



# Sustainability and Remedial Regime in the Sale of Consumer Goods

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### Abstract

The act of consumption is assuming an axiological dimension that deserves to be projected also in a remedial perspective. It is the relationship between private law and sustainability that comes into focus. An incentive policy for the remedy of the repair of goods is central to the project of a sustainable single market, in which the inseparability between individual interests and general interests should inspire the search for a new balance.

### I. Sustainability: A Sociological View

There is a common thread that connects physics, astronomy, natural sciences, sociology, philosophy, law: we call it the System.

Great modern minds have dedicated and still dedicate their entire lives to the study of the System. Whether this variously assumes the connotations of Society, Universe, Legal order, eminent experts have tried to identify the principles that govern a system reducing the complexity of a complex system.<sup>1</sup>

So, what can be defined as Society is a complex system. And it could be considered the system that records the greatest increases of complexity. Where there is an increase of the know-how, consequently there is less knowledge. The spread of the know-how implies the lack of knowledge of the consequences.<sup>2</sup>

The extension of knowledge has generated the intensification of the production. The mechanisms of continuous production have made evident the lack of knowledge of the consequences: this is usually called 'unsustainability'.

Unsustainability is a more tangible concept, if compared to sustainability. Until now we have experienced unsustainability. We know how to be unsustainable. We are aware that it is unsustainable acting as we have done so far.

Frank Trentmann,<sup>3</sup> has meticulously detailed the past five hundred years of

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<sup>1</sup> Giorgio Parisi, Nobel Prize winner for physics in 2021 for his studies on complex systems, explains that a complex system is a 'system described by phenomenological laws that do not derive immediately from the laws that describe the behavior of the individual components', G. Parisi, *In un volo di storni. Le meraviglie dei sistemi complessi* (Milano: Rizzoli, 2021).

<sup>2</sup> E. Capobianco and A. Fantini, 'Rischio pandemia e diritto dei contratti', in L. Nuzzo and S. Tommasi eds, *La differenza e l'ostacolo* (Napoli: Edizioni Scientifiche Italiane, 2021), 136.

<sup>3</sup> F. Trentmann, *The Empire of Things. How we Became a World of Consumers, from the*

consumption, giving us a pessimistic assessment of how we have behaved and are still behaving today.<sup>4</sup>

Unsustainability is therefore the otherness that makes the unity of difference.<sup>5</sup> And the difference is made by the human conduct of a human being.

We use to deviate, or at least we try to deviate, from what we have been tied to until now. This is the unsustainability. Today the priority is not being sustainable, but not being unsustainable anymore; there is no time left to be unsustainable.

The concept of sustainability brings out the close connection to what is called limit. Limit intended as limit of resources, consequently, limit of life.

And it is also linked to solidarity.<sup>6</sup> Sustainability and solidarity are connected by the opposition to the selfish vision.

Indeed, sustainability is the opposite of selfishness. Selfishness implies the centrality of the ego revealing its component of asociality. And asociality has nothing to do with freedom.

*Fifteenth Century to the Twenty-First* (London: Penguin Books, 2016).

<sup>4</sup> H.W. Micklitz, 'Squaring the circle? Reconciling consumer law and the circular economy' VI(8) *Journal of European Consumer and Market Law*, 229-237 (2020).

<sup>5</sup> A distinction can only be made compared to a unit. But the distinction allows you to see one side or the other. The unit remains undetectable. The unity of the distinction of good and evil cannot be observed; and this is why good is moral, just as evil is moral. Likewise, what is lawful pertains to the law and what is illicit pertains to the law itself. These observations are freely inspired by the extraordinary pages of N. Luhmann and R. De Giorgi, *Teoria della società* (Milano: Franco Angeli, 1992).

<sup>6</sup> Solidarity is icastically defined as 'an open window on society to allow its orderly development' by G. Vettori, 'Persona e mercato al tempo della pandemia' *Persona e mercato*, 6 (2020). Solidarity is identified as a 'speculative principle, internal to the judicial order; force of cohesion within the organism of objective law, and therefore a motive operating, from within, in the process of creation of subjective rights' by S. Pugliatti, *Teoria dei trasferimenti coattivi* (Messina: Casa Tipografica Ettore Silva, 1931), 111. In this perspective, the illustrious Author considers solidarity a 'unique vehicle, [...] through which an ineliminable contact between the State and the individual is established *ab origine*, and therefore between objective law and subjective law, the sole source from which arises, with that, the obligation of implementation and protection by the State, and with this the legitimate faculty of the individual, to which, as the obligation of protection extends, the right of disposal (limited and conditioned) also extends, which merges with it'. With particular regard to the compulsory relationship, R. Cicala, 'Produttività, solidarietà e autonomia privata' *Rivista di diritto civile*, 298 (1972), indicates that the 'solidarity formula [...] refers to a balancing of super-individual interests in the ethical perspective of the weakening of the "egoistic fact" not in the economic one of productivity'. In this perspective, P. Perlingieri, '«Depatrimonializzazione» e diritto civile', in Id, *Scuole, tendenze, metodi* (Napoli: Edizioni Scientifiche Italiane, 1988), 173; Id, 'Mercato, solidarietà e diritti umani' *Rassegna di diritto civile*, 82 (1995); Id, 'La tutela del consumatore tra liberismo e solidarismo', in Id, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 308-316; see also S. Rodotà, *Le fonti di integrazione del contratto* (Milano: Giuffrè, 1969), 132-152; F. Lucarelli, *Solidarietà e autonomia privata* (Napoli: Jovene, 1970), 92; N. Lipari, '«Spirito di liberalità» e «spirito di solidarietà»' *Rivista trimestrale di diritto e procedura civile*, 1-25 (1997); P. Stanzione, *La tutela del consumatore tra liberismo e solidarismo* (Napoli: Edizioni Scientifiche Italiane, 1999); S. Rodotà, *Solidarietà. Un'utopia necessaria* (Roma-Bari: Laterza, 2014), 36, places emphasis on the emergence of an 'ecological citizen', not conditioned in his actions by the exclusive reference to selfish interests or market logic, 'but necessarily involved in collective processes, where a further connection manifests itself - that between solidarity and participation - which makes solidarity re-emerge as a republican virtue'; V. Rizzo, 'Contratto e costituzione' *Rassegna di diritto civile*, 349-362 (2015).

It has been authoritatively argued that

‘sustainability is something that overcomes egoity and combines it with otherness, reconciling and reducing generational conflict to synthesis. Sustainability emphasizes the necessity, without it there isn’t sociality, explaining the development (not the solution) between *status personae* and *status civitatis* declaring the continuity between individual liberties and social rights, pursuing the effectiveness of the minimum vital to the person as a guarantee of the order’.<sup>7</sup>

For all these reasons the construction of the idea of the common and universal good,<sup>8</sup> have been advocated. In the opinion of the writer, this is an invention of the modern reason addressed to justify policy decisions.

The same can be applied to the concept of sustainability. It is a semantics construct, artificial semantics, since it does not correspond to the truth. The construction of the meaning around the concept of sustainability implies freedom, which in turn is a condition of knowledge.

Another piece of untruth of the modern society is the choice between sustainable and unsustainable, since freedom of choice means having a choice.<sup>9</sup> However, all choices are built. So, the choice in this context, has not alternatives. The possibilities, before becoming alternatives, are multiple. When possibilities become choices, they have been already minimized. This is an artificiality, which has nothing to do with freedom.

Thus, the possibilities of being sustainable are multiple. However, the alternatives – already reduced among the many possibilities – that are proposed to us are the less sustainable.

As a consequence, the lack of freedom of choice. In other words, being able to decide only on what cannot be decided.

Another concept connected to sustainability is that of education. Education to sustainability, which is an arduous mission. The atavistic problem is that the action of individuals composes the action of the community and the individual, ‘Man was created a rebel’.<sup>10</sup>

As mentioned above sustainability is a construct of semantics that has

<sup>7</sup> E. Caterini, *Sostenibilità e ordinamento civile. Per una riproposizione della questione sociale* (Napoli: Edizioni Scientifiche Italiane, 2018). Book reviewed by G. Perlingieri, ‘«Sostenibilità», ordinamento giuridico e «retorica dei diritti». A margine di un recente libro’ *Il Foro napoletano*, 101-118 (2020) and M. Pennasilico, ‘Recensione a E. Caterini, *Sostenibilità e ordinamento civile. Per una riproposizione della questione sociale*’ *Rassegna di diritto civile*, 1511-1519 (2018).

<sup>8</sup> Among the most fervent supporters of the category of common goods, U. Mattei, *Beni comuni. Un manifesto* (Roma-Bari: Laterza, 2011).

<sup>9</sup> Without an alternative, after all, it is not possible to choose.

<sup>10</sup> ‘[...] and how can rebels be happy?’, the words of Ivan Karamàzov, in F.M. Dostoevskij, *The Brothers Karamàzov* (New York: Dover Publications Inc., 2005), 227, in the sublime pages of the chapter *The Grand Inquisitor*.

established itself in social communication. The same can be applied to the sustainable development. But what does sustainability mean? Can a power plant be considered sustainable?<sup>11</sup> Can an incinerator be classified as sustainable? In addition, is the sustainable development sustainable?

