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"CORPORATE HARM TO COMMUNITIES AND DIRECTOR LIABILITY:
A COMPARISON OF ITALY AND CANADA"

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Abstract

This research investigates corporate harm to local communities between Italy and Canada to strengthen their protection through corporate governance measures. Despite growing regulatory pressure for corporations to limit socio-environmental impacts, Italy offers only limited safeguards to prevent or remedy such harm. Adopting a commons-inspired theoretical framework and undertaking comparative analysis with Canada–where stakeholder-oriented corporate governance has been widely debated in case law and scholarship–the research asks whether Italian corporate law provides a basis for recognizing a director's duty not to harm negatively affected communities. The study concludes affirmatively, identifying directors' duty to establish and implement adequate risk-management arrangements–a subtype of the duty of care–as a suitable statutory foundation. This conclusion is reinforced through analysis of Canadian cases and scholarly critiques, offering a robust legal and argumentative basis to affirm sustainability-oriented obligations for directors in Italy and extending prior scholarly proposals. Additional contributions include theoretical and methodological innovation and the development of a general framework for identifying communities as corporate stakeholders, which can guide the practical implementation of the proposal and support future research on corporate obligations towards local communities. Overall, the research shows how progressive statutory interpretation, based on inclusive conceptual considerations and supported by comparative insights, can inform legal innovation and enhance protections for communities impacted by corporate activity, providing pathways for advancing sustainability in Italian corporate governance.

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Introduction

> The inadequate use of available resources— too little labour, too much use of environmental resources — is clearly not in line with the preferences of society as they are revealed through the democratic system: people expect for themselves and for their children on the one hand more jobs and a stable income, but on the other also a higher quality of life. The latter element is reflected through an increasing demand for enjoyable jobs and environmentally-friendly products and public goods.
>
> Any new policy will have to contain substantive answers on how to reduce pollution and how to improve the quality of life in a broad sense. The former element concerns the reversing of the currently negative relationship between 'classical' economic growth and more pollution. People no longer see why the use of more packaging or the presence of more printed advertising material in their mail boxes contributes to higher economic growth figures, as is officially registered.
>
> Improving the quality of life, on the other hand, not only concerns habitats and nature protection, but also the amenity of the landscape, better integration of new buildings and transport infrastructure into historical urban centres, or the availability of parks and other green zones in urban areas. In such a way, the quality of life of millions of people can be substantially improved.[1]

It was 1994 when the European commission included these words in a White Paper aimed at identifying the major challenges of the 21st century and proposing ways to address them at a supranational level. More than thirty years have passed, yet those words still resonate. Entire generations, including mine, have been born and raised under the mantra of sustainability and social responsibility, and many profound changes have taken place since then–the birth of the European Union, the end and outbreak of wars, economic and political crises, the Covid-19 pandemic, to name just a few–yet one may still wonder to what extent the hopes expressed by the Commission in the 1994 White Paper have been fulfilled.

Unfortunately, there is no definitive answer to this question. The environmental and social footprint of business activity remains a global concern, with impacts ranging from the pollution of natural resources (air, water, soil) and loss of biodiversity to health issues for residents living near industrial sites and extreme weather events destroying homes, lives and livelihoods across the world. Communities everywhere continue to suffer from the “negative externalities” of corporate activity–i.e., costs borne by those other than the beneficiaries of the activities causing them. As we near the point of no return for climate change–estimated by scientists to occur around 2050–hopes are fading that future generations will be spared similar or even more severe consequences.

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[1] European Commission, *European Social Policy - A Way Forward for the Union - A White Paper*, [1994] COM/94/333 final.

These issues are undoubtedly complex, wide-ranging, and interdisciplinary. Even so, this doctoral research seeks to make a modest but hopefully meaningful contribution to one specific aspect of this broader problem: corporate harm to local communities, focusing primarily on Italy and comparatively with Canada. The following paragraphs elaborate further on this topic.

1. Research Context and Central Themes

Corporations can generate social and environmental externalities, such as the overconsumption of natural resources, direct or indirect involvement in polluting activities through business partners in countries with weak environmental regulation, limited engagement with local communities, the delocalization of production leading to mass layoffs, and many others. Although corporate social responsibility (CSR) initiatives–which promote the voluntary adoption of socially oriented business practices, such as employee-friendly policies or community engagement–have grown since the 1980s, and the global debate on corporate sustainability has intensified since the turn of the century, legal frameworks have yet to translate these voluntary efforts into general, mandatory obligations for companies and their management.

