

Market Citizenship: Fostering the Green Transition through European Private Law

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SUMMARY: I. Sustainable Development and EU Law. – II. Shifting from Competition to Cooperation. – III. Structural Level and Regulatory Private Law. – IV. Corporate Level. – V. «Consumption» Level. – VI. Toward a Market Citizenship.

I. Sustainable Development and EU Law

The main lines of the EU Green Deal immediately highlight the areas driven by Private/Regulatory Private Law for the transition toward a Circular Economy and the network of connections between them².

In this scenario, sustainability is ceasing to be a nebulous concept without any power and its functions are becoming less and less blurred. EU Treaties³, international Courts⁴ and national Constitutions⁵ are – directly or implicitly – already referring to Sustainable Development as a modern principle recalling solidarity and subsidiarity with a renewed consciousness of their time and space projection⁶. Concern for future generations therefore requires a different approach to the concept of development itself, enlightened by the awareness that economic growth that threatens the environment and does not address societal issues will not permit the ongoing enjoyment of fundamental freedoms enjoyed

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² See Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee Of The Regions – The European Green Deal (COM(2019) 640 final), available at https://eur-lex.europa.eu/resource.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0002.02/DOC_1&format=PDF

³ *Ex multis*, cfr. Artt. 3.3 TUE and art. 11 TFUE

⁴ Milestones, from this perspective, are: Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), 25 September 1997, available at <https://www.icj-cij.org/public/files/casereLATED/92/092-19970925-jud-01-00-en.pdf>; Sentence arbitrale relative au chemin de fer dit Iron Rhine (“Ijzeren Rijn”) entre le royaume de Belgique et le royaume des Pays-Bas, décision du 24 mai 2005, available at https://legal.un.org/riaa/cases/vol_XXVII/35-125.pdf; Case Concerning Pulp Mills on the River Uruguay (Argentina V. Uruguay), Judgment Of 20 April 2010, available at <https://www.icj-cij.org/public/files/casereLATED/135/135-20100420-JUD-01-00-EN.pdf>; Indus Waters Kishenganga (Pakistan v. India), Partial award, 18 February 2013, available at https://legal.un.org/riaa/cases/vol_XXXI/1-358.pdf.

⁵ See § 20 § *Grundgesetz*, as well as the French *Charte de l’environnement* francese and Arts. 2, co. 2 and 3, Chapter I, of the Swedish Instrument of Government or the recently emended Arts. 9 and 41 of the Italian Constitution.

⁶ Solidarity and subsidiarity, enveloped by the principle of Sustainable Development, have definitely acquired a wider temporal connotation and an unlimited extension in space, beyond national and EU borders. See, on the meaning of the references to protection of future generations: D. McGoldrick, *Sustainable Development and Human Rights: An Integrated Conception*, in *Int’l & Comp. L.Q.*, 1996, p. 796 ss.; P. Perlingieri, *I diritti umani come base dello sviluppo sostenibile. Aspetti giuridici e sociologici*, in *Riv. giur. Molise Sannio*, 2000, p. 11 ss.; in Id., *La persona e i suoi diritti. Problemi del diritto civile*, Napoli, 2005, p. 73 ss.; and in Id., *Lezioni (1969-2019)*, I, Napoli, 2020, p. 161 ss.; G. Carapezza Figlia, *Oggettivazione e godimento delle risorse idriche. Contributo a una teoria dei beni comuni*, Napoli, 2008, p. 170 ss.; A. D’Aloia, *Generazioni future (diritto costituzionale)*, in *Enc. dir., Ann.*, IX, Milano, 2016, p. 331 ss.; D. Porena, *Il principio di sostenibilità. Contributo allo studio di un programma costituzionale di solidarietà intergenerazionale*, Torino, 2017, spec. p. 99 ss.; B. Purvis, Y. Mao, D. Robinson, *Three Pillars of Sustainability: In Search of Conceptual Origins*, in *Sustain. Sc.*, 2019, p. 681 ss.; D. Imbruglia, *Mercato unico sostenibile e diritto dei consumatori*, in *Pers. merc.*, 2021, p. 189 ss.; M. Pieraccini, T. Novitz, *Sustainability through History*, in M. Pieraccini, T. Novitz, *Legal Perspectives on Sustainability*, Bristol, 2020, p. 9 ss.

worldwide. Thus, the realization of human capabilities in the present moment and over time imposes the criteria of reasonableness in the usage of natural resources and requires balancing conflicting interests in the capital market⁷.

This balancing function can be achieved through the principle of sustainable development, the normative power of which can be harnessed through focusing on the SDGs, the consensus surrounding which grants the legitimacy of the goal-oriented approach inspiring policy measures and legislation in the EU.