## II. Sustainable Development and Social Duty

‘Sustainable development’ is an evident oxymoron<sup>12</sup> consisting in approaching, in same locution, two words that express opposite and antithetical concepts (those of economic development and environmental sustainability). The concept of sustainable development has recently become a focal point of discussion between economists and ecologists; the adjective has been presented, in this discussion, more as a correction rather than a specification of the noun.

The expression has been included in the language and common sense, as the signal of a deep change in sensitivity, of a more widespread and aware ecological awareness.

Sustainable development has been effectively defined as

‘development that guarantees to everyone basic environmental, social and economic services without threatening the evolution of the systems (natural, built, social) on which these services depend’.<sup>13</sup>

In 1972, the Report of the ‘Club of Rome’ stated that the economic growth is incompatible with the sustainability because, sooner or later, as the world population grows, needs arise and these needs cannot be met without affecting the natural resources currently available.<sup>14</sup>

Hence the concept of resources substitutability. The degree of resources substitutability is inversely proportional to the degree of development sustainability: substitutability increases as sustainability decreases. Currently the debate revolves around the two middle positions of the scale ‘sustainability-substitutability’ and attempts are made to get to the bottom of the question related to the conservation of natural capital without however blocking economic growth.

<sup>11</sup> The announcement by the US authorities of the turning point on nuclear fusion is very recent, after the production, for the first time in history in a California laboratory, of a reaction that generates more energy than that needed to trigger it. It is a more environmentally sustainable source of energy than sources based on fossil fuels or nuclear fission.

<sup>12</sup> In this sense, M. Cafagno, ‘Cambiamenti climatici tra strumenti di mercato e potere pubblico’, in G.F. Cartei ed, *Cambiamento climatico e sviluppo sostenibile* (Torino: Giappichelli, 2013), 105-122.

<sup>13</sup> Definition found in the *Local Agenda 21* program, developed in 1994 by ICLEI (*International Council for Local Environmental Initiatives*).

<sup>14</sup> The reference is to the report published by a group of researchers from MIT published a report for the Club of Rome, entitled ‘The Limits to Growth’ aimed at gaining insights into the finiteness of our world system, D.H. Meadows et al, *The Limits to Growth* (New York: Universe Books, 1972).

The idea of sustainable development tends to challenge anthropocentric positions and pave the way to biocentric and ecocentric ones, considering all living and non-living people on the planet.<sup>15</sup>

The contribution of the United Nations fits into this scenario which, during its General Assembly of 25 September 2015, has been approved the document entitled ‘Transforming our world: the 2030 Agenda for Sustainable Development’, defined as ‘... a plan of action for people, planet and prosperity’, the result of a long and complex preparatory process.

Even the European Union (EU) has adopted an articulated posture that involves multiple sectors and, thus, the member countries are converging towards binding objectives with coordinated legislation.<sup>16</sup> In particular, the European Green Deal establishes the objective of making Europe the first continent with zero climate impact by 2050.<sup>17</sup> In this, as well as in other documents, the centrality of the concept of sustainable development and, therefore, of sustainability emerges not only with reference to environmental protection but also with broader social implications.<sup>18</sup>

In relation to the implementation of the 2030 Agenda, the EU Council issued two important Conclusions: ‘EU response to the 2030 Agenda for Sustainable Development – a sustainable European future’, adopted in 2017 and the most recent ‘Towards an ever more sustainable Union by 2030’, drawn up in 2019, thanks to which it urges the Commission to develop a comprehensive implementation strategy outlining timelines, objectives and concrete measures to integrate the

<sup>15</sup> There are many appeals for a sustainable use of resources contained in Pope Francis’ encyclical *Laudato Si*. In particular, it states that ‘The urgent challenge to protect our common home includes a concern to bring the whole human family together to seek a sustainable and integral development’ (Vatican City: Libreria Editrice Vaticana, 2015), 12. At the basis of the Holy Father’s thought is the idea of a future that urgently requires real change, in support of a world that takes as intrinsic value the quality of life, of relationships between men and of relationships between man and the entire planet, his common home.

<sup>16</sup> A framework of the multilevel system of European environmental governance and of the critical issues that arose following the economic crisis and the alterations of European memberships offered in A. Jordan et al, ‘EU Environmental Policy at 50: Retrospect and Prospect’, in A. Jordan and V. Gravey eds, *Environmental Policy in the EU* (London-New York: Routledge, 2021), 357-372.

<sup>17</sup> For an in-depth analysis, see L. Lionello, ‘Il Green Deal europeo. Inquadramento giuridico e prospettive di attuazione’ *Jus*, 105-142 (2020).

<sup>18</sup> The term ‘sustainability’, ‘born in the world of environmental policies (especially for the concept of ‘sustainable development’), has rapidly contaminated different sectors: sustainable finance, sustainable tourism, sustainable architecture, agriculture, etc. today everything appears sustainable, or, more often, unsustainable’: see M. Cartabia and A. Simoncini, ‘Introduzione’, in Ead eds, *La sostenibilità della democrazia nel XXI secolo* (Bologna: il Mulino, 2009), 13. See also R. Bifulco, ‘La responsabilità giuridica verso le generazioni future tra autonomia della morale e diritto naturale laico’, in A. D’Aloia ed, *Diritti e costituzione. Profili evolutivi e dimensioni inedite* (Milano: Giuffrè, 2003), 171. In fact, as for the concept of sustainability, the ‘origins can be found, without a doubt, in environmental matters, which refers to the potential of a certain ecosystem to remain unchanged over time; but the theme of sustainability is also linked to other sectors such as the economic, social and cultural one’, G. Sciancalepore, ‘The dimensions of sustainability’ *Iura and Legal System*, I, 8 (2020). See also F. Cirillo, ‘La sostenibilità come diritto delle generazioni presenti?’, in S. Lanni ed, *Sostenibilità globale e culture giuridiche comparate* (Torino: Giappichelli, 2022), 139-140.

Sustainable Development Goals (SDGs) in all the related internal and external EU policies.

In particular, in December 2017 the National Sustainable Development Strategy (NSDS) was approved in Italy, defining the guidelines of the economic, social and environmental policies aimed at achieving the sustainable development objectives by 2030; it is structured in five areas, corresponding to the '5Ps' of sustainable development proposed by the 2030 Agenda, each of which contains strategic targets and choices for Italy, related to the SDGs of the 2030 Agenda.<sup>19</sup>

Starting from this global frame of reference, it is possible having a deep dive on the sustainable development concept, recalling, although in a nutshell, some of the key concepts that underlie it. Among them those of: a) systemic approach: it places emphasis not only on the relevance of the phenomenon studied and all elements which characterize it, but also and above all on the interactions between these elements and on the synergies that develop between them; b) complexity: systemic thinking is based on the idea that a system is something more than the sum of the parts that compose it. This statement opposes any attempt at reductionism, linearity of cause and effect, the decomposition of reality into isolated parts, placing the emphasis on the global aspect of knowledge, on the structural complexity of the whole, of organisms and on the interactions between various phenomena. So, the system, becomes a key notion for the formulation of a new world conception; c) uncertainty: the mentioned systemic approach leads to the consideration that both the environment and societies are regulated by complex mechanisms, characterized by non-linear dynamics and therefore very difficult to be predicted; d) limit: the prestigious scientific journal *Nature*, on this matter, has published an essay written by several scientists, in which it is highlighted how, in many situations, the human impact on natural systems is now close to critical points ('thresholds'), beyond which the effects generated could be devastating for humanity. Therefore, 'planetary boundaries' are identified, from a biophysical point of view, which boundaries should not be exceeded by human intervention in order not to unleash devastating and dramatic effects for social, economic and environmental systems;<sup>20</sup> e) the long-term logic: this can be considered the most explicitly recalled aspect within the *Brundtland Report*.

The reference to future generations necessarily brings the focus on the generations to come, those who will populate the Planet in the distant future, thus expanding the planning perspectives and evaluations related to the inter-

<sup>19</sup> A. Bachiorri, 'Agenda 2030: un'opportunità per costruire insieme un futuro sostenibile' *Quaderni di ricerca sull'artigianato*, 305 (2020).

<sup>20</sup> The researchers also estimated numerical data that should be 'unsurpassable' for nine planetary boundaries: climate change, biosphere integrity (functional and genetic), land-system change, freshwater use, biogeochemical flows (nitrogen and phosphorus), ocean acidification, atmospheric aerosol pollution, stratospheric ozone depletion, and release of novel chemicals (including heavy metals, radioactive materials, plastics, and more).

generational dimension.<sup>21</sup>

Hence the different approaches mentioned, even if reticent, in the form of attempts to legalize the relations between present and future generations<sup>22</sup> (as well as duties of the current generation).<sup>23</sup>

The dimension of co-responsibility that characterizes the component of sustainable development, which can be attributed to the principle of subsidiarity,<sup>24</sup> is also lead to recognize individual economic operators – consumers included – to an active role in the creation of a more sustainable society.<sup>25</sup>

### III. Sustainability, Law and Progress

This renewed cultural context and the set of values included in the 2030 Agenda can allow the principle of sustainable development offering a synthesis also to be adopted by private activities. Even for this reason, a quick glance on the targets of the 2030 Agenda allow us to underline that the integrated approach cannot lead to considering private law impervious to sustainability.<sup>26</sup>

<sup>21</sup> A. Bachiorri, n 19 above, 299-300.