In most jurisdictions, such as Italy, management is still not legally required to consider non-shareholder stakeholders' (thereinafter just *stakeholders*) needs in decision-making or to actively prevent adverse impacts on them. More broadly, national and supranational lawmakers have only recently begun integrating environmental and social issues, traditionally governed by other areas of law, such as environmental law, into corporate law.[2] Notable examples include corporate sustainability reporting and due diligence requirements introduced at the EU level[3] and currently under discussion in other jurisdictions, such as Canada.[4] However, these initiatives are still in their early stages and, given the current political global climate, face both implementation delays and risks of dilution in scope and effectiveness.[5]

[2] Refer to Chapter 2, subsection 2 for further discussion.

[3] EU, *Directive 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014*, *Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting* [2022] OJ L 322/15; EU, *Directive 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859* [2024] OJ L 2024/1760.

[4] Department of Finance Canada, "Government advances Made-in-Canada sustainable investment guidelines and mandatory climate disclosures to accelerate progress to net-zero emissions by 2050" (9 October 2024), online: <https://www.canada.ca/en/department-finance/news/2024/10/government-advances-made-in-canada-sustainable-investment-guidelines-and-mandatory-climate-disclosures-to-accelerate-progress-to-net-zero-emissions.html> Last Modified: 2024-10-10.

[5] In the EU, mostly because of the so-called "Omnibus Package": EU, *Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements,* [2025] COM/2025/80 final. The proposal has been largely criticized by civil society, economists and legal scholars: "Joint Statement | The big EU deregulation. Disastrous Omnibus proposal erodes EU's corporate accountability commitments and slashes human rights and environmental protections", online: *ECCJ* <https://corporatejustice.org/publications/joint-statement-the-big-eu-deregulation/>; "Joint Press Release | Prominent economists across the EU warn of the deep costs of weakening sustainability regulations" (19 May 2025),

Against this background, it is evident that the social and environmental impacts of corporate activity still require significant attention, forming the first rationale underpinning this research.

Naturally, corporations are not inherently "evil", and they come in different shapes and sizes. However, certain corporate structures–namely, large, regular corporations–are more likely to generate significant social and environmental harm. This research identifies "large" corporations through a type-based approach, on the assumption that corporate forms generally correspond to the typical size of the entities adopting them. In Italy, the *società per azioni* (*S.p.A.*) or joint-stock company is chosen as the primary focus of this study as it embodies the archetype of the large collective enterprise, in opposition to *società a responsabilità limitata* (*s.r.l.*) or limited liability companies, which typically represent smaller companies. While not all large corporations take the S.p.A. form, there is a strong correlation between the two as this legal form is designed to accommodate the needs of complex, large-scale business organizations. Throughout this work, the term S.p.A. and "corporation" will therefore be used interchangeably in reference to the Italian context.

In Canada, this research focuses primarily on federally incorporated distributing corporations. Distributing corporations, also referred to as *public corporations*–are those whose shares are publicly traded, which is a key indicator of their large size and broad investor base. Federal incorporation further reinforces the typical large scale of distributing corporations, as it facilitates operations across provinces compared with provincial incorporation.

By "regular" corporations, this research refers to entities that do not adopt socially oriented legal forms or qualifications. Therefore, Italian *società benefit*–companies pursuing both profit and the common good–and *imprese sociali*–non-profit enterprises, sometimes organized as corporations, pursuing socially beneficial goals–are excluded from consideration. Similarly, Canadian *not-for-profit corporations* and British Columbia *benefit corporations* fall outside the scope of this study.

The second main focus of this research is on local communities, specifically those that qualify as corporate stakeholders, that is, groups affected by corporate activities. Since no general legal definition of "stakeholder communities" currently exists in Italy or Canada, part of this research, is devoted to developing one.[6] The focus on the local dimension is justified by practical considerations, namely, the need to ground the analysis within just two jurisdictions and to facilitate the identification of connections between endangered natural commons and communities, which, as will be seen, constitute a defining feature of stakeholder communities.

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online: *ECCJ* <https://corporatejustice.org/news/joint-press-release-prominent-economists-across-the-eu-warn-of-the-deep-costs-of-weakening-sustainability-regulations/>; "Legal scholars warn against watering down of corporate climate transition plans" (12 May 2025), online: *Smith School of Enterprise and the Environment* <https://www.smithschool.ox.ac.uk/news/legal-scholars-warn-against-watering-down-corporate-climate-transition-plans>. Similarly, Canada has experienced a setback in normative sustainability initiatives, which has drawn considerable criticism from scholars: "Our response to the Canadian Securities Administrators' update regarding their climate-related and diversity-related disclosure projects" (5 May 2025), online: *Canada Climate Law Initiative* <https://ccli.ubc.ca/our-response-to-the-canadian-securities-administrators-update-regarding-their-climate-related-and-diversity-related-disclosure-projects/>.

[6] Refer to Chapter 3.

