Corporate and Financial Markets Law

Some Backdrops and Prospective Scenarios About the Emerging 'Law of Sustainable Business Organizations'

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Abstract

The terms 'sustainability' and 'company' have been progressively used together in our day-to-day talks. Yet – at least at first sight – they may seem at odd with each other. In fact, the future of our planet – and, namely, the future of human and other animal species, of plants, and their respective biodiversity – is heavily (and will increasingly be) impacted by the ways and by the extent we, the people leaving on Earth, will succeed in making these two key notions (and the many, complex, multi-level implications that each of them in turn entails) fully integrated and compatible. On these premises, the essay will try to offer, first, an outline of the current significance of each of these two expressions; and then, some reasons why their necessary combination would represent one of the current major challenges of contemporary business organizations laws around the globe. The work argues that an emerging legal field of interdisciplinary research and teaching, that could be labeled the 'Law of Sustainable Business Organizations', seems to address this goal, taking up this jigsaw of legal and non-legal ESG-related topics, from the specific standpoint of the incorporated firms' typical structures and functions. The gradient of sustainability of the modern, for-profit, company *vis-à-vis* the many, interconnected ESG-related issues is alimenting this multidisciplinary research field, that – albeit concentrated in the business law area – could be fully understood by adopting a holistic approach; and that calls, inter alia, for intergovernmental coordination. Attaining for-profit business organizations' full ESG risk compliance would be the result of a sophisticated 'alchemy' of both regulatory and voluntary approaches, that is, of hard law (and often mandatory provisions) and soft law (and often optional) rules to be applied using the proportionality principle. Hence, finding a viable trade-off between ESG-related problems and market freedom represents the main challenge the Law of Sustainable Business Organizations ought to face in the following decade.

I. Introduction

The terms '*sustainability*' and '*company*' (or '*corporation*')[1] have been progressively used together in our day-to-day talks. Yet – at least at first sight – they may seem at odd with each other. *Sustainability*, in the last fifteen/twenty years, has been increasingly offered as a sort of methodological antidote to the multiple entanglements of the environmental, social, and governance (ESG) problems – and

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[1] The term 'company' is more commonly used in British law (eg in the UK 'Company Act' of 2006), whereas the term 'corporation' is more commonly used in US law (see, eg, the 'Delaware General Corporation Law'). Unless specified otherwise, hereinafter the two terms will be used interchangeably.

thus, to the correlated trades and businesses' risks and responsibilities that have started to detrimentally impact the survival conditions of our Mother Earth in the long run. On the other hand, the (for-profit) company – the most relevant and diffused business organization vehicle in the capitalistic/free-market economies (and even where capitalism is formally rejected) – has often been addressed as a 'much reviled as an externalizing, short-termist, inward-focused, politically manipulative machine'.[2]

In fact, the *future of our planet* – and, namely, the future of human and other animal species, of plants, as well as their respective biodiversity and ecosystems – is heavily (and will increasingly be) impacted by the ways and by the extent *we, the people leaving on Earth*, will succeed in making these two key notions (and the many, complex, multi-level implications that each of them in turn entails) *fully integrated* and *compatible*.

In the following pages, I will try to offer, first, an outline of the current significance of each of these two expressions; and then, some reasons why their necessary combination would represent one of the current major challenges of contemporary business organizations laws around the globe.

Anticipating some of this essay's conclusive remarks, an emerging legal field of interdisciplinary research and teaching seems to address this goal, taking up this jigsaw of legal and non-legal ESG-related topics, from the specific standpoint of the incorporated firms' typical structures and functions; and it could be labeled as the 'Law of Sustainable Business Organizations'. The corporate ESG viability (that is, the 'sustainability' of the modern, for-profit, 'corporation' *vis-à-vis* the many, interconnected ESG-related issues) is alimenting a multidisciplinary research field, that – albeit concentrated in the business law area – could be fully understood only by adopting a holistic approach, which, on one hand, needs intergovernmental coordination (thus in turn calling for comparative analyses); and, on the other

[2] A.R. Palmiter, 'Awakening Capitalism: A Paradigm Shift' (25 November 2021), 3, available at https://tinyurl.com/mreet52x (last visited 30 September 2024). The expression 'externalizing machine' often recurs among corporate law and corporate governance scholars, 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* (New York: Harper Collings Publishers Ltd, 1991), as claimed by the Authors on page 16 of the third edition of their classic hornbook *Corporate Governance* (Malden, MA-Oxford, UK: Blackwell, 2004); on the use of such expression, see also L.E. Mitchell, *Corporate Irresponsibility: America's Newest Export* (Hartford, CT: Yale University Press, 2001), 49-65 (chapter 2: 'The Perfect Externalizing Machine'). For a definition of the corporation, in connection with a critical definition of 'capitalism', see, eg, A.R. Palmiter, *Sustainable Corporations* (Washington: Aspen Publishing, 2023), 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'): see also para 4.

hand, spans across the multifaceted province of the law and extends beyond it. Certainly, matching effectively such quest for companies' ESG viability constitutes a complicated and rather sensitive task. To be sure, attaining for-profit business organizations' full ESG risk compliance would be the result of a sophisticated 'alchemy' of both regulatory and voluntary approaches, that is, of hard law (and often mandatory provisions) and soft law (and often optional) rules. Ultimately, to be meaningful and effective, the multifaceted Law of Sustainable Business Organizations should be addressed at finding that alchemy internationally, so as to be evenly enforced in a multi-jurisdictional dimension and avoiding to disproportionally compress private ordering and the innovation incentivizing market freedom.

II. 'Sustainability': Some Notes on a New 'Buzzword'[3]

Sustainability could be, and it is typically employed to define – from a qualitative point of view – an *intertemporal connection* between a *current viable status* and a *future viable status* of virtually any object, activity, conducts, species, etc. In its very general meaning, it may be referred, and it could be applied to many different topics and phenomena: for example, it may establish a connection between the present use (or misuse) of a parcel of land as a vineyard and the possibility of its continued agricultural use in ninety-nine years from today, by taking into consideration the current (as well as the short-term and/or the long-term) choices and methods of harvesting the field in question.

The concept of sustainability projects present behaviors into the future; actually, it *discounts present* behaviors *against* (the very possibility of) *future* ones and their relative values – not necessarily their economic (or monetary) values, though.[4] To be sure, this notion imports a preference for long-term *vis-à-vis* short-term (public and private market actors') plans and/or investments.[5]

[3] A.M. Pacces, 'Sustainable Corporate Governance: The Role of the Law', in D. Busch et al eds, *Sustainable Finance in Europe - Corporate Governance, Financial Stability and Financial Markets* (Cham, CH: Palgrave-Macmillan-Springer, 2021), 151 ('Sustainability is a buzzword and a policy goal'); H. Fleischer, 'Corporate Purpose: A Management Concept and its Implications for Company Law' *European Company and Financial Law Review*, 161, 162 (2021) (albeit referring to the strictly correlated expression 'corporate purpose', that 'found its way into the boardrooms of larger companies'). On the same tune, see also 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*, 409, 460 (2022).

[4] D. Weisbach and C.R. Sunstein, 'Climate Change and Discounting the Future: Guide for the Perplexed' 27 *Yale Law & Policy Review*, 433 (2009); T. Verheyden et al, 'ESG for All? The Impactof ESG Screening on Return, Risk, and Diversification' 28 *Journal of Applied Corporate Finance*, 47 (2016).

[5] As it has been noticed, long-term approaches generally tend to exacerbate wealth distributive problems, since – almost by definition – long-term policies require, in the short term, more sacrifices than those entailed by short-term policies: on this point, see F. Denozza, 'Scopo della società e interesse degli *stakeholders*: dalla "considerazione" all'"*empowerment*" ', in M. Castellaneta and F. Vessia eds, *La responsabilità sociale d'impresa tra diritto societario e diritto internazionale* (Napoli:

Favoring or not (and to what extent) short-term projects, as opposed to long-term ones, is essentially (albeit not exclusively) a matter of policy. Apparently, *public policy* (political choices) when these projects are within the province of any of the public interests (and, thus, governmental powers); *private policy*, when investments and/or (other economic-oriented or non-economic-oriented) plans are within the province of private agents, usually acting in some markets, that is, according to some free market/free enterprise principles.

However, as we will see in paras 3, 5, 6 and 7, the pervasive notion of 'sustainability' tends to blur and event to tilt such a distinction, because – at least in its general and most common sense – both public (that is, general communities') interests and private (ie market) interests are almost inevitably involved in the process of its attainment.

Not surprisingly, then, *sustainability* has been increasingly used to relate – and thus to assess, from several different points of view – the *viability* of current worldwide human *actions* (or *inactions*), including regulatory activism, with respect to *future* conditions of human, other animals, and plants, on planet Earth. Not coincidentally, this is exactly what the general concept of 'sustainability' – as applied to the 17 Sustainable Development Goals, contemplated in the UN 2030 Agenda for Sustainable Development, as adopted in Fall 2015 – entails. Indeed, back in 1987, 'sustainable development' has been defined by the *Bruntland Report*, as the development that 'meets the needs of the present without compromising the ability of future generations to meet their own needs'.[6]

Edizioni Scientifiche Italiane, 2019), 63, 79; F. Denozza, 'Lo scopo della società tra *short-termism* e *stakeholder empowerment*' *Rivista Orizzonti del Diritto Commerciale*, 29 (2021);Id, 'Incertezza, azione collettiva, esternalità, problemi distributivi: come si forma lo *short-termism* e come se ne può uscire con l'aiuto degli *stakeholders*' *Rivista delle società*, 297 (2021). See also: L.E. Strine Jr, 'One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?' 66 *The Business Lawyer*, 1 (2010); K. Greenfield, 'The Puzzle of Short-Termism' 46 *Wake Forest Law Review*, 627 (2011); J.C. Coffee Jr, 'The European Commission Considers "Short-Termism" (And "What Do You Mean By That?")' available at https://tinyurl.com/mr39w9p4 (last visited 30 September 2024); M. Stella Richter Jr, 'Long termism' *Rivista delle società*, 16 (2021); B. Choudhury and M. Petrin, 'Corporate Purpose and Short-Termism', in A. Afsharipour and M. Gelter eds, *Research Handbook on Comparative Corporate Governance* (Cheltenham: Edward Elgar, 2021) 73; M.V. Zammitti, '*Long-termism* e *short-termism* nella ricerca di strategie di sostenibilità' *Rivista Orizzonti del Diritto Commerciale*, 255 (2021). Recently, see also M.J. Roe, *Missing the Target - Why Stock Market Short-Termism is Not the Problem* (Oxford-New York: OUP, 2022).

[6] In 1987, the World Commission on Environment and Development (WCED), (which had been set up in 1983), 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 at https://tinyurl.com/4mtj8ahn (last visited 30 September 2024). The document came to be known as the '*Brundtland Report*' after the Commission's chairwoman, Gro Harlem Brundtland. It developed guiding principles for sustainable development as it is generally understood today. In 1989, the report was debated in the UN General Assembly, which decided to organize a UN Conference on Environment and Development which, in 1992, in Rio de Janeiro, tabled the UN Framework Convention on Climate Change (that entered in force in 1994): see under fn 21.

III. We – the People Living on Earth – Have No 'Planet B'!

Recent scientific surveys on 'planetary boundaries',[7] economic studies, sociological researches,[8] reports by the most authoritative inter-governmental and non-governmental organizations ('NGOs') – such as, for example, the Intergovernmental Panel on Climate Change ('IPCC') *Six Assessment Report* of 2022[9] – and even Pope Francis, in his Encyclical *Laudato Sì* of 2014,[10] are warning us that planet Earth is currently under very dangerous distress – 'at a precipice', using CERES' words:[11] that is, our current 'way of life' is *unsustainabl*e, at

[7] The planetary boundaries framework defines a safe operating space for humanity based on the intrinsic biophysical processes that regulate the stability of the Earth system: see, eg J. Rockström et al, 'Planetary Boundaries: Exploring the Safe Operating Space of Humanity' 14 *Ecology and Society* (2009), available at https://tinyurl.com/3xm8wr7f (last visited 30 September 2024); D. Griggs et al, 'Sustainable development goals for people and planet'495 *Nature*, 305 (2013); G.M. Mace et al, 'Approaches to defining a planetary boundary for biodiversity' 28 *Global Environmental Change*,289 (2014); W. Steffen et al, 'Planetary boundaries: Guiding human development on a changing planet' 347 *Science*, 1259855-1/11, 736 (2015); A. Brown, 'Planetary Boundaries' 5 *Nature Climate Change*, 19 (2015); F. Biermann and R.E. Kim, 'The Boundaries of the Planetary Boundary Framework: A Critical Appraisal of Approaches to Define a "Safe Operating Space" for Humanity' 45 *Annual Reviews of Environment and Resources*, 497 (2020); L. Persson et al, 'Outside the Safe Operating Space of the Planetary Boundary for Novel Entities' *Environmental Science & Technology* (2022). See also C. Karayalcin and H. Onder, 'Coping with climate shocks: Ecosystems Versus Economic Systems' (15 May 2023), published in the official website of *The Brookings Institution*, available at https://tinyurl.com/bapu9t88 (last visited 30 September 2024); B. Sjåfjell and C.M. Bruner, 'Corporations and Sustainability', in Ead eds, *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge-New York: Cambridge University Press, 2019), 3, 4-5 and 7-11.

[8] J. Robinson, 'Squaring the Circle: Some Thoughts on the Idea of Sustainable Development' 48 *Ecological Economics*, 369 (2004); M. Leach et al, 'Between Social and Planetary Boundaries: Navigating Pathways in the Safe and Just Space for Humanity', in OECD ed, *World Social Science Report 2013: Changing Global Environment* (Paris: OECD Publishing 2013), 84-90; K. Raworth, 'A Safe and Just Space for Humanity - Can We Live Within The Doughnut?' (February 2012), Oxfam Discussion Paper, available at https://tinyurl.com/yu77fm8y (last visited 30 September 2024); Id, *Doughnut Economics – Seven Ways To Think Like a 21st-Century Economist* (London: Chelsea Green Publishing, 2017); S.S. Vildåsen et al, 'Clarifying the Epistemology of Corporate Sustainability' 138 *Ecological Economics*, 40 (2017).

[9] The IPCC is the United Nations body for assessing the science related to climate change. Over time, its three Working Groups prepared a series of 'impact assessment' reports (and a Synthesis Report) about the state of scientific, technical and socio-economic knowledge on climate change, its impacts and future risks, and options for reducing the rate at which climate change is taking place. With specific regard to the 6th IPCC Impact Assessment Report, the Working Group I contribution ('Climate Change 2021: The Physical Science Basis') was finalized in August2021; the Working Group II contribution ('Climate Change 2022: Impacts, Adaptation and Vulnerability') was published in February 2022; the Working Group III contribution ('Climate Change 2022: Mitigation of Climate Change'), was completed in April 2022, and the Synthesis Report was accomplished in March 2023. The IPCC also produces Special Reports on topics agreed to by its member governments, as well as Methodology Reports that provide guidelines for the preparation of greenhouse gas inventories.

[10] Available at https://tinyurl.com/bdfhc3r2 (last visited 30 September 2024). See, eg, M. Cian, 'Dottrina sociale della Chiesa, sviluppo e finanza sostenibili, contributi recenti' *Rivista delle società*, 53 (2021).

[11] See CERES, *Ceres Roadmap 2030-A 10-year Action Plan for Sustainable Business Leadership*

least if we want to secure a viable future for the next generations of humans, animals generally, and plants (including their respective biodiversity and ecosystems).

Notably, the highest priority appears to be represented by the need to stop and to redress the environmental pollution emergencies and the consequent global warming phenomenon,[12] mainly caused (but the list is clearly much longer than the following examples) by the GHCs emissions on the atmosphere,[13] in turn alimented by continuous massive use of fossil energy sources for industrial, commercial, and household uses, by some intensive firming and agricultural methods, by the dispersion and/or waste of water and of other scarce natural resources, the systematic eradication and burning of large portions of pluvial forests, etc.

Since our planet's critical environmental, as well as social and economic conditions – as the three are inextricably interrelated[14] – soon could become

(2020), available at https://tinyurl.com/5y3pa4st (last visited 30 September 2024). Ceres is a nonprofit organization based in Boston (MA, USA), that – according to its website – is 'working with the most influential capital market leaders to solve the world's greatest sustainability challenges'. Through its 'networks and global collaborations of investors, companies and nonprofits', CERES drives 'action and inspire equitable market-based and policy solutions throughout the economy to build a just and sustainable future'.

[12] See, eg, C. Rosenzweig and P. Neofotis, 'Detection and attribution of anthropogenic climate change impacts' 4 *WIRWs Climate Change*, 12 (2013), available at https://tinyurl.com/nhffyzra (last visited 30 September 2024). See also MSCI, 'MSCI Net-Zero Tracker Report' (July 2023 Update) – 'A periodic report' by MSCI, a leading international investment consulting firm, based in New York, NY on 'progress by the world's listed companies toward curbing climate risk', is available for download at https://tinyurl.com/3ea8nb7t (last visited 30 September 2024). This *Report* warns that, whereas the Paris Agreement of 2015 (entered into force on 2016 within the United Nations Framework for Climate Change Convention of 1992, entered into force in 1994: see fn 21) set forth the 'threshold of limiting the rise in average global temperatures to 1,5 degrees Celsius (1.5°C, or 2.7°F) above preindustrial levels (…) the planet has warmed by nearly 1.3°C already'; and 'that while companies are pledging to reduce their emissions, preventing the costliest warming will require companies and investors to redouble their ambitions and back climate commitments with action' (quoting the proceedings from the Bonn Climate Change Conference held from 5 to 15 June, 2023, within the United Nations Framework Convention on Climate Change. Official documents can be retrieved at: https://unfccc.int/sb58).

[13] GHGs emissions (including CO_2 emissions) are mainly caused by continuous massive use of fossil energy sources, by some intensive firming and agricultural methods, dispersion and/or waste of water and of other scarce natural resources, the systematic eradication and burning of large portions of pluvial forests, etc). For a relatively recent country-by-country data on CO_2 emissions (and GHG emissions, generally), see, eg, H. Ritchie et al, *CO_2 and Greenhouse Gas Emissions* (2020), published online at *OurWorldInData.org*, available at https://tinyurl.com/32ruke4w (last visited 30 September 2024).

[14] V. Thomas, 'The Truth About Climate Action Versus Economic Growth' (3 May 2023), available athttps://tinyurl.com/4xypus26(based on the Author's book *Risk and Resilience in the Era of Climate Change* (Singapore: Palgrave-Macmillan, 2023) (last visited 30 September 2024) recently wrote that, until the recent past, 'Economic growth has taken precedence over environmental protection on the premise that raising living standards for people now must have priority over preserving nature for future generations. But this way of thinking runs into trouble when the destruction of natural capital rises to such a height that it blocks growth itself. The crucial question is whether runaway climate change puts to rest the growth-versus-environment dichotomy, necessitating that they be seen as the two sides of the same coin. The answer is an unambiguous yes at the global level, and a qualified yes at the country level. (…). Climate action is not only

irreversible, they all prompt national governments, private institutions, and each one of us to join in what should be an energic (re-)action, not only to the daily pollution of our *environment* (by, eg, CO_2 and GHCs emissions, generally), but also to *social* (human rights violations, unsafe/unhealthy labor conditions, gender inequalities, etc), *market* opportunisms,[15] and *governance* distortions and/or inefficiencies, both at public (governmental, intergovernmental) level and at private level, thereby involving different kind of persons and entities, political institutions, and even economic systems, such as, for example, regulated and unregulated local and global markets, all kinds of (incorporated and unincorporated) business organizations – including groups of companies, often organized as multinational enterprises (MNEs) – hybrid organizations, not-for-profit entities, and NGOs (which, albeit organized as private entities, typically advocate and/or pursue public interest goals), etc.

Thus, everyone may (sadly) consider that the issues generated by the globalization of markets and economies are now matched – so to speak – and to some extent embedded by an array of transnational environmental, social, economic, and governance problems – ie, the now popular ESG '*triad*'.[16]

As obvious as it may appear, just as market boundaries have been gradually dismantled, so that every single country and/or regional economic area is increasingly influenced by business operations occurring in other trades and/or industries, today the same holds true with regard to those detrimental factors affecting our 'planetary boundaries' (again: global warming, social and economic disparities, and public and/or private governance deficiencies, etc), as they occur at every latitude and they are able to exert mutual impacts on each other, irrespective of each nation' frontiers,[17] thereby calling for harmonized legislative and/or

complementary to poverty reduction but in key respects, the former is a necessary condition for the latter. When one-third of Pakistan goes underwater and 10 percent of GDP is wiped out, building flood defenses becomes synonymous with poverty reduction'. See, also, B. Sjåfjell and C.M. Bruner, n 7 above, 6-7 ('The idea that law and policy can be compartimentalized, with environmental issues left to environmental law, labor issues left to labor law, and so on, while imagining that the result will somehow become a consistent whole is outdated and has proven unworkable in practice') and A.R. Palmiter, 'Capitalism, Heal Thyself' *Rivista delle Società*, 293, 293-295 (2022).

[15] The concept of 'opportunism' (often also referred to as 'moral hazard') has been defined as 'self-interests seeking with guile' by a famous *Law and Economics* scholar (and Nobel Prize laureate in Economic Sciences in 2009), O.E. Williamson, *The Economic Institutions of Capitalism* (New York: The Free Press, 1985), 47; Id, 'Opportunism and Its Critics' 14 *Managerial and Decision Economics* (Special Issue), 97 (1993). More recently, 'opportunism' has been defined as 'the practice of engaging in actions that sacrifice ethical principles to benefit oneself at the expense of others' by S.D. Jap et al, 'Low Stakes Opportunism' 50 *Journal of Marketing Research*, 216, 216 (2013). For the use of 'opportunism' within the *corporate governance* setting, see *sub* fn 61.