<sup>22</sup> See A. D'Aloia, 'Generazioni future (diritto costituzionale)' *Enciclopedia del diritto* (Milano: Giuffrè, 2016), IX, 311-390; Id, 'Costituzione e protezione delle generazioni future?', in F. Ciaramelli and F.G. Menga eds, *Responsabilità verso le generazioni future* (Napoli: Editoriale Scientifica, 2017), 293-337; E. Caterini, n 7 above, 114-133; Id, 'Sustainability and Civil Law' *The Italian Law Journal*, 289-314 (2018); C. Caccavale, 'Per un diritto sostenibile', in G. Conte and M. Palazzo eds, *Crisi della legge e produzione privata del diritto* (Milano: Giuffrè, 2018), 241-269; C. Perlingieri, 'Nuove forme di partecipazione politica e «metodo democratico»' *Rassegna di diritto civile*, 873-900 (2018).

<sup>23</sup> The rights of future generations are conjugated as duties of the current generation, for example, by S. Mabellini, 'La sostenibilità in campo ambientale e i diritti delle generazioni future: un'ulteriore prova delle capacità palinogenetiche dell'art. 9, comma 2, Cost.' *Diritto e società*, 151-172 (2018). There is no doubt, then, that in constitutions there is a necessary 'projection towards future generations' which however does not necessarily translate into an explicit reminder: see S. Grassi, 'La Costituzione siamo noi' *Nomos*, 11 (2017).

<sup>24</sup> P. Perlingieri, 'La sussidiarietà nel diritto privato' *Rassegna di diritto civile*, 687-690 (2016).

<sup>25</sup> F. Bertelli, '«Dichiarazioni pubbliche fatte dal o per conto del venditore», conformità oggettiva ed economia circolare', in G. De Cristofaro ed, *La nuova disciplina della vendita mobiliare nel codice del consumo* (Torino: Giappichelli, 2022), 223. See G. Capaldo, 'Linee evolutive in tema di soggetti per una società sostenibile' *Persona e mercato*, 335, 340-341 (2020), which observes that 'freedom, social rights, fundamental human rights represent the testing ground of any economic system option, calling for an investigation which, as well as being juridical, also addresses and resolves ethical options and distributive and social justice' and states that 'subsidiarity is a value of the legal system which presupposes the integration between public power and social groups in the primacy of freedom and civil society [...] the art. 118 of the Constitution is a confirmation of the recognition of the centrality of the human person both as an individual and in social formations'.

<sup>26</sup> F. Bertelli, 'CSR Communication e consumo responsabile: un circolo virtuoso per la Circular Economy?', in S. Lanni ed, *Sostenibilità globale* n 18 above, 195. See E. Betti, *Teoria generale del negozio giuridico* (1950) (Napoli: Edizioni Scientifiche Italiane, repr, 1994), 48, which clarifies that the law does not have the merely static task of preserving reality unchanged, as well as 'of protecting the current distribution through the conferral of subjective rights to the present holders, it also has the dynamic task of making the perennial renewal possible, of facilitate the circulation of goods and the mutual use of services in accordance with gradually emerging needs'; D. Di Sabato, 'Diritto privato,



For all these reasons, private law not only cannot be considered extraneous to the ecological tradition, but it can represent a potential and determining factor to pursue the target no 12 of the 2030 Agenda, specifically dedicated to ‘Responsible consumption and production’.<sup>27</sup>

At this point, the question is the following: How can the private law reduce the unsustainability?

An attempt will be explained in details later on, considering that it is already too late trying to mitigate risks.

However, we are now explaining the meaning of sustainability.

In order to explain a concept resulting from a semantic construction which, as described before is based on fallacious assumptions of the distinction of an unobservable unit, it is mandatory combining abstractness and practical implications.

The first source of meaning lies in identifying ‘sustainability as an essential concept for material and spiritual progress and, therefore, for law’.<sup>28</sup>

The second source of meaning lies in revealing through sustainability the

‘need to adapt the categories to the demand for justice, as well as to propose solutions, when applicable, not so much compliant with the letter of the law but adequate to its *ratio*, to the overall logic of the system law in place,<sup>29</sup> based on inalienable normative values identifying the Italian constitutional legality, such as “solidarity” and “human dignity”’.<sup>30</sup>

Sustainable can be exclusively considered the ‘development’ referred to human being and social cohesion.<sup>31</sup>

This last concept, even more illusory of sustainability, cannot pass only through the exaltation of rights: it requires dutifulness.

rapporti economici, sostenibilità ecologica’ 25 *The Cardozo Electronic Law Bulletin*, 1-8 (2019); C. Caccavale, n 22 above, 241-269; C. Mignone, ‘Diritti e sostenibilità. una ricostruzione per immagini’ 14 *Actualidad Jurídica Iberoamericana*, 213-218 (2021).

<sup>27</sup> F. Bertelli, ‘«Dichiarazioni pubbliche fatte dal o per conto del venditore»’ n 25 above, 221-222.

<sup>28</sup> Definition taken from G. Perlingieri, n 7 above, 101.

<sup>29</sup> Complex and unitary, P. Perlingieri, ‘Complessità e unitarietà dell’ordinamento giuridico vigente’ *Rassegna di diritto civile*, 188-216 (2005).

<sup>30</sup> G. Perlingieri, n 7 above, 101, which, in turn, recalls the values evoked by E. Caterini, n 7 above, 11.

<sup>31</sup> *ibid* 145: ‘Therefore sustainability is a transversal concept that concerns the judge and the legislator; and it is also a noun that must assist the operation of all legal institutions, in order to ensure respect for the hierarchy of sources and values, as well as the “pre-eminence of the personalist function over the mercantile and patrimonialist one”, since without a consideration of the weaker groups the European project is destined to fade away’, see G. Perlingieri, n 7 above, 102; G. Vettori, *Contratto e rimedi. Verso una società sostenibile* (Padova: CEDAM, 2021), 60; Id, ‘Diritti e coesione sociale. Appunti per il seminario fiorentino del giorno 8 giugno 2012’ *Persona e mercato*, 4 (2012), who notes that ‘(t)he European institutions set the objective of sustainable development based on balanced growth and a highly competitive social market economy (...) it is not an empty formula, but a clause general principle which must be translated into principles and operational rules with the collaboration of all the social sciences’.

‘It has to be guaranteed inviolable rights<sup>32</sup> to the person recognizing the mandatory duties of human being. Without dutifulness there is no sociality’,<sup>33</sup> so that duty is ‘immanent to sociality’.

Sustainability, it has been authoritatively written, becomes a parameter of worthiness of all interests pursued.<sup>34</sup>

In coordination with the renewed requests for sustainability, consumer protection brings new content into an evolutionary dimension intended to give added value to the human choices, well beyond the profit achievement, pursuing relevant interests in terms of sustainability.<sup>35</sup>

The evolution in the globalized economy<sup>36</sup> originated through a development dynamic characterized by the circularity of the production and consumption cycle, as well as to the recovery, reuse and recycling of the good.<sup>37</sup>

Private autonomy can achieve a model of production and consumption able to preserve these elements till their exhaustion, contemplating the principle of solidarity<sup>38</sup> as driving force of the economic system.<sup>39</sup>

<sup>32</sup> See F.G. Viterbo, ‘Bisogni primari della persona e diritti inviolabili: limiti dell’autonomia individuale e collegiale’, in M. Costantino et al eds, *Destinazioni d’uso e discipline inderogabili nel condominio* (Milano: Giuffrè, 2014), 147-193; G. Berti De Marinis, *Disciplina del mercato e tutela dell’utente nei servizi pubblici economici* (Napoli: Edizioni Scientifiche Italiane, 2015), 183-268.

<sup>33</sup> E. Caterini, n 7 above, 21.

<sup>34</sup> G. Perlingieri, n 7 above, 102. See also G. Perlingieri, ‘Il controllo di «meritevolezza» degli atti di destinazione ex art. 2645 *ter c.c.*’ *Foro napoletano*, 63 (2014). With regard to the different methods of recourse to the principles underlying the control over acts of autonomy, S. Polidori, ‘Il controllo di meritevolezza sugli atti di autonomia negoziale’, in G. Perlingieri and M. D’Ambrosio eds, *Fonti, metodo e interpretazione. Primo incontro di studio dell’associazione dei dottorati di diritto privato* (Napoli: Edizioni Scientifiche Italiane, 2017), 391-408. With regard to the control of merit of ‘sustainable finance’ contracts see R. Di Raimo and C. Mignone, ‘Strumenti di finanziamento al Terzo settore e politiche di intervento locale nella «società inclusiva» europea. (Dalla filantropia alla finanza alternativa)’ *Giustizia civile*, 139-196 (2017).

<sup>35</sup> G. Vettori, ‘Verso una società sostenibile’ *Persona e mercato*, 466 (2021).

<sup>36</sup> On the evolution of the economic system in a ‘globalized’ sense see E. Capobianco, ‘Globalizzazione, mercato, contratto’ *Persona e mercato*, 133-143 (2017).

