha and Allan Mackenzie, 'Maximizing Micromobility: Unlocking opportunities to integrate micromobility and public transportation' (Institute for

To encourage the adoption of these environmentally friendly modes of transportation, many cities have implemented shared micro-mobility systems, such as shared bicycles or scooters.[69] However, as these systems have become more prevalent, we have also learned about their challenges and limitations. One significant challenge is vehicle rebalancing. Due to unbalanced commuting patterns in cities, certain areas experience an accumulation of vehicles while others suffer from a depletion.[70] This spatial imbalance poses difficulties for users who struggle to find available vehicles or docking spaces, resulting in longer travel times, frustration, and decreased system reliability.[71] System operators currently address this issue by manually redistributing vehicles across the city using vans or trucks, which incurs significant economic and environmental costs. In fact, rebalancing constitutes a major portion of operational expenses and greenhouse gas emissions in station-based bicycle-sharing systems.[72]

Another notable challenge is vehicle oversupply in dockless systems.[73] Unlike station-based systems that have limited docking stations, fleet sizes in

Transportation and Development Policy June 2021); International Transport Forum, 'Urban Planning and Travel Behavior: Summary and Conclusions' (ITF Roundtable Reports no 189 December 2022).

[69] Russel Meddin and others, 'The Meddin Bike-sharing World Map Report: 2022 edition' (2022); National Association of City Transportation Officials (NACTO), 'Shared Micromobility in the US from 2010-2021' (November 2022) <https://nacto.org/wp-content/uploads/2022/12/2020-2021_shared_micro_snapshot_Dec7_2022.pdf> accessed 17 September 2024.

[70] Hongyun Si and others, 'Mapping the bike sharing research published from 2010 to 2018: A scientometric review' (2019) 213 Journal of Cleaner Production 415; Andrew Curran, 'Translink public bike system feasibility study' (2008) Quay Communications Inc.; Jyh-Horng Lin and Ti-Chieh Chou, 'A geo-aware and VRP-based public bicycle redistribution system' (2012) International Journal of Vehicular Technology.

[71] Susan Shaheen and Stacey Guzman, 'Worldwide bikesharing' (2011) 1(39) Access Magazine 22; Andreas Kaltenbrunner and others, 'Urban cycles and mobility patterns: Exploring and predicting trends in a bicycle-based public transport system' (2010) 6(4) Pervasive and Mobile Computing 455; Chandra R Bhat and Rupali Sardesai, 'The impact of stop-making and travel time reliability on commute mode choice' (2006) 40(9) Transportation Research Part B: Methodological 709.

[72] Jannet Buttner and others, 'Optimising Bike Sharing in European Cities A Handbook.' (OBIS project June 2011); Hao Luo and others, 'Comparative life cycle assessment of station-based and dock-less bike sharing systems' (2019) 146 Resources, Conservation and Recycling 180.

[73] Tianqi Gu, Inhi Kim and Graham Currie, 'To be or not to be dockless: Empirical analysis of dockless bikeshare development in China' (2019) 119 Transportation Research Part A: Policy and Practice 122.

dockless systems can be 10 to 60 times larger, surpassing both user demand and the infrastructure capacities of cities.[74] This oversupply leads to system inefficiencies and urban issues such as illegally parked vehicles obstructing sidewalks, therefore, hampering instead of fostering the human livability of the urban environment.[75] Many cities have responded by implementing measures to regulate fleet sizes or discontinuing programs.[76]

In the next section, we will discuss how the introduction of autonomous driving technology has the potential to eliminate or mitigate these challenges. More specifically, we show what this means by considering the AI ethics principle of sustainability in the design and deployment of shared autonomous micro-mobility systems.

4.4. *Shared Autonomous Micro-Mobility (SAmM)*

Shared Autonomous Micro-Mobility (SAmM) represents an innovative approach that combines the advantages of AVs with shared and micro-mobility principles.[77] SAmM utilizes small, electric, and autonomous vehicles like scooters or bicycles that can be shared among users for short-distance trips within urban areas. This approach seems to align with the vision of walkable, vibrant, and human-centered cities, where pedestrians and street life remain a priority even in the era of AVs. Put differently: SAmM seems to exemplify how Urban AI can be used as a beneficial force for SSCs. Nevertheless, this statement demands an ethical assessment. In section 3, we showed how the AI ethics principle of sustainability can provide an adequate framework for evaluating from an ethical perspective the design and use of AIs in and for more environmentally sensitive and just cities. Howev-

[74] ibid; Jing Tao and Zhenhuan Zhou, 'Evaluation of Potential Contribution of Dockless Bike-sharing Service to Sustainable and Efficient Urban Mobility in China' (2021) 27 Sustainable Production and Consumption 921.

[75] Shuyan Zhao and others, 'When bike-sharing crashed in China: a bumpy ride' (2020) Journal of Business Strategy; Si and others (n 70).

[76] Jian-gang Shi and others, 'Critical factors to achieve dockless bike-sharing sustainability in China: A stakeholder-oriented network perspective' (2018) 10(6) Sustainability 2090.

[77] Naroa Coretti Sanchez, Luis Alonso Pastor and Kent Larson, 'Autonomous Bicycles: A New Approach to Bicycle-Sharing Systems' (IEEE 23rd International Conference on Intelligent Transportation Systems (ITSC), 20-23 September 2020); Michael Chia-Liang Lin, *Affordable autonomous lightweight personal mobility* (PhD thesis, Massachusetts Institute of Technology 2021).

er, embracing sustainability entails assessing SAmM through the two ethical lenses previously highlighted: social justice and ecological integrity.[78]

For example, to comply with the ethical criteria of *social justice*, we should question whether the design of such vehicles is conceived and hence works so as to compensate for existing inequalities, or if instead it ends up promoting systems perpetuating or exacerbating them by default.[79] In this regard, today, the development of SAmM is actively pursued in academia and industry, offering a diverse range of vehicle options, from bicycles to tricycles and scooters.[80] The diverse options foreseen aim to overcome a one-size-fits-all approach, which has very often an ideal user at its core and would lead to developing AI systems excluding by design certain categories, such as people affected by some physical and/or cognitive impairment. Indeed, such systems would maintain the same inequalities of access currently affecting our societies, instead of using the capabilities of AIs such as autonomous mobility to mitigate and/or compensate them. Rather than a one-size-fits-all approach, SAmM proposes instead different vehicles to cater to the diverse needs of urban dwellers, considering factors that range from morally irrelevant such as climate to some morally relevant ones such as age and psychophysical abilities. For example, vehicles like e-wheelchairs can provide efficient mobility-on-demand services to address the specific needs of elderly or disabled individuals – thus favoring the collection of a huge amount of data belonging also to minorities that are pivotal for inclusive design. In this sense, SAmM seems to comply with the *distributive justice criteria*, according to which we should promote AI-based urban transformations via technology whose benefits are by design fairly accessible and enjoyable by each individual (inclusivity by design). This criterion entails designing urban AI systems which respond as much as possible to the diverse needs, aspects, and characteristics of a heterogeneous population, reducing asymmetries in technology access and its use. Moreover, autonomous vehicles offer the potential to collect data to support decision-making and design more sustainable and fairer systems.[81] For instance, the current placement

[78] Giovanola and Tiribelli, 'Weapons of moral construction?' (n 19).

[79] Mhlambi and Tiribelli (n 38).

[80] Chia-Liang Lin (n 25); Naroa Coretti Sanchez, Luis Alonso Pastor and Kent Larson, 'Can autonomy make bicyclesharing systems more sustainable? An environmental impact analysis' (2022) 113 Transportation research part D: transport and environment 103489.

[81] Andres Rico, Yasushi Sakai and Kent Larson, 'JettSen: A Mobile Sensor Fusion Platform for City Knowledge Abstraction' (Future Technologies Conference (FTC), online, 5-6

of bike-sharing stations often favors active socioeconomic areas, leading to access inequalities based on race and income levels. Autonomous rebalancing in SAmM can improve accessibility by mitigating the impact of station location, and the data generated by these vehicles can assess improvements in accessibility, empowering stakeholders to implement effective strategies to address access social disparities in a proactive way.

As we pointed out in Sec. 3, distributive justice criteria are not the sole ones required by social justice as a constitutive ethical dimension of sustainability. It is also relevant to consider the criterion of *socio-relational justice* in the design of urban AI systems (even if it might be more fundamental in the case of other urban AI systems). As previously outlined, it necessitates developing and using AIs to promote fair conditions for social recognition. In other terms, to use AI for strengthening the socio-relational dimension of our living together, instead of isolating people (or setting them apart, for example, if constrained to move in their own car). This dimension is indeed crucial for enabling practices of social recognition and shared or cooperative agency, as well as for the possibility for civic friendship and solidarity, both fundamental for a healthy urban ecosystem. SAmM vehicles, characterized by their lightweight design and slow speed, are well-suited to operate in mixed settings, sharing space harmoniously with pedestrians.[82] This inherent flexibility can create more welcoming streetscapes and enable a more human-centered and sustainable approach to urban space utilization. Indeed, by utilizing fewer and smaller vehicles and reducing the need for parking, SAmM effectively reduces spatial demands and opens up opportunities for repurposing urban land that has traditionally been allocated for cars (e.g., for creating inclusive urban spaces such as squares and hangouts). This freed-up land can contribute to the re-densification of cities, fostering the development of viable public transportation systems, minimizing the ne-

November 2020); Julia Ursaki and others, 'Quantifying the equity of bikeshare access in US cities' (University of Vermont Transportation Research Center TRC Report no 15-011 2015); Daniel Fuller and others, 'Impact evaluation of a public bicycle share program on cycling: a case example of BIXI in Montreal, Quebec' (2013) 103(3) American journal of public health 85.

[82] Michael F Ballesteros, Patricia C Dischinger and Patricia Langenberg, 'Pedestrian injuries and vehicle type in Maryland, 1995–1999' (2004) 36(1) Accident Analysis & Prevention 73; Brian C Tefft, 'Impact speed and a pedestrian's risk of severe injury or death' (2013) 50 Accident Analysis & Prevention 871; Sanchez, Pastor and Larson, 'Can autonomy make bicyclesharing systems more sustainable?' (n 80).

cessity for long commutes, and creating more vibrant and pedestrian-friendly environments that foster lively street life and encourage social interactions within urban communities. Operationalizing the socio-relational justice criteria for Urban AI such as SAmM entails questioning whether such AI-based systems are conceived and designed for promoting urban shared spaces, services, practices, and hence encounters that can fuel and strengthen the social fabric of urban life, instead of consolidating inequalities and setting people apart, for example, by creating urban bubbles of socio-economic akin people, or fostering socio-economic status bound mobility choice.

However, promoting and complying with the AI ethics principle of sustainability requires also assessing SAmM according to another ethical lens, which expresses the *ecological dimension* (i.e., ecological integrity) of sustainability. This ethical dimension entails assessing the sustainability of the urban AI system itself, that is, its environmental impact (life cycle of AI systems) and, in case of environmental costs, its evaluation according to the criterion of fair use of environmental resources or *proportionality* (i.e., is the need for such systems so important as to justify the costs envisioned? Are such costs sustainable in the long run? Are short-term costs unavoidable for achieving SMCs? What kind of environmental resources are mainly exploited to develop them? Do such resources deserve particular attention and care?). Environmental considerations are paramount in the development of SAmM. Comprehensive life cycle assessment models have shown that SAmM achieves reductions in CO2 emissions per mile compared to current station-based and dockless systems.[83] These models consider unique aspects of SAmM, such as usage rates, additional miles traveled for pickup and recharging, and the environmental impact of sensor and computing systems that support autonomous driving. These findings underscore the potential of SAmM to contribute to a greener and more sustainable transportation system. Moreover, implementing SAmM has the potential to address key challenges associated with current shared micro-mobility systems. Autonomous vehicles can relocate themselves, enabling users to request on-demand rides for convenient door-to-door transportation. This eliminates the need for manual rebalancing and the struggle of searching for available vehicles or docking stations. The enhanced user satisfaction and reliability that autonomous on-demand vehicles would bring into the system can incentivize more individuals to choose active modes of transportation.

[83] Sanchez, Luis Pastor and Larson, 'Can autonomy make bicycle sharing systems more sustainable?' (n 80).

Furthermore, autonomous vehicles can also serve a higher number of trips per vehicle per day, reducing fleet size and addressing issues of vehicle oversupply. Simulation studies have shown that SAmM systems can outperform current station-based and dockless systems, resulting in significantly smaller fleet sizes.[84] As a consequence, despite potentially higher vehicle costs, the overall system cost can be lower than for current systems due to the decrease in the number of vehicles, which can turn SAmM into a more accessible option.[85] While we have a few answers to our ethical issues, others still require to be considered and investigated to ensure SAmM guarantees fair use of environmental resources, i.e., respect for ecological integrity, and hence sustainability.

Furthermore, while this sustainability-based ethics framework can make it possible to enact such ethical aspects from the design of such AI systems, policy formulation and regulation are also necessary to ensure that urban AI systems are deployed in an ethical, sustainable way; therefore, urban policy should also consider these aspects (e.g., AI ethics framework for the governance of Urban AI). For example, according to our framework, policies should accompany this design effort by promoting fair access to SAmM in terms of spatial accessibility and pricing (just to mention a few aspects underlined above) to promote not only the ethical design and development of Urban AI but also its governance. This effort implies collaboration among diverse stakeholders, including government authorities, transportation agencies, technology providers, operators, urban planners, and diverse community representatives, insofar as essential in the development of effective policies and regulations reflective of heterogeneous needs. These conversations should also cover further critical aspects such as safety, privacy, integration with existing infrastructure, job displacements, and public space utilization, which can fall under the ethical dimensions highlighted. Indeed, just an open and inclusive dialogue among stakeholders can lead to

[84] Naroa Coretti and others, 'On the simulation of shared autonomous micro-mobility' (2022) 2 Communications in Transportation Research 100065; Naroa Coretti Sanchez and others, 'On the performance of shared autonomous bicycles: A simulation study' (2022) 2 Communications in Transportation Research 100066; Daniel Kondor and others, 'Estimating the potential for shared autonomous scooters' (2021) 23(5) IEEE Transactions on Intelligent Transportation Systems 4651.

[85] Sanchez, Pastor and Larson, 'Autonomous Bicycles' (n 77); Benjamin Loeb and Kara M Kockelman, 'Fleet performance and cost evaluation of a shared autonomous electric vehicle (SAEV) fleet: A case study for Austin, Texas' (2019) 121 Transportation Research Part A: Policy and Practice 374.

finding common ground, reconciling conflicting viewpoints, and creating a mutually beneficial system capable of truly harnessing AIs as forces for more sustainable and smart urban ecosystems.

5. *Concluding Remarks*

In our paper, we proposed and argued for sustainability as a core AI ethics principle for the ethical design of Urban AI, understood as a potentially beneficial force for developing cities that are not only smart and efficient but also more inclusive, just, and fairer. To do so, we clarified the phenomenon of Urban AI and showed the limits of its underpinning techno-centric approach driven by efficiency and optimization, as well as the absence of a specific AI ethics framework to address such limits, prevent risks, and hence responsibly steer the development of Urban AI.

To fill this gap, we proposed considering a benchmarking principle both in the context of smart cities and in AI ethics, that is, the principle of sustainability. More specifically, we showed the need for substantiating sustainability as an AI ethics principle so as to make it truly effective for the ethical design of Urban AI. Therefore, we showed that the AI ethics principle of sustainability encompasses two ethical dimensions, that is, the ecological dimension and that of social justice, and grounded it on the ethical concept of care respect for people and the environment. We unpacked these dimensions and defined the ethical criteria that these two ethical dimensions need to meet in the design, development, and deployment of Urban AI in order to promote cities that are both smarter and fairer. Finally, we considered a practical case of urban AI systems, that is, the case of shared autonomous micro-mobility systems. We showed how the consideration of the AI ethics principle of sustainability as revised helps shed light on pivotal aspects for the ethical design of autonomous vehicles that cannot be overlooked if we aim to promote more human and environmentally sustainable smart cities.

Aware that much work needs to be done in this direction, we hope our research will pave the way for further conceptual analysis on sustainability as an AI ethics principle, as well as for more and more diversified practical case-sensitive analyses of urban AI systems so as to develop an increasingly structured, exhaustive, and hence robust sustainability-oriented framework for the ethical design and governance of Urban AI.

SECTION SIX.
EARLY-STAGE RESEARCHERS' COMMUNICATIONS

Elena Codoni

FRENCH AND ITALIAN BENEFIT COMPANIES

1. *Introduction*

The existing models of benefit companies across the world all originated from the lobbying activity carried out over the years by B Lab, a non-profit organization founded in the USA in 2008. According to their statement on the website, the sentiment that has guided B Lab in these years, is to put an end to the shareholder value maximization approach that they consider responsible for justifying behaviors that create inequality, environmental damage, and social fragmentation in the name of shareholder profit.[1]

B Lab first created its B Corp certification, a private certification issued to companies that decided to measure their impact through the B Impact Assessment.[2] But the intention of B Lab in these years has been also to push the lawmakers to adopt a new business model that would embed a corporate

[1] B Lab, 'Stakeholder Governance. Making business accountable to people and planet' (*B Lab Global*) <https://www.bcorporation.net/en-us/movement/stakeholder-governance/> accessed 28 January 2025.

[2] The B Corporation certification is self-imposed and privately regulated by B Lab which is attempting to establish a new kind of company that harnesses the power of business to solve social and environmental problems; to obtain the certification, a company is first required to take a "B Impact Assessment" that asks questions relating to accountability, employees, consumers, community, and the environment. A corporation is "certified" by B Lab once an acceptable score is obtained under their rating system (80 out of 200), and the company is required to submit supporting documents for a portion of the answers. B Lab relies on this self-reporting assessment and a separate auditing system to ensure B Corporations are pursuing and achieving their social mandates. Within an allotted time, following certification, B Corporations are required to amend their articles of incorporation to require directors to consider more than just shareholder interests when carrying out their duties. Companies that have benefit corporation legislation in their states are required to adopt the benefit corporation status within two years of certification. If the company's resident state eventually creates a benefit corporation, the company must adopt benefit corporation status within the period of four years from the legislation or two years after certification (Carol Liao, 'A critical Canadian perspective on the benefit corporation' (2017) 40 Seattle University Law Review 683, 687-688).

governance system that prioritizes, ideally, all the stakeholders.[3] So, through this lobbying activity, B Lab pushed some States in North America, South America, and Europe to adopt the legal form of the benefit company.[4] In this way, along with the private B Corp certification, many States adopted a legal form often called benefit corporation as in the USA[5] or British Columbia[6] or simply a legal qualification, as happens in Italy and France, where the benefit company is not a new type of business organization but just a legal

[3] Liao (n 2) 689; Guido Ferrarini and Shanshan Zhu, 'Is There a Role for Benefit Corporations in the New Sustainable Governance Framework?' (2021) European Corporate Governance Institute - Law Working Paper no 588/2021, 3 <https://ssrn.com/abstract=3869696> accessed 28 January 2025.

[4] On the B Lab web site (B Lab (n 1)) are indicated 51 jurisdictions around the world including Italy, Colombia, France, Peru, Rwanda, Uruguay, Ecuador, British Columbia, and Canada, as well as 44 U.S. states, Puerto Rico, and the District of Columbia (Washington, D.C.) that have stakeholder governance statutes. The statutes differ based on the degree of stakeholder consideration required. Some demand the triple bottom line of people, planet, and profit; others require a double bottom line of purpose and profit. For a comparison focus on the different models of benefit corporation in the world, see Henry Peter and others (eds), *The International Handbook of Social Enterprise Law. Benefit Corporations and Other Purpose-Driven Companies* (Springer 2023) 379 <https://link.springer.com/book/10.1007/978-3-031-14216-1> accessed 28 January 2025; also Carol Liao, Elsir U. Tawfik and Pat Teichreb, 'The Global Social Enterprise Lawmaking Phenomenon: State Initiatives on Purpose, Capital, and Taxation' (2019) Windsor Yearbook of Access to Justice 84, 86 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3704000> accessed 28 January 2025. Until last July, in the EU only Italy and France recognized benefit companies in their national legislation. In July 2022, Spain joined the club by introducing the Sociedades de Beneficio e Interés Común (Carmen Flores Hernández, 'Las nuevas sociedades en beneficio e interés (SBIC): ¿empresas con propósito en una nueva economía?' *CincoDías* (Madrid, 21 November 2022) <https://cincodias.elpais.com/cincodias/2022/11/10/legal/1668098360_016435.html> accessed 28 January 2025.

[5] For the Benefit Corporation legislations in the USA see Ellen Berrey, 'Social Enterprise Law in action: organizational characteristics of U.S. Benefit Corporations' (2018) 20 Transactions: The Tennessee Journal Of Business Law 21 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3377048> accessed 28 January 2025; also Haskell Murray, 'Defending Patagonia: Mergers & Acquisitions with Benefit Corporations' (2013) 9 Hastings Business Law Journal 485.

[6] For the Canadian legislations see Ivan Tchotourian, 'L'entreprise à mission: solution ou miroir aux alouettes pour la responsabilité sociale? Une comparaison critique franco-canadienne' (2021) Les Cahiers de Droit 757.

qualification that any type of business organization may obtain by amending their articles in the part dealing with the company's purpose.[7]

In Italy, benefit companies were introduced under the name of *società benefit* in December 2015.[8] As declared by the proponents of the law, the goal of introducing dual-purpose companies (profit and common benefit) was to bring about a real shift in the economic and business paradigm to break with *traditional governance* that is generally set on maximizing profit for shareholders.[9]

France had the same interest in introducing a new idea of more responsible and equitable capitalism.[10] In comparison with the Italian experience, the French legislator tried to act along with more structural reform. In 2019, France adopted a twofold approach with the so-called *Loi PACTE*. On the one hand, it introduced the French version of the benefit company, i.e., the *société à mission*; on the other, it amended the general rules for companies, explicitly allowing them to adopt their *raison d'être* and modifying art 1833 *code civil*.[11]

[7] Ferrarini and Zhu (n 3) 8.

[8] l 28 dicembre 2015, no 208 'Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (Legge di Stabilità 2016)' (l 208/2015), art 1 para 376-384.

[9] Disegno di legge 17 April 2015, no 1882 'Disposizioni per la diffusione di società che perseguono il duplice scopo di lucro e di beneficio comune' <https://www.senato.it/japp/bgt/showdoc/17/DDLPRES/0/934858/index.html?part=ddlpres_ddlpres1-relpres_relpres1> accessed 28 January 2025; to explore the Italian debate around corporate interest and purpose in the 19th and 20th centuries with a comparative approach to the US debate see Eugenio Barcellona, *Shareholderism vs. Stakeholderism. La società per azioni contemporanea dinanzi al «profitto»* (Giuffré 2022) 57-85.

[10] According to Jean-Dominique Senard and Nicole Notat, 'L'entreprise, objet d'intérêt collectif' (Rapport aux ministres de la Transition écologique, de la Justice, de l'Économie et des Finances du travail, 9 March 2018) <https://www.economie.gouv.fr/files/files/PDF/2018/entreprise_objet_interet_collectif.pdf> accessed 28 January 2025 Corporate Law reform was desired because the intention was to restore space and importance to the enterprise, which for years served instead only the corporation and shareholders to favor the pursuit of short-term profit (see also Stéphane Vernac, 'Du bon gouvernement de l'entreprise en société' (2018) Dalloz Grand Angle 86). To explore the French debate around corporate interest and purpose in the 19th and 20th centuries with a comparative approach to the US debate see Élisabeth Forget, *L'investissement étique: analyse juridique* (Presses Universitaires de Strasburg 2015) 542-643.

[11] Art 169, *loi* n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises (loi PACTE) amends art 1835 French Civil Code, which allows all companies to include a *raison d'être* in their statutes. The same article tries to explain the new legal

The number of benefit companies in France and Italy has continued to augment during these years, thanks also to the promotion by the lawmakers.[12] Given the increasing number of these companies and the appeal of these models in Europe,[13] the study has tried to assess their actual usefulness in the Italian and French national legal systems.

In order to do this, the research sets out to examine the various legal issues relating to the benefit companies in France and Italy, and attempts to evaluate the advantages gained by adopting the benefit company model to make companies more socially responsible, as desired by the lawmakers.

institution by defining it as the principles with which the company equips itself and for the respect of which it intends to allocate means in the realization of its activity. The definition of raison d'être is still widely debated (see Didier Poracchia, 'De l'intérêt social à la raison d'être des sociétés' (2019) 6 Bulletin Joly Sociétés 40; Isabelle Urbain-Parleani, 'L'article 1835 et la raison d'être' (2019) 3 Orizzonti del Diritto Commerciale 533; Sophie Schiller and others, 'La raison d'être' (2021) 180 Actes Pratiques et Ingénierie Sociétaire 6). Art 169 also amends art 1833 para 2 of the French Civil Code of which states that the company shall be managed in its corporate interest, taking into account the social and environmental challenges of its activity. The amendment was considered by the scholars to have introduced a broader notion of corporate interest (see Pierre-Henri Conac, 'L'article 1833 et l'intégration de l'intérêt social et de la responsabilité sociale d'entreprise' (2019) 10 Revue des sociétés 570). Arts L225-35 and L225-64 French Commercial Code, applicable to *sociétés anonymes*, have also been amended to introduce the specific notion of corporate interest and *raison d'être* into the Commercial Code.

[12] In France there are 1190 *sociétés à mission* for now (see 'La plateforme de référence des sociétés à mission en France' (*Observatoire des sociétés à mission*) <https://www.observatoire-dessocietesamission.com> accessed 28 January 2025; According to the study of Goodpoint, 'L'identità delle Società Benefit: Beneficio Comune e Valutazione d'Impatto' (*GoodPoint*, 9 May 2023) <https://goodpoint.it/cosa-facciamo/ricerca-sulle-societa-benefit/> accessed 28 January 2025, in Italy there were 2.911 *società benefit* on 31 March 2023.

[13] Not only has Spain recently joined the club in Europe, but proposals have been made in the European Union to adopt a European model of benefit company, see Mathilde Golla, 'La France défend la création du statut de société à mission au niveau européen' (*Novethic*, 20 october 2021) <https://www.novethic.fr/actualite/economie/isr-rse/la-france-defend-la-creation-du-statut-de-societe-a-mission-pour-l-europe-150250.html> accessed 28 January 2025. Also Armand Hatchuel, 'L'entreprise en France et en Allemagne: divergences actuelles et convergences futures' in Blanche Segrestin and Kevin Levillain (eds), *La mission de l'entreprise responsable* (Presses des Mines 2018) 142ff questions if it is possible to imagine a European model of *entreprise à mission*.

