



Freedom of Economic Initiative and ESG Parameters. Towards a New Corporate Social Responsibility

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Abstract

The need to calibrate the freedom of economic initiative against the parameters of sustainability requires reflecting on the forms of corporate social responsibility. The evolution of doctrine, jurisprudence, and legislation consistently underscores the obligation to respect the right to a healthy environment. This work, based on a methodological approach that prioritizes individual protection and is attentive to each case, highlights the different functions that, from time to time, corporate responsibility can assume.

Keywords

Corporate Social Responsibility, Freedom of Economic Initiative, Shell Case, Sustainable Economic Activities, New Ecological Enterprise.

I. Sustainability and Enterprise: Towards a New Business Standard

Phenomena such as rising temperatures, sudden weather events and, in general, unprecedented natural occurrences have made it imperative to take action to balance environmental protection objectives with freedom of economic initiative, and, in other words, with the ‘logic of profit underlying the corporate schemes’.¹ In this scenario, corporate social responsibility – CSR – has changed significantly.

Compared to the past, sustainable development and CSR are no longer separable elements but must be viewed as a unified concept. In this perspective, legal scholars face new ‘questions of a systematic order’ because ‘the environment, understood as the complex of goods that touch human life, presents itself to the legal system in a changed position’.² This

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¹ L.E. Perriello, ‘Per una sostenibilità in linea con il profitto’ *Rivista di diritto dell’impresa*, 178 (2022). More recently, see L. Vicente, ‘Corporate Governance in the United States, the United Kingdom, New Zealand, Canada, South Africa, India and Singapore’, in J. J. du Plessis, A. Hargovan, B. Nosworthy, *Principles of Contemporary Corporate Governance* (Cambridge: Cambridge University Press, 5th ed, 2024) 277-289.

² E. Caterini, ‘Iniziativa economica privata e “crisi ecologica”. Interpretazione analogica e positivismo’, in G. Perlingieri and E. Giorgini eds, *Diritto europeo e legalità*

evolution has ‘ferried’ sustainable development from an exclusive instrument of environmental protection to a safeguard of economic and social development.³

The discussion so far reflects the introduction of Environmental, Social and Governance⁴ (ESG) criteria, which have brought out the dual dimension (environmental and social) of economic growth.⁵ Through these three instruments, consumers, stakeholders, and investors can verify a company’s commitment beyond the mere social impact of the purchase of a product or the convenience of a long-term investment.

Therefore, it seems important to underline that this need, embedded in a new globalized economy, is not confined to a single country but applies to the world economy as a whole. From this perspective, we will examine the European regulatory framework, with particular attention to national regulations, while drawing comparisons with the US common law approach. First, it should be noted that the two systems are based on different values. However, even if there is a distinct value concept, personalist in the first case and individualist in the second, they all converge on the same ‘ideal’ of achieving the sustainability objectives outlined in the UN’s 2030 Agenda.

Implementing these objectives aims to reverse the trend of recent decades, where freedom of economic initiative has been wrongly founded on ‘ecological impoverishment’. For years, the environment has been seen

costituzionale a trent’anni dal volume di Pietro Perlingieri (Napoli: Edizioni Scientifiche Italiane, 2024), 273-362.

³ ‘La sostenibilità assurge a parametro valutativo dell’agire dei privati oltre che del pubblico’. In this sense see E. Caterini, *Sostenibilità e ordinamento civile. Per una riproposizione della questione sociale* (Napoli: Edizioni Scientifiche Italiane, 2018), 91.

⁴ Although this is not the subject of this study, it is appropriate to make a clarification. The acronym ESG reflects what was said initially, namely the concept of sustainable development and CSR as a unified entity. This is reflected, in fact, in the three dimensions of Environmental, Social and Governance. The ‘E’ covers all environmental criteria, assessing the behaviour and impact of a company both in the place where it operates and in the environment in general. The ‘S’ pertains to the social impact or the attention that the company must have towards the territory, employees, suppliers, customers and, in general, society as a whole. Finally, the ‘G’ stands for business management that aims at good practices and respect for ethical principles.

On this point, see R. Marcello and A.M. Loia, ‘L’integrazione dei fattori ESG nel processo di risk governance: pianificazione strategica e disclosure’ *Società e contratti, Bilanci e revisione*, 84-103 (2024).

⁵ See M. Castellaneta, ‘La promozione dello sviluppo sostenibile e la responsabilità sociale di impresa’, in P. Acconci ed, *La responsabilità sociale di impresa in Europa* (Napoli: Edizione Scientifiche Italiane, 2009), 55. For a more recent source, see S. Rossi, ‘Il diritto della Corporate Social Responsibility’, in C. Concetto et al eds, *Studi di diritto commerciale per Vincenzo Di Cataldo, Impresa, società, crisi d’impresa* (Torino: Giappichelli, 2021), II, 771.

as a means to extract goods and financial value, and people and nature have been considered resources for the economy.⁶

Therefore, the market must now go beyond profit as the sole motivation for doing business and consider the broader impact the activity can have on human rights⁷ and the environment.

