

### Attempts to Redefine Corporate Purpose and Consequences on Directors' Duties – Enel Use Case

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#### Abstract

Recently, economists and legal scholars have tried to deal with the trade-off between shareholders value maximization and stakeholders' interests. Paragraph 1 will investigate whether companies could create social value and increase their profitability simultaneously. European and Italian soft and hard law has evolved partially in line with such economic theories; paragraph 2 will assess whether such legislative initiatives might foster a redefinition of corporate purpose that would allow companies to enhance stakeholders' interests while pursuing long-term shareholder value maximization. Paragraph 3 will evaluate whether this rethinking of corporate purpose entails creating a new hypothesis of directors' liability. From a practical point of view, companies are directly affected by this change of perspective on corporate purpose. Paragraph 4, using the Enel Use Case as an example, will examine whether a realistic and profitable implementation of sustainable corporate governance could be concretely feasible. Finally, Paragraph 5 will draw the conclusions of the analysis.

#### I. The Evolution of Corporate Purpose in the Investigations of Economic Scholars

The correct interpretation of the concept of corporate purpose remains one of the most controversial topics among economic and legal scholars.<sup>1</sup>

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<sup>1</sup> In the early twentieth century, part of European scholars adhered to the 'contractual' doctrine of the company. According to this approach, which has become predominant in European legal systems, the company must be legally framed as a collaboration contract between private individuals, with the aim of remunerating the invested capital. Among the many contributions by legal scholars see P.G. Jaeger, *L'interesse sociale* (Milano: Giuffrè, 1964), 133, arguing that the social interest corresponds to the plurality of the interests of the shareholders, taking into account the juxtaposition between majority shareholders and minority shareholders. See also A. Mignoli, 'L'interesse sociale' *Rivista delle società*, 725-727 (1958), stating that corporate purpose must be identified with the common interest of the shareholders. Differently, the 'institutionalist' doctrine of social interest, founded in Germany in the 1920s by Walther Rathenau, see W. Rathenau, 'La realtà della società per azioni. Riflessioni suggerite da un'esperienza degli affari' *Rivista delle Società*, 913, 916-947 (1960), fostered a conception of corporate purpose not focused solely on the interests of shareholders. This theory considers the company a crucial tool for the economic development of a state. For this reason, the proponents of this theory believed that the efficiency of the company must also prevail over the interests of the shareholders. For a description of the main features of this theory, see P.G. Jaeger, *ibid* 133 and A. Mignoli, 'L'interesse sociale' *Rivista delle società*, 725-763 (1958); for a more recent analysis, see M. Libertini, 'Gestione 'sostenibile' delle imprese e limiti alla discrezionalità imprenditoriale' *Contratto e Impresa*, 1-3 (2023). After the end of the Second World War, the

From an economic theory standpoint, the dialectic between the majority shareholder value theory and the minority stakeholder theory predominated 20<sup>th</sup> century scholarship.

According to the shareholder value theory, the only duty of companies is to maximise their profits without deception or fraud.<sup>2</sup> Company' directors are considered agents of the shareholders and, therefore, cannot use company's money for purposes not aligned with shareholders' interests.<sup>3</sup> Differently, representatives of the stakeholder value theory believe that shareholder value maximization should not be the exclusive purpose of the company, because specific stakeholder interests should also be duly considered and valued.<sup>4</sup> Directors of companies should thus

contractualist thesis began to gain the upper hand, increasing its success at a global level after the collapse of the communist regimes and the correlative widespread success of the free market ideology. In recent years, however, there has been a partial change in trend, and the idea of corporate social responsibility has begun to gain favor among scholars once again. The phenomenon gradually began to interest the legislative field as well, as further described in para 2 below. For an analysis of the most recent outcomes of the debate, see G. Ferrarini, 'Corporate Purpose and Sustainability' *EUSFiL Research Working Paper Series*, 1-67 (2020); U. Tombari, 'Corporate purpose e diritto societario: dalla 'supremazia degli interessi dei soci' alla libertà di scelta dello 'scopo sociale'?' *Rivista delle Società*, 1-15 (2021); Id, *Corporate Power and Conflicting Interests: What Purpose and Whose Interests Should Corporate Directors Pursue?* (Milano: Giuffrè, 2021); M. Stella Richter, 'Long-Termism' *Rivista delle Società*, 16-52 (2021); C. Angelici, 'Potere e interessi nella grande impresa azionaria: a proposito di un recente libro di Umberto Tombari' *Rivista delle società*, 4-26 (2020); J. Fish and S. Davidoff Solomon, 'Should Corporations Have a Purpose?' *99 Texas Law Review*, 1309-1346 (2021); E. Rock, 'For Whom Is the Corporation Managed in 2020: The Debate over Corporate Purpose' *European Corporate Governance Institute – Law Working Paper 515/2020*, 1-29 (2021).

<sup>2</sup> M. Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), 112. On Friedman's economic philosophy on shareholder value, see also Id, 'The Social Responsibility of Business Is to Increase Its Profits' *The New York Times*, available at <https://tinyurl.com/bdf5fux2> (last visited 30 September 2024). Milton Friedman is often considered as the most outstanding representative of the shareholder value theory. According to Milton's philosophy: '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'. Friedman conceded that the long-run interest of a company could lead that company to invest resources for the benefits of the community where it conducts its business, but only because 'that may make it easier to attract desirable employees, it may reduce the wage bill or lessen losses from pilferage or sabotage or have other worthwhile effects'. Consequently, what might appear to be altruistic and socially responsible conduct is actually dictated by self-interest.

<sup>3</sup> M. Friedman, *Capitalism* n 2 above, 113. Friedman's philosophy is believed to have its roots in the judgement *Dodge v Ford* of the Supreme Court of Michigan, ruling that 'A business corporation is organized and carried on primarily for the benefit of the stockholders. The powers of directors are to be employed for that end'; see *Dodge v Ford* 170 NW 668 (1919). These conclusions have been widely invoked to argue that US positive law requires corporations to pursue the goal of profit maximization and that, therefore, directors have an obligation to place the interests of shareholders before all others. However, it was also found that the ruling *Dodge v Ford* never stated that directors' exclusive duty is to maximize shareholder profits. Rather, the Court said that profit is the main, but not the exclusive, goal of company directors. See C. Amatucci, 'Responsabilità sociale dell'impresa e nuovi obblighi degli amministratori. La giusta via di alcuni legislatori' *Giurisprudenza Commerciale*, 612, 627 (2022).

<sup>4</sup> In the United States, the stakeholder theory had been strongly advocated by Edward Freeman,

consider management effects on, and responsibilities towards, stakeholders, ie, the individuals or entities whose interests are influenced by the company's activity.<sup>5</sup>

In recent years, there have been growing attempts to argue that companies should not only pursue profits but also stakeholders' interests, to foster a 'sustainable development'.<sup>6</sup> These endeavors also represent a response to a widespread discontent towards a capitalistic system deemed incapable of adequately serving the common good.<sup>7</sup>

The 'enlightened shareholder value theory', a well-received academic thesis, argues that company directors should pay attention to all kinds of constituencies, such as customers, employees, suppliers of capital, communities and so on, because an appropriate management of these constituencies would foster the company's value maximisation in the long run.<sup>8</sup> Establishing of good relationships with stakeholders would integrate an important factor for the success of the company, since the market itself would recognize the real value of the company's business

who believed that 'current approaches to understanding the business environment fail to take account of a wide range of groups who can affect or are affected by the corporation, its stakeholders'. See R.E. Freeman, *Strategic Management. A Stakeholder Approach* (Boston: Pitman, 1984), 1-3. On the same subject-matter, see also D. Busch et al, *Sustainable Finance in Europe: Corporate Governance, Financial Stability and Financial Markets* (London: Palgrave Macmillan, 2021), 101. Even before Freeman, a precursor of stakeholder theory in the United States was E. Merrick Dodd. His philosophy is effectively briefed by C. Amatucci, n 3 above, 629-630.

<sup>5</sup> More precisely, stakeholders can be defined as employees, consumers, suppliers, local or global communities concerned with the environment and society as a whole. See R.E. Freeman, *Strategic Management* n 4 above, 1-3. For a more recent analysis, see also D. Busch et al, n 4 above, 101.

<sup>6</sup> The concept of sustainable development, which is widely used in the current debate relating to corporate purpose and the ethics of capitalism in general, found its definition in the report 'Our Common Future', drawn up in 1987 by World Commission on Environment and Development (WCED): 'Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. G.H. Brundtland, 'Our Common Future: Report of the World Commission on Environment and Development' available at <https://tinyurl.com/ybjvcjtk> (last visited 30 September 2024). On the definition of 'sustainable development' see also: G. Alpa, 'Responsabilità degli amministratori di società e principio di sostenibilità' *Contratto e impresa*, 721, 723 (2021).

<sup>7</sup> The issue has been precisely analyzed by C. Mayer, *Prosperity* (Oxford: Oxford University Press, 2018), 5, stating that nowadays the company 'is inhumane because we have taken humans and humanity out of it and replaced them with anonymous markets and shareholders over whom we have no control'. On the crisis of capitalism and possible remedies to it, see also A. Edmans, *Grow the Pie. How Great Companies Deliver both Purpose and Profit* (Cambridge: Cambridge University Press, 2020).