2. *The Management of the Benefit Company and the Wide Discretionary Power of Directors*

The benefit company is characterized by companies pursuing dual or multiple purposes, both profit and social and/or environmental missions. In Italy and France, to obtain the legal qualification, the associates must define the specific "common benefit goals" that the company shall pursue through the modification of articles.[14] These "common benefit goals" must be pursued along with the *usual* subjective profit purpose, i.e., the shareholder's interest in getting the dividends. In taking care of the pursuit of the "common benefit goals" indicated, the directors should accomplish the shareholders' will.[15]

[14] In France, according to art L210-10 Commercial Code, companies that want to obtain the benefit qualification must indicate a *raison d'être* in the articles, one or several social and environmental objectives that the company is committed to pursuing during its business, and lastly the procedures for monitoring the performance of the above-mentioned missions. In Italy, the definition of a benefit company is more complex and the requirements for obtaining the qualification are not very clear (for more on the issues related to the difficult distinction of benefit companies from non-benefit companies that carry out activities of common benefit see Mario Stella Richter jr, 'Società Benefit e Società Non-Benefit' (2017) Orizzonti del Diritto Commerciale 1; Alessio Bartolacelli, 'The Unsuccessful Pursuit for Sustainability in Italian Business Law' in Beate Sjåfjell and Christopher M. Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press 2020) 290). It should be noted that the qualification in Italy is recognized upon the specification of one or more common-benefit purposes (which is a broader wording than that of the French, indicating social and environmental objectives). The legislature itself in art 1 para 378 clarified that the purpose of common benefit can be either, in the exercise of the economic activity of benefit companies, of one or more positive effects, or the reduction of negative effects, on one or several categories of stakeholders.

[15] One of the reasons behind the adoption in the USA of the benefit corporation model can be traced back to the need to protect managers from shareholder lawsuits when pursuing social and environmental interests (see Ferrarini and Zhu (n 3) 4 'This issue was clearly illustrated by the Ben & Jerry case, the ice-cream company which was founded in 1978 with a strong social commitment such as investing part of their profits in a charitable foundation. The company was then sold by the founders to Unilever, the multinational consumer goods company, after a bidding contest, regardless of the fact that this could compromise its original corporate purpose, as the board of Ben & Jerry could have been sued by shareholders for not maximizing their wealth. Stockholder interests were also at the centre of the litigation between Craigslist and eBay, where the Court of Chancery (Delaware) recognized the value of a corporate culture chasing charitable goals, but stated that directors of for-profit companies have the fiduciary duty to promote corporate stock value above any other interest'.

Regarding the management of the benefit company, according to Italian law (art 1 para 380), the directors must adopt their decision striking a balance between the interest of the shareholders, the pursuit of the purposes of common benefit stated in the articles of association, and the other stakeholders' interests.[16] The French law does not provide any specific disposition regarding how the *société à mission* must be run by the directors. The second paragraph of art L210-10 reports only that the objectives are to be pursued in the cadre of its activities, and thus it is quite plausible that the directors must balance these objectives in the management of the business activity. Furthermore, in the absence of any specific legal requirements, it appears that the general provisions regarding all companies must be applied to the benefit company. In this sense, directors must manage the company in accordance with the principles set forth in the *raison d'être*, also specified in the articles, but above all they must manage it considering the social and environmental issues related to the company's business in accordance with art 1833 Civil Code (or art L225-35 Commercial Code if it is a *société anonyme*). In managing the company, the directors will have to pursue the objectives chosen by the shareholders, according to the principles stated in the *raison d'être*, but still consider the social and environmental issues of the business, including the pursuit of common benefit goals.[17]

Although the directors pursue the common benefit objectives specified in the articles while respecting the will of the shareholders, this mode of management aimed at balancing different interests grants the directors wide discretion in adopting management choices. And this is also because neither of the legislations has clarified how the objectives of common benefit, or

[16] The "other stakeholders" are those mentioned in art 1 para 376. In fact, the benefit company not only pursues one or more purposes of common benefit but must operate responsibly, sustainably, and transparently towards people, communities, territories and the environment, cultural and social goods and activities, bodies, associations, and other stakeholders. The list given in art 1 para 376 is obviously not exhaustive.

[17] The Board of Directors is responsible for determining the direction of the company's business activities, and for overseeing their implementation, in accordance with its corporate interests, considering the social and environmental challenges of its business and, where applicable, its *raison d'être*. This role, defined in art L225-35 of the French Commercial Code, implies that the Board of Directors must integrate the social and environmental objectives set out in the company's articles into the company's strategy (Bris Rocher, 'Rapport Rocher. Repenser la place des entreprises dans la société: bilan et perspectives deux ans après la Loi Pacte' (Rapport, 19 October 2021) 48 <https://www.economie.gouv.fr/files/files/2021/RAPPORT_ROCHER_EXE_PL.pdf> accessed 28 January 2025 (Rapport Rocher).

of a social and environmental nature, specified by the shareholders, should concretely interact with the traditional purpose of the company[18] (which is still the pursuit of profit as the company is a profit-making company and not limited in the pursuit of this purpose by any specific legal provision);[19] nor have they specified whether there is a ranking between the different purposes (profit, and common benefit) and which of these should prevail in case of conflict.[20] Nor have the French and Italian regulations provided for an obligation for shareholders to indicate in the articles the management methods that might guide the choice of directors.

[18] In France due to the confusion among the various legal concepts (*intérêt social*, *object social*, *raison d'être*...) efforts have been made to understand how to intend the concept of mission (see Rémi Dalmau, 'Les sociétés à mission: quelle nature et quelles sanctions?' (2020) 13 La Semaine Juridique Entreprise et Affaires 1136, who believes that the notion of mission is neither totally an element of corporate interest nor a corporate purpose or *raison d'être*. It appears to be a hybrid of these notions. Nevertheless, the fact that the mission is essentially at the confluence of *raison d'être* and corporate interest means that it can be seen as a limitation of the company's activity under the article, or even the law. The mission, defined by the company's articles, could therefore be seen as a new form of limitation on the powers of corporate bodies, and first and foremost a limitation on the powers of directors. The latter can only act insofar as they respect the corporate purpose and interests and within the limits of the mission.

[19] The scholars in Italy and France consider a benefit company a profit-making company (in France, Blanche Segrestin, 'De l'entreprise modern à l'entreprise responsable: norms de gestion et mission' in Segrestin and Levillain (n 13) 17) consider that the social and environmental purpose does not limit the profit for shareholders; also in Italy, see Giandomenico Mosco, 'L'impresa non speculativa' (2017) 2 Giurisprudenza Commerciale 231 who believes that the benefit company remains a profit-making company, but it also participates in the nonprofit reality through a hybrid functional paradigm in which the purpose of profit-sharing remains a priority and characterizing feature, but is no longer exclusive, making room for nonprofit purposes of common benefit). In any case, it is not clear how social and environmental objectives are to be considered and reconciled with the profit motive in art 1832 of the French Civil Code and art 2247 of the Italian Civil Code. For this reason, it is unclear if the profit company that obtains the benefit qualification has a new and different company interest regarding other non-benefit companies. If so, this could resolve problems regarding the way that directors must make managerial decisions.

[20] In Italy, legal scholars have highlighted that the legislation governing the benefit company, unlike that regulating the cooperative or social enterprise in Italy, has failed to specify a scale on which the profit motive must or must not prevail over the common law objectives indicated by the company in its statute (in this sense see for Italy: Giorgio Marasà, 'Scopo di lucro e scopo e scopo di beneficio comune nelle società benefit' (2017) Orizzonti del Diritto Commerciale 2). Some authors have emphasized the same problem in the American legislatures (see Murray (n 5) 485).

These doubts with respect to the graduation of different purposes remaining unsolved in this way generate a wide discretionary power for the directors who are thus largely free to balance management decisions,[21] but without making it easy to supervise their managerial choices and detect their accountability. Besides, the directors are liable for not complying with the "common benefit" stated in the charter but only the company itself and the shareholders (through a derivative action) have standing to bring suits alleging the breach of directors' duties and the failure to pursue public benefit in case of damages (e.g. reputational damages).[22] These laws do not explicitly provide for (nor prohibit) any kind of duty or additional liability of directors vis-à-vis third parties gaining any advantage from the public benefit objectives.[23] Their liability, however, would also be difficult to identify since, according to some scholars,[24] the managerial action of benefit company directors would also be subject to the benefit judgment rule, in addition to the business judgment rule.[25] The result then would be that the directors

[21] Mario Stella Richter Jr, Maria Lucia Passador, and Cecilia Sertoli, 'Benefit Corporations: Trends and Perspectives' in Peter and others (n 4) 213 believe that the 'directors are necessarily entrusted with the additional function of balancing the pursuit of this common-benefit purpose with that of traditional profit-making purpose, and this adjustment inevitably generates an additional room for choice'.

[22] Livia Ventura, 'Social Enterprises and Benefit Corporations in Italy' in Peter and others (n 4) 662; Ferrarini and Zhu (n 3) 10. Based on the business judgment rule as specified by the Italian jurisprudence, directors should not be held liable when the common benefit objective has not been achieved if they acted in good faith, diligently, and with no conflict of interest (see Marco Palmieri, 'L'interesse sociale: dallo shareholder value alle società benefit' (2017) 2 Banca Impresa Società 201-237). In France, according to arts 1850 Civil Code, L223-22 and L225-251 Commercial Code directors are liable to shareholders and the company for breaching the article dispositions (see Alain Pietracosta, 'Codification in company law of general CSR requirements: pioneering recent French reforms and EU perspectives' (2022) European Corporate Governance Institute - Law Working Paper 639/2022, 62 <https://ssrn.com/abstract=4083398> accessed 28 January 2025; Holger Fleischer, 'Corporate Purpose: A Management Concept and its implications for Company Law' (2021) 18 European Company and Financial Law Review 161, 173.

[23] Ventura (n 22) 632.

[24] Stella Richter Jr (n 14) 7; Marco Ventoruzzo, 'On "Prosperity" by Colin Mayer: Brief Critical Remarks on the (Legal) Relevance of announcing a Multi-Stakeholders Corporate Purpose' (2020) 1 Rivista delle società 43, 50.

[25] In France, we find evidence of the business judgment rule, which guarantees a presumption of good management on the part of the director, based on the jurisprudential principle that the employer is the sole judge (see Kevin Levillain and Blanche Segrestin, 'Les

of a benefit company would enjoy wider (dual) discretion, with the further consequence that they are less accountable for their choices to shareholders than are directors of non-benefit companies.[26]

In this sense, it seems that the introduction of the benefit models, desired in part to protect directors from possible shareholder lawsuits, has gone too far as it significantly increases the already wide discretionary power of directors in managing the company, potentially making it more difficult to challenge their managerial actions. However, this is not the only problem with benefit companies if one considers that, although they must pursue social and environmental goals and respect the interest of other stakeholders and not just shareholders, they have not expressly granted any stakeholder rights to be consulted for carrying out the common benefit mission, monitoring the execution, or in the event of a violation of the common benefit purpose, for suing the benefit company or directors. This absence of provisions could call into question the introduction of the benefit company model as a shift to corporate governance that prioritizes all stakeholders.[27]

3. *The Role of Stakeholders in the Benefit Company*

The stakeholders have no specific right to act against the directors and benefit companies for breaching their common benefit purpose because the Italian and French laws do not provide anything on this point. Other legislations, such as the Delaware and BC legislation, explicitly exclude this possibility for stakeholders.[28] The benefit company should be subjected to the provisions of com-

conditions cachées de la RSE: leçons du mouvement des Profit-with-Purpose Corporations' in Segrestin and Levillain (n 13) 124 n 6.

[26] Stella Richter jr (n 14) 7 who considers that in the case of the non-benefit company (and without statutory provision for common-benefit purposes), the directors will instead have to make their decisions only in the light of the ordinary business judgment rule: socially responsible management by the directors that also functions economically will not give rise to a contradiction between the typical purpose of the company and the common-benefit purpose; but a socially useful management choice that does not function economically may constitute just cause for the removal of the directors

[27] See B Lab (n 1).

[28] Some commentators in the USA denounced the same problem of the absence of adequate accountability and enforcement systems, since stakeholders have no rights of actions against directors who do not pursue the social and environmental purposes defined in the articles of association see Ferrarini and Zhu (n 3) 6; also Lyman Johnson, 'Pluralism

pany law relating to the specific corporate form in which the benefit company is incorporated. In France, the courts have for years accepted actions by third parties, usually, workers and creditors, who invoke the liability of directors who have violated a statutory commitment or acted improperly, provided that the claimants prove that they have suffered a prejudice resulting from the director's misconduct.[29] However, there is still no jurisprudence against a director of *société à mission*, but despite the difficulty of exercising such an action, it is not excluded that it can be exercised by a third party against the director of the benefit company.[30] In France, the benefit company must also state the *raison d'être* in the article that must be taken into consideration in the pursuit of the business activity balanced with the common benefit purposes. For some scholars, it is quite possible that the third parties have some options to act against the directors and the company if the *raison d'être* is violated.[31]

Finally, the French law provides that when the opinion of the external and independent organ concludes that one or more of the social and en-

in Corporate Form: Corporate Law and Benefit Corporations' (2013) 25 Regent University Law Review 269; Robert T. Esposito, 'The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation' (2013) 4 William & Mary Business Law Review 681.

[29] The director's liability may only be incurred by a third party if he demonstrates that the director intentionally committed a particularly serious fault incompatible with the normal exercise of corporate functions (see Schiller and others (n 11) 15; Pietrancosta (n 23) 62; Forget (n 10) 569 n 2340 where the author cites several case law cases about it. Dominique Schimidt, 'La société et l'entreprise' (*Dalloz Actualité*, 17 January 2018) <https://www.dalloz-actualite.fr/chronique/societe-et-l-entreprise1> accessed 28 January 2025 believes that in the case of liability claims against directors, these are now coming up against the legal theory of separable fault incompatible with the normal exercise of corporate functions, unless it is considered that the status of stakeholder is not the same as that of a third party.

[30] Some scholars have admitted it for breach of *raison d'être* by the director, despite the great difficulty in providing evidence (Rapport Rocher (n 17) 37; Schiller and others (n 11) 15). Therefore, it is believed that it can also be applied against the benefit company director who has violated the social and environmental mission.

[31] The company could be held civilly liable for breach of *raison d'être* under art 1240 Civil Code (see Urbain-Parleani, (n 11) 545); Pietrancosta (n 23) 62; Schiller and others (n 11) 15 who believe that by indicating the *raison d'être* in the articles, the company has made a unilateral engagement of intent that could create an obligation under art 1100 Code civil); it is believed that these possibilities could also be easily extended to violation of the social and environmental goals stated in the article of the benefit company. Regarding directors' liability for violation of the *raison d'être* see Schiller and others (n 11) 15; Pietrancosta (n 23) 62 who believe that it is, however, more difficult to prove.

vironmental objectives that the company has set for itself have not been complied with, the public prosecutor or any interested person may refer the matter to the president of the court, if necessary under penalty, to order the legal representative of the company to remove the indication of *société à mission* from all the company's acts, documents and communications.[32] This provision protects the correct information that the benefit company must provide in the market, and indirectly therefore some of the stakeholders (such as consumers, contractual parties, competing companies). However, it is not possible to employ the provision to force the company to pursue the violated social and environmental mission, even with the appointment of a court-appointed administrator.

In Italy, learned scholars discuss the possibility of applying the rule on directors' liability for direct damage to a shareholder or a third party to the stakeholders of the benefit company to allow them to invoke directors' liability by proving "direct pecuniary damage" due to the directors' conduct.[33] But for some scholars, the directors of the benefit company have no duty to the beneficiaries of the common benefit purpose, only to the shareholders.[34] Therefore, any breach of the duty to pursue (not only "profit"), but also the purpose of "common good" never determines the automatic triggering of a compensatory right of the stakeholders, but rather only the private compensatory remedy to protect the consumer from misleading advertising or the public remedy of any administrative sanctions imposed by the competent authority.[35] Therefore, the sanctioning apparatus expressly prepared by the Italian and French legislators (in Articles 1 para. 384 L. 208/2015 and L. 210-11 Commercial Code) seems to be intended to prevent misrepresenta-

[32] Art L210-11 Commercial Code; Ferrarini and Zhu (n 3) 12.

[33] The application of arts 2395 and 2476 para 6 Italian Civil Code to benefit company stakeholders is widely discussed. For example, in support of the application Ferrarini and Zhu (n 3) 10 ; Gianluca Riolfo, 'The new Italian benefit corporation' (2020) 21 European Business Organization Law Review 279, 300. For reconstruction of the debate, see Barcellona (n 9) 225 n 27; see also Stefano Prataviera, 'Società benefit e responsabilità degli amministratori' (2018) 4 Rivista delle società 919, 945 who discusses the limits and opportunities of applying art 2395 Civil Code to the benefit company's stakeholders.

[34] Serenella Rossi, 'L'impegno multistakeholder della società benefit' (2017) Orizzonti del diritto commerciale 4 who believes that the only duty that directors have to stakeholders, according to Italian benefit company regulations, is the correct and truthful information regarding actions taken and goals achieved.

[35] Art 1 para 384. See Barcellona (n 9) 226-227.

tion aimed at the public. It is therefore a regulation of the market, aimed at preventing and if necessary, blocking the phenomenon of so-called greenwashing.[36]

Even as regards the stakeholder prerogatives in the management and control of the benefit company – which should be a crucial point when creating a stakeholder governance model as required by B Lab[37] – the governance model of the benefit company in Italy and France does not prescribe any active stakeholder participation, but it is left to the directionality of the company to establish internal committees to represent the various categories of stakeholders and to carry out consultation or supervision.[38] There is just one disposition in French law, that some scholars[39] believe is a special power for stakeholders of the *société à mission*: the obligation that the *société à mission* must include one or more employees in the purpose committee (*comité de mission*).[40] But it needs to be clarified that French corporate law has traditionally given workers special forms of control over management activity.[41] For this reason, the presence of the employee in the purpose committee does not represent an opening to stakeholder interference in the management and control of the *société à mission* but is exclusively a heritage of the tradition of French corporate law. Nonetheless, French law does not preclude

[36] Daniela Caterino, 'Denominazione e labeling della società benefit, tra marketing "reputazionale" e alterazione delle dinamiche concorrenziali' (2020) 4 Giurisprudenza Commerciale 787, 799.

[37] See B Lab (n 1).

[38] Some have highlighted greater openness on the part of benefit companies to collaborate with associations, NGOs and stakeholders in conducting business (see Errol Cohen, *La société à mission. La loi PACTE: enjeux pratiques de l'entreprise réinventée* (Hermann Éditeurs 2019) 77).

[39] Ferrarini and Zhu (n 3) 12.

[40] Art L210-10 Commercial Code. The purpose committee should be established, distinct from other corporate bodies and including at least one employee, which shall be in charge of monitoring the execution of the social/environmental mission and of the presentation of an annual report attached to the management report and verified by an external and independent organ. If the company has less than 50 employees, the purpose committee may be replaced by a purpose referee, who may be an employee.

[41] See Edmond Schlumberger, 'La participation des salariés à la vie sociétaire' in Isabelle Urbain-Parleani and Pierre-Henri Conac (eds), *Regards sur l'évolution du droit des sociétés depuis la loi du 24 juillet 1966* (Dalloz 2018) 229 French law has over the years given more room to employees, even "direct" roles within management bodies, but it has never come to co-determination as in Germany. Workers are in fact involved in the management of the company, but they have more of a controlling rather than a decision-making role.

the possibility that the purpose committee may include third parties external to the company, such as representatives of associations or NGOs.[42] And the same can also be argued concerning Italian law because it does not preclude that the impact manager (*rappresentante del beneficio comune*)[43] can also be identified among such subjects. This is a facultative choice of the benefit company that could also be adopted by any other for-profit company that has not turned into a benefit and wants to adopt more equitable and sustainable behavior. As a result, the governance model of the benefit company in Italy and France does not prescribe by law active stakeholder participation, but it is left to the directionality of the company to establish internal committees to represent the various categories of stakeholders and to carry out consultation or supervision of the directors.

The absence of special provisions for companies with benefit company status could raise doubts concerning the concrete relevance that is accorded to benefit company stakeholders, who are referred to (directly or indirectly) in the articles as beneficiaries of the social and environmental purposes, but they do not hold any specific rights. Stakeholders of the benefit company do not have a special status compared to the stakeholders of a non-benefit company that decides on a one-time basis to take a certain benevolent action toward certain stakeholders or add a special social or environmental mission to their articles without becoming a benefit company. They can embrace the benevolence that the company decides to do, but they cannot claim it.

[42] A recent example is Doctolib, which has become a benefit company, and whose purpose committee (comité de mission) is composed of a wide range of personalities from the healthcare ecosystem (for example, representatives of the medical profession, patients, etc.) see 'Doctolib dévoile son Comité de mission, composé de personnalités plurielles de l'écosystème de la santé' (*Doctolib*, 8 June 2023) <https://about.doctolib.fr/news/doctolib-devoile-son-comite-de-mission-compose-de-personnalites-plurielles-de-lecosysteme-de-la-sante/> accessed 28 January 2025.

[43] Art 1 para 380. The *società benefit* shall identify one or more individuals to be appointed as "impact manager/s," with the specific task of pursuing the public benefit. The choice of the impact manager is left to the board of directors that has wide discretion in the selection. He/she can be a director, an officer, or another person working within the company, but the function can also be outsourced. The law does not regulate in detail the role of the impact manager but more generally refers to "individuals with the role and tasks for pursuing the common benefit." The impact manager may assist directors in their activities or check whether the company's activities are consistent with its social and environmental objectives. However, the appointment of the impact manager and his/her eventual liability does not exonerate directors and auditors from their duties and responsibilities (Ventura (n 22) 663).

The difficulty of sanctioning directors' behavior and recognizing stakeholder rights may also relate to the emptiness of control devices designed by Italian and French lawmakers to monitor the pursuit of the benefit company's mission of common benefit.

4. *Transparency Requirements and Control Systems*

The Italian and French legislators have both tried to figure out some solutions to major weaknesses found in the USA legislation that inspired their legislations.[44] But some differences between the Italian and French legislation exist regarding the assessment.

The French Lawmaker prescribes that the purpose committee (*comité de mission*) shall follow up on the mission's achievement and report to the general meeting.

When they decide to become a benefit company and state this in the articles, the shareholders must indicate the modalities of how the purpose committee is to supervise the mission.[45] This committee may obtain all the documents required for the accomplishment of its mission and conducts any audit it deems appropriate.[46] In this way, if the French legislator innovates regarding this new corporate body, however, he might decide to maintain a certain wide discretion in the shareholder's hands in defining the evaluation methods that the purpose committee must adopt. Nevertheless, follow-up is completed by monitoring performed by an external and independent organ that verifies the execution of mission.[47] The powers granted to the external and independent organ are considerable. The external and independent organ has access to all documents held by the company that are useful

[44] Ferrarini and Zhu (n 3) 12; Ventura (n 22) 663.

[45] Art L210-10 para 3 Commercial Code.

[46] Art L210-10 para 3 Commercial Code.

[47] Art L210-10 para 4 Commercial Code. David Hiez, 'The Suitability of French Law to B Corp' in Peter and others (n 4) 580. The external and independent organ must have been designated by the management body (art R210-21, II Commercial Code), unless otherwise stipulated in the articles of association. It must be one of the bodies accredited for this purpose by the French Accreditation Committee ((COFRAC) art R210-21, I Commercial Code) or by any other accreditation body that is a signatory to the multilateral recognition agreement (Alain Couret, 'Le décret du 2 janvier 2020 relatif aux sociétés à mission' (2020) 2 Bulletin Joly Sociétés 6).

for forming its opinion, in particular the report of the purpose committee. The independent body may carry out any on-site verification it deems useful within the company, and within the entities concerned by one or more of the social and environmental objectives forming part of the engagement, with their agreement.[48] The report is attached to the purpose committee's report. Like the extra-financial performance declaration for which the plan served as a model, it is published on the company's website and remains publicly accessible for at least five years. The audit results in a reasoned opinion which describes the due diligence carried out and indicates whether the company is meeting the objectives it has set itself. Where appropriate, the auditor mentions the reasons why, in his or her opinion, the objectives were not met, or why it was impossible to reach a conclusion.[49]

As mentioned above, there are no direct sanctions for failure to achieve objectives. However, when the audit results of the independent body conclude that one or more of the social and environmental objectives that the company has set itself have not been met, the public prosecutor or any interested party may refer the matter to the president of the court ruling in summary proceedings for the purpose of enjoining the company's legal representative, if necessary under penalty, to remove the words "*société à mission*" from all deeds, documents or electronic media emanating from the company.[50]

Italian law does not provide any monitoring by an independent and external body responsible for measuring the impact of the benefit company. In fact, according to art 1 para, 383, Italian law requires *società benefit* to produce and publish an annual benefit report on their website detailing their pursuit of the public benefit. The company itself drafts the report and considering that the law does not establish a specific indication, it can be assumed that the annual benefit report must be prepared by the company's directors, with the collaboration of the impact manager.[51] Unlike French leg-

[48] Couret (n 48) 6.

[49] Emmanuel Masset, 'Décret n° 2020-1 du 2 janvier 2020 relatif aux sociétés à mission: la fusée peut désormais décoller!' (2020) 4 Revue de sociétés 207; Couret (n 48) 6.

[50] Art L210-11 Commercial Code.

[51] Ventura (n 22) 663. Company directors are also in charge of drawing up the annual financial statements according to art 2423 Italian Civil Code. The author considers that the benefit report should not be considered an integral part of the annual financial statements but an autonomous document, which is not subject to approval at the general shareholders' meeting.

islation, the Italian company's impact and the pursuit of public benefit must be assessed using a third-party standard.[52] The third-party standard used must comply with the requirements listed by the law.[53] It must be comprehensive, independent (developed by an entity not controlled by, or affiliated to the *società benefit*), credible (designed by a subject that has both access to the necessary expertise and uses a balanced scientific and multistakeholder approach), and transparent.[54]

However, the absence of an independent third body to assess the company's impact makes it difficult to prove the failure to pursue the common benefit purpose or its violation and consequently to sanction the benefit company and its directors, since it is still the company and its directors who draft the impact report without the submission to any external audit.[55] The only external control provided for by the legislature is granted to the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato* (AGCM)) to apply the regulations on misleading advertising and misleading business practices[56] to sanction companies that, by using the name benefit company or abbreviation, repeatedly and without good cause do not pursue the public benefits provided for in their articles.[57]

As mentioned above,[58] in Italy and France the only sanctions identified by the legislature are based on the need to protect the market from greenwashing and purpose washing. But without an effective and independent assessment, it is very difficult to prove market abuse caused by the exploitation of benefit company qualifications.

It seems then that the two monitoring systems need to be extensively revisited by both the French and Italian lawmakers. The former should adopt unitary standards to objectively measure the pursuit of mission.[59] In this way, third-party and independent bodies would use the same standards to meas-

[52] Art 1 para 382 l b).

[53] Art 1 para 382. See annex 4 and 5 l 208/2015.

[54] Ventura (n 22) 664. Standards most commonly used by benefit companies to prepare the annual report are those of B Lab.

[55] Recent studies show that the level of compliance with the requirement at issue by Italian benefit companies is low and that the quality of reporting should be improved, also to enhance the comparability of reports across firms (see Ferrarini and Zhu (n 3) 11).

[56] Art 1 para 384.

[57] Ventura (n 22) 664.

[58] Art L210-11 Commercial Code and art 1 para 384; Caterino (n 37) 799.

[59] Rapport Rocher (n 17) 51.

ure the benefit company's execution of the mission. Whereas, the Italian legislature should think about strengthening its monitoring by establishing a third and independent body that verifies the information in the report based on the unitary standards developed also by an independent body. By implementing checking mechanisms, it might be easier to sanction companies that abuse the status of benefit companies.

