The Emerging Law of Sustainable Corporations

Chronicles from a Course, a *Colloquium*, and a *Symposium*

Edited by Maurizio Bianchini and Alan R. Palmiter

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Introduction and Acknowledgments

Setting the Stage for the Emerging Law of Sustainable Corporations: Some Methodological Remarks and a Possible Research Agenda

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This introductory essay outlines the reasons of the three-pronged educational project and its outcomes as documented in the three parts this volume consists of – that is, the three sets of the project's "chronicles" – in addition to the book's epilogue. It also delineates in some detail the main issues the rise of the law of sustainable companies – a developing body of rules and principles intended to shift the traditional paradigm of for-profit companies – ought to confront with, including: the problems of corporate purpose and their possible connections with the shareholderism vs. stakeholderism debates, the existing tensions between convergence and divergence in corporate governance, the possible role of path dependency and regulatory competition in deterring concurrence of new sustainability rules, and the different attitudes of the EU and the US legislators *vis-à-vis* sustainable corporations regulation. In addition, this introduction offers a list of research questions that may be used for subsequent in-depth analyses of various interdisciplinary topics characterizing the emerging law of sustainable corporations, *inter alia* pointing out that the (often constitutionally protected) enterprise freedom may result heavily impacted in connection with the nature of the limits to be imposed to managerial discretion according to policy decisions (that is, as a consequence of legislative action), the choice being, in essence, between a regulatory approach operating *from within*, as opposed to the regulatory approach operating *from without* the incorporated (for-profit) firm, by means of *external limits* to the free enterprise principle. A paragraph containing the book acknowledgments concludes.

Keywords: corporate law; corporate governance; sustainability; CSR; ESG; shareholderism vs. stakeholderism; corporate purpose; path dependency; regulatory competition; private law vs. public law; corporate risk management and compliance; enterprise freedom

1. Presenting a Three-Prong Educational Project ...

It is not a simple task that of writing an introduction of a book intended to account – as its title subheading suggests – for a three-prong academic project, built around an increasingly relevant topic, such as the "sustainability" of business companies[1]. And it would not appear easy for at least two main reasons, which will constitute the content of, respectively, this and the next two paragraphs of this introduction.

First, the "Chronicles" reported in this book reflect a multifaceted endeavour which had, since its inception, the main ambition to implement a joint educational attempt, built around a "Law of Sustainable Corporations" ("LSC") course principally addressed to students of the University of Padova School of Law; the LSC course has been taught during the Spring Semester 2021 by two corporate law scholars, Alan Palmiter, as the leading instructor – Alan of course being a true pioneer in teaching and writing on "corporate sustainability" topics –, and myself, in the light of the dramatic, and nearly exponential rise of *climate*, *social*, and *economic* emergencies the human beings, as well as all other animals and plants, have been experiencing at virtually any latitude throughout the last three-four decades[2].

[1] Or, using the U.S. law common terminology, the "corporation": incidentally, please note that throughout this introduction the terms "company" and "corporation" will be used as synonyms, albeit their further respective adjectivizations could occasionally lead to additional, different technical meanings.

[2] One of the oldest official documents released by the European Institutions on the sustainability matters are that of the European Commission of European Communities, *Towards Sustainability: A European Community Program of Police and Action in Relation to the Environment and Sustainable Development* (COM (92) 23 Final, vol. II), Brussels, 27 March 1992, available at: http://aei.pitt.edu/5910/, and European Commission: Directorate-General for Environment, *Towards Sustainability - A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development*, Publications Office, Brussels, 1993, both prompted by the active role of the World Commission on Environment and Development ("WCED"), which had been set up in 1983, which, *inter alia*, published a report entitled "Our common future" ("*Report of the World Commission on Environment and Development: Our Common Future*"), Transmitted to the United Nations General Assembly as an Annex to document A/42/427, available

To be sure, such alarming occurrences – coped with the supranational dimension of the global warming and its several consequences – are inevitably impacting on the traditional ways by which everyone is used to perceive market systems based on capitalism[3], as well its most perva-

here: <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>; see also The World Commission on Environment and Development, *Our Common Future*, Oxford University Press, Oxford 1987), that came to be known as the "*Brundtland Report*", after the WCED's chairwoman (and former Norway's Prime Minister) Mrs. Gro Harlem Brundtland. The *Brundtland Report* set forth, *inter alia*, a general (and still used) notion of "sustainable development" (see *infra*, *sub* footnotes 19, 29, and 30). One of the first contribution tackling the now popular and interdisciplinary topic this three-fold project – "corporate sustainability" – deals with is that written by J. Elkington, *Towards the Sustainable Corporation: Win-Win-Win Business Strategies for Sustainable Development*, «California Management Review» 36.2 (1994), pp. 90-100, in the wake of the 1992 UN Conference on Environment and Development (UNCED) held in Rio de Janeiro in June 1992, *inter alia* considering «some of the ways in which business» was then starting to develop «new "win-win-win" strategies in this area to simultaneously benefit the company, its customers, and the environment».

[3] It would most probably be simply foolish to even try to offer a reasoned set of bibliographical references to the overwhelming varieties of ideas and forms of "capitalism" and to academic works dealing with such a complex and pervasive approach to society as a whole, see, in direct connection with the notion of "sustainability", *e.g.*, A. Midttun, *Governance and Business Models for Sustainable Capitalism*, Routledge-Taylor & Francis Group, New York-Abingdon-London 2022; A.R. Palmiter, *Capitalism, Heal Thyself*, «Rivista delle Società», vol. 67.2-3 (2022), pp. 293-308; G. Strampelli, *La strategia dell'Unione europea per il capitalismo sostenibile: l'oscillazione del pendolo tra amministratori, soci e* stakeholders, «Rivista delle Società», vol. LXVI.2-3 (2021), pp. 365-374; K. Schwab (with P. Vanham), *Stakeholder Capitalism - A Global Economy that Works for Progress, People and Planet*, John Wiley & Son Inc., Hoboken 2021; R. Henderson, *Reimagining Capitalism in a World of Fire*, Public Affairs, New York 2020; L.E. Strine, *Jr.*, *Toward Fair and Sustainable Capitalism* (Aug. 2020), «The Roosvelt Institute Working Papers Series», available at: https://rooseveltinstitute.org/wp-content/uploads/2020/08/RI_TowardFairandSustainableCapitalism_WorkingPaper_202008.pdf; K. Pistor, *The Code of Capital - How the Law Creates Wealth and Inequality*, Princeton Univ. Press, Princeton-Oxford 2019; M. Jacobs, M. Mazzucato (Eds.), *Rethinking Capitalism - Economics and Policy for Sustainable and Inclusive Growth*, Blackwell Publishing-John Wiley & Sons-The Political Quarterly Publishing, Chichester (UK) 2016; J.E. Ikerd, *Sustainable Capitalism - A Matter of Common Sense*, Kumarian Press Inc., Bloomfield (CT) 2005; M. O'Connor (Ed.), *Is Capitalism Sustainable? Political Economy and Politics of Ecology*, The Guilford Press, New York 1994. On more general grounds, and with different views, see, *e.g.*, P.A. Hall, D. Soskice (Eds.) *Varieties of Capitalism - The Institutional Foundations of Comparative Advantage*, Oxford Univ. Press, Oxford-New York 2001; R.G. Rajan, L. Zingales, *Saving Capitalism from the Capitalists - Unleashing the Power of Financial Markets to Create Wealth and Spread Opportunity*, Crown Business-Penguin Random House LLC, New York 2003; D. Coates (Ed.), *Varieties of Capitalism, Varieties of Approaches*, Palgrave-Macmillan, New York 2005; B. Hancké, M. Rhodes, M. Thatcher (Eds.), *Beyond Varieties of Capitalism: Conflicts, Contradictions, and Complementarities in the European Economy*, Oxford Univ. Press, Oxford

sive legal, economic, social, and political institution[4], that is, the for-profit

2007; L. Zingales, *A Capitalism for the People - Recapturing the Lost Genius of American Prosperity*, Basic Books, New York 2012; T. Piketty, *Le Capital au XXIe siècle*, Éditions di Seuil, Paris 2013; C.M. Christensen, D. van Bever, *The Capitalist's Dilemma*, «Harvard Business Review», vol. 92.8 (2014), pp. 60-68; R. Reich, *Saving Capitalism - For the Many, Not the Few*, Alfred A. Knopf-Penguin Random House LLC, New York 2015.

[4] No reasonable person would deny that incorporated, for profit – firms – and especially multinational companies – given their enormous economic weight and market power, have also become "political actors", exercising political pressures on governments and legislators virtually at any latitude of the globe: see, *e.g.*, A.R. Palmiter, F. Partnoy, E. Pollman, *The Corporation as Political Actor* (Chapter 7 of), *Business Organizations - A Contemporary Approach*, West Publishers, St. Paul (MN) 2019[3], pp. 155-178; J. Mikler, *The Political Power of Global Corporations*, Polity Press, Cambridge (UK) - Medford (MA) 2018; R.A.G. Monks, *Corpocracy. How CEOs and the Business Roundtable Hijacked the World's Greatest Wealth Machine - And How to Get It Back*, John Wiley & Sons Inc., Hoboken (NJ) 2007, pp. 11-12, 112, 173-175 (but the whole book consists of penetrating critiques to corporations, its managements, and the US Business Roundtable, as social and political actors); A. Rasche, *The Corporation As A Political Actor*, «European Management Journal», vol. 33.1 (Feb. 2015), pp. 4-8; A.G. Scherer, G. Palazzo, D. Matten, *The Business Firm as a Political Actor: A New Theory of the Firm for a Globalized World*, «Business & Society», vol. 52.2 (2014), pp. 143-156; A. Rasche, D. Baur, M. van Huijstee, S. Ladek, J. Naidu, C. Perla, E. Schouten, M. Valente, M, Zhang, *Corporations as Political Actors: A Report on the First Swiss Master Class in Corporate Social Responsibility*, «Journal of Business Ethics», vol. 80.2 (2008), pp. 151-173. On the fundamental link between the multi-jurisdictional dimension of the groups of companies and their ability to exert political influence on single national governments, see, *e.g.*, J. Robinson, *Multinationals and Political Control*, Gower Publishing Co. Ltd., Aldershot 1983; J. Bakan, *The Corporation - The Pathological Pursuit of Profit and Power*, The Free Press, New York-London-Toronto-Sidney, 2004, p. 25 In the past, see also A.A. Berle *Jr.*, *Corporate Decision-Making and Social Control*, «The Business Lawyer», vol. 24.1 (1968), pp. 149-157: pp. 150-151 («[w]hereas a generation ago, the law was preoccupied with assuring that managements did not victimized their shareholders, preoccupation today is with the extent of their social and political and economic responsibility for the health of American economic machine and for employment and welfare of its citizens. […] we have huge and growing corporations whose operations are unlimited in direction and scope, required by law to have a certain competitive aspect, but permitted to have, in fact, a high degree of power over the development of the country's economics. Social Responsibility is the result of this dichotomy»); A. Chayes, *The Modern Corporation and the Rule of Law*, in E.S. Mason (Ed.), *The Corporation in Modern Society*, Harvard Univ. Press, Cambridge (MA) 1959, pp. 25-45: 25 («[t]he reason of concern is obvious. [The incorporated firms] are repositories of power, the biggest centers of nongovernmental poser in our society»). See also the essays collected in R. Nader, M.J. Green (eds.), *Corporate Power in America*, Grossman Publishers, New York, 1973, and in R. Nader, M.J. Green, J. Seligman, *Taming the Giant Corporation*, Norton, New York, 1976. Of course, none would genuinely believe that corporate agendas will be ousted from political arenas: indeed, today, none would doubt that the company is a full-fledge «political actor» – as the U.S. Supreme Court eventually confirmed in 2010, in the 5 to 4 decision adopted in the famous *Citizen United* case (literature published in the aftermath of this cornerstone decision

company[5] – what I will be hereinafter keen in addressing to as the "incorporated (for-profit) firm"[6].

Against this (alarming) backdrop, the co-curators of this Volume, together with each of the other contributors, had the opportunity to reflect, gather, and articulate a variety of different and, occasionally, even diverg-

is, again, unmanageable: see, *e.g.*, N.R. Lamoreaux, W.J. Novak (Eds.), *Corporations and American Democracy*, Harvard Univ. Press, Cambridge (MA)-London 2017; A. Winkler, *We The Corporations - How American Businesses Won Their Civil Rights*, Liveright Publ. Corp., New York-London 2018). Interestingly, the European Commission, since September 2020, is funding a 2 million euro ERC 5-years research project, named "Corporatocracy", hosted by the University of Utrecht (NL), whose web-page is titled "The Business Corporation as a Political Actor" (https://cordis.europa.eu/project/id/865165); and see also the Utrecth University corresponding web-site: https://businesscorporation.sites.uu.nl/. Apparently, the problem of taming the immense power bestowed to large (groups of multinational) companies still urges a viable solution, thereby «saving capitalism from capitalists», as Rajan and Zingales wrote in their famous book of 2002. Mapping, preventing, and mitigating ESG-related risks (and curbing correlative negligent and/or opportunistic conducts of corporate managers and/or controlling shareholders) may represent the flywheel that will finally induce private economic actors to effectively self-restrain from within – and governments to mandatorily restrain from without – incorporated firms' *political* power.

[5] The modern business company has been often described in such terms by both economists and lawyers: see, *e.g.*, O.E. Williamson, *The Modern Corporation: Origins, Evolution, Attributes*, «Journal of Economic Literature», vol. 19.4 (1981), pp. 1537-1568: p. 1537 («[t] here is virtual unanimity with the preposition that the modern corporation is a complex and important economic institution»); A. Gamble, G. Kelly, J. Parkinson, *Introduction: The Political Economy of the Company*, in Eid. (Eds.), *The Political Economy of the Company*, Hart Publishing, Oxford-Portland 2000, pp.1-20 («[i]n the last hundred years, the company has become a central institution of the modern capitalist economy, rivalling the market in its importance»); J. Bakan, *The New Corporation - How "Good" Corporations Are Bad for Democracy*, Vintage Books, New York 2020, p. 34 (inviting readers «to stay focus on the corporation *as an institution*, on how its legal structure compels the people who run companies to do what they do» [emphasis on the original]); A.R. Palmiter, *Sustainable Corporations*, Aspen Publishing, St. Paul (MN), 2022, p. xxvii (the Author considers the corporation «the most dominant institution in our modern world»).

[6] A. Chayes, *The Modern Corporation and the Rule of Law*, in E.S. Mason (Ed.), *The Corporation in Modern Society*, cit., p. 25 («"[t]he modern corporation" is the big business enterprise in the corporate form»). Professor A.A. Berle *Jr.*, in his *Foreword* to professor E.S. Mason's same edited book noticed (at x): «[f]rom the turn of the twentieth century to the present, ..., its position as major method of business organization has been assured. Although it was abused, no substitute form of organization was found. The problem was to make it restrained, mature, and socially useful instrument»). On the (possible) different use of the terms "corporation" and "firm", see C.R.T. O'Kelly, *Coase, Knight and the Nexus-Of-Contract Theory of the Firm: A Reflection on Reification, Reality, and the Corporation as Entrepreneur Surrogate*, «Seattle University Law Review», vol. 35.4 (2012), pp. 1247-1269.

ing arguments and opinions with regard to whether it would be possible (and, if so, how and to what extent) to make for-profit companies' structures, investment mechanisms, insolvency procedures, as well as their respective market activities, compliant both, with the increasingly urgent quests for "sustainability" in general – as they have been emerging from general public (and public policy) waves of societal and environmental concerns – and with consequent upswings in business behavioural standards that are progressively permeating the markets, as well as the legal arenas worldwide, thereby setting supplemental (and partly new) corporate governance guidelines, best practices, principles, and, increasingly, additional compelling sets of legal norms.

In the light of such complex assortment of interrelated issues, the Chronicles of this three-fold educational experiment are reflected in the papers laid out – albeit in reverse order – in each of the three parts this book is composed of, and namely: the students' contributions to the LSC course; a series of five "Sustainable Corporations *Colloquia*" (the "*Colloquia*"), which were held almost weekly during the LSC course, thereby complementing the regular course lectures, and the LSC course concluding event, the "Sustainable Corporations *Symposium*" (the "*Symposium*"), that was held on the 22st of April, 2021 – thus celebrating Earth Day – with over one hundred and twenty attendees from many countries, and with the much rewarding active participation of Padova law students.

Whereas the LSC course has been planned and mainly taught by Alan Palmiter during eight weeks of classes throughout the Padova Law School Spring Semester 2021, both the two collateral initiatives have been conceived and implemented by myself (with the generous support of Alan Palmiter, who also moderated the April 2021 *Symposium*, whereas I introduced it and moderated each of the five *Colloquia*), by inviting to speak eleven distinguished colleagues and experts, who, first, enthusiastically concurred in making both the LSC *Colloquia* series and the *Symposium* successful, and then, generously assented to transform their respective presentations into the remarkable essays that are now offered to the reader in the first and second part of these Chronicles.

Yet, there is more to be said about this volume.

Just as virtually any project that happens to be built around any magmatic topic, this one too grew and expanded, so to speak, "in the making". Thus, the idea to publish the presentations of LSC course's *Colloquia* and the LSC course's concluding *Symposium* was almost naturally complet-

ed by the intention to acknowledge and rewards the best eight Padova law students' LSC course final papers: this shall not be intended as a mere addition to the publication of the academic proceedings pertaining to the first two prongs of the project; rather, the co-curators of the Chronicles believe that their publication genuinely reflects the spirit that animated the overall purpose of this educational program[7] that was generously sponsored by Padova University. In addition, Alan Palmiter, in his brief introduction to Part III of this book will further illustrate the research challenges LSC students had to face in writing their end-of-course short essay assignments, and the overall results of their "corporate sustainability" investigations.

But – as anticipated at the inception of this paragraph – introducing this book does not appear an easy task also because of the multiple meanings and the interdisciplinary character of the topic around which each of the three aforementioned Padova Law School initiatives – the LSC course, the *Colloquia* series, and the LSC course concluding *Symposium* – were built, that is, the normative notion of the "sustainability" of the "companies"[8].

Thus – after delineating the main purported significance of this joint educational academic project as a whole and after having outlined each part it is composed of – in the remaining portion of this introduction I will attempt to illustrate it further, by touching upon some of the main issues that the co-curators and the contributors of these Chronicles could perceive as the most urgent and relevant during our respective personal "learning journey" this three-fold initiative prompted to embark in.

A paragraph dedicated to the book acknowledgments concludes.

[7] Namely, the University of Padova «Progetto per il miglioramento della didattica» (2019).
[8] Interestingly, the two terms are used in a strict and functional correlation in the title of the Ceres, *The 21st Century Corporation: The Ceres Roadmap For Sustainability* (co-authored by: A. Moffat, N. Scotnicki, R. Berwick, K. Lang, V. Ramani, R. Casey, B. Barton, M. Crawford, B. Sen, A. Newton), Ceres, Boston 2010, available at: https://www.ceres.org/resources/reports/21st-century-corporation-ceres-roadmap-sustainability (hereinafter, the "*CERES Roadmap 2010*"). The CERES Roadmap 2010 has been updated in 2016 and a new (online) version has been issued on October 6, 2020 https://www.ceres.org/news-center/press-releases/ceres-introduces-ceres-roadmap-2030-10-year-action-plan-sustainable (hereinafter "*CERES Roadmap 2030*").

2. ….. planned around the multifaceted and multidisciplinary corporate sustainability «jigsaw»[9] (some preliminary notes on some of the company sustainability most important drivers)

Whenever struggling with any of the several legal and non-legal implications of "sustainability", legislators, governmental officers, policy makers, judges, lawyers, legal scholars (and law students, of course!) ought to take into consideration – at any latitude of our Mother Earth – a relatively large set of additional terms (and their acronyms): not only the rather intuitive notion of "global warming", but also those definitions dealing with "planet boundaries"[10], the "triple bottom line: planet, peo-

[9] B. Sjåfjell, *The Role of Business Law in the Jigsaw Puzzle of Sustainability*, «Building Sustainable Legacies», vol. 5.1 (2015), pp. 42-56.

[10] The International Panel on Climate Change ("IPCC")'s *Sixth Assessment Report*, as developed by the IPCC throughout the "the sixth assessment cycle", running from (October 2015 to July 2023), the IPCC produced the Sixth Assessment Report ("AR6"): the IPCC's Working Group I contribution was released on 9 August 2021; the Working Group II and III contributions were released on 28 February and 4 April 2022, respectively; the IPCC AR6's *Synthesis Report* is expected to be released in early 2023. In addition, also see, *e.g.*, UN Environmental Program, *Emissions Gap Report (EGR) 2022: The Closing Window - Climate crisis calls for rapid transformation of societies*, Nairobi, October 2022, available at: https://www.unep.org/resources/emissions-gap-report-2022; WMO GAW Programme, *Greenhouse Gas Bulletin no. 18: The State of Greenhouse Gases in the Atmosphere Based on Global Observations through 2021* (26 Oct. 2022), available at: https://wmo.int/publication-series/wmo-greenhouse-gas-bulletin-no18-state-of-greenhouse-gases-atmosphere-based-global-observations; European Environmental Agency, *EEA Signals 2022 - Staying on course for a sustainable Europe* (EEA Web Report no. 04/2022), available at: https://www.eea.europa.eu/publications/signals-2022. On "planet boundaries" notion see, *e.g.*, J. Rockström, *et alii*, *Planetary Boundaries: Exploring the Safe Operating Space for Humanity*, «Ecology and Society», vol. 14.2 (2009) [online], available at: http://www.ecologyandsociety.org/vol14/iss2/art32/; B. Sjåfjell, *Sustainable Value Creation Within Planetary Boundaries - Reforming Corporate Purpose and Duties of the Corporate Board*, «Sustainability», 2020, 6245, p. 1-15; W. Steffen, *et alii*, *Planetary Boundaries: Guiding Human Development on a Changing Planet*, «Science», vol. 347, issue 6223 (13 Feb. 2015), p. 736, available at: https://www.science.org/doi/epdf/10.1126/science.1259855.

ple, and profits" ("TBL")[11], "doughnut economics"[12], "circular economy"[13],

[11] J. Elkington, *25 Years Ago I Coined the Phrase "Triple Bottom Line." Here's Why It's Time to Rethink It*, «Harvard Business Review [online]» (June 25, 2018), available at: <https://hbr.org/2018/06/25-years-ago-i-coined-the-phrase-triple-bottom-line-heres-why-im-giving-up-on-it>; Id., *Cannibals with Forks: The Triple Bottom Line of 21st Century Business*, 1998, pp. ix-x, 55-56, and 92; A.W. Savitz, K. Weber, *The Triple Bottom Line: How Today's Best-Run Companies are Achieving Economic, Social, and Environmental Success - And How You Can Too*, Jossey-Bass, San Francisco 2006, pp. x-xii; T. Hacking, P. Guthrie, *A Framework for Clarifying the Meaning of Triple Bottom-Line, Integrated, and Sustainability Assessment*, «Environmental Impact Assessment Review», vol. 28 (2008), pp. 73-89; T.F. Slaper, T.J. Hall, *The Triple Bottom Line: What Is It and How Does It Work?*, «Indiana Business Review [online]» (Spring 2011), available at: <https://www.ibrc.indiana.edu/ibr/2011/spring/article2.html>; H. Alhaddi, *Triple Bottom Line and Sustainability: A Literature Review*, «Business and Management Studies», vol. 1.2 (2015), pp. 6-10; O.A. Amos, E. Uniamikogbo, *Sustainability and Triple Bottom Line: An Overview of Two Interrelated Concepts*, «Igbinedion University Journal of Accounting», vol. 2 (2016), pp. 88-126.

[12] K. Raworth, *A safe and just space for humanity: can we live within the doughnut* (2012), available at: www.oxfam.org/sites/www.oxfam.org/files/dp-a-safe-and-justspace-for-humanity-130212-en.pdf; Ead., *Doughnut Economics - Seven Ways to Think Like a 21st-Century Economist*, Penguin Random House Business Books, New York-London 2017; on the interconnection between social and environmental risks factors and the "doughnut economics" and the planet boundaries approaches, see, *e.g.*, M. Leach, K. Raworth, J. Rockström, *Between Social and Planetary Boundaries: Navigating Pathways in the Safe and Just Space for Humanity*, in *World Social Science Report 2013*, OECD Publishing, Paris 2013, pp. 84-90.

[13] V. Rizos, K. Tuokko, A. Behrens, *The Circular Economy - A review of definitions, processes and impacts,* «CEPS Research Report», no. 2017/08 (April 2017), pp. 1-44: 1, available at: https://www.ceps.eu/download/publication/?id=9969&pdf=RR2017-08_CircularEconomy_0.pdf; V. Rizos, A. Behrens, W. van der Gaast, E. Hofman, T. Kafyeke, M. Hirschnitz-Garbers, C, Topi, R, Rinaldi, A, Ioannou, A. Flamos, *Implementation of Circular Economy Business Models by Small and Medium-Sized Enterprises (SMEs): Barriers and Enablers*, «Sustainability», 2016, issue 8, 1212, pp. 1-18; C. Egenhofer, A. Marcu, V. Rizos, A. Behrens, J. Núñez-Ferrer, A. Hassel M. Elkerbout, *Towards an Effective EU Framework for Road Transport and GHG Emissions*, «CEPS Special Report» No. 141 (July, 2016), pp. 1-31, available at: <https://www.ceps.eu/download/publication/?id=9503&pdf=ECH%20Transport%20CEPS%20Special%20Report.pdf>; V. Rizos, A. Behrens, T. Kafyeke, M. Hirschnitz-Garbers, A, Ioannou, *The Circular Economy: Barriers and Opportunities for SMEs*, «CEPS Working Document», no. 412 (September 2015), pp.1-26: p. 3 («[i]dentifying the specific origins of the circular economy is a highly complex, if not impossible, task as the concept has its roots in several different schools of thought and theories that question the prevailing linear economic systems that assume that resources are infinite»); R. Norman, P. Ramirez, *From Value Chain To Value Constellation: Designing Interactive Strategy* , «Harvard Business Review», vol. 71.4 (1993); see also, P. Lacy, J. Rutqvist, *Waste To Wealth: The Circular Economy Advantage*, Palgrave-Macmillan, London 2015; E. M. Ekern, *Towards an Integrated Product Regulatory Framework Based on Life Cycle Thinking*, in B. Sjåfjell, A. Wiesbrock (Eds.), *The Greening of European Business Under EU Law: Taking Article 11 TFEU Seriously*, Routledge, London 2015, pp. 144-162; K.

the "ESG (risks) factors"[14], "socially responsible investments" ("SRI")[15],

Webster, D.E. MacArthur, W, Stahel, J. Blériot, *The Circular Economy: A Wealth of Flows*, Lightning Source, La Vergne (TE) 2017[2]; C. Backes, *Law for a Circular Economy*, Eleven International Publishing, The Hague 2017. For an Italian perspective, see, *e.g.*, D. Iacovelli, *Rifiuti e Mercato nell'Economia Circolare*, Giappichelli, Torino 2021.

[14] Generally, the origin of the environmental, social and governance risks factors' analyses (and, thus, the "ESG" acronym) has been credited to the UN Global Compact Initiative in its Report "*Who Cares Win – Connecting Financial Markets to a Changing World*", published by The World Bank Group, Washington D.C., in 2004, available at: http://documents.worldbank.org/curated/en/280911488968799581/Who-cares-wins-connecting-financial-markets-to-a-changing-world), and prepared by a team of major financial institutions («A better inclusion of environmental, social and corporate governance (ESG) factors in investment decisions will ultimately contribute to more stable and predictable markets, which is in the interest of all market actors»). Thus – and interestingly – the "ESG" was initially introduced in the "Socially Responsible Investing" ("SRI") area, and more specifically, within an attempt to integrate environmental, social, and governance concerns in the financial markets realm. However, the acronym become known to the large public much later, possibly in connection with the execution of the Paris Agreement, in early Fall, 2015 (see *sub* footnotes 29 and 30). See, *e.g.*, E. Pollman, *The Making and Meaning of ESG* (Oct. 31, 2022), «University of Pennsylvania, Institute for Law & Economic Research Paper», No. 22-23, «European Corporate Governance Institute Law Working Paper», No. 659/2022, available at: https://ssrn.com/abstract=4219857; on the interconnection between SRI and ESG-based factors, see, *e.g.*, J.R. Macey, *ESG Investing: Why Here? Why Now?*, (Oct. 2021), «*George Mason University Law & Economics Research Paper Series*», No. 21-22, available on the «SSRN» at: http://ssrn.com/abstract=3942903; S. Lovisolo, *Global Environmental, Social and Governance (ESG) Capital Allocation Strategies Between Impact Ambitions and Measurement Challenges*, «Istituto Affari Internazionali» (2021); E. van Duuren, A. Plantinga, B. Scholtens, *ESG Integration and the Investment Management Process: Fundamental Investing Reinvented*, «Journal of Business Ethics», vol. 138.3 (Oct. 2016), pp. 525-533. See also R. Lolli, *L'Impatto dei Fattori ESG sull'Impresa - Modelli di* Governance *e Nuove Responsabilità*, il Mulino, Bologna 2021.

[15] See the essay by Lucia Picardi in Part I of this book. In addition, see, *e.g.*, M. Siri, S. Zhu, *Will the EU Commission Successfully Integrate Sustainability Risks and Factors in the Investor Protection Regime? A Research Agenda*, in «Sustainability», vol. 11.22 (2019), 6292; M.W. Sherwood, J. Pollard, *Responsible Investing - An introduction to Environmental, Social and Governance Investments*, Routledge, Abingdon (UK)-New York, 2019; A. Dyck, K.V. Lins, L. Roth, H.F. Wagner, *Do Institutional Investors Drive Corporate Social Responsibility? International Evidence*, «Journal of Financial Economics», 131.3 (2019), pp. 693-714; P. Krueger, Z. Sautner, L.T. Starks, *The Importance of Climate Risks for Institutional Investors* (2019), «European Corporate Gove rnance Institute (ECGI) - Finance Working Paper», No. 610/2019, «SSRN», available at: <https://ssrn.com/abstract=3235190>; J.M. Puaschunder, *On the emergence, current state, and future perspectives of Socially Responsible Investment (SRI)*, «Consilience: The Journal of Sustainable Development», vol. 16.1 (2016), pp. 38-63; E. Van Duuren, A. Plantinga, B. Scholtens, *ESG Integration and the Investment Management Process: Fundamental Investing Reinvented*, «Journal of Business Ethics», vol. 138.3 (2016), pp. 525-533; P. Crifo, V.D. Forget, *Think Global, Invest Responsible: Why the Private Equity Industry Goes Green*, «Journal of Business Ethics», vol. 116.1

"CSR"[16], just to mention few of them, in addition, of course to the term

(Aug. 2013), pp. 21-48; T.C. Berry, J.C. Junkus, *Socially Responsible Investing: An Investor Perspective*, «Journal of Business Ethics», vol. 112.4 (Feb. 2013), pp. 707-720; E. Escrig-Olmedo, M.J. Muñoz-Torres, M.A. Fernández-Izquierdo, *Socially Responsible Investing: Sustainability Indices, ESG Rating and Information Provider Agencies*, «International Journal of Sustainable Economy», vol. 2.4 (2010), pp. 442-461; R.P. Hill, T. Ainscough, T. Shank, D. Manullang, *Corporate Social Responsibility and Socially Responsible Investing: A Global Perspective*, «Journal of Business Ethics», vol. 70.2 (2007), pp. 165-174. More recently, see also, G. Strampelli, *Can BlackRock save the planet? The Institutional Investors' Role in Stakeholder Capitalism*, «Harvard Business Law Review», vol. 11 (2020-21), pp. 1-20; P. Rose, *Catalyzing Sustainable Investment*, «Environmental Law», vol. 51.4 (2021), pp. 1221-1276; S. Witney, *Corporate Governance and Responsible Investing in Private Equity*, Cambridge Univ. Press, Cambridge-New York-Port Melbourne-New Delhi-Singapore 2021, and the essays published in D. Busch, G. Ferrarini, S. Grünewald (Eds.), *Sustainable Finance in Europe - Corporate Governance, Financial Stability and Financial Markets*, Palgrave-Macmillan-Springer, Cham (CH) 2021; N. Linciano, P. Soccorso, C. Guagliano (Eds.), *Information as a Driver of Sustainable Finance - The European Regulatory Framework*, Palgrave-Mcmillan-Springer Nature, Cham, 2022.

[16] Among the recent official European documents on CSR, see, *e.g.*, EU Commission, *A Renewed EU Strategy 2011-2014 for Corporate Social Responsibility*, Brussels 25 February 2011 (COM(2011) 681 final), where "CSR" was defined *as* «the responsibility of enterprises for their impacts on society», adding that, in order to meet such «social responsibility», undertakings (the European legal term to address, *inter alia*, incorporated firms) «should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of maximising the creation of shared value for their owners/shareholders and civil society at large and identifying, preventing and mitigating possible adverse impacts»; EU Parliament, *Resolution of 6 February 2013 on Corporate Social Responsibility: promoting society's interests and a route to sustainable and inclusive recovery* (2012/2097(INI)); EU Commission, *Commission Staff Working Document - Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights: Overview of Progress*, Brussels, 20 March 2019 (SWD(2019) 143 final). Among the overwhelming literature on the subject, see, *e.g.*, H. Wells, *The Cycles of Corporate Social Responsibility*, «University of Kansas Law Review», vol. 51.1 (2002), pp. 77-140; A. Dahlsrud, *How Corporate Social Responsibility Is Defined: An Analysis of 37 Definitions*, «Corporate Social Responsibility and Environmental Management», vol. 15.1 (2008), pp. 1-13; A.B. Carrol, K.M. Shabana, *The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice*, «International Journal of Management Reviews», vol. 12.1 (2010), pp. 85-105; D.K. Millon, *Two Models of Corporate Social Responsibility*, «Wake Forest Law Review», vol. 46.3 (2011), pp. 523-540; D. Kinderman, *Corporate Social Responsibility in the EU, 1993-2013: Institutional Ambiguity, Economic Crisis, Business Legitimacy and Bureaucratic Politics*, «Journal of Common Market Studies», vol. 51.4 (2013), pp. 701-720; in the past, see especially (for a critical review of early CSR doctrines), H.G. Manne, *Corporate Responsibility, Business Motivation, and Reality* (Sept. 1962), now reprinted in *The Collected Works of Henry G. Manne* (Fred S. McChesney, general editor), vol. 1 (*The Economics of Corporations of and Corporate Law*), Liberty Fund Inc., Indianapolis, 2009, pp. 125-138. See also D. Vogel, *The Market For Virtue - The Potential and Limits of Corpo-*

"sustainability" itself, which appears to convey both a normative, and a positive significance[17].

rate Social Responsibility, Brooking Institution Press, Washington D.C. 2006; A. Crane, D. Matten (Eds.), *Corporate Social Responsibility*, SAGE Publications Ltd., London 2007; T. Lambooy, *Corporate Social Responsibility: Legal and Semi-Legal Frameworks Supporting CSR: Developments 2000-2010 and Case Studies*, Kluwer, Deventer 2010; F. Denozza, A. Stabilini, *CSR and Corporate Law: The Case for Preferring Procedural Rules* (April 2008), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1117576; Eid. *The Shortcomings of Voluntary Conceptions of CSR*, «Rivista Orizzonti del Diritto Commerciale», 2013.2, pp. 1-11, available at: <http://www.rivistaodc.eu/shortcomings-of-voluntary-conceptions-of-csr>; J.-P. Gond, N. Kang, J. Moon, *The Government of Self-Regulation: On the Comparative Dynamics of Corporate Social Responsibility*, in *Economy and Society*, vol. 40.4 (2011), pp. 640-671; A. Midttun, *CSR and Beyond - A Nordic Perspective*, Cappelen Damm Akademisk, Oslo 2013; B.I. Park, A. Chidlow, J. Choi, *Corporate social responsibility: Stakeholders influence on MNEs' activities*, «International Business Review», vol. 23.5 (2014), pp. 966-980; C.A. Williams, *Corporate Social Responsibility and Corporate Governance*, in J.N. Gordon, W.-G. Ringe (Eds.), *The Oxford Handbook of Corporate Law and Governance*, Oxford University Press, Oxford 2018, pp. 634-678; H.-W. Micklitz, *Organizations and Public Goods*, in S. Grundmann, H.-W. Micklitz, M. Renner, *New Private Law Theory - A Pluralist Approach*, Cambridge Univ. Press, Cambridge, 2021, pp. 414-433: p. 419; A. Beckers, *Enforcing Corporate Social Responsibility Codes - On Global Self-Regulation and National Private Law*, Bloomsbury-Hart Publishing, Oxford-Portland (OR), 2015; G.B. Portale, *La* Corporate Social Responsibility *alla ricerca di effettività*, «Banca, Borsa e Titoli di Credito», vol. LXXV.6 (2022), part. I, pp. 947-957; C. Angelici, *Divagazioni sulla "responsabilità sociale" d'impresa*, in M. Castellaneta, F. Vessia (Eds.), *La responsabilità sociale d'impresa tra diritto societario e diritto internazionale*, ESI, Napoli, 2019, pp. 19-39. See also A. Klettner, *Corporate Governance Regulation - The Changing Roles and Responsibilities of Board of Directors*, Routledge, London-New York 2017, pp. 141-150 (exploring, *inter alia*, the «role of corporate governance codes in encouraging [...] corporate social responsibility or CSR»); M. Contrafatto, J. Ferguson, D. Power, L. Stevenson, D. Collison, *Understanding power-related strategies and initiatives: The case of the European Commission Green Paper on CSR*, «Accounting, Auditing and Accountability Journal», vol. 33.3 (2020), pp. 559-587; H. Liang, L. Renneboog, *Corporate Social Responsibility and Sustainable Finance* (23 Feb., 2021), «Oxford Research Encyclopedia of Economics and Finance [online]», available at: https://oxfordre.com/economics/view/10.1093/acrefore/9780190625979.001.0001/acrefore-9780190625979-e-592.

[17] The general definition of "sustainability" is often coupled with that of "sustainable development" (and then see footnotes 2, 19, 29, and 30), thereby stressing upon the public policy and the intergovernmental approaches to such notion. *Ex multis*, cf. the definition provided by *Britannica - Online Encyclopaedia* (available here: https://www.britannica.com/topic/environmental-law/Sustainable-development#ref224618), which stresses the importance of the economic perspective of the time (*recte*: inter-epochal) relationship between *current* and *future* development's possibilities: «[s]ustainable development is an approach to economic planning that attempts to foster economic growth while preserving the quality of the environment for future generations». See also, *e.g.* E. Pollman, *Corporate Social Responsibility, ESG, and Compliance*, in B. van Rooij, D.D. Sokol (Eds.), *The Cambridge Handbook on Compliance*, Cambridge Univ. Press, Cambridge 2021, pp.

In addition, it appears that every sustainability issue would normally entail an assessment of past and present human conducts – including the determination of development models of society at large, market activities, and business organizations' structures – to reveal and, possibly, to forecast their correlative effects and mutual impacts in the future. This, in turn, it usually calls for the collection and measurement of past and current data and information relating to specific matter(s) or sector(s) – thus typically involving one or more ESG risk factor(s) – whose degree of resilience is being tested against specialized and often distinctive parameters, surveys' methods, and policy goals[18].

662-672; P. Hawken, *The Ecology of Commerce - A Declaration of Sustainability*, Harper Business, New York 2010; B. Sjåfjell, B.J. Richardson (Eds.), *Company Law and Sustainability: Legal Barriers and Opportunities*, Cambridge Univ. Press, Cambridge 2015; R. Henderson, R. Gulati, M. Tuschman (Eds.), *Leading Sustainable Change - An Organizational Perspective*, Oxford Univ. Press, Oxford 2015; from an Italian perspective, see, *e.g.*, A. Bartolacelli, *The Unsuccessful Pursuit for Sustainability in Italian Business Law*, in B. Sjåfjell, C.M. Bruner (Eds.), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, Cambridge University Press, Cambridge 2019, pp. 290-303; F. Gennari (Ed.), *Lo Sviluppo Sostenibile delle Piccole e Medie Imprese*, Giappichelli, Torino 2017; F. Massa (Ed.), *Sostenibilità - Profili Giuridici Economici e Manageriali delle PMI Italiane*, Giappichelli, Torino 2019; D. Porena, *Il Principio di Sostenibilità. Contributo allo Studio di un Programma Costituzionale di Solidarietà Intergenerazionale*, Giappichelli, Torino 2022.

[18] Assessing the level of ESG sustainability of a business enterprise involves a variety of parameters and survey methods, including, *e.g.*: parameters measuring the Environmental impact (this includes metrics like carbon footprint, water usage, waste generation, waste recycling/re-deployment, and energy consumption); parameters assessing the Social impact (this covers aspects such as employees' safety measures, employees' satisfaction, firm's community engagement, labor practices, and protection of human rights of employees and along the enterprise's supply chain(s)); parameters surveying the Governance impact (this involves evaluating firm's structure, allocation of business responsibilities, corporate governance practices, board diversity, executive compensation, transparency, and the level of compliance with legal rules of virtually any subject in which the undertaking may be involved, including environmental law, consumer protection, IP antitrust law, data protection law, tax and social security regulations, legal provisions countering white collar crimes, etc.). Notably, the economic performance is sometimes understood as a separate business sustainability parameter: however, since it includes traditional financial metrics (like profitability, revenue growth, and return on investment), but it also considers long-term value creation and risk management, may be considered as an additional parameter falling within the "G" element of the ESG triad, thereby confirming the double role of the "G" component in substantiating a set of sustainability parameters on its own, and, at the same time, offering a sort of cross-cutting/ interdisciplinary perspective to spot and determine risks factors prima facie belonging to the provinces of the "E" element and the "S" element. Almost needless to conclude that each of the three-prongs parameters deployed to assess the gradient of business or-

Thus, sustainability is to be generally intended as establishing – in respect of virtually any aspect of human (and/or human-related) activities – a qualified *inter-temporal link* among present and upcoming generations of animals and/or plants (including their respective biodiversity)[19],

ganizations' sustainability is often intertwined with the others. As to the sustainability survey methods, today one may mention a long list of fundamental metrics and tools such as Carbon footprint and GHG measurements, Life Cycle Assessment (LCA), Social Life Cycle Assessments (SLCA), Triple Bottom Line Accounting, Dow Jones Sustainability World Index (DJSI Word), ESG Metrics, Environmental Management Systems (EMS), and Social Impact Assessment (SIA). These, in turn are typically used (or embedded) in more established standards and reporting frameworks, such as, *e.g.*, Global Reporting Initiative (GRI) sustainability reporting (established in 1997), SASB and Sustainability Accounting (providing 77 industry-based standards that identify the most relevant sustainability issues for each trade and/or business activity), ISO Standards and Certifications (providing, inter alia, ISO 14001, ISO 26000, ISO 50001, and ISO 20121 sustainability-related standards), Eco-Management and Audit Scheme (EMAS) – a voluntary European Union regulation for organizations to assess, manage, and report on their environmental performance – B-Corp Impact Assessment and Certification, and the Sustainability Tracking, Assessment and Rating System (STARS), just to mention the most renowned ones. Overall, these sustainability assessment parameters and methods are intended to help incorporated enterprises worldwide to measure (thus indirectly fostering) their sustainability performance, ensuring they can meet the expectations of stakeholders and contribute to the general efforts toward worldwide sustainable development. Survey methods and reporting frameworks have been typically implemented by business and/or governmental organizations on a voluntary basis, albeit they are increasingly demanded according to sector-specific best practices and guidelines, and, more recently, they are mandated in connection with the present and near future enactment of ESG-related legal rules, such as, *e.g.*, the European Union's "taxonomy regulation" (see Regulation (EU) 2020/852, of the European Parliament and of the Council of 18 June 2020, on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, and that constitutes the cornerstone of the EU's sustainable finance framework as it aims, in conjunction with additional regulations and directives, to create a uniform and objective classification and reporting system for sustainable economic activities and sustainable financial investments) and – very soon – the Corporate Sustainability Reporting Directive ("CSRD"), which will supersede the "NFRD" of 2014: for some additional comments and bibliographical references see *infra*, *sub* fn. 72.

[19] According to the popular definition set forth in the *Bruntland Report* of 1987, para. 1 (see, *retro*, *sub* fn. 2), "sustainable development" – from which the general notion of "sustainability" has thereafter been derived – means «development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs». Furthermore, whereas the *Report*, *sub* paragraph 6, the *Report* states, *inter alia*, that «sustainable development requires that societies meet human needs both by increasing productive potential and by ensuring

thereby calling for a long-term, coordinated, and (hopefully) global vision and solution-planning skills that may be reasonably expected to exert a non-immaterial influence in preserving (and restoring) viable planetary boundaries in respect to every set of specific environmental, social, economic, as well as any correlated (public and/or private) governance problems and risks.

Scholars are almost unanimous in holding each element of the now famous ESG triad[20] as mutually intertwined under many material respects, as, *e.g.*, social disparities, corruption, and poor education programs frequently happen to be causally linked to environmental pollution; conversely, environmental disasters caused by climate changes due to industrially-induced global warming often impacts the social conditions of many less developed countries and that may, again, detrimentally impact governmental actions, civil rights protection, etc. And such interconnectedness, in turn, may further explain why the issues contemplated under the umbrella of the "G" element – including monitoring and policing the multifaceted types of business-related risks (again, each often showing various concurrent impacts on environmental and social issues) associated with multinational enterprises' supply chains[21] – is not less important than the other two sets of issues.

This is why – in very simplified terms – such general notion of sustainability touches on virtually all categories of societal, environmental and economic interests (the "TBL"), thus calling for intergovernmental

equitable opportunities for all», in paragraph 5 it further specifies that: «sustainable development requires the promotion of values that encourage consumption standards that are within the bounds of the ecological possible and to which all can reasonably aspire», while at the end of paragraph 9 one can also read that «At a minimum, sustainable development must not endanger the natural systems that support life on Earth: the atmosphere, the waters, the soils, and the living beings». Paragraph 15 of the *Report* concludes that «In essence, sustainable development is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development; and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations». Incidentally, it may be noticed that the key elements of the ESG notion – which will be coined 17 years later – are already being laid out in the *Bruntland Report.* Recently, the well-known and fortunate definition of "sustainable development" – and thus, more generally, of the term "sustainability" – has been deemed slightly incomplete: see, *e.g.*, A.R. Palmiter, *Sustainable Corporations*, cit., p. xxx («[n] otice however, that the definition does not take into account the survival of non-human species of the health of biodiverse ecosystems»).

[20] See, *e.g.*, A.R. Palmiter, *Capitalism Heal Tyself*, cit., pp. 294-296.

[21] V. Ulfbeck, A. Andhov, K. Mitkidis (Eds.), *Law and Responsible Supply Chain Management – Contract and Tort Interplay and Overlap*, Routledge, London-New York 2019.

coordination of critical policy decisions, which, in turn, appear to be inevitably lodged on (possibly harmonized) normative grounds.

Since its multifaceted meanings reach out beyond legal, economic, and/or market behaviours, such a wide notion of "sustainability" can logically precede any formula containing it, including that of "corporate sustainability". However, whereas the scope of every issue comprised within the ESG factors is expected to impact any (natural and legal) person, at any globe's latitude, it may be reasonably expected that the correlated ESG-related risks will almost inevitably affect the province of the laws of for-profit incorporated firms and that governing professional markets agents generally, at least to the extent that the impact exerted by each of those ESG-related issues on both public opinions – the society at large – and on governments would trigger the enactment of some sort of legal principles, standards, and/or specific mandatory set(s) of rules, in addition to guidelines and/or best practices that have been already adopted within specific (market) sectors on a voluntary basis.

Against this backdrop, "corporate sustainability"[22] represents a combination of two terms which someone could still perceive – at least at

[22] On definitional aspects, see the essay by Lina MIKALONIENE in Part II of the book. An interesting definition of "corporate sustainability" can also be found in C.M. BRUNER, B. SJÅFJELL, *Corporations and Sustainability*; EID., *Corporate Law, Corporate Governance and the Pursuit of Sustainability*, both in B. SJÅFJELL, C. M. BRUNER (Eds.), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, cit., respectively pp. 3-12, and pp. 713-720. See, also, A.R. PALMITER, *Sustainable Corporations*, cit., pp. xxviii-xxx; M. PAZIENZA, M. DE JONG, D. SCHOENMAKER, *Clarifying the Concept of Corporate Sustainability and Providing Convergence for Its Definition*, «Sustainability [online]», vol. 14 (27 June, 2022), 7838; J. MEUER, J. KOELBEL, V.H. HOFFMANN, *On the Nature of Corporate Sustainability*, «Organization & Environment», vol. 33.3 (2019), pp. 319-341; M.M. BERGMAN, Z. BERGMAN, L. BERGER, *An Empirical Exploration, Typology, and Definition of Corporate Sustainability*, «Sustainability [online]», vol. 9 (8 May, 2017), 753. See also, *e.g.*, S.S. VILDÅSEN, M. KEITSCH, M. FET, *Clarifying the Epistemology of Corporate Sustainability*, «Ecological Economics», vol. 138 (2017), pp. 40-46; M. KAHN, G. SERAFEIM, A. YOON, *Corporate Sustainability: First evidence on Materiality*, «Accounting Review», vol. 91.6 (Nov. 2016), pp. 1697-1724; M. AMINI, C.C. BIENSTOCK, *Corporate Sustainability: An Integrative Definition and Framework To Evaluate Corporate Practice And Guide Academic Research*, «Journal of Cleaner Production», vol. 76 (1 August 2014), pp. 12-19; I. MONTIEL, J. DELGADO-CEBALLOS, *Defining and Measuring Corporate Sustainability: Are We There Yet?*, «Organization & Environment [online]», 2014, pp. 1-27; P. TATICCHI, P. CARBONE, V. ALBINO (Eds.), *Corporate Sustainability*, Springer Verlag, Berlin-Heidelberg 2013. As to the increasingly frequent use of such notion in connection with corporate governance, see, *e.g.*, G. ARAS, D. CROWTHER, *Governance and sustainability - An Investigation Into the Relationship Between Corporate Governance and Corporate Sustainability*, «Management Decision», vol. 46.3 (2008), pp. 433-448; M.T. BODIE, *NASCAR Green: The*

first sight – as a sort of «oxymoron»[23], especially considering the modern, for-profit corporation as a typical example of social and environmental costs externalizing tool that is too often concerned with the short-term results[24] of the business and/or the financial activities being carried out by incorporated (for- profit) firms[25].

Problem of Sustainability in Corporations and Corporate Law, «Wake Forest Law Review», vol. 46.3 (2011), pp. 491-522; S. Benn, M. Edwards, T. Williams, *Organizational Change for Corporate Sustainability*, Routledge, Abingdon-New York 2018[4], pp. 3-6; L. Mélon, *Shareholder Primacy and Global Business: Re-clothing the EU Corporate Law*, Routledge, New York 2019, chapter 3; N. Ciocca, *Sostenibilità dell'attività di impresa e doveri degli amministratori*, in F. Massa (Ed.), *Sostenibilità. Profili giuridici, economici e manageriali delle PMI italiane*, Giappichelli, Torino, 2019, pp. 77-105; M. Gelter, *Sustainability and Corporate Stakeholders*, in A. Engert, L. Enriques, G. Ringe, U. Varottil, T. Wetzer (Eds.), *Business Law and the Transition to a Net Zero Carbon Economy*, CH Beck-Nomos-Hart Publishing, München-Oxford-Baden Baden 2021, pp. 50-55; A.M. Pacces, *Sustainable Corporate Governance: The Role of the Law*, in D. Busch, G. Ferrarini, S. Grünewald (Eds.), *Sustainable Finance in Europe - Corporate Governance, Financial Stability and Financial Markets*, cit., pp. 151-174; U. Tombari, *Riflessioni sullo "statuto organizzativo" dell'"impresa sostenibile" tra diritto italiano e diritto europeo*, in «Analisi Giuridica dell'Economia - AGE», vol. 2022.1, pp.135-144; M.A. Ciocia, C. Ghionni (Eds.), *Attività d'impresa e sviluppo sostenibile*, Edizioni Scientifiche Italiane, Napoli 2021; V. Mauerhofer, D. Rupo, L. Tarquinio (Eds.), *Sustainability and Law - General and Specific Aspects*, Springer Nature, Cham, 2020. On the relationship between corporate sustainability and CSR, see, *e.g.*, M. van Marrewijk, *Concepts and Definitions of CSR and Corporate Sustainability. Between Agency and Communion*, «Journal of Business Ethics», vol. 44.2-3 (2003), pp. 95-105; K.J. Zink, *Stakeholder Orientation and Corporate Social Responsibility: as a Precondition for Sustainability*, «Total Quality Management and Business Excellence», vol. 16.8-9 (2005), pp. 1041-1052. See also and the bibliography quoted *retro*, *sub* footnotes 16 and 17, and *infra*, *sub* footnotes 25-26, 28, 34-50 and 65-70.

[23] Borrowing the term from A.R. Palmiter, *Sustainable Corporations*, cit., p. xxvii.

[24] K. Greenfield, *The Puzzle of Short-Termism*, «Wake Forest Law Review», vol. 46.3 (2011), pp. 627-640; M. Stella Richter *Jr.*, Long termism, «Rivista delle Società», vol. LXVI.1 (2021), pp. 16-52. A different approach to the short-termism issues has been recently offered by M.J. Roe, *Missing the Target - Why Stock Market Short-Termism is Not the Problem*, Oxford Univ. Press, Oxford-New York, 2022.

[25] A.R. Palmiter, *Capitalism, Heal Thyself*, cit., pp. 294-295; Id., *Sustainable Corporations*, cit., xxviii: «[t]oday the corporation is presented in business schools and law schools as an entity imbued with various characteristics that minimize conflicts between its principal constituents [...] But the corporation has not been what it seems. It has not been an entity responsible for its own dealings – but instead has been an externalizing machine designed to push social and environmental costs onto others. It has not been a mediator of conflicting stakeholder interests – but instead has been a profit-making apparatus designed to maximize short-term financial gains for its shareholders. It has not been a reflection of societal priorities – but instead has been a plutocracy run by an inward-looking cadre of self-perpetuating executives. And it has not been a creature of law – but instead has been a political person empowered [...] to shape the regulatory landscape in which it

However, this is *not* the case[26]. To be sure, the for-profit company – typically characterized, *inter alia*, by legal personhood, and also affording their members (at least as a default legal rule) the limited liability privilege[27] – constitutes the main driver (and often, the underlying subject)

operates») and p. 104 («the corporation – particularly the large, multinational corporation that dominates the US and global economy – is an expression of the essentially extractive, responsibility-avoiding, short-term focused, inward looking, and politically manipulative philosophy that we call Capitalism. The corporation's relationship to labor and capital, to production and the environment, to current desires and long-term needs, and to democracy and elitism are all relationships implicit in modern Capitalism», of which the corporation thus represents the «principal instrument»); K. GREENFIELD, *The Puzzle of Short-Termism*, cit., p. 627: «[w]hen pondering the question of the "sustainable corporation," [...] one of the intractable problems is the nature of the corporation to produce externalities. By noting this characteristic, I am not making a moral point but an economic one. The nature of the firm is to create financial wealth by producing goods and services for profit; without regulatory or contractual limits, the firm has every incentive to externalize costs onto those whose interests are not included in the firm's current financial calculus. In fact, because of the corporation's tendency to create benefits for itself by pushing costs onto others, the corporation could aptly be called an "externality machine"». Such rather effective expression is often recurring in corporate law and corporate governance scholars works, albeit it is unclear whom should it be originally attributed to; probably, such a perspicuous expression should be traced back to R.A.G. MONKS and N. MINOW's first co-authored book: *Power and Accountability: Restoring the Balances of Power Between Corporations and Society* (Harper Collings Publishers Ltd., 1991), as claimed by the Authors on page 16 of the third edition of their classic hornbook *Corporate Governance* Blackwell, Malden (Ma)-Oxford (UK), 2004; on the use of such expression, see also L.E. MITCHELL, *Corporate Irresponsibility: America's Newest Export*, Yale Univ. Press, Hartford (CT), 2001, pp. 49-65 (Chapter 2:«The Perfect Externalizing Machine»). See also R.G. HANSEN, J.R. LOTT *JR.*, *Externalities and Corporate Objectives in a World With Diversified Shareholder/Consumers*, «Journal of Financial & Quantitative Analysis», vol. 31.1 (1996), pp. 43-68.

[26] Some recent monographic essays endeavoured to show the progressive alignment between the traditional capitalistic "mantra" of the "shareholder value maximization" ("SWM") – as traditionally embedded in the purpose of the (for profit) companies – on one side, and enterprises' social and environmental responsibilities, on the other side: see, *e.g.*, A. EDMANS, *Grow the Pie – How Great Companies Deliver Both Purpose and Profit*, Cambridge Univ. Press, Cambridge 2020; G. SERAFEIM, *Purpose and Profit: How Business Can Lift Up the World*, Harper Collins Leadership, New York 2022. In the past, on the *win-win* theory see also J. ELKINGTON, *Towards the Sustainable Corporation: Win-Win-Win Business Strategies for Sustainable Development*, cit., pp. 90-91.

[27] For an effective discussion of the different views expressed by renowned corporate law scholars about the list(s) of «intrinsic attributes» of the modern (for-profit) company, see C.M. BRUNER, *The Corporation's Intrinsic Attributes*, in B. CHOUDHURY, M. PETRIN (Eds.), *Understanding the Modern Company - Corporate Governance and Theory*, Cambridge Univ. Press, Cambridge 2017, pp. 60-87: 66-70. Leaving aside the others, while, by means of the legislative attribution to the business organizations of one of such inherent attributes of companies' structure – the "legal personality" (or "legal personhood") attribute – a seg-

of the research fields alimenting each of the preceding new (and not-so-new) labels and expressions[28], for the simple reason that the corporate enterprise vehicle is the worldwide capitalistic system's leading legal organizational model. Indeed, incorporated (for-profit) firms, especially when they are organized as multinational groups of companies ("MNEs"), do represent the key global business players, which – not coincidentally – find themselves strategically placed at the intersection of each of the seventeen "Sustainable Development Goals", set forth in the *UN 2030 Agenda* adopted by the UN General Assembly Resolution of 25 September 2015[29]

regation of each company's member assets from the corporate assets will typically result (thereby creating different sets of autonomous assets, *i.e.*, the company's assets and each shareholder's own assets: W.O. Douglas, C.M. Shanks, *Insulation from Liability Through Subsidiary Corporation*, «Yale Law Journal», vol. 39.2 (1929), pp. 193-218), the legislative concession of the "limited liability" privilege prevents corporate creditors to reach into the pockets of the company's members (shareholders), if the company's assets are insufficient to pay the corporate debts. Essentially because of that "risks insulation" effects, limited liability is said to be a legal feature of business organizations concurring in the externalization of social costs: see, *e.g.*, A.R. Palmiter, *Sustainable Corporations*, cit., p. 117. On the widely discussed issue of the boundaries of the limited liability privilege, see, *e.g.*, H. Hansmann, R. Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, *Yale Law Journal*, vol. 100.7 (1991), pp. 1879-1934. More recently, on limited liability generally (and with a focus on Anglo-American "veil piercing" legal doctrines), see, S.M. Bainbridge, M.T. Handerson, *Limited Liability - A Legal and Economic Analysis*, Edward Elgar Publ., Cheltenham (UK)-Northampton (MA), 2016.

[28] As insightfully pointed out by M.S. Lubber's *Letter from the President*, in Ceres, *The 21st Century Corporation: The Ceres Roadmap For Sustainability* (the "*CERES 2010 Roadmap*"), cit., p. 4, «[b]usiness is astute at solving problems, and many of the biggest global challenges we face are social and environmental. As a result, it is business that must lead the way by turning these challenges into opportunities. This means fully integrating sustainability considerations into governance, performance, accountability, R&D and overall business strategy. Tracking results, analyzing data and implementing actions to increase efficiency and competitiveness are cornerstones for success. The bottom line: sustainability must be the foundation of the 21st century corporation».

[29] General Assembly of the United Nation, Resolution no. 70/1, of 25 September 2015, bearing the following title: *Transforming Our World: The 2030 Agenda for Sustainable Development*, is available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/291/89/PDF/N1529189.pdf?OpenElement>. Information regarding the UN 2030 Sustainable Development Agenda can be found at: <https://sdgs.un.org/2030agenda>. One of its direct predecessor UN resolution (together with the *Rio Declaration on Environment and Development*, annexed to the *General Assembly Report of the UN Conference on Environment and Development*, held in Rio de Janeiro, Brazil, from 3, to 14 June, 1992, formally adopted on 12 August, 1992), is the Resolution of 20 March.1987, containing the WCED's *Report of the World Commission on Environment and Development: Our Common Future*", that – as pointed out *retro*, *sub* fn. 2 – then came to be known as the *Brundtland Report* (after the Commission's chairwoman Gro Harlem Brundtland). On the UN SDGs Agenda

– and notwithstanding the SDGs are primarily and directly addressed to sovereign countries that adhered to the UN Convention[30].

drafting process, see, *e.g.*, D. Griggs, M. Stafford-Smith, O. Gaffney, J. Rockström, M.C. Öhman, P. Shyamsundar, W. Steffen, G. Glaser, N. Kanie, I. Noble, *Sustainable Development Goals for people and Planet*, «Nature», vol. 495 (20 March, 2013), pp. 305-307; D. Griggs, M. Stafford Smith, J. Rockström, M.C. Öhman, O. Gaffney, G. Glaser, N. Kanie, I. Noble, W. Steffen, P. Shyamsundar, *An Integrated Framework for Sustainable Development Goals*, «Ecology and Society», vol. 19.4 (2014), 49; V. Fucci, *Social Innovation And Sustainable Development: A Nurturing Relationship*, Giappichelli, Torino 2022. Interestingly, each of the 17 UN SDGs seems to overlap, under many different respects, with the qualifying sustainability topics that were already included in the *CERES 2010 Roadmap*, cit., pp. 11 *et seq.*, albeit organized with a different format and illustrated in a different order. See also the more recent *CERES Roadmap 2030* (available at: <https://roadmap2030.ceres.org/?_ga=2.117620170.271132162.1679513514-1570247627.1679513514>). On the "intersections" among the SDGs and the corporate purpose-related issues, see, *e.g.*, L. Talbot, *Can Human Rights Shape the Multinational Company?*, in Ead., *Company Law*, Palgrave-MacMillan, London-New York 2014, pp. 108-137; S. Zagelmeyer, R. R. Sinkovics, *MNEs, Human Rights and the SDGs - The Moderating Role of Business and Human Rights Governance*, «Transnational Corporation», vol. 26.3 (2019), pp. 33-62.

[30] Albeit the opening statement of the 2015 UN General Assembly Resolution (quoted in the preceding footnote) concerned with the adoption of the SDGs reads as follows: «[t]his Agenda is a plan of action for people, planet and prosperity. It also seeks to strengthen universal peace in larger freedom», and although the Resolution continues by stating that «[a]ll countries and all stakeholders, acting in collaborative partnership, will implement this plan», and notwithstanding that on the UN 2030 Agenda dedicated website (https://www.un.org/sustainabledevelopment/development-agenda/), the Sustainable Development Goals ("SDGs") are self-defining as «a universal call to action to end poverty, protect the planet and improve the lives and prospects of everyone, everywhere», it should be remembered that, formally at least, only UN Member States (their governments) are the direct addressees of the UN General Assembly Resolutions and that the statements contained in the UN General Assembly Resolution of 2015 are not binding on private (natural and/or legal) persons. See, *e.g.*, S.M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, Proceedings of the Annual Meeting (American Society of International Law), vol. 73 (April 26-28, 1979), p. 301-309 (resolutions adopted by the General Assembly of the United Nations "lacks legislative powers. Its resolutions are not, generally speaking, binding on the States Members" of the UN). Notably, at the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC), which took place in Paris from 30 November to 12 December 2015, the text of an agreement was adopted, concerning the strengthening of the global response to climate change, the so-called "Paris Agreement", which was subsequently signed by on 22 April 2016. More specifically, the Paris Agreement sets out a long-term goal in line with the objective to keep the global temperature increase well below 2 °C above pre-industrial levels and to pursue efforts to keep it to 1,5 °C above pre-industrial levels. The EU Council, by its Decision (EU) 2016/590, of 11 April 2016, on the signing, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change (OJ L 103, 19.4.2016, p. 1), executed the Paris Agreement on behalf of the European Union; moreover, the EU Council, by its Decision /EU) 2016/1841, of 5

Incidentally, it may be pointed out that each of the SDGs, as described under the *UN 2030 Agenda*, can quite easily be matched with the core principles set forth in Articles 2 and 3 of the Treaty of the European Union ("TEU") of 2007[31] – including the goal of fostering of «solidarity between generations», «economic, social and territorial cohesion», «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 short, the positive legal notion of "sustainability", as it emerges from the TEU, does encompass virtually every issue falling within each of the SDGs and, thus, each of the three ESG pillars; and these, in turn, are heavily impacted by business activities, as carried out by companies, worldwide.

Therefore, "companies" and "sustainability" (as well as their respective principles, rules and/or standards) must find an effective way to to coexist and conflate: "corporate sustainability" shall then refer to the degree of long-term viability of both incorporated for-profit firms' structures and their correlative market postures, with respect to each of the many and mutually interrelated ESG-related risks[32] – not merely to the

October 2016, on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change (OJ L 282, 19.10.2016, p. 1), approved the Paris Agreement on behalf of the Union. See, *e.g.*, J.R. McIntyre, S. Ivanaj, V. Ivanaj, *The Role of Multinational Enterprises in Supporting the United Nations' SDGs*, Edward Elgar Publishing, Cheltenham (UK)-Northampton (MA) 2022; I. Montiel, A. Cuervo-Cazurra, J. Park, R. Antolín-López, B.W. Husted, *Implementing the United Nations' Sustainable Development Goals in International Business*, «Journal of International Business Studies», vol. 52.5 (2021), pp. 999-1030.

[31] The current version of the TUE was enacted in 2007 as part of the Lisbon Treaty, executed on 13 December 2007, and it entered into force on the 1st of December 2009. Indeed, Article 1, paragraph 5, TEU, makes it clear that the «Union [...] shall contribute [...] to the strict observance and the development of international law, including respect for the principles of the United Nations Charter».

[32] Risk management standards and guidelines, as well as their correlative corporate compliance regulations have witnessed an exponential intensification in the last 20-25 years, in parallel with, *inter alia*, disruptive technology and products advancements, automation of business plants processes, bribery and corporate looting scandals, de-localization of production in third-world countries with insufficient workers protection standards, the dramatic increase of environmental and/or industrial accidents, sea and air pollution consequences of mass-production and mass-consumption, which also resulted in a more frequent application within the private law province – including the business organizations law – of *precaution principles* and *professional responsibility standards*, as originally laid down and advocated by torts theories and criminal business law theories, and as often thereafter positively implemented by legislators when crafting new sets of corporate-based and/or management-based criminal offences: for further references, see the

usual company's ability to keep up with its business operations in the marketplace as an economically viable going concern, in the long-run[33].

In the last fifteen years or so, "corporate" (or "business") "sustainability"[34] has become a powerful locution that carries an almost inextricable compound of political – that is, *ideological* – social, economic, cultural, as well as technical legal meanings[35], albeit it probably still deserves some

essay by Costantino Grasso and Stephen Holden in Part II of this book. See also the Authors cited *infra*, *sub* footnotes 84 and 85, and the accompanying text.

[33] On this fundamental distinction, see the essays by Eddy Ricciardiello and Marek Porzycki, *infra*, in Part II of these "Chronicles".

[34] See, *e.g.*, M. Blowfield, *Business and Sustainability*, Oxford Univ. Press, Oxford-New York 2013; J.F. Sneirson, N.E. Shurtz (Eds.), *Sustainability & Business Law*, Carolina Academic Press, Durham (NC) 2017; B.L. Jacobs, B. Finney, *Defining Sustainable Business - Beyond Greenwashing*, «Virginia Environmental Law Journal», vol. 37.2 (2019), pp. 89-131: pp. 91-102; C. Mayer, J.J. Czarnezki, *Sustainable Business Law? The Key Role of Corporate Governance and Finance*, «Environmental Law», vol. 51.4 (2021), pp. 991-1040.

[35] Again, see Lina Mikaloniene in Part II of the book. See also the Authors quoted *retro*, *sub* footnotes 8-17, 22, 33, 34, 36, 38-40, 42-43, 49-53, and 55-57. On the legal relevance of ideological backgrounds surrounding the "corporate sustainability" (and the "corporate purpose") debates, see *retro sub* footnotes 3 to 5, and, in addition, B. Sjåfjell, J. Mähönen, *infra*, in Part I of this book. And see D.L. Engel, *An Approach to Corporate Social Responsibility*, in «Stanford Law Review», vol. 32.1 (Nov. 1979), pp. 1-98: 1, stating «that the topic of corporate social responsibility cannot be debated except against the background of a general political theory. The resolution of nearly every issue of "corporate social responsibility" depends heavily on one's beliefs about how our political process operates and one's convictions about the ideal political process», and I suspect that the same shall hold true also with regard to "corporate sustainability". See also, *ex multis*: F. d'Alessandro, *Il mantello di San Martino, la benevolenza del birraio e la Ford modello T, senza dimenticare Robin Hood (divagazioni semi-serie sulla c.d. responsabilità sociale dell'impresa e dintorni)*, «Rivista di diritto civile», vol. 2022.3, pp. 409-461 (especially pp. 412, fn. 5; 419-421, fn. 13; 434-438, fns. 33-35, and 440-443); B. Sjåfjell, M.B. Taylor, *Clash of Norms: Shareholder Primacy vs. Sustainable Corporate Purpose*, «International and Comparative Corporate Law Journal», vol. 13.3 (2019), pp. 40-66: 66 («company law is not value-neutral: law never is. The belief that one makes value-neutral decisions by not going into the underlying normative issues is one of the great fallacies of (modern) legal theory»); B. Sjåfjell, J. Mähönen, A. Johnston, J. Cullen, *Obstacles to Sustainable Global Business. Towards EU Policy Coherence for Sustainable Development*, «University of Oslo Faculty of Law Research Paper Series», No. 2019-02 (18 March 2019), available at: <https://ssrn.com/abstract=3354401>; B. Sjåfjell, *Redefining the Corporation for a Sustainable New Economy*, «Journal of Law and Society», vol. 45.1 (2018), pp. 29-45; M.J. Roe, M. Vatiero, *Corporate Governance and Its Political Economy*, in J.N. Gordon, W.-G. Ringe (Eds.), *The Oxford Handbook of Corporate Law and Governance*, cit., pp. 56-83 («[t]o fully understand the modern corporation's ownership, shape, and distribution of authority, one must attend to politics. Because basic dimensions of corporate organization can affect the interests of voters, because powerful concentrated interest groups seek particular outcomes that deeply affect large corporations, because those deploying corporate and financial re-

sources from within the corporation to buttress their own interests can affect policy outcomes, and because the structure of some democratic governments fits better with some corporate ownership structures than with others, politics can and does determine core structures of large corporations»); D. Millon, *Radical Shareholder Primacy*, «Univ. of St. Thomas Law Journal», vol. 10.4 (2013), pp. 1013-1044; C.M. Bruner, *Corporate Governance in the Common Law World - The Political Foundations of Shareholder Power*, Cambridge Univ. Press, Cambridge-New York, 2013; L.A. Stout, *The Problem of Corporate Purpose*, «Brookings Issues on Governance Studies», No. 48 (June 2012), available at: <https://www.brookings.edu/wp-content/uploads/2016/06/Stout_Corporate-Issues.pdf>, pp. 1 and 11-12; L.A. Stout, S.A. Gramitto Ricci, *Corporate Governance as Privately-Ordered Public Policy: A Proposal*, «Seattle Univ. Law Review», vol. 41.2 (2018), pp. 551-576. See also A. Bartolacelli, *Sustainability and Company Law: A Long Path to Walk*, «European Company Law Journal», vol. 18.1 (2021), pp. 4-6: 4 (expressly referring to the role of ideological posture in analysing sustainable corporate governance, and quoting J.C. Coffee *jr.*, *The European Commission Considers 'Short-Termism' (And 'What Do You Mean By That?')*, «ecgi news» (12 Nov. 2020), available at: <https://www.ecgi.global/publications/news/the-european-commission-considers-short-termism-and-what-do-you-mean-by-that>: prof. Coffee argued, *inter alia*, that «the manner in which directors behave is much more determined by custom and ideology, and in the U.S. both cause directors to believe they have a duty to maximize shareholder value (even though the law does not quite say that)»); D.S. Lund, E. Pollman, *The Corporate Governance Machine*, «Columbia Law Review», vol. 121.8 (2021), pp. 2563-2634 (arguing, *inter alia*, that corporate governance is not a «neutral set of processes and practices that govern how a company is managed», but, rather, shall be thought as a «"system" composed of an array of institutional players» each and advocating their respective agendas); S. Vallentin, D. Murillo, *CSR and the Neoliberal Imagination*, in: A. Sales (Ed.), *Corporate Social Responsibility and Corporate Change*, Springer Nature, Cham 2019, pp. 43-59; F. Jiang, T. Zalan, H.H.M. Tse, J. Shen *Mapping the Relationship Among Political Ideology, CSR Mindset, and CSR Strategy: A Contingency Perspective Applied to Chinese Managers*, in «Journal of Business Ethics», vol. 147 (2018), pp. 419-444; M. Orlitzky, *The Politics of Corporate Social Responsibility, or: Why Milton Friedman has been Right All Along*, in «*Annals in Social Responsibility*», vol. 1.1 (2015), pp. 5-29; G. Serafeim, *The Role of the Corporation in Society: An Alternative View and Opportunities for Future Research*, «Harvard Business School Working Paper Series», no. 14-110 (2013), available at: <https://ssrn.com/abstract=2270579>; C. Angelici, *La società per azioni - I. Principi e problemi*, Giuffrè, Milano 2012, p. 100; D. Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, «University of Pennsylvania Law Review», vol. 151 (2003), pp. 1861-1912; W. Lazonick, M. O'Sullivan, *Maximizing Shareholder Value: A New Ideology for Corporate Governance*, «Economy and Society», vol. 29.1 (2000), pp. 13-35; J.E. Parkinson, *Corporate Power and Responsibility - Issues in the Theory of Company Law*, Oxford Univ. Press, Oxford, 1995, pp. 1-2 (pointing out, *inter alia*, that «a study of company law is a study of the rules that sustain and regulate a mode of decision-making that rivals the market and the democratic process as a mechanism of social choice», and that «Company law itself [...] becomes an instrument of broad social policy, to be used perhaps to construct a 'corporate conscience', or to make the organization more 'open textured'»). In the past, see, *e.g.*, K.D. Walters, *Corporate Social Responsibility and Political Ideology*, «California Management Review», vol. 19.3 (1977), pp. 40-51; R.E. Freeman *The Politics of Stakeholder Theory: Some Future Directions* «Business Ethics

further clarifications about its actual significance, in order to avoid misunderstandings, especially in the light of the abundance of connotations attributed to such expression, which expose it to different legal constructions.

In fact, both the supra-national reach and the pervasive scope of the many, mutually intertwined issues that any current search for an acceptable – that is both measurable and reasonably adaptable – gradient of sustainability specifically concerned with for-profit organizations operating worldwide would inevitably entail, seem to make the case for a uniform notion of corporate sustainability in the international legal and business arenas. To be sure, the complex, multifaceted sets of issues which may go under the heading of such idiomatic expression inevitably impacted existing corporate governance models, thereby almost naturally altering existing definitions, while simultaneously plugging in the urgent need to redress the ongoing environmental damages, and to curb social and economic unbalances into the long-lasting "shareholderism-stakeholderism" disputes[36].

Quarterly», vol. 4.4 (1994), pp. 409-421; J. Nesteruk, *The Ethical Significance of Corporate Law*, «Journal of Business Ethics», vol. 10.9 (1991), pp. 723-727. On the possible reasons for different political (and thus ideological) underpinnings of company law, as part of each state's sovereign power to legislate, see, *e.g.*, M.J. Roe, *Political Determinants of Corporate Governance - Political Context, Corporate Impact*, Oxford Univ. Press, Oxford-New York, 2003, v, 1, 115-116, 135-136, 150 *et seq.*; A. Gamble, G. Kelly, J. Parkinson (Eds.), *The Political Economy of the Company*, Hart Publishing, Oxford-Portland 2000. See also, albeit in more general terms, T. Picketty, *Capital and Ideology* (translated by Arthur Goldhammer), Harvard Univ. Press, Cambridge (MA)-London 2020; I. Scoones, *The Politics of Sustainability and Development*, «Annual Review of Environment and Resources», vol. 41 (2016), pp. 293-319; L.B. Szalay, R.M. Kelly, *Political Ideology and Subjective Culture: Conceptualization and Empirical Assessment*, «American Political Science Review», 76.3 (1982), pp. 585-602.

[36] In the past, for the classic theorization of the "shareholder wealth maximization" ("SWM") as the U.S. (publicly held) companies' virtually exclusive purpose, see, M. Friedman, *Capitalism and Freedom*, Chicago Univ. Press, Chicago 1962; Id., *The Social Responsibility of Business is to Increase Its Profits*, «The New York Times, Sunday Magazine», September 13, 1970 (available at: https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsi-bility-of-business-is-to.html), and also reprinted in: W.C. Zimmerli, M. Holzinger, K. Richter (Eds.), *Corporate Ethics and Corporate Governance*, Springer, Berlin-Heidelberg 2007, pp. 173-178. In the U.S. law, the leading case supporting SWM is traditionally found in the famous decision *Dodge v. Ford Motor Co.* 170 N.W. 668, 684 (Mich. 1919), where the Michigan Supreme Court stated: «there should be no confusion [...] a business corporation is organized and carried out on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end». Thoroughly, on this notable case, see, *e.g.*, M.T. Henderson, *The*

Story of Dodge v. Ford Motor Company: Everything Old is New Again, in J.M. Ramseyer (Ed.), *Corporate Law Stories*, Foundation Press, New York 2009, pp. 37-76. One of the famous debate on the role of large publicly-held, for-profit (U.S.) corporations was that raised between professors Berle and Dodds, an account of which can be found (*ex multis*) in J.L. Weiner *The Berle-Dodd Dialogue on the Concept of the Corporation*, «Columbia Law Review», vol. 64.8 (1964), pp. 1458-1467. For a more recent support to the SWM theory, see, *e.g.*, S.M. Bainbridge, *The New Corporate Governance - In Theory and Practice*, Oxford Univ. Press, Oxford-New York 2008, pp. 11, 24-25, and 65-72; Id., *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, «Washington & Lee L. Review», vol. 50.4 (1993), pp. 1423-1447; C.M. Elson, N.J. Goossen, *E. Merrick Dodd and the Rise and Fall of Corporate Stakeholder Theory*, «The Business Lawyer», vol. 72.3 (2017), pp. 735-754, and, albeit with different approach (advocating the «perils of stakeholderism») L.A. Bebchuk, R. Tallarita, *The Illusory Promise of Stakeholder Governance*, «Cornell Law Review», vol. 106.1 (2020), pp. 91-166. In opposition to the SWM theory, see, *e.g.*, R.E. Freeman, D.L. Reed, *Stockholders and Stakeholders: A New Perspective on Corporate Governance*, «California Management Review», vol. 25.3 (1983), pp. 88-106; R.E. Freeman, *Strategic Management - A Stakeholder Approach*, Pitman, Boston-London-Melbourne-Toronto 1984; T. Donaldson, L.E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, *The Academy of Management Review*, vol. 20.1 (1995), pp. 65-91. For a legal critique of the "classic" SWM view of the for-profit company's purpose (often, but not necessarily coped with "shareholder primacy" theories), see, *ex multis*, M.M. Blair, L.A. Stout, *A Team Production Theory of Corporate Law*, «Virginia Law Review», vol. 85.2 (1999), pp. 247-328, L.A. Stout, *Bad and Not-so-Bad Arguments for Shareholder Primacy*, «Southern California L. Review», vol. 75.5 (2002), 1189-1209; Ead., *Why We Should Stop Teaching Dodge v. Ford*, «Virginia Law & Business Review», vol.3.1 (Spring, 2008), pp.164-190; Ead., *The Shareholder Value Myth - How Putting Shareholders First Harms Investors, Corporations and the Public*, BK Publishers, San Francisco, 2012; Ead., *The Toxic Side Effects of Shareholder Primacy*, «Univ. of Pennsylvania Law Review», vol. 161.7 (2013), pp. 2003-2023; C. Mayer, *Shareholderism Versus Stakeholderism - A Misconceived Contradiction. A Comment on 'The Illusory Promise of Stakeholder Governance' by Lucian Bebchuk and Roberto Tallarita* (June, 2020), «*ECGI - Law Working Paper Series*», No. 522/2020, «ssrn»; B. Sjåfjell, A. Johnson, L. Anker-Sørensen, D. Millon, *Shareholder Primacy: The Main Barrier to Sustainable Companies*, in B. Sjåfjell, B.J. Richardson (Eds.), *Company Law and Sustainability: Legal Barriers and Opportunities*, cit., pp. 79-147; B. Sjåfjell, J.T. Mähönen, *Corporate Purpose and the Misleading Shareholder vs Stakeholder Dichotomy*, «Bond Law Review», vol. 34.2 (2022), pp. 69-113. See also, with different views and accents: D. Gordon Smith, *The Shareholder Primacy Norm*, «Journal of Corporation Law», vol. 23 (1998), pp. 277-323; K. Williams, *From Shareholder Value to Present-Day Capitalism*, «Economy and Society», vol. 29.1 (2000), pp. 1-12; M.C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, «Business Ethics Quarterly», vol. 12.2 (2002), pp. 235-256; W.W. Bratton, M.L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, «Journal of Corporation Law», vol. 34.1 (2008), pp. 99-152; R.E. Freeman, J. S. Harrison, A. C. Wicks, B.L. Parmar, S. de Colle, *Stakeholder Theory - The State of the Art*, Cambridge Univ. Press, Cambridge 2010; M. Gelter, *Taming or Protecting the Modern Corporation? Shareholder-Stakeholder Debates in a Comparative Light, «NYU Journal of Law & Business»,* vol. 7.2 (2011), pp. 641-730; Id., *The Pension System and the Rise of Shareholder Primacy*, in «Seton

In conjunction with the emerging quest for a more sustainable legal and economic design of for-profit incorporated firms (and especially multinational groups of companies), the general contentions over companies'

Hall Law Review», vol. 43.3 (2013), pp. 909-970; Id., *EU Company Law Harmonization between Convergence and Varieties of Capitalism*, in H. Wells (Ed.), *Research Handbook on the History of Corporation and Company Law*, Edward Elgar Publishing, Cheltenham (UK) - Northampton (MA), 2018, pp. 323-352; J.F. Sneirson, *The History of Shareholder Primacy, from Adam Smith through the Rise of Financialism*, in B. Sjåfjell, C.M. Bruner (Eds.), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, cit., pp. 73-85; M.J. Vargas, *In Defense of E. Merrick Dodd*, «The Business Lawyer», vol. 73.2 (2018), pp. 337-374; L. Mélon, *Shareholder Primacy and Global Business - Re-Clothing the EU Corporate Law*, Routledge-Taylor & Francis Group, New York-Abingdon-London, 2019; L. Zingales, J. Kasperkevic, A. Schechter (Eds.), *Milton Friedman 50 Years Later*, ProMarket-Stigler Center, Chicago 2020; G.M. Hayden, M.T. Bodie, *Reconstructing the Corporation - From Shareholder Primacy to Shared Governance*, Cambridge Univ. Press, Cambridge 2020; L.E. Strine Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy. A Reply To Professor Rock* (Dec. 2020), available at: <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3240&context=faculty_scholarship>; L. Enriques, *ESG and Shareholder Primacy: Why They Can Go Together*, in P. Câmara, F. Morais (Eds.), *The Palgrave Handbook of ESG and Corporate Governance*, Palgrave-Macmillan-Springer, Cham 2022, pp. 131-136. Among the Italian legal scholarship, see, *e.g.*, F. d'Alessandro, *Il diritto delle società dai "battelli del Reno" alle "navi vichinghe"*(1988), in Id. *Scritti di Floriano d'Alessandro*, vol. I, Giuffré, Milano 1997, pp. 447-494; F. Vella, *L'impresa e il lavoro: vecchi e nuovi paradigmi della partecipazione*, «Giurisprudenza commerciale», vol. 40.6 (2013), pp. 1120-1152; U. Tombari, *"Potere" e "interessi" nella grande impresa azionaria*, Giuffré-Francis Lefebvre, Milano 2019; F. Denozza, *Il conflitto di interessi tra soci e altri* stakeholders, in R. Sacchi (Ed.), *Conflitto di interessi e interessi in conflitto in una prospettiva interdisciplinare*, Giuffré-Francis Lefebvre, Milano 2020, pp. 457-484; Id., *Due concetti di* stakeholderism, «Rivista Orizzonti del diritto commerciale», vol. X.1 (2022), pp. 37-67; R. Rolli, *L'Impatto dei fattori ESG sull'impresa - Modelli di* governance *e nuove responsabilità*, il Mulino, Bologna, 2020, pp. 78-98. E. Barcellona, *Shareholderism versus Stakeholderism - La società per azioni contemporanea dinanzi al profitto*, Giuffré-Francis Lefebvre, Milano 2022. The debate over shareholder primacy, SWM, and stakeholderism – recently reinvigorated by the U.S. Business Roundtable's Statement on the Purpose of the Corporation, of Aug. 19, 2019 (available at: <https://www.businessroundtable.org/opportunity-commitment>), that made some *prima facie* concessions to the meanwhile well-established "stakeholderism" vague, as prompted by previous statements by Mr. Larry Fink (the CEO of the world largest asset manager company, Black Rock) who, starting in January 2018, has been distilling some stakeholder-oriented "letters to investors" (available at: <https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter> which cumulatively had the effect of a changing perspective by Corporate America – is inextricably connected with the debate on the "corporate purpose" and with the models of capitalism and market economy in general; therefore, literature on these topics often overlap: see the works cited *sub* footnotes 3 to 5 and 38 to 53 and accompanying text.

social responsibility[37] spawn the somewhat more compelling "corporate purpose" debate[38], that – not surprisingly – constitutes one of the *leitmo-*

[37] See the works cited *sub* footnotes 16, 36, and 38.