<sup>37</sup> Concepts to which we will return. See also M.A. Ciocia, ‘Circolarità economica e trasparenza del prodotto’ *The European Journal of Privacy Law & Technologies*, 57-71 (2022).

<sup>38</sup> S. Rodotà, *Solidarietà* n 6 above, 102, who observes that solidarity is ‘a principle that provides the legal basis for the continuous restructuring of the socio-institutional system. It thus shows an inclusive attitude not only towards people, but towards the set of tools which, in the variability of times and contexts, make its realization possible’. On the principle of solidarity, in addition to the works cited in n 6 above, see A. Lener, ‘Ecology, person, solidarity: a new role of civil law’, in N. Lipari ed, *Tecniche giuridiche e sviluppo della persona* (Roma-Bari: Laterza, 1974), 333-348; N. Lipari, ‘Il senso della Costituzione. La cultura della solidarietà nella Costituzione italiana’ *Parlamento*, 16-24 (1989); P. Perlingieri, ‘I diritti umani come base dello sviluppo sostenibile. Aspetti giuridici e sociologici’ *Rivista giuridica del Molise e del Sannio*, 71-74 (2000); F.D. Busnelli, ‘Solidarietà: aspetti di diritto privato’ *Iustitia*, 435-452 (1999); R. Di Raimo, ‘Date a Cesare (soltanto) quel che è di Cesare. Il valore affermativo dello scopo ideale e i tre volti della solidarietà costituzionale’ *Rassegna di diritto civile*, 1082-1095 (2014); D. Porena, *Il principio di sostenibilità. Contributo allo studio di un programma costituzionale di solidarietà intergenerazionale* (Torino: Giappichelli, 2017), 172-178.

<sup>39</sup> See M. Monteduro and S. Tommasi, ‘Paradigmi giuridici di realizzazione del benessere

Even before that, the arduous task falls to the legislator.

#### IV. Circular Economy and Market Regulation

In ancient times, consumption assumed a strongly negative meaning. So, the Latin verb *'consumere'*, adopted into European languages, has assumed different meanings such as: 'using up, wasting away, finishing'.

Considering consumption no longer as wasteful, or as ruining a community, but rather as a way to make nations richer, more civilized and stronger can be traced back to the 18<sup>th</sup> century.

Adam Smith has highlighted the social and psychological impulses that drive people to gather and consume goods: they have begun to look at objects as 'means of happiness'.<sup>40</sup>

This has led to the implementation of consumption models, and before that of production, which focus on immediate gratification, wanting and owning more and more.

Different and more circular business models try to limit those externalities and can even help achieving sustainable economy along the lines of Kate Raworth's alternative 'doughnut' economic model: a model aimed to ensure access to basic needs for everyone, including but not limited to adequate food and education for the present and future generations. This model protects our ecosystem and evaluates the planetary boundaries.<sup>41</sup>

To enable and incentivize such more circular business models, the Law has a key role to play; this can also be applied to the 'conventional' consumer law. If consumer law needs to stay relevant, particularly because this role has already been acquired, it cannot only consider consumer protection goals in the short term; it should balance them with sustainability goals in order to protect consumers interests in the long term.<sup>42</sup>

Reflection of the new model of 'circular economy',<sup>43</sup> on the consumer level,

umano in sistemi ecologici ed esistenza indisponibile e ad appartenenza necessaria' *Benessere e regole di rapporti civili. Lo sviluppo oltre la crisi. Atti del 9° Convegno Nazionale S.I.S.Di.C. in ricordo di G. Gabrielli* (Napoli: Edizioni Scientifiche Italiane, 2015), 161-202.

<sup>40</sup> A. Smith, *Teoria dei sentimenti morali* (Milano: BUR, 1995).

<sup>41</sup> K. Raworth, *L'economia della ciambella. Sette mosse per pensare come un economista del XXI secolo* (Milano: Edizioni Ambiente, 2020), 373.

<sup>42</sup> E. Terry, 'A Right to Repair? Towards Sustainable Remedies in Consumer Law' IV *European Review of Private Law*, 872 (2019).

<sup>43</sup> We talk about the 'circular economy' to describe that new economic model, as opposed to the so-called linear 'take-make-consume-throw away' one, in which products and materials maintain their value and functions for as long as possible. This is on the assumption that the resources necessary for the production of goods are not unlimited, always accessible and can be eliminated at low cost. Therefore, the implementation of such a model would contribute to environmental protection in a dual way: on the one hand, it would reduce the demand and use of raw materials; on the other hand, the production of waste and pollution would decrease. See D.M. Matera, 'Difetto di conformità, gerarchia dei rimedi e sostenibilità ambientale nel nuovo

is the idea of sustainable consumption, which is also expressly valued at least in the inspiring reasons – translated in the recitals – by Directive 2019/771/EU.<sup>44</sup>

The new legislation on the sale of consumer goods, in reality, has fallen down into a regulatory environment that is already markedly eco-based.<sup>45</sup> This is primarily evidenced by sources of the primary rank.<sup>46</sup>

art. 135-bis cod. cons. e nella Dir. 771/2019' *Rivista di diritto privato*, 458-459 (2022).

<sup>44</sup> On EU Directive 2019/771 see G. Alpa, 'Aspetti della nuova disciplina delle vendite nell'Unione europea' *Contratto e impresa*, 825-830 (2019); J.M. Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services. Overview of Directives 2019/770 and 2019/771' *Journal of European Consumer and Market Law*, 194-201 (2019); A. De Franceschi, *La vendita di beni con elementi digitali* (Napoli: Edizioni Scientifiche Italiane, 2019), 31-36; F. Addis, 'Spunti esegetici sugli aspetti dei contratti di vendita di beni, regolati nella nuova Direttiva (UE) 2019/771' *Rivista Nuovo Diritto Civile*, 5-27 (2020); A. Barengi, 'Osservazioni sulla nuova disciplina delle garanzie nella vendita dei beni di consumo' *Contratto e impresa*, 806-822 (2020); J. Venherpe, 'White Smoke, but Smoke Nonetheless: Some (Burning) Questions Regarding the Directives on Sale of Goods and Supply of Digital Content' *European Review of Private Law*, 251-274 (2020); G. De Cristofaro, 'Verso la riforma della disciplina delle vendite mobiliari b-to-c: l'attuazione della dir. UE 2019/771' *Rivista di diritto civile*, 205-249 (2021).

<sup>45</sup> On the importance of the environmental issue in the European Union, M. Pennasilico, 'Economia circolare e diritto: ripensare la "sostenibilità"' *Persona e mercato*, 714-716 (2021) with a reference to European acts that enhance the principle of sustainable development. The A. speaks of ecological 'conversion', considering the use of this term preferable to that of 'transition'; see also Id, 'Dal "controllo" alla "conformazione" dei contratti: itinerari della meritevolezza' *Contratto e impresa*, 823 (2020), he highlights how social and environmental interests emerge in the Italian-European system of public and private negotiations. The role that environmental sustainability must play in consumer law is now widely emphasized by the doctrine, which attributes a fundamental role to this discipline in the development of a circular economy. Among the many opinions in this sense, see especially the reflections of H.W. Micklitz, n 4 above, 229-237; M. Pennasilico, 'Contratto ecologico e conformazione dell'autonomia negoziale' *Rivista quadrimestrale di diritto dell'ambiente*, 6 (2017), he considers the consumer an active part, which promotes and defends a fairer, more correct and responsible market. F. Capra and U. Mattei, *The Ecology of Law. Toward a Legal System in Tune with Nature and Community* (Oakland: Berrett-Koehler, 2015), 131, they argue the need for a general valorization of environmental protection in the very concept of law. For reflections on the relevance of sustainability in the contractual context see M.C. Gaeta, 'Il problema della tutela giuridica della natura: un'analisi comparata tra Italia e Stati dell'America Latina' *Rivista Nuovo Diritto Civile*, 313-342 (2020).

<sup>46</sup> D. Imbruglia, 'Mercato unico sostenibile e diritto dei consumatori' *Persona e mercato*, 510 (2021), who notes that 'the formula of sustainable development is today present in numerous sources of international law and in the jurisprudence of the International Court of Justice. In current primary source Euro-unitary law, sustainable development is an objective that binds the internal and external action of the Union, with respect to a plurality of environmental, social and market policies. With reference to this last dimension, the discussion initiated in recent years determines a new season of regulation of private autonomy which entails a bringing of the market closer to the ideal of sustainable resource management and therefore careful to avoid waste in the production and consumption of goods and he concludes by highlighting that 'this objective passes through private law. In particular, it is articulated in a strategy of effective control of misleading advertising statements, in the provision of an information exchange extended to the characteristics relating to the durability and reparability of the good, a strong incentive for repair instead of replacement, as well as reuse of the good'. Among the milestones recalled by the International Court of Justice to highlight the hermeneutic role of the principle of sustainable development we can mention, in particular, the decision *Gabcikovo-Nagymaros Project (Hungary v Slovakia)*, 25 September 1997, available at [tinyurl.com/4zepamy9](https://tinyurl.com/4zepamy9) (last visited 30 September 2024).