In this context, ‘generosity, the sense of the community’, respect and protection of the environment must be considered criteria that, moving away from the mere selfish interest typical of a profit-driven market and, therefore, heritage, are essential for establishing a market attuned to the new demands of social responsibility.⁸

II. Economic Initiative in Light of the Italian-European Regulatory Framework

The social change⁹ described here is not only a national but an international¹⁰ and European imperative. Think, for example, of the United Nations ‘Global Compact’ initiative, which has deepened the application of environmental protection principles to business.¹¹ Consider

⁶ In this sense and to deepen understanding, see E. Caterini, ‘Iniziativa economica privata e “crisi ecologica”’, n 2 above. The author points out that: *‘l’industrialismo, quindi l’intrapresa privata, ha fondato la sua espansione economica sull’impoverimento ecologico. Alla trasformazione a buon mercato della natura, al fine di ricavarne mercivalore, si è unito il mercato dei bisogni non più dipendenti dal lavoro ma dal guadagno e dal patrimonio accumulato. La tecnoscienza industrializzata ha artefatto la natura tramutandola in merce e valore economico, e al contempo ha naturalizzato l’economia. Di tal modo l’uomo e la natura sono divenuti “risorse” e l’economia ha inglobato l’ecologia’.*

⁷ In this sense see P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti. Attività e responsabilità* (Napoli: Edizioni Scientifiche Italiane, 2020), IV, 203 where the author points out that: *‘Uno stato sociale di diritto dipende sì dalla sua efficienza produttiva e organizzativa, ma soprattutto dall’attenzione che riserva a momenti di solidarietà compatibili con quanto effettivamente produce o è potenzialmente e realisticamente capace di produrre. L’investimento sociale si traduce, a sua volta, in un investimento produttivo destinato a dare efficienza allo stesso mercato’.*

⁸ See A. Sen, ‘Codici morali e successo economico’ *Mulino*, 194 (1994); Id, ‘Markets and Freedom: Achievements and Limitations of the Market Mechanism in Promoting Individual Freedoms’ *Oxford Economic Papers*, 45, 519 (1993).

⁹ In this sense, see K. Davis, ‘Understanding the Social Responsibility Puzzle’ 10(4) *Business Horizons*, 49 (1967), where the author stated ‘they possess such a great initiative, economic assets, and power in their actions do have social effects’.

¹⁰ See F. Marella, ‘Regolazione internazionale e responsabilità globale delle imprese transnazionali’ *Diritti umani e diritti internazionali*, 230 (2009).

¹¹ Three principles of the Global Compact are important for the subject under discussion. The first, principle no 7, stresses that ‘Businesses should support a precautionary approach to environmental challenges’. Secondly, principle no 8 states that businesses should ‘undertake initiatives to promote greater environmental responsibility’. Thirdly, principle no 9 says that they should ‘encourage the development and diffusion of

also the subsequent introduction, in 2010, of so-called benefit corporations that provide for the realization of a public benefit alongside the social benefits offered by individual social statutes.¹²

On the other hand, at the European level, the adoption of the European Parliament and Council Directive 2022/2464/EU¹³ (CSRD) addresses corporate sustainability¹⁴ reporting, mandating adherence to European principles of sustainability reporting.¹⁵ Equally important is the European Parliament and Council Directive 2024/1760/EU, approved on 24 May, which outlines companies' due diligence obligations.¹⁶

The new EU Regulations impose additional duties on directors regarding non-financial reporting to which companies will be subject. The Directive is guided by key principles of precaution and transparency, both of which are rooted in the broader principle of sustainable development. However, the first calls on companies to promote and encourage the use of appropriate technologies for the ecological development of the planet, while the second demands that businesses operate with transparency concerning their societal and environmental impact. In other words, non-financial statements are based on sustainable financial principles. Their

environmentally friendly technologies'. The text of the Global Compact is available at the following link: <https://unglobalcompact.org/>.

The project is the starting point that has been considered in the exercise of business, as well as aspects related to protecting human rights, work, the environment, and the fight against corruption and sharing.

In doctrine, see M. Cutillo, 'I National Contact Point dell'OCSE sulle imprese multinazionali. Un meccanismo di accesso alla giustizia effettivo per la società civile?', in F. Francioni ed, *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione europea* (Milano: Giuffrè, 2008), 233.

¹² In doctrine, see J.W. Callison, 'Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change' 2(1) *American University Business Law Review*, 85 (2012).

In the legislation, see para 201 of the Model Benefit Corporation Legislation.

¹³ European Parliament and Council Directive 2022/2464/EU 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. In particular, it stresses the link between social and environmental issues. In particular, see Recitals 9 and 53.

¹⁴ However, just as for the United Nations, the importance of integrating the Union's policies with environmental issues also emerged in Europe in the 2000s, and in particular with the Charter of Fundamental Rights. Its Art 37 points out precisely that 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'.