[38] Albeit the "corporate purpose" topic had already been extensively discussed by economists, and business organizations legal scholars – especially within the Anglo-American Law – in the past (in addition to the works cited *sub* fn. 36, see, *e.g.*, E.V. Rostow, *To Whom and for What Ends Is Corporate Management Responsible?*, in E.S. Mason (Ed.), *The Corporation in Modern Society*, Harvard Univ. Press, Cambridge (MA) 1959, pp. 46-71; A. Keay, *The Corporate Objective*, Edward Elgar, Cheltenham (UK)-Northampton (MA) 2011; L.A. Stout, *The Problem of Corporate Purpose*, cit.) yet, it is widely recognized that the main "triggers" to the current intensity of the "corporate purpose" debates could be found, in at least two of the series of public letters that the CEO of the asset manager giant Black Rock, Mr. Larry Fink, addressed in January 2018 and in January 2019, to its investors and to the issuers of securities already and/or prospectively in the Black Rock's portfolios (see *retro*, *sub* fn. 36); and, then, the US Business Roundtable *Statement on Corporate Purpose*, of 19th of August 2021 (*retro*, fn. 36): see, *e.g.*, Council of Institutional Investors, *Council of Institutional Investors Responds to Business Roundtable Statement on Corporate Purpose* (August 19, 2019), in <www.cii.org/aug19_brt_response>. In addition, see also the World Economic Forum, The Universal Purpose of a Company in the Fourth Industrial Revolution", *i.e.*, the so-called "Davos Manifesto", of December 2019 (available at: <https://www.weforum.org/stories/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/>). Currently, the literature on the proper "purpose" of the (for-profit) companies, in connection with stakeholderists' theories – including CSR doctrines, corporate sustainability doctrines, and the emerging ESG-factors driven corporate compliance rules and standards – is overwhelming and unmanageable within a single footnote: on the many different impacts of "corporate purpose" on an array of issues concerned with corporate governance, see the essays by Enrico Ginevra, Lina Mikaloniene, Lucia Picardi, Beate Sjåfjell and Jukka Mähönen, Francesco Schurr, and Marco Speranzin, in Part I and Part II of this book, where bibliographical references on the "shareholderism *vs.* stakeholderism" debate will also be provided. In addition, see, *e.g.*, the essays collected in P. Câmara, F. Morais (Eds.), *The Palgrave Handbook of ESG and Corporate Governance*, cit.; E. Pollman, R.B. Thompson (Eds.), *Research Handbook on Corporate Purpose and Personhood*, Edward Elgar, Cheltenham (UK)-Northampton (MA) 2021; B. Sjåfjell, C.M. Bruner (Eds.), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, cit. See also: C. Mayer, *Prosperity - Better Business Makes the Greater Good*, Oxford Univ. Press, Oxford 2018; G. Ferrarini, *An Alternative View of Corporate Purpose: Colin Mayer on Prosperity*, «Rivista delle Società», vol. LXV.1 (2020), pp. 27-42; Id., *Redefining Corporate Purpose: Sustainability as a Game Changer*, in D. Busch, G. Ferrarini, S. Grünewald (Eds.), *Sustainable Finance in Europe - Corporate Governance, Financial Stability and Financial Markets*, cit., pp. 85-150; M. Ventoruzzo, *Brief Remarks on "Prosperity" by Colin Mayer and the often Misunderstood Notion of Corporate Purpose*, «Rivista delle società», vol. LXV.1 (2020), pp. 43-50; A.R. Palmiter, *Sustainable Corporations*, cit., pp. 57; 66-80, and 304; U. Tombari, *Corporate Powers and Conflicting Interests*, Giuffré-Francis Lefebvre, Milano 2021, pp. 27-32 and pp. 73-85; H. Fleischer, *Corporate Purpose: A Management Concept and its Implications for Company Law*, «European Company and Financial Law Review», vol. 18.2 (2021), pp. 161-189; E.B. Rock, *For Whom is the Corporation Managed in 2020? The Debate Over Corporate Purpose*, «The

tiv underpinning the large majority of the contributions contained in this book.

As it impinges, simultaneously, in the function and in the correlative governance mechanisms of the most sophisticated form of business organizations, the company's "purpose" has been often intended as a general notion – not necessarily vested with a stringent legal meaning – the significance of which is supposed to extend beyond its contingent ob-

Business Lawyer», vol. 76.2 (2021), pp. 363; J.E. Fish, S. Davidoff Solomon, *Should Corporations have a Purpose?*, in *Texas Law Review*, vol. 99 (2021), pp. 1309-1346; B. Sjåfjell, M.B. Taylor, *A Clash of Norms: Shareholder Primacy Vs. Sustainable Corporate Purpose*, in «*International and Comparative Corporate Law Journal*», vol. 13.3 (2019), pp. 40-66; J.M. Heminway, *Shareholder Wealth Maximization as a Function of Statutes, Decision Law, and Organic Documents*, «Washington and Lee Law Review», vol. 74.5 (2017), pp. 939-972; L.E. Strine *Jr.*, *Corporate Power Is Corporate Purpose I: Evidence From My Hometown*, «Oxford Review of Economic Policy», vol. 33.2 (2017), pp. 176-187; Id., *Corporate Power is Corporate Purpose II: An Encouragement for Future Consideration from Professors Johnson and Millon*, «Washington & Lee Law Review», vol. 74.2 (2017), pp. 1165-1177; D.G. Yosifon, *The Law of Corporate Purpose*, «Berkley Business Law Journal», vol. 10.2 (2013), pp. 181-220; A.-M. Weber-Elżanowska *Sustainability Vs. Corporate Purpose: Will Transforming Values Shift The Paradigm?*, «Journal for the International and European Law, Economics and Market Integration», vol. 7.2 (2020), pp. 53-84; I. Wan Wan Duong, *Redefining Shareholder Value Maximization: Identifying Key Sustainable Investment Strategies and their Role in Rehabilitating Corporate Purpose*, «Consilience: The Journal of Sustainable Development», vol. 25 (2021-22), pp. 1-28. From the Italian perspective, see, *e.g.*, F. Denozza, *Scopo della società e interesse degli* stakeholders*: dalla "considerazione" all'"*empowerment*"*, in M. Castellaneta, F. Vessia (Eds.), *La responsabilità sociale d'impresa tra diritto societario e diritto internazionale*, cit., pp. 63-89; M.S. Spolidoro, *Interesse, funzione e finalità. Per lo scioglimento dell'abbraccio tra interesse sociale e* Business Purpose, «Rivista delle società», vol. LXVII.2-3 (2022), pp. 322-365; the proceedings of the Courmayeur Conference of September 2021, published in P. Montalenti, M. Notari (Eds.), *La nuova società quotata: tutela degli* stakeholders, sostenibilità e nuova *governance*, Giuffrè-Francis Lefebvre, Milano 2022; A. Daccò, *Spunti di riflessione su capitalismo sostenibile e strumenti a disposizione*, «Banca, borsa, titoli di credito», vol. LXXV.3 (2022), part I, pp. 372-393. The relevance of the 2019 U.S. Business Roundtable's Statement on the "corporate purpose" was specifically echoed in some thoughts expressed by a group of renowned Italian Business Law professors (Vincenzo Calandra Buonaura; Francesco Denozza; Mario Libertini; Giorgio Marasà; Marco Maugeri; Roberto Sacchi; Umberto Tombari), coordinated by A. Perrone, *Lo* statement *della* Business Roundtable *sugli scopi della società. Un dialogo a più voci*, published in «Rivista Orizzonti del Diritto Commerciale», vol. VII.3 (2019), pp. 589-614; and, in the same Review's issue, see also: F. Denozza, *Lo scopo della società: dall'organizzazione al mercato*, *ivi*, pp. 615-626; M. Libertini, *Un commento al manifesto sulla responsabilità sociale d'impresa della* Business Roundtable, *ivi*, pp. 627-636; M. Maugeri, *«Pluralismo» e «monismo» nello scopo della s.p.a. (glosse a margine del dialogo a più voci sullo* Statement *della* Business Roundtable, *ivi*, pp. 637-645. See also, P. Marchetti, *Dalla* Business Roundtable *ai lavori della* British Academy, «*Rivista delle società*», vol. LXIV.5-6 (2019), pp. 1303-1306.

jective(s), *i.e.*, the specific (set of) trade and/or business activities every incorporated organization is supposed to carry out in the market[39].

The "purpose" of the modern company is sometimes intended as (or confused with?) its typical, and somewhat innate, *raison d'être*[40], thus impinging on what is sometimes referred to – especially in civil law tradition (and insofar as the company's articles could be qualified within the notion of contractual instrument) – as the *cause* (or the *objective function*) of the company's articles of incorporation. Since the company's "purpose" often concurs also in defining the ultimate goal of the company's organization and activities – usually consisting in profit-seeking (see *infra*) – it appears capable of interfering with another very controversial

[39] The expression naturally recalls the language used in Article 61 of the so called "Loi PACTE" introduced new Article 1835 of the French Code Civil, that reads as follows: «Les statuts peuvent préciser une raison d'être, constituée des principes dont la société se dote et pour le respect desquels elle entend affecter des moyens dans la réalisation de son activité». On this important French provision, see, *e.g.* P.-H. Conac, *Le nouvel article 1833 du Code civil français et l'intégration de l'intérêt social et de la responsabilité sociale d'entreprise: constat ou révolution?*, «Rivista Orizzonti del diritto commerciale», 2019.3, pp. 497-516; T. de Ravel d'Esclapon, *Rapport Notat-Senard: l'entreprise, «objet d'intérêt collectif»*, «Dalloz Actualité», 18 mars, 2018 (commenting N. Notat, J.-D. Senard, J.-B. Barfety, *L'entreprise, object d'interêt collectif*, Paris, 9 mars 2018, available at: https://www.vie-publique.fr/rapport/37199-lentreprise-objet-dinteret-collectif); S. Schiller, *L'évolution du rôle des sociétés depuis la loi PACTE*, «Dalloz Actualité», 18 mars, 2018, pp. 517-532; I. Urbain-Parleani, *L'article 1835 et la raison d'être*, «Dalloz Actualité», 18 mars, 2018, pp. 533-548. Interestingly, professor Colin Mayer in his book *Prosperity*, cit., p. 42, suggests a different approach, mainly based on contractual obligations and, thus, on private ordering, since – in his view – the company's "purpose" should be defined by contract, that is, inserted in the articles of association at company's formation; consequently, directors' (and controlling shareholder(s)) fiduciary duties should be based on the corporate purpose, as defined in each company's incorporation charter. See, *retro*, *sub* footnotes 35, 36, and 37, and see also E.B. Rock, *Business Purpose and the objective of the Corporation*, in E. Pollman, R.B. Thompson (Eds.), *Research Handbook on Corporate Purpose and Personhood*, cit., pp. 27-47; A. Keay, *Tackling the Issue of the Corporate Objective: An Analysis of The United Kingdom's Enlightened Shareholder Value Approach*, «Sydney Law Review», vol. 29.4 (2007), pp. 572-612.

[40] See H. Fleischer, *Corporate Purpose: A Management Concept and its Implications for Company Law*, cit. (where such expression frequently recurs). In addition to the works cited *retro*, *sub* footnotes 35-39, see, from an Anglo-American Perspective, see also C.A. Williams, *For Whom is the Corporation Managed and What Is Its Purpose. A stakeholder perspective based on the Law of Delaware*, in E. Pollman, R.B. Thompson (Eds.), *Research Handbook on Corporate Purpose and Personhood*, cit., pp. 165-185; L.A. Bebchuk, K. Kastiel, R. Tallarita, *For Whom Corporate Leaders Bargain*, «Southern California Law Review», vol. 94.6 (2021), pp. 1467-1560; E. Pollman, *The History and Revival of the Corporate Purpose Clause*, «Texas Law Review», vol. 99.7 (2021), pp. 1423-1426; J.E. Fish, *Purpose Proposals*, «Univ. Chicago Business Law Review», vol. 1.1 (2022), pp. 113-155.

notion – at least within continental Europe company law tradition[41] –, that of "company's interest"[42].

Therefore, besides and beyond the necessary clarification of the actual scope and meaning of such relevant terms, the main issue those studying the emerging role of corporate sustainability law cannot disregard becomes whether or not such inherent "purpose" – to be found at the roots of the corporate form[43] – should, or should not exclusively consist in the wealth maximization of the shareholders (*i.e.*, the suppliers of the incorporated firm's equity, often referred to as the company's "residual claimants"[44]), thus ultimately questioning both the role and the scope

[41] For a thorough review of the continental Europe approach to company law, mainly based on the «regulatory policy model», see, G.H. Roth, P. Kindler, *The Spirit of Corporate Law - Core Principles of Corporate Law in Continental Europe*, C.H. Beck-Hart Publishing-Nomos, München-Oxford-Baden Baden 2013.

[42] In addition to the works cited *retro*, *sub* footnotes 35-40, and *infra*, *sub* footnotes 45, 49, and 52, and accompanying text, for a recent and effective explanation of the complexity of these topics, see, *ex multis*, H. Fleischer, *Corporate Purpose: A Management Concept and its Implications for Company Law*, cit., pp. 164-169, 170-182, and 188-189; Id., *Unternehmensinteresse und* intérêt social*: Schlüsselfiguren aktienrechtlichen Denkens in Deutschland und Frankreichand*, «ZGR» 2018, pp. 703-734; Id., *Walther Rathenau: Vom Aktienwesen - Eine geschäftliche Betrachtung (1917)*, in *Juristen Zeitung*, vol. 72.20 (2017), pp. 991-994; U. Tombari, *Corporate Powers and Conflicting Interests*, cit., pp. 27-43; 51-57, and 73-85 (but *passim*); A. Bruce, C. Jeromin, *Corporate Purpose - das Erfolgskonzept der Zukunft: Wie sich mit Haltung Gemeinwohl und Profitabilität verbinden lassen*, Springer-Gabler, Wiesbaden, 2020; P. Montalenti, *L'interesse sociale: una sintesi*, «Rivista delle società», vol. LXIII.2-3 (2018), pp. 303-319; M. Palmieri, *L'interesse sociale: dallo* shareholder value *alla Società Benefit*, «Banca, Impresa, Società», vol. XXXV.2 (2017), pp. 201-237; C. Fois, *L'interesse sociale tra teorie dello sviluppo dell'impresa e teoria del rischio*, in *L'interesse sociale tra valorizzazione del capitale e protezione degli* stakeholders - *In ricordo di Pier Giusto Jaeger*, Giuffrè, Milano 2010, pp. 153-178. In the past, see, in the Italian perspective, T. Ascarelli, *Interesse sociale e interesse comune nel voto*, «Rivista trimestrale di diritto e procedura civile», vol. 1951.4, pp. 1145-1167; Id., *I problemi delle società anonime per azioni*, «Rivista delle società», vol. I.1 (1956), pp. 3-34; Id., *L'interesse sociale dell'art. 2441 cod. civile. La teoria dei diritti individuali e il sistema di vizi nelle deliberazioni assembleari*, in Id., *Problemi giuridici*, Giuffrè, Milano 1959, vol. II, pp. 521-547; A. Mignoli, *L'interesse sociale*, «Rivista delle società», vol. III.4 (1958), pp. 725-763; A. Asquini, *I battelli del Reno*, «Rivista delle società», vol. IV.4-5 (1959), pp. 617-633; P.G. Jaeger, *L'interesse sociale*, Giuffrè, Milano 1964; Id., *L'interesse sociale rivisitato (quarant'anni dopo)*, «Giurisprudenza commerciale», vol. 27.5 (2000), part I, pp. 795-812.

[43] And to be intended, in turn, as a viable business going concern, thereby entailing additional issues about – *inter alia* – the (changing?) "purpose" of an insolvent, or nearly insolvent, business organization: see the contributions by Marek Porzycki and by Eddy Ricciardiello, both in Part II of this book.

[44] See, *e.g.*, B.R. Cheffins, *The Trajectory of (Corporate Law) Scholarship (Inaugural Lecture delivered 14 October 2003)*, Cambridge Univ. Press, Cambridge 2004, pp. 46-47.

to be attributed to the incorporated enterprises' "for-profit" element: a component that, in many jurisdictions – Italy among them – has been traditionally included within the characterizing features of this type of business ventures and without which such kind of organization ought to be qualified differently, *e.g.*, as a foundation or as an association, or as a different form of (business) organization[45].

[45] For example, according to the letter of Article 2247 of the Italian Civil Code (and pursuant to its traditional construction by the majority of Italian legal scholars), business companies (including joint-stock companies and limited liabilities companies) and partnerships (including general partnerships, unlimited business partnerships, and limited business partnerships) both share a general, inherent, "for-profit" purpose (the compelling character or innate element of the Italian business organizations' form, albeit its scope and intensity have been, and are still, disputed by Italian legal scholars): for a recent discussion of this "classic" Italian Business Organizations Law topic, see, *e.g.*, the essays collected by G. Olivieri, F. Vella, G.D. Mosco (Eds.), *Il lucro sostenibile. Obiettivi e ruolo delle imprese tra comunicazione e realtà*, in *Analisi Giuridica dell'Economia*, 2022.1, and by G.D. Mosco, F. Vella, G. Meo (Eds.), *Oltre il profitto - I nuovi rapporti tra impresa e sociale*, «*Analisi Giuridica dell'Economia*», 2018.1. *Ex multis*, see also G. Marasà, *Impresa, Scopo di Lucro ed Economicità*, «Analisi Giuridica dell'Economia», 2014.1, pp. 33-44; M. Porzio, *Allo scopo di dividerne gli utili*, «Giurisprudenza commerciale», vol. 41.4 (2014), part I, pp. 661-668; C. Angelici, *La società per azioni - I. Principi e problemi*, cit., pp. 9-11, 93-99; in the past, see, *ex pluribus*, G. Marasà, *Le "società" senza scopo di lucro*, Giuffrè, Milano 1984, and G. Santini, *Il tramonto dello scopo lucrativo nelle società di capitali*, «Rivista di Diritto Civile», vol. XIX (1973), part I, pp. 151-173: p. 155). In an Anglo-American perspective, see, *e.g.*, L.E. Strine *Jr.*, *Our Continuing Struggle With The Idea That For-Profit Corporations Seek Profit*, «Wake Forest Law Review», vol. 47.1 (2012), pp. 135-172; J.F. Sneirson, *The Sustainable Corporation and Shareholder Profits*, «Wake Forest Law Review», vol. 46.3 (2011), pp. 541-560. See also the authors cited, *sub* footnotes 35-42 and 52. Notably, since 2010, many US states – including Maryland, California, New York, and Delaware – enacted special statutes concerned with the regulation of business organizations pursuing a "public benefit" purpose, that – while not wiping off the traditional "for-profit" aim of the (incorporated) firms opting in such special regime – had the effect of creating a private-ordering sourced responsibility of the directors of the companies incorporated under any of these special statutes, to consider, in their business decisions, the traditional profit-seeking purpose while fostering the company's chartered "common" or "public" "benefit" purpose(s): see, *e.g.*, D. Brakman Reiser, *Benefit Corporations - A Sustainable Form of Organization*, «Wake Forest Law Review», vol. 46.3 (2011), pp. 591-626. Italy adopted, *inter alia*, a "società benefit" statute in December 2015 (effective as of January 2016), affording all legal forms ("types") of Italian business organizations to vest the business objective(s) with a "common benefit purpose": see, *e.g.*, E. Codazzi, *Scopo di lucro e di beneficio comune nel passaggio da società non benefit a società benefit*, «Rivista Orizzonti del diritto commerciale», 2021.3, pp. 1243-1289. For further details and bibliographical references on the Italian "società benefit", see the essay by Marco Speranzin, in Part I of this book. From an economic perspective see, *e.g.*, O. Hart, L. Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, «Journal of Law, Finance, and Accounting», vol.2.2 (2017), pp. 247-275.

Consequently, dealing with the many variances of both the "corporate purpose" and the classic "stakeholder vs. shareholder" debates, not only bears on both, the very nature of the company as a business organization and the nature of its constitutive instruments – thus particularly impinging on the allocation of the incorporated firm's internal roles and respective powers, that is, in essence, on its corporate governance system –, but it also impacts on the nature of the specific traits, the scope, and (side-)effects of company's many external relationships, with respect to both the market(s) where it operates – including, *inter alia*, the supply and distribution markets –, thus making the analysis of ESG-related risks connected to the "value chain" of products and services (as well as their recycling potentials) one of the topics currently under the spotlight of many legislators and, in turn, of legal scholars, economists and circular economy experts worldwide – and particularly with respect to the labour market, the capital and securities markets (the incorporated firms would resort to, from time to time, to find adequate debt and/or equity financing[46]), and their correlative market agents, as well as with regard to the other firm's private and public stakeholders, such as consumers (and their associations), labour unions, local communities, governments, public authorities, antitrust and securities markets agencies, and other regulators generally.

Hence, the corporate purpose and its many reciprocally entangled nuances could be seen – and have indeed been described[47] – as a sort of *jigsaw* where every piece needs to fit in and match with each other: and, of course, the same holds true also whenever one tries to unravel the complexities of any of the ESG issues, since they are heavily impacted and, at the same time, are capable of materially impacting the governance mechanisms of the incorporated firm, due to the central role played by companies with respect to virtually every issue of the triad[48]. Albeit there

[46] On this set of topics, see, in Part I of this book, the contribution by Lucia Picardi; and, in Part II, the contribution by Andrés Portilla.

[47] B. Sjåfjell, *The Role of Business Law in the Jigsaw Puzzle of Sustainability*, cit., pp. 42-44; see also A.R. Palmiter, *Capitalism, Heal Thyself*, cit., pp. 293-294 (who, *inter alia*, points out the «interconnectedness» of the legal problems stemming from the ESG-based approach).

[48] The notion of "double materiality" may be deemed an extension of the key accounting concept of 'materiality' of financial information. Yet, the concept of double materiality takes this notion one step further: it is not just climate-related impacts on the company that can be material, from both, financial and non-financial disclosure perspectives, but also any impacts of a company's structure (including governance postures and financial structures) and/or market operations on the climate and/or any other environmental,

are different views on this aspect, it would then be plausible to argue that corporate sustainability – as characterized as the compound of rules establishing the appropriate ESG "gradient" of business organizations – represents the last frontier of the never-ending discussion about the private or quasi-public nature of the for-profit companies[49].

social, and/or governance, dimension of sustainability (*i.e.*, any of the elements comprised under the ESG label); and it was then adopted as the main parameter to both select and evaluate the data and information to be provided by companies subject to the rules set forth under the Directive (EU) no. 2014/95 of the European Parliament and of the Council of 22 October 2014 (the, "Non-Financial Reporting Directive", or "NFRD"), that amended Directive (EU) no. 2013/34, as regards disclosure of non-financial and diversity information by certain large undertakings and groups – soon to be superseded by the enactment of the so called "Corporate Sustainability Reporting Directive" ("CSRD"). Of course, the "double materiality" concept implies the need to assess the impacts on the ESG factors derived from the interconnections existing among of each the pillars composing the ESG triad. Generally, on the interactions between the "E" factor and corporate governance see, *e.g.*, OECD, *Climate Change and Corporate Governance*, OECD Publishing, Paris 2022. See *amplius sub* fns. 66-67, and in the essay by Francesco Schurr, *infra*, in Part I of this book.

[49] On this highly debated topic, see, *e.g.*, J.E. Parkinson, *Corporate Power and Responsibility - Issues in the Theory of Company Law*, Oxford Univ. Press, Oxford, 1995, pp. 9-10 and 21-25 (but *passim*); R.H. Gordon, *Do Publicly-Traded Corporations Act in the Public Interest?*, «Advances in Economic Analysis & Policy», vol. 3.1 (2003), pp. 1-20; J.W. Cioffi, *Public Law and Private Power: Corporate Governance Reform in the Age of Finance Capitalism*, Cornell Univ. Press, Ithaca (NY) 2010; W.E. Wagner, *Imagining Corporate Sustainability as a Public Good Rather than a Corporate Bad*, «Wake Forest Law Review», vol. 46.3 (2011), pp. 561-590; I. Lee, *The Role of the Public Interest in Corporate Law*, C.A. Hill, B.H. McDonnell (Eds.), *Research Handbook on the Economics of Corporate Law*, Edward Elgar, Chaltenham (UK)-Northampton (MA) 2012, pp. 106-129; G. Serafeim, *The Role of the Corporation in Society: An Alternative View and Opportunities for Future Research* (2013), «Harvard Business School Working Paper Series», no. 14-110, available at <www.ssrn.com/abstract=2270579>; M.T. Moore, *Understanding the Modern Company Through the Lens of Quasi-Public Power*; D. Katelouzou, *Reflections on the Nature of Public Corporation in an Era of Shareholder Activism and Stewardship*, both in B. Choudhury, M. Petrin, (Eds.), *Understanding the Company - Corporate Governance and Theory*, Cambridge University Press, Cambridge 2017, pp. 91-116 and pp. 117-144, respectively; H.-W. Micklitz, *Organizations and Public Goods*, in S. Grundmann, H.-W. Micklitz, M. Renner, *New Private Law Theory - A Pluralist Approach*, Cambridge Univ. Press, Cambridge 2021, pp. 414-433 (esp. pp. 414-415 and 419-420). J. Told, F. Rüffler, *Public Interest and Corporate Law*, A. Frössel, T. Troup, *Public Interest in Insolvency Law*, both in Luboš Tichý, Michael Potacs (Eds.), *Public Interest in Law*, Intersentia, Cambridge-Antwerp-Chicago 2021, pp. 205-226 and pp. 247-270, respectively. See also, considering the public-private dichotomy as superseded, D. Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, «American Political Science Review», vol. 107.1 (2013), pp. 139-158; B. Sjåfjell, *Regulating for Corporate Sustainability: Why the Public-Private Divide Misses the Point*, in B. Choudhury, M. Petrin, (Eds.), *Understanding the Company - Corporate Governance and Theory*, cit., pp. 145-165.

To be sure, offering a solution to any of the foundational questions characterizing virtually every legal system represents a quite challenging endeavour, especially because any possible analysis of such multi-prongs issues would almost inevitably import the adhesion to (and, conceivably, the previous disclosure of) ideological preferences[50] – that is, polity-based choices – which, in turn, would call for an in-depth review and re-interpretation of virtually every material aspect of traditional corporate governance doctrines, as they have been differently rooted and enforced in every legal, social, and economic tradition underpinning each corporate governance regime[51], and thus reaching beyond the traditional province of business organizations law.

Just as it could be argued also with respect to the classic "shareholders vs. stakeholders" debate[52], an exhaustive discussion about the most appropriate purpose of the modern, for-profit companies seems to suffer some of the inherent limits stemming from the relevant role still played by path dependence[53]. And this, in turn, represents an additional level of

[50] See *retro*, the literature cited *sub* footnote 35, and, in addition, G. Ferrarini, *Redefining Corporate Purpose: Sustainability as a Game Changer*, cit., p. 86 (who, in discussing the notion of «corporate purpose», *inter alia* wrote: «[p]ossibly, no other concept of corporate law better reflects the social norms and political ideologies prevalent in each society at a given time»).

[51] In addition to the authors cited *infra*, *sub* footnotes 49, 53, 55, and 56, see also P.A. Gourevitch, J. Shinn, *Political Power and Corporate Control: The New Global Politics of Corporate Governance*, cit., pp. 4-10.

[52] See *retro*, *sub* footnotes 36-42. *Adde* M. Gelter, *Taming on Protecting the Modern Corporation Shareholder? Shareholder-Stakeholder Debates in a Comparative Light*, «New York University Journal of Law and Business», vol. 7.2 (2011), pp. 641-730.

[53] D. Puffert, *Path Dependence*, in *EH.Net Encyclopaedia*, available at: <https://eh.net/encyclopedia/path-dependence/> («[p]ath dependence is the dependence of economic outcomes on the path of previous outcomes, rather than simply on current conditions. In a path dependent process, "history matters" – it has an enduring influence. Choices made on the basis of transitory conditions can persist long after those conditions change. Thus, explanations of the outcomes of path-dependent processes require looking at history, rather than simply at current conditions of technology, preferences, and other factors that determine outcomes»); see also J. Mahoney, D. Schensul, *Historical Context and Path Dependence*, in R. Goodin, C. Tilly (Eds.), *The Oxford Handbook of Contextual Political Analysis*, Oxford Univ. Press, Oxford 2006, pp. 454-471. A foundational analysis of the influence that polity exerts on each jurisdiction's market system and on incorporated firms' internal rules, has been offered by M.J. Roe, *Political Determinants of Corporate Governance - Political Context, Corporate Impact*, Oxford Univ. Press, Oxford-New York, 2003. In addition to the essays collected in J.N. Gordon, M.J. Roe (Eds.), *Convergence and Persistence in Corporate Governance*, Cambridge Univ. Press, Cambridge 2004, see, *e.g.*, R. La Porta, F. Lopez-de-Silanes, A. Shleifer, *The Economic Consequences of Legal Origins*, «Journal of Economic Literature», vol. 46.2 (2008), pp. 285-332; J. Armour, S. Deakin, P. Lele, M.

complexity that adds up to the already challenging task of finding out if, and to what extent, a normative assessment of "corporate sustainability" – what may today be also defined a "ESG viability test" – should and/or could alter and re-shape the incorporated (for-profit) firm's traditional

Siems, *How Do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor, and Worker Protection*, «The American Journal of Comparative Law», vol. 57.3 (2009), pp. 579-629; R. Michaels, *Comparative Law By Numbers? Legal Origins Thesis, Doing Business Reports and the Silence of Traditional Comparative Law*, «American Journal of Comparative Law», vol. 57.4 (2009), pp. 765-795; F.A. Gevurtz, *The Globalization of Corporate Law: The End of History, or a Never-Ending Story?*, «Washington Law Review», vol. 86.3 (2011), pp. 101-147; C.M. Bruner, *Corporate Governance in the Common Law World - The Political Foundations of Shareholder Power*, cit., pp. 13-27; M. Gelter, M.M. Siems, *Language, Legal Origins, and Culture Before the Courts: Cross-Citations Between Supreme Courts in Europe*, «Supreme Court Economic Review», vol. 21.1 (2014), pp. 215-26; D. Cabrelli, M. Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case Based and Quantitative Analysis*, «The American Journal of Comparative Law», vol. 63.1 (2015), pp. 109-153; D.M. Salvioni, F. Gennari, L. Bosetti, *Sustainability and Convergence: The Future of Corporate Governance Systems?*, «Sustainability», vol. 8 (2016), pp. 1203-1227; M. Gelter, *Comparative Corporate Governance: Old and New*, in B. Choudhury, M. Petrin (Eds.), *Understanding the Company - Corporate Governance and Theory*, cit., pp. 37-59; Id., *Accounting and Convergence in Corporate Governance: Doctrinal or Economic Path Dependence?*, in A. Afsharipour, M. Gelter (Eds.), *Comparative Corporate Governance*, Edward Elgar, Cheltenham (UK)-Northampton (MA) 2021, pp. 282-300; Id., *Is Economic Nationalism in Corporate Governance Always a Threat?*, «Ohio State Business Law Journal», vol. 16.1 (2021), pp. 1-36. As to the possible (legitimate) scope, limits, and common pitfalls when engaging in comparative corporate governance research, see, *e.g.*, M. Siems, *Comparative Law*, Cambridge Univ. Press, Cambridge 2022 (3rd edition), pp. 129-130, 196-197 and 311-318 (dealing with idiosyncratic elements and social determinants of local corporate governance systems – *i.e.*, path dependent factors – that typically would limit global convergence); Id., *Convergence in Shareholder Law*, Cambridge Univ. Press, Cambridge, 2008; Id., *Convergence in Corporate Governance: A Leximetric Approach*, «Journal of Corporation Law», vol. 35.4 (2010), p. 729-756; A. Gambaro, R. Sacco, *Sistemi Giuridici Comparati* (4th edition), in *Trattato di diritto comparato* (directed by R. Sacco), Utet Giuridica-Wolters Kluwer Italia, Milano 2018, pp. 3-6 and pp. 10-16 (specifically on path dependency), pp. 19-25 (on legal systems' and single legal institutions' divergencies), and pp. 26-30 (on legal systems' convergences). Incidentally, *path dependency* may also concur in triggering the correlated phenomenon of "*regulatory competition*", on the assumption that the aimed-for global uniformity in the legal treatment of any given aspect of any given society – including the corporate governance relationships – could be eventually reached by selecting and extending the legal rules, principles, and/or standards already enacted by the "prevailing" jurisdiction, *i.e.*, by the jurisdiction that – due to a combination of economic, social, and political factors – will result the most influential in imposing its own rules, principles and standards to the other (competing) jurisdictions: see, again, M. Siems, *Comparative Law*3, cit., pp. and 309-311 and the Authors cited *infra*, *sub* footnote 56.

design, that is, both its inherent profit-maximizing function, and the latter's usual complement, *i.e.,* its typical cost-externalizing structure.

Indeed, the long standing, transnational diffusion of incorporated for-profit firms' model, the many similarities to be found among their respective main hallmarks[54], as well as the ongoing (voluntary and, to some extent, also regulatory) corporate governance convergence trends, cannot obliterate those differences still existing among company law principles, rules and standards, as each of these are formally enacted and/or materially construed in different jurisdictions – each of them in turn carrying idiosyncratic terms and conditions of use, both at organizational (*i.e.*, at the internal governance level), and *vis-à-vis* the market posture of companies[55].

Even more significantly, the interaction between the undisputable supranational dimension of the corporate sustainability phenomenon, on one hand, and the existing tensions among "convergence and persistence" trends in corporate governance approaches, on the other, appears capable to further exacerbate regulatory competition and the traditional public law-private law divide, under several respects[56].

[54] For an account of the intrinsic (common) attributes of the modern companies, see *sub* fn. 27.

[55] In addition to the works cited in the footnote 52, 53, and 56, see J.N. Gordon, *Convergence and Persistence in Corporate Law and Governance*, in J.N. Gordon, W.-G. Ringe (Eds.), *The Oxford Handbook of Corporate Law and Governance*, cit., pp. 28-55; K. Pistor, Y. Keinan, J. Kleinheisterkamp, M.D. West, *The Evolution of Corporate Law: A Cross-Country Comparison*, «Univ. of Pennsylvania Journal of International Economic Law», vol. 23.4 (2002), pp. 791-871; R.J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, «American Journal of Comparative Law», vol. 49.2 (2001), pp. 329-357; T. Murtha, S. Lenway, *Country Capabilities and the Strategic State: How National Political Institutions Affect Multinational Corporations' Strategies*, «Strategic Management Journal», vol. 15 (Supplement S2) (1994), pp. 113-129. See, also, on a different, albeit consequential perspective, L. Enriques, M. Gatti, *The Uneasy Case for Top-Down Corporate Law Harmonization in the European Union*, «Univ. of Pennsylvania Journal of International Economic Law», vol. 27.4 (2006) pp. 939-998; M. Gelter, *EU Company Law Harmonization between Convergence and Varieties of Capitalism*, in H. Wells (Ed.), *Research Handbook on the History of Corporation and Company Law*, Edward Elgar Publishing, Cheltenham (UK) - Northampton (MA), 2018, pp. 323-352.

[56] See *retro*, the Authors cited *sub* fn. 49 and the accompanying text. On the regulatory competition phenomenon, see, *e.g.*, M. Gelter, M. Siems, *Letting Companies Choose Between Board Models: An Empirical Analysis of Country Variations*, «Univ. Pennsylvania Journal of International Law», vol. 43.1 (2021), pp. 137-186; M. Gelter, *Centros and Defensive Regulatory Competition: Some Thoughts and a Glimpse at the Data*, «European Business Organization Law Review», vol. 20.3 (2019), pp. 467-492; Id., *The structure of regulatory competition in European corporate law*, «Journal of Corporation Law Studies»,

In fact, as it would recur in any comparative legal setting[57], fundamental business organizations notions – such as "corporate purpose" –

vol 5 (2005), pp. 247-284; S.M. Bainbridge, I. Anabtawi, Sung Hui Kim, J. Park, *Can Delaware Be Dethroned? Evaluating Delaware's Dominance of Corporate Law*, Cambridge Univ. Press, Cambridge (UK) - New York 2018. F. Gerner-Beuerle, F. Mucciarelli, E. Schuster, M. Siems, *Why do businesses incorporate in other EU Member States? An empirical analysis of the role of conflict of laws rules*, «International Review of Law and Economics», vol. 56.1 (2018), pp. 14-27; A. Bartolacelli, *Almost Capital-Less Companies in Europe: Trends, Variations, Competition*, «European Company and Financial Law Review», vol. 17.1 (2017), pp. 187-233; A. Zorzi, *A European Nevada? Bad Enforcement as an Edge in State Competition for Incorporations*, «European Business Organization Law Review», vol. 18.2 (2017), pp. 251-272; W.-G. Ringe, *Corporate Mobility in the European Union - A Flash in the Pan? An Empirical Study on the Success of Lawmaking and Regulatory Competition*, «European Company Financial Law Review», vol. 10.2 (2013), pp. 230-267; L. Enriques, M. Gelter, *Regulatory Competition in European Company Law and Creditor Protection*, «European Business Organization Law Review»», vol. 7.1 (2006), pp. 417-453; M. Ventoruzzo, *"Cost-Based" and "Rules-Based" Regulatory Competition: Markets for Corporate Charters in the US and the EU*, «New York Univ. Journal of Law and Business», vol. 3.1 (2006), pp. 91-153; H. Birkmose, *A "Race to the Bottom" in the EU?*, «Maastricht Journal of European and Comparative Law», vol. 13.1 (2006), pp. 35-80; M. Gelter, *The Structure of Regulatory Competition in European Corporate Law*, «Journal of Corporate Law Studies», vol. 5.2 (2005), pp. 247-284; L. Enriques, *EC Company Law and the Fears of a European Delaware*, «European Business Law Review», vol. 15.6 (2004), pp. 1259-1274; M.J. Roe *Delaware's Competition*, «Harvard Law Review», vol. 117.2 (2003), pp. 588-646; M Kahan, E. Kamar, *The Myth of State Competition in Corporate Law*, «Stanford Law Review», vol. 55.3 (2002), pp. 679-749; R. Romano, *The Advantage of Competitive Federalism for Securities Regulation*, The AEI Press, Washington D.C. 2002, pp. 63-111. In the past see, *e.g.*, Ead., *The Genius of American Corporate Law*, AEI Press, Washington 1993; Ead., *State Competition for Close Corporation Charters: A Commentary*, «Washington Univ. Law Quarterly», vol. 70.2 (1992), pp. 409-416; L.A. Bebchuk *Federalism and the corporation: the desirable limits on state competition in corporate law*, «Harvard Law Review», vol. 105.7 (1992), pp. 1442-1510; W.L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware* «Yale Law Journal», vol. 83.4 (1974), pp. 663-705; R.K. Winter, *Jr.*, *The "Race to the Top" Revisited: A Comment on Eisenberg*, «Columbia Law Review», vol. 89.7 (1989), pp. 1526-1529; Id., *State Law, Shareholder Protection, and the Theory of the Corporation*, «Journal of Legal Studies», vol. 6 (1977), pp. 251-292.

[57] In addition to the works quoted *retro*, *sub* footnotes 52, 53, and 55, see the essays collected by A. Afsharipour, M. Gelter (Eds.), *Comparative Corporate Governance*, cit.; D. Katelouzou, P. Zumbansen, *Transnational Corporate Governance: The State of the Art and Twenty-First-Century Challenges*, in P. Zumbansen (Ed.), *The Oxford Handbook of Transnational Law*, OUP, Oxford-New York 2021, pp. 615-646. On (the perils of) *legal transplants*, generally, see, comprehensively, M. Siems, *Comparative Law*[3], cit., pp. 196-197 and 291-304; Id., *Malicious Legal Transplants*, «Legal Studies», vol. 38 (2018), p. 103-119; M. Solinas, *The Nature of Legal Transplants - Inspirations from Postcolonial Scholarship*, «NZACL Yearbook», vol. 22 (2016), pp. 179-216; H. Spamann *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, «Brigham Young University Law Review, 2009.6 (2009), pp. 1813-1877.

are often crafted, studied, and/or deployed at supra-national level. But – on the other hand – when they need to be embedded in more discrete legal concepts and, then, to be plugged into an existing system of legal principles and rules, then they tend to be understood and analyzed with the "lenses" worn by each researcher: and thus according to her specific pre-comprehension sequence, which in turn is often influenced, at least to some extent, by some idiosyncratic elements, *i.e.,* the underlying societal values rooted both in her respective personal background, as well in the legal traditions and culture that shaped each observer's view.

To be sure, the compound of, and the interaction among these exogenous factors are generally deemed capable of exerting some non-trivial effects on the relevance, method, scope, and meaning(s) of the purported legal and economic analysis of the issue at stake, in addition, of course to its outcome.

From a different (albeit correlated) perspective, whereas it has almost become a common place recognizing that the globalization of the markets is now matched by the supranational dimension of the several, intertwined issues entailed by "corporate sustainability" (and especially the environmental and social problems), still one may quite accurately argue that – as of today – international legal instruments cannot suffice to create a set of sufficiently uniform and compelling measures limiting the "enterprise freedom" of incorporated firms – and especially that of MNEs – when operating both, within domestic boundaries, and across borders (often worldwide). This is mainly due to the legal scope of rights and obligations included in each treaty, which typically bind States *vis-à-vis* other States and/or international organizations, whereas only indirectly their provisions could regulate (and thus possibly restrict and police) behaviours of private business ventures, at least until the treaty States – each at its own pace and within the province of its own sovereign powers – will implement those rights and obligations as part of their respective national laws.

Therefore, once sustainability goals have been included in international legal instruments, namely treaties, primarily addressed to sovereign states, and further considering that virtually all sustainability-related issues do impact, not only the lives of all human, other animals and plants, wherever located, but also companies (as legal persons), their managements, and their stakeholders, then one could reasonably expect the consequent enactment – at national and/or regional level – of some regulatory measures, even beyond (and sometimes even in spite of) the

"spontaneous" adherence to some sector-specific CSR guidelines and/or voluntary creation of ESG risk mitigation programs at firm's (or even at MNE's) level.

To be sure, especially on the East side of the Atlantic Ocean there is an increasing consensus – notwithstanding the almost inevitable issues concerned with path dependence and consequential regulatory competition trends – that legislative interventions on virtually every aspect of the ESG-related problems would (and should) be necessary, and indeed undeferrable, in order to police the markets and to make companies' (and/or corporate groups') structures and supply chains "sustainable"[58].

This appears especially true *vis-à-vis* EU "undertakings"[59], thereby prospectively limiting what – especially in Continental Europe coun-

[58] B. Sjåfjell, *Why Law Matters: Corporate Social Irresponsibility and the Futility of Voluntary Climate Change Mitigation*, «European Company Law», vol. 8.2-3 (2011), pp. 56-64; Ead., *Regulating Companies as if the World Matters: Reflections From the Ongoing Sustainable Companies Project*, «Wake Forest Law Review» vol. 47.1 (2012), 113-134: 117 («What then is the role of companies in this bigger picture? Surely it is not companies, but policymakers and lawmakers, our parliaments and governments, who should do what is necessary to lead us into sustainable development. The responsibility of the state is incontestable. However, a part of that responsibility is considering the role of companies. The great significance of the function of companies within the global economy and the vast impact that the operations of companies today have, on an aggregated level, on society in general and on the biosphere and the atmosphere, means that a critical analysis of the purpose of companies and the regulatory framework within which they operate is crucial to a deeper understanding of the correlation between society and sustainable development. We cannot hope to achieve overarching societal goals without companies contributing to them»).

[59] The term "undertaking", referred to any form of economic activity operating in the market, recurs in both EU legislation and in the EU Court of Justice ("CJEU") decisions: see, *e.g.*, CJEU, 19 February 2002, C-309-99, *Wouters* (available at: www.curia.eu), paragraph 46, stating that: «[a]ccording to settled case-law, in the field of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed» (and quoting, Case C-41/90, *Höfner and Elser* [1991] ECR I-1979, paragraph 21; Case C-244/94, *Fédération française des sociétés d'assurances and Others* [1995] ECR I-4013, paragraph 14; and Case C-55/96 *Job Centre* [1997] ECR I-7119, *Job Centre II*, paragraph 21)), and paragraph 47, according to which «[i]t is also settled case-law that any activity consisting of offering goods and services on a given market is an economic activity» (and quoting Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 Commission v Italy [1998] ECR I-3851, *CNSD*, paragraph 36). More recently, see also CJEU, decision of 6 October 2021, C-882/19, *Sumal*, available in www.curia.eu, where, under paragraph 39, the Court, inter alia, reminded that: «[...] the concept of 'undertaking', within the meaning of Article 101 TFEU, [...] constitutes an autonomous concept of EU law [...]» (quoting judgment of 14 March 2019, *Skanska Industrial Solutions et al.*, C724/17, EU:C:2019:204, paragraph 47) and paragraph 40, where it added that: «[i]n the same way, it follows from Directive 2014/104/EU of

tries – is often referred to as the "enterprise freedom" or "free enterprise" principle, which, as such, is typically recognized and protected at constitutional level, both domestically and by Article 16 of the EU Charter of Fundamental Rights[60].

Indeed, whereas the US lawmakers (both at federal and state levels) currently seem more cautious about the possibility to impose CSR, or ESG responsibilities on private businesses organizations[61], the European legislator, since 2011[62], has been gradually adopting what today appears a

the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1), and in particular from Article 2(2) thereof, that the same legislature defined the 'infringer' upon whom it is incumbent, in accordance with that directive, to provide compensation for loss caused by the infringements of competition law attributable to that 'infringer', as being 'an undertaking or association of undertakings which has committed an infringement of competition law'».

[60] Both Articles 16 of the EU Charter of Fundamental Rights and Article 41, para. 1, of the Italian Constitution, do expressly acknowledge and guarantee private "enterprise freedom" (both to individuals and to any organization), albeit within some limits (see, *e.g.*, Article 41, paras. 2 and 3, Italian Constitution). Notably, according to Article 6 of the TEU, the EU Charter of Fundamental Rights enjoys the same hierarchical dignity (and thus the same level of binding strength) as the other European Lisbon treaties, namely the TEU (already mentioned) and the Treaty on the Functioning of the European Union (TFEU). An excellent English commentary (and translation of) the Italian Constitution can be found in M. Cartabia, N. Lupo, *The Italian Constitution - A Contextual Analysis*, Hart Publishing, Oxford-New York-Dublin, 2022. See also *infra*, *sub* footnote 90.

[61] In 2010, the U.S. Securities and Exchange Commission ("SEC"), issued a "Guidance on Climate Change Disclosure". On the 21st of March 2022, the SEC released a «Proposed Rule» on «Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices», available at: <https://www.sec.gov/files/rules/proposed/2022/33-11068.pdf>. On the evolution of the ESG-related regulatory actions under the U.S. laws of corporations and securities regulation, see, *e.g.*, A.R. Palmiter, *Climate Change Disclosure: A Failed SEC Mandate* (2015), available on «ssrn.com»; Id., *Sustainable Corporations*, cit., pp. 349-354 and 364-370. See also, C.A. Williams, J.E. Fisch, *Petition for SEC Rulemaking on Environmental, Social, and Governance Information Disclosure* (Oct. 1, 2018), available at: <https:// www.sec.gov/rules/petitions/2018/petn4-730.pdf>; D.M. Nagy, C.A. Williams, *ESG and Climate Change Blind Spots. Turning the Corner on SEC Disclosure*, «Texas Law Review», vol. 99.7 (2021), pp. 1453-1485; J.C. Coffee, *Jr.*, *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk*, «Columbia Law Review», vol. 2021.2 (2021), pp. 602-650. In the past, see also, C.A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, «Harvard Law Review», vol. 112.6 (1999), pp. 1197-1311.

[62] EU Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A renewed EU strategy 2011-14 for Corporate Social Responsibility* (COM (2011) 681 final); EU

rather "proactive" regulatory attitude, whose effects on the EU "internal market" have already been tested by the implementation, in 2014, of the Non-Financial Reporting Directive (NFRD), as an amendment of the 2013 corporate accounting directive[63], and the Sustainable Finance Disclosure Regulation (SFRD), passed in 2019[64]. Besides some ESG-related and corporate sustainability non-binding documents issued by the European Commission and the European Parliament – such as, *e.g.*, the "European Green Deal"[65] – the regulatory actions by the EU institutions will very soon revamp by means of the formal enactment of the new Corporate Sustainability Reporting Directive (the CSRD)[66] – which will substantially amend the NFRD (by setting forth, *inter alia*, additional disclosure rules and some ESG assessment benchmarks, according to the "double

Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions Action Plan: Financing Sustainable Growth*, of 8 March 2018 (COM (2018) 97 final). See also: R. Redondo Alamillos, F. de Mariz, *How Can European Regulation on ESG Impact Business Globally?*, «Journal of Risk and Financial Management», vol. 15.7 (2022), 291.

[63] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014, amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

[64] The SFRD (Regulation (EU) no. 2019/2088) imposes to financial markets' agents (including institutional investors) and financial advisors to disclose both the climate risk exposures and the degree of investment sustainability consistently with the "Taxonomy Regulation"; in turn, the Taxonomy Regulation (Regulation (EU) no. 2020/852) introduces a legislative system for defining sustainable economic activities with reference to six main goals, (namely: climate change mitigation, including the mitigation of GHGs according to the 2015 Paris Agreement; climate change adaptation; sustainable use of water resources; transition to circular economy; pollution prevention; protection of biodiversity). See *retro*, *sub* fn. 15.

[65] EU Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Green Deal* (COM (2019) 640 Final); Ead., *Delivering the European Green Deal On the path to a climate-neutral Europe by 2050* (2022), available at: <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_en>; see also, Ead., *Action Plan: Financing Sustainable Growth* (COM (2018) 97 final).

[66] EU 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*, of 21 April 2021 (COM (2021) 189). The final text of the CSRD was finally approved on the 28th of November 2022 by the European Council, it is scheduled to be signed by the President of the European Parliament on the 14th of December 2022, and it is expected to be published in the EU Official Journal by the end of December 2022.

materiality principle"[67]) – and in the near future, by approval of the last February proposal for a corporate sustainability due diligence directive (CSDDD)[68].

[67] The "double materiality" concept was set forth in the EU Commission's *Communication containing the Commission's Guidelines on Non-financial Reporting: Supplement on Reporting Climate-related Information*, of 20 June 2019 (C/2019/4490), which, in turn, built on the previous of the EU Commission's, *Communication containing the Commission's Guidelines on non-financial reporting (methodology for reporting non-financial information)*, of 5 July 2017 (C/2017/4234). At page 6, the EU Commission's 2019 Guidelines encouraged undertaking falling within the scope of the NFRD, to assess materiality of non-financial information (mainly for disclosure purposes) from two perspectives: (a) «the extent necessary for an understanding of the company's development, performance and position» and «in the broad sense of affecting the value of the company»; and (b) the environmental and social impact of the company's activities on a broad range of stakeholders. Of course, the double materiality concept implies the need to assess the impacts on the ESG factors derived from the interconnectivity of the two aforementioned aspects. As pointed out *retro*, *sub* fn. 48, the notion of "double materiality" may be deemed an extension of the key accounting concept of "materiality" of financial information. Yet, the concept of double materiality takes this notion one step further and it seems to have the ability to become a very important heuristic tool to detect, to assess, and to report – on an uniform basis – ESG-based impacts data and/or risks. It appears to constitute the backbone of the innovations set forth in the final draft and soon to be adopted CSRD: see, *e.g.*, J. Baumüller, K. Sopp, *Double Materiality and the Shift from Non-Financial to European Sustainability Reporting: Review, Outlook and Implications*, «JAAR», vol. 23.1 (2022), pp. 8-28; S. Jørgensen, A. Mjøs, L.J. Tynes Pedersen, *Sustainability Reporting and Approaches to Materiality: Tensions and Potential Resolutions*, «Sustainability Accounting, Management and Policy Journal», vol. 13.2 (2022), pp. 341-361>; A.W. Ng, S.M. Yorke, J. Nathwani, *Enforcing Double Materiality in Global Sustainability Reporting for Developing Economies: Reflection on Ghana's Oil Exploration and Mining Sectors*, «*Sustainability*», vol. 14.16 (2022), 9988; C.A. Adams, A. Alhamood, X. He, J. Tian, L. Wang, Y. Wang, *The Double-Materiality Concept - Application And Issues* (GRI invited contribution), published by the Global Reporting Initiative, 2021, available at: <https://durham-repository.worktribe.com/preview/1634374/33139.pdf; A. Calabrese, R. Costa, N. Levialdi Ghiron, T. Menichini, *Materiality Analysis in Sustainability Reporting: A Method for Making it Work in Practice*, «European Journal of Sustainable Development», vol. 6.3 (2017), pp. 439-447.

[68] EU Commission, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, of 23 February 2022 (COM (2022) 71). The CSDDD Proposal can be found at: <https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2022)71&lang=en>. On the CSDDD background, see, *e.g.*, European Commission: Directorate-General for Justice and Consumers, *Study on directors' duties and sustainable corporate governance - Final report*, Publications Office, July 2020, available at: <https://data.europa.eu/doi/10.2838/472901>; M.J. Roe, H. Spamann, J. Fried, C. Wang, *The European Commission's Sustainable Corporate Governance Report: A Critique*, «Harvard Business School Working Paper Series», No. 21-056 (Oct. 14, 2020), available at: <https://www.hbs.edu/ris/Publication%20 Files/21-056_51410b50-5488-477a-9aa3-df8f81138e53.pdf>; European Commission: Di-

Therefore, albeit some material divergencies, inevitably, still persist, both on substantive issues – such as the already mentioned problem of identifying (possibly on a communal global base) the appropriate, ESG compatible, "corporate purpose" of the incorporated (for profit) firms – and on the choice of the most effective regulatory approach – here, a clear example may be represented by the current activism of the European legislators with respect to ESG-related business matters[69], as compared

rectorate-General for Justice and Consumers, F. Torres-Cortés, C. Salinier, H. Deringer, C. Bright, *et alii*, *Study on Due Diligence Requirements through the Supply Chain - Final Report*, Publications Office, January 2020, available at: <https://data.europa.eu/doi/10.2838/39830>; J.G. Ruggie, *European Commission Initiative on Mandatory Human Rights Due Diligence and Directors' Duties*, (February, 2021), «Harvard J.F. Kenney School of Government Paper Series», available at: <https://policycommons.net/artifacts/10916491/european-commission-initiative-on-mandatory-human-rights-due-diligence-and-directors-duties/11795160/; C. Macchi, C. Bright, *Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation*, in M. Buscemi, N. Lazzerini, L. Magi, D. Russo (Eds.), *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law*, Brill-Nijhoff, Leiden 2020, pp. 218-247. On the EU Parliament Corporate Sustainability Due Diligence draft directive, see, *e.g.*, EU Commission, *Questions and Answers: Proposal for a Directive on corporate sustainability due diligence* (23 February 2022), available on: <https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_1146>; E. Wymeersch, G. Ferrarini, K. Hopt, P. Davies, R. Skog, A. Recalde, M. Winner, S. Emmenegger, A. Opalski, A. Pietrancosta, M. Roth, M. Schouten, *European Company Law Experts Group - The European Parliament's Draft Directive on Corporate Due Diligence and Corporate Accountability*, «Rivista delle società», vol. LXVI.2-3 (2021), pp. 275-296; L. Enriques, *The European Parliament Draft Directive on Corporate Due Diligence and Accountability: Stakeholder-Oriented Governance on Steroids*, *ivi*, pp. 319-324; M. Libertini, *Sulla proposta di Direttiva UE su "Doveri di diligenza e responsabilità delle imprese"*, *ivi*, pp. 325-335; P. Marchetti, *Il bicchiere mezzo pieno*, *ivi*, pp. 336-348; F.M. Mucciarelli, *Ricomporre il nesso spezzato: giurisdizione e legge applicabile alle imprese multinazionali*, *ivi.*, pp. 360-364; G. Strampelli, *La strategia dell'Unione europea per il capitalismo sostenibile: l'oscillazione del pendolo tra amministratori, soci e* stakeholders, *ivi*, pp. 365-374; U. Tombari, *La Proposta di Direttiva sulla* Corporate Due Diligence *e sulla* Corporate Accountability*: prove (incerte) di un "capitalismo sostenibile"*, *ivi*, pp. 375-379; M. Ventoruzzo, *Note minime sulla responsabilità civile nel progetto di direttiva* Due Diligence, *ivi*, pp. 380-386. On the recent EU Commission's proposal, see., *e.g.* G. Ferrarini, *Sustainable Governance and Corporate Due Diligence: The Shifting Balance Between Soft Law and Hard Law*, in P. Câmara, F. Morais (Eds.), *The Palgrave Handbook of ESG and Corporate Governance*, Palgrave-Macmillan-Springer, cit., pp. 41-57; C. Patz, *The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment*, in *Business and Human Rights Journal*, vol. 7.2 (2022), pp. 291-297; E. Barcellona, Shareholderism versus Stakeholderism - *La società per azioni contemporanea dinanzi al profitto*, cit., pp. 171-200; G.D. Mosco, R. Felicetti, *Prime riflessioni sulla proposta di direttiva UE in materia di* Corporate Sustainability Due Diligence, in *AGE, Analisi Giuridica dell'Economia*, 2022.1, pp. 185-211.

[69] L Mélon, *Shareholder Primacy and Global Business: Re-clothing the EU Corporate Law*,

with the more prudent approaches of their US (state and federal) counterparts – the rapidly emerging research and teaching focus on "corporate sustainability"[70], together with the (possibly unintended) harmonization effect induced by the common reactions to negative business externalities spilling-over from localized ESG issues[71], could leverage the ongoing global convergence trends concerned both, with incorporated firms' business operations (that is, their respective market) standards and rules, and with their respective corporate governance models – these two aspects, of course, being intimately entangled together.

While "butterfly effects" import the well-known ability to obliterate the geographical and/or the geo-political distance that usually is to be found among all those environmental disasters, social disparities, and ineffective (public and private) governance choices that are taking place at different planetary latitudes, they may also frustrate – once again – the integrity and the scope of each state's sovereign legislative prerogatives.

This, in turn, may aliment the risks of both, unbalanced regulatory frameworks in each of the complex ESG spheres at domestic level, with the consequent increase of regulatory arbitrages and forum shopping practices; and, correlatively, a possible "race to the bottom" trend, that could be triggered by states' expectations to reap off some competitive

cit., chapter 4. At Member State level, see, *e.g.*, the German *Lieferkettensorgfaltspflichtengesetz* ("LkSG"), the so-called *Supply Chain Due Diligence Act*, enacted by the German Bundestag on June 11, 2021; the LkSG has been published in the German Federal Law Gazette on July 22, 2021 (and it will come into force on the 1st of January, 2023). The Official German text of the LkSG is available at: <https://www.bgbl.de/xaver/bgbl/start.xav#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl121s2959.pdf%27%5D__1733681620742>. See H. Fleischer, *Grundstrukturen der lieferkettenrechtlichen Sorgfaltspflichten,* in *CCZ - Corporate Compliance Zeitschrift*, 2022, pp. 205-222; P. Kindler, *I gruppi di società nella nuova legge tedesca in materia di* due diligence *sulle catene di approvvigionamento (*Lieferkettensorgfaltsplichtensgesetz*)*, in M. Callegari, A. Cerrato, E. Desana (Eds.), Governance *e mercati – Studi in onore di Paolo Montalenti*, Giappichelli, Torino, 2022, vol. II, pp. 1605-1616; on the French *Loi PACTE*, see *retro*, fn. 39.

[70] Many examples of monograph studies, collection of essays have been already quoted throughout this introduction, such A.R. Palmiter, *Sustainable Corporations*, cit.; B. Sjåfjell, C.M. Bruner (Eds.), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, cit.; P. Câmara, F. Morais (Eds.), *The Palgrave Handbook of ESG and Corporate Governance*, cit. In addition, see, *e.g.*,: P. Yeoh, *Environmental, Social and Governance Laws, Regulations and Practices in the Digital Era*, Kluwer Law Int'l, Alphen aan den Rijn 2022; C. Liao (Ed.), *Corporate Law and Sustainability from the Next Generation of Lawyers*, McGill Queens Univ. Press, Montréal, 2022; V. Mauerhofer, D. Rupo, L. Tarquinio (Eds.), *Sustainability and Law - General and Specific Aspects*, Springer Nature, Cham, 2020.

[71] See *retro*, *sub* fn. 25.

advantages over other states by refusing to enact, or by enacting more lenient ESG rules and/or more relaxed standards at firms' organizational level, as well as at market and transactional levels.

Moreover, the current absence of generally (*i.e.*, worldwide) accepted business sustainability assessment and reporting standards[72], that could be uniformly applied in each relevant market/industry sector, while receiving validation and credit on a global scale – that is, in every jurisdiction – still constitute a sort of "alibi" and/or one of the present major disincentives to the voluntary pursuance of ESG-related goals by private businesses in the international arena, because of the difficulties firms may face, both in learning about their sector specific applicable ESG assessment criteria, requirements, timing, and reporting guidelines, and in having their genuine ESG compliance efforts recognized also – and legitimately – for reputational purposes.

Ultimately, the lack of common ESG assessment benchmarks and reporting methods may result in weakening governmental ESG policy actions, since any of such regulatory standards, together with those correlative monitoring and enforcement activities, would not be grounded on globally accepted measurement standards that could be evenly imposed and policed by public authorities, without incurring the risk of creating a competitive disadvantage to the business organizations located or other-

[72] R.Y.J. Siew, *A Review of Corporate Sustainability Reporting Tools (SRTs)*, «*Journal of Environmental Management*», vol. 164 (2015), pp. 180-195; Z. Wang, T.S. Hsieh, J. Sarkis, *CSR Performance and the Readability of CSR Reports: Too Good to be True?*, «Corporate Social Responsibility and Environmental Management», vol. 25.1 (2018), pp. 66-79: M. Coronato, A. D'Orazio, *Il principio di sostenibilità nelle pratiche di impresa: tipologia e diffusione delle misure di sostenibilità nel quadro Italiano*, in F. Massa (Ed.), *Sostenibilità - Profili giuridici, economici e manageriali delle PMI italiane*, cit., pp. 1-34: pp. 6-11; F. Berg, J.F. Koelbel, R. Rigobon, *Aggregate confusion: The Divergence of ESG Ratings* MIT Sloan School of Management, Cambridge, (MA) 2019, pp. 1-42; J. Howard-Grenville, *ESG Impact Is Hard to Measure - But It's Not Impossible*, «Harvard Business Law Review» (22 January, 2021), available at: <https://hbr.org/2021/01/esg-impact-is-hard-to-measure-but-its-not-impossible>; D. Daugaard, A. Ding, *Global Drivers for ESG Performance: The Body of Knowledge*, «sustainability», vol. 14.2 (2022) 2322; A.R. Keeley, A.J. Chapman, K. Yoshida, J, Xie, J. Imbulana, S. Takeda, S. Managi, *ESG Metrics and Social Equity: Investigating Commensurability*, «Frontiers in Sustainability», vol. 3 (21 Sept. 2022), 920955; A.R. Palmiter, *Sustainable Corporations*, cit., pp. 355-363; E. Rouen, K. Sachdeva, A. Yoon, *The Evolution of ESG Reports and the Role of Voluntary Standards* (Oct. 2022), «Harvard Business School Working Paper Series», no 23-024, available at: <https://www.hbs.edu/ris/Publication%20Files/23-024_5d9ec300-5c37-4cac-9edb-bcf59650ceb4.pdf>; L. Dal Fabbro, *ESG - La Misurazione della Sostenibilità*, Rubbettino, Soveria Mannelli 2022. See also *retro*, *sub* footnotes 48 and 66-67.

wise operating in a given jurisdiction and more generally some room for regulatory arbitrages.

On one hand, the absence of generally accepted ESG data gathering, assessment, and reporting standards and principles increases the risks of selective disclosure, greenwashing, and window-dressing practices by those who are only seeking reputational (*i.e.*, competitive) advantages, without really engaging in any meaningful (voluntary/market driven and/or governmental) ESG-compliance programs[73]. On the other hand, discrepancies in the enactment of ESG reporting and/or compliance obligations may alter competition among businesses operating in different jurisdictions and/or among businesses with different organizational structures that would entail a different arrangements of firms' respective services and/or products supply chains[74].

Furthermore, in the light of a globalized economy and a virtually frontierless flows of capitals, the lack of a well-established, global, reliable, standardized, playing field in ESG compliance responsibilities is expected to increase costs of doing business for those firms burdened by specific duties (and/or market-originated best practice) to periodically engage in ESG compliance-related activities (e.g., the oil and mineral extraction businesses, the clothing and fashion business, etc.).

And a correlative, substantial increase in corporate compliance costs may end up representing a disincentive to reach a full-fledge ESG sustainability for business organizations, especially for small and medium-sized enterprises ("SMEs"), which often have to compete with bigger undertakings, more apt to absorb and/or to pass-on to clients the increases of their respective operating costs attributable to firms' sustainability compliance programs, consequent sustainability-related contractual obligations and/or legal rules.

Yet, SMEs may be faced with unilateral contractual termination threats by larger businesses which happens to be placed in the same "value chain", if ESG compliance programs were not satisfactorily im-

[73] G. Michelon, *Sustainability Disclosure and Reputation: A Comparative Study,* «Corporate Reputation Review», vol. 14.2 (2011), pp. 79-96; M.A. Cherry, J.F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing after the BP Oil Disaster*, «Tulane Law Review», vol. 85.4 (2011), pp. 983-1038; G. Catello Landi, *Sostenibilità e Rischio d'Impresa - Evidenze e Criticità dei* Rating ESG, Cedam-Wolters Kluwer, Milano 2020; F. Bertelli, *Le dichiarazioni di sostenibilità nella fornitura dei beni di consumo*, Giappichelli, Torino 2022.

[74] V. Ulfbeck, A. Andhow, K. Mitkidis (Eds.), *Law and Supply Chain Management - Contract and Tort Interplay and Overlap*, Routledge, London-New York 2019.

plemented, thereby creating a negative loop whereby the SMEs could be forced to face the unfortunate alternative of financial distress (and/or insolvency), either because of the termination effects of business relationships with important business clients, or because of the ...unsustainable costs derived from ESG risk management and compliance terms.

Moreover, the shortcomings stemming from the lack of a ESG regulatory level playing field – which may also result in an insufficient gradient of "legal certainty"[75] – could actually be regarded also as a relevant instance among public governance issues comprised within the "G" set of the ESG risk factors triad: in turn, the resulting regulatory loopholes could directly determine private governance choices by companies (especially MNEs), thereby triggering additional opportunistic behaviours possibly affecting an array of additional matters relating to the triad's other two components, "E[nvironmental]" and "S[ocial]" and detrimentally impacting the overall competitivity of SMEs.

Therefore, as the interdisciplinary approach offered by these Chronicles will attempt to demonstrate, a level playing field of, *inter alia*, sustainable corporate, bankruptcy, securities, banking, and financial laws rules – in addition to adequate contract, tort, environmental, social security and labour law provisions – seems to constitute one of the necessary pre-conditions in order to preserve free and fair trade and to ensure innovation incentives in a global, pro-competitive regulatory environment.

Likewise, an effective and integrated set of specific "white collar crimes", relating to the peculiar ESG risks, should also concur in ensuring that compliance with corporate sustainability emerging standards and rules will also be adequately taken into account in planning and adopting managerial decisions.

3. A possible research agenda for future research on legal and policy issues concerned with "corporate sustainability"

In the light of the foregoing introductory notes, the last task of this introduction shall consist in the attempt to offer the reader a possible checklist of some of the problems emerging throughout each part of the Chronicles gathered in this book, in order to (hopefully) contribute in

[75] M. Fenwick, M. Siems, S. Wrbka (Eds.), *The Shifting Meaning of Legal Certainty in Comparative and Transnational Law*, Bloomsbury-Hart Publishing, Oxford-London-Portland (OR) 2017.

setting the stage for a viable (albeit still general) legal framework that might be useful to engage in further research regarding the emerging "law of corporate sustainability" – or, more comprehensively, "business sustainability law".

Assuming that voluntary CSR approaches are useful – sometimes even necessary – but seldom sufficient in order to attain a satisfactory and market-efficient level of "sustainability" in the for-profit companies' structural design (governance mechanisms) and in their correlative market conducts; and further considering such assumption itself as an important element of the wider issue that almost inevitably arises about the optimal level of heteronomous regulation of private business organizations, then the first emerging question consists in asking (*a*) what are the appropriate scope, strength, and intensity of "pro-sustainability" regulations which could, and (possibly) should, be enacted in any jurisdiction with regard to the incorporated firm's structures – or, if you wish, companies' inherent "design" –, by also considering, among other relevant factors, the incorporated (for profit) firm's current private ordering nature, its posture, and its respective cultural, social, political, economic contexts[76].

In connection with such fundamental policy question, some additional issues deserve to be further investigated: (*b*) to what extent such regulations could, consequently, be laid down (and then enforced) at transnational, regional or just at a domestic level, considering that each of the aforementioned factors are still characterized by significant levels of idiosyncrasy[77].

[76] See the literature quoted *retro*, *sub* footnotes 49, 51, 53, 55, and 56.

[77] One of the most important set of CSR principles at international level can be found in the "Guiding Principles on Business and Human Rights", presented by the Special Representative of the United Nations Secretary-General, Professor John Ruggies of Harvard University (thereafter called the "Ruggies Principles") to the United Nations Human Rights Council and endorsed by it in June 2011. As the *Interpretative Guide* illustrates, the Ruggies Principles state the "global standard of practice that is now expected of all States and businesses with regard to business and human rights. While this important set of responsible business conduct principles does not constitute a legally binding instrument, the Guiding Principles elaborate on the implications of existing standards and practices for States and businesses, and include points covered variously in international and domestic law" (https://www.ohchr.org/en/publications/special-issue-publications/corporate-responsibility-respect-human-rights-interpretive). See also, J.G. Ruggie, *Just Business - Multinational Corporations and Human Rights*, W.W. Norton & Co., New-York-London 2013. More recently, see, *e.g.*, M. Buscemi, N. Lazzerini, L. Magi, D. Russo (Eds.), *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law*, cit.; I. Bantekas, M.A. Stein (Eds.), *The Cambridge Companion to business*

And then, (*c*) how such (possibly inter-governmental and/or transnational) regulatory actions should be: (*c.1*) crafted and, then, coordinated together according to generally accepted standards of conduct, and then (*c.2*) implemented into and then enforced by each targeted legal system(s) – *i.e.*, the current business organizations' law(s) and its closely related legal and business administration fields[78], including accounting rules and standards.

In addition, it should be questioned (*d*) whether any regulatory actions to be enacted according to *(a)*, *(b)*, and *(c)* above, should address (and, thus, should be paced on) either: (*d.1*) the business organization's typical internal structure (thus directly impacting the current corporate governance posture and its common theoretical underpinnings, such as the traditional shareholder wealth maximization "dogma", generally attributed to Milton Friedman's famous September 1970 New York Times Magazine article[79], and the law and economics' major attainment in this field, *i.e.*, the agency costs theory within the firms' doctrines and the contractarian approach to company law[80]); (*d.2*) or the incorporated firm's

and Human Right Law, Cambridge Univ. Press, Cambridge 2021; F. Wettstein, *Business and Human Rights - Ethical, Legal, and Managerial Perspectives*, Cambridge Univ. Press, Cambridge 2022.

[78] Such as, *e.g.*, securities and financial markets laws, insolvency and restructuring laws, banking and insurance laws, business contracts, competition law, IP law, criminal business laws. As pointed out *infra*, the general issue of "sustainability", when applied to firms, reveals all its multifaceted aspects, which though happen to be closely intertwined – thereby determining the multidisciplinary approach one should use in order to understand "corporate sustainability". The point is effectively laid out, *inter alios*, by D. Blood, *Foreword* (entitled «*The Global Context for Business is Changing*»), in the *Ceres 2010 Roadmap*, cit. p. 5: «[w]hen considering sustainability, it is important to focus on the entire spectrum of interrelated factors. True sustainability means judging solutions on a life-cycle basis and considering the complete set of inputs, costs and externalities. Sustainability challenges are increasingly interconnected: the climate crisis and poverty, pandemics and demographics, water scarcity and migration/urbanization. Sustainability challenges cannot be considered in isolation».

[79] But see, originally, M. Friedman, *Capitalism and Freedom*, cit., pp. 131-132, according to which «[t]here is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud»; see *retro*, *sub* footnotes 35 and 36.

[80] See, *ex pluribus*, A.A. Alchian, H. Demsetz, *Production, Information Cost, and Economic Organization,* «American Economic Review», vol. 62.5 (1972), pp. 777-795; Eid., *The Property Right Paradigm*, «Journal of Economic History», vol. 33.1 (1973), pp. 16-27; M.C. Jensen, W.H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, «Journal of Financial Economics», vol. 3.4 (1976), pp. 305-360; B.

market activities (thus indirectly impacting the organizational structure, to the extent market regulations would also import, directly or indirectly, incorporated firms' internal adjustments).

To be sure, any legal rules and/or standards addressed to police economic activities would almost inevitably bear an impact at *both* levels – incorporated firm's governance and company's market activities – at the same time, albeit legislators operating in different jurisdictions, because of their respective legal systems' peculiarities, could be reasonably expected to be deploying different (and often combined) legal techniques in order to attain their specific aimed-for results at each of the two levels[81].

Furthermore – and perhaps even more importantly from a comparative corporate governance theory point of view – the scope of the current corporate sustainability debate should encompass the (*e*) fundamental policy problem – that appears to be increasingly debated – concerning: (*e.1*) whether any called-for legislative interventions concerned with any of the many ESG-related issues should lay out what could be described as an instrumental set of "internal limits" to the (often constitutionally protected) "business" (or "enterprise") "freedom", so that such functional limits to entrepreneurial discretion would be able to operate *from within* (or *from inside*) the inherent logic of the incorporated for-profit firms, by

Klein, R.G. Crawford, A.A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, Journal of Law & Economics, vol. 21.2 (1978), pp. 297-326; E. Fama, *Agency Problem and the Theory of the Firm*, «Journal of Political Economics», vol. 88.2 (1980), pp. 288- 307; M.C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, «Business Ethics Quarterly», vol. 12.2 (2002), pp. 235-256 (*inter alia* setting forth the so-called "enlightened value maximization" theory and also available at <http://papers.ssrn.com/abstract_id=220671>); O.E. Williamson, *Organization Form, Residual Claimants, and Corporate Control*, «Journal of Law & Economics», vol. 26.2 (1983), pp. 351-366; H. Demsetz, *The Structure of Ownership and the Theory of the Firm*, «Journal of Law & Economics», vol. 26.2 (1983), pp. 375-390; O. Hart, J. Moore, *Property Rights and the Nature of the Firm* , «Journal of Political Economy», vol. 98.6 (1990), pp. 1119-1158; F.H. Easterbrook D.R. Fischel, *The Economic Structure of Corporate Law*, Harvard Univ. Press, Cambridge (MA) 1991. See also, W.W. Bratton, *The "Nexus of Contracts" Corporation: A Critical Appraisal*, «Cornell Law Review», vol. 74 (1989), pp. 407-465.

[81] Incidentally, this is one of the main theses I tried to advocate – with special focus on "enterprise's contracts" (B2B and B2C contracts entered by commercial undertakings, a category of market agents which today consist, essentially, of business organizations, and especially in what here have been often called *incorporated firms, i.e.*, companies) – in my two-volume monographic study: M. Bianchini, *La Contrattazione d'impresa, tra autonomia contrattuale e libertà di iniziativa economica*, Parte I (*Profili storico-evolutivi*), Giappichelli, Torino 2011, and Id., Parte II (*Profili Ricostruttivi*), Giappichelli, Torino 2013.

imposing positive (*i.e.*, pro-active) conducts (as well as correlative liabilities) to those entrusted with business management roles, meant to compel company's fiduciaries to (proactively) act in order to attain ESG-related goals.

Or, alternatively, (*e.2*) whether any of such ESG regulatory interventions should resort to normative-type of "external" limits to business freedom, which, in turn, would "carve out" correlative obligations (and correlative liabilities[82]) meant to discipline the companies' negative externalities *from without (*or *from outside*) the firm: that is, without altering incorporated for-profit firms' current DNA (*i.e.*, their inherent private profit-seeking /profit maximizing nature), but rather by imposing an enhanced, ESG-focused set of new enforceable rules and/or standards of conduct – again (see point (*d*) *retro*) – either (or both) at the company level, and/or at the management's level, and/or, in case of corporate groups, at the dominant shareholder's level.

Incidentally, it should also be noted that an additional and very important field of legal research – which, again, appears naturally suitable to be investigated in a comparative perspective – consists in finding out (*f*) whether or not the *Business Judgment Rule* ("BJR")[83] could be legitimately used – and if so, to what extent – by companies' directors and/or

[82] See, *e.g.*, P. Akey, I. Appeal, *The Limits of Limited Liability: Evidence from Industrial Pollution*. «Journal of Finance», vol. 76.1 (2021), pp. 5-55.

[83] The common law origins of the BJR are apparently to be found in the 1829 decision *Percy v. Millaudon*, rendered by the Supreme Court of Louisiana. The case law and the academic literature on the BJR – a fundamental legal *caveat* to the directors' (and officers') fiduciary duty of care that can be traced in many business organizations laws, albeit under significant variants and with some material differences (as to some triggering elements, procedural matters, burden of proof, etc.) – is of an unmanageable vastity: see, *e.g.*, S.S. Arsht, *The Business Judgment Rule Revisited*, «Hofstra Law Review» vol. 8.1 (1979), pp. 93-134; M.A. Eisemberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, «Fordham Law Review», vol. 62.3 (1993), pp. 437-468: 440-445; Id., *Background Study for the California Law Revision Commission on Whether the Business-Judgment Rule Should Be Codified* (May 1995), available at: <https://clrc.ca.gov/pub/BKST/BKST-BusinessJudgment.pdf>; W.T. Allen, *The Corporate Directors' Fiduciary Duty of Care and the Business Judgment Rule under US Corporate Law*, in K. Hopt, H. Kanda, M.J. Roe, E. Wymmersch, S. Prigge (Eds.), *Comparative Corporate Governance: The State of Art and Emerging Research*, Oxford University Press, Oxford 1998, pp. 307-331; S.M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, «Vanderbilt Law Review», vol. 57.1 (2004), pp. 83-130; D.C. Baraka, *Business Judgment Rule*, in S.O. Idowu, N. Capaldi, L. Zu, A.D. Gupta (Eds), *Encyclopaedia of Corporate Social Responsibility*, Springer, Berlin-Heidelberg 2013, pp. 264-267. For a recent application under Italian company law, see, *e.g.*, Suprema Corte di Cassazione, decision no. 25056, of 9 November, 2020, available at: <https://www.italgiure.giustizia.it/sncass/>.

by corporate top management as an appropriate and effective exculpatory defence in case of absence of, and/or deficiencies in, *e.g.*, long-term planning, reasonable governance structure, adequate monitoring, accounting, and financial reporting systems, disclosure mechanisms[84], and

[84] In trying to connect the responsibility of corporate directors for implementing, monitoring and enforcing (either voluntary, or mandatory) rules and/or standards of corporate conducts, relating to the respect of (if not proactive pursuance) of ESG-related goals, with directors' fiduciary duties (typically, the duty of due care and the duty of loyalty), it may be worth borrowing from an insightful essay, which stressed on that «[a]lthough there is some variation among jurisdictions in how these duties apply to risk management, fiduciary duties of care and loyalty are widely used to hold corporate boards accountable for carrying out their oversight functions, and fiduciary duties are ubiquitous even beyond the common law jurisdictions where they first developed. Depending on the jurisdiction, they may be incorporated into corporate governance codes, or applied under other bodies of law beyond corporate or commercial law»: V. Harper Ho, *Board Duties: Monitoring, Risk Management and Compliance*, in A. Afsharipour, M. Gelter (Eds.), *Comparative Corporate Governance*, cit., pp. 242-262: 248; see also M. Gelter, G. Helleringer, *Fiduciary Principles in European Civil Law Systems*, in E.J. Criddle, P.B. Miller, R.H. Sitkoff (Eds.), *The Oxford Handbook of Fiduciary Law*, Oxford Univ. Press, New York 2019, pp. 583-602; A. Keay, *Board Accountability in Corporate Governance*, Abingdon (UK) - New York 2015, pp. 114-115; A. Keay, J. Loughrey, *The Framework for Board Accountability in Corporate Governance*, «Legal Studies», Vol. 35 No. 2, 2015, pp. 252-279; C. Villiers, J. Mähönen, *Accounting, auditing, and reporting: Supporting or obstructing the sustainable companies objective?*, in B. Sjåfjell, B. Richardson (Eds.), *Company Law and Sustainability: Legal Barriers and Opportunities*, Cambridge University Press, Cambridge-New York 2015, pp. 175-225. See also the next footnote. Notably, since the major Italian company law reform of 2003, the Italian corporate directors' (and internal auditors') liabilities system has been increasingly influenced by a risk management/risk prevention approach (see, *e.g.* V. Buonocore, *Adeguatezza, precauzione, gestione, responsabilità: chiose sull'art. 2381, commi terzo e quinto, del codice civile*, «Giurisprudenza commerciale», vol. 33.1 (2006), part I, pp. 5-41; M. Irrera, *Assetti organizzativi adeguati e governo delle società di capitali*, Giuffrè, Milano, 2005). Such process has been confirmed (and extended to partnership law) by the recent enactment, in 2019, of Article 2086, paragraph 2, of the Italian Civil Code (and matched by the provisions set forth under Article 3 of the recently implemented Italian Insolvency Code), introducing a far-reaching duty, generally entrusted with the "entrepreneur" (*i.e.*, with the managing partners and company directors) to select and to implement *adequate* administrative, organizational, and accounting measures (adequateness to be tested against both the «nature» of the trade or business, and the «size» of the enterprise), in order to ensure, *inter alia*, the prospective the economic and financial sustainability of the firm as a going concern, and thus preventing their insolvency and/or financial distress ("crisis"). Such duty appears to perfectly match with and to fit in the current quest for sustainability (see also *sub* footnote 88, *infra*): for further details (and for additional bibliographical references) on this approach and its possible effects on the emerging corporate sustainability rules, see the essays by Enrico Ginevra (*infra*, Part I), and by Eddy Ricciardiello (*infra*, Part II); in addition see Assonime, *Doveri degli amministratori e sostenibilità - Rapporto Assonime (Note e Studi 6/2021)*, «Rivista delle società»,

– generally – absent or insufficient organizational measures, that would result, in the light of the specific circumstances of each case, in a breach of ESG-based general rules and/or specific ESG-related compliance obligations[85], if not – this aspect depending on the policy solution provided

vol. LXVI.2-3 (2021), pp. 387-425, and S. Bruno, *Cambiamento climatico e organizzazione delle società di capitali a seguito del nuovo testo dell'art. 2086 c.c.*, «Banca, Impresa, Società», vol. XXXIV.1 (2020), pp. 47-66. Generally, on the impacts on Italian mechanisms of corporate governance and directors' liabilities exerted by the new Italian provision under Article 2086, paragraph 2nd (and Article 3 of the Insolvency Code), see also, M.S. Spolidoro, *Note critiche sulla "gestione dell'impresa" nel nuovo art. 2086 c.c. (con una postilla sul ruolo dei soci)*, «Rivista delle società», vol. LXIV.2-3 (2019), pp. 253-273; S. Fortunato, *Codice della crisi e Codice civile: impresa, assetti organizzativi e responsabilità*, «Rivista delle società», vol. LXIV.5-6 (2019), pp. 952-991; P. Montalenti, *Gestione dell'impresa, assetti organizzativi e procedura di allerta: dalla "Proposta Rordorf al Codice della crisi"*, in A. Amatucci *et Alii* (Eds.), *La nuova disciplina a delle procedure concorsuali - In ricordo di Michele Sandulli*, Giappichelli, Torino 2019, pp. 482-491; Id., *Il Codice della crisi d'impresa e dell'insolvenza: assetti organizzativi adeguati, rilevazione della crisi procedure di allerta nel quadro generale della riforma*, «Giurisprudenza commerciale», vol. 47.5 (2020), part I, pp. 829-846; Id., *Le riforme del Codice civile: assetti organizzativi societari*, in A. Jorio, R. Rosapepe (Eds.), *La riforma delle procedure concorsuali - In ricordo di Vincenzo Buonocore*, Giuffrè, Milano, 2021, pp. 41-47; M. Cian, *Crisi dell'impresa e doveri degli amministratori: i principi riformati e il loro possibile impatto*, «Nuove leggi civili commentate», 2019.5, pp. 1160-1176; E. Ginevra, C. Presciani, *Il dovere di istituire assetti adeguati* ex *art. 2086 c.c.*, *ivi*, pp. 1209-1238; V. Calandra Bonaura, *Amministratori e gestione dell'impresa nel Codice della crisi*, «Giurisprudenza commerciale», vol. 47.1 (2020), part I, pp. 5-22; S. Ambrosini, *Assetti adeguati e "ibridazione" del modello s.r.l. nel quadro normativo riformato*, in M. Irrera (Ed.), *La società a responsabilità limitata: un modello transtipico alla prova del Codice della Crisi - Studi in onore di Oreste Cagnasso*, Torino, Giappichelli, 2020, pp. 433-444; Id., *Adeguatezza degli assetti aziendali, doveri degli amministratori e azioni di responsabilità alla luce del codice della crisi*, in M. Callegari, A. Cerrato, E. Desana (Eds.), Governance *e mercati - Studi in onore di Paolo Montalenti*, Giappichelli, Torino, 2022, vol. II, pp. 1703-1720; Id., *Diritto dell'impresa in crisi*, Pacini Giuridica, Pisa 2022, pp. 43-54; E. Barcellona, Business Judgment Rule *e interesse sociale nella crisi - L'adeguatezza degli assetti organizzativi alla luce della riforma del diritto concorsuale*, Milano, Giuffré 2020; M. Irrera, *Adeguatezza degli assetti organizzativi tra correttezza e* business judgment rule, in P. Montalenti, M. Notari (Eds.), *Crisi d'impresa. Prevenzione e gestioni dei rischi: nuovo codice e nuova cultura*, Milano, Giuffré 2021, pp. 81-96; V. Di Cataldo, D. Arcidiacono, *Decisioni organizzative, dimensioni dell'impresa e* Business Judgment Rule, in «*Giurisprudenza commerciale*», vol. 48.1 (2021), pp. 69-99.

[85] In addition to the literature quoted in the previous footnote, also see, *e.g.*, S.J. Griffith, *Corporate Governance in an Era of Compliance*, «William and Mary Law Review», vol. 57.6 (2016), pp. 2075-2140, and the essays collected in S. Manacorda, F. Centonze (Eds.), *Corporate Compliance on a Global Scale - Legitimacy and Effectiveness*, Springer, Cham 2022; B. van Rooij, D.D. Sokol (Eds.), *The Cambridge Handbook on Compliance*, Cambridge Univ. Press, Cambridge 2021; S.A. Cerrato (Ed.), *Impresa e rischio - Profili giuridici del* risk management, Giappichelli, Torino 2019; A. Martínez-Echevarría y García de

to question (*e*) above – in an outright breach of a newly crafted directors' general and open-ended duty, allegedly to be found[86] in connection with directors' responsibility to proactively pursue ESG-related goals[87], thus

Dueñas (Ed.), *Interés social y gobierno corporativo sostenible: deberes de los administradores y deberes de los accionistas*, Thomson Reuters-Aranzadi, Pamplona, 2019; G. Rossi (Ed.), *La* corporate compliance*: una nuova frontiera per il diritto?*, Giuffré, Milano 2017; M. Irrera (Ed.), *Assetti adeguati e modelli organizzativi nella corporate governance delle società di capitali,* Zanichelli, Bologna 2016. See also, A. Adotti, S. Bozzolan, *La gestione della* compliance - *Sistemi normativi e controllo dei rischi*, LUISS, Roma 2020 (II ed.); A. Lai (Ed.), *Il contributo del sistema di prevenzione e gestione dei rischi alla generazione del valore d'impresa*, Franco Angeli, Milano, 2013. See also, B. Simkins, S.A. Ramirez, *Enterprise-Wide Risk Management and Corporate Governance*, «Loyola Univ. Chicago Law Review», vol. 39.3 (2008), pp. 571-594; G. Strampelli, *Sistemi di controllo e di indipendenza nelle società per azioni*, EGEA, Milano 2013; A.R. Keay, J. Loughrey, *The Framework for Board Accountability in Corporate Governance*, «Legal Studies», vol. 35.2 (2015), pp. 252-279; M. Siri, S. Zhu, *Will the EU Commission Successfully Integrate Sustainability Risks and Factors in the Investor Protection Regime? A Research Agenda*, «Sustainability», vol. 11.22 (2019), 6292, and, with more specific regard to the group of companies setting, see, *e.g.*, I. Mevorach, *The Role of Enterprise Law Principles in Shaping Management Duties at Times of Crisis*, «European Business Organizations Law Review», vol. 14.4 (2013), pp. 471-496.

[86] At least according to the fairly large portion of the academic scholarship that supports an increased active public role of private businesses in fostering SDGs and in reducing ESG-related issues, while carrying out their respective legitimate business purpose(s): see the literature cited in footnotes 35-40 and 49.

