

A Bottom-Up Financial Strategy for a Sustainable Society

Adele Emilia Caterini*

Abstract

This paper examines the Social Impact Bond as a form of Impact Investment to finance policies of ecological transition. Due to the lack of sufficient traditional financial resources, the involvement of the private sector in the pursuit of environmental, social and economic objectives could actively contribute to sustainable development. This study seeks to analyse these bottom-up interventions which, albeit with limited and long-term remuneration, fight against climate change through the use of renewable sources. Thus, besides favouring carbon neutrality, these interventions promote the overcoming of the current economic crisis. However, the measures presuppose a concrete assessment of their merit according to the criteria of reasonableness, proportionality and sustainability, as well as an analysis of how adequate they are with respect to the positive results pursued.

I. Introduction

The climate emergency is highly correlated with the economic crisis.¹ The connection between the two derives from the ‘financialisation of the economy’, since the ‘fundamental value’ of financial products is not strictly linked to the market price. The sudden change in the prices of fossil fuels, such as oil, do not depend on the deregulation of real supply or demand, but on the relative operations on the derivative markets.² European monetary policy usually responds to increasing relative prices, and therefore inflation, by raising interest rates. These measures cause a contraction in demand to the detriment of economic growth. A suitable solution

* PhD Student in *Civil Law and Constitutional Legality*, University of Camerino - PON ‘Research and Innovation’ 2014-2020 ‘Doctorates on green topics’, CUP J19J21018790001 (XXXVII cycle, academic year 2021-2022). The essay is a Deliverable (D.3.2) of the research project UNICAM FAR ESCOP4Green – ‘Enhancing Sustainable Consumption and Production for the Green transition’ funded by the European Union - NextGenerationEU, MUR - Promotion and Development Fund - D.M. 737/2021.

¹ J. Tirole, *Économie du Bien Commun* (Paris: Presses Universitaires de France, 2016), 293, where the link between the economy and ecological transition is explained: ‘L’impératif écologique ne peut être respecté que si l’impératif économique l’est. (...) Les mécanismes de prix (taxe ou marché) ne sont donc pas les ennemis d’une politique écologique, mais bien au contraire la condition nécessaire pour qu’une politique écologique de grande envergure puisse se réaliser’.

² G. Giraud, *Transizione ecologica. La finanza a servizio della nuova frontiera dell’economia* (Verona: EMI, 2015), 76-78. According to the author, ‘The “engine” of inflation in our globalized economy is not, in fact, the price-wage circuit, but the price of energy’, 26-27.

to combat the climate emergency, mainly caused by the use of fossil energy sources,³ and to promote economic development, is to invest in ecological transition. Recourse to credit constitutes a means for the pursuit of general interests, as long as it is sustainable. The increase in competitiveness, for the benefit of future generations, must be balanced with solidarity.

A thorny issue concerns public and private finances and their relative inadequacy to fully bear the cost of eco-friendly measures. The instability of the two sectors is connected to the strong interrelation between the two that intervene to cover one another. The European Central Bank and national banks have bought public debt securities where States in exchange rescue bankrupt credit institutions.⁴ In addition, there is a strong credit squeeze due to the banks' 'distrust of savers' solvency' following the 2006 subprime mortgage crisis.

From the aforementioned situations, the need arises for the involvement of the private sector to achieve *ultra partes* interests. The principle of horizontal subsidiarity⁵ establishes the 'autonomous initiative of citizens' in the pursuit of general interests, implementing the value-person. This concept allows their widespread participation in the legal system, and also through negotiation autonomy. In addition, Art 43 of the Italian Constitution establishes the possibility of reserving or transferring to 'communities of users' the provision of essential public services, energy sources or monopoly situations for purposes of general utility.

The 'financialisation of welfare'⁶ expresses the engagement of financial operators in the realisation of social policies.⁷ The use of private savings which have grown as a result of the recent pandemic is an indispensable resource for the implementation of ecological transition.

Overcoming the public-private dichotomy⁸ allows for the coexistence of the

³ *ibid* 102: 'Climate warming is due to greenhouse gas emissions, about 60% due to CO₂ resulting from the combustion of fossil energy sources (coal, oil and gas)'.

⁴ For an in-depth analysis, see G. Giraud, n 2 above, 152-157.

⁵ '(...) a clear demarcation between negotiating autonomy and initiative pursuant to Art 118 cost. cannot be supported; on the contrary, it is the same negotiating autonomy that finds its foundation in subsidiarity. Art 118 cost. (...) is no other than the explicit formal recognition of autonomy as an initiative, an act of impulse, which finds in itself both the capacity for self-regulation and that of regulation, with external relevance. (...) The separateness or even the contrast between Art 1322 of the Italian Civil Code and Art 118 Cost does not exist'. P. Perlingieri, 'La sussidiarietà nel diritto privato' *Rassegna di diritto civile*, II, 687 (2016).

⁶ M. Francesca, 'Inclusione finanziaria e modelli discriminatori. Note introduttive sugli epigoni della discriminazione razziale', in Id and C. Mignone eds, *Finanza di impatto sociale. Strumenti, interessi, scenari attuativi* (Napoli: Edizioni Scientifiche Italiane, 2020).

⁷ In accordance with C. Mignone, 'Terzo settore e strumenti finanziari ad impatto sociale' *Giustiziacivile.com*, II, 9 (2014), the new models of 'organized solidarity' lead to a vision of forms of funding that are no longer merely patrimonial but are based on 'mixed performance', that is, the combination of social benefits and financial profits.

⁸ According to J. Tirole, n 1 above, 63, the economy, being at the service of the common good, contributes to the pursuit of the general interest and collective well-being. With reference to the climate issue, the author argues that the suggestions of economists, such as taxation on emissions

pursuit of social objectives and the profit-making intent of investors. A systematic and axiological reading⁹ entails, in accordance with personalist and solidarity principles, the functionalisation of the market to the value of the person¹⁰ and the realisation of the ‘vital minimum’.¹¹ The latter, in fact, is guaranteed through horizontal subsidiarity and, thus, the welfare society contract.¹²

II. Social Finance: Bottom-up Intervention for Ecological Transition

An example of the forms of investment that combine profit-making and social purposes is Sustainable Responsible Investments (SRIs), an investment approach that takes into account positive social or environmental effects as a complementary aim with respect to the main business goal. The investment assessment and decision are, therefore, based on the so-called ESG criteria.¹³ While Responsible Investment aims to avoid the harm, excluding investments that could create negative social

and the provision of negotiable emission rights, have considerably reduced the level of ecological policies and improved environmental conditions.

⁹ Relating to the need for a systematic and axiological interpretation, ‘the principle of legality implies compliance with individual precepts, but coordinated with a set of normative propositions and harmonised with the fundamental principles of primary importance (...), through the comparison and contextual knowledge of the problem to be regulated – a fact historically determined – in order to identify the most appropriate legislation for the interests and values it bears. The interpretation, therefore, is by definition logical-systematic (...) and teleological-axiological, that is, aimed at the implementation of the values characterising the legal system’. P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti* (Napoli: Edizioni Scientifiche Italiane, 4th ed, 2020), II, 334-335.

¹⁰ ‘The market is only an idea serving the primary objective of protecting the person and his rights, not the result to be achieved’. P. Perlingieri, ‘Relazione conclusiva’, in Id and L. Ruggeri eds, *Diritto privato comunitario*, (Napoli: Edizioni Scientifiche Italiane, 2009), II, 401.

¹¹ ‘The “vital minimum” is the “essential content” of the inviolable rights of man, it is the *res cogitans* of human dignity as the nucleus of the *status personae*, where the *res extensa* is the *status civitatis*’. E. Caterini, ‘Il “minimo vitale”, lo stato di necessità e il contrasto dell’esclusione sociale’ *Rassegna di diritto civile*, IV, 1129, 1141 (2016).