Consequently, in what follows, references to "communities" should be understood as referring to local ones.

Although communities are often mentioned within stakeholder definitions in legal documents–from the 2001 EU *Green Paper on Promoting a European framework for Corporate Social Responsibility* to the 2024 *Corporate Sustainability Due Diligence Directive* (CS3D)–they still receive limited attention in legal frameworks, which generally adopt an individualistic view of harm and redress. Even where legal recognition exists for communities, as is the case of Italian communities with collective land rights (*usi civici* and *assetti fondiari collettivi)* and Canadian Indigenous communities, such recognition remains confined to specific historical and cultural contexts and does not extend to a broader legal concept of "community" as a corporate stakeholder. Consequently, the extent of corporate legal research devoted to these groups is, to the best of my knowledge, extremely limited, and, in Italy, virtually absent. These factors justify the research's focus on communities, aiming to take a first step toward bridging this gap.

A third key characteristic of this research is its focus on Italy. This choice is based on two main considerations. First, Italy is particularly vulnerable territory to environmental threats and has an unenviable record of environmental and social harm caused by business activities affecting local populations. One striking example is the former Ilva steel plant in Taranto, Apulia–my home region–where economic interests have long outweighed public health and environmental protection, resulting in a major disaster that remains unresolved. Other well-known cases include the Isochimica asbestos decontamination plant in Avellino, Campania, and Eni's oil plant in Val d'Agri, Basilicata.[7] In northern Italy, further examples include air pollution in the Po Valley linked to intensive livestock and agricultural practices,[8] the environmental risks posed to Venice lagoon by mass tourism industry and nearby industrial activities,[9] and the potential threats to the landscape and biodiversity of Emilia Romagna region from extracting activities.

Furthermore, notwithstanding the compelling need to develop legal mechanisms to protect communities, Italy does not impose broad, effectively enforceable obligations on corporations to avoid harming stakeholders, nor does it establish a general duty on corporate directors to do so.

On the one hand, the existing provisions on preventing and mitigating of risks for stakeholder communities–such as international instruments promoting corporate responsibility and domestic provisions within environmental and consumer law–remain insufficient to effectively address the

[7] *Visit to Italy - Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, by UN, A/HRC/50/40/ADD.2 (17 June 2022).
[8] Jacopo Lunghi, Maurizio Malpede & Lara Aleluia Reis, "Exploring the impact of livestock on air quality: A deep dive into Ammonia and particulate matter in Lombardy" (2024) 105 Environmental Impact Assessment Review 107456.
[9] UNESCO World Heritage Centre, "UNESCO World Heritage Centre - State of Conservation (SOC 2025) Venice and its Lagoon (Italy)", online: *UNESCO World Heritage Centre* <https://whc.unesco.org/en/soc/4723/>; Hung Vuong Pham et al, "Multi-model chain for climate change scenario analysis to support coastal erosion and water quality risk management for the Metropolitan city of Venice" (2023) 904 Science of The Total Environment 166310.

negative social and environmental externalities generated by large businesses.[10] International instruments–such as the *UN Guiding Principles on Business and Human Rights*, the *OECD Guidelines for Multinational Enterprises*, and the *ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*–are often voluntary, and even when ratified at the national level, they typically lack effective enforcement mechanisms for victims to obtain redress.[11] Moreover, their binding effect on private actors necessarily operates through the state, which does not always ensure an adequate balance between economic and socio-environmental interests, as illustrated by several condemnations issued by supranational courts against Italy.[12]

Similarly, domestic sectorial legislation applies only within the scope and objectives of the relevant legal framework and does not cover all potentially affected stakeholders, such as communities. For instance, Italian consumer law protects a specific category of individuals (consumers) within market-based relations, which generally do not apply to communities.[13] Sectorial legislation may also not allow affected stakeholders to claim compensation for the harm suffered, especially if it is non-material and collective harm. For example, Italian environmental law allows enforcement exclusively to public authorities, while private parties may claim compensation only for individual harm, generally in the form of damage to property or health.[14] Although indirect protection may occur–if the public authority takes action and if environmental remediation also restores the community's losses–such protection remains an unreliable and highly conditional remedy.

On the other hand, the prevailing Italian scholarly view of the corporate interest, which guides directors' decision-making, is that in regular corporations it primarily coincides with profit, while social or environmental considerations play only a limited role.[15] Overall, the combination of these factors–the absence of enforceable corporate and managerial duties to prevent and mitigate risks to stakeholder communities, the limited legal recognition afforded to such communities and their large exposition to harm in Italian experience–results in weak protection for stakeholder communities in Italy, making Italy particularly relevant for researching possible ways to enhance such protection. Consequently, even though stakeholder protective tools theoretically exist in Italy, as with the right of individual stakeholders to directly sue corporate directors for damages caused by their managerial conduct provided under Article 2395 of the Italian Civil Code, these tools have generally been interpreted narrowly, in ways that make it difficult to use them to protect social and environmental interests.