In particular, the common values implied in the principle of sustainable development are reshaping the economic model of a 'competitive social market economy' in the EU internal market, as well as the overall approach to EU law. EU policies – after decades spent focusing on market regulation to ensure free competition – are now adopting strategies and measures aimed at enhancing cooperation between institutions and market players and at the empowerment of stakeholders.

The principle of sustainable development demands of every market player – institutions, corporations and citizens – a contribution for the transition to a circular economy and private law can channel their answers conforming private autonomy in light of sustainability⁸. Indeed, the normative power of the principle of sustainable development enables European Private Law to accelerate the green transition in different sectors.

The impact of this principle on private law is self-evident considering at least two SDGs, the 17th and the 12th. Whereas SDG 12 directly targets *Responsible Consumption and Production*, which is already widely regulated by private law, the systemic SDG 17 – *Partnership for the Goals*, has no specific sector of reference, since it requires comprehensive contributions from economic forces to push forward sustainable development.

The pathways tracked by SDGs 12 and 17 demonstrate the need to investigate how and to what extent economic initiatives can foster this transition, as well as to identify the main instruments available for private autonomy to integrate individual economic interests with collective environmental or social ones. The analysis will be conducted at 3 different levels of a complex and inter-related system (§§ III, IV, V, respectively for structural, corporate and consumption level), giving rise to questions about the concept of (market) citizenship and suggesting a reconceptualization of the role of corporations and consumers.

⁷ E. Caterini, *Sostenibilità e ordinamento civile. Per una riproposizione della questione sociale*, Napoli, 2018, spec. p. 145 ss. (see also the reviews by G. Perlingieri, «Sostenibilità», *ordinamento giuridico e retorica dei diritti*. *A margine di un recente libro*, in *Foro nap.*, 2020, p. 101 ss., whose conclusion affirms that balancing interests is the only method allowing to catch the deep essence of sustainability; and M. Pennasilico, *Recensione a E. Caterini, Sostenibilità e ordinamento civile. Per una riproposizione della questione sociale*, in *Rass. dir. civ.*, 2018, p. 1511 ss.); Id., *Sustainability and Civil Law*, in *ItaLJ*, 2018, p. 289 ss.; Id., *La «sostenibilità» nell'esperienza giuridica contemporanea. In occasione della discussione svoltasi nell'Ateneo barese*, in *Sostenibilità: sfida o presupposto?*, edited by D.A. Benitez, C. Fava, Milano, 2019.

⁸ See M.T. Maloney, G.L. Brady, *Capital Turnover and Marketable Pollution Rights*, in *J. Law Econ.*, 1988, p. 203 ss.; R.W. McGee, W.E. Block, *Pollution Trading Permits as a Form of Market Socialism and the Search for a Real Market Solution to Environmental Pollution*, in *Fordham Envtl. L. Rev.*, 2011, p. 51 ss.; M. Pennasilico, *Sviluppo sostenibile e «contratto ecologico», un altro modo di soddisfare i bisogni*, in *Rass. dir. civ.*, 2016, p. 1291 ss.; and in *Contratto e ambiente. L'analisi «ecologica» del diritto contrattuale*, edited by M. Pennasilico, Napoli, 2016, p. 287 ss. (ivi see also P. Perlingieri, *Persona, ambiente e sviluppo*, p. 321 ss.); Id., *Contratto ecologico e conformazione dell'autonomia negoziale*, in *Riv. quad. dir. ambiente*, 2017, p. 4 ss.; and in *Giust. civ.*, 2017, p. 809 ss.; C. Irti, *Gli «appalti verdi» tra pubblico e privato*, in *Contr. impr.*, 2017, p. 183 ss.; R. Catalano, *Sviluppo sostenibile delle reti per le comunicazioni elettroniche e tutela della salute e dell'ambiente*, in *Attività d'impresa e sviluppo sostenibile*, a cura di M.A. Ciocia, C. Ghionni, Napoli, 2021, p. 39 ss.; S. Zuccarino, *Il contratto «conformato» quale statuto normativo del mercato energetico*, Napoli, 2021, p. 34 ss. e 188 ss.; Id., *Sostenibilità ambientale e riconcettualizzazione del contratto*, in *Ann. S.I.S.Di.C.*, 2022, p. 65 ss.; F. Bertelli, *Le dichiarazioni di sostenibilità nella fornitura di beni di consumo*, Torino, 2022, spec. p. 89 ss.

II. Shifting from Competition to Cooperation

The 17 Goals of the Agenda 2030 clearly show that Sustainable Development can only be achieved through new forms of cooperation, beyond those between private parties. The private sector undoubtedly plays a pivotal role in the market but, more broadly, the required level of cooperation is multi-level and involves multiple stakeholders. Some scholars have already pointed out that, in this scenario, public/private partnerships are challenging the traditional separation between public and private law⁹. Intersections between the private and public sectors are increasingly evident in capital market law, considering the energy sector as well as banking and finance or the new technologies applied therein. These fields demonstrate that cooperation between institutional actors, private players and public independent authorities characterizes the strategy to adapt market regulation to modern issues and to pursue a balanced economic development.