[87] An increasingly common misunderstanding that seems arising from the ESG turmoiled analysis of the emerging ESG-based legal rules and ESG-based practice standards in the light of the traditional BJR approach is that consisting in conflating what could be labelled as (mere) "economic" and/or "financial" sustainability of business organizations, with a much more comprehensive sustainability concept, comprised of a complex set of issues of "compatibility" of current with the ESG (UN's SDGs) goals, which import various and profound critiques to the inherent flaws in corporate (and corporate governance) design and to the detrimental externalization of social costs that are usually deemed attached to the very idea of a typical for-profit organization (see., *e.g.*, C. Mayer, *Prosperity - Better Business Makes the Greater Good*, cit., p. 1-2 «[t]he corporation is the creator of wealth, the source of employment, the deliverer of new technologies, the provider of our needs, the satisfier of our desires, and the means to our ends. [...]. At the same time it is the source of inequality, deprivation and environmental degradation [...] because the corporation is getting bigger to a point where in some cases it is large than nation states. And as nations find themselves unable to service their debt obligations, the turn to corporations to supply the goods and services that they provided in the past. But is the corporation capable of bearing the responsibilities that are being place on its shoulders? [...]. How can we make sure that we harness business as a source of societal benefits and avoid its detriments? How do we make it the creator of prosperity of the many not just the few, and of the future not just the past?»). Indeed, "corporate ESG sustainability" entails a multidisciplinary as well as comparative analysis (a "holistic" approach, if you wish: see G. Ferrarini, *Redefining Corporate Purpose: Sustainability as a Game Changer*, cit., pp. 137-142, who

inevitably falling within the province of the company directors' correlative liabilities[88].

calls for a «holistic view of corporate purpose, rather than a sectoral one, such as those found either in law or in economics and finance»), meant to find possible remedies to the ill-structures of the modern for-profit company, while preserving the inherently private nature of the incorporated firms. True is, though, that companies (as well as those entrusted with decision-making authority within them) may be upheld to different sets of legal obligations – and, thus, to different degrees of "privateness" (as professors A.A. Berle *Jr.* and G.C. Means already described in their famous book *The Modern Corporation and Private Property* The Macmillan Company, New York 1932, Ch. V) – depending on their size, their level of capital concentration, their governance structures, and the type of business activities each incorporated firm is set to carry out in the marketplace. And discerning among these different forms of business organizations in connection with the ESG-related risks could represent a viable starting point to assess and to systematize legal rules dealing with "corporate sustainability".

[88] L.E. Strine *Jr.*, K.M. Smith, R.S. Steel, *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and ESG Strategy*, «Iowa Law Review», vol. 106.4 (2021), pp. 1885-1922; R. Rolli, *L'Impatto dei fattori ESG sull'impresa - Modelli di* governance *e nuove responsabilità*, cit., pp. 127-144. One thing is for company's directors (and/or internal audit bodies, such as, *e.g.*, the "supervisory board" in the German dual-tier model and the "collegio sindacale" within the so-called "latin model" of corporate governance) to behave so as to abstain from violations of the duty of loyalty and from the violation of the duty of care, and, more generally, to obey any mandatory legal provisions (duty to respect specifically enacted legal obligations). These are typically construed as *external* limits to the directorial and managerial discretion, and – consequently – to the "business freedom" each business organization is usually entitled to enjoy on a general basis, pursuant to the legal system(s) principles and rules where the business vehicle (either or both) has been incorporated and/or where it operates. A different approach would be including within the responsibilities (and thus within the legal obligations) of the corporate directors and managers an open-ended duty to actively pursue any ESG (or CSR) goal(s), *i.e.*, what according to civil law taxonomy would be deemed a sort of "general clause": see, M. Rescigno, *"Sostenibilità": una nuova clausola generale nelle regole dell'esercizio dell'attività di impresa*, in R. Sacchi (Ed.), *Il ruolo delle clausole generali in una prospettiva multidisciplinare*, Giuffrè, Milano 2022, pp. 431-462. More generally, on the role of "general clauses" within the province of Italian "enterprise" (or "business") law, see, *ex multis*: G. Scognamiglio, *"Clausole generali", principi di diritto e disciplina dei gruppi di società*, «Rivista di diritto privato», 2011, no. 4, pp. 517-553; M. Libertini, *Clausole generali, norme di principio norme a contenuto indeterminato. Una proposta di distinzione*, «Rivista critica di diritto privato», 2011, no. 3, pp. 345-378; Id., *Ancora a proposito di principi e clausole generali, a partire dall'esperienza del diritto commerciale*, «Rivista Orizzonti del Diritto Commerciale», 2018, no. 2, pp. 1-36. See also the insightful essays collected in G. Meruzzi, G. Tantini (Eds.), *Le clausole generali del diritto societario*, in *Trattato di diritto commerciale e diritto pubblico dell'economia* (directed by F. Galgano), vol. LXI, Cedam, Padova 2011. On the qualification as a "general clause" of the directors's duty to organize and to monitor the enterprise administrative and accounting structure to prevent and/or minimize risks (the so called "organizational, administrative, and accounting adequacy" principle), see, *e.g.*, P. Montalenti, *I principi di corretta am-*

Conclusively, it could be added that – not surprisingly – the previous list of issues (and especially that concerned with the alternative approach, internal *vs.* external, to any possible regulatory interventions in the current corporate governance structures and market postures) are presently reflected in the cyclically resurgent efforts of establishing the appropriate "corporate purpose"[89] of the incorporated for-profit firms, in order to make the latter's design "viable", that is, compliant (or, rather,

ministrazione: una nuova clausola generale, in M. Irrera (Ed.), *Assetti adeguati e modelli organizzativi nella corporate governance delle società di capitali*, cit., pp. 3-22; A. Caprara, *I principi di corretta amministrazione - Struttura, funzioni e rimedi*, Giappichelli, Torino 2021. Moreover, "bending" – so to speak – the incorporated firms' directorial discretion and/or the managerial roles so as to serve the proactive pursuance of societal goals would mean transforming companies in a *longa manus* of governments, which in turn are those supposed to take care of the common good (the so-called "public interest": see, *e.g.*, C. Bezemek, T. Dumbrovský, *The Concept of Public Interest*, in L. Tichý, M. Potacs (Eds.), *Public Interest in Law*, Intersentia, Cambridge-Antwerp-Chicago 2021, pp. 3-24; and see *retro*, *sub* fn. 49), on behalf of their respective communities (voters): for instance, refraining from employees' exploitation, because a legal provision expressly prohibits any form of slavery, does not mean that companies shall have the legal responsibility of fighting social inequities and/or ensuring employees' personal freedoms; just as refraining from polluting the sea, in accordance with a legal rule sanctioning environmental pollution, does not mean imposing to companies the legal duty to pursue clean water goals. To be sure, there are many situations (and legal provisions) in which such distinction is (or, due to judicial constructions, becomes) blurred. Yet, it seems essential to mark and to revamp that fine line, in order to avoid confusion and subtle conversion of private companies into quasi-public agencies entrusted with public interest's agendas. Taking this argument a little further, one may anticipate that, if directors and officers of for-profit companies may be charged with what in the civil law tradition are called "obligations of result" ("obligations de résultat", "obbligazioni di risultato", "obligaciones de resultado") – which typically lead to D&Os' liabilities if the expected result has not been accomplished, notwithstanding the agent's good faith and best efforts – then any public interest goal could be embedded within the scope of corporate directors duties, thereby imposing *from within* the incorporated (for-profit) firms the proactive pursuance of societal purposes by the company's directors and officers. In addition, whereas "result obligations" may have the effect of substantially reducing (if not overriding altogether) the operational scope of the "business judgment rule", by plugging a D&Os duty to provide for "adequate" corporate accounting, organizational, and administrative measures meant to ensure corporate ESG compliance (with regard to both, the corporate governance structure, and the incorporated firm's market operations), into a binding "obligation of result" to pursue full ESG compliance, the entire system of D&Os liabilities could be re-cast as a formidable legal mechanism to "bend" any directorial discretion of any for-profit undertaking toward the proactive attainment of the SDGs. See also the literature cited *retro*, in footnotes 35-42, 49; also see, *infra*, *sub* footnote 90.

[89] See *retro*, *sub* footnotes 35-39 and accompanying text.

not in contrast[90]) with each of those sixteen-plus-one sustainable devel-

[90] Thirty four years ago, a renowned Italian business law scholar brilliantly discussed the policy problem raised by the tension naturally existing between the "business freedom" that should characterize any capitalistic system based on the free market economy (and that is currently protected, as a matter of principle under Article 41, paragraph 1, of the Italian Constitution of 1948 and, at EU level, by Article 16 of the European Charter of Fundamental Rights, which, according to Article 6 of the TEU, deserves the same binding legal value of the other EU treaties) and its limits, as constitutionally affirmed (albeit on a general basis) under paragraph 2 and 3 of Article 41 of the Italian Constitution: G. Oppo, *L'iniziativa economica* (1988), in Id., *Scritti giuridici*, vol. I (*Diritto dell'impresa*), Cedam, Padova 1992, pp. 16-55: 35 («[i]l limite» to the enterprise freedom principle, as set forth pursuant to Article 41, paragraph 2 of the Italian Constitution «non impone di perseguire, ma solo di non contrastare i valori privilegiati dal costituente. [...]. Altro è vietare un comportamento che vada contro un principio, e altro è imporre un comportamento perché conforme al principio»). It may be worth further noting that professor Oppo's essay was part of an ongoing debate concerned with the appropriate level of what has been called the "*funzionalizzazione dell'impresa privata*", and which refers – in its essence – to those various (ideological, that is, political) attempts – that from time to time recurred in Continental Europe during the second half of the XX century – to subordinate private entrepreneurs' natural objectives (that is, what in Europe has been often called the "company's interest") to non-business purposes, such as *e.g.* social and/or public policy ends, thereby curbing "from within" – so to speak – the business freedom that typically supports legitimate entrepreneurial discretion (that is, managerial choices) of private business. The nature of the (*internal*, or *external*) limits to the free enterprise principle/private ordering mechanisms can be considered a *leit motiv* of the Italian business and company law scholarship during the whole XX century, but especially upon the enactment of the Italian Constitution of 1948 (see, *e.g.*, G. Minervini, *Contro la «funzionalizzazione» dell'impresa privata*, «Rivista di diritto civile», vol. IV (1958), part I, pp. 618-636; V. Spagnuolo Vigorita, *L'iniziativa economica privata nel diritto pubblico*, Napoli, Jovene 1959, pp. 78 *et seq.*; F. Galgano, *La libertà di iniziativa economica privata nel sistema delle libertà costituzionali*, in *Trattato di diritto commerciale e di diritto pubblico dell'economia* (directed by F. Galgano), vol. I (*La costituzione economica*), Cedam, Padova 1977, pp. 511 *et seq.*; Id., *Diritto commerciale - L'imprenditore*, Zanichelli, Bologna 2013 (XIII ed.), pp. 169-170; N. Irti, *L'ordine giuridico del mercato*, Laterza, Bari-Roma 2003; V. Buonocore, *Iniziativa economica privata e impresa*, in Id., (Ed.), *Iniziativa economica e impresa nella giurisprudenza costituzionale*, ESI, Napoli, 2007, pp. 3-62; M. Libertini, *Sulla nozione di libertà economica*, in *Contratto e impresa*, 2019.3, pp. 1255-1286; U. Tombari, *Corporate Power and Conflicting Interests*, cit., pp. 27 *et seq* and pp. 55 *et seq.* (and *passim*); L. Marchegiani, *Shifting the SME Corporate Model Towards Sustainability: Suggestions from Italian Company Law*, «Italian Law Journal» vol. 7.2 (2021), pp. 355-372: 363-364; S. Del Gatto, *Poteri pubblici, iniziativa economica e imprese*, RomaTrePress, Roma 2019; E. Barcellona, Shareholderism versus Stakeholderism - *La società per azioni contemporanea dinanzi al profitto*, cit., pp. 208-221; S.A. Cerrato, *Appunti per una via italiana all'ESG. L'impresa costituzionalmente solidale (anche alla luce dei nuovi artt. 9 e 41, comma 3, Cost.)*, «Analisi Giuridica dell'Economia», 2022.1, pp. 63-114: 72-74). And discussions on this multifaceted topic appears not only to have survived the globalization waves, but also to have revamped also in the "corporate sustainability" debates: interestingly, Article 41, paragraph 2, of the Italian Constitution

opment factors, as they have been laid down in the UN's 2030 Sustainable Development Goals Agenda, and which could be now translated into what – both at political and academic level – are increasingly deemed as the main ESG-based issues.

This introduction cannot be the appropriate place to try to suggest any plausible answer to such multi-pronged sets of difficult problems. Every protagonist of these Chronicles – including the selected Padova law students in their excellent short essays – not only will offer her/his own perspective and a variety of possible solutions with respect to many of the policy and methodological questions that have been outlined in the previous pages, but each of them will also account for her/his own intellectual and passionate "journey" throughout the many different paths one may pursue in overcoming traditional incorporated firm's negative externalities attitudes, and that are ultimately concurring toward a full-fledge sustainable company regime.

Moreover, I would dear to believe that each portion of the Chronicles composing this book – by establishing a net of close and mutual connections to many of the emerging ESG-related legal research fields – will contribute in shaping the contours of what I would tend to regard as the "ESG viability test" to which incorporated firms are increasingly summoned to, not only by the evolving market dynamics, but also – and increasingly – by the worldwide public opinions, and, consequently, by domestic legislators and regulators, in the light of the transition, from a *mere possibility* for business companies (*recte*, their directors and senior officers) to *voluntarily* take into consideration – in discharging their respective business policy-making roles – an array of stakeholders interests (so far, too often poorly defined in legal terms), to a *demarcated* and *compelling* sets of legal obligations that appear necessary to map, to disclose, to monitor, and to police ESG-related risks, in order to prevent and/or to redress those ESG-related damages caused by the inadequate governance structures and/or the market operations of any given incorporated firm, thereby limiting *from without* – not *from within* – what I am keen in calling the "sacred soil" of the enterprise freedom, still to be considered an essential element of market economies based on some form of capitalism (of course, on the basic assumption that we should hold on to socio-economic systems still based on capitalism).

was amended to insert a new limit to the "enterprise freedom" set forth under paragraph 1, that is the economic activity cannot be carried out to the detriment of the environment («in modo da recare danno [...] all'ambiente»).

All this, of course, with the view of rapidly attaining the necessary cross-border harmonization of both, the legal provisions, and their respective enforcement measures, in order to curb regulatory arbitrages and protectionist postures, thereby ensuring a fair and open market competition at every latitude of the global business arena.

4. Acknowledgments

Before wrapping up these introductory remarks, I would like to deeply thank – in the order they did present – each speaker participating at the Spring 2021 LSC *Colloquia* series: Lina Mikaloniene, Andrés Portilla, Marek Porzycki, Edgardo Ricciardiello, Costantino Grasso (and Stephen Holden, who co-authored the essay included herein), as well as each speaker presenting at the final LSC course event, the Sustainable Corporations *Symposium*, held on the 22nd of April, 2021 (the Earth Day!): Beate Sjåfjell (and Jukka Mähönen, who co-authored the essay included herein), Francesco Schurr, Elisabeth Pollman, Enrico Ginevra, Lucia Picardi, and Marco Speranzin[91].

And I would like to express my deep appreciation to Alan Palmiter, for teaching, with his unique “touch” and passion, most of the 2021 LSC course at the Padova School of Law (a very positive experience that we are planning to replicate in Spring 2023!), for supporting me in organizing the Sustainable Corporations *Symposium*, for chairing it, and for the time he dedicated in co-editing of this book (also with the support provided by Elena De Pieri, PhD in Law Candidate at the University of Bergamo, whose valuable co-editorial assistance with regard to Part III of these Chronicles Alan Palmiter and I would like to acknowledge).

Not less importantly, together with Alan Palmiter, we would like to praise each of the thirty Padova Law students (none of them native English speakers) who enthusiastically attended the LSC course in the Spring Semester of 2021, actively participated to the LSC *Colloquia*, and to the final Sustainable Corporation *Symposium*, by offering insightful comments and raising meaningful questions, and especially those eight students whose final course essays were selected to contribute to Part III of the Chronicles (in alphabetical order: Marco Bottin, Elisabetta Crocet-

[91] Elisabeth Pollman (Professor of Law at the University of Pennsylvania, Carey Law School, Philadelphia, PA, U.S.A.) brilliantly presented “The Persistent Power of SWM in U.S. Corporate Law”, but could not join us in the *Symposium* proceedings publication project.

ta, Angelica De Faci, Francesca De Panni, Matteo Micheletto, Francesco Petronio, Serena Petrovici, and Nastassia Rossi).

Last, but not least, I would like to convey – also on behalf of Alan Palmiter and each of the volume contributors – our gratitude to the University of Padova for sponsoring the "Law of Sustainable Corporations" course held in the Spring 2021, as well as for patronizing this publication; and special thanks are addressed by the co-curators and by each of the book authors to the Padova University International Projects and Mobility Office staff and to the staff of the Department of Private Law and Critique of Law for providing effective organizational support to this three-fold educational project.

Padova, on the 12th day of December, 2022

Part I

Chronicles from a Sustainable Corporations *Symposium*

Corporate Purpose and the EU Corporate Sustainability Due Diligence Proposal*

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After decades of being dormant, corporate purpose has become a hot topic of discussion again in company law and corporate governance. In the European Union, the tension between the European societal approach to companies with its long history and the US originated efficiency-based approach with its much shorter history (and weaker basis) is palpable in the heated debates on both sides of the Atlantic ever since the European Commission launched its Sustainable Corporate Governance initiative[1] in 2020. In this debate, especially shareholder primacy proponents have been very vocal and ideological in their contributions, seeking to frame the discussion within what we call a misleading *shareholder vs. stakeholder* dichotomy. We reject the dichotomy as a meaningful framing of the debate. We argue that corporate purpose instead should be taken serious-

* This essay is a reprint of the blog post with the same title published in the Oxford Business Law Blog on 24 February 2022. We welcome comments to the essay at b.k.sjafjell@jus.uio.no.

[1] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en.

ly as a matter of company law and as an element in ensuring the contribution of business to sustainability. In our working paper, «Corporate Purpose and the Misleading Shareholder *vs.* Stakeholder Dichotomy»[2], we discuss how such an overarching purpose could be operationalized with a redefinition of duties of the board with sustainability due diligence as a key tool. In this light, we discuss the EU Commission's proposal for a Corporate Sustainability Due Diligence Directive[3], launched on 23 February 2022.

Keywords: corporate governance; EU sustainable corporate governance initiative; shareholder vs, stakeholder primacy model; Nordic company law scholars; EU corporate sustainability due diligence directive proposal; EU corporate sustainability reporting directive proposal

1. The danger of the *shareholder vs stakeholder* dichotomy

The Anglo-Saxon *shareholder vs. stakeholder* debate is misleading and outright dangerous in the way it takes company law proper out of the discussion and reinforces the shareholder primacy drive[4], which remains a main barrier to sustainable business[5]. Caught between the choices between shareholder primacy and what we call "stakeholder primacy", there is no room for the broad canvassing of other options that suit bet-

[2] B. Sjåfjell, J. Mähönen, *Corporate Purpose and the Misleading Shareholder vs Stakeholder Dichotomy*, «SSRN», February 21, 2022, https://ssrn.com/abstract=4039565. This is a working paper version of an article with the same name forthcoming with «Bond Law Review».

[3] *Proposal for a directive of the European parliament and of the council on Corporate Su-stainability Due Diligence and amending Directive (EU) 2019/1937*, of 23 February, 2022, COM(2022) 71 final, «EUR-Lex», https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071. The proposal is also briefly introduced in a press release of 23 February 2022 by the European Commission, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1187.

[4] B. Sjåfjell, A. Johnston, L. Anker-Sørensen, D. Millon, *Shareholder Primacy: The Main Barrier to Sustainable Companies*, in B. Sjåfjell, B.J. Richardson (Eds.), *Company Law and Sustainability: Legal Barriers and Opportunities*, Cambridge University Press, Cambridge 2015, pp. 79-147. The chapter is available at «SSRN», https://ssrn.com/abstract=2664544.

[5] C.M. Bruner, B. Sjåfjell, *Corporate Law, Corporate Governance and the Pursuit of Sustainability*, in B. Sjåfjell, C. M. Bruner (Eds.), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, Cambridge University Press, Cambridge 2019, pp. 713-720.

ter the variety of company law regimes over the world. We see how the shareholder primacy drive continues to constrain, in Christopher Bruner's words, «our collective sense of the possible – even for many who favor pursuing corporate sustainability in the abstract»[6].

The challenges societies around the world face today – and which business contributes to – will not be resolved through identifying possible stakeholders and their private preferences. Balancing of interests risks quickly becoming a utopia; in a *stakeholder primacy* model, the strongest, most strategic or most vocal of stakeholders may get to set business strategies and make decisions for private benefits. The result of stakeholder primacy may accordingly be power-grabbing, entrenching of inequalities and continued unsustainability. Privileged stakeholders may then reap private benefits to the detriment of those with less or no power.

This leaves little or no room for vulnerable groups, such as invisible workers down in global value chains, Indigenous communities, future generations – and the environment that we all depend on. We risk people and the environment being subjugated to providers of "capitals"[7] in stakeholder theorisations and reporting schemes.

The biggest mistake the European Commission has made in its Sustainable Corporate Governance initiative was to speak the stakeholder language. Opponents of change were thereby given the ammunition of being able to postulate that the proposal would mean incorporating some kind of stakeholder primacy into the boardrooms. Shareholder primacy proponents could then use this to argue that their way of seeing the boards as "agents" of shareholders is the only way to ensure that companies are run efficiently and well – through the faulty logic of the legal-economic thinking underpinning the still prevailing paradigm. Indeed, we posit that the dichotomy of shareholder primacy or stakeholder theory, has been used as a strawman by those who do not wish to see any change, together with one single element of the broad set of reports the Commission has drawn on in its work. This includes very much the so-called group of Nordic company law scholars, who have chosen to present themselves in a way that has been understood – falsely – as being a statement on behalf of Nordic company law scholars generally[8], and

[6] *Ibid.*, p. 716.

[7] J. Mähönen, *Integrated Reporting and Sustainable Corporate Governance from European Perspective*, «Accounting, Economics, and Law: A Convivium», February 27, 2020, https://doi.org/10.1515/ael-2018-0048.

[8] P. K. Andersen et al, *Response to the Study on Directors' Duties and Sustainable Corporate Governance by Nordic Company Law Scholars*, «SSRN», October 7, 2020, https://ssrn.com/

even further – as representative of Nordic countries[9]. Following up these grandiose statements with claims that the Commission had "abandoned its proposal" and that the reawakened "zombie proposal" is motivated by a desire to harmonise – out of all context – corporate governance in the EU[10], only further underlines the irrational resistance against change. That we are on the right track to resolving sustainability issues because not all environmental news is negative, is as poorly founded as strawman claims of extremists declaring the "capitalist system" to be doomed are irrelevant[11].

2. Taking sustainability seriously: sustainable value creation within planetary boundaries

The question of how to secure the contribution of our businesses to the fundamental transformation to sustainability is not one that should be responded to in the ideological and emotional way as we have seen in some of the responses when the Sustainable Corporate Governance initiative was launched. Now that the Directive proposal is out, we encourage all who wish to participate in the discussion to lay aside any ideological "shareholder vs stakeholders" viewpoints. That is not what is at stake. While the IPCC report on climate change of 2021 has been referred to as "code red for humanity"[12], planetary boundaries research[13]

abstract=3709762.

[9] J.L. Hansen, *Sustainable Corporate Governance? - A Response from the Nordic Countries*, «Oxford Business Law Blog», November 2, 2020, https://www.law.ox.ac.uk/business-law-blog/blog/2020/11/ec-corporate-governance-initiative-series-sustainable-corporate.

[10] J.L. Hansen, *Zombies v. Subsidiarity-Opening on 8 December 2021*, «Oxford Business Law Blog», October 28, 2021, https://www.law.ox.ac.uk/business-law-blog/blog/2021/10/zombies-v-subsidiarity-opening-8-december-2021.

[11] *Ibid.*

[12] *Secretary-General Calls Latest IPCC Climate Report "Code Red for Humanity", Stressing "Irrefutable" Evidence of Human Influence*, «United Nations Meetings Coverage and Press Releases», August 9, 2021, https://press.un.org/en/2021/sgsm20847.doc.htm.

[13] An introduction to the planetary boundaries framework is available at https://www.stockholmresilience.org/research/planetary-boundaries/the-nine-planetary-boundaries.html. Key research articles include J. Rockström et al., *Planetary Boundaries: Exploring the Safe Operating Space for Humanity*, «Ecology and Society», December 2009, https://www.ecologyandsociety.org/vol14/iss2/art32/; W. Steffen et al., *Planetary boundaries: Guiding human development on a changing planet,* «Science», January 15, 2015, https://www.science.org/doi/full/10.1126/science.1259855; L. Persson et al, *Outside the Safe Operating Space of the Planetary Boundary for Novel Entities*, «Environmental Science & Technology*», January 18, 2022*, https://doi.org/10.1021/acs.est.1c04158.

show that reality is even more grim – we have a whole set of code reds for humanity and they are increasing in number, clearly demonstrated for example in the 2022 research by Persson et al.[14], and the status for the European Union is not good[15]. Working towards sustainability also entails questions of social justice[16] – just as we cannot silo environmental issues into various categories to be dealt with separately, we cannot separate environmental and social issues. These are all interconnected elements[17]. All of these issues must all be dealt with simultaneously. The sustainability challenges of our time are complex and interconnected and attempting to silo sustainability work into dealing piecemeal with isolated elements will not work.

While there seems generally to be an increasing consensus among governments[18] and businesses[19] on the need to integrate sustainability into the governance of our globalized businesses, the attempts to do this so far seem to have been based on three principles: a) as few clear and enforceable rules as possible, b) support voluntary measures although they haven't worked so far, and c) if we must regulate, be sure to leave company law out of the picture.

However, to get real about integrating sustainability, we need to go to company law, which is the regulatory infrastructure for decision-making in business. As all company law scholars who have analysed the sources

[14] L. Persson *et al*, *Outside the Safe Operating Space of the Planetary Boundary for Novel Entities*, «Environmental Science & Technology», *January 18, 2022*, https://doi.org/10.1021/acs.est.1c04158.

[15] T. Häyhä, S.E. Cornell, H. Hoff, P. Lucas and D. van Vuuren, *Operationalizing the concept of a safe operating space at the EU level – first steps and explorations*, «Stockholm Environmental Institute», July 3, 2018, https://www.sei.org/publications/operationalizing-concept-safe-operating-space-eu/.

[16] K. Raworth, *A safe and just space for humanity: Can we live within the doughnut?*, «Oxfam Discussion Papers», February, 2012, https://www-cdn.oxfam.org/s3fs-public/file_attachments/dp-a-safe-and-just-space-for-humanity-130212-en_5.pdf; M. Leach, K. Raworth, J. 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*, UNESCO Publishing, OECD Publishing, Paris 2013, pp. 84-90.

[17] B. Sjåfjell, T. Häyhä, S. Cornell, *Research-Based Approach to the UN Sustainable Development Goals. A Prerequisite to Sustainable Business*, «SSRN», January 28, 2020, https://ssrn.com/abstract=3526744.

[18] *Human Rights Due Diligence: The State of Play in Europe*, «Shift», March 2021, https://shiftproject.org/resource/mhrdd-europe-map/.

[19] *More than 100 companies and investors call for effective EU corporate accountability legislation*, «Business and Human Rights Resource Centre», February 8, 2022, https://www.business-humanrights.org/en/latest-news/eu-mandatory-due-diligence-2022/.

know, company law gives a broad discretion to corporate boards and by extension senior management in their corporate governance. There is, in other words, space within the current company law and corporate governance systems to steer businesses in more sustainable directions. This has by some been used as an argument for the sanctity of company law – no need for change, move on, nothing to see here! The problem is that this discretionary space is taken up by the social norm of shareholder primacy. We therefore suggest, on the basis of over a decade of multijurisdictional comparative analyses of the drivers for and the barriers to sustainable business, that company law must take back that space and clarify why we have companies (corporate purpose) and give a principle-based instruction to boards on how to do their jobs in this era that is defined by the extreme unsustainabilities resulting from business as usual[20].

Sustainable value creation is already an emerging concept in corporate governance all over the world. What needs to be done is to position sustainable value creation within the ecological limits of our planet. We therefore propose both "sustainable value" and "planetary boundaries" as general clauses in company law, the content of which gradually can be firmed up as practice develops. This doesn't mean we don't think there should be any guidance in the law – quite the opposite, as we see the need to ensure that business does not take these two concepts and turn them into opportunities for greenwashing, bluewashing or "sustainability washing". Integrating these concepts into the duties of the board is therefore also paramount, outlining this in a way that provides legal certainty.

Avoiding the shareholder vs stakeholder trap does not mean that we do not in our proposal encompass a wide variety of interests affected by the company's business. However, while involving affected communities, trade unions, and civil society is crucial, a mere canvassing of 'stakeholder interests' and giving priority to the ones that make themselves heard the most is insufficient, misleading and potentially destructive for the overarching purpose of sustainable value creation. The backdrop must always be the interconnected complexities and the vulnerability of the often unrepresented groups (whether invisible workers deep in the global value chains, Indigenous communities, or future generations), and the aim of a sustainable future within planetary boundaries.

[20] See *e.g.* B. Sjåfjell, *Reforming EU Company Law to Secure the Future of European Business*, «SSRN», March 4, 2021, https://ssrn.com/abstract=3797685.

3. Under pressure: the proposed Corporate Sustainability Due Diligence Directive

The European Commission's Corporate Sustainability Due Diligence Directive proposal, presented on 23 February 2022, aims to put into place mandatory and harmonised sustainability due diligence rules in the European Economic Area, in recognition of the insufficiency of voluntary action by business and the regulatory chaos that business faces in its cross-border activities.

The proposed Directive is appropriately named as a Corporate Sustainability Due Diligence Directive, resonating in title with the proposed Corporate Sustainability Reporting Directive[21]. It is positive that the Corporate Sustainability Due Diligence Directive proposal clarifies which environmental and human rights issues that are intended included. However, a broader approach is needed, drawing on a research-based concept of sustainable value creation within planetary boundaries[22].

The proposal builds on a due diligence duty for the members of the board and the chief executive officer of the company. It reflects the international human rights and environmental international law obligations and concretises the steps of the due diligence process. There is, however, a danger of box ticking instead of principle-based evaluations of risks of unsustainability.

There are proposals for both public and private enforcement, including civil liability for the board members and the chief executive officer, which makes this proposal different from much what we have otherwise seen in the corporate sustainability area. The scope of the proposal is however extremely narrow, excluding in its direct application all small and medium-sized enterprises, and covering only some 13,000 EU companies and some 4,000 third-country companies.

The proposal takes an important core company law step, which we have advocated in our work, namely to clarify that the duty of the board (strangely formulated as a duty, in Anglo-Saxon speak, for all "directors") is to promote the interests of the company. Wisely, this is not attempted

[21] *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 final, April 21, 2021, «EUR-Lex», https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0189.

[22] B. Sjåfjell, T. Häyhä, S. Cornell, *Research-Based Approach to the UN Sustainable Development Goals. A Prerequisite to Sustainable Business*, «SSRN», January 28, 2020, https://ssrn.com/abstract=3526744.

harmonized (and especially not through including some kind of stakeholder language), rather leaving the content of the interests of the company to the variety of company law regimes in Europe. What is missing, however, is further situating this duty within an overarching purpose of sustainable value creation within planetary boundaries, which would have given a clearer sustainability-oriented framing for the whole proposal.

The proposal does employ misleading stakeholder language in the consultation duties as part of due diligence, where it would have been better to specify that the consultation should take place with affected communities, groups and people.

The proposed Directive is clearly a product of the tension resulting from, on the one hand, the social norm of shareholder primacy and the drive to keep company law untouched by sustainability issues, and on the other hand, the willingness to make necessary changes to mitigate the extreme unsustainabilities of business as usual. We see this in the way core company law issues are relegated to the end of the proposal. It would have been much more logical to set out clearly in the beginning of the proposed Directive the core duties of the boards to ensure that sustainability due diligence is used as a key tool for integrating sustainability into the entire business of the company.

The Directive proposal needs to be strengthened on a number of points, and it is now to be discussed further by the European Parliament and the Council, before it can be adopted with possible revisions. We strongly recommend that the further work with the Directive proposal is positioned with a research-based concept of sustainability and takes company law and corporate governance seriously, rather than allowing the misleading shareholder vs stakeholder dichotomy to set the parameters for continued siloing of core company law as the regulatory infrastructure for corporate decision-making.

Corporate Sustainability Reporting. Some comments on the Legislative Perspectives of Non-Financial Reporting in the EU

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The 2021/2022 proposal for a Corporate Sustainability Reporting Directive (CSRD) can be considered as an essential milestone on the way towards a more resilient and sustainable European, as well as global economy. The paper takes into consideration the legal developments, starting with the 2014 Non-Financial Reporting Directive (NFRD) and focuses on the relevance of the draft CSRD within the greater picture of the environmental and social policies of the EU. After its entry into force, the CSRD will replace the concept of non-financial reporting with the concept of sustainability reporting. Thus, the draft puts a much stronger emphasis on the stakeholder value as compared to previous pieces of legislation, such as the NFRD. With the implementation of the CSRD on member state level, European companies will have to release environmental and social factors that affect their business value on one hand and on the other hand the impact of their activities on the economy, the people and the environment. Not only large companies, but also specific small companies and SMEs shall fall within the scope of the new directive.

Keywords: Shareholder value versus Stakeholder value debate; Corporate Social Responsibility, Non-Financial Reporting Directive, Corporate Sustainability Reporting Directive, ESG Factors, Resiliency, Double Materiality, SMEs.

1. Opening remarks

The question regarding "shareholder value *versus* stakeholder value", one of the all-time "bestselling" topics within the academic debate on the scope of corporations in the light of Corporate Social Responsibility (CSR)[1], has entered a new stage: On 21 April 2021 the European Commission released a proposal for a directive regarding the reporting of environmental and social matters, the so-called Corporate Sustainability Reporting Directive (CSRD)[2].

This draft document shows the intention of the European lawmaker to put the transparency of environmental and social issues within European corporations on a much higher level by amending the 2014 so-called "Non-Financial Reporting Directive" (NFRD)[3].

This seems to be a great strategy in order to face today's challenges such as the transformation of the EU economy in the aftermath of the Covid-19 pandemic as well as the current trends of full digitalization

[1] See H. Fleischer, *Corporate Social Responsibility – Vermessung eines Forschungsfeldes aus rechtlicher Sicht*, «AG – Die Aktiengesellschaft», 2017, pp. 509 ff.

[2] For comments on the draft see *e.g.*: J. Baumüller, N. Häring, S. Meri, *Ausblick auf die europäischen Standards für die Nachhaltigkeitsberichterstattung* «IRZ – Zeitschrift für internationale Rechnungslegung», 2022, pp. 125 ff.; N. Borcherding, J. Freiberg, S. Skoluda, *Entwurf einer Corporate Sustainability Reporting Directive*, «StuB – Steuern und Bilanzen: Zeitschrift für das Steuerrecht und die Rechnungslegung der Unternehmen», 2021, pp. 469 ff.; C. Deiminger, *Corporate Sustainability Reporting Directive (CSRD) – ein weiterer Schritt zur Digitalisierung der Unternehmensberichterstattung*, «KoR – Zeitschrift für internationale und kapitalmarktorientierte Rechnungslegung», 2022, pp. 114 ff.; G. Lanfermann, O. Scheid, *Vorschlag der EU-Kommission zur Corporate Sustainability Reporting Directive (CSRD)*, 2022, «DB – Der Betrieb», pp. 1213 ff.; S. Müller, O. Scheid, J. Braumüller, *Kommissionsvorschlag zur Corporate Sustainability Reporting Directive: Von der nichtfinanziellen Berichterstattung zur Nachhaltigkeitsberichterstattung*, «BB – Betriebsberater», 2021, pp. 1323 ff.; M. Nietsch, *Von der nichtfinanziellen Berichterstattung zur Nachhaltigkeitsberichterstattung – Eine Momentaufnahme zum Vorschlag der Corporate Sustainability Reporting Directive*, «ZIP – Zeitschrift für Wirtschaftsrecht», 2022, pp. 449 ff.; N. Otter, S. Müller, J. Hartau, *Umsetzung der Nachhaltigkeitsberichterstattung in mittelständischen Unternehmen – Berichterstattung über Sozialbelange*, «BC - Zeitschrift für Bilanzierung, Rechnungswesen und Controlling», 2022, pp. 64 ff.; W. Schön, *Nachhaltigkeit in der Unternehmensberichterstattung*, «ZfPW – Zeitschrift für die gesamte Privatrechtswissenschaft», 2022, pp. 207 ff..

[3] See Directive 2014/95/EU of the European Parliament and the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095.

within EU corporations in addition to those increasingly posed by environmental, social, and governance (ESG) issues.

The political agreement between the Council of the European Union and the European Parliament on the CSRD proposal has been finally reached on 21 June, 2022, and the latest version of the directive draft has been published on 30 June 2022[4].

2. Reasons for the adjustments of the NFRD

2.1. The achievements of the NFRD

When it comes to analyzing any legislation regarding sustainability, it is required to distinguish two types of rules: the hard ones, focusing on mandatory rules of conduct, *e.g.*, due diligence rules regarding the production and marketing of goods and services and corporate governance rules, versus the soft ones, that merely require the businesses to release information and thus to follow specific transparency standards[5]. The draft CSRD as well as the NFRD fall within the second category. They deal with the transparency issues only without addressing directly issues of due diligence, corporate governance and other behavioral issues of the corporations' bodies.

Originally, the European lawmaker considered it to be enough to actually require the businesses to report publicly about their environmental impact. It had been expected that by forcing the corporations to report, they would automatically change their internal environmental and social policies to the better. Thus, it can be summarized, that the implementation of the 2014 NFRD has been an essential step towards a better understanding of environmental and social factors of business within the EU. According to the rules contained in the NFRD large companies have to

[4] The updated 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 of 30 June 2022, Document 2021/0104 (COD), can be downloaded at https://www.consilium.europa.eu/media/57644/st10835-xx22.pdf. Once the formal decision-making process will have been accomplished, the text of the CSRD will be published in the Official Journal of the European Union and will enter into force 20 days after the publication..

[5] See M. Nietsch, *Von der nichtfinanziellen Berichterstattung zur Nachhaltigkeitsberichterstattung – Eine Momentaufnahme zum Vorschlag der Corporate Sustainability Reporting Directive*, «ZIP – Zeitschrift für Wirtschaftsrecht», 2022, p. 449.

report about the social and environmental impact of their activities on an annual basis. Thus, according to the current NFRD corporations need to release annual information about how sustainability issues affect their business and about their impact on people and environment[6].

2.2. Shift to new rules

The new term Corporate Sustainability Reporting indicates a radical shift into a new and more efficient set of rules aimed at supporting the stakeholder interests of companies. Hence, the CSRD will be the ideal pairing to other legislative measures in the field of sustainability rules for European companies, such as the European Corporate Governance Directive[7]. When analyzing the CSRD proposal and analyzing the provisions contained in the draft, it seems to be essential to always take into consideration the big picture of European policymaking, especially the so-called Green Deal framework[8]. In December 2019 the EU has presented the Green Deal as the EU's main growth strategy. It aims at the realization of a transition of the EU economy to a sustainable model. With the strategies laid down in the Green Deal, the EU intends to become the first climate neutral internal market by 2050. From an overall perspective, the Green Deal aims at a cleaner environment, at affordable energy, at smarter transport as well as on new jobs. In the light of the most recent historic developments, such as the Covid-19 pandemic and the war in Ukraine, the agenda contained in the EU Green Deal seems to be even more important.

As mentioned previously, the CSRD proposal falls under the category of so called "soft" legislative measures and thus does not aim at changing directly the behavior of the corporations' directors or their staff[9]. On the

[6] See C. Deiminger, *Corporate Sustainability Reporting Directive (CSRD) – ein weiterer Schritt zur Digitalisierung der Unternehmensberichterstattung*, «KoR – Zeitschrift für internationale und kapitalmarktorientierte Rechnungslegung», 2022, p. 114.

[7] See N. Borcherding, J. Freiberg, S. Skoluda, *Entwurf einer Corporate Sustainability Reporting Directive*, «StuB – Steuern und Bilanzen: Zeitschrift für das Steuerrecht und die Rechnungslegung der Unternehmen», 2021, p. 469.

[8] See G. Lanfermann, O. Scheid, *Vorschlag der EU-Kommission zur Corporate Sustainability Reporting Directive (CSRD)*, «DB – Der Betrieb», 2021, p. 1213; W. Schön, *Nachhaltigkeit in der Unternehmensberichterstattung*, «ZfPW – Zeitschrift für die gesamte Privatrechtswissenschaft», 2022, p. 207.

[9] See M. Nietsch, *Von der nichtfinanziellen Berichterstattung zur Nachhaltigkeitsberichterstattung – Eine Momentaufnahme zum Vorschlag der Corporate Sustainability Reporting Directive*, cit.

contrary it aims at forcing them to grant third parties a greater insight into the sustainability policies adopted in the company. Thus, the CSRD proposal is focused primarily at a higher level of transparency and can have an indirect positive impact on the decision making of the management in the field of sustainability, *e.g.* regarding the climate change[10].

2.3. Beneficiaries

Thus, the question arises who should primarily benefit from the new proposed piece of legislation aiming at the release social and environmental information[11]. According to the wording it seems plausible to assume that the European Commission intended to give the shareholders as well as investors an easier access to information and furthermore to enhance the quality as well as the accuracy of the information[12]. It does not surprise that the European policymakers have also addressed the digital manageability of the information required to actually make investment decisions[13].

In the previous years since the entry into force of the NFRD, the expectancy of investors regarding the quality and completeness of information regarding e.g. environmental issues as well as human rights standards in the supply chain have changed dramatically[14]. There seems to be a much higher demand regarding crucial information on stakeholder interests as well as the opportunity to cross-check the accuracy of the information provided. This demand can be explained with the economic boom of sustainability investments on the financial markets[15]. Since the entry into force and the implementation of the NFRD there have been many doubts about the accuracy of the released information[16].

[10] See W. Schön, *Nachhaltigkeit in der Unternehmensberichterstattung*, cit., p. 230.

[11] See N. Otter, S. Müller, J. Hartau, *Umsetzung der Nachhaltigkeitsberichterstattung in mittelständischen Unternehmen – Berichterstattung über Sozialbelange*, «BC – Zeitschrift für Bilanzierung, Rechnungswesen und Controlling», 2022, p. 64.

[12] See W. Schön, *Nachhaltigkeit in der Unternehmensberichterstattung*, cit., p. 232.

[13] See N. Borcherding, J. Freiberg, S. Skoluda, *Entwurf einer Corporate Sustainability Reporting Directive*, cit.; C. Deiminger, *Corporate Sustainability Reporting Directive (CSRD) – ein weiterer Schritt zur Digitalisierung der Unternehmensberichterstattung*, cit., p. 114.

[14] See H. Fleischer, *Corporate Social Responsibility – Vermessung eines Forschungsfeldes aus rechtlicher Sicht*, cit., p. 521.

[15] See W. Schön, *Nachhaltigkeit in der Unternehmensberichterstattung*, cit., p. 219.

[16] See M. Nietsch, *Von der nichtfinanziellen Berichterstattung zur Nachhaltigkeitsberichterstattung – Eine Momentaufnahme zum Vorschlag der Corporate Sustainability Reporting Directive*, cit., p. 449.

2.4. Shareholder and Stakeholder interests

The proposal of the directive contains a fundamental change regarding the fields of information as well as the scope of the information. According to the new Art. 19a, as amended by Art. 1 par. 3 of the CSRD proposal, the management report information shall allow to understand the impact of the businesses on matters of sustainability[17]. On the contrary, the same report shall also describe how sustainability matters affect the undertaking's performance[18].

The draft provision can be interpreted as a legislative attempt to allow for a balanced result that takes into consideration not only the stakeholder interests (thus the negative impact of the undertaking's activities on matters of sustainability), but also the shareholder's interests (thus the risks and opportunities resulting from the undertaking's respect of sustainability matters for the business performance)[19].

3. Important Milestones

3.1. Sustainability in the context of the pandemic

Many jurisdictions in the world currently deal with the economic, social and legal aftermath of the Covid-19 pandemic and its implications on the need for a higher level of resiliency and sustainability. The publication of the proposal for CSRD can be considered to be the most essential milestone in the realization of the EU Sustainable Finance Action Plan, same as the political agreement on the same draft reached in June 2022[20]. It seems that the experts drafting the CSRD have taken into consider-

[17] See S. Müller, O. Scheid, J. Braumüller, *Kommissionsvorschlag zur Corporate Sustainability Reporting Directive: Von der nichtfinanziellen Berichterstattung zur Nachhaltigkeitsberichterstattung*, cit., p. 1323; M. Nietsch, *Von der nichtfinanziellen Berichterstattung zur Nachhaltigkeitsberichterstattung – Eine Momentaufnahme zum Vorschlag der Corporate Sustainability Reporting Directive*, cit., p. 459.

[18] See M. Nietsch, *Von der nichtfinanziellen Berichterstattung zur Nachhaltigkeitsberichterstattung – Eine Momentaufnahme zum Vorschlag der Corporate Sustainability Reporting Directive*, cit., p. 457.

[19] See W. Schön, *Nachhaltigkeit in der Unternehmensberichterstattung*, cit., p. 232.

[20] See J. Baumüller, N. Häring S. Meri, *Ausblick auf die europäischen Standards für die Nachhaltigkeitsberichterstattung*, cit., p. 125; C. Deiminger, *Corporate Sustainability Reporting Directive (CSRD) – ein weiterer Schritt zur Digitalisierung der Unternehmensberichterstattung*, cit.

ation the literature published on CSR reporting in Europe, the US, Asia and beyond[21]. The current political discussion as well as the upcoming implementation procedures in the 27 member states will have to focus on the practical implications for businesses, shareholders as well as stakeholders[22]. For the fact that SMEs were rather untouched by the previous and current CSR regime, there has been less economic, social and legal research on the impact of sustainability reporting on SMEs[23]. There is no doubt that the implementation process as well as the legal design of the future reporting standards[24] will have to consider the fact that SMEs are the backbone of European economy. Thus, we can summarize that the non-European experiences on CSR reporting cannot be transferred easily on the EU, simply because hardly any other large market in the world seems to rely so much on SMEs as the EU[25].

3.2. Perspective of the investors

All legislative steps that have been taken by the EU in the last years need to be assessed primarily from the perspective of investors, and specifically of institutional investors[26]. They demand a homogeneous reporting practice where directors have less discretion in deciding about the quantity and quality of information given to the public.[27]

Until now, there is a huge variety of different reporting standards applied in various jurisdictions. It needs to be highlighted that the creation of uniform reporting standards has been on the priority list not only of

[21] Such as *e.g.* H. Fleischer, *Corporate Social Responsibility – Vermessung eines Forschungsfeldes aus rechtlicher Sicht*, cit., p. 509.

[22] See N. Otter, S. Müller, J. Hartau, *Umsetzung der Nachhaltigkeitsberichterstattung in mittelständi-schen Unternehmen – Berichterstattung über Sozialbelange*, cit., p. 64; S. Müller, O. Scheid, J. Braumüller, *Kommissionsvorschlag zur Corporate Sustainability Reporting Directive: Von der nichtfinanziellen Berichterstattung zur Nachhaltigkeitsberichterstattung*, cit., p. 1323; G. Lanfermann, *Vorschlag der EU-Kommission zur Corporate Sustainability Reporting Directive (CSRD)*, cit., p. 1213.

[23] See M. Nietsch, *Von der nichtfinanziellen Berichterstattung zur Nachhaltigkeitsberichterstattung – Eine Momentaufnahme zum Vorschlag der Corporate Sustainability Reporting Directive*, cit., p. 451.

[24] See J. Baumüller, N. Häring S. Meri, *Ausblick auf die europäischen Standards für die Nachhaltigkeitsberichterstattung*, cit., p. 125.

[25] See N. Otter, S. Müller and J. Hartau, *Umsetzung der Nachhaltigkeitsberichterstattung in mittelständischen Unternehmen – Berichterstattung über Sozialbelange*, cit., p. 64.

[26] See W. Schön, *Nachhaltigkeit in der Unternehmensberichterstattung*, cit., p. 232.

[27] See H. Fleischer, *Corporate Social Responsibility – Vermessung eines Forschungsfeldes aus rechtlicher Sicht*, cit., p. 515.

political law-making institutions (such as the EU legislation), but also of Rating Agencies and International Organizations[28], such as the International Organization of Securities Commissions (IOSCO)[29].

One of the major advantages of standard guidelines is the avoidance of the distortion of competition between capital markets and more fairness as far as information standards are concerned[30]. As long as the financial disclosure standards are too different between member states, investors don't have a chance to carefully evaluate the investments opportunities and to follow their own ethical standards.

3.3. Global perspective

It might be questionable whether it was a good move of the EU lawmaker to actually embark into the creation of specific EU reporting standards on environmental and social issues (as contained in the NFRD and in the draft CSRD as well as in the reporting standards) or whether it would have been wiser to follow a more global (and not Euro-centric) approach in the legislation by relying *e.g.* on international agreements with the other regions of the world, such as North America, Asia etc.

Furthermore, it is debatable whether, from a more general perspective, it might have been wiser to entrust the market with the setting of standards regarding CSR reporting, or whether there had been a need for (global) mandatory rules that obligate the management of all firms to actually report the same way. At the moment it seems that the US is following rather the first approach, while the proposal for a CSRD proves a clear commitment to set harmonized mandatory reporting rules for all 27 member states[31].

As previously mentioned, the CSRD draft follows the path laid down in the previous pieces of legislation, especially the NFRD that already requires large public-interest corporations to disclose environmental and social information.

The CSRD proposal will increase the range of corporations subject to the reporting obligations and will also force the management of the cor-

[28] See W. Schön, *Nachhaltigkeit in der Unternehmensberichterstattung*, cit., p. 239.

[29] https://www.iosco.org.

[30] See J. Baumüller, N. Häring S. Meri, *Ausblick auf die europäischen Standards für die Nachhaltigkeitsberichterstattung*, cit., p. 125.

[31] See W. Schön, *Nachhaltigkeit in der Unternehmensberichterstattung*, cit., p. 211; H. Fleischer, *op. cit.*, p.511.

porations to be more specific when delivering information. Moreover, according to the draft, the information is also subject to third-party audit[32].

4. The "Double Materiality" Concept

The economic and political pressure that finally led to the creation of the draft CSRD were the deficiencies of the NFRD. The range of application of the latter piece of legislation seems to be too limited as well as the demanded quality of information that has to be delivered under the NFRD[33]. It needs to be highlighted that the draft CSRD contains a more precise specification of the so-called double materiality concept than the current NFRD[34].

As far as the reporting contents is concerned, the information regarding the sustainability needs to be part of the management report[35]. This information needs to be tagged digitally[36]. Furthermore, the CSRD has a wider going enforcement mechanism relying on heavier sanctions and puts a harder burden on the companies related to the drafting of the reports[37].

It needs to be highlighted that the scope of the CSRD is extended and will include all large companies no matter whether they are listed or not, as well as small companies and SMEs listed on EU markets. Only micro companies are granted a simplified reporting procedure[38]. The labelling of the directive seems to be decisive for its success. The replacement of the old term "non-financial reporting" with the modern term "sustainability reporting" will have a positive impact on the political acceptance on member state level in the implementation process[39].

[32] G. Lanfermann, O. Scheid, *Vorschlag der EU-Kommission zur Corporate Sustainability Reporting Directive (CSRD)*, cit., p. 1213.
[33] See N. Borcherding, J. Freiberg, S. Skoluda, *Entwurf einer Corporate Sustainability Reporting Directive*, cit., p. 469.
[34] See G. Lanfermann, O. Scheid, *op. cit.*, p. 1213.
[35] See J Baumüller, N Häring, S. Meri, *Ausblick auf die europäischen Standards für die Nachhaltigkeitsberichterstattung*, cit., p. 125.
[36] See C. Deiminger, *Corporate Sustainability Reporting Directive (CSRD) – ein weiterer Schritt zur Digitalisierung der Unternehmensberichterstattung*, cit., p. 114.
[37] See G. Lanfermann O. Scheid,, *op. cit.*, p. 1213.
[38] See M. Nietsch, *Von der nichtfinanziellen Berichterstattung zur Nachhaltigkeitsberichterstattung – Eine Momentaufnahme zum Vorschlag der Corporate Sustainability Reporting Directive*, cit., p. 451.
[39] See S. Müller, O. Scheid, J. Braumüller, *Kommissionsvorschlag zur Corporate Sustainability Reporting Directive: Von der nichtfinanziellen Berichterstattung zur Nachhaltigkeits-*

The European legislation had already started to embrace the double materiality concept in Art. 19a and in Art. 29 a of the NFRD[40]. The present draft has an even clearer focus on this concept. The cornerstones of the "new" double materiality concept have been outlined in Recital 25 as well as Art. 1 par. 3 and 7 of the draft CSRD[41]. At this stage it needs to be analyzed how the double materiality concept works. First, the proposal for a CSRD focuses on the question how sustainability topics are implemented into the business reality of the corporations as well as on the daily life of the directors. Second, the draft CSRD demands a constant evaluation of the impact of the undertakings on the environment as well as on persons (such as workers, consumers, other stakeholders etc.). Thus, the double materiality concept has endorsed an internal as well as an external perspective[42].

As mentioned previously, the reference to Articles 19a and 29a of the NFRD, as contained in Recital 25 of the draft CSRD, allows for a smooth improvement in the field of sustainability reporting[43]. Thus, the double materiality concept, as described in Recital 25 of the draft CSRD, requires a report non only on the information that is necessary for everybody (such as e.g. an investor) to understand the development, performance and position of the corporation, but also on its impact on human rights, matters of the employees as well as environmental issues and other topics (such as bribery and corruption)[44]. It can be summarized that double materiality means that a report is required, first, on the impact of the corporations' activities on the environment as well as the people and, second, on how the sustainability measures are affecting the business[45].

5. Fields covered by the CSRD

Finally, it needs to be questioned which fields should be covered by an ideal piece of legislation dealing with CSR reporting and whether the

berichterstattung, cit., p. 1323.

[40] These provisions have also been quoted in Recital no. 25 of the CSRD.

[41] See G. Lanfermann, O. Scheid, *Vorschlag der EU-Kommission zur Corporate Sustainability Reporting Directive (CSRD)*, cit., p. 1213.

[42] See S. Müller, O. Scheid, J.Braumüller, *op. cit.*, p. 1323.

[43] See M. Nietsch, *Von der nichtfinanziellen Berichterstattung zur Nachhaltigkeitsberichterstattung – Eine Momentaufnahme zum Vorschlag der Corporate Sustainability Reporting Directive*, cit., p. 454.

[44] See W. Schön, *Nachhaltigkeit in der Unternehmensberichterstattung*, cit., p. 234.

[45] See S. Müller, O. Scheid, J. Braumüller, *op. cit.*, p. 1323.

CSRD complies with this model[46]. The reporting content contained in the draft CSRD seems to be very wide. As results from Art. 1 par. 3 and 7 of the proposal for a CSRD (as well as from the Recitals 26 ss.) the report has to contain a description of the business model and the strategy applied by the company as far as sustainability issues are concerned[47]. Furthermore, the draft CSRD requires that targets related to sustainability topics are pronounced properly as well as the progress in the various phases of achievement of the targets[48].

The new piece of draft legislation will also require the company to describe its own policies regarding sustainability as well as the due diligence processes. This includes that the company always has a focus on the sustainability-related risks. The company needs to explain which actions it takes to manage the risks[49].

It seems to be quite remarkable that the proposal for a CSRD requires the disclosure of intellectual capital as well as of social and relationship capital (Art. 1 par. 3 CSRD). Thus, the draft CSRD points out that the corporation is always acting in a chain situation and that the capital regarding relationship with other companies are essential with respect of its business performance as well as the maintenance of sustainability criteria[50].

It can be expected that the draft CSRD will assist investors by assuring that the information released by the corporation is accurate and can be relied on[51]. This is particularly true for the current phase in history where the economy of the 27 EU member states is in the middle of a transformation process from a high-carbon economy to a low one.

Even though the NFRD had a very positive impact on the shift of mentality of European corporations' managers, shareholders and stakeholders as well as investors, it is still too weak to have a significant im-

[46] See H. Fleischer, *Corporate Social Responsibility – Vermessung eines Forschungsfeldes aus rechtlicher Sicht* (2017), AG – Die Aktiengesellschaft, 509 ss.

[47] See G. Lanfermann, O. Scheid, *Vorschlag der EU-Kommission zur Corporate Sustainability Reporting Directive (CSRD)*, cit., p. 1213.

[48] See M. Nietsch, *Von der nichtfinanziellen Berichterstattung zur Nachhaltigkeitsberichterstattung – Eine Momentaufnahme zum Vorschlag der Corporate Sustainability Reporting Directive*, cit., p. 452.

[49] See G. Lanfermann, O. Scheid, *Vorschlag der EU-Kommission zur Corporate Sustainability Reporting Directive (CSRD)*, cit., p. 1213.

[50] See M. Nietsch, *Von der nichtfinanziellen Berichterstattung zur Nachhaltigkeitsberichterstattung – Eine Momentaufnahme zum Vorschlag der Corporate Sustainability Reporting Directive*, cit, p. 457.

[51] See W. Schön, *Nachhaltigkeit in der Unternehmensberichterstattung*, cit., p. 216.

pact on the business practices[52]. Thus, at the current stage, the information provided by the corporations seems to be not detailed enough. Furthermore, it seems to be difficult to check whether the reported data are consistent. As of today, this makes it quite hard for investors to rely on the non-financial, ESG-related information to be provided to them, also for purposes of their investment decisions.

On the contrary, the CSRD, once it will be implemented, will require corporations falling within its scope to provide non-financial data that would allow current and prospective investors to compare what the various (competing) companies, that ought to comply with the same CSRD rules, are doing, as far as sustainability issues are concerned. Eventually, investors will be in the position to appreciate the real impact the activities carried out by their companies are actually exerting on environmental, social, as well as governance matters[53].

Thus, the draft CSRD can be regarded as one of the major instruments in the objective to increase sustainable finance and to reach the level of respect for environmental and social matters that are aimed at within the EU's political goals, such as *e.g.* the so called EU Green Deal[54]. As already mentioned, the shift to a greener, cleaner and fairer economy in the EU can happen only if investors can be sure that the information released by corporations is reliable, comparable and can be trusted when taking investment decisions[55].

As far as the contents is concerned, companies will no longer be in a position to pick and choose which sort of information they intend to release to the public. On the contrary, the draft CSRD contains a very rigid framework and has a differentiated view on what and how the release of information on environmental and social issues shall happen.

It needs to be emphasized that the European Commission will not directly draft the reporting standards that need to be followed by the companies in order to comply with the CSRD. Currently, the European

[52] S. Müller, O. Scheid, J Braumüller, *Kommissionsvorschlag zur Corporate Sustainability Reporting Directive: Von der nichtfinanziellen Berichterstattung zur Nachhaltigkeitsberichterstattung*, cit., p. 1323.
[53] See M. Nietsch, *Von der nichtfinanziellen Berichterstattung zur Nachhaltigkeitsberichterstattung – Eine Momentaufnahme zum Vorschlag der Corporate Sustainability Reporting Directive*, cit., p. 457.
[54] See G. Lanfermann, O. Scheid, *Vorschlag der EU-Kommission zur Corporate Sustainability Reporting Directive (CSRD)*, cit., p. 1217.
[55] See G. Lanfermann, O. Scheid, *Vorschlag der EU-Kommission zur Corporate Sustainability Reporting Directive (CSRD)*, cit., p. 1213.

Financial Reporting Advisory Groub (EFRAG), a body based on the concept of private-public partnership, is in charge of drafting the standards under the supervision of the European Commission[56]. As mentioned before, the double materiality standards will require the corporations to release environmental and social factors that would be likely to affect their business value, on one hand; and, on the other hand, the impact on the economy, the people and the environment[57]. It should also be highlighted that the information provided will need to be in its nature both qualitive and quantitative and its scope will have to be extended as to encompass short, medium and long-term perspectives. Furthermore, the data released by each company to be subjected to the CSRD will have to be verified and evaluated by an external auditor.

While the NFRD has a very narrow scope as far as the companies covered are concerned, the draft CSRD affects a much larger number of companies and thus can be regarded as a very important milestone. However, according to the general proportionality principle, small companies will not be required to unveil the same quantity of details on their business activities and the strategies of achievement of the business goals as well as their environmental and social impact, as large companies.

After the entry into force of the CSRD, as usual when a directive is concerned, each of the 27 member states will have to implement its provisions into national legislation. This will allow the member states to fit the new rules into their national company law mechanism, respecting the corporate governance system acting domestically (such as the dualistic, the monistic or the traditional Italian system of corporate governance)[58].

As far as the time horizon is concerned, the pieces of legislation on member state level, resulting from the implementation of the CSRD will most likely be operative in 2024. After that, the businesses will have to conform to the new rules.

Finally, as far as CSRD compliance costs are concerned, one could reasonably expect a higher disclosure burden on the companies in the 27 member states. On the other hand, non-compliant companies will have

[56] See J. Baumüller, N. Häring, S. Meri, *Ausblick auf die europäischen Standards für die Nachhaltigkeitsberichterstattung (2022)*, cit., p. 125.

[57] See M. Nietsch, *Von der nichtfinanziellen Berichterstattung zur Nachhaltigkeitsberichterstattung – Eine Momentaufnahme zum Vorschlag der Corporate Sustainability Reporting Directive*, cit., p. 454.

[58] G. Gandini, R. Astori, R. Cassano, *Structures of Corporate Governance in Italy and Comparison at European Level*, «International Review of Business Research Papers», 2009, pp. 441-453.

more difficulties to attract investors, as well as to hire qualified staff and to market their goods and services. Thus, the enforcement of the CSRD will happen not only by means of legal instruments, but also through competitive market dynamics.

Adequate Corporate Internal Structures and Sustainability

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In Europe, two paths are considered strategic for creating sustainable value: insert the social values within the concept of purpose or within the interest of the corporation. A different strategy is looking at the operating rules of management: an issue that can be considered particularly topical, in the light of the Resolution of the European Parliament of 10 March 2021, regarding a proposal for a directive on a due diligence obligation for the undertakings. In Italy, the point seems connected to the rule introduced with the recent reform of Article 2086, paragraph 2, of the Italian Civil Code, which places on the directors a particular duty of correct administration. In terms of general legislative policy, the traditional "proprietary approach" is gradually being replaced by a new one, which relies on the rules of those who are entrusted with powers over resources destined for production. This approach imposes a proceduralization of the above rules, in order to prevent the betrayal of the entrustment operated and guarantee the adequate use of the resources entrusted. The new proposal, in fact, has the broad ambition to make all businesses Entities real Fiduciaries in the pursuit of all social values. Looking at the Italian legal system, however, it can be said that, in the absence of provisions similar to those contained in the EU Parliament Resolution of 10 March 2021, Article 2086 of the Italian Civil Code cannot be considered sufficient to outline a fiduciary duty of the company or its directors towards those who complain of some damage to environmental and social sustainability.

Keywords: Corporate Internal Structures; Sustainable value; Duty of correct management; Article 2086 of the Italian Civil Code; Fiduciary duties; Corporate Due Diligence Directive Proposal

1. A Premise: A Change of Regulatory Strategy?

Let's start with a necessary premise.

In Europe, two paths are considered strategic for creating sustainable value: insert the social values (the protection of the rights of the stakeholders) within (*a*) the concept of purpose pursued by the shareholders or within (*b*) the interest of the corporation pursued by the directors.

These two strategies are often unified perhaps promiscuously in the concept of improving corporate governance with the consideration of the values of sustainability.

The question I am dealing with today is whether, in order to achieve the sustainability objectives through corporate legislation, the attention of the jurist should be placed elsewhere.

That is, if rather than looking at the principles of corporate structure, we should look at the operating rules of management: how the company should operate (in pursuing the traditional corporate interest), where the values of sustainability (referable to third parties) are to be protected.

2. The recent Italian Reform of Article 2086 Civil Code

The above issue can be considered particularly topical, in the light of the Resolution of the European Parliament of 10 March 2021, regarding a proposal for a directive on a due diligence obligation for the undertakings.

In Italy, the point seems connected to the rule introduced with the recent reform of Article 2086, paragraph 2, of the Italian Civil Code, within the framework of the regulation of the business crisis.

Pursuant to the new article 2086 paragraph 2 of the Italian Civil Code, the entrepreneur, who operates in a corporate or collective form, must: *i*) establish an organizational, administrative and accounting structure that is adequate to the nature and size of the company, also based on the timely detection of the crisis of the company and the loss of business continuity; *ii*) take action without delay for the adoption and implementation of one of the tools provided for by the law for overcoming the crisis and recovering business continuity.

This rule has been criticized or belittled by many. In fact, by adopting a conservative perspective, the norm above would be only a rule that specifies an obligation of diligence on directors that already exists, applicable to all collective enterprises. Furthermore, this rule should always be read in view of satisfying the shareholders' interest to profits.

However, I am convinced that this is not the case, and I supported it in an essay written together with Chiara Presciani. This new rule, on the contrary, places on the directors a particular duty of correct administration, dictated in consideration of an extension of the fiduciary obligation that is imposed on them, as managers of the company, towards third parties.

3. The Reasons of the Reform

Among the rest, that Article 2086 (in its new formula) establishes an obligation deriving from the management of the company and designed to protect third parties is proved by the placement of the rule within the general discipline of firms. Trivially, it cannot be considered that Article 2086 of the Italian civil code constitutes an obligation of the entrepreneur towards himself.

However, a broader justification can be given to the aforementioned interpretation.

In particular, it should be noted in the first place that in recent decades there has been a process of "privatization of the realization of socio-economic interests", which have been increasingly entrusted to the rule of competition and social formations and not to the intervention of the State.

Secondly, the thrust of globalization has led to an acceleration of this process, with the consequence of the increasing reliance on private initiative of positive general economic results as well as the expectation regarding the protection of the social values involved.

All this has generated awareness of the need for greater accountability in the implementation of the activity by the holders of the relative power. And this, in obedience to the rule – provided for, in Italy, in Article 41, paragraph 2, of the Constitution – according to which the economic initiative cannot be carried out in contrast with the social utility, as well as with that – contained in Article 3, paragraph 3, of the Lisbon Treaty – of sustainable competition.

This change at the level of general economic-social policy and strategy has led to a shift in the modality of intervention of the Italian legislator in the relationship of each private individual with the social sphere.

The traditional legislative strategy is a "proprietary" one, which entrusts the protection of the social rights against other private behaviours to the spontaneous activation of the interest of the owner of the assets to avoid liability for damages caused to third parties. Therefore, this mechanism, transposed to the level of corporations, is based on the idea that the interest in the defense of the integrity of the corporate assets by the shareholders (owners of the same) indirectly involves deterrence towards actions that prove to be detrimental to third-party creditors. The shareholders, to avoid detrimental consequences to the corporate assets, will be careful that the directors do not step on the rights of third parties or in general will not generate externalities.

This traditional approach is gradually being replaced by a new one, which relies on the rules of those who are entrusted with powers over resources destined for production: in the premise that, where socio-economic well-being is mainly based on the private assignment of resources, the relative holders become responsible for their correct use. This approach imposes a proceduralization of the above rules, in order to prevent the betrayal of the entrustment operated and guarantee the adequate use of the resources entrusted.

4. The EU Proposal Assumption. Corporations as Fiduciaries

If you agree with the above reconstruction (but of course, only if you agree with it) it seems clear to me that the proposed directive, contained in the Resolution of the European Parliament of 10 March 2021, moves in that same direction.

See Article 1, of the proposal:

> «This Directive is aimed at ensuring that undertakings under its scope operating in the internal market fulfil their duty to respect human rights, the environment and good governance and do not cause or contribute to potential or actual adverse impacts on human rights, the environment and good governance through their own activities or those directly linked to their operations, products or services by a business relationship or in their value chains, and that they prevent and mitigate those adverse impacts».

It seems clear that this sentence does not claim to require the corporation to have a social interest that is inclusive of the values of the stakeholders. Indeed, the proposal starts from the very opposite assumption that company directors do not pursue in themselves, or may not pursue, socially virtuous objectives or in a socially efficient manner. And it is on this premise that it is proposed to extend the range of relevance of the fiduciary characterization of business activity.

See again Article 1, paragraph 2, of the Proposal:

> «This Directive lays down the value chain due diligence obligations of undertakings under its scope, namely to take all proportionate and commensurate measures and make efforts within their means to prevent adverse impacts on human rights, the environment and good governance from occurring in their value chains, and to properly address such adverse impacts when they occur. The exercise of due diligence requires undertakings to identify, assess, prevent, cease, mitigate, monitor, communicate, account for, address and remediate the potential and/or actual adverse impacts on human rights, the environment and good governance that their own activities and those of their value chains and business relationships may pose. By coordinating safeguards for the protection of human rights, the environment and good governance, those due diligence requirements are aimed at improving the functioning of the internal market».

It should be noted that the trend thus envisaged seems to replicate an extension that has already occurred in the financial sector, where brokerage firms have by law become the trustees of the resources they manage, in view of the specific protection of the social value of savings: this is the so-called the product governance rule.

The new proposal for a directive, however, has a broader ambition, precisely because it aims to make all businesses Entities (and not just financial intermediation companies) real Fiduciaries, and in the pursuit of all social values and not only not limited to the involvement of savings.

5. Conclusion

Looking at the Italian legal system (which on this point is identical to that still in force throughout Europe), it can be said that, in the absence of provisions similar to those contained in the proposal for a directive of the European parliament of 10 March 2021, Article 2086 of the Italian Civil Code cannot be considered sufficient to outline a fiduciary duty of the

company or its directors towards those who complain of some damage to environmental and social sustainability.

To date, the only "sustainability" positively envisaged in the legal system (if by this we mean a rule governing the exercise of the business activity that prevents damage to social and environmental values) concerns the specific values of credit in the market in view of the financial sustainability of the company (Article 2086) and the entrusting of savings to intermediaries (product governance).

However, something else will happen if the proposal for a directive would come to a definitive formulation and would be adopted.

Doctrine has raised numerous doubts in this regard, correctly pointing out the numerous technical defects of the proposal. However, in the face of what seems to me an important acceleration of the intention to protect sustainability, I would be cautiously optimistic about the possibility that the technical gaps can be resolved, and that the remaining objections formulated on a political-strategic level can be overcome.

In fact, it is not a question of renouncing the possibility of finding a difficult balance between capital income and its social value: this is the aim of other legal instruments, such as that of the discipline on the transparency of non-financial information. The point (which can coexist with the intent just mentioned) is instead to accept the need to include sustainability among the necessary costs of the destination of capital for competitive production.

Will this idea be able to stand up to globalization?[1]

[1] Essential Bibliography: Assonime, *Doveri degli amministratori e sostenibilità*, «Rivista delle società», 2021, pp. 387-425; E. Barcellona, Business judgement rule *e interesse sociale nella "crisi"*, Giuffrè, Milano 2020, pp. 57 ff.; J.H. Binder, *Governance of Investment Firms under MiFID II*, in D. Busch, G. Ferrarini (Eds.), *Regulation of the EU Financial Market*, Oxford University Press, Oxford 2015, pp. 59 ff.; V. Buonocore, *Etica degli affari, impresa etica e impresa socialmente responsabile*, in G. Conte (Ed.), *La responsabilità sociale dell'impresa*, Laterza, Roma-Bari 2008, pp. 46-73: 58; V. Calandra Buonaura, *Funzione amministrativa e interesse sociale,* in *L'interesse sociale tra valorizzazione del capitale e protezione degli stakeholders*, Giuffrè, Milano, 2010, pp. 101-114: 104; V. Calandra Buonaura, *Amministratori e gestione dell'impresa nel Codice della crisi*, «Giurisprudenza commerciale», 2020, part I, pp. 5-22; O.O. Cherednychenko, *Contract Governance in the EU: Conceptualising the Regulation between Investor Protection Regulation and Private Law*, «European Law Journal», vol. XXI, 2015, pp. 500-520; F. Denozza, *Lo scopo della società tra* short-termism *e* stakeholder empowerment, «Orizzonti del diritto commerciale», 2021, pp. 29-60; L. Enriques, *The European Parliament Draft Directive on Corporate Due Diligence and Accountability: Stakeholder-Oriented Governance*

on Steroids, «Rivista delle società», 2021, pp. 319-324; G. Ferrarini, *An Alternative View of Corporate Purpose: Colin Mayer on Prosperity*, «Rivista delle società», 2020, pp. 27-42; G. Ferrarini, M. Siri, S. Zhu, *The EU Sustainable Governance Consultation and the Missing Link to Soft Law*, *Ecgi Law working paper*, n. 576/2021, https://ssrn.com/abstract=3823186; R. Flannigan, *The Economics of Fiduciary accountability*, «Delaware Journal of Corporate Law», vol. XXXII, 2007, pp. 393-429; R. Flannigan, *The Fiduciary Obligation*, «Oxford Journal of Legal Studies», vol. IX, 1989 , pp. 285-322; T. Frankel, *Fiduciary Law*, «California Law Review», vol. LXXI, 1983, pp. 795-836; T. Frankel, *Fiduciary Law*, Oxford University Press, Oxfod-New York 2011; E. Ginevra, *Il problema della responsabilità fiduciaria degli intermediari finanziari*, «Rivista del Diritto Commerciale e del diritto generale delle obbligazioni», 2019, part I, pp. 569-603; E. Ginevra, C. Presciani, *Il dovere di istituire assetti adeguati* ex *art. 2086 c.c.*, «Le Nuove Leggi Civili Commentate», 2019, pp. 1209-1238; M. Libertini, *Impresa e finalità sociali. Riflessioni sulla teoria della responsabilità sociale dell'impresa*, «Rivista delle società», 2009, pp. 1-33; M. Libertini, *Economia sociale di mercato e responsabilità sociale dell'impresa*, «Rivista Orizzonti del diritto commerciale», 2013, pp. 1-27: 9; M. Libertini, *Sulla proposta di Direttiva UE su "Dovere di diligenza e responsabilità delle imprese"*, «Rivista delle società», 2021, pp. 325-335; P. Marchetti, *Il bicchiere mezzo pieno*, «Rivista delle società», 2021, pp. 336-348; M. Maugeri, *Informazione non finanziaria e interesse sociale*, «Rivista delle società», 2019, pp. 992-1031; F. Mezzanotte, *Regulation of Business-Clients Relationships through 'Organisational Law'*, «European Review of Contract Law», vol. XIII, 2017, pp. 123-163; A. Mirone, *L'organizzazione dell'impresa societaria alla prova del codice civile della crisi: assetti interni, indicatori e procedure di allerta*, «Rivista Orizzonti del diritto commerciale», 2020.1, pp. 23-54; P.O. Mülbert, *The Eclipse of Contract Law in the Investment Firm-Client Relationship: The Impact of the MiFID on the Law of Contract from a German Perspective*, in G. Ferrarini, E. Wymeersch (Eds.), *Investor Protection in Europe, Corporate Law Making. The MiFID and Beyond*, Oxford University Press, Oxford 2006, pp. 299-320; K. Riesenhuber, *A need for Contract Governance?*, in S. Grundmann, Y.A. Atamer (Eds.), *Financial services, financial crisis and general European contract law: failure and challenges of contracting*, Wolters Kluwer, Alphen aan der Rijn 2011, pp. 61-84; E.B. Rock, *For whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose*, «European Corporate Governance Institute (ECGI)» Law Working Paper No. 515/2020, «SSRN», 1 May 2020, available at: https://ssrn.com/abstract=3589951; M.S. Spolidoro, *Note critiche sulla «gestione dell'impresa» nel nuovo art 2086 c.c. (con una postilla sul ruolo dei soci)*, «Rivista delle società», 2019, pp. 253-273; M. Stella Richter *jr.*, Long-Termism, «Rivista delle società», 2021, pp. 16-52; G. Strampelli, Soft law *e fattori ESG: dai codici di* corporate governance *alle* corporate guidelines, «Rivista delle società», 2021, pp. 1100-1121; G. Strampelli, *La strategia dell'Unione europea per il capitalismo sostenibile: l'oscillazione del pendolo tra amministratori, soci e stakeholders*, «Rivista delle società», 2021, pp. 365-374; U. Tombari, *"Potere" e "interessi" nella grande impresa azionaria*, Giuffrè, Milano, 2019; U. Tombari, Corporate purpose *e diritto societario: dalla "supremazia degli interessi dei soci" alla libertà di scelta dello "scopo sociale"*, «Rivista delle società», 2021, pp. 1-15.

Brief Remarks on Corporate Sustainability and Shareholder Activism

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Institutional investors activism is one of the hottest corporate and securities law issue. Particularly, it is worth to ask whether institutional investors can pursue a sustainable corporate governance and how EU securities regulation can foster this role. Today most retail investors hold shares through institutional shareholders, which have therefore the power to request publicly hold corporations to pay attention to sustainability. However, they do so on behalf of their beneficiaries, because they are ultimately bearing the financial results of the corporate management. The key issue is whether the corporate governance behavior of institutional investors reflect the preferences of their beneficiaries, *i.e.* an agency cost problem. Moreover, institutional investors include a variety of financial intermediaries having different relationship with their beneficiaries. There are actively managed funds and funds passively tracking a market index, which have therefore different incentives to pursue sustainable corporate governance. On these premises the presentation aims to provide a synthetic but comprehensive view of how different investment strategies and behaviors of institutional investors can ameliorate the quality of corporate decisions. For this purpose, it is crucial to investigate the role of self-regulation and that of EU securities regulation (particularly the EU Taxonomy Regulation) in coping with the principal-agent relationship’s problem and curbing greenwashing.

Keywords: Institutional investors; Monitoring; Engagement; Activism; Stewardship Codes; ESG factors; Agency problems; EU Non-Financial Disclosure Regulation; EU Taxonomy Regulation

1. Introduction

Foreign institutional investors have been acquiring large block-holdings even in the Italian listed companies over the last decade[1]. The concentration of shareholder ownership in the hands of institutional investors has long been at the center of the international debate in corporate and securities law. In fact, it has to be pointed out that only a minority of retail investors hold stock directly[2] and they hardly vote their shares[3]. Most retail investors hold shares through institutional investors, which are therefore the most influential shareholders of publicly held corporations worldwide.

There is indeed a widespread view that the inertia of those investors in monitoring the performance of the investee companies was one of the main causes of the financial crisis of 2008 and that in order to prevent any future crisis it is necessary to require greater accountability of institutional shareholders which can monitor how publicly held corporations act[4].

As a result, the institutionalization of the ownership of listed companies is considered as an instrument of corporate governance to promoting the long-term interests of shareholders and investing into the creation of "corporate wealth".

Particularly, institutional investors have the power to prompt the publicly held corporations to pay attention to sustainability, but they do so on behalf of their beneficiaries (retail clients of mutual funds, pension funds, and comparable collective investment schemes), that are the so-

[1] Commissione Nazionale per le Società e la Borsa ("Consob"), *Rapporto sulla corporate governance delle società quotate italiane*, Consob, Roma 2018.
[2] A. De La Cruz, A. Medina, Y. Tang, *Owners of the World's Listed Companies*, «OECD Capital market Series», OECD Publishing, Paris 2019, available at: www.oecd.org/corporate/Owners-of-the-Worlds-Listed-Companies.htm .
[3] J.E. Fisch, *Standing Voting Instructions: Empowering the Excluded Retail Investor*, «Minnesota Law Review», 102.1, (2017), pp. 11-60.
[4] S. Alvaro, M. Maugeri, G. Strampelli, *Investitori istituzionali, governo societario e codici di* stewardship. *Problemi e prospettive*, «Quaderni giuridici Consob», n. 19, Consob, Roma 2019, p. 6.

called "residual claimants", because they bear the ultimately results of corporate management.

Therefore, a key question of sustainable corporate governance is whether the corporate governance behavior of institutional investors is aligned with the preferences of their beneficiaries. There is an agency cost problem.

Institutional investors include a variety of financial intermediaries having different kind of relationship with their beneficiaries. They differ particularly on whether they engage with companies ('voice') or avoid them altogether ('exit').

Under this scenario it is crucial to investigate whether negative externalities produced by corporations and affecting the well-being of individuals ("non-financial stakeholders") can be controlled through corporate governance tools or legislative regulation. Special attention has to be paid to EU securities regulation and its capacity to ameliorate the principal-agent relationship between institutional investors, which have the power to influence corporate decision-making, and their beneficiaries, who may be interested not only in financial results but also in the other stakeholders' wealth.

The remainder of this paper is as follows: the starting point is the analysis of the theoretical framework of institutional investors' activism and the principal-agent relationship between institutional shareholders and their beneficiaries. Secondly, I will try to depict the different investment strategies of institutional investors and how that affect their incentives in pursuing corporate sustainability. Finally, I will examine the approach taken by the EU regulation, particularly securities regulation, which poses the question how establishing mandatory disclosure can support sustainable corporate governance and curb greenwashing.

2. Institutional owners and their corporate governance activities. A short survey

The focus on the relationship between institutional investors and corporate management is not new. Qualitative social scientists have developed an analysis of the relationship between institutional investors and corporate managers. For instance, Useem[5] offers a comparison of «the

[5] M. Useem, *Investor Capitalism: How Money Managers are Changing the Face of Corporate America*, Basic Books (Harper Colling Publishers), New York 1996.

rival lenses through which corporate executives and money managers view each other»[6]. Useem's central thesis starts from the assumption that, due to the fact that institutional investors perform as shareholders on behalf of a myriad of savers, there has been a movement from an era of managerial capitalism to one of "investor capitalism", in which institutional investors have substantially reduced the agency costs in corporate governance.

To a certain extent the focus on the confrontation between money managers and executives leads to the idea that the corporate governance role of activist shareholders, besides the strengthening of the market for corporate control, is the best strategy in order to improve efficiency and maximize corporate performance[7].

A further step of this process is "fiduciary capitalism" where financial intermediaries, representing a spectrum of savers and investing widely in publicly held corporations, can play a relevant role in corporate governance as a part of their fiduciary duties to beneficiaries[8].

Since the last decade of the twenty century some scholars asked for rules changes that enable financial institutions to effectively pressure underperforming companies. Such measures should allow, for example, institutions to coordinate their approach to a particular underperforming company and to communicate directly with management in ways that not require expensive proxy mechanisms, which can expose institutions to large liabilities.

On these grounds, institutional owners have had to redirect the focus of their corporate governance activities to "monitoring", which encompasses «the informal and formal ways institutions seek to influence the

[6] J.C .Coffee, jr., *The Folklore of Investor Capitalism*, «*Michigan Law Review*», vol. 95 (1997), pp. 1970-1989, available at: https://scholarship.law.columbia.edu/faculty-scholarship-944.

[7] S. Rossi, *Il diritto della* Corporate Social Responsibility. The legal rules of Corporate Social Responsibility, «Rivista Orizzonti del Diritto Commerciale», 2021.1, pp. 99-134: 114-115. The proposition that governance – the rules and institutions by which agents are compelled to act – matters to corporate governance is central to the finance view. Good governance should be equal to the maximization of long-term shareholder wealth. Therefore, the financial model justifies the need for strong, active shareholders and provide an agenda to strengthen rules that allow institutions to force managers to maximize long term shareholders' wealth: see J.P. Hawley, A.T. Williams, *The Emergence of Fiduciary Capitalism*, «Corporate Governance. An International Review», vol. 5.4, (1997), pp. 206-213: 208.

[8] J.P. Hawley, A.T. Williams, *The Rise of Fiduciary Capitalism: How Institutional Investors Can Make Corporate America More Democratic*, Univ. of Pennsylvania Press, Philadelphia 2000.

performance of corporations»[9]. The various forms of monitoring – that may range from *ad hoc* and informal responses to a crisis to the so-called 'just vote no' campaigns – have arisen because institutions have only a limited ability to exercise their right to exit[10].

However, although there is some evidence that while the institutional investor is a more credible antagonist on the political level, from an economic point of view it may be a far weaker opponent. As we are going to illustrate beyond, there are several reasons why organizationally institutional investors – particularly pension funds – are unable to affect behavior at their portfolio companies. Anyway, «the emphasis on how money managers and executives work and play together in the corporate sandbox illustrates the limitations of monitoring»[11].

In this context, a great deal of thinking on corporate governance has focused on developing ways to enable institutional shareholders to stimulate and support the board of directors in playing their traditional role of representatives of the owners. Moreover, some commentators[12] cast corporate governance in general and monitoring in particular in a wider political context. The conclusion was that monitoring of institutional investors has a political dimension in which the 'rules of the game' have to be determined by rules and regulations.

This short survey of the reconcentration of the ownership in the hands of financial institutions and of the policy currents in the debate on corporate governance at the end of the twentieth century show some important implications deemed to be developed in the subsequent decades.

Apart from a long-term paradigm shift in corporate law and government policy, the advent of "fiduciary capitalism" with a great concentration of wealth in the hands of relatively few institutions raises serious concerns about "the monitoring of the monitors". Such reconcentration in fact adds one more layer of agents between the 'real' owners and the agents who runs the firms they own[13]. It is important to add that there

[9] J.P. Hawley, A.T. Williams, *The Emergence of Fiduciary Capitalism*, cit., 209.

[10] Some scholars [J.C. Coffee *Jr. The Folklore of Investor Capitalism*, cit., pp. 1983 ff.] argued that the U.S. market is heavily concentrated and therefore is one with less liquidity. As a result, large investors cannot exercise the right to exit without cost when they are unsatisfied with a particular management performance. To the extent that investors find exit costly, they must turn to 'voice' and then become more active shareholders.

[11] J.C. Coffee *Jr.*, *The Folklore of Investor Capitalism*, cit., p. 1986.

[12] M.J. Roe, *Strong Managers, Weak Owners: The Political Roots of American Corporate Finance*, Princeton University Press, Princeton (NJ) 1994.

[13] J.P. Hawley, A.T. Williams, *The Emergence of Fiduciary Capitalism*, cit., p. 210, who

is a great variety of beneficiaries for whom the institutional investors act as representatives.

Secondly, authors start to ask what "maximize shareholders wealth" mean, particularly whether the goal of profit maximization is subject to a set of social constraints, according to some changes in the structure of the American society and a growing "sense of community"[14]. In the effort to identify the model of "investor capitalist" or of "fiduciary capitalist", long-term interests of savers and public interest to long-term combine each other in a corporate economy which could create wealth and sustainability. However, some questions arose with regard to public policies that may benefit the country as a whole either socially or economically, but which may adversely affect individual firms.

3. Engagement, activism, stewardship

On these grounds, institutional investors have been viewed as able to act as 'stewards' of the investee companies not only in the U.S., but also in the UK as well as at the European level.

Even though the variable and arguably inconsistent types of institutional investors make difficult to either frame institutions' role descriptively or conceptualize their role normatively, there seems to be a preponderant focus on the use of corporate governance rights as being expressive of an optimal form of investment management, which deliver a meaningful monitoring of corporate management.

Policy makers have shown an increasing commitment to promoting the quality of engagement between institutions and the management of the corporations. They basically assume that: a) a greater engagement of shareholders (mainly institutional investors) in the investee companies with a long-term perspective (*i.e.* conventionally more than five years) has been able to create positive external effects for both the real economy as a whole and the investors themselves; b) the "entrepreneurial

noted that «owners now have the compound agency problem of getting financial institutions to act in their best interests in getting the managers to act in their best interests. On the surface, an agency chain of this type would seem to make everything much more difficult»; see also R.J. Gilson, J.N. Gordon, *The Agency Costs of Agency Capitalism: Active Investors and the Revaluation of Governance Rights*, «Columbia Law Review», vol. 113 (2013), pp. 863-927: 874 ff.