5. *Final Remarks*

To conclude, founding the benefit company is a purely negotiated decision, circumscribed by the will of the shareholders, who thereby constitute the possible conflict between their different visions of the goals to be assigned to their enterprise. And, since it remains a profit-making (or mutualistic, as the case may be) enterprise, this option can be driven by different and varied motivations, from the most genuinely altruistic to the fundamentally selfish ones of seeking new market opportunities with counterparts sensitive to issues of social responsibility.[60] In addition, some scholars believe that benefit company legislation merely confirms the shareholder approach rather than putting an end to it.[61]

Moreover, if the goal of lawmakers is to move beyond the idea of traditional capitalism to force all companies to increase their sustainability and responsibility to society, the most effective way is to adopt new mandatory obligations for all companies. Indeed, interventions of a voluntary nature (such as choosing to take on a *raison d'être* or become a benefit company) are functional for this intent, but they are believed to play a marginal and secondary role. Such legal instruments cannot be the main vehicle for promoting a new, more responsible, or sustainable model of a company. They can, at most, be legal institutes that complement the new obligations of all companies, but only if their legal regime is implemented. In this way, the status of benefit companies will be assumed only by those companies that are truly well-intentioned in promoting purposes of common benefit in addition to profit. It is likely that precisely such illuminated companies will have no

[60] Rossi (n 34) 2.

[61] Barcellona (n 9) 37 who criticizes the enthusiasm with which Mayer looks at benefit companies (see Colin Mayer, *Prosperity Better Business Makes the Greater* (Oxford University Press 2018) 42).

problem actively involving stakeholders in the life of the benefit company or subjecting themselves to greater reporting and monitoring obligations.

My view is, therefore, that benefit company status should be retained as optional, leaving it up to the members to decide whether to adopt the status, but with appreciable changes from a regulatory perspective. Indeed, the current state of the legislation is likely to give a marketing advantage, but is not necessarily justified by concrete results in terms of common benefit. Such legal gaps could in the long run cause citizens to distrust the good intentions of companies (and not just benefit companies) to make themselves more sustainable and accountable, and moreover penalize even those companies that employ the qualification to really pursue purposes of common benefit. Hence it is clear that there should be intervention on precisely those problematic aspects that have made the legislation too weak. Therefore, the tools for monitoring and verifying the execution of the mission should be implemented. It is imperative to set objective standards of measurement and impose external control. These changes could also be effective in binding the liability of the company and the board of directors in case of violation or non-compliance with the common benefit mission. Furthermore, the most important change would be the addition of new mandatory provisions to grant consultation and monitoring power to stakeholders.[62] It is also necessary to clarify their rights vis-à-vis the benefit companies in order to resolve any doubts about their entitlement to sue the companies and directors for violation of the common benefit purpose.

But above all, for these changes to have a real impact, a clear and objective definition is needed of what the common benefit purpose(s) is that the company intends to pursue, in this way taking action to eliminate the vagueness and abstractness of the definition. One hypothesis would be to institute a benefit purpose check prior to the adoption of the qualification or to standardize common benefit purpose assumptions. Some scholars have also proposed the provision of prior consultation with stakeholders to jointly define common benefit purposes to be stated in the articles.[63]

Faced with such proposals, one might be afraid that the benefit company status could become less attractive to companies, but in reality, there is the belief that the exploitation of the benefit company status will be employed only by those companies that are truly intent on pursuing purposes of common benefit and making a practical commitment to achieving them.

[62] Rapport Rocher (n 17) 50.

[63] Pietrancosta (n 23) 59.

Clara De Chirico

CANADIAN INDIGENOUS COMMUNITIES AND SUSTAINABILITY

1. *Introduction*

This research examines the implementation of sustainability in Indigenous consultations in Canada. Using a two-sided methodological approach that aims to consider both corporate and community perspectives in consultation, this study identifies principles for improving their relationships. It is part of a broader doctoral research project on stakeholder protection conducted jointly at the University of Macerata, Italy, and the University of Ottawa, Canada. This research sheds light on one of the most important tools in Canadian law for safeguarding the interests of Indigenous communities in relation to industrial projects on their traditional lands. By examining the characteristics of the consultation process and critically analysing the expectations of Indigenous communities regarding its outcomes, this study seeks to reimagine the relationship between industry and local communities in a holistic and equitable manner.

In the next section, I provide a brief overview of the origins and content of Indigenous consultations in Canada. Subsequently, I explore the connection between the concept of sustainability and the research topic. I then turn to the literature review and identify the gap that my research aims to fill. Based on these gaps, I outline the research questions and provide information on the applied methodology and methods. The final section summarises the research findings and discussion, followed by some concluding remarks.

2. *Indigenous Consultation in Canada*

Consultation serves as an important platform for Indigenous communities and corporations to engage with each other. The Duty to Consult requires the Government of Canada to consult with Indigenous communities whose rights may be affected by economic development projects in their territories. The government is also responsible for appropriately addressing community needs and mitigating potential harm. While the duty officially

rests with the government, consultation is typically delegated to proponent companies. As a result, companies establish direct relationships with Indigenous communities and have a de facto responsibility to provide information about the project and seek their consent.[1]

The Duty to Consult is based on Section 35(1) of the Canadian Constitution Act, which recognises Aboriginal and Treaty rights,[2] and on the Principle of the Honour of the Crown. The latter is a constitutional principle that governs the fiduciary relationship between the Crown and Indigenous peoples and requires the government to respect and protect them from exploitation.[3]

Pivotal Supreme Court of Canada (SCC) rulings have further developed the Duty to Consult. In the *Sparrow* case, the SCC held that Aboriginal rights limit the sovereignty of the Crown and can only be infringed upon if the government has a valid purpose and acts honourably.[4] In the *Badger* and *Haida Nation* cases, this protection was extended to established Treaty rights as well as to Aboriginal and Treaty rights that have been asserted but not yet proven in court.[5] In the *Rio Tinto* case, the Court outlined a three-step test to determine when the Duty to Consult is triggered, involving the Crown's actual or potential knowledge of an Aboriginal claim or right, a Crown's planned conduct, and the likelihood of adverse effects on the identified claim or right.[6] Nonetheless, the test is general in nature and the level of consultation required has to be determined on a case-by-case basis.

It is worth noting that the Duty to Consult does not obligate the government to reach an agreement with the consulted community, nor does it give the community a veto over project implementation. However, the ratification of the United Nations Declaration on the Rights of Indigenous

[1] Peter Landmann, 'Crown Delegation of Consultation Responsibilities' (2012) OBA.org <http://www.oba.org/en/pdf/sec_news_abo_dec12_con_lan.pdf> accessed 17 September 2024.

[2] While Aboriginal rights originate with indigenous peoples, Treaty rights are the result of negotiated agreements between indigenous groups and the Canadian government.

[3] *Mitchell v MNR* [2001] SC (Canada) 1 SCR 911, para 9.

[4] *R v Sparrow* [1990] SC (Canada) 1 SCR 1075.

[5] *R v Badger* [1996] SC (Canada) 1 SCR 771; *Haida Nation v British Columbia (Minister of Forests)* [2004] SC (Canada) 3 SCR 511.

[6] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council* [2010] SC (Canada) 2 SCR 650.

Peoples (UNDRIP)[7] in British Columbia and at the federal level in Canada[8] may contribute to a more robust understanding of consent-seeking. UNDRIP mandates governments to obtain the free, prior, and informed consent (FPIC) of Indigenous peoples before proceeding with a project.

3. *How does Sustainability Fit in?*

Although the connection between Indigenous consultation and the concept of sustainability may not be immediately obvious, it is indeed a strong one. While "sustainability" tends to be equated with environmental stewardship, it encompasses much more than that. For example, the concept of sustainable development integrates environmental concerns with social and economic ones.[9] In order to achieve sustainable development goals, the engagement of Indigenous communities in industrial projects is fundamental. This is evident in Canada's SDG implementation plan, which includes advancing partnership and reconciliation with Indigenous peoples as one of its targets.[10]

From an Indigenous perspective, the concept of sustainability also goes beyond nature conservation. It includes consultation with native groups, protection of cultural resources and traditional knowledge, and respect for cultural differences.[11] It is no coincidence that the Indigenous community of Alderville First Nation, in its consultation protocol, defines sustainability in terms of the survival and prosperity of the community, its members, and its cultural heritage, in addition to the well-being of the surrounding environ-

[7] United Nations General Assembly, 'United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)' (13 September 2007).

[8] British Columbia, 'Declaration on the Rights of Indigenous Peoples Act' (SBC 2019); Government of Canada, 'United Nations Declaration on the Rights of Indigenous Peoples Act' (SC 2021, c 14).

[9] Jamie Benidickson, *Environmental Law* (5th edn, Irwin Law 2019).

[10] Government of Canada 'Canada's Federal Implementation Plan for the 2030 Agenda' <https://www.canada.ca/en/employment-social-development/programs/agenda-2030/federal-implementation-plan.html> accessed 17 September 2024.

[11] Grant Christensen, 'What Does It Mean to Be Sustainable? Regulating the Relationship between Corporations and Indigenous Peoples' in Beate Sjåfjell and Christopher M Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press 2019) 429.

ment.[12] This broader understanding of sustainability highlights the need to examine its social implications.

4. *Literature Review and Research Gaps*

We have seen that reconciliation with Indigenous communities appears in both the Western agenda for sustainable development and the Indigenous understanding of "sustainability". In practice, however, achieving this goal is not as straightforward as it may seem in theory. In the context of Indigenous consultation, substantial and procedural issues hinder the goal, as a review of both Western and Indigenous scholarship shows.

Substantial issues include power asymmetries and a lack of trust between the parties in consultation. Power asymmetries can manifest themselves in different ways, such as disparities in knowledge about the nature of the project and implications due to different approaches to science and resource limitations. These asymmetries affect the way consultations are conducted and give proponents greater control over the process. As a result, these disparities can lead to doubts about the actual influence of communities on the final decision.[13] Procedural issues include, among other things, proponents' uncertainty about the standards to follow. For example, a lack of timing provisions poses risks to the meaningfulness of consultation, since if consultation occurs too early or too late, it is unlikely to have any practical relevance to the final project.[14]

To address these problems, scholars from both sides have advanced various recommendations. However, these recommendations often lack comprehensiveness. On the one hand, Western scholars have focused primarily

[12] Alderville First Nation, 'Alderville First Nation Consultation Protocol' (2015) <http://alderville.ca/wp-content/uploads/2017/02/AFNProtocol2.pdf> accessed 17 September 2024.

[13] James Anaya, 'Report of the Special Rapporteur on the rights of indigenous peoples; The situation of indigenous peoples in Canada' (UN Human Rights Council A/HRC/27/52/Add.2 2014), cited by Françoise Montambeault and Martin Papillon, 'Repoliticising Indigenous Participation: FPIC Protocols in Canada and Brazil' (2022) The International Journal of Human Rights 1, 7.

[14] Riccarda Flemmer and Almut Schilling-Vacaflor, 'Unfulfilled Promises of the Consultation Approach: The Limits to Effective Indigenous Participation in Bolivia's and Peru's Extractive Industries' (2015) 37 Third World Quarterly 172.

on the role of corporations and legal institutions, emphasising their responsibility to improve the effectiveness of engagement practices with local communities and other external stakeholders.[15] However, these calls for action by Western actors can significantly limit the role of Indigenous communities in contributing to the success of consultation, potentially exacerbating inequalities rather than mitigating them. On the other hand, Indigenous scholars have primarily emphasised relationships between the government and Indigenous communities, in line with the idea of self-determination, which implies establishing a 1:1 relationship with the government.[16] This perspective is also biased because it overlooks the crucial role played by proponents in consultation.

5. *Research Questions and Methodological Insights*

I challenge both of the aforementioned approaches and argue that sound relationships can only be achieved by recognising an equal and active role for both parties in the consultation process. This raises the question of how relationships can be improved and whether there are any guidelines for better consultation. To address these questions, I examined 17 Indigenous Unilateral Consultation Protocols (UCP), documents unilaterally adopted by various Indigenous communities across Canada to govern consultations.

UCPs have legal status within Indigenous legal systems, though not within Canadian law. They express the Indigenous perspective on consultation and provide guidelines for its implementation in the community in which they were issued. I have chosen them because they are rooted in Indigenous values and worldviews, and thus align with the requirements of the applied Critical Indigenous Methodology (CIM). The CIM aims to incorporate the Indigenous

[15] See Alberto Chilosi, 'Stakeholder Protection, Varieties of Capitalism, and Long-Term Unemployment' (2010) 9 European Journal of Comparative Economics 197 (suggesting introducing forms of stakeholder representation in corporate boards or protective provisions in labour law); Kenneth E Goodpaster, 'Business Ethics and Stakeholder Analysis' (1991) 1 Business Ethics Quarterly 53 (suggesting recognising directos' ethical obligations towards stakeholders).

[16] See John Borrows, 'Wise Practices: Exploring Indigenous Economic Justice and Self-Determination' in Robert Hamilton and others (eds), *Wise practices: exploring Indigenous economic justice and self-determination* (University of Toronto Press 2021).

worldview into research, making it appropriate for this study.[17] Additionally, the CIM recognises the significance of relationships among all beings. These relationships form kinship and determine the extent of one's responsibility to all interconnected entities. Consequently, the CIM offers researchers the opportunity to rethink the relationship between industry and locals in a holistic way.[18] A second reason for selecting UCPs is that they specifically address proponent companies as delegated parties responsible for conducting consultations. This makes them particularly relevant for understanding the dynamics of their relationship. Lastly, the selected sample of UCPs covers a wide range of geographical areas within Canada, respecting the diversity of Indigenous communities and acknowledging the complexity of Indigenous cultures.

I conducted a textual analysis of the UCP sample, examining recurring concepts and terms, to identify Indigenous values underlying consultation. This qualitative method is consistent with the requirements of the CIM, as it prioritises interpretation over objectivity and seeks to identify shared solutions to social needs. Additionally, this method provides valuable insights into the consultation phenomenon by offering a contextual understanding of the perspectives and concerns of Indigenous communities within the broader Indigenous worldview.[19]

Building upon the values identified, I formulated five practical principles for fostering meaningful relationships between industry and local communities. This step was informed by the Two-Eyed Seeing (TES) principle, which originated in the field of scientific learning as an approach to reconcile Western and Indigenous worldviews through a process of "weaving" different educational techniques.[20] By adopting a dual perspective, the principles

[17] Cora Weber-Pillwax, 'Indigenous Research Methodology: Exploratory Discussion of an Elusive Subject' (1999) 33 The Journal of Educational Thought (JET) / Revue de la Pensée Éducative 31; Shawn Wilson, 'What Is Indigenous Research Methodology?' (2001) 25 Canadian Journal of Native Education 175.

[18] See James (Sakéj) Youngblood Henderson, 'Postcolonial Indigenous Legal Consciousness' (2002) 1 Indigenous Law Journal 16.

[19] Evelyn Steinhauer, 'Thoughts on an Indigenous Research Methodology' (2002) 26 Canadian Journal of Native Education 69, 72; Stanley Deetz, 'Interpretative Research in Communication: A Hermeneutic Foundation' (1977) 3 Journal of Communication Inquiry 53, 66.

[20] Cheryl Bartlett, Murdena Marshall and Albert Marshall, 'Two-Eyed Seeing and Other Lessons Learned within a Co-Learning Journey of Bringing Together Indigenous and Mainstream Knowledges and Ways of Knowing' (2012) 2 Journal of Environmental Studies and Sciences 331.

I have developed seek to consider and balance the interests of both communities and corporations. While there have been preceding legal studies on UCPs,[21] this study introduces the original application of the TES principle.

6. *Values and Principles for Meaningful Consultation*

The textual analysis of the UCP sample revealed four underlying Indigenous values that inform consultation. First, *interconnectedness* highlights the recognition of the interdependence of all elements of Creation. This value emphasises the understanding that all beings are part of a larger web of relationships and depend on each other to thrive.[22]

Second, *reciprocity* emphasises the importance of knowledge exchange and learning across different ways of knowing (i.e., people belonging to different cultural traditions). It acknowledges the value of diverse cultures and encourages the sharing of knowledge between Indigenous and non-Indigenous perspectives.[23]

Third, *relational accountability* refers to the accountability that individuals have to other people, animals, or natural elements with whom they have relationships. This value is rooted in the concept of relational knowledge and informs the Indigenous approach to academic research, which includes an obligation for researchers to "answer their relations", which means to address the needs and concerns of their communities.[24]

Fourth, *materiality* reflects the Indigenous responsiveness to practical issues and a refusal of abstraction. In the legal context, materiality shapes the law to be a tool for addressing real conflicts that may arise within the community, rather than being purely theoretical.[25]

Interpreted through the TES approach, these values may inform five practical principles for improved consultation. These principles aim to meet the values and needs of both actors involved.

[21] See, eg Montambeault and Papillon (n 13).

[22] Leah Levac and others, 'Learning Across Indigenous and Western Knowledge Systems and Intersectionality' (2018) Canadian Research Institute for the Advancement of Women 10; Steinhauer (n 19) 73; Borrows (n 16) 271.

[23] Levac and others (n 22) 10.

[24] Wilson (n 17) 177.

[25] Steinhauer (n 19).

1. The value of interconnectedness highlights the importance of *involving all members of the community in the consultation process*. Consultation should take place within the community, and if necessary, may involve other affected communities and subcontractors. This could be done, for example, by using community consultation bodies to mediate between community members and corporate representatives. By ensuring that all community members have a voice in the project, their engagement would be more meaningful and enable the consultation to address specific individual needs. Simultaneously, extending the scope of consultation to include all those likely to be affected by the project would increase its effectiveness. By giving community bodies the responsibility for consulting their members, proponents would be relieved of the burden of reaching out to them and establishing a common ground for dialogue, resulting in cost and time saving.
2. *Mutual learning* stems from the value of reciprocity. This principle calls for companies and communities to engage in mutual disclosure of their interests and expectations early in the process. For example, in-person meetings between representatives and community visits could help both parties to better understand and accommodate each other's needs. This would also foster a more collaborative atmosphere in which communities are less sceptical of proponents' intentions and more open to providing consent.
3. The value of reciprocity also implies the *participation of all parties in negotiations, with equal power and say*. This principle aims to build a "created space" for participation among all parties, moving away from a hierarchical structure in which one party "owns" or "leads" the consultation while others are left "lagging" behind with limited influence in the process.[26] One way to fulfill this principle could be to incorporate illustrations in written agreements, whenever applicable. This is because imagery has a cultural significance in Indigenous traditions, and the inclusion of images in consultation documents would be perceived as a recognition of Indigenous participation and influence in the process.
4. According to the value of relational accountability, proponents' duties arise from their relationships with the communities affected by

[26] Andrea Cornwall, 'Unpacking "Participation": Models, Meanings and Practices' (2008) 43 Community Development Journal 269.

industrial operations. Therefore, *consultation should be understood as the 'right thing to do'* and should be undertaken regardless of legal requirements to do so. By engaging in consultation whenever Indigenous interests are likely to be affected by a project, communities can develop trust in this tool and in their counterparts, leading to peaceful coexistence and long-term project success.

5. Consistent with the value of materiality, *consultation should also address practical issues*. Consultation agreements, if applicable, should set timelines, regulate resource provision, and include sample templates. Providing appropriate resources for Indigenous communities to engage in consultations can help bridge information gaps between them and the proponent companies. This can make consultations more meaningful. Moreover, examples and templates would help proponents assess the feasibility of their proposal at an early stage, thereby avoiding unnecessary costs and delays and streamlining the project.

7. *Conclusion*

This study suggests the possibility of reimagining Indigenous-corporate relationships. By adopting a TES approach to interpreting a set of Unilateral Consultation Protocols adopted by Indigenous Communities across Canada, five principles have been formulated that aim to benefit both Indigenous communities and companies. These principles seek to address the substantial and procedural issues identified in Indigenous and Western literature, simultaneously empoweing Indigenous communities while providing practical guidance to corporate directors on how to implement sustainable development goals. In addition, these principles are general in nature, which makes them potentially applicable beyond the scope of the Duty to Consult. Further research is needed to explore whether they can serve as new standards for improving stakeholder engagement in corporate operations.

Davide Clementi

FROM THE ENVIRONMENT IN COURTS TO ENVIRONMENTAL COURTS. COMPARATIVE PERSPECTIVES FROM INDIA AND CHINA

1. *Introduction. The Quest for the Environmental Jurisdiction*

Since the end of the Seventies, specialized Environmental Courts (ECs) and Environmental Tribunals (ETs) have been flourishing throughout the globe. According to their most prominent scholars, ECs vary 'from fully developed, independent judicial branch bodies with highly trained staffs and large budgets all the way to simple, underfunded village ECs that handle environmental cases one day a month with rotating judges',[1] while ETs 'range from complex administrative-branch bodies chaired by ex-Supreme Court justices, with law judges and science-economics-engineering Ph.D. graduates, to local community land use planning boards with no law judge'.[2]

From civil law systems to common law countries, from liberal-democratic States to flawed democracies or authoritarian regimes, the most diverse legal systems have experimented with creating these new-found institutions. This is exceptionally legitimate for India and the PRC, where economic growth, environmental degradation, and the creation of elementary environmental regulations often go hand in hand.

Despite the formation of statutory environmental laws in India and China,[3] the two countries have nonetheless experienced the tragedy of ecological disasters, anthropic environmental damage, and the destruction of common goods and properties.

The question of moving from law in books to law in action is thus central to the legal systems of the two Asian countries. Distant in legal traditions

[1] George Rock Pring and Catherine Kitty Pring, 'Environmental Courts & Tribunal: A Guide for Policy Makers' (United Nations Environment Programme 2016) 13.

[2] ibid.

[3] For a preliminary and historical reconstruction of environmental legislation in India, see Debasish Chatterjee, 'Multiple Environmental Legislations in India. An Analysis' (2005) in 4 (5) International Journal of Law Management and Humanities 1665. Similarly, for China, see Zhai Tiantian and Chang Yen-Chiang, 'The Contribution of Chinese Civil Law to Sustainable Development: Progress and Prospects' (2019) 11(1) Sustainability 294.

and political and economic structures, the two giants have grappled with the issue of making environmental laws and regulations effective[4] while also pioneering the establishment of Environmental Courts and Tribunals (ECTs).

Using a comparative approach, this paper aims to reconstruct the genesis of ECTs in the Indian and Chinese legal contexts and to assess the real impact of the specialized environmental judiciaries in both countries.

2. *The Indian Case*

The Indian judiciary has long addressed the question of ECTs, starting with impelling resolutions of large-scale environmental disasters.

For the first time since the (still unfolding) 'jurisdictional Odyssey' of the Bhopal disaster,[5] the Supreme Court of India dealt with the necessity of interdisciplinary cooperation between '[j]urists, technologists and other experts in Economics, environmentology, futurology, sociology, and public health'[6] to face the environmental degradation caused by anthropic activities.

[4] cf Lorenzo Squintani, 'Addressing the (Lack of) Effectiveness of Environmental Law and the Gap between Law in the Books and Law in Action' (2020) 17 Journal for European Environmental and Planning Law 133, 135; International Network for Environmental Compliance and Enforcement, 'INECE Special Report on Climate Compliance' (INECE 2009) 16, where 'compliance' and 'enforcement' are placed at the base of the pyramid to ensure the success of the sustainable development goal.

[5] On the night of December 2 to 3, 1984, forty-two tons of methyl isocyanate - a highly toxic compound used in the production of pesticides, plastics and polyurethanes - was released into the atmosphere from the facilities of Union Carbide India Ltd., a subsidiary of the U.S. multinational Union Carbide. Used in the production of an insecticide, the chemical compound then spread as a toxic cloud in Bhopal (in the Indian state of Madhya Pradesh, killing 3,787 people in a matter of hours, mainly in the vicinity of the plant, poisoning another 20,000 in the following months to death, and causing clinically detectable damage to more than half a million people. The Bhopal disaster still represents the world's worst chemical leak disaster ever. For the earliest remarks made by the legal scholars of that time, see Lori Ann Olejniczak, 'Bhopal Disaster Litigation: A Jurisdictional Odyssey' (1987) 2 (1) Emory Journal of International law Dispute Resolution 205. Concerning the most recent developments in the Bhopal case, see Ajoy Karpuram and R Sai Spandana, 'SCO Explains: The Bhopal Gas Tragedy, 40 Years Later' (*SCObserver*, 24 January 2023) <https://www.scobserver.in/journal/sco-explains-the-bhopal-gas-tragedy-40-years-later/> accessed 28 January 2025.

[6] *Union Carbide Corporation vs Union of India Etc* [1989] SCC (2) (India) 540.

The very turning point of such a vision of cooperation-specialization of the judiciary was the controversial Delhi Cloth Mills disaster.

Located in New Delhi's urban area, the factories of Delhi Cloth Mills Ltd. – a Shriram Food and Fertilisers Ltd. subsidiary – were affected by a massive oily gas leak. For this reason, an influential environmental lawyer, M.C. Mehta, filed a writ petition with the Supreme Court of India based on Article 32 Const., requesting the closure of the plants or removal and relocation. Two separate disputes arose from Mehta's writ, both of which came to the attention of India's Supreme Court.

In the first decision, the Court was to rule on whether or not Shriram's facilities should be reopened while the judgment was still pending. Recognizing the company's ability to resume production activities within certain limits, the Court noted the rise in pollution and environmental damage cases, with an increasing burden on courts at each level. To remedy this, the Supreme Court of India deemed it necessary, even in its own work, to employ neutral scientific, experiential skills in order to provide an 'essential input' to adjudicative activity.

In addition, the Court suggested that the Government of India should, on the one hand, set up a research group on ecological sciences and, on the other, establish 'Environment Courts' on a regional basis with a toga judge and two experts appointed by the research group according to the nature of the case.[7]

In the subsequent court case originating from the environmental disaster in Delhi,[8] the Court, when going into the facts of the case, had to balance the compelling interests involved.

The Court's approach was essentially aimed at realizing the 'ends of justice', which are, basically, the 'protection of the fundamental right to life enshrined in Article 21 of the Constitution', thus recognizing an intrinsic nexus between the right to life enshrined therein and the compensation for environmental damage.

On the applicability of Article 32 Const., the Court reiterated that in addition to the 'power to issue directions, order or writ for enforcement of

[7] *MC Mehta & Anr Etc vs Union of India & Ors Etc* [1986] SCC (2) (India) 176, where it stated that «it might be desirable to set up Environment Courts on the regional basis with one professional Judge and two experts drawn from the Ecological Sciences Research Group keeping in view the nature of the case and the expertise required for its adjudication. There would of course be a right of appeal to this Court from the decision of the Environment Court».

[8] *MC Mehta & Anr vs Union of India & Ors* [1986] SCC (1) (India) 395.

the fundamental rights', it also shares a 'constitutional obligation […] to protect the fundamental rights of the people', having 'all incidental and ancillary powers, including the power to forge new remedies and fashion new strategies designed to enforce the fundamental rights [...], particularly in the case of the poor and disadvantaged who are denied basic human rights and to whom freedom and liberty have no meaning'.[9]

Third, the Supreme Court of India profoundly innovated the rule regarding the owners' liability for damage caused by their property, according to which persons whose objects therein leak out of the property and are likely to cause damage merely because they spill out due to an unnatural use of the same is held liable without having to provide proof of their negligence. As is well known, this is an English-derived doctrine based on the precedent of Rylands v Fletcher.[10]

Recognized and applied in Indian law, the so-called strict liability doctrine derived from Rylands was first reviewed in the present case. Faced with companies operating in an industry that was subject to risk or inherently dangerous, the Supreme Court of India held that a rule developed in 19th-century English law 'can provide no guidance for the development of a standard of liability consistent' with the Constitution and the needs of the modern economy and society, so shaped by scientific and technological knowledge. The Court declared that 'law cannot afford to remain static', anchored in a rule that prevails in England.