<sup>8</sup> The enlightened shareholder value theory is effectively described by the economist Michael Jensen, who argued that social welfare is maximized when all firms in an economy maximize total firm value. Social value is created when a firm produces an output or set of outputs that are valued by its customers more than the value of the inputs it consumes in such production. 'Spend an additional dollar on any constituency to the extent that the long-term value added to the firm from such expenditure is a dollar or more'. M. Jensen, 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function' *Journal of Applied Corporate Finance*, 297-317 (2010). On enlightened shareholder value see also C. Amatucci, n 3 above, 619. However, it has also been argued in literature that if it is true that, in the long run, shareholders' interest and stakeholder value may coincide, this might not always be the case. See M. Stella Richter, 'Long-Termism' n 1 above, 47.

policy in terms of market share, employee loyalty and finally cash flows and risk.<sup>9</sup>

The ‘shared value theory’ has also gained a high favor.<sup>10</sup> ‘Shared value’ can be defined as ‘policies and operating practices that enhance the competitiveness of a company while simultaneously advancing the economic and social conditions in the communities in which it operates’.<sup>11</sup> Differently from the opinions that consider the interests of shareholders and stakeholders in opposition to each other, the shared value theory maintains that it is possible creating economic value and at the same time addressing the needs of stakeholders. Accordingly, the purpose of a company should be redefined in terms of shared value, not solely profit, because the creation of shared value ‘emphasizes collective well-being as a source of innovation that can lead to greater profitability and competitive advantage’.<sup>12</sup>

Among the books of economists that have proposed a rethinking of corporate purpose, *Prosperity* by Colin Mayer is prominent. Mayer argues that big companies should aim at solving problems for the communities where they operate, making profits in the process.<sup>13</sup> Corporate purpose must emerge from the corporate charter, where it is also necessary to describe how corporate governance mechanisms strive for achieving it in the best possible way.<sup>14</sup> Mayer’s corporate governance model assigns to directors the role of balancing the interests of shareholders with those of stakeholders, pursuing the long-term prosperity of the company. Corporate purpose should be defined in the corporate charter, while directors’ duties should be based on the corporate purpose so defined.<sup>15</sup>

<sup>9</sup> M. Jensen, n 8 above, 246. According to G. Ferrarini, ‘An Alternative View of Corporate Purpose: Colin Mayer on Prosperity’ *Rivista delle Società*, 27, 41-42 (2020), the enlightened shareholder value theory is an intermediate perspective, representing a compromise between the traditional shareholder primacy theory and the stakeholder approach.

<sup>10</sup> M. Porter and M. Kramer, ‘Creating Shared Value: How to Reinvent Capitalism – And Unleash a Wave of Innovation and Growth’ *Harvard Business Review*, January-February 2011.

<sup>11</sup> *ibid* 6.

<sup>12</sup> M. Kramer, ‘Creating shared value to tackle climate change’, available at <https://tinyurl.com/mu3ud7rd> (last visited 30 September 2024), stating that the goal for companies would be to earn profits by benefiting society, thus creating a win-win scenario. As a matter of facts: ‘companies need a healthy society and society needs healthy companies’.

<sup>13</sup> In Mayer’s view ‘purpose is primary and shareholder value derivative’, thus inverting the ranking proposed by the shareholder value theory. See C. Mayer, n 7 above, 114. This philosophy is consistent with the proposal of the British Academy and in particular with the eight principles contained in the Principles for Purposeful Business (How to deliver the framework for the Future of the Corporation. An Agenda for business in the 2020s and beyond), stating that: ‘the purpose of business and corporations is to solve the problems of people and planet profitably, and not to profit from causing problems’. See P. Marchetti, ‘Dalla Business Roundtable ai lavori della British Academy’ *Rivista delle Società*, 1303, 1303-1310 (2019).

<sup>14</sup> C. Mayer, n 7 above. This view is opposed by G. Ferrarini, ‘An Alternative View’ n 9 above, 13, where the author argues that it is unnecessary to specify the corporate purpose in the company’s charter, since several documents are periodically approved by the board which clarify the purpose pursued by the company and its management, such as the strategic plans, the financial statements and the non-financial disclosure.

<sup>15</sup> Mayer entrusts the discipline of his model to private law, since, in his opinion, a public regulation would lead to a conflict between the interests of the regulator and those of the

Another recent outstanding work that deals with the issue of corporate purpose is Alex Edmans' 'Grow the Pie'.<sup>16</sup> Under Edmans' view, the company must pursue its purpose for the welfare of all its stakeholders; increasing profits will only be a side effect. The pie symbolizes the value created by a company. Shareholders and stakeholders enjoy different slices of the pie, depending on the business strategy the company elects to adopt.<sup>17</sup> In general, shareholders receive value, while stakeholders enjoy value. Edmans pie-growing mentality sees the pie as expandable and capable of increasing its value for the interests of both shareholders and stakeholders. This theory argues profit is generated in parallel with the creation of value for the whole society. 'Profits, then, are no longer the end goal, but instead arise as a by-product of creating value'.<sup>18</sup>

## II. The Evolution of Corporate Purpose Under Corporate Law

The evolution of the concept of corporate purpose that emerged in the writings of economic scholars is also reflected in recent legislative interventions that have involved various jurisdictions.<sup>19</sup> Many legal systems are currently adopting a position somewhere in between shareholder value theory and stakeholder theory.<sup>20</sup>

### 1. A Brief Comparison of Foreign Legal Systems

Section 172 (1) of the 2006 UK Companies Act provides that: 'A director of a

shareholders. See C. Mayer, n 7 above. A similar solution has recently been adopted also by the French legislator, that allowed companies to define their *raison d'être* in the statute. See Art 1835 of the French Civil Code, as revised by the *PACTE* Act of 22 May 2019. According to some scholars, this model shows limits since the wording of corporate purpose will often be generic; managers will always find ways to circumvent it; shareholders will find it difficult to monitor compliance; enforcement of similar undertakings in cases of breach will be too difficult. See M. Ventoruzzo, 'Brief Remarks on 'Prosperity' by Colin Mayer and the Often Misunderstood Notion of Corporate purpose' *Rivista delle società*, 43, 46 (2020); D. Busch et al, n 4 above, 123-124.

<sup>16</sup> A. Edmans, n 7 above.

<sup>17</sup> Eg, employees receive 'their pay, but also training, advancement opportunities, job security, and the ability to pursue a vocation and make a profound impact on the world'; suppliers gain a stable source of revenue; the local government enjoys tax revenues. See A. Edmans, n 7 above, 19.

<sup>18</sup> A. Edmans, n 7 above, 23-26. Edmans theory has many similarities with the enlighten shareholder value theory, as they both argue that shareholder value and stakeholder interests are highly correlated in the long run. However, under enlighten shareholder value, company's ultimate goal is to generate profits, while the creation of value for stakeholders would be desirable only to the extent that it increases profits in the long term. Differently, Edmans' theory suggests that company's ultimate goal is to create general value for the society, while the creation of shareholder value would be a consequent by-product. See D. Busch et al, n 4 above, 127.

<sup>19</sup> D. Busch et al, n 4 above, 108.

<sup>20</sup> For an overview, see D. Busch et al, n 4 above, 108-120; U. Tombari, 'Corporate purpose' n 1 above, 8-9; J.M. Coutinho de Abreu, 'CSR - 'responsabilità' senza responsabilità (legale)?' *Giurisprudenza Commerciale*, 1088, 1092 (2019); L. Calvosa, 'La governance delle società quotate italiane nella transizione verso la sostenibilità e la digitalizzazione' *Rivista delle Società*, 309, 315 (2022) and C. Amatucci, n 3 above, 632-635.

company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole'. Section 172 (1) further specifies the issues that directors should take in consideration while performing their duties, namely:

'(a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company'.

Furthermore, the UK Corporate Governance Code (2018) requires the board of directors to promote long-term sustainable success by generating value for shareholders and contributing to the social community.<sup>21</sup> According to certain scholars, these provisions reflect the enlighten shareholder value approach, pursuant to which the balancing of the interests of the stakeholders carried out by the company directors must in any case serve to enhance the interests of the shareholders.<sup>22</sup>

Within the European Union, given the current absence of a harmonizing intervention, Member States have regulated the matter independently.

In German legal system,<sup>23</sup> the first definition of corporate purpose appeared in the Corporate Law of 1937 and was characterized by a reference to the common good of the enterprise, the people, and the Empire.<sup>24</sup> This definition of corporate purpose lasted until the review made by the German Corporate Law of 1965. In that occasion, a first draft of the definition of corporate purpose suggested to entrust the management board with the task of managing the company under its own responsibility, as required for the good of the enterprise, its workers and shareholders, and by the common good.<sup>25</sup> However, the German legislature rejected such proposal and rather stated that 'the management board should manage the

<sup>21</sup> See Section 1 of the UK Code of Corporate Governance.