¹⁵ Commission Delegated Regulation 2023/2772/EU of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards [2023].

¹⁶ European Parliament and Council Directive 2024/1760/EU of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024].

ultimate purpose is to provide investors, ‘non-governmental organizations, social partners, communities affected by business activities and other stakeholders’¹⁷ with a clear understanding of the risks and opportunities that sustainability presents for its investments as well as for comparing companies within the market.

The framework described must also pay attention to the European Parliament and Council Regulation 2020/852/EU that introduced the so-called taxonomy of eco-sustainable economic activities.¹⁸ The purpose of this Regulation is to create a guide for companies, investors, and public institutions to assess their activities, integrate sustainability policies, define their business policies, and, in general, improve internal ecological transition policies. To this end, Art 9 identifies the environmental objectives that must be pursued for an activity to be classified as ecological. The company, choosing at least one, will have to act without harming others. What has just been said is the explanation of the ‘Do No Significant Harm’ principle (DNSH).¹⁹

These principles help implement the so-called ‘value chains’ outlined in the Directives. With this term, the European legislator refers to the entire production chain (including products and services, business relationships, and supply chains, as well as the measures taken to identify and monitor any negative environmental impacts).²⁰

The EU’s objective is clear: to ‘pursue an “ecological budget” that preserves the existing status’ through the creation of precise rules that dictate ‘the conditions to productivism’ according to which: ‘a) the exploitation of resources cannot exceed natural or managed regeneration; b) waste deposited in the environment cannot exceed the assimilation rate’.²¹

Art 19 *bis* of the CSRD mandates that both large and small and medium-sized enterprises prepare the above-mentioned corporate sustainability report. This report must include ‘information necessary for understanding how sustainability issues affect the performance of the company, its results and its situation’. However, micro-enterprises are excluded from this obligation.

¹⁷ See Recital 14 of the European Parliament and Council Directive 2022/2464/EU.

¹⁸ European Parliament and Council Regulation 2020/852/EU of 18 June 2020 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088 [2020] OJ L198/13.

¹⁹ To learn more about DNSH in business matters, see S. Ostojić, L. Simone, S. Edler and M. Traverso, ‘How Practically Applicable Are the EU Taxonomy Criteria for Corporates? An Analysis for the Electrical Industry’ *Sustainability* (2024).

²⁰ See Art 19 *bis*, para 2, letter f, point ii of the European Parliament and Council Directive 2022/2464/EU.

²¹ E. Caterini, ‘Iniziativa economica privata e “crisi ecologica”’, n 2 above, 273-362.

At the national level, Member States must transpose the CSRD by 6 July 2024. In Italy, the Ministry of Economy and Finance launched a consultation phase that closed on 18 March.²² Although transposition has started, national legislation already imposes direct and indirect obligations. References are made to the bill transposing the European Parliament and Council Directive 2014/95/EU²³ and the principles enshrined in the Italian Constitution and the Italian Environment Code.

The solidaristic and personalistic character of the Italian Constitution obliges legal scholars to understand freedom of economic initiative not merely as an instrument of the entrepreneur's²⁴ prerogative but as a general principle that helps to balance inequalities in relationships, protect legal positions, and safeguard collective interests that might otherwise be overlooked.²⁵ This imprint joins the recent constitutional reform affecting Arts 9 and 41, which emphasize that economic activity becomes instrumental in the realization of the existential values of the person.²⁶ This perspective also informs the interpretation of 'social utility'²⁷

²² The draft of the transposition decree subject to consultation can be viewed at the following link: https://www.dt.mef.gov.it/export/sites/sitodt/modules/di-partimento/consultazioni_publiche/3_Consultazione-decreto-di-ecepimento-CS-RD.pdf.

²³ European Parliament and Council Directive 2014/95/EU 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] L330/1.

²⁴ This 'restricted' concept, on the other hand, is the characteristic of the overseas system of so-called Corporate Philanthropy. On this point, see R.N. Mefford, 'Sustainable CSR in Global Supply Chains' 9 *Journal of Management and Sustainability*, 82-92 (2019). More dated in time, see T.A. Hemphill, 'Corporate Governance, Strategic Philanthropy and public Policy' *Business Horizons*, 32 (1999).

²⁵ In this sense and to deepen understanding, see A. Addante, 'Responsabilità sociale dell'impresa' *Digesto*, 5 (2005).

²⁶ In this sense see P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, n 7 above, 217. See also in the mentioned work, page 216 where the author points out 'in ciò consiste il nesso inscindibile tra libertà di iniziativa economica e valori personalistici e solidaristici, là dove "inviolabili" sono i diritti dell'uomo e "inderogabili" sono i doveri di solidarietà economica, politica e sociale; si che le situazioni patrimoniali [...] non possono non realizzarsi in conformità ai valori del personalismo e del solidarismo'.