[16] See, eg, A.R. Palmiter, 'Capitalism' n 14 above, 298-299.

[17] B. Sjåfjell and C.M. Bruner, n 7 above, 6-7 ('In addition to the rampant problem with lack of legal compliance within national borders, the international and fragmented nature of business further challenges' the 'idea that law and policy can be compartmentalized'. Indeed 'The size, complexity and power of modern corporations highlight the fallacy of this silo approach to law

governmental interventions (also) in the economic setting – ie, in the province of 'private ordering' – thus ultimately intruding inside the realm of business organizations' (that is, in the companies' and especially multinationals') networks of contractual and/or quasi-contractual relationships.

Therefore – if approached under such particular respect – the term *sustainability*, not only calls for an *immediate* moral and ethical – that is, mainly *voluntary*[18] – self-restraint of individuals', groups' (and even governments') discretionary use of 'scarce resources' – including natural resources, such as, for example, *clean*, *drinking water* – in order to preserve the very possibility to maintain animal and plant life on Earth (comprised of the preservation of their respective levels of biodiversity) *in the future*, that is, for future generations.[19] But it also increasingly prompts the enactment of a compelling and coordinated set of rules, meant to achieve – using the law and its typical enforcement tools – those same results that are assumed to be not attainable on a mere voluntary and/or cooperative basis (ie, by exclusively resorting to private ordering instruments).

Consequently, selecting and implementing those legal rules would be no longer just part of a single market's or just a group of firms' self-imposed best practice – often accompanied by a reputation enhancement purpose, albeit sometimes tainted by (anticompetitive) 'greenwashing' behaviours. Instead, these compelling regulations would (need to) be enforced with the *rationale* of fostering the entire globe's 'common good': that is, again, the preservation of the all *flora* and *fauna* respective species, and, thus, the attainment of a globally viable social and economic environment and for the sake of currently young, as well as for the future generations of our planet – not just to preserve our single 'backyard'.

If an immediate and globally coordinated reaction to the *status quo* – which shall thus be also comprised of adequate (that is, *proportionate*) legal enforcement measures – ought to be deemed both necessary and urgent in order to (try to) redress an unsustainable (ab)use of our planet, it should also be added that – to

and policy. Simply put, corporations can easily structure their businesses to evade a given jurisdiction's regulatory power'). See also J. Zhao, 'Extraterritorial Attempts to Addressing Challenges to Corporate Sustainability', in B. Sjåfjell and C.M. Bruner eds, n 7 above, 29.

[18] Thus, not surprisingly, one of the main features of the several CSR policies adopted by business organizations worldwide, is their voluntary character: see, eg, H.W. Micklitz, 'Organizations and Public Goods', in S. Grundmann et al, *New Private Law Theory - A Pluralist Approach* (Cambridge: Cambridge University Press, 2021), 414, 419; A. Beckers, *Enforcing Corporate Social Responsibility Codes - On Global Self-Regulation and National Private Law* (Oxford-Portland (OR): Bloomsbury-Hart Publishing, 2015); C. Angelici, 'Divagazioni sulla "responsabilità sociale" d'impresa', in M. Castellaneta and F. Vessia eds, *La responsabilità sociale n 5 above*, 19, 24-25; F. Denozza and A. Stabilini, 'The Shortcomings of Voluntary Conceptions of CSR' *Rivista Orizzonti del Diritto Commerciale*, 1 (2013); J.P. Gond et al, 'The Government of Self-Regulation: On the Comparative Dynamics of Corporate Social Responsibility' 40 *Economy and Society*, 640 (2011).

[19] See, *ex pluribus*, M. Abrescia, 'Un diritto al futuro: analisi economica del diritto, Costituzione e responsabilità tra generazioni', in R. Bifulco and A. D'Aloia eds, *Un diritto per il futuro. Teorie e modelli dello sviluppo sostenibile e della responsabilità intergenerazionale* (Napoli: Jovene, 2008), 161.

be meaningful and effective – such reaction must be carried out *simultaneously* by every country on earth, by policing those behaviors that are exacerbating the current environmental emergency, socio-economic disparities and shortcomings, and (private and public) governance distortions of the previous two factors (including 'greenwashing' and 'social-washing' unethical and anticompetitive phenomena): that is, the ESG risk factors *triad*. In the last decade, the ESG-related risks factors (all, or just some of them) have inexorably become part of our common chats, dinner parties' talks, politicians' agendas, newspapers articles and investigative reportages, as well as academic multidisciplinary discourses.[20]

And yet, as of today – whereas many are already well aware of the very simple *fact* that we have 'no planet B' – we, the people living on Mother Earth, unfortunately are still quite far from witnessing (and welcoming) any real and effective coordination of efforts at international (ie, at inter-state) level to curb ESG-related problems, but for the 'soft' outcomes generated from the annual COPs,[21]

[20] An attempt to contribute to this interdisciplinary debate on the magnitude of the *ESG risks* and/or on the level of *ESG sustainability* was offered by the Padova Multidisciplinary Summer School on 'Corporate Sustainability: From CSR to ESG' that I had the privilege to plan, organize, and direct, in September 2022, at the School of Law of the University of Padova (which on that same year celebrated its 800th anniversary since its foundation). The five-days long intensive program involved some thirty academics and experts from three different Continents, and almost one hundred students from four different Continents, who have been presenting and discussing the ongoing transition from the CSR voluntary approach to the ESG regulatory approach from many different legal and economic perspectives, but sharing the fundamental methodological premise – at the basis of this interdisciplinary academic initiative – that complex corporate sustainability issues call for holistic solutions. See, eg, F. Vella, 'Il pericolo di un'unica storia: il diritto (commerciale) e le nuove frontiere dell'interdisciplinarità' *Rivista Orizzonti del Diritto Commerciale*, 775 (2021).

[21] 'COP' stands for 'Conference(s) of the Parties', to the United Nations Framework Convention on Climate Change ('UNFCCC'), of which the COP represents the highest permanent decision-making body. The UNFCCC was originally proposed at the Intergovernmental Negotiating Committee in New York from 30 April to 9 May 1992, and it was then opened for signature in occasion of the UN Conference on Environment and Development (UNCED), held in Rio de Janeiro, from 3 to 12 June 1992, when 154 countries adhered to it. The text of the UNFCCC, can be retrieved at https://tinyurl.com/y5fue2ma (last visited 30 September 2024). The UNFCCC entered into force on the 21 March 1994 (upon its official ratification by 50 States). The first annual COP was held in 1995 (in 2020 the COP was not held, due to the Covid pandemic. A list of the COP sessions, with updated links to the COP official transcripts and official documents, can be retrieved at https://tinyurl.com/399d2pem (last visited 30 September 2024)). The 'Kyoto Protocol', which was signed in 1997, was the first official international follow-up of the UNFCCC, and it was then superseded by the Paris Agreement of 2015, which entered into force in 2016. The Paris Agreement is an international treaty on climate change, adopted by 196 Parties at the UN Climate Change Conference (so called 'COP21') in Paris, on 12 December 2015 (see the Decision 1/CP/21, entitled 'Adoption of the Paris Agreement', included in the UN Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, dated 29 January 2016, and available at https://tinyurl.com/5xx79wz9 (last visited 30 September 2024)). The Paris Agreement entered into force on 4 November 2016. Its main purpose is to bond UN countries to implement adequate measures so as to hold 'the increase in the global average temperature to well below 2° C above pre-industrial levels' and to deploy adequate efforts 'to limit the temperature increase to 1,5° C above pre-industrial levels'. United Nations Climate Change (UNFCCC secretariat), *What is the Paris Agreement? How does the Paris Agreement work?* (2020), available at the United Nations Climate Change Official Website, https://tinyurl.com/4fr4skuf (last visited 30

along with the slightly more compelling effects (albeit not directly binding on private companies) stemming from the 2011 *UN Guiding Principles on Business and Humar Rights*,[22] coped with the recently revised OECD's *Guidelines for Multinational Enterprises on Responsible Business Conduct*.[23]

These recommendations are addressed by the UN to member states: and then, in turn, by (some) of these states' governments to national and multinational enterprises; they are intended to exert pressure on corporate management (as well as, possibly, on their respective investors) so as to make them adhering to social rights and to environmental protection and precaution standards, both in their market operations and in their governance structures, including company group's 'value chain': that is, making sure that those supranational recommendations will be respected, not only by each subsidiary pertaining to any multinational group of companies, but also by each additional independent business organization forming part of each MNE's respective 'supply chain(s)'.[24]

September 2024). By 2022, the UNFCCC counts 198 parties.

[22] The 'UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' ('UN Guiding Principles') have been endorsed by the UN Human Rights Council by its Resolution no 17/4, of 16 June 2011, and are addressed to the UN's member States. They are also known as the '*Ruggie Principles*', after the name of the late Harvard University professor John G. Ruggie, who was appointed in 2005 as a UN Special Representative for Business and Human Rights and who drafted the UN Guiding Principles. See, eg, J.G. Ruggie, *Just Business - Multinational Corporations and Human Rights* (New York: W.W. Norton and Company, Inc., 2013); see also I. Bantekas and M.A. Stein eds, *The Cambridge Companion to business and Human Right Law* (Cambridge: Cambridge University Press, 2021; K. Morrow and H. Cullen, 'Defragmenting Transnational Business Responsibilities - Principles and Process', in B. Sjåfjell and C.M. Bruner eds, n 7 above, 43; H. Liu, 'The Environmental Protection Responsibility of Multinational Enterprises' 16 *Highlights in Business, Economics and Management*, 485 (2023).

[23] The 2023 'OECD Guidelines for Multinational Enterprises on Responsible Business Conduct' ('OECD MNEs Guidelines') are recommendations addressed by the OECD to governments and, indirectly, to multinational enterprises; therefore, they are not legally binding on private entities. According to their contents' synopsis, available at the OECD web page on 'Responsible Business Conduct' (https://tinyurl.com/bdh4dd3f (last visited 30 September 2024), where the OECD MNEs Guidelines can be downloaded), the OECD MNEs Guidelines 'aim to encourage positive contributions enterprises can make to economic, environmental and social progress, and to minimise adverse impacts on matters covered by the Guidelines that may be associated with an enterprise's operations, products and services. The OECD MNEs Guidelines cover all key areas of business responsibility, including human rights, labour rights, environment, bribery and corruption, consumer interests, disclosure, science and technology, competition, and taxation. The 2023 edition of the OECD MNEs Guidelines provides updated recommendations for responsible business conduct across key areas, such as climate change, biodiversity, technology, business integrity and supply chain due diligence, as well as updated implementation procedures for the National Contact Points for Responsible Business Conduct'.

[24] R. McCorquodale et al, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' 2 *Business and Human Rights Journal*, 195 (2017); B. Fasterling, 'Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk' 2 *Business and Human Rights Journal*, 225 (2017); K. Buhmann, 'Neglecting the Proactive Aspect of Human Rights Due Diligence? A Critical Appraisal of the EU's Non-Financial Reporting Directive as a Pillar One Avenue for Promoting Pillar Two Action' 3 *Business and Human Rights Journal*, 23 (2018); V. Ulfbeck et al eds, *Law And Supply Chain Management - Contract and Tort Interplay*

IV. The Second Prong of the Analysis: the Modern (for-Profit) Corporation, as the Key Actor of the Capitalistic System, Strategically Placed at the Crossroad of Every Sustainability Issue (and, thus, at the Intersection of Each of the 17 UN's Sustainable Development Goals)

The preceding remarks suffice to suggest that each of the environmental, social, and governance *sustainability* factors – the general notion of 'ESG sustainability' – swiftly impinges into the very nature of the market economy's most relevant 'legal product': what I am keen in calling the 'incorporated firm', *id est*, the modern (for-profit) 'corporation' (or 'company').[25] Indeed, the incorporated firm does

and Overlap, (London-New York: Routledge, 2019); G. Quijano and C. Lopez, 'Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?' 6 *Business and Human Rights Journal*, 241 (2021); T. Nguyen, 'The Structural Complexity of Multinational Corporations and the Effect on Managing Huma Rights Risks in the Supply Chain', in I. Bantekas and M.A. Stein eds, n 22 above, 560; G.A. Sarfaty, 'Global Supply Chain Auditing', in B. van Rooij and D.D. Sokol eds, *The Cambridge Handbook on Compliance* (Cambridge: Cambridge University Press, 2021), 977; F. Wettstein, *Business and Human Rights - Ethical, Legal, and Managerial Perspectives* (Cambridge: Cambridge University Press, 2022), 142; E. Partiti, 'The Place of Voluntary Standards in Managing Social and Environmental Risks in Global Value Chains' 13 *European Journal of Risk Regulation*, 114 (2022). In connection with both, the German Law on the companies due diligence obligations throughout their respective supply chain (*Lieferkettensorgfaltsgesetz/LkSG*) and the consequent EU Commission's Corporate Due Diligence Directive ('CSDDD') proposal of 23 February 2022, as amended, that was finally adopted on the 24th of May, 2024 (according to the press release available at https://tinyurl.com/84ahy5df (last visited 30 September 2024)), see J.G. Ruggie, 'European Commission Initiative on Mandatory Human Rights Due Diligence and Directors' Duties' (February 2021), Harvard J.F. Kenney School of Government, available at https://tinyurl.com/bdw67pum (last visited 30 September 2024); and see *amplius* in para 6, *sub* nos 74 and 81.

[25] See n 1 above. For the proposition that the (for-profit) company (or corporation) – as the most relevant organizational form of a trade or business 'enterprise' – represents the key institution of modern and contemporary capitalism, see, eg, L. Talbot, 'Corporate Governance and the Political Economy of the Company', in B. Sjåfjell and C.M. Bruner eds, n 7 above, 86, 87 ('capital formation in early capitalism was generally organized under the legal form of a partnership, but by the end of the nineteenth century, it was predominantly organized under the company'), and 90 ('the modern company became the business form of choice in the late nineteenth century because it enables capital to transcend its boundedness to a particular business and to seek out new profitable areas. It allows capitalists to have no commitment to the long-term development of a business, only its capacity to deliver profits. Company law enables capital to become alienated from the productive entity and thus to limit its exposure to company debts'); see also, B. Sjåfjell and C.M. Bruner, n 7above, 5-6 ('The corporation has been cited as one of the most ingenious legal inventions of modern history, making it possible for capital from investors to be channelled to risky business ventures (…)';thus the 'legal form of the corporation remains the principal mode of organisation of large, capital-intensive business, and their regulation is often the default point of reference in the law and policy of other business forms'; moreover, 'Corporate law and corporate governance concern the regulation of the most impactful units in our economy (…)'); E. McGaughey, *Principles of Enterprise Law* (Cambridge: Cambridge University Press, 2022), 1 (pointing out that the 'Modern enterprise, most often organized in corporation and by the state', is characterized by 'three functions – of finance, governance and' allocation of 'rights'; and it 'accounts for the incredible growth, welfare and prosperity of humankind since the Industrial Revolution'); A.R. Palmiter, *Sustainable Corporations* n 2 above, xxvii (defining the 'corporation' as 'the most dominant institution in our modern world').

constitute the most common form of for-profit 'enterprise';[26] and in that capacity it comes into play as the second term being addressed in these introductory remarks on the emerging body of law concerned with 'corporate sustainability'.[27]

Thus, the aforementioned ESG sustainability issues question what I would call the incorporated firm's current 'ESG viability' – that is, the *gradient* of sustainability of for-profit companies, as the more relevant and statistically more recurrent model to organize and to carry out any enterprise, 'firm', or (using the European Union law terminology) 'undertaking':[28] that is, any trade or business, worldwide, adopting

[26] E. McGaughey, n 25 above, 2 ('enterprise law is almost entirely about corporations and states, and their use or abuse of power'); R.A.G. Monks and N. Minow, *Corporate Governance* (Malden (Ma)-Oxford (UK): Blackwell, 3rd ed, 2004), 14 ('Corporations are such a pervasive element in everyday life (…). Corporations do not just determine what goods and services are available in the marketplace, but more than any other institution, corporations determine the quality of the air we breathe and the water we drink, and even where we live'). See also A.A. Berle Jr, 'The Theory of Enterprise Entity' 47 *Columbia Law Review*, 343, 344 (1947); T. Raiser, 'The Theory of Enterprise Law in the Federal Republic of Germany' 36 *American Journal of Comparative Law*, 111, 113-114 (1988). According to E. McGaughey, n 25 above, 1, 'The ideas of the 'entrepreneur', the 'state-owned' enterprise, the 'multinational enterprise' or the 'enterprise state' are powerful psychological and social concepts as well as legal ones (…)'.Moreover, the term 'enterprise' has also been employed by the EU legislator, eg, in Art 4(18) of the Regulation (EU) no 2016/679, General Data Protection Regulation ('GDPR'), where an 'enterprise' means 'a natural or legal person engaged in an economic activity, irrespective of its legal form'. As pointed out by E. McGaughey, *Principles of Enterprise Law*, quot., 2, the term 'enterprise' has been frequently used also in the UK legal system, as the 'UK has passed various 'Enterprise Act' (…)'. Recently, on the Italian notion of 'entrepreneur' ('imprenditore'), see, *ex pluribus*, G. Marasà, *L'imprenditore - Artt. 2082-2083*, in *Commentario del Codice civile*, directed by F.D. Busnelli (Milano: Giuffrè, 2021).

[27] B. Sjåfjell and C.M. Bruner, 'Corporations and Sustainability' n 7 above, (first – at 4 – distinguishing a 'weak' from a 'strong sustainability' form; and then – at 11 – laying down their workable definition of 'corporate sustainability' as 'business and finance contributing to the overreaching aim of securing the social foundation for people everywhere, now and in the future, while remaining within the planet boundaries. More specifically, this involves business and finance creating value in a manner that is: (a) *environmentally* sustainable, in that ensures the long-term stability and resilience of the ecosystems that support human life; (b) *socially* sustainable, in that it facilitates the achievement of human rights and other basic social rights, as well as good governance; and (c) *economically* sustainable, in that it satisfies the economic needs necessary for stable and resilient societies'). See also, from different perspectives, A.R. Palmiter, 'Awakening Capitalism' n 2 above; M. Amini and C.C. Bienstock, 'Corporate Sustainability: An Integrative Definition and Framework To Evaluate Corporate Practice and Guide Academic Research' 76 *Journal of Cleaner Production*, 12 (2014); S.V. Sagen et al, 'Clarifying the Epistemology of Corporate Sustainability' 138 *Ecological Economics*, 40 (2017); B. Purvis et al, 'Three Pillars of Sustainability: In Search of Conceptual Origins' 14 *Sustainability Science*, 681 (2019); A. Bartolacelli, 'Editorial. Sustainability and Company Law: A Long Path to Walk' 18 *European Company Law*, 4 (2021).

[28] 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, eg, CJEU, 19 February 2002, C-309-99, *Wouters*, available atwww.curia.eu¸ para 46,stating that: 'According 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* v *Macrotron GmbH*, [1991] ECR I-1979, para 21; Case C-244/94 *Fédération française des sociétés d'assurances and Others*, [1995] ECR I-4013, para 14; and Case C-55/96 *Job Centre*, [1997] ECR I-7119, *'Job Centre II'*, para 21)), and para 47, according to which 'It is also settled case-law that any activity consisting of offering goods and

organizational structures and/or business models that tend (are inherently designed) to externalize (ie, to displace on someone else's shoulders) its business-generated economic, social, and environmental costs.[29]

It should be briefly recalled that for-profit companies could be qualified as organized 'legal vehicles', specifically designed to steadily engage in a trade or business in the market(s) of the production and/or the distribution of good and/or services, with the aim of at least covering organizational and operating costs with revenues earnt from those activities, but, often, also with the specific purpose of generating profits to remunerate the risk those who contributed equity capital to the enterprise. Whether the profit 'purpose' (or 'motive') ought to be embedded in all, or just in some, types or forms of business organizations (and, if so, to what extent it could be legitimately opted out and to what extent would, or should, such 'for-profit purpose' necessarily entail the maximization of shareholders' wealth) is

services on a given market is an economic activity' (and quoting Case 118/85 *Commission* v *Italy,* [1987] ECR 2599, para 7; Case C-35/96 *Commission* v *Italy*, [1998] ECR I-3851, '*CNSD*', para 36). More recently, see also CJEU, decision of 6 October 2021, C-882/19, *Sumal* v *Mercedes Benz Trucks España S.L.* available at www.curia.eu, where, under para 39, the Court, *inter alia*, reminded that: '(…) the concept of 'undertaking', within the meaning of Art 101 TFEU, (…) constitutes an autonomous concept of EU law (…)' (quoting judgment of 14 March 2019, *Vantaan kaupunki* v*Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, para 47) and para 40, where it added that: 'In the same way, it follows from European Parliament and Council Directive 2014/104/EU of the 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 [2014] OJ L349, 1), and in particular from Art 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'.