The Treaty on European Union (TEU) in Art 3, para 3, is providing that the Union works for the sustainable development,<sup>47</sup> specifying that this development has to be based (among other elements) ‘on a high level of protection and quality environment improvement’. Para 5 of the same article is establishing the active role that the Union plays in accordance with the rest of the world in promoting ‘the sustainable development of the Earth’.

On the other hand, the Treaty on the Functioning of the European Union (TFEU) in Art 11 is providing that environmental protection requirements must be integrated into the definition and implementation of Union policies aimed at the sustainable development promotion.

Similarly, Art 37 of the Charter of Fundamental Rights of the Union is also establishing that Union policies should aim to a high level of environmental protection and quality improvement, to be ensured in accordance with the principle of sustainable development.<sup>48</sup>

It is clear that, in these sources the idea itself of ‘sustainable development’ is firmly linked to the environmental protection, and can be translated with the need a new sustainable single market.<sup>49</sup>

In recent times, the Euro-unitary institutions seem to have reached the targets, already affirmed in primary-ranking sources, of establishing a sustainable single market.

This goal fixes the internal and external action of the Union, with respect to a plurality of environmental, social and market policies.

The principle of ‘sustainable development’ - introduced, but not defined by the Treaty of Amsterdam of 1997 - establishes its best-known definition in the 1987 Report of the World Commission on Environment and Development (so-called *Brundtland Report*),<sup>50</sup> which considers ‘sustainable’ the ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’.

The analysis of the relationship between constitutional legality and sustainable development, carried out without ideological preconceptions and in the awareness of the axiological hierarchy that legitimizes the legal system in force, allows us to understand that the notion of sustainable development can only be conform to the priority of personalist and solidarity values,<sup>51</sup> indicated by Italian-European

<sup>47</sup> On the notion of sustainable development see M. Pennasilico, ‘Sviluppo sostenibile, legalità costituzionale e analisi “ecologica” del contratto’ *Persona e mercato*, 37-38 (2015); Id, ‘Economia circolare’ n 45 above, 714-716.

<sup>48</sup> D.M. Matera, n 43 above, 460.

<sup>49</sup> The European Parliament reaches these conclusions in the European Parliament Resolution (2020/2021(INI)) of 25 November 2020 on Towards a more sustainable single market for business and consumers [2021] OJ C 425/10. In this regard, see D. Imbruglia, n 46 above, 506-508.

<sup>50</sup> The document, commissioned by the United Nations under the title *Our Common Future*, is usually referred to by the name of the coordinator Gro Harlem Brundtland, who chaired the Commission in 1987.

<sup>51</sup> P. Perlingieri, ‘Principio personalista, dignità umana e rapporti civili’ *Annali della SISDiC*

positive law.<sup>52</sup>

So, in light of these guidelines, the programmatic regulatory framework outlined in recent years is defining a new season of regulation of private autonomy bringing the market closer to the ideal of sustainable resource management and consequently taken to avoid production wastes and goods consumption.

More importantly, ethical, social and ecological considerations must be taken into account to define the market consumer choices.

The classic vision of consumer law, which reflects the *homo oeconomicus* model – the model of ‘rational economic agent’ – has to be re-examined nowadays in the light of consumption acts carried out by players who act in the market as bearers of complex interests.

The ability of a commodity to satisfy its needs is increasingly evaluated on the basis of ecological, social and political considerations. This evaluation is not simply looking at just the function of the purchased goods and its enjoyment.

It is no longer a ‘niche’ phenomenon. The ‘ethical consumption’ has grown in recent years, so much to influence the production and goods supply. We are now observing the proliferation of commercial operators who adopt (and advertise) sustainability policies on several fronts: from the selection of raw materials, to production techniques, up to the working conditions of their employees.<sup>53</sup>

The goal of the convenience of the immediate result is set aside according to the perspective of the neoclassical vision which is based on the theory of personal interest.

Consumer choices no longer merely respond to a pure selfish calculation. The act of consumption often assumes an axiological dimension that deserves to be projected also in a remedial perspective.<sup>54</sup> We are now going to better clarify

2020, 1-17 (2020).

<sup>52</sup> M. Pennasilico, ‘Sviluppo sostenibile’ n 47 above, 41. Ample evidence of the primacy of personalistic and solidarity values in P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, II, *Fonti e interpretazione* (Napoli: Edizioni Scientifiche Italiane, 4<sup>th</sup> ed, 2020), 159-190; see also N. Lipari, *Diritto e valori sociali. Legalità condivisa e dignità della persona* (Roma: Studium, 2004); S. Rodotà, *Dal soggetto alla persona* (Napoli: Editoriale Scientifica, 2007), 26-88; Id, ‘Il nuovo *Habeas Corpus*: la persona costituzionalizzata e la sua autodeterminazione’, in S. Rodotà and M. Tallacchini eds, *Trattato di bio-diritto Rodotà e Zatti, Ambito e fonti del biodiritto* (Milano: Giuffrè, 2010), 169-230; Id, *Solidarietà* n 6 above, 2014; F.D. Busnelli, ‘La persona nell’interazione tra norme di diritto internazionale e principi di diritto privato «costituzionalizzato»’, in *L’incidenza del diritto internazionale sul diritto civile. Atti del 5° Convegno Nazionale S.I.S.Di.C.* (Napoli: Edizioni Scientifiche Italiane, 2011), 43-55; F. Parente, ‘La persona e l’assetto delle tutele costituzionali’, in G. Lisella and F. Parente eds, *Persona fisica* (Napoli: Edizioni Scientifiche Italiane, 2012), 43-49. More generally, the principle of sustainable development could also be recognized as having that ‘nomogenetic’ function, which assigns ‘even to subjects other than the legislator, the task of identifying what the legislator is no longer able to do exclusively’ (F. Addis, ‘Sulla distinzione tra regole e principi’ *Europa e diritto privato*, 1043 (2016)).

<sup>53</sup> C. Mignone, Report entitled ‘*Homo oeconomicus, homo ecologicus, homo digitalis*. Towards a sustainable consumer law’ as part of the *Summer School ‘Consumer Rights and Europe’s Digital Future’* held in Lecce on 10 May 2022.

<sup>54</sup> In this sense A. Quarta, ‘Per una teoria dei rimedi nel consumo etico. La non conformità

this point.

Therefore, the act of consumption becomes an ‘axiological act’.<sup>55</sup> The ethical consumer, moreover, is willing to pay a higher price for goods that ensure this correspondence, in the belief that their individual purchasing choices contribute to the promotion of a fairer and more equitable market.

This leads us to reflect on the relationship between ‘sustainable consumption’ and market regulation goals. Especially if we consider that these ‘new values’ which inspire the act of consumption today do not express simple tastes or consumers whims. On the contrary, they reveal particular attention toward fundamental rights, whether they are related to individuals, non-human subjects, or to the environment. These rights are no longer conceived in a purely vertical value – such as claims against public authorities – but in a horizontal dimension, as a limit to the exercise of economic activities.<sup>56</sup>

## V. Conformity and Remedies in the New Regulation of the Sale of Consumer Goods

It is the relationship between private law and sustainability that is solicited, in light of the technological transformations and the digital revolution which have opened up important glimmers for reflecting, as anticipated, in a remedial perspective on the durability of products and the ‘right to repair’.<sup>57</sup>

As for the first concept, there is an important evolution.

It is quite obvious referring to the notion of ‘non-conformity’, recently restructured by the European legislator with the approval of the Directives 2019/770/EU and 2019/771/EU on contracts for the supply of digital content and digital services and on contracts for the goods sale.<sup>58</sup>

The concept reflects a set of rules somewhat ‘crushed’ on the material features of the contract good where potential anomalies in the production process are destined to be detected only if they have an impact on the consumer’s right to use the thing protected from the hypothesis of ‘malfunctioning’.

And yet, for some time now, an authoritative doctrine has tried to filter, within

sociale dei beni tra vendita e produzione’ *Contratto e Impresa*, 523 (2021). See also L. Mezzasoma, ‘Consumatore e Costituzione’ *Rassegna di diritto civile*, 311-327 (2015).

<sup>55</sup> A. Quarta, n 54 above, 524.

<sup>56</sup> C. Mignone, ‘*Homo oeconomicus*’ n 53 above.

<sup>57</sup> A. Quarta, ‘Contenuti digitali e beni con elementi digitali: c’è ancora posto per la proprietà privata?’, in T. Pasquino et al eds, *Questioni attuali in tema di commercio elettronico* (Napoli: Edizioni Scientifiche Italiane, 2020), 46-52.

<sup>58</sup> European Parliament and Council Directive (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136/1 and European Parliament and Council Directive (EU) 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L 136/28.

these rather tight meshes, those hypotheses of ‘social non-conformity’<sup>59</sup> which are due to ‘unsustainable’ production processes, because they are characterized by the violation of the fundamental rights of third parties.

In particular, Art 2, para 2 (d) of Directive 99/44/EC, repealed by Directive 2019/771/EU, identified, as an index of conformity, the usual qualities and performances, specifying that both should be defined in relation to the reasonable consumer expectations,

‘considering the nature of the goods and public statements about the characteristics of the goods made by the seller, the manufacturer or his agent or representative, in advertising or on labelling’.<sup>60</sup>

Especially before the entry into force of 170/2021 Decree Law<sup>61</sup> implementing the Directive 2019/771/EU, an asset could be considered compliant with the provisions of the law when it was suitable ‘for the use for which goods of the same type are usually used’ (Art 129, para 2, (a) Consumer Code) and it was therefore able to ensure the typical and normal use to which the goods falling within the same product category are destined. Therefore, they detected the intrinsic features of the consumer good which ensure the perfect functioning of the good, allowing its use.