¹² ‘There is the triple functional sequence of the contract. One linked to the economic balance between performances (between peers or spontaneous competitiveness), a second one governed by an induced economic balance (interclass or guided competitiveness), the third one based on sine-allagmatic satisfactory performance. The latter does not present competitive reasons while emphasising sustainable social justice. This does not cancel itself out in the first two contractual functions, although it can cooperate to improve the efficiency of the market. (...) These contracts have their roots in the ‘social community’ rather than in the market as a legal construct. The contracts of the social community still have a patrimonial content. They can be of exchange but they are not compensatory’. E. Caterini, *Sostenibilità e ordinamento civile. Per una riproposizione della questione sociale* (Napoli: Edizioni Scientifiche Italiane, 2018), 100-103.

¹³ ‘They take into account a company’s performance with respect to its effects on nature, its relationships with employees, clients and society, and the transparency of its governance’. European Parliament, ‘Social Impact Investment, Best Practices and Recommendations for the Next Generation’, 2020, 16, available at <https://tinyurl.com/3efv5mx2> (last visited 20 September 2023). In addition to the intrinsic convenience of the economic operation, environmental and social factors guide the choices of investors. Receiving a positive opinion from the market, they also become indexes of return on investment.

value, Sustainable Investment tries to produce social benefits in addition to economic ones by prioritising investments that meet environmental, social and governance sustainability standards.¹⁴

In contrast, (Social) Impact Investing¹⁵ represents a proactive method¹⁶ that intends to achieve, in addition to a financial return, a measurable and positive impact¹⁷ on the environment or society. Following the new and exacerbated social challenges of the recent Covid-19 pandemic and the subsequent economic crisis, as well as the current war conflicts, '(...) Social Impact Investment (SII) has emerged as one of the most effective potential strategies for solving the key societal challenges of our time'.¹⁸

Although subsidiary welfare measures have also been established at the national level,¹⁹ it is necessary to analyse the Impact Investing negotiation schemes

¹⁴ *ibid* 16.

¹⁵ This expression, coined in 2007 during a meeting organised by the Rockefeller Foundation, describes, according to the Global Impact Investing Network (GIIN), a set of 'investments made with the intention to generate positive, measurable social and environmental impact alongside a financial return'.

¹⁶ The 'proactive' intentionality constitutes the characterising element of impact investing with respect to the SRI models. M. Falkowski and P. Wisniewski, 'Impact Investment as New Investment Class' *Review of Business and Economics Studies*, 78-79 (2013).

¹⁷ It has been considered 'a silent revolution that is spreading in the capital market, which evolves from the two-dimensional represented from risk and revenue, to a three-dimensional identity, induced by the introduction of a third dimension: the impact' A. Casadei, 'La rivoluzione silenziosa del social impact investing' *Amministrazione e finanza*, III, 71-72 (2016).

¹⁸ European Parliament, 'Social Impact Investment', 9, available at <https://tinyurl.com/3efv5mx2> (last visited 20 September 2023).

¹⁹ Based on their practical dissemination, in Italy an initial regulation of these forms of supplementary and subsidiary welfare with respect to public intervention can be found in Title IX of decreto legislativo 3 July 2017 no 117, relating to the solidarity bonds of third sector entities and other forms of social finance, the intent of which is to favour the financing of social utility activities carried out by Third Sector entities (Art 77). These solidarity securities consist of bonds and other debt securities, as well as certificates of deposit, issued by credit institutions to raise capital restricted to finance the activities of general interest carried out by third sector entities. The peculiarity consists in the fact that placement commissions are not applied. The only form of remuneration is the interest related to the use of the capital raised by non-profit entities. Since the applicable interest rate is not set by the legislator, the bank can also grant the loan at an interest rate lower than the yield of the securities. In this case, it will be responsible for paying the remaining part to the subscribers, thus renouncing a part of the profit. C. Mignone, 'Meritevolezza dell'iniziativa, monetizzazione del benessere e nuovi modelli di welfare sussidiario' *Rassegna di diritto civile*, I, 115, 126-127 (2017). In addition, the Provvedimento 8 November 2016 no 584 of Banca d'Italia, laying down provisions for the collection of savings from entities other than banks, disciplines in Section IX Social lending or lending based crowdfunding. It constitutes a tool through which a plurality of subjects can request repayable funds for personal use or to finance a project of a plurality of potential financiers, through online platforms. Art 100-ter, decreto legislativo 24 February 1998 no 58 (TUF), as replaced by Art 4, lett a), decreto legislativo 3 August 2017 no 129, includes social enterprises among the subjects entitled to raise risk capital through the subscription of financial instruments based on the proposed economic initiative published on authorised portals. Again, Art 10, legge 6 June 2016 no 106 of the Third Sector reform establishes the Italy Social Foundation with the aim of supporting, through financial resources and management skills, the implementation and development of innovative interventions by non-profit organisations. Having a subsidiary function

adopted in practice. It has been authoritatively affirmed, ‘social impact finance is a phenomenon that comes from below’.²⁰

1. Applicative Experiences of Impact Investing: The Social Impact Bond

Among the Social Impact Finance tools,²¹ the Social Impact Bond (SIB) stands

with respect to public intervention, it is characterised by the prevalent use of resources from private entities. The raising of capital can also take place through investment instruments and methods, directly or in partnership with third parties, welfare models supplementary to those guaranteed by public measures and other social finance instruments (Art 10, Para 2, letter b), legge no 106/2016). Moreover, forms of involvement of non-profit entities are envisaged through co-programming tools that relate to the needs to be met, the interventions necessary for this purpose, the methods of implementation of the same and the resources available (Art 55, Para 2, decreto legislativo 3 July 2017 no 117), and the co-design of specific service or intervention projects (Art 55, Para 3, decreto legislativo no 117/2017).

²⁰ C. Mignone, ‘Meritevolezza dell’iniziativa’ n 19 above, 115, 119.

²¹ Debt-for-nature swaps (DNS) are further ‘low profit’ (C. Mignone, ‘Finanza alternativa e innovazione sociale: prolegomeni ad una teoria dell’«impact investing»’, in *Benessere e regole dei rapporti civili. Lo sviluppo oltre la crisi, Atti del 9° Convegno Nazionale in ricordo di Giovanni Gabrielli, 8-9-10 Maggio 2014* (Napoli: Edizioni Scientifiche Italiane, 2015), 368, models that combine social benefits and financial profits. These so-called Environmental Agreements provide for the purchase of debt of developing countries by NGOs (so-called private DNS) or States (so-called public DNS) with subsequent cancellation or reduction of the same. For an in-depth analysis, M. Meli, ‘Ambiente e mercati finanziari: i Debt-for-Nature Swaps’ *Osservatorio del diritto civile e commerciale*, I, 79-93 (2016). These are, unlike Social Impact Bonds, solutions of a centralized nature. The current public and private financial situation, however, requires the promotion of initiatives of private autonomy for the pursuit of general interests, such as environmental ones.

Social crowd-funding and European social entrepreneurship funds (EuSEF) are also financial instruments that constitute forms of integration between market and environment. The first consists of the risk capital fundraising through an online portal for the financing of innovative start-ups, also aimed at ecological purposes. The imbalance between risk and financial return of such policies is mitigated through a risk reduction with the involvement of non-professional investors, generally not inclined to default risk (C. Mignone, *ibid* 354). European social entrepreneurship funds governed by European Parliament and Council Regulation (EU) 2013/346 of 17 April 2013, instead, establish a diversification of risk as the manager has the obligation to invest 70% of the subscribed capital in ‘qualifying portfolio undertaking’. The latter is defined as such that, among the requirements, ‘has the achievement of measurable, positive social impacts as its primary objective in accordance with its Arts of association, statutes or any other rules or instruments of incorporation establishing the business’ (Art 3, Para 1, letter d (ii), European Parliament and Council Regulation (EU) 2013/346). A measurable and positive social impact includes activities concerning environmental protection with a societal impact, such as anti-pollution, recycling and renewable energy (recital 14, European Parliament and Council Regulation (EU) 2013/346). However, it is not excluded the use of 30 % of its aggregate capital contributions and uncalled committed capital for speculative purposes (Art 5, Para 1, European Parliament and Council Regulation (EU) 2013/346). As it has been authoritatively argued, while in social crowdfunding the social value of the financed activity is the justifying reason for a special regulation, in EuSEF funds and Social Impact Bonds the interest of the investor changes as it affects not only the financial result but also the achievement of measurable positive social impacts (C. Mignone, *ibid* 360).