²⁷ For a deeper exploration, see P. Weitzel and Z.J. Rodgers, 'Broad Shareholder Value and the Inevitable Role of Conscience' *New York University Journal of Law & Business*, 35 (2015). For a more historical perspective, see W.B. Donham, 'The Social Significance of Business' *Harvard Business Review*, 406 (1927). As early as 1927, Donham noted that 'unless more of our business leaders learn to exercise their powers and responsibilities with a definitely increased sense of responsibility toward other groups in the community, unless without great lapse in time there is through the initiative of such men an important socializing of business, our civilization may well head for one of its periods of decline'. Nearly a century later, Donham's words appear almost prophetic. See also E. Merrick Dood Jr, 'For Whom Are Corporate Managers Trustees?' 45 *Harvard Law Review*, 1145 (1932) where the author stresses that society is an 'economic institution which has a social service as well as a profit-making function'.

contained in Art 41 and the definition of ‘social function’ outlined in Art 42 of the Italian Constitution.

The first, in fact, becomes a tool to ‘weigh’ the merit of the entrepreneur’s *modus operandi*, while ‘the person and his dignity become the confirmative limit of the same concept of autonomy or freedom of negotiation’.²⁸

Within this framework of values, companies emerge as the protagonists of ecologically responsible progress.²⁹

III. The Shell Case. Avant-garde of Modern Corporate Social Responsibility

The attribution of the power to ‘bring about social change’³⁰ to companies highlights the social responsibility they bear in achieving the common objectives of the UN’s 2030 Agenda on the one hand³¹ and the inevitable transformation of CSR on the other. In this context, another important principle should be introduced: the adequacy³² emphasized by the CSRD. The purpose of the rule mentioned above requires companies to adapt their organizational structure to achieve the abovementioned objectives.

A similar approach was taken by the Hague District Court, which, in the case of Royal Dutch Shell,³³ ordered Shell to reduce CO₂ emissions by at least 45% by 2030 compared to those of 2019. The importance of the case lies in the application of the international principle of the standard of care. The latter, read together with the United Nations Guiding Principles on Business and Human Rights, the United Nations Global Compact, and

²⁸ P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, n 7 above, 277 in which the author also stresses that “[i]l rispetto dell’utilità sociale” “condiziona tutto il mercato e tutte le attività di mercato” e seppure “il contratto, anche “d’impresa”, non è tenuto a perseguire l’utilità sociale, deve essere ad essa conforme, non solo nella sua produttività, ma più in genere nel suo risultato economico”.

²⁹ See F. Lazzara, ‘L’azienda come motore per la transizione giusta: dalla Responsabilità sociale d’impresa all’advocacy. Il caso del contratto di espansione’ *federalismi.it*, 206-223 (2024); M. Clarich, ‘La tutela dell’ambiente attraverso il mercato’ *Diritto pubblico*, 219 (2007).

³⁰ L.E. Perriello, ‘Per una sostenibilità in linea con il profitto’, n 1 above, 185.

³¹ See F. Lazzara, ‘L’azienda come motore per la transizione giusta: dalla Responsabilità sociale d’impresa all’advocacy’, n 29 above, 211.

³² To learn more, see V. Buonocore, *Le nuove frontiere del diritto commerciale* (Napoli: Edizioni Scientifiche Italiane, 2006), 199.

³³ The decision of the Hague Court is available at the following link: https://www.giurisprudenzapenale.com/wp-content/uploads/2021/07/ECLI_NL_RBDHA_2021_5337.pdf.

the OECD Guidelines on Multinational Enterprises,³⁴ led the courts to conclude that Shell's action was negligent. The Hague judges identified a general corporate responsibility for climate change, anticipating the EU legislator and highlighting the need to align the Dutch legal system³⁵ with both international and Union principles. Thanks to the above principles, along with Arts 2 and 8 of the ECHR³⁶ and other recent climate-related rulings,³⁷ the judges highlighted the importance of economic development that considers the right to live in a healthy environment.

What emerges so far is a convergence of jurisprudence, doctrine, and legislation toward a shared goal.

What was once a matter of hermeneutic activity has now become a parameter of accountability³⁸ for all companies, which must adhere to and implement the prescribed standards.³⁹ This approach aims to fulfil at least one of the objectives outlined in Art 9 of the European Parliament and Council Regulation 2020/852/EU.

IV. The New Corporate Social Responsibility

Given this context, it must be stressed that CSR, like the general rules laid down by the legislator, must also differentiate between the source (contractual or non-contractual) of liability, the presence or absence of the psychological element, the assessment criteria, and the resulting accountability. In other words, thanks to the general clause of unjust

³⁴ In this sense, see E. Napoletano and S. Spinelli, 'Il caso Royal Dutch Shell. La Corte olandese impone il taglio del 45% delle emissioni di CO₂ al 2030: abuso di diritto o rispetto degli accordi internazionali?' *Giurisprudenza penale*, 10 (2021).