As a corollary, “Partnership for the Goals” is a goal itself. However, it is also a mandatory condition to achieve the SDGs overall.

From an EU private law perspective, “partnership for the goals” raises some questions concerning the rights and duties of corporations in pursuing shareholders’ interests protecting, at the same time, those of stakeholders’ through the adaptation of their business models to address the environmental and social implications of their activities. Moreover, the desired collaboration between supervisory public bodies and enterprises in the field of sustainability – as the Action Plan for Sustainable Finance and its implementation tools testify – requires analyzing authorities’ powers and competencies to monitor sustainability and, eventually, to react to unsustainability. Both these questions lead to a more systemic approach that recognizes the impact of the principle of sustainable development on private autonomy, which can no longer be intended as a simple expression of individual interests.

With this awareness, it is certainly true that specific instruments to foster the green transition are needed. However, it is not less true that a consideration of market players as active citizens could allow their joint activities to express a political power in reshaping the economic model through the integration of environmental/social perspectives and ESG factors in private law instruments, primarily in contracts¹⁰.

⁹ Anticipating the hybridization of public/private law, see: M. Giorgianni, *Il diritto privato e i suoi attuali confini*, in *Riv. trim. dir. proc. civ.*, 1961, p. 391 ss.; A.M. Balestreri, *Sussidiarietà, territorio, cooperazione fra mano pubblica e soggetti privati. Spunti per un inquadramento giuridico*, in *Dir. amm.*, 1998, p. 615 ss.; S. Cassese, *Quattro paradossi sui rapporti tra poteri pubblici ed autonomie private*, in *Riv. trim. dir. pubb.*, 2000, p. 389 ss.; Id., *L'arena pubblica. Nuovi paradigmi per lo Stato*, in *Riv. trim. dir. pubb.*, 2001, p. 607 ss.; E. Del Prato, *Principio di sussidiarietà e regolazione dell'iniziativa economica privata. Dal controllo statale a quello delle autorità amministrative indipendenti*, in *Riv. dir. civ.*, 2008, I, p. 257 ss. More recently, G.M. Salerno, *Iniziativa privata, sussidiarietà e diritti sociali: una prospettiva di ordine costituzionale*, in *Perc. cost.*, 2016, p. 151 ss.; B. Sordi, *Verso la grande dicotomia: il percorso italiano*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 2016, p. 193 ss.; Id., *Diritto pubblico e diritto privato. Una genealogia storica*, Bologna, 2020, *passim*; A. Zoppini, *Diritto privato vs diritto amministrativo, (ovvero alla ricerca dei confini tra Stato e mercato)*, in *Riv. dir. civ.*, 2013, p. 515 ss.; Id., *Il diritto privato e le «libertà fondamentali» dell'Unione europea (principi e problemi della «Drittwirkung» nel mercato unico)*, in *Riv. dir. civ.*, 2016, p. 712 ss.; and in *Le «libertà fondamentali» dell'Unione europea e il diritto privato*, edited by F. Mezzanotte, Roma, 2016, p. 38 ss.; Id., *Il diritto privato e i suoi confini*, Bologna, 2020, spec. pp. 201 ss. e 239 ss.; G. Calabresi, *L'altruismo, la beneficenza e le istituzioni no profit*, in *Il futuro del Law and Economics. Saggi per una rimeditazione ed un ricordo*, Italian edition edited by F. Fimmano, V. Occorsio, Milano, 2018, p. 105 ss.; A. Gambaro, *Interessi diffusi, interessi collettivi e gli incerti confini tra diritto pubblico e diritto privato*, in *Riv. trim. dir. proc. civ.*, 2019, p. 779 ss.; C. Napolitano, *Il partenariato pubblico-privato nel diritto dei beni culturali: vedute per una sua funzione sociale*, in *dirittifondamentali.it*, 2019, disponibile al link <http://dirittifondamentali.it/wp-content/uploads/2019/08/Napolitano-Il-partenariato-pubblico-privato-nel-diritto-dei-beni-culturali-vedute-per-una-sua-funzione-sociale.pdf>; A. Quarta, M. Spanò, *Le forme del comune. Note sulle istituzioni della cooperazione*, in *Iride*, 2021, p. 81 ss.

¹⁰ See, *ex multis*, C. Poncibò, *The Contractualisation of Environmental Sustainability*, in *ERCL*, 2016, p. 335 ss.

This premise highlights the connection between SDG 17 and SDG 12. The latter, being more focused on the (sustainable) consumption-production circle, sets two targets addressing the importance of sustainability information and, thus, communication¹¹.