The green bonds are thematic bonds that qualify as debt capital investments issued and underwritten because of an environmental benefit. Relating to them ‘there is, therefore, a functional interpenetration of the realization of a common benefit in the contractual cause of the financial

out. The first one was experimented with in 2010 by the UK Minister of Justice to reduce the recidivism rate of three thousand short-term inmates of Peterborough Prison and, consequently, the daily public spending for each prisoner.²² The main agreement was stipulated between the aforementioned Minister and a vehicle company, invested in and constituted by the intermediary Social Finance Ltd. It provides for the fulfilment of the Minister's obligation to remunerate investors in the event of a predetermined reduction in the recidivism rate among the beneficiaries of the programme.²³

This form of public-private partnership is characterised by the raising of capital from private investors for the implementation of social policy programmes.²⁴

instrument, so that the cause of the contract assumes in concrete an original configuration, which (...) imposes its subjection, in its functional complexity, to checks of lawfulness and merit of the pursued interests' (D. Lenzi, 'La finanza d'impatto e i green e social bonds. Fattispecie e disciplina tra norme speciali e principi generali' *Banca Impresa Società*, I, 124 (2021)). In this sense, a further development of the market for high quality green bonds is enhanced at European level by the Proposal for a Regulation of European Parliament and Council (EU) 2021/0191 of 6 July 2021 on European green bonds. In addition, the recent Proposal for a Regulation of European Parliament and Council (EU) 2023/0077 of 14 March 2023 to improve the Union's electricity market design, also aims to boost renewable energy investment partly by improving the markets for long term contracts. Among them, two-way contracts for difference are direct price support schemes that not only give renewable energy suppliers reliable revenues, limiting their financial risk and greatly reducing their cost of capital, but also provide consumers with stable prices. They, in fact, with an upward limitation of the market revenues, establishes that the revenues are passed on to all final electricity customers, including households, SMEs and industrial consumers, based on their consumption.

²² A. Nicholls and E. Tomkinson, 'The Peterborough Pilot Social Impact Bond', in A. Nicholls, R. Paton and J. Emerson eds, *Social Finance* (Oxford: Oxford Academic, 2015), 335-380.

²³ The pilot project, lasting five years, provided for a minimum remuneration of 2.5% per year in the event of a reduction in the recidivism rate of 10% for each of the three groups into which the beneficiaries were divided or a reduction in the recidivism of 7.5% on average with respect to the total number of beneficiaries. A better result would have resulted in higher returns with a cap equal to 13% while a lower result would have resulted in the loss of the capital invested. In 2017, the intermediary announced the success of this project with a reduction in recidivism equal to 9% at a collective level with a consequent return to the seventeen investors of the capital and an additional 3% per annum for the investment period.

²⁴ The main figures of SIB are: a public authority that, on the basis of issues of general interest, identifies a social result to be pursued, the programme to be implemented in agreement with the service provider and the remuneration of the investment deriving from the hypothetical positive outcome of the programme; private investors who provide the necessary financing, generally through phased payments established to achieve interim results; a specialised intermediary acting directly or through a vehicle company (special purpose vehicle set up to manage this contract specifically); the service provider, usually a third sector organisation, responsible for rendering the service and for its quality, which is remunerated, to compensate for the costs incurred, by the intermediary with the capital of the investors, generally regardless of the achievement of the predetermined objectives; a neutral evaluator, a third and independent body whose task is to measure the outcomes achieved with the relative social impact and to determine the consequent return of investors. Additional figures may intervene, such as an advisor as technical support to public figures; the guarantors of the investment, parties to a surety agreement with the intermediary, and investors who ensure to the latter the return of at least part of the amount; the managers of the guarantee instruments who reduce the risk borne by the investors by encouraging forms of coverage of part or all of the capital. C. Napolitano, 'Il social impact bond: uno strumento innovativo alla ricerca del suo diritto', in M. Francesca and C. Mignone eds, *Finanza di impatto sociale* n 6 above.

This constitutes a rather flexible tool that implies the participation of a multiplicity of actors. Its essential content is the agreement between the public body and an intermediary or vehicle company with which the former undertakes to pay the amount set for the achievement of the social purpose in terms of public spending savings.

The main characteristic of this negotiating scheme is the conditioning of the reimbursement in the invested sum and the payment of the related interests²⁵ on the pursuit of the pre-established social results, measurable *ex post* by a neutral evaluator (for this reason, called ‘outcomes-based contract’). Arguably, the term ‘bond’ does not express the nature of the security, but the correlation between profitability and the social results.²⁶ It follows that SIBs, rather than debt securities that attribute to the holder the repayment of the loaned capital and fixed interest (coupon) accrued within a certain period, are comparable to equity securities as the financial return depends on the achievement of specific social results.²⁷

According to this approach, investors aim to achieve a dividend defined as ‘mixed’, ie consisting of

‘identifying those social benefits that a prevention activity is able to generate, quantifying the economic aspect in terms of future spending savings and using a rate of these savings to remunerate the investor who has ‘bet’ on the success of a project’.²⁸

Therefore, the financial return depends on a variable, the social impact,²⁹

²⁵ Investments could target a range of returns from below the market rate to the market rate, depending on the investors’ strategic goals. In the first case, investors primarily aim to generate the social or environmental good, and are often willing to give up some financial return if necessary (so-called impact first investors). In the second case, however, they are typically commercial investors who seek subsectors that offer market-rate returns while achieving some social or environmental good (so-called financial first investors). For this distinction, see J. Freireich and K. Fulton, ‘Investing for Social & Environmental Impact. A Design for Catalyzing an Emerging Industry’, 2009, 33, available at <https://tinyurl.com/3znwruj8> (last visited 20 September 2023).

²⁶ A. Del Giudice, *I Social Impact Bond* (Milano: FrancoAngeli, 2015), 45.

²⁷ N. McHugh et al, ‘Social Impact Bonds: A Wolf in Sheep’s Clothing?’ 21 (3) *Journal of Poverty and Social Justice*, 247-257 (2013).

²⁸ A. Del Giudice, n 26 above, 12. The remuneration dependent on the achievement of the environmental or social impact in accordance with Art 2411, para 2, Italian Civil Code, is considered admissible, provided that it depends on objective parameters. It is therefore necessary to identify clear quantitative thresholds for the impact of which the specific remuneration arrangements will apply. (D. Lenzi, n 21 above, 139).

²⁹ The impacts are defined in the Glossary of Key Terms in Evaluation and Results Based Management published by the OECD-DAC in 2002, as the ‘[p]ositive and negative, primary and secondary long-term effects produced by a development intervention, directly or indirectly, intended or unintended’. The most widespread approaches are the counterfactual ones, based on quasi-experimental verification methods through which the achievement of the objectives pursued and the existence of a direct causal link between the programme and the impact achieved by comparison with a control group are measured. However, they are effective only in 5% of projects characterised by simplicity, stability of environmental conditions and brevity. The adoption of evaluation methods, so-called ‘case sensitive’ ones, based on the experience of the beneficiaries, could allow a modification of

correlated to factors that cannot be controlled by investors or by other actors in the operation. The achievement of the expected result, however, is partially influenced by the quantitative and qualitative adequacy of the service provider's performance.³⁰ Furthermore, the *ex ante* assessment of the probability of verification of the social impact is very difficult for the investor who does not have the power to control

the interventions for their greater effectiveness. F. Rucco, 'La valutazione di impatto sociale nei modelli payment by result: scelta degli indicatori e limiti dell'approccio controfattuale', in M. Francesca and C. Mignone eds, *Finanza di impatto sociale* n 6 above, 431-449.