[14] J.P. Hawley, A.T. Williams, *The Emergence of Fiduciary Capitalism*, cit., pp. 211-212.

activism" of hedge funds (whose holding period is 1.7. years) is not to be supported[15].

As a result, many traditional institutional shareholders have moved from a role of mere monitoring of the management of the investee companies to an easier communication and cooperation with the managers, establishing a purposeful dialogue and trying to influence them.

In order to investigate some issues related to the development of corporate governance activities of institutional investors, it is important to distinguish, placing them in relation to each other, the concepts of stewardship, activism and engagement.

The activism embraces the set of initiatives that shareholders take in order to provoke a change of the business strategies of the management, as well as of the composition and functioning of corporate bodies. In other words, activism is the monitoring of management and intervention with the goal of a proper exercise of shareholders' rights.

On the other side, stewardship has been developed all over the world in self-regulated codes, premised upon the advantages of engagement between institutional investors and investee companies and aiming to improve the confrontation and cooperation with corporate boards. According to a changing view, engagement is expected to be more than a reaction to problems that have already developed and would require ongoing, close monitoring of the company's development, at least at a high strategic level[16].

According to the EFAMA Stewardship Code, the existence of engagement turns to be a 'condicio sine qua non' for the stewardship activity[17]; however, enhancing the indications contained in the UK Stewardship Code 2020[18], it is not possible a complete assimilation between the phe-

[15] S. Alvaro, M. Maugeri, G. Strampelli, *Investitori istituzionali, governo societario e codici di* stewardship, cit., pp. 13-14.

[16] *Idem*, p. 6.

[17] *EFAMA Stewardship Code*, Principles for asset managers' voting on, voting in, engagement with investee companies (2018), available at: https://www.efama.org.

[18] In the UK a Stewardship Code was adopted in the wake of the financial crisis of 2007-2009, as a result of a recommendation of the Walker's Review of corporate governance in UK banks and other financial industry entities of 2009. The first version of the Code, which appeared in 2010, was put together by the Financial Reporting Council (FRC), a quasi-governmental agency, but was substantially based on the "Statement of principles" produced by the representative body of institutional shareholders itself about twenty years earlier and revised several times subsequently. The first version of the Code –that was quickly revised in 2012, perhaps because of its origins – was under criticism as it was «not effective in practice». The signatories to the SC, particularly the asset owners and as-

nomenon of stewardship and that of engagement. In the second version of the UK Stewardship Code, the techniques of stewardship are defined in a more expansive way, so that, although engagement is still given emphasis, it is only one among a broader set of recommended procedures. Stewardship techniques embrace «investment decision-making, monitoring assets and service providers, engaging with issuers and holding them to account on material issues, coalitions around approaches, and exercising rights and responsibilities»[19].

These developments have been driven by the heavy emphasis placed on environmental (especially climate change), social and governance factors (ESG). ESG factors are integrated into stewardship, not simply presented as an odd-on. The mainstreaming of ESG factors into stewardship can be seen also "in the definition of market-wide factors" such as the systemic risks, including the "climate change" [20].

It is remarkable that the EFAMA Stewardship Code expressly mentions the «environmental and social concerns» and «compliance, culture and ethics» as matters of engagement[21].

Equally significant is a shift in the UK Stewardship Code so as to have regard not just to the fortune of individual investee companies, but to the market as a whole. It «also recognizes that asset owners and asset

set managers, passed lightly over the implementation of the stewardship policies. Whilst the first version of the SC can be seen as an adjunct to UK Corporate Governance Code (CGC), which had been based on the model of a monitoring board, the second version contains a much broader concept of stewardship and of the techniques to be deployed to further it than does the first version: P.L. Davies, *The UK Stewardship Code 2010-2020: From Saving the Company to Saving the Planet?*, «ECGI Law Working Paper» No. 56/2020, (2020), available at: https://ecgi.global/content/working-papers.

[19] *UK Stewardship Code*, Principles for Asset Owners and Asset Managers, n. 7 (2020). It has to be noted that the second version of the UK Stewardship Code moves away from an almost exclusive focus on engagement as the recommended version of stewardship. Particularly, whilst engagement was a strategy based on "voice", so that "exit" was not thought to count as engagement, buy and sell decisions ("investment decisions") seem to have equal weight with engagement. Therefore, «if engagement is one technique for responsible management and oversight of capital, entrance and exit decisions are another, whilst allocation seems to refer primarily to entrance and exit decisions»: P.L. Davies, *The UK Stewardship Code 2010-2020: From Saving the Company to Saving the Planet?*, cit., p. 8.

[20] *Idem*, pp. 8-9.

[21] *UK Stewardship Code 2020*, Principles for Asset Owners and Asset Managers, n. 7 and Reporting Expectation-Outcome, that provides: «Signatories systematically integrate stewardship and investment, including material environmental, social and governance issues, and climate change, to fulfil their responsibilities»; moreover, «Signatories should explain how information gathered through stewardship has informed acquisition, monitoring and exit decision».

managers play an important role as guardians of market integrity and in working to minimize systemic risks as well as being stewardship of the investment in their portfolio»[22].

The above results argue a prompt and 'energetic' reaction by financial and economic institutions[23] to some important international agreements and initiatives which aim to encourage corporations to adopt policies of social and environmental sustainability[24]. The Corporate Social Responsibility (CSR) has uncovered the limitations of the "neoclassical" model. When government are unable to reach the first-best allocation of resources correcting the market failures and legislatures do not enact reasonable effective regulations controlling social problems others than the traditional "agency costs" [25], an academic debate arises over the "corporate purpose". The CSR approach claims that corporations acting to reflect the "prosocial" preferences of their stakeholders (including also the shareholders, but not limited to them) improve social welfare as second best.

The 'dark side' of this trend could be the concern of institutional investors to avoid stricter regulations compelling them to pursue long-term perspective in their asset management activity. Likewise, the renewed interest showed by the managers of corporations towards social responsibility could be explained on the basis of the relationship with the providers of capital and with the goal to constrain the pressure by institutional investors on the short-termism and to look at the non-financial stakeholders' interests[26].

[22] P.L. Davies, *The UK Stewardship Code 2010-2020: From Saving the Company to Saving the Planet?*, cit., p. 8.

[23] See Blackrock CEO's January 2018 letter and 2019 Business Roundtable "Statement on the Purpose of a Corporation", that sets forth a broad and inclusive conception of the corporation purpose.

[24] The various political proposals stemming from the critiques against the "shareholder primacy" are mentioned by E.B. Rock, *For Whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose*, «ECGI Law Working Paper» No. 515/2020, «SSRN», 1 May 2020, available at: https://ssrn.com/abstract=3589951.

[25] E.B, Rock, *For Whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose*, cit., p. 5, according to whom the above "agency costs" are fundamentally three and emerge from the divergence of interests between: shareholders and managers, controlling shareholders and non-controlling shareholders, shareholders and creditors.

[26] S. Rossi, *Il diritto della* Corporate Social Responsibility, cit., pp. 102-103, sub nt. 5.; E.B, Rock, *For Whom is the Corporation Managed in 2020? Etc.*, cit., pp. 4-5, who notes that «[t]he combination of frustration with legislative inaction and fear of radical future regulation has brought forth a plethora of ideas that can be implemented through private sector initiatives. This include Lipton's 'New Paradigm', the 'Davos Manifesto', and 'Commonsense Corporate Governance Principles', as well as new groups that are trying

4. The approach taken by the EU legislatures

The ideas referred to above seem to permeate even the efforts of the European Union (EU) in corporate matter.

The Directive (EU) 2017/828 (the so-called Shareholder Rights Directive II) regards the encouragement of long-term commitment by shareholders of listed companies in corporate governance in conjunction with the pursuit of ESG goals.

In developing the basic assumption that active commitment of investors may produce good results from a long-term perspective, the SRD II extends in turn in five main directions: a) facilitating the exercise of shareholders' rights in listed companies by means of the transmission of information along the whole "investment chain" (*i.e.* the chain of intermediaries that often hold shares for their beneficiaries); b) encouraging the communication of companies with their shareholders and the various stakeholders; c) increasing the disclosure of institutional investors and asset managers in relation to the policies of engagement towards the investee companies; d) providing for the involvement of shareholders in establishing policies for the remuneration of directors and voting on the Remuneration Report that outlines the fees paid; e) improving the transparency and control by shareholders concerning transactions with related parties.

The engagement policy has to include a description of the methods by which the investee companies are monitored on important issues such as strategy, financial and non-financial performance, risks, capital structure, the social and environmental impact and corporate governance.

Institutional investors are obliged to inform the market annually that their investment strategy is (or isn't) in line with the long-term prospects of their customers, providing a description of the behavior and an explanation of the most significant votes and any use of proxy advisors[27]. They must also disclose to the public how they voted at the general shareholders' meeting of the company of which they are shareholders.

In the approach taken by the European Commission, the participation of shareholders should be expressed by active supervision of the

to forge a new consensus as the 'Investor Stewardship Group', and 'Coalition for Inclusive Capitalism'. The various efforts to bring greater attention to 'ESG' or 'Environmental Social and Govermance' matters in the boardroom, including a board level focus on climate change, diversity and human capital, are of a piece with the effort to converge on a more sustainable system».

[27] Article 3-*octies*, paragraph 1, letter b), of the Directive (EU) No. 2017/828 ("SHRD-II").

issuer, dialogue with the board of directors and exercise of the shareholders' rights, including possibly voting rights and cooperation with others shareholders in order to improve the governance of the company in which they invest their money.

The Commission encourages the long-term commitment by the investors and other non-market goals on the assumption that the long-term perspective is better than the short-term one[28]. For this reason, the Shareholder Rights Directive includes a number of rules that curb, albeit marginally, hedge fund activism[29] for want of a long-term engagement of institutional investors, such as pension funds and insurance companies, which are therefore set apart from the others. In the Commission's view, they should have in fact a primary interest in engaging actively in corporate governance.

Anyway, some prominent scholars pose the question whether a profit-oriented strategy can take into account the interests of stakeholders. Moreover, given the increased number of the interested parties, who have to confront each other and reach proper compromises, it could be easier to reconcile the long-term and the short-term perspectives. It could be possible for some groups to concede immediately something with the view to get a compensation through a future benefit[30].

It can be useful to add that the European Commission[31] and the European Parliament[32] have proposed a sustainable corporate governance framework based on directors' duties and due diligence obligations towards all company stakeholders. That approach to sustainable corporate governance imposes direct constraints to the decision-making of

[28] At a theoretical level it is quite controversial that favoring the interests of long-term shareholders could increase the value generated by a firm over time: J.M. Fried, *The Uneasy Case for Favoring Long-Term Shareholders*, «Yale Law Journal», (2015), 1554-1628; in the Italian literature, see – among others – M. Stella Richter, *jr.*, Long-Termism, «Rivista delle società», 2021, pp. 16-52.

[29] A.M. Pacces, *Hedge Fund Activism and the Revision of the Shareholders Right Directive*, «ECGI-Working Paper» No. 353/2017, pp. 1-25, «SSRN», 21 April 2017, available at: https://ssrn.com/abstract_id=2953992.

[30] F. Denozza, *Quale quadro per lo sviluppo della* corporate governance?, «Rivista,Orizzonti del diritto commerciale», 2015, pp. 1-14: 13; A.M. Pacces, *Hedge Fund Activism and the Revision of the Shareholders Right Directive*, cit., p. 4.

[31] European Commission (2020), *Sustainable corporate governance. Inception Impact Assessment*, Ares(2020) 4034032 (30 July 2020), available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainble-corporate-governance_en .

[32] European Parliament, *Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability*, 2020/2129(INL), available at: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html.

corporation requiring corporate managers not to pursue only profit, but to balance the different interests of shareholders and non-shareholders constituencies such as suppliers, customers, employees, and the society at a large.

5. Different investment strategies and level of engagement

When exploring whether the engagement of institutional investors is likely to produce better corporate decisions, it is useful to keep in mind that the answer may differ according to the investment strategy followed by asset owners and asset managers.

In fact, although investment strategy is a broad concept, different level or type of engagement can be contemplated according to the fact that funds are passively or actively managed. Active and passive funds can be considered separately, although the distinction is complicated by the fact that large asset managers – including, but not limited to the Big Three (BlackRock, Vanguard and State Street Global Advisors) – today combine passive and active strategies into so-called "fund-families"[33].

It can be pointed out that many commentators are skeptical that institutional investors can ameliorate corporate governance, let alone to lead to a sustainable corporate governance. The institutionalization of shareholders' ownership has produced a variety of institutional investors' typologies, whereas the role they play in terms of corporate governance is a tool of their investment strategy and reflects the commercial constraints connected to their business model.

Most institutional investors – particularly mutual funds and pension funds – are diversified, both for legal and non-legal reasons. Many are also "indexed", meaning that they make no decision as to which shares to invest in or about the weight of the investment in any specific stock. When they choose the index they will track, the only thing they have to do is making the buying and selling decisions consequently. In comparison with the other principal type of investment strategy, that is stock picking, index funds offer diversification at a lower price and cannot underperform the market[34].

[33] A.M. Pacces, *Will the EU Taxonomy Regulation Foster a Sustainable Corporate Governance?*, «ECGI Law Working Paper» No. 611/2021, (2021), pp. 1-24: 15, available at: https://ecgi.global/content/working-papers.

[34] J.C. Coffee *jr.* (2016), *Preserving the Corporate Superego in a Time of Activism: An Essay on Ethics and Economics*, available at: https://scholarship.law.columbia.edu/faculty_schol-

Due to the diversification, the shareholding held in each company is normally only a small part of the total assets managed by the institutional investors, as well as of the specific funds.

The high portfolio diversification causes a disproportion between the costs of monitoring (collection of specific information on the company, communication with directors, organization of possible proxy solicitation) and the revenues earned in case of success. Where the institutional investor follows a policy of extreme diversification, its targets are necessarily constrained by its logistic inability to meaningfully engage with all the companies whose stocks they hold. Even the Big Three are underequipped. They have a thin staffing that must result in an overload problem that could discourage any serious attempt of engagement, whereas smaller index fund managers tend to follow the proxy advisers[35].

There is also a high degree of competition in the market of mutual funds and collective investment schemes. In case of pension funds, investment decisions are delegated to external money managers, who compete for the company's pension business. Thus, a large corporation may at any time have a number of outside pension managers handling in pension's assets, who all actively compete with one another. This create a coordination problem due to the fact that different fund managers can and do vote differently on the same issue and find it difficult to cooperate when they are in competition for the client's business[36].

Index funds as well as pension funds still face collective action and free-riding problem by other funds who have invested in the same companies. Collective action among a dispersed coalition will be costly. In the U.S. those institutions who lead the fight must often incur the considerable expenses of proxy fights and litigation, but they have limited way of taxing the free-riders, who may benefit from these expenses but do not want to pay for them[37].

arship/2002, pp. 1-43: 11.

[35] P.L. Davies, *The UK Stewardship Code 2010-2020: From Saving the Company to Saving the Planet?*, cit., pp. 13-14, who points out that «not all forms of effective engagement are beyond index funds. In fact, in the case of management or hedge funds proposals, the functional capacity of institutional shareholders, even index funds, to engage appears not to be a serious cause for concerns». The point rather is that voting by index funds is often «reactive», so that «in the core area» for the UK Stewardship Code, index funds are not viewed as reliable initiators of fundamental corporate governance changes.

[36] J.C. Coffee *jr.*, *The Folklore of Investor Capitalism*, cit., pp. 1975-1976.

[37] *Idem*, p. 1976.

Some synergies reducing the cost of engagement and increasing its benefits can be developed by operating fund families, that benefit from managing simultaneously index funds, which can not be distinguished from competitors, and active funds that are unique. These synergies within fund families can incentivize the use of voice, engaging with companies on "cross-cutting issues", such as environmental sustainability. Most importantly there can be flows of specific firm information between the investment teams and the engagement teams, who know where companies will be going in terms of cross-cutting issues. Therefore «index fund managers engaging with the companies on material sustainability issues generate returns for sister active funds that not only can rebalance their portfolio, but also benefit from higher inflows of sustainability-minded beneficiaries into the family. Active fund managers sharing information with engagement teams reduce the cost of tailoring general engagement policies to the specific company being engaged»[38].

And yet, someone could say that institutional investors, particularly index funds, are not yet completely aware of the opportunity and the role that they should play. Index funds have attracted enormous investment in recent years and thus have gained high voting power. Due to the fact that most retail investors do not exercise directly their voting rights, the stakes held by index funds often result in effective control by a handful of asset managers[39], especially in companies where there is a higher concentration of institutional investors ownership.

This scenario raises the problem of index funds incentives and provides comprehensive empirical evidence of their stewardship activities. Some commentators note that the Big Three and other institutional investors are «excessively deferential to corporate managers»[40] and rarely vote against them. One has to keep in mind that behind-the-scenes negotiations and compromise, where a number of large institutional investors

[38] A.M. Pacces, *Will the EU Taxonomy Regulation Foster a Sustainable Corporate Governance?*, cit., p. 17, who reminds the case of Blackrock, where engagement and investment teams share information on a platform called Aladin. However, conflicts of interests can arise among passive and active funds managed by the same adviser; and due to the fact that advisers charge higher fee to active funds than to passive funds, advisers who manage both types of funds may have incentives to benefit active funds at the expense of passive funds: E.B Rock, M. Kahan, *Index Funds and Corporate Governance: Let Shareholders be Shareholders*, «Boston University Law Review», vol. 100 (2020), pp. 1771-1815: 1811.

[39] L.A. Bebchuck, S. Hirst, *The Specter of the Giant Three*, «Boston University Law Review», vol. 99.3 (2019), pp. 721-741, who also analyze the key factors that have conducted to the heavy concentration of the index funds markets:

[40] *Idem*.

are represented by a common agent, may be effective, including on corporate sustainability[41]. The presence of large institutional investors acts as a credible threat equally to voting particularly in countries where not all publicly listed companies have a controlling shareholder and many existing controlling shareholders can be outvoted by a coalition of institutional investors.

It is important to bear in mind that two factors may contribute to the success of the index funds' engagement and their dialogue with the investee companies.

Firstly, their expertise lies in tracking an index with minimum error and with minimum cost. Therefore, they are permanent shareholders apart from the extreme case of changing index[42].

Secondly, large index funds cannot do exit without costs when they are dissatisfied with a particular management performance. Rather they are locked in. To the extent that investors find exit costly, they have to turn to the alternative remedy of voice and then become more active shareholders[43]. It is relevant to take notice that that institutional investors tend to favor broad goals, such as environmental policies on climate change, that apply to many firms and can formulated in general terms, rather than firms-specific issues that require a particular analysis[44].

[41] It can be noted that behind-the-scenes engagement «may be effective economics, but poor politics». On these grounds, «both corporate managers and public pension funds may prefer high profile face-offs to quiet bargaining between a coalition of investors and an individual corporate management»: J.C. Coffee, jr., *The Folklore of Investor Capitalism*, cit., p. 1978.

[42] J. Fichter, E.M. Hemskeerk, J. Garcia Bernardo, *Hidden power of the Big Three? Passive Index Funds, Re-concentration of Corporate Ownership, and the New Financial Risk*, «Business and Politics», 19.2 (2017), pp. 298-326: 300. In the Italian literature, see S. Gilotta, *Il dialogo selettivo tra la società quotata e i suoi azionisti*, Giuffrè, Milano 2022, pp. 23 ff.

[43] J. Fichter, E.M. Hemskeerk, J. Garcia Bernardo, *Hidden power of the Big Three? Passive Index Funds, Re-concentration of Corporate Ownership, and the New Financial Risk*, cit., p. 307, who warn about the implications that the index funds cannot credibly claim to exit a company based on the assessment of corporate performance.

[44] Basically, the point is that the diversified institutional investor will virtually never initiate a firm-specific shareholder proposal. They usually vote against management because the proxy advisor had recommended such a vote. [J.C. Coffee, jr., *Preserving the Corporate Supergo in a Time of Activism*, cit., pp. 12-13]. That happens because a "pro-active" engagement where a company is underperforming require to develop «more precise measures, a more detailed analysis [...]. Without such analysis, it is hard to pinpoint the cause for low performance and to recommend specific changes»: see E.B. Rock, M. Kahan, *Index Funds and Corporate Governance: Let Shareholders be Shareholders*, cit. p. 1808.

6. Hegde Funds' Entrepreneurial Activism

Activist funds are a subset of hedge funds. Originally, hedge funds claim to be better stock pickers thanks to better research and analysis, but, in reality, some of them failed to live up to this standard. Other hedge funds presented themselves as "quantitative" funds who can exploit market anomalies through the use of complex algorithms. Again, some succeed, others failed. Such funds have only limited interest in voting. However, instead of seeking the best stocks, hedge funds started to identify mediocre companies and attempt to force a sale or break-up of these firms.

Hedge funds have a different business model than the other institutional investors, particularly the mutual funds, as the activist campaigns reveal: a) hedge funds are essentially undiversified, and most of them hold relatively small portfolios in terms of the number of stocks held; b) unlike mutual funds, they typically have significant staff, thus they can identify companies where management changes may unlock "negative synergy" (i.e. the difference between the value of the firm's assets and its lower stock price), or provoke a sale to a new bidder; c) hedge funds employ a compensation formula that encourages their managers to accept high risks[45].

Particularly, hedge funds' managers charge a performance fee in addition to a percentage of the assets under management. This aligns their incentives with investors having a relative high appetite for risk.

Hedge funds profit from investing in stock that they can buy, hold and resell at a higher price. The purpose of entrepreneurial activists' engagement with the management of the target company is to accomplish meanwhile a change that will increase the stock price.

Hedge funds activism consistently succeed wherever institutional ownership is concentrated, but it is not always value increasing. Some prominent academics[46] pointed at the central issue of hedge funds' entrepreneurial activism: whist activist hedge funds are replacing traditional pension funds and mutual funds as the primary catalyst in corporate gov-

[45] J.C. Coffee, *jr.*, *Preserving the Corporate Superego in a Time of Activism*, cit., p. 29.

[46] J.C. Coffee, *jr.*, *Preserving the Corporate Superego in a Time of Activism*, cit., pp. 16 ff., who noted further: «The point is not that hedge funds are evil, amoral or dangerous, but that in their 'engagements' with public corporations, they will be regularly pushing the firms they engage towards higher leverage and riskier strategies. Because they are today the driving force behind shareholder activism, this implies that activism is increasingly leading to greater risk».

ernance, it is remarkable to ask why «why this transition imply a shift in the direction of a greater risk tolerance».

A fundamental critique moved at hedge funds is that they may succeed without any screening by institutional investors, if they act as a coalition, namely a so-called "wolf-pack"[47]. This tactic could enable the participants to engage in informed trading based on material non-public information, to escape old corporate defenses (most notably the poison pills) and to gain high profits at seemingly low risk. However, the impact of wolf packs seems to be overestimated[48].

Another recurrent objection to hedge funds' activism is short-termism. This is the most difficult concern to handle because short-termism is seldom well defined and means different things to different beholders.

In detail, the above concern is that the hedge funds' activism is associated with a pattern involving three key-changes in the target firm:

1) an increase of the leverage;
2) higher payouts for the shareholders either by distributions of dividends or stock buybacks;
3) a reduction in the company's long-term investments in research and developments (R&D) and the resource to finance them.

The leading proponents[49] of hedge funds' activism name this context "investment-limiting" interventions. They agree that such context is prevailing, but at the same time they affirm that it leads to optimal investments' levels.

In general, according to the "myopic-activist" claim intervention by activist hedge funds pushes for actions that are detrimental to the long-term interests of companies and their shareholders. Again, this argument is not borne out by the empirical evidence[50].

[47] J.C. Coffee, jr., D. Palia *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, «Columbia University School of Law-Working Paper» No. 521 (6 Sept., 2015), available at: https://ssrn.com/abstract=2656325, pp. 1-107: 28 ff.; Y.T. Wong Forrester, *Wolves at the Door: A Closer Look at Hedge Fund Activism*, «SSRN», 2016, available at: https://ssrn.com/abstract=2721413, providing empirical evidence that lead activists tip their trading partners before publicly disclosing or filing the Schedule 13D which the 1934 Security Exchange Act requires investors to file within 10 days of first acquiring five percent of any class of securities of a publicly listed company.

[48] A.M. Pacces, *Hedge Fund Activism and the Revision of the Shareholder Rights Directive*, cit., p. 9.

[49] L.A. Bebchuck, A. Brav, W. Jiang, *The Long-Term Effects of Hedge Funds Activism*, «Columbia Law Review», vol. 115 (2015), pp. 1085-1156: 1135 ff.

[50] *Idem*, pp. 1101 ff. (finding that buy and hold stock returns are positive in the three-years and five-years after the Schedule 13D filing).

Hedge funds are not short-terminist in the conventional sense of 'cutting and running'.

This result says nothing about whether the stock market is myopic relative to some horizon longer than the activist's holding period (1.7. years on average).

The 'right' horizon to maximize profit is endogenous to the company's business and the state of product market competition.

7. Capacity and incentives problems

One has to ask whether activist hedge funds could be able to reduce agency problems between corporate managers and their dispersed shareholders. If abnormal stock returns occur because of the hedge funds' actions in reducing managerial agency problems, then one should observe changes in real variables, including changes in corporate governance, reduction of excessive managers' compensation, movement away from non-optimal capital structure. However, most of evidence suggested the positive abnormal returns are not significantly related to such changes[51]. These results show that hedge funds have strong stock selection skills and the ability to identify underperforming firms as targets, but do not support the hypothesis that activists cause positive abnormal stock returns: in fact, target stocks do not outperform control stocks over the long-term[52].

In addition, some academics[53] claim that it is myopic to applaud the rise of activism and to see its underlying corporate governance issues as involving only the tensions between managers and shareholders. Other stakeholders have interests that are put in trouble by hedge funds activism, particularly creditors. But whilst creditors can legitimately contract with the corporation to protect themselves, other non-financial stakeholders, such as workers, local communities and consumers, can be harmed by the use of governance leverage by hedge funds. If these inchoate communities are not in a position to contract, the board should be

[51] J.C. Coffee jr., D. Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, cit., pp. 75 ff.

[52] K.J.M. Cremers, E. Giambona, S.M. Sepe, Y. Wang, *Hedge Fund Activism and Long-Term Firm Value*, «SSRN», December 13, 2018, pp. 1-66, available at: https://www.ssrn.com/abstract=2693231.

[53] J.C. Coffee jr., *Preserving the Corporate Superego in a Time of Activism*, cit., p. 31.

able to act on behalf of them. This test should cast light whether the board is called to mediating a conflict between shareholders and stakeholders.

The key point for our reflections is again that institutional investors (especially pension funds and mutual funds) are themselves agents and not ultimate investors[54]. Therefore, the question is whether the institutional investors' decisions – as agents who monitors the company's board – truly reflect the views and values of the ultimate beneficial owners. There is some widespread opinion that, in determining the best interests of the beneficiaries, institutions and money managers can take into account the prosocial preferences of the beneficiaries themselves and, on this basis, can legitimately decide to avoid socially controversial assets, that put financially at risk their portfolios[55]. Not very differently, some authors argue that institutional investors are allowed to pursue goals other than profit maximization only if they have a specific ESG mandate, that would naturally lead to exit from non-ESG investments.

The relevant issue is how institutional investors respond in terms of corporate governance activities to the increased saliency of environmental sustainability for their beneficiaries.

On the other hand, some authors[56] note that both index funds and stock pickers have only limited incentives to engage beyond voting or the enforcement of market-wide best practices. Therefore, it is questionable whether reputational incentives can change the situation.

In the UK there is some evidence that reputational incentives encourage adherence to the soft law, particularly to the Stewardship Code. Under the first version there has been the introduction of a public tiering

[54] One should consider that the notion of stewardship itself is a functional concept, in so far as it is characterized by the obligation on the manager to act in the best interests of its "own" clients and by the subsequent consideration of the exercise of shareholders rights as a part of the "whole investment process" carried by the manager. In Italy, according to art. 35-*decies*, lett. e), TUF, intervention and voting by fund managers, Sicav and Sicaf, are significantly influenced by the pursue of the ultimate owners' interest. Voting, that is not exhaustive of stewardship, is typically the object of an obligation aimed to pursuing an others' interest, or a power, that is a function in its technical meaning: M. Maugeri, Proxy advisors*, esercizio del voto e doveri "fiduciari" del gestore*, «Rivista, Orizzonti del diritto commerciale», 2016, pp. 1-17; M. Stella Richter *jr.*, *Intervento e voto con strumenti finanziari di pertinenza di fondi comuni di investimento*, in R. D'Apice, (Ed.), *L'attuazione della MiFID in Italia*, Il Mulino, Bologna 2010, pp. 437-461: 444.

[55] M. Maugeri, *Informazione non finanziaria e interesse sociale*, «Rivista delle società», 2019, pp. 992-1031: 1023.

[56] P.L. Davies, *The UK Stewardship Code 2010-2020: From Saving the Company to Saving the Planet?*, cit., p. 18.

system, based on the assessment of the quality of the Stewardship Code signatories' engagement policies.

Although there were no overt sanctions for an institution which failed to achieve to top-tier, many did. One can argue that an incentive operating here was to avoid governmental action which might turn a "comply or explain" approach into a more intrusive regulation[57].

The reporting requirements for Stewardship Code's signatories in relation to their engagement outcomes have been enhanced under the second version. Besides disclosing their engagement strategies (including its escalation if the initial engagement is unsuccessful), the Stewardship Code 2020 requires signatories to disclose «the outcomes of engagement that is ongoing or completed in the preceding 12 months», included the results of any collaborative engagement or escalated engagement. The annual reporting requirement aims obviously at «keeping up the pressure of signatories to the Code», but it is uncertain that it represents the appropriate one. Ironically the result of the detailed annual reporting requirement of engagement could be that it will undermine the commitment to increase the long-term value of investee companies, but it will certainly produce reportable events[58].

Reputational incentives may in fact operate more effectively in relation to ESG factors, including climate change. If beneficiaries change their preferences in favour of ESG, the investment model of institutional investors will adjust accordingly.

It is significant that according to the UK Stewardship Code the benefits for the economy, the environment and the society are expected to be produced by the creation of a long-term value for investors, not independently of investor value[59].

However, if the argument that companies with high ESG scores perform better than companies with lower ones is true, then the case for ESG investing will fit easily with the standard business models of both index

[57] P.L. Davies, *The UK Stewardship Code 2010-2020: From Saving the Company to Saving the Planet?*, cit., p. 18; however, some authors complains that the Financial Reporting Council's tiering has only «limited impact on the stewardship topics revealed by the disclosure statement»: D. Katelouzou, (2022), *The Rhetoric of Activist Shareholder Stewards*, «EGCI-Law Working Paper» No. 636/2022, pp. 1-84, p. 11, available at: http://ssrn.com/abstract_id=4057118.

[58] P.L. Davies, *The UK Stewardship Code 2010-2020: From Saving the Company to Saving the Planet?*, cit., p. 22.

[59] See *UK Stewardship Code*, *Principle No. 1.*

tracking and stock picking funds, without the need to identify reputational incentives to add to the business model incentives[60].

To such extent non-financial disclosure[61] can ensure a link between ESG disclosure and firm performance and act as an incentive for the corporate management to pursue interests of constituencies other than shareholders. It also provides an essential basis in order to permit asset managers to fulfill the obligation to disclose how much of their total investment are taxonomy-aligned[62].

However, a problem of greenwashing has to be faced. On one hand, the availability of many ESG metric, which diverge to a large extent, creates incentives for companies and institutional investors to arbitrage between ratings to get a good score at the least cost. On the other, someone[63] argues that "ESG combines different prosocial goals, most of which are hard to measure and even harder to weight against each other. Although rating providers publish more granular information about the single E,

[60] See P.L. *Davies*, (2020), *The UK Stewardship Code 2010-2020: From Saving the Company to Saving the Planet?*, cit., p. 24. A very interesting perspective looks at the positive externalities stemming from the adoption of socially responsible behaviors by some firms even though they could contrast the profit maximization. Such positive externalities can lead to a whole increase of the portfolio's value managed by institutions and money managers and, as a result, of the share owned by the single beneficiary. This is the case of the so-called "big polluters", few multinational firms producing the most part of greenhouse gas emissions and thus causing the problems related to the climate change, that is in turn the source of systemic risks. If the big polluters are compelled to reduce the greenhouse gas emissions also through actions which contrasts with the profit maximization's goal, their stock value decreases, but it leads to positive returns for other stock values. Even the investor moved by appetite for profit, but who holds a share of that portfolio will be rationally interested in such actions. To sum up, institutional investors have been increasing their engagements with portfolio companies on environmental issues, whereas the presence of institutional share ownership significantly increases portfolio firms' environmental performance. Quite surprisingly, they are pursuing profit maximizing goals unrelated to any personal moral agenda, but this profit maximization is directed at the portfolio, rather than at firm level. Investors address negative externalities at their source, as they want to minimize harms to their broader portfolio: see M. Condon, *Externalities and the Common Owner*, «Washington Law Review», vol. 95.1 (2020), pp. 1-81.

[61] The definition "non-financial reporting" is used as synonymous with "sustainability reporting", which is preferred in the context of the Proposal of the European Commission's Proposal for a Corporate Sustainability Reporting Directive (CSRD), as it is more comprehensive embracing also relevant financial information released by the listed companies and principally addressed shareholders and investors: G. Strampelli, *L'informazione finanziaria tra sostenibilità e profitto*, «Analisi giuridica dell'economia», 1/2022, pp. 145-164.

[62] G. Strampelli, *L'informazione finanziaria tra sostenibilità e profitto*, cit., p. 147.

[63] A.M. Pacces, *Will the EU Taxonomy Regulation Foster a Sustainable Corporate Governance?*, cit., p. 8.

S, and G elements, this does not solve the problem. Not surprisingly unreliable ESG ratings undermine beneficiaries' ability to reduce negative externalities by picking institutional investors committed to sustainable corporate governance. Likewise, unreliability weakens institutional investors' capacity to commit because of adverse selection.

In the European dimension, it is necessary to investigate whether the law can enable beneficiaries to distinguish the behavior of institutional investors focusing on climate change from greenwashing and support sustainable corporate governance on a broader scale. A way to curb greenwashing should be a regulation establishing mandatory disclosure that supports institutional investors' credible commitment, recognizable by beneficiaries, to pursue the environmental sustainability of the investee companies. Disclosure should be based on a standardized metric, allowing for comparison and external verification, for instance by courts enforcing the commitment. These characteristics should have a credible 'signaling' effect, then costlier to imitate by greenwashing. Regulation should also include rules of conduct ensuring that retail investors understand mandatory disclosure and use it in making investment choices which are able to match their nonfinancial preferences[64].

8. The Role of EU Securities Regulation in Promoting Sustainable Corporate Governance

The final remarks of this paper will look at the EU securities regulation and its ability to reduce the agency problems in the relationship between institutional investors and their beneficiaries.

Assuming that a prominent goal of securities regulation is investor protection, including the enhancement of retail investors' knowledgeable choice of investment products, and this goal has been traditionally pursued by securities regulation through mandatory disclosure, one has to be mindful either of the limitations of such approach[65], in general, or of the further implications of sustainability, in particular.

[64] A.M. Pacces, *Will the EU Taxonomy Regulation Foster a Sustainable Corporate Governance?*, cit., pp. 8-9.

[65] J. Armour, *et Al.*, *Principles of Financial Regulation*, Oxford University Press, Oxford 2016, pp. 80 ff.; N. Moloney, *How to Protect Investors. Lessons from the EC and the UK*, Cambridge University Press, Cambridge 2010, pp. 45 ff.; for the Italian sectoral discipline, A. Perrone, *Servizi di investimento e regole di comportamento. Dalla trasparenza alla fiducia*, «Banca, borsa, titoli di credito», 2015, part I, pp. 31-42.

Notwithstanding, the European legislator has embarked on a very ambitious and comprehensive strategy not limiting its initiatives to engagement, but also aiming at reforming the whole securities regulation having regard to the sustainability.

From this point of view, it is important to mention the Sustainable Finance Action Plan[66], which has resulted in a significant overhaul of EU securities regulation, introducing a regulatory taxonomy of sustainable economic activities. In order to implement the above Action Plan, the EU legislator has taken three regulatory initiatives: 1) first, the Sustainable Finance Disclosure Regulation (SFDR)[67], introducing a system whereby every institutional investor offering financial products in the EU must publish qualitative and quantitative information about the impact of their investments on sustainability; 2) second, the Taxonomy Regulation (TR)[68], that has established a system whereby every investment, offered in the EU, that claims an impact on sustainability must corroborate this claim quantitatively, in terms of alignment with a regulatory taxonomy of sustainable economic activities; 3) third, the overhaul of the MiFID[69], will mandate the inclusion of sustainability preferences – framed in terms of the above-mentioned regulations – in suitability and product governance obligations of financial intermediaries. Pacces[70] provides a detailed overview of the three main characteristics of the Action Plan and their ability to align institutional investors' incentives with the sustainability preferences of their beneficiaries.

The SFDR has a very broad scope, as long as it applies to virtually every institutional investor and asset manager that offers financial products in the EU. It requires fund managers to disclose in their reports and websites how they tackle sustainability risk and the Principal Adverse Impacts (PAIs) of their investments on sustainability goals, detailed by

[66] European Commission, *Financing Sustainable Growth*, Bruxelles, March 8, 2018, COM (2018) 97 final.

[67] Regulation (EU) 2019/2088 of the European Parliament and the Council on sustainability-related disclosures in the financial services sector (SFDR), «EU Official Journal», 2019, L317, pp. 1-16.

[68] Regulation (EU) 2020/852 of the European Parliament and of the Council on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088 (Taxonomy Regulation), «EU Official Journal», 2020, L198, pp. 13-43.

[69] Directive 2014/65/EU of the European Parliament and the Council amending Directive 2013/34/EU as regards disclosures of non-financial and diversity information by certain large Undertaking and groups (NFRD), «EU Official Journal», 2014, L330, pp. 1-9.

[70] A.M. Pacces, *Will the EU Taxonomy Regulation Foster a Sustainable Corporate Governance?*, cit., pp. 9 ff.

secondary regulation. If institutional investors choose not to disclose, they must explain their choice. Extensive disclosures are mandated at the product level as well. There are three types of financial products that can be offered in the EU according to the SFDR. First are art. 9, or so-called 'dark green' products, which have sustainable investment (i.e. contributing to an environmental or social goal, without harming any of these and featuring good governance practices) as their objective and must disclose how this objective is pursued concretely. Second are art. 8, or 'light green' products, which promote, among others, environmental or social factors and must disclose how these factors are met concretely. Third are all conventional financial products, which do not pursue sustainability, but must nevertheless disclose how they integrate sustainability risks into investment decision-making (art. 6) and their PAIs on sustainability factors (art. 7), unless they explain why either sustainability risks or PAIs are irrelevant for their investments[71]. The attention paid to the quantitative dimension is important in this framework because, in principle, it enables retail investors to compare institutional investors and their financial products' scores in terms of negative externalities. However, to the extent that sustainability also involves the transition to technologies that generate fewer negative externalities, the SFDR mainly prescribes on the investment in transition explanations in a narrative way, which is complemented by the EU Taxonomy.

The Taxonomy Regulation is the first step of a very comprehensive project of the EU, aiming to establish a full classification of sustainable economic activities based on standards endorsed by regulation. The project has started from environmental sustainability, focusing on two environmental objectives: climate change mitigation and adaptation, whose pertinent standards already apply in 2022.

Basically, according to the TR an investment is taxonomy-aligned to the extent that it finances taxonomy-aligned activities. Due to the fact that the standards set a quantitative threshold for every activity considered, an investment's degree of taxonomy alignment is represented through a straight percentage which is easy to identify by retail investors. The Taxonomy Regulation mandates disclosure of taxonomy alignment for several entities – which include the financial and nonfinancial

[71] The SFDR is in force since March 2021. The disclosure templates and the quantitative and qualitative indicators of PAIs are specified by Regulatory Technical Standards that applied from 2022.

firms subject to the Non-Financial Reporting Directive (NFRD)[72] – and financial products, adding a straightforward quantitative dimension to the broad scope of SFDR. The Taxonomy also applies to the three categories of financial products defined by the SFDR. Dark green products will have to disclose the proportion of sustainable investment that is taxonomy-aligned in connection to a specific objective, as a percentage of all investments. Likewise, light green products will have to include such a disclosure to the extent that they promote environmental characteristics by including sustainable investments, specifying that the remaining portion of the underlying investments «does not take into account the EU criteria for environmentally sustainable activities». Such a negative disclosure also applies to all the conventional products that make no sustainability claim. These will have to include a warning that the financial product «does not take into account the EU criteria for environmentally sustainable activities» (Article 7 TR).

In this context, all asset managers offering products in the EU will have to disclose how much of their total investments are taxonomy-aligned. However, as mentioned before, institutional investors must rely on issuers for fulfilling this obligation, but issuers will only be obliged to publish the proportion of taxonomy-eligible activities for the year 2022 (in 2023) and their taxonomy alignment for the year 2023 (in 2024).

Moreover, non-EU issuers are not subject to the Taxonomy and many economic activities are not included in the Taxonomy. Thus, in the initial phase disclosing this kind of information will be challenging for institutional investors[73], who are expected to have a strong incentive to calculate – and ask their investee companies to calculate – their degree of taxonomy alignment to avoid losing clients to competitors.

Meanwhile, because the EU regulator has intentionally put a narrow definition of environmental sustainability (referring to ‘substantial con-

[72] Directive 2014/95/EU of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosures of non-financial and diversity information by certain large undertakings and groups (NFRD), «EU Official Journal», 2014, L330, pp. 1-9.
[73] According to the Market and Securities Stakeholder Group, *Consultation on Guidelines on certain aspects of the MiFID II suitability requirements* (2022), «legislation will be implemented in a context where several pieces of the puzzle are still missing. In particular, lack of data on investee companies will make the alignment of sustainability preferences and investment products difficult. In this context, it will be almost impossible for financial institutions to go beyond a ‘best effort’ compliance. This is neither appropriate nor desirable, but in the present context firms cannot be charged beyond best efforts with (i) the responsibility to make investors understand such a complex set of issues and (ii) completing the lack of regulation and data».

tribution' to climate change mitigation and adaptation), the commentators claims that "the first data on taxonomy-alignment are expected to be modest and only improve with time". Therefore, one fears that a problem of greenwashing might arise, as «institutional investors managing mainly conventional index funds, such as the Big Three, might well disclose the taxonomy alignment of their products, too, if only to avoid the stigma of negative disclosure»[74].

Furthermore, if the regulatory function concerning the topic of sustainability is to mandate the disclosure of a credible signal – that could curb greenwashing and make it easier for beneficiaries to compare and for courts to verify the information provided by issuers and mutual funds – the signal is credible because it is based on sustainability measures established and enforced by regulation. The assumption might be true, but not without certain qualifications. Firstly, environmental sustainability is not entirely measurable, because it is an uncertain concept on continuous transition, whereas measures reflect the state of knowledge. For that reason, the narrative disclosure – which the Taxonomy regulation mandates too – is as relevant as quantitative information[75].

A second characteristic under criticism it that these metrics reflect a political compromise and thus may be flawed. However, the Taxonomy improves the adverse selection problem deriving from the ambiguity of private-label ESG indicators and lead beneficiaries to choose institutional investors who match their sustainability preferences[76].

In principle, the Taxonomy regulation should also permit beneficiaries to knowledgably choose institutional investors matching their sustainability preferences, thereby reducing agency cost. To this purpose, it should be important for retail investors, who are available to give up financial return in exchange for reduction of negative externalities. However, retail investors are not necessarily prepared to look at indicators

[74] A.M. Pacces, *Will the EU Taxonomy Regulation Foster a Sustainable Corporate Governance?*, cit., p. 11. However, this fear seems to be not supported by some recent empirical data, as in the last year funds managing assets tor a total value of 25 billion euro have asked for a downgrade from Article 9 to Article 8 likely pushed by the concern to avoid the risk of greenwashing: see C. Edwards, S. Gordon, *Sfdr tracker: article 8 now the norm*, «Barclays Report», September 14, 2022.

[75] G. Strampelli, *L'informazione finanziaria tra sostenibilità e profitto*, cit., p. 160, who emphasizes the importance of a balance between quantitative data and narrative way to present non-financial information.

[76] A.M. Pacces, *Will the EU Taxonomy Regulation Foster a Sustainable Corporate Governance?*, cit., p. 12.

such as PAIs or the degree of taxonomy alignment, or anyway they might fail to appreciate the consequences of these indicators on their investment choice. Most retail investors buy financial products through financial intermediaries, such as investment firms or banks providing investment services, who have to guide them to make knowledge investment choices.

It is not odd that a third, important aspect of the Sustainable Finance Action Plan is the inclusion of investor sustainability preferences into the conduct of business rules governing the provision of investment services, particularly the obligation to provide suitable personal recommendations[77] and product governance.

The EU legislator has recently amended the MiFID Delegated Regulation[78], so that to include the consideration for the client "sustainability preferences" in the suitability test. The sustainability preference will have to be expressed in terms of SFDR or the Taxonomy Regulation, indicating, in particular:

i) a minimum proportion of taxonomy-aligned activities; or,

ii) a minimum proportion of sustainable investment; or,

iii) qualitative or quantitative elements of acceptable PAIs. In the provision of advised investment services, investment service providers will have to ask their clients whether they request a minimum sustainability threshold, and only then advise on the suitable risk/return trade-off.

It has to be pointed out, however, that according to the EU sectoral financial regulation, the suitability rule applies only if investors receive personalized recommendations, whereas they often receive investment advice as marketing communications[79]. This problem might be tackled

[77] Particularly, investment firms providing investment advice or portfolio management have to provide suitable personal recommendations to their clients or have to make suitable investment decisions on behalf of their clients for their preferences about risk/return trade-off.

[78] EU Commission, *Delegated Regulation* of 21 April 2021, amending Delegated Regulation (EU) 2017/565 as regards the integration of sustainability factors, risks and preferences into certain organizational requirements and operating conditions for investment firms, «EU Official Journal», 2021, L277, pp. 1-5. The amendments apply from 2 August 2022, as a «part of a broader Commission initiative on sustainable development and lay the foundation for a EU framework which puts sustainability considerations at the heart of the financial system to support transforming Europe's economy into a greener, more resilient and circular system in line with the European Green Deal objectives»: see ESMA, *Final Report. Guidelines on certain aspects of the MiFID II suitability requirements*, 23 September 2022, ESMA 35-43-3172, p. 8.

[79] A.M. Pacces, *Will the EU Taxonomy Regulation Foster a Sustainable Corporate Governance?*, cit., pp. 12-13.

considering the guidelines released by the supervisory Authorities, particularly ESMA[80], oriented to expand the notion of investment advice, thus enlarging the scope of the suitability rule and adopting consequently a paternalistic model of investor protection[81].

9. Conclusions

Institutional investors may contribute to reconcile and harmonize the conflicting interests of shareholders and stakeholders, but they must fundamentally fulfill the obligation to pursue the interests of their beneficiaries. Therefore, broadly speaking, asset owners and money managers are not expected to push for the adoption of ESG policies by the investee companies when the financial interests of their beneficiaries will suffer. The relationship between asset managers and their customers or owners is different form the relationship between institutional investors and their portfolio companies. A further principal-agent layer is added to the traditional ones and further agency costs potentially occur. Moreover, the exercise of shareholder rights is embedded in the organizational structure according to which the asset managers perform their activity. Therefore, the focus is not only on voting, but also on monitoring and divestment.

As a result, asset managers and their investment advisors have a significant leeway in determining the extent to which they will take into account ESG factors, whist still remaining within the legal framework. The pivotal issue is the development of institutional investors' incentives to take a broad view of their powers and duties in relation to ESG elements.

Recently, inflows into ESG funds tend to exceed those into conventional funds within the mutual funds industry. Asset managers could deal with the increasing demand for ESG funds adopting a greenwashing strategy, focusing on the dimensions of sustainability which are easier to achieve, but eventually less material, and thus leading to a sub-optimal level of sustainability.

In order to curb greenwashing, it is essential the provision of a harmonized and credible mandatory disclosure, that should be able to act as a strong incentive for financial institutions and to align the ESG investments with the preferences of the institutional investors' ultimate own-

[80] ESMA, *Guidelines on certain aspects of the MiFID suitability requirements*, July 2012, available at: www.esma.europa.eu.

[81] A. Perrone, *Servizi di investimento e tutela dell'investitore*, «Banca, borsa, titoli di credito», 2019, part. I, pp. 1-16.

ers. In the EU this task can be carried out by securities regulation which traditionally plays a complementary role to the corporate law in increasing efficiency, governing systemic risk and achieving sustainability.

Benefit Legal Entities in Italy: An Overview

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Benefit legal entities combine the normal logic of profit-making with corporate sustainability. They pursue, in addition to the profit purpose, one or more aims of common benefit to be indicated in the articles of association relating to the corporate activity. An initial question is whether the pursuit of these joint objectives (i.e., profit and social responsibility) is reserved solely to benefit corporations and whether (and to which extent) non-benefit legal entities are excluded from pursuing these dual aims. As regards the notion of common benefit, its specification in the articles of association raises some significant legal issues. Firstly, it affects the assessment of the directors' fiduciary duties; directors are required to balance the interests of the shareholders with those other interests provided for in the by-laws, and consequently such balance has potential implications on directors' liability. Secondly, stakeholders adversely affected by the entity's failure to achieve those common benefit aims must be protected, but it is difficult to assess how. Finally, setting out a corporation's common benefit could trigger, under certain conditions, the exit right of dissenting shareholders following the acquisition or loss of the «benefit status».

Keywords: Benefit Coorporation; Italy; Società Benefit; B-Corp; Common Benefit; Corporate Purpose; Benefitwashing; Benefit Judgment Rule; Exit Right

1. Introduction

A benefit corporation (in Italian società benefit) is a legal entity that pursues positive impacts (or the reduction of negative ones) on society, workers, communities, the environment, cultural and social heritage or other stakeholders, in addition to profit as its legally defined goal (Article 2247 of the Italian Civil Code)[1].

Benefit legal entities were introduced in Italy with the approval of the Law 28th December 2015, n. 208, which came into effect on 1st January 2016, aimed at encouraging the spread of companies pursuing the dual purpose of profit and common benefit. Italy became the first European state to create a new legal status for the società benefit, which evokes the US benefit corporations foreseen by the many States benefit corporation statutes (starting from Maryland in 2010) and the Model Benefit Corporation Legislation[2]. However, national regulation has some important

[1] Under Italian law all for-profit legal entities (partnerships; corporations or LLCs) and also mutual-type companies could become benefit companies: see *infra*. Some definitions of benefit corporation are available on the website *www.societabenefit.net*. Furthermore, *Assobenefit*, a non-profit association which aims to contribute to the establishment of a new economic model of sustainable development on the Italian territory, coordinates the network of benefit corporations being set up in Italy and collects their data: see *www.assobenefit.org*.

[2] See for reference M.B. Dorff, *Why public benefit corporations?*, «Delaware Journal of Corporate Law», 2017; J.E. Fisch, S.D. Solomon, *The "value" of a public benefit corporations?* (April 14, 2021), «Univ. of Pennsylvania, Institute for Law & Economics Research Paper No. 20-54» and «European Corporate Governance Institute - Law Working Paper No. 585/2021», available at «SSRN»: https://ssrn.com/abstract=3712532. However, it is worth mentioning that a not-for-profit legal entity similar to the American benefit corporation has emerged firstly, in Europe, in the U.K. in 2004: in fact, in Pt. 2 of Companies Act 2004 the Government created a new type of legal entity, known as the Community Interest Company (CIC), which can be either a company limited by shares or by guarantee (but not compatible with charitable status) with primarily social objectives whose surpluses are reinvested for that purpose in the business or the community; this means that the CIC pursues a beneficial outcome for the community or a section of it rather than individual goal, which could be broadly compared with the pursuit of common benefit. It should be remembered, however, that the CIC as a form of social enterprise, unlike the benefit legal entity, has to respect an asset lock, under which a maximum dividend has to be distributed to the shareholders to the extent of 35% of the annual financial result: on the topic see P.L. Davies, S. Worthington, *Principles of modern company law*, 9th ed., Sweet & Maxwell, London 2012, pp. 8 ff.; A. Bartolacelli, *Modelos de sociedades "especiais" com fim adicional de "benefício comum": benefit corporations dos EUA, società benefit italianas e sociétés à mission francesas (com uma nota anglo-alemã)*, «VI Congresso de Direito das Sociedades em Revista», 2022, pp. 352 ff. In France the most advanced form of sustainable enterprise is the société à mission, whose status was introduced by the Pacte Law in 2019:

gaps that have drew attention of the Italian scholarship and that still remain somewhat unresolved: this paper aims to focus on the most problematic aspects of this new "instrument" of doing business and to present some new cause for reflection.

Società benefit represents a traditional legal entity, but with modified obligations relating to higher standards of purpose, accountability and transparency[3]. It is part of a set of new forms of business organization that illustrates the hybridization of for-profit and non-profit models, constituting a case of formal adoption of a legal form that allows the main purpose of the entity to be non-profit-making (in addition to social enterprise provided by Legislative Decrees nos. 112/2017 and 117/2017).

The main characteristics of a benefit legal entity can be summarized as follows: *i)* a two-fold purpose, namely a profit division generally foreseen by Article 2247 of the Italian Civil Code – which is common to all for-profit legal entities under Italian law (partnerships, corporations and LLCs) – and a positive impact on society and environmental sustainabil-

it is a form of legal entity that statutorily gives itself a social or environmental purpose in addition to a profit-making purpose: this entity must publicly declare its social and environmental objectives by including them in the by-laws: see on the topic A. Couret, B. Dondero, *Loi PACTE et droit des affaires*, Levallois, 2019, pp. 1 ff. In Germany see on the project about the *GmbH mit gebundenem Vermögen* H. Fleischer, *Ein Schönheitswettbewerb für eine neue Gesellschaftsform mit Nachhaltigkeitsbezug: Zur rechtspolitischen Diskussion um eine GmbH mit gebundenem Vermögen*, «ZIP», 2022, pp. 345 ff.

[3] On the topic see in the Italian scholarship: S. Corso, Le società benefit nell'ordinamento italiano: una nuova "qualifica" tra profit e non-profit, «Le nuove leggi civili commentate», 2016, pp. 995 ff.; C. Angelici, *Società* benefit, «Rivista Orizzonti del diritto commerciale», 2017/2, pp. 1 ff.; M. Stella Richter *jr.*, *Società* benefit *e società non* benefit, «Rivista del diritto commerciale», 2017, part I, pp. 271 ff.; F. Denozza, A. Stabilini, *La società benefit nell'era dell'*investor capitalism, «Rivista Orizzonti del diritto commerciale», 2017/2, pp. 1 ff.; A. Zoppini, *Un raffronto tra società "benefit" ed enti "non profit": implicazioni sistematiche e profili critici*, «Rivista Orizzonti del diritto commerciale, 2017/2, pp. 1 ff.; A. Bartolacelli, *Le società benefit: responsabilità sociale in chiaroscuro*, «Non Profit Paper», 2017, pp. 253 ff.; M. Palmieri, *L'interesse sociale: dallo* shareholder value *alle società benefit*, «Banca, impresa, società», 2017, pp. 201 ff.; G. Marasà, *Imprese sociali, altri enti del terzo settore, società benefit*, Giappichelli, Torino, 2019, pp. 13 ff.; M. Cian, *Dottrina sociale della Chiesa, sviluppo e finanza sostenibili: contributi recenti*, «Rivista delle società», 2021, 53 ff.; Id., *Sulla gestione sostenibile e i poteri degli amministratori: uno spunto di riflessione*, «Rivista Orizzonti diritto commerciale», 2021/3, pp. 1131 ff.; A. Daccò, *Le società benefit tra interesse dei soci e interesse dei terzi: il ruolo degli amministratori e i profili di responsabilità in Italia e negli Stati Uniti*, «Banca, borsa e titoli credito», 2021, part I, pp. 40 ff.; G.M. Nori, *La società Benefit un (nuovo) mezzo per (non) fare impresa*, «Rivista di diritto societario», 2021, pp. 787 ff.; A. Bartolacelli, *Modelos de sociedades "especiais"*, cit., pp. 285 ff.; G.A. Rescio, *L'oggetto della società benefit*, «Rivista di diritto civile», 2022, pp. 462 ff.

ity[4], which must be included in the corporate purpose[5]; *ii)* accountability, since a benefit corporation is committed to considering the impact of the business on society and the environment in order to create long-term sustainable value for all stakeholders; *iii)* transparency, since it is required to report its progress and activity annually, and using third party's standards.

As already mentioned, the Italian law extends the possibility to become benefit to all for-profit legal entities (*società di persone*: partnerships; *società di capitali*: corporations or LLCs), and to cooperatives (*società cooperative*: mutual-type entities). Thus, the benefit model does not constitute a new corporate type: in fact, existing entities that decide to pursue an additional common benefit purpose do not have to undergo a corporate conversion, but must amend their articles of association (by modifying the clause relating to the corporate purpose), in accordance with the provisions specific to each type[6]. Therefore, since a benefit corporation is not a new corporate type, the rules are in line with those provisions specific to each corporate type laid down in the Italian Civil Code, with some additional obligations aimed at achieving the common benefit (which will be discussed below).

Under Italian law, the legal framework of benefit entities provides no specific advantage to the legal entity – such as tax benefits, tax relief, financial benefits, etc. – nor does it allow waivers to the ordinary rules of corporate or partnership law laid down by the Italian Civil Code[7].

[4] Thus, integrating economic and social development, as well as environmental protection (or, in other words, the three Ps: profits, people and planet). For an historical background on the three-dimensional concept of sustainable development, see: The World Commission on Environment and Development, *Our common future*, Oxford University Press, Oxford 1987 (also generally known as the «*Brundtland Report*»).

[5] The introduction of common benefit in the corporate purpose has the dual advantage of ensuring that such a provision is known to third parties and binding the directors to its pursuit: for a broader analysis of the profit-making purpose and the common benefit purpose see E. Codazzi, *Scopo di lucro e di beneficio comune nel passaggio da società non benefit a società benefit*, «Rivista Orizzonti del diritto commerciale», 2021/3, pp. 1243 ff.

[6] For example, it may be provided that the activity of jewelry manufacturing must use only recycled materials. For other examples see M. Stella Richter *Jr.*, *Società benefit e società non benefit*, cit., p. 273. The problem whether such an amendment could trigger an exit or appraisal right is examined in par. 5.

[7] S. Corso, *Le società* benefit *nell'ordinamento italiano*, cit., p. 1007, note 49; S. Prataviera, *Società* benefit *e responsabilità degli amministratori*, «Rivista delle società», 2018, pp. 943 ff. (and footnote 100). However, specific tax credits for benefit legal entities were further introduced by Article 38-*ter* of the "Decreto Rilancio" (Decree law No. 34/2020), which provided for a tax credit of 50% of the costs of setting up or becoming a benefit corpo-

However, benefit legal entities have important *marketing advantages*, since they can attract customers and turn to those investors interested in an impact investment[8]. Therefore the option (not the obligation) to introduce next to the corporate name the words "*società benefit*" or the acronym "*SB*" and to use this qualification in any securities issued, in the documents and in the communications towards third parties (Paragraph 379 Law n. 208/2015), gives the legal entity the opportunity to obtain advantages on the market. For instance, the benefit corporation may have an edge over other competing corporations in relationships with lenders and customers that prefer to finance and consume products belonging to socially and environmentally responsible legal entities.

Five years after the Law's introduction, there are almost two thousand *società benefit* in Italy. The majority are corporations and LLCs (*società a responsabilità limitata*), mainly based in the North-Centre (Lombardy, Lazio and Emilia Romagna), and in the sector of business services (52.5%)[9].

The US non-profit agency B-Lab has aimed since 2007 to promote a socially and environmentally sustainable business model through the issuance of B-corporation certification to those companies that pass an assessment test of their business. However, BCorp and benefit legal entities do not necessarily coincide. In fact, while BCorp are corporations that have voluntarily submitted to an assessment concerning environmental and social impact profiles, Italian benefit legal entities are those

ration, incurred from the moment in which the law came into force until 30th June 2021; the conversion of the "Decreto Sostegni *bis*" (Decree law No. 73/2021) has provided for a further extension to 31st December 2021, later confirmed by the "Decreto Aiuti" (Decree law No. 50/2022) for the whole year 2022 (the extension of the eligible costs to include consultancy, notary and registration costs). The perimeter of the facility is set by the inter-ministerial decree, 12th November 2021, which provides the procedures for accessing the tax credit. The aim is to encourage these legal entities by cutting costs by 50% through the recognition of a tax credit to be used for compensation, with a limit of 10.000 Euros per taxpayer.

[8] A. Daccò, *Le società benefit tra interesse dei soci e interesse dei terzi*, cit., p. 49. On the US literature, see J.E. Fisch, S.D. Solomon, *The "value" of a public benefit corporations*, cit., pp. 5 ff.

[9] According to data reported by the *Il Sole 24 Ore* newspaper, by 26th June 2021, benefit corporations in Italy were 926, distributed as follows: 898 corporations or LLCs; 14 partnerships; 14 other forms (such as mutual-type companies); the number doubled in the year of the Covid pandemic. Currently, as reported by Il Sole24Ore by 23rd May 2022, the number of benefit legal entities totals 1.922, of which 97% are corporations or LLCs, with a dozen corporations also joining the Euronext Growth Milan stock exchange and an increasing tendency for start-up companies to adopt the benefit model.

which provide for the pursuit of a common benefit in their by-laws. In addition, while BCorp certification is time-limited (2 years, renewable if a subsequent assessment is passed), benefit corporation status, deriving from an amendment to the articles of association, remains without time limits[10]. Therefore, in Italy there are benefit corporations that are not BCorps, BCorps which are not benefit corporations, and benefit corporations which have BCorps certification[11].

2. Common Benefit

Italian Law no. 208/2015 defines the "common benefit" under Paragraphs 376 and 378. It means the pursuit of one or more positive effects, or the reduction of adverse ones, for stakeholders, such as individuals,

[10] For a broader analysis of the distinction between benefit corporations and B-Corp see L. Ventura, *Benefit corporation e circolazione di modelli: le "società benefit", un trapianto necessario?*, «Contratto e impresa», 2016, pp. 1134 ff.; M[argh]. Bianchini, C. Sertoli, *Una ricerca Assonime sulle società benefit. Dati empirici, prassi statutaria e prospettive*, in *Analisi giuridica dell'economia*, 2018, pp. 207 ff.; S. Prataviera, *Società benefit e responsabilità*, cit., pp. 926 ff.

[11] In Italy, more than 120 corporations have obtained BCorp certification according to the data reported by the B Book 2021 available on www.nativalab.com. For instance, Arbos s.r.l., which realizes environmentally sustainable and innovative paper products for schools, offices and gifts using exclusively recycled materials, is not a benefit corporation, but has been certified as a BCorp since 2019. Similarly, Damiano s.p.a., which processes organic dried fruit in respect of the environment and the community, has been a certified BCorp since 2016, but it is not a benefit corporation. Alessi s.p.a., one of the leading internationally renowned Italian Design manufacturers, has been certified BCorp since May 2017 and is also a benefit corporation; Alessi is involved in a series of local and international charitable projects and its ability to innovate by combining design and materials makes it an ideal example of a business that creates value for the community by balancing profit goals with local involvements. Another corporation with dual status is Fratelli Carli s.p.a., active in producing olive oil, which is a benefit corporation that has also been certified as a BCorp since 2014: its social commitment is based on five purposes, which are i) the use of recyclable and biodegradable materials; ii) the use of renewable energies; iii) the purchase of products from local suppliers who carry out their activities creating a positive impact on society and the environment; iv) care of the staff through compensation awards; v) promotion of a healthy lifestyle and support for humanitarian initiatives. Nativa s.r.l. is both a benefit corporation and certified BCorp: more specifically, it was the first BCorp in Italy – in 2013 – and Italian partner of BLab that also collaborated with the Italian Senate for the introduction of the benefit corporation law; Nativa is committed to promoting the benefit movement as well as supporting companies in their positive impact assessment process. Sesa s.p.a., a leading operator in the sector of technological innovation and IT and digital services, was one of the first Italian listed corporations to include in its by-laws the aim of sustainable growth and to become a BCorp.

communities, territories and the environment, cultural and social heritage, entities and associations as well as other third parties, while carrying out the corporation's economic activities[12]. More specifically, stakeholders can be identified as individuals or groups of individuals directly or indirectly involved in, or affected by, the activities of the benefit corporation, being, *inter alia:* workers, clients, suppliers, lenders, creditors, public administration and society in general[13].

Even before the introduction of Law no. 208/2015, legal entities were allowed to realize common benefit purposes also by means of specific provisions in the articles of association, while respecting the typical for-profit purpose[14]. Now Paragraphs 377 and 379 of such Law affirm

[12] M. Cian, *Clausole statutarie per la sostenibilità dell'impresa: spazi, limiti e applicazioni*, «Rivista delle società», 2021, p. 481, specifies that the common benefit is pursued *in* the exercise of the economic activity and that it is not intended that the business need to be flanked by the exercise of a non-productive activity, since it is the economic activity itself that is characterized by the tension towards common benefit; therefore the common benefit cannot be achieved by providing, for example, in addition to the lucrative production of motor vehicles, for the production of a network of kitchens for the free distribution of meals to the needy. On the contrary, according to this example, the distribution of meals to the needy may constitute a common benefit for a corporation active in the catering sector, whose by-laws could provide for the free allocation of part of the production. It is also true that such a thesis would simply result in the manifestation of a different way by which to exercise the main economic-lucrative activity, but it cannot be excluded that the indication in the corporate purpose of the common benefit also translates into the provision of specific activities "in addition" to those contemplated therein: S. Corso, *Le società benefit nell'ordinamento italiano*, cit., p. 1012, gives the example of an activity aimed at reducing the environmental impact of the corporate production process.

[13] From the definition laid down by Paragraph 376 it follows that a legal entity can be qualified as benefit if it employs production processes and business strategies that minimize the negative externalities that the corporation produces towards them: in this sense, see Circolare Assonime, 19/2016, p. 11. See again M. Cian, *Sulla gestione sostenibile e i poteri degli amministratori etc.*, cit., p. 1136, where the Author emphasizes that the common benefit could also fall outside the area of sustainable management in the strict sense: this is the case, for example, of the awareness of public opinion on the condition of women in distant countries of the world, by a publishing company that distributes in schools a series of works on this subject free of charge.

[14] G. Oppo, *Sulle erogazioni gratuite delle aziende di credito*, in Id., *Scritti giuridici*, IV, Cedam, Padova 1992, pp. 139 ff.; Id., *Le banche di credito cooperativo tra mutualità, lucratività ed "economia sociale"*, in *Scritti giuridici*, VI, Cedam, Padova 2000, p. 548; R. Costi, *La responsabilità sociale dell'impresa e il diritto azionario italiano*, in *La responsabilità dell'impresa. (Atti del Convegno di Studi "Per i trent'anni di Giurisprudenza commerciale" – Bologna, 8-9 ottobre 2004)*, Giuffrè, Milano 2006, pp. 83 ff.; M. Libertini, *Impresa e finalità sociali. Riflessioni sulla teoria della responsabilità sociale dell'impresa*, «Rivista delle società», 2009, pp. 1 ff.; V. Calandra Buonaura, *Responsabilità sociale dell'impresa e doveri degli amministratori*, in V. di Cataldo, P.M. Sanfilippo (Eds.), *La responsabilità sociale*

that the common benefit should be specifically stated in the corporate purpose[15] and pursued through management practice that balances the interests of the shareholders with the interests of those potentially affected by the corporation's activities. Determining the common benefit lies with shareholders, whilst directors are responsible for the actual pursuit of the common benefit, but still having to balance it with the essential profit-making purpose[16]. The obligation to manage the legal entity by balancing shareholders' and stakeholders' interests raises crucially the question of how this balance can be achieved[17].

Therefore, on the one hand, according to the letter of the Law no. 208/2015 the common benefit should be *specifically* described and outlined in the section of the articles of association covering corporate purpose, being inadmissible the provision of purposes for which no form of objective verification is possible. On the other hand, in practice, there is no recurring pattern regarding the specification of common benefit in the corporate purpose, and it typically differs from one corporation's by-laws to another. As a result, in some cases, the corporate purpose takes on a general character, with blurred boundaries and non-quantifiable goals, which do not appear to entail a significant change in the corporation's activities[18]. In other cases, instead, the clause in question is spelled out

dell'impresa. In ricordo di Giuseppe Auletta, Giappichelli, Torino 2013, pp. 91 ff.; M. Stella Richter *jr.*, *L'impresa azionaria tra struttura societaria e funzione sociale*, in F. Macario, M.N. Miletta (Eds.), *La funzione sociale nel diritto privato tra XX e XXI secolo. Atti dell'incontro di studio*, RomaTre Press, Roma 2015, p. 77 (where the Author already develops a first consideration of benefit corporations).

[15] In Italy, the articles of association must provide for the corporate purpose. On the topic of the corporate purpose of benefit legal entities see G.A. Rescio, *L'oggetto della società benefit*, cit., pp. 462 ff.; in general, for a comparative analysis of the evolution of the public company's corporate purpose see H. Fleischer, *La definizione normativa dello scopo dell'impresa azionaria: un inventario comparato*, «Rivista delle società», 2018, pp. 803 ff.

[16] A. Bartolacelli, *Le società benefit*, cit., pp. 263-264. For directors' duties and liability see paragraph 4.

[17] In this respect, it should be noted that the balance between different interests is not new in the Italian legal system, as it already exists for example, firstly, in the regulation of corporate groups, where the management of the group aims to balance the interests of the parent corporation and those of the subsidiaries (see Article 2497 and ff. of the Italian Civil Code), and, secondly, in the context of corporations managing public services and therefore subject to specific service obligations, where the interest in the remuneration of capital must be balanced with the protection of public purposes (see: Art. 4, Legislative Decree n. 175/2016, "*Testo Unico in materia di società a partecipazione pubblica*").

[18] This trend mainly concerned the first benefit corporations. For example, Illycaffè s.p.a., which represents an entity whose sustainable practices are focused on ecosystem conservation and environmental stewardship, seeks to reduce the environmental impact of the

in detail as required by the law, for example with the specific indication that the legal entity allocates a part of the annual profit to the pursuit of the common benefit[19]. Preferably, there should be a *specific clause* in the articles of association detailing the aims of common benefit that the legal entity intends to pursue, since this may be useful in identifying third party beneficiaries, assessing directors' actions and, finally, the possible exercising of exit right, as it will be discussed below[20].

entire production process, and the common benefit drafted in its articles of association refers to the following areas: *i)* responsible chain of value and sustainable agriculture; *ii)* aspiration to quality and happiness of life; *iii)* circular economy and innovation. This clause includes general and non-quantifiable goals, such as the achievement of happiness, which however highlights the strong ideals and social motivations which today characterize benefit corporations and corporate social responsibility. Reynaldi s.r.l., one of the first corporations in Italy to become benefit, has a less wide-ranging, but still not strictly specific corporate purpose clause: one of its aims is "to achieve maximum safety and quality of excellence in cosmetic products, combined with aspects relating to the environmental and social impact generated by the company's activities" and favors low-impact production systems, cold working, using energy from renewable sources and adopting waste reduction policies. On the topic see G.A. Rescio, *L'oggetto della società benefit*, cit., pp. 472 ff.: the goal of human happiness implies the impossibility of verification or measurement, whereas it is different if it is specified that the goal of happiness must be pursued through specific outcomes, such as the reduction of poverty or the improvement of working conditions.

[19] Pieces of Venice s.r.l. has included in its by-laws a specific common benefit: it collects recyclable materials from Venice and its lagoon and transforms them into design objects for children, it involves social revitalization and rehabilitation, and it devolves to charity the added value obtained from the auctions of unique pieces. Edilgeo 4.0. SB deals with projects aimed at reducing the negative impacts of earthquakes on the entire communities in which it operates, and its by-laws specify that the corporation allocates at least 5% of any annual profit (but not more than 30%) to the improvement or structural adjustment of public buildings. G.A. Rescio, *L'oggetto della società benefit*, cit., pp. 464 ff., argues that common benefit can also be pursued by the direct devolution of a portion of the positive results of the activity in favor of the benefited stakeholders' category: according to the Author, to say otherwise would lead to paradoxical results, such as that of qualifying as benefit a legal entity that produces pastries and allocates part of its unsold products to soup kitchens and not one that allocates to the same soup kitchens a sum of money obtained from the proceeds of its activity. About the allocation of part of the economic results to common benefit purposes see also M. Cian, *Clausole statutarie per la sostenibilità dell'impresa,* cit., pp. 485 ff.: according to private contracting, both clauses imposing or precluding the adoption of certain strategies or the performance of certain categories of transactions are legitimate. For other examples of how the common benefit is declined in different corporations, see. M[argh]. Bianchini, C. Sertoli, *Una ricerca Assonime*, cit., pp. 209 ff.

[20] A. Daccò, *Le società benefit tra interesse dei soci e interesse dei terzi*, cit., p. 53; J.E. Fisch, S.D. Solomon, *The "value" of a public benefit corporations,* cit., pp. 10 e 16 ff.: benefit corporations need to set forth a more concrete, measurable social purpose in their charter. For

The status of *società benefit* is subject to the adoption and maintenance of the pursuit of common benefit, and Paragraphs 382 and 383 of Law no. 208/2015 are designed to check its compliance. The legal entity is therefore required to produce and publish on its website an annual benefit report and to attach it to the annual financial statement. The report informs the public about the overall social and environmental performance of the benefit corporation, and it also serves to inform directors so they are better able to meet their duties and shareholders so they are better able to exercise their rights[21]. In fact, it includes: *i)* the description of the specific objectives, methods adopted and action taken by the directors in order to pursue the aims of common benefit; *ii)* the evaluation of the general impact of the company, using a third-party evaluation having the requirements listed in the law; *iii)* a specific section containing the description of the new objectives which the benefit corporation intends to pursue in the following fiscal year[22].

The common benefit that the legal entity aims to achieve is the material feature of the law under analysis, and the positive impact on society and the environment becomes one of the factors in the production of value of the business, also contributing on a reputational and competitive level. Pursuant to Paragraph 384 of the Law no. 208/2015, a benefit legal

directors' liability and shareholders' exit right see paragraphs 4 and 5.

[21] General information about the content of the annual benefit report is available on *www.societabenefit.net*

[22] In general, disclosure obligations concerning corporate sustainability are becoming increasingly important not only at national but also at European level. The European Parliament, on 10th March 2021, approved the proposal for a Directive on "*Corporate due diligence and corporate accountability*", which aims to oblige legal entities to adopt a diligent strategy and to set up procedures for consulting and informing stakeholders. On this topic, see in the Italian scholarship various essays published in *Riv. soc.*, 2021, pp. 297 ff. In November 2021, the European Commission adopted a package of measures to improve the ability of legal entities to raise capital in the EU and to ensure that European citizens get the best possible conditions for their savings and investments, including through better access to data on companies and trades. In particular, the European Single Access Point (ESAP) aims to offer free and open access to public information on financial aspects and corporate sustainability; within it, corporations will be able to publish information on sustainability, in support of the objectives of the European Green Deal. On 23rd February 2022 the European Commission has adopted a *new proposal* for a Directive on "*Corporate sustainability due diligence*", in order to improve corporate governance through the integration of the identification and, if necessary, the prevention and mitigation of human rights and environmental risks into corporate policies, and also with the aim of minimizing actual impacts, establishing complaints procedure and increasing transparency through reporting obligations.

entity's failure to pursue the common benefit purpose is subject to the provisions on misleading advertising (*pubblicità ingannevole*: Legislative Decree no. 145 of 2nd August 2007) and to the provisions of the Consumer Code (Legislative Decree no. 206 of 6th September 2005), with regard to unfair commercial practices, including anti-competitive practices[23].

These provisions are extremely relevant not only to counter the risk of "benefitwashing", but also to neutralize, in general, "greenwashing" practices, *i.e.* declaring commitment to sustainable activities just to gain visibility and public relations. Advertising messages containing "green" declarations on the sustainable qualities of a product, cannot be vague and generic, but truthful and scientifically verifiable[24]. Recently, an Italian decision (Court of Gorizia, 25 November 2021) issued a precautionary order against a company (not benefit) accused of misleading advertising and communication, as it used advertising messages with an impact on environmental and sustainability issues, whilst proposing, in fact, polluting products: the Court ordered the inhibition of the misleading claims, also setting penalties for any failure to comply with the decision, and to publish the order on its website[25].

[23] This does not mean that a different choice stated in the articles of association by the shareholders, whereby they entrust the directors with the activation of the common benefit and agree to remain shareholders of a non-benefit corporation until this happens, would be illegal: however, such a clause must be coordinated with the corporate name, which may not include the qualification of *società benefit* or the acronym *SB* until the common benefit begins to be pursued: on the topic see G.A. Rescio, *L'oggetto della società benefit*, cit., pp. 471 ff. Furthermore, the rules of misleading advertising concerning benefit corporations are the same as those that apply when a mutual-type company presents itself to the public as predominantly mutual but is not: on the topic see A. Bartolacelli, *"Predicare bene e razzolare male": la concorrenza sleale delle società dichiaratamente benefit, ma che non perseguono una finalità di beneficio comune"*, in *Desafíos del regulador mercantil en materia de contratación y competencia empresarial*, Marcia Pons, Madrid 2021, p. 323 and pp. 335 ff. The Author also specifies that the provisions of misleading advertising and of the Consumer Code also apply to non-benefit corporations that have included the pursuit of common benefit in their corporate purpose, in coherence with the thesis, to which the Author adheres, that these corporations are considered benefit (for a broader analysis see par. 3); in this sense, the corporate purpose is recognized as having a commercial communication function and, therefore, an external relevance for the application of remedies for failure to pursue the common benefit.

[24] Article 12 of the Code of Self-Discipline for Commercial Communication (*Codice di autodisciplina della comunicazione commerciale*, issued by the *Istituto dell'Autodisciplina Pubblicitaria*), states that commercial communication claiming or evoking environmental or ecological qualities of a product *"must be based on truthful, relevant and scientifically verifiable data"*.

[25] However, in the appeal precautionary order of 12 March 2022, the Court of Gorizia up-

In addition to civil remedies, which could be triggered by competitors, an important role is played by the Competition Authority (*Autorità Garante della concorrenza e del mercato*, *AGCM*), which is required to identify and stop cases of misleading advertising and can start the procedure on its own initiative or at the request of those stakeholders who came into contact with the corporation[26]. To protect both entrepreneurs and consumers, the *AGCM* has the task of imposing the administrative sanctions due, in particular, when the corporation abuses the «benefit status» in order to improperly acquire a competitive advantage over other companies or to carry out transactions intended to mislead the consumer. The *AGCM* could issue inhibiting measures aimed at preventing anti-competitive behavior, and financial penalties for breach of the regulation[27].

3. The fine line between benefit and ordinary legal entities pursuing common benefit purposes

From the above observations, a question arises: whether non-benefit legal entities (a for-profit corporation or a mutual-type company) are prevented from balancing a for-profit purpose with a common benefit purpose.

Paragraph 379 of the Law no. 208/2015 states that non-benefit corporations which intend to pursue also aims of common benefit shall amend accordingly their articles of association, in compliance with the relevant provisions applying to the different forms of legal entities foreseen by Italian law. As the pursuit of a common benefit is part of the general plan-

held the company's claim against the first instance order, holding that the complaint was unfounded for lack of the precondition of *periculum in mora* and that no proof had been offered that the defendant's "green" communication had resulted in the loss (or a risk of loss) of customers by the claimant.

[26] A. Bartolacelli, *"Predicare bene e razzolare male"*, cit., p. 349: the AGCM thus acts as a "*gatekeeper of the effectiveness of benefit corporations*", establishing the boundaries of legitimacy of the adoption of this form and repressing opportunistic behavior. The reference to the rules on misleading advertising for benefit corporations that do not pursue a common benefit confirms that reputation advantages play a significant role on the market: G. Marasà, *Imprese sociali*, cit., p. 18.

[27] P. Jaeger, F. Denozza, A. Toffoletto, *Appunti di diritto commerciale*, Giuffré, Milano 2019, p. 732, state that the AGCM may firstly impose fines even in the event of insufficient or unsatisfactory prosecution of the common benefit due to fraud or negligence and order the immediate cessation of the communication of misleading advertising and, secondly, the authors assume an obligation to pay compensation to consumers harmed by the deception.

ning of an entity's activities and not simply related to an individual management choice, it follows that non-benefit corporations, whose by-laws do not even include common benefit aims, are prohibited from planning the pursuit of a common benefit as a general purpose.

Consequently, a first distinction has to be made between general purpose (plan of activities) and single management operations (acts)[28]. The prohibition imposed by Paragraph 379 on a non-benefit legal entity from planning its activities for the pursuit of a common benefit does not necessarily imply a prohibition from performing single operations aimed at pursuing a purpose of this kind. For instance, the program to allocate a fixed annual percentage of the profit to financing a museum is reserved exclusively to a benefit corporation (or, as we will discuss immediately, to a non-benefit corporation that provides for the pursuit of common benefit goals in its articles of association); instead, corporations other than benefit would not be prohibited from making specific donations to the same museum[29].

The complexity becomes stronger when trying to draw a secondo distinction between benefit corporations (especially when the common benefit does not take a prominent position) and non-benefit corporations that provide for the pursuit of common benefit goals in their articles of association (without having changed their name to "*società benefit*"), since the latter are considered as well to be entitled to plan the pursuit of activities aimed at realizing the common benefit[30]. Some authors argue

[28] C. Angelici, *Società benefit*, cit., pp. 7 ff.; M. Cian, *Clausole statutarie per la sostenibilità dell'impresa*, cit., p. 478; according to G. Marasà, *Imprese sociali*, cit., p. 20, to argue that non-benefit corporations are prohibited from pursuing common benefit would run against the legislator's intentions. In fact, according to the Author, the law seeks to encourage the achievement of general interest goals and socially responsible behavior by all legal entities, so it would be paradoxical to imagine a reading of the provisions in analysis that prevents non-benefit corporations from behaving "virtuously"; the Author adds that if the purpose of common benefits is considered by the directors of the company, even in the absence of a clause in the articles of association which provides for them, directors will not be exposed to liability if socially responsible management of the business does not compromise the primacy of the profit purpose; E. Codazzi, *Scopo di lucro e di beneficio comune*, cit., p. 1260; A. Bartolacelli., *"Predicare bene e razzolare male" etc.*, cit., 329 ff., who highlights the difference between common benefit purpose and plurality of common benefit acts, taking the view that the former is performed exclusively by benefit corporations, whereas the latter may also be performed by non-benefit corporations.

[29] See again C. Angelici, *Società benefit*, cit., pp. 7 ff.; F. Denozza, A. Stabilini, *La società benefit nell'era dell'*investor capitalism, cit., p. 10; U. Tombari, *L'organo amministrativo di S.p.A., tra "interessi dei soci" ed "altri interessi"*, «Rivista delle società», 2018, pp. 26 ff.

[30] Unlike non-benefit corporations that have not included any reference to common bene-

that the qualification of benefit corporation is in this hypothesis automatically triggered: since the addition of the acronym *"SB"* in the corporation name is optional, the legal entity may be benefit *ab origine* if it has included the pursuit of common benefit in its purposes from the moment of its constitution, or it may become one later by introducing such an indication[31]. On the contrary, according to a different – and preferable – thesis, there can be no automatism, since the shareholders' will cannot be ignored in the event of a submission to an additional, specific regulation such as that of benefit corporations, which would be the case in the event of automatic acquisition of benefit status[32].

In other words, *on the one hand*, benefit corporations must pursue the common benefit, which however does not necessarily assume greater functional importance than the profit purpose, unless the by-laws define which purpose has priority[33]. *On the other hand*, corporations other than

fit in their articles of association, which can only carry out single management operations or acts for that purpose: see note 29.

[31] For this thesis see A. Bartolacelli, *The Unsuccessful Pursuit for Sustainability in Italian Business Law*, in *The Cambridge Handbook of Corporate Law, Corporate governance and sustainability*, edited by B. Sjafjel, C.M. Bruner, Cambridge, 2020, pp. 295 ff.; Id, *La società benefit*, cit., pp. 277 ff.: Paragraph 379 must be interpreted as meaning that if a legal entity that is not yet benefit intends to pursue activities of common benefit, it has to amend its articles of association so as to become a benefit legal entity; however, the Author has slightly modified his opinion over time (as indicated in note 29), affirming that, while common benefit purpose is performed exclusively by benefit legal entities, plurality of common benefit acts may also be performed by non-benefit entities.

[32] S. Prataviera, *Società benefit e responsabilità degli amministratori*, cit., p. 954; G. Marasà, *Imprese sociali*, cit., p. 25; E. Codazzi, *Scopo di lucro e di beneficio comune*, cit., p. 1264; P. Montalenti, *La società per azioni: dallo* shareholder value *al successo sostenibile. Appunti*, in A. Mirone, R. Pennisi, P.M. Sanfilippo, R. Vigo (Eds.), *Studi di diritto commerciale per Vincenzo di Cataldo*, vol. II.2, Giappichelli, Torino 2021, p. 679. According to a third and intermediate theory, only if the clause in the articles of association is worded in terms of directors' obligation (not option) to pursue the common benefit, does the legal entity become benefit to all intents and purposes. See M. Stella Richter, *Società benefit e società non benefit*, cit., p. 276.

[33] This can be deduced from Paragraph 376, which does not impose any hierarchy between the two different purposes, and even before that from the law itself, which makes no provision for the "weight" of common benefit purposes over economic ones, unlike what is derived from the regulations on social enterprises and mutual-type corporations, in which the subjective profit does not constitute the main purpose of the entity, since this must remain the pursuit, respectively, of the *"*civic, solidarity and socially useful purposes*"* (Art. 2, Legislative Decree no. 112/2017 on social enterprises) and the mutualistic purpose (Art. 2511 Civil Code): see G. Marasà, *Imprese sociali*, cit., pp. 15 ff. According to U. Tombari, *"Potere" e "interessi" nella grande impresa azionaria*, Giuffré, Milano 2019, in benefit legal entities common benefit and profit-making purposes must be placed in

benefit, even if they have included the pursuit of common benefit in their articles of association, can (but need not) aim at pursuing a common benefit, but the profit-making purpose must be a priority[34].