[10] Private contracting is not considered in the text because, generally, it does not provide effective protection for stakeholders like communities, as they often lack both the technical expertise and the bargaining power required to negotiate on equal terms with corporations.

[11] Emmanuel Kojo Nartey, "Addressing Corporate Human Rights Violations and Environmental Harm: Advancing a Holistic Remedial Framework through Tort Law and the EU Corporate Sustainability Due Diligence Directive (CSDDD)" (2024) 10:3 Athens J L 345–372 at 353–354.

[12] E.g., *Locascia and Others v Italy*, 2023 ECtHR; *AA e altri c Italia*, 2022 CEDU; *Cordella c Italia*, 2019 CEDU.

[13] See Arts 2 and 3 Condumer Code (Italy).

[14] See Art 311 TUA (Consolidated Environmental Act) (Italy).

[15] For further details, see Chapter 2, subsection 2 and Chapter 4, subsection 2.

The comparison with Canada is justified by the fact that, to the best of my knowledge, it is the only Western legal system–besides Italy under Article 2395–that offers corporate law mechanisms for stakeholder protection. Under the oppression remedy (section 241 of the Canada Business Corporations Act) (CBCA), Canadian law allows individuals to bring direct compensatory claims against directors for harm suffered as a result of their conduct. In theory, such actions are also available to stakeholders, as the definition of *complainant* contained in section 238 of the same Act and applicable to this remedy, includes "any other person who, in the discretion of a court, is a proper person to make an application under this Part." Consequently, under black-letter Canadian statutory law, a stakeholder who has suffered harm arising from director conduct may seek redress by bringing a claim directly against them, either personally or through another individual identified as a proper person by the court.

Additionally, Canada has traditionally adopted a stakeholder-oriented understanding of the corporate interest, which, as mentioned, guides directors' decision-making and thereby influences corporate behaviour. This orientation was formalized in 2019 through the addition of subsection 122(1.1) CBCA, which explicitly permits consideration of socio-environmental interests–such as the interests of employees, retirees and pensioners, and the environment–within the notion of "the best interest of the corporation".

Importantly, this does not mean that Canadian business law offers adequate and effective protection to corporate stakeholders. As will be discussed, such protection remains largely theoretical, particularly for stakeholders other than creditors. Nor does it mean that Canadian corporations and directors are under a legal duty to pursue socio-environmental objectives. The provision in section 122(1.1) CBCA allows, but does not mandate, directors to take such interests into account.[16]

Nevertheless, these features and, more broadly, Canada's relatively openness to stakeholder considerations within corporate law, make it a key jurisdiction for studying issues of corporate sustainability, stakeholder harm, and available remedies. The extensive Canadian case law and scholarship on corporate purpose and directors' duties have also provided a valuable basis for expanding and deepening the discussion on the protection of stakeholders in Italian companies.[17]

2. Research Aim and Core Question

The above sets the context for this research. The primary aim of this study is to address the limited legal protection currently available to communities harmed by corporate activity in Italy, seeking to complement existing international and domestic legal instruments that promote corporate social and environmental sustainability with corporate law tools. Its central research question asks whether Italian corporate law provides a suitable basis for recognizing a director's duty not to harm stakeholder communities. Related questions include providing a legal definition of

[16] Refer to Chapter 4.

[17] This is particularly evident in Chapter 5, subsection 4.

stakeholder communities as beneficiaries of this duty and identifying appropriate enforcement mechanisms.

My core argument is that, in Italy, the legal basis for the duty not to harm stakeholder communities should not be sought within the concept of the corporate interest that informs director fiduciary duties, as most stakeholder advocates suggest. Rather, it should be located within the duty of care, which requires directors to act diligently and in good faith within the limits established by law and the articles of association. In this light, I contend that the corporate risk-management framework already established in Italy under Articles 2086 and 2381, paragraphs 3 and 5 of the Civil Code may serve as a suitable foundation for requiring corporate directors to integrate stakeholder interests into decision-making and, consequently, strengthen the legal protection of communities in corporate governance. This outcome can be achieved if, consistent with the growing legal emphasis on corporate sustainability–primarily at the EU level–the existing corporate risk-management framework in Italy is interpreted as serving not only to safeguarding corporate interests but also to protecting external (social and environmental) interests potentially affected by business operations, including stakeholder community interests.[18]

This study's focus on corporate law tools stems, first, from the recognition that law shapes private conduct, including that of corporations and corporate bodies. While legal frameworks have historically permitted, at least in part, "irresponsible" corporate social and environmental behaviour–for instance, when interpreted through the shareholder primacy lens that prioritizes profit maximization over broader social well-being–they also hold the potential to drive change if reinterpreted from more nuanced and sustainability-oriented perspectives. The law can also play a constructing role in this transformation by recognizing the legal relevance of both individual and collective stakeholders and by granting them access to enforcement mechanisms. This would enable harmed parties to seek justice and redress, while simultaneously creating deterrence incentives for corporations and directors to undertake "sustainable" conduct.