International and European behavioral studies concerning ethical and responsible consumption/investing, as well as purchasing attitudes of millennials and Gen Z assist in understanding that sustainability information will be determinative for effective engagement of market actors in the transition to a low carbon economy¹². Indeed, stronger stakeholder engagement could lighten corporate governance and ethical retail investors could have a louder voice in market dynamics. From this perspective, easily accessible and clear non-financial disclosure can help prevent market failures. Beside this, it would also ensure the empowerment of consumers and retail investors, unleashing their potential to express preferences for sustainable products, services and companies. Aware market players' economic activities could therefore drive a virtuous circle for a more responsible production through demand and supply mechanisms.

Granting transparency in communication, European Private Law could support the whole process by acting at structural, corporate and consumption level¹³.

III. Structural Level and Regulatory Private Law

The first level on which current regulations operate to foster sustainability within EU internal market is the structural one.

Indeed, the regulatory approach that is increasingly adopted by the EU legislator encourages public/private partnerships in different fields and incentivizes self-regulation to ensure market integrity and safety, as well as financial stability during the green transition. Clear examples can be found in Sustainable Finance and Digital Finance measures, impacting on market structures, determining the affirmation of activity-based rules and disclosing new principles operating in capital market law as common denominator¹⁴. In these sectors, the

¹¹ SDG targets include: 12.6 - Encourage companies, especially large and transnational companies, to adopt sustainable practices and to integrate sustainability information into their reporting cycle; 12.8 Ensure that people everywhere have the relevant information and awareness for sustainable development and lifestyles in harmony with nature. Concerning the importance of sustainability information, see J.N. Sheth, B.I. Newman, B.L. Gross, *Why We Buy What We Buy: A Theory of Consumption Values*, in *J. Bus. Res.*, 1991, p. 159 ss.; V. Mak, E. Terryn, *Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment Through Consumer Law*, in *JCP*, 2020, p. 227 ss.; H.W. Micklitz, *Squaring the Circle? Reconciling Consumer Law and the Circular Economy*, in *EuCML*, 2019, p. 229 ss.; may I also recall F. Bertelli, *le dichiarazioni di sostenibilità nella fornitura di beni di consumo*, cit., spec. pp. 177 ss. e 202 ss.; Id., *CSR Communication e consumo responsabile: un circolo virtuoso per la Circular Economy?*, in *Sostenibilità e culture giuridiche comparate*, a cura di S. Lanni, Torino, 2022, p. 193 ss.

¹² See the Report on US Sustainable, Responsible and Impact Investing Trends, 2014, "The Forum for Sustainable and Responsible Investment available at http://www.ussif.org/Files/Publications/SIF_Trends_14.FES.pdf, accessed 1 June 2016. S. Gramitto Ricci, C. Sautter, *The Educated Retail Investor: A Response to 'Regulating Democratized Investing'*, in *Ohio State Law Journal Online* (Forthcoming); Id., *Wireless Investors*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4171224.

¹³ The point is anticipated, in a dialogue with the authors of *New Private Law Theory: A Pluralist Approach* (S. Grundmann, H.W. Micklitz, M. Renner) by C. Mak, *Civil Courts and Delocalized Justice: Reflections on the Shell Nigeria Cases in Light of Theories of Communication and Constitutionalization*, in *German Law Journal*, p. 872 ss.

¹⁴ M. Barcellona, *Mercato mobiliare e tutela del risparmio. L'intermediazione finanziaria e le responsabilità di banche e Consob*, Milano, 2009, p. 17 ss.; J. Basedow, *The State's Private Law and the Economy – Commercial Law as an Amalgam of Public and Private Rule-Making*, in *Am. J. Comp Law*, 2008, p. 703 ss.; V. Ricciuto, *Regolazione del mercato e «funzionalizzazione» del contratto*, in *Studi in onore di Giuseppe Benedetti*, Napoli, 2008, p. 1611 ss.; H.W. Micklitz, *The Visible Hand of European Regulatory Private Law (ERPL). The Transformation from Autonomy to Functionalism in*

dialogue established between private actors and supervisory bodies allows a higher reactivity of regulatory responses to emerging needs, including sustainability.

Overall, the politicization and economization of private law, shaping a “self sufficient European private legal order”¹⁵ are aimed at preventing market failures, which are now also linked to ESG risks, by a re-orientation of market structures and law-making methods. It does not only mean that sustainability has been introduced among the objectives of the internal market in recent proposals of the EU legislature. It also means that the cooperative approach required to implement the principle of subsidiarity, in harmony with art. 5 TUE, is incentivizing private regulation and, at the same time, imposes focus on the function of every economically relevant human act of private autonomy.