<sup>22</sup> U. Tombari, 'Corporate purpose' n 1 above, 8-9; D. Busch et al, n 4 above, 115; J.M. Coutinho de Abreu, n 20 above, 1092; L. Calvosa, n 20 above, 314 and C. Amatucci, n 3 above, 632-635, noting also that the three decades of validity of the enlightened shareholder value in the British legal system have recorded critical issues and uncertainties, having recognized the legitimacy to take action against the administrators responsible for the violation of Section 172 only to the shareholders' assembly, with the exclusion of the other stakeholders, due to the fact that the latter have not been invested by the legislator with a real right to set forth a legal claim.

<sup>23</sup> For a specific analysis of the concept of corporate purpose under German law see G.B. Portale, 'La Corporate Social Responsibility alla Ricerca di Effettività' *Banca Borsa Titoli di Credito*, 947, 950-952 (2022).

<sup>24</sup> *ibid* 950, highlighting that this provision was an expression of the National Socialist ideology of the early twentieth century. See also H. Fleischer, 'La definizione normativa dello scopo dell'impresa azionaria: un inventario comparato' *Rivista delle Società*, 803, 803-817 (2018).

<sup>25</sup> *ibid* 806.

corporation under its own responsibility'.<sup>26</sup> Also the definition of corporate purpose contained in the German Code of Corporate Governance reflects the continuing debate related to this institute. The original formulation,<sup>27</sup> which referred to long-term value creation, was firstly amended in 2009 to emphasize the role of stakeholders.<sup>28</sup> The definition underwent subsequent amendments in 2017 and 2019, until reaching the current 2022 version, which reads: 'The Management Board is responsible for managing the enterprise in its own best interests'.<sup>29</sup> However, the Foreword of the Code specifies that: 'the Code highlights the obligation of Management Boards and Supervisory Boards – in line with the principles of the social market economy – to consider the interests of the shareholders, the enterprise's workforce and the other groups related to the enterprise (stakeholders) to ensure the continued existence of the enterprise and its sustainable value creation (the enterprise's best interests). These principles not only require compliance with the law, but also ethically sound and responsible behaviour'.<sup>30</sup> Finally, it is worth highlighting a recent intervention by the German legislature aimed at imposing, on large companies, duties of conduct to protect human rights and the environment in the distribution chains of products and services.<sup>31</sup>

The French legal system also expressed interest in rethinking the concept of corporate purpose. The original version of Article 1833 of the French Civil Code initially provided that companies shall have 'a legal purpose that shall be formed in the common interest of the partners'.<sup>32</sup> In 2019, the *PACTE* Act added a second paragraph to Art 1833,<sup>33</sup> stating that: 'a company shall be managed in its corporate interest, factoring in the social and environmental issues raised by its business activity'.<sup>34</sup> According to some scholars, this new wording reflects an evolution of the concept of corporate purpose, which is no longer limited only to the maximization of shareholder value. However, it also raises questions regarding the scope of the new obligations placed on company directors.<sup>35</sup> Furthermore,

<sup>26</sup> *ibid* 806.

<sup>27</sup> See Para 4.1.1 of the German Corporate Governance Code 2002.

<sup>28</sup> See Para 4.1.1 of the German Corporate Governance Code 2009.

<sup>29</sup> See Para A(I) of the German Corporate Governance Code 2022.

<sup>30</sup> Foreword of the German Corporate Governance Code 2022. According to G. Ferrarini, 'An Alternative View' n 9 above, 40, in Germany 'corporate law is no doubt stakeholder oriented, but shareholder value concepts have been imported as a consequence of capital market development'.

<sup>31</sup> *Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten – Lieferkettensorgfaltspflichtengesetz* [Act on Corporate Due Diligence Obligations in Supply Chains] of 16 July 2021.

<sup>32</sup> See Art 1833 of the French Civil Code.

<sup>33</sup> The reform comes at the end of intense consultations and a lively political debate which found a positive epilogue in the Notat-Sénard Report, entitled 'L'entreprise, objet d'intérêt collectif' available at <https://tinyurl.com/yft447d6> (last visited 30 September 2024).

<sup>34</sup> See *PACTE* Act.

<sup>35</sup> P. Conac, 'Le nouvel article 1833 du Code Civil Français et l'intégration de l'intérêt social et de la responsabilité social d'entreprise: constat ou révolution?' *Orizzonti del diritto commerciale*, 497, 500 (2019); U. Tombari, 'Corporate purpose' n 1 above, 8-9.

the *PACTE*, intervening again on the text of Art 1835, allows companies to specify their purpose ('raison d'être') in their charter.<sup>36</sup> The amendments introduced by the *PACTE* show how French corporate law is tending towards a mixed notion of corporate purpose, in an attempt to reconcile shareholder value with stakeholder interests.<sup>37</sup>

## 2. Corporate Purpose under Italian Law

In the Italian legal system, the purpose of a company is strongly conditioned by the paradigm of profitability, as expressed by Art 2247 of the Italian Civil Code.<sup>38</sup> However, the theory of the ethical and sustainable success of the company is progressively gaining ground.<sup>39</sup>

The provisions on non-financial declarations<sup>40</sup> require companies to describe not only the main risks associated with social and environmental issues, but also how to manage them.<sup>41</sup> These declarations presuppose the existence of a margin

<sup>36</sup> This purpose is the reason why the company is established. It determines the orientation of the company's management and defines its identity and vocation. See C. Amatucci, n 3 above, 636-638. On this matter, see also C. Angelici, n 1 above, 8, stating that the regulatory intervention of the French legislator under analysis ultimately allows shareholders to individualize the reasons for their participation in the company and concretely define the interests they intend to pursue.

<sup>37</sup> D. Busch et al, n 4 above, 112-113. As happened with the English reform, the difficulty of reconciling conflicting interests was noted in doctrine, even though the impact study of the legislation declared the primacy of the interests of companies, with the consequence that social and environmental issues just have to be taken into consideration. In a nutshell, Art 1833 should never allow directors to take decisions contrary to the company's interest based on social or environmental considerations. C. Amatucci, n 3 above, 636-638.

<sup>38</sup> G. Alpa, n 6 above, 726; U. Tombari, 'Corporate purpose' n 1 above, 12; C. Brescia Morra, 'Chi salverà il pianeta, Lo Stato o le grandi corporation? ESG: una formula ambigua e inutile' *Rivista trimestrale di diritto dell'economia*, 78, 87-88 (2022); G. Ferrarini, 'Corporate Purpose' n 1 above, 31; G.B. Portale, n 23 above, 950. The same rationale characterizes Article 2497 of the Italian Civil Code, concerning companies' management and coordination. See Assonime, 'Doveri degli amministratori e sostenibilità', 1, 6-10, available at <https://tinyurl.com/4w3fpbfb> (last visited 30 September 2024).

<sup>39</sup> U. Tombari, 'Corporate purpose' n 1 above, 13; G. Alpa, n 6 above, 725-729; M. Libertini, n 1 above, 80-87; D. Palombo, 'The Future of the Corporation: the Avenues for Legal Change' 10 *Journal of the British Academy*, 43-86 (2022); Assonime, n 38 above, 6.

<sup>40</sup> European Parliament and Council Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC [2013] OJ L182/19; European Parliament and Council Directive (UE) 2014/95/UE of 22 October 2014, amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L330/1 (the so-called Non-Financial Reporting Directive); European Parliament and Council Directive (EU) 2022/2464 of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022] OJ L322/15. For an overview, see 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*, 433-465 (2023).

<sup>41</sup> Art 3, para 1, letter c) of decreto legislativo 30 December 2016 no 254, as amended by



of discretion for companies in deciding whether and to what extent pursuing sustainable and ethic business objectives.<sup>42</sup>

References to sustainable corporate governance have been inserted also in the Italian Consolidated Law on Finance.<sup>43</sup> Specifically, Art 123-*ter*, para 3-*bis* provides that the remuneration policy of directors, general managers and executives with strategic responsibilities shall contribute to the corporate strategy, the pursuit of long-term interests and the sustainability of the company. Moreover, Art 124-*quinquies*, para 1, requires institutional investors and asset managers to adopt and communicate to the public an engagement policy which describes, among other things, how investee companies are monitored in matters of corporate governance, social and environmental impact, and potential conflicts of interest in relation to their engagement.<sup>44</sup>

Equally important, the Italian Code of Corporate Governance specifies that

legge 30 dicembre 2018 no 145 (Italian Budget Law of 2019).

<sup>42</sup> M. Libertini, n 1 above, 84.

<sup>43</sup> Decreto legislativo 24 February 1998 no 58, as subsequently amended.