Corporate law, in particular, could play a crucial role in promoting responsible corporate conduct and protect harmed stakeholders by integrating social and environmental concerns into the regulatory framework that governs corporations. Such integration would have both symbolic and practical significance. Symbolically, it would challenge the Italian mainstream view that social and environmental matters fall outside the corporate sphere and belong exclusively to other areas of law, such as environmental law. Reframing them as part of corporate law would signal that, even if corporations are not (and, in my opinion, should not be) required to pursue social or environmental objectives per se, they must nonetheless recognize the social and environmental implications of their activities and take adequate steps to identify, prevent, and mitigate the risks they generate.

Practically, embedding social and environmental concerns within corporate law would allow sustainability norms to operate on a broader and more general basis than sector-specific

[18] Refer to Chapter 5 for detailed reasoning.

legislation such as consumer or environmental law. Corporate law provisions can apply to all corporations of a given type, such as those organized as S.p.A., and bind corporate bodies directly. In this sense, using corporate law to promote sustainability means establishing rules that specifically require corporations and their bodies to act sustainably, rather than imposing sustainability obligations only in limited circumstances (e.g., when market relations with consumers or environmental damage occur). Ultimately, corporate law offers the possibility to introduce a general, binding obligation not to harm stakeholders, an obligation that is currently absent in the Italian legal system, thus helping to fill this gap.

Nevertheless, the contribution that corporate law can make to enhancing stakeholder protection is necessarily limited, and is meant to complement, not replace, other legal and non-legal mechanisms already in place. The limits of corporate law are mainly structural: as noted, the issue of corporate harm to stakeholders is complex and global and cannot be resolved solely through reforms in a single jurisdiction. Furthermore, corporate externalities are multifactorial, shaped by economic incentives, behavioural dynamics, and cultural factors, among others. Within this broader context, law can only provide partial solutions. Addressing the issue of stakeholder protection from corporate harm effectively requires an integrated, multidisciplinary approach that combines insights from diverse legal and non-legal fields. Clearly, such an endeavour exceeds the scope of a single research project like this one.

A holistic and multidisciplinary approach is also essential to tackle what is, by its very nature, a compound problem. This means assessing the potential consequences of legal reforms and reinterpretation also from non-legal perspectives. For example, introducing a new statutory duty for corporate directors not to harm communities could alter behavioural incentives promoting more sustainable conduct, but can also potentially affect broader economic and social dynamics, such as by discouraging individuals from taking up directorial roles, increasing the costs associated with these positions, or incentivizing corporate relocation to less stringent jurisdictions.

3. Theoretical Framework

This study applies such a nuanced approach by adopting the Theory of the Commons (ToC) as its theoretical framework. Originally developed in economics, the ToC has since been explored in legal studies, including in Italy. For this research, the ToC is understood in its legal dimension as developed by Italian jurists, as a theory that underscores the essential role of shared resources (*commons*, such as water and its distribution systems, the Internet, natural landscape, and others) in the fulfillment of people's fundamental rights, and emphasizes the need to safeguard these resources from risks posed by corporate activities. In this sense, the ToC offers an alternative to the mainstream profit-maximizing model of corporate governance, advocating for a more socially and environmentally balanced perspective.

The ToC promotes a holistic understanding of fundamental legal concepts, particularly that of private property, by emphasizing that the preservation of commons as necessary for exercising fundamental rights requires placing limits on proprietors' prerogatives. Indeed, the exercise of

certain owners' rights, such as excluding non-owners from access or exploiting the resource at will, may impede others from benefitting from the resource and from exercising their corresponding rights. The ToC thus advances a multilateral perspective that recognizes and seeks to reconcile the diverse interests connected to a common resource.[19]

Furthermore, the ToC is inherently interdisciplinary. Italian legal scholarship on the commons have developed through contributions from private, public, and constitutional law scholars, reflecting a theory that transcends individual legal domains. Beyond law, studies on commons have evolved within disciplines such as sociology, anthropology, geography, architecture, primarily inspired by Italy's traditional forms of commons, mostly known as *usi civici* and *assetti fondiari collettivi*, which attribute land rights (e.g., harvesting, grazing, water use) to specific communities. These phenomena have generated, and continue to generate, a rich body of interdisciplinary research.