[29] Whereas I share the position of those who believe that (for-profit) companies, like any other business (and non-business) organizations, should be(come) 'sustainable', in the light of (and in order to concur in redressing) the current global environmental, social and economic emergencies, the language I prefer to use – 'ESG viability of for-profit companies' (and for-profit business organizations, generally) – allows me to better liaise it to the idea (further developed in para 7) that incorporated for-profit firms – to be intended as the most relevant form of organizations implementing the (often constitutionally protected) 'business freedom' (or 'freedom of enterprise', as it is sometimes also referred to) – should be *limited* by legal provisions, but not 'functionalized' – ie, 'bended', so to speak – to the active pursuance of societal purposes, by subjecting the for-profit company to structural (internal) limits: that is, the free enterprise principle (which shall apply also *vis-à-vis* governmental directions) should not be altered by the law (or even sub-legislative provisions) so as to make them instrumental to (ie, a mere function of) the direct attainment of common interest goals, which is what a public, not a private entity, should be incorporated for. Of course, such very sensitive and complex topic almost inevitably leads to the more general question of whether business organizations should be entrusted with – and thus whether they should be compelled to carry out – societal purposes (namely fostering the attainment of public policy goals related to the ESG issues and/or to the SDGs), thereby becoming *quasi-public entities*, as the *longae manūs* of the governmental action. In turn, the question about the rationale, the legitimacy, and the nature of the (necessary) limits to enterprise's freedom almost inevitably falls within the *shareholderisms* vs *stakeholderisms* never-ending debates, and, ultimately, about the fine line allegedly dividing the *private law* and *public law* provinces. On these very complex and mutually entangled issues, see some bibliographical references under fns 30, 46, 49-50, 57, 84, and 85.

still a highly debated issue, to whom numerous and assorted answers have been offered with regard to different jurisdictions:[30] however, this very complex problem

[30] Under Italian business organizations law – whereas the general notion of 'firm' (or 'enterprise'), as set forth under Art 2082 of the Italian Civil Code (see *sub* fns 26 and 28), has been traditionally interpreted as a qualified (market) activity not necessarily (but only typically) requiring a for-profit motive, but just to be carried out by means of an 'economic method' (ie, as a 'viable going concern') – Italian partnerships and companies (excluding cooperatives companies and, to some extent, consortia) used to be deemed to pursue a profit purpose ('*scopo di lucro*'), according with Art 2247 of the Italian Civil Code (which explicitly includes the 'profit motive' – '*allo scopo di dividerne gli utili*' – among the legal elements concurring in both the partnership's contract and company's contract common definition). On the long-lasting debate on the scope, intensity, and compulsory character of the corporate (for-profit) purpose, in the Italian perspective, in addition to the Authors quoted *sub* footnote 85, see also, *ex multis*: C. Angelici, *La società per azioni*, I - *Principi e problemi*, in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2012), 90-93 and 345-348; Id, 'Divagazioni' n 5 above, 27-28; U. Tombari, *Corporate Power and Conflicting Interests - What Purpose and Whose Interests Should Corporate Directors Pursue?* (Milano: Giuffrè, 2021), 73; E. Barcellona, Shareholderism versus Stakeholderism - *La società per azioni contemporanea dinanzi al profitto* (Milano: Giuffrè, 2022), 59, 64, 67-70, and 221-225; on the generally accepted assumption that the general notion of 'enterprise', as set forth under Art 2082 of the Italian Civil Code, does not necessarily require a profit intent, but simply a reasonable prospective to cover costs with revenues (ie, the consistent implementation of an 'economic method' in organizing and in carrying out any trade or business), see G. Marasà, *L'imprenditore* n 26 above, 20-22, 29, and 119-122. In a German perspective, see, eg, A. Riechers, *Das Unternehmen an sich - Die Entwicklung eines Begriffes in der Aktienrechtsdiskussion des 20 Jahrhunderts* (Tübingen: J.C.B. Mohr-Siebeck, 1990); F. Laux, *Die Lehre vom Unternehmen an sich. Walther Rathenau und die aktienrechtliche Diskussion in der Weimarer Republik* (Berlin: Duncker & Humblot, 1998); A. Bruce and C. Jeromin, *Corporate Purpose – das Erfolgskonzept der Zukunft: Wie sich mit Haltung Gemeinwohl und Profitabilität verbinden lassen* (Wiesbaden: Springer-Gabler, 2020). In a comparative German-French perspective, see, eg H. Fleischer, 'Unternehmensinteresse und intérêt social: Schlüsselfiguren aktienrechtlichen Denkens in Deutschland und Frankreich (Comparing Unternehmensinteresse and Intérêt Social: A Guided Tour Through Last Century's Corporate Law History in Germany and France)' 47 *Zeitschrift für Unternehmens und Gesellschaftsrecht (ZGR)*, 37 (2018). In a French company law perspective, see, eg, 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*, 497 (2019); T. de Ravel d'Esclapon, 'Rapport Notat-Senard: l'entreprise «objet d'intérêt collectif»' *Dalloz Actualité*, 18 mars 2018(commenting N. Notat et al, *L'entreprise, object d'interêt collectif*, Paris, 9 mars 2018, available at https://tinyurl.com/r8mnhnc4 (last visited 30 September 2024)); S. Schiller, 'L'évolution du rôle des sociétés depuis la loi PACTE' *Rivista Orizzonti del Diritto Commerciale*, 517 (2019); I. Urbain-Parleani, 'L'article 1835 et la raison d'être' *Rivista Orizzonti del Diritto Commerciale*, 533 (2019). For a UK perspective, see, eg, J.S. Liptrap, 'Bristih Social Enterprise' 21 *Journal of Corporate Law Studies*, 595 (2021). In a Spanish perspective, see the essays collected by M.C. Chamorro Domínguez et al eds, *Derecho de Sociedades y Sostenibilidad* (Madrid: La Ley, 2023). In a U.S. corporate law perspective, see, eg, D.J.H. Greenwood, 'Telling Stories of Shareholder Supremacy' 2009 *Michigan State Law Review*, 1049, 1072 (2009); L.A. Stout, *The Shareholder Value Myth - How Putting Shareholders First Harms Investors, Corporations and the Public* (San Francisco: BK Publishers, 2012); L.E. Strine Jr, 'Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit' 47 *Wake Forest Law Review*, 135 (2012); B.S. Sharfman, 'Shareholder Wealth Maximization and Its Implementation Under Corporate Law' 66 *Florida Law Rev*iew, 389 (2014); J.M. Heminway, 'Shareholder Wealth Maximization as a Function of Statutes, Decision Law, and Organic Documents' 74 *Washington and Lee Law Review*, 939 (2017); S.J. Padfield, 'The Role of Corporate Personality Theory in Opting Out of Shareholder Wealth Maximization' 19 *Transactions: The Tennessee Journal of Business Law*, 415 (2017); D.G.

cannot be dealt *funditus* within the scope of this essay.

For profit companies' main rules are usually sourced from a national 'Business Organizations Law', sometimes compounded in a general private law 'Code' (eg, in the Italian Civil Code), or in a dedicated domestic 'act' or 'statute' (eg, the UK Company Act of 2006), on the assumption of a freedom of incorporation/freedom of establishment principle. Moreover, business organizations laws[31] of virtually every jurisdiction worldwide, while enabling business ventures both, to self-regulate themselves (at least to some variable extent), and to build and nourish business networks by means of private ordering instruments (including the ability of companies, as legal persons, to 'create progeny pretty much at will',[32] thereby spawning corporate groups), and often on a multinational basis, also vest corporations with two main structural features, ie, 'legal personality' and, almost inevitably, 'limited liability' privilege for its members ('shareholders' or 'stockholders'),[33] the

Yosifon, 'Opting Out of Shareholder Primacy: Is the Public Benefit Corporation Trivial?' 41 *Delaware Journal of Corporation Law*, 461 (2017); E.C. Chaffee, 'The Origins of Corporate Social Responsibility' 85 *University of Cincinnati Law Review*, 353, 356-357 and 371-374 (2017); R.J. Rhee, 'A Legal Theory of Shareholder Primacy' 102 *Minnesota Law Rev*iew, 1951 (2018); S.M. Bainbridge, *The Profit Motive - Defending Shareholder Value Maximization* (Cambridge-New York: Cambridge University Press, 2023), 11-12. For some additional comparative references, see, *ex pluribus*, M. Maugeri, ' "Pluralismo" e "monismo" nello scopo della s.p.a. (glosse a margine del dialogo a più voci sullo *statement* della *Business Roundtable*)' *Rivista Orizzonti del Diritto Commerciale*, 637 (2019); A. Bartolacelli, 'The Unsuccessful Pursuit for Sustainability in Italian Business Law', in B. Sjåfjell and C.M. Bruner eds, *The Cambridge Handbook* n 7 above, 290.

[31] Intuitively,'Business Organization law' represents a wider notion than 'Company law' or 'Corporations law', since it includes, *inter alia*, the rules governing partnerships, special types of companies such as cooperatives, the US 'limited liability companies', and other 'hybrid' entities (on the US business organizations forms, see, eg, E.H. Franklin, 'A Rational Approach to Business Entity Choice' 64 *Kansas Law Review*, 573 (2016); L. Johnson, 'Pluralism in Corporate Form: Corporate Law and Benefit Corporations' 25 *Regent University Law Review*, 269 (2013); L.E. Ribstein, *The Rise of Unincorporation* (Oxford-New York: University Press Oxford, 2009); Id, 'Making Sense of Entity Rationalization' 58 *The Business Lawyer*, 1023 (2003); R. Booth, 'Form and Function in Business Organizations' 58 *The Business Lawyer*, 1433 (2003). Incidentally, it may also be noted that the specific types of 'business organizations' are differently regulated in each jurisdiction and, therefore, the actual 'perimeter' of such general notion should always be ascertained against each legal system.

[32] J. Micklethwait and A. Wooldridge, *The Company - A Short History of a Revolutionary Idea* (New York: The Modern Library, 2003), XV.

[33] While by means of the legislative attribution of 'legal personality' (or 'legal personhood') to the business organization a segregation of each company's member assets from the corporate assets occurs (thereby creating different sets of autonomous assets, ie, the company's assets and each shareholder's own assets: W.O. Douglas and C.M. Shanks, 'Insulation from Liability Through Subsidiary Corporation' 39 *Yale Law Journal*, 193 (1929), 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. Legal personality and limited liability and are two different legal concepts, performing two different, albeit to some extent complementary functions, that often, but not always, overlap; for example, under Italian Business organizations law, the limited partnership (the 'società in accomandita semplice', or 's.a.s.') is usually deemed *not* vested with legal personhood and yet it necessarily contemplates at least one partner enjoying the limited liability privilege and at least one unlimited partner; conversely, the partnership limited by shares (the 'società in accomandita per azioni', or 's.a.p.a.'),while deemed

latter affording the member(s) of the company the ability to segregate – and thus to strategically distance from – the personal risks of economic losses, typically implicated by the investment in the equity of the business legal entity.[34] Diversification and 'insulation' of the ultimate beneficiaries of the corporate operations from business risks ensue almost naturally from the combination of those two common legal characteristics of the (for profit) incorporated firms.

Large companies – especially those whose stocks (and/or bonds) are issued and then traded in securities markets ('public', or 'publicly-held' corporations', or 'listed' companies) – also present two more legal characteristics, ie, the 'free transferability of the shares' (the equity securities representing the residual claims owned by the shareholders) and a complex corporate governance[35] system that also includes a 'centralized' (or 'delegated') management attribute.[36] And many legal scholars

vested with 'legal personality', also necessarily contemplates two sets of shareholders, one of which is necessarily divested of the limited liability privilege, while necessarily vested with the directorial role. Furthermore, in the Anglo-American corporate law setting, it may be recalled that California corporation law did not recognize the limited liability privilege to the stockholders of the California corporations until 1931: see, eg, M.I. Weinstein, 'Limited Liability in California: 1928-1931' (September 2000), available at https://ssrn.com/abstract=244333 (last visited 30 September 2024). On the widely discussed issue of the boundaries of the limited liability privilege, see, eg, H. Hansmann and R. Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' *Yale Law Journal,* 1879 (1991). On the legal personhood hallmark (in the aftermath the famous 2010 US Supreme Court case *Citizen United*), see, eg, E. Pollman, 'Reconceiving Legal Personhood' *Utah Law Review*, 1629 (2011); A. Verstein, 'Enterprise Without Entities' 116 *Michigan Law Review*, 247 (2017). Some fresh approaches to 'legal personality', in connection with the debate over the (appropriate) 'corporate purpose' could be found in the essays collected in E. Pollman and R.B. Thompson eds, *Research Handbook on Corporate Purpose and Personhood* (Cheltenham, UK-Northampton, MA: Edward Elgar, 2021), and in B. Sjåfjell and C.M. Bruner eds, *The Cambridge Handbook* n 7 above.

[34] On the close connection between the *limited liability privilege* – as afforded by the business organizations law virtually everywhere (albeit with exceptions and limits) – and the 'externalization of corporate's harm', see A.R. Palmiter, *Sustainable Corporations* n 2 above, 103 and 105-107.

[35] For a definition of 'corporate governance' see, eg, the OECD, 'G20/OECD Principles of Corporate Governance' (30 November 2015), available athttps://tinyurl.com/3ernxzkr (last visited 30 September 2024); see also Financial Reporting Council, 'UK Corporate Governance Code' (16 July 2018), available at https://tinyurl.com/mskfkxs9 (last visited 30 September 2024), and, additionally, the 'Report on Financial Aspects of Corporate Governance' (1 December 1992) issued by 'The Committee on the Financial Aspects of Corporate Governance', chaired by Sir Adrian Cadbury (the so-called *Cadbury Report*), available at https://tinyurl.com/4dx3bhp9 (last visited 30 September 2024); American Law Institute (M.A. Eisenberg, Chief Reporter), *Principles of Corporate Governance: Analysis and Recommendations*, vol 1, part I (Philadelphia, PA: ALI, 1994), (currently under revision). The Milan Stock Exchange, through its Corporate Governance Committee, also drafted a 'Corporate Governance Code': the latest edition (January 2020) is available at https://tinyurl.com/mth3vf65 (last visited 30 September 2024): see, eg, E. Ginevra, 'Il codice di corporate governance: introduzione e definizioni (con un approfondimento sul 'successo sostenibile')' *Rivista delle società*, 1017 (2023).

[36] The 'delegated' or 'centralized' management hallmark has been traditionally meant to implement what has been defined the 'divorce' of 'property' (of the equity interests held, *pro quota*, by the stockholders in public companies) from 'control' (over the public companies' business operations) by a very famous, corporate governance foundational book, *The Modern Corporation and Private Property*, written by professors Adolph A. Berle *Jr* and Gardiner C. Means and published in New York, in 1932 by The Macmillan Company. On such 'divorce' see, *ex multis*, E.F. Fama and M.C. Jensen, 'Separation of Ownership and Control' 26 *Journal of Law & Economics*,

argue for additional and/or different (sets of) main legal characteristics that, according to their respective views, could (and should) be found in the company's common structure.[37]

301 (1983); M.M. Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century* (Washington D.C: The Brookings Institution, 1995); M.J. Roe, 'Political Preconditions to Separating Ownership from Corporate Control' 53 *Stanford Law Review*, 539 (2000); J.C. Coffee Jr, 'The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control' 111 *Yale Law Journal*, 1 (2001). Recently, with specific regard to the debate on whether or not the relationship between shareholders and management should still be analysed within the Berle and Means theorem on the separation between 'property' and 'control' in the light of the quest for *corporate sustainability*, see, eg (in addition to the bibliographical references nos above 44, 49, and 50), F. Denozza, 'Lo scopo della società: dall'organizzazione al mercato' *Rivista Orizzonti del Diritto Commerciale*, 615 (2019); Id, 'Scopo della società e interesse degli *stakeholders*: dalla "considerazione" all'"*empowerment*" ', in M. Castellaneta and F. Vessia eds, *La responsabilità sociale d'impresa* n 5 above; A.R. Palmiter, 'Awakening Capitalism' n 2 above, 4; C.A. Williams, 'For Whom is the Corporation Managed and What is Its Purpose', in E. Pollman and R.B. Thompson eds, *Research Handbook* n 33 above, 165-184; E.B. Rock, *Business Purpose and the Objective of the Corporation*, in E. Pollman and R.B. Thompson eds, *Research Handbook* n 33 above, 27; E.B. Rock, 'For Whom is the Corporation Managed in 2020?: The Debate Over Corporate' 20 *NYU School of Law, Law and Economics Research Paper Series* 16, (2020) available athttps://tinyurl.com/mr4ytfhp (last visited 30 September 2024); L.E. Strine Jr, 'Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy. A Reply To Professor Rock' (December 2020), available at https://tinyurl.com/6h87a22v (last visited 30 September 2024); H. Fleischer, 'Corporate Purpose: A Management Concept and its Implications for Company Law' *European Company and Financial Law Review*, 170 (2021); G. Ferrarini, 'Redefining Corporate Purpose: Sustainability as a Game Changer', in D. Busch et al eds, *Sustainable Finance in Europe - Corporate Governance, Financial Stability and Financial Markets* (Cham (CH): Palgrave-Macmillan-Springer, 2021), 85; J. Fish and S. Davidoff Solomon, 'Should Corporations have a Purpose?' 99 *Texas Law Review*, 1309 (2021), and, more recently, S.M. Bainbridge, *The Profit Motive* n 30 above. On the topic-correlated impact of the ESG-factors analysis on the allocation of powers to shareholders, see, in addition, F. Partnoy, 'Shareholder Primacy is Illogical', in E. Pollman and R.B. Thompson eds, *Research Handbook* n 33 above, 186; L.M. Fairfax, 'The Shareholder-Stakeholder Alliance: Exposing the Link Between Shareholder Power and the Rise of a Corporate social Purpose', in E. Pollman and R.B. Thompson eds, *Research Handbook* n 33 above,109; L. Enriques, 'ESG and Shareholder Primacy: Why They Can Go Together', in P. Câmara and F. Morais eds, *The Palgrave Handbook of ESG and Corporate Governance* (Cham, CH: Palgrave-Macmillan-Springer, 2022), 131; M.C. Chamorro Domínguez, 'La Influencia de los Socios en la Consecución de la Sostenibilidad Corporativa', in Id and A.J. Viera González eds, *Derecho de Sociedades* n 30 above, 265. See also M.C. Jensen, 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function' 22 *Journal of Applied Corporate Finance*, 32 (2010) (previously published in 12 *Business Ethics Quarterly*, 235 (2002)).

[37] See, generally, R.C. Clark, *Corporate Law* (Boston: Little Brown & Co, 1986), 2-5; R.A.G. Monks and N. Minow, *Corporate Governance* (Chichester, UK: John Wiley & Sons, 5th ed, 2011), 7; R. Kraakman et al, *The Anatomy of Corporate Law*, (Oxford-New York: Oxford University Press, 3rd ed, 2017), 5 (adding a fifth element to the four already indicated in the text and in fn 5, ie, 'investor's ownership'); E.B. Rock, 'Business Purpose' n 33 above, 31 (adding also 'Capital lock-in'). See also A.R. Palmiter, 'The US Corporate Elephant' (February 2005), available at https://tinyurl.com/7yc43hh3 (last visited 30 September 2024), pointing out seven main characteristics of US corporate law, in turn to be intended as a 'creature' of state (not US federal) law, and especially referring to Delaware General Corporation law and to the American Bar Association's *Revised Model of Business Corporation Act* (according to *Wikipedia* (https://tinyurl.com/2f2uf88b (last visited 30 September 2024)), a 'model act' or a 'model law' is a 'model legislation', ie, 'a suggested example for a law, drafted centrally' – usually by non-governmental organizations like, eg, the American Legal Institute and the United

Such organizational elements of the modern company – especially publicly-held corporations – concur in raising large amounts of (equity and debt) capital, thus creating, in turn, the pre-conditions for carrying out capital intensive trade and business activities, and for the creation of capital markets and securities markets generally, all of which constituting, in turn, the necessary 'ingredients' to foster a globalized market economy.[38]

I already pointed out the essential role the modern corporation played (and that it is still playing) in establishing and fostering all the variants of the contemporary capitalistic systems. Now it should be added that the modern company will inevitably play a concurring key-role in attaining ESG viability (or, according to a different nomenclature, 'corporate sustainability'). Typical business risks associated both, with incorporated firms' market-related choice of conducts (companies' operational behaviours) and with their organizational options (that is, associated with each incorporated firm's choice of corporate governance model), influence and at the same time are influenced by ESG-related factors (and correlated risks).

This will become apparent as soon as one shall realize that none of the 17 Sustainable Development Goals ('SDGs') set forth in the UN 2030 Agenda for Sustainable Development (adopted by the UN General Assembly in September 2015) could be attained without the active participation (not necessarily a voluntary cooperation, though) of the main global markets' actors, the corporations.[39] Indeed,

Nations Commission on International Trade Law – 'to be disseminated and suggested for enactment in multiple independent legislature. The motivation classically has been the hope of fostering more legal uniformity among jurisdictions, and better practice in legislative wording, than would otherwise occur; another motivation sometimes has been disguised under such ideals. Model laws can be intended to be enacted *verbatim*, to be enacted after minor modification, or to serve more as general guides for the legislatures'). For a Continental Europe approach to the legal theory of the for-profit companies, see G.H. Roth and P. Kindler, *The Spirit of Corporate Law - Core Principles of Corporate Law in Continental Europe* (München-Oxford-Baden Baden: C.H. Beck-Hart-Nomos), 2013.

[38] The history of the modern company – as a medium-to-extra-large, incorporated, capital-catalyser firm – can be found, eg, in J. Micklethwait and A. Wooldridge, *The Company* n 32 above; S. Gialdroni, *East India Company. Una storia giuridica (1600-1708)* (Bologna: il Mulino, 2011); Id, 'A Commercial Soul in a Corporate Body: From the Medieval Merchant Guilds to the East India Company', in B. Van Hofstraeten and W. Decock eds, *Companies and Company Law in Late Medieval and Early Modern Europe* (Leuven: Peeters Publishers, 2016), 149; Id, 'Incorporation and Limited Liability in Seventeenth Century England. The Case of the East India Company', in D. De Ruysscher et al eds, *The Company in Law and Practice: Did Size Matter? (Middle Ages-Nineteenth Century)* (Leiden: Brill, 2017), 110; Id, 'Was the East India Company a "Democratic" Organization? Majority principle and Power Relations in 17th Century England' *RomaTre Law Review*, 37 (2020); O. VOC, '1602-1623' 73 *The Journal of Economic History*, 1050 (2013); C. Mayer, *Prosperity* n 25 above, 61. With a specific focus on the US corporation, see, eg, L.M. Friedman, *A History of American Law* (Oxford-New York: OUP, 4th ed, 2019), 8, and C.R.T. O'Kelly, 'The Evolution of the Modern Corporation: Corporate Governance Reform in Context' *University of Illinois Law Review*, 1001 (2013); more recently, see also W. Magnuson, *For Profit - A History of Corporations* (New York: Basic Books, 2022).