<sup>44</sup> Arts 123-*ter* and 124-*quinquies* of decreto legislativo 24 February 1998 no 58. Sensitivity towards the values of social and environmental sustainability has grown significantly in recent years, as demonstrated by the increasingly numerous measures aimed at promoting respect for social and environmental values in the exercise of economic activities. Among the most significant, apart from those just cited, are: (1) legge 11 November 2011 no 180, which indicates among its goals the promotion of the inclusion of social problems and environmental issues in the performance of business activities and in their relations with the social partners (Art1, para 5, letter d); (2) legge 28 December 2015 no 208 (Art 1, paras 376-383), containing the regulation of benefit companies, which provides that, whatever their typological guise, the companies that pursue in the exercise of their activity, in addition to the purpose of the distribution of profits among shareholders (Art 2247 of the Italian Civil Code), one or more purposes of common benefit and operate in a responsible, sustainable and transparent manner towards people, communities, territories and the environment, cultural and social assets and activities, bodies and associations and other stakeholders; (3) the discipline of the social enterprise, introduced by decreto legislativo 24 March 2006 no 155, subsequently repealed by decreto legislativo 3 July 2017 no 112, issued in implementation of the delegation granted to the Government with legge 6 June 2016 no 106, which today regulates this subject-matter; (4) Art 6 of decreto legislativo 19 August 2016 no 175, containing the Consolidated Act on publicly-owned companies, which establishes that in public-controlled companies, without prejudice to the functions of the control bodies envisaged by law and by-laws, in relation to the size and organizational characteristics as well as the activity carried out by the companies themselves, the corporate governance tools can be integrated by providing, among others, their own codes of conduct, or adherence to collective codes of conduct concerning the regulation of entrepreneurial behavior towards consumers, users, employees and collaborators, as well as other holders of legitimate interests involved in the company's activity (Art 6, para 3, letter c) and corporate social responsibility programs, in compliance with the recommendations of the Commission of the European Union (Art 6, para 3, letter d); (5) new Code of Public Contracts, issued with decreto legislativo 31 March 2023 no 36, which will enter into force starting from 1 July 2023, whose Art 57, para 2, provides that the contracting authorities and the granting bodies contribute to the achievement of the environmental objectives set out in the Action Plan for the environmental sustainability of consumption in the public administration sector through the inclusion, in the project and tender documentation, of at least the technical specifications and contractual clauses contained in the minimum environmental criteria, defined for specific categories of contracts and concessions, and which, again, the contracting authorities economically valorize the procedures for awarding contracts and concessions that comply with the minimum environmental criteria.

the board of directors shall guide the company by pursuing its ‘sustainable success’,<sup>45</sup> defined as the creation of long-term value for the benefit of the shareholders, giving consideration to the interests of other relevant stakeholders.<sup>46</sup> Moreover, the Code states that the remuneration policy for directors, members of the control body and top management is functional to the pursuit of the company’s sustainable success.<sup>47</sup> Finally, the Code assigns the task of contributing to the sustainable success of the company also to the internal control and risk management system.<sup>48</sup>

Last but foremost, the newly revised Art 41 of the Italian Constitution prohibits conducting economic initiative in conflict with social utility or in a way that damages health and the environment.<sup>49</sup> Provisions of Art 41 are enforceable on a legislative level, not being directly applicable.<sup>50</sup> However, despite this restrictive reading, it could be possible to identify this provision as an influential statement capable of guiding the continuation of an evolutionary process that, albeit always through the mediation of the legislator, orients companies toward the goal of sustainable development.<sup>51</sup>

The above-mentioned provisions permit an interpretation of the concept of corporate purpose that allows company directors to take into appropriate consideration the interests of stakeholders while pursuing long-term shareholder value maximization.<sup>52</sup>

<sup>45</sup> Art 1 of the Italian Code of Corporate Governance 2020.

<sup>46</sup> Definitions of the Italian Code of Corporate Governance 2020. According to Assonime, n 38 above, 15, this approach does not conflict with the principle according to which the function of the company is to pursue the lucrative interests of the shareholders but enriches the audience of interests that those who manage the company should consider. In a more critical sense, see C. Brescia Morra, n 38 above, 92, where the author states that the Code uses vague formulas, which present margins of ambiguity that are not suitable for translating into preceptive mechanisms. For further thoughts, see M. Stella Richter, ‘Profili attuali dell’amministrazione delle società quotate’ *Giurisprudenza Commerciale*, 416, 419-422 (2021), arguing that formulas such as sustainable development, sustainability, long-term and similar are not in themselves suitable for translating into preceptive mechanisms. They do not seem to constitute parameters suitable for precisely orienting the action of the corporate bodies.

<sup>47</sup> Art 5 of the Italian Code of Corporate Governance 2020.

<sup>48</sup> Art 6 of the Italian Code of Corporate Governance 2020. For further information on the impact of the implementation of the Italian Corporate Governance Code on the concept of corporate purpose, see D. Stanzione, ‘Scopo e oggetto dell’impresa societaria sostenibile’ *Giurisprudenza Commerciale*, 1023, 1041 (2022); G. Ferrarini, ‘The EU Sustainable Governance Consultation and the Missing Link to Soft Law’ *European Corporate Governance Institute – Law Working Paper 576/2021*, 1, 9-16 (2021). Regarding the political choice to leave the regulation of company governance rules to soft law, see G. Alpa, n 6 above, 731-732.

<sup>49</sup> Legge costituzionale 11 February 2022 no 1 ordered the modification of the Art 41, second para and the modification of the Art 41, third para. For an analysis of the consequences of such amendments, see M. Libertini, n 1 above, 71-87; G. Capo, ‘Libertà d’iniziativa economica, responsabilità sociale e sostenibilità dell’impresa: appunti a margine della riforma dell’articolo 41 della Costituzione’ *Giustizia Civile*, 81, 99-104 (2023).

<sup>50</sup> G. Alpa, n 6 above, 725; G. Capo, n 49 above, 99-104; M. Libertini, n 1 above, 71-87.

<sup>51</sup> G. Capo, n 49 above, 99-104; Assonime, n 38 above.

<sup>52</sup> U. Tombari, ‘Corporate purpose’ n 1 above, 13; G. Racugno and D. Scano, ‘Il dovere di diligenza delle imprese ai fini della sostenibilità: verso un Green Deal europeo’ *Rivista delle*

### 3. A New European Approach: the Directive on Corporate Sustainability Due Diligence

The debate on the definition of an appropriate form of sustainable corporate governance is also part of the European Union institutions' agenda.<sup>53</sup>

The European Strategy on Sustainable Finance, renewed in implementation of the European Green Deal, aims at creating a regulatory system that guarantees an adequate flow of information on companies' policies related to environmental, social and governance issues.<sup>54</sup>

So far, the most influential EU intervention in the field of corporate purpose is the recent directive on corporate sustainability due diligence (CSDDD).<sup>55</sup> The CSDDD marks a change in EU strategy on corporate sustainability, introducing a duty for companies not only to identify negative impacts of their activities on human rights and the environment and publicly account for them, but also to develop a strategy to prevent or reduce those impacts.<sup>56</sup> The overall objective of the CSDDD is to promote sustainable value creation and improve the long-term performance and resilience of EU companies.<sup>57</sup>

*Società*, 726, 744 (2022).

<sup>53</sup> As a matter of facts, one of the aims of the European Union is to work towards the sustainable development of Europe. See Art 3, para 3, Treaty on European Union (Consolidated Version of the Treaty on European Union [2008] OJ C115/13).

<sup>54</sup> Within this framework, without any claim to completeness, it would be appropriate to highlight: (1) the European directives on non-financial reporting (cf n 23 above); (2) the regulation on sustainability reporting in the financial services sector, ie, European Parliament and Council Regulation (EU) 2019/2088 of 27 November 2019 on sustainability-related disclosures in the financial services sector [2019] OJ L317/1; (3) Shareholder Rights Directive II, ie, European Parliament and Council Directive (EU) 2017/828 of 17 May 2017 amending Directive 2007/36/EC [2017] OJ L132/1; and (4) the regulation on the so-called environmental taxonomy ie, European Parliament and Council Regulation (EU) 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088 [2020] OJ L198/13. For a detailed overview, see T. Di Marcello, 'Strategia europea sulla finanza sostenibile, informazione societaria e possibili riflessi sulla gestione della società' *Giurisprudenza commerciale*, 607-623 (2023); L. Calvosa, n 20 above.

<sup>55</sup> Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L, 5.7.2024. For an overview, see R. Ibba, n 40 above, 460; M. Stella Richter, 'Corporate Sustainability Due Diligence: noterelle semiserie su problemi serissimi' *Rivista delle Società*, 714, 719-720 (2022), where, however, it is specified that the CSDDD constitutes an attempt at innovation that is still embryonic and uncertain; G. Racugno and D. Scano, n 52 above, 726-733; M. Libertini, n 1 above, 65.

<sup>56</sup> R. Ibba, n 40 above, 460. On the issue, see also M. Stella Richter, *Corporate Sustainability* n 55 above, 719-720, where the author states that with the CSDDD the European Union has begun to abandon a purely market approach, although this is still an embryonic and uncertain departure. In particular, according to the author, the use of the due diligence formula seems to suggest the attempt by the European legislator to seek space in a sort of border area between suggested but not imposed virtuous behaviors and actual hard law. For further thoughts, see also G. Racugno and D. Scano, n 52 above, 733; M. Libertini, n 1 above, 65.