³⁵ P. Perlingieri, 'Argomentazione comparativa', in R. Favale and L. Ruggeri eds, *Scritti in onore di Antonio Flamini* (Napoli: Edizioni Scientifiche Italiane, 2020), 1053.

³⁶ Think of Eur. Court H.R., *Lopez Ostra v Spagna*, Judgment of 9 December 1994; Eur. Court H.R., *Guerra and others v Italia*, Judgment of 19 February 1998. See also Eur. Court H.R., *Fadeyeva v Russia*, Judgment of 9 June 2005. In these judgments the European Court highlighted that a violation of Art 8 ECHR, stemming from non-compliance with a company's environmental protection policy, can adversely affect an individual's health.

³⁷ To deepen awareness in this sense, see the case *Urgenda* as well as the cases *Guerra and others v Italia* and *Fadeyeva v Russia*.

In doctrine, see K. Zabrodina, 'The *Urgenda* Case: The Existential Dimension of Climate Change between Effective Protection and Political Discretion', in L. Ruggeri and K. Zabrodina eds, *Making Production and Consumption Sustainable: A Global Challenge for Legislative Policies. Case Law and Contractual Practices. Guidelines for Changing Markets* (Vienna: SGEM WORLD SCIENCE, 2023), 645.

³⁸ S. Rossi, 'Il diritto della Corporate Social Responsibility', n 5 above, 780.

³⁹ For example, in this sense, see the standard of the European Financial Reporting Advisory Group that issued the European Sustainability Reporting Standards. See https://finance.ec.europa.eu/news/commission-adopts-european-sustainability-reporting-standards-2023-07-31_en.

damage⁴⁰ contained in Art 2043 of the Italian Civil Code, ‘new facts’ that may trigger liability can be identified.⁴¹ These include risks related to environmental impact and the subsequent harm to people or property⁴² that may arise from business activity.

The classification of corporate responsibility has long been a topic of doctrinal debate, which is divided into two main perspectives. The first advocates for the application of strict liability and, therefore, attributing unjust damage to the company not because of intentional or negligent actions but simply because it engaged in business activities. The second, however, sees responsibility for fault or intent as the cause of unjust damage. Consider, for example, the company’s ‘abstention’ behaviours.

The unitary regulatory framework analysed suggests that the obligation to adhere to ESG parameters gives rise to responsibility not merely as a risk associated with improper conduct of an activity but also as a potential sanction instrument. This refers to cases where the company fails to respect the social utility that the economic initiative must achieve through compliance with the legislation in place.⁴³

In this context, it becomes clear that the function pursued by CSR cannot be restricted to a mere reparative function. The variety of injurious behaviours causes an inevitable diversity of functions that, from time to time, according to the implications arising from the unjust damage, will emerge from the concrete case. The choice of one function over another, or their coexistence,⁴⁴ serves a dual purpose: ensuring security and evaluating the damage and its intensity to effectively protect the injured party.⁴⁵ The choice of function must also be made in light of the legal situations being protected, whether they are financial or existential.⁴⁶ Beyond the typical reparative function, CSR also encompasses preventive and punitive functions if the obligation established by the non-financial reporting is not respected or that of striking the right balance between the exercise of the

⁴⁰ See V. Buonocore, ‘Le nuove frontiere del diritto commerciale’, n 32 above, 164; Id, ‘Impresa (diritto privato)’ *Enciclopedia del diritto*, *Annali*, I, (Milano: Giuffrè, 2007).

⁴¹ In this sense, see G. Alpa, ‘La responsabilità civile tra solidarietà ed efficienza’ *Rivista critica del diritto privato*, 195 (2004) in which the author stresses that civil liability is ‘*un laboratorio in attività costante*’.

⁴² To learn more, see V. Buonocore, ‘Impresa (diritto privato)’, n 40 above, 45.

⁴³ In this sense, see V. Buonocore, ‘Le nuove frontiere del diritto commerciale’, n 32 above, 233-234.

⁴⁴ See P. Perlingieri, ‘Le funzioni della responsabilità civile’ *Rassegna di diritto civile*, 119 (2011).

⁴⁵ See M. Barcellona, *Trattato della responsabilità civile* (Torino: Utet Giuridica, 2011), 7.

For the case law, see Corte costituzionale 11 November 2011 no 303; Corte costituzionale 23 June 2016 no 152; Corte costituzionale 22 October 2014 no 238.