At a structural level, regulatory private law is trying to push economic initiatives toward a long-term perspective resulting in social utility, thus increasing the social cohesion to which art. 3.3 TUE refers¹⁶. In so doing, regulatory private law does not simply impact on the pre-contractual and contractual stage. Indeed, regulatory instruments and policy measures are influencing the whole business model of economic activities, their organizational profile and corporate governance¹⁷. With specific regard to sustainability, the assumption is strengthened considering the purpose of the EU Taxonomy (Reg. 2020/852EU)¹⁸ and the recommendations developed to tackle ESG risks. The European Central Bank and the European Banking Authority have developed reports and guidelines concerning the assessment of the impact of ESG factors, the identification of proper mitigation/adaptation strategies and the management and supervision of ESG risks for credit institutions and investment firms¹⁹. Accordingly, institutions subject to their supervision are encouraged to

Competition and Regulation, EU Working Paper n.14/2008, available at <https://cadmus.eui.eu/handle/1814/8707>.

¹⁵ H.W. Micklitz, *The Visible Hand of European Regulatory Private Law (ERPL). The Transformation from Autonomy to Functionalism in Competition and Regulation*, cit.

¹⁶ See G. Vettori, *Diritti e coesione sociale. Appunti per il seminario fiorentino del giorno 8 giugno 2012*, in *Pers. merc.*, 2012, p. 4 ss.; M. Libertini, *Concorrenza e coesione sociale*, in *Orizz. dir. comm.*, 2013, available at http://images.rivistaodc.eu/f/articoli/101_articolo_pyms6_orizzonti.pdf; and in *Pers. merc.*, 2015, p. 53 ss.; Id., *Doveri ambientali, sviluppo sostenibile e diritto commerciale*, in *Doveri intergenerazionali e tutela dell'ambiente. Sviluppi, sfide e prospettive per Stati, imprese e individui*, Atti del convegno svoltosi presso l'Università degli Studi di Milano, 7 ottobre 2021, edited by P. Pantalone, special issue of *Il diritto dell'economia*, 2021, p. 93 ss.; F. Maisto, *L'autonomia contrattuale nel prisma della sussidiarietà orizzontale*, Napoli, 2016, p. 123 ss.; Id., *Sussidiarietà: autonomie e coesione sociale*, in *Rass. dir. civ.*, 2017, p. 1360 ss.; P. Perlingieri, «Controllo» e «conformazione» degli atti di autonomia negoziale, in *Rass. dir. civ.*, 2017, p. 214 ss.; V. Ricciuto, *Nuove prospettive del diritto privato dell'economia*, in *Diritto dell'economia*, edited by E. Picozza, V. Ricciuto, Torino, 2017, p. 336 ss.; A. Gentili, *Il diritto regolatorio*, in *Riv. dir. Bancario*, 2020, p. 23 ss., pointing out that regulatory private law tries to channel economic activities toward a result of public utility, giving corporations rules of conduct balancing their economic targets with other societal interests.

¹⁷ M. Angelone, *Diritto privato «regolatorio», conformazione dell'autonomia negoziale e controllo sulle discipline eteronome dettate dalle authorities*, in *Nuove autonomie*, 2017, pp. 441 ss., spec. 443 ss.; A. Gentili, *Il diritto regolatorio*, cit., pp. 30 ss., spec. 32, pointing out that legislation, through hard law instruments, establishes general rules and principles, whereas regulatory private law introduces, through soft law, specific concrete rules considering all the involved interests and soliciting the adhesion of market players in the specific sector.

¹⁸ See, on this point, the positions of K. Pistor, *Green Markets Won't Save Us*, in *Social Europe*, 24 March 2021, claiming that «the European Union's new regulation on 'sustainability-related disclosures in the financial services sector' looks like yet another attempt to address climate change without actually paying the full bill for it». A. Paces, *Will the EU Taxonomy Regulation Foster Sustainable Corporate Governance?*, in *Sustainability*, 2021, p. 1 ss.

¹⁹ See BCE, *Guida sui rischi climatici e ambientali. Aspettative di vigilanza in materia di gestione dei rischi e informativa*, available at <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.202011finalguideonclimate-relatedandenvironmentalrisks~58213f6564.it.pdf>; EBA *Report on Management and Supervision of ESG Risks For Credit Institutions and Investment Firms*, Eba/Rep/2021/18, available at https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Reports/2021/1

be proactive in incorporating ESG factors into their business strategies and to adopt forward-looking approaches for sustainable business models²⁰.

The links connecting corporate governance to EU policies/legislation and regulatory instruments necessitates, therefore, further analysis of the role of corporations in the green transition.

IV. Corporate Level

A pure voluntary approach to CSR has already revealed several shortcomings, leading to some paradoxes and abuses²¹. EU legislation goes beyond this voluntary approach, without yet making it mandatory²².

On the one hand, traditional instruments can be adapted to new purposes and conformed to promote circular economy through corporate activities, for example through the introduction of sustainability clauses in contracts of the supply chain or through effective mechanisms of enforcement for codes of ethics and conduct²³.

On the other hand, there are new proposals specifically addressing the issue of environmental and social responsibility of corporations.