Moreover, as applied in this study, the ToC integrates broader social and environmental considerations into strictly legal reasoning. By emphasizing the limits on private property as necessary to ensure the fulfillment of fundamental rights, it reminds us that legal concepts cannot be isolated from their social and environmental dimensions. The ToC thus offers a perspective that recognizes and values the multiple facets of legal problems, fostering a more integrated understanding of law's role in addressing corporate harm. In more practical terms, the nuanced approach fostered by the ToC will also be reflected in this research through consideration of the incentives shaping directors' behaviour, both in weighing their preference for fulfil shareholders' interests and in assessing the effectiveness of the proposed director duty to take care to prevent harm to stakeholder communities arising from the broader obligation to establish and maintain adequate organizational, administrative and accounting arrangements.

4. Methodological Overview

Methodologically, this research employs a functional legal comparison between Italian and Canadian corporate law. Legal comparison serves as a research strategy that establishes relationships between two or more legal phenomena, examines them, and identifies their similarities and differences.[20] Functional comparison is a specific approach within legal comparison, grounded in the principle of functional equivalence,[21] according to which "in law,

[19] Refer to Chapter 2 for further conceptual remarks.

[20] Legal comparison gained enormous success among Italian legal scholars, as witnessed by the manifesto contained in the so-called Trento Thesis. *Le tesi di Trento* (1987), available at: <https://dirittocomparato.org/wp-content/uploads/2021/07/Le-tesi-di-trento.pdf>. The international success of comparison in business law is witnessed by Antonio Gambaro, "I temi commercialisti al X Congresso Internazionale di Diritto Comparato" (1978) Riv Soc 1658–1663. For non-Italian literature on legal comparison, see Esin Orucu, *The Enigma of Comparative Law: Variations on a Theme for the Twenty First Century* (Leiden/Boston: Martinus Nijhoff Publishers, 2004; Ralf Michaels, "The Functional Method of Comparative Law" in Mathias Reimann & Reinhard Zimmermann, eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 338 at 379–380.

[21] A renowned example of the application of functional comparative methodology in corporate law is provided by Reinier H Kraakman, *Diritto societario comparato: un approccio funzionale*, by Luca Enriques (Bologna: Il Mulino,

the comparable is only that which fulfills the same task, the same function".[22] The fundamental assumption behind functionalism is that all societies face comparable challenges that their legal systems must address. Although different jurisdictions may adopt distinct approaches, the solutions they find often lead to similar effects.[23] Accordingly, this methodology seeks to examine how a specific legal problem arising in society A and society B is addressed in each system and whether there are useful insights the compared parties can learn from one another.[24]

Both Italy and Canada confront the challenges of addressing corporate harm to stakeholders and regulating managerial discretion to prevent such harm, while also maintaining key features of the corporate structure, such as the pursuit of economic gains for shareholders, managerial flexibility in decision-making, and appeal to external investors. Although the two jurisdictions diverge in their theoretical approaches to corporate governance–Italy following a contractarian approach and Canada adopting a more stakeholder-oriented perspective–in practice, both are, to some extent, influenced by shareholder primacy ideas when defining the corporate interest.

These differences and similarities allow not only for a comparative analysis of the two systems but also for identifying the strengths and weaknesses of the respective solutions, evaluating their relevance for the other jurisdiction, and considering the potential for cross-pollination. For instance, the Canadian debate on framing a director's duties to prevent harm to stakeholders within the duty of care serves to assess whether a similar framing could also be problematic in Italy.[25]

Additionally, functional comparison aligns with the ToC framework adopted in this research, as both prioritize empirical, problem-oriented approaches over abstract theoretical modelling, such as that which characterizes of the neoliberal law and economic perspective.[26] Consistent with the

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2006). An application of functional comparison to European private law is that of Ugo Mattei & Mauro Bussani, "In Search of the Common Core of European Private Law" (1995) 2 European Review of Private Law 485–486. A relevant Italian scholarship contribution to the functional comparative methodology is provided by Michele Graziadei, "The functionalist heritage" in Pierre Legrand & Roderick Munday, eds, *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003) 100. For an overview of criticisms raised against functional legal comparison, see *Methods of Comparative Corporate Governance*, SSRN Scholarly Paper, by Christopher M Bruner, SSRN Scholarly Paper ID 3520817 (Rochester, NY: Social Science Research Network, 16 January 2020) online: <https://papers.ssrn.com/abstract=3520817>.
For further information on other approaches to legal comparison (e.g., socio-legal approach, historical approach) refer to Mathias Siems, "New Directions in Comparative Law" in *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2019); Michele Graziadei, "The functionalist heritage" in Pierre Legrand & Roderick Munday, eds, *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003) 100 at 100–101; Randall Morck & Bernard Yeung, "Never Waste a Good Crisis: An Historical Perspective on Comparative Corporate Governance" (June 2009), online: <https://www.nber.org/papers/w15042> DOI: 10.3386/w15042.