⁴⁶ P. Perlingieri, ‘Le funzioni della responsabilità civile’, n 44 above, 116.

economic initiative and the protection of the rights of the person and the environment.⁴⁷

The decision not to restrict liability to a single function also came from the European legislator. Administrators are encouraged to assess how the company intends⁴⁸ to ensure the achievement of the transition objectives and how it considers the interests of multiple internal and external stakeholders interested in the proper exercise of the entrepreneurial activity. In particular, the assessment carried out by the administrator concerns ‘the elements of risk and opportunity for the care for the social and environmental impact of business activity’.⁴⁹

It is clear from what has been said that the preventive function provided for in European legislation must be accompanied by the additional punitive function. The company, being obliged to identify the ESG objectives to be achieved, will only be responsible if it respects the self-imposed goals on which the recipients of the goods have relied. Finally, a third function, the so-called deterrent function,⁵⁰ guides administrators to align management with sustainability parameters.⁵¹ In other words, the predictability and, therefore, the preventability of harmful events leads the interpreter to consider in the ‘sanction key the obligation to compensate for damages’.⁵² The goal of production is no longer solely financial; it now also considers the social impact and, therefore, respect for social sustainability as an instrument of solidarity⁵³ between present and future

⁴⁷ To learn more, see G. Alpa, ‘Responsabilità degli amministratori di società e principio di “sostenibilità”’ *Contratto e impresa*, 725 (2023). See, also, L. Vicente, ‘Corporate Governance in the United States, the United Kingdom, New Zealand, Canada, South Africa, India and Singapore’, n 1 above, 277-289.

⁴⁸ A. Pisani Tedesco, *Strumenti privatistici per la sostenibilità ambientale e sociale* (Torino: Giappichelli, 2024), 157 in which underlines ‘*fra le diverse funzioni esprimibili dall’istituto, si devono menzionare perlomeno le seguenti: compensativa, preventiva o deterrente, sanzionatorio-punitiva, organizzativa e moralizzatrice*’.

⁴⁹ G. Alpa, ‘Responsabilità degli amministratori di società e principio di “sostenibilità”’, n 47 above, 730-731.

⁵⁰ See F. Möslein, ‘Sustainable Corporate Governance: A Way Forward’ *European Corporate Governance Institute – Law Working Paper No. 583*, 7 (2021). See also L.E. Perriello, ‘Per una sostenibilità in linea con il profitto’, n 1 above, 193.

⁵¹ However, in some jurisdictions the deterrent function of responsibility for compliance with sustainability indicators is a problem. In Italy, for example, 99% of companies are micro-enterprises excluded from the Sustainability Reporting Directive. In this case, therefore, the deterrent function cannot be attributed to the EU legislation, but to the EU Charter of Fundamental Rights and, in particular, to Art 41 of the Italian Constitution.

⁵² F. Quarta, *Risarcimento e sanzione nell’illecito civile* (Napoli: Edizioni Scientifiche Italiane, 2013), 69.

⁵³ The link between solidarity and sustainability can be tightened in U. Mattei and A. Quarta, ‘Tre tipi di solidarietà. Oltre la crisi nel diritto dei contratti’ *giustiziacivile.com* (2020), especially para 4, in which by living law ‘*parrebbe emergere un’idea di solidarietà proattiva che interviene come limite interno all’autonomia contrattuale*’; A. Lasso, ‘Sostenibilità sociale e diritti fondamentali della persona’, in D.A. Benítez and C. Fava eds,

generations.⁵⁴ Consequently, any conduct contrary to the obligations assumed triggers liability, which will be addressed differently according to whether there is an obligation between the damaging company and the injured party or whether the liability arises from an unlawful act, as defined under Art 2043 of the Italian Civil Code.

The set of functions just described, deduced from the will of the EU legislator, positively changes corporate responsibility, compelling companies to 'moralize' their activities and prioritize the objectives of social sustainability. In particular, the deterrent function becomes central because the compensatory remedy plays a key role in regulating the market through its application.

In light of this recent regulatory framework, it is clear that, although the Shell case would have come to the same conclusion, it would have had a different basis for argument.

Consider, for example, a manufacturing company that decides to base its production on pursuing ESG parameters. As part of its policy, the company commits to gradually reclaiming the creek where, for years, it has dumped its waste. To achieve this, the company pledges to both install modern purifiers and use highly sustainable materials (such as those locally sourced from nearby farms or previously used and recycled materials) and natural dyes (as outlined in Art 9, paras c), d) and e), and 10, letter d) of the European Parliament and Council Regulation 2020/852/EU).

By identifying potential risks of business activity and proactively adopting precautionary tools, the company demonstrates a commitment to sustainability that resonates with consumers. This choice results in attracting customers who value a company's attention to short- and long-term risks, both for the inhabitants near the enterprise and for all those who buy the product. It also highlights the profiles that are intertwined, varied, and range from ethical ones to those of responsibility.

Unlike in the past, failure to adhere to the code of conduct and implement the actions to improve the company's performance no longer constitute a mere 'reliance subject to protection'. Instead, it represents an absolute obligation, a source of liability based on the specific cause of the offence. The evolution of legislation no longer applies the Latin '*brocardo*' '*cuius commoda eius et incommoda*' but now focuses on setting production targets and establishing a duty of diligence. This duty obliges companies to

Sostenibilità: sfida o presupposto? (Milano: Cedam, 2019), 94; B. Bertarini, *Il principio di solidarietà tra diritto ed economia. Un nuovo ruolo dell'impresa per uno sviluppo economico inclusivo e sostenibile* (Torino: Giappichelli, 2020), 5.