Recognizing that companies engaged in hazardous activities were burdened with the obligation to conduct them with the highest safety standards, then Shriram was 'absolutely liable' and had to compensate in any case for damages resulting from its activities without being able to argue that it had taken 'all reasonable care' or that the damage had occurred 'without any negligence' on its part.[11]

[9] Supreme Court of India [1987] SCC (1) (India) 395.

[10] *John Rylands and Jehu Horrocks v Thomas Fletcher* [1868] UKHL 1 LR 3 (HL) 330. Here are some recommended readings on the topic of legal liability for non-natural use of land and bursting reservoirs: Francis Hermann Bohlen, 'The Rule in Rylands v Fletcher Part I' (1911) 59(5) University of Pennsylvania Law Review 298; David W Williams, 'Non-Natural Use of Land' (1973) 32(3) Cambridge Law Journal 310; Alfred William Brian Simpson, 'Legal liability for Bursting Reservoirs: The Historical Context of Rylands v. Fletcher' (1984) 13(2) Journal of Legal Studies 209; Andrew J Waite, 'Deconstructing the rule in Rylands v Fletcher' (2006) 18(3) Journal of Environmental Law 423.

[11] cf Vidisha Rana, 'Strict Liability v Absolute Liability' (2020) 20 Supremo Amicus 596, where the Author reconstructs the differences between strict liability and absolute liability introduced in *MC Mehta v Union of India*.

A few years later, at the end of the Second Millennium, the Supreme Court faced a new case of environmental damage by some companies in Rajasthan. The Indian Council for Enviro-Legal Action filed a writ seeking the suspension of the activities of several companies alleged to have spilled a highly polluting mixture.

In addition to consolidating the rule of absolute liability, strengthening the 'public trust doctrine'[12] and enshrining the entry of the 'polluter pays principle' into the Indian legal system,[13] India's supreme judges reiterated their orientation in favor of 'establishing environmental courts', with their own highly qualified staff and jurisdiction over environmental disputes.

Thus, despite more than a decade of urging by the Indian courts, the Indian government has been responsible for a resounding fiasco: the National Environmental Tribunal Act, passed by the Indian Parliament in July 1995, was never implemented due to the inaction of India's Government in issuing the notification decree.[14]

A few years after the National Environmental Tribunal Act 1995 failed, the Law Commission of India (LCI) proposed its own vision of ECTs. Taking as its model the experiences of the Environmental Courts already established in Australia and New Zealand, the LCI asserted that there was a need to develop regional or statewide ECTs in India, composed of judicial members assisted by technical experts. The ECTs envisaged by the LCI

[12] The public trust doctrine is as fully integrated into the Indian legal system as it is in the art 48A, Indian Constitution whereby the state undertakes to protect and improve the environment and safeguard the nation's forests and animal life, as in case law, which, precisely in dealing with environmental cases, takes the opportunity to mention it directly. Cf *MC Mehta v Kamal Nath* [1997] SCC (India) 388; *Th Majra Singh v Indian Oil Corporation* [1999] AIR J&K (India) 81; *MI Builders v Radhey Shyam Sahu* [1999] AIR SC (India) 2468; *KM Chinnappa & TN Godavarman Thirumulpad v Union of India* [2003] AIR SC (India)724; *Intellectual Forum, Tirupathi v State of AP and Ors* [2006] 3 SCC (India) 363; *Fomento Resorts and hotels Ltd v Minguel Martins* [2009] 3 SCC (India) 571.

[13] In this way see, Satish C Shastri, "The Polluter Pays Principle' and the Supreme Court of India' (2000) 42(1) Journal of Indian Law Institute 109.

[14] The National Environmental Tribunal Act, 1995 no 27 of 17 June 1995, § 1(2). Scholars at the time, however, criticized the general structure of the Law, which would give the National Environmental Tribunal jurisdiction limited to compensation for death or injury to persons, properties, and the environment. Cf Nadim Chowdhury and Nitish Srivastava, 'The National Green Tribunal in India: Examining the Question of Jurisdiction' (2018) 21(2) Asia Pacific Journal of Environmental Law 192; Atul Kumar Tiwari, *Environmental Laws in India: Contribution of the Supreme Court* (Deep & Deep Publications New 2006) 165 ff.

would have 'original jurisdiction in the civil cases where a substantial question relating to the 'environment', including the enforcement of any legal or constitutional right relating to the environment is involved'.[15]

The beginning of the second decade of the 2000s saw the crystallization, at least in the Indian legal system, of a specialized environmental jurisdiction model.

The inaction of the Indian legislature, which as early as 1995 had attempted to respond to the countless environmental tragedies – first and foremost among them that of Bhopal – was not broken until fifteen years later, when it was decided to respond and confront, in the words of the doctrine of the time, to the 'sheer neglect and/or lack of political will to take the risk on the part of the executive to pave the way for the establishment of such a specialized environment tribunal'.[16]

In July 2009, the Central Government of India introduced in the Lok Sabha the National Green Tribunal Bill.[17] According to its proponents, the National Green Tribunal (NGT) would 'provide an opportunity for people, who feel aggrieved by the non-implementation of these laws, to seek civil damages'.[18]

Already in the preamble of the NGT Act, adopted after a fast-track parliamentary process on June 2, 2010, two main elements are noted: India's national legislature has incorporated, first, the proclamations in international fora to which India has subscribed,[19] and second, the consistent jurisprudence over time that has outlined the right to a healthy environment as a constitutive part of the right to life under Article 21 Const. Ind.

Due to 'its broad, variable, and constantly changing content',[20] the NGT further details the right to life by outlining it as a measurable criterion

[15] Law Commission of India, *186th Report on Proposal to Constitute Environment Courts* (Law Com No 6(3)84/2003 LC(LS) 2003) 165-6.

[16] Bharat H Desai and Balraj Sidhu, 'On the Quest for Green Courts in India' (2010) 3(1) Journal of Court Innovation 103.

[17] The National Green Tribunal Bill, 2009 no 63 of 31 July 2009.

[18] Jairam Ramesh, 'Lok Sabha Debates. Further Discussion on The Motion for Consideration of The National Green Tribunal Bill, 2009' (reported by Indian Kanoon, 30 April 2010) <https://indiankanoon.org/doc/401966/> accessed 28 January 2025.

[19] Special mention is made to the United Nations Conference on the Human Environment in Stockholm in June 1972 and the United Nations Conference on Environment and Development, held in Rio de Janeiro in June 1992.

[20] *M/S Sterlite Industries Ltd vs Tamil Nadu Pollution Control Board* [2013] NGT (India).

through 'the most vital necessities - i.e., air, water, soil – which in consideration of the right to life in Article 21, may not be misused or polluted in a way that reduces the quality of life of others'. Thus, NGT's decisions are based on the 'risk of harm to the environment or human health based on the public interest'.[21]

The NGT Act also embraces the LCI's report outcome on the jurisdiction, which now encompasses all civil disputes where there is a 'substantial question relating to the environment' concerning the implementation of one of the Acts listed in the Annex to the NGT Act.[22] It is in the hands of the judge to determine what the substantive question is, as well as the severity of the harm contained therein.[23]

The locus standi is characterized by the power for 'any aggrieved person' to make an application for compensation, damages, settlement of a dispute, or reparation of a personal injury or property damages,[24] but the NGT itself has broadened the locus standi by ruling that 'a larger circle of persons can move the court for the protection or defense or enforcement of a civil right or to ward off or claim compensation for a civil wrong, even if they are not proprietarily or personally linked with the cause of action'.[25]

As with any specialized environmental ECTs, India's NGT is characterized by its procedure's speediness and specialized benches. It is composed of (a) a Chairperson, appointed by the Central Government among those who are serving or have served as Supreme Court's justices or Chief Jus-

[21] *ibid*

[22] The National Green Tribunal Act, 2010 no 19 of 2 June 2010 (NGT Act), §14(1) and Annex I, where the seven laws under the NGT's jurisdiction are listed, i.e., the Water (Prevention and Control of Pollution) Act, 1974 no 6 of 23 March 1974; Water (Prevention and Control of Pollution) Conservation Act, 1977 no 36 of 7 December 1977; Forest (Conservation) Act, 1980 no 69 of 27 December 1980; Air (Prevention and Control of Pollution) Act, 1981 no 14 of 29 March 1982; Environment (Protection) Act, 1986 no 29 of 23 May 1986; Public Liability Insurance Act, 1991 no 6 of 22 January 1991; Biological Diversity Act, 2002 no 18 of 5 February 2003.

[23] The Access Initiative, 'The National Green Tribunal Bill, 2009. Towards a Green Future or a Green Signal for Violators?' (TAI India Secretariat 2009) 7.

[24] NGT Act, §§16, 18(2).

[25] *The Goa Foundation Anr vs. Union of India Ors* [2013] NGT (India). Cf Supreme Court of India, *Maharaj Singh vs. State of Uttar Pradesh* [1977] 1 SCC (India) 155. The NGT also quotes *Jasbhai Motibhai Desai vs. Roshan Kumar* [1976] AIR SC (India) 578, where the Supreme Court 'held that the expression 'injured person' denotes an elastic and, to some extent, elusive concept'.

tices of the High Court;[26] (b) ten to twenty judicial members with identical requisites; (c) and ten to twenty expert members, each of them with at least fifteen years of expertise in environmental science or expertise in forestry, wildlife, biodiversity, and ecology, with the additional requirement of having obtained a Ph.D. in these subjects or a Master's degree in Engineering or Technology.[27]

Furthermore, the Supreme Court of India expanded the NGT's cognizance in a resonant decision. India's top judiciary body recognized the NGT's suo moto cognizance on environmental cases, even though such a power is not embodied explicitly in the NGT Act. The Supreme Court of India interpreted the phrase 'to secure the ends of justice' within the National Green Tribunal (Practice & Procedure) Rules, 2011, no. 24,[28] in the sense of conferring to the NGT a broad discretionary power to secure justice. This power also includes the promotion of litigations concerning environmental rights, granting compensation to disaster victims, the creation of schemes for implementing ecological principles, and suing authorities for negligence when necessary.[29]

At the end of proceedings or using its 'self-activating capability', the NGT could now decide for the relief or the compensation in favor of the victims of polluting actions and/or other infringements against relevant laws, as well as for the restitution of damaged properties or the restoration of environmental-deteriorated areas.[30]

[26] NGT Act, §§ 3 5(1).

[27] NGT Act, §5 (2)(a).

[28] *Municipal Corporation of Greater Mumbai v Ankita Sinha & Others* [2018] SCC (India) 12122-12123. cf The National Green Tribunal (Practice and Procedure) Rules, 2011 no 24 of 4 April 2011: 'Order and directions in certain cases. - The Tribunal may make such orders or give such directions as may be necessary or expedient to give effect to its order or to prevent abuse of its process or to secure the ends of justice'.

[29] cf Bhumika Indulia, 'NGT could act upon a letter written to it but cannot be triggered *suo motu* on learning about an environmental exigency? Supreme Court Verdict' (*SCC Online*, 11 October 2021) <https://www.scconline.com/blog/post/2021/10/11/whether-the-national-green-tribunal-has-the-power-to-exercise-suo-motu-jurisdiction-in-the-discharge-of-its-functions-under-the-national-green-tribunal-act-2010/> accessed on 28 January 2025.

[30] NGT Act, §15.

3. *The Chinese Case*

Let us now turn our attention to the legal system of the People's Republic of China. It is necessary to highlight how establishing ECTs in the once Middle Kingdom has been marked by developing specialized environmental jurisdiction, starting with protecting seas and waters.

The development of the blue economy in the years following China's economic opening-up prompted the Chinese Communist Party to create specialized subject-matter dispute resolution forums, aiming to 'specifically examine naval or maritime-related cases'.[31] Therefore, the Standing Committee of the National People's Congress issued the Decision of November 11th, 1984, regarding the 'establishment of maritime courts in coastal port cities'.[32]

According to the Decision, the Supreme People's Court had the power to establish, modify or abolish maritime courts (haishi fayuan **海事法院**) following an assessment of necessity.[33] Just two weeks after adopting the Decision, the SPC issued the Decision concerning 'various issues related to the establishment of maritime courts', establishing five maritime courts in Guangzhou, Shanghai, Qingdao, Tianjin, and Dalian. For the first time in the Chinese legal system, the territorial jurisdiction of the first five maritime courts established in 1984 derogated from the territorial boundaries of the first-level people's courts.[34]

More interestingly, the subject-matter jurisdiction of Maritime Courts extended not only to maritime disputes but also to other matters, prominent

[31] Zheng Tianxiang, 'Explanation on the Draft Decision on the Establishment of Maritime Courts in Coastal Port Cities [**关于在沿海港口城市**设**立海事法院的决定（草案）**]' (1984) Bulletin of SPC-PRC [**中**华**人民共和国最高人民法院公**报] <http://gongbao.court.gov.cn/Details/dcf1db5e7a4b143e07b0f543c82245.html?sw=> accessed 28 January 2025.

[32] Standing Committee of the National People's Congress, 'Decision on the Establishment of Maritime Courts in Coastal Port Cities' [**全国人民代表大会常**务**委**员**会关于在沿海港口城市**设立海事法院的决定] adopted at the 8th Session of the 6th National People's Congress on 14 November 1984, and promulgated by Order No 20 of the President of the People's Republic of China <https://www.12371.cn/2021/02/01/ARTI1612169824732675.shtml> accessed 28 January 2025.

[33] Article 1, Decision (SC-NPC) 11/14/1984.

[34] Supreme People's Court, 'Decision on several issues concerning the establishment of maritime courts' [**最高人民法院关于**设立海事法院几个问题**的决定**] 28 November 1984 hereinafter Decision CSP (1984), commented by Yongjian Zhang, Shumei Wang and Xiaoqiang Fu, 'The Understanding of the Provisions of the Supreme People's Court on the Jurisdiction of Maritime Litigation' (2016) 4 Review on Enforcement of Law [**法律适用**] 82.

among which were cases relating to 'compensation for damages caused by the discharge of noxious substances by ships or for improper measures carried out off-shore, resulting in the contamination of waters (shui yu 水域)'.[35]

Therefore, it is remarkable that, as early as the first half of the 1980s, a specialized court with specific jurisdiction over certain environmental damage disputes existed in China, removing their handling from the ordinary people's courts.[36]

In addition, with the approval of Special Maritime Procedural Law (SMPL), the exclusive jurisdiction (zhuanshu guanxia 专属管辖) of maritime courts is explicitly defined for lawsuits related to pollution damage arising from the release, omission, or leakage of oil or other harmful substances by a ship. Courts' authority pertains to incidents occurring at the site of the pollution event, the location of the resulting damage, or where preventive actions were taken in the context of maritime activities such as production, operations, ship dismantling, and repair.[37]

This bottom-up creation model of a maritime-environmental specialized jurisdiction was later upheld in the still-progressing journey for Chinese ECTs. After decades of out-of-control economic growth to the detriment of the environment and people, the Chinese government began to question the environmental control strategy that has gone down in history as 'Pollution First, Treatment Later' (xian wuran, hou zhili 先污染, 后治理).[38] Scholars called on the Chinese government to reform the institutions charged with

[35] Decision CSP (1984), art 3 no 3.

[36] See Supreme People's Court, notice no 39 of 23 December 1989 [发 [1989] 39号] on the further implementation of the scope of jurisdiction of Maritime Courts cases [最高人民法院关于进一步贯彻执行海事法院收案范围的通知诠释], in which it was clarified that the ordinary people's courts should no longer accept cases under the jurisdiction of the maritime courts unless they were easy, readily resolved, not pertaining to foreign interests, and arose in places distant from the maritime courts. The Notice in question clarified how conflicts of jurisdiction between ordinary courts and maritime courts should be resolved, so as to favor the latter instead of the former.

[37] See art 7, Special Maritime Procedural Law [中華人民共和國海事訴訟特別程序法], approved at the 13th Session of the Standing Committee of the Ninth National People's Congress on 25 December 1999 and promulgated by Order no 28 of 25 December 1999 of the President of the People's Republic of China.

[38] Hossein Azadi, Gijs Verheijke and Frank Witlox, 'Pollute first, clean up later?' (2011) 78(3-4) Glob Planet Change 77-82.

protecting the environment and enforcing environmental law, including through changes in the judiciary.[39]

To achieve this, in December 2005, the State Council issued a Decision in which, for the first time it not only acknowledged the limited approach to environmental protection to date but also legitimized the establishment of specialized environmental jurisdiction. While specifically targeting 'the environmental problems that gradually emerged in industrialized countries over a hundred years, but in China have manifested themselves in the last twenty years', the Central People's Government envisaged 'a legal aid mechanism for victims' and 'the establishment of a prosecutorial system against civil and administrative environmental cases.' The tendency was to go in the direction of instituting 'procedures for the referral of environmental cases and cooperation with judicial authorities in the handling of various environmental cases'.[40] Although it did not directly mention ECTs, for the first time an official Chinese government document called on local governments to experiment with new forms of managing and dealing with – but also resolving – disputes related to the environment and its rights and duties.

Decision No. 39/2005 starkly contrasted an earlier and long-standing opposite stance by the SPC. In February 1989, in response to the Wuhan District People's Court's request for the establishment of an environmental protection court, the Supreme People's Court stated that there was 'no legal basis for the establishment of environmental courts in the basic people's courts', preferring the institution of a 'specialized collegial commission for the hearing of environmental protection disputes in the relevant trial ', without, among other things, 'confusing' the functions of jurisdiction which is in the hands of the judiciary, and the administrative functions prerogative, in the hands of public administrations.[41]

However, it should be noted that the intent of the Wuhan District Peo-

[39] cf Elizabeth C Economy, *The River Runs Black: The Environmental Challenge to China's Future* (Ithaca 2004) 92.

[40] State Council of the People's Republic of China, Decision no 39 12 December 2005 [国发 [2005] 39号] on the Implementation of the Scientific Outlook on the Development and Strengthening of Environmental Protection [国务院关于落实科学发展观加强环境保护的决定].

[41] Supreme People's Court, 'Point no 1 Response to 'Report on the Establishment of the Environmental Court by the People's Court of Shikou District, Wuhan" [最高人民法院对"关于武汉市　口区人民法院设立环保法庭的情况报告"的答复] (10 February 1989) <http://www.elinklaw.com/zsglmobile/lawView.aspx?id=4199> accessed 28 January 2025.

ple's Court was not to establish a unit that was functionally and administratively autonomous from the basic people's court: the use of the term fating (法庭), which can be translated as Tribunal,[42] instead suggested the will to establish a sub-unit that, while endowed with judgment power following a trial, would still be administratively dependent on the People's Court (fayuan 法院) that had established it.

In the following decades, environmental disputes saw an uncontrolled growth: from a mere one hundred thousand in 1989 to three hundred thousand at the beginning of the new Millennium, to seven hundred thousand in the year of the Beijing Olympics.[43] It was a clear symptom of both a degradation of ecosystems and resources but also of a certain activism of the population in bringing to the judiciary man-made damages to the environment.

Just as preparations were in full swing in Beijing for the lighting of the Olympic brazier, in Qingzhen, a city-county in Guizhou province, more than two thousand kilometers away from the Chinese capital, the local government was attempting to remedy an environmental disaster that had long worried local residents.

The pool of water that stretches across the city and serves as a drinking water reservoir, Hongfeng Lake - literally "red maple" (红枫) lake because of the characteristic presence of red-leafed shrubs -had suffered the percolation of the millions of tons of phosphogypsum residue accumulated over the years by Guizhou Tianfeng Chemical, a company still active in the field of chemical fertilizers. The phosphogypsum had then promoted the proliferation of certain algae infestations and cyanobacteria, which had naturally deteriorated the water quality from which the water utilities drew.

[42] See Supreme People's Court (Judicial Committee) art 2, Rules of the People's Courts of the People's Republic of China, adopted in 1979 and re-adopted at the 617th meeting of the Judicial Committee of the Supreme People's Court on 26 November 1993, and amended in accordance with the decision of the Supreme People's Court on the Amendment of the Rules of the People's Courts of the People's Republic of China adopted at the 1673rd meeting of the Judicial Committee of the SPC on 21 December 2015: 'The court is a special place where the people's courts try all kinds of cases on behalf of the state in accordance with the law'. Art 1 of the 1979 version stated even more solemnly that 'The court is the place where the people's court exercises the judicial power of the state and adjudicates criminal and civil cases' (**法庭是人民法院行使国家**审**判**权，审判刑事案件和民事案件的场**所**).

[43] Ministry of Environmental Protection (PRC), 'National Journal on the State of the Environment for the Year 2010' [**中国**环境状况公报] <https://www.mee.gov.cn/gkml/sthjbgw/qt/201301/t20130109_244898.htm> accessed 28 January 2025.

Prompted by the Central Committee of the provincial Communist Party and after receiving assent from the territorially competent Intermediate People's Court, in November 2007, the Guizhou People's Provincial Government and the Guiyang's Municipal Government decided to establish a grassroots environmental people's court based on Article 26 of the Organic Law, and an intermediate court responsible for appeals against lower-level court decisions.[44] This came after the visit of the then Vice-President of the Supreme People's Court Wang E'Xiang, which stated that it was 'mandatory to consider the establishment of an environmental court to combat the problem of water pollution'.[45]

On December 10th of the same year, the municipal administrative bureau in charge of protecting the waters of Hongfeng Lake and of the other two city reservoirs immediately filed suit against Guizhou Tianfeng, whose head office was located in Gaofeng suburb, Pingba County, under the Hongfeng Lake drinking water protection zone and within the territorial jurisdiction area of the newly established Qingzhen Environmental Court.

Surveys conducted by the Guizhou Provincial Environmental Monitoring Center calculated that the pH of leachate liquids was 2.25, with a total phosphorus concentration of 50,060 mg/l and fluoride concentration of 536 mg/l.

In the civil proceeding, the administrative office demanded the cessation of all illegal conduct damaging the Hongfeng Lake ecosystem, along with the payment of litigation costs. For its part, the defendant company asserted that it had complied with every provision regarding countering pollution, asserting that it had a plan for mitigating the effects that would be implemented by July 2008.

Despite this, the Qingzhen Environmental Court, just twenty days after the filing of the party's application, found the defendant liable for the

[44] Guizhou Daily, 'Guiyang establishes a court and a judicial committee for environmental protection' [贵**阳成立**环境保护审判庭和环境保护法庭] (*Lawyers.org*, 21 November 2007) <https://www.lawyers.org.cn/info/e01f7a4db0b24ad5ba9246823b4f1ae3> accessed 28 January 2025; Jiang Xiao, Yan Qilei and Kong Zhangyan, 'The dream of China's first environmental court of "environmental justice"' [**中国首个**环保法庭的 "环保司法 "**梦**] (*Xinhuanet* [**新**华网网], 25 December 2014) <https://www.chinacourt.org/article/detail/2014/12/id/1524034.shtml> accessed 28 January 2025.

[45] Luo Bin, 'Two courts protect clear water and two swords guard green mountains. The Road to Jurisdictionalization of Environmental Protection Litigation in Guiyang Courts' [**两庭**护绿水 **双**剑**守青山**访谈 --贵阳法院环保审判专业**化之路**]' (7 July 2011) 72 Weekly Practice [实务周刊].

facts charged against it. The Court recognized that "the environment is the necessary precondition for the sustained and harmonious development of human society." In this regard, the plaintiff played a major role, "bearing the social and public duty to manage, in accordance with the law, the resources of Hongfeng Lake, which constitute the primary source of drinking water for the millions of citizens of Guiyang Municipality". In addition, the court stated that the defendant company had failed to produce within the statutory timeframe any documentation attesting to the absence of a causal link between the percolation of phosphogypsum from the reservoir it owned, and the actual pollution caused to Hongfeng Lake and one of its tributaries.[46]

Based on Article 6 of the Environmental Protection Law of the People's Republic of China,[47] Article 5, para. 2 of the Law on Prevention and Control of Aquatic Pollution[48] and Articles 29, 33, 34 of the Law on Prevention and Control of Environmental Pollution,[49] together with Article 124 of the General Principles of Civil Law, the defendant was recognized liable, and was required to cease using the site for phosphogypsum storage from the date of

[46] See Supreme People's Court, art 2, Legislative Interpretation no 33 of 21 December 2001 [法释[2001]33号] on 'Various Provisions on Evidence in Civil Proceedings' [最高人民法院关于民事诉讼证据的若干规定] adopted at the 1201st meeting of the CSP Judicial Committee on 6 December 2001, which states that '[a]ny party has the burden of providing evidence to prove the facts on which its claims are based or to refute the facts on which the other party's claims are based. If there is no evidence or if the evidence is insufficient to prove the party's factual arguments, the party with the burden of proof bears the adverse consequences.'

[47] Environmental Protection Law of the People's Republic of China, art 6: 'All units and individuals have an obligation to protect the environment and have the right to report or file charges against units or individuals who cause pollution or damage to the environment'.

[48] Law on the Prevention and Control of Aquatic Pollution, art 5 para 2: 'Any unit or individual who has suffered damage directly as a result of a water pollution hazard has the right to seek compensation for damages and elimination of the hazard by the polluter'.

[49] Environmental Pollution Prevention and Control Law, art 29: 'Units discharging industrial solid waste shall establish and improve the responsibility system for the prevention and control of environmental pollution and take measures for the prevention and control of environmental pollution from industrial solid waste'; Article 33: 'Any person who deposits metallurgical residues, chemical industry residues, burned coal ash, ore tailings, ore tailings or other industrial solid wastes in the open air shall construct special facilities and sites for the purpose'; Article 34: 'Facilities and sites constructed for the storage or treatment of industrial solid wastes shall comply with the environmental protection standards prescribed by the competent administrative department for environmental protection of the State Council'.

publication of the judgment and to take measures by March 2008 to remove obstacles and hazards posed to the detriment of the environment.

From the establishment of these first environmental courts onward, the Supreme People's Court overruled its earlier decision, allowing 'the establishment of independent environmental courts when environmental disputes are numerous in order to carry out specialized adjudication in environmental protection cases and increase the judicial level of environmental protection'.[50] Since then, more than one hundred and thirty ECTs have mushroomed, with the aim of upholding 'the two basic lines, i.e., the developmental one and that of environmental protection'.[51]

This 'green push'[52] for judicial protection of the environment was certainly marked by the first three experiences in Guizhou, Qingzhen, and Wuxi, Jiangsu, a true laboratory of the balancing attitude of CPC's local cadres, who were more incentivized to show their concern for the effects of economic growth on the environment not only for the sake of nature but for the effects that deteriorating environmental indices would have in the long run on local prosperity.

China's first ECTs have shown how, even in a legal system like China's - characterized by the extreme politicization of the judiciary, typical of socialist regimes - it is possible to imagine and make effective the participation of civil society and citizens in judicial proceedings with institutions that expand locus standi. However, in the face of a substantial increase in environmental litigation, with more than 190,000 civil, 42,000 administrative, and 26,000 criminal cases recorded by China's first instance courts in 2018 alone,[53] China's environmental courts continue to be deficient in a legal basis sanctioned

[50] Supreme People's Court, art 13 Circular no 18, 29 June 2010 [**法**发 [2010] 18**号**] on the issuance of various opinions on the provision of judicial guarantees and services to accelerate the transformation of the economic development mode [**关于**为**加快**经济发展方式转变**提供司法保障和服**务的若干意见].