[39] See B. Sjåfjell and M.B. Taylor, 'Clash of norms: Shareholder primacy vs. sustainable corporate purpose' 13 *International and Comparative Corporate Law Journal*, 40-41 (2019), ('there is a contradiction embedded in the notion of sustainable development: a fundamental role for business in creating the value necessary for sustainable development is contradicted by the evidence of the

both unincorporated and incorporated firms – and especially multinational enterprises (groups of companies) – happen to be strategically placed at the crossroads of each and every issue entailed by each and every SDG.[40] Thus, the further remark that each of the 17 SDGs and virtually every ESG-related issue shows an almost complete match, today, would probably represent a sort of truism. Incidentally, it may be added that the main ESG-related issues and the UN's SDGs, tend to overlap also with the principles set forth in Arts 2 and 3 of the Treaty of the European Union (as it was enacted in Lisbon in 2007).

All good, so far? Not really!

Incorporated firms (and for-profit business associations generally, including partnerships) are typically deemed 'profit maximizers': that is, they have been crafted – both structurally and functionally (that is: they are 'inherently' designed[41]) – to foster their 'natural' and typical 'profit motive'.[42] This means, in turn, that their respective management usually aims at reducing costs and/or incrementing

central role played by business in creating unsustainable social and environmental impacts').

[40] See, eg, E. McGaughey, *Principles* n 25 above, 1 (whereas 'Modern enterprise, most often organized in corporation and by the state, gives us the ability to lie a life of splendour and holds the promise of a future when poverty may be forgotten. Yet when out of balance, enterprise law also accounts for inhuman levels of squander, abuse of power and exploitation (…). Enterprise law is probably the dominant cause of the most basic threats that we must resolve in the twenty-first century, namely escalating inequality, climate damage, and war, because enterprise is the primary type of association that stands between polities and families').

[41] This may be held true even if the 'company', as a well-known form of business (for-profit) organization, in many jurisdictions has been (and is being) used for (and thus, so to speak, has been 'bended to') non-profit purposes, thereby vesting (public and private) entities, engaged in a diversified array of no-profit activities with 'legal personality' (and often also with the limited liability privilege for their members), while affording them a viable, well known, manageable, and reliable governance set of rules: this issue, of course, deals (also) with the fine line existing between public law and private law, on one hand (paras 5 and 7), and with the limits to the enterprise freedom, on the other (see para 7). See, eg, H. Hansmann, *The Ownership of Enterprise* (Cambridge, MA: Harvard University Press, 1996). For some bibliographic references on this complex legal issue under the Italian law, see, eg, G. Marasà, *L'imprenditore* n 26 above, 274-342; the essays collected in V. Cerulli Irelli and M. Libertini eds, *Iniziativa economica pubblica e società partecipate* (Milano: Egea, 2019); V. Donativi, *Le società a partecipazione pubblica* (Milano: Wolters Kluwer, 2016); C. Ibba ed, *Le società a partecipazione pubblica a tre anni dal Testo unico* (Milano: Giuffré, 2019); G. Guizzi ed, *La* governance *delle società pubbliche nel d.lgs. n. 175/2016* (Milano: Giuffré, 2017); F. Cerioni ed, *Le società pubbliche* (Milano: Giuffrè, 2023). See also, A. Caprara, *Impresa pubblica e società configurazione giuridica tra autonomia* (Napoli, Edizioni Scientifiche Italiane, 2017); E. Codazzi, *La società in house. La configurazione giuridica tra autonomia e strumentalità* (Napoli: Editoriale Scientifica, 2018). Before the enactment of the Italian consolidated law on state-owned companies (Legislative Decree 19 August, 2016, no 175, as amended), see, eg, C. Ibba, *Le società "legali"* (Torino: Giappichelli, 1992); F. Santonastaso, *Le società di diritto speciale*, in R. Costi ed, *Trattato di diritto commerciale* founded by V. Buonocore, IV (Torino: Giappichelli, 2009), 10. From a public law perspective, *ex multis*, see F. Goisis, *Contributo allo studio delle società in mano pubblica come persone giuridiche* (Milano: Giuffrè, 2004); P. Pizza, *Le società per azioni di diritto singolare tra partecipazioni pubbliche e nuovi modelli organizzativi* (Milano: Giuffrè, 2007); M. Cammelli and M. Dugato eds, *Studi in tema di società a partecipazione pubblica* (Torino: Giappichelli, 2008).

[42] B. Sjåfjell and C.M. Bruner, *Corporations* n 7 above, 5-6. And, again, see fns 30, 36, 44, 49, 50, and 85.

revenues connected to the firms' trade or business activities. The structure – that is the *corporate governance* model – of for-profit companies has been traditionally crafted (and 'bended') to that end.

Moreover, if the company is listed in a securities market, the (market) value of its outstanding shares will usually reflect (*inter alia*) the economic and the financial results attained by the issuing company, thereby triggering an additional incentive for management to show adequate returns to the company's investors, possibly in the short-term, to justify their compensations (and bonuses) and, ultimately, to keep their jobs, together with a good reputation.

These (and others) turned up as being good enough reasons to make the 'incorporated firms' the world's main *social cost externalizers*:[43] that is, companies, virtually everywhere, tend to place the costs of their business operations – and not necessarily monetary and/or current costs, but also non-pecuniary and/or future costs – on the shoulders of the society at large and/or on those of specific groups of people – generally addressed as the *company's stakeholders*[44] – which, while somehow connected to the company (and/or its trade or business activities), on one hand, are not enjoying the economic benefits of the trade or business each corporation engages in, and that, on the other hand, will be detrimentally affected by the enterprise's operations.

Thus, if, for example, a company engages in the manufacturing of some chemical products, which later proved to be cancerogenic, and the chemical waste are dumped in the river running by the firm's premises, whereas the profits earned from the chemical business will only benefit the incorporated firms' investors (as well as its management), the resulting water pollution will affect the (long-term) health conditions of the people using the downhill waters for household (eg, drinking, cleaning) purposes, thereby causing to this group of corporate stakeholders to bear a 'social cost' consisting in the dealing with the consequences – sometimes even lethal consequences – of the corporate activities.[45]

The societal concerns that incorporated firms have been traditionally eliciting because of their social costs externalizing attitudes, together with the political role[46]

[43] A.R. Palmiter, Sustainable Corporations n 2 above, xxvii, 101, and 103-104. For an illustration of the term 'externality', see, eg, E. McGaughey, *Principles* n 25 above, 70. See also, D. Dharmapala and V.S. Khanna, 'Controlling Externalities: Ownership Structure and Cross-Firm Externalities, *Journal of Corporate Law Studies*, 1, 23, (2021). On (firm's) externalities see the seminal essay by R.H. Coase, 'The Problem of Social Cost' 3 *Journal of Law and Economics*, 1 (1960).

[44] See, eg, R.E. Freeman et al, *Stakeholder Theory - The State of the Art* (Cambridge: Cambridge University Press, 2010); M. Gelter, 'Sustainability and Corporate Stakeholders', in A. Engert et al eds, *Business Law and the Transition to a Net Zero Carbon Economy* (Oxford-München: C.H. Beck-Nomos-Hart Publishing Verlagsgesellschaft, Baden-Baden Hart Publishing, 2021), 50-55. See also *sub* fns 30, 36, 49, 50, and 85.

[45] Recently, see eg, C. Grasso, 'The Aspartame Debate: Are Economic Interests Clouding the Truth?' *The Corporate Social Responsibility and Business Ethics Blog* (27 August 2023), available at https://tinyurl.com/27rv7svn (last visited 30 September 2024).

[46] This is the problem of the consequences of the overreaching (and sometimes unconscionable) economic power exerted by economic (ie, market) actors, such as, especially, multinational group of

that some corporate actors – namely large corporations and multinational

companies, and the consequential interference of the formers with the democratic decision-making processes of sovereign states, and thus with each sovereign state's domestic and foreign politics, so as to transform the economic power into a *lato sensu* 'political power'; of course, such issue is not new: see J. Habermas, *Between Facts and Norms - Contributions to a Discourse Theory of Law and Democracy* (translated by W. Rehg), (Cambridge, UK – Maiden, MA: Polity Press-Blackwell Publishing-The MIT Press, 1996), 433-434 ('State sovereignty is undermined to the extent that powerful corporations are involved in the exercise of political authority without being legitimated for this and without submitting to the usual responsibilities incumbent on government authorities'). See also, G. Rossi, *Il mercato d'azzardo* (Milano: Adelphi, 2008), 17-18;W.G. Friedmann, 'Corporate Power, Government by Private Groups and the Law' 57 *Columbia Law Review*, 155 (1957); A.S. Miller, 'The Corporation as a Private Government in the World Community' 46 *Virginia Law Review*, 1539 (1960); J.S. Nye Jr, 'Multinational Corporations in World Politics' 53 *Foreign Affairs*, 153 (1974); T.J. Biersteker, 'The Illusion of State Power: Transnational Corporations and the Neutralization of Host-Country Legislation' 17 *Journal of Peace Researc*h, 207 (1980); D. Mazzeo, 'The State and the Transnational Corporation: An International Perspective' 10 *Journal of Eastern African Research& Development*, 1-27 (1980); J. Robinson, *Multinationals and Political Control* (Aldershot: Gower Publishing Co Ltd, 1983); A. Uhlin, 'Transnational Corporations as Global Political Actors: A *Literature Review' 23 Cooperation and Conflict, 231 (1988); J. Bakan, The Corporation. The Pathological Pursuit of Profit and Power* (New York: Free Press, 2004); Id, *The New Corporation - How "Good" Corporations are bad for Democracy* (New York: Vintage Books, 2020); P.A. Gourevitch and J. Shinn, *Political Power and Corporate Control - The New Global Politics of Corporate Governance* (Princeton, NJ: Princeton University Press, 2005); J.M. Kline, 'MNCs and Surrogate Sovereignty' 13 *Brown Journal of World Affairs*, 123 (2006); A.G. Schereret et al, 'Global Rules and Private Actors: Toward a New Role of the Transnational Corporation in Global Governance' 16 *Business Ethics Quarterly*, 505 (2006); S.D. Cohen, 'Multinational Corporations versus the Nation-State: Has Sovereignty Been Outsourced', in Id, *Multinational Corporations and Foreign Direct Investment: Avoiding Simplicity, Embracing Complexity* (New York: Oxford Academic, 2007), 233-251; D.A. Detomasi, 'The Multinational Corporation and Global Governance: Modelling Global Public Policy Networks' 71 *Journal of Business Ethics*, 321 (2007); F. Wettstein, *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution* (Stanford: Stanford University Press, 2009); D.J.H. Greenwood, 'Essay: Telling Stories of Shareholder Supremacy' *Michigan State Law Rev*iew, 1049, 1072-1073 (2009); C. Dörrenbächer and M. Geppert eds, *Politics and Power in the Multinational Corporation - The Role of Institutions, Interests and Identities* (Cambridge: Cambridge University Press, 2011); L.C. Backer, 'Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order' 18 *Indiana Journal of Global Legal Studies*, 751 (2011); K. Irogbe, 'Global Political Economy and the Power of Multinational Corporations' 30 *Journal of Third World Studies*, 223 (2013); W. Hussain and J. Moriarty, 'Corporations, the Democratic Deficit, and Voting' 12 *Georgetown Journal of Law & Public Policy*, 429, 432-433 (2014); Id, 'Accountable to Whom? Rethinking the Role of Corporations in Political CSR' 149 *Journal of Business Ethics*, 519 (2018); A.G. Scherer et al, 'The Business Firm as a Political Actor - A New Theory of the Firm for a Globalized World' 52 *Business & Society*, 143 (2014); M. Geppert et al, 'Politics and Power in Multinational Companies: Integrating the International Business and Organization Studies Perspectives' 37 *Organization Studies*, 1209 (2016); J. Mikler, *The Political Power of Global Corporations* (Newark: Polity Press, 2018); I.S. Kim and H.V. Milner, 'Multinational Corporations and their Influence Through Lobbying on Foreign Policy', in C.F. Foley et al eds, *Global Goliaths: Multinational Corporations in a Changing Global Economy* (Washington DC: The Brookings Institution, 2021), 497-536; D.S. 'Lund, Asset Managers as Regulators' 171 *University of Pennsylvania Law Review*, 77 (2022). More recently, see also F. Vella, *Proprietà e fini dell'impresa*, forthcoming in the *Proceedings of the International Symposium for the 70th Anniversary of the Rivista delle società*, 'La s.p.a. nell'epoca della sostenibilità e della transizione tecnologica', held in Venice, on 10 and 11 November, 2023, 7-8 of the manuscript (accessed upon the courtesy of the Author). See also the following fn.

enterprises[47] – have acquired over time in the international arena, had the effect of recurrently putting companies (and especially multinational groups of corporations) under the national governments' spotlight, thereby making corporate structures (ie, their organizational choices, their means of ensuring that all their agents would respect the rules and principles set forth by the applicable laws, including labor laws, environmental laws, tax laws, antitrust provisions white-collar crimes laws, whistleblowing regulations, etc) and companies' market conducts (also) a matter of public interest: ie, making both aspects falling within the scope of legislative (civil, criminal, tax, and administrative) regulations, that go under the general label of 'corporate compliance and risk management' rules.[48]

Therefore, there should be little doubt left on that the latest in time (and possibly the most relevant) set of public interest concerns the private (multinational) enterprises are posing to national governments – as well as at international level

[47] P.T. Muchlinski, *Multinational Enterprise and the Law* (Oxford-New York: OUP, 3rd ed, 2021); S. Picciotto, *Regulating Global Corporate Capitalism* (Cambridge: Cambridge University Press, 2011). See also the preceding footnote and fns 19-21. With specific attention to the multinational companies' social responsibilities, see, eg, J.G. Ruggie, 'Multinationals as Global Institutions: Power, Authority and Relative Autonomy' 12 *Regulation & Governance*, 317 (2018); L.C. Backer, '*A* Lex Mercatoria, for Corporate Social Responsibility Codes Without the State? A Critique of Legalization Within the State Under the Premises of Globalization' 24 *Indiana Journal of Global Legal Studies*, 115 (2017); Id, 'Regulating Multinational Corporations: Trends, Challenges, and Opportunities' 22 *The Brown Journal of World Affairs*, 153 (2015); M. Monshipouri et al, 'Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities' 25 *Human Rights Quarterly*, 965 (2003); J. Bennett, 'Multinational Corporations, Social Responsibility and Conflict' 55 *Journal of International Affairs*, 393 (2002). See also, with more specific regard to MNE's *liabilities*, eg, A.R. Palmiter, *Sustainable Corporations* n 2 above, 111 (discussing, *inter alia*, the notable US Supreme Court case *United States* v *Bestfoods*, 524 U.S. 51 (1998)) and 224-226; F.M. Mucciarelli, 'Ricomporre il nesso spezzato: giurisdizione e legge applicabile alle imprese multinazionali' *Rivista delle società*, 349, 351-352 (2021); M.V. Zammitti, *La responsabilità della capogruppo per la condotta socialmente irresponsabile delle società subordinate* (Milano: Giuffré, 2020), passim. In the recent past see also: M. Sornarajah, **'**The liability of multinational corporations and home state measures', in Id, *Foreign Investment,* (Cambridge: Cambridge University Press, 5th ed,2021),174-208; K.K. Wodajo, 'Multinational Enterprise Tort Liability and Limited Liability Rule: An Economic Analysis' 29 *International Company and Commercial Law Review*, 283 (2018); P. Muchlinski, 'Limited liability and multinational enterprises: a case for reform?' 34 *Cambridge Journal of Economics,* 915 (2010); S. Joseph, 'Liability of Multinational Corporations: An Integrated Approach to Economic and Social Rights', in M. Lanford ed, *Social Rights Jurisprudence – Emerging Trends in International Law and Comparative Law* (Cambridge: University Press, Cambridge, 2009), 613-627; M.T. Kamminga and S. Zia-Zarifi eds, *Liability of Multinational Corporations under International Law* (The Hague-London-Boston: Kluwer Law International, 2000).

[48] See, eg, S.J. Griffith, 'Corporate Governance in an Era of Compliance 57 *William and Mary Law Review*, 2075 (2016), and the essays collected in S. Manacorda and F. Centonze eds, *Corporate Compliance on a Global Scale – Legitimacy and Effectiveness* (Cham (CH): Springer, 2022); B. van Rooij and D.D. Sokol eds, *The Cambridge Handbook* n 24 above; S.A. Cerrato ed, *Impresa e rischio - Profili giuridici del* risk *management* (Torino: Giappichelli, 2019); G. Rossi ed, *La* corporate compliance*: una nuova frontiera per il diritto?* (Milano: Giuffré, 2017). See also, A. Adotti and S. Bozzolan, *La gestione della* compliance - *Sistemi normativi e controllo dei rischi* (Roma: LUISS, 2nd ed, 2020); A. Lai ed, *Il contributo del sistema di prevenzione e gestione dei rischi alla generazione del valore d'impresa* (Milano: Franco Angeli, 2013). See also the works cited *sub* fns 64-69, and 72.

– are those associated with the emergencies represented by the many and intertwined ESG risks.

In some relevant respects, this appears as a new chapter of a century-long diatribe – that among *stakeholderisms* and *shareholderisms*[49] – that essentially tries to establish an equilibrium between (corporate) powers and (social) responsibilities within a free enterprise/free-market economy:[50] but today it is

[49] Besides the often-recalled *Berle* v *Dodd* and *Berle* v *Mann* diatribes (on which see, eg, S.M. Bainbridge, 'Interpreting Nonshareholder Constituency Statutes' 19 *Pepperdine Law Review*, 971 (1992); W.W. Bratton and M.L. Wachter, 'Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation' 34 *Journal of Corporation Law*, 99 (2008); V. Harper Ho, ' "Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide' 36 *Journal of Corporation Law*, 59, 69-77 (2010), and the famous quote(s) from Milton Friedman *NY Times Magazine* article (published on 13th September, 1970, at 32, and reported in the next fn), see, eg (and with quite different accents), M. Gelter, '*Taming or Protecting the Modern Corporation? Shareholder-Stakeholder Debates in a Comparative Light*' 7*NYU Journal of Law & Buisness*, 641 (2011); Id, 'The Pension System and the Rise of Shareholder Primacy' 43 *Seton Hall Law Review*, 909 (2013); Id, '*Comparative Corporate Governance: Old and New*', in B. Choudhury and M. Petrin eds, *Understanding the Company - Corporate Governance and Theory* (Cambridge: Cambridge University Press, Cambridge, 2017), 37-59; 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* (Cheltenham, UK – Northampton, MA: Edward Elgar Publishing, 2018), 323-352; L.A. Stout, 'The Problem of Corporate Purpose' *Brookings Issues on Governance Studies*, no 48, (2012), 1-14, available at https://tinyurl.com/yknhe74s (last visited 30 September 2024); C. Mayer, *Prosperity - Better Business Makes the Greater Good*, (Oxford: OUP, 2019); Id et al, '50 years later, Milton Friedman's Shareholder Doctrine is Dead, in Fortune', available at https://tinyurl.com/4jz87h5w (last visited 30 September 2024); L. Enriques, 'Missing in Friedman's Shareholder Wealth Maximization Credo: The Shareholders' 65 *Rivista delle società,* 1285 (2020); L.A. Bebchuk and R. Tallarita, 'The Illusory Promise of Stakeholder Governance' 106 *Cornell Law Review*, 91 (2020); C. Mayer, 'Shareholderism Versus Stakeholderism - a Misconceived Contradiction. A Comment on 'The Illusory Promise of Stakeholder Governance' by Lucian Bebchuk and Roberto Tallarita' 522 *ECGI - Law Working Paper Series*, (2020); J.F. Sneirson, 'The History of Shareholder Primacy, from Adam Smith through the Rise of Financialism', in B. Sjåfjell and C.M. Bruner eds, *The Cambridge Handbook* n 7 above, 73; K.J. Hopt and R. Veil, 'Gli stakeholders nel diritto azionario tedesco: il concetto e l'applicazione. Spunti comparatistici di diritto europeo e statunitense' *Rivista delle società*, 65, 921 (2020); F. Vella, *Proprietà e fini dell'impresa* n 46 above, 2-3, 9, and 17-19; Id, 'L'impresa e il lavoro: vecchi e nuovi paradigmi della partecipazione' *Giurisprudenza commerciale*, 40, 1120 (2013); R. Rolli, *L'Impatto dei fattori ESG sull'impresa – Modelli di* governance *e nuove responsabilità* (Bologna: il Mulino, 2020), 78; U. Tombari, *Corporate Power and Conflicting Interests - What Purpose and Whose Interests Should Corporate Directors Pursue?* (Milano: Giuffré, 2021), 6 (but passim); E. Barcellona, *Shareolderism versus stakeholderism* n 30 above, passim; F. d'Alessandro, *Il mantello di San Martino* n 3 above; Id, 'Il diritto delle società dai "battelli del Reno" alle "navi vichinghe" '(1988), in Id, *Scritti di Floriano d'Alessandro* (Milano: Giuffré 1997), I, 447; F. Denozza, 'Due concetti di stakeholderism' *Rivista Orizzonti del Diritto Commerciale*, 37 (2022); A. Alonso Ureba, 'Derecho de Sociedades y Función Económico Social de la Gran Impresa ("Interés Social" Vs "Interés de Impresa": Una Cuestión Abierta)', in M.C. Chamorro Domínguez and A.J. Viera González eds, *Derecho de Sociedades* n 30 above, 27. See also, K. Schwab (with P. Vahnam), *Stakeholder Capitalism - A Global Economy that Works for Progress, People and Planet* (Hoboken, NJ:John Wiley & Sons Inc., 2021); C. Windbichler, 'The Public Spirit of the Corporation' 15 *EBOR*, (2001), 795; M.S. Spolidoro, Interesse, funzione e finalità. Per lo scioglimento dell'abbraccio tra interesse sociale e Business Purpose' *Rivista delle società*, 69, 322 (2022). See also *sub* fn 46.