⁵⁴ A. Pisani Tedesco, *Strumenti privatistici per la sostenibilità ambientale e sociale*, n 48 above, 33.

identify and prevent risks to reduce the costs of damages, thus encouraging the limitation of harmful events.⁵⁵

As regards non-contractual liability, it is necessary to identify the key elements, namely the unlawful act, intent and fault, unjust damage and the causal link. It seems appropriate to exclude the approach whereby CSR is a strict liability. The element of fault is evident when there is a clear discrepancy between the actions a company should have carried out to pursue the 'social utility of economic initiative' and those it actually carried out. Equally evident is the commission of an offence caused by non-compliance with the social and environmental obligations assumed. More complex, however, is the etiological link. The burden of proof will fall on the injured party to demonstrate that the company failed to use natural dyes, sustainable fabrics or to install purification plants to reduce pollutant discharges into the nearby river.

Having clarified the reasons for the unlawfulness, it must be pointed out that the law to be applied differs depending on the injured party. Indeed, in this perspective, it is appropriate to distinguish between a general consumer, who is subject to consumer law, and the owner of the right of residence or a property located in the area adjacent to the manufacturing company that could invoke the application of Art 844 of the Italian Civil Code to seek the cessation of harmful emissions. Consider also the case where a company has commissioned a batch of T-shirts from a manufacturing company and takes action for the quality of the product, or simply a parent company taking action against a subsidiary for failing to comply with its group-wide sustainability obligations.

From the above considerations, it can be inferred that what has changed in the present case is precisely the internal component. In other words, the choices of the company that impact consumers, investors, and stakeholders must now be guided by good governance to achieve the minimum transition targets mandated by recent EU legislation. In the emerging scenario, responsibility no longer revolves around the directors' balancing of the company's interests, but rather centres on the company's failure to uphold its code of conduct. The legal significance of this breach gives rise to liability on the company's part. However, similar to the manufacturer's responsibility, the company could also be held responsible if, despite respecting its policy, it is not in line with the standards laid down in the legislation.⁵⁶

⁵⁵ A. Addante, 'Responsabilità sociale dell'impresa', n 25 above, 7.

⁵⁶ For further information, see G. Glinski, 'Corporate Social Responsibility and Corporate Liability for Environmental Damage' *CEPRI Working Paper Series*, 5 (2020) where the author stresses that 'compliance with any CSR or environmental self-commitments, standards or best practices does not necessarily lead to a 'safe harbour' in the tort of negligence as the duty of care is normative rather than empirical and these self-

Therefore, it is necessary to balance the freedom of economic initiative (Art 41 of the Italian Constitution) with protected interests (whether monetary or not). In this context, it is crucial to distinguish between the 'purpose and subjective function of the activity and the objective and subjective intent of the entrepreneur' and the 'internal company social contracts and external social contracts between companies'. Disregard for norms, premeditation and, general transgressions play a vital role in this analysis.⁵⁷

The latter, in conjunction with the principles and freedoms mentioned, must guide the judge in identifying the actual liability of the company.⁵⁸

Given the importance of assessing each specific case in relation to the injured party involved and the discipline to be applied, it should be stressed that the remedy must be both compensatory and inhibitory. In other words, given the important interest of the community, it is necessary not only to ensure the cessation of harmful behaviour and the attainment of the fixed standards but also go beyond mere compensation of the damages to address the needs of the injured party.

V. Conclusions

In summary, it is possible to affirm how the essence of enterprise and capitalism is evolving. States and companies must both move towards creating a new capitalism, so-called 'sustainable capitalism'.

In this evolving landscape, it is necessary to immediately set up a company organizational framework from which it is possible to easily identify the responsible person and correctly evaluate the choices regarding purchasing, payments, and the production chain.⁵⁹

Furthermore, the importance of the sanctioning function of liability must be measured according to the criteria of reasonableness and proportionality, taking into account the degree of culpability of those who have breached the obligations assumed and the actual damage caused. Moreover, the centrality of the function, as mentioned above, is justified not only by the fact that each damage is unique but, above all, because what is at stake is the violation of fundamental rights and freedoms. Especially for this last reason, it is insufficient to merely require the offending company to compensate for the damage. Instead, it seems more appropriate to consider applying a sanction to 'punish and discourage the

commitments or standards could be inadequately lax, outdated or inadequate in a given situation'.

⁵⁷ F. Quarta, *Risarcimento e sanzione nell'illecito civile*, n 52 above, 82.

⁵⁸ *ibid* 98.

⁵⁹ V. Buonocore, 'Impresa (diritto privato)', n 40 above, 48.

recurrence of the same violation'.⁶⁰ Moving beyond a purely restorative function appears to be of fundamental importance because, in addition to ensuring the effectiveness of environmental protection, it guarantees the principle of constitutional solidarity.