It could be difficult, in practice, to distinguish between a benefit corporation that pursues the common benefit together with the profit-making purpose, which remains principal, and a non-benefit corporation that pursues a common benefit, included in the corporate purpose, together with the principal profit-making purpose. The main difference measured in terms of mandatory provision: while the benefit legal entity must, necessarily, pursue the common benefit, the latter (non-benefit with a common purpose) retains a choice with respect to the realization of this further objective (not having the market advantages of the «benefit brand»). Furthermore, a part of the scholarship has argued that directors of a non-benefit corporation may pursue the common benefit under the twofold condition, i.e., *residually* with respect to the profit-making inter-

any case on the same level. If the legal entity pursues the common benefit as its primary goal, the difference between benefit corporations and social enterprises (included in the Italian legal system with Legislative Decree no. 155/2006), becomes less evident. The main differences between benefit legal entities and social enterprises are the following ones: *i)* social enterprises are associations, foundations, partnerships, start-ups, LLC, corporations, which have, as a purpose, to develop, fund and implement social, cultural or environmental issues; instead the status of benefit corporation is reserved only to legal entities mentioned in par. 1; *ii)* while social enterprises are basically non-profit, benefit corporations are a type of for-profit legal entity in which the common benefit does not replace the profit goals; *iii)* while the social enterprise has to draw up a social financial statement and is subject to control by the Ministry of Labor, the benefit corporation has to draw up an annual report and is subject to the control of the AGCM. See A. Cetra, *Impresa sociale vs. impresa socialmente responsabile: prove di avvicinamento tra terzo e secondo settore*, in G. Palmieri (Ed.), *Oltre la pandemia. Società, salute, economia e regole nell'era* post *Covid-19*, Editoriale Scientifica, Napoli 2020, pp. 243-257, pp. 254 ff.: reflecting on the rapprochement between «second» and «third» sector, and taking into account that paragraph 380 of Law no. 208/2015 does not affect the compositional function of the Board of Directors, the Author argues that in benefit legal entities there could be an involvement in governance of external interests, as in social enterprises; the Author leaves open the question of whether this conclusion could already be supported *de iure condito*, prospecting the expansive potentiality of the Legislative Decree no. 112/2017. The empirical analysis carried out by M[argh]. Bianchini, C. Sertoli, *Una ricerca Assonime sulle società benefit*, cit., pp. 217 ff., has identified a case of a benefit corporation that changed its status to social enterprise, Izmade s.r.l., an architecture and design firm that creates furnishings and installations with products resulting from the encounter between eco-sustainable materials and artisanal production processes.

[34] M. Cian, *Sulla gestione sostenibile e i poteri degli amministratori etc.*, cit., pp. 1139 ff.; E. Codazzi, *Scopo di lucro e di beneficio comune*, cit., pp. 1256 ff.

ests of the shareholders, and *instrumentally* with respect to the pursuit of profit-making purpose of the legal entity in the long-term[35].

However, it is difficult to follow this thesis, since it is not clear exactly what the *instrumentality* that should link the two purposes, of profit and of common benefit, consists of. On the contrary, preferable is the view where it is sufficient that the pursuit of the latter is *subsidiary* to the former[36].

To summarize, three scenarios can be envisaged under Italian law: *i)* benefit legal entities, which have included the common benefit in their articles of association, *must* necessarily pursue it; *ii)* non-benefit corporations, which have included the common benefit in their articles of association, *may* plan to carry out activities in pursuit of the common benefit, but without an obligation to do so; *iii)* non-benefit corporations, which have not amended their articles of association, may realize *individual* common-benefit transactions, but not pursuit a common benefit as a general purpose.

4. Directors' duties, benefit judgement rule and liability

The common benefit purpose is closely linked to directors' duties.

A benefit legal entity needs to identify one or more individuals to be appointed as «benefit director» with a specific task of aiding and controlling the pursuit of the common benefit, and reporting the activities of the corporation (Paragraph 380). Directors may be liable if they fail to appoint the benefit director, since this appointment is one of the directors' obligations imposed by Law no. 208/2016.

However, the Law does not specify those who have to pursue this goal or the conditions required to be appointed. The so-called benefit director (or benefit officer) has been identified in 90% of cases as a person who holds an office in the corporation and only in the remaining 12% of cases as an external consultant[37]. The benefit director is often a member of the Board of Directors.

[35] F. Denozza, A. Stabilini, *La società benefit nell'era dell'*investor capitalism, cit., p. 10; U. Tombari, *L'organo amministrativo di S.p.A., tra "interessi dei soci" ed "altri interessi"*, cit., p. 27; E. Codazzi, *Scopo di lucro e di beneficio comune*, cit., p. 1260.

[36] G. Marasà, *Imprese sociali, altri enti del Terzo Settore, società benefit,* cit., p. 19; M. Stella Richter *jr.*, *L'impresa azionaria*, cit., pp. 78 ff.

[37] The data were collected from research on benefit corporations conducted by Alta Scuola Impresa e Società, presented on 5th June 2018 in Milan, at the Università Cattolica del Sacro Cuore; a graphic showing this data can be found in M[argh]. Bianchini, C. Sertoli, *Una*

The appointment of benefit director does not reduce the other directors' controls and powers (and any liability of the benefit director does not exonerate other directors from liability for failing to pursue the common benefit[38]). In this case, the provisions of the Civil Code shall apply in relation to each type of corporation with regard to the liability of directors.

The balance of objectives and, consequentially, directors' fiduciary duties and liability represent a delicate point of the regulation. The board of directors of all (ordinary) legal entities must balance various interests, which are normally homogeneous[39], and this balance cannot be judicially challenged under the business judgement rule. However, directors of a benefit corporation are expected to manage the legal entity also with the aim of pursuing the common benefit, taking into account *heterogeneous* interests, *i.e.* those of shareholders and also those of stakeholders[40].

Since the legislator has not fixed any specific criteria, it is difficult to determine how directors should manage the business while balancing profit maximization and common benefit. Furthermore, there is a close relationship between the content of the provision regarding corporate purpose in the by-laws and leeway reserved to the directors, since the more general the definition of common benefit is, the more room directors will have to identify the concrete ways in which it will be pursued[41].

ricerca Assonime sulle società benefit, cit., 214.

[38] A. Daccò, *Le società benefit tra interesse dei soci e interesse dei terzi*, cit., p. 54; *Circolare Assonime*, no. 19/2016, cit., pp. 1172 ff.

[39] In ordinary legal entities (not *benefit*), the profit-making or mutualistic purpose of the shareholders must be considered primary, and the directors must only pursue the interests of the stakeholders, the fulfilment of which may be included among the objectives to be pursued within the articles of association, if the realization of these further interests is functional, at least in the long term, to procuring an advantage for the shareholders (otherwise, the protection of stakeholders' interests – not instrumental in securing advantages for shareholders – remains only eventual).

[40] C. Angelici, *A proposito di shareholders, stakeholders e statuti,* «Rivista del diritto commerciale» 2021, part II, pp. 213 ff.; M. Palmieri, *L'interesse sociale: dallo* shareholder value *alle società* benefit, cit., pp. 216 ff.; R. Caputo *Jr*, *Benefit corporations: the end of shareholder primacy in the takeover context?*, «Delaware Journal of Corporate Law», 2021, pp. 279 ff.

[41] M. Cian, *Diritto delle società*, III, Giappichelli, Torino 2020, pp. 50 ff.; M[argh]. Bianchini, C. Sertoli, *Una ricerca Assonime sulle società benefit*, cit., p. 213; R. Sacchi, *La capacità propulsiva della s.p.a. quotata è andata esaurendosi?*, «Rivista Orizzonti del diritto commerciale», 2021/2, pp. 596 ff. The risk of a wide directors' discretion is discussed in many contributes regarding benefit corporation and ESG: see, for example, A. Murray, *Tomorrow's Capitalist*, Public Affairs, New York 2022. As noted, this would result into adding a further «benefit judgment rule» to the traditional «business judgement rule»: see M.

For this reason, it has been proposed to include in the by-laws, to facilitate the balance between different interests, the constitution of advisory committees composed of independent directors or experts at the disposal of the board[42], or to require shareholder authorization for directors to carry out any acts that could adversely affect shareholders' interests. In any case, the identification of specific criteria that directors should respect when balancing the different interests remains one of the currently more discussed issues of the regulation in question.

Thus, directors are required to manage the corporation in accordance with the obligations and duties relating to the corporate type chosen[43] and they must employ the highest degree of care required by the nature of the office. They may be exposed to liability for not complying with the pursuit of common benefit, which can trigger the regulation of directors' liability foreseen by the Civil Code.

Firstly, there is little doubt that non-compliance with the obligation to pursue the common benefit can be defined as "non-compliance with the obligations imposed by the by-laws", and this motivates the removal for just cause of the director[44].

Secondly, even if shareholders could be clearly interested in pursuing a common benefit, it is difficult to demonstrate if non-compliance has

Stella Richter *jr*., *Società benefit e società non benefit*, cit., p. 278.

[42] *Circolare Assonime*, no. 19/2016, cit., p. 10. See also A. Bartolacelli, *Le società benefit*, cit., p. 271: hybrid financial instruments with the right to appoint an independent member of the management body, with control functions in relation to the pursuit of the common benefit.

[43] This is confirmed by Paragraph 380, Law no. 208/2015, which provides that failure to comply with the obligations may constitute a breach of the duties imposed on directors by law and by the articles of association and that such a breach entails the application of the provisions of the Civil Code in relation to each type of corporation.

[44] C. Angelici, *Società benefit*, cit., p. 10; S. Prataviera, *Società benefit e responsabilità degli amministratori*, cit., pp. 966-967. See also M. Cian, *Sulla gestione sostenibile e i poteri degli amministratori etc.*, cit., pp. 1139 ff., where the Author develops an analysis of the clauses that bind directors to pursue sustainability by integrating stakeholders' requests in non-benefit corporations: if these clauses are formulated in terms of an obligation for directors, their violation, even if the legal entity is not benefit and even if it suffers no damage, would result in removal for just cause of the directors. It should be noted that, in the Italian LLC (*società a responsabilità limitata*), the single shareholder (even a minority shareholder) has the power to challenge the directors' failure to pursue the common benefit by requesting their removal (Art. 2476, Paragraph 3, of the Italian Civil Code). It is also possible to assume the activation, in both public companies and LLCs, of judicial control *ex* Art. 2409 of the Italian Civil Code for severe irregularities committed by the directors, when they have neglected the realization of the common benefit thereby causing damage to the company (even if identifying what the damage is remains problematic).

damaged the legal entity's assets and consequently whether this can lead to a claim against directors or officers for compliance or damages[45].

Furthermore, third parties who are the beneficiaries of the common benefit pursued by the legal entity have no means of acting against the directors of the corporation for failure to pursue the common benefit[46]. According to the majority scholarship, this justifies the application of Art. 2395 Italian Civil Code (Art. 2476 for the LLC)[47]. These articles regulate the action for damages which can be proposed by an individual shareholder or an interested third party when they are directly damaged by negligent or intentional actions carried out by the directors[48]. Since the pursuit of the common benefit is part of the directors' duties, when they have caused, by a negligent or intentional act, a legitimate expectation that the legal entity will perform the promised common benefit, stakeholders can sue the directors directly for damage arising from the non-compliance with that duty[49].

However, the potentially vague nature of the stakeholders' relations vis-à-vis the corporation needs to be addressed. Firstly, it is necessary to identify exactly the third parties entitled to act: an answer could be to request a specific "relation" that qualifies the position of the third party

[45] C. Angelici, *Società benefit*, cit., p. 10, who points out that the non-fulfilment is not sufficient, since compensation requires the existence of a real damage to the corporation; S. Prataviera, *Società benefit e responsabilità degli amministratori*, cit., p. 965, who notes the difficulty in proving a causation between the managerial conduct and the damage allegedly sustained.

[46] Except for the class action: A. Bartolacelli, *Le società benefit*, cit., p. 270. For the same concern in the US literature, see J.E. Fisch, S.D. Solomon, *The "value" of a public benefit corporations*, cit., p. 9. See also M. Palmieri, *L'interesse sociale: dallo* shareholder value *alle società* benefit, cit., pp. 220 ff.

[47] *Circolare Assonime*, no. 19/2016, cit., p. 27; S. Corso, *Le società benefit nell'ordinamento italiano*, cit., pp. 1025 ff.; A. Bartolacelli, *Le società benefit*, cit., pp. 270 ff.; C. Angelici, *Società benefit*, cit., pp. 10 ff.; P. Agstner, *Benefit corporations and the directors' accountability*, draft read thanks to the courtesy of the Author.

[48] Articles 2395 and 2476 Civil Code are applicable to (public and closed) corporations and to other legal entities (partnerships and mutual-type companies): see V. Pinto, *La tutela risarcitoria dell'azionista tra "danno diretto" e "danno indiretto"*, Pisa Univ. Press, Pisa 2012, pp. 38 ff. and 279 ff.; M.V. Zammitti, *La responsabilità della capogruppo per la condotta socialmente responsabile delle società subordinate*, Giuffré, Milano 2020, pp. 267 ff.

[49] On the other hand, as noted by E. Codazzi, *Scopo di lucro e di beneficio comune*, cit., p. 1267, directors of non-benefit corporations who have sacrificed profit maximization through the performance of a systematic activity aimed at the common benefit can become as well liable towards the shareholders: the availability of the remedies indicated could constitute a disincentive with respect to the management of a non-benefit corporations as if it were a benefit and, instead, an incentive to formally adopt the latter status.

and its reliance on the fulfillment of the common benefit (duty of protection)[50]. Secondly, it could be extremely difficult to obtain proof (and the amount) of the damage directly caused to the third parties[51] and so, alternatively, it could be possible to give the beneficiaries of the common benefit, through *ad hoc* provisions in the articles of association, a greater and more specific impact on corporate governance with a view to providing stakeholders' empowerment[52].

In any case, directors have considerable leeway in balancing the different interests at stake and in adopting strategic decisions, and the application of the business (and therefore *benefit) judgment rule* could protect them from the risk of incurring liability when making business decisions[53].

[50] C. Angelici, *Società benefit*, cit., p. 12, who affirms that «the prevailing answer is to require a specific 'social relation' capable of qualifying the position of the 'third party', and its reliance on the performance of the contract concluded between others. This, if one wanted to translate it with reference to the present issues, necessarily follows from the degree of specificity with which the "purpose of common benefit" is formulated in the statute: whether it is such as to justify an expectation, which obviously cannot but be personal, of which one can complain of injury». For example, if the corporate purpose provides that the legal entity must take into account the interests of the health and welfare of workers, this specification would entitle them, or the associations representing them, to act under Art. 2395 Civil Code, since they have a qualified relationship. The qualified relationship of the stakeholders necessary to act against the directors has also concerned foreign jurisprudence: F. Denozza, *Responsabilità dell'impresa e "contratto sociale": una critica*, in *Diritto, mercato ed etica – Omaggio a Piergaetano Marchetti*, EGEA, Milano 2010, pp. 269 ff. Taken into consideration the difficulty of framing the relationship between the legal entity and the stakeholders in order to configure a legitimacy of the latter to act against the benefit corporation's directors, probably the most effective protection for the stakeholders themselves is the AGCM's armory, consisting in inhibiting measures aimed at preventing anticompetitive behavior: see A. Bartolacelli, *"Predicare bene e razzolare male" etc.*, cit., pp. 332 ff.

[51] F. Denozza, A. Stabilini, *La società benefit nell'era dell'*investor capitalism, cit., pp. 12-13, are skeptical, arguing that it is difficult for stakeholders to take direct action against the corporations' directors and wondering whether the choice of being a benefit corporation does not entail the emergence of any rights for the stakeholders, but only the emergence of their potential claims against directors. S. Prataviera, *Società benefit e responsabilità degli amministratori*, pp. 968 ff.: according to the Author, it seems, considering the gaps in the framework already examined, that directors are essentially free to determine the objectives of common benefit, as long as they are able to rationally justify their choices.

[52] This topic has been discussed with reference to the action that foundation's beneficiaries could initiate in case foundation's directors are not compliant with their duties: see A. Zoppini, *Le fondazioni. Dalla tipicità alle tipologie*, Jovene, Napoli 1995, pp. 184 ff.

[53] J.E. Fisch, S.D. Solomon, *The "value" of a public benefit corporations*, cit., pp. 9 ff. See also S.A. Cerrato, *Appunti per una "via italiana" all'ESG: l'impresa "costituzionalmente

5. The exit right

The inclusion of the common benefit in the articles of association affects the position of the shareholders as well. In fact, another important issue is to assess whether the inclusion (or deletion) in the articles of association relating to the pursuit of the common benefit, in accordance with the majorities required (by law or by the articles of association) to change the corporate purpose, enables dissenting shareholders to exercise their exit right, whether the legal entity is qualified as benefit (following the by-laws' amendment) or not.

The issue is also discussed in other legal systems: for instance, in the United States there is no uniform regulatory system for the exit (or appraisal) right, but there is a general requirement for a resolution passed with the affirmative vote of 2/3 of the share capital in order to become a benefit corporation (supermajority vote). However, recently, in July 2020, Delaware amended the PBC statute to exclude the supermajority vote and the appraisal right for dissenting members of traditional corporations that become benefit (or vice versa)[54]. It should be borne in mind that in the United States benefit corporations are identified as corporate special forms, unlike Italian benefit legal entities, as already explained.

The exit right, *i.e.* the shareholder's power to exit the legal entity by means of his own decision (and to obtain the fair value of its shareholding), is recognized under Italian law in certain events that are considered by the law as reasonable indications of a change in the corporation's organization, such as to affect the original activity. Moreover, the exit right is deemed an effective remedy that balances the power of the majority

solidale" (anche alla luce dei "nuovi" artt. 9 e 41, comma 3, Cost.), to be published in the *Studies in honor of Paolo Montalenti* and read thanks to courtesy of the Author, pp. 16 ff. of the manuscript: he addresses the problem of balancing the profit-making purpose and the protection of interests included in the "ESG criteria" (in general, with reference to the legal entity taking a spontaneous active part in social and environmental policies, and not only with regard to benefit entities) from a different perspective, based not on the expansion of the interests that directors are required to pursue, but on the implementation of the principle of solidarity imposed by the Italian Constitution (Artt. 2, 9 and 41) on people as individuals and in social groups: the criterion of solidarity requires the entrepreneur to direct his actions according to the logic of proportionality, reasonableness and balancing between his own selfish interest and that of those who may be affected by the initiatives undertaken; according to the Author, the violation of the criterion of solidarity in the process of making a decision may be reviewed by the judge – overcoming the BJR – and may give rise to a liability of the director for mismanagement.

[54] See *www.corpgov.law.harvard.edu/2020/08/31/delaware-public-benefit-corporations-recent-developments/.*

and the interests of the dissenting minority in the face of radical choices made by the former[55]. In the context of benefit legal entities, the issue should be analyzed by considering whether such a change in the articles of association is of a significant and substantial nature, and should be explored in relation to the different types of companies affected by the amendment[56].

With regards to *partnerships*, the unanimity rule solves the problem of the dissenting shareholders' exit right with respect to a change in the corporate purpose that includes the common benefit. Instead, if the partners derogate from the unanimity principle and introduce the amendment clause by majority vote, it is first necessary to check whether the articles of association provide for an exit right and details of its just cause (it could be expressly provided, for example, that a change in the corporate purpose constitutes just cause for dissenting shareholders to exit).

In any case, given the accentuated personalistic component of partnerships and the partners' unlimited liability, the acquisition (or loss) of the benefit status may assume a wider scope and, according to a more extensive approach, could integrate – regardless of whether the articles of association provide for – a hypothesis of just cause and therefore an exit right pursuant to Art. 2285 of the Italian Civil Code[57].

With regards to *corporations* and *LLCs* (Italian *società per azioni* and *società a responsabilità limitata*), the exit right respectively provided for in Articles 2437 and 2473 of the Italian Civil Code could be triggered when there is a substantial change in the essential structure of the corporation or in its economic risk. More specifically, it has to be understood whether the resolution by which the legal entity has modified the corporate purpose enables an exit right pursuant to Art. 2437, letter *a)*, of the Italian Civil Code, which is triggered when the amendment causes

[55] For a broader analysis of the exit right (in general) in the Italian law see ex multis: M. Stella Richter *Jr.*, *Diritto di recesso e autonomia statutaria*, «Rivista del diritto commerciale», 2004, part I, pp. 403 ff.; V. Calandra Buonaura, *Il recesso del socio di società di capitali*, «Giurisprudenza commerciale», 2005, part I, pp. 316 ff.; P. Revigliono, *Il recesso nella società a responsabilità limitata*, Giuffré, Milano 2008, pp. 1 ff.; C. Frigeni, *Partecipazioni in società di capitali e diritto al disinvestimento*, Giuffré, Milano 2009, pp. 1 ff.; E. Ginevra, *La partecipazione azionaria*, in M. Cian (ed.), *Diritto delle società*, III, Giappichelli, Torino 2020, pp. 302 ff.

[56] For an analysis see M.V. Zammitti, *Il diritto di recesso nelle società c.d.* benefit, cit., pp. 575 ff.

[57] M. Stella Richter *Jr.*, *Società* benefit *e società non* benefit, cit., pp. 280 ff.; M.V. Zammitti, *Il diritto di recesso nelle società c.d.* benefit, cit., pp. 589 ff.; E. Codazzi, *Scopo di lucro e di beneficio comune*, cit., pp. 1282 ff.

a *material* change in the corporate purpose and determines a change in the investment's risk; or pursuant to Art. 2473 of the Italian Civil Code, which is triggered when some operations carried out by the LLC, related to purposes other than those defined in the articles of association, entail a *substantial* change in the corporate purpose.

This assessment should be made on a case-by-case basis that takes into account the exact content of the common benefit set out in the corporate purpose and tries to establish whether the change in the latter affects corporate governance choices and the corporation's overall production processes[58]. As the scholarship notes, the exit right cannot be triggered when the corporate purpose is general and broad since the new benefit activities would not represent any substantial changes in the corporate purpose that provide for a significant alteration in the investment's risk, whether increasing or reducing it[59]. Therefore, the balance directors must achieve between stakeholders' benefit purpose and shareholders' profit goal does not appear to be automatically reflected in the risk conditions of the investment, unless the alteration in those conditions is linked to a significant modification of the activities that can actually be carried out that may lead to discontinuity with those previously performed[60].

[58] S. Corso, *Le società* benefit *nell'ordinamento italiano*, cit., pp. 1013-1014; M.V. Zammitti, *Il diritto di recesso nelle società c.d.* benefit., cit., pp. 583 ff.

[59] M. Stella Richter *Jr.*, *Società benefit e società non benefit*, cit., pp. 280 ff., who also develops an analysis of the hypotheses of the exit right in the different types of legal entities that are qualified as benefit; M.V. Zammitti, *Il diritto di recesso*, cit., pp. 593 ff. For example, Vita Società Editoriale s.p.a. is a benefit corporation which was listed on the Alternative Investment Market (AIM) from October 2010 to May 2017. Vita Società Editoriale s.p.a. became a benefit in 2016 by amending its articles of association; the corporation promotes sustainable economic and social models with particular attention to social entrepreneurships and their development; it gives voice to Italian and European non-profit organizations and collaborates with for-profit and non-profit organizations to contribute to their development. These conditions are extremely general and do not contravene the economic purpose of the legal entity; in this case the exit right would presumably not be recognized. It should be remembered that, according to the prevailing scholarship, the dissenting shareholder may exercise the exit right only if there has been a formal resolution to change the corporate purpose, since a mere de facto change is not sufficient. For a more complete analysis of the exit right in the case of a substantial and formal change of the corporate purpose see for all P. Revigliono, Il *recesso nella società a responsabilità limitata*, cit., pp. 91 ff.; V. Calandra Buonaura, *Il recesso del socio di società di capitali*, cit., p. 2069; G. Zanarone, *Della s.r.l.*, in *Commentario del Codice civile fondato da Piero Schlesinger*, II, Giuffré, Milano 2010, pp. 1266 ff.; S. Ciceri, *L'impugnazione delle delibere negative e il diritto di recesso del socio per modifica dell'oggetto sociale nella giurisprudenza spagnola*, «Rivista del diritto societario», 2022, 368 ss.

[60] See also E. Codazzi, *Scopo di lucro e di beneficio comune*, cit., pp. 1276 ff.: in order to

From this perspective, another paragraph of Italian corporate law could be material: Article 2437, letter *g)*, Civil Code, which provides – with reference to corporations - for the exit right in case of a change in the corporation's by-laws affecting rights connected to the shares. It could apply when there are other beneficiaries or stakeholders in the benefit corporation, since these other beneficiaries can affect the shareholders' rights to take part of the corporation's profits. An example is where a modification aims to destine a certain percentage of the profits to benefit activities; in this case the exit right could be considered as resulting not from the change of the corporate purpose, but from the modification of the participation rights referred to in Article 2437, letter *g)*, of the Italian Civil Code[61].

What has been pointed out regarding corporations is also material with regards to Italian LLCs: the change of the corporate purpose, with the inclusion of the common benefit, must entail a material alteration in the investment's risk to entitle the dissenting shareholder to exercise the exit right (on the basis of the rule provided by Art. 2437 Civil Code, which represents a general principle applicable also to the LLCs)[62].

balance the conflicting needs of not discouraging recourse to the benefit corporation and the exit right to the dissenting shareholder, the Author suggests to insert in the articles of association of the benefit corporation a conventional exit right correlated to the entire balancing activity carried out by the legal entity over a significant period of time: in this way it will be possible for the shareholders to verify to what extent the profit-making interest has been sacrificed and whether in practice there are conditions for exercising the exit right.

[61] See Italian Supreme Court decision no. 13845, of 22 May 2019, published in «Le Società», 2019, pp. 1273 ff., and commented by P. Piscitello: the Court specifies that the amendment of a clause in the articles of association relating to the distribution of profits, which has a negative effect on the patrimonial rights of shareholders by providing for the reduction of the percentage allocated to the distribution of profits in view of the increase in the percentage to be allocated to reserves, justifies the exit right of minority shareholders; see also M. Stella Richter *Jr.*, *Società* benefit *e società non* benefit, cit., pp. 283-284.

[62] A. Daccò, *La s.r.l.: la struttura finanziaria*, in M. Cian (ed.), *Diritto delle società*, III, Giappichelli, Torino 2020, pp. 714 ff.; Consiglio Notarile Triveneto, *Orientamento I.H.1: Modifica dell'oggetto sociale e recesso*: «For LLCs, it must be considered that any change in the purpose of the company, even if minor, is not sufficient to legitimize the dissenting shareholders to exercise the exit right; though Art. 2473 Civil Code simply speaks of a 'change in the purpose', a significant change in the company's activity is instead necessary (as expressly prescribed by Art. 2437 Civil Code for public companies)»; E. Codazzi, *Scopo di lucro e di beneficio comune*, cit., p. 1274: since Art. 2473 Civil Code allows the shareholders of a LLC to exit also in the event of *de facto* changes in the legal entity's purpose, provided that they are substantial, it is possible to consider using this cause of exit also in the event that a non-benefit corporation operates as a benefit, deter-

6. Conclusions

The regulation of benefit legal entities could represent a new way of doing business, where profit and common benefit are necessarily two sides of the same coin. Although the greater attraction of investors and consumers interested in sustainable development and the corporation's reputational gains may be important advantages in the long term, the breadth of the regulation analyzed raises the question of whether it can bring real change in the entrepreneurial paradigm its promoters aim for.

In particular, the Italian regulation of benefit corporations has shortcomings in some areas, particularly in the criteria to be established in the by-laws specifying the purposes of common benefit[63].

As a result, three main problems emerge and should be handled as discussed in the article: firstly, directors may have excessive discretion when pursuing the common benefit; secondly, stakeholders have no express right to act against the directors for failing to pursue the common benefit; thirdly, it is not clear when, and according to what criteria, dissenting shareholders can exercise the exit right when the legal entity acquires or loses the benefit status.

mining a change in the activities envisaged in the corporate purpose, which also reflects on the purpose of the legal entity and on the shareholders' rights.

[63] For similar comments in the US literature, see J.E. Fisch, S.D. Solomon, *The "value" of a public benefit corporations*, cit., pp. 1 ff.

Part II

Chronicles from a Series of Sustainable Corporations *Colloquia*

Sustainability Concept in Company Law and Corporate Governance: Why, How and Who

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The aim of this chapter of the book is to offer a contribution to a heated debate topic on the potential of company law through corporate governance framework to better support a sustainable development. In the overall picture of different regulatory approaches and techniques and with the focus on the ongoing developments at the EU company law, hard law legislative solutions concerning corporate purpose and director's duty of care as well as mandatory due diligence that are at the core of sustainable corporate governance, as those enabling to promote positive contributions by the companies to sustainable development and tackling adverse impacts on society associated with their operations, are addressed.

Keywords: Sustainability; sustainable development; United Nations 2030 Agenda for Sustainable Development Goals; company law; EU company law; corporate governance; corporate sustainability; mandatory due diligence

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1. Introduction

Lively discussions on sustainability in company law and thus the role of the companies have been going on during the last years. They form part of the broader debate over the regulatory approaches on whether and how to incorporate or reflect sustainability in various fields of laws. In that context it is worth mentioning that the EU and its 27 Member States are committed to the 2030 Agenda for Sustainable Development of the United Nations and its implementation, adopted by all United Nations Member States[2].

The 2030 Agenda includes the 17 Sustainable Development Goals and their related 169 targets and it provides a new policy framework aimed to balance three dimensions – economic, social and environmental (profit, people and planet) and to ensure that no one is left behind[3].

Sustainable development of Europe is embodied in the Treaty on European Union[4], and the UN Sustainable Development Goals are in line with the European vision[5].

There is, however, a different progress in achieving UN Sustainable Development Goals among the Member States, and it can be challenging to attain them by 2030[6]. In searching the ways on how to accelerate the sustainable transition, a role of the companies in contributing towards

[2] Available at: http://www.un.org.cn/info/6/620.html ; https://www.un.org/en/about-us .

[3] General Assembly of United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development, Resolution*, 2015, available at: https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E .

[4] See Article 3, paragraphs 3 and 5, of the Treaty on European Union (consolidated version), available at: http://data.europa.eu/eli/treaty/teu_2016/2020-03-01 .

[5] For the policy commitment at the EU level, see: B. Sjåfjell, *Sustainable Value Creation Within Planetary Boundaries - Reforming Corporate Purpose and Duties of the Corporate Board* (August 3, 2020), «Sustainability», vol. 12.15 (2020), 6245; «University of Oslo Faculty of Law Research Paper», No. 2020-20; «Nordic & European Company Law Working Paper», No. 21-04, available at: «SSRN», https://ssrn.com/abstract=3666952, p. 2; see also: European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Next steps for a sustainable European future, European action for sustainability*, 2016, COM/2016/0739 final.

[6] Sustainable Development Solutions Network and Institute for European Environmental Policy, *Europe Sustainable Development Report 2021*, available at: https://eu-dashboards.sdgindex.org , pp. vii, 7-8, 11, 15. The same holds true in achieving the objectives of the Paris Climate Agreement of 2015 (which together with the UN Sustainable Development Goals viewed as a package) oriented towards climate-neutrality by 2050.

sustainable development has been emphasized[7] by better integrating sustainability into the corporate governance framework[8].

Having this in mind, the aim of the chapter of the book is to deliver to a heated debate topic on the potential of Company law through corporate governance framework to better contribute to the sustainable development. In the overall picture of different regulatory approaches and techniques and with the focus on the ongoing developments at the EU Company law, hard law legislative solutions concerning corporate purpose and director's duty of care as well as mandatory due diligence that are at the core of sustainable corporate governance are addressed.

2. Why: potentials for Company law to contribute to a better sustainable development

Companies have done much in voluntary pursuing responsible business conduct initiatives[9]. International soft law instruments are helpful for business in determining guidelines for responsible business conduct standards, for example, the UN Guiding Principles on Business and Human Rights[10], OECD Guidelines for Multinational Enterprises[11] and complementary OECD due diligence guidance for responsible business conduct[12], Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of the International Labour

[7] European Commission, *Reflection paper - Towards a Sustainable Europe by 2030*, Brussels 30.1.2019, COM (1019) 22 final, pp. 26-27.
[8] European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Green Deal*, Brussels, 11.12.2019, COM(2019) 640 final, p. 17; European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Europe's moment on the Repair and Prepare for the Next Generation*, Brussels, 2020, COM(2020) 456 final, p. 6.
[9] See, *e.g.*, European Commission, *Reflection paper - Towards a Sustainable Europe by 2030*, cit., pp. 33-35.
[10] UN, *Guiding Principles on Business and Human Rights*, 2011, available at: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
[11] OECD, *OECD Guidelines for Multinational Enterprises*, OECD Publishing, Paris, 2011, available at: http://dx.doi.org/10.1787/9789264115415-en.
[12] OECD (2018), *OECD Due Diligence Guidance for Responsible Business Conduct*, available at: https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm. For sector-specific guidance on due diligence for responsible business conduct, see: https://mneguidelines.oecd.org/sectors/.

Organization[13], G20/OECD Principles of Corporate Governance with the focus on public companies[14], as well as other voluntary initiatives promoting corporate sustainability, such as the UN Global Compact[15].

There is, however, ongoing debate about the sufficiency of a voluntary soft-law approach and permissive regulations and hence a potential for hard law in the field of company law to contribute in accelerating the progress of achievement of the UN Sustainable Development Goals. In particular, the EY study on directors' duties and sustainable corporate governance prepared for the European Commission in 2020, gave a stimulus for developing the heavy discourse. For example, according to the EY study, a tendency for the EU listed companies is "to focus on short-term benefits of shareholders rather than on the long-term interests of the company", and failure "to capture the full extent of long-term sustainability risks and impacts"; claiming that the *status quo* falls short in achieving the UN Sustainable Development Goals[16].

The EY study hence argues for the potential EU legislative intervention[17].

Another study on due diligence requirements through the supply chain prepared by BIICL, Civic Consulting and LSE Consulting of the same year, commissioned by the European Commission, has focused on due diligence processes to address the adverse human rights and environmental impacts in companies' own operations and in their supply chain. The study has revealed that one-third of business respondents confirmed they performed due diligence which takes into account all human rights and environmental impacts, and another one-third – a due diligence to a limited extent[18]. Alongside with the sector-specific

[13] International Labour Organization, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 1977 (with its further amendments of 2000, 2006, 2017), available at: https://www.ilo.org/manila/publications/WCMS_647984/lang--en/index.htm.

[14] OECD, G20/OECD Principles of Corporate Governance, OECD Publishing, Paris, 2015, available at: http://dx.doi.org/10.1787/9789264236882-en.

[15] Available at: https://www.unglobalcompact.org/what-is-gc/mission/principles.

[16] European Commission, Directorate-General for Justice and Consumers, *Study on directors' duties and sustainable corporate governance: final report*, Publications Office, Brussels, 2020 *https://data.europa.eu/doi/10.2838/472901* (hereinafter, "EY study"), p. vi.

[17] *Ibidem*, pp. vi-xii.

[18] European Commission, Directorate-General for Justice and Consumers, F. Torres-Cortés, C. Salinier, H. Deringer, *et Alii*, *Study on due diligence requirements through the supply chain: final report*, Publications Office, Brussels, January 2020, available at: https://data.europa.eu/doi/10.2838/39830 (hereinafter: "BIICL, *Civic Consulting and LSE*

initiatives already undertaken at the EU level, the BIICL, Civic Consulting and LSE Consulting study suggests further considering the possible regulatory options (both soft law– and hard law– approaches as well as smart mix); and a harmonized general mandatory due diligence requirement for adverse human rights and environmental impacts, as a legal duty or standard of care, to be applied horizontally across sectors at the EU level is a possible solution[19].

With the view that companies could take on a bigger role in contributing into the overall progress to achieve the UN Sustainable Development Goals[20], and taking into account the Covid-19 pandemic related-developments that witness increased debate on corporate sustainability, there are ongoing discussions over corporate governance framework being more aligned towards sustainability objectives. The traditional approach[21] claiming that other areas of law more effectively deal with the problematic issues associated with that particular field (tax, labour, environmental, etc.) is also being contested by arguing for a coherent approach in a policy lawmaking[22]. There are, however, divergent views as both to the regulatory approaches and techniques to be dealt with in achieving the policy goals and their effects.

Consulting Study"), p. 16.

[19] BIICL, *Civic Consulting and LSE Consulting Study*, cit., pp.15-23 and pp. 231-260.

[20] *Europe Sustainable Development Report 2021*, cit., pp. 52-53; Sustainable Development Solutions Network and Institute for European Environmental Policy, *Europe Sustainable Development Report 2020*, available at: *https://www.sdgindex.org/reports/europe-sustainable-development-report-2020/*, p. 63.

[21] See, *e.g.*: E.B. Rock, *For Whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose* (May 1, 2020), «European Corporate Governance Institute - Law Working Paper», No. 515/2020; «NYU School of Law, Public Law Research Paper», No. 20-16, and «NYU Law and Economics Research Paper», available at «SSRN»: https://ssrn.com/abstract=3589951, p. 5 and p. 25; M.J. Roe, H. Spamann, J.M. Fried, C.C. Y. Wang, *The European Commission's Sustainable Corporate Governance Report: A Critique* (October 14, 2020), «European Corporate Governance Institute - Law Working Paper», No. 553/2020 and «Harvard Public Law Working Paper», No. 20-30», and «Yale Journal on Regulation Bulletin», available at «SSRN»: https://ssrn.com/abstract=3711652, pp. 149-150; *e.g.*, tax law.

[22] B. Sjåfjell, *Reforming EU Company Law to Secure the Future of European Business* (March 4, 2021), in *University of Oslo Faculty of Law Research Paper*, No. 2021-05 (Preprint of article in *European Company and Financial Law Review*, 2/2021); in *Nordic & European Company Law Working Paper*, No. 21-13, available at: *https://ssrn.com/abstract=3797685*, 2 and 15; *Europe Sustainable Development Report 2021*, cit., x.

3. How and who: solutions for a more sustainable corporate governance framework

It is widely acknowledged that transparency rules implemented through corporate sustainability reporting should be perceived as added value thereto. Indeed, pursuant to the EU Company law, accounting reporting for large public-interest companies requires to disclose sustainability-related matters[23]. And currently, there is the EU legislative initiative under way aiming to improve corporate sustainability reporting itself, as well as to broaden the scope of the reporting companies[24].

Nevertheless, there is much less consensus on whether, in addition to the improved disclosure requirements, and in coordination with them, mandatory substantive rules in the area of corporate governance framework should also be enacted; and, if so, what legal instruments – national or European – embedding those rules are to be deemed the most appropriate.

The question as to whether and how the corporate governance framework could be better adapted to achieve a greater sustainability calls for the need to consider a number of legal tools and to evaluate them carefully (for example: (re)definition of corporate purpose taking into account broader interests, expanding and/or clarifying directors' duties in relation to sustainability, incorporating sustainability expertise at the level of the board and greater diversity on boards, better linking directors' remuneration to sustainability targets[25], putting in place loyalty shares, revisiting enforcement tools, establishing mandatory due diligence, etc.).

[23] Article 19a of Directive no. 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive no. 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, available at: *http://data.europa.eu/eli/dir/2013/34/2021-12-21*. Large public-interest companies with more than 500 employees have to include in the management report a non-financial statement containing environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, *inter alia* reporting on due diligence.

[24] EU Commission, *Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive no. 2004/109/EC, Directive no. 2006/43/EC and Regulation (EU) no. 537/2014, as regards corporate sustainability reporting*, COM(2021)189 final, 2021/0104(COD). For more information, see: https://ec.europa.eu/info/publications/210421-sustainable-finance-communication_en#csrd.

[25] Articles 9a and 9b of the Directive no. 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies (consolidated text), available at: *http://data.europa.eu/eli/dir/2007/36/2017-06-09*.

There are pros and cons arguments in relation to each of the various legal tools, either in isolation or in combination, for Company law to pursue the policy goals that could produce desirable changes.

Although there are divergent views as to the most appropriate solutions, those enabling to promote positive contributions by the companies to sustainable development and tackling adverse impacts on society associated with corporate operations, have to be addressed. In that vein, corporate purpose and director's duty of care, as well as mandatory due diligence may be deemed at the core of sustainable corporate governance, thus deserving some further considerations.

3.1. Corporate purpose and director's duty of care

A corporate purpose as the central concept in corporate governance attracted considerable attention from scholars. The two prevailing theories defining a corporate purpose, *i.e.* the shareholder primacy theory aimed to promote shareholder value (and the enlightened shareholder value approach when stakeholder interests are considered as long as it is in the interest of shareholders, as the shareholder primacy doctrine) and the stakeholder theory focusing on pluralistic governance model[26], embodied either as a hard law rule or a social norm, design boundaries for corporate directors in directing and controlling the companies. The corporate purpose helps to define what duties company's directors have.

Sustainable corporate governance brought a renewed emphasis on the pluralistic governance model, balancing various stakeholders' interests. Corporate business practices that integrate economic, social, and

[26] More about the doctrines with the related references, see: L.A. Bebchuk, R. Tallarita, *Will Corporations Deliver Value to All Stakeholders?* (August 4, 2021), «Vanderbilt Law Review», vol. 75 (May, 2022), available at «SSRN»: https://ssrn.com/abstract=3899421 , p. 1, pp. 10-13, pp. 22-23, and p. 52; H. Fleischer, *Corporate Purpose: A Management Concept and its Implications for Company Law* (January 21, 2021), «European Corporate Governance Institute - Law Working Paper» No. 561/2021, available at «SSRN»: https://ssrn.com/abstract=3770656; G. Ferrarini, *Corporate Purpose and Sustainability* (December 7, 2020), «European Corporate Governance Institute - Law Working Paper» No. 559/2020, available at «SSRN»: https://ssrn.com/abstract=3753594 (an edited version of this paper appears as a chapter in D. Busch, G. Ferrarini, S. Grünewald (Eds.), *Sustainable Finance in Europe - Corporate Governance, Financial Stability and Financial Markets*, Palgrave-MacMillan-Springer, Cham (CH) 2021, pp. 85-160); M. Petrin, *Beyond Shareholder Value: Exploring Justifications for a Broader Corporate Purpose* (November 1, 2020), available at «SSRN»: https://ssrn.com/abstract=3722836, and also in E. Pollman, R.B. Thompson (Eds.), *Research Handbook on Corporate Purpose and Personhood*, Edward Elgar Publishing, Chalthenam 2022, pp. 345-362.

environmental issues (all three together being dimensions of sustainability) are essential in achieving more sustainable development[27]. Companies are to be encouraged to focus on long-term and sustainable performance[28]. In that context, one could argue that a corporate purpose as a core concept of corporate governance should reflect a broader view of stakeholders' interests. In its own turn, the corporate purpose-related discussions in the context of sustainability may involve a debate over whether a company has to simultaneously generate social value alongside profit, and which essentially points to even more fundamental question on the role of the companies in the contemporary society[29].

Sustainability objectives should not be, however, viewed in contravention of the overall purpose of the company as a commercial enterprise and an investment vehicle for the shareholders. Concept of sustainability does not in itself modify traditional understanding of the company to be it a fundamentally different legal entity, *e.g.* a non-profit entity, or a social enterprise aimed to pursue social goals and solve social problems[30]. Sus-

[27] European Commission, *European action for sustainability*, cit., 1-2 and 17; B. Sjåfjell, *Sustainable Value Creation*, cit., 5; C.L. Villiers, B. Sjåfjell, G. Tsagas, *Stimulating Value Creation in a Europe in Crisis* (January 7, 2022), «University of Oslo Faculty of Law Research Paper» No. 2022-01, pp. 4-9, available at «SSRN»: https://ssrn.com/abstract=4003345 , and also in B. Sjåfjell, G. Tsagas, C. Villiers (Eds.), *Sustainable Value Creation in the EU: Towards Pathways to a Sustainable Future through Crises*, Cambridge Univ. Press, Cambridge 2022 (Chapter 1).

[28] See European Commission, *The European Green Deal*, cit., p. 17; see also *sub* Action 10, in European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, Action Plan: Financing Sustainable Growth*, 2018, COM/2018/097 final, p. 3 and p. 11.

[29] H. Fleischer, *Corporate Purpose: A Management Concept and its Implications for Company Law,* cit. pp. 13 ff.; E.B. Rock, *For Whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose*, cit., p. 6 and p. 30; J. Quinn, *The Sustainable Corporate Objective: Rethinking Directors' Duties*, «*Sustainability*», vol. 11.23 (2019), p. 6734, available at: https://doi.org/10.3390/su11236734 , p. 2; C. Mayer, *The Governance of Corporate Purpose* (May 12, 2021), «European Corporate Governance Institute - Law Working Paper» No. 609/2021, available at «SSRN»: https://ssrn.com/abstract=3928613 , pp. 1-20 (stating that corporate purpose is about producing profitable solutions, not profiting from producing problems as well as avoiding detriments to others).

[30] As to a re-definition of the purpose of the company as being "to create sustainable value within planetary boundaries", without a fundamental change of the nature of the company, see B. Sjåfjell, *Reforming EU Company Law*, cit., pp. 16-17; B. Sjåfjell, *Sustainable Value Creation*, cit., 6. As to "social enterprises", see: Article 2, paragraph 1) and paragraph 13) of the Regulation (EU) No. 2021/1057 of the European Parliament and of the Council of 24 June 2021, establishing the European Social Fund Plus (ESF+) and repealing Regulation (EU) No. 1296/2013, available at: http://data.europa.eu/eli/reg/2021/1057/2021-06-30;

tainability is predominantly about the way (manner) in how the company pursues its corporate purpose. The duty of care of directors should thus reflect undertaking towards sustainability.

It has been suggested that replacement of the shareholder primacy model with the stakeholder governance model does not necessarily ensure producing expected effects in properly addressing stakeholders' interests[31]. As responsible business conduct and new business models are considered horizontal enablers for sustainable transition[32], rather than revisiting the concept of a corporate purpose, a debate over the directors' mandate directing the company in a more sustainable way (manner) could proceed.

Corporate directors are the key players to ensure company's strategies, business models and business practices to be aligned with the sustainability objectives. At the company setting, the boards are in the best position to further develop responsible companies[33]. One could view this with the similar pattern emerging in Corporate Governance Codes[34] orienting the boards to direct the companies towards the long-term success and sustainable value creation of the enterprise[35]. Although open-ended aspects of sustainable business standards may possess a difficulty in shaping their contours by directors and finding equilibrium in address-

European Commission, *Social enterprises and their ecosystems in Europe - Comparative Synthesis Report* (drafted by C. Borzaga, G. Galera, B. Franchini, S. Chiomento, R. Nogales, C. Carini), Publications Office of the European Union, Luxembourg, 2020, available at: https://europa.eu/!Qq64ny.

[31] L.A. Bebchuk, R. Tallarita, *Will Corporations Deliver Value to All Stakeholders?*, cit. (showing empirical findings of the review of corporate governance documents of more than one hundred US public companies those joined the Business Roundtable's 2019 Statement on the Purpose of a Corporation committing to deliver value to all stakeholders suggest that the companies retain shareholder primacy).

[32] European Commission, *Reflection paper*, cit., p. 14, and pp. 26-27.

[33] R.G. Eccles, M. Johnstone, Louis, C. Mayer, J.C. Stroehle, *The Board's Role in Sustainability*, «Harvard Business Review» (September-October 2020), available at: https://hbr.org/2020/09/the-boards-role-in-sustainability .

[34] G. Ferrarini, M. Siri, S. Zhu, *The EU Sustainable Governance Consultation and the Missing Link to Soft Law* (April 9, 2021), «European Corporate Governance Institute - Law Working Paper» No. 576/2021, available at «SSRN»: https://ssrn.com/abstract=3823186, pp. 10-11; H. Fleischer, *Corporate Purpose: A Management Concept and its Implications for Company Law*, cit., pp. 16-18 (with specific reference to the German Corporate Governance Code).

[35] Also see B. Sjåfjell, *Sustainable Value Creation*, cit., pp. 4-7 (suggesting to implement a duty of the board to promote sustainable value creation within planetary boundaries to have the corporate purpose determined and thus operating as sustainable value creation within planetary boundaries).

ing sustainability elements is a challenging task, business judgment rule should guide directors in business decision making.

In that context it should be mentioned that in 2020, the European Commission published the sustainable corporate governance initiative to improve the EU regulatory framework on company law and corporate governance by enabling companies to focus on long-term sustainable value creation, as a complementary to the review of the Non-Financial Reporting Directive[36]. According to the summary feedback of the subsequently launched public consultation by the European Commission, the respondents in general supported a holistic approach to be integrated into corporate decision making[37].

It is, however, worth noting that the EY study, which was the basis for the initiative of the European Commission in relation to "directors' duty of care – stakeholder interests", has been met with the heavy criticism due to the various reasons – methodology, research evidences and reform proposals[38]. Others submit that the criticism against the EY study should not distract the main emphasis that, in the context of global challenges such as climate change, the company law has potential to promote sustainability at the EU level, albeit a nudging regulatory approach should be used instead, *i.e.*, a mix of soft law combined with mandatory procedural

[36] European Commission, *Inception Impact Assessment on sustainable corporate governance*, Ref. Ares(2020)4034032 - 30/07/2020, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en.
[37] European Commission, Directorate-General Justice and Consumers, *Summary report – public consultation on sustainable corporate governance initiative* (26 October 2020 – 8 February 2021), available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/public-consultation_en, pp. 4-6.
[38] See, *e.g.*, M.J. Roe, H. Spamann, J.M. Fried, C.C.Y. Wang, *The European Commission's Sustainable Corporate Governance Report: A Critique*, cit.; A. Edmans, *Response to the EU Commission Study on Sustainable Corporate Governance*, London Business School European-Commission-Sustainable-Corporate-Governance.pdf, 2020, available at: www.alexedmans.com; K. Lannoo, J. Lau Hansen, A. Thomadakis, *Are European listed corporations short-termist?*, in *European Capital Markets Institute Commentary*, No. 71 (January 2021), available at: https://www.ecmi.eu/sites/default/files/are_european_listed_corporations_short_termist.pdf; European Company Law Experts Group, *Comment on the European Commission's Consultation Document: Proposal for an Initiative on Sustainable Corporate Governance*, 2020, available at: https://europeancompanylawexperts.wordpress.com/publications/comment-by-the-european-company-law-experts-group-on-the-europeancommissions-consultation-document-proposal-for-an-initiative-on-sustainable-corporate-governance/; see also, G. Ferrarini, M. Siri, S. Zhu, *The EU Sustainable Governance Consultation and the Missing Link to Soft Law*, cit., pp. 7-8.

rules[39]. In the similar vein, some suggested sustainability disclosure, soft law instruments and directors' incentives aligned with sustainability targets as preferred solutions rather than reforming substantive directors' duties at the EU level[40]. The subsidiarity principle seems to be among the issues that raise significant concerns about the potential harmonization efforts[41]. On the other hand, given the overreaching EU policy objective for sustainable development, there is a support for a harmonized duty requiring company's directors to promote sustainable value creation as reflecting the company's role in a modern society while highlighting that sustainability objectives cannot be sufficiently achieved at the national level[42]. Some stresses the key role and potential of the private sector in sustainable transformation and thus, alongside with the due diligence requirement, the need at the EU level to clarify directors' duties in relation to strategic oversight of sustainability matters and to align incentives for executives with the sustainability targets[43]. As a compromise, it has been also suggested to focus on long-term value creation and on sustainable corporate governance, albeit contesting the EY study and recommending carrying out further analysis on the effects of different corporate governance mechanisms and on possible, alternative regulatory instruments[44]. Current academic literature generally submits that sufficiently weak en-

[39] F. Möslein, K.E. Sørensen, *Sustainable Corporate Governance: A Way Forward* (January 4, 2021), «European Corporate Governance Institute - Law Working Paper» No. 583/2021, available at: https://ssrn.com/abstract=3761711; in *European Company Law Journal*, no. 1 (2021), pp. 7-14.

[40] See, *e.g.*, G. Ferrarini, M. Siri, S. Zhu, *op. cit.*, p. 7, and M.J. Roe, H. Spamann, J.M. Fried, C.C.Y. Wang, *op. cit.*, p. 150 (supporting the idea of aligning directors' private incentives with social goals in the pay scheme).

[41] See, G. Ferrarini, *Corporate Purpose*, cit., p. 61, and M.J. Roe, H. Spamann, J.M. Fried, C.C.Y. Wang, *The European Commission's Sustainable Corporate Governance Report: A Critique*, cit., p. 134, p. 138.

[42] See, B. Sjåfjell, *Reforming EU Company Law*, cit., pp. 3-6 (with regard to the EU legal basis for sustainability reforms), B. Sjåfjell, *Sustainable Value Creation*, cit., pp. 10-11, and J. Quinn, *The Sustainable Corporate Objective: Rethinking Directors' Duties*, cit., p. 9.

[43] See, *Open letter: An encompassing approach to effective Sustainable Corporate Governance to European Commission President Ursula von der Leyen and Vice-President Věra Jourová from WWF European Policy Office, Finance Watch, Share Action, Frank Bold, Economy for the Common Good*, Oxfam, 31 January 2022, available at: https://www.finance-watch.org/publication/joint-statement-ngos-express-deep-concerns-on-the-upcoming-sustainable-corporate-governance-initiative/.

[44] See A. Bassen, K. Lopatta, W.G. Ringe, *Feedback from University of Hamburg*, 2020, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/F594615_en.

forcement of directors' duties in Member States may result in not achieving the effect intended from the reform[45].

The intensive legal policy discourse regarding sustainability in corporate governance is not yet over and, at the European level, the way forward remains to be seen.

3.2. Mandatory due diligence

Another fundamental issue in company law relates to corporate externalities that harm society[46]. It has been argued that voluntary soft-law approach alone and disclosure requirements are not sufficient to encourage companies to better internalize externalities generated by their operations[47]. In that respect, alongside with the transparency rules for corporate sustainability reporting, a mandatory due diligence requirement for the company, as a preventive measure and a substantive corporate duty (standard of care) premised on not-to-harm basis, could be an appropriate legal technique to consider.

The due diligence concept is aimed to deal with the externalities associated with the company's operations by establishing and implementing processes, an integral part of the corporate decision-making and risk management, aimed to identify, prevent, mitigate and account for severe impacts, such as human rights and environmental, both in the company's own operations and in its supply chain or value chain[48]. Under the due diligence concept, companies need not only to follow responsible business conduct standards in their own activities, but they have to ensure that the whole group (including their subsidiaries) as well as third parties involved in the business relationships (suppliers, buyers, other business relationship) respected human rights and environmental protection standards, both when operating at national level and in other jurisdictions[49]. Therefore, companies globally operating in the countries with the lower standards as compared with the ones at their home country and inter-

[45] See, *e.g.*, F. Möslein, K.E. Sørensen, *Sustainable Corporate Governance, etc.*, cit., p. 4.
[46] See, *e.g.*, BIICL, *Civic Consulting and LSE Consulting Study*, cit., pp. 214-218 and p. 225. For example, in that respect it was also submitted that it should be avoided profiting at the expense of others (see, C. Mayer, *The Governance*, cit., pp. 5-7).
[47] See, BIICL, *Civic Consulting and LSE Consulting Study*, cit., pp. 218-222 and pp. 243-250; G. Ferrarini, *Corporate Purpose*, cit., pp. 41-42.
[48] See, *e.g.*, the *UN Guiding Principles on Business and Human Rights*, cit., pp. 13-21, the *OECD Guidelines for Multinational Enterprises*, cit., and the *OECD Due Diligence Guidance for Responsible Business Conduct*, cit.
[49] *Ibidem.*

nationally recognized as gatekeepers have to ensure through essentially contractual devices and purchasing practices that their subsidiaries and business partners abroad comply with those higher standards.[50] Having this in mind, in a similar vein as it was already mentioned in relation to the corporate purpose, imposing a task upon companies through the mechanism of the corporate duty to carry a mandatory due diligence in a supply chain or value chain raises an issue as to the role of the companies in contemporary society. On the other hand, a due diligence being a context-specific and risk-based is also viewed as a defense to liability of the company[51].

Although dealing with the adverse impacts of corporate activities on society through a mechanism of due diligence is not without its own problems (e.g. challenges to gather information for risk assessment, administrative and financial burden for small and medium sized business, legal uncertainty in relation to a clarification of the scope of the internationally recognized responsible business conduct standards, proportionality as to the scope and content of a due diligence, ability to control and influence business partners, extraterritoriality, applicable law, enforcement, etc.), several jurisdictions aiming to induce companies to better internalize externalities generated by their operations have adopted mandatory corporate due diligence legislation, some are going through the processes of preparation the legislative initiatives[52].

The national regulatory approaches towards corporate due diligence for adverse human rights and environmental impacts resulting from business activities seem, however, to be different both in scope (companies, areas, chain) and the liability model as well as its enforcement.

For example, in 2017, France adopted legislation requiring large French public companies to establish and implement a vigilance plan aimed to identify risks and prevent serious violations of human rights and fundamental freedoms, personal health and safety and the environment that result from their world-wide activities of the group and contractors and suppliers with an established business relationship (*i.e.*, regular, significant and stable) when those activities are linked to this

[50] Also see, P.H. Conac, I. Urbain-Parleani, *The 2017 Act on the duty of vigilance of parent and outsourcing companies*, «Revue trimestrielle de droit financier», 2017.3, pp. 90-96.
[51] See, BIICL, *Civic Consulting and LSE Consulting Study*, cit., p. 20, pp. 110-112, and p. 252.
[52] *Ibidem*, pp. 170-172, pp. 192-213, and pp. 239-242; M. Krajewski, F. Wohltmann, K. Tonstad, *Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?*, *«Business and Human Rights Journal»*, vol. 6 (2021), pp. 550-558, also available at «SSRN»: https://ssrn.com/abstract=3926360 .

relationship[53]. The actual scope of the legislation is enlarged due to the indirect effect of the law on contractual partners and foreign parents of large French subsidiaries[54]. In France, alongside with the company's obligation to adopt and publicly disclose a vigilance plan in case of its failure to comply with the duty through the judiciary, and a public fine for a false disclosure imposed by securities oversight authorities, a French company may incur civil liability for damages with respect to harm that could have been avoided if the company had fulfilled its statutory requirements to design the plan and implement it[55].

In 2021, Germany has also adopted a mandatory human rights and certain environment-related due diligence requirement for certain large companies, albeit of any legal form, that have their legal or real seat (central administration, principal place of business, administrative headquarters) or a branch in Germany, covering company's own business (including subsidiaries), their direct suppliers as well as indirect suppliers to a limited extent, both in Germany and abroad[56]. While in Germany, the corporate mandatory due diligence model is predominantly premised on public disclosure by reporting about actions German companies have taken in preventing and mitigating adverse impacts on society in their supply chain, as well as public enforcement rules (public fine, exclusion from public procurement) and does not provide for a civil liability through a private enforcement[57].

[53] French companies (registered as either a public limited liability company (*Sociétés anonymes*) or partnership limited by shares (*Sociétés en commandite par actions*)) having their legal seat in France and at group level with at least 5,000 employees in France or 10,000 worldwide for two fiscal years have to establish a vigilance plan: see, P.H. Conac, I. Urbain-Parleani, *The 2017 Act on the duty of vigilance of parent and outsourcing companies*, cit., pp. 90-96.
[54] *Ibidem*, pp. 92-93.
[55] *Ibidem*, pp. 94-96.
[56] If the parent company has a decisive influence over the subsidiary, to comply with the due diligence obligations, the parent company has to include business area and supply chains of the subsidiary as well. See., *e.g.*, M. Krajewski, F. Wohltmann, K. Tonstad, *op. cit.* Since 2023, different types of companies with at least 3,000 employees have a duty. From 2024, the threshold is reduced to 1,000. Foreign companies without a real seat or domestic branch in Germany will not fall under the scope of the law even if they supply goods and services on the German market. Federal Ministry of Labour and Social Affairs, Supply Chain Act, available at: https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/FAQ/faq.html .
[57] It is, nevertheless, submitted that liability claims on general tort law should not be excluded. See, *e.g.*, M. Krajewski, F. Wohltmann, K. Tonstad, *Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?*, cit.,

In the context of tackling the phenomena of corporate externalities, an increasing role of the national courts should be emphasized as well[58].

Growing attention as to how better minimize negative impacts of corporate operations in society was not unnoticed at the European level. Alongside with the existing legal instruments related to sector- or issue-specific due diligence and functionally similar measures as well sustainability reporting requirements,[59] a need for the EU intervention establishing a mandatory corporate due diligence requirement at the EU level is currently considered. According to the summary feedback to the public consultation on sustainable corporate governance initiative, built on *BIICL, Civic Consulting and LSE Consulting Study* on the subject-matter and launched by the European Commission, majority of overall respondents supported the need to develop an EU legal framework for due diligence[60].

In March 2021, the European Parliament by its resolution encouraged the European Commission taking a harmonized approach on mandatory corporate due diligence for EU-companies and third country-companies operating within the EU – large companies, publicly listed small and medium-sized companies and small and medium-sized companies operating in high-risk sectors to tackle adverse impacts on human rights, the environment and good governance through their own activities and the value chains[61].

Although, at this stage, it is difficult to debate about forthcoming legislative solutions, in the overall complex and global setting in better tackling negative corporate externalities, the European legislative initiative concerning corporate due diligence on human rights and environmental impacts across supply chains would build a level playing for companies

pp. 7-9.

[58] See, A. Hösli, *Milieudefensie et al v. Shell: A Tipping Point in Climate Change Litigation against Corporations?*, «*Climate Law*», vol. 11.2 (2021) (brill.com) ("The District Court of The Hague's decision in the matter of *Milieudefensie et al. v. Shell*, issued in May 2021, is an unprecedented ruling, holding a fossil-fuel company accountable for its alleged contribution to climate change"). See, also, BIICL, *Civic Consulting and LSE Consulting Study*, cit., pp. 175-177.

[59] See *Recital* Z of the European Parliament, *Resolution with recommendations to the Commission on corporate due diligence and corporate accountability*, of 10 March 2021 (2020/2129(INL)) (2021/C 474/02), P9_TA(2021)0073; see also BIICL, *Civic Consulting and LSE Consulting Study*, cit., pp. 167-169.

[60] European Commission, *Summary report – public consultation on sustainable corporate governance initiative* (26 October 2020 – 8 February 2021), cit., p. 4.

[61] European Parliament, *Resolution with recommendations on corporate due diligence*, cit.

in the internal market. This measure could be useful in better tackling negative international spillovers generated by the EU[62].

4. Concluding remarks

Possible regulatory measures (voluntary soft-law approach and permissive regulations, hard law legislative solutions, targeted either to procedural or substantive rules, smart mix) is an ongoing and heated debate topic on the potential of Company law through corporate governance framework to better deliver to the sustainable development. And in the light of these developments, at the European level, we also witness ambitious goals aimed at contributing towards more sustainable corporate governance framework. Have a moment and see whether a search for the most suitable ways for companies to do more in contributing to sustainable development may cause a revolutionary paradigm-shift in European company law.

[62] *Europe Sustainable Development Report 2021*, cit., pp. viii-xi, pp. 15-21, and pp. 27-28.

Sustainability in finance: evolving approaches and the role of regulation

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Financial institutions around the world are increasingly incorporating ESG (Environmental, Social and Governance) criteria in every aspect of their business. In particular, sustainable finance directly incorporates ESG principles into business decisions and investment strategies. Today, while sustainable finance is among the fastest growing areas, it still represents a small fraction of global financial markets. Attention to climate issues responds to societal pressures and the realization of the urgency to tackle climate change and its devastating effects on the environment, people and the economy. Climate risks have become financial risks through two main channels: physical risks, such as those derived from extreme weather events; and transition risks, derived changes in regulatory and fiscal policy, technology and consumer preferences. In order to incorporate climate consideration into financial activities and products several of key elements are necessary: data, as the basis of relevant climate information; metrics and methodologies, that translate such data into financial data; taxonomies, which assist in differentiating between climate friendly (green) activities and harmful (brown) ones; and disclosure of relevant information from both the corporate and financial sectors. While investor and client pressures are significant catalyst of sustainability in finance, regulation is today the main driver. The G20 at the political level and global standard setters such as the Financial Stability Board and the Basel Committee are increasingly focusing on climate risks and their impact on

financial firms, as well as the impact of financial activities on the environment Current regulatory approaches focus more on ensuring resilience of financial firms and markets against climate risks. However, financial firms have also the ability to make a positive impact on the environment by providing the necessary financing for the costly transition towards a climate friendly economy.

Keywords: sustainability; ESG; financial institutions; sustainable finance; SDGs; G20; Financial Stability Board; Basel Committee; physical risks, transition risks; disclosure; taxonomies; global standards; financial regulation.

1. Introduction

Financial institutions around the world are increasingly incorporating ESG (Environmental, Social and Governance) criteria in every aspect of their business. Attention to climate issues responds to societal pressures and the realization of the urgency to tackle climate change and its devastating effects on the environment, people and the economy. The financial sector thus faces a host of new issues, new demands and new stakeholders.

In particular, incorporating sustainability considerations into business strategy and risk assessment will offer some of the greatest challenges – and opportunities – the financial sector has ever encountered. Sustainable finance directly incorporates ESG principles into business decisions and investment strategies.

2. Sustainable finance as one of the fastest growing areas of the global financial market; regulation as its main driver

Today, while sustainable finance is among the fastest growing areas, it still represents a small fraction of global financial markets.

To attain the global targets set through the Paris Agreement and the broader United Nations Sustainable Development Goals (SDGs), policymakers have estimated that there is an annual financing gap of $2.5 trillion through 2030. Achieving the Paris Agreement objectives alone would require making 95% of the electricity supply low carbon, 70% of new cars zero emission, and reducing the CO2 intensity of the building sector by 80% by 2050. Meeting these objectives will require investment on a scale not seen since the industrial revolution.

While investor and client pressures are significant catalyst of sustainability in finance, regulation is today the main driver. The G20 at the political level and global standard setters such as the Financial Stability Board and the Basel Committee are increasingly focusing on climate risks and their impact on financial firms, as well as the impact of financial activities on the environment. However, emerging policies and regulation around sustainable finance are only one element of a broader set of internationally coordinated efforts – including in macroeconomic policy – that will be required to achieve these goals.

3. Climate risk assessment as an innovative discipline: the "physical risks" and the "transition risks"

Climate (and broader environmental) risk assessment is an innovative and rapidly evolving discipline, raising several important regulatory and supervisory policy questions that require careful consideration. Climate risks have become financial risks through two main channels: *physical risks*, such as those derived from extreme weather events; and *transition risks*, derived changes in regulatory and fiscal policy, technology and consumer preferences.

The financial industry has been learning more and more about physical risks as data becomes available, including historical data from past natural events. Such risks are now better understood and are increasingly part of credit assessment and underwriting, insurance underwriting and, increasingly, investment decisions.

Transition risks are however more challenging. They require an understanding of the implications of future changes in policy (for example regarding carbon tax policy), technological development (when electric batteries will be more efficient and cheaper to produce) and consumer preferences (when electric vehicles will be preferred over combustion engine ones).

4. The challenging task of estimating climate risks and to factor them into financial decisions: the lack of a global policy framework on sustainable finance and the "fragmentation of standards" danger

The lack of historical data and the complexities of future scenario modeling make the estimation of these risks a challenging task. In order

to incorporate climate consideration into financial activities and products several of key elements are necessary: data, as the basis of relevant climate information; metrics and methodologies, that translate such data into financial data; taxonomies, which assist in differentiating between climate friendly (green) activities and harmful (brown) ones; and disclosure of relevant information from both the corporate and financial sectors.

As policymakers and regulators increasingly factor climate risk into their deliberations, the pace at which regulatory proposals have been developed in some parts of the world equals or even exceeds that after the global financial crisis.

A new global network – the Central Banks and Supervisors Network for Greening the Financial System (NGFS) was established in December 2017 to share learning on policies; similarly, the Coalition of Finance Ministers for Climate Action (launched in April 2019) will enable ministers to make commitments on key issues, potentially including carbon pricing. The European Union (EU) has developed a comprehensive action plan to integrate sustainability into its financial policy framework, reinforced by the December 2019 European Green Deal growth strategy.

Following the EU's example, several other jurisdictions have established green finance strategies, or formed expert groups to outline what is needed to achieve a "sustainable" financial sector.

However, the sustainable finance policy landscape is complicated by the fact that there is not yet a global policy framework. Moreover, some key jurisdictions that will be essential to achieving aligned frameworks have been largely absent from the still-emerging global policy and standard setting discussions.

The work to date of the standard setters and the NGFS is fundamental and impressive in its scope – particularly given it has occurred in a short period of time. But while the growing focus on climate risk is welcome and appropriate, activity is taking place in various pockets across the traditional international standard-setting organizations – including the Financial Stability Board (FSB), the Basel Committee on Banking Supervision (BCBS), the International Organization of Securities Commissions (IOSCO), the International Association of Insurance Supervisors (IAIS) and the International Organisation of Pension Supervisors (IOPS) – as well as in the institutions comprising the international financial architecture (*e.g.* the International Monetary Fund). All this is taking place alongside the work of new groupings outside the normal international

economic policymaking apparatus (such as the NGFS and the International Standards Organization).

In addition, many countries and regions across the world are developing jurisdiction-specific rules in relation to various aspects of sustainable finance, often at different speeds and with diverging objectives (which are the natural consequence of diverging views about the environment, the carbon intensity of their economies, their energy strategies, their dependence on natural resources, etc. just to cite a few factors).

The increasing coordination among financial supervisors through the NGFS and standard setting-bodies, including the newly formed Basel Committee Task Force on Climate related Financial Risks is very welcome and timely. Nonetheless, there is growing concern about regulatory and policy fragmentation, which is rapidly becoming a reality at the individual country level.

Such fragmentation could result in undesirable complexity and inconsistency of the resulting standards and requirements pertaining to sustainable finance. In a recent IIF-EBF Global Climate Finance Survey of 70 financial institutions, 65% of institutions said that "green" regulatory market fragmentation was a big source of concern and would have a material impact on the market for sustainable finance. Central banks and regulators are themselves concerned about comparability and consistency of the evolving supervisory frameworks with respect to climate risks, as noted in recent OMFIF-Mazars research.

There are numerous examples of policy fragmentation, but they tend to cluster around three main categories:

a) Prudential regulation and supervision;
b) Market and conduct regulation and the definition of sustainable finance taxonomies; and
c) Reporting, disclosure and accounting approaches.

In the first area, prudential regulation and supervision regarding sustainability has evolved at a fast pace but without the "umbrella" guidance of global standards such as the ones developed by the Basel Committee. Only until recently the Basel Committee has started setting global guidelines on issues such as general principles for the supervision of climate risk. However, it is fair to say that at this stage European and US regulations on the roles and responsibilities of financial firms regarding the environment still differ substantially in scope and ambition.

In regard to the second area, the regulations on ESG investment, sale and commercialization of ESG products, the development of ESG ratings

and, importantly, the development of sustainable finance taxonomies that classify how "green" or "brown" an asset is significantly diverge among the main jurisdictions, with Europe having the most developed and complex sets of regulations. To illustrate the point of divergence in a clear way it is sufficient to observe that currently there are over 26 different taxonomies around the world, with some of them being clearly incompatible with each other.

Finally, disclosure, reporting and accounting for ESG is the area that currently presents the greatest hope for alignment. The establishment in 2021 of the International Sustainability Standards Board (ISSB) present a unique opportunity to achieve a minimum level of convergence on reporting standards. While clear challenges still exist (chief among them the reconciliation of the US concept of economic materiality versus the EU concept of double materiality) there is great hope in the work of the ISSB and the willingness of key jurisdictions to follow the new standards once completed.

5. The search for a sound, multi-purposes "sustainable finance" regulatory policy and legal framework

While the regulatory efforts to date are a helpful starting point, sustainable finance requires the development of a sound global policy and regulatory framework that ensures an aligned path to achieve the SDGs, protects consumers, supports market development, and facilitates the needed transition in key economic sectors.

Countries should experiment and retain flexibility to identify the most appropriate approaches for their local legal and market context, but a multiplicity of different approaches to key policy and regulatory initiatives will be at best inefficient and at worst ineffective in supporting the transitions. Regulatory uncertainty and complexity will impede the ability of the financial sector to mobilize effectively to provide the necessary investment and insurance underwriting for transitioning. A disaggregated and competing approach to policy development in this complex area could affect the quality of the resulting policy frameworks. There is also a risk that activity will migrate to parts of the global financial system that are less stringently regulated or not subject to the same standards.

The financial industry has advocated to the G20 to consider an enhanced sustainability agenda that brings together, in a careful and considered manner, key policy discussions across finance ministries, central

banks, financial sector regulators/supervisors, and multilateral institutions. Ultimately, sustainable finance is only one part of a broader set of coordinated policies that will be required across the economy, as highlighted in the recent BIS publication The green swan: central banking and financial stability in the age of climate change. In particular, policymaking related to sustainable finance should be aligned with other macroeconomic policymaking that will be a necessary part of the transition to a sustainable economy.

With respect to financial sector policymaking, the financial industry has encouraged the FSB and other standard-setting bodies to play a leading role to promote balanced global policy development. The coalition of central banks and supervisory authorities in the NGFS has made a tremendous effort to further thinking on how to analyze and measure climate change risk, and are developing handbooks, including on supervisory practices. The NGFS should continue to play a key role as a platform and forum for authorities to exchange views and best practices with regards to climate-related risks for the financial sector and the development of sustainable finance. This could complement any work that is undertaken by the FSB and global standard setters to contribute to considered and balanced policy development over time. Work could initially focus on climate risks and policies given the growing urgency of that agenda, before turning to broader environmental, social and governance issues. This work could leverage the evolving industry body of knowledge on climate risk.

6. Concluding remarks

Climate risk assessment should be a collaborative effort between the international standard-setting bodies and the private sector. There are clear shared interests in the sustainable finance agenda and both sectors bring helpful perspectives and resources, with neither having a clear advantage in terms of information or experience.

Moreover, both public and private sectors will be held to account by the broader public for progress towards a more sustainable economy.

Collaborative efforts would therefore be an efficient and effective way forward.

There are already good examples of effective collaboration, such as the private-sector led Task Force on Climate-Related Financial Disclosures (TCFD), which was originally launched by the FSB.

The financial industry is ready and willing to engage further with the relevant standard setters, the NGFS, and others to determine efficient and effective ways to develop an appropriate regulatory and supervisory framework for sustainable finance[1].

[1] Selected Bibliography: K. Rismanchi, J. McDaniels, S. Gringel, *Prudential pathways: Industry perspectives on supervisory and regulatory approaches to climate-related and environmental risks* (2021), available at: https://www.iif.com/Portals/0/Files/content/Regulatory/01_21_2021_prudential_pathways.pdf; A. Portilla, S. Gibbs, K. Rismanchi, *Sustainable finance and regulation: the case for greater international alignment* (2020), available at: https://www.iif.com/Portals/0/Files/content/Regulatory/.

Sustainability in corporate insolvency law. Are "sustainable insolvency proceedings" possible?

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Sustainability is not among expressly acknowledged objectives of insolvency proceedings, although societal interest is present to a considerable extent within their core functions of providing equitable distribution among creditors or restructuring viable enterprises in distress. Several specific examples of situations are discussed where insolvency proceedings contribute to reaching environmental, social, ethical and governance goals. In conclusion the proposal to add explicit reference to sustainability objectives to insolvency laws is not supported, as it is found that insolvency proceedings might contribute better to the realisation of those objectives by staying within their current roles, especially if sustainability-enhancing outcomes are supported by general preferences of market participants and encouraged or required by the general (non-insolvency) legal framework.

Keywords: Sustainability; company law; insolvency law; insolvency and restructuring proceedings; societal interests; par condicio creditorum; ESG (ESEG) goals.

1. Introduction

Despite being one of the most important current topics of corporate law, sustainability is only rarely discussed in the context of insolvency proceedings. Such proceedings have usually (in most jurisdictions) clearly defined aims providing some sort of balance between creditor satisfaction in a fair and orderly way (maximizing creditor value and equitable distribution) and rehabilitation of the debtor (corporate restructuring or, in the case of natural persons, discharge and "fresh start"). In the context of sustainability a question arises whether, and to what extent, such typical aims of insolvency proceedings can be accompanied by additional purposes, corresponding to sustainability understood broadly by reference to the 'ESG' or 'ESEG' (**E**nvironmental, **S**ocial, **E**thical[1], **G**overnance) criteria[2]. If answered in the affirmative, this question leads to two further queries. Should sustainability-related purposes overrule traditional (typical) objectives of insolvency proceedings? How should the cost of realising those purposes be allocated? It should be explored whether sustainability-related functions are, at least in some cases, already realised by insolvency proceedings under the existing framework even if not expressly provided for by insolvency legislation.

2. Core functions of insolvency proceedings

The following table shows the presence of main functions of insolvency proceedings in laws of several jurisdictions in an extremely simplified form[3]. Insolvency laws are taken into regard as a whole, including all types of insolvency proceedings, without distinction between them. While in many cases some of the objectives of proceedings are present only in some

[1] While the second 'E' in 'ESEG' is usually subsumed under "governance" ('G'), resulting in a much more frequent use of a shorter abbreviation 'ESG', the longer 'ESEG' form is mentioned here to reflect the role of insolvency law in fostering business ethics and preventing fraud.

[2] See T. Linna, *Business Sustainability and Insolvency Proceedings - The EU Perspective*, «Journal of Sustainability Research», 2020, 2(2):e200019, pp. 2-5, for a discussion of ESEG sustainability as opposed to profitability-related ESP (economic sustainability performance).

[3] Based on the comparative research project published in D. Faber-N. Vermunt-J. Kilborn-T. Richter (Eds.), *Commencement of Insolvency Proceedings*, Oxford International and Comparative Insolvency Law Series, vol. 1, Oxford University Press, Oxford 2012, see para. 1.2 of the General Outline of National Reports, p. xiii. Relevant for the topic of the present article, the template for national reports includes a question on whether societal interests are taken into account and if they can possibly override creditor interest. As the table only has an indicative purpose, later (post-2012) changes are mostly not included.

types of them (e.g. restructuring might not be present as a purpose in proceedings involving winding-up while it takes the lead in reorganization or composition proceedings), for the purposes of the present text it is sufficient to indicate whether they are present in the insolvency law framework at all.

Jurisdiction	**Creditor satisfaction, including equitable distribution**	**Restructuring of the debtor/ corporate rescue**	**Discharge/ "fresh start" for individuals (natural persons)**	**Other objectives**
Australia	+	+	+	–
Belgium	+	+	+	protection of employment
Brazil	+	+	–	investigating crimes
Cameroon (OHADA Uniform Bankruptcy Act[4])	+	+	–	–
Canada	+	+	+	a set of secondary goals: economic stability, certainty and growth, legal and procedural transparency, and predictability
China	+	+	–	maintaining the order of the socialist market economy

[4] The OHADA Uniform Bankruptcy Act (*Acte uniforme portant organisation des procédures collectives d'apurement du passif*) in its current version of 10 September 2015 is applicable in 17 mostly Francophone African states – members of the Organisation for Harmonisation of Business Law in Africa (OHADA).

Czechia	+	+	+	–
England	+	+	+	–
France	+	+	+	preserving employment
Germany	+	+	+	–
Israel	+	+	+	–
Italy	+	+	+	protection of employment (in some of the proceedings)
Mexico	+	+	–	avoiding further insolvencies, preservation of employment
Netherlands	+	+	+	according to case law, societal interests clearly subordinated to the interests of joint creditors but may override interest of individual creditors in exceptional cases
Poland	+	+	+	–
South Africa	+	+	+/–	
(limited scope not amounting to full discharge)	employees' interest to be taken into account, however subservient to creditor interest			
South Korea	+	+	+	–

Spain	+	+	–	–
Sweden	+	+	+	safeguarding employment/ job opportunities at a particular location
Tanzania	+	+	–	protection of jobs and economic stability (subordinated to creditor interest)
United States	+	+	+	preserving benefits offered to the society by operating companies, most importantly employment.

Although detailed solutions, in particular the relation between respective purposes of proceedings, vary between jurisdictions, it can be still held that insolvency laws worldwide are remarkably similar in their basic functions. The traditional purpose of maximising creditor satisfaction and ensuring an equitable distribution between creditors is universally present, as is the purpose of restructuring the debtor in order to maintain its operation on the market. In many cases the restructuring function is also subordinated to the creditor interest, as a successful corporate rescue is understood as an instrument leading to better outcome for creditors. Finally, "fresh start" for individuals, understood as discharge of debts of overindebted natural persons, despite not being a traditional purpose of insolvency law (with notable exception of the United States) has been accepted as one in most jurisdictions.

It can also be observed that the insolvency law usually rather sparingly acknowledges broader societal interest beyond those three functions of insolvency proceedings mentioned just above. When this is the case, this interest most commonly includes, first and foremost, the preservation of

employment[5]. As it can be achieved by successful restructuring or sale of the debtor's enterprise as going concern, acknowledgment of this purpose does not usually result in a departure from realising creditor interest or restructuring as main (most important) functions of the proceedings. However, its significance may lie in allowing for restructuring outcomes where creditor interest (satisfaction to a bigger extent) is subordinated to some degree to employees' interest in maintaining the operation of the enterprise.

In fewer cases, maintaining overall economic stability and order is provided for as a purpose of insolvency law. Again, this purpose fits well into three main functions and should not be considered distinct from them. In particular, maintaining social order by ensuring equitable distribution instead of a chaotic race between creditors for the debtor's assets is a traditional core function of bankruptcy law, dating back to its very beginnings.

The above table does not include broader context of general rules of law, including constitutional provisions governing the economic system. Such rules may affect the interpretation of insolvency laws, including the application of their objectives, in the direction of greater inclusion of broader societal interest. As some examples, Article 41, paragraph 2, of the Italian Constitution provides for common (or social) good ("*utilità sociale*"), safety, liberty and human dignity as a limit to the freedom of economic activity, Article 20 of the Polish Constitution provides for social market economy, founded on the freedom of economic activity but also on solidarity, dialogue and cooperation of social partners, while the German Constitution applies the overarching principle of the "social state" ("*Sozialstaat*"), mentioned expressly in its Article 20(1). Even in jurisdictions not expressly acknowledging any societal interests in their insolvency law such general clauses at the constitutional level may lead to interpretations going beyond the narrow application of explicit purposes of insolvency proceedings. However, the practical meaning of such general constitutional rules alone is likely to remain limited. Without being expressly reflected in the insolvency laws themselves, they will not lead to the acknowledgment of societal interest as autonomous objectives of

[5] Cf. K. Bauer, J. Krasnodomska, *The premises for corporate social responsibility in insolvency proceedings*, in «Social Reponsibility of Organizations. Direction of Changes, Research Papers of Wrocław University of Economics», No. 387, 2015, pp. 26-27, where maintaining employment in the context of restructuring is acknowledged as following the corporate social responsibility (CSR) purposes.

insolvency proceedings but rather give more societal perspective to the application of principal (traditional) objectives.

A wider, more comprehensive list of objectives of insolvency law is provided for by UNCITRAL in its 2005 *Legislative Guide on Insolvency Law*, a document intended to serve as a reference for insolvency law reforms undertaken in any jurisdiction worldwide[6]. The following key objectives are acknowledged:

- provision of certainty in the market to promote economic stability and growth,
- maximization of value of assets,
- striking a balance between liquidation and reorganization,
- ensuring equitable treatment of similarly situated creditors,
- provision for timely, efficient and impartial resolution of insolvency,
- preservation of the insolvency estate to allow equitable distribution to creditors,
- ensuring a transparent and predictable insolvency law that contains incentives for gathering and dispensing information,
- recognition of existing creditor rights and establishment of clear rules for ranking of priority claims, and
- establishment of a framework for cross-border insolvency.

While more detailed and paying more attention to the general stabilizing effect of a well-functioning insolvency framework and its benefits to the economy, the UNCITRAL objectives list does not actually include any elements that would go beyond traditional functions of insolvency proceedings as outlined above. From this perspective it is the smooth realisation of the traditional purposes of insolvency law that is beneficial to the society but there is no explicit acknowledgment of societal purposes that would correspond to sustainability understood as the ESEG criteria.

3. Societal perspective in core functions of insolvency proceedings

3.1. Winding-up and creditor satisfaction

The traditional function of insolvency (bankruptcy) proceedings as collective enforcement proceedings against an insolvent debtor has al-

[6] UNCITRAL, *Legislative Guide on Insolvency Law*, Part One, UNCITRAL, New York 2005, pp. 10-14, available on https://uncitral.un.org/en/texts/insolvency .

ways included maintaining social order and avoiding chaotic and possibly violent individual enforcement measures as its main purpose alongside creditor satisfaction. The situation of insolvency of the debtor creates a potential conflict between creditors and solving this conflict by ensuring an equitable distribution in an orderly way lies at the very origin of collective enforcement as opposed to standard (singular) enforcement proceedings. In this aspect insolvency law can already be considered to fulfil a societal interest.

Another matter where societal considerations play a significant role is the ranking and priority of creditors. All jurisdictions provide for at least some exceptions to the *pari passu* rule, *i.e.* to the equal treatment of all creditors. Some of those exceptions are justified by a technical necessity (*e.g.* priority of administration claims is necessary to ensure the very conduct of proceedings), some result from the need to respect rights *in rem* established to secure claims in a way ensuring a coherent system of collateral arrangements that provides legal certainty to the parties. Most other privileges, especially those awarded to specific categories of unsecured claims arising before the opening of insolvency proceedings (pre-commencement claims), result from policy choices of the respective jurisdiction considering a specific category of claims to be of such importance as to deserve priority before ordinary unsecured claims. Categories of claims enjoying such privilege vary between jurisdictions but frequently include family support claims, tax claims, social security contributions, employees' claims, claims of specified business partners (*e.g.* farmers delivering their own produce) etc.[7] In this way the basic function of insolvency law of ensuring an equitable (as different from equal) distribution includes a policy choice of deciding what is considered "equitable". This policy choice can be influenced by criteria sharing some similarities with the ESEG understanding of sustainability, even if neither ESEG criteria nor sustainability in general are expressly invoked. In particular, there is a strong social argument for privileges for family support claims, employees' claims, social security contributions, while governance-related justification is provided for awarding priority to public law (in particular tax) claims.

[7] For comparison of insolvency privileges across several jurisdictions see the respective national reports in D. Faber, N. Vermunt, J. Kilborn, T. Richter, I. Tirado (Eds.), *Ranking and Priority of Creditors*, Oxford International and Comparative Insolvency Law Series, Vol. 3, Oxford University Press, Oxford 2016.

While considering the importance of specific categories of creditors and possible reasons to grant them priority it is however necessary to note that any such priority, *i.e.* any exception to the *pari passu* rule, comes at the expense of ordinary unsecured creditors, receiving a correspondingly smaller payout in result of the distribution of proceeds. It results from the very situation of insolvency that improving the position of a particular creditor or group of creditors in distribution of proceeds diminishes the funds available for satisfaction of other creditors. Contrary to a typical policy decision assigning priority to a need or an issue, which usually just affects distribution of public funds, in this case a policy choice, regardless of its justification, is taken not at the cost of the taxpayer (of the general public) but rather shifts the burden on those few persons or entities that have the misfortune to find themselves, sometimes accidentally, in the position of an ordinary unsecured creditor in particular insolvency proceedings.

The above consideration led to the abolishment of all or some privileges in some jurisdictions. In particular, Austria (since 1982) and Germany (since 1994, entered into force in 1999) opted for "classless insolvency", a model of bankruptcy proceedings without privileged claims, with priority awarded just to post-commencement administration claims and separate satisfaction of secured creditors from proceeds from the collateral, but otherwise maintaining the *pari passu* rule between unsecured creditors[8]. This choice has been made easier by well-functioning systems of assisting at least some of socially vulnerable creditors (like persons entitled to family support or employees) in case of insolvency of the debtor, yet operating outside insolvency law. Similar considerations, with German and Austrian law being invoked as an example, led to the more recent abolishment of priority for tax claims in Polish insolvency law by the 2015 reform[9]. The change was justified by an argument that maintaining a privilege for tax claims would shift the burden of tax liabilities of an insolvent debtor to his unsecured creditors, leading to lower recovery rates in bankruptcy proceedings, thereby increasing the risk

[8] See H. Duursma-Kepplinger, Ch. Englmair, *National Report for Austria*, and Ch. Paulus, M. Berberich, *National Report for Germany*, in D. Faber *et al.* (Eds.), *Ranking and Priority of Creditors*, cit., respectively, pp. 49-53 and pp. 293-294. As outlined by those commentators, some efforts however have taken place to reintroduce a *de facto* preference for at least some tax claims by requalifying them, wherever possible, as post-commencement administration claims.

[9] See M. Porzycki, A. Rachwał, *National Report for Poland*, in D. Faber *et al.* (Eds.), *Ranking and Priority of Creditors*, cit., p. 398.

of the "domino effect", as well as raising objections of unfairness under constitutional principles. Social considerations were expressly quoted as a reason to maintain privileges for employees' and alimony (family support) claims[10].