[50] See the Authors quoted *sub* nos 36, 44, 49 above and 84 below, and *adde* S.M. Bainbridge,*The*

not just about debating the 'pros and cons' of a new corporate governance theory, since the future life conditions of animals and plants living on our planet are now at stake!

The preceding observations – together with those expressed in paras 3 and 4, with regard to the supranational dimension of the *sustainability* issues and their necessary intersections with business organizations' structures and market activities, which in turn call for a joint, coordinated, global inter-governmental responses – may help in further justifying the assertion that I made at the beginning of the current paragraph: that no SDG listed in the UN 2030 Agenda for Sustainable Development (adopted in by the UN General Assembly in September 2015) could realistically be attained without regulating, policing, and sometimes limiting what, according to the Italian taxonomy, goes under the name of the enterprise *freedom*, usually vested with the business actors – and especially with for-profit (multinational) companies – operating in the marketplace.

One more remark to conclude this paragraph: since any public or private policy concerned with corporate sustainability issues – in order to be meaningful – should entail a high gradient of harmonization at supra-national level, it could be argued that the ESG viability 'mission' will end up embedding a strong case for *convergence* of domestic rules concerned both, with business organizations governance posture and, more generally, with the crucial market roles and

New Corporate Governance - In Theory and Practice (Oxford-New York: OUP, 2008), 15-16 ('corporate governance is made at the margins of an unending competition between two competing values: namely, authority and accountability'); R.A.G. Monks and N. Minow, *Power and Accountability: Restoring the Balances of Power Between Corporations and Society* (New York: Harper Collins Publishers Ltd, 1991); Id, *Watching the Watchers: Corporate Governance for the 21st Century* (Hoboken, NJ: John Wiley & Sons Inc., 1996); R.A.G. Monks, *Corpocracy: How CEOs and the Business Roundtable Hijacked the World's Greatest Wealth Machine - And How to Get It Back* (Hoboken, NJ: John Wiley and Sons, Inc, 2007); L.E. Strine Jr, Corporate Power Is Corporate Purpose I: Evidence From My Hometown' 33 *Oxford Review of Economic Policy*, 176 (2017); Id, 'Corporate Power is Corporate Purpose II: An Encouragement for Future Consideration from Professors Johnson and Millon' 74 *Washington & Lee Law Review*, 1165 (2017); Id, 'The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law' 50 *Wake Forest Law Review*, 761 (2015). It may be worth mentioning that even Milton Friedman, when advocating against stakeholders theories (and, thus, against CSR doctrines) was not compromising on the company's and corporate management's respective duties to fulfil and respect their correlative corporate responsibilities, to the extent that these responsibilities (ie, external limits to 'enterprise freedom', and, thus, incorporated firms' organizational and operational discretion) were mandated by the law: the full quote of the famous Chicago School and Nobel Laureate scholar that has been spawning such an intense (and still vibrant) debate on the legitimacy and limits of CSR approaches (and on stakeholderisms, generally) reads as follows: 'The view has been gaining widespread acceptance that corporate officials and labor leaders have a 'social responsibility' that goes beyond serving the interest of their stockholders or their members. This view shows a fundamental misconception of the character and nature of a free economy. In such an economy, 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, which is to say, engages in open and free competition, without deception or fraud': M. Friedman, *Capitalism and Freedom* (1962) (Chicago-London: University Chicago Press, 40th Anniversary ed, 2002), 133.

responsibilities of business organizations.[51]

V. The Current Relevance of the 'Corporate Sustainability' Concept in Setting the Stage for a New Forefront of the Traditional 'Public Law vs Private Law' Divide

As pointed out in paras 2 and 3, *sustainability* could be framed and understood as a methodological approach, and a correlative set of parameters, used to prevent, to monitor, to measure, and to redress (and/or at least to mitigate) the impact of the many human-generated ESG-related harms (as well as the correlative ESG-related risks factors) on the ability of future generations of women and men, animals generally, and plants to survive in the (not too far) future.

Moreover, as illustrated in para 4, *sustainability* appears inevitably concerned with both, the structural and the governance aspects of private 'enterprises' – whether organized in the form of incorporated entities, or as partnerships (and even if carried out by a sole entrepreneur) – together with their respective conducts in the marketplace.

Therefore, when the sustainability approach is to be used in order to assess the multiple ESG impacts of (for-profit) business organizations (and their markets operations) in the future of our planet – that is, to measure companies' ESG/SDGs viability –almost inevitably it will then become also matter of public

[51] The respective levels of global 'convergence' and 'persistence' in company law principles and rules, at any given time, is often deemed to depend on many different political, social, economic variables, as well as on each jurisdiction's own cultural roots (see sub n 86 below and accompanying text). In the light of the severe challenges to the apparently most common shareholder-oriented corporate governance model (based on the shareholder wealth maximization purpose, SWM, so widespread globally that often it has been referred to as the 'standard' model) that have been posed in the last two decades by the increasingly diffuse quests for turning (also) the company – wherever incorporated and/or managed – into a ESG-viable business organization form (see, eg, M.M. Blair and L.A. Stout 'A Team Production Theory of Corporate Law' *Virginia Law Review*, 247, 249-253 and 257-58 (1999); B. Sjåfjell, 'Sustainability and Law and Economics: An Interdisciplinary Redefinition of Agency Theory', in Id et al, *Interdisciplinary Research for Sustainable Business - Perspectives of Women Business Scholars* (Cham, CH: Springer, 2022), 81; C. Mayer, 'Reinventing the Corporation' 4 *Journal of the British Academy*, 53 (2016), it may be argued that no 'end of history for corporate law' could be confirmed yet, at least in those terms which were envisaged by Professors Hansmann and Kraakman in their famous 2000 essay (H. Hansmann and R. Kraakman, 'The End of History for Corporate Law'(2000), in J.N. Gordon and M.J. Roe eds, *Convergence and Persistence in Corporate Governance* (Cambridge: Cambridge University Press, 2004), 33, where they argued, *inter alia*, that 'Despite the apparent divergence in institutions of governance, share ownership, capital markets, and business culture across developed economies, the basic law of the corporate form has already achieved a high degree of uniformity, and continued convergence is likely. A principal reason for convergence is a widespread normative consensus that corporate managers should act exclusively in the economic interests of shareholders, including noncontrolling shareholders. (…) . The ideology of shareholder primacy is likely to press all major jurisdictions toward similar rules of corporate law and practice. Although some differences may persist as a result of institutional or historical contingencies, the bulk of legal development worldwide will be toward a standard legal model of the corporation'.

policy, precisely because any such assessment shall encompass the measurement, in theon those planetary boundaries that currently ensure animals and plants survival conditions, as well as on a variety of societal and (private and public) governance matters.

And yet, as of today, only few groups of nations – including the EU[52] – are proactively attempting to react to the entangled compounds of environmental, social, and governance emergencies by means of the enactment of specific sets of direct and indirect rules imposing – both to public (governmental and quasi-governmental) entities, and to private (for profit and not-for profit) organizations (including incorporated firms, eg, those companies located or showing a substantial contacts with the EU's 'internal market') – higher and more specific environmental and social protection standards, together with improved governance mechanisms(including pro-gender diversity, whistleblowers protection, and anti-bribery rules), often coped with public compensatory actions, while in many other areas of the globe the environment and the other two factors currently still appear substantially neglected.

Geo-political reasons, economic interests, market-oriented policies, ethical, religious, and cultural behaviors generally, together with other social factors – that is, those idiosyncratic elements that typically concur in defining political communities and, thus, different legal systems around the planet – all converge in creating a very complex and intricate net of reciprocal vetoes that are currently stopping those necessary global reactions to the now self-evident magnitude of the ESG-related risks triggered by the private (business) actors on the global scene.

An additional reason that may concur in explaining some national governments 'reticence *vis-à-vis* the regulation of ESG-related risks – thus devolving the corporate social responsibility problem to the (insufficient) enterprises voluntary self-restraint – could be found in some underlying 'collective action problem',[53] not too dissimilar

[52]See, on this specific aspect (which appears to fall within the regulatory activism on corporate sustainability matters enacted by the EU legislator, starting with 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'), 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); EU Commission, 'Action Plan: Financing Sustainable Growth' (COM (2018) 97 final); L. Mélon, *Shareholder Primacy and Global Business - Re-Clothing the EU Corporate Law* (New York Abingdon, UK: Routledge, 2019) 1, 3-5, 117-119, 146, 150, and 197; R. Ibba, 'L'introduzione di obblighi concernenti i fattori ESG a livello UE: dalla direttiva 2014/95 alla proposta di direttiva sulla corporate sustainability due diligence' *Banca, borsa, titoli di credito*, I, 433 (2023); see also fns 63, 73, 74, and 75 and 81.

[53] See, eg, P.G. Harris, 'Collective Action on Climate Change: The Logic of Regime Failure' 47 *Natural Resources Journal*, 195 (2007); D.C. Esty and A.L.I. Moffa, 'Why Climate Change Collective Action has Failed and What Needs to be Done Within and Without the Trade Regime' 15 *Journal of International Economic Law*, 777 (2012); M.A. Janssen, 'A Behavioral Perspective on the Governance of Common Resources' 12 *Current Opinion on Environmental Sustainability*, (2015), 1-5; S.R. Brechin, 'Climate Change Mitigation and the Collective Action Problem: Exploring Country Differences in Greenhouse Gas Contributions' 31 *Sociological Forum* (Special Issue), 846 (2016); S. Hormio, 'Collective responsibility for climate change' 14 *WIREs Climate Change* (July

from what *Law and Economics* scholars almost half a century ago posited with regard to the costs that a single (or even a small group of) non-controlling shareholder(s) would have to face in order to effectively monitor the agents (namely, the directors and officers) of a publicly-held corporation:[54] costs that worked as a deterrent for any meaningful engagement by dispersed shareholders, ultimately resulting in their 'rational apathy' (with regard to almost any active participation to shareholders' decisions,[55] which could corresponds – *mutatis mutandis* – to the today's reluctant attitude of many states in enacting a coordinated set of pro-ESG/SDGs rules.

Indeed, many of the legislative measures relating to each of the ESG-related issues that have already been (or will soon be) enacted in some legal systems (including the EU) could be eventually perceived as counterproductive (and thus, in some instances, even rejected) by the same stakeholders groups to whom those regulatory measures were primarily addressed, and namely (multinational groups of) companies and to a lesser extent even by consumers. This could be the case, for example, when (and to the extent that) legal persons and/or other pressure groups falling within the reach of such more exacting environmental and socially conscious rules and/or standards would perceive them as an undue burden to their economic and social activities, and/or an unwarranted restriction to consumer's choice: and – therefore – they could be claimed as *useless* for the purposes these constraints have been enacted. Moreover, such undue burden/useless claims are often intended as a threat to market freedom and fair competition principles.

In fact, such claims may find some policy grounds (and, thus, political attention) precisely because of these rules' too narrow jurisdictional scope, while at the same time offering additional discretion and/or other unwarranted market advantages

2023), available at https://tinyurl.com/2nmbxk4s (last visited 30 September 2024), 1, 4; A. Kallhoff, 'Climate Change Action as Collective Action', in G. Pellegrino and M. Di Paola eds, *Handbook of the Philosophy of Climate Change* (Cham, CH: Springler Nature, 2023), 1179. Compare with M. Banks, 'Individual Responsibility For Climate Change' 51 *The Southern Journal of Philosophy*, 42 (2013), available at https://tinyurl.com/5d65j592 (last visited 30 September 2024). See also A. Fragnière, 'Climate Change and Individual Duties' 7 *WIREs Climate Change*, 798 (2016), available at https://tinyurl.com/3rp4jst8 (last visited 30 September 2024).

[54] Notoriously, in the traditional *Law & Economics* construction of the corporation as a 'network of contracts' (see M.C. Jensen and W.H. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' 3 *Journal of Financial Economics*, 305 (1976), publicly-held companies' directors are deemed acting as *agents* for the shareholders (*principals*), typically considered as a group, at least when there is no controlling shareholder (if a controlling shareholder is to be found, then an agency relationship is deemed to exist between the latter and the company's board of directors). See, eg, R. Kraakman et al eds, *The Anatomy of Corporate Law* n 27 above, 29, 79, 84.

[55] For a critical assessment of rational (shareholders') apathy with regard to environmental shareholder proposals at the shareholder annual general meeting of US publicly held companies, recently see, eg, L.M. Fairfax, 'From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm' 99 *Boston University Law Review*, 1301 (2019); S.C. Haan, 'The pathology of passivity: Shareholder passivity as a false narrative in corporate law' *ECGI Blog* (21 February 2024), available at https://tinyurl.com/3y58xv4f (last visited 30 September 2024) (and, *amplius*, Id, 'The Pathology of Passivity', in S.T. Omarova et al eds, *Hidden Fallacies in Corporate Law and Financial Regulation – Reframing the Mainstream Narratives* (New York: Bloomsbury-Hart Publishing, forthcoming).

(in terms of, eg, lower costs of regulatory compliance) to any of their competitors located in countries adopting more relaxed ESG regulations (or no ESG regulations at all).

To be sure, as many times in history, market-related forces, and public (societal) interests almost inevitably meet, and often collide.[56] This is why company's ESG viability is very likely to become the contemporary forefront of the never-ending debate on the fine line of demarcation of the classic *private law-public law* divide,[57] as projected in an international and comparative dimension and thus exacerbated by the 'regulatory competition' phenomenon.[58]

[56] On the 'triangular relationship between public goods, varieties of capitalism (VoC) and corporate social responsibility (CSR)', suggesting that 'the type of market economy provides insights on whether the prime responsibility of is supposed to lie with the state of with the private companies', and – implicitly – on the legal implications of the VoC on the 'corporate purpose' issues (on which see also fns 30, 49, 50, and 85), which, in turn, clearly should be viewed as being closely interrelated with each of the formers, see, H.W. Micklitz, 'Organizations and Public Goods' n 18 above, 414 (and passim). See also J. Tirole, *Economics for the Common Good* (Princeton: Princeton University Press, 2017); M. Libertini, 'A "highly competitive social market economy" as a founding element of the European economic constitution' 18 *Concorrenza e mercato*, part II, 491 (2011).

[57] It would be impossible to offer an adequate bibliography on this 'classic' legal research topic within the constraints of a single fn. See, eg, N. Bobbio, 'Pubblico/privato' *Enciclopedia* (Torino: Einaudi, 1981), XIII, then published in Id, *Stato, governo, società. Per una teoria generale della politica* (Torino: Einaudi, 1985), 3; O. Beaud, 'La distinction entre droit public et droit privé: un dualisme qui résiste aux critiques', in J.B. Auby and D. Friedland ed, *La distinction du droit public et du droit privé: regards français et britanniques. Une entente assez cordiale?* (Paris: Editions Panthéon-Assas, 2004), 21; M. Rosenfeld, 'Rethinking the boundaries between public law and private law for the twenty first century: An introduction' 11 *International Journal of Constitutional Law*, 125-128 (2013); G.A. Benacchio and M. Graziadei eds, *Il declino della distinzione tra diritto pubblico e diritto privato* (Trento: University Trento Press, 2016); A. Jakab, 'Public law–private law divide?' *European Constitutional Language* (Cambridge: Cambridge University Press, 2016), 387; J.B. Auby, 'Public/Private', in P. Cane et al eds, *The Oxford Handbook of Comparative Administrative Law* (Oxford-New York: Oxford University Press, 2019), 467; I. Pupolizio, *Pubblico e privato. Teoria e storia di una grande dicotomia* (Torino: Giappichelli, 2019); O.O. Cherednychenko, 'Rediscovering the public/private divide in EU private law' *European Law Journal*, 27 (2020); E. Slautsky, 'L'influence du droit de l'Union européenne sur la distinction du droit privé et du droit public: l'exemple du droit des marchés publics', in A. Bailleux et al eds, *Distinction (droit) public/(droit) privé: brouillages, innovations et influences croisées* (Bruxelles: Presses de l'Université Saint-Louis, 2022), 115. With specific regard to the heavily discussed role of companies, see, eg, L.E. Mitchell, 'Private Law, Public Interest? The ALI Principles of Corporate Governance' 61 *George Washington Law Rev*iew, 871, 876 (1992-1993); P.H. Pattberg, 'The Institutionalization of Private Governance: How Business and Non Profit Organizations Agree on Transnational Rules' 18 *Governance*, 589 (2005); M. Bainbridge, *The New Corporate Governance* n 50 above, 9; J.W. Cioffi, *Public Law and Private Power: Corporate Governance Reform in the Age of Finance Capitalism* (Ithaca (NY): Cornell University Press, 2010); I. Lee, 'The Role of the Public Interest in Corporate Law', in C.A. Hill and B.H. McDonnell eds, *Research Handbook on the Economics of Corporate Law* (Chaltenham, UK-Northampton, MA: Edward Elgar, 2012), 106-129; D. Ciepley, 'Beyond Public and Private: Toward a Political Theory of the Corporation' 107 *American Political Science Review*, 139 (2013); M.T. Moore, 'Understanding the Modern Company through the Lens of Quasi-Public Power', in B. Choudhury and M. Petrin eds *Understanding the Company* n 49 above, 91; B. Sjåfjell, *Regulating for Corporate Sustainability: Why the Public-Private Divide Misses the Point*, ibid 145; H.W. Micklitz, 'Organizations and Public Goods' n 18 above, 414-415 and 419-420.

[58] Today, the literature on 'regulatory competition' and the 'race to the bottom' effects that

In order to deal with these very complex issues, and to foster a harmonized and possibly uniform response to the global ESG issues, the OECD Council, on 12 December 2022, adopted the '*Recommendation on the Role of government in Promoting Responsible Business Conduct*'. As explained in the *Recommendation* itself, this (non-binding) document

> 'lays out a set of 21 principles and policy recommendations to assist governments, other public authorities and relevant stakeholders in their efforts to design and implement policies that enable and promote responsible business conduct'.[59]

VI. Some (Not Exhaustive) Remarks on the Emerging 'Law of the Sustainable Business Organizations': (a) the Role to be Played by the General Clauses of 'Organizational, Administrative and Accounting Adequacy', Pursuant to Italian Company Law and (Corporate) Insolvency Law

The preceding notes constitute just the introduction to a very complex, multidisciplinary, and yet dramatically important area of study, that will probably challenge legal scholars for a long period of time in the future. I will now try to offer some prospectives on current developments of legal research, focusing on some company law principles rooted in the enterprise freedom, as they are evolving in the light of some relevant legislative changes.

As pointed out in para 2, *sustainability* is a qualified *intertemporal link* that connects set(s) of present circumstances to future scenarios by a pre-selected causation link (or even sets of links), projecting the effects of current behaviors and/or situations into the future ability to at least maintain (and thus to afford) the same behaviors and/or situations.

Thus, the notion of *sustainability* can be (and is) currently used, at every latitude of the planet, in connection with many different scenarios, including the

the former phenomenon often triggers is overwhelmingly vast: see, *ex multis*, the essays collected in A. Zoppini ed, *La concorrenza tra ordinamenti giuridici* (Roma-Bari: Laterza, 2004); see also B. Sjåfjell and C.M. Bruner, 'Corporations and Sustainability' n 7 above, 7 ('Simply put, corporations can easily structure their businesses to evade a given jurisdiction's regulatory power'). On the 'regulatory competition' phenomenon, generally, see, eg, R. Romano, 'Law as a Product: Some Pieces of the Incorporation Puzzle' *Journal of Law, Economics, and Organization*, 225 (1985); more recently, see Id, *The Advantage of Competitive Federalism for Securities Regulation* (Washington DC: AEI Press, 2002); S.M. Bainbridge et al eds, *Can Delaware Be Dethroned? Evaluating Delaware's Dominance of Corporate Law* (Cambridge-New York: Cambridge University Press, 2018), and (albeit mainly in the EU company law perspective); H.W. Micklitz, 'Law as a Product', in S. Grundmann et al eds, *New Private Law Theory* n 18 above, 437. See also D. Kandar and G.M. Prakash, 'Law As A Product From Tradition And Culture' 3 *Indian Journal of Law and Legal Research*, available at https://tinyurl.com/46mmezsk (last visited 30 September 2024).

[59] Available at https://tinyurl.com/mryd4z2z (last visited 30 September 2024).

analysis of future environmental, economic, and social conditions – globally –, in the light of the emerging data about the current detrimental impact of human activities on the planet (including animals, plants and their biodiversity).

Scientific data show that in the last two centuries or so, trade and business activities and their organizations have heavily contributed to the *status quo*. Business organizations, voluntarily created and often organized as incorporated firms, have been traditionally perceived as profit-seeking organizations 'no matter what' – ie, no matter the high costs the trade or business carried out by the companies would be charging to the society at large. On the other hand, 'sustainability' has become – in its current and most frequent use – a far-reaching public policy notion, based on the ideological adherence to societal, or common interest values[60] addressed to the preservation of our planet, and thus naturally tending to limit private individuals' and/or groups' self-interest (including *opportunistic*)[61] motives and, correlatively, the realm of private ordering.