[51] Global Network [环球网], 'China's first environmental court has several cases that are the first of their kind, and third-party supervision prevents the verdict from falling on deaf ears [**中国首个**环保法庭多个案例创**首例**，**第三方**监**督**让**判决不落空**]', 8 October 2018 <https://baijiahao.baidu.com/s?id=1613735529827435881&wfr=spider&for=pc> accessed 28 January 2025.

[52] Xinhua, 'China resorts to judicial protection in green push' (*China Daily*, 22 July 2013) <https://www.chinadaily.com.cn/business/greenchina/2013-07/22/content_16811458_2.htm> accessed 28 January 2025.

[53] See J D Zhang, 'A thesis on the establishment of specialized environmental and resources courts in China' (2019) 354 IOP Conf Series 2.

by national regulation. On the contrary, they faced in some cases an almost zero pending caseload due to the lack of uniformity of proceedings, difficulties in access to justice, a jagged local and provincial environment that 'lacks legitimacy and rationality',[54] and with clear signs of interference and opposition from local branches of the Communist Party.[55]

4. *Final Remarks*

The previous pages have reviewed the approach taken by India and the People's Republic of China in establishing specialized ECTs.

In both experiences, it has been recognized that the establishment of environmental forums has been teleologically oriented toward resolving disputes involving the environment, its law, and the rights, personal or real, those legally relevant environmental facts affect.

The Indian judiciary, through the activism of the Supreme Court of India, has provided both specific remedies to citizens' rights injuries through an expansive and ecologically oriented reading of the right to life, as well as clear policy direction to an often inert and insensitive legislative power. A legislative power that is insensitive to environmental protection, even prone to interests contrary to the protection of natural resources and not without some endorsement from the supreme judiciary itself.

The passage of the NGT Act and the commissioning of the National Green Tribunal then marked the legislative and procedural crystallization of specialized environmental justice in India. This signified the transition from a model of justice that we might call 'environment in courts', in which the resolution of ecological disputes is devolved to ordinary fora lacking

[54] Han Xiaoming, 'A review of the phenomenon of "there is nothing to judge" by environmental courts [环保法庭 "**无案可**审 "现**象再**审视]' [2019] 2 Legal Studies Forum [**法学**论坛].

[55] Yao Peishuo, 'Environmental courts in many places have "no case to try": some local governments interfere in the administration of justice [**多地**环保法庭 "**无案可**审" **一些地方政府干**预**司法**]' (*Workers' Daily* [**工人日**报], 14 October 2014) <https://www. chinanews.com.cn/gn/2014/10-25/6716383.shtml> accessed 28 January 2025.

specific scientific expertise,[56] to ECTs,[57] in which the environmental judiciary becomes specialized and/or centralized, and is constitutively endowed with the technical-scientific knowledge, necessary for resolving disputes that transcend the traditional separation of civil, administrative and criminal jurisdiction.[58]

In stark contrast, precisely, the Chinese case had a diametrically different modality and outcome from that of India. The People's Republic of China did not see a top-down genesis of environmental jurisdiction, starting from an act of decision-making, impetus, or direction by the policymaker or a judicial body at the top of the hierarchy of courts.

Borrowing in legal technique those typical trial-and-error modes peculiar to the "Chinese-style" implementation of economic and social policies, China has seen experimental examples of environmental courts spring up from below, gradually replicated throughout the country:[59] from just a hundred ECTs in the first half of the last decade, the number of environmental courts and tribunals has grown exponentially to form a "specialized environmental trial system with Chinese characteristics," encompassing 2426 specialized environmental forums.[60]

[56] There has also been a reference to 'Climate change in Courts' in Giuseppe Naglieri, 'Climate changes in Courts: different judicial approaches to government actions on cutting greenhouse emissions. Comparing Europe and America through selected cases' (2022) 4 DPCE Online 1917.

[57] See George Rock Pring and Catherine Ketty Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative 2009). Of the same authors, George Rock Pring and Catherine Ketty Pring, 'Specialized Environmental Courts and Tribunals at the Conference of Human Rights and the Environment' (2009) 11 Oregon Review of International Law 301.

[58] cf Lin Yanmei, 'A comparative study of regionalized procedural approaches to environmental justice [环境司法区域化审判方法的**比**较**研究**]' [2015] 1 Journal of China University of Political Science and Law [**中国政法大学**报]; Wang Wei, 'Improve legal protection mechanisms and advance the construction of ecological civilization [**完善司法保**护机制 **推**进生态**文明建**设]' (*People's Forum*, 29 July 2019) [**人民**论坛].

[59] Song Zongyu, Yuan Chen and Dan Yuan, 'The barriers to the specialization of environmental justice in China and the ways forward [环境司法专门化在中国的机制障碍 **与路向**转换]' [2013] 19(6) Journal of Chongqing University of Social Science [**重**庆**大学学**报渊社会科学版冤] 101.

[60] Xinhua, 'Courts across the country have established 2,426 specialized agencies or organizations for environmental resource trials [**全国法院已**设立环境资**源**审判专门机构或组织2426**个**]' (*Xinhua*, 20 September 2022) <https://baijiahao.baidu.com/s?id=1744472355723429248&wfr=spider&for=pc> accessed 28 January 2025.

At the end of this brief journey through the formation of ECTs in such different legal systems, some trajectories can be assessed: ECTs may perhaps mark a viable way toward the difficult balancing between safeguarding growth and social stability and the effective protection of the ecosystem and natural resource trajectories of development, also for the benefit of future generations.[61]

[61] Marie-Pierre Camproux Duffrène, 'L'accès au juge civil français en cas d'atteintes à l'environment: une diversité d'actions pour répondre à la diversité des préjudices' in Julien Bétaille (ed), *Le droit d'accès à la justice en matière d'environment* (Presses de l'Université Toulouse Capitole 2016) 203-224 ; Sofia Ciuffoletti, 'Verso una giurisprudenza ecologica. Il discorso giurisprudenziale sui diritti connessi alla protezione dell'ambiente' (2019) XVI Jura Gentium 183; Lorenzo Serafinelli, 'La responsabilità civile come tecnica di compensazione assiologica degli interessi climatici nell'inerzia delle politiche legislative. Un'analisi comparatistica di controversie private per pubblici interessi' (2022) 4 DPCE Online 2197.

Giacomo Menegus

SUSTAINABLE TOURISM LAW IN ITALY? YET TO COME

1. *Introduction*

One of the most authoritative Italian scholars in Tourism Law, Vincenzo Franceschelli, recently traced the history of Tourism Law in a captivating little book named '*Le Stagioni del Turismo*' (The Ages of Tourism)[1]. In this book, Franceschelli describes the evolution of tourism and its legislation, with a focus on the Italian context, starting with *Le Grand Tour* of Goethe and the scions of the European noble families, touching upon the first pieces of legislation adopted in Italy, specifically addressing tourism (that dates back to 1910), then the rise of the tourism industry, and finally the advent of the European Union law concerning consumer protection. This time-journey ends in contemporary times, with the emergence of mass tourism and its adverse consequences on cities, host communities, and the environment.

In the very last part of the small booklet, Franceschelli focuses on the challenges of Tourism and Tourism Law in our contemporary world. The book was published shortly after the pandemic and reflects that dramatic event which threatened the survival of the tourism industry as a whole. However, despite the pandemic, the first challenge addressed is that of Sustainability and Sustainable Development in Tourism. In this respect, Franceschelli explicitly advocates the emergence of a Sustainable Tourism Law, elaborating on some considerations he has already expressed in previous works on the role of law in relation to Sustainable Tourism.[2]

This intriguing perspective, however, should be carefully examined, above all to verify whether tourism law, and in particular that of Italy, is actually evolving in the direction of sustainability, or, on the contrary, Franc-

[1] Vincenzo Franceschelli, *Le Stagioni del diritto: Il viaggio, il diritto, la vacanza* (Key 2021).

[2] Vincenzo Franceschelli, 'From Tourism to Sustainable Tourism: An Italian Approach' in Vincenzo Francescelli, Francesco Morandi and Carlos Torres (eds), *Sustainable Tourism Law* (ESHTE 2019).

eschelli's thoughts were limited to paving the way for a future course of action.

As Beate Sjåfjell observed, albeit with specific reference to the areas of business and related to business, after the adoption of the United Nations Sustainable Development Goals (SDGs) in 2015, there is much sustainability talk,[3] but, at the same time, '[t]here is much "sustainability washing" (using references to sustainability to cover over continued unsustainable business) and "sustainability wishing" (for example, business goals related to sustainability without clear plans on how to achieve them).'[4]

This is possibly even more true in the tourism sector, where many public and private actors intend sustainability above all in terms of pure marketing. Sustainability is conceived not as a goal towards which tourism as a whole and all tourism-related activities (such as transport, land use and waste management) should converge, but as a particular kind of tourism, an alternative to conventional mass tourism. Making reference to the framework of approaches to sustainable tourism proposed by Clarke, the current dominant understanding in the tourism industry can be deemed that of 'continuum.'[5] According to Clarke, this position implies actors are persuaded of the impossibility of replacing the entire gamut of mass tourism with sustainable tourism, as both are based on the simultaneous utilisation of the resources of the destinations. Sustainable tourism is therefore considered a form of tourism among others. In this context, sustainability is employed in the promotion of alternative tourist activities, generally with greater attention to the environmental footprint (as is the case, for example, of the 'slow tourism' of paths, cycling routes, and horse riding or 'ecotourism') and in the tourist destination marketing, with the aim of gaining a (rather narrow) market niche sensitive to environmental and social impacts. Within the broader offer of tourist products, Destination Management Organisations (DMOs) and tourism operators tend to add and develop products that respond to the growing environmentally sensitive demand of a part of the travellers but do not change the whole tourism

[3] Beate Sjåfjell, 'Sustainability and Law in the Anthropocene' (2022) University of Oslo Faculty of Law Research Paper No 2022-46 <https://ssrn.com/abstract=4212422> accessed 31 July 2023.

[4] ibid.

[5] Jackie Clarke, 'A Framework of Approaches to Sustainable Tourism' (1997) 5 Journal of Sustainable Tourism 224.

ecosystem.[6] Furthermore, the plans for the transformation of tourist destinations in terms of sustainability, even the most ambitious ones, tend to show a very limited level of implementation.[7] This unsatisfactory transformation depends on many factors, but among others, a crucial role is played by the vagueness of the commitments and the flawed and weak processes undertaken to achieve the planned objectives.

Against this gloomy background, this chapter seeks to critically examine the capacity and effectiveness of the main legal instruments that can be deemed as 'Sustainable Tourism Law' to implement genuine sustainability in the tourism sector. The aim is to assess the current inconsistency and poor effectiveness of what is defined as the 'Sustainable Tourism Law' (especially at the Italian level) and, thus, the need to promote further legal studies on sustainability as well as coherent normative reforms in this area in order to achieve a 'strong' sustainable transformation of the tourism sector.

Of course, in order to verify how effective the sustainable tourism law is, it is necessary to explain what the concept of sustainability entails when applied to the tourism sector. In Section 2, I therefore briefly analyse the concept of 'sustainable tourism', referring to the most relevant international declarations and charters. Afterwards, in Sections 3 and 4, sustainable tourism tools at the international and European levels will be investigated, stressing how alongside the great proclamations and objectives, for a number of reasons, the effectiveness of the principles and objectives enshrined in charters and pursued through public policies are still very evanescent. On the basis of these instruments, some key principles of sustainable tourism will be emphasised, the implementation of which will then be verified at the Italian level. Finally, in Section 5, the analysis focuses on the Italian context to highlight how the few (but increasing) references to sustainable tourism in national legislation and policies are disappointingly weak and

[6] According to a Eurobarometer survey from October 2021, 82% of Europeans are willing to change their travel habits for more sustainable practices, including consuming locally sourced products, reducing waste and water consumption, travelling off-season or to less visited destinations and choosing transport options based on their ecological impact. European Commission, 'Flash Eurobarometer 499 – Attitudes of Europeans towards tourism' (October 2021) <https://europa.eu/eurobarometer/surveys/detail/2283> accessed 31 July 2023.

[7] Walter Jamieson and Michelle Jamieson, 'Managing overtourism at the municipal/destination level', in Rachel Dodds and Richard W Butler (eds), *Overtourism: Issues, Realities and Solutions* (De Gruyter 2019).

flimsy. At the same time, through a series of paradigmatic examples, the failure of tourism law and related legal instruments to implement the most basic principles of sustainable tourism will be substantiated. The concluding reflections advocate a new season of legal studies on sustainability in tourism legislation in order to enhance and promote the central role of the law for the transformation of the sector and, more generally, of the social culture of the players of the tourism industry.

2. *Sustainable Tourism*

First, as anticipated, it is necessary to define 'Sustainable Tourism'.

In order to do so, it may be helpful to trace, albeit briefly, the path which, after the emergence of the first concerns on the negative consequences of tourism activity from an environmental, social and cultural perspective, then led – with the affirmation of the more general concept of sustainable development in 1972 – to the elaboration of the notion of sustainable tourism through a series of international conferences.

Relying on the overall picture offered by Fennell and Cooper,[8] the ideal starting point of this path can be placed at the beginning of the 1950s when the Commission for Travel Development within the International Union for Travel Development (forerunner of the United Nations World Tourism Organisation, UNWTO) started to examine how to minimize the adverse impacts on destinations. In the same period, awareness of a darker side of tourism began to emerge in popular culture.[9] Some seminal studies, such as those by Budowski,[10] Krippendorf,[11] and Cohen,[12] in the 1970s, ushered in

[8] David A Fannell and Chris Cooper, *Sustainable Tourism: Principles, Contexts and Practices* (Channel View Publications 2020).

[9] David A Fannell and Chris Cooper make references to the works of James Cerruti and Thomas Nebbia on Acapulco ('The Two Acapulcos' (1964) National Geographic), Huw Jones on Gozo ('Gozo: the living showpiece' (1972) 45 Geographic Magazine 53) and J Naylon on the Balearic Islands ('Tourism-Spain's Most Important Industry' (1967) 52 Geography 23).

[10] Gerardo Budowski, 'Tourism and Environmental Conservation: Conflict, Coexistence, or Symbiosis?' (1976) 3 Environmental Conservation 27.

[11] Jost Krippendorf, *Les dévoreurs de paysages: Le tourisme doit-il détruire les sites qui le font vivre?* (Editions 24 Heures 1977).

[12] Eric Cohen, 'The impact of tourism on the physical environment' (1978) 5 Annals of Tourism Research 215.

new tourism studies on the subject, critically analysing the negative impacts of tourism.

In this first phase, the main problem was usually considered not the tourism industry in general but the rising mass tourism and its adverse environmental, social and cultural effects. This idea led to the theorization and emergence of alternative tourism practices – expressly conceived as opposed to mass tourism – and also to responsible tourism. The latter – although it is challenging to offer a distinct and unambiguous definition – can be described as a form of tourism that requires an ethical approach ('responsible' is considered here as a synonym of 'ethical'),[13] built on the basis of the imperative to respond in terms of duty to the needs expressed by others. One of the best-known explanations of this kind of tourism dates back to the *Cape Town Declaration* of 2002,[14] organized by the Responsible Tourism Partnership and Western Cape Tourism as a side event preceding the World Summit on Sustainable Development in Johannesburg (South Africa) and attended by 280 delegates from 20 countries. According to the final declaration issued by the Conference, Responsible Tourism is intended to be that which:

- minimizes negative economic, environmental, and social impacts;
- generates greater economic benefits for local people and enhances the well-being of host communities, improves working conditions and access to the industry;
- involves local people in decisions that affect their lives and life chances;
- makes positive contributions to the conservation of natural and cultural heritage, to the maintenance of the world's diversity;
- provides more enjoyable experiences for tourists through more meaningful connections with local people, and a greater understanding of local cultural, social and environmental issues;
- provides access for physically challenged people;
- and is culturally sensitive, engenders respect between tourists and hosts, and builds local pride and confidence.[15]

[13] Corrado Del Bò, *Etica del turismo: Responsabilità, sostenibilità, equità* (Carocci 2021).

[14] Responsible Tourism Partnership and Western Cape Tourism, 'Cape Town Declaration on Responsible Tourism in Destinations' (2002).

[15] ibid.

Despite a greater emphasis on the ethical aspects of tourism activities, it is evident that many claims have a solid bond to sustainability and sustainable development, starting from the first statement, which encompasses the three famous pillars of sustainability (environmental, social and economic). This connection/overlapping of the two concepts emerges even more clearly from the *Global Code of Ethics for Tourism*, adopted in 1999 by the General Assembly of the World Tourism Organization and two years later acknowledged by the United Nations.[16] Under Article 3, tourism is expressly considered 'a factor of sustainable development'. And in the *Preamble*, it is also stated that the goal of the World Tourism Organization is 'to promote responsible, sustainable and universally accessible tourism in the framework of the right of all persons to use their free time for leisure pursuits or travel with respect for the choices of society of all peoples', combining the two terms of 'responsibility' and 'sustainability', that seem thus to form a hendiadys.

In the 1980s, in parallel with the rising consciousness that tourism is not the 'green' or 'smokeless' industry believed up to then, the idea of sustainable development in tourism also emerged.

The fact that tourism is not even mentioned in the landmark Brundtland Report (1987) may highlight the lack of widespread awareness, in the late 1980s, of the harmful potential of tourist activities on the environment (or, according to Wall,[17] reflect the 'frequent ignoring or ignorance of tourism by policy makers').

Yet already, in 1980, with the Manila Declaration,[18] the foundations had been laid for the inclusion of the concept of sustainable development in the tourism sector. The terms sustainability and sustainable development were actually not mentioned in the document, but many of the principles around which sustainable tourism was later built, were nonetheless clearly enucleated. While focusing above all on the economic and social contribution that can derive from tourism, with particular attention to developing countries, the Declaration highlights how 'The satisfaction of tourism requirements must not be prejudicial to the social and economic interests of the population in tourist areas, to the environment or, above all, to natural resources,

[16] World Tourism Organisation (UNWTO), 'Global Code of Ethics for Tourism' (1999).

[17] Geoffrey Wall, 'Is ecotourism sustainable?' (1996) 2 Environmental Management 207.

[18] World Tourism Organisation, 'Manila Declaration on World Tourism' (1980).

which are the fundamental attraction of tourism, and historical and cultural sites.' And it also emphasizes the need to promote 'improved conditions of employment for workers engaged in tourism and confirm and protect their right to establish professional trade unions and collective bargaining'.

Other international conferences followed, including the Bad Bull Conference (1986) and the Globe '90. In the latter, according to a still famous definition, 'sustainable tourism development is envisaged as leading to management of all resources in such a way that can fulfil economic, social and aesthetic needs while maintaining cultural integrity, essential ecological process, biological diversity and life support systems.' The overall purpose is 'of meeting the needs of present tourists and host regions while protecting and enhancing opportunity for the future'. The influence exerted by the contemporary debate on sustainable development is here clear, even from the wording.

Since the beginning of the 1990s, there has been a significant rise in tourism studies devoted to sustainable tourism.

If one of the core principles is precisely that of the proficient management of all the resources the tourism sector relies on, a deeper understanding of what sustainable tourism entails was developed thanks to cutting-edge studies. For instance, Linda Cronin underlined the crucial need for successful sustainable tourism planning to involve local populations and maximize their benefits.[19] Along this line, Vincent May highlighted how development has often ignored the values of local people and, as a result, has failed to consider naturally occurring changes in the natural resource itself.[20] Richard Butler, one of the most influential authors in the field of tourism studies, critically examined the very concept of sustainable tourism, noting that it has often been used without properly defining it or giving it confusing and conflicting definitions. While on the basis of the verb 'to sustain', an appropriate definition of sustainable tourism may be that of 'tourism which is in a form which can maintain its viability in an area for an indefinite period of time',[21] Butler observed, based on literature, that what was normally meant by the term 'sustainable tourism' was as follows:

[19] Linda Cronin, 'A Strategy for Tourism and Sustainable Developments' (1990) 32 World Leisure & Recreation 12.

[20] Vincent May, 'Tourism, environment and development: Values, sustainability and stewardship' (1991) 12 Tourism Management 112.

[21] Richard W Butler, 'Tourism - an evolutionary perspective' in James G Nelson, Richard W Butler and Geoffrey Wall (eds), *Tourism and Sustainable Development: Monitoring, Planning, Managing* (University of Waterloo Department of Geography Publication 1993).

> Tourism which is developed and maintained in an area (community, environment) in such a manner and at such a scale that it remains viable over an infinite period and does not degrade or alter the environment (human and physical) in which it exists to such a degree that it prohibits the successful development and well-being of other activities and processes.[22]

On the basis of this definition and the critical review of the literature of the time, Butler pointed out and addressed some major issues in sustainable tourism, which are still crucial in the contemporary debate, such as the concept of carrying capacity, the control of tourism development (including monitoring and measurement), the need to apply sustainability also to mass or conventional tourism.[23]

Thanks to scientific research in this realm, the concept of sustainable tourism was further refined and – despite the still ongoing wide debate and controversies on its exact conceptualisation – gained specific and distinctive features.

Meanwhile, in 1993, the first issue of the *Journal of Sustainable Tourism* was published.

In 1995, under the auspices of UNESCO, the World Tourism Organization (UNWTO) and several other leading international organisations, a first World Conference on Sustainable Tourism, held on the Spanish island of Lanzarote, laid down the founding principles of sustainable tourism in the *Charter for Sustainable Tourism* (also known as the 'Charter of Lanzarote'). The Charter expressly states that 'Tourism development shall be based on criteria of sustainability, which means that it must be ecologically bearable in the long term, as well as economically viable, and ethically and socially equitable for local communities.' And it recognizes 'that tourism is ambivalent, since it can contribute positively to socio-economic and cultural achievement, while at the same time, it can contribute to the degradation of the environment and the loss of local identity.'

As is clear from this brief (and necessarily incomplete) review of the evolution of the concept of sustainable tourism, it is hard to offer an unquestioned and perfectly unambiguous definition of it.

However, in order to undertake the review of sustainable tourism law, reference can be made to the widely used definition of sustainable tourism

[22] ibid.

[23] Richard W Butler, 'Sustainable tourism: A state-of-the-art review' (1999) 1 Tourism Geographies 7.

provided in 'Making Tourism More Sustainable: a Guide for Policy Makers',[24] a set of guidelines built on UNEP and WTO's previous work on different aspects of sustainability, issued in 2005.

According to the UNEP/WTO definition, sustainable tourism is:

> Tourism that takes full account of its current and future economic, social and environmental impacts, addressing the needs of visitors, the industry, the environment and host communities.[25]

More precisely, it states that the sustainable tourism development guidelines and management practices laid down in the document 'are applicable to all forms of tourism in all types of destinations, including mass tourism and the various niche tourism segments. Sustainability principles refer to the environmental, economic and socio-cultural aspects of tourism development, and a suitable balance must be established between these three dimensions to guarantee its long-term sustainability'.

In addition, according to UNEP/WTO, sustainable tourism should:

1) Make optimal use of environmental resources that constitute a key element in tourism development, maintaining essential ecological processes and helping to conserve natural resources and biodiversity.
2) Respect the socio-cultural authenticity of host communities, conserve their built and living cultural heritage and traditional values, and contribute to inter-cultural understanding and tolerance.
3) Ensure viable, long-term economic operations, providing socio-economic benefits to all stakeholders that are fairly distributed, including stable employment and income-earning opportunities and social services to host communities, and contributing to poverty alleviation. Sustainable tourism development requires the informed participation of all relevant stakeholders, as well as strong political leadership to ensure wide participation and consensus building. Achieving sustainable tourism is a continuous process and it requires constant monitoring of impacts, introducing the necessary preventive and/or corrective measures whenever necessary. Sustainable tourism should also maintain a high level of tourist satisfaction and ensure a meaningful experience to the tourists, raising their awareness about

[24] UN Environmental Programme and UN World Tourism Organisation (UNEP & UNWTO), 'Making Tourism More Sustainable - A Guide for Policy Makers' (2005).

[25] ibid 11-12.

sustainability issues and promoting sustainable tourism practices amongst them.[26]

Relying on this definition, it is now possible to examine the international framework concerning Sustainable Tourism. However, given the strong connection outlined above between responsible tourism and sustainability, the review of the international law framework is not limited only to charters and tools expressly devoted to sustainable tourism but takes also into account instruments concerning ethics in tourism.

3. *Sustainable Tourism Law: International Principles and Objectives*

If we search for sustainable tourism law, it follows that we must refer to those instruments – irrespective of whether they go or not under the label 'sustainable tourism' – that establish general rules, objectives and principles conceived to attain sustainability in the tourism sector, as broadly described in the previous Section.

At the international level, an array of charters is expressly devoted to Sustainable Tourism.

Just to mention the most significant, the first remarkable commitments can be found in the already cited *Charter for Sustainable Tourism*, signed in Lanzarote in 1995, which appealed to the international community and, in particular, to governments, other public authorities, decision-makers and professionals in the field of tourism, public and private associations and institutions whose activities are related to tourism, and tourists themselves, to adopt the principles and objectives set out therein.

In view of the later analysis of the national framework, it is worth mentioning among others, Principle 9: 'Governments and the competent authorities, with the participation of NGOs and local communities, shall undertake actions aimed at integrating the planning of tourism as a contribution to sustainable development' which highlights the importance of tourism planning.

And Principles 3 and 6 as well, on the role and significance of host communities, that state respectively: 'Tourism must consider its effects on the cultural heritage and traditional elements, activities and dynamics of each local community. Recognition of these local factors and support for the iden-

[26] ibid 11-12.

tity, culture and interests of the local community must at all times play a central role in the formulation of tourism strategies, particularly in developing countries' and: 'Quality criteria both for the preservation of the tourist destination and for the capacity to satisfy tourists, determined jointly with local communities and informed by the principles of sustainable development, should represent priority objectives in the formulation of tourism strategies and projects'.

Twenty years later, in the city of Vitoria-Gasteiz, the Basque Country, Spain, the same principles of this first declaration were fully reiterated during the World Summit on Sustainable Tourism (ST+20), which adopted the new *World Charter of Sustainable Tourism +20*. In the document, after setting sustainable tourism in the wider context of sustainable development, a series of actions are listed, ranging from the need for governments and international organisations to 'integrate sustainability in national and international tourism policies, strategic plans and operations for meeting national sustainable development objectives, and the UN Sustainable Development Goals (SDGs)'[27] to the demand to 'empower local communities and indigenous peoples and facilitate their involvement in planning and developing tourism'[28] and 'to consider the carrying capacity of destinations, not only in the case of natural sites but also urban areas, especially when the quality of life of the residents is compromised.'[29]

The Charter recognises that Sustainable Development Goals (SDGs), adopted in the UN 2030 Agenda for Sustainable Development (2015), represent a significant opportunity to further guide tourism along an inclusive and sustainable course.

The *Sustainable Development Goals (SDGs)* are indeed another key reference for Sustainable tourism in the international context. Tourism is precisely targeted in SDGs 8, 12, and 14. According to Target 8.9, the 2030 Agenda aims to 'devise and implement policies to promote sustainable tourism that creates jobs and promotes local culture and products.' The importance of sustainable tourism is also highlighted in Target 12.8.b., which aims to "develop and implement tools to monitor sustainable development impacts for sustainable tourism that creates jobs and promotes local culture

[27] Vitoria-Gasteiz, the Basque Country, Spain, 'World Charter for Sustainable Tourism +20', Vitoria-Gasteiz, the Basque Country, Spain, 10.