<sup>57</sup> Commission Staff Working Document Impact Assessment Report. Accompanying the document Proposal for a Directive of the European Parliament and of the Council on Corporate

The core duties envisaged by the CSDDD are identifying, preventing, mitigating and accounting for negative impacts on human rights and the environment caused by companies' activity and their value chains.<sup>58</sup> In addition, certain large companies are required to establish a plan to ensure that their business strategy is compatible with the Paris Agreement's goal of limiting global warming to 1.5 °C.<sup>59</sup> Moreover, the Directive shall not constitute ground for decreasing the level of protection of human rights and the environment already envisaged by EU and Member States' law.<sup>60</sup>

The CSDDD aims at increasing the relevance of stakeholders' interests in target companies' corporate purpose.<sup>61</sup> However, it does not introduce a groundbreaking turnaround in the actual governance system of EU companies.<sup>62</sup> As a matter of facts, according to many legal scholars, the most appropriate interpretation of the CSDDD appears to be the one requiring company directors to pursue shareholders' value maximization, in compliance with the already existing applicable mandatory rules that protect the interests of the relevant stakeholders (employees, consumers, suppliers, local or global communities concerned with the environment and society as a whole).<sup>63</sup>

Sustainability Due Diligence and amending Directive (EU) 2019/1937, SWD/2022/42 final, available at <https://tinyurl.com/34cbdbbh> (last visited 30 September 2024).

<sup>58</sup> Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L, 5.7.2024, Art 1.

<sup>59</sup> *ibid* Art 22.

<sup>60</sup> *ibid* Art 1. In its first version proposed by the Commission, the Directive also provided that company directors, when fulfilling their duty to act in the best interest of the company, must take into consideration human rights, fight against climate change and environmental damage. See Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23 February 2022 COM(2022) 71 final 2022/0051 (COD), Art 25. However, this provision was eliminated from the final version of the CSDDD.

<sup>61</sup> G. Racugno and D. Scano, n 52 above, 744.

<sup>62</sup> S. Rossi, 'Il diritto della Corporate Social Responsibility' *Orizzonti del Diritto Commerciale*, 99, 121 (2021). In a partially different sense, see G. Racugno and D. Scano, n 52 above, 733-738, according to which the detailed provisions of the Directive should make it possible to overcome that generality and vagueness which, until now, has prevented, with a generic recourse to the Corporate Social Responsibility formula, the identification of the contents of corporate social responsibility, the means by which to pursue it, the monitoring tools and the relative sanctioning system. The author, however, recognizes that the protection of the interests of the stakeholders must be seen as functional and complementary to the maximization of shareholders' profit: the sacrifice of profit in the short term can undoubtedly be legitimized by a managerial conduct of the directors aimed at a useful result for the shareholders in the long term. According to other legal scholars, the CSDDD constitutes a first step, which should be followed by further, more incisive measures. The juridical-economic debate on the subject, in fact, is far from closed. In this sense, see R. Ibba, n 40 above, 463.

<sup>63</sup> G. Racugno and D. Scano, n 52 above, 738; E. Barcellona, 'La sustainable corporate governance nelle proposte di riforma del diritto europeo: a proposito dei limiti strutturali del c.d. stakeholderism' *Rivista delle Società*, 1, 45 (2022); R. Ibba, n 40 above, 458. In additions some scholars have also argued that sustaining that the aim of the CSDDD is to equalize the interests of stakeholders with those of shareholders, not only appears difficult to implement, but would also conflict with the fundamental values of the European Union, as well as of the Italian legal

### III. Consequences on Company Directors' Liability of the Recent Rethinking of Corporate Purpose

Moving within this constantly evolving framework, it is useful to assess whether recent attempts to redefine corporate purpose may have consequences in terms of company directors' liability.

If the only purpose of a company was the generation of profit, shareholders could file a liability claim against the directors in case the company's net profit was sacrificed to create value for the stakeholders. Conversely, if the directors had the right, but not the obligation, to give up a portion of the company's net profit to allocate it to projects of stakeholders' interest, no liability claim could be brought by the shareholders against the directors were such a strategy implemented. If, otherwise, directors had the obligation to balance the interests of the shareholders and those of the stakeholders, the latter could undertake a liability claim against the directors in case of failure to achieve such balance.<sup>64</sup>

The orientations described above may suggest that a progressive reform of corporate purpose is underway, leading to an obligation for company directors to orient business activities towards sustainable development strategies. However, fascinating such a thesis may seem from an ethical point of view, it would be difficult to support under current positive law.

It might be useful to consider the example of a company carrying out a business that causes the release of polluting substances in the environment but does so in compliance with the limits imposed by applicable law. Arguing that this negative impact on the environment, even if not causing any violation of the law, may create hypothesis of liability would cause a contradiction. If the law intended to prohibit any kind of polluting activity, or at least lower the tolerance thresholds, the law itself would have provided for such an obligation. But if the relevant legal framework allowed polluting activities below specific thresholds, no detrimental consequences could be coherently imposed on a company which pollutes the environment, while staying in compliance with the limits imposed by applicable law.<sup>65</sup>

Furthermore, also assuming the level of diligence required of directors was

system. If it were accepted that the pursuit of the interests of stakeholders assumes equal dignity with respect to shareholder value maximization, this would be equal to imposing on company directors an unspecified duty of distribution of wealth at the expense of shareholders and for the benefit of stakeholders. However, such a task, in a system that incorporates the principles of market economy based on competition, is the responsibility of the public sector, not of the private sector.

<sup>64</sup> E. Barcellona, 'La sustainable corporate governance' n 63 above, 1-4; L. Calvosa, n 20 above, 315-316.

<sup>65</sup> Another example would be a European company which, within its supply chain, purchases goods that incorporate child labor permitted by the law of the country where these goods are produced. Again, either European law introduces a clear prohibition on the purchase of goods incorporating child labor; or, if such a prohibition were not instituted, it would become contradictory to impose on a company consequence detrimental to the performance of an activity, perhaps ethically despicable, but nevertheless permitted by applicable law. For an overview of more examples that explains in detail such contradiction, see E. Barcellona, 'La sustainable corporate governance' n 63 above, 18-20.

higher than that prescribed by current legislation, this obligation would still be unenforceable. In fact, there would be no reference threshold to determine the amount of additional diligence that would be required of the directors.<sup>66</sup>

In addition, the same concept of sustainability, if applied to a company's business activity, can lead to divergent and possibly even conflicting interpretations:<sup>67</sup> (i) on the one hand, company sustainability over time, ie, the company's capability to preserve financial stability in the long run;<sup>68</sup> (ii) on the other hand, company sustainability from an environmental and social point of view, ie, the company's ability not to create detrimental externalities affecting the environment and human rights. It is possible (and desirable) that these two concepts of sustainability go hand in hand, but they could also conflict. Consider the case of a company that, to pursue sustainability from an environmental and social point of view, takes on costs that jeopardize its sustainability from an economic standpoint.<sup>69</sup> Furthermore, even environmental and social interests can, in practice, come into conflict. An example might be the possible clash between the need to protect the environment by interrupting the activity of a particularly polluting production site and the necessity to keep the activity running due to the social interest of avoiding prejudicial effects on employment.<sup>70</sup> If these different concepts of sustainability were to clash with each other, a trade-off would be inevitable.<sup>71</sup>

However, the task of establishing how and to what extent the interests of an organized social community shall be protected does not belong to company directors but to politics, acting as the representative of the relevant organized social communities.<sup>72</sup> Rather, company directors should pursue the goal of

<sup>66</sup> E. Barcellona, 'A cosa serve il corporate purpose?' speech held during the conference in Venice 'Convegno internazionale di studi per i settant'anni della Rivista – La s.p.a. nell'epoca della sostenibilità e della transizione tecnologica', 10-11 November 2023. See also R. Ibba, n 40 above, 456-457.

<sup>67</sup> M. Stella Richter, 'Long-Termism' n 1 above, 29-32.

<sup>68</sup> Company directors' duty to pursue this kind of sustainability is hardly deniable. In Italy, this obligation is provided for by Art 2086 of the Italian Civil Code.

<sup>69</sup> M. Stella Richter, 'Long-Termism' n 1 above, 29-32; Id, 'Corporate Sustainability' n 55 above, 721-723.

<sup>70</sup> M. Stella Richter, 'Long-Termism' n 1 above, 29-32.

<sup>71</sup> M. Stella Richter, 'Corporate Sustainability' n 55 above, 721-723, explaining that if the goals that must be pursued by the company directors were not adequately selected, leaving it to their discretion to weigh between an enormous variety of interests, the inevitable consequence would be that the directors will not be accountable at all (accountability to everyone means accountability to no one), because they will always be able to balance conflicting interests availing themselves of the benefits of the business judgment rule. Similar arguments are also expressed by: M. Stella Richter, 'Long-Termism', n 1 above, 33. See also M. Jensen, n 8 above, 238: 'telling a manager to maximize current profits, market share, future growth in profits, and anything else one pleases will leave the manager with no way to make a reasoned decision'.