Art 129, para 2, (c) Consumer Code identified the usual qualities and performances as an index of conformity, to be defined not only in relation to goods of the same type, but also to the reasonable expectations of the consumer

‘considering the nature of the goods and, where appropriate, public declarations on the specific features of the goods made in this regard by the seller, the producer or his agent or representative, with a particular focus on advertising or on labeling’.

Furthermore, the conformity was verified starting from the description of the goods made by the trader (point b)) and detecting the brochures contents or other information delivered to the consumer. Finally, the last index concerned the lack of promised qualities in relation to ‘the particular use desired by the consumer’, provided that this was accepted by the trader ‘also by conclusive facts’ (point d)).<sup>62</sup>

The aforementioned Directive on certain aspects concerning contracts for the sale of goods (Dir 771/2019/EU) has changed the regulation on the conformity of the goods sold, providing, in place of the complicated system of presumptions referred to in Art 2 of Directive 1999/44/EC, two distinct conformity profiles: one defined as subjective (Art 6) and the other as objective (Art 7). From an attention

<sup>59</sup> The expression is used by A. Plaia, ‘La garanzia convenzionale nella vendita al consumo’ *Rivista di diritto civile*, 159 (2005).

<sup>60</sup> H. Collins, ‘Conformity of goods, the network society, and the ethical consumer’ *European Private Law*, 633 (2014).

<sup>61</sup> Decreto legislativo 4 November 2021, n. 170 entered into force on 10 December 2021.

<sup>62</sup> A. Quarta, ‘Per una teoria’ n 54 above, 533.



standpoint to sustainability needs, point d) of this last provision comes into clear relief and, therefore, the reference to durability as an objective requirement of conformity, so that the seller is obliged to provide the consumer (Art 5) a good that has the normal durability ‘in a good of the same type and which the consumer may reasonably expect’ (Art 7.1. (d)). Moreover, if the inclusion of the average life expectancy that the consumer can reasonably expect among the good conformity requirements represents the real effect of the provision, other doctrine, in an interpretative way, believes that the same reference (durability) should also include reparability.

By always placing ourselves in a favorable perspective to a sustainable market, it signifies that among the elements that contribute to the formation of the expectation on the durability of the good, Directive 2019/771/EU also includes the

‘public statement made by or on behalf of the seller, or other persons in previous links of the chain of transactions, including the producer, particularly in advertising or on labelling’ (Art 7.1. (d)).

It is argued<sup>63</sup> that this statement, could provide legal basis for the fight against greenwashing<sup>64</sup> which is further and different from that one followed up to now, represented by the reconciliation of misleading sustainable declarations in the context of unfair commercial practices.<sup>65</sup>

As for the remedy plan, Art 13 of Directive 2019/771/EU, fully transposed in Art 135-*bis* of the Consumer Code, provides that in case of lack of conformity of the good, the consumer has the right to restore the conformity of the goods, or, alternatively, to receive a proportional price reduction, or to terminate the contract. For the purposes of the so-called primary remedy (restoration of the conformity

<sup>63</sup> E. Van Gool and A. Michel, ‘The New Consumer Sales Directive 2019/771 and Sustainable Consumption: a Critical Analysis’ IV(10) *Journal of European Consumer and Market Law*, 136-147 (2021).

<sup>64</sup> The term ‘greenwashing’ aims to summarize the exploitation of information relating to the social and environmental responsibility of the company for advertising purposes, motivated by the factual data which increasingly sees commercial decisions based on reasons that go beyond economic interest. In this sense F. Bertelli, *Le dichiarazioni di sostenibilità nella fornitura di beni di consumo* (Torino: Giappichelli, 2022), 45; Id, ‘Dichiarazioni pubbliche’ n 25 above, 228-229. On the topic, see R. Torelli et al, ‘Greenwashing and Environmental Communication: Effects on Stakeholders’ Perceptions’ *Business Strategy and the Environment*, 407-421 (2020). On the effects of greenwashing on consumption choices, from a sociological and economic perspective see *ex multis*, M. Carrigan and A. Attalla, ‘The Myth of the Ethical Consumer – Do Ethics Matter in Purchase Behaviour?’ *Journal of Consumer Marketing*, 560-574 (2001); E. Maitre-Ekern, ‘The choice of regulatory instruments for a circular economy’, in K. Mathis and B. Huber eds, *Environmental Law and Economics* (Cham: Springer, 2017), 305-334; I. Topall et al, ‘The Effect of Greenwashing on Online Consumer Engagement: A Comparative Study in France, Germany, Turkey, and the United Kingdom’ *Business Strategy and the Environment*, 465-480 (2020).

<sup>65</sup> D. Imbruglia, ‘La sostenibilità dei rimedi consumeristici nella direttiva 771/2019/UE e oltre’ XVI *Actualidad Jurídica Iberoamericana*, 358 (2022), who recalls the proceedings AGCM, PS/4026; PI/2486; PS/ 6302; PS/10211; PS/8438; PS/1038; PS/7235; PS/11400 (all available at <https://tinyurl.com/39bxu3t8>) (last visited 30 September 2024).

of the goods), Art 13, para 2 of Directive 2019/771/EU states that the consumer can choose between repair and replacement. The provision then clarifies that the seller is obliged to carry out the restoration of conformity according to the method chosen by the consumer (repair or replacement) unless this does not present disproportionate costs.

The same Art 13-*bis* of the Consumer Code specifies that the disproportion has to be assessed considering all the circumstances and in particular: a) the value that the goods would have if there were no lack of conformity; b) the significance of the lack of conformity; c) the possibility of using the alternative remedy without significant inconvenience for the consumer.<sup>66</sup>

The choice between repair and replacement is left to the consumer, once again.

All sustainability needs are debased by this recent regulatory framework; by the lack of hierarchization of the remedies suitable for restoring the conformity of the property.

Even more if we consider that the Directive 2019/771/EU itself advocates these needs in its recitals.

Reference is made, first of all, to recital no 32 of Directive 2019/771/EU, in the part in which it specifies that ‘Ensuring longer durability of goods is important for achieving more sustainable consumption patterns and a circular economy’. At the same time, then, the recital no 48 identifies in the repair the tool to ‘encourage sustainable consumption and could contribute to greater durability of products’.<sup>67</sup>

And, therefore, repair as ‘an inherently sustainable remedy’.<sup>68</sup>

Although reparation is therefore one of the primary remedies in the remedial system outlined by the Directive, which is a commendable choice in terms of sustainability, it is not preferred to the alternative primary remedy of replacement by the European legislator. The choice between repair or replacement is up to the consumer in the system of the Directive,<sup>69</sup> but there is no incentive or obligation

<sup>66</sup> Art 13, para 2, Directive (EU) 2019/771. With regard to the disproportionality of costs, a difference can be identified in the literal wording between the old and new legislation. Directive 1999/44/EC, in fact, provided for and specified that a remedy should be considered disproportionate if it imposed unreasonable costs on the seller compared to the other, taking into account: i) the value the goods would have if there were no lack of conformity; ii) the significance of the lack of conformity; iii) whether the alternative remedy could be completed without significant inconvenience to the consumer. The new legislation makes it explicit that for the purposes of assessing the disproportionality of the costs of the remedy, ‘all the circumstances’ must be taken into account and in particular those indicated in points a), b) and c) of para 2, Art 13 Directive (EU) 2019/771.

<sup>67</sup> See S. Pagliantini, ‘Contratti di vendita di beni: armonizzazione massima, parziale e temperata della Dir. UE 2019/771’ *Giurisprudenza Italiana*, 230-238 (2020); and in Id, *Il diritto privato europeo in trasformazione. Dalla direttiva 771/2019/UE alla direttiva 633/2019/UE e dintorni* (Torino: Giappichelli, 2020), 8-13; A. Barengi, n 44 above, 810; T.M.J. Möllers ‘The Weaknesses of the Sale of Goods Directive – Dealing with Legislative Deficits’ *Jus civile*, 1186 (2020).

<sup>68</sup> E. Van Gool and A. Michel, n 63 above, 136-147.

<sup>69</sup> S. Jansen, ‘Hiërarchie der remedies in de consumentenkoop: EU vs VS’ *Tijdschrift Voor Privaatrecht*, 211 (2017); D. Staudenmayer, ‘The Directive on the Sale of Consumer Goods and Associated Guarantees – A Milestone in the European Consumer and Private Law’ *European Review of Private Law*, 547-554 (2000); M.C. Bianca, ‘Article 3: Rights of the consumer’, in M.C.

for the consumer to opt for the repair instead of the replacement.

Environmental impact does not appear to play any role in the weighting exercise.<sup>70</sup>

From a sustainability perspective, inputs referred to in the aforementioned recitals, are thwarted and have no correspondence in the body of the legislative framework.