One of the forthcoming measures is the CSRD²⁴, which will emend the NFRD to encompass more companies into its scope and turn formal compliance into a more

015656/EBA%20Report%20on%20ESG%20risks%20management%20and%20supervision.pdf; but see also DNB, *Good Practice. Integration of Climate-related Risk Considerations into Banks' Risk Management*, available at <https://www.dnb.nl/media/jwtjyvf/definitieve-versie-gp-en-qa-klimaatrisico-s-banken.pdf>

²⁰ In this sense, EBA *Report on Management and Supervision of ESG Risks*, cit., p. 16, according to which “The EBA encourages institutions to act proactively in incorporating ESG considerations into their business strategy and risk management [...] and] to integrate ESG risks into their business plans, risk management, internal control framework and decision-making processes”.

²¹ Cfr., *ex multis*, K. Davis, *Understanding the Social Responsibility Puzzle*, in *Bus. Horiz.*, 1967, p. 45 ss.; M. Libertini, *La responsabilità d'impresa e l'ambiente*, in *La responsabilità dell'impresa. Convegno per i trent'anni di Giurisprudenza commerciale*, Bologna, 8-9 ottobre 2004, Milano, 2006, p. 215 ss.; Id., *Economia sociale di mercato e responsabilità sociale d'impresa*, in *La responsabilità sociale dell'impresa – In memoria di Giuseppe Auletta*, edited by V. Di Cataldo, P. Sanfilippo, Torino, 2013, p. 9 ss.; *ivi* see also F. Denozza, *Le aporie della concezione volontaristica della CSR*, p. 49 ss.; *La responsabilità sociale dell'impresa*, edited by G. Conte, Bari, 2008.

²² About the opportunity of an EU “nudging” (on which the reference is to R.H. Thaler, C.R. Sunstein, *Nudge. Improving Decisions About Health, Wealth, and Happiness*, New York, 2009; C.R. Sunstein, L.A. Reisch, *A Bill of Rights for Nudging*, Oxford-Portland, 2019), see A. Gentili, *Il diritto regolatorio*, cit., p. 36; H.W. Micklitz, *Squaring the Circle?*, cit., p. 236 ss. More broadly, see also P. Bergkamp, *Can Nudging Consumers Help Promote Corporate Social Responsibility?*, in *Corporate Finance Lab*, available at <https://corporatefinancelab.org/2019/08/23/can-nudging-consumers-help-promote-corporate-social-responsibility/>; J.J. Häußermann, *Nudging and Participation: A Contractualist Approach to Behavioural Policy*, in *Philos. Manag.*, 2020, p. 19 ss.

²³ See, *ex multis*, F. Cafaggi, *Crisi della statualità, pluralismo e modelli di autoregolamentazione*, in *Pol. dir.*, 2001, p. 558 ss.; A. Vitale, *I codici di autoregolamentazione tra autonomia collettiva e coregolamentazione*, Roma, 2004, p. 9 ss.; N. Brutti, *Rilevanza giuridica dell'autoregolamentazione: osservazioni sui «codici di comportamento» di società quotate*, in *Le società*, 2007, p. 1215 ss.; S. Rossi, *Luci e ombre dei codici etici d'impresa*, in *Riv. dir. soc.*, 2008, I, p. 23 ss.; Id., *Il diritto della «Corporate Social Responsibility»*, in *Orizz. dir. comm.*, 2021, p. 99 ss.; A. Beckers, *Enforcing Corporate Social Responsibility Codes: on Global Self-Regulation and National Private Law*, Oxford-Portland, 2015, p. 186 ss.; G. Bevivino, *La responsabilità sociale delle imprese. Strumenti attuativi e rimedi*, Napoli, 2018; Id., *L'impatto sul mercato delle regole, legali e convenzionali*, in *Mercato Concorrenza Regole*, 2019, pp. 491 ss.; B. Boschetti, *Soft Law e normatività*, in *Riv. reg. merc.*, 2018, p. 5 ss.; M. Ramajoli, *Self regulation, soft regulation e hard regulation nei mercati finanziari*, *ivi*, 2018, p. 2 ss.

²⁴ Proposal for a Directive of the European Parliament and of the Council Amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards

substantial attempt to protect human rights and the environment. In certain conditions, unsustainable business behavior will be a source of liability for corporations and the duty of care of directors will envelop the management and mitigation of ESG risks. Both elements will give a renewed relevance to stakeholders' interests in boardrooms, but the tools available to ensure a proper engagement still need to be properly recognized.