Similar reasons can be invoked against introducing any sustainability-related privileges into the ranking of claims. From the insolvency law perspective a general conclusion can be drawn that the less exceptions to equality in the ranking of unsecured creditors, the more efficient are insolvency proceedings in performing their basic functions.

Another point where core functions of insolvency proceedings can be considered to serve similar purposes as the ESEG criteria refers to the ethical aspect of sustainability (second "E" in ESEG) and results from insolvency law's role in fostering business ethics, preventing fraud and reckless trading. This function is particularly important in transactions avoidance provisions, making it possible to challenge fraudulent or otherwise detrimental acts of the debtor performed prior to the opening of insolvency proceedings. Similar rationale can be identified behind the role of the insolvency practitioner, tasked with tracking down the debtor's assets together with identifying any previous acts that could result in transactions avoidance claims, claims for damages etc. Provisions on liability of former directors for damages and rules disqualification of directors can also be quoted in this regard. While the principal purpose of those regulations of insolvency law is to recover assets and thereby to increase satisfaction of creditors, they also have at least some role in preventing the sort of behaviour they penalize.

Historically there was some controversy whether insolvency law also has a function of removing unviable or failed businesses from the economy, in line with Joseph Schumpeter's famous concept of "creative destruction" or rather "process of incessant rise and decay of firms and industries which is the central … fact about the capitalist machine"[11]. However, most modern jurisdictions take the approach assigning this function not to insolvency law but rather to company law which usually deals with the question of existence (or demise) of a corporation after the conclusion of insolvency proceedings with a winding-up scenario[12].

[10] See *Explanatory Memorandum to the Draft Restructuring Law*, Parliamentary print no. 2824 of 9.10.2014, pp. 87-88.

[11] J.A. Schumpeter, *Business Cycles: A Theoretical, Historical, and Statistical Analysis of the Capitalist Process*, Mc Graw-Hill Book Co., New York-Toronto, London 1939, p.92.

[12] Under the U.S. law it results from the differentiation between the federal bankruptcy law and the company law which remains in the area of state law, see J. Kilborn, *National*

Either view is taken, properly conducted insolvency proceedings, leading to the winding-up and dissolution of an unviable businesses, contribute to a more effective reallocation of resources in the economy. That aspect as well can be considered to lie in the societal interest, beyond the immediate interest of creditors.

3.2. Restructuring/corporate rescue

Much more societal interest is to be found in the restructuring function of insolvency proceedings, as rescuing distressed but viable enterprises brings many benefits to the economy and the society, leading to emphasis on this function in basically all recent insolvency law reforms with "second chance policy" being the favourite catchphrase. Restructuring in itself does not necessarily need to include more sustainability perspective as compared to winding-up, as re-allocation of resources to other owners or users may lead to better outcomes – from environmental or social perspectives – than their continued use by the debtor[13]. On the other hand, beside economic factors, maintaining the existence and operation of the debtor's enterprise has usually a strong social rationale. Its benefits include maintaining employment, preserving know-how and skills, reducing losses of creditors and business partners and avoiding further insolvencies („domino effect"). By those effects restructuring allows for involving interests of a wider range of stakeholders than just the debtor and creditors. Some of those advantages can also be achieved within liquidation by selling the debtor's enterprise as a "going concern", allowing it to continue functioning under new ownership and management[14].

A well-functioning restructuring framework is also beneficial for the financial market stability, as it prevents a further build-up of non-per-

Report for the United States, in D. Faber, N. Vermunt, J. Kilborn, T. Richter (Eds.), *Commencement of Insolvency Proceedings*, cit., 784; under German law the "purification function" (*Reinigungsfunktion*) of insolvency law is considered to be historic and not relevant anymore, see discussion by Ch. Mezger, *Die vollständige Abwicklung insolventer Handelsgesellschaften - Zugleich ein Beitrag zur gesellschaftsrechtlichen Liquidation*, Herbert Utz Verlag, München 2011, pp. 91-98; under English law dissolving companies when necessary is acknowledged among the tasks of corporate insolvency law, albeit with rather low priority, see V. Finch, *Corporate Insolvency Law. Perspectives and Principles*, Cambridge Univ. Press, Cambridge 2009[2], p. 27.

[13] See T. Linna, *Insolvency proceedings from a sustainability perspective*, «Int.l Insolv. Rev.», 2019, No. 28, pp. 222-223.

[14] *Ibidem*, p. 217.

forming loans that would occur when debtors sink further into insolvency. In this regard it is particularly important to encourage an early application of restructuring measures, at early signs of distress while the debtor is not yet insolvent. In this context it should be noted that the EU Directive on restructuring and insolvency[15], so far the most ambitious harmonisation initiative in the area of insolvency law in Europe, takes specific focus on preventive restructuring requiring EU Member States to introduce early measures to prevent insolvency in their national frameworks[16]. The Directive, while taking into account and aiming to enhance societal benefits of successful restructuring, does not however include specific references to sustainability and aims rather to strengthen the general restructuring framework with its existing purposes, without changing them towards including the sustainability perspective[17].

A key issue for restructuring is properly distinguishing between viable and unviable enterprises in order to choose between restructuring and winding options. In the context of restructuring viability is usually understood narrowly as ability to return to generating profit. Non-financial information on sustainability aspects of continued activity of a debtor is not usually required, which is understandable in situations involving insolvency or threat of insolvency. However, including non-financial aspects may (or may not) be desirable depending on the nature of the market on which the debtor operates and the influence of sustainability on chances for successful continuation[18]. It might be the case that environmental and/or social aspects of the debtor's activity have significant impact on expected profitability, as enterprises disregarding those aspects can be penalized by consumers and investors thereby reducing chances for a successful turnaround.

Similar arguments concern restructuring plans outlining measures intended to turn around the debtor's business. The question whether they should include sustainability-related criteria, *e.g.* reducing emissions, improving environmental standards, adopting cleaner technologies etc.,

[15] Directive (EU) No. 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) No. 2017/1132 (Directive on restructuring and insolvency), OJ L 172, 26.6.2019, p. 18.

[16] See in particular *Recitals* nos. 3 and 22 to the Directive.

[17] See a discussion by T. Linna, *Insolvency proceedings from a sustainability perspective*, cit., pp. 229-230.

[18] *Ibidem*, pp. 225-226.

cannot be answered in the same way without taking the circumstances of the case into account. In many cases there is a potential conflict between economic interest of stakeholders in the restructuring process (creditors and shareholders), interested in profitability of the restructured debtor, and improving sustainability which might require costly investment in *e.g.* environment-friendly technologies and/or reduce expected profits[19]. In such cases reducing costs resulting from the pursuit of sustainability goals might be justified from the perspective of the purposes of restructuring and of the interest of creditors and shareholders[20]. On the other hand, return to profitability in the longer term might as well require including sustainability criteria in the continued activity simply because the cost of disregarding them in a particular area of activity could quickly become excessive.

Furthermore, large institutional creditors which adopt sustainability as part of their business strategies may be willing to agree for more generous terms and accept bigger losses (*e.g.* a larger reduction of their claims or longer extension of payment deadlines) if similar sustainability factors are included in the debtor's restructuring plan[21]. Including this perspective in restructuring arrangements does not require any changes in insolvency laws, as it lies fully within the respective powers of the debtor and the creditors. A decisive factor in this regard lies simply in the awareness of large creditors (in particular banks and other financial institutions) and their adoption of sustainability criteria as standards for their businesses. In an optimistic scenario the role of large institutional creditors, adopting ESG-friendly policies for negotiating and accepting restructuring plans, may even correspond to the role of large investment funds in driving corporations towards adopting sustainable policies in result of their investment strategies and/or voting power in companies held in their portfolios[22].

In result, sustainability criteria can and should be taken into account both while assessing viability of the debtor's enterprise and while drafting restructuring plans. However, under current restructuring laws they are not treated as a purpose in itself but rather should be considered an important factor influencing expected profitability and chances

[19] Cfr. T. Linna, *Insolvency proceedings from a sustainability perspective*, cit., p. 224.
[20] *Ibidem*, p. 227.
[21] *Ibidem*, p. 227.
[22] See a discussion of the role of institutional investors by A.R. Palmiter, *Capitalism, heal thyself*, 25 Nov 2021 «SSRN», available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3940395 .

for a successful restructuring. In an ideal situation, overall conditions on the specific market, policies of large creditors, advantageous conditions for new financing for sustainable business models as well as the regulatory framework (*e.g.* phasing out or heavier taxation of "dirty" technologies) should have the combined effect of encouraging sustainable solutions in restructuring as most likely to return the debtor to long-term profitability. In such environment, successful restructuring, even if not driven by sustainability as its expressly acknowledged purpose, should by itself contribute to the realisation of sustainable development aims[23].

3.3. Insolvency proceedings and environmental hazard

Particular focus on societal benefits of insolvency proceedings is found in some jurisdictions in relation to proceedings applying to natural persons. Where such proceedings aim at "fresh start", discharge of overindebted natural persons in order to reintegrate them into the economy and society, it can be considered probably the most sustainability-related purpose of insolvency law (in a social meaning). Acknowledgment of discharge as an explicit purpose of insolvency proceedings may serve as justification both for overriding creditor interest and for providing financing of proceedings from public funds if the debtor (the estate) is unable to cover the costs[24]. Proceedings involving natural persons are clearly outside the scope of corporate insolvency, so they are beyond the topic of this article.

4. Insolvency proceedings and environmental hazard

The question of including sustainability factors in decision-making in insolvency proceedings appears most acute in cases involving environmental hazard or an already materialised environmental damage. It is obvious that environmental factors should be taken into account in insolvency proceedings, both in liquidation and restructuring scenarios.

[23] A similar idea was expressed by K. Bauer, J. Krasnodomska, *The premises for corporate social responsibility in insolvency proceedings*, cit., p. 27, who pointed to benefits of restructuring to various groups of stakeholders beyond the debtor and the creditors.

[24] *E.g.* in Article 2(2) of the Polish Bankruptcy Law discharge of natural persons is acknowledged as a purpose of proceedings ranked equally to creditor satisfaction. Correspondingly, Article 491[7] introduces a State-financing mechanism for consumer insolvency cases with insufficient assets.

It is more doubtful however whether taking them into account should be exclusively the matter of environmental regulations or if it should also result from the application of insolvency laws.

Environmental regulations apply universally, without any exception neither for insolvent debtors (including debtors-in-possession subject to restructuring proceedings) nor insolvency practitioners managing the debtor's enterprise or winding-up the estate. Therefore, in case of an acute environmental hazard caused by the insolvency estate, taking measures to prevent harm is a duty of the insolvency liquidator and the resulting costs should be qualified as costs of administration of the estate. Virtually all jurisdictions treat administration costs as privileged claims, to be satisfied with priority over ordinary creditors. In such situation there is no tension between potentially existing sustainability-related (here: the first "E" from the ESEG acronym) purposes of insolvency law and its general purposes, as costs imposed on the estate result from non-insolvency (here: environmental) regulation.

A more problematic situation exists if claims against the debtor resulting from environmental pollution are considered to arise before the opening of insolvency proceedings, putting them in most jurisdictions at par with other unsecured creditors[25]. Lack of priority for such claims means that they are almost never satisfied in full, leaving the costs resulting from environmental damage unsatisfied. It is therefore of crucial practical importance to determine whether a particular cost resulting from environmental damage caused by a debtor in insolvency can be considered to arise only after the opening of insolvency proceedings (and therefore be satisfied with priority) or to have arisen already before the opening proceedings (putting it in the same rank as ordinary unsecured creditors)[26].

However, in both above cases, from the insolvency law perspective a claim resulting from environmental hazard or damage is considered yet another creditor's claim, with its ranking and way of satisfaction determined by insolvency law. Although a clear economic conflict exists in such situation, as other creditors' claims compete with environmental obligations of the debtor for priority and payment[27], that conflict is

[25] For a discussion of such situation under U.S. law, see L.N. Coordes, *Harmonizing Insolvency and Sustainability in the Courtroom and the Boardroom* (2018), «University of Oslo Faculty of Law Legal Studies Research Paper Series», No. 2018-20, p. 7.

[26] See L.N. Coordes, *op.cit.*, p. 7, for a discussion of divergent approaches taken by courts under U.S. law.

[27] See L.N. Coordes, *op.cit.*, p. 6.

nevertheless just an example of the standard conflict between creditors resulting from the insolvency of the debtor. Solving this conflict is well within insolvency law's fundamental function of ensuring an orderly and equitable distribution. Specific reference to sustainability-related purposes of insolvency law neither exists nor would be helpful in such situation. What matters is to which extent sustainability-related concerns are reflected in policy choices of the legislator determining the ranking of claims and the scope of exceptions to the *pari passu* principle, bearing in mind that such exceptions result ultimately in an additional burden on unsecured ordinary creditors (as has been discussed above). Environmental sustainability might be a factor influencing the legislator's decision when determining the ranking of claims but does not constitute a purpose of proceedings in itself.

A different but related problem arises if insolvency law allows for exclusion („cutting off") of "onerous" assets (with expected zero or negative value) from the insolvency estate, in fact leading to them being abandoned and left for the society to take care of. There is a clear ethical argument against externalising the cost resulting from "onerous" assets causing environmental problems by leaving it to be covered by the society. Such cost, if kept in the insolvency estate, diminishes its total value, therefore reducing expected proceeds to be distributed among creditors. Exclusion of an "onerous" asset leads to an artificial increase in the value of the estate, de facto resulting in subsidising payouts to the creditors by the society covering the environmental cost related to the asset in question[28].

On the other hand, disallowing exclusion of "onerous" assets from the insolvency estate may significantly delay and/or hamper the application of adequate measures to address the environmental hazard. The insolvency estate, by definition underfunded and often intended to be wound-up as quickly as possible (in the liquidation scenario), is usually much less able, both financially and organisationally, to address environmental issues than competent public authorities. Saddling the society (meaning in practice the competent authorities) with this burden in such cases raises an ethical objection but can be justified by a practical, purely utilitarian argument.

On the balance, it seems that the possibility of exclusion of "onerous" assets should be maintained in insolvency law, preferably with some sort

[28] Cfr. T. Linna, *Insolvency proceedings from a sustainability perspective*, «Int.l Insolv. Rev.», 2019, No 28, pp. 220-221.

of regulation allowing the public authorities to recover at least a part of the related cost, *e.g.* by treating their claim for reimbursement of costs resulting from addressing environmental hazard as part of administration expenses.

5. Conclusion

To answer a question whether it would be desirable to amend insolvency laws in order to include more sustainability-related objectives, *e.g.* by referring to the ESG/ESEG criteria in the purposes of proceedings, a counterargument can be raised that, by their nature and specific purposes, insolvency proceedings are not adapted to be a primary instrument of realisation of sustainability-related purposes, as they are best served by other branches of law and other institutions[29].

Insolvency or threat of insolvency are a specific situation in the life cycle of a corporation when taking regard to sustainability criteria is much more difficult than in its normal course of business. In case of restructuring the debtor is literally struggling for survival which depends on restoring its (financial) profitability.

It should be also noted that in terms of size and importance for the overall economy insolvent companies or companies in distress are not particularly significant compared to the whole economy. Trying to incorporate sustainability-related criteria directly into insolvency laws could blur their purposes, making them contradictory, and hamper their effectiveness[30] while failing to bring a significant contribution towards the realisation of sustainability-related purposes in the economy as a whole.

However, insolvency proceedings are always conducted in a specific economic and regulatory environment. It is the way this environment is shaped (*e.g.*, by creating incentives for better environmental practices) that influences the result in terms of sustainability. If sustainability is profitable in result of overall preferences of the market (including investors, consumers, lenders, insurers, etc.)[31] and of the application of non-insolvency laws (including general tax and regulatory framework, as

[29] See Ch. Paulus, M. Berberich, *National Report for Germany*, in D. Faber, N. Vermunt, J. Kilborn, T. Richter (Eds.), *Commencement of Insolvency Proceedings*, cit., pp. 315-316.
[30] *Ibidem.*
[31] See A.R. Palmiter, *Capitalism, heal thyself*, (25 Nov 2021), «SSRN», available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3940395 , for an optimistic description of an ongoing paradigm shift in the market economy that could make such scenario possible.

well as specific regulations, *e.g.*, the environmental law), proper conduct of insolvency proceedings will improve the sustainability of restructured businesses and/or recycled assets while at the same time serving core purposes of insolvency law. In such situation the best way to include sustainability perspective into insolvency law will be simply to make insolvency proceedings function as efficiently as possible – and let them contribute indirectly in such way to a more sustainable economy.

Sustainability and Going Concern

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In more recent times, the debate on corporate social responsibility (Social_Corporate Responsibility - SCR) has taken on considerable dimensions, involving almost all sectors of human existence and science. The acknowledgment of climate change and the impact of the style of human life on the environment has led legislators from all over the planet to raise awareness of conduct based on the care and pursuit of "third party" interests: think of the policies for reducing the use of materials with a high environmental impact, or the imposition of principles to which the conduct of the company business must imprint. Sustainability soon became a paradigm, perhaps even a rhetorical one of adaptation to generally recognized and widely accepted values by the constitutional charters and international treaties and its scope has expanded to such an extent as to assume meanings that are not entirely univocal. The SCR in the context of business organizations, perhaps also due to of the serious economic crises that have occurred since 2008, is which soon became a manifestation on the behavioral level far from spontaneous compliance with the primary values of our society, such as environmental protection, safety, human dignity, work. It is an accepted principle that governance, as a system with the which enterprises are directed and controlled, should be imprinted today to environmental, social and governance (ESG) values. The SCR seems to become today the paradigm of responsibility "from contact" of the company which imposes an action on corporate governance based on neminem ledere and the protection of the rights of third parties (stakeholders, minority shareholders and local and national communities). In this sense, sustainability therefore becomes applied to business organi-

zations, synonymous with long term or the need to prepare tools from the moment the company is set up suitable for guaranteeing business continuity as an aptitude of the company a remain on the market over time. The social dimension of the company thus moves away from guardianship of the environment to the obligation to pursue business continuity as safeguarding the stability of the company not only in the interest of the shareholders (shareholders value) but of the company itself, in the awareness that the adoption of early intervention and crisis (re)solution measures business constitutes the only perspective for efficient and free management conflicts of interest of the company where the shareholders' value comes put the interest (perhaps even of a public nature) before stability business economics

Keywords: CSR; sustainability; stakeholderism; ESG; non-financial disclosure; triple bottom line; going concern; insolvency; Italian Insolvency Code ("Codice della Crisi e dell'Insolvenza"); company directors' duties; BJR; creditor protection; groups of companies.

1. Introduction

The debate on "corporate social responsibility" ("CSR") has recently assumed considerable dimensions, involving almost all fields of human existence and the sciences. The acknowledgment of climate change and the impact of human activities on the environment has induced policy makers and legislators all over the planet to focus on "third party" interests.

"Sustainability" has become a paradigm, perhaps even rhetorical[1], of adaptation to values generally recognized and widely accepted by constitutional charters and international treaties. Its scope has expanded so much that it has assumed meanings that are not entirely univocal. As commentators have observed, there is a risk that sustainability might be emptied of any concrete meaning[2].

[1] See J. ROBINSON, *Squaring the circle? Some thoughts on the idea of sustainable development*, «Ecological Economics», vol. 48 (2004), p. 374.

[2] See J. MÄHÖNEN, *Integrated Reporting and Sustainable Corporate Governance from European Perspective*, «Accounting, Economics, and Law: A Convivium», vol. 10.2 (2020), available at: https://doi.org/10.1515/ael-2018-0048; G. D'ATTORRE, *Sostenibilità e responsabilità sociale nella crisi d'impresa*, «Diritto della crisi», 13 April, 2021, available at: https://www.dirittodellacrisi.it/articolo/sostenibilita-e-responsabilita-sociale-nella-crisi-dimpre-

CSR in the context of business organizations, perhaps also due to the serious economic crises that have spread since 2008, has become a behavioral manifestation that is anything but spontaneous. It seeks to recognize primary values of the company, such as environmental protection, safety, human dignity, work.

It has become a recognized principle that governance, as a system by which companies are managed and controlled, must today be based on "environmental, social and governance" ("ESG") values[3].

Following the thought movements of the late 1970s that proposed "social and environmental accounting" ("SEA") or "social and environmental reporting" ("SER"), culminating in the theorization of corporate social responsibility (CSR) which summarizes the so-called "triple bottom line" (social-environmental-financial) and which had led to soft law initiatives such as the Global Reporting Initiative ("GRI") of 1997, we are witnessing a progressive transposition even at a regulatory level of the principles set out there we can summarize in the need to pursue a balance between the need for shareholder profit (subjective value) and company value (enterprise or objective value) and the need for the business activity to also include the safeguarding of interests or third-party legal assets (stakeholders doctrine)[4].

sa; V. Buonocore, *Impresa (Diritto privato)*, in *Enciclopedia del diritto. Annali*, I, Giuffré, Milano 2007, pp. 765 ff.; U. Tombari, *"Potere" e "interessi" nella grande impresa azionaria*, Giuffré, Milano 2019, pp. 36 ff.; M. Castellaneta e F. Vessia (Eds.), *La responsabilità sociale d'impresa tra diritto societario e diritto internazionale*, ESI, Napoli 2019.

[3] See *Report of the Committee on The Financial Aspects of Corporate Governance*, December 1, 1992 (the so-called "Cadbury Report"); see also A. Keay, *An Analytical Study of Board Accountability in Transactional Codes of Corporate Governance,* in J.J. Du Plessis, C.H. Low (Eds.), *Corporate Governance Codes for twenty-first Century: International Perspectives and Critical Analyses,* Springer, Cham 2017, p. 117.

[4] See, *e.g.*, UK Companies Act 2006, Section 172, labelled: «Duty to promote the success of the company», which states:

"(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

(a) the likely consequences of any decision in the long term,

(b) the interests of the company's employees,

(c) the need to foster the company's business relationships with suppliers, customers and others,

(d) the impact of the company's operations on the community and the environment,

(e) the desirability of the company maintaining a reputation for high standards of business conduct, and

(f) the need to act fairly as between members of the company.

(2) Where or to the extent that the purposes of the company consist of or include pur-

Numerous initiatives have been taken both at European and transoceanic level aimed at affirming the need for a company also oriented towards safeguarding these interests: from the UN Global Compact in which the "Principles for Responsible Investment" (UN "PRI") were issued, to GRI, the "Carbon Disclosure Project" ("CDP"), the "Sustainability Accounting Standards Board" ("SASB"), the American and European SRI, and the 2001 European Commission's Green Book – all confirming the spontaneous and voluntary nature of CSR.

In 2011 the European Commission issued the document "Renewed EU strategy" for the period 2011-14 on corporate social responsibility. This document represents an important step for European policies on CSR, since starting from the previous elaborations and initiatives, it launches a new course of action. In particular, it highlights how the number of socially responsible companies has significantly increased thanks to membership in European platforms such as the Forum, the Global Compact, EMAS, the Business Social Compliance Initiative, and the Global Initiative Reporting.

In Europe, the transposition of the CSR to the legislative level was preceded by the self-regulatory codes of listed companies in the wake of the experience of the German legal system and then merged into the EU Directive no. 2014/95, on non-financial information; and in the EU Directive no. 2017/828, on shareholder rights (Article 9-*bis*)[5].

In Italy, there are extensive regulatory references to the CSR both in the discipline on benefit companies (Article 1, paragraph 376, Law no. 208, of 28 December 2015) and, as will be seen, in the perspective of the new Italian Insolvency Code ("Codice della Crisi d'Impresa e dell'Insolvenza", enacted in January 2019 and eventually entered into force, with substantial additions and amendments, on July, 2022, hereinafter, the "CCII").

It appears significant that, in this context, a new definition of corporate social responsibility is introduced as «corporate responsibility for their impact on society», thereby emphasizing attention to social and

poses other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieve those purposes.
(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company».

[5] See: Borsa Italiana, *Italian Corporate Governance Code*, approved in January 2020; see also: P. Marchetti, *Il nuovo Codice di Autodisciplina delle società quotate,* «Rivista delle società», 2020, pp. 269 ff.

environmental issues, transparency, the relationship with stakeholders. The new European strategy starts from the assumption that CSR must be managed and developed by companies in dialogue with the social partners, and public intervention must therefore be limited to the proposal of voluntary policy measures (such as the Forum or the Alliance) and to regulation complementary, such as certification, reporting, budgeting, and market incentives criteria (*e.g.*, in public procurement).

The European approach was pushed in 2014 to extend the CSR to the economy and finance by favoring the introduction of non-financial information in the financial statements. This approach then resulted in the EU Directive no. 2014/95, on "non-financial reporting" which was implemented in Italy by the Legislative Decree no. 254/2016, on the "non-financial declaration" of listed issuers and widespread issuers[6].

For the first time at a regulatory level, a provision relating to the CSR has become mandatory with the provision of an administrative sanction in the event of its violation[7]. Even if the thought that, to date, corporate

[6] Article 3 of the Legislative Decree no 254/2016 provides that the declaration concerns environmental, social, personnel issues, respect for human rights and the fight against corruption. These issues must be represented within the limits of what they are actually relevant in relation to the activities carried out and the characteristics of the company and must be represented in such a way as to ensure understanding of the business activity, its performance, its results and of the impact it produces. It is interesting to note that the Decree provides that evidence is given of at least a series of aspects, such as: Legislative Decree 8 June 2001, no. 231; (ii) the policies practiced by the company, including those of due diligence, the results achieved through them and the related key performance indicators of a non-financial nature; (iii) the main risks, generated or suffered, connected to the aforementioned issues and deriving from the company's activities, its products, services or commercial relationships, including, where relevant, supply chains and subcontracting. however, due to the activities carried out and the reference markets, it does not assume concrete relevance for some of the companies subject to the obligation of non-financial declaration - such as those operating exclusively in the financial intermediation sector - and in this sense the provisions are certainly relevant. from paragraph 6 of the article in question, which provides that, in compliance with the so-called "comply or explain" principle, public interest entities that do not practice policies in relation to one or more of the areas referred to in paragraph 1, provide within the same declaration, for each of these areas, the reasons for this choice, indicating the reasons in a clear and articulated manner. For parent companies of large groups, they are required to prepare a consolidated non-financial statement. In this regard, Article 4 of the Decree provides that, to the extent necessary to ensure understanding of the group's business and its performance, the consolidated statement includes the data of the parent company and of the subsidiaries fully consolidated. The consolidated non-financial statement relates to the aforementioned issues and the rules on the preparation methods described below apply to CSR.

[7] See J. Mähönen, *Integrated Reporting and Sustainable Corporate Governance from European Perspective*, cit.; M. Battaglia, P. Gragnani, N. Annesi, *Moving Business toward*

social responsibility is still purely voluntary, the same principles enunciated at various levels are largely already implemented by positive law.

Further, the adoption of social policies soon became a quality "brand" of the company to the point of affecting the performance of the company itself, especially in the financial markets where, for some time, the economic benefits of adopting "socially oriented policies" have been emphasized in the context of business organizations[8].

The analysis of the impact of social policies adopted by business organizations, despite having led to non-univocal results in terms of greater or lesser profitability, has clearly highlighted the conflict of interest that arises between the short-term vision of investors with respect to the need for social policies which, by definition, are based on a medium-long term vision. In fact, the sustainable dimension should contribute to a dramatic reduction of said conflict since investors are paying today more attention to the social dimension of the company and CSR can hurt both company and portfolio profitability.

Milton Friedman in his famous 1970 essay[9] in which he suggested the theory of corporate social responsibility to be subversive as an element pertaining to the management of the company that should have diverted from the purely selfish vision (shareholders value) of the majority shareholders and even removed from the shareholders the decisions regarding the pursuit of social interests under the agency theory (*i.e.*, the attribution of exclusive management responsibility to the directors),

Sustainable Development Goals (SDGs): Evidence from an Italian "Benefit-For Nature" Corporation, «Entrepreneurship Research. Journal», vol. 10.4 (2020), available at: https://doi.org/10.1515/erj-2019-0305.

[8] See A.M. Almansoori, H. Nobanee, *How Sustainability Contributes to Shared Value Creation and Firm's Value*, «SSRN», October 19, 2019, available at: https://ssrn.com/abstract=3472411, and http://dx.doi.org/10.2139/ssrn.3472411; A. Alshehhi, H. Nobanee, N. Khare, *The Impact of Sustainability Practices on Corporate Financial Performance: Literature Trends and Future Research Potential*, «Sustainability», vol. 10.2 (2018), pp. 494-519; R. Ameer, R. Othman, *Sustainability Practices and Corporate Financial Performance: A Study Based on the Top Global Corporations*, «Journal of Business Ethics», vol. 108.1 (2012), pp. 61-79. G. Fiori, F. Di Donato, M.F. Izzo, *Corporate social responsibility and firms performance - An analysis on Italian listed companies*, «SSRN», 27 November, 2007, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1032851.

[9] See: M. Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, «The New York Times Magazine», September 13, 1970, pp. 32-33, pp. 122, 126 («the great virtue of private competitive enterprise—it forces people to be responsible for their own actions and makes it difficult for them to 'exploit' other people for either selfish or unselfish purposes. They can do good—but only at their own expense»).

opened the way to an opposite business model oriented to the protection of stakeholders[10].

Thus, anticipating the modern debate on social interest in the era of the CSR in which the dilemma of the conflict between the selfish interest of investors persists with respect to the protection needs of other categories of subjects whose interests or rights may be jeopardized by a management of the company not compliant with certain values. The theme that interests this analysis is the transition from a concept of the CSR from being conducted on a voluntary basis based on a better efficiency of corporate governance to a real obligation to act "responsibly" that is imposed at every stage of the life of the company and which does not only concern the environmental and social impact but also the protection of "third parties". It is undoubtable that the role of soft law and the investor's behavior which are oriented to a new concept of investment can play a better role than the regulation itself.

The CSR seems to become today the paradigm of corporate "contact" responsibility that imposes on corporate governance an action based on the "*neminem ledere*" and safeguarding the rights of third parties (stakeholders, minority shareholders and local and national communities). In this meaning, sustainability therefore becomes, applied to business organizations, synonymous with long-term or the need to prepare suitable tools to ensure business continuity as an attitude of the business to remain on the market over time, from the time the business is established.

The social dimension of the company thus shifts from environmental protection to the "duty" to pursue business continuity as a safeguard for the stability of the company not only in the interest of the shareholders (shareholders value) but of the company itself, in the awareness that the adoption of early intervention measures and (re) solution of corporate crises constitutes the only prospect for the efficient and conflict-free management of the company where the interest (perhaps even of public interest) is placed above the shareholders' value economic stability of businesses. But the long-term perspective, on the other, hand should consider that in some circumstances when the financial situation of the

[10] See: D. Hedblom, B.R. Hickman, J.A. List, *Toward an understanding of Corporate Social Responsibility: theory and field experimental evidence*, «National Bureau of Economic Research Working Paper», No. 26222, 9 September, 2019, http://www.nber.org/papers/w26222; «SSRN», 26 August 2022, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450248 .

enterprise appears compromised the best option is liquidation for creditor's protection.

The transition from the "selfish" vision of the company in which the majority shareholders can extract private benefits from control even in the presence of a situation of capital and financial deterioration to that of the necessary adoption of safeguards to protect third parties in the event and with the approaching the crisis is not an absolute novelty. At least this manifestation of the social dimension of the company was reached following the banking and financial crashes of 2009 and more recently in the light of Covid-19 pandemic spreading with adoption of preventive measures from the unprecedented business crisis that characterized banking, financial and insurance companies. At the same time a sustainable approach should induce to make a distinction between enterprises which have been experiencing financial troubles due to the Covid-19 from enterprises already compromised without any chance to survive.

In the context of EU Directive no. 2014/59 (the Bank Recovery and Resolution Directive, "BRRD"), we are witnessing for the first time the overcoming of the short-term vision to the long-term one through crisis preparation and early warning measures (recovery plans, intra-group financial support agreements and resolution measures) which require real planning or programming of the crisis where there are chances to recover the financial stability and there is no risk that the financial support can cause more financial distress and damages to the creditors.

An approach that then influenced the EU Directive no. 1023/2019 on the preventive restructuring of companies and, in turn, the recent entry into force of the CCII. In the light of the latter, it appears possible to affirm, in essence, that the sustainability of the company has increasingly become not only the protection of the environment and social security, but also of the financial stability of the companies (until the financial stability is not to detriment for creditors and stakeholders) which must respond, since the moment of their establishment, with organizational and management tools, suitable to guarantee the pursuit of business continuity as an attitude of the company to remain on the market over time.

2. The economic method of the company as a conditioning factor in the planning of the crisis

Where the premise is shared that the business activity in order to be considered sustainable must look at a long-term dimension since, other-

wise, it would not meet the due diligence standards as the activity would satisfy only the primary interests of the Leadership capital by favoring the extraction of private benefits to the detriment of stakeholders and external assignors, especially in the emergence of the crisis, it is necessary to ask whether, really, the need to pursue business continuity constitutes a precept attributable to the social responsibility of the company or if it responds to a general obligation already provided for by law.

The Italian Civil Code is based on the definition of the "*entrepreneur*" provided by Article 2082 of the Italian Civil Code according to which an entrepreneur is someone who carries out a professionally organized economic activity for the purpose of producing or exchanging goods or services. Notion that is also adapted to the small business owner pursuant to art. 2083 of the Italian Civil Code and, in essence, it is taken up by art. 2247 of the Italian Civil Code where the partnership agreement is defined, the contract between two or more persons with whom they confer goods or services for the joint exercise of an economic activity to divide the profits.

A common element of the notions provided by the Civil Code regarding the individual or collective enterprise is the conduct of an economic activity or an activity that must be carried out with an economic method which involve an efficient decision-making process. By virtue of the Italian Accounting Organization ("OIC") Principle no. 19, business continuity is embodied in the ability of the company to set up a functioning economic complex intended to produce income for a foreseeable future period relating to a period of at least 12 months from the balance sheet date. A concept that, on the contrary, is incorporated in the new CCII, where the definition of "crisis" is anchored to the probability of the occurrence of insolvency over a period (the state of economic-financial imbalance that makes the insolvency of the debtor probable, and that for the companies manifests itself as the inadequacy of prospective cash flows to regularly meet planned obligations).

Well, business continuity is an essential element of the very existence of the business if, having lost any prospect of continuity, the business compendium must be broken up and the business entity liquidated according to the procedure that leads to its extinction.

However, the concepts of sustainability and continuity do not coincide: the first identifies not only the need for the durability of the activity according to a temporal perspective but the activity itself is aimed at protecting multiple interests, including those outside the company; con-

tinuity is a concept provided by business science to define the company's ability to generate revenues suitable for remunerating costs regardless of the destination of the operating income. In terms of gender to species, we could say that sustainability presupposes continuity even if the former has a broader scope as it tends to target the business activity on a qualitative level and protected interests. If the economic method constitutes a structural element of the business activity, the distinction between business activities and other dissimilar legal situations (community of enjoyment, etc.) lies precisely in the programming, or in the modus through which this objective is pursued. The business activity differs from the others for the level of planning and organization functional to it: the propensity to produce distributable income cannot therefore disregard a planning of the business activity that will involve different figures (or, if prefers, corporate functions in relation to the phases of the enterprise).

However, the planning of the business activity is not only functional to the production of the shareholders' income as the preservation of business continuity in certain situations appears to constitute the only remedy (with liquidation if there are not chances to protect said interests) to achieve the best pursuit of the protection of third parties including, the non-exclusive one, creditors. Where a decisive role would assume the need to safeguard values also of constitutional rank (Article 41 of the Italian Constitution, on the freedom of private economic initiative and the limit of the prohibition of contrast with social utility or the damage to security, freedom, and human dignity)[11].

Think of the declaration of insolvency of large companies in crisis where the "bankruptcy" of the subject corresponds to the need for maintenance according to the business sector for national production needs (see, for example: Ilva di Taranto; Alitalia).

The central point then becomes that of combining sustainability and the principles that are inferred from the regulatory system in the transition from business continuity to business crisis or insolvency[12].

The traditional view according to which the ownership of the insolvent company would be transferred from the shareholders to the creditors has recently received quite a few criticisms (see below). The Italian regulatory system, as recently outlined even in the face of the recent

[11] See: V. Buonocore (Ed.), *Iniziativa economica e impresa nella giurisprudenza costituzionale*, ESI, Napoli 2006, p. 10.
[12] See G. D'Attorre, *La responsabilità sociale dell'impresa insolvente*, «Rivista di diritto civile», 2021, p. 60.

attempts to reform insolvency law and the business crisis, appears clearly geared towards crisis prevention as a possible but entirely possible phase in the life of the business and, with reference to liquidation, to the affirmation of the prevalence of corporate restructuring and reorganization with respect to the disintegration of company compendia: in this meaning, sustainability means knowing how to anticipate the crisis through measures of various kinds whose main purpose is to make the company not unprepared and thus to be able to adopt behavioral codes "proportional" to the nature and severity of the adverse event that may occur[13].

At the same time, sustainability of the insolvent company means favoring solutions aimed at restructuring the company, rather than its disintegration, if the alternative measures to liquidation, not only guarantee the best satisfaction of creditors, but also the best balance of interests other than those of the shareholders.

As has recently been highlighted, the problem appears complex as it is a question of actually understanding which interests are to be protected in order to be able to believe that the business activity, even if in a situation of distress (or even insolvency), responds to the canon of sustainability (*i.e.*, as an attitude to pursue such primary interests) and can in any case justify its continuation. The issue is further complicated as the assessment of convenience should be parameterized in the light of the various interests at stake and not just that of the corporate creditors attracted by their "best satisfaction".

A recent acceptable point of arrival is that insolvency does not cancel the canon of sustainability or even the bankruptcy of the entrepreneur can coexist with a sustainable vision of the dissolved company by evaluating the interests involved in the process of disintegration (or liquidation) of the assets according to a logic that derives from the positive right of unnecessary asset allocation according to the best (economic) satisfaction of creditors[14].

Sustainability of the company in crisis involves, on the other hand, an assessment of acceptance of the risk of the continuation of an activity which, on the side of the operator, has resulted in bankruptcy, but which in the perspective of satisfying those third parties' interests can be efficient with respect to the disintegration of the compendium. Under the pressure of soft law (*e.g.*, Uncitral, Legislative Guide on Insolvency Law),

[13] See E. Ricciardiello, *Gli accordi di sostegno finanziario infra-gruppo nella crisi dei gruppi bancari*, «Diritto della Banca e dei Mercati Finanziari», 2016, p. 683.
[14] See G. D'Attorre, *Sostenibilità e responsabilità sociale nella crisi d'impresa*, cit.

we are witnessing an overcoming of the equation *insolvency = liquidation* in favor of corporate creditors. Even irredeemable insolvency makes it possible today to recover value in favor of subjects other than corporate creditors in terms of what has been effectively defined as "*limit to the maximization of assets to be allocated to creditors*" on the assumption of the reconciliation of values, including those of rank constitutional. Balancing of which is also stated at the level of the Directive no. 2019/1023/EU, on restructuring and insolvency.

Concluding on this point, it can be said that the verification of sustainability must also concern the *twilight phase*, or the very emergence of the crisis or even insolvency, since these are possible "phases" in the life of the company that make the continuation of the company's activity compatible for the pursuit of interests of different nature, including that of creditors, according to a balance with other potentially superordinate and conflicting values.

3. Business continuity and crisis detection methodology according to a prospective analysis of the possibility of insolvency

Business continuity in its sense of duty to guide the management of the company to a long-term vision (which involves economic-financial equilibrium and the protection of sustainability as safeguard of other interest as well) implies the need to prepare systems for periodic monitoring of the management trend and risk profiling.

In this sense, sustainable business involves an organizational and planning duty that involves the "business level" of the organization itself[15]. From the moment it comes into existence, the company must know how to deal with every possible evolution of the business and its performance. Diligent management therefore becomes one that knows how to anticipate the emergence of the crisis by preparing codes of conduct to be adopted in the presence of certain situations that can negatively impact the economic trend.

Sustainability implies risk management[16], or (i) planning of the business crisis by identifying functions and subjects to whom specific tasks

[15] See A. Keay, *The Corporate Objective*, EE Publishing, Cheltenham 2011.

[16] See N. Chileshe, L. Wilson, J. Zuo, G. Zillante, *Strategic risk assessment for pursuing sustainable business in the construction industry: Diagnostic models*, University of South Australia. (2013).

are entrusted in the presence of adverse events; (ii) drafting of codes of conduct to be adopted in the emergence of the crisis or its probable verification[17].

This new approach[18] which is traced in our legal system already in positive law (Article 2086 of the Italian Civil Code) determines an epochal change in corporate governance as it can no longer be geared towards satisfying the sole profit needs of shareholders; but to safeguard the value of the company itself which is functional to the protection of high-ranking values (employees, economic and financial stability of local or national sectors, public health and so on) and of widespread interests. In this sense, the obligation codified even in the law of the company to provide adequate organizational structures functional to the timely detection and management of the crisis is the pillar on which the preservation of business continuity is based as a value of the sustainable company.

Business management can no longer be the prerogative of improvised decisions while the planning of management choices assumes central value which, in turn, presupposes organization or planning of the crisis (using the jargon of banking law "crisis preparation" to denote the full awareness that it is indeed a phase of the enterprise that is anything but improbable) [19]. In this context, financial information becomes central, or, in extreme simplification, the analysis of the process of collecting and processing information on management trends that can ensure management a prompt reaction in the face of risks. But even this fundamental activity cannot be separated from an *ex ante* identification of the functional levels to which certain competences are entrusted. The relevant information will have a complex nature involving both the organizational

[17] See E. Ricciardiello, *La crisi dell'impresa di gruppo tra strumenti di prevenzione e di gestione*, Milano, Giuffré 2020.

[18] See S. Ambrosini, *L'adeguatezza degli assetti organizzativi, amministrativi e contabili e il rapporto con le misure di allerta nel quadro normativo riformato,* «Crisi d'impresa e insolvenza», 15 ottobre 2019, available at: https://blog.ilcaso.it/libreriaFile/1135.pdf, pp. 2-3. A. Panizza, *Adeguati assetti organizzativi, amministrativi e contabili: aspetti teorici ed operativi*, «Ristrutturazioni Aziendali», 11 agosto 2021, available at: https://ristrutturazioniaziendali.ilcaso.it/uploads/admin_files/panizza-11-08-21-RA.pdf; P. Bastia, E. Ricciardiello, *Gli adeguati assetti organizzativi funzionali alla tempestiva rilevazione e gestione della crisi: tra principi generali e scienza aziendale*, «Banca, Impresa Società», 2020, pp. 1-56; P. Bastia, *Gli adeguati assetti organizzativi, amministrativi e contabili nelle imprese: criteri di progettazione*, «Ristrutturazioni Aziendali», 27 luglio 2021, available at: https://ristrutturazioniaziendali.ilcaso.it/uploads/admin_files/bastia-27-07-21-RA.pdf.

[19] See Z. Prutina, *The effect of corporate social responsibility on organizational commitment*, «Journal of Management Sciences», vol. 21.1 (2016), pp. 227-248.

structure of the company, that the performance and impact of the business activity on other protected interests. In this perspective, the activity of corporate sustainable reporting is part of the main tool for collecting and processing information relating to the performance of management, its evolutionary prospects in the short, medium and long term, also from a preventive point of view of the crisis[20].

It should be noted that for the purposes of greater harmonization at EU level of reporting rules and protocols, the IRRC (International Integrated Reporting Council) was set up and published the International Framework already in force from January 1, 2022.

The reference is to standard rules intended to operate at a global and harmonized level so that the information relating to the company's performance is increasingly "circular" and accessible to contain the risks of default and preserve business continuity as an absolute value of the business. "IR" (integrated reporting) are defined within the Framework as:

> «concise communication about how an organization's strategy, governance, performance and prospects, in the context of its external environment, lead to the creation, preservation or erosion of value over the short, medium and long term. An integrated report should be prepared in accordance with the Framework. 1B Objective of the Framework 1.3 The purpose of the Framework is to establish Guiding Principles and Content Elements that govern the overall content of an integrated report, and to explain the fundamental concepts that underpin them. 1.4 The Framework is written primarily in the context of private sector, for-profit companies of any size but it can also be applied, adapted as necessary, by public sector and not-for-profit organizations».

The absolute novelty lies in the fact that these are standards applicable to all businesses, of any size, with purpose and non-profit. The objective is the detection through precise communication processes regarding the strategy

The definition confirms the centrality of business continuity as a factor in preserving the company as well as the close interdependence that exists between "human and financial capital" and the protection of third parties. On a qualitative level, IR means collecting and processing "inter-

[20] See A. Jan, M. Marimuthu, *Bankruptcy and Sustainability: A Conceptual Review on Islamic Banking Industry, Global Business and Management Research: An International Journal*, vol. 7.1 (2015), pp. 109-138. M. Almansoori, H. Nobanee, *How Sustainability Contributes to Shared Value Creation and Firm's Value*, «SSRN», October 19, 2019, available at: https://ssrn.com/abstract=3472411, or http://dx.doi.org/10.2139/ssrn.3472411.

connected" information that relates to the capital, financial performance, production, social relevance of the company and its implications on the environment. In this way, the so-called "Stakeholder management model" already incorporated in numerous codifications (also at the level of self-regulatory codes)[21].

The business model based on IR is increasingly affirmed, which presupposes a suitable governance organization, the adoption of the risk management function, the forecast (or planning) of strategy in the short, medium, and long term as well as an internal control apparatus. IR combines financial and non-financial information. The reporting activity, moreover, primarily satisfies the interest of stakeholders, interested in the company creating value and maintaining it over time (*e.g.*: suppliers, employees, contractual counterparties, local communities, policy makers and legislators)[22]. As confirmed on the basis of the IR discipline, the monitoring activity functional to the timely detection and management of the crisis cannot be delegated to the regulation on the share capital or the separate and consolidated financial statements since the crisis, as a financial phenomenon, is highlighted through the prospective inability of the entrepreneur to meet his pecuniary obligations in a specific time frame (six months).

Well, neither the regulations relating to the obligations of conservation of the share capital (Articles 2446, 2447, 2482-*ter* of the Italian Civil Code) represents a remedy against financial deterioration. Where statistically, the loss of share capital constitutes more than a back datable index of overt insolvency. It should also be remembered that the share capital, also considering its progressive "debasement" due to the evolution of the discipline of business organizations (simplified srl, start-ups), no longer represents a guarantee of the obligations assumed by the company. towards creditors. As far as the financial statements are concerned, it only provides a «posthumous and static snapshot» of the company's equity and financial performance, not providing any protection in advance with respect to a crisis that has already emerged, without thereby wishing to debase the importance of this document with respect to a future forecast of the firm's decline.

[21] See J.J. Du Plessis, A. Rühmkorf, *New trends regarding sustainability and integrated reporting for companies: what protection do directors have?*, «The Company Lawyer», 2015, p. 49. But see A.R. Palmiter, *Capitalism, Heal Thyself*, read for kind concession of the Author (who proposes a new concept of capitalism as «awakening capitalism»).

[22] See J. Oliver, G. Vesty, A. Brooks, *Conceptualising integrated thinking in practice*, «Managerial Auditing Journal», 2016, p. 228.

Corporate social responsibility should then, in this sense, manifest itself where the entrepreneur, individual or collective, fails to have a suitable organization (*rectius*: adequate) aimed at measuring risk, its management and solution. As will be seen, it is not possible today to believe that the principle of unquestionable management choices (business judgment rule) finds application space with respect to anticipation and emergence of the crisis as the discretion of the directors stops when, in the transition from a situation of continuity to that of gone concern, the protection of creditors and collective interest bearers becomes a primary value.

Turning to the subject of the information and how it should be processed, it seems useful to remember that the IICR has established that reporting must be characterized on the basis of quantitative and qualitative elements: the former are based on performance and financial indicators (and also the protection of third interests as better explained above), the latter concern the way in which the company operates on a financial and equity level and how it intends to pursue the objectives of business continuity over time (long term vision).

It is no coincidence that the IICRs link the information objectives to precise attributions of competences and responsibilities of corporate governance. There is the precise assumption of a responsibility related to the «integrity» of the information that is provided in the reporting. On the close connection between correct information functional to the timely detection of the crisis and adequate organizational structures, the IICR establish at a principal level:

> «In applying paragraph 1.20, the organization will consider its own governance structure, which is a function of its jurisdiction, cultural and legal context, size and ownership characteristics. For example, some jurisdictions require a single-tier board, while others require the separation of supervisory and executive / management functions within a two-tier board».

The provision of principle no. 2 of the IIRC, according to which the information must be suitable to highlight how the company produces income but also (in the event of a crisis) how it loses value and what the reasons are. On this point, in fact, it is established that:

> «An integrated report explains how an organization creates, preserves or erodes value over time. Value is not created, preserved, or eroded by or within an organization alone. It is:
> - Influenced by the external environment
> - Created through relationships with stakeholders
> - Dependent on various resources.
>
> [...]

2.3 An integrated report therefore aims to provide insight about:

- The external environment that affects an organization
- The resources and the relationships used and affected by the organization, which are referred to collectively in the Framework as the capitals and are categorized in Section 2C as financial, manufactured, intellectual, human, social and relationship, and natural
- How the organization interacts with the external environment and the capitals to create, preserve or erode value over the short, medium and long term».

As already stated in the European legislation (*e.g.*, in the "BRRD"), the IICRs are inspired by a new concept of social interest as a synthesis of a plurality of protected legal assets whose preservation produces value for the company itself and it brings benefits to the shareholders themselves and to the community understood as a set of stakeholders with multiple interests (stakeholders). The long-term vision is related precisely to the ability of the organization to preserve capital[23] by carrying out its own characteristic activity that is oriented towards sustainable business as the company's understanding of carrying out an activity aimed at widespread well-being. On this point, the IICR establish that «The ability of an organization to create value for itself is linked to the value it creates for others. As illustrated, this happens through a wide range of activities, interactions, and relationships in addition to those, such as sales to customers, that are directly associated with changes in financial capital. These include, for example, the effects of the organization's business activities and outputs on customer satisfaction, suppliers' willingness to trade with the organization and the terms and conditions upon which they do so, the initiatives that business partners agree to undertake with the organization, the organization's reputation, conditions imposed on the organization's social license to operate, and the imposition of supply chain conditions or legal requirements «When these interactions, activities, and relationships are material to the organization's ability to create value for itself, they are included in the integrated report. This includes taking account of the extent to which effects on the capitals have been externalized (*i.e.*, the costs or other effects on capitals that are not owned by the organization).

[23] In a wide meaning as «the capitals comprise financial, manufactured, intellectual, human, social and relationship, and natural, although as discussed in paragraphs 2.17–2.19, organizations preparing an integrated report are not required to adopt this categorization» (part. 1, introduction).

Governance must be organized to identify risk reduction or management strategies and maximize business opportunities, but also to protect employees, customers, suppliers and the entire community. This approach presupposes the so-called allocation plan or the planning for the distribution of resources (2.27). To anticipate the crisis and manage risks, it is necessary to prepare measurement and monitoring tools that can provide governance with timely and correct information on past, present and, in perspective, future trends. These are obviously not static but dynamic processes that consider the actual performance of the company and that know how to operate a periodic review process from within. The integrated reports combine all the interdependent evaluation elements or indicators that are of relevance for the purposes of crisis prevention so that the company achieves the medium-long term vision[24].

These reports analyze the performance of the past in a prospective manner with respect to a long-term vision through a verification of the adequacy of the governance in the time frame analyzed to be able to anticipate any adverse scenario. Among the relevant indicators there is the capital in the sense set out above and the ability of the organization to preserve and implement it but also the risks that can compromise its conservation; also relevant are the financial information relating to the trend of the reference market, new business opportunities, energy efficiency, cooperation at the local community level. Likewise, it is important to identify which external parties are relevant to the company whose protection cannot be required even for the purposes of proper business management.

The reports must be inspired by the principle of materiality (3.17), or they must reveal information that is of relevance in terms of corporate social responsibility and that can undermine the stability of the company in the medium and long term. The process of identifying protected legal assets is of essential importance and this takes place according to a scale of values and priorities that must be stated and be disclosed.

According to the Framework, reports should contain at least eight elements: 1. Organizational overview and external environment; 2. Governance; 3. Business model; 4. Risks and opportunities; 5. Strategy and resource allocation; 6. Performance; 7. Outlook; 8. Basis of preparation and presentation (4.1). As regards the aspect of governance that is related to

[24] See D. Woschnack, S. Hiss, S. Nagel, B. Teufel, *Sustainability Disclosure and the Financialization of Social Sustainability*, «Accounting, Economics, and Law: A Convivium», vol. 10.2 (2020), available at: https://doi.org/10.1515/ael-2018-0053.

organizational structures, it is important to map and evaluate the organization in a critical way and establish the organization both in terms of the model adopted in practice but also from a subjective point of view (skills and professional background) is suitable for pursuing the set objectives. This verification evokes the enhancement of the principle of professionalism as well as that of the adequacy of the management and certainly implies a periodic verification of the suitability under the subjective profile of the persons responsible for carrying out company functions.

Concluding on this point, adequacy of the organizational structures implies decsribing the business model taking into account, according to the long-term vision, the ways in which the company operates on the market or the ways in which it obtains financial means (input) and how it transforms resources for place its products or services on the market (outputs) and how the company contemplates the protection of stakeholders by avoiding or managing the risks (financial and otherwise) related to the business activity carried out.

4. Corporate responsibility as a deterrent against risky conduct by directors: the need for a corporate organization capable of preventing abusive conduct (moral hazard) based on the nature and size of the company

If business continuity represents an essential element of the company's existence and its pursuit means attributing a vision of "durability" to the management, it is important to understand how the decision-making process of the top management bodies of the company must behave as there is a clear interconnection between the process. decision-making (in a formal and substantial sense) and durability of the company as an attitude to remain on the market and avoid insolvency.

Sustainability appears to be a concept strictly connected to insolvency and the danger that it manifests itself during the life of the company: the action of the management body must therefore be based on the pursuit of business continuity, considering that the crisis can trigger at any time and for reasons that are not homogeneous.

In this phase, the conflict of interest between the command capital expressed by the majority directors of the company and the other stakeholders, including the directors themselves who can be incentivized to carry out risky operations as they are more profitable in the short term

and guarantee them remunerative benefits, minority shareholders, corporate creditors, etc. it can be decisive.

The crisis situation entails an aggravation of the risk on the creditors side since the financing of the company in crisis can bring asymmetrical advantages: in the perspective of the financing shareholders, the success of the refinancing operation would bring advantages to the same shareholders-financers for the increase of value of their participation; on the creditors side it would be completely neutral and, in case of failure of the transaction, the creditors would have to compete with the lender by reducing the expectation of repayment of their credit in terms of the quantum. It is the moral hazard[25]. that induces the controlling shareholders, through the directors of their appointment, to undertake risky operations that can lead to a surplus for the investor shareholders by now unexpected based on the characteristic activity of the company, unable to take place according to conditions of equilibrium. They further borrow the company by resorting to credit to reduce the claims of corporate creditors (so-called claim dilution) [26]. This triggers a situation of no return for the company which ends up sacrificing the corporate creditors in the face of the limited risk assumed by the shareholders[27].

The shareholders, as residual creditors[28] (upon satisfying the creditors 'reasons), have no incentive to invest further for the sole purpose of smoothing out losses and safeguarding the creditors' reasons. The directors, in a situation of crisis or insolvency, representing the interests of the majority shareholders as residual claimants, invest in activities with low profitability with the consequence that the company is in fact financed by social creditors who find themselves disadvantaged given the principle of the limitation of liability.

The situation of financial distress or tension also induces the controlling shareholders to contract investments in unprofitable activities

[25] See F. Brizzi, *Responsabilità gestorie in prossimità dello stato di insolvenza e tutela dei creditori*, «Rivista del diritto commerciale», 2008, part I, p. 1027.

[26] See L. Stanghellini, *La crisi d'impresa fra diritto ed economia. Le procedure di insolvenza*, Il Mulino, Bologna 2007, p. 24.

[27] See L. Benedetti, *Lo statuto dei finanziamenti dei soci e infragruppo a favore della società in crisi*, YouCanPrint, 2016, pp. 6-7; G.B. Portale, *I "finanziamenti" dei soci nelle società di capitali*, «Banca, borsa, titoli di credito», 2003, part. I, p. 666; M. Maugeri, *Finanziamenti "anomali" dei soci e tutela del patrimonio nelle società di capitali*, Giuffrè, Milano 2005, p. 51.

[28] See F.H Easterbrook, D.R. Fischel, *The Economic Structure of Corporate Law*, Harvard University Press, Cambridge (MA) 1991.

even if they are safe as these investments do not appear to be profitable for the losses but only for the assets as a guarantee of the creditors, thus excluding a direct advantage for investor shareholders. The same disincentive manifests itself in terms of access to an insolvency procedure that would not give any advantage to the insolvent entrepreneur but only to creditors, with the consequence that the shareholders attempt out-of-court restructuring, aggravating the failure to the point of depleting the corporate assets through distraction[29]. The issue also involves the governance of the company at the time of default where the holders of credit rights (stakeholders) have no voice with respect to the choices of the management body of the debtor company: which poses a problem of protection, but also of governance, in the twilight phases of the company (i.e. those half-twilight zones in which there is no discipline of corporate or insolvency law that apparently establishes duties and application principles). This situation of misalignment of interests, as mentioned, is exacerbated in the presence of a situation of insolvency. In a distress situation, the conflict of interest between shareholders and creditors explodes with respect to a performing situation: in fact, the former are no longer interested in increasing the company's assets but aim to divide it pro rata net of debts to creditors who, the latter, have a primary interest in maintaining the highest possible capitalization values as a guarantee of the fulfillment of the obligations assumed by the company[30]. Thus, we are witnessing a dissociation between the power of management of the company that still belongs to the shareholders and the business risk that would instead fall completely on the creditors[31].

The transition from a situation of continuity to that of default has led part of the doctrine to identify a real shift in the center of gravity of interests (and also of the duties of directors in a crisis phase, so-called shifting of duties) from controlling shareholders to creditors with the consequence that the directors would no longer have the objective of pursuing the corporate interest but that of the corporate creditors in order to minimize the consequences of insolvency and manage the company conservatively in order to extract the highest liquidation value pos-

[29] See L. Stanghellini, *La crisi d'impresa fra diritto ed economia. Le procedure di insolvenza*, cit., p. 50.

[30] See G. Ferri *jr.*, *Garanzia patrimoniale e disciplina dell'impresa in crisi*, in N. Abriani *et alii*, *Diritto fallimentare - Manuale breve*, Giuffré, Milano 2013^2, p. 29.

[31] See A.M. Luciano, *La gestione della s.p.a. nella crisi pre-concorsuale*, Milano, Giuffré 2016, p. 4.

sible[32]. Following this approach, the management of the company would pass from the controlling shareholders-administrators to the creditors themselves as residual owners or to the bearers of third interest which need to be safeguarded[33].

The identification of corporate creditors as "*managers and financiers of the company in crisis*" leads to a reflection not only on the legitimacy to run the insolvent company (if it is the responsibility of the directors, expression of the shareholders who experience the conflict of interest described above or to the creditors themselves through the identification of insolvency procedures that identify the representative of the procedure as the agent of the creditor class) but also to its concrete operating procedures. The affirmation of the exclusive interest of the creditor class (creditor maximization) rather than pursuing the interest of the controlling shareholders (shareholder maximization) as already explained elsewhere does not lead to satisfactory results[34]: on the one hand, the maximization of profit would jeopardize the reasons of creditors through the dispersion of the residual value of the assets and the encouragement of moral hazard; but, in the same way, the pursuit of a heritage conservation policy would constitute an obstacle to recovery operations of the business and crisis prevention[35].

Excessive anticipation of conservative management can configure, according to the common law perspective, the responsibility of the directors in the same way as a delay in accessing crisis resolution procedures[36]. The prospect of a transition from a situation of business continu-

[32] See R. Kraakman *et Alii*, *The anatomy of corporate law. A comparative and functional approach*, Oxford Univ. Press, Oxford-New York 2017[3], p. 114; A. Keay, *The shifting of Directors' Duties in the Vicinity of insolvency*, «International Insolvency Review», vol. 24.2 (2015), pp. 140-164. *Contra*: F. Brizzi, *Doveri degli amministratori e tutela dei creditori nel diritto societario della crisi*, Giappichelli, Torino 2015, p. 35. See also, L. Picardi, *Il ruolo dei creditori fra monitoraggio e orientamento della gestione nelle società per azioni*, Giuffrè, Milano 2013.

[33] See D. Vattermoli, *Gli* insolvency protocols *nelle operazioni di ristrutturazione del gruppo di imprese in crisi*, «Diritto della banca e dei mercati finanziari», 2019, I, p. 11 (fn. 4).

[34] See E. Ricciardiello, *La crisi dell'impresa di gruppo tra strumenti di prevenzione e di gestione*, cit.; see also A. Zoppini, *Emersione della crisi e interesse sociale (Spunti dalla Teoria dell'*Emerging Insolvency*)*, «Jus civile», 2014.2, p. 60, available at: www.juscivile.it . See also A. Nigro, *Principio di ragionevolezza e regime degli obblighi e della responsabilità degli amministratori di spa*, in «Giurisprudenza commerciale», 2013, part. I, 457 ff.

[35] See *Report of Reflection Group on the Future of EU Company Law 2011.*

[36] See P.L. Davies, *Directors' Creditor-Regarding Duties in Respect of Trading Decisions Taken in the Vicinity of Insolvency,* in *European Business Organization Law Review* (EBOR), vol. 7, 2006 (stating that: «the need to promote a 'rescue culture' for companies in finan-

ity and crisis if not insolvency leads the holders of command capital and their directors instead of investing further in equity given that the capital appears to be lost in carrying out transactions that may prove imprudent for the purpose, according to short-termism view, to raise the firm financially. But these are operations that often do not consider the effects that are anything but beneficial to the company. The reflection concerns even before (substantially) the identification of rules (standards or rules) that impose specific conduct on administrators (fiduciary duties) in the presence of the crisis or in the perspective of the crisis[37]. Theme that requires a preliminary reflection on the social interest in the business crisis[38].

The question implies an overcoming, or a broad review, of the notion of social interest as it is proposed today in the era of sustainable business and corporate social responsibility[39]: social interest that must be related to the size of the company and the risk connected to the activity that constitutes its corporate purpose, becoming the corporate social responsibility the emblem of the protection not only of interests such as safety and the environment but, in general, against any event that has an impact on the company and its stability of the weather[40].

cial distress may lead the legislature to limit the creditor-regarding duty arising before, but in the vicinity of, insolvency to cases of liquidation and not to extend it to companies being handled through procedures whose main aim is to save the company or (parts of) its business as a going concern»).

[37] See B. Becker, P. Strömberg, *Fiduciary Duties and Equity-Debtholder Conflicts*, National Bureau of Economic Research Working Paper Series, n. 17661 (Dec. 2011), available at: https://www.nber.org/papers/w17661.

[38] See *ex multis* A. Hargovan, T.M. Todd, *Financial Twilight Re-Appraisal: Ending the Judicially Created Quagmire of Fiduciary Duties to Creditors*, «University of Pittsburgh Law Review», vol. 78. 2 (Winter 2016), pp. 135-180; K. Van Zwieten; *Director Liability in Insolvency and Its Vicinity: West Mercia Safetywear Ltd v Dodd Revisited*, «Oxford Journal of Legal Studies», vol. 38.2 (June, 2018), pp. 382-409; F. Tung, *Gap Filling in the Zone of Insolvency*, «Journal of Business and Technology Law», vol. 1.2 (2007), pp. 1201-1226.

[39] See J.F. Sneirson, *The Sustainable Corporation and Shareholder Profits*, «Wake Forest Law Review», vol. 46 (2011), pp. 541-559; D. Millon, *Two Models of Corporate Social Responsibility*, «Wake Forest Law Review», vol. 46.2 (2011), pp. 523-540.

[40] See T. Rozman, *Corporate Groups and Corporate Social Responsibility: The EU Perspective*, «The Turkish Commercial Law Review», vol. 2.2 (2016), pp. 205-218, affirming that: «At the EU normative (non-binding) level, the concept of CSR was initially defined in the *Green Paper - Promoting a European Framework for Corporate Social Responsibility* (Green Paper) as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis'. The Green Paper aimed to provide a holistic approach towards CSR by listing and describing various dimensions of CSR, *e.g.*, social responsibility integrated management, social responsibility reporting and auditing, 'quality in work, social and eco-labels, and

5. Corporate social responsibility because of the failure to plan the crisis involving the management of the company regardless of the organizational forms adopted

A prerequisite for the corporate social responsibility is the overcoming of the single entity approach in the wake of tort liability and the valuation of the company as an activity that can be exercised indiscriminately by different organizational forms, which implies an assumption of responsibility related not to the subject but to the activity of a company that can be contingent on several subjective levels. The corporate size of the corporate group is well known in antitrust regulations[41] and the theories on corporate social responsibility often refer to the articulation of the multinational company into corporate groups[42].

Alongside the traditional stakeholders, categories of subjects or protected interests are identified such as to transform the duties of the directors on the qualitative level of management and organization in a preventive function of protecting multiple interests, including those of public relevance. The pursuit of such widespread interests cannot be shielded through the paradigms of limited liability and the separation of assets of the companies belonging to the group but assumes a corporate dimen-

socially responsible investment. A renewed EU strategy 2011-14 for Corporate Social Responsibility' provides a new, much wider definition of CSR, *i.e.*, 'the responsibility of enterprises for their impacts on society'" The document discusses the relevance of CSR and argues that CSR is not only in the interest of corporations (especially in terms of risk management, cost savings, access to capital, customer relationships, human resource management, and innovation) but also in the interest of society as a whole (in terms of offering a set of values on which to build a more cohesive society and sustainable economic system)».

[41] See European Court of Justice, decision of 10 September 2009, C-97/08 P, *Akzo Nobel NV et al. v. Commission of the European Communities, «European Court Reports», 2009, I-08237.* In the *Akzo* case, the ECJ clearly stated that the concept of the undertaking has to be understood as an economic unit even if it comprises different legal persons. Furthermore, since dominant and dependent companies comprise a single economic unit, fines for competition law infringements may be addressed both to the dependent company, which is directly involved in the competition law infringement, and to the dominant company. The reason rests in the contestable presumption that the dominant company can exercise a decisive influence over the conduct of the dependent company. See also ECJ, decision of 14 July 1972, C-48/69, *Imperial Chemical Industries v. Commission*; F. Stârc-Meclejan, *Groups of Companies and Environmental Liability Confronting*, «Perspectives of Business Law Journal», vol. 2.1 (Nov. 2013), pp. 234-236.

[42] See U. Grušic, *Responsibility in groups of companies and the future of international human rights and environmental litigation*, «The Cambridge Law Journal», vol. 74.1 (March 2015), pp. 30-34.

sion as limited liability would become an incentive for managers to adopt risky conduct both in terms of risk of business and the impact of business activity on other protected interests[43].

The maximization of business profit (or shareholders primacy) therefore constitutes a parameter that is cumulated with the "social" dimension of the company which does not only look to the interest of the majority shareholders but to the well-being of society and the environment (so-called triple bottom line) and in general to the relocation of the corporate interest in the context in which the company operates[44].

Corporate responsibility undoubtedly represents a good incentive for directors to pursue conscious management free from risky conduct. After all, as seen, sustainable business requires not only knowing how to combine the maximization of business profits with respect for the environment; but also to pursue company policies according to a perspective of continuity (long term vision) precisely because the social responsibility of the company presupposes compliance with specific management rules that concern the company as a whole and therefore also the chosen organizational model that must strive to the pursuit of cost-effectiveness and financial equilibrium over time[45].

The preceding digressions are useful for understanding, in the face of the emergence of the crisis, or the simple probability of its emergence, how the duties and powers of the directors and the control body within the company behave as the insolvency since it is not possible to consider

[43] See M. Dearborn, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, «California Law Review», vol. 97.1 (2009), pp. 195-261: 212 («In comparison to limited liability, enterprise liability better addresses the problem of tort creditors because it reallocates risk and forces parent corporations to internalize the risks of their subsidiaries. Under a limited liability regime, parent corporations have no incentive to purchase insurance or adequately capitalize subsidiaries because limited liability artificially removes these operating costs. Enterprise liability, in contrast, forces the parent corporation to absorb these costs by purchasing insurance or adequately capitalizing the subsidiary. Enterprise liability thus leads to "more efficient investment decision-making, including the allocation of capital, and removes the moral hazard aspect of limited liability»).
[44] A.W. Savitz, K. Weber, *The Triple Bottom Line: How Today's Best-Run Companies Are Achieving Economic, Social, and Environmental Success - and How You Can Too*, Jossey-Boss (John Wiley & Son), San Francisco 2006, p. xii; M. Tueth, *Fundamentals of Sustainable Business. A Guide for the Next 100 Years*, World Scientific, Hackensack (NJ) 2010, pp. 45-46; J.F. Sneirson, *Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, «Iowa Law Review», vol. 94.3 (2009), pp. 987-1022: 991.
[45] See D. Millon, *Two Models of Corporate Social Responsibility*, cit., pp. 530-33 («a sustainable business takes a view of the firm that is both broader and longer than the typical, conventional focus on short-term financial gains»).

that the duty of loyalty of the directors undergoes a shifting (slippage) in favor of the creditors rather than the company and how the unitary size of the company gives the management an obligation to guarantee stability (if possible) destined to persist and which is functional to prevent insolvency.

This implies not only, under certain conditions, the possibility of financial intervention (and the implementation of financial support agreements in corporate groups), but also the preferential treatment of the loans granted for the prevention and resolution of the crisis. The response given by the new CCII regarding incentives to finance, also intra-group in terms of pre-deduction, appears to be consistent with this approach.

The opportunities for moral hazard are exacerbated in group organizations thanks to the internal finance circuit that is generated as a result of management and coordination[46] and the financial risk that is assumed as a result of the financial branching and interconnection is completely comparable to that deriving from the "tort liability" or the liability for an unlawful act as there are many examples of the involvement of "third parties" with respect to the material author of the damage. In groups' organizations there is potentially the same phenomenon described above, *i.e.*, the allocation of resources in conflict of interest to group units to the disadvantage of others, the confusion of assets or even the assumption of intra-group obligations at disadvantageous conditions for the companies' contracting parties that result in a decrease in the patrimonial guarantee of the creditors of these companies[47].

It is a question of understanding what it means to apply the CSR fee to a company in crisis or insolvent. The interpretative attempts of the doctrine, albeit authoritative, have so far been stopped at an evaluation of the canon of corporate social responsibility with a view to verifying insolvency procedures in the context of the new CCII according to an appreciable graded examination of the legal asset "protection of creditors" with respect to procedural context under consideration.

However, the sustainability fee was verified in terms of the protection of social creditors in the perspective of their better satisfaction (albeit with criticism of the author who reconciles the need to reduce this fee to

[46] See E. Ricciardiello, *La crisi dell'impresa di gruppo tra strumenti di prevenzione e di gestione*, cit.; S. Johnson, R. La Porta, F. Lopez De Silanes, A. Shleifer, *Tunneling*, «*American Economic Review*», vol. 90.2 (2000), pp. 22-27.

[47] See V. Atanasov, B. Black, C. Ciccotello, *Unbundling and Measuring Tunneling*, «University of Illinois Law Review», vol. 2014.5 (August 31, 2014), pp. 1697-1738.

a factor that is anything but absolute) in the context of institutions bankruptcy (judicial liquidation) and arrangement with creditors.

In the opinion of the writer, the canon of sustainability permeates the management of the company even in advance of the emergence of the crisis, involving decision-making and information processes that must be prepared when the company is performing. This organizational structure affects the way in which the crisis can be prevented or overcome. The organizational structure used must be maintained and implemented during the emergence phase of the crisis, as a sudden and unjustified change in the management or worse in the financial management of the company cannot be considered consistent with the diligence fee. Just as the mechanisms of financial procurement and disbursement in finance cannot be jammed except by causing serious damage to third parties and to the company itself, denoting an action based on conflict of interest.

6. CSR and business judgment rule, financial support to the company in crisis

At this point, it is a question of understanding to what extent the emergence of the crisis or insolvency can justify the decision of the management body to access a liquidation or restructuring procedure or to exercise power to evaluate not only on the *quomodo* but even on an of the recurrence of a hypothesis of patrimonial and financial deterioration. It is necessary to consider that the transition from a condition of continuity to one of distress leads the company into a different dimension which is functional to the satisfaction of the reasons of various categories of subjects including, first, the corporate creditors as well as the shareholders as residual claimants[48].

The transition from ordinary management to that of the crisis would even seem to determine, according to another prospect, a change in the corporate purpose of the company, and within the group, of the holding company as the subject exercising management and coordination[49].

The system outlined by the Italian reform of the bankruptcy law occurred in 2005 highlights the perfect coexistence between the crisis, such

[48] See A. Nigro, D. Vattermoli, *Diritto della crisi delle imprese. Le procedure concorsuali*, il Mulino, Bologna 2014^{3}.
[49] See R. Rordorf, *Doveri e responsabilità degli amministratori di società di capitali in crisi*, «Le Società», 2013, p. 669.

as the company's inability to carry out its business in each period, and direct or indirect continuity.

The current regulations on composition and debt restructuring agreements as amended by the new CCII (Articles 284 *et seq.*) perfectly allows continuity to be maintained even in the presence of a situation of serious deterioration such as a business crisis. The regulatory system provided for by the bankruptcy law also makes the activation of liquidation procedures (bankruptcy or arrangement) compatible with business continuity (*e.g.*: company lease and provisional operation)[50].

The possibility of maintaining business continuity, even indirectly (*i.e.*, referring to a subject other than the insolvent entrepreneur as happens in the lease of a company within the bankruptcy or in the provisional exercise), allows us to confirm that liquidation, as an antithetical condition to business continuity, it is not an automatic effect of the change in the financial condition of the company but concretely depends on the choices made by the corporate bodies. For example, the obligation to prepare the financial statements according to the liquidation criterion dictated by Article 2423 of the Italian Civil Code it only depends on the actual cessation of production and on the business breakdown or on the formal activation of a liquidation procedure.

It is even obvious that the activation of a liquidation or concerted bankruptcy procedure often represents an inevitable consequence of a situation of instability that resulted in irremediable insolvency that leaves no other alternative to the management bodies[51]. Moreover, the plethora of tools made available by the legal system reinforces the duty to select the most suitable way to resolve the company's crisis in a sustainable way.

There is, therefore, no doubt that access to an insolvency procedure itself represents a specific duty of the directors which is sanctioned with an aggravation of compensation liability in the event of its omission. The CCII introduces for the first time a specific duty in this sense in Article 3 of the CCII (duties of the debtor), which refers to the new Article 2086 of the Italian Civil Code about adequate organizational structures, and Article 4, lett. *b)*, of the CCII, regarding the obligation of the debtor to take prompt action with regard to the necessary access to a crisis resolution procedure in order not to prejudice the rights of creditors.

[50] See F. Pacileo, *op. cit.*, p. 106.

[51] See *OIC Principle* no. 5, *sub* paragraphs nos. 7, 7.1, and 7.2.

On this point, it should be noted that crisis prevention, as well as its rapid and timely solution, represents a precept that derives from the principles of correct business and corporate management codified in art. 2497 of the Italian Civil Code and diligent action of the management body pursuant to art. 2392 of the Italian Civil Code and that this duty, although it should also be related to the functions of other bodies (managing directors and control body), mainly pertains to the administrators as recipients of the "constituent" architecture function of the company and its organization in practice[52]. Given the difficulty of identifying with certainty the twilight zone of the company and given the unpredictability in terms of time of the emergence of the crisis (as it may also depend on unforeseeable factors such as compensatory actions and external elements), the preparation of prevention plans and saved

This need also arises in the face of the uncertainties regarding the exact qualification and distinction of the state of crisis and that of insolvency in the legal sense, also in relation to the economic one where it would even be possible to identify sub-phases such as that of pre-crisis[53]. The reference is not to mere standard or customary rules of international commercial law: there are positive law rules that expressly refer to continuity as the end of business activity according to the economic method. For example the Article 2423-*bis*, no. 1), of the Italian Civil Code, which establishes the principle of drafting the financial statements according to prudence and in the perspective of the continuation of the business if continuity is still possible; in Article 2082 of the Italian Civil Code which, referring to the exercise of an activity with the economic method, recalls business continuity as an essential element of economic management (*i.e.*, remuneration of costs with revenues and the creation of objective profits).

The Auditing Standards (see IAS, no. 1; ISA Italy, no. 570) also refer to the going concern as a rule of the performing company which indicates the ability to continue to carry out the activity in the foreseeable future by coping with the liabilities during the normal course of business with self-sufficiency and productivity. This step appears important because it makes us understand how the business continuity of the company is

[52] See R. Rordorf, *Doveri e responsabilità degli amministratori di società di capitali in crisi*, cit.; P. Abbadessa, *Profili topici della nuova delega amministrativa*, in P. Abbadessa, G.B. Portale (Eds.), *Il nuovo diritto delle società* – Liber amicorum *Gian Franco Campobasso*, Utet Giuridica, Milano 2007, 2, p. 493.

[53] See G. Strampelli, *Capitale e struttura finanziaria nella società in crisi*, «Rivista delle società», 2012, p. 631.

connected to the financial equilibrium understood as the ability of the characteristic activity to generate income flows suitable for covering liabilities.

All these regulation references should also take into account the social dimension of the enterprise even at the time of crisis in order to establish what value should prevail in some circumstances: sustainability as safeguard of more wide interests or the business financial continuity only?

As the doctrine warns, the concept of continuity embodies solvency as the company's attitude to face liabilities where it is possible to distinguish active continuity as an attitude to generate income flows and passive continuity as the ability to meet liabilities[54]. It follows that the inadequacy of early crisis detection tools, such as timely access to resolution tools, entails responsibility for the violation of a specific duty, namely that of planning the crisis and managing it in the event of its emergence through the timely access to existing resolution tools[55]. But is time to reflect if there is a duty to keep alive a business in any case and at any cost. In this evaluation would be considered again the social dimension of the business.

The specific relationship between organization and purpose gives rise to a duty of adequacy, the violation of which can be reviewed ex post by the judge as it does not affect the review of the merits of individual business decisions (Business Judgment rule): the decision of the management body (but also of control) whether or not to access a crisis prevention or management tool cannot be at the mere discretion of the directors, as it concerns only the choice of the resolution tool adopted but not the choice of whether to access it or not.

The business judgment rule in a moment of crisis or insolvency cannot operate with reference to the access to a crisis resolution tool but only at the time of intervention which depends on the results of the information flows.

On the other hand, moving on to the emergence of the crisis, the CCII affirms the supremacy and preference of the restructuring procedures over the liquidation hypothesis which is considered an extreme remedy:

[54] See F. Pacileo, *op. cit.*, p. 84.

[55] See A. Mazzoni, *La responsabilità gestoria per scorretto esercizio dell'impresa priva della prospettiva di continuità aziendali*, in G. Presti (Ed.), *Amministrazione e controllo nel diritto delle società* - Liber Amicorum *Antonio Piras*, Giappichelli, Torino 2010, p. 833. See also D. Galletti, *La ripartizione del rischio di insolvenza - Il diritto fallimentare tra diritto ed economia*, Il Mulino, Bologna 2006, p. 165.

in the context of the unitary procedure for access to the crisis procedures and insolvency, the legislator of the CCII gave the restructuring a decided favor over liquidation, placing its discussion first.

The same provisions on pre-deduction even overcome the taboo of the prohibition of financing a company in crisis or insolvent with rules of net facilitation, granting the lender (partner or external) not only the integration of the credit but the privilege of pre-deduction if the financing is functional to the preservation of business continuity in a sustainable way (Article 6, letter *d)*, of the new CCII).

It should be noted that the provisions on pre-deduction relating to the arrangement with business continuity and the debt restructuring agreements provided for by Article 99 and the following Articles of the new CCII and they do not relegate the admissibility of pre-deductible finance to the best satisfaction of creditors but to the direct or indirect continuation of the business activity justifying the authorization of the court even in the absence of certification if there is an objective prejudice to the continuation of the business activity.

7. Conclusive remarks

We can conclude that business continuity in some circumstances might be considered already part of the corporate social responsibility at the Italian regulation level. It must be pursued since the establishment of the company and it must be preserved as far as possible even in the context of the business crisis where there is still the possibility of recovery and there are not prevailing interests to protect, as environment. The creditor's dimension must consider the sustainability which means that not only financial position is relevant in the decision-making process to pursue continuity.

It can be assumed that, without prejudice to the prohibition of moral hazard that would preclude the financing of the company in crisis where it leads to the aggravation of the failure, there is a legal obligation to preserve the business continuity also by resorting to the financing (internal or external) of the company in the context of reorganization procedures that will be preferred to liquidation if it is avoidable.

The CSR would operate on the contrary where management could be blamed for not having made access to the reorganization or restructuring measures required by law when it was possible to save the company by ensuring its business continuity.

Business continuity undoubtedly constitutes clarification of the canon of sustainability in terms of long-term vision and the preservation of corporate value over time functional to the protection of a multiplicity of uneven interests, shareholders, corporate creditors, suppliers, the local or national community (depending on the size of the company).

Exploring the Interconnections Between Corporate Social Responsibility and Corporate Crime

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This chapter considers the potential for organisations to abuse their CSR commitments in order to create and foster criminogenic environments, whereby the corporation is empowered to shape the enforceable regulatory landscape, and evade detection of wrongdoing. Where wrongdoing is detected, the corporation may further be able to act to limit regulatory responses and its own liability, effectively reducing or eradicating meaningful consequences to criminality. By developing a schematic conceptualisation, it is demonstrated that CSR shapes the legal and regulatory landscape during three specific stages: pre-crime, pre-detection, and post-detection responses. Subsequently, the chapter addresses the potential for whistleblowers to combat such behaviours, and pierce the veil of secrecy that allows for CSIR to flourish, whereby fostering transparency and accountability.

Keywords: CSR; Company Law; Criminal Law; Corporate Crimes; CSIR; Whistleblowing Regulation.

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1. Introduction

This chapter takes the opportunity to explore the links between the areas of corporate social responsibility (CSR) and corporate crime as well as organizational wrongdoing, and the interplay between the related concepts.

In doing so, the chapter explores how the lack of CSR or deliberate corporate irresponsible behaviour, that some authors define as corporate social irresponsibility (CSIR)[1], may contribute to the creation of criminogenic environments which give rise to corporate crimes and encourage criminal activity. Subsequent to any criminal act, the actions of corporations may further hamper any investigation of wrongdoing or criminality through shaping the regulatory and investigatory environment.

In order to look at the interconnections between CSIR and corporate crime is necessary to start from a classificatory assumption. The perpetration of a criminal conduct could be considered *per se* as an irresponsible action[2] in that criminal actors show disregard for others. Where such an irresponsible behaviour is compared to law-abiding approaches, it is labelled in criminology as "deviance." Parsons explains that deviance may be considered as

> «[a departure] from conformity with the normative standards which have come to be set up as the common culture. A tendency to deviance in this sense is a process of motivated action, on the part of an actor who has unquestionably had a full opportunity to learn the requisite orientations, tending to deviate from the complementary expectations of conformity with common standards so far as these are relevant to the definition of his role»[3].

As a result, both CSIR and corporate crime may represent irresponsible corporate actions. Therefore, in order to evaluate how the former may affect the latter, it is necessary to distinguish between these two kinds of irresponsible behaviour. In that regard, the approach used in this work is to distinguish the irresponsible conduct that generates CSIR and the ones

[1] See, for example, R. Alcadipani, C. Rodrigues de Oliveira Medeiros, *When Corporations Cause Harm: A Critical View of Corporate Social Irresponsibility and Corporate Crimes*, «Journal of Business Ethics», vol. 167 (2020), pp. 285-297.

[2] For the purposes of this work the concept of "irresponsibility" does not involve a situation of "insanity" or lack of mental capacity. Corporations act in an irresponsible way where they operate without taking in adequate consideration the consequences of their actions and how their decisions may adversely affect their stakeholders.

[3] T. Parsons, *The Social System*, Routledge, London 1991, p. 177.

that fall into corporate criminal activities on the basis of whether or not such conducts are criminalized in the legal system. In other words, for the purposes of this analysis, differently from corporate criminal activities, the concept of CSIR includes corporate actions that although irresponsible, are not currently criminalized.

Adopting such a distinction, the interconnections between CSR and corporate crime appear to be multifaceted and multidimensional. Specifically, using a schematic approach, CSIR seems to interact with criminal conducts in at least three dimensions: before the perpetration of a criminal conduct (the pre-crime phase), after the perpetration of a criminal conduct but before that it has been revealed to society (the silent phase), and after that the corporate criminal action has been unveiled to authorities (the response phase).

Using such a scheme, the ensuing parts of this chapter will explore different types of corporate irresponsible behaviour, evaluating how they affect the perpetration of corporate criminal activities or their impact on the victims, the society, or the environment.

2. The Pre-crime Phase

Within the context of CSIR, pre-crime may be broadly understood as the exertions of influence by the organisation prior to the perpetration of the crime. Accordingly, the pre-crime phase is of significant importance as it allows us to examine the actions organisations take prior to perpetration of criminality or wrongdoing, and better conceptualise how these actions shape the regulatory landscapes, and the contributions make towards fostering criminogenic environments.

2.1. Undue interference in the public decision-making process

The manner in which a corporation engages in the political process contributes towards the corporate character, and is an exercise of the corporate personhood. Therefore, it may be understood that any form of political engagement or dialogue by a corporation is a means of expressing the values of that specific corporation.

One of the most pervasive issues we have been experiencing in our democracies is unethical lobbying practices and corporate powers distortion of the democratic decision-making process. By understanding lobbying as the activities undertaken with the aim of influencing the leg-

islative and regulatory environment, and therefore the subsequent consequences, corporate lobbying may be considered successful if it achieves influencing political and regulatory reform in pursuit of predetermined outcomes.

What is increasingly self-evident, is the overlapping of the corporate and political spheres, whereby corporations continue to develop increasing 'non-marketing strategies'[4]. The use of expansive non-marketing strategies, through the process of lobbying, has been described as the largest impact and influence a corporation may exert, and the means through which to undertake the greatest good, or conversely, harm[5].

Corporations may legitimise political lobbying as a natural extension of their CSR activities, justifying their regular contact with legislators, regulators, and decision makers, as a method of giving legal and regulatory shape to wider organisational aspirations that extend beyond simply the boundaries of organisational operation, and instead shift the political and regulatory environment in which themselves and others operate, and therefore breathe life into their espoused and championed principled social stances.

However, such conduct becomes problematic when there exists a disjuncture between the publicly stated goals and intentions of the organisation, and the changes that are being advocated in practice. In this way, corporations may use their sustainability initiatives as a means to deflect from the realities of their political efforts to block or otherwise roll back meaningful change, especially where there remains a conflict of interests[6]. Highlighting this, US Senator Sheldon Whitehouse explains:

> «Despite the statements emitted from oil companies' executive suites about taking climate change seriously and supporting a price on carbon, their lobbying presence in Congress is 100% opposed to any action. In particular, the American Petroleum Institute, the oil industry trade association, is an implacable foe. Given the industry's massive conflict of interest, there is every reason to believe they are playing a double game:

[4] D.P. Baron, *Integrated strategy: Market and nonmarket components*, «California Management Review», vol. 37.2 (1995), pp. 47-65.

[5] A. Schendler, M. W. Toffel, *What environmental Ratings Miss*, Harvard Business School, Boston (MA) 2011, pp. 17-18.

[6] S. Anastasiadis, *Toward a view of citizenship and lobbying: Corporate engagement in the political process*, «Business & Society», vol. 53.2 (2014), pp. 260-299. F. Den Hond, K.A. Rehbein, F.G. de Bakker, H.K.V. Lankveld, *Playing on two chessboards: Reputation effects between corporate social responsibility (CSR) and corporate political activity (CPA)*, «Journal of Management Studies», vol. 51.5, (2014), pp. 790-813.