In addition to not having foreseen a preference for repair over replacement,<sup>71</sup> the European legislator, perhaps unconsciously, has even reduced the spaces for restoring conformity (and, therefore, those for possible repair), by introducing hypotheses in which the lack of conformity gives the consumer the right to directly request the proportional reduction of the price in compliance with or the termination of the sales contract (Art 13, para 4, Dir 2019/771/EU).<sup>72</sup>

All things considered, in a society in which consumers are used to instant gratification and in which manufacturers spend huge budgets ‘to wet consumer’s appetites for the most recent products with the newest design features’,<sup>73</sup> it is not objectively easy justify the option for the reparative remedy over the replacement.

## VI. Possible Techniques to Encourage the Repair of Goods

It is certainly correct to confirm that the consumer is in the best position if he has a free choice of remedies, as this is currently the case in some EU Member States<sup>74</sup> and as proposed by the *Bureau Européen des Unions de Consommateurs*

Bianca and S. Grundmann eds, *EU Sales Directive – Commentary* (Antwerpen: Intersentia, 2002), 149-168.

<sup>70</sup>A case judged by the Norwegian Supreme Court in 2006 is quite interesting in this regard. In Norway, consumers also have the right to choose between repair or replacement, unless the chosen remedy involves ‘unreasonable costs’ for the seller. The case concerned the heels of boots that had broken six weeks after the purchase. The seller refused the replacement as this would lead to unreasonable costs. The Supreme Court considered this justified and explicitly made reference to environmental reasons: the repair was justified as it seemed also the most respectful option of the environment.

<sup>71</sup>S. Pagliantini, n 67 above, 230-238, which underlines how the restoration of compliance by means of a repair intervention of the asset/correction of the defect certifies that the European discipline of the sale of consumer goods and the remedies to protect the consumer cannot be read in the exclusive interest of one of the parties, but are more generally aimed at encouraging sustainable consumption; A. Barengi, n 44 above, 811-812, who notes that ‘durability and sustainability are taken into consideration by the legislator of the reform in complementary terms with respect to the specific legislation on individual products, identified as a more suitable *sedes materiae* and in order to connect on the one hand the assessment of compliance of the product, in the sense that the product must guarantee durability considered normal for assets of the same type and that the consumer can reasonably expect, taking into account the nature of the specific goods, including any need for reasonable maintenance of the goods’.

<sup>72</sup>D. Imbruglia, ‘La sostenibilità’ n 65 above, 360.

<sup>73</sup>J. McCollough, ‘The disappearing repair trades’ VI(33) *International Journal of Consumer Studies*, 625 (2009).

<sup>74</sup>The reference is to Greece, Portugal and Slovenia.

(BEUC). However, this option does not consider externalities and is difficult to be reconciled with sustainability goals.

It is (at this stage) neither realistic nor desirable to impose remediation as the only remedy in all circumstances. However, a clear hierarchy whereby repair would take priority over replacement rather than being treated as an alternative of equal merit/value to the latter would at least have an awareness-raising effect on both consumers and businesses.<sup>75</sup>

There are many reasons why consumers may prefer the replacement rather than the repair.

Among these: there is the tendency to prefer a new product compared to a repaired one, both from a functional and aesthetic point of view (so-called fashion obsolescence); the consumers distrust delegating their goods to a repairer, distrust of expected repair time and distrust on how repairs are made.<sup>76</sup>

The consumer propensity is also encouraged by a regulatory datum of the new discipline, result of the transposition of a well-known orientation of European jurisprudence.<sup>77</sup> The reference goes to the Art 135-ter, para 4, of the Consumer Code, in which it is foreseen that the consumer is not required to pay for the normal use of the replaced good in the period preceding the exercise of the remedy. The weak contractor has the right to ask for a new good, for free, even after the conclusion of the contract.

The goodness of repair is also appreciable in the presence of other techniques usually considered sustainable.

It is a far more efficient strategy than recycling.<sup>78</sup> Repair (and re-use) provides energy, materials, water and other savings, and the transportation costs to put a product back into use are usually lower. Recycling is less efficient as it causes a loss of material and a deterioration of the materials quality. In addition, recycling a product implies a secondary production stage to bring it back into a reusable form, thus requiring more material consumption than the reuse.<sup>79</sup>

Although, as mentioned, in a logic inspired by sustainability, repair is preferred to replacement, undoubtedly in this order of ideas the best option could be the repair with 'renewed' or 'remanufactured' goods. Remanufacturing is the process whereby a used product is returned into the 'like-new' condition: it includes sorting, inspection, disassembly, cleaning, reprocessing and reassembly and may involve a combination of old and new components.

<sup>75</sup> E. Terryn, n 42 above, 857-858.

<sup>76</sup> *ibid* 854; as well as V. Mak and E. Terryn, 'Circular Economy and Consumer Protection' 43 *Journal of Consumer Policy*, 235-248 (2020); cf J.M. Carvalho, 'The premature obsolescence of the new deal for consumers' III(10) *Journal of European Consumer and Market Law*, 87 (2021), which highlights how no element in the directive would favor repair with respect to the other remedies.

<sup>77</sup> This is the famous case of the Court of Justice, Case C-404/06 *Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände*, [2008] ECR I-2685.

<sup>78</sup> *United Nations Environment Programme* (2011), 'Recycling of Materials: A Status Report', available at <https://tinyurl.com/yhb2pxjd> (last visited 30 September 2024).

<sup>79</sup> E. Terryn, n 42 above, 853.

However, it is a practice that is not yet very widespread in our area, also due to the lack of trust placed by users in the opportunity and convenience of this technique and which can lead to controversial profiles in terms of consumer rights.<sup>80</sup>

A compromise solution, which would require a new intervention by the EU legislator, could be to allow the seller to the replacement of a defective product with another reconditioned (regenerated) good, forcing him to provide to the consumer a new, additional warranty period.

This could overcome the consumers lack of trust in remanufactured goods. This requirement is already known to several EU Member States, as some of them already provide a new extended warranty period after repair or replacement.<sup>81</sup>

The tendency to repair also involves the removal of the obstacles that really prevent the possibility of resorting to do-it-yourself ('DIY') or independent repair.

These obstacles can be of practical and/or legal nature: they range from the lack of spare parts availability to the unreasonable price of the missing parts to the presence of glued components or by items impossible to be disassembled.<sup>82</sup>

Furthermore, the lack of technical sheets availability in the form of manuals or repair notes is particularly challenging for electronic devices. The 'reverse engineering', that is the dissimulation of an item to extract the knowledge needed, is considered only a stopgap solution because of its costs and time-consuming, especially due to the huge number and variety of electronic devices.

In addition, companies often invoke intellectual property rights to prevent consumers and independent repairers from accessing their electronic devices.

Recourse to the remedy could also be stimulated through tax incentives. Several options can be considered: such as a differentiated withdrawal according to reparability; tax deductions for repair costs or a reduced Value added tax (VAT). In Sweden the latter two options have already been adopted.<sup>83</sup>

## VII. Right to Repair: A New Legislative Framework

If this is the framework resulting from the advent of Directive 2019/771/EU,

<sup>80</sup> In the USA, the problem arose regarding the terms of Apple's commercial guarantee. A collective action has been started for the replacement of defective products with reconditioned products where this would not have been clearly indicated in terms of the commercial guarantee.

<sup>81</sup> This is the case of Austria, Croatia, Denmark (3 years after repair), Estonia, Greece. Other countries include a new guarantee period in the event of a replacement (Hungary, Poland, Portugal, Slovakia, Spain).

<sup>82</sup> Apple's patented 'pentalobe security screws' are a notorious example in this regard. These 'security screws' require special screwdrivers to open the device thus hindering independent or DIY repair.

<sup>83</sup> In 2017, Sweden adopted a series of tax measures aimed at strengthening the techniques of repair, recycling and circular economy in general. Specifically, these measures are aimed at decreasing the cost of repairs by reducing the VAT rate on certain goods (including bicycles, shoes and clothes) from 25 per cent to 12 per cent and are aimed at allowing consumers who choose to repair their appliances to deduct from taxes 50 per cent of the cost of labor.

the result of the related Commission proposal dating back to 2015, it can be confirmed that recently times and in particular after the pandemic crisis, the European institutions seems to have accepted the criticisms from the literature having considered seriously the objective, stated in the Treaties, of establishing a sustainable single market.

To better understand this change of pace, we can move on from the resolution of the European Parliament Resolution 2020/2021 of 25 November 2020 on the theme ‘Towards a more sustainable single market for business and consumers’,<sup>84</sup> which provides a clear example of the role that private law covers in the establishment of such a market and which intends providing indications for the already announced revision of Directive 2019/771/EU. Since the first recital, the resolution places in the middle the objective of sustainable development: it states that

‘whereas dwindling natural resources and the proliferation of waste make it essential to establish sustainable patterns of production and consumption which are commensurate with planetary boundaries and focus on a more effective and sustainable use of resources’.

The strategy suggested by the European Parliament to the Commission for the establishment of a sustainable single market relies on various aspects, such as the durability, reparability and reusability of products, which affect contract law on several occasions.