Several years ago, the Italian Constitutional Court⁶¹ also ruled in this direction, stressing that in the case of harm to human health or the environment, civil liability provides 'not only to restore the damaged person's assets but also to prevent and sanction the wrongful act. Civil liability, therefore, can simultaneously fulfil preventive and sanctioning functions'.⁶²

When analysing the legal systems of Common Law countries, and in particular in the United States, it is possible to see how punitive damages have the objective of deterring antisocial, malicious, or harmful activities by imposing an 'ultra-compensatory civil sanction'. This sanction is proportionate, obviously, to the degree of offence suffered.⁶³ It is, therefore, possible to note the common thread that links the two systems or shared focus on discouraging activities that negatively affect society.

In both systems, the attention given to corporate activity highlights the centrality of sustainability as a balance between economic, environmental, and social interests. Although this similarity differs, the rules governing the recognition of these functions differ. While the compensatory function is rooted in our legal system, the same cannot be said of the sanction function,⁶⁴ which is less consistent and cannot be directly compared to other legal systems, such as, for example, that of the United States.⁶⁵

Compared to the past, the responsibility placed on directors becomes explicit if social and environmental interests are not considered or respected in company management. This responsibility is part of the general duty of care of directors.⁶⁶

⁶⁰ F. Quarta, *Risarcimento e sanzione nell'illecito civile*, n 52 above, 330.

⁶¹ This refers to Corte costituzionale 17 December 1987 no 641.

On the point, see M. Zarro, *Danno da cambiamento climatico e funzione sociale della responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 2022), 159.

⁶² F. Quarta, *Risarcimento e sanzione nell'illecito civile*, n 52 above, 231.

⁶³ *ibid* 246. Also see M. Zarro, *Danno da cambiamento climatico e funzione sociale della responsabilità civile*, n 61 above, 161.

⁶⁴ In this matter, see C. Scognamiglio, 'I danni punitivi e le funzioni della responsabilità civile' *Il corriere giuridico*, 918 (2016).

⁶⁵ See P. Mogin, 'Why Judges, Not Juries, Should Set Punitive Damages' *The University of Chicago Law Review*, 65 (1998); M.I. Krauss, 'Markets and the Law. Punitive Damages and the Supreme Court: A Tragedy Five Acts' *George Mason Law & Economics Research Paper No. 07-34* (2007). In jurisprudence, however, there are several cases in which the US Courts have analysed 'punitive damages'. To deepen understanding in this sense, see F. Quarta, *Risarcimento e sanzione nell'illecito civile*, n 52 above, para 33.

⁶⁶ S. Rossi, 'Il diritto della Corporate Social Responsibility', n 5 above, 778.

The judgment of adequacy and reasonableness cannot 'limit' the development and well-being of the person to the market and its rules. Law fulfils the fundamental role of dictating the 'limits and [the] corrections' necessary for the pursuit of 'wealth and its distribution' but is always attentive to the pivotal value of the unitary order.⁶⁷ In other words, the market represents the instrument and the space through which contractual autonomy finds its expression, and, for this reason, it needs precise rules that 'legitimize and regulate it'. Therefore, economic initiative must be conducted in a manner that respects the environment in which the person, the supreme value of the order, can develop.

In conclusion, it must be pointed out that social utility 'becomes a parameter to weigh the merit of entrepreneurial action and [the environment], and the person and human dignity become a limiting factor'⁶⁸ for the freedom of economic initiative and, therefore, the market and all the activities connected with it. Ultimately, it can be said that the balance that must be made also concerns the relationship between 'productivity' and sustainability, where doctrine, jurisprudence,⁶⁹ and lawmakers are now convinced that 'selfish profit' must take a step back from 'just solidarity'.⁷⁰

⁶⁷ See P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, n 7 above, 199 in which the author stresses that: '*la società non è riducibile al mercato e alle sue sole regole; il diritto, al quale spetta la regolamentazione della società, indica limiti e correttivi, dettati non soltanto dal perseguimento della ricchezza e dalla sua distribuzione, ma da valori e interessi di natura diversa*'. From the same author, see also G. Perlingieri, 'Mercato, solidarietà e diritti umani' *Rassegna di diritto civile*, 84, 91-93 (1995). Finally, see C. Scognamiglio, 'I danni punitivi e le funzioni della responsabilità civile', n 64 above, 919 in which the author stresses that '*la fattispecie non deve mai essere considerata singolarmente, ma occorre guardare l'intero contesto in cui essa è collocata*'.

⁶⁸ P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, n 7 above, 277.

⁶⁹ Finally, consider the possibility given to citizens to bring an action before the European Court of Human Rights in the event of a market operator causing damage resulting from incorrect social self-regulation. See Eur. Court H.R., *Hatton and others v Regno Unito*, Judgment of 7 November 2000. See also Eur. Court H.R., *Moreno Gomez v Spagna*, Judgment of 16 November 2004.

⁷⁰ To learn more, see E. Caterini, *Sostenibilità e ordinamento civile*, n 3 above, 96.