> trying to buy a little credibility with these public comments while using all their quiet lobbying muscle to crush any threat of bipartisan action on the carbon pricing they claim to espouse» [7].

Such conducts are not restrained to the fossil fuel industries but are endemic through most every corporate sector, for instance, a recent report uncovered ten major food and beverage companies, including Nestle, PepsiCo, and Coca-Cola, lobbying in private against stricter plastics legislation aimed at reducing the amount of single use plastics and increasing environmental responsibilities of corporations in relation to plastic, while simultaneously making public commitments to reducing plastic waste and increasing recycling, and in many cases being prominent members of high profile joint initiatives to tackle plastic pollution[8].

Big corporations tend to use their immense wealth and power to bend national governments to their will. Such an influence may adversely affect the democratic process, generate lax regulations, allow the abuse of individual rights, or even lead to harmful practices for human health or the environment. Senator Sheldon Whitehouse has illustrated such a phenomenon eloquently when he affirmed that, «corporations of vast wealth and remorseless staying power have moved into our politics, to seize for themselves advantages that can be seized only by control over government»[9].

Such an interference with the political process generates a situation that Prem Nath Sikka brilliantly defines as, «cognitive capture, the psychological standardizing, of the key policy makers… they become sort of puppets that don't actually have to be asked to do anything they just serve their masters' interests»[10].

The immense wealth and power that corporations have acquired amplified by globalisation results in businesses frequently operating in regulatory voids or grey areas where nation states, limited to the exercise of

[7] S. Whitehouse, *The Climate Movement Needs More Corporate Lobbyists*, «*Harvard Business Review*» (2016), available at: https://hbr.org/2016/02/the-climate-movement-needs-more-corporate-lobbyists .

[8] Changing Markets Foundation, *Talking Trash: the corporate playbook of false solutions to the plastic crisis* (2020), available at: http://changingmarkets.org/wp-content/uploads/2021/01/TalkingTrash_FullVersion.pdf .

[9] S. Whitehouse, *Captured: The Corporate Infiltration of American Democracy*, New York, The New Press 2017, p. xix.

[10] P.N. Sikka, *VIRTEU Roundtable "Institutional Corruption and Avoidance of Taxation"*, 2021, Video recording at 29':29'', available at: https://www.corporatecrime.co.uk/virteu-institutional-corruption.

domestic power, find it difficult or impossible to legislate for corporate conduct.

It is in this vein that corporate political activism may contribute towards creating a criminogenic environment that leads to a lack of enforceability or significant watering down of standards. The Nobel prize winning economist, Milton Friedman, famously affirmed, «there is one and only one social responsibility of business — to use its resources and engage in activities designed to increase its profits, so long as it stays within the rules of the game»[11], and as such, argues that the political and regulatory sphere, and the private enterprise sphere, remain separate entities. Politicians on behalf of society make the rules, and the corporations operate within them, however, such arguments neglect to consider the role of corporations in establishing these self-same rules, whereby the powerful vested interests work to establish the enforceable boundaries, or lack thereof, of their own actions.

What this facilitates and enables corporations to undertake is a subversive form of disruptive political interference, obscured under the legitimacy of exercising CSR approaches. Organisations are able to weaponize the rhetoric of virtue in their CSR commitments while secretly engaging in anti-regulatory lobbying[12]. The effect is to shield both policy makers and the corporations themselves from public scrutiny, and to absolve both of responsibility for undertaking harmful actions while simultaneously publicly signalling their virtues as a means of legitimising those political interventions. The corporations are able to dismiss questions of harmful lobbying practices by claiming political engagement in line with their established CSR commitments and raising industry standards and protections, while political actors and legislators may explain the conduct as engaging with stakeholders, industry experts, and seeking to strengthen protections in the public and international interests.

The ways in which corporations may use their corporate power and wealth to interfere with the political decision-making process are multifaced and, in many cases, subtle[13]. Also, it remains extremely difficult

[11] M. Friedman, *The social responsibility of business is to increase its profits*, in *Corporate ethics and corporate governance*, Springer, Berlin-Heidelberg 2007, pp. 173-178.

[12] A. Favotto, K. Kollman, *Mixing business with politics: Does corporate social responsibility end where lobbying transparency begins?*, «Regulation & Governance», vol. 15.2 (2021), pp. 262-279: p. 264; J. Graafland, H. Smid, *Decoupling among CSR policies, programs, and impacts: An empirical study*, «Business & Society», vol. 58.2 (2019), pp. 231-267.

[13] T. Cave, A. Rowell, *The truth about lobbying: 10 ways big business controls government*, «The Guardian» (2014), available at: https://www.theguardian.com/politics/2014/mar/12/

to decouple the ways in which corporate unethical lobbying practices affects corporate criminal activities. In that regard, it is possible to mention several potential adverse consequences of such a corporate influence on the political decision-making process: favoring self-regulation over mandatory regulation; adopting an unnecessary level of complexity in regulation; limiting the scope of the criminalization of corporate illicit conducts; opposing the implementation of effective transparency regimes; adopting legal instruments favourable to corporate criminals such as negotiated resolutions; and lobbying to defund regulatory and enforcement authorities.

What appears unquestioned, is that, traditionally, corporations have used such authority to lobby in order to be free to operate in a vastly deregulated legal environment. In other words, they actively lobby to resist further regulations or the removal of existing rules and such form of CSIR may cause harm and generate the erosion of trust between the firms and their crucial stakeholders.

An example that is emblematic of such an unethical and undue pressure on the political decision-making process is represented by the efforts that energy companies made in the United States to avoid the implementation of Section 1504, which is entitled "Disclosure of Payments by Resource Extraction Issuers" of the Dodd-Frank Wall Street Reform and Consumer Protection Act enacted in 2010 as a response to the financial crisis. The purpose of Section 1504, which basically provides that companies in the extractive industries (oil, gas, and mining) have to publicly disclose the amounts that they pay to foreign governments in connection with projects abroad, is to fight against corrupt practices perpetrated by U.S. companies. The implementing rules of Section 1504, which were developed by the SEC and were supposed to become effective as of 25 September 2016, met with determined opposition from the energy companies lobby. Their efforts received support in the Congress shortly after Donald John Trump was elected president of the United States and, on 3 February 2017, with a resolution sponsored by 34 Republican Representatives, the U.S. Congress nullified the rules that the SEC issued in 2016 to implement Section 1504 of the Dodd-Frank[14]. Such irresponsible approach to

lobbying-10-ways-corprations-influence-government.

[14] C. Grasso, *The troubled path towards greater transparency as a means to foster good corporate governance and fight against corruption in the energy sector*, in S. Goutte, D. Khuong Nguyen (Eds.), *Handbook of Energy Finance Theories: Practices and Simulations*, World Scientific, Hackensack (NJ)-London-Singapore 2020, p. 378.

corporate lobbying adopted by the U.S. energy firms directly frustrated the U.S. government attempts to counter corruption in the energy sector, which is well-known as an industrial sector where corrupt practices are widespread[15].

Another example of how corporations use their power to bend national governments to their will may be found within the taxation sector where accounting giants are able to craft favorable tax rules from inside the government[16]. In this specific area regulated firms use the regulatory process to secure private economic advantages, in part, by controlling the flow of information to regulators. Control also derives from the perverse incentives created by the so-called "revolving door" of regulation whereby regulators are recruited from the industry that they regulate, and return to that industry after completing their term of government service[17]. Such an unethical corporate pressure frustrates the governments' attempt to counter tax crimes limiting the application of criminal law to manifest fraudulent practices while leaving the widely used corporate practices aimed at aggressively reducing their tax liabilities in the grey area of tax avoidance, which is not usually criminalized.

In some means to address this governance gap, transnational corporations are increasingly stepping up to fill this void by imposing methods of self-regulation in their operations. The so-called "social license to operate" of a corporation is no longer simply fulfilled by toeing the line and following national laws or expressions of charitable donations or other philanthropic programmes as a means to engage with stakeholders, but rather, the social license to operate is increasingly linked to meeting social expectations to address or otherwise mitigate negative externalities produced by the global markets they participate in. The implementation of voluntary self-regulatory frameworks allows the corporation to address the governance and legitimacy gaps created by increasing globalisation, while exercising positive corporate citizenship, whereby the organisation is able to attain societal validation and approval[18].

[15] C. Grasso, *The Dark Side of Power: Corruption and Bribery within the Energy Sector*, in R. Leal-Arcas, J. Wouters (Eds.), *Research Handbook on EU Energy Law and Policy*, Edward Elgar Publishing Ltd., Cheltenham 2017, pp. 237-256.

[16] J. Drucker, D. Hakim, *How Accounting Giants Craft Favorable Tax Rules From Inside Government*, «The New York Times» (2021), available at: https://www.nytimes.com/2021/09/19/business/accounting-firms-tax-loopholes-government.html .

[17] D. Ostas, *Tax Compliance Through Governmental Capture. An Ethical Assessment* (2022), available at: https://www.corporatecrime.co.uk/virteu-reports .

[18] A.G. Scherer, G. Palazzo, *The new political role of business in a globalized world: A*

The governance gaps that expressions of CSR attempt to plug, by example working conditions and environmental standards in developing nations, corporate global citizenship, and enhanced human rights protections, frequently take the form of implementing voluntary standards within that specific organisation and supply chain in order to give rise to organisational intention, what some term as "civil regulation". This civil regulation is distinct in character and operation from "government regulation" by virtue of the voluntary nature of the actions[19]. By example, Nike have implemented labour and environmental standards in over 700 factories outside of the US that produce its products, and established effective and credible monitoring processes to ensure adherence[20]. Practices of this nature have become increasingly common by large corporations, with over 12,000 businesses and 3,000 non-business stakeholders signing up to the United Nations Global Compact and committing themselves to aligning their operations and strategies around ten universal principles in the areas of human rights, labour, the environment, and anti-corruption[21].

Despite some significant achievements and raising standards brought about by internal reforms, or civil regulation, these voluntary acts remain just "voluntary". As expressions of CSR become the norm within many large public facing corporations, with demonstrated beneficial impacts on societal reputation, shareholder value[22], employee, and societal confidence[23], and some beneficial financial impacts[24], by implementing sys-

review of a new perspective on CSR and its implications for the firm, governance, and democracy, «Journal of Management Studies», vol. 48.4 (2011), pp. 899-931.

[19] T.P. Lyon, M.A. Delmas, J.W. Maxwell, P. Bansal, M. Chiroleu-Assouline, P. Crifo, F. Wijen, *CSR needs CPR: Corporate sustainability and politics*, «California Management Review», vol. 60.4 (2018), pp. 5-24: 7.

[20] Nike Inc., *Breaking Barriers*, in *FY20 Nike Impact Report* (2020), available at: *https://purpose-cms-preprod01.s3.amazonaws.com/wp-content/uploads/2021/04/26225049/FY20_NIKE_Inc_Impact_Report2.pdf*.

[21] For greater context on these goals, the impact of the Global Compact, and how these are monitored see, United Nations, *UN Global Company Strategy 2021-2023*, available at: *https://ungc-communications-assets.s3.amazonaws.com/docs/about_the_gc/UN-GLOBAL-COMPACT-STRATEGY-2021-2023.pdf*.

[22] C. Flammer, *Does corporate social responsibility lead to superior financial performance? A regression discontinuity approach*, «Management Science», vol. 61.11 (2015), pp. 2549-2568.

[23] L.M. Rothenhoefer, *The impact of CSR on corporate reputation perceptions of the public - A configurational multi-time, multi-source perspective*, «Business Ethics: A European Review», vol. 28.2 (2019), pp. 141-155.

[24] P. Crifo, V.D. Forget, *The economics of corporate social responsibility: A firm-level perspective survey*, «Journal of Economic Surveys», vol. 29.1 (2015), pp. 112-130.

tems of voluntary standards this may weaken or diminish the argument for the requirement of enforceable state regulation, therefore allowing the organisations themselves to set the base standards of industry in opposition to more stringent standards that would better serve the needs of society.

It is unrealistic to hold the expectation to exclude businesses from politics, and from exerting levels of influence, overtly or otherwise, against legislators and decision makers, however, such involvement need not happen in the shadows and be excluded from transparency requirements.

This would help target matters of corruption, and prevent in some manner the buying of political favour. Further, this allows stakeholders and members of society to more meaningfully assess the impact of the company, and if they have the courage of their espoused CSR convictions.

There is required real transparency and accounting reporting reform as means to prevent actions such as "astroturf lobbying" where organisations covertly funnel funds to supposedly grassroots groups or think tanks that lobby and advocate for policies and changes that are against a corporations declared CSR commitments.

The critical nature of meaningful and effective transparency may not be overstated. It is the central means by which to expose *quid pro quo* agreements, backdoor lobbying, rank hypocrisy, and forms of capture by private interests against the interests of the public.

In the wake of significant recent scandals, for instance Theranos and the prosecution of Elizabeth Holmes, it acts to highlight how transparency is required to also protect shareholder interests, and a means for investors to hold the board to account for misleading or otherwise decisions, with funders not being kept in the dark regarding how their funds are used in practice, and allowing them the choice to remove investments if firms are investing in practices that are misaligned to the morals and beliefs of the shareholder.

There exists a significant level of progress in areas of self-reporting on CSR matters, by example the Global Reporting Initiative enjoyed the participation of 12 organisations in 1999 and over 5,000 today, and KMPGs 2020 Survey of Sustainable Reporting finding that 69% of the planets largest 250 companies report on their sustainability perfor-

mance[25], this has unfortunately failed to extend to voluntary and meaningful political reporting.

While transparency around direct political financing and substantial cash donations to politicians, parties, and campaigns, remains of critical importance, as has been demonstrated through matters such as the revolving door phenomenon, astroturfing, and abuse of CSR responsibilities to societal protection to excuse direct lobbying, it has been demonstrated that a simple reflection on cash donations is no longer enough to capture the plethora of practices that lead to institutional corruption or forms of capture. The UN Global Compact has made battling corruption one of the central functions of its actions, and it may serve for a vehicle for broader calls for political transparency[26].

However, it may be understood that the expectation for large organisations to engage in effective and meaningful voluntary transparency is misguided and naive. Within the context of good faith actors who are actively attempting to align their publicly demonstrated CSR commitments and their expressions of political CSR, and the influence they may attempt to exert on political actors and regulators in line with those CSR commitments, then voluntary standards around transparency may well be an excellent starting point, but regardless, good faith actors are not the central focus of this chapter, and simply, not all large and powerful corporations are good faith actors.

The potential impact and meaningful success of voluntary standards, such as the UN Global Compact, must be examined in the context of not only being resistant to voluntary reporting or increased transparency, but organisations actively attempting to undermine current regulatory environments, weaken enforcement provisions, prevent, or otherwise limit investigations, and reduce sanctions for wrongdoing, all while simultaneously reporting the opposite to their own stakeholders.

While there exists a lack of enforceable transparency standards, society and stakeholders still require a safety mechanism to allow the identification of rank hypocrisy under the cover of CSR reporting, and it is in this capacity whistleblowers and leakers are able to play a pivotal role.

[25] KMPG, *The Time Has Come – The KMPG Survey of Sustainability Reporting 2020*, (2020).
[26] T.P. Lyon, M.A. Delmas, J.W. Maxwell, P. Bansal, M. Chiroleu-Assouline, P. Crifo, F. Wijen, *CSR needs CPR: Corporate sustainability and politics*, «California Management Review», vol. 60.4 (2018), pp. 5-24: 12.

2.2 Compliance programmes

Corporate compliance can be defined as the internal systems and controls that an organisation adopts to prevent crimes. It is possible to distinguish between "voluntary" and "mandatory" compliance.

> «Compliance programs could be defined as voluntary when a company and its managers can introduce and design them, but the law does not incentivise or impose a legal perspective on their adoption and implementation. Therefore, introducing a compliance program is the choice of an organisation that could be justified by other extra-legal reasons such as reputation. Conversely, a compliance program can be defined as mandatory when its adoption and effective implementation are imposed by law; in that case, an entity's management has an obligation to adopt organisational measures. Failure to comply with them can lead to sanctions»[27].

Internal compliance programmes are a key feature of many regulatory systems in order to encourage legal obedience, especially within the regulated financial sector, by example anti-money laundering provisions. These compliance programmes, when faithfully implemented, serve to protect not only society from the effects of the wrongdoing, but also the organisation themselves from the consequences of non-compliance with legal or regulatory instruments. Importantly, the meaningful implementation of compliance programmes may act to shield an organisation from prosecution, or reduce the sanctions following violations, making them a valuable asset to corporations.[28] However, for a corporation to avail themselves in this protection they are required to demonstrate that the programme was not simply a box ticking exercise or "paper programme", but rather, was designed, implemented, reviewed, and revised, as appropriate in an effective manner[29].

From a CSR perspective, the implementation of internal compliance programmes is a fundamental expression of embedding CSR principles into the organisations daily operation, whereby, regardless of regulatory

[27] D. Vozza, *Exploring Voluntary and Mandatory Compliance Programmes in the Field of Anti-Corruption*, in S. Manacorda, F. Centonze (Eds), *Corporate Compliance on a Global Scale*, Springer, Cham 2022, pp. 313-339: 324.
[28] By example, within the context of the US, the United States Department of Justice, *United States Attorneys Manual Principles of Federal Prosecution of Business Organizations*, § 9-28.300 (2013), states a factor for consideration whether to bring charges is "the existence and effectiveness of the corporation's pre-existing compliance program".
[29] *U.S. Attorneys' Manual*, cit., § 9-28.800.

necessity or potential leniency, the company is able to protect society from rogue or bad faith actors internally, and therefore an expression of the corporate ethical character. Good corporate leadership should encourage internal compliance from the top down, providing clear frameworks for compliance, rewarding systems that encourage compliance, and punishing those that do not[30]. The implementation of these policies provides social legitimacy for the organisations continued operation, however, when implementation is weighed against competing issues such as internal efficiency or profit generation, then decoupling may occur[31]. In a CSR environment, the decoupling of policies and implementation may be broadly understood as a means to gain legitimacy through communication of internal mechanisms to police the organisation and encourage a culture of compliance and societal interest, while in practice, the policies are not given effect[32].

An example of decoupling may be seen in the case of HSBC who between 2010 and 2018 failed to maintain an effective anti-money laundering (AML) program and to conduct due diligence on its foreign correspondent affiliates. Such failures of oversight led the bank to permit terrorists, narcotics traffickers, human traffickers, and others to launder hundreds of millions of dollars through its subsidiaries, resulting in a fine of £63.9m for compliance systems failures[33].

Similarly, from 2006 to 2010, the US branch severely understaffed its AML compliance function and failed to implement an anti-money laundering program capable of adequately monitoring suspicious transactions and activities particularly from HSBC Mexico, which was the preferred financial institution for drug cartels and money launderers. The bank failed to monitor over $670 billion in wire transfers and over $9.4 billion in purchases of physical U.S. dollars. The bank entered into a Deferred

[30] See the US Department of Justice so-called McNulty Memo, *Principles of Federal Prosecution of Business Organizations*, which outlines the guidance for good corporate leadership to foster compliance.
[31] J. Graafland, H. Smid, *Decoupling among CSR policies, programs, and impacts: An empirical study*, «Business & Society», vol. 58.2 (2019), pp. 231-267.
[32] P. Bromley, W.W. Powell, *From smoke and mirrors to walking the talk: Decoupling in the contemporary world*, «Academy of Management Annals», vol. 6.1 (2012), pp. 483-530.
[33] J. Jolly, *HSBC fined £64m for failures in anti-laundering processes*, «The Guardian», 17 December, 2021, available at: https://www.theguardian.com/business/2021/dec/17/hsbc-fined-64m-failures-anti-laundering-fca .

Prosecution Agreement with the DOJ, paid $1.256 billion, and accepted the appointment of a monitor[34].

Following the detection of wrongdoing and regulatory intervention, there exists a responsibility for the corporations to undertake internal systematic reform to ensure programmes of compliance are implemented to prevent future instances of similar wrongdoing. However, empirical evidence suggests that this is not the case, and that “corrupt” corporate culture is inherently resilient. The HSBC case is emblematic in that regard. Despite the existence of a deferred prosecution agreement in the US, the bank continued to fail to give effect to meaningful compliance programmes.

Further, thanks to the FinCEN Files leaks it emerged that, although after the scandal of 2012 the bank entered into a Deferred Prosecution Agreement and was subject for years to external monitoring, the bank processed at least $31 million between 2014 and 2015 for companies later revealed to have moved stolen government funds from Brazil; and more than $292 million between 2010 and 2016 for a Panama-based organization branded by U.S. authorities as a major money launderer for drug cartels[35]. The fact that the DOJ knew about this raises questions about the department’s 2017 decision to pronounce HSBC reformed and allow its probation to lapse.

Demonstrations of CSR, including compliance programmes, are the means through which corporate actors may petition and apply influence on decision makers and legislators to take a light touch regulatory approach, understood as voluntary compliance. While arguing that more involved and comprehensive enforceable regulatory frameworks are unnecessary and place an onerous burden on industry actors reflective of the apparent success of CSR based self-regulation, in practice, this argument works to foster criminal conducts through an overt reliance on corporations and their agents to be sincere and earnest moral actors.

If we are to understand self-regulation with a basis of legitimacy gained through CSR engagement, and CSR by its very nature is a volun-

[34] D.O.J., *HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement. Department of Justice*. December, 11 2012, available at: https://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations .

[35] S. Woodman, *HSBC moved vast sums of dirty money after paying record laundering fine*, « International Consortium of Investigative Journalists», September 21, 2020, available at: https://www.icij.org/investigations/fincen-files/hsbc-moved-vast-sums-of-dirty-money-after-paying-record-laundering-fine/ .

tary set of standards of conduct, then the very notion of self-regulation based on voluntary standards as opposed to extrinsically enforced standards is flawed.

Centrally, by advocating for a voluntary set of standards established by corporate actors, as opposed to regulatory provisions grounded in democratic institutions, this in effect shift the responsibility of setting those standards from the public sphere, to the private. Where regulatory boundaries are set and enforced by democratic institutions, the central focus becomes the benefit to society and limit of societal harms, with principles subject to public scrutiny and debate, whereas shifting this responsibility to the private sphere allows the central focus to not be on societal wellbeing, but rather, the dominating motivation becomes private and financial interests at the cost of societal health[36].

Greif argues that self-regulation is only effective when it includes explicit sanctions to confront and prevent opportunistic behaviours amongst members[37], while studies have demonstrated that in practice, voluntary pressures to take difficult and sometimes costly decisions weaken during implementation resultant of the lack of explicit sanctions and monitoring[38]. Commonly, self-regulation includes features such as self-reporting transgressions or breaches of rules, backed with comprehensive systems of audit to provide assurance to stakeholders, investors, and regulators, however, increasingly, independent auditors themselves are being identified as being embroiled in the wrongdoing, and supporting the firm in obscuring wrongdoing and criminality by failing to report inconsistencies in declarations, to investigate irregularities, and to issue false declarations of assurance[39]. The auditors regulator, the Financial Reporting Council, report that 29% of the audits delivered by the seven

[36] W. Cragg (Ed.), *Ethics codes, corporations, and the challenge of globalization*, Edward Elgar Publishing, Cheltenham 2005, p. 15.

[37] A. Greif, *Micro theory and recent developments in the study of economic institutions through economic history*, «Advances in economic theory and econometrics», 1997, pp. 79-113.

[38] J. Rivera, P. De Leon, *Is greener whiter? Voluntary environmental performance of western ski areas*, «Policy Studies Journal», vol. 32.3 (2004), pp. 417-437.

[39] By example, see the role of Ernst Young in the Wirecard scandal and the failure to identify a missing €1.9 billion, the role of KMPG, PwC, Deloitte and Ernst & Young in the collapse of the construction firm Carillion when creating false meeting minutes and audit documents, and the auditors collecting £72m in fees for advising the company, auditors advising companies on methods to evade taxes, by example KMPG's 2005 US prosecution and fine of $456m for criminal wrongdoing, amongst others.

largest audit firms fail to meet basic standards[40], raising further questions regarding their suitability and fitness in the context of self-regulatory environments.

Therefore, the exercise of CSR, including implementation of compliance programmes, allows corporations to display their virtues and efficacy to a range of stakeholders, including legislators and decision makers, whereby they may argue that self-regulation through the implementation of CSR principles is an effective means of regulating conduct within the industry, and both establishing and upholding standards, however, what remains clear is that corporate interests and societal interests are not necessarily intertwined, and by allowing corporations to establish the boundaries of their acceptable operation and declaration of wrongdoing, it enables corporate actors to establish standards that benefit the corporation at the expense of societal interests. Of central importance, systems of self-regulation require corresponding systems of crime detection and enforceability of standards, yet despite the clear evidence of the ineffectiveness and inadequacy of self-reporting and external auditing as means to provide assurance, corporations remain able to lobby decision makers to maintain these light-touch interventions at the cost of meaningful reform.

3. The Silent Phase

The silent phase of the schematic addresses the actions of an organisation following the commission of a crime, but prior to the wider detection or alerting of the conduct. It is during this period that the organisation is aware of their own conduct, and have yet to take any further actions in order to remedy the breach.

3.1. Internal investigations and self-reporting

Resultant of the political interventions that facilitate the shaping of enforcement mechanisms, powerful organisations are able to create circumstances which enable them to obscure wrongdoing and reduce accountability through resisting detection of wrongdoing, and exploiting organisational cooperation as a means to reduce liability.

[40] Financial Reporting Council, *FRC Annual Audit Quality Inspection Results 2020/21*, July 23 2021, available at: https://www.frc.org.uk/news/july-2021/frc-annual-audit-quality-inspection-results-2020-2 .

In some instances where a corporation reasonably understands it may have engaged in serious criminal conducts, many wish for this to remain private from the public, media, and favour taking their own internal measures as opposed to alerting police and regulators[41].

However, where they are unable to completely shroud their actions in secrecy, they may seek favourable outcomes through compliance with public regulatory and policing agencies, often through an agreement to undertake an internal investigation on behalf of the enforcement agency, and self-reporting the outcomes.

Corporate internal investigations serve a range of purposes, including identifying credible explanations for illicit or questionable business practices, future compliance assurance following wrongdoing, to identify and correct areas of operation that have allowed misconduct, or to influence organisational strategy[42].

By undertaking internal investigations and self-reporting, organisations contribute to pluralist regulation through assuming a private policing function, whereby they are endowed with the authority to make decisions regarding their own liability, blurring the lines between investigator and target. Notwithstanding some statutory duties, there remains no legal obligation for the board to notify authorities of suspected or identified wrongdoing, nor to cooperate with any investigation[43].

Accordingly, in order to induce cooperation and self-reporting, within the US there is a stated policy of offering to resolve cases through deferred prosecution agreements, and non-prosecution agreements[44], and reductions of fines or other penalties, with similar inducements to cooperation in other states. In addition to a lower level of sanction, it also enables individuals to reduce or eliminate their personal liability, by example through disbarment or losing licences to operate in regulated

[41] M. King, *What makes a successful corporate investigator – An exploration of private investigators attributes*, «Journal of Financial Crime», vol. 27.3 (2020), pp. 701-714; P. Gottschalk, M. Tcherni Buzzeo, *Reasons for gaps in crime reporting: The case of white-collar criminals investigated by private fraud examiners in Norway*, «Deviant Behavior», vol. 38.3 (2017), pp. 267-281.

[42] T.A. Hemphill, F. Cullari, *Corporate governance practices: A proposed policy incentive regime to facilitate internal investigations and self-reporting of criminal activities*, «Journal of business ethics», vol. 87.1 (2009), pp. 333-351.

[43] K.J. Hopt, *Internal Investigations, Whistleblowing and External Monitoring, Comparative Experiences, Economic Insights, Findings from Corporate Practice*, «European Corporate Governance Institute-Law» Working Paper No. 574 (2021).

[44] D.M. Uhlmann, *Deferred prosecution and non-prosecution agreements and the erosion of corporate criminal liability*, «Maryland Law Review», vol. 72.4 (2013), pp. 1295-1344.

sectors[45], and pass the criminal liability to the organisation, often resulting in the decision makers and accountable officers evading any personal detriment.

From the perspective of the regulators, having these companies conduct their own internal investigations and disclose the results to the relevant agency is argued to lend considerable assistance to the government's own impending or ongoing investigations. The results of internal investigations may support in identifying pathways regulators were otherwise unaware of, and utilises the corporations extensive resources while shifting the financial burden from the public purse[46].

Notwithstanding, following serious criminal conduct the ability of corporations to reduce their own liability, and to significantly influence the direction and focus of any subsequent investigation, is not without concern. Internal investigations are privately structed and lack sufficient oversight or enforceable regulation, with the significant control of the process resting within the hands of the corporation suspected of wrongdoing[47]. This lack of oversight provides a perverse incentive to discourage meaningful internal investigations as such efforts risk identifying wrongdoing that law enforcement or regulators would otherwise be unaware of[48].

In addition, there exists a disproportionate lack of sanction and accountability placed on large organisations following criminal resolution in comparison to smaller organisations and individuals without the substantial resources available to large corporations[49]. This risks creating a dual application of criminal law whereby smaller actors with less potential for causing serious harm hold a higher risk of more meaningful or impactful consequences for wrongdoing, as opposed to large multinational corporations who may levy their considerable resources to reduce their own liability, despite the significant and wide-ranging harm caused.

[45] B.L. Garrett, (2007), *Structural reform prosecution*, «Virginia Law Review», vol. 93 (2007), pp. 853-957.

[46] S.W. Buell, *Capital Offenses: Business Crime and Punishment in America's Corporate Age* «SSRN», September 16, 2016, available at: https://ssrn.com/abstract=2840042.

[47] B.A. Green, E.S. Podgor, *Unregulated internal investigations: Achieving fairness for corporate constituents*, «Boston College Law Review», vol. 54 (2013), pp. 73-126.

[48] S. Patterson, *Co-opted Cooperators: Corporate Internal Investigations and Brady v. Maryland*, «Columbia Business Law Review», vol. 2021.1, pp. 417-471.

[49] D.M. Uhlmann, *Deferred prosecution and non-prosecution agreements and the erosion of corporate criminal liability*, cit., pp. 1301-1302.

One significant difference between private internal investigations into wrongdoing and public policing, is the range of legal tools available to the investigators. While regulators and public policing bodies are endowed with the power of the law in order to investigate, and may follow leads and compel the corporation to provide explanations and evidence, no corresponding power exists within the private policing sphere, nor does there exist an equivalent sanction for dishonesty, deceit, or obscuring information. Accordingly, this lack of enforceable candour presents a risk to any internal investigation undertaken on behalf of public enforcement bodies. In short, for internal investigations to be of value there must be a belief that they are undertaken openly, honestly, conducted with integrity, and that all findings are disclosed to the policing agency, including the detection of other wrongdoing (the spill-over effect).

While public police, such as regulators, may impose sanctions on the organisation or pass the information to prosecutors in order to consider criminal liability, this is not a function shared by those conducting internal investigations, rather, their role is to establish facts and advise clients on what to do next[50].

As such, by engaging in private policing as a form of internal investigation into wrongdoing, as opposed to public disclosure resulting in public policing and potential regulatory intervention, the company empower themselves with the authority to conceal their wrongdoing, and consequentially, to evade resultant sanctions. Where the company do undertake self-investigations and disclose wrongdoing, they are able to reduce the impact of the transgressions through framing and directing the investigations, obscure other wrongdoing that a public body may otherwise have detected during an investigation, and regardless, through cooperation are able to substantially reduce any potential sanctions and liability.

In effect, when organisations are empowered with the authority to escape consequences for their deviant or criminal actions, and indeed may profit from them while shielding themselves from public scrutiny or reputational harm, then they may be emboldened to undertake similar courses of actions again, understanding that the risks of detection are minimal[51].

[50] P. Gottschalk, *Private policing of white-collar crime: case studies of internal investigations by fraud examiners*, «Police Practice and Research», vol. 21.6 (2020), pp. 717-738.
[51] O. Engdahl, *White-collar crime and first-time adult-onset offending: Explorations in the concept of negative life events as turning points*, «International Journal of Law, Crime and

4. The Response Phase

Finally, the response phase addressed the conduct of organisations in shaping the regulatory and accountability landscape following the criminal conduct, and when this conduct has been detected.

4.1 Firms' Accountability for Corporate Crime

Reflective of corporate personhood, large multinational corporations are often treated as a single entity, with corresponding singular responsibility for criminal or administrative offences that are undertaken in the course of pursuing corporate aims.

Yet, it must be remembered that the origins of corporate personhood is reflective of the need for corporations to undertake actions that only humans had been endowed with to that point in history. Corporate personhood became a functional necessity and response to growing organisational authority, and therefore, for corporations to operate effectively, they had to be able to undertake conducts that only persons had been authorised to take to that point, by example, to engage in contractual relationships, to own property, to enforce legal rights, and to have legal rights enforced against them.

This does not make humans and corporations one and the same. Legal personhood is not the same as personhood, and it is misguided to treat them as interchangeable. Exemplified by Shylock in the Merchant of Venice in his impassioned appeal to express the shared aspects of humanity in response to the antisemitic abuse suffered, he states:

> «Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions? Fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer, as a Christian is? If you prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die? And if you wrong us, shall we not revenge?»[52].

These are features that are shared in the basic exercise of humanity, and the basic features of personhood. If you cut us, we bleed; if you tickle us, we laugh; and if you poison us, we are harmed. We are endowed with passions, affections, and we respond autonomously to injustice. These

Justice», vol. 43.1 (2015), pp. 1-16.

[52] W. Shakespeare, *The merchant of Venice*, Yale University Press, Hartford 2008, Act 3, Scene 1.

are qualities that make us human but are not shared by organisations or corporations.

While corporate personhood may be a practical necessity, it is not the same as exercising autonomous decision-making capability, and as such, it is necessary to question the extent to which corporate personhood should shield decision makers from accountability for legal transgressions.

Separate corporate personhood is often a shield deployed by organisational members as a means to evade accountability for deliberate wrongdoing, or acting against the interests of society and against their own espoused CSR principles.

In practice, this creates a dual level of accountability – one for individuals who transgress against civil or criminal standards, and another for organisations, allowing those behind orchestrating schemes to avoid accountability.

Despite the limited liability of organisational members, corporations are increasingly attempting to further limit their own liability following wrongdoing. This is done in no small part through the abuse of the international legal systems, whereby large and powerful corporations are able in some instances to decide the jurisdiction that oversees their cases, favouring legal environments less likely to impose sanctions. This acts as a further disconnect between the standards applied to individuals, and those applied to corporations.

By some example is the actions of the oil company Texaco, and their operations in Ecuador. During the 1960s, Texaco began drilling operations in the Amazon causing significant and widespread environmental destruction, including "swimming pool-sized waste pits of oil" in the vicinity of their works. For decades, pollution flowed freely into rivers and streams used by the Indigenous population for drinking water. As could be reasonably foreseen, this caused cancers of the stomach, liver and throat which reportedly became more common in the region, as did childhood leukaemia[53]. During October 2000, the American multinational energy corporation Chevron acquired Texaco.

In 1993, an American lawyer and public defender in Washington, Steven Donziger, joined a legal team investigating reports of pollution in Ecuador. Thanks to his efforts a landmark 2011 decision was reached by the

[53] A.K. Hurtig, M.S. Sebastián, *Epidemiology vs epidemiology: the case of oil exploitation in the Amazon basin of Ecuador*, «International journal of epidemiology», vol. 34.5 (2005), 1170-1172.

Ecuador courts that ordered Chevron to pay $9.5bn in damages to people blighted by decades of polluted air and water[54]. Not only has Chevron denied liability but also it has never paid up, claiming «shocking levels of misconduct» and fraud by Donziger and the Ecuadorian judiciary[55].

During the resulting and ongoing Kafkaesque legal battle in the United States, Donziger was accused of contempt of court, a misdemeanour offense, for interfering with justice where, after that Chevron was granted seizure of his laptop and mobile phone including all of the privileged attorney information. During the resultant appeal on this point, Donzinger was placed under house arrest in August 2019 and was detained at home for more than 800 days before being sentenced to six-months imprisoned [56]. The company's formal position on that is that «Donziger has no one to blame but himself for his problems»[57].

The Donziger case is a clear demonstration as to the power and authority wielded by large corporations, and their ability to resist accountability. Despite their publicly stated CSR aims, there remains a steadfast reluctance to accept responsibility for illegality and harm, however, maintain the arguments that regulation benefits from being light touch and self-enforceable in character.

4.2 Avoidance of Criminal Sanctions

Influence of regulatory systems and processes do not simply extend to attempting to avoid detection or accountability prior to the identification of criminal behaviours, but also extend to sanctions available to be imposed upon corporations that are not similarly applied to other societal actors. One such example is the use of deferred prosecution agreements (DPAs), otherwise known as corporate settlement agreements.

A DPA is a form of non-trial resolution that allows an agreement between a company found to have broken the law, and the prosecuting au-

[54] S. Romero, C. Krauss, *Ecuador Judge Orders Chevron to Pay $9 Billion*, «New York Times», February 14, 2011, available at: https://www.nytimes.com/2011/02/15/world/americas/15ecuador.html.

[55] O. Milman, *The lawyer who took on Chevron – and now marks his 600th day under house arrest*, «The Guardian», March 28, 2021, available at: https://www.theguardian.com/us-news/2021/mar/28/chevron-lawyer-steven-donziger-ecuador-house-arrest.

[56] E. Helmore, *Lawyer Steven Donziger gets six-month sentence for contempt in Chevron battle*, «The Guardian», October 01 2021, available at: https://www.theguardian.com/us-news/2021/oct/01/steven-donziger-lawyer-sentenced-contempt-chevron .

[57] O. Milman, *The lawyer who took on Chevron – and now marks his 600th day under house arrest*, cit.

thority, to resolve the matters without the requirement for a full criminal trial[58]. In effect, a DPA is a way to impose a term of probation upon a corporation without a conviction by enabling a prosecutor to bring charges but then agree to hold them in abeyance pending the organisations successful completion of certain provisos in the agreement for a set period[59].

While some scholars highlight the virtues of DPA's, arguing they are, «simply a prosecutorial tool used to avoid lengthy and costly trials with little hope of true remorse, accountability, reintegration and rehabilitation for participating stakeholders»[60], others contend DPA's provide a mechanism for corporations to negotiate their way out of the criminal process[61]. In essence, while DPA's may limit potential "corporate death" that otherwise successful prosecutions may result in, they lack effective transparency as the prosecutor, when applying to the court for the grant of a DPA, may cherry pick and submit evidence they consider supports their application, while omitting other evidence that may suggest it is not in the interests of justice to enter into a DPA in the first place, whereby pertinent information is held from public scrutiny.

Of significant importance, the existence of DPA's may contribute towards fostering criminogenic environments by perpetuating a culture of paying to undertake crimes, while shielding individuals from criminal liability. From a practical perspective, corporations relying on access to agreements may undertake a cost-benefit analysis and consciously decide to engage in criminal conduct following the evaluation of future costs of potential agreements should they be caught. Recent studies suggest that imposing large fines on corporations does not actually deter corporate crime and that where negotiated resolutions are used, that corporate recidivism rates remain disturbingly high[62]. By example the release of the

[58] C. Grasso *et. alii*, in Council of Europe - Economic Crime and Cooperation Division, *Liability of Legal Persons for Corruption Offences* (May, 2020), COE, Strasbourg 2020, available at: https://rm.coe.int/liability-of-legal-persons/16809ef7a0 .
[59] C. Grasso, *Peaks and troughs of the English deferred prosecution agreement: The lesson learned from the DPA between the SFO and ICBC SB Plc*, «Journal of Business Law», vol. 5 (2016), pp. 388-408: 393.
[60] D. McStravick, *Deferred prosecution agreements and the restorative justice paradigm: Justice restored or corporate cop out?*, in N. Ryder, L. Pasculli (Eds.), *Corruption, Integrity and the Law. Global Regulatory Challenges*, Routledge, London 2020, pp. 113-126: 113.
[61] C. King, N. Lord, *Negotiated Justice and Corporate Crime: The Legitimacy of Civil Recovery Orders and Deferred Prosecution Agreements*, Palgrave-McMillan-Springer, Cham 2018.
[62] N. Werle, *Prosecuting Corporate Crime When Firms are Too Big To Jail: Investigation, Deterrence, and Judicial Review*, «Yale Law Journal», vol. 128 (2018), pp. 1366-1438.

FinCEN files[63] highlight the willingness of financial institutions to continue to repeatedly engage in conduct that is the subject of DPAs, and to continue to profit from powerful and dangerous clients, even after paying significant fines for doing so[64].

Therefore, it may be understood that the existence and use of DPA's following the detection of criminality fails to provide an effective deterrent to not only other corporate actors from engaging in the same or similar conduct, but fails to prevent the company subject to the DPA from further engaging in the same conduct, in part by virtue of shielding the corporate members such as the board or individual actors within the corporation from criminal liability. Corporations are not, in practice, autonomous actors, able to undertake decision making separate and independent from that of its members, however, while the perpetrators of the misconduct often evade sanction, wrongdoers may lack a sense of personal responsibility as it is the corporation that is made the subject of enforcement.

The use of DPA's highlight a key problem in the context of corporate crime, that is, the lack of sense of individual culpability among employees. If the personal liberty of individuals within the company was at stake through personal responsibility resulting in incarceration, or if they could face being disbarred from working in similar roles or sectors for a period of years, that would be a more immediate deterrent to the members[65].

Therefore, it is in the continued interests of corporate actors to limit their own personal liability for wrongdoing in favour of opaque financial sanctions levied against the corporation, which do not provide meaningful deterrence to engaging in crime. Through lobbying practices and forms of capture, corporate actors are able to shape the post-crime responses of society to their actions, and levy their significant power and resources to enable them to continue to engage in criminality safe in the knowledge that, in the event they are caught, the resultant sanction will in all probability be financial in character, and the potential benefits of

[63] ICIJ, *FinCEN Files*, «International Consortium of Investigative Journalists», Official Website, 2020, available at: https://www.icij.org/investigations/fincen-files/ .

[64] S. Holden, *The FinCEN Files: Leakers and Whistleblowers Combating Economic Crime*, «The Corporate Social Responsibility and Business Ethics Blog», 30 September, 2020, available at: https://corporatesocialresponsibilityblog.com/2020/09/30/fincen/ .

[65] D. Johnson, *What Are the Merits of Taking a Hybrid Regulatory Approach Toward the Enforcement of Corporate Financial Crime in the United Kingdom and United States of America?*, «Journal of White Collar and Corporate Crime», vol. 3.1 (2022), pp. 23-32.

engaging in criminal conduct may outweigh the liabilities if their conduct is uncovered.

5. Whistleblowing

In an environment that allows corporations to weaponise their CSR commitments in order to create criminogenic environments categorised by insulating organisations from transparency, regulation, and accountability, this raises the salient question regarding how to respond in order to further encourage and implement effective corporate citizenship.

And it is in this capacity that whistleblowing is able to expand across all three of the discussed stages, pre-crime, silence, and response, and provide an effective means of piercing the veil of secrecy, in doing so empowering societal actors to address the conducts of delinquent organisations.

The relationship between the regulators and the regulated is beset by an asymmetry of knowledge and resources, with the regulated knowing much more about the behaviour intentions and conduct then it is possible for the regulator to know[66].

One critical means of piercing the veil of secrecy for obscured corporate wrongdoing is the disclosures of whistleblowers. While whistleblowing has no universally agreed definition, it is broadly understood as «an organisational member's (former or current) disclosure of illegal, immoral, or illegitimate practices under the control of their employers to persons or organizations that may be able to effect action»[67]. Within this context, whistleblowing is the act of an employee who reports or discloses information on illegal activities perpetrated by or that occur within their organisation.

The Council of Europe has recognized that the act of reporting represents the exercise of the freedom of expression and that whistleblowers contribute to strengthening transparency and democratic accountability in our democratic systems. Whistleblowing is about protecting human rights and the rule of law in a democratic society and about making our communities a safer and better place[68].

[66] A. Savage, R. Hyde, *The response to whistleblowing by regulators: a practical perspective*, «Legal Studies», vol. 35.3 (2015), pp. 408-429.

[67] J.P. Near, M.P. Miceli, *Organizational dissidence: The case of whistle-blowing*, «Journal Of Business Ethics», vol. 4.1 (1985), pp. 1-16.

[68] Council of Europe, *Protection of Whistleblowers. Recommendation CM/Rec(2014)7*

Increasingly, whistleblowers are expected to perform an internal regulatory function in order to detect, alert to, and prevent instances of corporate and organisational wrongdoing. This represents a large shift towards decentralised policing[69]. In this way, whistleblowing becomes a pro-social activity with the beneficiaries being society, and are therefore recognised as performing a «societal control mechanism over organizational misdeeds»[70].

Importantly, from the corporations perspective, they pose a significant benefit to the organisation in identifying and alerting to wrongdoing from rogue actors or simple mistakes. «They are one of the least expensive and most efficient sources of feedback about mistakes the firm may be making», and as such are an asset to protect the organisation from others and itself[71].

Critically, the benefits and impacts of whistleblowing do not extend to any single of the three areas discussed in this chapter, but rather, they span across each stage. In the context of the pre-crime environment, whistleblowers, as knowledgeable insiders, are equipped to draw attention to immoral forms of conduct such as when organisations attempt to secretly lobby or fund campaigns that are otherwise against their publicly stated aims, highlighting these disjuncture's and decoupling processes, and therefore making organisations accountable to their members and stakeholders.

During the silence phase, potential whistleblowers may become aware of criminal conduct that has occurred, and attempted cover-ups or other efforts to evade detection, by example, bringing the illegal actions to the notice of regulators, or directing auditors to files that have been deliberately excluded from inspections as they demonstrate wrongdoing. In this way, whistleblowers are able to combat cultures of secrecy and hiding wrongdoing by bringing such actions to light.

and Explanatory Memorandum, COE, Strasbourg 2014, available at: https://rm.coe.int/16807096c7.

[69] O. Engdahl, B. Larsson, *Duties to distrust: The decentring of economic and white-collar crime policing in Sweden*, «British Journal of Criminology», vol. 56.3 (2016), pp. 515-536.

[70] M.P. Miceli, J.P. Near, *Standing Up or Standing By: What predicts blowing the whistle on organizational wrongdoing?*, in J.J. Martocchio (Ed.), *Research in personnel and human resources management*, Emerald Group Publishing Limited, Bingley 2005, pp. 95-136.

[71] T.M. Dworkin, E.S. Callahan, *Internal whistleblowing: Protecting the interests of the employee, the organization, and society*, in «American Business Law Journal», vol. 29 (1991), pp. 267-308: 299.

Finally, during the response phase, whistleblowers are able to bring stakeholders, regulators, and the publics attentions to organisations not acting in good faith, or engaging in further criminal conduct, by example, releasing documents that demonstrate a continuation of actions subject to a DPA.

In the vast majority of cases individuals blow the whistle "internally" informing employers, possibly using anonymous channels, about the illicit activities they have discovered[72]. In others, they consider it necessary to contact the appropriate authorities or even to make the wrongdoing public[73].

Accordingly, the policies and support offered to whistleblowers, both before and after disclosures, speak to the value of the corporate character in their approaches to preventing and detecting internal wrongdoing, and the efficacy of self-regulatory policies.

Corporations who are serious about their CSR commitments, as opposed to engaging in window dressing, will proactively encourage internal disclosures as a means of preventing wrongdoing at the earliest possible instance, implementing channels for anonymous reporting and comprehensive systems of whistleblower protections from retaliation.

Recognising the regulatory role whistleblowers play and the existential threat they represent to bad faith actors, organisations frequently engage in public processes of retaliation against disclosing parties, for example intimidation, harassment, dismissal or violence by their fellow colleagues or superiors. Fears of retaliation continue to act as a strong deterrent to disclosing wrongdoing[74], and despite the implementation of legislative protections, employers have expressed that in order to discourage whistleblowers, they are prepared to engage in retaliation and pay any subsequent fine[75].

[72] P. Mazerolle, A.J. Brown, *Support for whistleblowing among managers: exploring job satisfaction and awareness of obligations,* in A.J. Brown (Ed.), *Whistleblowing in the Australian Public Sector. Enhancing the theory and practice of internal witness management in public sector organisations*, ANU Press, Canberra 2008, pp. 165-180.

[73] P.B. Jubb, *Whistleblowing: A restrictive definition and interpretation*, «Journal of Business Ethics», vol. 21.1 (1999), pp. 77-94.

[74] R. Kölbel, N. Herold, *Whistle-blowing from the perspective of general strain theory*, «Deviant Behavior», vol. 40.2 (2019), pp. 139-155.

[75] W. Bourdon-W. Bourdon, *Shall whistleblowers' protection be extended?* (video), «The Corporate Social Responsibility and Business Ethics Blog», December 17, 2020, at 31':12'', available at: https://corporatesocialresponsibilityblog.com/2020/12/17/bourdon-whistleblowers-protection/.

Accordingly, corporations may attempt to point to their whistleblower policies and reporting channels to legitimise their sincerity to internal and self-regulation, whereby continuing to lobby and advocate for light touch regulatory functions, however in practice create hostile environments that embed a culture of fear should a party blow the whistle. In this manner, corporations are able to attempt to further limit detection methods, resist transparency, and nurture a culture that rewards wrongdoing and risk taking, whereby they may further create a criminogenic environment.

One such example may be seen from 2016 when the Chief Executive of Barclays Bank, Jes Staley, attempted to unmask an internal whistleblower, who send a letter through the internal anonymous channel raising concerns about the recruitment of a CEO's friend (Tim Main) as head of the bank's financial institutions group in New York. Staley attempted twice to use Barclay's internal security team to track down the authors of two anonymous letters sent to the board and a senior executive at the bank, including receiving support from US law enforcement to attempt to identify the whistleblower.

When this came to light, the Financial Conduct Authority and Prudential Regulation Authority jointly fined Staley £642,430 for «failing to act with due skill, care and diligence» and «undermining confidence in Barclays' whistleblowing procedures»[76]. Barclays Bank itself escaped financial penalties in the UK, however, on December 2018, Barclays was fined $15m by the New York State Department of Financial Services for the corporate failures.

6. Conclusion

Within the broad context of research into the impact and implications of CSR on corporate conduct, and how positive expressions of CSR may work to establish beneficial outcomes for society, there has been respec-

[76] Financial Conduct Authority, *FCA and PRA jointly fine Mr James Staley £642,430 and announce special requirements regarding whistleblowing systems and controls at Barclays*, «Financial Conduct Authority Official Website», May 11 2018, available at: https://www.fca.org.uk/news/press-releases/fca-and-pra-jointly-fine-mr-james-staley-announce-special-requirements#:~:text=Mr%20Staley%20failed%20to%20act,by%20Barclays%20in%20June%202016.&text=%E2%80%9CMr%20Staley%20breached%20the%20standard,confidence%20in%20Barclays'%20whistleblowing%20procedures.

tively little focus examining the conceptual links between CSR and the establishment and perpetuation of criminogenic environments.

This chapter has taken the opportunity to outline methods in which CSR may be weaponised in order to legitimise political interference, and to foster regulatory environments that not only fail to effectively respond to corporate crime, but through resisting calls for enhanced transparency and accountability, including through meaningful regulation, may actively enable and encourage criminal conduct.

Through the abuse of lobbying of political and regulatory actors, under the guise of political CSR and attempting to better shape the regulatory environment to societies wider benefit, corporate actors are able to shape both the crime prevention and response regulatory landscapes, including resisting detection and enforcement mechanisms.

Accordingly, as a means of combating this abuse, whistleblowers have the potential to pierce the veil of secrecy and bring stakeholders and the public's attention to corporate misdeeds before, during, and after, criminal conduct whereby increasing the risk of detection. This increased risk of detection of immoral or criminal conducts at all stages in the process acts to disincentivise corporate criminal behaviour, aggressive and secretive lobbying, decoupling between policy and action, and attempting to evade liability for wrongdoing.

Part III

Chronicles from a "Law of Sustainable Corporations" Course

Sustainability Disclosures by U.S. Corporations: Comparison of CSR Reports and SEC 10-K Filings (Introducing Eight Selected Field Studies by Law Students of the University of Padova, School of Law)

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A special contribution to this book is provided by eight Padova law students who attended the Sustainable Corporations course held by Professors Alan Palmiter and Maurizio Bianchini during the Spring semester of academic year 2020/2021 at the Padova University's School of Law. The final assignment of this course called on students to prepare a research paper on an actual U.S. public corporation, comparing two key corporate disclosure documents: (1) the corporation's Corporate Social Responsibility (CSR) report; and (2) the corporation's annual report on Form 10-K filed with the U.S. Securities and Exchange Commission (SEC).

[1] Elena De Pieri prepared the first draft of this introduction and edited the eight student essays to conform with the publishing guidelines for this book.

Both disclosure documents are intended to provide corporate transparency. The CSR Report is voluntary and generally communicates information about the corporation's activities and performance with respect to the corporation's environmental, social, and economic impacts. The Form 10-K is a mandatory annual report required by the SEC containing data and information related to the corporation's operations and financial performance. While the Form 10-K is generally meant to inform investors, the CSR Report is typically aimed at the public, including consumers of the corporation's products and communities where the corporation operates.

The assignment was stated as follows:

> «Please identify an actual US public company's recent online CSR report (it may have a different name, such as 'Sustainability Report' or 'Corporate Accountability Report,' but should be similar to the Cisco CSR report referenced in the course materials. Then find the company's most recent 10-K filing (annual report) with the SEC».
>
> «Please summarize three aspects of the CSR report related to three sustainability topics of your choice and the treatment of these three topics in the 10-K's Risk Factors/MD&A section. Include a link to the URL for each document. Then critique the methodology, coverage, and contents of these two disclosure documents with respect to these three topics based on what you've learned in this course, with references to relevant course materials. The essay should be between 1000-1200 words in length».

In their papers, the students focused on such matters as employee welfare, workplace diversity and inclusion (especially women representation), and strategies to assess the company's societal and environmental impact, including its carbon footprint, water use, and its role in food waste. Among the companies selected by the students were United Parcel Service, Johnson & Johnson, Nike, Nvidia, FedEx, Kraft Heinz, and Walmart.

Generally, students found inconsistencies between the two documents. While the CSR reports generally described and offered details about the environment, social, and governance (ESG) strategies of each corporation, the same company's Form 10-K typically did not provide any meaningful discussion of these ESG aspects of the company's operations and performance, except to refer vaguely to environmental matters, or employee and worker welfare.

Many students concluded that ESG is still in its infancy – at least as of 2020, the year covered by their reports. Sustainability is not yet integrated into the operations and finances of large US corporations, nor does it seem to be relevant to investors in their valuation of these corporations and their securities. That is, the commitment by large US corporations to ESG issues seemed questionable, given what the studied corporations said to investors in their annual SEC filings compared to what they said to the public in their CSR reports.

The sequence of the following eight papers is organized according to the alphabetical order of each student's last name.

United Parcel Service, Inc.

Marco Bottin
Student, University of Padova, School of Law

Keywords: UPS; ESG; sustainability; shareholder primacy model

1. Introduction

«United Parcel Service, Inc. ("UPS"), founded in 1907, is the world's largest package delivery company and a premier provider of global supply chain management solutions. We offer a broad range of industry-leading products and services through our extensive presence in North America; Europe; the Indian sub-continent, Middle East and Africa ("ISMEA"); Asia Pacific and Latin America. Our services include transportation, distribution, contract logistics, ground freight, ocean freight, air freight, customs brokerage and insurance. We operate one of the largest airlines in the world, as well as the world's largest fleet of alternative fuel vehicles. We deliver packages each business day for approximately 1.7 million shipping customers to 11.8 million delivery customers in over 220 countries and territories. In 2020, we delivered an average of 24.7 million packages per day, totalling 6.3 billion during the year. Total revenue in 2020 was $84.6 billion»[1].

[1] https://www.google.com/aclk?sa=l&ai=DChcSEwiGjObLuf35AhUXzncKHUvwAik-YABABGgJlZg&sig=AOD64_24oB-jZoA35vkIoVmDZXV8ks-8bA&q&adurl&ved=2a-hUKEwiKotvLuf35AhUy_7sIHXrrBsoQ0Qx6BAgFEAE.

2. Usage of alternative fuels

2.1. Corporate Sustainability Report[2]

The issue of alternative and renewable fuels is being approached from a GHG emissions reduction perspective. Talking about the ground fleet only, in 2019 UPS bought 135 million gallons of alternative fuels, (about 24 % of total ground fuel usage). A purchase 250 million gallons of renewable natural gas (RNG) is planned over the next several years, including the largest-ever single U.S. investment in RNG. The company 2025 goal in this area is to achieve 40% alternative fuel as a percentage of total ground fuel. In the last decade, about 1 billion USD was invested in the field of renewable and alternative fuels.

2.2. Form 10-K[3]

There is just a single mention of alternative fuels and that is just for highlighting how UPS has the world's largest fleet of alternative fuel vehicles. Apart from that, fuel costs are only discussed in terms of economic impact on the operations with an in-depth analysis of how to counteract changes of prices.

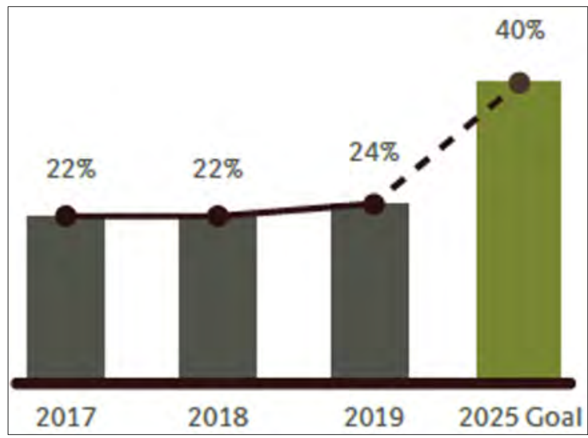
The systems adopted are the implementation of indexed fuel surcharges and hedging transactions (although this is made from time to time, not as a standard practice).

The challenge is avoiding the adverse impact of higher fuel costs on operating results, even though UPS itself admits there can also be no assurance that hedging transactions will be effective in protecting from changes in fuel prices.

Moreover, disruption in fuel supplies as a result of war, weather-related events or natural disasters, actions by producers are factors beyond UPS's control and a recognized threat to the company profitability.

[2] UPS Sustainability Report (2019), available at: https://sustainability.ups.com/media/2019-progress-report.pdf.

[3] UPS's SEC Form 10-K (2021), available at: http://www.investors.ups.com/static-files/cb6195d8-7129-4ea3-a616-329e8023e1ae.



from: UPS's SEC Form 10-K (2021)

The difference on how the issue is being treated at first glance may seems just one of "competence": 10-K is more focused on the financial side, as it should be expected by a SEC filing. However, one could wonder if such a commitment to alternative energies could actually withstand a negative economic situation for the company (as it was the case with COVID). The pledge on expanding the fleet with vehicles running on alternative fuels is making this less and less a risk, as it would not be possible to operate those vehicles on "normal" fossil fuel, leaving only room to a possible slowdown on reaching the set goal. Something that should be better analysed (or rather, better shown) is the aggregate mix of alternative fuel: given how broad the category is, the effectiveness on reducing GHG emissions could vary greatly on the basis of what is actually chosen.

3. Employee welfare and benefits (especially pensions)

3.1. Corporate Sustainability Report

Aside from the mention of the sum of 40 billion USD (which comprises the current total spent on employee compensation, benefits and training), there is no mention of anything related to an increased commitment of UPS in the field of wages and other benefits. There is a mention which may seems relevant: "We support employees with programs like college scholarships for employees' children, mortgage assistance, preschool

funding for single parents, and loans for recent immigrants.”. However, this is from an interview with a long-time Canadian supplier of UPS.

3.2. Form 10-K

There are mentions of the collective bargaining agreements in which UPS employees are a part of: 327,000 employees employed are under a national master agreement and various supplemental agreements with local unions affiliated with the Teamsters, of which approximately 11,000 are employees of UPS Freight. Moreover 3,000 pilots are employed under a collective bargaining agreement with the Independent Pilots Association (“IPA”).

Pension Fund	EIN / Pension Plan Number	Pension Protection Act Zone Status		FIP / RP Status Pending / Implemented		(in millions) UPS Contributions and Accruals			Surcharge Imposed
		2020	2019			2020	2019	2018	
Central Pennsylvania Teamsters Defined Benefit Plan	23-6262789-001	Green	Green	No	NA	$ 57	$ 48	$ 44	No
Employer-Teamsters Local Nos. 175 & 505 Pension Trust Fund	55-6021850-001	Red	Red	Yes	Implemented	16	14	13	No
Hagerstown Motor Carriers and Teamsters Pension Fund	52-6045424-001	Red	Red	Yes	Implemented	11	10	9	No
I.A.M. National Pension Fund / National Pension Plan	51-6031295-002	Red	Green	Yes	Implemented	44	41	38	No
International Brotherhood of Teamsters Union Local No. 710 Pension Fund	36-2377656-001	Green	Green	No	NA	161	142	129	No
Local 705, International Brotherhood of Teamsters Pension Plan	36-6492502-001	Yellow	Yellow	Yes	Implemented	120	113	104	No
Local 804 I.B.T. & Local 447 I.A.M.—UPS Multiemployer Retirement Plan	51-6117726-001	Yellow	Yellow	Yes	Implemented	124	112	116	No
Milwaukee Drivers Pension Trust Fund	39-6045229-001	Green	Green	No	NA	53	48	42	No
New England Teamsters & Trucking Industry Pension Fund	04-6372430-001	Red	Red	Yes	Implemented	140	120	121	No
New York State Teamsters Conference Pension and Retirement Fund	16-6063585-074	Red	Red	Yes	Implemented	135	119	108	No
Teamster Pension Fund of Philadelphia and Vicinity	23-1511735-001	Yellow	Yellow	Yes	Implemented	85	74	66	No
Teamsters Joint Council No. 83 of Virginia Pension Fund	54-6097996-001	Green	Green	No	NA	82	75	69	No
Teamsters Local 639—Employers Pension Trust	53-0237142-001	Green	Green	No	NA	74	68	61	No
Teamsters Negotiated Pension Plan	43-6196083-001	Green	Green	No	NA	40	37	34	No
Truck Drivers and Helpers Local Union No. 355 Retirement Pension Plan	52-6043608-001	Green	Green	No	NA	27	24	22	No
United Parcel Service, Inc.—Local 177, I.B.T. Multiemployer Retirement Plan	13-1426500-419	Red	Red	Yes	Implemented	107	100	95	No
Western Conference of Teamsters Pension Plan	91-6145047-001	Green	Green	No	NA	1,138	939	868	No
Western Pennsylvania Teamsters and Employers Pension Fund	25-6029946-001	Red	Red	Yes	Implemented	37	34	31	No
All Other Multiemployer Pension Plans						104	102	72	
					Total Contributions	$ 2,555	$ 2,220	$ 2,042	

from: UPS’s SEC Form 10-K (2021)

Additionally, there are approximately 1,600 airline mechanics who are covered by a collective bargaining agreement with Teamsters Local 2727.

Finally, approximately 3.400 of auto and maintenance workers who are not employed under agreements with the Teamsters are employed under collective bargaining agreements with the International Association of Machinists and Aerospace Workers.

Employees’ financial conditions improvement is not mentioned as a sustainability matter for UPS and while at a first glance it does not seems like UPS is engaging in any trade union crushing or exploitation of its employees (at least on the pension side), one is left to wonder if such an omission and the inclusion of “citizenship awards” isn’t a cheap way for UPS to escape this topic (but see below).

4. Policy on the role of a company in the society

4.1. Corporate Sustainability Report

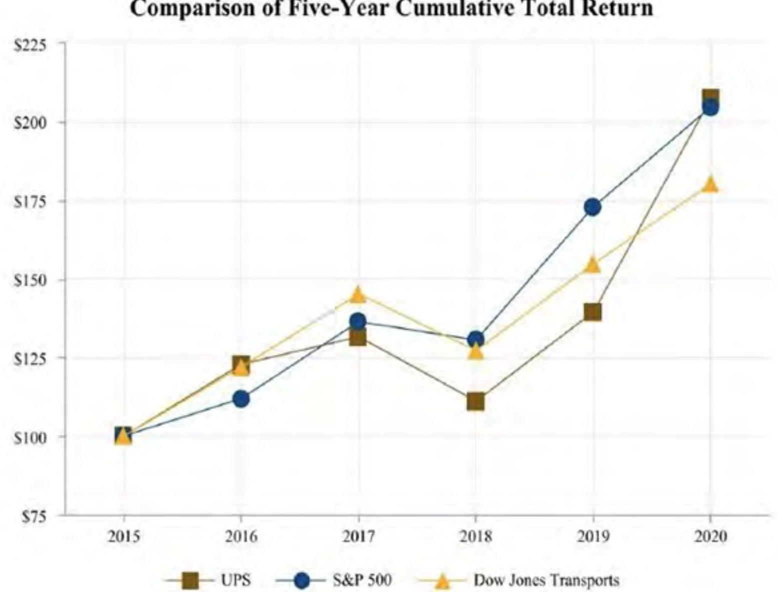
Although not mentioned explicitly by name, “Customer First, People Led, Innovation Driven” is part of the structure of the Report. In each section the measures which UPS has decided to adopt are listed, stating the progress towards certain goals or new targets adopted. An additional section on environmental sustainability is added at the beginning. There is no mention anywhere of shareholders, stock performance or dividends in the entire Report.

from: UPS’s Sustainability Report (2020)

4.2. Form 10-K

It is stated that UPS has adopted a “Customer First, People Led, Innovation Driven” strategy, aimed at improving financial performance, provide the best customer experience and benefit to shareowners. On January 24, 2021, UPS entered into a definitive agreement to divest UPS Freight business. This will allow UPS to be more focused on the core parts of its business, the one that drive the greatest value for shareholders. The transaction is expected to close during the second quarter of 2021. This

divestiture is expected to result in an improvement to operating margin and return on invested capital.



from: UPS's SEC Form 10-K (2021)

There appear to be a strong hypocrisy in defining the very same policy differently in what are supposedly two closely related documents. In my opinion, what should be considered prevalent is the 10-K form: UPS still believes in shareholder interest's primacy and around that objective creates a sustainability plan, which is instrumental to that. As already mentioned, a costly increment of employees' remuneration is nowhere to be seen, while a divestiture from a non-profitable industry, effectively shutting down a branch of the company, is present.

Johnson & Johnson Corp.

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Keywords: Johnson & Johnson 2019 "Health for Humanity" (CSR) Report; Johnson & Johnson 2019 Form 10-K; diversity; equity; inclusion; environment; shareholder wealth maximization model; CERES Roadmap 2030.

1. Introduction

The main aim of this paper is to spot and analyze the differences between the 2019 Johnson & Johnson Corporation's "Health for Humanity" (the "CSR") Report[1] and the 2021 Johnson & Johnson Corporation's Form 10-K[2].

We will focus on three main topics that both documents present, which are the following: (i) diversity, equity and inclusion; (ii) sourcing of raw materials; (iii) environment. We will conclude with a brief consideration about our findings.

[1] Available at: https://healthforhumanityreport.jnj.com/2019-health-for-humanity-report-summary-pdf.

[2] Available at: https://johnsonandjohnson.gcs-web.com/sec-filings/sec-filing/10-k/0000200406-21-000008.

2. Diversity, equity and inclusion

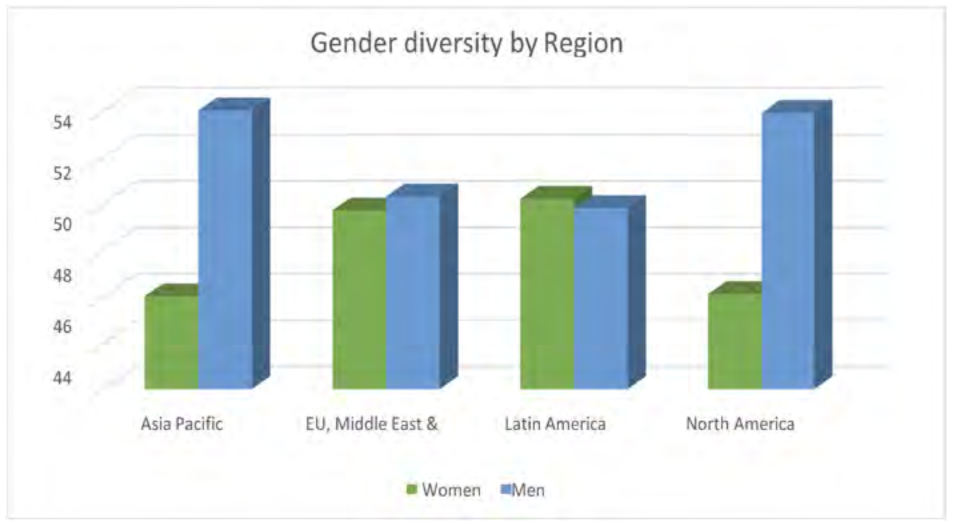
	10-K REPORT	**CSR REPORT**
Commitment	To workplace diversity and to cultivating, fostering, and advancing a culture of equity and inclusion.	To workplace diversity and to cultivating, fostering and advancing a culture of inclusion
Aim	Best performance of workers that, by being themselves, lead the company to success.	Solve today's complex health problems, with the differences of employees' background.
Effects	Accelerate the Company's efforts to advance a culture of inclusion and innovation; build a diverse workforce for the future; enhance business results and reputation.	Accelerate the Company's efforts to advance a culture of inclusion and innovation; build a diverse workforce for the future; enhance business performance and reputation.
Guidance	Internal and external insights; global best practices; continual employee feedback.	Examines how inclusion has been key driver for innovation stories on how employees, using inclusion and diversity, care also for costumers and consumers

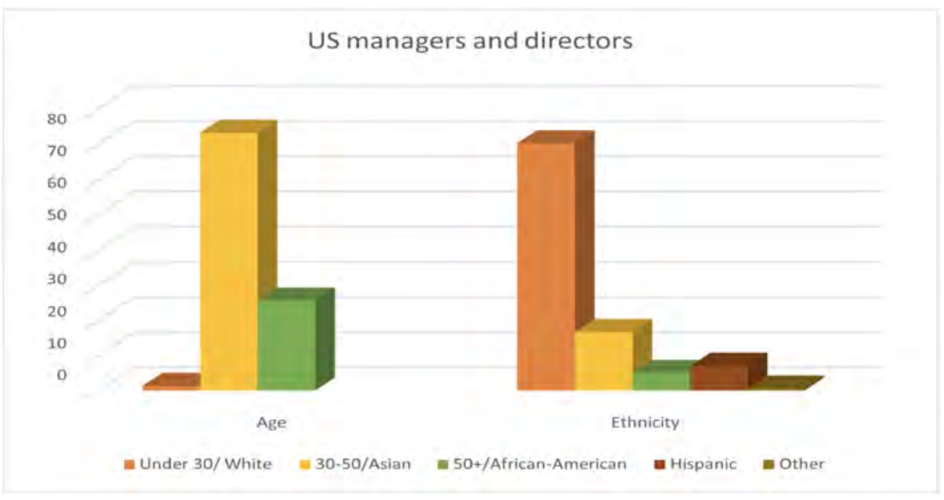
Even if academics[3] do not agree on the benefits of diversity and inclusion, these are cherished almost equally in both J&J's Reports. This would seem to indicate a great effort on the part of the company to make this its highlight. As a matter of fact, the gender gap has now been sur-

[3] See, *e.g.*: R.B. Adams, D. Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, «European Corporate Governance Institute (ECGI)», Finance Working Paper, No. 57/2004 (Oct. 2008), available at «SSRN»: https://ssrn.com/abstract=1107721, or http://dx.doi.org/10.2139/ssrn.1107721; W. Henisz, T. Koller, R. Nuttall, *Five Ways that ESG Creates Value*, «McKinsey Quaterly» (Nov. 14, 2019), available at: https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/five-ways-that-esg-creates-value ; J.W. Winter, *The Human Experience of Being-in-the-Board: A Phenomenological Approach*, «SSRN», November 3, 2018, available at SSRN: https://ssrn.com/abstract=3319392, or http://dx.doi.org/10.2139/ssrn.3319392, p. 4.

passed in this company: there is almost parity between men (53,8%) and women (46,2%) in managing roles.

But culture of inclusion does not stop to gender: age, ethnicity, etc. are the key in order to assert that that you foster it. And J&J fails to be as effective in these fields.





from: J&J 2020 CSR Report

3. Sourcing of raw materials

	10-K REPORT	**CSR REPORT**
Sources	Multiple	Sustainable
Effects	No material adverse effect on the financial results in case of unavailability	This supply chain affects biodiversity impacts on the planet, as well as human rights andfair labor conditions
How		Responsibility Standards forSuppliers outline; additional material-specificsourcing criteria for key commodities or materials ofconcern; partnerships with organizationsthat help define appropriate standards and controls in responsible sourcing
Which		**Palm oil:** thanks to the partnershipwith: WWF support forests, wildlife, long-term community wellbeing; Earthworm Foundation, increased transparency back tomill; **Wood-fiber**: thanks to thepartnership with Rainforest Allianceimplement Products Sourcing Criteria and improve supplier assessment; SupplyShift platformgiven to suppliers, improve the accuracy and efficiency in wood-fiber products sourcing; **Conflict minerals**: as requested by regulations, determine the use, country of origin and source of conflict minerals: Member of the Responsible Minerals Initiative, cross-industry organization that helps companies source conflict-free minerals.

The difference between the two paragraphs is self-evident. There is not a mere difference in the syntax of the sentence: the content is completely unlike.

Form 10-K cares for the financial stability, which is directly related to SWM and its primacy in a corporation. Paradoxically, as reported by Belinfanti and Stout[4], "shareholder value theory" has a narrow focus on the immediate future. This will lead the business to a possible financial crisis. So, if you're just worried about your stock price, you are engaged in a path toward failure.

CSR gives a complete analysis of the phenomenon: from the position of the corporation on the topic, to the measures taken in order to be as effective as possible in sourcing for raw materials. The project is ambitious: it does not only affect the corporation, but it is also imposed to suppliers. The tools used seem to be well suited to ensure the search for a sustainable resource, as shown by EcoVadis' assessments[5].

4. Environment

	10-K REPORT	**CSR REPORT**
Rules	U.S. international environmental protection measures: compliance with all environmental laws and regulation	
Commitment		To marshaling expertise, resources and partnerships; to reduce the environmental footprint of operations, products and extended supply chain while delivering BetterHealth for All
Effects	No material effect upon capital expenditures, cash flows, earnings competitive position.	Improvements in products across Pharmaceutical, Medical Devices,Consumer Health

[4] T. Belinfanti, L.A. Stout, *Contested Visions: The Value of Systems Theory for Corporate Law*, «Univ. Pennsylvania Law Review», vol.166.3 (2018), pp. 579-631.
[5] See https://ecovadis.com/.

How		Optimizing operations: more water/energy efficiency; reducing waste and lifecycle impacts of products; encouraging suppliers to make in their businesses and supply chains green, partnering with stakeholders to influence change on a broader scale;
Which		climate resilience water/waste management product sustainability

Even in this case the mismatch between the two approaches is obvious. Form 10-K is still rooted to the classical approach aimed at SWM. The compliance with environmental regulations is feasible since it does not impact company's earnings. The fact that this principle is still guarded is scary to me, since historically it became the justification for disregarding the need for a much faster transition to a non-carbon economy. On the other hand, the CSR gives full adherence to the environmental movement. There is convergence with W. Wagner's idea that sustainability disclosure should be viewed as a public good. If corporations share their sustainability practices, that will lead to better sustainability practices.

Plus, another key point is reaching out to stakeholders, as required by CERES Roadmap 2030, to bring wider change of mindset. These tools had a tangible effect on many levels, but the one with astonishing result is the continuous decrease of GHG emissions.

5. Conclusion

Johnson & Johnson's CSR Report is much more comprehensive, informative, innovative and proactive than the Form 10-K. As a matter of fact, two out of the three topics analyzed present totally divergent approaches. Thus, we can say with certainty that this corporation implements the so called "triple speak".

As A. Palmiter asserts, the main purpose of this approach can be traced back to opening up to as many options as possible in order to

attract a larger number of investors – from the one interested only in profits, to the one with a “green” soul – and benefit from it.

Nevertheless, J&J seems to be moving in the right direction. Compared to S. Benn *et alii*’s “phase model”, this company is in the so called “compliance step”. A way to get out from this deadlock is, as J. Winter believes, to take the distances from “agency theory” and aim for good governance.

How? By making administrators feel like they are fulfilling a greater purpose rather than just seeking for profit. Which, for J&J, could be to solve today’s health problems. Maybe, after all, the creation of the Covid-19 vaccine was the first move towards it. Only the time will tell.

In conclusion, even if some steps ahead have been made, there are many more to do in order for Johnson & Johnson to live up to its expectations. To be a leader between sustainable corporations some groundbreaking moral decisions must be made.

Nike, Inc.

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Keywords: Nike, Inc.; Sustainability; Ceres Roadmap 2030.

1. Introduction

Since 1964, Nike Inc. ("Nike") is an American multinational corporation ($37.4 billion), the world's largest supplier of athletic shoes and sports equipment. In the following paper, I will analyze the Nike's "Impact Report" (CSR report) for the FY 2019 and the last available Nike's Form 10-K for the FY 2020.

2. Employees

Nike works to have its employee base reflect its global community. It also continues to listen to its employees and invest in its "culture" to create a workplace where all employees feel valued and have opportunities for career growth.

2.1. Leadership matters

BOARD OF DIRECTORS		CY16	CY17	CY18	CY19
TOTAL		12	11	13	13
GENDER					
Female	%	25%	18%	23%	31%
	#	3	2	3	4
Male	%	75%	82%	77%	69%
	#	9	9	10	9

In 2019, the company maintained a sharp focus on building diversity at the most senior levels because they know increasing diversity of leadership is fundamental to progress. In addition, they also supporting early-career employees in their efforts to advance. They increased representation of women at the VP-level by 3 percentage points (p.p.) as the picture above shows .

2.2. Payment

Nike defines pay equity as equal compensation for women, men and all races/ ethnicities who undertake the same work at the same level, experience, and performance. In 2019, they released their results and have maintained a 1:1 pay *ratio* for men to women (globally) and white to U.S. In the U.S., they enhanced benefits to support the diverse ways their employees grow and care for their families.

2.3. Occupational health and safety

Nike aim to provide safe, hygienic, and healthy workplaces across its value chain, both in its own facilities and in those operated by suppliers. They do this by adopting and refining safety systems and rules, through education and training, and by fostering a safety culture.

2.4. Safety in contract factories

Fire safety (collaboration with Fair Labor Association), building safety (according to the laws of countries or certified structural engi-

neering), occupational health (routine monitoring and analytical methods), machine safety (improving factory suppliers' capabilities to operate and maintain modern and automated machinery).

2.5. Form 10-K filing

«As of May 31, 2019, we had approximately 76,700 employees worldwide, including retail and part-time employees. Management is committed to maintaining an environment where all Nike employees have the opportunity to reach their full potential. None of employees are represented by a union, except for certain employees in the APLA geography, where local law requires those employees to be represented by a trade union. Nike has never experienced a material interruption of operations due to labor disagreements».

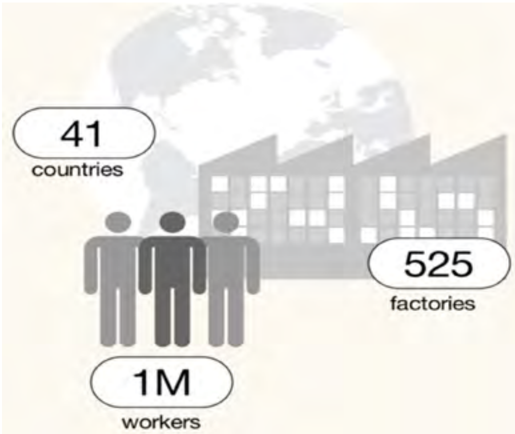
2.6. Comments

Following the UN Guiding Principle, Nike respects and protects human rights, while establishing grievance mechanisms for individuals and communities who may be adversely impacted (29 a.). Furthermore, according with Ms. K. Higginbottom says, management is more ethical, in fact there's a description of employees into CSR Report (which is also confirmed in 10 K filing).

3. Sustainable sourcing

Nike believes in the power of collective action to tackle both internal and external pressures that prevent its suppliers from putting the health and wellbeing of the worker at the center of their work. It also believes that the work in partnership with others in the industry serves to benefit it all and provide a level playing field to both brands and suppliers.

Then Nike evaluates its factories' sustainability performance based on standards set out in Nike's Code of Conduct and Code Leadership Standards . Those expectations align with leading international standards to protect worker rights, create a safe working environment, safeguard communities where suppliers operate, and advance environmental protections. It continues to review the most frequent areas of non-compliance, such as hours, wages, and benefits, to identify ways they can strengthen compliance with its contract factories.



And it searches for opportunities, like improving audit data quality, addressing the root causes of issues, and working with other brands in the supply chain to drive consistent performance.

In addition, Nike continues to: (i) support improvements in the enforcement of local laws through its relationship with Better Work and training of factory management through Lean 2.0; (ii) evolve demand and production planning with its suppliers to smooth volume fluctuations and enhance predictability; (iii) facilitate greater industry engagement with multi- brand facilities and alignment to shift the approach suppliers take to forecasting.

3.1. Engaged workforce

A skilled, valued and engaged workforce is the key for growth and sustainability. Furthermore, Nike delivers improvements in key measures: unplanned absenteeism, turnover, and contract factory worker engagement and wellbeing. "Rewarding performance and attracting talent benefits all stakeholders: they will continue to learn from those leading suppliers who have successfully implemented advanced compensation systems, and to research their suppliers' biggest challenges in this area".

3.2. Form 10-k filing

«Our success depends in part on the continued service of high-quality employees, including key executive officers and personnel. Competition for employees in our industry is intense and we may not be successful in attracting and retaining such personnel».

3.3. Comments

Reading this part of Nike's CSR Report, it's impossible not thinking about the Nike as a "super-organism", such as "group of individual organisms working as one large self-regulating system". It's also clear that this corporation uses lots of multiple inputs to reach its goals, which management hold. In addition, Nike surprisingly reflects all Ceres Roadmap's stakeholder engagement, mostly engagement activity and substantive dialogue.

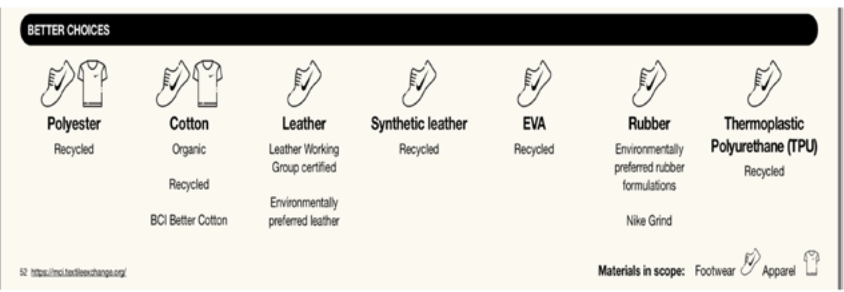
4. Materials

Nike focuses on scaling the use of innovative sustainable materials and reducing the material-related footprint of manufacturing. In FY19, some recycled materials were used in 76% of Nike brand footwear and apparel products.

The type of materials it uses represent the greatest opportunity for reducing its impact. To support these efforts, they are evolving the tools available to their product and materials team to enable better decision-making.

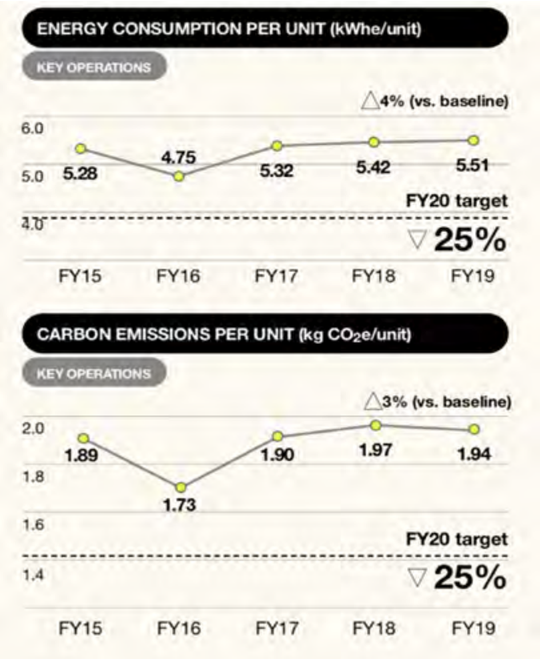
4.1. A very innovative product

More than 90% of the waste from materials used in Air soles production is turned into new, innovative cushioning systems. For example, they are developing new recycled polyester and leather alternative options that can potentially be incorporated across their product line, including synthetic leathers, socks, laces, linings, and sock liners.

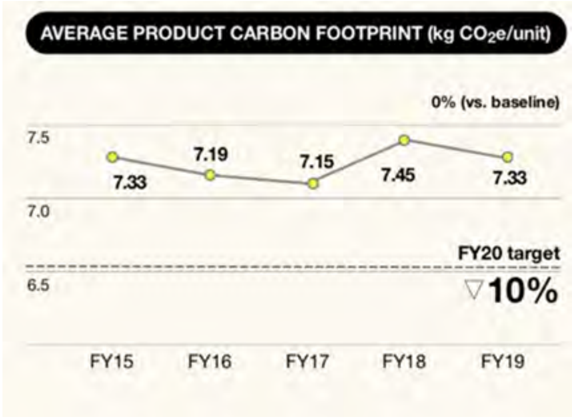


4.2. Energy and carbon

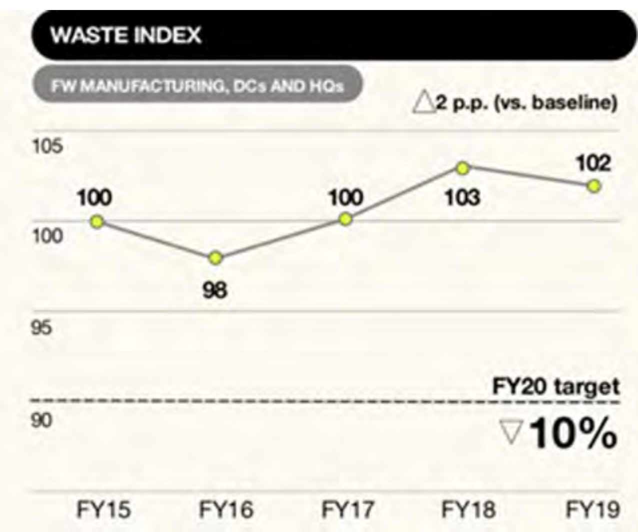
By the end of FY19, Nike largest finished goods footwear factories in China, Vietnam, and Indonesia – over 90% of their footwear production – continue to reduce its overall carbon footprint.



Moving forward, they are helping factories to pursue large-scale solar projects and implementing a thermal solar program so factories can heat water needed in washing stages of the manufacturing process. Now that factories have implemented over 40 boiler projects.