According to the 'double materiality' approach,[62] while social and economic

[60] See, eg, M.J. Roe, 'Path Dependence, Political Options, and Governance Systems', in K.J. Hopt et al eds, *Comparative Corporate Governance: The State of the Art and Emerging Research* (Oxford: Oxford University Press, 1997), 847; L.A. Bebchuk and M.J. Roe, 'A Theory of Path Dependence in Corporate Ownership and Governance', in J.N. Gordon and M.J. Roe eds, *Convergence* n 51 above, 69. Here it would be impossible to account for the 'ideological underpinnings' of 'corporate sustainability' in the light of the various political, social, cultural, legal, and economic intertwined issues such expression shall entail. It may suffice to stress that the many questions combined under such currently popular label are caused by, and, at the same time, are exerting a significant ideological momentum; therefore, also the following sequence of quotes seems to perfectly apply *also* to the law of sustainable business organizations: 'At its core, corporate law, like most law, is a morality play. Its internal structure is not determined by logic, justice, or efficiency. Instead, doctrine and action alike flow from a highly contested argument over status and position'; 'we are constrained by the nature of the morality we are describing and trying to influence. And, much to our regret, we constantly rediscover that our moral universe is not simple or unified, but complex and contradictory – a constant intellectual struggle between competing ideals that parallels the real-world political struggles between competing people, parties, and goals'; more generally, 'The law is a conflict of narratives. The stories it tells have independent power that can influence, as well as be influenced by, the struggles that create it and which it mediates'; corporate law and securities law make no exception: they 'are driven by several large narratives', ie, 'coherent (in narrative, not logical) and complex stories, extending beyond simple metaphors or framing': see D.J.H. Greenwood, 'Essay: Telling Stories of Shareholder Supremacy' *Michigan State Law Review*, 1049 (quotes at 1049, 1050, and 1052) (2009). Stated differently, even the meaning and scope we would individually decide to attach to the concept of 'corporate sustainability' (or 'companies' ESG viability') depends – ultimately – upon those narratives that will more convincingly embed each of our respective ideological (not necessarily rational/logical) human stances.

[61] On the meaning of 'opportunism', generally, see n 15 above. Within the typical corporate governance structure of a for-profit company, 'opportunism' (behaviors characterized by 'moral hazard') could be found, mainly, within three sets of legal relationships: those between *shareholder and management*; those among *shareholders and corporate creditors*, and (especially in closely held companies, including limited liability companies), in the relationships among *minority shareholders and majority shareholders*: see, eg, R. Kraakman et al, *The Anatomy of Corporate Law* n 37 above, 29.

[62] 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,

conditions are heavily dependent on the environmental conditions, and vice versa, animal and plants lives (and their biodiversity) are seriously at risk due to the aggregate negative externalities stemming from business organizations conducts (including their organizational models), thereby prompting an assessment of ESG-related risks that ought to measure, in close correlation, how ESG factors influence business organizations practices (including governance choices), and, correlatively, how different business organizations' organizational and operational options would respectively impact the ESG-related problems.

Therefore, *sustainability* may be coupled with environmental, social, economic, and (private and public) governance issues – thereby constituting the ESG 'triad', we all should be somewhat familiar with by now – on at least three key assumptions: (*a*) that any and every set of ESG-related issues is (and will increasingly be) capable of intense interactions with each other, and to mutual influence, because they are all interconnected, both synchronically and diachronically; more specifically each of these sets of issues – according to the double materiality approach – are impacting and, at the same time are being impacted by the operations carried out, and/or by the governance models adopted by the business organizations (and namely MNEs), worldwide; (*b*) by the same token, ESG issues cannot be dealt with on a mere domestic (or even regional) basis, as their mutual influence clearly does not stop at the

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 – or any other environmental, social, and/or governance, dimension of sustainability (ie, 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 – now repealed and superseded by Directive (EU) no 2022/2464, of the European Parliament and of the Council of 14 December 2022, amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting ('Corporate Sustainability Reporting Directive' or 'CSRD'). Indeed, 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 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 (and, now, of the CSRD), 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. See, eg, F.E. Mezzanotte, 'Corporate Sustainability Reporting: Double Materiality, Impacts and Legal Risks' 23 *Journal of Corporate Law Studies*, 633 (2023). On the connection between disclosure of ESG related matters and firms' performance, see, eg, D. Gafni et al, 'ESG regulation and financial reporting quality: Friends or foes?' 61 *Finance Research Letters*, 105017 (2024); M. Chibanem and M. Joubrel, 'The ESG-efficient frontier under ESG rating uncertainty' 67 *Finance Research Letters*, 105881 (2024).

national borders, thereby calling for a coordinated transnational reaction, whenever sustainability approach is to be applied – holistically – to the complex sets composing the ESG risk factors, and (*c*) it necessarily entails the active contribution of both governments and business organizations, and namely of (multinational) corporations as MNEs are the main market players at every latitude of the globe.

In the light of the foregoing remarks, there should be little doubt that the two notions these remarks aimed to deal with – *sustainability* and *incorporated firms* – cannot longer afford to be (and to be held) at odd with each other: they should become necessary companions, or companions by necessity, if you wish.

Fortunately (and albeit this is just the first step of a long and complicated process of acknowledgment and reaction to the ESG problems), an increasing number of governments – and the EU currently appears one of the most proactive political institution[63] – are becoming aware of these issues and their interconnectedness, and, therefore, they are including them in their policy agendas while media are heightening their attention to interplay between business organizations and the ESG issues and they are generally much more prepared than in the past to communicate to all people living on earth that the entire planet's sustainability is under severe distress.

While national governments must first find appropriate ways to effectively coordinate their respective ESG policies and then enact and evenly enforce rules of conduct to prevent, preserve and, if necessary, to redress environmental and social harms, incorporated firms – as the main legal and economic institutions of contemporary capitalism, and in the light of their undeniable tendence to externalize social costs of their business activities – must correlatively implement globally uniform ESG compliance rules and standards, adequate organizational and monitoring measures in order to respect the public policies aimed at attaining the SDGs within those deadlines that scientists deem necessary to preserve the planet, animals plants (and their biodiversity) for future generations.

For example, some renowned Italian scholars[64] have started to consider

[63] Sustainability goals are clearly stated in Arts 2 and 3 of the Treaty of the European Union (TUE) and the EU legislator is currently implementing a wide range of mandatory provisions implementing those goals: see sub fn 24, and fns 73 and 74. On the leading role of EU law in shaping corporate and financial sustainability see, eg, A.M. Pacces, 'Sustainable Corporate Governance' n 3 above, 152-53 and 169-173. Incidentally, it should be mentioned that Arts 9 and 41, of the Italian Constitution have been amended in 2022 in order to introduce, as an additional limit to the enterprise freedom, the environmental sustainability principle: in addition to the bibliography cited under fn 84, see, eg, 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*, 63 (2022); G. Passarelli, 'Imprese, mercati e sostenibilità: nuove sfide per il diritto commerciale', available at https://tinyurl.com/4y24zp45 (last visited 30 September 2024). More recently, see S. Ambrosini, *L'impresa nella Costituzione* (Bologna: Zanichelli, 2024), passim.

[64] See, eg, 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* (Milano: Giuffrè, 2022), 431. More generally, on the role of 'general clauses' within the province of Italian 'enterprise' (or 'business') law, see, *ex multis*: G. Scognamiglio,

'corporate (or enterprise) sustainability' – when analyzed within the specific coordinates provided by the Italian business organizations law – as a 'general clause' of conduct that would affect, at the same time, companies (undertakings) and their management's behaviors, both at organizational level and at the market operations' level, thereby generating a new set of responsibilities and correlative liabilities to be mandated by the law in the light of the protection of societal – not just private – interests.[65]

Furthermore, if (as it could be reasonably anticipated) this approach would eventually be turned into an acceptable test to assess the (Italian) business organizations' ESG viability, then such new 'general clause' should probably be

'"Clausole generali", principi di diritto e disciplina dei gruppi di società' *Rivista di diritto privato*, 517 (2011); M. Libertini, 'Clausole generali, norme di principio norme a contenuto indeterminato. Una proposta di distinzione' *Rivista critica di diritto privato*, 345 (2011); Id, 'Ancora a proposito di principi e clausole generali, a partire dall'esperienza del diritto commerciale' *Rivista Orizzonti del Diritto Commerciale*, 1 (2018). See also the insightful essays collected in G. Meruzzi and G. Tantini eds, 'Le clausole generali del diritto societario' *Trattato di diritto commerciale e diritto pubblico dell'economia* (directed by F. Galgano) (Padova: CEDAM, 2011), LXI. 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, eg, P. Montalenti, I principi di corretta amministrazione: una nuova clausola generale', in M. Irrera ed, *Assetti adeguati e modelli organizzativi nella corporate governance delle società di capitali* (Bologna: Zanichelli, 2016) 3; A. Caprara, *I principi di corretta amministrazione - Struttura, funzioni e rimedi* (Giappichelli: Torino, 2021), passim; A.M. Benedetti, 'Gli "assetti organizzativi adeguati", tra principi e clausole generali. Appunti sul nuovo art. 2086 c.c.' *Rivista delle società*, 965 (2023); for additional references on this clause see *infra*, in this paragraph, and fns 48, 65-69, 71, 75, and 76.

[65] On this emerging issue see, eg, B. Sjåfiell, 'Time to Get Real: A General Corporate Law Duty to Act Sustainaibly', in M.C. Chamorro Domínguez and A.J. and Viera González eds, *Derecho de Sociedades* n 30 above, 93; Ead, 'Integrating sustainability into the duties of the corporate board', in A. Martínez-Echevarría y García de Dueñas ed, *Interés social y gobierno corporativo sostenible: deberes de los administradores y deberes de los accionistas* (Pamplona: Thomson Reuters-Aranzadi, 2019), 163; Ead, *Realising the Potentials of the Board for Corporate Sustainability*, in B. Sjåfjell, C.M. Bruner eds, *The Cambridge Handbook* n 7 above, 696, and, from other perspectives, see also: B. McDonnel et al, 'Green Boardrooms' 53 *Connecticut Law Review*, 335 (2021); R. Rolli, *L'Impatto dei fattori ESG* n 49 above, chapter IV; M. Cian, 'Sulla gestione sostenibile e i poteri degli amministratori: uno spunto di riflessione' *Rivista Orizzonti del Diritto commerciale*, 1131 (2021); C. Amatucci, 'Responsabilità sociale dell'impresa e nuovi obblighi degli amministratori. La giusta via di alcuni legislatori' *Giurisprudenza commerciale*, I, 612 (2022); Assonime, 'Doveri degli amministratori e sostenibilità - Rapporto Assonime (Note e Studi no 6/2021)' *Rivista delle società*, 387 (2021); A. Genovese, *La gestione ecosostenibile dell'impresa azionaria - Fra regole e contesto* (Bologna: il Mulino, 2023), 130-132 and 164-184; M. Libertini, 'Gestione "sostenibile" delle imprese e limiti alla discrezionalità imprenditoriale' 39 *Contratto e Impresa* 1, 54 (2023); N. Ciocca, 'Sostenibilità dell'attività di impresa e doveri degli amministratori', in F. Massa ed, *Sostenibilità - Profili giuridici, economici e manageriali delle PMI italiane* (Torino: Giappichelli, 2019), 77-105. See also, M.V. Zammitti, *La responsabilità della capogruppo* n 47 above; L. Papi, 'Verso un modello *enlightened governance*? A proposito dei doveri di gestione responsabile', in M. Castellaneta and F. Vessia eds, *La responsabilità sociale d'impresa* n 5 above, 231. In connection with the EU Commission's CSDDD proposal of 23 February 2022, as amended and ultimately approved by the EU Parliament (on 24 April, 2024) and by the EU Council (on 24 of May, 2024), see fns 24, 74, and 81.

matched and coordinated both, with the already intense thread of the existing corporate compliance and risk management rules and standards, and with another recent key behavioral standard of (Italian) corporate governance, that is the assessment of the 'adequacy' of the organizational, administrative and accounting structure of the undertakings, to be evaluated, case by case, in the light of both, the *size*, and the *specific type(s) of trade(s) or business(es)* carried out by each enterprise under scrutiny.[66]

Such principle of 'organizational, administrative, and accounting adequateness' of the Italian undertakings – which shows some similarities to the three-prong principle first laid out in the *Caremark* case in the Delaware corporate law[67] (as

[66] The Italian literature on this principle (expressed, since the Italian company law reform of 2003, in Arts 2381, paras 3 and 5, and 2403, of the Italian Civil Code and Art 149, para. 1, letter *c)*, of the Italian Financial and Securities Act of 1998, as amended) is overwhelming: see, eg, in addition to references provided under fns 64, 66, 69, 71, 75 and 76: V. Buonocore, 'Adeguatezza, precauzione, gestione, responsabilità: chiose sull'art. 2381, commi terzo e quinto, del codice civile' *Giurisprudenza commerciale*, I, 5-41 (2006); M. Irrera, *Assetti organizzativi adeguati e governo delle società di capitali*, (Milano: Giuffrè, 2005); Id, 'Adeguatezza dell'assetto organizzativo, amministrativo e contabile', in V. Donativi ed, *Trattato delle Società* (Torino: UTET, 2023), 1549; I. Kutufà, 'Adeguatezza degli assetti e responsabilità gestoria' *Amministrazione e controllo nel diritto delle società* (Torino: Giappichelli, 2010), 707; M. Mozzarelli, *Appunti in tema di rischio organizzativo e procedimentalizzazione dell'attività imprenditoriale*, ibid, 728; M. Callegari, 'Gli assetti societari e i gruppi', in M. Irrera ed, *Assetti adeguati* n 64 above, 585; Ead, 'Gli assetti adeguati nei gruppi tra disciplina positiva ed autonomia privata' *Rivista della Corporate governance,* 413-427; G. Riolfo, 'Assetti e modelli organizzativi della società per azioni: il ruolo degli organi societari nei sistemi alternativi di amministrazione e controllo', in M. Irrera ed, *Assetti adeguati* n 64 above, 139; N. Rondinone, 'Interesse sociale vs. interesse "sociale" nei modelli organizzativi di gruppo presupposti dal d.lgs. n. 254/2016' *Rivista delle società*, 360 (2019); V. Calandra Bonaura, 'Corretta amministrazione e adeguatezza degli assetti organizzativi nella Società per azioni' *Giurisprudenza Commerciale*, I, 439 (2020); P. Benazzo, 'Organizzazione e gestione dell'"impresa complessa": compliance, adeguatezza ed efficienza. E pluribus unum' *Rivista delle società*, 1197 (2020); V. Di Cataldo, 'Dimensioni minime per il dovere di creare assetti e valutazione della diligenza nella loro creazione', 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), 570; S. Ambrosini, *Assetti adeguati e "ibridazione" del modello s.r.l. nel quadro normativo riformato*, ibid 433; Id, 'Adeguatezza degli assetti aziendali, doveri degli amministratori e azioni di responsabilità alla luce del codice della crisi', in M. Callegari et al eds, Governance *e mercati - Studi in onore di Paolo Montalenti* (Torino: Giappichelli, 2022), II, 1703-1720; R. Santagata, 'Assetti organizzativi adeguati e diritti particolari di ingerenza gestoria dei soci' *Rivista delle società*, 1453 (2020); R. Lolli, *L'Impatto dei fattori ESG* n 49 above, 127; A. Jorio, 'Note Minime su assetti organizzativi, responsabilità e quantificazione del danno risarcibile' *Giurisprudenza commerciale*, I, 812 (2021); L.A. Bianchi, *La gestione dell'impresa. I consigli di amministrazione tra regole e modelli organizzativi* (Bologna: il Mulino, 2021), 118; A. Genovese, *La gestione ecosostenibile* n 65 above, 130; N. Abriani and G. Schneider, '*Adeguatezza degli assetti, controlli interni e intelligenza artificiale',* in V. Donativi ed, *Trattato delle Società*, fn, I, 1179; G. Meruzzi, 'Il riparto di responsabilità per inadeguatezza organizzativa', in M. De Poli and G. Romagnoli eds, *Azioni di responsabilità nelle società di capitali* (Pisa: Pacini Giuridica, 2nd ed, 2024), 13. See also, in a public law perspective, R. Titomanlio, *Il principio di precauzione fra ordinamento europeo e ordinamento Italiano* (Torino: Giappichelli, 2018).

[67] *In re Caremark Int'l Inc. Deriv. Litig*., 698 A.2d 959, 970-971 (Del. Ch. 1996); on this seminal case see, eg, S.M. Bainbridge, 'Caremark and Enterprise Risk Management' 34 *Journal of Corporation Law*, 967 (2009); D.C. Langevoort, 'Caremark and Compliance: A Twenty Year Lookback' 90 Temple Law Review, 727 (2017). See also S. Gadinis and A. Miazad, 'Corporate Law

refined by later cases)[68] – has been enacted, first, under Arts 2381, paras 3 and 5, and 2403, para 1 (with respect to Italian stock companies); and then, since 2019, also under Art 2257, para 1 (with respect to Italian partnerships) and Art 2475, para 1 (with respect to Italian limited liability companies), so as to ground a specific responsibility – as well as a corresponding liability – on managing partners and on companies management[69] of the Italian unincorporated and incorporated firms.[70]

In connection therewith, a more general and pervasive 'entrepreneurial duty' of the management of Italian partnerships and companies to select and to implement an 'adequate' organizational, administrative, and accounting structure, as well as to monitor the 'adequacy' of such system in the light of the (incorporated and unincorporated) firms' subsequent operations and/or governance choices, has been enacted in 2019, both, on general terms (and with respect to all business organizations), under Art 2086, para 2, of the Italian Civil Code, and in order to assess partnerships' managing partners, corporate directors' and internal auditors' liabilities in case of financial crisis and/or insolvency, pursuant to Art 3 of the Italian Code of Enterprise Crisis and Insolvency.[71]

and Social Risk' 73 *Vanderbilt Law Review*, 1401 (Oct. 2020) (inter alia advocating the advantage of 'Contrasting sustainability with compliance, the only risk monitoring mechanism sanctioned in our laws'). See also *sub* fns 48, 68, 72, and 76.

[68] See, eg, *Marchand* v *Barnhill*, 212 A.3d 805 (Del. 2019), in which (former) Delaware Supreme Court Chief Justice Leo E. Strine Jr, in his unanimous opinion, *inter alia* specified that the board of directors 'failed to implement any system to monitor Blue Bell's food safety performance or compliance', and thus failed to apply the 'duty to monitor' doctrine enunciated in the *Caremark* case; Chief Justice Strine, while quoting *Caremark*, significantly added – possibly opening the door for future discussions – that: 'A board's 'utter failure to attempt to assure a reasonable information and reporting system exists' is an act of bad faith in breach of the duty of loyalty'. Recently, see also *In re McDonnald's Corporation Stockholder Derivative Litigation*, No 2021-0324 (Del. Ch. Jan. 25, 2023). On the corporate management duty of oversight and on the *Caremark* case progeny, see M. Petrin, 'Assessing Delaware's Oversight Jurisprudence: A Policy and Theory Perspective' 5 *Virginia Law & Business Review*, 433 (2011) (cited by Vice Chancelor Laster in *In Re McDonald's Corp. Stockholder Derivative Litigation*); Id, 'The Curious Case of Directors' and Officers' Liability for Supervision and Management: Exploring the Intersection of Corporate and Tort Law' 59 *American University Law Review*, 1661 (2010).

[69] As well as on the internal auditors, to the extent that an 'internal auditors board' ('collegio sindacale') is mandated under Italian business organizations law; see, eg, the essays collected in G. Meo and G. Presti eds, 'Indipendenza? Dipende…' 2 *Analisi Giuridica dell'Economia* (2022); see also V. Calandra Bonaura, 'Ruolo e responsabilità degli organi di controllo societari nel Codice della crisi e dell'insolvenza' *Giurisprudenza commerciale*, I, 791 (2020); M. Centonze, 'Il *risk-based approach* come metodo di condotta del collegio sindacale' *Giurisprudenza commerciale*, I, 866 (2020); A. Caprara, *I principi di corretta amministrazione* n 64 above, 114.

[70] See, again, the Authors quoted *sub* fns 64, 66, and 69, and, for additional references, see also under fns 71 and 75.

[71] The new Italian Crisis and Insolvency Code is contained in the Legislative decree 12 January 2019, no 14, as amended (and as finally entered into force in July 2022): among the first systematic commentaries of the Code, see, eg, S. Ambrosini ed, *Crisi e insolvenza nel nuovo Codice - Commento tematico ai dd.lgs. nn. 14/2019 e 83/2022* (Bologna: Zanichelli, 2022). On the impact of the new para 2 of Art 2086 of the Italian Civil Code (also in connection with Art 3 of the Italian Crisis and Insolvency Code and/or with Arts 2257, 2381, and 2475 of the Italian Civil Code), see, eg (in addition to references *sub* fns 64, 66, 69, 75 and 76): M.S. Spolidoro, 'Note critiche sulla "gestione dell'impresa"

In addition – and in more general terms – it can be (and it has already)[72] quite safely anticipated that the specific ESG risks management rules that have been recently and/or are currently being enacted at EU level (eg, the SFDR of 2019, the puzzle of primary and secondary regulations constituting the European 'ESG

nel nuovo art. 2086 c.c. (con una postilla sul ruolo dei soci) *Rivista delle società*, 253 (2019); S. Fortunato, 'Codice della crisi e Codice civile: impresa, assetti organizzativi e responsabilità' *Rivista delle società*, 952 (2019); M. Cian, 'Crisi dell'impresa e doveri degli amministratori: i principi riformati e il loro possibile impatto' *Nuove leggi civili commentate*, 1160 (2019); E. Ginevra and C. Presciani, 'Il dovere di istituire assetti adeguati ex art. 2086 c.c.' *Nuove leggi civili commentate*, 1209 (2019); P. Montalenti, 'Gestione dell'impresa, assetti organizzativi e procedura di allerta: dalla "Proposta Rordorf al Codice della crisi"', in A. Amatucci et al eds, *La nuova disciplina delle procedure concorsuali - In ricordo di Michele Sandulli* (Torino: Giappichelli, 2019), 482; Id, 'Il Codice della crisi d'impresa e dell'insolvenza: assetti organizzativi adeguati, rilevazione della crisi procedure di allerta nel quadro generale della riforma' 47 *Giurisprudenza commerciale*, I, 829 (2020); Id, 'Le riforme del Codice civile: assetti organizzativi societari', in A. Jorio and R. Rosapepe eds, *La riforma delle procedure concorsuali - In ricordo di Vincenzo Buonocore* (Milano: Giuffrè, 2021), 41-47; V. Calandra Bonaura, 'Amministratori e gestione dell'impresa nel Codice della crisi' *Giurisprudenza commerciale*, I, 5 (2020); 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); S. Bruno, 'Cambiamento climatico e organizzazione delle società di capitali a seguito del nuovo testo dell'art. 2086 c.c.' *Banca, Impresa, Società*, 47 (2020); S. Ambrosini, *Diritto dell'impresa in crisi* (Pisa: Pacini Giuridica, 2022), 43-48; E. Ricciardiello, 'Sustainability and Going Concern' *Rivista delle società*, 53 (2022). More recently, see also M. Perrino, 'Adeguatezza del sistema organizzativo, amministrativo e contabile e doveri dell'imprenditore e degli amministratori' forthcoming in *Proceedings* n 46 above.