[22] Konrad Zweigert, "Methodological Problems in Comparative Law" (1972) 7:4 Israel L Rev 465–474 at 466–467.

[23] *Ibid* at 467.

[24] Esin Orucu, "Methodological Aspects Of Comparitive Law" (2006) 8:1 European Journal of Law Reform 29–42 at 33.

[25] Chapter 5 will explore this and other insights emerging from the comparison with Canada.

[26] However, both law and economics and legal comparison may adopt functionalist approach; see Ugo Mattei & Roberto Pardolesi, "Law and economics in civil law countries: A comparative approach" (1991) 11:3 International

recalled view that reinterpreting corporate law can foster sustainability in business, comparative analysis offers a new lens through which to revisit legal concepts–such as adequate organizational arrangements or directors' civil liability for harm to stakeholders–thereby contributing to the broader endeavour of legal innovation that underpins this work.

Director civil liability for harm to stakeholders represents one of the most significant points of comparison between Italy and Canada for discussing the protection of corporate stakeholders in these jurisdictions. In Canada, as noted, the oppression remedy permits claims to be filed directly against directors for conduct harmful to individuals beyond the corporation.[27] The extensive debate that emerged in Canada surrounding the use of this remedy to protect coporate stakeholders makes it particularly relevant for examining whether a similar possibility exists or may exist in Italy under Article 2395 of the Civil Code, which similarly permits third parties to bring direct claims against directors for harm resulting from director conduct. Naturally, to ensure a balanced comparison, the peculiarities of each legal system will be duly acknowledged, and, on that basis, the feasibility and extent of potential cross-pollination will be assessed.

In terms of research process, this research is exploratory[28] thus follows an inductive bottom-up process that, based on the analysis of data–primarily, legal provisions and secondary interpretative sources such as doctrine and jurisprudence–seeks to produce preliminary generalizations about the existence of a suitable basis in the Italian corporate law for a director duty to prevent harm to stakeholders. Some data will also be derived from online sources such as corporate websites and social media profiles to complement indeterminate legal sources in the identification of stakeholder community defining features.[29]

5. Research Boundaries

A potential research limitation concerns the empirical implementation of the proposed directors' duty of care to prevent harm to communities. Although this study offers several, and hopefully compelling arguments supporting the effectiveness of such a duty in enhancing community protection in Italy, prospective impact analysis will be necessary to further substantiate these claims and to test their applicability in practice. Moreover, this study's findings rest largely on legal provisions–primarily EU legislation on corporate sustainability–with a relatively narrow scope, covering mainly very large corporations. Any prospective implementation study should

Review of Law and Economics 265–275 at 265 cited by Antonio Gambaro, "The Trento Theses" (2004) 4:1 Global Jurist Frontiers, online: <https://www.degruyter.com/document/doi/10.2202/1535-1653.1117/html> n 63; Klaus J Hopt, *Comparative Company Law 2018* (Rochester, NY, 2019) at 26 on "Comparative Company Law and Economics".

[27] Most notably, in *Air Canada Pilots Association v Air Canada Ace Aviation Holdings Inc*, [2007] CanLII 337, (ON SC), an association of employees tried to block the distribution of assets to shareholders and argued that the employer company had significant pension obligations towards them. In *BCE Inc v 1976 Debentureholders*, [2008] 3 SCR 560, (SCC) [*BCE*] a group of investors complained that BCE failed to establish that its Plan of Arrangement, which involved a leveraged buyout of the company's shares resulting in a substantial amount of new debt for a wholly owned subsidiary of BCE, was oppressive and unfairly prejudicial to them and unfairly disregarded their interests.

[28] Robert A Stebbins, *Exploratory Research in the Social Sciences* (SAGE Publications, Inc., 2001).

[29] Specifically, data used to investigate Canadian hybrid corporations and Italian Renewable Energy Communities (CERs) and Community Cooperatives (CCs) in Chapter 3.

therefore take this aspect into account. Further shortcomings also include the acceptance of the study's theoretical premises and the restriction of the research scope to public corporations. A more detailed discussion of these limitations and possible ways to address them in future research is provided in the concluding section.

For now, it is sufficient to note that reliability and validity–i.e., accuracy in capturing the researched phenomenon and replicability by other scholars[30]–have been pursued to ensure the analysis meets high scientific standards. To ensure validity, relevant and representative cases for comparison were selected, and attention was paid to factors beyond black letter law that may influence corporate and director behaviour, and the effectiveness of community protection. Replicability, to the extent possible in legal reasoning, has been pursued through a detailed description of data and methods, and through the inclusion of tables summarizing complementary non-legal data.