4.3. Waste

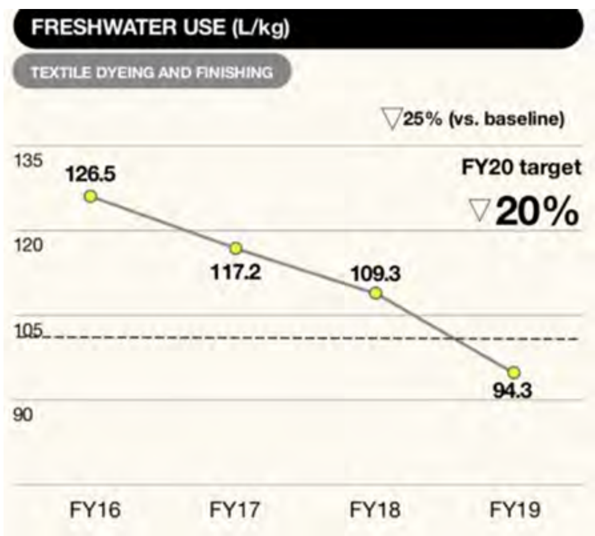


Waste can result from decisions and processes at every step. So, to generate less waste overall, it needs interconnected efforts across the company: a circular approach that considers waste from initial product design to product take-backat end-of-life and multiple stages in between.

Across the company and value chain, it's innovating significantly on recycling and reusing materials, creating efficiencies, and reducing waste at source by adopting better practices at factories, distribution centers, and headquarters.

4.4. Water

In FY17, they deployed the Nike Water Minimum Program to every key supplier making fabric for Nike, setting several important performance expectations. The program then mandates that facilities identify their exposure to water-scarcity and flooding risks and develop mitigation plans in high-risk regions: now uses less water.



4.5. Form 10-k filing

«As we continue to develop new technologies, we are simultaneously focused on the design of innovative products incorporating such technologies throughout our product categories».

4.6. Comments

Nike offers a Social Responsible Investing opportunity; in fact it provides financial returns while benefitting society, environment and workers. It incorporates ESG issue in its ownership policies and practices and implement its progressive activities.

This corporation, then, follows the "performance" of Ceres Roadmap 2030 . It is unbelievable how, today, Nike is sustainably developing: every goal that Sustainable Corporation course have about "rethinking" the figure of corporations, role of investors, stockholders and moral integrity seem to be reached by this multinational and very influential company.

Personally, I don't have any doubts that Nike is a model to be imitated by other companies, mostly for its inclusion and multiethnic way to work with employees and its incessant research to innovative and perfect its products, keeping attention to the environment.

Nvidia: an ESG analysis

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Student, University of Padova, School of Law

Keywords: NVIDIA Corporation; ESG; diversity; inclusion

1. Introduction

In this paper it will be analyzed the U.S. public company NVIDIA Corporation. The inquire will be based on the Form 10-K for the fiscal year ended on January 31, 2021, and on 2020 CSR Report.

2. Overview on ESG strategy of NVIDIA

2.1. Environment

Regarding the CSR filings, NVIDIA aim to build the most energy efficient technologies and conduct its business towards mitigating climate change. That is validated by its section on *Environmental impacts of products* on the CSR Report, where it affirms that «GPUs are 10 times more energy efficient than CPUs for parallel compute workloads, [...] are 20 to 25 times more energy efficient than traditional CPUs servers for AI workloads».

MFR Power Comparison

We performed power savings measurements in our performance lab on RTX 2080 and RTX 2070 graphics cards for desktop gaming against several benchmarks.* The results show significant power savings.

NVIDIA PRODUCT	MFR OFF AVERAGE POWER	MFR ON 60FPS AVERAGE POWER	MFR ON 40FPS AVERAGE POWER
GeForce RTX 2080 Desktop, 1080p Apps	1.00x	0.49x	0.32x
GeForce RTX 2080 Desktop, 1440p Apps	1.00x	0.76x	0.45x
GeForce RTX 2070 Desktop, 1080p Apps	1.00x	0.66x	0.42x
GeForce RTX 2070 Desktop, 1440p Apps	1.00x	0.87x	0.63x

* Max Frame Rate and WhisperMode tests were performed across 12 benchmarks including: Assassin's Creed Odyssey, Strange Brigade, Battlefield V, The Witcher 3, Ashes Of The Singularity Escalation, Middle-earth: Shadow of War. Power measured in terms of Total Graphics Power (TGP).

from NVIDIA 2020 CRS Report

NVIDIA refers to an EPEAT Registration, but the link led to an error page. Words that are non-present in this Report are *crypto mining* and *crypto currency.*

About the Form 10-K, it states that if they do not continue to develop market specific technologies considering social and environmental impact of NVIDIA's technologies, its financial results could be negatively impacted. At page 16 we find the first reference to cryptocurrency: NVIDIA recognises that its GPUs is capable of crypto mining and the demand has fluctuated thanks to the volatility in the crypto market. It also fears the change in Ethereum 2.0 that would lead to resale of its GPUs. In this Form there is also no linkage to the impact of cryptocurrency on the environment; the only reference is about demand and trade issues.

2.2. Social

In the NVIDIA CSR Directive we read: «increase employee diversity by hiring and developing women and underrepresented minorities». An entire corporation policy regards this topic and states that it does not discriminate employee or applicants based on color, religion, sex, veteran status, age, national origin, any disability, medical condition, sexual orientation, or gender. Diversity and Inclusion is a priority, a whole paragraph is dedicated to the Black community. The CEO makes a powerful statement: «We will elevate the urgency of increasing Black population at *every level* of our company». NVIDIA

efforts will be focused on strengthening relationships with Historically Black Colleges and Universities and organizations that support the Black community. It will engage to evaluate the recruiting pipeline to identify bottlenecks for women and minorities during recruiting and to eliminate unintended bias. NVIDIA will track progress through internal goals to increase hiring of women and minorities.

Racial / Ethnic Diversity Snapshot*

RACE/ETHNICITY	FY20	FY19	FY18
Asian/Indian	49.2%	50.2%	50.1%
White	38.2%	38.7%	41.1%
Hispanic/Latino	3.4%	3.3%	3.3%
Black/African American	1.1%	1.0%	1.0%
Native Hawaiian/Pacific Islander	0.3%	0.3%	0.3%
American Indian/Alaska Native	0.2%	0.1%	0.1%
Two or more races	0.9%	0.7%	0.5%
Decline to state/not specified	6.7%	5.7%	3.6%
TOTAL	100%	100%	100%

* Minority data represents the United States only

from NVIDIA 2020 CSR Report

In the Form 10-K, NVIDIA highlights the importance of recruiting and develop diverse talent, some issues that could occur are changing in immigration and work permit laws and regulations.

2.3. Governance

NVIDIA has a Financial Code that states forth principles for its financial team, among these we find the principles (i) to «act in good faith with integrity, and without misrepresenting or failing to disclose material facts known to you with respect to your financial duties to NVIDIA» and (ii) to communicate financially information in a «clear manner that ensures full, fair, accurate, timely and understandable disclosure in all reports and documents that NVIDIA files».

About the CSR Report, NVIDIA ensure transparency to its shareholders, guarantee long-term interest being served. One of its core values is *transparency.*

ECONOMIC PERFORMANCE

INDICATOR *(DOLLARS REPRESENTED IN MILLIONS)*	FY20	FY19	FY18
Revenue	$10,918	$11,716	$9,714
Total operating expenses	$3,922	$3,367	$2,612
Net income	$2,796	$4,141	$3,047
Gross margin	62.0%	61.2%	59.9%
Income tax expense (benefit)	$174	($245)	$149
Total assets	$17,315	$13,292	$11,241
Total shareholders' equity	$12,204	$9,342	$7,471
Total liabilities and shareholders' equity	$17,315	$13,292	$11,241
R&D expenses	$2,829	$2,376	$1,797

from: NVIDIA 2020 CSR Report

In the Form 10-K it is reported that shareholders have taken legal action against the corporation, claiming that NVIDIA made false and/ or misleading statements related to channel inventory and the impact of cryptocurrency mining on GPU demand in 2017 and 2018; in addition, multiple stockholders filed derivative lawsuits against members of the board and certain officers on the same basis. Other derivative actions have been filed for the District of Delaware.

Still, GPUs sold for mining are not listed in revenue as you can see in the graphic below, they were listed for the first time on April 12, 2021, in NVIDIA 8-K Report for 150$ million.

3. Observations on ESG strategy of Nvidia

3.1. Environment

There is an ongoing conversation about the sustainability of crypto currencies and their "mining". However, blockchain technology is diverse and blanket statements should be avoided , there are diverse consensus mechanism available. We will focus on a crypto that use GPUs for its mining, and in future will pass to Proof of Stake mechanism of consensus: Ethereum. Its algorithm is made to be ASICs-resistant, so NVIDIA's GPUs are the ideal solution. Not a single time this topic is mentioned in NVIDIA's CSR Report or Form 10-K, but

environmentally is still an issue, annually Ethereum-mining takes at least 60 TWh.

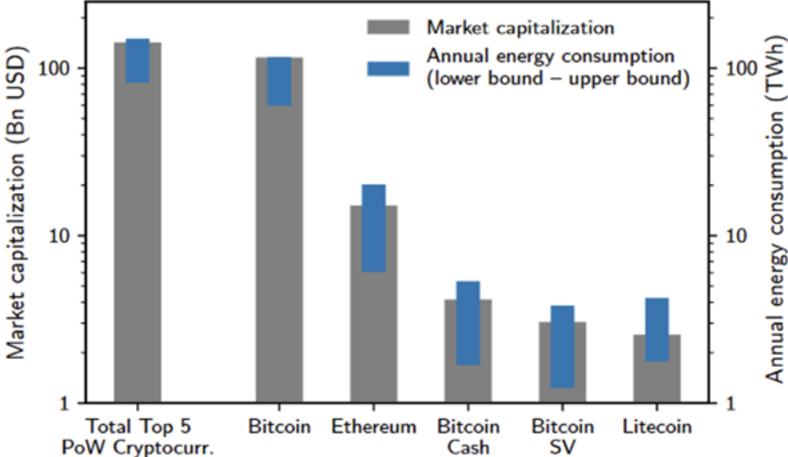

Fig. 1 Market capitalization and the computed bounds on energy consumption for the 5 highest valued Proof-of-Work cryptocurrencies. Note the logarithmic scale on the y-axis

from: *The Energy Consumption of Blockchain Technology: Beyond Myth*

Other authors state that from January 1, 2016 to June 30, 2018 Ethereum mining consumed an average of 7 MJ to generate 1 US$, during the same period, researchers estimated mining for all major 4 cryptocurrencies was responsible for 3-15 million tonnes of CO2 emissions . NVIDIA appointed this issue on a product basis, via more energy efficient technologies and related to scarcity for its gamer base it created a product line made for miners, to discourage those to buy common GPUs NVIDIA created a feature that detect mining and cut in half the hash rate . Effective way to not incur in any liability: products for its primary source of income (gamers), environmentally friendly and creating a line only for miners means that when Ethereum will be full on PoS those GPUs will not be resalable to gamers, its concern in the 10-K would be less frightening. A short-term manoeuvre to help long term earnings.

Table 2 | Power requirement estimates for various cryptocurrency networks

Power estimates	Malone and Dwyer[12]	McCook[17]	Bevand[14]	De Vries[11]	Digiconomist[13]	This study		
Year of estimate	2014	2014	2017	2018	2018	2016	2017	2018
Currency		Network Power Requirement (MW)[b]						
BTC	100-10,000	115	470-540	2,550-7,670	8,119[a]	283	948	3,441[c]
ETH	–	–	–		2,382[a]	24	299	1,165[c]
LTC	–	–	–		–	3.4	30	330[c]
XMR	–	–	–		–	4.5	23	97[c]

[a]Reflects the power requirements estimated on 30 June 2018. [b]1 MW × 1 h = 1 MWh = 3,600 MJ and 1 MW = 8.76 GWh yr^{-1}. [c]These data reflect power requirements for the first six months of 2018 only. The energy requirements change, generally upward, for each of the networks each day. Thus, the data are presented in power (W) rather than energy (J). Malone and Dwyer[12] made several broad assumptions, resulting in estimated power consumption over three orders of magnitude. Our study follows the methodology reported by Bevand[14], in which hashrates and miner hashing efficiencies are inputs to determine energy consumed and coins generated. Our estimates are given for all of 2016, 2017 and up to 30 June 2018 for 2018. Therefore, the 2018 data is not representative of the entire year but are reported to show the continued increase in energy demand. Digiconomist[13] calculates the energy requirements by assuming operational costs spent on hardware including cooling costs. See Supplementary Information for a discussion of the methodologies.

from: *Quantification of energy and carbon costs for mining cryptocurrencies*

3.2 Social

Knowing the acts that NVIDIA has put in the field to make the corporation more inclusive, is the board of directors diverse?

After the murder of George Floyd, many corporations had to take an urgent stance against systematic racism: George Floyd was murdered on May 25, 2020; Mr Dabiri became NVIDIA director on July 13, 2020, and Ms. Shah on December 8, 2020.

Prior to these dates there was no minorities represented in the NVIDIA Board.

Currently, the board is made up by 13 people, and only 3 of them represents minorities: one black male, one Asian female, one Asian male (also serving as CEO).

Is this performative allyship? Probably, but indeed the measures that NVIDIA said it will follow are good, the only question if this will last and be consistently implemented.

3.3. Governance

This comment will be focused on one derivative lawsuit, Ron Workers Local 580 Joint Funds v. NVIDIA Corporation . In May 2017 NVIDIA launched a GPU dedicated to mining "crypto SKU" and reported its sales in the OEM segment creating the impression that NVIDIA' Gaming business was insulated from crypto-related volatility, when the price of Ethereum rose the gaming segment was skyrocketing. When analysts and investors questioned if the sale of GeForce was due

to gaming or crypto-mining Mr. Huang denied the incidence of miners, then the miners' demand decade, NVIDIA stocks began to plummet. The derivative lawsuit for the Northern District of California asserts claims for breach of fiduciary duties, unjust enrichment, waste of corporate assets and violations of the Exchange Act based on misleading and false statements.

In March 2020, the judge dismissed the case finding the company's investors did not show actors involved knowingly made false statements about its inventory of GPUs.

Following the guidelines of the company's Financial Code, the data should have been more precise and transparent with shareholders, in fact this lack of information had a bad impact on them. In the other parts of this analysis we have seen how NVIDIA has taken interne measures to tackle this issue, from the statement contained in the 8-K to the fear of Ethereum 2.0 in the Form 10-K.

An analysis of Nike, Inc.'s Sustainability Profile

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Keywords: Nike, Inc.; CSR; ESG; sustainable sourcing

1. Introduction

«Just do it» is the notorious and motivational slogan of Nike, Inc., the world's largest athletic apparel maker ("Nike"). Given the importance that environmental and social topics have gained in our current and extremely watchful society, we might want to take a look at *how they do it.*

In this paper I'm going to analyze three aspects of Nike's FY20 "Impact Report" (*i.e.*, the Nike's CSR report), focusing specifically on three sustainability topics of said document and comparing the treatment they receive there with the one the same three topics received in the corresponding annual Form 10-K that Nike submitted to the SEC . The three topics up for debate are: employees and engaged workforce, community impact and sustainable sourcing.

2. Employees and engaged workforce

Employees treatment and diversification is the first topic treated in the Report, throughout the paragraphs is made clear how it is viewed as a key aspect for the company with sentences like «diversity fosters

creativity and accelerates innovation» and while pointing out the enhancement of equality, inclusion, and diversity the door is left wide open for further improvement, even on matters like equal pay that are considered almost achieved goals reading the pay equity data.

Furthermore, the company commits to acquire and attract the best talent through innovative and large recruiting programs and then allow employees and managers for personal and professional growth.

Another ongoing objective is to improve the way employees can provide their feedback on the company strategies through yearly surveys while improving year by year leadership accountability.

In the Form 10-K, specifically in the Risk Factors section, it's highlighted how success depends on the continued service of high-quality employees that have to be continuously recruited, retained, and engaged to avoid the risk of losing them in such a highly competitive industry and how the policies on immigration adopted by the U.S. government could negatively impact the ability to attract skilled employees who are from outside the nation.

NIKE, Inc. Totals by Gender (Global)[29]

	CY15		*CY16*		*CY17*		*CY18*		*CY19*		*CY20*		*Change From CY15-20*	
All Employees[30]														
Gender	#	%	#	%	#	%	#	%	#	%	**#**	**%**	#	% pts
Female	28,967	48%	31,338	48%	32,082	48%	31,792	49%	33,060	48.7%	**32,617**	**49.51%**	3,650	1.26 p.p.
Male	31,077	52%	33,878	52%	34,657	52%	33,559	51%	34,845	51%	**33,268**	**50.49%**	2,191	-1.26 p.p.
Total	60,044	100%	65,216	100%	66,739	100%	65,351	100%	67,905	99.7%	**65,885**	**100.0%**	5,841	0.00 p.p.
Directors+[31]														
Female	1,853	36%	2,091	37%	2,146	38%	2,412	39%	2,660	40.8%	**2,758**	**42.5%**	905	6.16 p.p.
Male	3,248	64%	3,553	63%	3,513	62%	3,734	61%	3,852	59%	**3,733**	**57.5%**	485	-6.16 p.p.
Total	5,101	100%	5,644	100%	5,659	100%	6,146	100%	6,512	99.8%	**6,491**	**100.0%**	1,390	0.00 p.p.
Vice Presidents (VPs)														
Female	104	27%	116	28%	119	32%	145	36%	161	39%	**162**	**41.1%**	58	13.96 p.p.
Male	279	73%	299	72%	258	68%	257	64%	252	61%	**232**	**58.9%**	-47	-13.96 p.p.
Total	383	100%	415	100%	377	100%	402	100%	413	100%	**394**	**100.0%**	11	0.00 p.p.

NIKE, Inc. Totals by Race/Ethnicity (U.S.)

	CY15		CY16		CY17		CY18		CY19		CY20		Change from CY15–20	
All Employees														
	#	%	#	%	#	%	#	%	#	%	**#**	**%**	#	% pts
U.S. Racial and Ethnic Minorities	17,688	52.9%	19,249	54.5%	20,513	56.5%	18,331	55.3%	19,418	56.7%	**19,345**	**58.1%**	1,657	5.16 p.p.
Race/Ethnicity														
American Indian or Alaskan Native (Not Hispanic/Latino)	137	0.4%	124	0.4%	121	0.3%	123	0.4%	143	0.4%	**128**	**0.4%**	-9	-0.03 p.p.
Asian (Not Hispanic/Latino)	2,566	7.7%	2,817	8.0%	2,949	8.1%	2,825	8.5%	3,079	9.0%	**3,097**	**9.3%**	531	1.62 p.p.
Black or African American (Not Hispanic/Latino)	7,267	21.7%	7,963	22.6%	8,530	23.5%	7,175	21.7%	7,425	21.7%	**7,953**	**23.9%**	686	2.14 p.p.
Hispanic/Latino	5,992	17.9%	6,399	18.1%	6,911	19.0%	6,151	18.6%	6,572	19.2%	**6,055**	**18.2%**	63	0.25 p.p.
Native Hawaiian or Other Pacific Islander (Not Hispanic/Latino)	264	0.8%	253	0.7%	275	0.8%	240	0.7%	239	0.7%	**213**	**0.6%**	-51	-0.15 p.p.
Two or More Races (Not Hispanic/Latino)	1,462	4.4%	1,693	4.8%	1,727	4.8%	1,817	5.5%	1,960	5.7%	**1,899**	**5.7%**	437	1.33 p.p.
Unknown	94	0.3%	15	0.0%	141	0.4%	209	0.6%	228	0.7%	**306**	**0.9%**	212	0.64 p.p.
White (Not Hispanic/Latino)	15,643	46.8%	16,029	45.4%	15,661	43.1%	14,595	44.0%	14,597	42.6%	**13,655**	**41.0%**	-1,988	-5.80 p.p.
Total	33,425	100%	35,293	100%	36,315	100%	33,135	100%	34,243	100%	**33,306**	**100.0%**	-119	0.00 p.p.

from Nike's FY20 "Impact Report"

3. Community impact

Community Impact is described in the FY20 Impact Report as the core of what Nike is and does with its history being tied to courts, tracks, and fields.

The company trains employees to serve as Community Ambassadors (NCA) through programs of volunteer works in schools and their communities. Getting kids to play sports is an important objective and Nike invests every year in worldwide programs to train coaches, financing new facilities (ex. Obama Presidential Center in Chicago), and give opportunities to adolescents living in poverty to get close to sports. In the Form 10-K, the topic is barely mentioned with the only reference being the aim to maintain, promote and develop the brand's reputation.

4. Sustainable Sourcing

The Sustainable Sourcing section in the Report introduces the Sustainable Manufacturing and Sourcing Index (SMSI): a system, launched in 2012, designed to rate the sustainability performance of factories Nike works with.

These facilities receive color-coded ratings (red, yellow, bronze, silver, gold) based on SMSI with bronze being the minimum standard of compli-

ance to the Nike Code of Conduct and gold indicating a world-class level of compliance in sustainability.

A factory rated below bronze (red or yellow) has six months to remediate its issues unless they are deemed critical, in this case, remediation must be immediate. Failing to remediate leads to the possibility of responsible exit by Nike.

Factory Ratings: NIKE, Inc.

	FY16	*FY17*	*FY18*	*FY19*	***FY20***
Gold	0	0	0	0	**0**
Silver	4	5	7	10	**15**
Bronze	570	532	499	478	**474**
Yellow	60	28	12	11	**12**
Red	27	23	23	26	**17**
No Rating	2	3	1	0	**0**
Total	663	591	542	525	**518**

from Nike's FY20 "Impact Report"

Another issue the company faces is Excessive Overtime (EOT) and to contrast it Nike introduced new rules in the Code of Conduct that affiliated factories need to comply with: employees must not work for more than 60 hours a week and have at least 24 consecutive hours of rest every week.

In the annual filing to the SEC, this topic is directly mentioned when facing the issue of negative claims and publicity caused by how suppliers around the world, closely tied to Nike, handle their business (the company only requires them to act in compliance with the law).

Nike is famous for advancing its athletes' speed in the sport facilities, but this Report was a marathon more than a sprint: 125 pages of in-depth description of the present situation and future programs.

The section regarding the employee diversity and treatment is the more detailed in both the Nike's FY20 CSR Report and Nike's Form 10-K filing of the three that are being analyzed. The company is showing serious interest in building a diverse and equal workspace with statistics showing a constant growth in minorities representation and the concern about the effect of U.S. immigration policy shows determination in building a skilled and diverse workforce.

Another promising statistic is the one regarding the presence of women on the corporate board, a recurring thematic in recent studies that points out how women directors enhance corporate social value and that gender diversity on boards leads to greater awareness of the full dimension of a board decision (Peter Lando, Colorado Law School).

Board of Directors

	CY15		CY16		CY17		CY18		CY19		CY20	
Gender												
	#	%	#	%	#	%	#	%	#	%	#	%
Female	3	23%	3	25%	2	18%	3	23%	4	31%	**4**	**33%**
Male	10	77%	9	75%	9	82%	10	77%	9	69%	**8**	**67%**
Total	13	100%	12	100%	11	100%	13	100%	13	100%	**12**	**100%**

from Nike's FY20 "Impact Report"

A 2019 research by "The Catalyst" shows that the representation of women on boards was around 26% in the U.S. and as the data provided by Nike in the FY20 table reported above the company is consistently exceeding the national average with exactly one third (33%) of board members being women. On the leadership accountability side, the statement that concludes Nike's CEO John Donahoe's opening letter it's particularly striking: he states that for the first time executive compensation will be tied to the progress of the company in deepening diversity and inclusion, protecting the planet and advancing ethical manufactory.

In these years of systemic development and triple bottom line talks, the impact that Nike has on communities around the world is probably the aspect that more than any other brings the company closer to establish a multi-purpose system. Inspiring young kids to be active and play sports is of great importance from a physical, social, and even ethical standpoint: (as Professor Umberto Vincenti of the University of Padova) also points out), playing sports encourages responsibility and respect towards teammates and opponents, leading to a better approach to social life in general.

Sustainable Sourcing is undoubtedly the most challenging target for any contemporary company and Nike makes no difference. Being af-

fected by the manufacturing scandals that emerged in recent years the company has introduced the aforementioned SMSI color-coded system to evaluate suppliers they work with, but even with this encouraging initiative, the concerns of negative publicity due to practices of suppliers (Nike operates in 12 different countries through 112 non directly owned factories) expressed on the annual SEC Report show how the company still hasn't managed to have deep and comforting monitoring of its worldwide operations.

Another alarming signal is that the only concern expressed by the company is related to publicity and public opinion more than the health of workers, the effects on the environment of how suppliers handle their production or the significant distances that Nike goods need to travel to please the ever-growing customer request.

5. Conclusion

In conclusion, Nike is currently showing great dedication to social thematic, proving to be not only in line but even ahead of a growing national standard regarding gender and ethnic diversity in its workforce and dedicating consistent amounts of funds (1,5% of pre-tax income in 2020) to drive positive impact to communities worldwide.

On the other hand, the company is still struggling on the sustainable sourcing side, even with all of its suppliers being internally evaluated as a bronze-standard it's eye-catching how none of them are gold-rated and how few the silver-rated ones are: there's room for improvement with the objective of a change of culture that needs to include the whole corporate sector.

FedEx Corporation

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Keywords: Fedex; sustainability; UN SDGs; stakeholders; Triple Bottom Line.

1. Introduction

FedEx is a large US public company incorporated in Delaware (the preeminent state for US corporations thanks to various reasons) which has played a decisive role during the pandemic. FedEx revenues in FY2019 amounted to $69.69 billion.

The delivery of packages is critical for sustainability:

[t]he number of people engaged in the sector is growing;

goods are mainly transported with fuel-using aircrafts and vehicles which produce a large environmental impact;

package-delivery is a key for development of communities (and not only shareholders).

I will analyze three aspects (one for each side of the "*triple bottom line*") of the 2020 CSR report and the 10K report of FedEx Corporation:

1) **People**: treatment of employees;
2) **Planet**: attitude towards CO2 emissions;
3) **Profits**: responsibility towards communities (and not only shareholders).

2. People

People-Related Sustainability Development Goals in the UN 2030 Agenda

2.1. Focus: employees' benefits and rights (for example to unionize) and diversity.

	Global Citizenship Report	10K Report
Methodology and approach	• Solidarity • Respect • Support.	• Indifference; • Fear.
Contents	• Philosophy: PSP (People-Service- Profit). Employees': • Safety; • Health and wellness; • Retirement plans; • Good wages and benefits; • Diversity; • Education and training; • Respect of the right to unionize.	• Fear of the formation of Unions; • Pension plans: less costs for FedEx and "*more flexibility*" for workers; new plans only for **non-union** employees; • Lawsuits for "*wage-and-hour violations in which plaintiffs claim, [...], that they were forced to work "off the clock," were not paid overtime or were not provided work breaks*". Only comment: liability would not be material.

Coverage	• Employees' well-being in every aspect of their life; • Value for the company.	• Nothing said about wages, well-being, rights, diversity (only a few words in the introduction). • Fear of unions

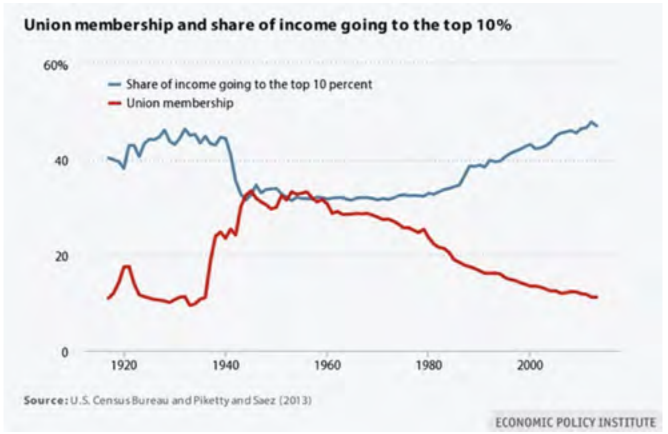
2.2. Comment and Comparison

Huge difference:

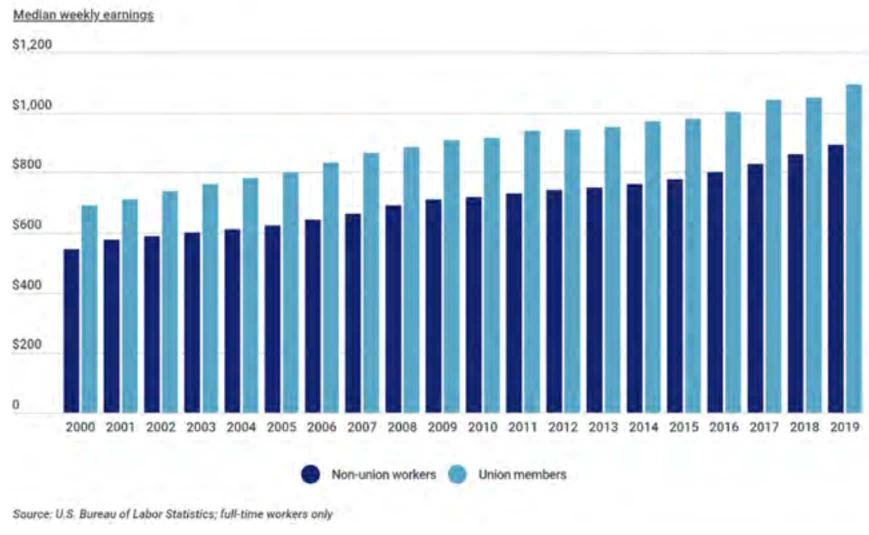
- CSR report: employees as a resource. Also diversity is present as a goal in the CSR report, but the effective results are not material (as shown by the table below);
- 10K report: employees seen as a "problem": costs should be reduced and their rights should be diminished (regarding unions see graphs below).

GLOBAL HEADCOUNT BY GENDER (not including TNT Express)	FY17	FY18	FY19
Total Employees	349,456	377,226	403,631
Total Male Employees	249,674	269,824	288,340
Male % of Headcount	71%	72%	71%
Total Female Employees	99,782	107,052	115,291
Female % of Headcount	29%	28%	29%
Management Employees	27,200	28,559	30,381
Male % Management Employees	78%	78%	77%
Female % Management Employees	22%	22%	23%
Non-Management Employees	322,256	348,667	373,250
Male % Non-management Employees	71%	71%	71%
Female % Non-management Employees	29%	29%	29%

Table copied from FedEx 2020 Global Citizenship Report



Economic Policy Institute; Source: US Census Bureau and Piketty and Saez (2013)



US Bureau of Labo Statistic; full time workers only

3. Planet

Planet-Related Sustainability Development Goals in the UN 2030 Agenda

3.1. Focus: carbon emissions reduction, sustainable vehicles and aircrafts.

	Global Citizenship Report	10K Report
Methodology and approach	• Progressive; • Long-term view.	• Economical and financial; • Reputational.
Content	• Reduce, Replace, Revolutionize policy; • Governance designed to reach this goals; • Innovation and alternative energy sources; • Sustainable Aviation: support of CORSIA, adopted by the ICAO (UN) which can enforce it; • "Advocating for regulatory and policy changes that support emissions reduction, efficiency improvements, and cleaner technology".	• Reduce, Replace, Revolutionize policy. • Risk of costs for regulatory efforts to limit GHG-emissions (especially if different in different countries); • Impact on price and availability of fuel; • Risk of global climate change (physical risks) and regulations on it; • Awareness about the GHGs emitted by airplanes could harm FedEx reputation and reduce customer demand.
Coverage	• Environment as "Common home" (to quote Pope Francis): necessity to protect it from every harm.	• Carbon Emissions's reduction as a key to a sustainable financial position from various points of view.

3.2. *Addendum*

Comment to an EPA proposal about fuel by FedEx's CSO: 1 October 2015. The tone is progressive: no request of blocking regulations but only advices (f.e. incentives).

Only conservative prudence:

- Longer time frames to reduce GHG "in an economically sustainable fashion"[1]

[1] http://blogs.edf.org/climate411/files/2016/08/fedex.pdf.

3.3. Comment and comparison

Overall, similarity regarding CO2 emissions, but different attitude towards mandatory regulations:

- CSR: Opportunity;
- Epa Comment on Clean power act: "*FedEx is committed to finding planet-conscious solutions that meet the needs of society. Not only do we try and set an example by our own actions, we advocate policy in support of these efforts*"[2]
- 10K: Risk and cost.

However FedEx complies voluntarily with environmental standards (there are a lot of reasons for voluntary compliance: f.e. financial performance[3]).

- CO2 emissions reduction:
- CSR: company as a public entity;
- 10K business and financial reasons.

Environmental sustainable governance: Chief Sustainability Officer; involvement of Nominating & Governance Committee with oversight responsibility on CSR. Independent director could be a counterbalance to dangerous managers groupthink[4] (which could cause the exasperation of the SWM principle, that is the origin of risky operations on the environment because, due to the limited liability of companies which contributes in valuing less future losses than earnings in the short term, it is preferable to risk a lot regardless of the potential huge dangers).

[2] https://www.theguardian.com/sustainable-business/2015/apr/02/corporate-america-climate-change-position-epa.

[3] S. Manrique, C.-P. Martí-Ballester, *Analyzing the Effect of Corporate Environmental Performance on Corporate Financial Performance in Developed and Developing Countries*, «Sustainability», vol. 9.11 (2017), pp. 1957 ff.; https://doi.org/10.3390/su9111957;

[4] P. Tunjic, *Governing and Directing: Are They Different?*, «Governance», No. 232 and No. 233 (Oct. and Nov., 2013).

Images copied from FedEx 2020 Global Citizenship Report

DIRECT AND INDIRECT GHG EMISSIONS (METRIC TONS CO_2e)	FY17	FY18	FY19
Direct Energy Consumption (Scope 1)			
Aircraft Fuel			
Jet Fuel	10,889,010	11,467,497	11,692,918
Vehicle Fuel			
Diesel	2,582,237	3,049,466	3,020,199
Gasoline	241,331	235,226	242,740
Propane	50,535	55,432	59,850
Liquefied Natural Gas (LNG) & Compressed Natural Gas (CNG)	7,625	8,153	7,810
Facility Use			
Natural Gas	278,650	333,844	379,953
Heating Oil	4,211	2,765	2,703
Total Direct Emissions (Scope 1) (metric tons CO_2e)	**14,053,599**	**15,152,383**	**15,406,173**

Table copied from FedEx 2020 Global Citizenship Report

4. Profits

Pprofits-Related Sustainability Goals in the UN 2030 Agenda

4.1. Focus: strategic long-term impact on communities.

	Global Citizenship Report	10K report
Methodology and approach	• Humanitarian approach; • Economic point of view; • Systems Thinking.	• Financial and economic approach; • Reputational approach.
Contents	• Help development of communities with various programs (f.e. FedEx cares); • Larger financial returns if good relationship with employees, partners, suppliers; • "*Diverse programs to support youth, women, veterans, and others in accessing employment; assistance to small-business owners; and cash, in-kind support, and volunteering to benefit people and communities*"; • Goal: directly impact 50 million people before 2023.	• In the introduction: FedEx goal is long-term success benefiting all stakeholders; • Help women and minority entrepreneurs; • In case of disaster, help communities heal, learn and thrive; • Various investments made for the competitive position over the long-term; • FedEx brand relies on its reputation for high standards of social and environmental responsibility and corporate governance and ethics.
Coverage	• Attention to communities and every stakeholder.	• Long-term focus in strategic investments for development of business and communities.

OUR CSR STRATEGY/ECONOMY

BUSINESS PERFORMANCE[ii]	FY17	FY18	FY19
Revenue ($B)	$60.32	$65.45	$69.69
Operating Income ($M)	$4,566	$4,272	$4,466
Operating Margin	7.6%	6.5%	6.4%
Net Income ($M)	$2,997	$4,572	$540
Diluted EPS	$11.07	$16.79	$2.03
Capital Expenditures ($B)	$5.12	$5.66	$5.49

ii For more information, see our 2019 Annual Report.

STAKEHOLDER VALUE-ADDED TABLE	FY17	FY18	FY19
Dividends Paid to Shareholders ($M)[ii]	$426	$535	$683
Salaries and Employee Benefits ($B)[ii]	$21.99	$23.80	$24.78
Community Investments ($M)[iii]	$65.30	$64.12	$62.40

ii For more information, see our 2019 Annual Report.
iii This includes cash, in-kind and United Way team member contributions.

Table copied from FedEx 2020 Global Citizenship Report

4.2. Comment and comparison

[B]oth in CSR and in 10K report, it is accepted what also Leo Strine states: corporations are not there only for the profit of shareholders, but are a social actor responsible towards all stakeholders (in opposition to what the sadly famous economist Milton Friedman says)[5]. It is clearly stated (in both documents) that the company is not "short-termist", but focuses on long term strategic projects for the benefit of multiple subjects.

FedEx reports clarify how much considering all stakeholders is profitable in the current framework of consumers, employees, investors[6]. As a signal of this attitude, FedEx's Chairman and CEO Frederick W. Smith in 2019 signed the BR Statement on the Purpose of a Corporation[7]. If this is the purpose of the corporation, companies can be seen as a moral system which thinks in a systematic and holistic way[8], and the FedEx documents share this approach

Interesting aspect: shareholders' activism is described as something that «could divert the attention of management and our board of directors from our business», probably subsuming that shareholders would request short-term dividends and not long-term investments[9]. However,

[5] L.E. Strine Jr., *Our Continuing Struggle With the Idea That For-Profit Corporations Seek Profit*, «Wake Forest Law Review», vol. 47.1 (2012), pp. 135-172.

[6] «The Economist» (Aug. 15, 2019), available at: https://www.economist.com/business/2019/08/15/fedexs-visionary-founder-is-a-disrupter-at-risk-of-disruption .

[7] U.S. Business Roundtable, *Statement on the Purpose of a Corporation* (Aug. 19, 2019), available at: https://opportunity.businessroundtable.org/ourcommitment .

[8] T. Belinfanti, L.A. Scout, *Contested Visions: The Value of Systems Theory for Corporate Law*, «University of Pennsylvania L. Rev.», vol. 166.3 (2018), pp. 579-631.

[9] Idea supported by various studies, see, *e.g.*: S. Jain, B. Blackfor, D. Dabney, J. Small,

shareholders' activism could be a mean by which long- term investment is supported (see the letter to CEOs by Larry Fink from Black Rock[10]), but this would need a majority of "quality shareholders"[11].

Anyway, the results seem not material: most of the wealth is given to shareholders.

Table copied from FedEx 2020 Global Citizenship Report

5. Conclusions

The three topics form a "crescendo" on the understanding by FedEx on how much financial performance and sustainability matters are related:

What is the Optimal Balance in the Relative Roles of Management, Directors, and Investors in the Governance of Public Corporations? (March 11, 2014), «SSRN», available at: https://ssrn.com/abstract=2407716, or http://dx.doi.org/10.2139/ssrn.2407716;

[10] https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.

[11] L.A. Cunningham, *The Case for Empowering Quality Shareholders*, «Brigham Young University Law Review», vol. 46.1 (2021), pp. 1-83.

People: huge **divergence** between the goals of the CSR report and 10K;

Planet: **uniformity** on the goals, but different approach on regulations. However, effective results seem not material;

Profits: **strong correspondence** between the approaches of the reports, but without material changes (and with an evident lack regarding employees' treatment).

To conclude, FedEx's overall approach denotes a strong awareness of the need for a change of pace for sustainability and allows us to look to the future with great optimism. Hopefully, the ideas will indeed generate an effective improvement. Now is the time to move from words to actions.

The Kraft Heinz Company – A comparative study on their ESG Report and SEC Form 10-K

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Keywords: Kraft Heinz Company; sustainability; ESG disclosure

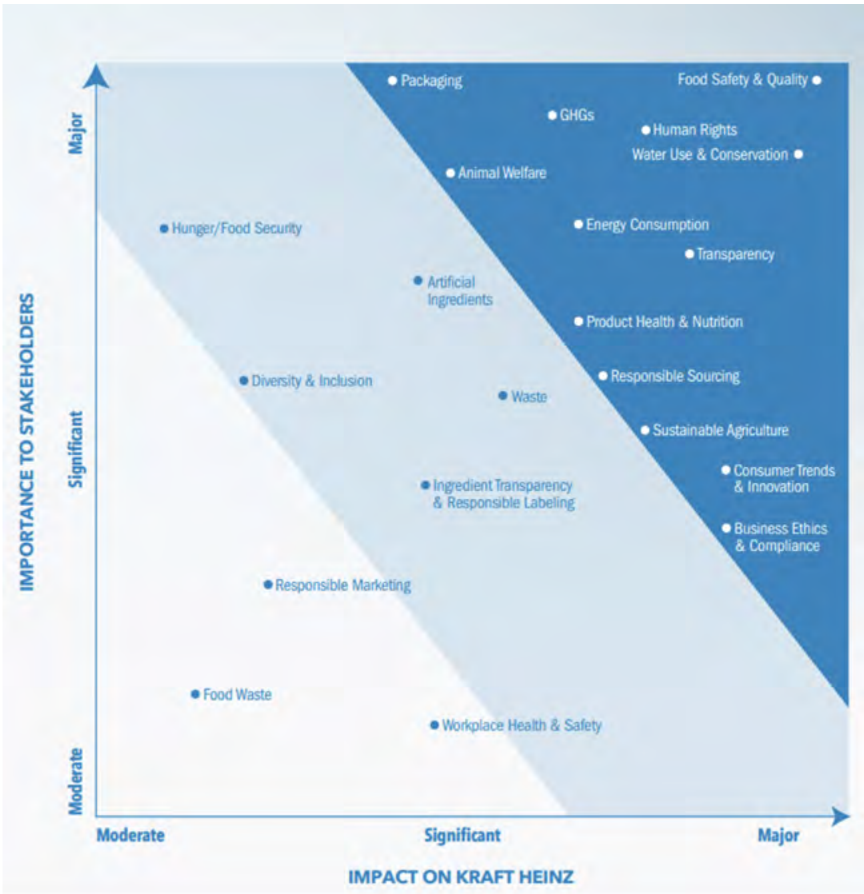
1. Introduction

The Kraft Heinz Company ("Kraft Heinz") is an American corporation which – as stated in its 2021 Form 10-K SEC filing[1] – «manufacture(s) and market(s) food and beverage products, including condiments and sauces, cheese and dairy, meals, meats, refreshment beverages, coffee, and other grocery products throughout the world». It is the third-largest food and beverage company in North America and the fifth-largest one in the world.

On a side note, it should be reminded that Kraft Heinz is a company formed by the merger of Kraft Foods and Heinz, a process that was cemented in 2015. Both Kraft Foods and Heinz, even before the merger, were no strangers to controversies that revolved around themes disparaging from food quality, to factory pollution, to homophobia regarding the advertisement and issues with the SEC.

[1] The Kraft Heinz 2021 Form 10-K is available at: https://ir.kraftheinzcompany.com/sec-filings/sec-filing/10-k/0001637459-21-000009.

The paper is based on the comparative analysis of 2020 ESG (CSR) Report[2] and the Kraft Heinz 2021 Form 10-K. Here it is a graphic I found in their 2020 ESG (CSR) Report that I believe is very interesting and on which I based my choices regarding which topics I should analyze. In fact, I thought to choose a topic for each "tier" of importance (Moderate, Significant and Major): food waste, diversity and inclusion, animal welfare.



from Kraft Heinz 2020 ESG Report

[2] Available at: https://www.kraftheinzcompany.com/esg/pdf/KraftHeinz-ESG-Report-2020.pdf.

2. Environmental stewardship and food waste

2.1. The strategy

The strategy for preventing the food waste is based on three points: (i) giving the highest priority to the issue; (ii) analyzing and testing on how processes, products and packaging can be optimized; (iii) investigation on where unneeded byproducts/unwanted products can find other uses vs. going to landfill (beneficial land application and product donations to those in need).

Regarding the donation strategy-updating product code data to increase donatable life, there are other three actions which are : analyzing warehouse data to optimize product diverted to donation; working with partners to ensure product is in the best form to be received for donation and relabeled or repackaged when necessary; working with retail and food service customers to increase donations, learn best practices, and share in the mission to decrease food waste.

2.2. Focus on the COVID-19 pandemic

The Kraft Heinz Company made both food and financial donations around the globe, although concentrating their efforts more in the Western countries rather than the rest of the world. It is not clear whether these donations were an effective effort regarding the food waste issue, as it is not specified whether they were helping out by providing near-to-the-expiration-date products. Although, they did set up partnerships with food banks.

2.3. Form 10-K

No mention of this was made in their annual Report.

3. People, workplace, culture and diversity & inclusion

In their 2020 CSR Report, Kraft Heinz focused on three strategic areas: hiring and growing talent from diverse backgrounds and perspectives, developing inclusive leaders, tracking and reporting on their progress.

3.1. Hiring and growing talent from diverse backgrounds and perspectives.

In 2018, Kraft Heinz made a commitment to expand their school recruiting list to include partnerships with Historically Black Colleges and Universities in the USA. The talent acquisition team has partnered with various companies to start using artificial intelligence in the hiring process in order to reduce bias (projects are already under way in the U.S. and Europe). Since 2016, Kraft Heinz has enabled groups and individuals to form and lead Business Resource Groups (BRGs), to help foster diversity, inclusion and belonging for all employees.

3.2. Developing inclusive leaders

In 2019, they launched *Interrupting Bias in the Organizational People Review Process*, an interactive learning experience designed to help managers identify and interrupt unconscious bias in their talent review process, with the participation of over 600 managers worldwide.

3.3. Tracking and reporting on their progress

Since 2018, Kraft Heinz has been a participant in the *Lean in Women* in the workplace survey. Three out of ten members of their Executive Leadership Team are women. In 2019, Kraft Heinz celebrated achieved their first perfect score on the Corporate Equality Index (CEI). CEI rate corporate policies and practices for LGBTQ inclusion. They continue to track and report inclusion metrics on their Engagement Survey with their progress increasing year over year.

3.4. Focus on Transition Policy

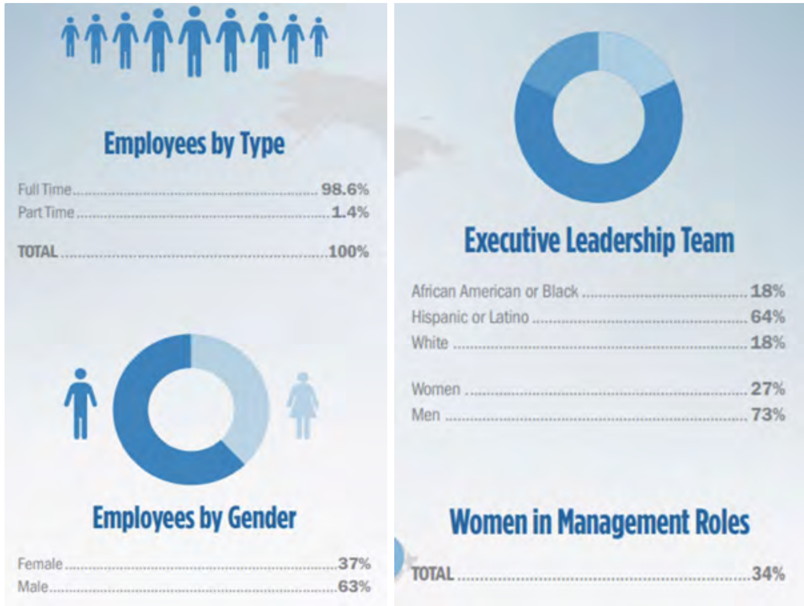
In 2018, Kraft Heinz published its Transition Policy[3], which gives guidance to approaching and supporting gender transition in the workplace. These guidelines are in line with Kraft Heinz's EEO (Equal Employment Opportunity) and Anti-Harassment policies which prohibit discrimination and harassment based on gender identity and gender expression. At every step of the transition plan, the employee is given complete support.

[3] Available at: https://www.kraftheinzcompany.com/diversity-inclusion.html .

3.5. Form 10-K

In the section *Human Capital Management*, Kraft Heinz reiterates their commitment to creating a diverse and inclusive workplace. Actually, there are even some pieces of text that are identical, which is something positive as it shows consistency on this area.

«Our Values are *We are consumer obsessed*, *We dare to do better every day*, *We champion great people*, *We demand diversity*, *We do the right thing*, and *We own it*, and they are the foundation upon which our culture is built. They represent the expectations we have for ourselves and the environment we aspire to create for our Company».



from Kraft Heinz 2020 ESG Report

4. Responsible sourcing and animal welfare

Here it is a comprehensive outline of the company's goals regarding their commitment to responsible animal sourcing.

Responsible Sourcing Performance Scorecard

	COMMITMENT/FOCUS	BASELINE	DEADLINE	PERFORMANCE THROUGH 2019
Progress on Goal	Source 100% of Eggs Globally from Cage Free Hens		2025	In 2019 we sourced 70% of our eggs globally from cage-free hens.
	Source 100% of Eggs in Europe from Free-Range Hens		2020	In 2019 we sourced 39% of our eggs in Europe from free-range hens.
	Improve 100% of Broiler Chicken Welfare Supply in the U.S.		2024	We continue to be committed to improving broiler welfare and are incorporating leading science in our assessment. 100% of our U.S. supply is cage-free. We're proud of our new global animal welfare policy overall as well as the establishment of the Advisory Committee of Experts, which stands to better the lives of millions of animals. We will pursue continuous improvement in this, and in all animal welfare areas and keep up-to-date with the most relevant science.
	Improve 100% of Chicken (Fresh, Frozen, Processed) Welfare in our European Supply		2026	We continue to assess and work towards improved chicken welfare in our European supply and look forward to future updates in this area we added in 2019.
	Source 100% of Global Pork Supply Free of Traditional Gestation Stall Housing		2025	In 2019, we sourced 16 percent of our global and 100 percent of our European pork supply from sows housed in alternative gestation systems.
	Purchase 100% Sustainable and Traceable Palm Oil to the Mill by 2022	2018	2022	100% of our directly purchased volumes are certified sustainable via RSPO (a 39% increase from Baseline) and 99.3% traceable to the mill of origin. In 2019, we published our Global Human Rights Policy. We also conducted a risk assessment of all commodities within our supply chain to better understand any potential risk. We have a zero tolerance policy for human rights violations. We have committed to implementing 3rd party diligence audits in 2021.

from Kraft Heinz 2020 ESG Report

The strategy is based on three elements: health and productivity, emotional well-being and naturalness. The first means that healthy animals are provided with quality shelter, feed, and water. The second means that negative experiences are minimized, and positive experiences enhanced. Naturalness refers to the fact that animals perform important species-specific behaviors.

This concept of animal welfare builds upon the internationally recognized «Five Freedoms» which include the fundamental principles of freedom from hunger and thirst, from physical, thermal discomfort and pain, injury or disease, freedom to express normal behaviors, and freedom from fear and distress.

Also, other pillars of Kraft Heinz's policy are: (i) supporting housing designs that support an animal's ability to perform species-specific behaviors; (ii) when painful procedures need to be performed, they encourage pain mitigation, such as the use of anesthetics or analgesics; (iii) animals deserve to be treated humanely.

4.1. Form 10-K

Also for this issue, there is not really any mention at all.

5. Conclusion

Regarding the food waste issue, it is quite confusing that, as shown on the graphic in the first page of this paper, food waste was not regarded as one of the most essential areas of the company, while at the same time on

the dedicated section of their CSR Report it is referred as their «highest priority». Regarding the diversity issue – while we can agree that Kraft Heinz has set up many exceptional initiatives – I am very suspicious on their strategy concerning the use of the artificial intelligence. I am afraid it might not be the smartest choice now, since there are still many faults in these systems (just take into consideration the case of the infamous Loomis case concerning the COMPAS system[4]). Moreover, there was little to nothing about other important aspects (gender pay gap, maternity/ paternity leave, safe workplace for racial minorities).

There is still a vast room for improvement, Kraft Heinz can definitely do better. On animal welfare, Kraft Heinz is using many good practices and their goals seem like are progressing very well, even though I do not understand why it is not mentioned at all in the 10-K form since it is a food company and responsible sourcing is of utmost importance.

While the CSR is much more complete, detailed, and comprehensive, the 10-K Form lacks almost everything regarding the sustainability aspects, which again brings up the problem of ESG disclosure. Regulations are way too permissive and should instead, in my opinion, take a much more European approach: companies should keep their freedom and private nature, but certain aspects should have a mandatory disclosure, following certain guidelines. This is why I strongly agree with the 2018 Petition for ESG disclosure, advocated by professors Williams and Fisch[5].

[4] https://nicic.gov/loomis-case-use-proprietary-algorithms-sentencing-2017

[5] "Request for rulemaking on environmental, social, and governance (ESG)", filed with the SEC (File 4-730), by prof. Cynthia Williams and prof. Jill E. Fisch, on January 10, 2018, available at: https://digitalcommons.osgoode.yorku.ca/reports/207/.

Walmart Environmental and Social Commitments

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Keywords: Walmart, Inc.; ESG; sustainability; supply chain; corporate purpose; corporate risks; greenwashing 2019 US Business Roundtable Statement on the Purpose of a Corporation

1. Introduction

Walmart Inc. ("Walmart") is an American multinational retail corporation that operates a chain of hypermarkets, discount department stores and grocery stores. In recent years, Walmart has shown strong commitment to sustainability topics and it aims to become a *regenerative company*, where people and nature are at the core of the firm's business practices. According to the company's 2020 ESG Report[1], Walmart's corporate purpose is to save people's money and improve people's quality of life by producing significant environmental and social value. In this sense, three areas of risk stand out among the others, as it is shown by the Walmart 2021 Form 10-K[2], which will be compared to Walmart 2020 ESG Report in the following pages: climate changes, supply chain, and retail operations.

[1] Available at: https://corporate.walmart.com/esgreport2020/.
[2] Walmart's Form 10-k for the FY ended on January 31, 2021, available at: https://d18rn-0p25nwr6d.cloudfront.net/CIK-0000104169/598c8825-536a-4371-ab8a-98b9ee761c43.pdf

2. Climate changes

Due to the scale of its operations and its global sourcing footprint, Walmart is exposed to considerable climate risk. Therefore, it should come as no surprise that the company is at the forefront of investments targeting climate change, channeling significant resources towards the reduction of Green House Gas (GHG) emissions along its entire supply chain.

As a matter of fact, the company announced in 2017 its goal to cut 1 billion metric tons of GHG emissions by 2030. The so-called "Project Gigaton"[3] is intended to help Walmart's suppliers identify, prioritize and implement sustainability projects in six key areas – energy use, sustainable agriculture, waste, deforestation, packaging and product use. The project, which complies with the guidelines set by the Paris Agreement and the United Nations Sustainable Development Goals, is now scoring more than 230 million metric tons GHG reduction and saw the collaboration of 2.300 suppliers.

On the other side of the equation, Walmart is also looking at ways to reduce the environmental impact of its distribution activities. With the rise of online shopping, Walmart's own eCommerce platform experienced a surge in the number of online purchases. Data collected allowed the company to measure how different shopping systems (i.e., online shopping, pick-up, delivery, in- store shopping) affect emissions and showed that an omni-channel distribution model is the key to lower-carbon shopping. For instance, customers can buy larger baskets of non-perishable products in store and resort to online for the purchase of fresh products, cutting on the number of journeys to the store. It is a case of the customer's quest for convenience resulting in the creation of environmental value.

However, this does not necessarily imply the creation of shareholder value, reason why investments in eCommerce, technology, supply chain and store remodels appear under the "Risk Factors" section of Walmart's Form 10-K. Indeed, these kinds of longer-term investments draw resources which could be spent on current issues / areas of improvement, affecting short-term profitability and thus share price[4].

[3] Available at: https://www.walmartsustainabilityhub.com/climate/project-gigaton.
[4] Walmart 2021 Form 10-K, cit., p.14.

Nonetheless, management appears to be keen on pursuing said investments, backed by the strong performance of online sales in FY2021[5].

3. Responsible supply chain

Walmart's interest in the impact of its supply chain extends beyond environmental concerns and includes also social and governance issues. Suppliers are carefully selected based on their adherence to a list of standards of conduct set directly by Walmart. These standards cover general law compliance, production transparency, involuntary/underage labor, freedom of association, work environment fairness and safety.

Moreover, Walmart ensures that suppliers comply to these standards in two ways. First, it provides suppliers with guidance on these topics – currently over 4,300 suppliers received training and education materials. Second, it performs regular risk assessments of its supply chain, followed by auditing activities in areas deemed to be at risk. By doing so, Walmart is supposed to be able to detect and, hopefully, to get rid of unwanted supplier practices in a timely manner.

Nonetheless, the risk of suppliers not upholding these standards cannot be dismissed entirely based on these efforts, reason why supplier risk is one the risk factors listed in the Form 10-K[6]. As expected, the Walmart 2021 Form 10-K draws the attention to potential adverse financial implications of supplier risk, while the ESG Report takes the wider perspective of all stakeholders, not just shareholders.

4. Walmart's retail opportunity

The retail sector is notoriously a foundational entry point to work, a place to gain valuable and transferrable skills, and a significant portion of the overall job market.

Walmart is aware of this and, being one of the largest employers in the sector, is committed to improving the working conditions of its employees. The company offers a wide variety of carrier opportunities, low barriers to entry, competitive wages and benefits, and paths to advancement through on-the-job trainings. In practice, some of measures taken in the past include reducing the gender gap (55% women workers), upgrad-

[5] *Idem*, p. 35.
[6] *Idem*, p. 17.

ing average wages to $14.20/hour (minimum federal is 7.35$/hour), and providing paid time off and family leave. However, any measure affecting the cost of labor is a burning issue for shareholders, and this is especially true for Walmart, which employs 2.3 million people worldwide. Indeed, Walmart's Form 10-k points out how deeply connected labor costs are to overall profitability[7].

This did not prevent Walmart from adopting measures supporting its employees throughout the COVID-19 pandemic. The company provided extra pay and benefits, including special cash bonuses and a COVID-19 Emergency Leave Policy in the U.S. Thanks to an impressive top-line growth (c. 7% growth in net sales in FY2020), the impact of these added costs to profitability was negligible. However, when the company decided upon these measures, extra growth caused by COVID-19 was not budgeted, indicating that management was willing to give up some profits in an effort to support its employees.

5. Final thoughts

At first, I was skeptical of Walmart's path to becoming a sustainable corporation: how can a company which strives to cut down costs engage in (costly) sustainable practices? My feeling was further reinforced when reading of Walmart's past charges of "greenwashing"[8]. Indeed, I believe I was faced with some of these in the Walmart's description of its (responsible) supply chain management, where in my opinion further improvements must be made. Perhaps, rethinking the product assortment and drastically reducing the procurement of unsustainable products (*e.g.*, red meat raised through intensive farming), rather than adding sustainable ones to the mix (*e.g.*, organic red meat) would have a greater impact on society wellbeing.

However, having analyzed the company and compared its ESG Report with its Form 10-k, I could feel more confident in saying that Walmart is

[7] Walmart 2021 Form 10-K, cit., p. 20.

[8] See, *e.g.*, *'Greenwashing' Costing Walmart $1 Million*, by J. Lyons Hardcastle, «Environmental + Energy Leader» (February 17, 2017), available at: https://www.environmentalleader.com/2017/02/greenwashing-costing-walmart-1-million/#:~:text=Walmart%20has%20agreed%20to%20pay%20%241%20million%20to,%E2%80%9Cbiodegradable%E2%80%9D%20or%20%E2%80%9Ccompostable%E2%80%9D%20in%20violation%20of%20California%20law.

adopting several socially responsible policies while trying to combine affordability and sustainability.

Indeed, Walmart is aiming at creating a shared value that integrates shareholders and stakeholders' interests, which also seems to align the company's view of corporate governance with the US Business Roundtable's recent 2019 Statement on the Purpose of the US Corporations[9].

[9] The U.S. Business Roundtable Statement of August 19, 2019 on the "Purpose of a Corporation", is available at: https://purpose.businessroundtable.org/.

EPILOGUE

Awakening Capitalism: A Great Turning?

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Everywhere we are being called to act. Mother Nature is reaching a breaking point – and her storms, droughts, fires, rains, and heat waves are speaking to us. So is the IPCC, which in its latest assessment report makes clear the time is now or never. Market capitalism is beginning to awaken to the world being interconnected, with investors shunning companies that externalize harm and searching for companies that do not – in the pursuit of better financial returns.

This essay proceeds in five parts. First, the great turning that is underway asks us to imagine and construct a circular economy, one in which (as the aboriginal Australians know) everything comes from the bush and returns to the bush. Second, a look at Western Civilization (and thus the Greek philosophers) reveals that we are captured by categorical paradigms, especially when it comes to the power structures of business. Third, the modern financial system is moving from Homer Simpson's short-termist, myopic, externalizing way of thinking and of behaving to Lisa Simpson's varied, open-hearted viewpoints and action. Fourth, the data on company-level ESG performance are growing in breadth and depth, fueling an explosion in ESG investing -- and thus offering powerful evidence that something is happening. Fifth, the role of government – long understood to be to compel business not to externalize harm – must be rethought, given that government remains controlled by corporations and wealthy elites.

In short, market capitalism is now directing government – not the other way around – and propelling a great transition in which humanity is at the beginning of recognizing and acting upon our inter-connectedness. A model of what such a global system might well be mercantile Venice, the world's longest-lived republic. Not only was La Serenissima commercially powerful and wealthy, but she also understood that her security and success depended on the health of her lagoon, and the well-being of her citizens.

Keywords: Circular economy, inter-connectedness, market capitalism, ESG performance, ESG investing, institutional investors, stakeholders, cost externalization, role of government, great transition.

1. Introduction

The ESG movement is here – Capitalism is healing itself. But in many ways ESG is small compared to sustainability. And sustainability is small compared to "*pro humanitate*" – the motto of my University.

So, the ESG movement leads to a question: can humanity heal herself? We have a somewhat narrow conception of ourselves and thus of our human potential. Undertaking a great transition, I believe, is our next step.

We are in an epochal moment as the old moves into the new. Sometimes, when in transition, we focus on the moment, on the minutia. And we fail to notice the larger changes that are engulfing us. Steven Pinker has studied this and finds that recent data on homicide, war, poverty, pollution, education, and more show we're better now than 30 years ago. Recently, a Medium piece concludes that we are generally much wealthier and healthier, but less wise.

These are some of my thoughts. They are ruminations, and I'm quite sure they will strike each of you in different ways. So, I invite you – let's ruminate together.

The Sustainable Corporation

The Pantheon in Rome is the most remarkable edifice. More visited than any other Roman monument, it has survived intact for nearly two millennia. Its oculus, perhaps its defining feature, represents three interconnected ideas. First, beauty is eternal, not just everlasting. Second, our planetary existence depends on the sun, and we human beings cannot exist without the nature the sun makes possible. Third, we human beings have the capacity to manipulate nature to create sustenance, even regeneration, under the sun.

2. Mother Earth is calling us to act

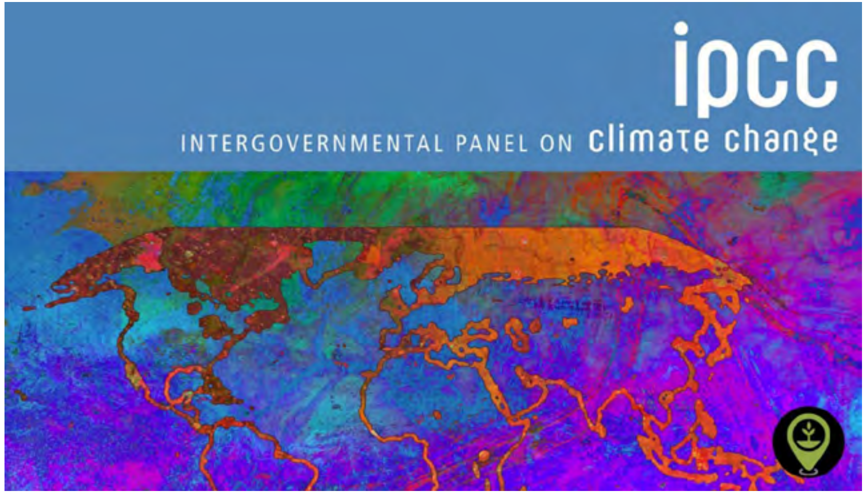
Mother Earth is lately in our hands, and she is calling us to save ourselves. A blues song from the Louisiana bayou in the 1920s, *When the levee breaks,* is that call. The song reinterpreted by Led Zeppelin in the 1970s and by *Playing for Change* this year is Mother Nature calling us – screaming at us – to wake up. The only way for us to learn, to really learn, is first to open our minds with art, poetry, music. This is the creative source of knowledge – now to save humanity's place in our planet.

> If it keeps on rainin', levee's goin' to break
> When the levee breaks, I'll no place to stay.
> Mean old levee taught me to weep and moan, Lord
> […]
> Cryin' won't help you, prayin' won't do you no good
> When the levee breaks, mama, you got to move,
> ooh All last night sat on the levee and moaned

So, Mother Earth is telling us, each of us, to move, to take responsibility, to act. It is Mother Earth telling our most powerful collective self, our market capitalism, to awaken.

3. The IPCC is calling us to act

The Intergovernmental Panel on Climate Change released its Sixth Assessment Report on Impacts, Adaptation, and Vulnerability in February 2022. The Panel reports that things are getting more and more dire. Tackling climate change requires a fundamental overhaul of nearly all aspects of human life – including how we conduct our economic, financial and our business life.



The Intergovernmental Panel on Climate Change Sixth Assessment Report (2022)

Every aspect of human life must be part of the climate crisis solution: from how we produce electricity and power our transportation system, from how we build our cities to how we manufacture goods, from how we grow food to how we protect forests (especially the rain forests) and wetlands. All are part of the solution. Fortunately, we are at a point in human knowledge where we can find and implement solutions for a real change. Along with this, global net carbon emissions must peak immediately. Emissions, which are still rising after the pandemic, must begin to fall. We have the science and technology to do this.

This Inter-governmental Panel's report says we need a coordinated international effort to pursue a solution which involves all aspects of human life. I accept that we need a coordinated international effort. But notice the report's mindset – its animating assumption. Capitalism is the problem, the culprit, the enemy. To solve the climate crisis, we must

overcome the design of Capitalism – by government action. But what if, just maybe what if, Capitalism is healing itself?

4. Market capitalism is calling us to act

From its birth, Capitalism has been based on and structured around the externalization of costs. A simple way of describing this is to think about years ago when human beings started to engage in commerce – first with barter and later with money.

Here's the story. I have two goats. You have five bags of wheat. We agree to an exchange: the two goats for the five bags of wheat. It's a commercial transaction. We each inspect what the other offers, we then make the exchange, and we go our separate ways. After sacrificing and eating one of the goats, you discover that the animal was not well. You become sick and one of your family members dies. I knew the goat was not well, and I exchanged it without telling you. I externalized the cost of the goat (the harm) to you – to pursue my own advantage.

Business has been designed to externalize costs for millennia. It is perhaps one of its intrinsic aspects – reduce costs, increase profits. But in the last few years this began to change. Business has been told by the very Capitalist system that business inhabits that the externalization of harm means to hurt oneself. As investment firms awaken to the damage done to their portfolios by companies that externalize costs on other portfolio companies, business is suddenly being challenged to seeing how things are interconnected.

We thus have for the first time in civilization's history the beginnings of a global system – a market capitalist system, beyond government -- that induces business to internalize its harm and costs. The rising recognition among investors, consumers, employees, workers, and communities of an interconnected world begets an economy in which we have reason not to externalize harm onto others or onto the planet. It is becoming clear that when we externalize harm, we actually hurt ourselves. Likewise, we are figuring out that if we share benefits, those benefits come back to us in a circular flow. In other words, this means that the take/make/waste economy – built on hurting others – is moving toward a functioning circular economy.

5. Here's my five-part essay

This essay proceeds in five parts. First, to understand this Great Transition, we should understand the nature of the circular economy – both as a process and a goal. It is one in which inter-connectedness – both in human and ecological terms – is recognized, studied, acted upon. Like the aboriginal Australians, everything comes from the bush and returns to the bush. We are invited to new modalities of seeing our reality.

Second, it's useful to pause and consider a short history of Western Civilization and thus the Greek philosophers, whose thinking has shaped our interpretation of reality and the distribution of power – that is, the constructs of western society. This is the starting point to deeply understand the changes are now taking place in Capitalism. Greek philosophy – upon which our modern Capitalism is built – assumed that the world is a set of categories, each permanent, each isolated from others, each logically consistent. This is demonstrably false. Nothing is permanent, nothing is an island, contradictions abound.

Third, the changes in the capitalist financial system can be represented by a "Simpson metaphor". The financial system is moving from Homer Simpson's way of thinking and behaving to Lisa Simpson's life viewpoint and action. That is, we are moving from a selfish, short-termist, myopic understanding of business and finance to a more expansive, long-termist, open-eyed understanding.

Fourth, the data on ESG performance are growing in breadth and depth – offering powerful evidence that something is happening. These data are clear: a business that focuses on ESG – that is, a business that focuses on its environmental impact, on its carbon footprint, on the welfare of its employees and customers, on the openness and diversity of its governance structure – is a more profitable business. This performance advantage is just beginning and is likely only to grow. It has led to an explosion in what is called *ESG investing* – that is, money managers opting for businesses that can be defined as sustainable.

Fifth, we must confront the role of government, which I believe leads to new understandings of the "public sphere" in this epochal change. According to our usual vision, government – and only government – is tasked with directing business not to externalize harm. This is built on the assumption that Capitalism is inherently based on short-termist,

myopic externalization of costs. But given that government remains controlled by corporations and elites, we must free ourselves of the idea that government is the only possible repository of good. Instead, government guided by Capitalism – not the other way around – may be what propels this transition.

5.1 Everything is interconnected

Everything is interconnected. My essay *Capitalism, heal thyself* sought to illustrate this with my observation of a plastic bottle. The plastic bottle and I are cousins, literally cousins, multiple times removed. We all came from a life form called Protists – today, algae and bacteria. The Protists broke off to become plants, then later animals and fungi. As a human animal, I'm a cousin of all plants, including the plants that became petroleum. The plastic bottle and I are related in this way. Everything is connected on this Earth. Human beings – particularly, modern human beings – fail to understand these interconnections, which are critical to our making of a circular economy.

The brilliant British economist Kate Raworth captures all of this in her elaboration of Doughnut Economics. According to her vision, humanity's current challenge is to implement sustainable development within the means of the planet's limited natural resources. She offers a visual framework, shaped like a doughnut, which identifies planetary boundaries outside the doughnut together with social boundaries within the doughnut – the doughnut the safe and just space in which humanity can thrive. In this space, we must learn to deal with each other to ensure our mutual existence.

The war in Ukraine is a sign of our failure to deal with our inter-connectedness. There are other glaring examples. We know that we are exhausting our climate stability, bringing to extinction every day far more species than arise, ruining our soil, our waters, our lands, our oceans. We are not using as well as we should and as we can our planetary resources. We are not fulfilling our human needs in ways that provide for the safe and just space for humanity.

The “Doughnut Economics” (Kate Raworth, 2012)

Social equity, human health, distribution of resources, gender equality, education, are all within the doughnut where we must adapt and resolve things better. Outside the doughnut, we must abandon our linear economy of take/make/waste and adopt instead a circular economy of make, use, re-use, re-make, recycle. Many technical minds, and many in business, are focused on the question how we create an economy that does not exhaust what is outside the doughnut while satisfying the needs of people inside the doughnut.

For example, Patagonia now has a line of clothes made by with hemp that is much safer and better than cotton. As we rethink our wardrobes, we must find a will to change, use our imagination, and rely on good science. The Patagonia hemp clothes have a higher price than the cotton clothes they replace – but they have a lower cost. As we transition, it’s important to recognize the difference, sometimes gaping, between price

and cost. That is, how our short-sighted markets price things is not the same how longer-seeing people (and the planet) value them.

5.2 Short history of Western Civilization

There is an account that when Gandhi was asked what he thought of Western Civilization, he replied that it would be a good idea. Maybe, we in the West are not that civilized. Maybe we can take some lessons from the East.

We humans live in power structures. For example, when I gave a talk on this subject, students listened, and I spoke. That was the power relationship that we had adopted. Part of our power structures arise from whether we are listening to our left-brained IQ and what it tells us where power structures, and our deeper right-brained EQ and how it identifies power structures. I believe we are moving from IQ to EQ.

Western Civilization opted for our left-brained IQ. In 550 BC the Greek philosopher Parmenides concluded that reality is one, change is impossible, existence is timeless and uniform. Famously, he said, "Whatever is is, and what is not cannot be." This is the view that came to undergird Western philosophy – perhaps because it's a view that fits with and legitimizes existing power structures.

This static view of human power structures was repeated and codified by Socrates, then Plato. Put into categories by Aristotle, repeated by the dominant Western institutions – first the church and then government.

The dualistic vision of reality permeates many aspects of human life, including the corporation. The corporation is understood as an entity composed of what's inside of it – namely, shareholders and managers. Outside the corporation are those who supply and consume its goods and services. Thus, profits – which are seen as inside the corporation – are the only thing that matters to the corporation, given that its purpose is to satisfice the insiders. Any harm created outside the corporation is not the corporation's problem because it occurs outside the corporation.

A bit after Parmenides in 500 BC, another Greek philosopher Heraclitus offered a different view of reality. He said everything flows, everything is in constant transformation, there is a unity of opposites. Famously, he said, "No man ever steps into the same river twice." This non-dualistic thinking sees that the corporation is both inside and outside, and sometimes neither inside nor outside.

The non-dualistic tradition is rooted in Eastern philosophy. The Buddha's teachings` reflected this philosophy. Jesus said the poor shall in-

herit the earth – how can this be? They're poor. The poor have nothing to inherit. The Christian mystics continued this understanding that opposites and contradictions reveal truth. Today, there are many non-dualistic thinkers, some of whom see a Great Turning. Humanity they observe, is in the process of rethinking itself.

5.3 From Homer Simpson to Lisa Simpson

Our capital markets and corporations are undergoing a generational change – much like that of The Simpsons.

The new "global investor" is no longer Homer Simpson. Think about Homer: "Beer, cheap beer. I want beer. I want beer now." Homer is very much a dualistic externalizing, short-termist, self-absorbed thinker. He has modeled the approach for investing and thus global capitalism for hundreds of years. For example, if the Dutch East India Company (the world's biggest corporation ever) and its trading in India cause harm in India, that is India's problem. The purpose of the corporation was to make its Dutch investors, Dutch managers, and The Netherlands wealthier and wealthier. This is the mindset that has undergirded Capitalism, wanting things for oneself, ignoring others who we blithely assume will take care of themselves somehow. Homer Simpson once said to a thief who had broken into the house, "Don't hurt me. It's OK if you hurt them. Just don't hurt me." As loveable as Homer might be, this attitude is not sustainable.

What is the attitude of the new global investor? It is that of the millennials. Gen X, Y, Z are investing their money and human capital in jaw-dropping amazing ways. They are Lisa Simpson. Her mindset is science, music, justice, animals, shapes, feelings. The new generation understands that all is interconnected, all is part of and affects the human condition.

This new generation invests for the long term, with a focus on how their investments will be good for people and the planet. Profits only make sense if they arise in a world in which we all can live. Not thinking about how a business affects the well-being of its employees and its customers, how it treats animals, how it deals with its impact on the environment is a way to hurt oneself.

Then, there is impudent, risk-taking Bart. He's the startups, along with the PE and VC firms investing in the startups. And Bart – more than anyone – is looking for ESG, real ESG. Lisa loves Bart, though as he rides his scooter down the middle of the street, she screams out "Bart, wear a helmet".

5.4 The data – and the underlying driver

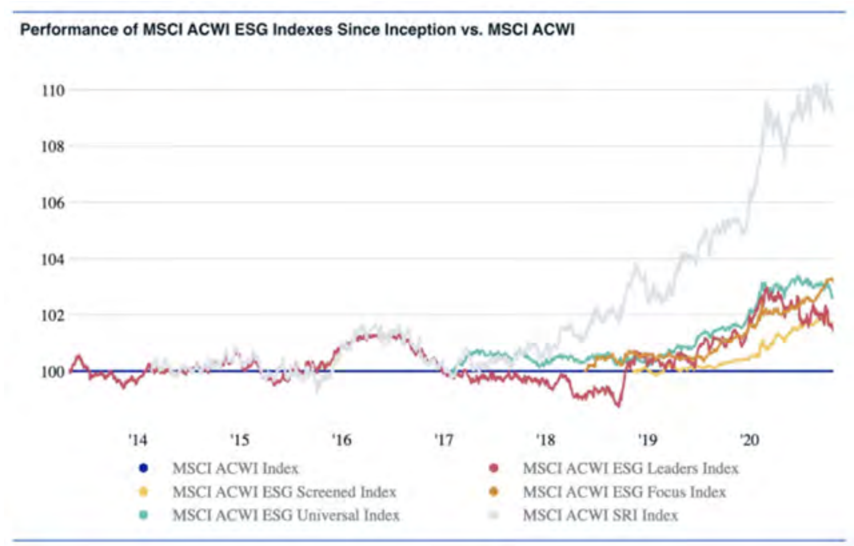
Sustainable Investing in the U.S.A. (1995-2020)

This chart needs to be updated. Since 2020 things have got even more remarkable. ESG incorporation is growing, ESG focus is growing, so too impact ESG investing. More workers – and investors – have become attentive to workplace satisfaction, corporate culture, environmental impact, social governance. Shareholders are becoming much more active, and the big shareholders are using engagement to push companies even further and faster.

The driver is that ESG – the real stuff – makes money. Workers are more productive, customers are more loyal, those up and down the supply chain are looking for it. A bit like when it became clear (about 2014) that renewables (solar and wind) are cheaper than carbon-based energy, including fracked gas, the result became inevitable. The move toward renewables was assured – because when price and cost coincide, things happen.

Here is a recent chart that makes clear that ESG has an advantage and that the advantage is only growing. The business literature is starting to notice. The law literature remains mostly mired in its paradigms. But the

big consulting firms and others seeing opportunities in this transition, their noses attuned to money, are tripping over themselves selling this chart:



ESG – the real stuff – makes money

To repeat some of the points in Capitalism, heal thyself – whose data and analysis is confirmed in the months since I posted it – during the pandemic, investment managers discovered that an ESG investment focus produced better returns. ESG tended to be a proxy for business resilience, which was highly rewarded during the pandemic. But it then exposed that ESG also translates into innovation and adaptation. In a world of the unpredictable, these may be the most certain recipes for business success.

It's worth considering how this has played out with the Big Three, whose combined equity holdings is about 20 percent of US public equities, and about 25 percent of voting power given that many retail investors don't bother sending in their proxies. BlackRock has $11 trillion under management, divided about $8 trillion in indexed funds and $3 trillion in managed funds. Vanguard's $7 trillion AUM is mostly indexed. State Street's $4 trillion AUM is divided between indexed and managed funds. Not surprisingly, BlackRock appears to be more engaged with ESG than Vanguard, which seems happy to see alpha move into beta. The Big Three and the other big institutional shareholders who largely follow each other's lead are the ESG vehicles – all driven by the advantage of the ESG

business model over the old externalization-of-costs business model. The Big Three, with their 25% voting bloc in US companies, means they call the shots on US corporate governance. If they want to get rid of a CEO, or if they want a board to change the company's direction, they have the power to do this.

For example, ExxonMobil (the world's largest private oil and gas company) has weighed down investment portfolios for the past several years. Its oil and gas business not only has an iffy future, but the company's active indifference to climate change has meant that it has hurt the returns at other companies. Think of the storms, flooding, fires, losses, damage wrought by ExxonMobil on a diversified investment portfolio. Realizing this, investors (especially the big ones) started to sell ExxonMobil, whose stock through the end of 2021 fell about 30% during the previous five years. Meanwhile, the overall stock market was up about 110%.

In the fall of 2021, the Big Three and the other big institutional shareholders put pressure on ExxonMobil to move toward biofuels. They voted with a hedge fund to seat directors with renewable energy chops – eventually, two incumbent directors were voted out and replaced with two renewable-energy directors. Why would big shareholders – especially investment managers who run low-cost indexed funds – engage in this kind of voting activism? It's an interesting question. It would seem "tone at the top" and firm culture matter. BlackRock has every reason to be activist in its managed funds, and every reason for managers of the firm's managed funds to pressure managers of the firm's indexed funds.

The result at ExxonMobil is that the company had a nice rebound in the first half of 2022, in part because its competitor Russia hurt herself, but also because the company seems to be making strides in algae-produced jet fuel – the one form of transportation for which carbon-based fuels have an advantage over electric batteries.

5.5 A role for government

A linchpin of my thesis of an awakening Capitalism is that we are moving – even more – toward a market capitalism in which government takes its orders from the elites, from the capitalists. Historically, this has meant that the corporate lobby calls the shots in Washington and US state capitols. Lately, it means that the corporate/finance lobby – when of one mind – determines the policy and regulatory outcomes.

So, what is government's role in ESG movement?

We are used to thinking that government leads business. We often say that the corporation is a creature of law – of state corporate law and lately federal disclosure/corporate governance law. Nonetheless, government is controlled and has been controlled by business. We do not have a functioning democracy, at least as whimsically described in our civics textbooks and constitutional law casebooks. We have a high-functioning market capitalism. And we always have.

Basically, corporate elites control government by lobbying (thus to communicate their agenda) and by supporting candidates with political expenditures and contributions (thus to supply voters).

As a result, corporations in politics has meant (1) the federal government panders to the corporate elites, (2) no federal policy or law in the last two generations has ever happened without corporate/elite support – that is, policies and laws supported only by the poor and middle-class (the majority of voters) never happen – these are the findings of a study by a Princeton political scientist and Northwestern sociologist, and (3) the US Supreme Court sides almost always with corporations, highly influenced by the views of the Business Roundtable and the US Chamber of Commerce, and to some extent the Council of Institutional Investors.

Scene at the Signing of the Constitution of the United States
(Howard Chandler Christy, 1940)

Garry Wills has written about democracy. His book "Lincoln at Gettysburg" is a classic. So too his less known book "Venice: The Lion City". He points out that Venice – which to my mind is the birthplace of modern capitalism, especially the US flavor – did not produce great historical texts, but instead a pictorial history in paintings and other artwork. So, too the United States. Except for Charles Beard, our historical texts offer mostly lovely myth making. Our law school curricula is similarly far-fetched, but then we were all taught and still teach the mirage of "legal reform."

What we have is a market capitalism. Seeing ourselves in this way, we can find a model – even a blueprint – in Venice, the longest-lived republic, which lasted for more than 1000 years. Although its business model was destroyed in 1492 when Vasco Da Gama figured out how to go to India and China around the Cape of Good Hope, Venice had so much wealth that it thrived for another 300 years on its accumulated fortune.

Prospect of the Grand Canal, Venice
(Alan R. Palmiter, 1995)

It's interesting to contemplate the political model of La Serenissima. Venice was never a democracy. It was a Republic by, for, and of the merchants. There was The Council of Ten, which ran the show. The Council of Hundred oversaw the smaller council and the Doge, who was the symbolic head of state. Thus, the merchants of Venice, the powerful wealthy families, controlled the state politics. Venice was successful and healthy.

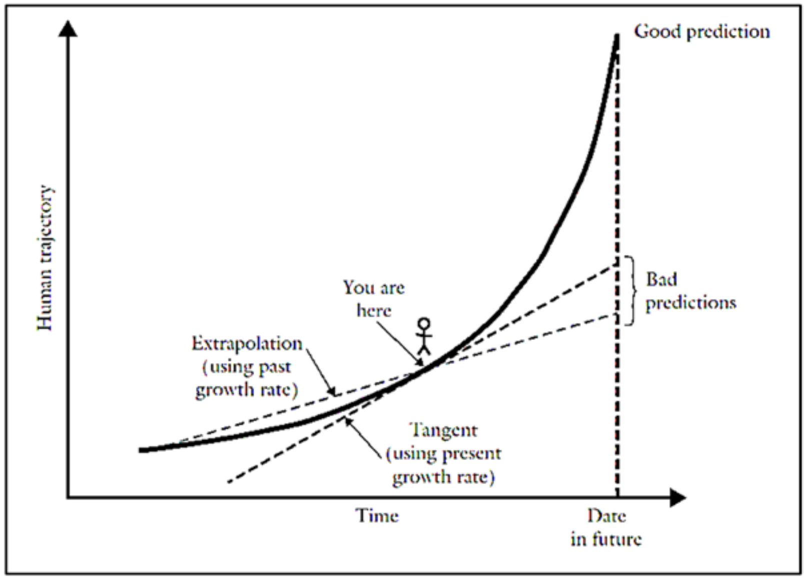
The Venetians understood that everything – beginning with the eco-system of their life-giving and protective lagoon – is interconnected. Like the Venetian lagoon, a magnificent living system, the Venetians created the world's greatest piece of integrated art. Venice itself. The Venetians understood that failing to take care of one aquatic animal, to control one virulent pest, or to maintain the proper flow of water, would have caused the lagoon to collapse – and the city with it.

Thinking about the model of La Serenissima, we might aspire to become a more perfect "market capitalist" union.

6. Concluding remarks

This is where we are today. We are standing at the beginning of exponential change – actually, a series of S curves. Think about the arrival and then the adoption of means of communications – telegraph, telephone, radio, TV (B&W and then color), cell phones, smart phones, implanted thought-transmission devices, etc.

If we draw a straight line from the past, we badly miss where we are headed. Even if we recognize the power of the tangent (the first derivative), we miss our mark. Only by understanding that we are on an exponential curve can we see into the future.



This is where we stand today
(Alan R. Palmiter, 2022)

You may notice that nothing in this essay is about Awakening Capitalism: A Paradigm Shift (my essay on how separation of ownership and control, corporation as cost externalizer, agency theory, role of government, and lots of political theory are all out the window). Why? I'm not really interested in theory. Generally, theories are so stultifying.

The nineteen essays composing this book document a three-fold educational project built around a "Law of Sustainable Corporations" course, organized by the School of Law of the University of Padova, within the Padova University "Miglioramento della Didattica" (Teaching Enhancement) mission, and co-taught by professors Alan Palmiter (Wake Forest University, School of Law) and Maurizio Bianchini (Padova University, School of Law) during the Spring 2021. The LSC course was complemented by a series of *Colloquia* and an end-of-course international *Symposium*, whose proceedings are published in the second and in the first part of the book, respectively, whereas the third part is dedicated to the best eight short essays submitted by Padova students as their LSC course's final written assessment.

Each of three parts this volume consists of represents an endeavour to delineate and to account for some of the most significant issues that are currently shaping the fascinating *journey* into the complex, articulated, multidimensional realm of "corporate sustainability" problems, which are deemed to extend beyond the usual legal survey of the conditions upon which a business organization could qualify as an economically and financially viable concern in a mid to long-term perspective. Upon the premise that the incorporated firm – *i.e.*, the typical for-profit company that, albeit in different fashions, intensively populates and dominates the globalized economy – firmly and strategically stands at the intersection of the 17 Sustainable Development Goals set forth in the UN's 2030 Agenda for Sustainable Development adopted in 2015, the book contributors – academics, experts, and law students – offer the reader a diversified (and sometimes diverging), substantive, cutting-edge analyses on several different aspects of corporate sustainability, including the corporate purpose «jigsaw», the role of institutional investors *vis-à-vis* sustainable responsible investing, the new sustainability provisions impacting corporate reporting and corporate governance structures, the sustainability-oriented principles emerging in the banking sector, the alternative business form represented by the benefit companies, the interactions between principles of corporate crimes and principles of sustainable corporate compliance and risk management, the stakeholders-oriented approach in corporate insolvency, and more.

The *leitmotiv* underpinning the essays collected in the book lays in the multi-prong question about whether, to what extent, and how for-profit companies – and thus their directors, managers, shareholders, and the institutional investors engaging with them and with other stakeholders in various forms – could leave behind their traditional design, as well as the well-established principles currently shaping their usual corporate governance posture, so as to transform themselves, from social costs « externalizing machines», into sustainable business vehicles, operating within the stringent boundaries of legal restrictions, not just in a socially responsible fashion, but, more comprehensively, as *ESG-compliant* market players: that is, within a deeply renovated mindset that could hopefully characterized by what Alan Palmiter in his concluding essay called a new era of «awakening capitalism».

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