<sup>72</sup> E. Barcellona, 'La sustainable corporate governance' n 63 above, 35; C. Brescia Morra, n 38 above, 95-99. On this point, see also M. Stella Richter, 'Corporate Sustainability' n 55 above, 724-725, expressed himself in a more moderate sense: the author does not deny that companies, especially very large ones, have been, are and will be political bodies; nor, according to the author, would it make sense to say that such companies should not engage in politics. Instead, it is a question

shareholder value maximization and, at the same time, take into consideration the stakeholders' interests to the extent prescribed by relevant rules issued by politics.<sup>73</sup>

As a matter of fact, according to the fundamental principles of modern Western democracies, the definition and implementation of the purposes and values of a given organized social community is entrusted to parliaments and governments elected according to constitutional rules. Delegating these tasks to private entities lacking democratic legitimacy but holding large market power, such as company directors, would lead to an illegitimate removal of responsibility from the state and a consequent erosion of the power democratically vested in the people of such state.

Considering the above constrains, even if one accepts an evolutionary interpretation of the concept of corporate purpose requiring company directors to take due consideration of human rights and the environment, the measures that company directors would concretely be required to implement would be those already envisaged by pre-existing applicable law. Therefore, stakeholders would be unable to bring liability actions against company directors who have not protected human rights and environment more than what is required by applicable law.<sup>74</sup>

As a consequence, it would be irrelevant in terms of directors' liability if, among a number of management choices not prohibited under applicable law, company directors opted for the one with the highest negative impact on human rights or on the environment would be irrelevant in terms of directors' liability. Indeed, if the directors' conduct caused a legally relevant damage, the directors would be found liable under applicable law irrespective of whether they have acted in compliance with general sustainability principles. If, on the other hand, no legally relevant damage occurred, directors could not be considered liable due solely to the circumstance that it would have been possible to adopt a business decision with less environmental impact.<sup>75</sup>

The current regulatory framework regarding corporate purpose summarized above would seem to offer directors the possibility – and not the obligation – to implement a corporate strategy that takes into consideration also the interests of stakeholders, to the extent that this is in line with the purpose of maximizing shareholders' profit.<sup>76</sup> Consequently, if the directors, acting under the aegis of the business judgment rule, opted for the implementation of such a strategy, no

of evaluating whether it is appropriate for the legal systems to leave the large companies an almost unlimited space to engage in politics, moreover on issues of close interest to the community. See also M. Libertini, n 1 above, 69, arguing that the CSDDD would require regulatory integration to guarantee a coherent assessment of the various ethical principles to which the Directive refers.

<sup>73</sup> E. Barcellona, 'La sustainable corporate governance' n 63 above, 36.

<sup>74</sup> Of course, nothing would prevent target companies from taking on a voluntary commitment to do more. But in this hypothesis, the liability in the case non-compliance would not be a tort liability, but rather a contractual liability. See E. Barcellona, 'La sustainable corporate governance' n 63 above, 20.

<sup>75</sup> T. Di Marcello, n 54 above, 621.

<sup>76</sup> M. Libertini, n 1 above, 85.

liability claim could be brought by the shareholders against the directors who had invested a part of the company's profit in initiatives of stakeholders' interest. Such an interpretation of corporate purpose would legitimize the company management models capable of maximizing shareholders' profits while creating value also for shareholders.<sup>77</sup>

#### **IV. Enel Use Case: Embedding Sustainable Progress on Business Strategy**

The necessity to explore business strategies that effectively deal with the trade-off between shareholder value maximisation and stakeholder interests is a particularly current relevant topic in the energy sector.

While on the one hand energy industry constitutes one of the economic activities with the greatest environmental impact, on the other hand recent years have seen an acceleration of the transition from fossil-based to renewable power.<sup>78</sup> This transition not only poses significant business challenges on companies, but also offers the opportunity and responsibility to have a leading role in the conception of sustainable business strategies.

This brief case study investigates how Enel, one of the most significant energy companies in the world,<sup>79</sup> has addressed these challenges. Specifically, para 4.1 will provide an overview of the main features of Enel's sustainable business model; para 4.2 will investigate whether, within this sustainable business model, the creation of value for stakeholders is functional to shareholder value maximization; finally, para 4.3 will analyze if the implementation of Enel's sustainable business model is covered by the business judgment rule.

##### **1. A Sustainable Business Model**

Enel is one of the first signatories of the 2019 'Business Ambition for 1.5 °C' campaign promoted by the United Nations. On such occasion, Enel has publicly declared its commitment to develop a business model in line with the Paris

<sup>77</sup> See previous paragraph 2, containing a brief commentary on M. Jensen, n 8 above; M. Porter and M. Kramer, n 10 above; C. Mayer, n 7 above; A. Edmans, n 7 above.

<sup>78</sup> According to 'bp Statistical Review of World Energy' (2022): Encouragingly, renewable energy, led by wind and solar power, continued to grow strongly and now accounts for 13% of total power generation. Renewable generation increased by almost 17% in 2021 and accounted for over half of the increase in global power generation over the past two years. See 'bp Statistical Review of World Energy' (2022), 4, available at <https://tinyurl.com/z2uedv26> (last visited 30 September 2024).

<sup>79</sup> In 2023, Enel accounted as one of the world's largest private electricity distribution companies, with about 70 million end users connected to its grids, including 45.2 million users with active smart meters. Enel also managed one of the largest customer bases of any private company, with more than 61 million customers. See Enel's 'Sustainability Report 2023', available at <https://tinyurl.com/5n6vm5rw> (last visited 30 September 2024).



Agreement's goal to limit the average global temperature increase to 1.5 °C.<sup>80</sup>

The core of Enel's sustainable business model is the ambition to achieve zero emissions by 2040. The achievement of this target is based on development of energy generation from renewable sources, a secure and reliable electric grid, and a clean electrification of consumption.<sup>81</sup> In 2022, Enel defined a decarbonization roadmap, which have been certified by the Science-Based Targets initiative.<sup>82</sup>

In 2023, Enel's net renewable installed maximum capacity reached 55.5 GW, corresponding to 68.2% of the total net installed maximum capacity.<sup>83</sup> In parallel, Enel proceeded with the process of dismantling coal-fired power plants. In 2022, Enel shut down the last coal-fired unit at the Bocamina power plant in Chile and the Teruel thermal power plant in Spain.<sup>84</sup>

Furthermore, Enel aims at promoting electrification solutions powered by renewable sources, in order to achieve a clean electrification. Despite the current geopolitical crisis, in 2023 Enel generated around 127 TWh of electricity from renewable sources,<sup>85</sup> recording a 13% increase compared to the 112.4 TWh generated in 2022,<sup>86</sup> and reached 1,730 MW of battery storage, an element of flexibility that is becoming increasingly strategic in the energy transition process.<sup>87</sup>

<sup>80</sup> Details available at <https://tinyurl.com/7m82vnh9> (last visited 30 September 2024).

<sup>81</sup> In order to achieve this objective, Enel plans to accelerate the decarbonization of the energy production process, through the combination of the development of renewable generation plants, storage systems and the progressive decommissioning of thermal power plants. At the same time, investments are being made in strengthening distribution networks, enablers of the energy transition already underway, allowing electricity networks to accommodate greater volumes of renewable energy. See Enel's 2023 Report and Financial Statements, available at <https://tinyurl.com/wwm8kvb> (last visited 30 September 2024).

<sup>82</sup> The roadmap envisaged a reduction of all direct and indirect greenhouse gas emissions by around 99% by 2040 compared to 2017 throughout the value chain. By 2025, Enel plans to add around 21 GW of installed renewable capacity, reaching a total managed capacity of around 75 GW (including around 4 GW from BESS - Battery Energy Storage Systems, ie, batteries for storing electricity). The outcome would be the increase of the percentage of energy generated from zero-emission to around 83%. This will mark a further significant step by Enel toward achieving its decarbonization goals, in line with the 1.5 °C objective established by the Paris Agreement. See 'Enel's Zero Emission Ambition', available at <https://tinyurl.com/3mct3kuz> (last visited 30 September 2024). A strategic lever to support Enel's decarbonization strategy and the path to a fair and inclusive transition is circular economy. Enel aims at progressively applying circular economy to its entire business model, so that it becomes increasingly sustainable, resilient, and competitive. Circular economy aims at creating benefits both by reducing costs and risks related to the supply of raw materials and in terms of generating additional revenues through the continued use of assets and materials. An example of circular economy application is the development of circular smart meters made of fully regenerated plastic, purposely conceived to be circular right from the design phase. For an overview of Enel's circular economy strategy, see Enel's position paper 'A journey into Enel's Circular Economy', available at <https://tinyurl.com/36xbkemz> (last visited 30 September 2024).

<sup>83</sup> Enel's '2023 Sustainability Report' n 79 above, 15.

<sup>84</sup> Enel's '2022 Sustainability Report', available at <https://tinyurl.com/5n6vm5rw> (last visited 30 September 2024), 168.

<sup>85</sup> Enel's '2023 Sustainability Report' n 79 above, 72.