[72] With regard to US corporation law, see, eg, L.E. Strine Jr et al, 'Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy' 106 *Iowa Law Review*, 1885 (2021). On the relevance of the *Caremark* case, see *sub* fns 48, 67 68, and 76.

taxonomy', the CSRD of 2022 and its ESRS,[73] and the recently adopted CSDDD,[74]

[73] The Sustainable Finance Disclosure Regulation (Regulation (EU) no 2019/2088) imposes to all financial market actors (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). Whereas Arts 19a, 29a, 29b, 40a of the CSRD (Directive (EU) no 2022/2464)requires some companies (namely, listed and large EU and non-EU) to disclose information about the risks and opportunities arising from ESG-related issues, as prescribed by Arts 43(3b) and 29b(1) of the CSRD, on 31 July 2023, the EU Commission adopted the first cross-cutting reporting standards and standards for all sustainability topics (European Sustainability Reporting Standards – ESRS, which are now under scrutiny by the EU Parliament and the EU Council). By a *Proposal for a decision of the European Parliament and of the Council amending Directive 2013/34/EU as regards the time limits for the adoption of sustainability reporting standards for certain sectors and for certain third-country undertakings* (COM(2023) 596 final), eventually adopted by the EU Council on the 29 April 2024 – which amended the CSRD of 2022– the implementation of sector-specific sustainability reporting standards for EU companies and general sustainability reporting standards for non-EU companies has been postponed to 30 June 2026, in order to give companies more time to apply the first set of ESG reporting standards and prepare for the next ones. It may briefly be recalled that, in its Communication *Long-term competitiveness of the EU: looking beyond 2030* (as part of the *SME Relief Package*, COM(2023) 535 final) the EU Commission identified reporting as one of the main burdens for companies in general and for SMEs, hence proposing to reduce undertakings' reporting obligations by 25% without undermining the underlying policy objectives. Recently, see K. Hummel and D. Jobst. 'An Overview of Corporate Sustainability Reporting Legislation in the European Union' 21 *Accounting in Europe*, 1 (2024); T. Dinh et al, 'Corporate Sustainability Reporting in Europe: A Scoping Review' 20 *Accounting in Europe*, 1 (2023).

[74] In connection with the EU Commission proposal of the Corporate Due Diligence Directive ('CSDDD'), published on the 23 February 2022 and finally adopted (in an amended version) on 24 May 2024, according to the press release available at https://tinyurl.com/bddzax9w (last visited 30 September 2024), see, eg: E. Wymeersch et al, 'European Company Law Experts Group - The European Parliament's Draft Directive on Corporate Due Diligence and Corporate Accountability' *Rivista delle società*, 275 (2021); L. Enriques, 'The European Parliament Draft Directive on Corporate Due Diligence and Accountability: Stakeholder-Oriented Governance on Steroids' *Rivista delle società,* 319; M. Libertini, 'Sulla proposta di Direttiva UE su "Doveri di diligenza e responsabilità delle imprese"' *Rivista delle società,* 325; P. Marchetti, 'Il bicchiere mezzo pieno' *Rivista delle società,* 336; F.M. Mucciarelli, 'Ricomporre il nesso spezzato' n 47 above, 359-360; G. Strampelli, 'La strategia dell'Unione europea per il capitalismo sostenibile: l'oscillazione del pendolo tra amministratori, soci e *stakeholders*' *Rivista delle società*, 365 (2021); U. Tombari, 'La Proposta di Direttiva sulla *Corporate Due Diligence* e sulla *Corporate Accountability*: prove (incerte) di un "capitalismo sostenibile"' *Rivista delle società,* 375; M. Ventoruzzo, 'Note minime sulla responsabilità civile nel progetto di direttiva *Due Diligence*' *Rivista delle società,* 380; G. Ferrarini, 'Sustainable Governance and Corporate Due Diligence: The Shifting Balance Between Soft Law and Hard Law', in P. Câmara and F. Morais eds, *The Palgrave Handbook of ESG and Corporate Governance* (Cham, CH: Palgrave-Macmillan-Springer, 2022), 41; C. Patz, 'The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment' 7 *Business and Human Rights Journal*, 291 (2022); E. Barcellona, Shareholderism versus Stakeholderism n 30 above, 171. More recently, see, eg, B. Sjåfjell, 'Corporate Sustainability and Due Diligence'1 *European Company Case Law* (ECCL), 5 (2023); I.M. Barsan, 'Scope and private enforcement of corporate sustainability due diligence requirements - A comparative approach', ibid, 31; J. Linder and S. Meyer, 'Supply Chain Act under German Law', ibid 55; A.J. Viera González, 'El Deber de Diligentia de los Administradores

the many directives and regulations already in force, and/or soon to be enacted, pursuant to the 'EU Green Deal', etc) will soon merge with the more general principles and standards that have been long and widely implemented with regard to business-related risks management and company compliance duties, possibly altering the traditional scope of the BJR,[75] hence integrating and ultimately strengthening the scope and the substantive reach of the correlative business and corporate compliance liabilities,[76] especially (albeit not exclusively) in connection with the parallel process of establishing uniform and homogeneous ESG rating methods.[77]

Como Forma de Aplicación de los Principios del Desarrollo Sostenible', in M.C. Chamorro Domínguez and A.J. Viera González eds, *Derecho de Sociedades* n 30 above, 215; E.R. Jordá Capitán, 'La Función de la Responsabilidad Civil de la Impresa En Materia de Sostenibilidad. La Propuesta de Directiva Sobre Diligencia Debida', ibid, 307; A. Genovese, *La gestione ecosostenibile* n 65 above, 184-188. Recently, see also A. Schall, 'The CSDDD: Good Law or Bad Law?' 21 *European Company Law*, 56 (2024). For additional references see fn 81.

[75] Specifically, on whether or not the BJR should be applied to the general 'organizational, administrative, and accounting adequacy' clause (also in the vicinity of insolvency), see, eg, in addition to the bibliography cited, *sub* fns 64-69, 71, and 76: C. Amatucci, 'Adeguatezza degli assetti, responsabilità degli amministratori e *Business Judgment Rule*' *Giurisprudenza commerciale*, I, 643 (2016); L. Benedetti, 'L'applicabilità della *business judgment rule* alle decisioni organizzative degli amministratori' *Rivista delle società*, 413 (2019); M. Irrera, 'Adeguatezza degli assetti organizzativi tra correttezza e business judgment rule', in P. Montalenti and M. Notari eds, *Crisi d'impresa. Prevenzione e gestioni dei rischi: nuovo codice e nuova cultura* (Milano: Giuffré, 2021), 81; V. Di Cataldo and D. Arcidiacono, 'Decisioni organizzative, dimensioni dell'impresa e *business judgment rule*' *Giurisprudenza commerciale*, I, 69 (2021); E. Ricciardiello, 'La rilevanza delle fasi della crisi in punto di identificazione delle condotte doverose degli organi sociali (dalla *twilight zone* alla perdita di continuità aziendale, all'insolvenza e alla decozione)', in L. Balestra and M. Martino eds, *Crisi d'impresa e responsabilità degli organi sociali nelle società di capitali* (Milano: Giuffré, 2022), 59, 76-81; M. Martino, 'La responsabilità degli amministratori', ibid, 99, 135-142.

[76] See fns 48, 64-69, 71, 72, and 75. In addition, see, eg, D.C. Langevoort, 'Compliance as Liability Risk Management', in B. van Rooij and D.D. Sokol eds, *The Cambridge Handbook* n 24 above, 123; E. Pollman, 'Corporate Social Responsibility, ESG, and Compliance', ibid, 662; B. Simkins and S.A. Ramirez, 'Enterprise-Wide Risk Management and Corporate Governance' 39 *Loyola University Chicago Law Review*, 571 (2008); A.R. Keay and J. Loughrey, 'The Framework for Board Accountability in Corporate Governance' 35 *Legal Studies,* 252 (2015); G. Strampelli, *Sistemi di controllo e di indipendenza nelle società per azioni* (Milano: EGEA, 2013); M. Siri and S. Zhu, 'Will the EU Commission Successfully Integrate Sustainability Risks and Factors in the Investor Protection Regime? A Research Agenda' 11 *Sustainability*, 6292 (2019), and, with more specific regard to the group of companies (multinational enterprises) setting, see, eg, I. Mevorach, 'The Role of Enterprise Law Principles in Shaping Management Duties at Times of Crisis' 14 *European Business Organizations Law Review*, 471 (2013); M. Rabitti, 'Responsabilità da *deficit* organizzativo', in M. Irrera ed, *Assetti adeguati* n 64 above, 955. For a thorough analysis of the risk of non-compliance with the EU data protection rules in the bank business supply chain, see L. Miotto, *Organizzazione di impresa e gestione dei dati personali - Il rischio di non* compliance *nelle catene di fornitura* (Torino: Giappichelli, 2022).

[77] See, *ex multis*, A. Engert, 'ESG Ratings - Guiding a Movement in Search for Itself' *European Corporate Governance Institute - Law Working Paper*,no 727/2023, available at https://tinyurl.com/ejv894nu (last visited 30 September 2024); D. Cash, *Sustainability Rating Agencies vs Credit Rating Agencies - The Battle to Serve the Mainstream Investor* (Cham, CH: Spinger-Palgrave Macmillan, 2021); A. Hughes et al, 'Alternative ESG Ratings: How Technological

Thus, business organizations' compliance responsibilities concerned with ESG-related risks (especially by those incorporated firms embedded in a group of companies and/or in MNEs) – as well as those (separate albeit often, mutually interfering) responsibilities resting with their respective management (corporate directors and officers) – are likely to become soon the ultimate frontier of companies' as well as corporate directors' liabilities litigation:[78] indeed, as it has effectively pointed out, *Caremark* (directors duties)and the emerging *regulations* of *ESG risks* are '*Perfect Together*'.[79]

As the *Shell* litigations in Netherland (in 2019-2021) and in UK (in 2022-2023)

Innovation Is Reshaping Sustainable Investment' 13 *Sustainability*, 3551, 1 (2021); G.A. Safarty, 'Regulating Through Numbers: A Case Study of Corporate Sustainability Reporting' 53 *Virginia Journal of International Law*, 575 (2013); F. Möslein, 'Certifying 'Good' Companies - A Comparative Study of Regulatory Design', in B. Sjåfjell and C.M. Bruner eds, *The Cambridge Handbook* n 7 above, 669; A.A. Alfalih, 'ESG disclosure practices and financial performance: a general and sector analysis of SP-500 non-financial companies and the moderating effect of economic conditions' 13 *Journal of Sustainable Finance & Investment*, 1506 (2022). From an Italian perspective, see, eg, E. Clementino and R. Perkins, 'How Do Companies Respond to Environmental, Social and Governance (ESG) ratings? Evidence from Italy' 171 *Journal of Business Ethics*, 379 (2021); G. Catello Landi, *Sostenibilità e Rischio d'impresa - Evidenze e criticità del* Rating ESG (Padova: CEDAM, 2020); L. Dal Fabbro, *ESG - La misurazione della Sostenibilità* (Rubbettino: Soveria Mannelli, 2022); F. Bertelli, *Le dichiarazioni di sostenibilità nella fornitura di beni di consumo* (Torino: Giappichelli, 2022); P. Tenuta andD.R. Cambrea, *Corporate Sustainability: Measurement, Reporting and Effects on Firm Performance* (Cham, CH: Springer, 2023).

[78] Of course, company's liability postulates that the incorporated firm could be treated as a legal 'subject' (typically, a 'legal person'), that could, therefore, be held liable for breach of contracts, torts, environmental liability, etc, like any other market agent, whereas corporate management's liabilities may be originated in connection with some company's own responsibility (and thus corporate liability), but it may also be triggered in connection with a breach of the fiduciary duties owed to company's shareholders, or by the violation of specific legal provisions that would in turn be deemed relevant in assessing directors' (and/or management's) fulfilment of their 'good faith' and/or 'duty of obeyance' obligations (on which see, eg, A.R. Palmiter, 'Duty of obedience: the forgotten duty of U.S. Corporate Law' *Rivista di diritto societario*, 436 (2013) and A. Mazzoni, 'Introduzione a Alan R. Palmiter *Duty of obedience: the forgotten duty of U.S. Corporate Law*' *Rivista di diritto societario*, 434-435. While company's liability and corporate directors' liability notably operate on different grounds, incidentally, it may be added that Italian company law provides for three separate company directors' (and/or top management's) liability rules, thereby framing three different scopes of D&Os' duties: liability towards the shareholders (Arts 2392, 2393, and 2393-*bis* of the Italian Civil Code); liability towards the company's creditors (Art 2394, of the Italian Civil Code), which may be further articulated within groups of companies (Arts 2497-2497-*septies*, of the Italian Civil Code), and towards third parties for damages *directly* caused to their patrimonies (Art 2395, Italian Civil Code). Whereas this latter type of corporate directors and officers liability action seems quite difficult to be successfully grounded before Italian courts (especially because of standing and causation reasons that cannot be exhaustively illustrated in this fn), it should be added that – in the light of the anticipated convergence of different directors and officers responsibilities (and correlative duties) – civil law scholars and lawyers may reasonably expect to witness a revamped interest in the old distinction between those types of directors and officers legal obligations to deploy their learned, good faith best efforts to diligently and prudently act in the best interest of the company, and those D&Os' legal obligations consisting in ensuring that the company would attain a specific goal (eg, a pre-determined standard of compliance), thereby imposing directors and officers to achieve a specific result, in order to avoid liability claims.

[79] L.E. Strine Jr et al, 'Caremark and ESG' n 72 above, 1885.

have already started to show,[80] one of the main issues that will be often debated (and litigated) will be whether the BJR could (and, if so, to what extent) protect managing partners and companies directors' business choices from shareholders' and, possibly, stakeholders' complaints, *also* with regard to the ESG risk prevention and ESG risk management policies – both *within* the legal boundaries of the single business legal entity and/or partnerships, and *beyond* those boundaries, ie, upwards and/or downwards the business organization's 'supply chain', as it will be soon imposed by the combination of the upcoming EU directives on corporate sustainability reporting (CSRD) and on corporate sustainability due diligence (CSDDD).

Whether falling within the province of the loyalty owed to the company and its equity interest holders – as the recent progeny of the *Caremark* case seems to hint – or within an enhanced duty to carefully manage business organizations, the general increase in the duty to diligently assess, monitor, prevent and redress ESG-related problems, by ensuring that an adequate system of organizational, administrative and accounting checks has been enacted (and it is effectively implemented) within any single incorporated firm, as well as within the corporate group (if any), and across the company's (or the group's) value chain(s),[81] represents

[80] For more information about the case see, eg, https://tinyurl.com/bdefbakv (last visited 30 September 2024); https://tinyurl.com/84ks8mx6 (last visited 30 September 2024); https://tinyurl.com/2p9kf5ws (last visited 30 September 2024) could be deemed just an early example of such new trend. See also F. Benatti, 'Prospettive sul contenzioso climatico' *Rivista di Diritto Privato*, 545 (2023). See under fns 65, 72, and 76.

[81] See *sub* fns 24, 52, 63, 73, and 74 and see also: Ernst & Young, "Study on directors' duties and sustainable corporate governance' (July 2020), available at https://tinyurl.com/5bz2myeu (last visited 30 September 2024); G. Ferrarini et al, 'The EU Proposed Reform of Director's Duties and The Missing Link to Soft Law' 25 *European Business Organization Law Review*, 359 (2024); B. Sjåfjell, 'Corporate sustainability and due diligence'1 *European Company Case Law (ECCL)*, 5-30 (2023); I.M. Barsan, 'Scope and private enforcement of corporate sustainability due diligence requirements - A comparative approach' 1 *European Company Case Law (ECCL)*, 31 (2023); European Company Law Experts Group (ECLE), 'The proposed Due Diligence Directive should not cover the general duty of care of directors' *European Corporate Governance Institute Blog,* 2 August 2022 (last visited 30 September 2024); P. Krüger Andersen et al, 'Response to the Proposal for a Directive on Corporate Sustainability Due Diligence by Nordic and Baltic Company Law Scholars' 22 *Nordic & European Company Law Working Paper Series*1, (2022), available https://tinyurl.com/28pj37kb (last visited 30 September 2024); M. Stella Richter Jr, 'Corporate Sustainability Due Diligence. Noterelle semiserie su problemi serissimi' *Rivista delle società*, 714 (2022); G.D. Mosco and R. Felicetti, 'Prime riflessioni sulla proposta di direttiva UE in materia di Corporate Sustainability Due Diligence' *Analisi Giuridica dell'Economia* 1, 185 (2022); F. Agostini and M. Corgatelli, 'Article 25 of the Proposal for a Directive on corporate sustainability due diligence: enlightened shareholder value or pluralist approach?' 19 *European Company Law Journal*, 92 (2022). On the related German law on the companies' duty of 'due diligence' across their respective supply chains (*Lieferkettensorgfaltsgesetz/LkSG*) entered into force on 1 January 2023 (see, eg, A. Schall, '(Berechtigte) Lücken in der Lieferkettensorgfaltspflicht des LkSG?' *NZG - Neue Zeitschrift für Gesellschaftsrecht*, 787 (2022); Id et al eds, *Lieferkettensorgfaltspflichtengesetz: Kommentar* (Berlin: de Gruyter, 2023); H. Fleischer, 'Grundstrukturen der lieferketten rechtlichen Sorgfaltspflichten' *CCZ - Corporate Compliance Zeitschrift*, 205 (2022); Id, 'Risk Management and Due Diligence Obligations under the German Supply Chain Act', forthcoming in the *Proceedings* n 46 above, offering additional bibliographical references on the *LkSG*; J. Lieder and S. Meyer, 'Supply chain act and liability under German law' 1 *European Company Case Law (ECCL),* 55 (2023). For some

– in my opinion – the compelling legal limit that the ESG movement is presently forcing into business organizations laws of many jurisdictions, including Italy.

However, devising and, then, enforcing such a regulatory limit inevitably imports critical and, of course, not uncontroversial policy choices, as its construction – albeit naturally influenced by the circumstances of each D&Os liability case at hand and by the specific forum rules[82] – ultimately entails the selection of important ideological options on the corporate governance model that it would be set (or, rather, be deemed) to prevail in the following decades, with respect to the many different ESG-related risks and their correlative corporate responsibilities.

VII. *Continued*. (b) The Role to be Played by the 'Enterprise Freedom' Principle within the Raising of the EU Regulatory Trends Concerned with ESG Risks Management and Assessment (*Public Law* v *Private Law*: A Reprise)

The preceding remarks could also concur in explaining why an increasing number of experts, scholars, and politicians, in several different jurisdictions, while still considering incorporated firms, by and large, *private entities* – enjoying, as such, business (or enterprise) freedom, and therefore primarily (albeit not exclusively) subject to private law rules (including the freedom of contract principle), and private ordering mechanisms –, yet would deem their operations (and, ultimately, even their structural elements concurring to their *governance* posture) to be too heavily impacting many relevant ESG-related matters of *public* interests, thereby necessarily falling (also) within the province of the *public law*.[83]

Hence, the eternal diatribe contending the boundaries between the provinces of *private law* and *public law* revives once again under the header of (the assessment of) the company's ESG viability.

Ultimately, the main issue that should wear off – and that indeed is currently challenging – the corporate law scholars' intellects all around the globe consists in finding out *to what extent* and *how* ESG issues should impact and *limit* the

echoes in the Italian Scholarschip, see, eg: P. Kindler, 'I gruppi di società nella nuova legge tedesca in materia di due diligence sulle catene di approvvigionamento (Lieferkettensorgfaltsplichtensgesetz)', in M. Callegari et al eds, Governance *e mercati – Studi in onore di Paolo Montalenti* (Torino: Giappichelli, 2022), II, 1605; A. Vicari, 'Risikoanalyse e Risikomanagement nella LkSG: spunti in tema di assetti adeguati nella "catena di fornitura"' *Giurisprudenza commerciale*, I, 757 (2023); F. Bordiga and A. De Maria, 'Tutela dei diritti umani nelle catene di approvvigionamento nell'ordinamento tedesco: la Lieferkettensorgfaltsplichtensgesetz' *Rivista delle società*, 971 (2022).

[82] Incidentally, the many existing differences on forum procedural and substantive rules constitutes an additional incentive to regulatory arbitrages by MNEs: they prevent the creation of a regulatory level playing field that would eventually eliminate those companies' competitive advantages that are merely based on their respective main place of management or operations (real seat doctrines) and/or their respective place of incorporation (incorporation doctrine).

[83] See para 5 and bibliographic references under fn 57.