It has already been noted that, despite regulatory instruments preaching a doctrine according to which the “*optimum*” implies the realization of common and collective interests, there is a lack of methods to incentivize a permanent adhesion of private market actors to the optimal route for cooperation²⁵. However, the research regarding innovative strategies for the integration of stakeholders' interests at institutional and corporate level cannot be overlooked if the final purpose is the creation of sustainable value chains and business models. At a corporate level, the main questions that arise from the need to ensure the implementation of the principle of sustainable development rekindle the debate on corporate purpose, namely establishing how and to what extent shareholders' and stakeholders' interests can be balanced for the common welfare. Indeed, if appropriately designed, corporate arrangements could become tools mitigating the potential impact of environmental and social risks.

Moreover, the proposal of a Directive of Corporate Sustainability Due Diligence is also strengthening the relationship between corporate governance/sustainability information and ethical consumption. This connects with SDG 12 in that, from the entrepreneurial side, it highlights the possible positive outcomes of sustainable business conducts on society, which can be maximized by the identification of appropriate mechanism to encourage “corporate citizenship”²⁶.

IV. «Consumption» Level

The other side of the SDG 12 coin is consumption.

Data concerning sustainable attitudes in purchase and investing immediately reveal how powerful informed and conscious consumers' and investors' choices could be if the power-imbalance caused by information asymmetry in business-to-consumer relationships was overcome.

In this scenario, sustainability disclosure underlies the rebalancing power of information and transparency, which could be appreciated in two phases: pathology and physiology of sustainability claims. In the former, market distortions caused by the communication to the public of false, deceptive or misleading sustainability information can be identified and addressed invoking, at first, the provisions of the UCPD (dir. 29/2005EU) and MCAD (2006/114EC)²⁷. Whereas ‘greenwashing’ can fall into the MCAD according to Art. 4, the possibility to enforce sustainability claims on the ground of the UCPD rests on Arts. 5, 6, 7,

corporate sustainability reporting (COM/2021/189 final), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0189>.

²⁵ A. Gentili, *Il diritto regolatorio*, cit., p. 38 s.

²⁶ C. Valor, *Corporate Social Responsibility and Corporate Citizenship: Towards Corporate Accountability*, in *Bus. Soc. Rev.*, 2005, p. 191 ss.; A.B., Carroll, K.M. Shabana, *The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice*, in *IJMR*, 2010, p. 85 ss; F. Onyango Ogola, J.F. Mária, *Mechanisms for Development in Corporate Citizenship: A Multi-Level Review*, in *IJCSR*, 2020.

²⁷ F. Henning-Bodewig, *Corporate Social Responsibility, the VW Scandal and the UCP Directive*, in *JCML*, 2016, p. 153 ss.; A. Beckers, *The Regulation of Market Communication and Market Behaviour: Corporate Social Responsibility and the Directives on Unfair Commercial Practices and Unfair Contract Terms*, in *Common Mark. Law. Rev.*, 2017, p. 475 ss.; F. Bertelli, *I green claims tra diritti del consumatore e tutela della concorrenza*, in *Contr. impr.*, 2021, p. 286 ss.

the scope of which is broad enough to cover any misleading information or omissions potentially capable to distort the average consumer's behavior. In this field, independent authorities' interventions should protect the authenticity of market choices and preserving fair competition, guaranteeing market integrity in the name of super-individual interests. Nevertheless, greenwashing may also reflect on the single professional-consumer relationship. Using the principle of sustainable development as an interpretative tool, both CRD (dir. 2011/83/EU) and CSGD (dir. 771/2019/EU) affirm seller's contractual liability for the dissemination of vague or ambiguous green claims, where it is not followed by any business conduct actioning self-commitments to sustainability. The recent proposal aimed at empowering consumers in the green transition through the amendment of the UCPD and the CRD endorses this reconstruction²⁸.

Amending the UCPD, the proposal specifically tackles greenwashing: environmental or social impact, as well as durability and reparability are enclosed in the list of possibly "misleading" product characteristics. Business conduct consisting of making generic or vague environmental claims "where the excellent environmental performance of the product or trader cannot be demonstrated" are blacklisted as unfair commercial practices, notwithstanding the chance to proceed with a case-by-case assessment and qualify as misleading the dissemination of environmental claims referring to future environmental performance without clear, objective and verifiable commitments and targets, or without an independent monitoring system. Additionally, the suggested approach of CRD extends sellers' precontractual information duties to features of the products such as durability and reparability, thus nudging producers to realize long-lasting and repairable goods and challenging planned obsolescence²⁹.

Durability, reparability and, more broadly, environmental impact should also be included in the evaluation of conformity of the delivered good according to the provisions of the CSGD³⁰. Indeed, the objective criteria of conformity offered by Art. 7, sub d), dir. 2019/771/UE – repealing dir. 1999/44/UE – now explicitly includes reasonable expectations of the consumer based on public statements made by (or on behalf of) the seller or by other professionals in the value chain. Consequently, the delivery of a good whose claimed environmental qualities cannot be demonstrated or whose production threatens human rights or the environment should determine sellers' liability to the consumer for lack of conformity.