[28] ibid 11.

[29] ibid.

and products.' Lastly, sustainable tourism is also identified as one of the tools to 'increase the economic benefits to Small Island developing States and least developed countries' as comprised in SDG target 14.7.

Nevertheless, all the 2030 Agenda SDGs, even those that do not report a precise reference to tourism, may be relevant for sustainable tourism. The UNWTO stated that 'tourism has the potential to contribute, directly or indirectly, to all of the goals'[30] and, with the support of the State Secretariat for Economic Affairs of Switzerland (SECO), launched the *Tourism 4 SDGS platform*,[31] an interactive online tool that shows the connection between tourism and the different SDGs, while monitoring the relevant initiatives adopted all over the world within the tourism sector.

Good examples of sustainable tourism-related SDGs are the 'SDG 11 – Sustainable Cities and Communities', since sustainable tourism can not only be a driver for the promotion of urban regeneration and the preservation of cultural heritage, but it can also counteract the deleterious effects, especially on an environmental and social level, that mass tourism produces on the most fragile destinations. Or also the 'SDG 5 – Gender Equality', as the UNWTO observes, 'Tourism can empower women, particularly through the provision of direct jobs and income-generation from SMEs in tourism and hospitality-related enterprises. Tourism can be a tool for women to become fully engaged and lead in every aspect of society.'[32]

In the field of responsible tourism, the most relevant document is the *Global Code of Ethics for Tourism*, adopted in 1999 by the General Assembly of the World Tourism Organization.

The Code sets out a list of principles designed to guide key-players in tourism development, addressing governments, the travel industry and stakeholders, host communities and tourists alike. Even if it does not mention the Charter of Sustainable Tourism – arguably because the latter puts too many constraints on governments and the tourism industry, according to Canestrini[33] – the Code, as already stated, comprises even key principles for

[30] World Tourism Organization (UNWTO), 'Tourism and the Sustainable Development Goals' (2015) <https://www.e-unwto.org/doi/pdf/10.18111/9789284417254> accessed 31 July 2023.

[31] World Tourism Organisation (UNWTO), 'Tourism for SDGs (T4SDG)' <https://tourism4sdgs.org> accessed 31 July 2023.

[32] ibid.

[33] Duccio Canestrini, *Andare a quel paese. Vademecum del turista responsabile* (Feltrinelli 2003).

sustainable tourism. The Code is structured in 10 Articles, amply covering the economic, social, and environmental components of sustainable tourism: Article 1: Tourism's contribution to mutual understanding and respect between peoples and societies; Article 2: Tourism as a vehicle for individual and collective fulfilment; Article 3: Tourism, a factor of sustainable development; Article 4: Tourism, a user of the cultural heritage of mankind and contributor to its enhancement; Article 5: Tourism, a beneficial activity for host countries and communities; Article 6: Obligations of stakeholders in tourism development; Article 7: Right to tourism; Article 8: Liberty of tourist movements; Article 9: Rights of the workers and entrepreneurs in the tourism industry; Article 10: Implementation of the principles of the Global Code of Ethics for Tourism.

Apart from Article 3, explicitly devoted to sustainable development, a significant principle is enshrined under Article 5. In line with the more refined wording of the Charter of Lanzarote, the Global Code states, under Article 5, paragraph 1, that: 'Local populations should be associated with tourism activities and share equitably in the economic, social and cultural benefits they generate, and particularly in the creation of direct and indirect jobs resulting from them', thus emphasising the central role of host communities.

Although not legally binding, the Code also features a voluntary implementation mechanism through its recognition of the World Committee on Tourism Ethics (WCTE), to which stakeholders may refer, pursuant to Article 10, matters concerning the application and interpretation of the document.

A non-binding or voluntary set of principles and objectives is a common feature of sustainable/responsible tourism law at the international level. All the declarations and charters mentioned above can be regarded as *soft law* or, at least, *policy instruments*.[34] They do not establish any legal obligation either for public authorities or for private stakeholders in tourism and display a limited capacity to influence and directly guide tourism activities towards sustainability.

However, positioning the aforementioned Charters within the vast and multifaceted realm of soft law does not necessarily mean that they have no legal value at all. It must be acknowledged that some commitments, especially in declarations expressly devoted to sustainable tourism, do not seem

[34] Franceschelli (n 2) 429.

to reach a minimum degree of 'formal legality' or apparently do not adopt a normative wording, being vague, unspecific and not precise, leaving ample room for discretion in application and interpretation.

Nonetheless, most of the sustainable tourism principles retain a certain legal value.

The same conclusions drawn by many international law scholars[35] within the debate on the legal value of SDGs and the 2030 Agenda may apply mutatis mutandis to the case of sustainable/responsible charters and declarations.[36] As for the SDGs, the principles and objectives enshrined in the charters mentioned, in particular when expressly referred to therein, can play a crucial role in interpreting and clarifying the meaning of legally binding instruments. Hence, the focus ought to shift from the soft law instruments per se to the potential interactions that can emerge between the principles of sustainable and responsible tourism ('soft law') and more binding legal frameworks ('hard law').

As noted with regard to SDGs and the EU legal order,[37] there could also be room for 'substantive borrowing' from sustainable tourism (soft) law, which may be a source of inspiration for legislation at the European and national level.[38]

[35] Asa Persson, Nina Weitz and Mans Nilsson, 'Follow-up and Review of the Sustainable Development Goals: Alignment vs. Internalization' (2016) 25 RECIEL 59; Rakhyun E. Kim, 'The Nexus between International Law and the Sustainable Development Goals' (2016) 25 RECIEL15; Werner Scholtz, Michelle Barnard, 'The Environment and the Sustainable Development Goals: 'We are on a Road to Nowhere" in Duncan French and Louis J Kotzé (eds), *Sustainable Development Goals: Law, Theory and Implementation* (Edward Elgar Publishing 2018).

[36] French and Kotzé (eds), *Sustainable Development Goals* (n 35); Riccardo Pavoni and Dario Piselli, 'The Sustainable Development Goals and International Environmental Law: Normative Value and Challenges for Implementation' (2016) 13 Veredas Do Direito 13; Massimiliano Montini, 'L'interazione tra gli SDGs ed il principio dello sviluppo sostenibile per l'attuazione del diritto internazionale dell'ambiente' (2019) 9 Federalismi.it <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=38580&content=&content_author=> accessed 8 September 2024.

[37] Maryna Rabinovych, 'Legal Status and Effects of the Agenda 2030 within the EU Legal Order' (2020) 16 Journal of Contemporary European Research 182.

[38] For the term 'substantive borrowing' reference is made to Katja Ziegler, The Relationship between EU Law and International Law (2013) 17 University of Leicester School of Law Research Paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2373296> accessed 31 July 2023.

However, this potential still remains largely unexpressed.

An attempt to go beyond this minimal approach, intended to reinforce the effectiveness of the Global Code of Tourism Ethics, was made with the drafting and approval of the *Framework Convention on Tourism Ethics* (2019), the first international treaty under the United Nations World Tourism Organisation. The Convention upheld the nine core principles of the Global Code of Ethics for Tourism, which were already accepted by the UNWTO General Assembly and widely known by the international tourism community. Nevertheless, at the same time, the Convention is a legally binding instrument under international law: every UNWTO and United Nations member state is currently called on to consider ratifying the Convention, should they choose to do so in alignment with their constitutional protocols and practices. By doing this, they commit to crafting policies that align with the Ethical Principles in Tourism outlined within the Convention.

Unfortunately, for now, accessions to the Convention are still extremely limited since only four States ratified the treaty (Albania, Lebanon, Nigeria, and Seychelles), preventing it from entering into force, since under its Article 20(1), the Convention shall enter into force on the thirtieth day following the date of deposit of the tenth instrument of ratification, acceptance, approval or accession.

4. *The European Union Law and Sustainable Tourism: a Drop in the Bucket*

For a long time, even if crucial for the very economic, social and cultural integration of Europe, tourism was not included among the matters expressly conferred on the European Union. Only in 1992, with the Treaty of Maastricht, establishing the European Union, did the Community's action also extend to the adoption of 'measures in the field of energy, civil protection and tourism.' The Community was thus authorized to adopt, within the framework of other policies, orientation and development 'measures' in the tourism sector. The interventions have been indirect, through legislative acts and policies in other sectors, such as culture, research, transport, free movement of people, goods and services, small and medium-sized enterprises (SMEs), regional and cohesion policies.

The introduction of the principle of sustainability into initiatives related to tourism at the European level took place through a series of communications issued by the Commission.

The first prominent moment is marked by the Communication 'Basic orientations for the sustainability of European tourism' of 2003,[39] in which the European Commission announced 'a series of measures to give concrete form to further Community contributions for the implementation of sustainability in the tourism sector.'

The same communication anticipated the formation, in 2004, of the 'Group for the Sustainability of Tourism' (GST), made up of various experts representing in a balanced way the industrial associations, some tourist destinations and the union associations of civil society, aimed at promoting synergies between stakeholders and provide useful inputs to the process of an Agenda 21 for the sustainability of European tourism.[40]

In the following communication of June 2006, 'A renewed EU tourism policy: towards a stronger partnership for European tourism',[41] the Commission reaffirmed the extreme relevance of the objective outlined in 2003, both as a contribution to sustainable development in Europe and in the world and for its lasting growth, and informed that it had started the elaboration of Agenda 21 for tourism.

The role of the Union with respect to the tourism industry further changed with the Treaty of Lisbon (2007).

According to Article 6(d) and Article 195 of the Treaty of Functioning of the European Union (TFEU), the Union gained a supporting and complementary competence in relation to tourism, which implies that the European Union can only intervene to support, coordinate or complement the action of its Member States in this field.

In particular, Article 195 TFEU states that 'The Union shall complement the action of the Member States in the tourism sector, in particular by promoting the competitiveness of Union undertakings in that sector'. This aim is pursued by: '(a) encouraging the creation of a favourable environment for the development of undertakings in this sector; (b) promoting cooperation between the Member States, particularly by the exchange of good practice'.

[39] European Commission, 'Basic orientations for the sustainability of European tourism' (Communication) COM(2003) 716 final.

[40] Cosimo Notarstefano, *Turismo e Unione Europea: Profili giuridici e istituzionali* (Hoepli 2011).

[41] European Commission, 'A renewed EU Tourism Policy: Towards a stronger partnership for European Tourism' (Communication) COM(2006) 134 final.

The year 2007 marked a decisive turning point also with respect to another key communication by the European Commission.

On 19 October 2007, the Commission officially presented the 'Agenda for a sustainable and competitive European tourism',[42] based on the results of the work of the GST presented in the report 'Action for a more sustainable European tourism',[43] published in February 2007.

In brief, the Agenda represents a further contribution to the implementation of the renewed Lisbon strategy for growth and jobs and the renewed strategy for sustainable development with specific reference to tourism.[44]

While representing eminently a policy tool, the Communication substantiates the principles on which the European sustainable development of the tourism industry must be based:

- *Take a holistic and integrated approach* - All the various impacts of tourism should be taken into account in its planning and development. Furthermore, tourism should be well balanced and integrated with a whole range of activities that affect society and the environment.

- *Plan for the long term* - Sustainable development is about taking care of the needs of future generations as well as our own. Long term planning requires the ability to sustain actions over time.

- *Achieve an appropriate pace and rhythm of development* - The level, pace and shape of development should reflect and respect the character, resources and needs of host communities and destinations.

- *Involve all stakeholders* - A sustainable approach requires widespread and committed participation in decision making and practical implementation by all those implicated in the outcome.

- *Use best available knowledge* - Policies and actions should be informed by the latest and best available knowledge. Information on tourism trends and impacts, and skills and experience, should be shared across Europe.

- *Minimise and manage risk (the precautionary principle)* - Where there is uncertainty about outcomes, there should be full evaluation and preventive action should be taken to avoid damage to the environment or society.

[42] European Commission, 'Agenda for a sustainable and competitive European tourism' (Communication) COM(2007) 621 final.

[43] 'Action for More Sustainable European Tourism' (Report of the Tourism Sustainability Group, February 2007) <http://www.ernestproject.eu/coalap/ernest/other_docs/10072009160632789_tsg_final_report_en.pdf> accessed 31 July 2023.

[44] Notarstefano (n 40) 78.

- *Reflect impacts in costs (user and polluter pays)* - Prices should reflect the real costs to society of consumption and production activities. This has implications not simply for pollution but for charging for the use of facilities that have significant management costs attached to them.

- *Set and respect limits, where appropriate* - The carrying capacity of individual sites and wider areas should be recognised, with a readiness and ability to limit, where and when appropriate, the amount of tourism development and volume of tourist flows.

- *Undertake continuous monitoring* - Sustainability is all about understanding impacts and being alert to them all the time, so that the necessary changes and improvements can be made.

Even without mentioning any of the international legal instruments listed in Section 3, the 2007 Agenda is clearly imbued with the principles of sustainable tourism.

In alignment with these guiding principles, the Commission has taken on the responsibility of coordinating efforts to generate and disseminate knowledge regarding sustainable tourism. This includes championing outstanding travel destinations and harnessing the potential of EU financial instruments, for instance, by facilitating the funding of sustainable tourism initiatives through the European Regional Development Funds (ERDF) during the period of 2007-2013. Additionally, the Commission is actively integrating sustainability and competitiveness into every facet of its policy framework.

The Commission actively advanced several significant initiatives. Notably, the 'European Destinations of Excellence' (EDEN) pilot project stood out. This endeavour concentrated on promoting exceptional European tourist destinations—emerging locales that were both recognizable and aligned with sustainability principles. While the funding for this project was depleted by 2011, the Commission remained committed to its execution through the framework of the programme for enterprise and SME competitiveness (COSME). Among the myriad of European funding programmes dedicated to bolstering sustainable tourism, COSME emerged as a particularly advantageous platform. Over time, it has consistently provided a favourable arena for financing endeavours related to sustainable cross-border tourism products.[45]

[45] European Commission, 'Sustainable transnational tourism products' <https://single-market-economy.ec.europa.eu/sectors/tourism/eu-funding-and-businesses/funded-projects/sustainable/transnational-products_en> accessed 31 July 2023.

Furthermore, despite the limited legal basis, over the years the European Union has been able to promote and develop other interesting policy instruments.

It is worth mentioning the following:

- The *European Tourism Indicators System* (ETIS) for sustainable destination management is a system of indicators suitable for all tourist destinations, encouraging them to adopt a more intelligent approach to tourism planning. As detailed on the Commission's website, ETIS serves as a multifaceted instrument. It aids destinations in embracing a sustainable approach to managing their locales, functioning as both a managerial resource and a monitoring system. This system is designed for effortless data collection and comprehensive information gathering, enabling destinations to track their performance seamlessly across successive years. It is important to note that ETIS operates as an informative resource rather than a certification programme. This attribute renders it valuable for policymakers, tourism enterprises, and a range of stakeholders.

- The *EU Ecolabel*, the official European environmental label, is available also to tourism accommodation and campsite services willing to prove and promote their environmental excellence.

- The *EU Eco-Management and Audit Scheme* (EMAS), a voluntary tool (environmental certification) developed for companies and organizations in all sectors to evaluate, report, and continuously improve their environmental performance; the most recent EMAS campaign was launched in summer 2023.

As a response to the pandemic crisis, there has been an acceleration of the transition toward sustainability within the European tourism-related policies and initiatives.

In March 2021, for example, although with a focus on the aim of fully restoring the freedom of movement between European countries after the COVID-19 limitations, the European Parliament approved a resolution entitled 'Defining an EU strategy for sustainable tourism.'[46]

In February 2022, the Commission adopted a plan entitled 'Transition Pathway for Tourism',[47] an updated EU industrial strategy, which highlights

[46] European Parliament Resolution 2020/2038(INI) of 25 March 2021 on establishing an EU strategy for sustainable tourism [2021] OJ C 494/106.

[47] European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, 'Transition pathway for tourism' (Publications Office of the European Union, 2022) <https://data.europa.eu/doi/10.2873/344425> accessed 31 July 2023.

the need to strengthen the resilience of the tourism sector and accelerate the digital and green transitions after the COVID-19 pandemic. The transition pathway identifies 27 areas of measures for the green and digital transitions, and for making the EU's tourism industry more robust.

Focusing on the Section devoted to 'Regulation and Public Governance', among other things, the Plan calls for: fair measures for short-term rentals (STRs); regulatory support for multimodal travelling; improvement in statistics and indicators for tourism; comprehensive tourism strategies development or update; collaborative governance of tourist destinations.

In response to this plan, the Council adopted the 'EU agenda for tourism 2030' in December 2022.[48] The Agenda focuses on five priorities: the green and digital transitions; resilience and inclusion; skills and support; and the governance and policy-enabling framework, with several actions included under each priority.

Finally, in November 2022, the Commission proposed a revision of Regulation (EU) 2018/1724 on the collection and sharing of data on short-term accommodation rental services (COM(2022)0571). Paying special attention to SMEs, this proposal – probably one of the most significant regulatory initiatives on sustainable tourism to date – aims to develop a responsible, transparent and fair growth of short-term rentals within a balanced tourism ecosystem. In April 2024, the regulation was definitively approved., as part of the ongoing efforts to promote a balanced tourism ecosystem within the EU.[49]

Taking a holistic view of the European journey, significant strides have been taken by the Union in bolstering initiatives for sustainable tourism. This progress has been evident through focused policies and substantial financial support. Nevertheless, given its restricted jurisdiction, the Union's impact on regulatory dimensions, particularly in the domain of 'sustainable tourism law,' has been comparatively restrained. Notably, recent initiatives related to short-term rentals, stand as an exception to this trend.

In essence, while the European Union has proactively championed sustainable tourism via policy directives and public strategies, its legislative framework concerning sustainable tourism remains somewhat confined.

[48] Council of the European Union, 'New European agenda for tourism' (Press release, 1 December 2022) <https://www.consilium.europa.eu/en/press/press-releases/2022/12/01/new-european-agenda-for-tourism/> accessed 31 July 2023.

[49] Regulation (EU) 2024/1028 of the European Parliament and of the Council of 11 April 2024 on data collection and sharing relating to short-term accommodation rental services and amending Regulation (EU) 2018/1724.

5. *The (Un)sustainability of the Current Italian Tourism Legislation*

Attempting to identify 'true' sustainable tourism law at the Italian level proves to be a daunting task. On the surface, the term 'sustainable tourism' appears frequently in various tourism planning documents, policies, and advertisements, giving the impression that the Italian tourism system has embraced sustainability and shifted away from traditional mass tourism.

However, beneath this veneer of 'sustainability,' the reality is quite different. The Italian legislation concerning tourism remains largely unchanged, as does the majority of the tourism industry.

For example, the 'Strategic Plan for Tourism Development', a significant policy instrument in Italy covering the years 2017-2020 and adopted by the Minister of Cultural Heritage and Tourism, prominently features sustainability throughout its policies.[50] Similarly, the new Strategic Plan for the years 2023-2027, adopted in June 2023, follows a similar approach, with the words 'sustainability' and 'sustainable' mentioned extensively.[51] However, upon closer examination, it becomes evident that the initiatives and actions labelled as 'sustainable' are often ambiguous or limited to ecological transitions in specific, narrow segments of the Italian tourism industry.

In essence, while there is a prevailing appearance of sustainability in official documents, the concrete implementation of genuinely sustainable practices within the broader tourism sector remains lacking. A good example of these kinds of initiatives is the so-called 'Fund for sustainable tourism',[52] with a budget of 25 million euros, which funds accommodation facilities and tourism businesses for the three-year period 2023-2025 to:

1. carry out interventions useful for the conception, creation, promotion and enhancement of projects that encourage more sustainable tourism;
2. carry out interventions aimed at obtaining sustainability certification;
3. create a list of official bodies to issue the aforementioned certifications.

[50] Ministero dei Beni e delle Attività Culturali e del Turismo, *Strategic Plan for Tourism Development 2017-2022,* accessed 31 July 2023.

[51] Ministero del Turismo, *Strategic Plan for Tourism Development 2023-2027* <https://www.ministeroturismo.gov.it/piano-strategico-del-turismo-2/>

[52] Ministero del Turismo, d min 22 marzo 2023 <https://www.ministeroturismo.gov.it/fondo-per-il-turismo-sostenibile/> accessed 31 July 2023.

Similar public policies are planned in regional legislation (see, for instance, those of Veneto[53] and Lombardy[54]) and almost all the recent regional laws on tourism comprise a number of 'decorative' references to sustainable tourism.[55]

The most significant references to 'true sustainability' can be found in policies that aim to promote alternative forms of tourism, such as walking, sustainable mobility, and exploring alternative routes, products, and destinations. However, these policies suffer from the same limitation mentioned earlier, as they often consider sustainable tourism only as a niche market rather than a comprehensive goal for the entire tourism industry (see Section 1).

One of the most noteworthy initiatives in this regard is outlined in the Italian National Resilience and Recovery Plan (NRRP), which places a strong emphasis on sustainable tourism by allocating substantial resources to projects promoting sustainable destinations. Notably, the 'Attractiveness of villages' initiative,[56] commonly known as 'Bando Borghi,' has received 420 million in funding. The underlying philosophy behind this investment is to move away from concentrating tourist flows and investments in the so-called 'big attractors,' such as major cities of art and popular seaside and mountain destinations. Instead, the focus is on promoting smaller sites, challenging the conventional approach to alternative sustainable tourism. The allocated funds are intended for projects that encompass the urban regeneration of small villages, restoration and conservation of cultural heritage, and the development of comprehensive management and tourism promotion strategies.

However, even with this investment, several issues have surfaced during implementation.[57] The main limitation of this policy is that it addresses only a few specific territorial contexts, failing to stimulate an overall transition toward sustainability in the entire national tourism system.

In essence, while there is a prevailing appearance of sustainability in official documents, the concrete implementation of genuine sustainable practices within the broader tourism sector remains lacking.

[53] art 44, l reg Veneto 14 giugno 2013, no 11 'Sviluppo e sostenibilità del turismo veneto' (l reg Veneto 11/2013).

[54] art 75, l reg Lombardia 1 ottobre 2015, no 27 'Politiche regionali in materia di turismo e attrattività del territorio Lombardo'.

[55] See, for example, l reg Veneto 11/2013.

[56] Giacomo Menegus, 'Bando Borghi e autonomie territoriali' (2022) 5 Le Regioni 931.

[57] ibid 934 ff.

A prominent example of the failure of tourism law to implement the principle of sustainability is offered by the Italian (non)regulation of short-term rentals.[58]

It is widely recognized that the rise of home-sharing platforms, particularly Airbnb, has led to several negative externalities, especially in cities facing overtourism as popular international tourist destinations.[59]

The proliferation of short-term rentals has resulted in a reduced availability of residential properties for long-term rentals, leading to increased rents as property owners opt for the more lucrative and flexible tourist market. Moreover, local authorities and researchers have reported challenges in managing certain services, such as waste collection and public transport, due to the fluctuating 'temporary population' of tourists that varies significantly in a short period. Gentrification and touristification phenomena have also emerged, negatively affecting businesses not directly related to the tourism sector. Additionally, issues have arisen concerning disturbances for neighbours and local residents.

The fiscal aspect is another critical consideration. It involves not only addressing tax evasion related to income from short-term rentals but also managing the collection of tourist taxes.

From a social perspective, the impacts of short-term rentals on host communities are clearly at odds with the principles of sustainable tourism.

However, unlike most European cities and states, such as Paris, Berlin, or Barcelona,[60] Italy has yet to establish a comprehensive regulatory framework aimed at promoting sustainable development in the tourist accommodation sector while considering the housing needs of local communities.

The initial legislation addressing the matter was Article 4 of decree-law no. 50/2017 (converted into law no. 96/2017), entitled 'Tax regime for short-term rentals.' Primarily focused on fiscal matters, this regulation faced partial implementation due to disputes between Airbnb and the Revenue Agency, even leading to legal proceedings. Subsequently, Article 13-quater of decree-law no. 34/2019 introduced 'Provisions on short-term rentals and

[58] Giacomo Menegus, 'Processi di regolazione della sharing economy: oltre la self-regulation' (2021) 3 Osservatorio sulle fonti 1436-37.

[59] Filippo Celata and Antonello Romano, 'Overtourism and online short-term rental platforms in Italian cities' (2022) 30 Journal of Sustainable Tourism.

[60] Gianluca Bei and Filippo Celata, 'Challenges and effects of short-term rentals regulation: A counterfactual assessment of European cities' (2023) 101 Annals of Tourism Research <https://www.sciencedirect.com/science/article/pii/S0160738323000786> accessed 31 July 2023.

accommodation businesses,' amending decree-law no. 50/2017. This led to the creation of the 'Database of accommodation facilities and properties intended for short-term rentals' by the Ministry of Tourism (Ministerial Decree no. 1782 of 29 September 2021).

At the regional level, many Regions have adopted regulations to introduce a registration code, aiming to facilitate control and monitoring of tourist accommodation by local authorities.[61]

Having limited jurisdiction in this field, certain cities have implemented innovative approaches to address the excessive proliferation of short-term rentals. For example, in Venice, the Urban Construction Regulation (RUE) was reformed to require all houses used for tourist rentals to have a 'septic tank.' While initially intended for all private homes to protect the Venice Lagoon environment, the requirement was indefinitely suspended due to implementation challenges in the historic city. However, it still applies to hotels and tourist accommodation, leading the municipality to treat short-term rentals and B&Bs as regular accommodation facilities.[62] Similarly, starting from June 2023, the Municipality of Florence, based on Tuscany's land use legislation (Regional Law no. 65/2014), decided to ban any new openings of short-term rentals, B&Bs, and similar accommodation in the UNESCO historic city centre.[63] Following a temporary suspension of the initiative in 2024 due to formal reasons, the new city administration reinstated the restriction during the summer of the same year. Meanwhile, the Tuscany Region also took action toward the end of 2024 with a comprehensive reform of its tourism legislation (Regional Law No. 61 of 2024, the so-called Unified Tourism Act), allowing around 90 Tuscan municipalities with the highest tourist density to introduce limitations on short-term rentals[64]. However, the legislation is still awaiting implementation by municipal administrations.

[61] Giacomo Menegus, 'Recenti interventi delle regioni ordinarie in materia di locazioni per finalità turistiche' (2020) 1 Osservatorio sulle fonti.

[62] The Regulation was challenged before the Regional Administrative Court, which upheld it twice: TAR Veneto, sent 27 December 2022, no 1961 and sent 8 July 2023, no 1022.

[63] Ernesto Ferrara, 'Firenze, Nardella annuncia lo stop a nuovi Airbnb nel centro storico', *la Repubblica* (Firenze, 1 June 2023) <https://firenze.repubblica.it/cronaca/2023/06/01/news/firenze_nardella_stoppa_i_nuovi_airbnb_nel_centro_storico-402789010/> accessed 31 July 2023.

[64] See Article 59 (Criteria and limits for the operation of short-term tourist rental activities), Regional Law No. 61 of 2024.

During the Draghi Government, Article 37-bis decree-law no. 50/2022 was introduced, offering 'Measures to encourage the increase in the supply of rental accommodation for long-term residential use in the historic city of Venice.' This regulatory intervention, although limited to Venice, stands out as the first example of 'hard regulation' in this field in the Italian context. It grants the Municipality the authority to integrate urban planning tools with specific regulations to define maximum limits and conditions for the use of residential properties for short-term rentals, particularly in the historic centre and the islands of the Venetian Lagoon.