Two private institutes are the most involved: guarantees and information. With regards to guarantees, sustainability is relevant to the extent that longer warranty periods correspond to longer-lasting goods. As regards to the last, the assumption – typical of market regulation – is that in order to establish a sustainable market, characterized by efficient resources management, it is necessary to put the consumer in a position to evaluate a product also bearing in mind its expected life and its reparability.

A crucial point of the strategy aimed to establish a sustainable market as outlined by the Parliament is related to the so-called right to repair. Once again, the resolution deals with the issue of information. It states that information related to spare parts availability, software updates and product reparability should be given to the consumer in a clear and easily readable manner at the time of purchase. By information on the product reparability, the Parliament means information related to the estimated availability period from the date of purchase, the average spare parts price of at the time of purchase, the recommended approximate times for delivery and repair, information on repair and maintenance services, if applicable. Furthermore, the resolution suggests that the Commission makes this information available even after the purchase, including it in the documentation together with

<sup>84</sup> European Parliament Resolution (2020/2021(INI)) of 25 November 2020.

a list of the most frequently encountered breakdowns and how to repair them (Art 10). Again, in order to encourage the repair, the resolution envisages free access to the information needed for the asset maintenance, free of charge for consumers and operators – including independent ones – available in the repair sector (Art 11, (a)) and mandatory for all sellers the information about the repair possibility (Art 10, (e)).

Even more recent and targeted is the resolution of the European Parliament of 7 April 2022<sup>85</sup> concerning the right to repair.

Recital (H) states that

‘a number of obstacles prevent consumers from opting for repair, including unavailability of information, lack of access to spare parts, lack of standardization and interoperability, or other technical barriers, and the costs of repair’.

Furthermore, the European Parliament encourages the Commission to require manufacturers to design their products in order to last longer and that can be repaired safely and that their components are easily accessible and removable; it also emphasizes the need to ensure that end-users and independent repair service providers have better access to spare parts and instruction manuals within a reasonable time and at a reasonable cost; it claims that an adequate 'right to repair' should provide repair industry actors, including independent repairers, and consumers with free access to the information needed to maintenance and repair; it emphasizes that while consumers have the right to choose between repair and replacement of defective goods under the Sales of Goods Directive, in practice, consumers usually opt for replacement over repair, often due to the high cost of the repair; therefore would the Commission provide, in its initiative on the right to repair, a set of measures to promote and encourage consumers, producers and traders to opt for repair rather than replacement; it notes that the forthcoming revision of the Sales of Goods Directive could include, *inter alia*, measures addressed to encourage consumers to choose repair rather than replacement, such as an obligation to provide for a replacement product when repairing certain products.

Ultimately, effective relevance is given to the sustainable remedy par excellence, ie the restorative one, prompting a revision of the remedy plan in the direction of a hierarchy of remedies.

On a closer inspection, it can be confirmed that the big technology giants<sup>86</sup> have often expressed their disagreement on the right to repair. And all laws approved in Europe and in the UK have aroused quite a few criticisms from consumer associations, because considered inadequate.<sup>87</sup> First of all because these standards

<sup>85</sup> European Parliament Resolution (2022/2515(RSP)) of 7 April 2022 on the right to repair [2022] OJ C 434/81.

<sup>86</sup> Such as Microsoft, Apple, Amazon.

<sup>87</sup> On 1 March 2021, the Regulation (EU) 2021/341 entered into force. It stipulates that

can be applied only to some equipment. Secondly, because there is no way to prevent manufacturers from making overly expensive repairs by charging higher costs for parts or bundling parts so that sections have to be replaced together.

The first pioneer was Apple. The Cupertino company has announced the ‘Self Service Repair’ (self-service repairs) allowing customers, Italians included, to fix an issue, to access to the original spare parts of the devices using Apple tools.<sup>88</sup>

Microsoft, right after, announced that would have studied ways and methods to reduce its environmental impact, making its products easier to repair.

As above-mentioned, because the Euro-unitary legislator was not ready in implementing a remedial policy fully in line with the sustainable nature that the Treaties imposed on the single market, national legislators adopted some protection forms consistent with the objective of the sustainable market. In particular, the French legal system has adopted a law which, by intervening on the *Code de l’Environnement* (Environment Code) and on the *Code de la Consommation* (Consumer Code), introduces different significant disciplines in the regulation of the sustainable market.

Among the various provisions introduced by the *Loi* (French Law) no 2020-105<sup>89</sup> in the *Code de l’Environnement* of particular interest is the new Art Legge 541-9-2 which introduces the reparability index (*‘indice de réparabilité’*), suitable to inform consumers about the possibility of good repair. All producers, importers, distributors or other subjects involved who are introducing electrical products on the market are therefore obliged to communicate this index to the seller (as well as the parameters used for the determination), which will then be communicated, by labeling and at the time of purchase, from the seller to the consumer. Starting from January 2024, this obligation will be changed: reference will have to be made to a sustainability index (*‘indice de durabilité’*), and not to the reparability index, suitable to represent asset features related to the reliability and product hardness.

With reference to the various rules introduced by the *Loi* no 2020-105 in the *Code de la Consommation* (Consumer Code), it is worth recalling the provisions on repair. In order to facilitate the use of this remedy, the French legislator has established, on one hand, that to all products repaired under the legal guarantee

washing machines, dishwashers, refrigerators and screens (including televisions), light sources and separate control equipment must be manufactured to be more easily repairable and have a longer life (requiring manufacturers to provide professional repairers spare parts and repair manuals). From 1 September 2021, external power supplies, light sources and control equipment are also subject to these obligations. The UK was one of the first states to align substantially with these EU measures. The provisions of the Ecodesign Directive for energy-related products and the Energy Information Regulations 2021, also known as the ‘Right to Repair’ regulations, were ratified by the Government of the United Kingdom of Great Britain (UK) on 1 July 2021.

<sup>88</sup> The change is effective from 6 December 2022. Customers in Belgium, France, Germany, Italy, Poland, Spain, Switzerland and the United Kingdom can purchase original Apple parts and tools as well as have direct access to repair manuals.

<sup>89</sup> *Loi no 2020-105 du 10 février 2020 relative à la lutte contre le gaspillage et à l’économie circulaire* (available at <https://tinyurl.com/5f3ad4s8>) (last visited 30 September 2024).



is applied a six-month extension and, on the other hand, that, if the repair cannot be carried out by an expert, the good given in replacement of the defective one is covered by an annual guarantee (Art Legge 217-9). Secondly, the *Loi no 2020-105* has been also applied in the discipline on planned obsolescence envisaged by the *Code de la Consommation*, introducing a specific prohibition for manufacturers from making it enable to be repaired or regenerated (Art Legge 441-3). This prohibition has the clear intention to allow the asset repair even outside the official circuits of the subject who placed the asset on the market.<sup>90</sup>

### VIII. Looking for a New Balance

It is undeniable that the current European Union law is seriously behind in terms of the targets aimed to put in place a sustainable single market.

The time is ripe for the regulation of employment between consumer and trader to be implemented part of the doctrine itself. In other words, the search for a new 'equilibrium' is finally imposed, which no longer requires exclusively an equivalence of services. A balance that, regardless of market valuations related to the good or service, considers the consumer's non-patrimonial interests as well.<sup>91</sup>

It is exactly what the consumer law needs to take the path towards sustainability: wider-ranging remedies to be incentivized with respect to protection devices still modeled on individual interests, therefore incapable of activating those broader dynamics to which the 'ecological consumer' aspires.

In this regard, the enhancement of the durability, reparability and reusability of the product should encourage investments aimed at ensuring the repair interventions not only physically feasible, but also economically sustainable for the seller who, therefore, would prefer an intervention on the *res* (item), already delivered, instead of its replacement with another. In the same direction, an expression of general preference for the selected remedy could in turn promote the goods production much more easily repairable or updatable to the detriment of disposable or planned obsolescence products.<sup>92</sup>

A future-proof consumer law can no longer exclusively focus on the economic

<sup>90</sup> D. Imbruglia, 'La sostenibilità' n 65 above, 365-366.

<sup>91</sup> P. Perlingieri, 'Equilibrio normativo e principio di proporzionalità nei contratti' *Rassegna di diritto civile*, 348-356 (2001); Id, *Il diritto dei contratti tra persona e mercato* (Napoli: Edizioni Scientifiche Italiane, 2003), 305-317; Id, 'L'interesse non patrimoniale e i contratti' *Annali della Facoltà di Economia di Benevento*, 19-45 (2012).

<sup>92</sup> A. Barenghi, n 44 above, 812, who observes that the parameters of the durability and sustainability of the product could be included among the elements that the seller could cite to refuse the replacement in favor of the repair. However, the Author also notes that, despite the importance attributed by the Recitals (nos 32 and 48) to the durability of the product and the sustainability of the remedy, 'the circumstance that the Art 13, para 2, does not contain any reference to this aspect is therefore an indication of the only declamatory nature of this reference, as it is at least doubtful whether the interpreter can leverage the clarifications of the recital to also introduce the reference to these elements in the evaluation of the conduct and of the parties' claims'.

consumers interests of but should also be aimed at the sustainability in order to reconcile the objectives of Art 11 TFEU (sustainable development) and Art 12 TFEU (consumer protection).

The inseparability between individual and common interests should inspire the pursuit of this new balance.