From a remedial perspective, the importance of reparability could and should be highlighted also referring to the framing of art. 13 of the CSGD. Belonging to the first degree of remedies available to the consumer, repair could become the most sustainable remedy overall, balancing consumers' interest to achieve the planned utility and sellers' interests to maintain the contractual relationship with the more general interest to incentivize sustainable production³¹.

²⁸ Proposal for a Directive of the European Parliament and of The Council Amending Directives 2005/29/EC and 2011/83/EU as Regards Empowering Consumers for the Green Transition through Better Protection Against Unfair Practices and Better Information – (COM(2022)143 final

²⁹ See A. De Franceschi, *Planned Obsolescence Challenging the Effectiveness of Consumer Law and the Achievement of a Sustainable Economy*, in *EuCML*, 2018, p. 217 ss.; E. Van Gool, A. Michel, *The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis*, in *EuCML*, 2021, p. 136 ss.; M. D'Onofrio, *Obsolescenza programmata: qualificazione giuridica e rimedi alla luce della direttiva 2019/771/UE e del diritto interno*, in *Nuove leggi civ. comm.*, 2022, p. 516 ss.

³⁰ V. Mak, E. Terryn, *Circular Economy and Consumer Protection*, cit., p. 227 ss.; may I also recall here Le dichiarazioni di sostenibilità nella fornitura di beni di consumo, cit., p. 202 ss.

³¹ E. Terryn, *A Right to Repair? Towards Sustainable Remedies in Consumer Law*, in *ERPL*, 2019, p. 857; D. Imbruglia, *Mercato unico sostenibile e diritto dei consumatori*, cit., p. 189 ss.

Last but not least, the Sustainable Product Initiative (SPI) and the notion of an EU product ‘passport’ also confirm the trend that aims at empowering consumers to fill the information gap on sustainability issues through the creation of easily accessible reporting mechanisms³².

Given that the power imbalance in business-to-consumer relationships depends on the availability of information, it is therefore possible that transparency will redistribute power in the market.

In this light, the image of the “weak” consumer, and as such, the addressee of measures of protection, is now subject to a reconceptualization: the aware-informed consumer, as market citizen, could have the political power – if not the duty – to shape market dynamics through the expression of private autonomy³³.

VI. Toward a Market Citizenship

The objective of a circular economy brings attention to the relationship between individual autonomy and public interest. In this context, the goal of sustainable development is formally shared at global level. Accordingly, the responsibility to contribute to the realization of a virtuous circle of sustainable consumption and production is likewise shared between economic actors. Both consumers and corporations represent a political force of a complex and interconnected system made of interdependencies, where individual economic interests no longer have primacy, but at the same time – respecting the limits imposed to private autonomy – the possibility to choose the less sustainable option is still an integral means of economic freedom³⁴. The transition to a circular economy is also a cultural process which – as behavioral changes prove – is already in place but still not completed. As already suggested for consumers³⁵, broadening market actors’ education is a necessary step to switch the common mind-set to a long-term vision.

In the meanwhile, the idea underpinning the reconstruction and requiring further development is that proper communication of (sustainability) information, establishing a continuous dialogical relationship between stakeholders and corporations, could also make the adoption of sustainable business models the most convenient choice from an economic perspective. The flow of information in the right direction is indeed functional to empower stakeholders and to promote their active engagement in corporate decisions in a way that, by the means of a democratization of corporate governance, would make the whole market system more democratic³⁶.

³² See https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-products-initiative_en

³³ Cfr. H.W. Micklitz, *Squaring the Circle?*, cit., spec. p. 235, referring to the “politicisation of the role and function of the consumer” beyond national law, but also highlighting the criticalities to which splitting consumers into a triad of vulnerable, confident and responsible consumers could lead to and underlining the urgent need to “conceptualise a sustainable consumer protection law”; also note the recent perspective offered by V. Mak, *A Primavera for European Consumer Law: Re-birth of the Consumer Image*, in *EuCML*, 2022, p. 77 ss.

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³⁴ H.W. Micklitz, *Squaring the Circle?*, cit., p. 235.

³⁵ H.W. Micklitz, *Squaring the Circle?*, cit., p. 235.

³⁶ M. Hesselink, *European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?*, in *ERPL*, 2007, p. 323 ss.; J. Davies, *The European Consumer Citizen in Law and Policy*, London-New York, 2011, p. 78 ss.; G. Teubner, A. Beckers, *Expanding Constitutionalism*, in *Indiana J. Global Leg. Stud.*, 2013, p. 537 ss. See also C. Mak, *Civil Courts and Delocalized Justice: Reflections on the Shell Nigeria Cases in Light of Theories of Communication and Constitutionalization*, cit., spec. p. 875, recalling the implication of Habermas’ theory and remembering that

«democratic legitimacy of law-making is not found in shared values as such, but based on communicative processes among participants».