However, the municipal regulation necessary for its implementation has not yet been approved; a debate is currently underway in the city council over a draft that merely introduces a few behavioural obligations for hosts and guests and is unlikely to have any effect on reducing STRs.

Only in the summer of 2023 did the Ministry of Tourism begin studying some form of limitation on short-term rentals. Unfortunately, partly due to some internal disagreements within the governing majority, the outcome of the debate and study process has been disappointing. Article 13-ter of Decree-Law no. 145/2023 (converted into law no. 91/2023) merely introduces a national registration code for accommodation facilities (including STRs) and some safety obligations. These are measures aimed at combating irregular activities and improving the quality of hospitality, but they have nothing to do with the sustainability of the short-term rental sector.

Another critical issue largely unaddressed by Italian legislation is overtourism. The term 'overtourism' refers to situations in which the impact of tourism exceeds the physical, ecological, social, economic, psychological, and political capacity thresholds in certain locations and at specific times (according to the 'Research for TRAN Committee - Overtourism: impact and possible policy responses'[65]).

Several renowned Italian tourist destinations, such as Florence and Venice,[66] are widely recognized examples of overtourism on a global scale. Venice, in particular, has become synonymous with the 'Venice syndrome,'[67]

[65] Paul Peeters and others, *Research for TRAN Committee - Overtourism: impact and possible policy responses* (European Parliament, Policy Department for Structural and Cohesion Policies 2018).

[66] Emma Nolan and Hugues Seraphine, 'Venice: capacity and tourism' in Dodds and Butler (eds), *Overtourism* (n 7).

[67] Claudio Milano, 'Overtourism and tourismphobia: Global trends and local context' (2017) Barcelona: Ostelea School of Tourism & Hospitality.

which signifies the detrimental effects of unsustainable tourism development on the city. The Cinque Terre in Liguria is also facing similar challenges.

While innovative approaches and tools to mitigate overtourism are being studied worldwide, Italy, despite being one of the countries most affected by this phenomenon, lacks a regulatory framework and specific initiatives to tackle the issue effectively. The current promotion of lesser-known and less-visited destinations and itineraries, while a step in the right direction, has yielded uncertain results.

The absence of clear legislation and a defined toolbox leaves few local administrations that are willing to regulate or limit tourist flows with inadequate and questionable tools that offer limited effectiveness. However, as outlined in Sections 2, 3, and 4, one of the fundamental principles of sustainable tourism is to ensure destinations operate within their proper carrying capacity by implementing limits and regulations through laws.

In relation to the cities of art, the Municipality of Venice has the option to implement a tourist tax, commonly referred to as an 'entry ticket,' specifically targeting day-visitors to the city.[68] The primary objective behind this measure is to effectively manage tourist influx during peak periods and alleviate overcrowding.[69]

Implemented by the Italian Government to safeguard the city from potential UNESCO 'blacklisting' as a World Heritage Site in Danger, the tourist fee has sparked numerous concerns about its validity. The fee, designed for day-trippers, has raised doubts due to its extensive list of exemptions and its relatively low cost, leading to doubts about its actual effectiveness. Moreover, the Municipality is now encountering mounting opposition from a segment of the local population who fears the city's transformation into a mere museum-like destination. Simultaneously, the administration itself is uncertain about the appropriate timing and implementation methods for the tax. As a result, the enforcement of the tax has been continuously postponed and remained stalled until last year.

[68] art 1, para 1129, l 30 dicembre 2018, no 145 'Bilancio di previsione dello Stato per l'anno finanziario 2019 e bilancio pluriennale per il triennio 2019-2021'.

[69] Loris Tosi and Ernesto M Bagarotto, 'La tassazione delle città d'arte ed il contributo di accesso alla città di Venezia' (2021) 1 Rivista trimestrale di diritto tributario 97; Loris Tosi, 'Le possibili alternative: l'esperimento della tassa di sbarco a Venezia e la prospettiva della city tax', in Roberto Cordeiro Guerra (ed), *Città d'arte e fisco: Verso un Turismo sostenibile?* (Pacini Giuridica 2021).

In light of the new UNESCO recommendation to 'blacklist' the city, which was disclosed in Summer 2023, a brief experimental phase was conducted in 2024, limiting the application of the entry fee to a few days. Although it generated significant revenue, the tax does not appear to have had any impact on the influx of tourists, which – according to available data – actually increased compared to those who visited the city during the same period the previous year.[70]

The picturesque villages of Cinque Terre in Liguria attract millions of tourists each year, especially day-trippers, who wander through the charming alleys and narrow streets of their historic centres. However, in Spring 2023, the situation escalated to severe overcrowding, raising safety concerns during the Easter weekend. This has reignited discussions about implementing restrictions on the number of tourist entries to these small villages.[71] So far, concrete measures have been limited to controlling access to the renowned 'Via dell'Amore,' a scenic pedestrian route connecting Riomaggiore and Manarola. To walk this path, visitors must now book in advance and pay a fee.[72]

Similarly, in Liguria's Portofino, the Mayor issued an order in April 2023 to establish 'no-waiting zones' in an attempt to deter tourists from stopping to take selfies and congesting the area.[73]

In Sardinia, faced with similar overcrowding issues, efforts are being made to preserve the marine ecosystem by setting sustainable limits on some particularly fragile beaches. The Municipality of Baunei, for instance, has decided

[70] R.A. Hughes, Evasion, confusion and protests: How effective is Venice's new tourist tax?, in Euronews, 21 May 2023. See also E. Vianello, Aspettando l'ultima onda: Venezia e la gestione dell'overtourism, in DiTe - Rivista di studio delle dinamiche territoriali, 9 January 2025..

[71] 'Cinque Terre invase dai turisti: i sindaci chiedono una legge speciale', *IlSole24Ore* (Milano, 10 April 2023) <https://www.ilsole24ore.com/art/cinque-terre-invase-turisti-sindaci-chiedono-legge-speciale-AEo1noFD> accessed 31 July 2023.

[72] Michela Bompani, 'Cinque Terre, Via dell'Amore a pagamento: 5 euro per 160 metri', *la Repubblica* (Genova, 6 July 2023) <https://genova.repubblica.it/cronaca/2023/07/04/news/cinque_terre_scontro_nel_sito_unesco_sul_biglietto_dingresso_alla_via_dellamore-406638204/?callback=in&code=OGY0ZDBLNJATOGNHMI0ZN2VMLWIWMWQTNMI0NZBLZGM5MGQ3&state=5f59dc9f3b894ab28034df3eefa55171> accessed 31 July 2023.

[73] Angela Symons, 'Portofino introduce il divieto di sosta pedonale', *Euronews* (10 May 2023) <https://it.euronews.com/viaggi/2023/05/10/portofino-introduce-il-divieto-di-sosta-pedonale> accessed 31 July 2023.

to maintain access restrictions to certain beaches in 2023 and 2024, a measure already enforced in previous years. Another well-known beach, 'La Pelosa' in Stintino, will also have limited access between June 1 and October 31, 2023.[74]

Notably, other destinations have also implemented restrictions. The Lake of Braies, popularized by the TV drama 'One step from heaven' (*A un passo dal cielo*), has experienced a surge in mass tourism. Consequently, access limitations have been introduced to maintain the site's integrity.[75]

The preceding overview of significant cases demonstrates that local authorities typically respond to overtourism using ad hoc measures, which may have questionable effectiveness (evident in the case of Venice), or emergency orders which, while useful for urgent situations, are not suitable for managing the recurring issue of overtourism.

An innovative and sustainable approach has been adopted by the Autonomous Province of Bolzano/Südtirol, where a complex system of maximum overnight stays, varying by municipality, has been implemented.[76] This exemplifies, however, an almost unique nationwide effort to address overtourism. Likewise, in the Trentino-Alto Adige Region, the Provinces of Trento and Bolzano have undertaken initiatives (*#Dolomitesvives*) to regulate motorized traffic flows on Alpine Pass Roads, specifically to promote sustainable tourism and mobility.[77]

Nonetheless, such examples of excellence remain limited in number. Some cases, often cited in international literature as instances of sustainable tourism, may, upon closer examination, reveal a narrower scope of actual impact.

[74] Valentina Iorio, 'Turisti, in Italia ed Europa è boom: sono troppi? Perché l'«overtourism» è un problema', *Il Corriere della Sera* (Milano, 26 July 2023) <https://www.corriere.it/economia/consumi/23_luglio_26/overtourism-italia-europa-turisti-cbc23f3c-2a09-11ee-84a-e-fdab1efa7b6b.shtml> accessed 31 July 2023.

[75] Gianfranco Piccoli, 'Turismo al lago di Braies, auto a numero chiuso nella perla dell'Alto Adige', *la Repubblica* (Roma, 12 July 2022) <https://www.repubblica.it/cronaca/2022/07/12/news/lago_braies_alto_adige_auto_numero_chiuso-357511106/> accessed 31 July 2023.

[76] Provincia Autonoma di Bolzano/Südtirol, 'Programma provinciale per lo sviluppo del turismo 2030+ (PPST 2030+)' <https://www.provincia.bz.it/turismo-mobilita/turismo/programma-sviluppo-turistico.asp> accessed 31 July 2023.

[77] Greta Erschbamer, Elisa Innerhofer and Harald Pechlaner, 'Dossier – Overtourism. Ovvero quando il turismo supera i limiti' (Eurac, October 2018) <https://webassets.eurac.edu/31538/1657705708-09-25-overtourism-it.pdf> accessed 31 July 2023. The order laid down by the Province was challenged before the Local Administrative Court, which upheld it; see TAR Bolzano, sent 9 May 2018, no 157.

This concerns the two decree-laws (no. 45 of 2021 and no. 103 of 2021) implemented by the Draghi Government, aiming to restrict the passage of cruise ships in the San Marco Basin and eventually exclude them from the Venice Lagoon after a transition period.[78] This decision garnered significant attention globally. Despite receiving positive international recognition, the restrictions outlined in the decrees do not fully align with the principles of sustainable tourism.

Regrettably, cruise ships are still allowed to dock in the environmentally delicate Venice Lagoon, specifically at the Port of Marghera, which is part of the UNESCO World Heritage site along with the city of Venice. The current decree-laws have primarily achieved a form of 'aesthetic' sustainability, as the large cruise ships (so-called '*Grandi Navi*') are prohibited from passing before San Marco Square. However, true environmental sustainability has not been fully realized as these ships still impact the lagoon's fragile ecosystem.

Another critical aspect that deserves attention is the potential impact of climate change on the Italian tourism industry. In line with the principles of sustainable tourism, which emphasize long-term planning and preserving tourist resources for future generations, it is essential for the government and public authorities to conduct studies and develop adaptation and conservation strategies.

However, there is a notable absence of fully reliable monitoring and up-to-date data reflecting the latest scientific predictions on climate change. The most significant effort in this direction can be traced back to 2014, when the Ministry of the Environment adopted the 'Report on the state of scientific knowledge on impacts, vulnerability, and adaptation to climate change in Italy.'[79]

And yet, already in the 2014 Italian Report it was stated that:

> a growing share of foreign tourists will tend to leave Italy for less warm destinations, while a growing share of Italian tourists will tend to choose Italy instead of warmer destinations. The balance is generally negative, but at the regional and provincial level these two effects are distributed according to the respective share of international and domestic tourists on the national total.[80]

[78] Lorenzo Casini, 'La salvaguardia di Venezia "città acquatica": dall'utopia alla realtà' (2021) 2 Aedon 145.

[79] Ministero dell'Ambiente, *Rapporto sullo stato delle conoscenze scientifiche su impatti, vulnerabilità ed adattamento ai cambiamenti climatici in Italia* <https://www.mase.gov.it/sites/default/files/archivio/allegati/clima/snacc_2014_rapporto_stato_conoscenze.pdf> accessed 31 July 2023.

[80] ibid 94.

The estimated decline in tourist numbers varies significantly across different regions, with some experiencing slight drops and others facing more pronounced declines. However, the overall picture, drawn in 2014 and spanning three decades (2020, 2030, 2050), remains alarming.[81]

The lack of proper monitoring is closely linked with weak adaptation planning, as highlighted during Summer 2023. The Italian press covered the upset reactions of Italian politicians to statements made by the German Minister of Health, Karl Lauterbach, during his vacation in Italy.[82] He expressed concerns about Italy's future as a tourist destination in the face of exceptional heat waves related to climate change.[83] In response, the Minister of Tourism, Daniela Santanchè, made vague references to the principle of sustainability in the Strategic Tourism Plan,[84] giving the impression that Italy lacks a concrete and clear strategy to address climate change impacts on tourism.

Back in 2015, the 'National Strategy for Adaptation to Climate Change,'[85] based on the work of the Euro-Mediterranean Centre on Climate Change (CMCC), already highlighted the severe effects expected on the tourism industry, particularly regarding the number of incoming visitors. The strategy was implemented through the 'National Plan for Adaptation to Climate Change' (PNACC),[86] a tool guiding the most effective adaptation actions in Italy and integrating adaptation criteria into existing planning tools. The

[81] ibid 94-95.

[82] 'Il ministro della Sanità tedesco in visita in Italia: "Qui il turismo non ha futuro. Usare le chiese come celle frigorifere"', *La Repubblica* (Roma, 23 July 2023) <https://www.repubblica.it/cronaca/2023/07/23/news/karl_lauterbach_turismo_italia_cambiamento_climatico-408701512/> accessed 31 July 2023.

[83] The original tweet in German said the following: 'Heute in Bologna Italien eingetroffen, jetzt geht es in die Toskana. Die Hitzewelle ist spektakulär hier. Wenn es so weiter geht werden diese Urlaubsziele langfristig keine Zukunft haben. Der Klimawandel zerstört den Süden Europas. Eine Ära geht zu Ende.' (*Twitter*, 13 July 2023) <https://twitter.com/Karl_Lauterbach/status/1679484860812136448> accessed 31 July 2023.

[84] 'Il ministro della Sanità tedesco e l'Italia: "Il turismo senza futuro". L'altolà di Santanchè', *La Stampa* (Torino, 23 July 2023) <https://www.lastampa.it/politica/2023/07/23/news/il_ministro_della_sanita_tedesco_e_litalia_il_turismo_senza_futuro_laltola_di_santanche-12961389/> accessed 31 July 2023.

[85] Ministro dell'Ambiente e della Tutela del Territorio e del Mare, d min 16 giugno 2015, no 86 'Strategia nazionale di adattamento ai cambiamenti climatici (SNAC)'.

[86] Ministero dell'Ambiente e della Sicurezza Energetica, Piano Nazionale di Adattamento ai Cambiamenti Climatici, December 2023.

plan, finally released only in December 2023[87], outlined several critical effects of climate change on tourism.

It predicted both direct and indirect negative impacts, including shifts in travel destinations towards higher latitudes and altitudes, seasonal changes in tourist flows, and a shift in preferences for foreign and Italian tourists.

The ski tourism sector would be significantly affected, with the potential loss of natural snow cover in many ski resorts due to rising temperatures. Alarmingly, even a moderate temperature increase of 1°C could render several ski resorts in Friuli Venezia Giulia and other regions incapable of maintaining a winter season. The lack of structured adaptation strategies at the national level is concerning, especially considering that some areas still plan to build ski facilities despite the projected loss of natural snow.

Concluding our examination of sustainable tourism law in Italy, let us now delve into the regulation of tourist taxes, known as 'imposte di soggiorno' and 'tasse di sbarco.' These taxes, with their Pigouvian nature,[88] hold the potential, from an economic theory perspective, to counteract the negative externalities caused by high tourist flows on host communities and the ecosystem. They align with the concept of sustainable tourism, aiming to address the impacts of tourism in a balanced manner.

However, despite their potential, tourism law faces challenges in achieving true sustainability with these taxes.[89] Firstly, the revenue generated from these taxes is legally allocated to 'interventions in the field of tourism.' Unfortunately, in destinations experiencing significant tourist inflows, this allocation might inadvertently exacerbate rather than alleviate the spiral of touristification, intensifying the pressures on host communities. Secondly, the involvement of stakeholders in the decision-making process is a crucial principle of sustainable tourism, as discussed in Sections 2 and 3. However, the current obligation for municipalities to engage only the 'most representative associations of the owners of accommodation facilities' excludes the participation of host communities. This exclusion undermines the fundamental concept of sustainable tourism, which emphasizes the inclusion of local communities in decision-making to ensure tourism benefits are distributed equitably.

[87] See Decree no. 434 of 21 December 2023.

[88] Arthur C Pigou, *The Economics of Welfare* (Macmillan & Co 1920).

[89] Giacomo Menegus, 'Le imposte turistiche locali: per un ripensamento nel segno della sostenibilità' (2023) IV Convegno di contabilità pubblica. Atti Convegno Nazionale di Contabilità Pubblica Venezia, 16-18 dicembre 2021, Editoriale scientifica, Napoli 2023, 831-840.

6. *Sustainable Tourism and Law in Italy: an Underrated Relationship*

In conclusion, the concept of sustainable tourism in Italy is yet to be fully embraced and translated into a comprehensive legal framework. Despite the frequent mention of 'sustainability' in various tourism planning documents and policies, the existing legislation related to tourism remains largely unchanged. The absence of a clear and robust regulatory framework presents challenges in ensuring the proper management and development of the tourism industry while safeguarding the environment, communities, and visitors.

For sustainable tourism to become a reality, regulation is imperative.

Already in 2005, UNEP and UNWTO highlighted the central role in the development of sustainable tourism of what is defined as 'command and control instruments.' In particular, the aforementioned document 'Making Tourism More Sustainable - A Guide for Policy Makers' provides a comprehensive and convincing overview of various command and control instruments that can be used to promote sustainable tourism.[90] These instruments include legislation, regulation, licensing, land use planning, development control, and Environmental Impact Assessment (EIA).

Legislation, regulation, and licensing play a critical role in strengthening sustainability by establishing compulsory and enforceable requirements with associated penalties for non-compliance. Specific aspects, such as location and nature of development, employee rights, visitor safety, environmental damage, and resource use, should be covered by a basic legal framework applicable to all types of tourism.[91]

According to UNEP and UNWTO, to support tourism sustainability, existing legislation should be reviewed and strengthened, considering factors like positive encouragement for sustainable tourism, powers of relevant bodies, and stakeholders' ability to engage in sustainable tourism. A national tourism law, coordinated with other relevant laws, can provide the basis for underpinning sustainability and controlling tourism-related activities.[92]

A particular emphasis is put on land use planning and development control, which are deemed essential for sustainable tourism, influencing tourism development and other forms of development that may impact tourism.

[90] UN Environmental Programme and UN World Tourism Organisation (UNEP & UNWTO), 'Making Tourism More Sustainable - A Guide for Policy Makers' (2005) 78 ff.

[91] ibid.

[92] ibid 79.

Planning should be strategic, flexible, and participatory, integrating tourism strategies with spatial planning at the national, regional, and local levels. Zoning and regulations should be utilized as well to control tourism development, and development control processes should ensure compliance with regulations and prevent illegal development.[93]

Finally, the relevance of Environmental Impact Assessment (EIA) is stressed: EIA can enhance sustainability by evaluating the potential impacts of tourism development on the environment and communities and, according to the guidelines, should be used more extensively and effectively as a requirement for developers, and its application to tourism should be clarified and extended in appropriate cases.[94]

Overall, the document emphasizes the need for strong command and control instruments to achieve sustainable tourism, protect the environment, and promote responsible tourism practices.

In Italy, the lack of such a comprehensive regulatory framework for sustainable tourism, or even the limited implementation of some of the tools mentioned in the document, raises considerable concern, especially given the rapid expansion of the tourism industry in the post-pandemic era. Without adequate legal mechanisms, competing rights and interests beyond the tourism sector may be jeopardized.

It is imperative for constitutional law and public law scholars to play a more active role in facilitating the transition of the tourism industry towards sustainability. Historically, the attention of constitutional scholars on tourism primarily revolved around the division of legislative powers between the State and the Regions, with minimal focus on the general issues of regulating tourist activities. However, recent developments, particularly the emergence of sustainable tourism as a response to the adverse impacts of conventional mass tourism, have revealed the constitutional significance of the industry.

The concept of sustainability applied to tourism has shed light on imbalances and injustices stemming from unsustainable practices, paving the way for new avenues of research. Foremost among these is the exploration of the rights and freedoms of host communities and other vulnerable actors in the tourism sector. Thus far, legal scholarship has predominantly centred on safeguarding the rights of tourist businesses and visitors, overlooking the negative repercussions on host communities, urban environments, and other non-tourism-related

[93] ibid 82-86.

[94] ibid 88-89.

economic activities. These concerns underscore the necessity for further studies and understanding of both established rights (e.g., housing, property, economic enterprise) and emerging interests (e.g., the right to the city, the right to a stable climate, the rights of future generations) in the face of tourism impacts.

The challenges posed by the imperative to regulate and manage tourism sustainably have exposed the inadequacy of existing legal and policy tools. Addressing this requires a comprehensive evaluation of the current legal framework and the distribution of powers among different levels of government, as well as careful consideration of conflicting rights, experimentation, impact analysis, and many other factors.

The required active involvement of all stakeholders, particularly host communities, in the planning and regulation of tourism activities necessitates reforming existing governance structures and processes, such as those related to tourism taxes. This requires renewed research in participatory tools and public-private partnership frameworks, which challenge principles of horizontal subsidiarity and local participation and democracy.

Lastly, the concept of long-term planning, especially in the face of climate change, and the holistic approach to sustainability in the tourism industry call for extensive reform of tourism legislation. This reform should encompass governance reforms, an innovative and proactive role of public authorities, and the revision of existing instruments and policies.

However, it is crucial to acknowledge that this research endeavour is still in its nascent stages. The complexity of the issues at hand demands collaborative efforts from scholars, policymakers, and stakeholders to create an effective and comprehensive regulatory framework for sustainable tourism.

In conclusion, although the notion of sustainable tourism has been acknowledged to some extent in policy documents, its full realization in Italy remains pending. The country must progress beyond mere rhetoric and take concrete legal actions that genuinely prioritize sustainability within the tourism industry. Achieving this goal necessitates proactive regulation and harmonization of existing laws to safeguard the environment, communities, and visitors while simultaneously promoting responsible and sustainable tourism practices. A comprehensive legal framework is indispensable for Italy to embark on a genuine journey towards sustainable tourism.

As pointed out by Franceschelli in his book, we may envision the age of sustainable tourism as a hopeful prospect, but it is yet to be effectively embraced. The development of sustainable tourism law is a journey yet to unfold, and significant efforts lie ahead.

Cristiana Lauri

GOVERNING SMART SUSTAINABLE CITIES. THE CASE OF URBAN MOBILITY

1. *Sustainability and the City. The Struggle for «Real Sustainability»*

Among the many paths of sustainability, the research field of cities represents a frontier of analysis of growing interest.[1] Studying the issue of sustainability through the lens of the city leads one to consider an evolution of the concept of the city itself. In recent times, indeed, multiple definitions of the city concept have emerged at the political level. We speak here of sustainable cities as well as of smart cities.[2]

This study aims to explore the link between the concept of smart city and that of sustainable city.

The two concepts are interdisciplinary, and have been explored by urban studies from different viewpoints. In this paper, that of public law is key in order to contextualize smart and sustainable cities within an institutional framework, and to achieve "real sustainability".[3] In other words, the dimension of a public strategy for good urban administration is fundamental.

In the research conducted to date, scholars have investigated the smart city as a new vision of urban contexts, a new paradigm to be developed and applied with respect to six axiological dimensions (environment, economy, living, mobility, governance, people) in an interdisciplinary perspective.

The metropolitan or municipal level can vary: literature conceptualizes smart cities as well as smart places, smart regions, smart towns, or smart

[1] See UN-HABITAT, 'The Value of Sustainable Urbanization' (World Cities Report 2020) <https://unhabitat.org/sites/default/files/2020/10/wcr_2020_report.pdf?\> accessed 28 January 2025.

[2] Cristiana Lauri 'Smart City', in *Digesto delle Discipline Pubblicistiche* (VIII upd, UTET 2021) 377-396; Maria Grazia Della Scala, 'Lo sviluppo urbano sostenibile e gli strumenti del governo territoriale tra prospettive di coesione e tutela dei diritti fondamentali' (2018) 4 Diritto Amministrativo 787.

[3] Beate Sjåfjell, 'From Sustainability in Law to Sustainability Law?' in Alessio Bartolacelli (ed), *The Prism of Sustainability. Multidisciplinary profiles: law, economics, and ethics* (Editoriale Scientifica 2024).

villages.[4] A Smart City «is a city well-performing in a forward-looking way in these six characteristics, built on the "smart" combination of endowments and activities of self-decisive, independent and aware citizens».[5]

The abovementioned forward-looking perspective is the essence of sustainability as it refers to the intergenerational dimension which is a baseline for the principle of sustainable development.[6] This is the junction point where the smart city and the sustainable city meet each other, sharing the same horizon.

Taking impetus from such a framework, the study will analyze the main features of the governance of smart sustainable cities.

Policy-makers at international level have been facing urban issues by using soft law tools. Take, for example, the "UN New Urban Agenda", at global level; the "Leipzig Charter on Sustainable Cities" or the "Toledo Charter on Urban Regeneration"; the "Pact of Amsterdam" and, more recently, the "Ljubljana Agreement" and the "Multiannual Work Programme for the Urban Agenda" at EU level.

These documents are at the frontline of a transformative era, commonly recognized as the "twin transition", which is the institutional context of the digital and environmental transitions.

In the EU context, crisis factors – such as the ecological crisis and linked with this the Covid-19 pandemic[7] – have given a significant boost to a general political strategy for sustainability and resilience. As far as the post-pandemic recovery is concerned, it is based on plans and public funds that are

[4] See Luca Mora and others, 'Smart city governance from an innovation management perspective: Theoretical framing, review of current practices, and future research agenda' (2023) Technovation 123.

[5] Rudolf Giffinger and others, *Smart cities - Ranking of European medium-sized cities* (Centre of Regional Science (SRF) Vienna, University of Technology 2007).

[6] Philippe Sands, *Principles of International Environmental Law* (Cambridge 2012); Pierre-Marie Dupuy and JE Vinuales, *International Environmental Law* (Cambridge 2015).

[7] About the connection between the ecological crisis and the Covid-19 pandemic see David E Bloom, Daniel Caderette and JP Sevilla, 'Epidemics & economics' (2018) Finance and development, 46; Rob Jordan 'How does climate change affect disease?' (Stanford Earth, School of Earth, Energy and Environmental Sciences 2019); Xiao Wu and others, 'Exposure to air pollution and Covid-19 mortality in the United States: a nationwide cross-sectional study' (2020) <medRxiv.org> accessed 28 January 2025. See also Nicholas A Robinson 'The Next Pandemic is here' (2020) Environmental Forum, 35, where the Author highlights that 'Spatial planning of cities and new developments determines environmental security. Cities are front lines managing zoonotic diseases, since most of the world's people live in cities'.

specifically aimed at pushing toward the renewal and innovation of cities and infrastructures, both physical and social. This trend shows an evolution of the soft law tools introduced for urban strategies, towards a broader framework made up of the combination of hard law measures that can decisively influence urban development and innovative practices that reveal a new cultural awareness of urban sustainability.[8]

2. *An Example: The Case of Urban Mobility*

I will briefly showcase this through the example of one of the axiological dimensions of smart cities, that of mobility.