<sup>86</sup> *ibid*

<sup>87</sup> *ibid* 95.

Enel's sustainability performance in terms of environmental, social and governance (ESG) principles is subject to the monitoring of ESG analysts and rating agencies.<sup>88</sup> In 2023, Enel maintained a top positioning in the main ESG indices and rankings.<sup>89</sup>

Enel plays an active role in various energy-related and multi-stakeholder organizations focused on the promotion of energy transition and fight against climate change, both nationally and globally.<sup>90</sup>

Since 2004, Enel has been committed to the United Nations Global Compact, adhering to its ten founding principles relating to human rights, labor standards, environmental protection, and the fight against corruption.<sup>91</sup> In 2011, Enel joined the Global Compact LEAD, a small group of leading companies in the field of sustainability at a global level. Enel's position in the LEAD group was confirmed in 2018.

## **2. Harmonizing the Creation of Profit for Shareholders and Stakeholders' Interests**

Enel's sustainable business model does not represent an act of pure philanthropy, but rather a strategy to optimally achieve shareholder value maximization in the long term.

Since 2011, drawing inspiration from the teachings of Porter and Kramer,<sup>92</sup> Enel has been committed to integrating shared value creation in its business activity.<sup>93</sup> The nuts and bolts of this strategy are represented by the idea that

<sup>88</sup> ESG ratings plays a strategic role to support investors in assessing sustainable business models and identifying risks and opportunities linked to sustainability in their investment portfolio.

<sup>89</sup> By way of example, see (1) S&P ESG Scores, rating 84/100 (average score: 35); (2) MSCI, rating: AAA (average score: BBB); (3) FTSE Russel ESG Rating, rating: 4,9/5 (average score: 2,7); (4) Refinitiv ESG Rating, score 91/100; (5) Bloomberg ESG, rating 80/100. For a more detailed list see Enel's '2023 Sustainability Report' n 79 above, 25. Enel was also the first company to fully align its company reporting to the Net-Zero Company CA100+ Benchmark and was included in the Just Transition Assessment of the World Benchmarking Alliance. See Enel's '2022 Sustainability Report' n 84 above, 43. Moreover, for transparency purposes, Enel draws up its 'Sustainability Report' in line with the 'Consolidated set of GRI Standards' on reporting defined by the Global Reporting Initiative, available at <https://tinyurl.com/5d8d8b98> (last visited 30 September 2024), taking into account also the supplement dedicated to the Electric Utilities Disclosure sector issued in 2013 by the GRI, available at <https://tinyurl.com/43dwpxt9> (last visited 30 September 2024). See Enel's '2023 Sustainability Report' n 79 above, 366.

<sup>90</sup> eg, (1) United Nations Global Compact (UNGC); (2) Sustainable Energy for All (SEforALL); (3) CSR Europe; (4) World Business Council for Sustainable Development (WBCSD); (5) Global Reporting Initiative (GRI); (6) IFRS Sustainability Alliance; ; (7) Global Investors for Sustainable Development (GISD) Alliance;; (8) Science Based Target Network (SBTN) for Nature; (9) Taskforce on Nature-related Financial Disclosures (TNFD) Forum;; (10) First Movers Coalition; (11) Sustainable Stock Exchanges Initiative; (12) World Climate Foundation. See Enel's '2023 Sustainability Report' n 79 above, 11-13.

<sup>91</sup> The list of the ten principles is available at <https://tinyurl.com/4s2wzuh2> (last visited 30 September 2024).

<sup>92</sup> M. Porter and M. Kramer, n 10 above.

<sup>93</sup> M. Kramer, n 12 above.

long-term success of a company depends on creating value for both shareholders and the communities interested by its activity. Accordingly, a company is successful when its stakeholders are also prospering.<sup>94</sup>

Enel's strategy to create shared value with local communities consists of several phases. First, it is necessary to understand the local context, assessing potential positive and negative impacts of Enel activities on local communities. This analysis aims at identifying common needs between Enel and its stakeholders. Following steps require the definition and execution of a business plan that maximizes the potential positive impacts and minimizes the potential negative impacts. Finally, the time comes to monitor, evaluate, and report on the results of the adopted strategy both on shareholder interests and on the creation of value for stakeholders.<sup>95</sup>

According to Enel '2023 Sustainability Report', in 2023 Enel's strategy aimed at creating value for local communities involved approximately 3,9 million beneficiaries. These projects involve infrastructure development, education and vocational training programs, support to cultural and economic activities, access to energy, rural and suburban electrification, and promotion of social inclusion for the most vulnerable groups of the population.<sup>96</sup>

Enel adopted the London Benchmarking Group (LBG) method to determine its contribution toward the development of the communities where it operates.

<sup>94</sup> *ibid*

<sup>95</sup> Enel's '2023 Sustainability Report' n 79 above, 222.

<sup>95</sup> Furthermore, to ensure the application of the shared value creation strategy in all the companies of the Enel Group, Enel has established dedicated functions in all of its global business lines.

<sup>96</sup> Enel 2023's 'Sustainability Report' n 79 above, 220-221. A first example is the *Hortas em Rede* project, managed by *Enel Distribuição São Paulo*, with the support of the NGO *Cidades Sem Fome*. The underlying idea, strongly inspired by the concept of circular economy, is to improve the quality of the areas under electricity transmission lines, through the creation and development of urban gardens. The project is intended for São Paulo's peripheral areas with a high population concentration and aims at demonstrating how a sustainable infrastructure can be integrated into the territory by responding to the needs of communities and contributing to the enhancement of the landscape. From its inception in 2018 until March 2022, *Hortas em Rede* has generated 1.5 hectares of urban gardens, more than 50 tons of food grown and approximately \$1.1 million in income generated. See on Enel's '2022 Sustainability Report' n 84 above, 259. Another typical case is the shared value creation that accompanies the construction and operation of power plants for the generation of electricity from renewable sources, like the Rattlesnake Creek Wind Farm in Nebraska, which brings a wide amount of wind energy into Nebraska's electric grid and gives a boost to local investments and job opportunities. The construction of the power plant required an investment of over 430 million dollars and, once completely operational, will generate about 1300 GWh of sustainable energy per year. This amount of energy will help to avoid the emission of over 940,000 tons of CO<sub>2</sub> each year. Furthermore, Enel has cooperated with associations that protect wildlife to minimize the threat to the local environment. Rattlesnake Creek project also involved the building of almost 50 kilometers of new roads and the creation of about 300 new jobs during the plant's construction. Enel contributed significantly to the Rural Workforce Housing Investment Fund in the city of Wakefield, used by local community to remodel or build new homes to attract and maintain a rural workforce. Moreover, Enel has sponsored scholarships in science, technology and renewable energy local students. More details on Rattlesnake Creek plant are available at <https://tinyurl.com/2p8j22em> (last visited 30 September 2024).

In 2023, the registered contribution was about 118 million euro.<sup>97</sup>

### 3. Compliance with Business Judgement Rule

As illustrated in previous paragraph 2, recent legislative measures tend towards a partial rethinking of the concept of corporate purpose, allowing company directors to adopt a business strategy that takes into consideration also the interests of stakeholders, at least to the extent that this is beneficial to the achievement of shareholder value maximization.

Enel's sustainable business model seems to fall within this parameter, as the creation of value for stakeholders it envisages does not represent a mere pauperization of shareholders' income, but rather an investment for creating profit in the long run for shareholders (and consequently one of the possible strategies suitable for achieving shareholders' interests).<sup>98</sup> Thus, Enel's administrative body, protected by the business judgment rule, could legitimately chose this strategy to achieve the maximization of shareholders' profit, provided of course that directors do not act manifestly for selfish purposes, in an uninformed or negligent manner, or in violation of specific provisions established by applicable law.<sup>99</sup>

The business strategies aimed at generating profit are inherently indeterminate and, above all, characterized by structural uncertainty. It is precisely due to this framework of uncertainty that the business judgment rule finds its very reason for being. The rationale that lies beneath the business judgment rule is precisely to exempt from liability directors who, despite failure to achieve the objectives entrusted to them by the shareholders, nevertheless acted free from malice and manifest irrationality.<sup>100</sup> Through the business judgment rule, the legal system intends to set company directors free to assume reasonable economic risks for the good of the company, as long as the decision-making process meets certain standards of caution and preventive information.

In the Italian legal system, the business judgement rule has been recently

<sup>97</sup> For an overview of Enel's approach to measure the value of its commitment for local communities Enel's '2023 Sustainability Report' n 79 above, 223-224.

<sup>98</sup> See the combined provisions of the previous paras 1 and 4.2.