In accordance with Art 7, para 3, legge 6 June 2016 no 106, this formula implies an impact assessment of both a quantitative and qualitative nature. While the first one provides investors with objective parameters of risk and profitability management, the second allows for the adequate and effective ascertainment of the resolution of the social problem and the effects produced. For these reasons, a programme similar to that of the London Homelessness SIB, which collects from private lenders the amount necessary for the provision of a social service with the aim of eradicating the problem of homelessness, whose indicator is represented by the number of homeless people with stable housing and of foreign ones repatriated, is undeserving as it distorts the interest underlying the function of the service. In this case, the Mungo Foundation, the service provider, participates in the formation of the capital of the vehicle company (Street Impact Ltd), bearing a significant share of the risk. It is, therefore, incentivised to achieve the numerical objectives set out in the main contract. C. Mignone, 'Finanziarizzazione del welfare e funzione degli atti di autonomia' *Rassegna di diritto civile*, II, 567, 592 (2021).

To assess the environmental or social impact pursued by SIB model, there are several standards aimed at measuring it, such as the GRI Standards developed by the Global Reporting Initiative. They enable an organization to report information about its most significant impacts on the economy, environment, and people, including impacts on their human rights, and how it manages these impacts. They are organized into three series: GRI Universal Standards which apply to all organizations; GRI Sector Standards applicable to specific sectors; and GRI Topic Standards each listing disclosures relevant to a particular topic. According to them '(a)ssessing the significance of the impacts involves quantitative and qualitative analysis. How significant an impact is will be specific to the organization and will be influenced by the sectors in which it operates, and its business relationships, among other factors. In some instances, this may need a subjective decision. The organization should consult with relevant stakeholders [...] and business relationships to assess the significance of its impacts. The organization should also consult relevant internal or external experts' (GRI 3: Material Topics 2021, available at <https://tinyurl.com/2s3dhsju>, 12, (last visited 20 September 2023)). According to these Standards, the significance of an actual positive impact is determined by the scale (beneficial impact assessment) and scope of the impact (impact spread) as well as the likelihood of the impact. The latter, relating to the chance of the impact happening, can be measured or determined qualitatively or quantitatively. It can be described using general terms (eg, very likely, likely) or mathematically using probability (eg, 10 in 100, 10%) or frequency over a given time period (eg, once every three years) (GRI 3: Material Topics 2021, available at <https://tinyurl.com/2s3dhsju>, 13 (last visited 20 September 2023)). There are also several techniques for measuring non-financial results including the Social Return On Investment (SROI), with regard to social impact. It consists of the measurement in monetary terms of the costs, benefits and any negative consequences of an activity, in addition to a report of the effects deriving from the program. For an in-depth analysis, J.J. Cordes, 'Using cost-benefit analysis and social return on investment to evaluate the impact of social enterprise: Promises, implementation, and limitations' *Evaluation and Program Planning*, 64, 98-104 (2017); R. Barone, 'Impact investing e ruolo della pubblica amministrazione: rischi e opportunità', in M. Francesca and C. Mignone eds, *Finanza di impatto sociale* n 6 above, 427, in which it has been underlined that '[t]his tool allows not only to evaluate and know the produced social impact, but it can be helpful to investors in order to make a comparison between different possibility of investment and to make their choice'.

³⁰ This is a variable 'never experienced before in finance'. See A. Del Giudice, n 26 above, 106.

the disbursement activity.³¹ Indeed, it is a high-risk operation that falls entirely on the investors.³²

For these reasons, a guarantee fund³³ was set up by Bloomberg Philanthropies in the Rikers Island model adopted in 2012 in New York to reduce the recidivism rate of young prisoners. It performs the task of limiting the risk of loss of the invested capital in the event of failure to achieve the social objective³⁴ or, in the reverse case, collects resources usable for new operations of the same type.³⁵

Another thorny aspect of this negotiating tool would be the risk of exploiting personal services for profit-making purposes.³⁶ This maximisation of the financial return with the potential degradation of the underlying public interest would

³¹ C. Mignone, 'Meritevolezza dell'iniziativa' n 19 above, 115, 123 (2017).

³² It has been stated that from the development of this new way of financing the non-profit organisation that includes 'support from an asset class structured with the aim of generating financial returns and achieving positive social impacts' comes the problem of the 'financial-social return gap. The social benefit is considerable, but the risk of losing the entire capital is not offset by a sufficient return to make the investment attractive'. C. Mignone, '“Impact Investing” in the European Legal System: An Italian Perspective on Investors' Protection and Regulatory Compliance' *Rivista di diritto bancario*, III, 303, 312 (2016).

³³ Similarly, the Municipality of Naples launched a programme for the disposal of waste through the construction of a composting plant in Scampia which provides for the cold extraction of biogas and without the emission of substances and odours. The peculiarities of the operation can be seen: in the issue of a bond called TRIS (Public Expense Reduction Title) not by a public entity but by the Intesa Sanpaolo Group, through Banca Prossima; in the certainty of savings in public spending equal to € 40 per ton of wet waste (from €140 spent to dispose of waste outside the region to € 100 per ton to deliver the collected waste to the new plant); in the absence of risk for investors thanks to the guarantee offered by Banca Prossima and, if successful, in remuneration corresponding to that of government bonds; in the pursuit of a further social objective, namely the reduction of unemployment or inactivity through the involvement of social enterprises in the various phases of the waste valorisation cycle. C. Mignone and R. Di Raimo, 'Strumenti di finanziamento al Terzo settore e politiche di intervento locale nella «società inclusiva» europea. (Dalla filantropia alla finanza alternativa)' *Giustizia civile*, I, 179-180 (2017).

³⁴ The SIB is a \$ 9.6 million loan launched to support the delivery of therapeutic services to 16- to 18-year-olds incarcerated on Rikers Island. It will be repaid based on the actual and projected cost savings realised by the New York City Department of Correction as a result of the expected decrease in recidivism. The Goldman Sachs loan is a multiple-draw term loan to MDRC, an experienced intermediary, to provide funding to the service provider, the Osborne Association. The Vera Institute of Justice, an independent, nonpartisan, not-for-profit centre for justice policy, serves as the evaluator of the programme and evaluates the extent to which the programme has reduced the rate of recidivism. The main feature is that Bloomberg Philanthropies provided a \$7.2 million grant to MDRC to guarantee a portion of the loan, thus reducing Goldman Sachs' risk. See J. Olson and A. Phillips, 'Rikers Island: The First Social Impact Bond in the United States' *Community Development Innovation Review*, 97 (2013).

³⁵ By virtue of the fund's existence, the early closure of the programme to reduce the recidivism rate below the pre-established threshold was followed by a loss for investors of \$ 1.2 million compared to the \$ 7.2 million paid.

³⁶ 'Consequently, those most vulnerable and in greatest need may be "parked" and neglected due to the difficulty, cost and time involved in dealing with them satisfactorily, while operations are focused instead on "creaming" clients with less need, but who are easier to remove from claimant counts, thereby fulfilling incentivised or contractual outcomes'. See N. McHugh et al, 'Social Impact Bonds: A Wolf in Sheep's Clothing?' 21(3) *Journal of Poverty and Social Justice*, 247, 250 (2013).

determine the choice of programmes and objectives with an easily measurable impact and, therefore, with a reasonable probability of success. A further consequence would be the tendency of the service provider to maximise the numerical objectives set out in the agreement.³⁷

With a view to the prevalence of profit-making purposes, the selection of the target group could take place in a discriminatory way. This danger of so-called ‘cherry-picking’ or ‘adverse selection of beneficiaries’ consists in the exclusion of individuals with personal qualities that could reduce the chances of the success of the programme. However, the assessment of this inequality presupposes the verification not of hateful intent³⁸ but of an objective justification.³⁹ Discrimination would be prohibited only if it were of a disproportionate measure with respect to the prejudice suffered by the discriminated and to the possibility of finding valid alternatives, or an inadequate method compared to other solutions involving less sacrifice of the users’ interest. In these cases, the lawfulness and merit of the cause of the contract would be affected and, therefore, the illegitimacy of the administrative discretionary activity and of the power of autonomy would ensue.⁴⁰

Furthermore, given the uncertainty of the model, small organisations in the non-profit sector would hardly be able to participate in an SIB due to the lack of sufficient resources to bear the resulting risks.⁴¹

These risks, however, are limited if not almost entirely eliminated in the case of financing ecological transition where they consist of interventions with an easily measurable socio-environmental impact and whose success is highly probable. The yield of these interventions, although limited and in the long term,⁴² is more solidly guaranteed, since the uncertainty to which investors are generally exposed, even for climatic emergencies, is significantly reduced.⁴³ It is also remuneration in the broad sense, including not only the financial profit but the achievement of environmental results to which the social and economic ones are

³⁷ C. Mignone, ‘Una via costituzionale all’impact investing’, Parte II, in M. Francesca and C. Mignone eds, *Finanza di impatto sociale* n 6 above, 34-35.