Contemporary urban contexts are characterized by issues such as urban congestion and air and noise pollution.

These issues have been exacerbated if one also thinks of the growing polarization between centers and suburbs, together with the frequent inefficiencies of local public transport and the consequent risk of social marginalization.[9]

In the abovementioned context of "ecological crisis", principles of prevention, precaution, integration, equality, and a holistic approach to urban issues, impose regulatory systems that through various measures – planning, command and control and market liberalization – aim to decongest urban centers and improve the quality of life in urban spaces. Indeed, mobility represents a driving factor of change in the evolution of law in general and is an example of convergence for the three pillars of sustainable development – economic, social and environmental.

As highlighted by the European Court of Auditors, in a Special Report entitled "Sustainable Urban Mobility in the EU: No substantial improvement is possible without Member States' commitment", «managing urban

[8] Strategies and actions put in place to face the problems arising from the pandemic containment measures have been collected by OECD, 'Respacing our cities for resilience' (Covid-19 Transport Brief 2020); OECD, 'City policies responses in tackling Coronavirus. Contributing to a Global effort' (2020); UN-HABITAT, 'Un-habitat Guidance on Covid-19 and public space' (2020). See also A Benjamin and others, 'Editorial' (2022) Legal Policy and Pandemics – The Journal of the Global Pandemic Network, 1.

[9] Cristiana Lauri 'Sustainable Urban Mobility in the Era of Urban Regeneration in Italy' (2023) 12 Federalismi.t 104 <https://www.federalismi.it/index.cfm> accessed 28 January 2025.

mobility is an important challenge for urban areas. Planners and policy-makers, in addition to inevitable financial constraints, are faced with many, often competing demands: maintaining a high quality of life while also creating an attractive environment for businesses; and restricting traffic in sensitive areas while not curbing the necessary movement of goods and people».[10]

Awareness of these critical issues, which indeed afflict many urban contexts on a global scale, has been specifically addressed by the sustainable development strategies. Target 11.2 of the Sustainable Development Goals wishes «by 2030, [to] provide access to safe, affordable, accessible and sustainable transport systems for all, improving road safety, notably by expanding public transport, with special attention to the needs of those in vulnerable situations, women, children, persons with disabilities and older persons».

This inspires planning systems of smart and sustainable urban mobility, where new targets, new technologies, new policies, and new legal tools are integrated. Indeed, markets have sought to respond to the overwhelming demand for mobility, proposing innovative options such as shared transport and intelligent transport systems.

But these market solutions need to be included in a wider and more comprehensive public strategy, based on the concept of sustainable development, innovated by considering besides the traditional social, environmental, and economic pillars, technological innovation driving digitization towards sustainability purposes. This enables the balance of the social and economic needs for mobility with a reduction of negative externalities, i.e., environmental, imposed by the climate strategy, and boosted by new technologies and practices. Indeed, the climate targets are the foundation of these actions and constitute a regulatory framework which is shaping the way urban mobility is planned.

Specifically, the Paris Agreement, which sets out global commitments to combat climate change, urges countries to establish national strategies (Nationally Determined Contributions or NDCs) to achieve the binding target of keeping the global average temperature increase below 2°C compared

[10] European Court of Auditors, 'Special Report' (2020) clarifies that urban mobility 'refers to the ease with which people can move between destinations in urban areas with the help of the transport network and services available' and that 'there are many factors that affect urban mobility patterns, such as demography, land-use, governance, the availability of public transport, car use, and the local economy'.

to pre-industrial levels and continuing action toward the subsequent 1.5°C ceiling.

The European Union identified its own NDC valid for all member states, thus reinforcing Paris targets within its climate policy.[11] Indeed, with the European Climate Law,[12] it identified the binding goal of climate neutrality in the Union by 2050 and the intermediate target of reducing all net greenhouse gas emissions by at least 55 percent by 2030, compared to 1990 levels, promoting a complex action with a comprehensive package of proposals to update climate legislation and strategy to the new targets.[13] The 2030 and 2050 targets are legally binding for EU member states, which are required to submit their own national plans. Alongside action to mitigate and combat climate change, obligations include the development of action aimed at adaptation in order to strengthen resilience to the inevitable severe socio-economic and environmental impacts on the population and on the most vulnerable and strategic sectors, including infrastructure. Environmental policies are also integrated with energy policies, thus strengthening the tools for responding to climate change and the ecological crisis.[14]

The implementation of these objectives is more concretely referred to as the package of proposals "Fit for 55%" aimed at updating the European legislation to the new targets, and whose strategy includes the reform of the EU emissions trading system and CO2 emission standards for cars and vans.[15]

[11] The EU joined the Paris Agreement with Decision 2016/1841.

[12] Regulation (EU) 2021/1119 of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') [2001] OJ L243/1.

[13] European Commission, "Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality' (Communication) COM(2021)550 final.

[14] See European Commission, 'A policy framework for climate and energy in the period from 2020 to 2030; COM(2015)80, A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy; COM(2016)860, Clean Energy for All Europeans' (Communication) COM(2014)15 final; European Commission, 'The European Green Deal' (Communication) COM(2019)640final; and European Commission, 'REPowerEU: Joint European Action for more affordable, secure and sustainable energy' (Communication) COM(2022)108 final, adopted following the outbreak of the Russian-Ukrainian conflict, that further strengthened the strategy to ensure climate change and energy security for the Union by reducing dependence on Russian fossil fuels.

[15] Cars and vans account for 15% of the total EU emissions of carbon dioxide, see 'Fit for 55' Communication.

In March 2023,[16] progressive EU-wide emission reduction targets for cars and vans for 2030 and beyond were introduced, including a 100% reduction target for 2035 for new cars and vans.[17]

Implementing this general framework are the national strategies defined in the Integrated National Energy and Climate Plans, provided for in Regulation (EU) 2018/1999.

This new regulatory framework is essential in order to reflect on how urban planning governance, which is traditionally based on the balance of local interests according to general rules and principles set by national norms and specified in regional laws, is today more and more affected by the challenges identified by global and EU legal systems.

This shift is clearly demonstrated by EU policies on sustainable mobility and is generally connected with a development process towards maximum integration of environmental and climate policies in other sectors, as shown by the abovementioned recent European climate strategy and the national strategy.[18]

The trend has to be read in the light of the most recent generation of urban planning, that of "urban regeneration", characterized by the limitation on land consumption, environmental impact reductions, preservation of local economics, digitization, social inclusion, and wide accessibility.[19] In this framework, following the indications in the SDGs and the interpretation

[16] The Council adopted its general approach on the proposal in June 2022; an agreement with the European Parliament was reached in October 2022; the regulation was adopted by the Council in March 2023. See Regulation (EU) 2023/857 of 19 April 2023 amending Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement, and Regulation (EU) 2018/1999 [2023] OJ L111/1; and Regulation (EU) 2023/839 of 19 April 2023 amending Regulation (EU) 2018/841 as regards the scope, simplifying the reporting and compliance rules, and setting out the targets of the Member States for 2030, and Regulation (EU) 2018/1999 as regards improvement in monitoring, reporting, tracking of progress and review [2023] OJ L107/1.

[17] The new rules set the following targets: 55% CO2 emission reductions for new cars and 50% for new vans from 2030 to 2034 compared to 2021 levels; 100% CO2 emission reductions for both new cars and vans from 2035.

[18] Here, following the Green Deal, the Italian Plan for Recovery and Resilience dedicates the axis M2C2 to 'renewable energy, hydrogen, network and sustainable mobility'; M2C2.4 to 'developing more sustainable local transport'; M3C2 to 'intermodality and integrated logistics'.

[19] Lauri, 'Sustainable Urban Mobility in the Era of Urban Regeneration in Italy' (n 9).

given by the Court of Auditors, the issue of social justice and the principles of equality and solidarity also become central to the redesigning of urban mobility policies. This necessarily involves acting responsibly towards future and present generations, and means tackling the current discrimination between those who can enjoy favorable transport conditions and those who find themselves in segregated situations as a consequence of the inadequacies of the mobility sector.

3. *The Tools for Smart Sustainable Urban Mobility*

In this scenario, we can find flexible and heterogeneous administrative measures to regulate "soft mobility", i.e. non-motorized forms of transport (walking or cycling), pedestrian islands, the network of cycle paths, and also the use of ITS to facilitate shared mobility services. These innovations are supported by strategic actions such as the "City30km/h", aimed at creating a safe and favorable environment for coexistence between different forms of transport in urban areas and a stronger commitment to collective interests.[20]

Along the same lines is the idea of the "15-minute city", according to which cities have to be organized in a way so that everyone can reach work, leisure, instruction, and health services in a range of 15 minutes by walking in a green and receptive city. The approach relies on the principles of ecology (for green and sustainable cities); proximity (to reduce distance to workplace); and solidarity (to create links connecting people and boost participation).[21]

The integration of all the multiple forms of mobility in urban contexts can certainly offer positive outcomes for city users in terms of efficiency. Nevertheless, in many cities, openness to forms of smart and sustainable

[20] See Edoardo Galatola and Andrea Colombo, *Città30 – Il Vademecum* (2023) <https://www.fiab.info/download/VademecumCITTA30.pdf> accessed 28 January 2025.

[21] See Carlos Moreno, *Vie urbaine et proximité à l'heure du Covid-19* (Humensis, Editions de l'observatoire 2020); Carlos Moreno and others, 'Introducing the "15- minute city": sustainability, resilience and place identity in future post-pandemic cities' (2021) 4(1) Smart Cities <https://www.mdpi.com/2624-6511/4/1/6> accessed 28 January 2025. See also Sofia Ranchordas, 'Smart mobility, Transport Poverty and the Legal Framework of Inclusive Mobility' in Michèle Finck and others (eds), *Smart Urban Mobility* (Springer 2020) 61; Giancarlo Frosio, 'Sharing or Platform Urban Mobility? Propertization from Mass to MaaS', in ibid 163.

mobility requires paths of transformation from the point of view of urban planning legislative choices, in order to make it consistent with the morphology of the city and with the needs of the communities, having regard to socio-economic aspects. This is because the means that fall under the definition of sustainable mobility require the adaptation and rethinking of the entire urban context and its regulatory strategies, even if on a small scale.[22]

The governance of such an approach seems to be possible through procedures that are able to ensure a dialogue between different levels of government – from local to supranational – also through the involvement of the various stakeholders or, better, city users. In other words, involving those who find themselves, in a dynamic perspective, experiencing the city in all its aspects, regardless of the kind of connection with the territory – residence, citizenship, and even informality.[23]

Thus, from the point of view of administrative action, the programming and planning functions are crucial, both in the mobility sector and in the integration with other types of plan. It is not mere chance if policymakers are facing the need for smart sustainable mobility regulation through a new planning tool: the Sustainable Urban Mobility Plan (SUMP).

This kind of plan promotes integration between the various forms of transport described above and the urban areas through intermodality, the strategy aimed at strengthening and developing rapid mass transport lines (metros, tramways, and highly integrated and interconnected metropolitan railway systems), checking and information systems, cycling and walking, and sharing mobility.

SUMPs are "projects of the mobility system" and include an organic set of material and immaterial interventions aimed at achieving specific objectives. As highlighted by the European commission, «Sustainable Urban Mobility Planning is Europe's *de facto* urban transport planning regulatory concept»: we would say, it is "the new normal".

In the European context, sustainable mobility appears in a number of Directives relating to pollution reduction, safety and security, and is then

[22] For example, to include dedicated charging stations for electric cars (see Directive (EU) 2014/94/EU of 22 October 2014 on the deployment of alternative fuels infrastructure [2014] OJ L307/1); stations for bike sharing; or sensors for smart mobility systems.

[23] Saira Abbasi and Cristiana Lauri, 'Informal settlements and international migrants: the city of Rome (Italy) as case study', in Alessandra Feliciotti and Martin Fleischmann (eds), *Annual Conference Proceedings of the XXVIII International Seminar on Urban Form* (University of Strathclyde Publishing 2022) 1044-1051.

translated into different documents. Indeed, a framework that facilitated the introduction of SUMP has been systematically developed by European policymakers through the Thematic Strategy on the Urban Environment (2005), the Green Paper on Urban Mobility (2007), and the Action Plan on Urban Mobility (2009), which proposed «twenty measures to encourage and help local, regional and national authorities in achieving their goals for sustainable urban mobility». The growing interest in sustainable mobility policies and transport planning in EU law is shown, then, by the European Union White Paper of 2011, which formulated concrete targets for urban transport to contribute to strategic global and European policy goals, such as those from other documents of the European Commission and the European Parliament, whose indications merged into the European Strategy for Low Emission Mobility of 2016.

Subsequently, the EU has approved three mobility packages: two in 2017, containing legislative proposals and initiatives to implement the strategy for low-emission mobility and to ensure a smooth transition to a clean, competitive and interconnected mobility. This is consistent with the transition to a modern and low-carbon economy, which is a key political priority for the European Commission and is embodied in its priority of developing a resilient Energy Union and a forward-looking climate change policy; another in 2018, consistent with the industrial policy.

At the end of 2013, with the Urban Mobility Package, the European Commission defined the concept of Sustainable Urban Mobility Plans in an Annex and, at the same time, released the first version of the related Guidelines. The new approach to the strategic planning of urban mobility actually takes as a general basis the European document "Guidelines. Developing and Implementing a Sustainable Urban Mobility Plan" (ELTIS Guidelines), approved in 2014 by the European Commission's Directorate-General for Mobility and Transport,[24] and follows the Directive 2014/94/EU, on the deployment of alternative fuels infrastructure.

[24] Frank Wefering and others, *Guidelines. Developing and Implementing a Sustainable Urban Mobility Plan* (Rupprecht Consult – Forschung und Beratung GmbH, 2013). The recommendations for preparing a SUMP have been updated considerably in the second edition, published in 2019, available at <https://urban-mobility-observatory.transport.ec.europa.eu/system/files/2023-09/sump_guidelines_2019_second%20edition.pdf> accessed 28 January 2025. The origins of SUMP go back to the European Thematic Strategy on the Urban Environment (see European Commission, 'Thematic Strategy on the Urban Environment' (Communication) COM(2005) 718) which proposed the preparation of guidelines for Sustainable

In Italy, it has been transposed by Legislative Decree No. 257 of 16 December 2016,[25] which provided that a decree of the Minister of Infrastructure and Transport should adopt guidelines for the drafting of Urban Sustainable Mobility Plans. The subsequent Ministerial Decree of 4 August 2017 approved the Guidelines for the drafting and approval of Sustainable Urban Mobility Plans and included the indications of the 2011 White Paper, also picking up the guidelines set out in the Document "Connecting Italy: infrastructure needs and projects". The Urban Mobility Package «sketches out the guiding principles of the planning process and the topics to be addressed in a Sustainable Urban Mobility Plan. The concrete steps to be followed, practical guidance and good practices are contained in the Guidelines. Since the publication of the Urban Mobility Package, the concept of Sustainable Urban Mobility Plans has been widely taken up across Europe and internationally».[26]

The unifying feature of the emerging urban planning regulatory framework can be seen through the allocation of competences and powers in sustainable mobility planning regulation. Firstly in terms of content and methods, the need for a systemic and holistic approach is reflected by the legal nature of sustainable mobility plans.

As pointed out by the Italian Constitutional Court,[27] the plan not only constitutes an instrument of a strategic nature and programmatic purpose,

Urban Transport Plans; see also the first guidance document by the PILOT project (2007, available at <https://www.rupprecht-consult.eu/fileadmin/migratedRupprechtAssets/Documents/Pilot_EN_WEB.pdf> accessed 28 January 2025); and European Commission, 'Urban Mobility Package' (Communication) COM(2013) 91, which included a definition of the concept of "Sustainable Urban Mobility Plans". In the Eltis Guidelines one can read that 'Over the last few years, we have seen major new developments in many areas of urban mobility. Due to new technologies, driverless electric vehicles may soon be on our roads, new business models provide "Mobility as a Service", and at the same time changing attitudes among travelers result in an increase in shared mobility and cycling. These few examples indicate that important changes are occurring on different levels of the mobility system that made it necessary to rethink and update the original SUMP Guidelines. In addition, a wealth of SUMP implementation experience has been collected that needed to be made available as inspiration for practitioners across Europe'.

[25] See art 3, para 7, lett c).

[26] Frank Wefering and others, Guidelines. Developing and Implementing a Sustainable Urban Mobility Plan. Second edition (Rupprecht Consult – Forschung und Beratung GmbH, 2019), available at <https://urban-mobility-observatory.transport.ec.europa.eu/system/files/2023-09/sump_guidelines_2019_second%20edition.pdf> accessed 28 January 2025

[27] Corte cost, sent 19 aprile 2018, no 78.

but also contains fundamental, concretely operational indications for the development of the local public transport system, effective for achieving sustainable mobility, since it includes the allocation and assignment of financial resources to the various purposes. In other words, it is an operational instrument in which urban planning solutions, choices related to the environment, social inclusion, and financial resources all converge. Secondly, the authorities that are to be involved in the drafting of the plans are crucial. Even if urban mobility management is a responsibility of cities and member states, the EU through its environmental policies intervenes actively in this area.[28]

The integration of policies and the role of the sustainable mobility sector as a synthesis, intersection and main characteristic of a new season of planning regulatory needs can be observed in all the actions connected with the Green Deal, which is part of a new dynamic of relations between economy and ecology – as outlined in the strategies on the circular economy – that can be improved through strategic programming and planning.[29]

In addition, it reflects this new legislative approach to sustainability, if we consider that from 2023 Sustainable Urban Mobility Plans become mandatory for all Italian cities with more than 100,000 inhabitants.

According to its definition «A Sustainable Urban Mobility Plan is a strategic plan designed to satisfy the mobility needs of people and businesses in cities and their surroundings for a better quality of life. It builds on existing planning practices and takes due consideration of integration, participation, and evaluation principles». Based on these key principles, the SUMP creates a strong connection between transport and urban policies. SUMPS, thanks

[28] This approach can also be seen in the Italian National Strategic Plan for Sustainable Mobility that reflects European guidelines in the national legislation. The strategic nature of sustainable mobility is shown also through the distribution of powers in the constitutional set-up. It is no coincidence that the Italian Constitutional Court has highlighted that in this field there are competences both of the State, such as environmental matters, and of the Regions, such as local public transport, the co-presence of which leads to the need for the active collaboration of the Regions to be expressly envisaged in the very definition of the Plan, in compliance with the principle of loyal collaboration between public powers.

[29] See Francesco de Leonardis, 'Economia circolare: saggio sui suoi tre diversi aspetti giuridici: verso uno Stato circolare?' (2017) 1 Dir amm 163; Francesco de Leonardis, (ed), 'Studi in tema di economia circolare' (EUM 2017); Elisa Scotti, 'Poteri pubblici, sviluppo sostenibile ed economia circolare' (2019) Il Diritto dell'Economia, 2; Chiara Feliziani, 'L'economia circolare nei decreti semplificazione e nel PNRR: quanto manca alla meta?' (2021) Rivista giuridica di urbanistica 823.

to their strategic value, have to be coordinated with sectoral plans and can even be hierarchically superior to them.[30]

Why is the SUMP innovative with respect to the traditional transport planning regulatory approach?

The SUMP seems to perfectly fit the needs of the age of "urban regeneration" and of the "post-pandemic city".

By reading the ELTIS Guidelines, it is possible to outline the main features of this innovative mobility planning governance tool.

The main aspect to highlight here is that the focus of the SUMP is not limited to traffic management itself, but there is a pivotal concern for people and their needs, such as their basic right to mobility, given that its main targets are not flow and traffic capacity but accessibility, quality of life, social equity, health protection, and, to sum up, sustainability.

It is a short- and medium-term delivery plan, but with a long-term vision and strategy as well as an intergenerational approach, which puts into practice the principle of sustainable development. Thus, it encourages the most sustainable mobility modes, generally aiming at inter-modality to create integrated solutions towards efficiency and cost effectiveness. Neither is it limited to infrastructures but considers the combination of infrastructure, market, regulation, information and promotion.[31]

Looking at its contents, the SUMP has to be strategically coordinated with other kinds of plans, and consistent with related policy areas, promoting «the coordination of policies between sectors (especially transport, land use, environment, economic development, social policy, health, safety, and energy), and broad cooperation across different layers of government and with private actors». The plan expresses «the need to cover all aspects of mobility (both people and goods), modes and services in an integrated manner», and aims to cover the entire «functional urban area» based on trav-

[30] Considering the urban planning regulatory framework, the SUMP may also provide for interventions as variants to existing urban planning instruments, which will be updated according to the procedures provided for by law.

[31] See Elda Turco Bulgherini and Michele M Comenale Pinto, 'Trasporti e intermodalità' in Giovanna Colombini and others (eds), *Infrastrutture di trasporto e sistemi di regolazione e gestione. Coesione, sostenibilità e finanziamenti* I (Editoriale Scientifica 2019) 3; Ruggiero Dipace, 'Le reti di trasporto fra disciplina europea e nazionale per la realizzazione di una mobilità sostenibile', in ibid 31; Francesco Gaspari, 'La regolazione della mobilità urbana sostenibile e i limiti del Green Deal dell'Unione europea: ovvero, il ruolo dello Stato all'alba della post-globalizzazione' (2021) 1 Munus 67.

el-to-work flows rather than a single municipality within its administrative boundaries.

So the integration of the plan with other planning acts is achieved through the external coherence analysis, which is aimed at consolidating the general objectives of SUMP. This type of analysis checks the consistency of the plan with the framework in which it is working, for example, superordinate sectoral plans such as the Hydrogeological Structure Plan, Flood Risk Management Plan, Regional Landscape Plan, Regional Energy Plan, and the National Sustainable Development Strategy in the 2030 scenario.[32]

The methodology and procedure are also innovative, given that the drafting process relies on an interdisciplinary working group's activity and not just on the domain of transport engineering projecting. This means that the planning regulatory processes of SUMPs involve stakeholders and citizens through a transparent and participatory approach and is not reserved only for experts.

Relevance is finally given to the ex post phase, which is aimed at systematic evaluation of impacts to facilitate learning and continuous improvement of urban mobility, by widening the traditional impact assessment.

Regarding the management of mobility, the role of company and school mobility managers is enhanced, as they are called upon to manage widespread soft mobility projects for home-school connections and for home-work travel plans, also considering the adoption of smart working as a conditioning factor.[33]

4. *Smart Sustainable Cities: The Features of a Strategy*

An overall reading shows how sustainability today represents the guiding principle of the system and therefore plays the role of a unifying factor, a

[32] In particular, the sustainability objectives expressly referred to by the SUMP are: OGS1. Improve air quality; OGS2. Improve the energy efficiency of the mobility system to combat climate change; OGS3. Reduce noise emissions; OGS4. Reduce the impact on soil and subsoil; OGS5. Ensure the environmental protection of water resources and the water ecosystem; OGS6. Reduce the impact on cultural heritage and landscape; OGS7. Increase security and social equity; OGS8. Improve information and encourage participation; OGS9. Reduce the impact on human health; OGS10. Improve the quality of the urban environment and settlements; OGS11. Nature and biodiversity.

[33] About the role of the mobility manager within the concept of smart city, see Cristiana Lauri, 'Expert Knowledge and Smart City Administration' (2021) 1 Erdal 57.

baseline for a complex system of governance. The World Cities Report 2020 reaffirms that sustainable urbanization remains central to overall sustainable development.[34]

What is the common feature among the abovementioned urban solutions? All these innovations require a global rethinking of the existing built city by combining urban planning legislation and the evolution of (mobility) strategies.[35]

The reconfiguration of urban infrastructure is subjected to quantitative and qualitative assessment in addition to planning and programming methods that concretize a paradigm shift toward an integrated and interdisciplinary approach to mobility planning, public space design regulation, and governance.

The lesson that the abovementioned experiences seems to teach is that strong public enforcement has to underlie the paradigm shift.

To conclude, the current generation of town planning – that of urban regeneration and post-pandemic recovery – has to conform to laws and urban regeneration that works towards integration in urban development according to a mixed human/nature-centric view, able to translate principles into urban practice. The imperative is sustainability, understood as the concretization of democratic systems in which accessibility is a collective right, extrinsic of the right to the city.[36]

Urban mobility is a component of broader policies in which local governments are gaining strength: environment and climate, pandemic, energy, and security. It is no coincidence that EU policies on mobility are being quantitatively and qualitatively expanded, even if at times they are still uncertain – for example, to date the strategy on the type of assets in which to

[34] See UN-HABITAT, 'World Cities Report 2020' (n 1).

[35] Mission 3 of the National Recovery and Resilience Plan provides for a series of investments aimed at developing a modern, digital, sustainable and interconnected transport infrastructure network that can increase transport electrification and digitization, and improve the country's overall competitiveness, particularly in the South. All regulatory references on the national strategy and dedicated funding lines are accessible at <https://www.governo.it/it/approfondimento/pnrr-infrastrutture-una-mobilit-sostenibile/16704> accessed 28 January 2025.

[36] As theorized by Henri Lefebvre, *Le droit à la ville* (Anthropos 1968); David Harvey, *Rebel Cities. From the right to the city to the urban revolution* (Verso 2012). See also Sheila R Foster and Christian Iaione, *Co-Cities. Innovative Transitions toward Just and Self-Sustaining Communities* (MIT 2022).

invest as a priority in order to achieve decarbonization objectives seems to be ambiguous.

In order to make this further path of evolution between urban planning law and mobility regulation concrete today, an effort of convergence and integration is required not only of themes and policies but also of binding legislation and governance tools. This is the case between local and planning authorities, but also between these and the market regulatory authorities, which can significantly influence the supply of local transport services and their quality.

The transition to a strategic vision, requiring infrastructure investments, is an engine for the economy and enhances the blue economy and the circular model.[37] It can help to combine new enterprise and forms of competitiveness, and the new needs of urban communities.

There is a new cultural awareness among policymakers and public administrators to put in place suitable tools to deal with this transition and to make them effective, in order to grasp the diversity of each territorial context. Furthermore, there is the presence of a political legal and administrative structure which is clearly headed in the direction of putting in place an emerging hard law framework. This is the trend embraced by the SDGs and the European Union.

Nowadays sustainability drives the ecological and digital transition, also through the urban planning system, calling into question local, regional, national, and EU competences in a perspective of wider loyal collaboration and public participation, according to the model of the circular State, and the introduction of environmental values in the democratic constitutions.

Subsidies and incentives for businesses, support for demand, the guarantee of public services, programming and planning rules, which seemed to belong to a narrative of the past, outdated during the construction of the legal order of the single and global market, are thus making new sense. Indeed, there is a renewed centrality within a broader European project for sustainable and resilient communities, that also underlines a new method for understanding and measuring urban wellness and city efficiency.

[37] See for example UNECE and PEP, 'Road transport facts and figures: How healthy and environmentally friendly is our transport today?' (2021) <https://unece.org/pep/publications/road-transport-facts-and-figures-how-healthy-and-envionmentally-friendly-our> accessed 28 January 2025.

Arguably, one should ask to what extent the success of sustainability governance tools, such as a SUMP, depends on a pre-existing situation of cultural change. Where this exists one can see that SUMPs can play a catalytic integrative role. Where it does not, convening those circles of planning and intense dialogue upon which integrative planning depends would seem a whole lot harder. But this is another story.

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