<sup>99</sup> See the arguments outlined in previous para 3. The business judgment rule originated in common law jurisdictions, and then became one of the key elements for assessing the liability of directors in many corporate law systems worldwide. Even in legal systems in which this principle is not explicitly codified in law, judges tend to implement it through case law, avoiding substituting their own management assessments for those of administrators. For an overview, see C. Gerner-Beuerle, 'The Duty of Care and the Business Judgement Rule: a Case Study in Legal Transplants and Local Narratives', in A. Afsharipour and M. Gelter eds, *Comparative corporate governance* (Cheltenham: Edward Elgar Publishing, 2021), 220-221, arguing, that 'the business judgment rule gives legal expression to the idea that questions of business judgment are best left to the honest decision of the directors' since 'Courts are not well placed to substitute their own discretion for that of the directors, since they typically lack the necessary expertise and act with the benefit of hindsight'. See also D. Kershaw, 'The Foundations of Anglo-American Corporate Fiduciary Law' *LSE Law, Society and Economy Working Papers 15/2018*, 1-20 (2018).

<sup>100</sup> See E. Barcellona, 'La sustainable corporate governance' n 63 above, 46.

reaffirmed by the Italian Supreme Court, ruling that company directors' management choices are unquestionable on their merits by judges, since such choices are often made in conditions of market uncertainty. What the judges can instead evaluate is whether the decision-making process was implemented correctly and in an informed manner, taking into account the preventive adoption of the necessary precautions, as well as the diligence shown in appreciating in advance the relevant risks.<sup>101</sup> If those standards are met, the management choices of the company directors shall not entail a source of liability, but possibly just a cause for the director's dismissal.<sup>102</sup>

Given the foregoing, and retracing the arguments referred to above in para 3, it seems that the administrative body of Enel, acting under the business judgment rule, could well choose to adopt an ethical and sustainable strategy of shareholder value maximization without risking liability claims from shareholders.<sup>103</sup> Therefore, the adoption of a credible and all-round sustainable business approach, which aims at enhancing the interests of both the company and the communities interested by the company's activity, would not only have sound grounds for being economically convenient,<sup>104</sup> but would also find legal legitimization.

## V. Conclusive Thoughts

Faced with the crisis of capitalism, economic scholars have attempted to theorize a definition of corporate purpose that would allow company directors to pursue not only the interests of shareholder, but also the creation of value for stakeholders. However, it is worth noting that this is not a purely academic orientation. It is the global community itself, where large companies necessarily operate, that has repeatedly expressed its support for the adoption of sustainable and ethical business models.<sup>105</sup> Furthermore, the economic convenience stemming

<sup>101</sup> Corte di Cassazione 19 January 2023 no 1678, available at [www.dejure.it](http://www.dejure.it); Corte di Cassazione 22 June 2020 no 12108, available at [www.dejure.it](http://www.dejure.it); Corte d'Appello di Torino 8 September 2022 no 965, available at [www.dejure.it](http://www.dejure.it).

<sup>102</sup> Tribunale di Roma 16 October 2019 no 19881, available at [www.dejure.it](http://www.dejure.it). In general, each jurisdiction declines the business judgment rule according to its own rules, but some common traits may nevertheless be found, such as the absence of conflicts of interest, the duty to act on a well-informed basis and the abstract suitability of decisions adopted to serve the best interests of the company. See G.B. Portale, n 23 above, 954; C. Gerner-Beuerle, n 99 above, 220.

<sup>103</sup> Company directors are expected to pursue profit. With respect to this objective, they enjoy the discretion associated with the business judgment rule. Directors can, of course, consider the interests of stakeholders, but only to the extent that this is functional to maximizing the benefits for the company. In pursuing profit, directors obviously also maintain the legal duty to respect all mandatory rules established to protect stakeholders. With respect to this duty, there is in fact no discretion, nor any relevance of the business judgment rule. See E. Barcellona, 'La sustainable corporate governance' n 63 above, 50.

<sup>104</sup> See the economic theories outlined under previous para 1.

<sup>105</sup> Among others, see the study carried out on 17 countries, including Italy, by Simon Kucher& Partners, 'The Global Sustainability Study 2021' available at <https://tinyurl.com/3whe3tn3> (last

from the attention paid by companies to sustainability issues is also highlighted by Blackrock's 2022 letter to the CEOs: 'we focus on sustainability not because we're environmentalists, but because we are capitalists and fiduciaries to our clients'.<sup>106</sup> Companies that remained indifferent to the consequences of the increasingly widespread interest in sustainability issues coming both from legislators and the civil society would face a serious entrepreneurial risk in the long term.<sup>107</sup>

Many modern legal systems do not prohibit the implementation of more ethical and environmentally friendly business strategies. Indeed, in some cases, they even encourage them. As a matter of fact, some jurisdiction, aware of the growing importance that sustainability is assuming in contemporary economies, have started to reshape the concept of corporate purpose, in order to allow company directors to take into account also the needs of stakeholders, as long as this is in line with the goal of increasing the company's profits.

This trend must not lead to the belief that company directors are required to do more than what is required by applicable law while evaluating the consequences of their business decisions on stakeholders. Otherwise, the legal system would end up contradicting itself, as argued above in para 3. The task of protecting human rights and the environment belongs to the democratically elected institutions representing the relevant organized social communities and cannot be delegated to companies.<sup>108</sup> It would therefore be desirable to have political interventions resulting as multilateral and coordinated as possible at a global level, ensuring that polluting and violating human rights becomes, even if not totally forbidden, at least economically inconvenient.

Nonetheless, without prejudice to the foregoing, it would still be advisable

visited 30 September 2024), which shows that over 34% of the population is willing to pay more for a sustainable product or service. See also the research carried out in 2022 by Deloitte in the United Kingdom, available at <https://tinyurl.com/uwmzevb2> (last visited 30 September 2024), confirms the considerable attention paid by consumers to issues of sustainability, so much as to guide their purchasing choices. See also M. Campobasso, 'Doveri degli amministratori e successo sostenibile', speech held during the conference in Venice 'Convegno internazionale' n 66 above.

<sup>106</sup> Larry Fink's 2022 letter to CEOs, 'The power of capitalism', in <https://tinyurl.com/3kvfp377> (last visited 30 September 2024).

<sup>107</sup> C. Brescia Morra, n 38 above, 97-98. In addition, stakeholder protection in corporate governance not only can be a strategy to give a boost to long-term value maximization, but also as an outcome of the compliance with applicable legal rules and ethical standards. In this sense, see D. Busch et al, n 4 above, 139. See also P. Grieco 'Saluto introduttivo' speech held during the conference in Venice 'Convegno internazionale' n 66 above, arguing that sound governance is an essential asset for the development of businesses and the market, as it also allows companies to increase the resilience to the occurrence of extraordinary events. However, as argued also by Nobel laureates George Akerlof and Robert Shiller, markets have no moral and a deceptive commercial behavior may often result profitable, at least in the short term. Nowadays, creating profit by adopting an ethical and sustainable business model remains a challenging and innovative choice, despite the considerable amount of authoritative studies that argue in favor the convenience and feasibility of such strategy. For this reason, a boost by regulatory support appears as necessary for a widespread implementation of sustainable corporate governance. This opinion is shared, among others, by D. Busch et al, n 4 above, 137-150.

<sup>108</sup> U. Tombari, 'Corporate purpose' n 1 above, 3; M. Libertini, n 1 above, 77-78.

for companies to have the courage to play their part when the essential cornerstones of society are in crisis, at least because in the long-term such crisis will end up affecting their very ability to generate profits.<sup>109</sup> Empirical analyses show that at least part of world industry has not remained indifferent to the recent trends towards the reshaping of corporate purpose. The Enel Use Case provides a practical example of a business strategy aimed at creating shared value for both shareholders and stakeholders, taking advantage of the new earning opportunities that such a strategy may entail.

However, it is appropriate to keep in mind that the adoption of a sustainable business model does not prevent companies from being primarily profit-making entities: companies would not undertake a sustainable business strategy out of pure altruism, but to the extent they find it an appropriate mean to reach the maximization of profitability. Therefore, to make this system work in practice, all the actors involved would be required to play their part. Not only it would be necessary for companies to implement a sustainable business strategy, but also for stakeholders to reward such companies by means of market share, employee loyalty and cash flows. Acting this way, stakeholders would make failing to respect human rights and the environment less profitable than not doing so.<sup>110</sup> Such a course of actions could make it possible to overcome the conflict between shareholders and stakeholders and move towards a constructive and beneficial dialogue for both parties.

In conclusion, and to give an answer to the questions posed in the abstract, this article has argued that the adoption of a sustainable governance system, which takes into due consideration both long-term shareholder value maximization and stakeholders interests: (i) is suitable, from a theoretical point of view, to generate wealth both for the company and the local communities concerned by the company's activity; (ii) finds legitimacy in the Italian and EU regulatory framework; and (iii) proves to have ground for being feasible and profitable from an empirical standpoint. Those who have the foresight to apply this new business strategies today might be the first to reap its benefits in the next future.

<sup>109</sup> U. Tombari, 'Corporate purpose' n 1 above, 3; M. Libertini, n 1 above, 77-78. See also U. Tombari, 'Il futuro della s.p.a.' speech held during the conference in Venice 'Convegno internazionale' n 66 above, where the author maintains that a company, if it does not take the interests of its stakeholders into consideration, will have difficulty achieving growth in the medium to long term.

<sup>110</sup> On this argument, see the work of M. Jensen on enlightened shareholder value theory, referred to above in para 1.