³⁸ The discrimination carried out by economic operators is attributable to a ‘profit maximisation or, in general, (to) an efficient resource allocation strategy’. See P. Femia, *Interessi e conflitti culturali nell’autonomia private e nella responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 1996), 534.

³⁹ C. Mignone, ‘Una via costituzionale all’impact investing’ n 37 above, 44.

⁴⁰ *ibid* 42.

⁴¹ A. Del Giudice, n 26 above, 101.

⁴² According to G. Giraud, n 2 above, 27, this would be a profitability of 3% over ten years.

⁴³ Unregulated markets are, in fact, incomplete, as they are exposed to adverse risks, also climatic ones, which are not hedged. They are therefore always exposed to sunspot, that is, ‘an extrinsic random variable (→), which is not connected to market fundamentals (such as the preferences and resources of agents or production technology), which nevertheless influences the behaviour of operators through their expectations (→ expectation) on the choices of everyone else’. ‘Macchia solare’, *Dizionario di Economia e Finanza Treccani*, 2012, available at <https://tinyurl.com/bdzbw29k> (last visited 20 September 2023). This leads to inefficient fluctuations in the economy. G. Giraud, n 2 above, 74.

correlated in favour of the community, and consequently to the benefit of the investors themselves.⁴⁴ These operations, therefore, ensure for the purposes of the target group, a selection of diversified subjects who voluntarily join the initiative, including those of low income and in conditions of vulnerability. This involves wide participation and accessibility even for subjects whose economic potential is limited.

2. Legal Issues: The Involvement of Public Entities and the Merit of the SIB

With reference to the compatibility of this negotiation model with internal legal regulation, since the SIB provides social services,⁴⁵ it is necessary to assess the compliance of the model with the application of the legislation on public procedures.

The first legal issue concerns the regulation on public accounting of the public administration. On one hand, the certainty or predictability that characterises the formation of the financial statements of public bodies requires the latter to draw up a multi-year financial statements showing the spending commitments for the obligations assumed determined in the *an* and in the *quantum*.

⁴⁴ J. Tirole, n 1 above, 280-281, in underlining the need for international actions to combat climate change, argues that social co-benefits can lead to eco-sustainable behaviours: '*certain pays pourraient encourager leurs habitants à manger moins de viande rouge, non pas pour lutter contre les émissions de méthane (qui est un GES) et donc contre le réchauffement climatique, mais afin de réduire la prévalence des maladies cardiovasculaires. Ces «cobénéfices» créent un incitant, très insuffisant mais un incitant tout de même, à réduire les émissions*'.

Since the financing of ecological transition policies through the use of private savings offers the investor not only economic benefits but also social and environmental benefits, this phenomenon seems to be attributable to so-called positive sanctions. Relating to positive sanctions, see A. Lepore, *Prescrizione e decadenza. Contributo alla teoria del «giusto rimedio»* (Napoli: Edizioni Scientifiche Italiane, 2012), 61; P. Perlingieri and P. Femia, *Nozioni introduttive e principi fondamentali del diritto civile* (Camerino-Napoli: Edizioni Scientifiche Italiane, 2nd ed, 2004), 7; N. Bobbio, 'Le sanzioni positive', in P. Perlingieri and P. Femia ed, *Dalla struttura alla funzione* (Milano: Edizioni di Comunità, 1977), 33.

⁴⁵ According to the Consiglio di Stato, Adunanza della Commissione speciale, 20 August 2018 no 2052, *giustizia-amministrativa.it*, '[...] the assignment of social services, in any case governed by the national legislator, must comply with the pro-competitive legislation of European origin, as it represents a method of commitment, a service (in Euro-unitary terms, a 'contract') which falls within the perimeter of application of the current Euro-unitary law. Nevertheless, under certain conditions, the procedure for assigning social services governed by domestic law is not subject to the regulation of Euro-unitary origin. This happens when: the procedure governed by domestic law is not selective in nature; it does not tend, even prospectively, to the assignment of a social service; the procedure governed by domestic law aims at entrusting a social service to a private law body which, however, the entrusted body will carry out entirely free of charge [...]. In this sense, the actual gratuitousness, with regard to the content, is resolved in terms of non-economic service since it is managed, from a cost and benefit point of view, necessarily at a loss for the provider. Consequently, it is not provided by the market, rather it is out of the market'. Consequently, the gratuitousness of the SIB is excluded by virtue of the existence of a remunerable or in any case guaranteed investment although in a future and conditional way. C. Napolitano, 'Il social impact bond' n 24 above, 368-369, no 34.

In the SIB, contrarily, the remuneration of the investors and, therefore, the payment by the public-promoter subject is conditioned by the achievement of a certain level of social impact and, consequently, of a saving in public spending. Based on the negotiation choice, the financial return can consist of a fixed and predetermined amount or can be proportional to the level of social impact. In the latter case, the fulfilment of the payment is uncertain not only in the *an* but also in the *quantum*,⁴⁶ resulting in it being incompatible with the rules of public finance.

Firstly, in order to ensure compatibility with the aforementioned regulation, it is necessary for the measure of the social impact to be predetermined, quantifiable, recognisable and controllable.⁴⁷ In this way, it is possible to identify the maximum amount that the public authority is required to pay in the event of a successful outcome of the programme. An authoritatively proposed solution suggests, following the stipulation of the SIB, registration in the current year of the aforementioned maximum amount by the entity. Based on the progress of the transaction, this is followed by the payment to investors of an amount equal to or less than the item recorded in the balance sheet or the recording of extraordinary income that can be reinvested in other public or social policies.⁴⁸

Another question of particular importance concerns the legal classification of the model. In fact, various reconstructions have been proposed aimed at connecting the SIB with one of the figures governed by the code of public contracts.⁴⁹

⁴⁶ C. Napolitano, 'Il social impact bond' n 24 above, 361.

⁴⁷ *ibid* 361.

⁴⁸ *ibid* 362.

⁴⁹ With regard to public contracts for the provision of services, the critical issues raised concern the different distribution of market risk. As can be deduced from the ANAC determination 23 September 2015 no 10, 'Linee guida per l'affidamento delle concessioni di lavori pubblici e di servizi ai sensi dell'articolo 153 del decreto legislativo 12 aprile 2006, n 163', what differentiates this contract from that of the concession of both works and services 'is the sharing of the risk between the administration and the concessionaire. In the absence of risk related to management, regardless of the *nomen iuris* used, not the concession but the contract is configured (...) (6). While in the public contract it weighs both on the contracting authority-public administration and on the economic operator, in the SIB it falls entirely on the investors. In the absence, therefore, of an essential element, it does not seem that the SIB can be identified with this negotiating scheme. See C. Napolitano, 'Il social impact bond' n 24 above, 372. A different approach recognises the concessionary nature of the SIB, understood as a contract between the Administration and the 'implementing body' made up of private investors, the service provider and the specialised intermediary (*L'applicazione di strumenti pay-by-result per l'innovazione dei programmi di reinserimento sociale e lavorativo delle persone detenute*, coordinated by the Human Foundation with the contribution and support of the Development and Growth Foundation (Fondazione Sviluppo e Crescita CRT), with the contribution of the Polytechnic University of Milan, the University of Perugia and KPMG, January 2016-2017, 83). Similar to the service concession where the management risk is transferred to the economic operator (his remuneration derives from the provision of the service to third party users), in the SIB the financial risk of the transaction is borne by private investors and not by the public side. Doubts arise, however, from the fact that the service provider is remunerated by a third party, ie the investors. According to a jurisprudential orientation, however, the onerousness of the contract would exist, albeit in a substantial or weak sense, 'whenever the contractor may seem to derive a legitimate and autonomous economic benefit from the execution of the contractual service, even if not paid to him as an exchange contractual by