(usually constitutionally protected) *enterprise freedom*:[84] that is, the discretion

[84] M. Libertini, 'Gestione "sostenibile" ' n 65 above; Id, 'Sulla nozione di libertà economica' *Contratto e impresa*, 1255 (2019); E. Ginevra, 'Libertà d'impresa, autonomia privata e nuove direttrici per l'interprete', in E. Ginevra et al eds, *L'orizzonte è una linea che non c'è* - Liber Amicorum *per Aldo A. Dolmetta* (Pisa: Pacini Giuridica, 2023), 573; G. Capo, 'Libertà d'iniziativa economica, responsabilità sociale e sostenibilità dell'impresa: appunti a margine della riforma dell'art. 41 della Costituzione' *Giustizia Civile*, 81 (2023); F. Fimmanò, 'Art. 41 della Costituzione e valori ESG: esiste davvero una responsabilità sociale dell'impresa?' *Giurisprudenza commerciale*, I, 777 (2023); B. Saavedra Servida, 'Sviluppo sostenibile e autonomia d'impresa - L'interesse ambientale come limite all'autonomia privata?' *Osservatorio del diritto civile e commerciale*, 143 (2023); E. Barcellona, *Shareholderism versus Stakeholderism* n 30 above, 208; S.A. Cerrato, 'Appunti' n 63 above, 72; E. La Marca, 'Rischio e libertà nell'impresa azionaria, tra standardizzazione dei processi decisionali, prevenzione della crisi e annunciato superamento dello scopo di lucro' *Rivista delle società*, 508 (2021); L. Marchegiani, 'Shifting the SME Corporate Model Towards Sustainability: Suggestions from Italian Company Law' 7 *Italian Law Journal* 355, 363-364 (2021); S. Amorosino, *Le regolazioni pubbliche delle attività economiche* (Torino: Giappichelli, 2021). In the past, see, G. Minervini, 'Contro la "funzionalizzazione" dell'impresa privata' *Rivista di diritto civile*, I, 618 (1958); V. Spagnuolo Vigorita, *L'iniziativa economica privata nel diritto pubblico*, (Milano: Giuffré, 1959), 78; U. Belviso, 'Il concetto di "iniziativa economica privata" nella Costituzione' *Rivista di diritto civile*, I, 153 (1961); P. Barcellona, *Intervento statale e autonomia privata nella disciplina dei rapporti economici* (Milano: Giuffré, 1969), 1-11; F. Galgano, 'La libertà di iniziativa economica privata nel sistema delle libertà costituzionali' *Trattato di diritto commerciale e di diritto pubblico dell'economia* (directed by F. Galgano), I, *La costituzione economica* (Padova: CEDAM, 1977), 511; G. Oppo, *'L'iniziativa economica'*, in Id, *Scritti giuridici* (*Diritto dell'impresa*) (Padova: CEDAM, 1992) 16, 34-39; V. Buonocore, 'Iniziativa economica privata e impresa', in Id ed, *Iniziativa economica e impresa nella giurisprudenza costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2007), 3. Recently, see R. Costi, 'Sostenibilità e scopo della società' *Banca, Impresa, Società*, 503, 505-506 (2023); S. Ambrosini, *L'impresa nella Costituzione* n 63 above, 8-9 and 25-32. In a French law perspective, see, eg, G. Ripert, 'L'ordre économique et la liberté contractuelle', in *Recueil d'études sur les sources du droit en l'honneur de François Gény* (Paris: Libr. du. Recueil Sirey, 1934), 347; Id, *Le régime démocratique e le droit civil modern* (Paris: Libr. générale de droit et de jurisprudence, 2nd ed, 1948), 254-256; G. Farjat, *L'ordre public économique* (Paris: Libr. générale de droit et de jurisprudence, 1963); with specific reference to the French *loi n° 2017-399 du 27 mars 2017*, see, eg, L. Mavoungou, 'Le pouvoirs privés économiques à l'épreuve de la loi français sur le devoir de vigilance' *Rev. Internationale de droit économique*, 49 (2019); in a US law perspective, see, *ex multis*, D.G. Yosifon, *Corporate Friction: How Corporate Law Impedes American Progress And What To Do About It* (Cambridge: Cambridge University Press, 2018); L.A. Stout and S.A. Gramitto Ricci, 'Corporate Governance as Privately Ordered Public Policy: a Proposal' 41 *Seattle University Law Review*, 551 (2018); W.E. Wagner, 'Imagining Corporate Sustainability as a Public Good Rather than a Corporate Bad' 46 *Wake Forest Law Review*, 561 (2011); B. Choudhury and M. Petrin, 'Corporate Governance that 'Works for Everyone': Promoting Public Policies through Corporate Governance Mechanisms' 18 *Journal of Corporate Law Studies*, 381 (2018); T. Wu, 'The Goals of the Corporation and the Limits of the Law' *The CLS Blue Sky Blog*, available at https://tinyurl.com/e56xxazz (last visited 30 September 2024); M. Petrin, *'Beyond Shareholder Value - Exploring Justifications for a Broader Corporate Purpose',* in E. Pollman and R.B. Thompson eds, *Research Handbook* n 33 above, 345; Y.S. Lee, 'Reconciling Corporate Interests with Broader Social Interests - Pursuit of Corporate Interests Beyond Shareholder Primacy' 14 *William & Mary Business Law Review*, 1 (2022-2023). From a transnational business and company law perspective see, B. Sjåfjell et al, 'Shareholder Primacy: The Main Barrier to Sustainable Companies', in B. Sjåfjell and B.J. Richardson eds, *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge: Cambridge University Press, 2015), 79; L.C. Backer, 'A Lex Mercatoria For Corporate Social Responsibility Codes Without the State? Critique of Legalization Within the State Under the Premises of Globalization' 24 *Indiana Journal of*

that entrepreneurs – and namely corporate managers – have traditionally been enjoying in choosing the trades and/or businesses they wanted to engage in, and strategic options implementing business models and as they deem fit and appropriate in order to best fulfil their private economic interests (traditionally, but often discussed, to maximize returns on equity-type investments, that is, in for-profit companies, to pursue the SWM).[85]

Global Legal Studies, 115 (2017). In an European perspective see, specially, B. Sjåfjell et al, 'Securing the Future of European Business: SMART Reform Proposals' (7 May 2020) *University of Oslo Faculty of Law Research Paper Series*11, (2020), and *Nordic & European Company Law Working Paper Series*8, (2020), (cf especially Section 6.2.1) available at https://tinyurl.com/yfhn8vxd (last visited 30 September 2024); B. Sjåfjell and G. Tsagas, 'Integrating Sustainable Value Creation in Corporate Governance: Company Law, Corporate Governance Codes and the Constitution of the Company', in B. Sjåfjell et al eds, *Sustainable Value Creation in the European Union - Towards Pathways to a Sustainable Future through Crises* (Cambridge: Cambridge University Press, 2023), 209; B. Sjåfjell, 'Time to Get Real: A General Corporate Law Duty to Act Sustainably', in H. Birkmose et al eds, *Instruments of EU Corporate Governance: Effecting Changes in the Management of Companies in a Changing World* (Kluwer Law International: Alphen aan den Rijn, 2023), chapter 3.

[85] See, eg, S.M. Bainbridge, *The Profit Motive* n 30 above, 169 ('Shareholder value maximization is the law. It ought to be the law (…) because the chief alternative available in liberal democratic societies – stakeholder capitalism – is fundamentally flawed. (…)'); *contra* LA. Stout, *The Shareholder Value* n 30 above, 28-32 (denying the existence of a pervasive shareholder wealth maximization norm). In addition to the works cited in fns 36, 44, 49, 50, and 84, see also O. Hart, L. Zingales, 'Companies Should Maximize Shareholder Welfare Not Market Value' 2 *Journal of Law, Finance, and Accounting*, 247 (2017). With regard to this key topic, that was introduced, *sub* fn 30, Italian business organizations law – especially in the light of the important legislation introduced in 2015 with regard to the 'società benefit' (on which see, M. Speranzin, 'Benefit Legal Entities in Italy: An Overview' 19 *European Company LawJournal*, 142 (2022); M. Palmieri, 'L'interesse sociale: dallo shareholder value alla società Benefit' *Banca, Impresa, Società*, 201 (2017); E. Codazzi, 'Società benefit (di capitali) e bilanciamento di interessi:alcune considerazioni sull'organizzazione interna' *Rivista Orizzonti del Diritto commerciale*, 589 (2020), and in 2017, with regard to both, the 'social enterprise' and the 'third sector entities' rules (as set forth, respectively in Decreto legislativo 3 July 2017, no 112, and in Decreto Legislativo 3 July 2017, no 117, on which see, eg, the essays collected by G.D. Mosco et al eds, 'Oltre il profitto - I nuovi rapporti tra impresa e sociale' *Analisi Giuridica dell'Economia*1, (2018); G. Marasà, *Imprese sociali, altri enti del terzo settore, società benefit* (Torino: Giappichelli, 2019); M. Ceolin, 'Codice del Terzo settore - a norma dell'articolo 1, comma 2, lettera b), della legge 6 giugno 2016, n. 106', in *Commentario del Codice Civile Scialoja-Branca-Galgano* (Bologna: Zanichelli, 2023) – does no longer seem to require all business companies to necessarily pursue a full-fledge for-profit purpose, in the exclusive interest of their members (shareholders, quota-holders, partners) – as it was assumed in the past, pursuant to the common traditional construction of Art 2247 of the Italian Civil Code, which explicitly states that the ultimate end of the economic (trade or business) activity to be carried out by the company (or partnership) is that of 'sharing the profits' among its members (see, eg, G. Marasà, *Le "società" senza scopo di lucro* (Milano: Giuffré, 1984), 73, and 113; Id, 'Lucro, mutualità e solidarietà nelle imprese (Riflessioni sul pensiero di Giorgio Oppo)' *Giurisprudenza commerciale*, I, 197 (2012). Albeit the issue is still intensively debated, there is an emerging trend that, in the light of the abovementioned legislation, treats the full-fledge for-profit corporate purpose in the (exclusive) interests of their members merely as a default/not-mandatory company law rule (see, eg, M. Porzio, 'Allo scopo di dividerne gli utili' *Giurisprudenza commerciale*, I, 661 (2014); *contra*, R. Costi, *Sostenibilità* n 84 above, 503-504. Indeed, in the light of both: (a) the business organization's additional 'label' ('social enterprise', 'benefit company'), and (b) their respective, specific business objectives (in addition to, in case of benefit corporations, the common benefit purpose(s)), to be set

And this, in turn, further postulates that appropriate and coordinated private *and* public governance measures be implemented *at present time*, without any further delay, *worldwide*, thereby creating a uniform regulatory playing field – which ideally should disregard national boundaries to limit regulatory arbitrages and to curb regulatory competition – in order to improve the overall social conditions of planet's (*present* and) *future* populations, as environmental, economic, and social issues are closely intertwined with each other, each representing just a specific aspect of the contemporary overall sustainability objectives that *we* – the people living on Earth – cannot afford to miss, for our own sake *and* for the sake of those who will come after us.

Not surprisingly, both issues – that relating to the limits of the business freedom and that concerning the limits of domestic regulations in spite of the global scale of the sustainability problems – are very contentious, essentially because they both linger at the core of the idea of the controversial relationship between market and state, on one side, and on the very notion of state's sovereignty on the other; and also, because both impinge on various non-legal idiosyncratic aspects (cultural, social, economic) that are specific of each legal system and that cannot therefore be easily harmonized.

To be sure, very high and intense ideological stakes are entailed by each of those challenges – and, thus, behind any 'temptation' to bend egoistic purposes (as

forth in each organization's specific articles of association/incorporation, such a rule can be departed from – in full, or in part – thereby treating the 'profits', as earnt by each legal entity from its respective trade or business, simply as a means in order for these business organizations to pursue their own ultimate not-for-profit (societal) end(s). However, should the specific business organization not be labelled as a 'social enterprise', nor as a 'società benefit', nor as a 'cooperative company' (endorsing a 'prevailing mutual purpose': see Arts 2512, 2513, and 2514 of the Italian Civil Code); or, alternatively, if its profit purpose shall not be deemed otherwise limited (or excluded) by the operation of other specific legal provisions (eg, those enacted by companies participated by local and/or central governments, or by other 'public entities': see fn 41), or by explicit and analytical (albeit limited) constrictions set forth in the company's certificate of incorporation (on this specific issue, see, recently: M. Cian, 'Clausole statutarie per la sostenibilità dell'impresa: spazi, limiti e implicazioni' *Rivista delle società*, 475, 485-488 (2021), then the for-profit purpose should re-expand to its traditional full scope. And, if this is the case, then shareholder's wealth maximization shall still be considered as the organization's exclusive and ultimate end: thus, any social responsibility project could then be pursued by the company's directors, although on a mere voluntary basis, while such managerial decisions generally remaining subject to the BJR standard of review. Therefore, whereas Italian business organizations – mainly due to the ability to opt-out of the traditional for-profit model, pursuant to the recent 'social enterprise' and the 'benefit company' rules – could be thought as a sort of 'empty vessel' that one may 'load' with virtually any legitimate 'purpose', including not-for profit, societal ends (of course, subject to the applicable legislation's terms and conditions), by contrast, and by the same token, the shareholders' traditional interest to the maximization of their respective equity investment – with the view to ultimately 'share the profits' among themselves– may be deemed strengthened by the very possibility – as expressly reinforced by the aforementioned Italian provisions – to choose alternative forms of business organization that would allow to voluntarily depart (opt out) from those types of full-fledge for-profit business organizations. See also the essays collected by G. Olivieri et al eds, 'Il lucro sostenibile. Obiettivi e ruolo delle imprese tra comunicazione e realtà' *Analisi Giuridica dell'Economia*, 1 (2022).

naturally embedded in any private entrepreneurial project) towards societal/ public policy ends – and one could anticipate that 'path dependance'[86] would also play a relevant role in framing any plausible answer, by slowing down any corporate governance/corporate purpose convergence trend.

However – and again – it would seem reasonable to anticipate that the companies' ESG viability (or 'corporate sustainability') – whether one would perceive it as an ideologically-oriented mission, or just as a not essential and

[86] In general, on *path dependency* (originally, as an evolutionary economics' concept), see, eg, P.A. David, 'Clio and the Economics of QWERTY' 75 *American Economic Review*, 332 (1985); Id, 'Path Dependence And The Quest For Historical Economics: One More Chorus Of The Ballad Of Qwerty' (1997), available at https://tinyurl.com/7p38wjmf (last visited 30 September 2024); Id, 'Path Dependence, Its Critics and the Quest of 'Historical Economics' (2000), available at https://tinyurl.com/mr2ayrun (last visited 30 September 2024); Id, *Evolution and path dependence in economic ideas: past and present* (Cheltenham, UK-Northampton, MA: Edward Elgar Publishing, 2005); K. Dopfer, 'Toward a Theory of Economic Institutions: Synergy and Path Dependency' 25 *Journal of Economic Issues*, 535 (1991); B. Arthur, *Increasing Returns and Path Dependence in the Economy* (Ann Arbor: University of Michigan Press, 1994); P. Pierson, 'Path Dependence, Increasing Returns, and the Study of Politics' 94 *American Political Science Review*, 251 (2000); M. Stack and M.P. Gartland, 'Path creation, Path Dependency, and Alternative Theories of the Firm' 37 *Journal of Economic Issues*, 487 (2003); W. Barnes et al, 'Old Habits Die Hard: Path Dependency and Behavioral Lock-in' 38 *Journal of Economic Issues*, 371 (2004); J. Mahoney and D. Schensul, 'Historical Context and Path Dependence', in R. Goodin and C. Tilly eds, *The Oxford Handbook of Contextual Political Analysis* (Oxford-New York: Oxford University Press, 2006), 454. In the legal arena, see, eg, S.E. Page, 'Path Dependence' I *Quarterly Journal of Political Science*, 87 (2006). In the legal arena, see, eg, B. Markesinis, 'Judicial Mentality: Mental Disposition or Outlook as a Factor. Impeding Recourse to Foreign Law' 80 *Tulane Law Review*, 1325 (2006); M.M. Siems, 'Legal Origins: Reconciling Law & Finance and Comparative Law' 52 *McGill Law Journal*, 55 (2007); R. La Porta et al, 'The Economic Consequences of Legal Origins' 46 *Journal of Economic Literature*, 285 (2008). Within the specific company (and corporate governance) law area, see, eg, M.J. Roe, *Political Determinants of Corporate Governance: Political Context, Corporate Impact* (Oxford-New York: Oxford University Press, 2003); and the essays collected in J.N. Gordon and M.J. Roe eds, *Convergence* n 51 above; A.N. Licht et al, 'Culture, Law, and Corporate Governance' 25 *International Review of Law and Economics*, 229 (2005); J. Armour et al, 'How Do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor and Worker Protection' 57 *American Journal of Comparative Law*, 579 (2009); Id, *Comparative Law* (Cambridge: Cambridge University Press, III ed, 2022), 61-62, 129-131, 195-200, 261-263, and 315-318; J.W. Cioffi, *Public Law and Private Power: Corporate Governance Reform* n 57 above, chapter 1; C.M. Bruner, *Corporate Governance in the Common-Law World - The Political Foundations of Shareholder Power* (New York: Cambridge University Press, 2013), 4-5 and 111; M. Gelter and M.M. Siems, 'Language, Legal Origins, and Culture before the Courts: Cross Citations between Supreme Courts in Europe' 21 *Supreme Court Economic Review*, 215 (2013-14). Moreover, see the essays collected by A. Afsharipour and M. Gelter eds, *Comparative Corporate Governance* (Cheltenham, UK-Northampton, MA: Edward Elgar Publishing,2021); D. Katelouzou and 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* (Oxford-New York: OUP, 2021), 615. 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, ie, 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 under fn 58.

possibly transient nuance of business organizations law – could have the beneficial effect of fostering uniformity among current diversified corporate governance models and markets' rules, thereby ultimately concurring in re-defining – on a global scale – the legitimate boundaries of the 'enterprise freedom' and, hence, the limit of legitimate regulatory actions by governments in market activities.

VIII. Concluding Remarks

Any interdisciplinary approach to the ESG-related risks seems almost inevitably to be impacted by and to have a correlative impact on both, the market operations and the structures (governance) of incorporated firms, worldwide.

Thus, the quest for corporate ESG viability – that is, the attainment of a viable level of 'sustainability' of both, the companies' design, and the markets regulatory environment where incorporated firms respectively operate, in the light of the many interconnected ESG and SDGs-related issues – is alimenting a somewhat new multidisciplinary research field, that could be fully understood only by adopting a holistic approach.

The 'law of sustainable business organizations' could adequately describe this rapidly expanding topic that – albeit concentrated in the company law area – spans across the multifaceted province of the law, as enacted and enforced in different jurisdictions, and extends beyond it.

From a legal perspective, matching effectively such quest for companies' ESG viability constitutes a very complicated and sensitive task, *inter alia* because it would entail striking a delicate balance between regulatory (top-down/hard law) interventions with respects to corporate governance mechanisms and businesses 'operational rules, on the one hand; and voluntary (bottom/up), or semi-voluntary (soft law) sets of best organizational and trade practices rules – which, to some extent, could be instilled by virtuous market-based incentives – on the other.

At the same time, it postulates a concurring definition of the fine line between public law and private law using the proportionality principle to secure that the free market/free enterprise principle – which in many countries (such as, eg, in Italy) enjoys a constitutional protection – would neither be bended to public policy goals, nor result over compressed, so as to substantially deter productive investments and innovation.

Moreover, it would also appear an ambitious goal, because the process of finding such balance would also import the attainment of substantive international cooperation among national governments, as differential regimes would almost inevitably generate some degree of regulatory competition, in turn resulting in regulatory arbitrages, especially by more sophisticated market actors (namely, MNEs).

To be sure, achieving for-profit business organizations' full ESG compliance would be the result of a sophisticated 'alchemy' of both, voluntary/market and

compulsory/regulatory approaches. One of the foreseeable (and already perceivable) outcomes would be the widening of managerial (ie, D&Os') responsibilities, a heightened level of diligence expectations, which will plausibly result in an increase of D&Os liabilities and correlative litigation. Even in close corporations and in LLCs, monitoring and prevention of ESG-related risks, prudential (sometimes even conservative) managerial behaviors, and advance ESG planning are becoming standard benchmarks to be used to assess D&Os liabilities, due, especially, to the increased attention to the environmental and human rights compliance standards throughout the products and services supply chains.

Indeed, risk management adequacy and correlative compliance assessment duties – which already constitute very pervasive aspects of corporate governance (especially in groups of companies and/or in those companies that operate internationally) – will conceivably become even more crucial liability triggers for company's directors and managers (as well as for internal and external auditors); and the general principle of proportionality may consequently be expected to play a key-role in assessing the gradient of every company's ESG viability *vis-à-vis* such measures, in connection with each firm's dimension and organizational complexity, as well with regard to the nature of the economic activities it carries out in the market. This, in turn, could advance the highly controversial position of those who argue that managerial discretion (and, thus, enterprise freedom as applied to incorporated firms) could be bent (functionalized) to serve the active pursuance of ESG goals, thereby transforming *de facto* the for-profit company into a quasi-public entity.

And yet, dealing with those (and other) complex and interrelated private ordering and public policy regimes, geo-political, and jurisdictional issues is precisely the essence of the 'law of sustainable business organizations', as an emerging multifaceted and interdisciplinary field of both legal research and teaching that is here to stay.[87]

[87] See, once more, A.R. Palmiter, *Sustainable Corporations* n 2 above: this book is – to my knowledge – the first law coursebook that sets forth in a systematic way (with specific attention to US corporate and securities law) the many intertwined legal, business, and social issues entailed by the two terms 'sustainability' and 'corporations'. See, in addition, some recent rich collections of essays: B. Sjåfjell and C.M. Bruner eds, *The Cambridge Handbook* n 7 above; D. Busch et al eds, *Sustainable Finance* n 3 above; P. Câmara and F. Morais eds, *The Palgrave Handbook of ESG* n 36, above; C. Liao ed, *Corporate Law and Sustainability from the Next Generation of Lawyers* (Montréal: McGill Queens University Press, 2022); P. Yeoh, *Environmental, Social and Governance Laws, Regulations and Practices in the Digital Era* (Alphen aan den Rijn: Kluwer Law International, 2022); T. Miller and Todd L. Cort eds, *The Sustainable Corporation: A Legal and Business Centric Approach to ESG* (American Bar Association, 2023); T. Kuntz ed, *Research Handbook on Environmental, Social and Corporate Governance* (Cheltenham, UK-Northampton, MA: Edward Elgar Publishing, 2024); J.H. Binder et al, *Corporate Purpose, CSR, and ESG* (Oxford: Oxford University Press, 2024 (forthcoming)).