Overcoming the rigidity of subsumption⁵⁰ in a typical scheme and classification,⁵¹

the contracting authority'. Consiglio di Stato 4 October 2017 no 4631, *giustizia-amministrativa.it*. In the operational reality, however, given the heterogeneity of the negotiating scheme, the contract is not always stipulated with subjects linked by the 'aggregative bond'. In fact, *uti singuli* relationships could be established. See C. Napolitano, 'Il social impact bond' n 24 above, 372. Furthermore, there is no management risk borne by the service provider. As for the one burdening the investor, the risk of the private investor in the SIB does not correspond to an entrepreneurial risk in the strict sense. In the SIB, it derives from the uncertainty of the realisation of the expected social impact. In accordance with a different doctrinal orientation, the SIB can be qualified as an 'atypical random contract of public-private partnership'. See A. Blasini, 'Nuove forme di amministrazione pubblica per negozio: i "social impact bonds"' *Rivista trimestrale di diritto pubblico*, I, 69 (2015). The latter, as deducible from Arts 3, para 1, lett eee) and 180, decreto legislativo no 50/2016, constitutes a versatile negotiating tool that pursues a public interest and, for this reason, is subject to public procedures. In this scheme there is also the transfer of risk to the economic operator, under the triple profile of construction risk, of availability and demand for the services rendered as defined respectively by Art 3, para 1, lett aaa), bbb) and ccc). However, the lack of risks, such as those of construction, or the diversity of the same in the SIB, has already been highlighted. See C. Napolitano, 'Il social impact bond' n 24 above, 385. With reference to the availability risk, the typical one of the SIB is characterised by conditional repayment. The service provider does not perform with the aim of generating revenues for himself but to provide a service with a positive social impact such as to determine public cost savings. The demand risk, on the other hand, does not exist, as the beneficiaries of the services are predetermined on the basis of the social problem to be solved. Another essential element of the public-private partnership is the economic-financial balance understood as covering the management and investment costs with revenues. Otherwise, the SIB is a transaction that is by nature uncertain. In fact, in the event of failure to achieve the social result, the Administration must not use public resources to balance the losses. See C. Napolitano, 'Il social impact bond' n 24 above, 387, in which, 'the financial results – crucial in the PPP – have marginal importance in the SIB, where instead it is the social value that assumes full centrality'. The last distinctive feature is the monitoring by the contracting authority of the activity of the economic operator, in particular the permanence of the risk borne by the operator itself (Art 181, para 4, decreto legislativo no 50/2016) where, in the SIB, the supervisory activity is entrusted to a third party. It also consists of *ex post* control relating to service quality standards. The Social Impact Bond is also associated with project financing. See G. Pasi, 'Credito e innovazione sociale: l'avvento di nuovi schemi negoziali nell'amministrazione delle carceri. La direzione suggerita dai Social Impact Bond' *Rassegna economica*, I, 213, (2015). The first mechanism, however, unlike the second, does not finance a specific subject (a specially constituted company, a so-called project company) but a complex project and it is subject to 'conditional remuneration': remuneration of the investors from the public authority depends on achieving a positive social impact. See C. Napolitano, 'Il social impact bond' n 24 above, 359-360. Otherwise, in project financing, the repayment of the loan and the achievement of a profit derive from the effective management of the financed activity in which the same private subjects participate.

⁵⁰ The reconstruction of the contractual phenomenon as multiple and as a minimum unit enriched by the particular circumstances of the concrete cases determines the necessary integration of the so-called general discipline with those relating to individual contracts. The result is 'a single open system, from which to draw from time-to-time principles and rules more appropriate to the interests at stake according to an interpretation that respects and uses the fact and which proceeds to identify the legislation most compliant with it, definitively moving away from the rules and by the hermeneutical techniques inspired by the mechanism of the subsumption of the fact in the abstract case. Subsumption, moreover, is exhausted in the underestimation of the peculiarities of concrete, subjective and objective circumstances, making the most congruous, most adequate, most reasonable solution inaccessible'. See P. Perlingieri, 'Nuovi profili del contratto' *Rassegna di diritto civile*, 545 (2000), now in Id ed, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 421.

⁵¹ Categories 'must be abandoned when they represent an obstacle to the reasonable decision

this bottom-up intervention finds its constitutional foundation in the principle of horizontal subsidiarity pursuant to Art 118, para 4, of the Italian Constitution. Given the organisational and financial heterogeneity of this model, as an expression of private autonomy,⁵² what is relevant is the

‘unitary functional foundation, which finds due anchoring in the hierarchy of constitutional principles, whatever the concrete source of regulation or source of financial supply’.⁵³

To this end, it is necessary to evaluate the merit of the structure of interests,⁵⁴ as the positive implementation of the fundamental principles, since

‘(...) subsidiarity is not a source in itself, autonomous, independent, separate from the legal system. Subsidiarity is deserving if it conforms to the hierarchy of values of the overall system: *pacta sunt servanda*, but only if those agreements correspond to the hierarchy of values of the system’.⁵⁵

Similarly to the limits of legislative power in the matter of fundamental rights,

of the concrete case, trying to find new categories that are more adequate to the new normative needs. In the awareness that the categories have no ontological value, what exists in reality are concrete problems’. See P. Perlingieri, ‘Metodo, categorie, sistema nel diritto del commercio elettronico’, in P. Stanzione and S. Sica eds, *Commercio elettronico e categorie civilistiche* (Milano: Giuffrè, 2002), 9.

⁵² Private initiative is, therefore, to be included in the legal system as a whole ‘as part now implementing, now conforming, now creative and constitutive’. P. Perlingieri, ‘La sussidiarietà nel diritto privato’ n 5 above.

⁵³ C. Mignone, ‘Una via costituzionale all’impact investing’ n 37 above, 47-48.

⁵⁴ C. Mignone, ‘Meritevolezza dell’iniziativa’ n 19 above, 115, 118. As authoritatively stated, it is necessary ‘not to stop the evaluation of the act to the mere judgment of lawfulness and to also request its merit, if we consider that the constitutional values require full implementation: therefore, negatively, the non-invasion of a limit of protection is not enough, but positively, the fact must be representable as a practical realisation of the juridical order of values, as a coherent development of systematic premises set out in the constitutional charter’. P. Perlingieri, *Il diritto civile* n 9 above, 611. Therefore, ‘it does not appear correct to exhaust the scope of Art 1322, paragraph 2, of the Italian Civil Code in the judgment of lawfulness. This solution is contradicted by the awareness (...) that the contract, even typical – thus the distinction between typicality and atypicality enters into crisis – must always be subjected to the control of merit: that the parties can conclude atypical contracts, provided they are aimed to achieve deserving interests of protection according to the legal system (Art 1322, para 2, Italian Civil Code), is a general principle. (...) It is not enough that the act is lawful, but it needs to be, even if typical, worthy of protection in that particular context (in consideration of those subjects, of that moment, of that added clause, etc.). (...) The negotiation act is valid not so much because it is wanted but if, and only if, it is intended to achieve, according to an order based on personalism and solidarity, an interest worthy of protection’ (ibid 348).

⁵⁵ P. Perlingieri, ‘La sussidiarietà’ n 5 above. It has been recognised that from *pacta sunt servanda* dogma there is a shift to *licet tamen pacta emendari*. E. Caterini, *Lineamenti di diritto civile italo-europeo. Dal mercato alla persona* (Napoli: Edizioni Scientifiche Italiane, 2009), 130. Similarly, according to J. Ghestin, ‘La formation du contrat’, in Id, *Traité de droit civil* (Paris: Librairie générale de droit et de jurisprudence, 3rd ed, 1993), 28, both individual and public benefit and fairness, aimed at rebalancing the assets of the contracting parties, constitute fundamental principles of the general theory of the contract.

negotiating welfare interventions by both private individuals and public administrations must also be proportionate,⁵⁶ reasonable⁵⁷ and sustainable.⁵⁸ This control of merit, therefore, implies a concrete verification that also concerns the adequacy of the model to achieve the social result.⁵⁹

III. Conclusions

As all these considerations demonstrate, with a view to overcoming the dichotomy between negotiating autonomy and subsidiary intervention,⁶⁰ that the SIB represents a negotiating model that is functional to satisfy interests that transcend those of the parties to cover the primary needs of third parties.⁶¹ It guarantees finding resources that are additional to and of greater value than those stemming from traditional channels (bank credit, public financing and private donations). This leads to an improvement of services, of both a quantitative and qualitative nature, in terms of greater efficiency and innovation. Besides, medium- and long-term preventive interventions are more affordable and effective than interventions of a subsequent and restorative nature.⁶² Further, since the risk of failure falls on the investors, the use of Impact Investing would favour the

⁵⁶ The principle of proportionality ‘consists in the right proportion or quantification and configures a distinct but inseparable parameter with respect to that of reasonableness (understood as abstract justifiability), a different way of assessing the entity of the patrimonial [and non-] interest, a measure of its legal protection but still to be compared and balanced with that of other interests’. P. Perlingieri, *Il diritto civile* n 9 above, 122.

⁵⁷ Reasonableness ‘is a criterion that, in compliance with the principle of legality, helps to identify the solution in the moment of application (...) most of all compliant not only with the letter of the law, but with the overall logic of the system and its normative values (...)’. G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 22-23.

⁵⁸ According to E. Caterini, *Sostenibilità e ordinamento civile* n 12 above, the judgment of sustainability, involving a control of commutative and distributive justice, becomes an evaluative parameter of the actions of individuals and the public for the best qualitative satisfaction of the vital needs of the person. It ‘makes what preserves the person and the community worthy of increasing self-preservation. The parameters of measurement of the growth or well-being of a people change from exclusively quantitative to qualitative-quantitative’ (33-34). ‘In summary, reasonableness and proportionality, together with sustainability, delimit the concrete meaning of the merit of the civil law activity, as a judgment that sometimes adjusts, other times interrupts, the continuity of the legal system to ensure the best implementation of the fundamental principles’ (148-149).

⁵⁹ C. Mignone, ‘Meritevolezza dell’iniziativa’ n 19 above, 115, 139-140.

⁶⁰ ‘At the centre of the question there is no autonomy, but autonomies: from legislative autonomy to the discretion of the public administration, up to negotiation autonomy’. P. Perlingieri, ‘La sussidiarietà nel diritto privato’ n 5 above.

⁶¹ C. Mignone, ‘Meritevolezza dell’iniziativa’ n 19 above, 115, 118 (2017).

⁶² Regarding the costs of COVID-19, they are over US \$11 trillion with a future loss of US \$10 trillion in earnings, while investments in preparedness are measured as US \$5 per person annually. It has been stated that ‘it would take 500 years to spend as much on investing in preparedness as the world is losing due to COVID-19’. Global Preparedness Monitoring Board, annual report, ‘A World in Disorder: Global Preparedness Monitoring Board annual report 2020’ (6) available at <https://tinyurl.com/4cwazrf4> (last visited 20 September 2023).

experimentation of socially relevant measures without affecting public finance.⁶³

Given the constitutional foundation of the SIB on the principle of horizontal subsidiarity (Art 118, para 4, Italian Constitution),⁶⁴ control of the merit of the structure of interests concretely established for a specific programme is fundamental, in consideration of the underlying values and of the adequacy of the model for the social results pursued.

In this direction, the SIB represents a 'win-win' system to bring benefits to all the parties involved in the operation, and it presupposes a collaborative relationship among the actors of the operation.

It is therefore appropriate to provide for a sharing of the risk of programme failure between them, albeit proportionate to the type of participation.⁶⁵

Special attention should be paid to the service provider whose remuneration is generally not influenced by the outcome of the programme. It is necessary for this body to be held accountable if the outcome is not achieved for a cause attributable to it. In fact, the social result and the economic return for investors depend in part on the service provider's conduct.⁶⁶ In the light of the need to control, even if indirectly, its activity,⁶⁷ monitoring by the third party should,

⁶³ C. Mignone, 'Una via costituzionale all'impact investing' n 37 above, 34.

⁶⁴ '[T]he participatory structures aimed at «self-handling» in the field of social utility services perform an essential inclusive and equalising function where the social private is called upon to contribute equally to finding the necessary resources to support growth and innovation' (C. Mignone, 'Finanza alternativa' n 21 above, 370). In this sense, the Third Sector Code favours the autonomous initiative of citizens who contribute, even in an associated way, to the pursuit of the common good, to raising levels of active citizenship, cohesion and social protection, encouraging participation, the inclusion and full development of the person, to exploit the potential for growth and employment (Art 1).

⁶⁵ An innovative SIB model that takes this aspect into consideration is Epicus Occupational Wellness I. It was adopted in Finland in 2015 to solve the social problem of low productivity and high absences from work due to illness and the high stress of public employees. The peculiarity consists in providing for an allocation of the risk of failure of the initiative through the subordination of the liquidation margin of 20% of the service providers and the management fee of the intermediary to the total return to the lenders of the invested capital and through the distribution of the profits deriving from the success of the programme in the amount of 70% for the investors and 30% for the suppliers and the manager of the SIB. Another peculiar element is the absence of a public contracting authority and, in its place, the establishment of a fund that collects and manages the revenues of customers, that is, public employers.

⁶⁶ Regarding Public-Private Partnerships, it has been argued that it is a good option 'if the quality of the service can be well specified in the initial contract (or, more generally, if there are good performance measures which can be used to reward or penalise the service provider)'. See O. Hart, 'Incomplete Contracts and Public Ownership: Remarks, and an Application to Public-Private Partnerships' 113(486) *The Economic Journal*, C69, C74 (2003). Consequently, 'Following Hart's logic, SIB transactions also should be optimal only in those situations where quality and related performance measurements can be described *ex ante* in the pay for success contract'. D. Burand, 'Contracting (Incompletely) for Success: Designing Pay for Success Contracts for Social Impact Bonds (SIBS)' 29(1) *Cornell Journal of Law and Public Policy*, 1, 19 (2019).

⁶⁷ In the USA, most of the SIBs have a 'a dual oversight structure that includes two separate committees, one tasked with providing *operational* oversight and the other with *executive* oversight. The operating committee focuses on monitoring the delivery of social services and usually has limited decision-making authority. (...) In comparison, the executive or steering committee has

therefore, not be limited only to the final qualitative assessment of the service provided, but should cover the entire duration of the operation.

Furthermore, with a view to the effective protection of a weak contractor,⁶⁸ investors who participate in a highly uncertain transaction must receive clear, complete and non-fraudulent information.⁶⁹ In order to make a conscious decision,

greater decision-making authority and, among other things, may shorten or extend the duration of the project and replace parties' (ibid 23-24). In this governance and oversight structure, however, investors do not have direct decision-making power, although it can be indirect through the figure of the project manager or intermediary, except for the Denver and two Salt Lake County SIBs, launched in 2016, where investors have voting rights on the Executive Committees (ibid 25).

⁶⁸ In a critical perspective of the subjective doctrinal positions, linked to the quality of a weak contractor, and the objective one related to the act of consumption, the notion of consumer as a 'profane' contractor is affirmed, including in the protection of acts 'relating to the profession'. It is therefore considered that 'with regard to professional consumption, only the hypotheses in which the agent does not have the necessary skills to assess the consequences of the act must be included in the scope of protection, and therefore the latter has to be considered a professional with regard to acts which, although not constituting the object of the profession, are placed with respect to it in a relationship of non-occasional instrumentality'. See E. Gabrielli, 'Sulla nozione di consumatore' *Studi in onore di Cesare Massimo Bianca* (Milano: Giuffrè, 2006), III, 227. Relating to overcoming the identification of the weak contractor with the consumer in the context of guarantee contracts, a concrete assessment is required of the contractual weakness deriving from the lack of specific knowledge or of a technical or economic nature or from difficulties in accessing information in the context of certain contractual relationships. L. Ruggeri, 'Contratti di garanzia e tutela del contraente debole', in E. Caterini, L. Di Nella et al eds, *Scritti in onore di Vito Rizzo. Persona, mercato, contratto e rapporti di consumo* (Napoli: Edizioni Scientifiche Italiane, 2017), II; with reference to the impact of energy transition policies on the figure of the consumer, see L. Ruggeri, 'Just Energy Transition: From Energy Consumer Protection to Energy Consumer Empowerment', in Id and F. Pascucci eds, *Prosumerism and Energy Communities Expanding Concepts in a Global Perspective* (Vienna: SGEM WORLD SCIENCE (SWS) Scholarly Society, 2022), 6, in which 'European policies on the energy market have led to a rethink of the notion of consumer, which can no longer be based on the legal definition of the term "consumer", the consequences of which is that serious and well-founded protection needs can come from legal entities that cannot be subsumed under the legislative definition'.

⁶⁹ In this regard, European Parliament and Council Regulation (EU) 2017/1129 of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC [2017] OJ L168/12, states that 'The information on the public offer of their admission to trading on a regulated market is essential to protect investors, as it eliminates the information asymmetries between the latter and the issuers (...)' (recital 3) and that '(t)he provision of information which, depending on the characteristics of the issuer and the securities, is necessary for investors to make informed investment decisions ensures, together with the rules of conduct, investor protection. Furthermore, such information is an effective tool for increasing confidence in securities and thus contributing to the proper functioning and development of the securities markets (...)' (Recital 7). This is even more true in social impact investments where the social variable that generates the financial income is related not only to the provided services but also to conditions independent of the actors in the operation.

In fact, European and national regulations have been drawn up to increase investor protection in ethical/responsible finance. In implementation of Art 117 ter TUF, Art 136 and 137 of Consob Intermediaries Regulation 15 February 2018, no 20307, amended by resolution no 22430 of 28 July 2022, establish greater reporting and information obligations for those who provide 'ethical' or 'socially responsible' products and services relating to the social or environmental objectives to be pursued and the associated criteria for selecting financial instruments.

it is necessary for these information requirements not to be limited to the mere profitability of the securities and the material factors from which they derive, but also to include the social objectives, related measurement procedures, as well as reasonable projections of and information on past outcomes achieved in the sector.⁷⁰

In this perspective, it also notes the preventive management of conflicts of interest, also by virtue of the exponential number of subjects involved and the heterogeneous nature of interests.⁷¹ It follows that in the case of deviation from

Also in relation to the European social entrepreneurship funds, the European Parliament and Council Regulation (EU) 2013/346 identifies a specific discipline of contractual correctness and transparency. It provides, in fact, information obligations for managers of qualifying funds for social entrepreneurship, including those relating to 'the positive social impact being targeted by the investment policy of the qualifying social entrepreneurship fund, including, where relevant, projections of such outcomes as may be reasonable, and information on past performance in this area' (Art 14, para 1, lett *d*) and to 'the methodologies to be used to measure social impacts' (Art 14, para 1, lett *e*). A policy of harmonisation of the non-financial disclosure system is implemented by European Parliament and Council Directive 2014/95/EU of 22 October 2014 amending European Parliament and Council Directive 2013/34/EU with reference to a certain large undertakings and groups and by the relative decreto legislativo 30 December 2016 no 254. The discipline establishes a non-financial statement containing information relating to environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, including a description of the policies to those matters, the outcome of them, the related principal risks and non-financial key performance indicators relevant to the particular business. For an in-depth analysis, G. Strampelli, 'L'informazione non finanziaria tra sostenibilità e profitto' *Analisi Giuridica dell'Economia*, I, 145-164 (2022).

⁷⁰ C. Mignone, 'Investimento a impatto sociale. Etica, tecnica e rischio finanziario' *Rassegna di diritto civile*, III, 924 (2016). In addition to these disclosure requirements, common and homogeneous assessment criteria of activities and measurement metrics for environmental impact should be identified. With reference to the former, in order to combat the phenomenon of greenwashing and to standardise activities among Member States to achieve the common goal of ecological transition, European Parliament and Council Regulation (EU) 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending European Parliament and Council Regulation (EU) 2019/2088 [2020] OJ L198/13 established criteria at the Union level for determining whether an economic activity can be qualified as environmentally sustainable.

With reference to sustainable investment, European Parliament and Council Regulation (EU) 2019/2088 of 27 November 2019 on sustainability-related disclosures in the financial services sector 'aims to reduce information asymmetries in principal-agent relationships with regard to the integration of sustainability risks, the consideration of adverse sustainability impacts, the promotion of environmental or social characteristics, and sustainable investment, by requiring financial market participants and financial advisers to make pre-contractual and ongoing disclosures to end investors when they act as agents of those end investors (principals)' (recital n 10). Some, however, believe that the transparent use of ESG factors is not guaranteed exclusively by the provision of disclosure obligations to financial market participants and financial advisers but by ensuring that 'this information is such as to make the sustainable risks comparable to each other [...] or the level of the sustainability of the various financial products [that are] potentially attractive for the consumer who intends to give their investments an ESG imprint'. See G. Berti De Marinis, 'Patrimonio culturale e fattori ESG nel mercato assicurativo' *Rivista del mercato assicurativo e finanziario*, I, 53, (2020).

⁷¹ The European social entrepreneurship funds Regulation, in fact, establishes a preventive identification of conflicts and an adequate management and control of them to prevent that they

the interest underlying a particular financial instrument, even if it is not economic, there is an abuse attributable to Art 1394 of the Italian Civil Code by the person responsible for such conduct,⁷² as in the case of Social Impact Bonds by the service provider.⁷³

With a view to sustainable development, it is therefore necessary to use private savings to finance the ecological transition.⁷⁴ In this sense, Impact Investing would constitute an adequate and reasonable solution that generates a balance between profit and redistribution. The application of this model to the environmental sector, in fact, is in itself suitable to limit and/or reduce the risks to which investors are generally exposed and ensures a more solidly guaranteed profit, albeit limited and in the long term. This does not exclude the need for an evaluation of the merit and sustainability of the project to be financed in practice,⁷⁵ with the aim of preventing the implementation of operations for pure profit instead of ecological purposes.

affect the interests of the qualifying social entrepreneurship funds and of the investors and to ensure that the qualifying social entrepreneurship funds that they manage are fairly treated (Art 9). Also in the framework of the Proposal for a Regulation of the European Parliament and of the Council 2021/0191 are provided forms of management of actual or potential conflicts of interest in relation to external reviewers who have the task of assessing the ecological character of obligations and the activities financed by them (Art 27). This discipline is intended to ensure the achievement of environmental objectives and, therefore, the protection of the interests of investors who ‘sacrifice’ a profitable financial return for the realization of a positive ecological impact.

⁷² In this sense, C. Mignone, ‘Finanza alternativa’ n 21 above, 363.

⁷³ With a view to an effective remedy, the prevention of abusive conduct is left to private autonomy through the preparation of appropriate methods, measure and level of impact of the implementation of the environmental impact in the emission regulation (D. Lenzi, ‘La finanza d’impatto’ n 21 above, 136).

⁷⁴ The choice of these assets represents the personalist and solidarity vision to which it is intended to adhere. It guarantees greater democratic autonomy by overcoming the concept according to which ‘everyone is condemned to try to anticipate what the dictatorship of the majority of investors (representing a minimum number of people, but with considerable power) will think’. G. Giraud, *Transizione ecologica* n 2 above, 79.

⁷⁵ These operations can, therefore, represent effective models for the pursuit of general interests provided that the pan-patrimonial conception of economic initiative is exceeded, ‘to begin to look with the eyes of the legal system to the descriptive functional profile of the interests – including non-economic ones – deductible in the [concrete] investment relationship’ (C. Mignone, ‘Finanza alternativa’ n 21 above, 368).