6. Chapter Overview

The work is structured as follows. Chapter 2 sets out the theoretical foundations of the research, arguing that the combination of neoliberal concepts and the contractarian underpinnings of Italian corporate law has contributed to the discipline's limited attention to the protection of communities affected by corporate activities. It proposes the Theory of the Commons (ToC) as a more stakeholder-sensitive framework to complement existing corporate legal approaches in Italy and promote the inclusion of stakeholder community interests in corporate governance.

Chapter 3 examines the legal notion of the "stakeholder community", whose protection from corporate harm constitutes the central focus of this study. It identifies three essential features of such communities: (a) a territorial dimension implying a connection with local natural commons; (b) a shared and primary interest in protecting those commons from overconsumption and degradation; and (c) democratic governance. The chapter then assesses the extent to which these features are met in six legally recognized community models from Italy and Canada, with a twofold aim: to identify real-world communities that may qualify as beneficiaries of the proposed directors' duty of care, and, consequently, to ascertain to what extent the proposed criteria serve as a useful generally applicable framework for identifying communities beyond those analyzed for the purpose of the reconceptualization of the duty of care advocated in Chapter 5.

Chapter 4 turns to corporate law topics more specifically, discussing directors' fiduciary duties and the possibility of extending them to include a duty to consider stakeholder interests and avoid harmful decisions–a topic largely debated in Italian scholarship in relation to corporate sustainability and CSR. The chapter takes a negative stance, arguing that such an extension would neither be possible nor effective in Italy due to the absence of general legal provisions authorizing or requiring directors to balance or prioritize stakeholder interests over those of shareholders, as well as other theoretical and practical reasons.

[30] Stebbins, *supra* note 28.

Chapter 5 proposes an alternative approach: identifying a director duty not to harm communities within the duties of care, particularly in the obligation to establish, implement and maintain organizational, administrative and accounting arrangements that are adequate to prevent corporate risks. This focus builds on prior Italian scholarship advocating an extensive, outward-looking interpretation of this risk-management framework, according to which the mentioned obligation should protect not only the company from external risks but also third parties from risks posed by the corporation itself.

Chapter 6, assuming the proposed interpretation is accepted, discusses potential enforcement mechanisms by examining both preventive and compensatory tools available under Italian law–primarily class actions and representative actions–, possible improvements, and considering the feasibility of direct enforcement of community rights.

The concluding section reiterates the central argument that, within the boundaries defined by the scope of application of EU corporate sustainability legislation, current Italian law already offers a basis for requiring corporate directors to prevent harm to communities. It further reflects on the study's limitations and identifies avenues for future research.

Chapter 2: Theoretical Framework

1. Introduction

This chapter discusses the theoretical foundations of my research. It begins by exploring the limitations of the current Italian corporate legal framework in protecting communities negatively affected by corporate activities. These limitations arise from the interpretation and application of the legal framework in accordance with neoliberalism. I propose that an approach based on the Theory of the Commons (ToC) could help mitigate these shortcomings.

The ToC is an economic and legal theory challenging the idea that collective action problems can be solved through privatisation or centralisation within the state. Legally, the ToC emphasizes the relevance of certain resources, referred to as "commons", for the fulfilment of people's fundamental rights, here intended as inalienable and imprescriptible rights of any human being.[1] Generally, commons are defined as resources that, due to the impossibility or significant difficulty of being enclosed or insulated from other natural resources, are accessible to various users who rely on them to carry out their activities. When one user exploits the resources, it limits other users' right to enjoy them. To address this issue, the ToC suggests that commons' proprietary prerogatives should be limited in order to permit users to access and enjoy the resource.

Within this general context, this research focuses on natural commons and the negative impact their exploitation may generate on community users.[2] A ToC-based approach could prevent this drawback by stressing the limits that corporations have when undertaking activities that can negatively affect commons. This way, the ToC seems well-suited to challenge the neoliberal postulates in which the current Italian corporate legal framework and scholarly debate are rooted, which, on the contrary, emphasize private property and individualism.

The chapter is divided into two sections. The first section outlines the Italian corporate legal framework and its limitations in considering communities' interests, investigates the underlying causes of these limitations and presents the ToC as a potential means to overcome them. The second section explores the limits of existing procedural mechanisms in Italy to address harm to stakeholder communities, focusing on as class actions and public interest litigation. It also examines prospects for recognizing communities as holders of legally relevant and enforceable interests. These topics will also return in the following chapters.

Section I

2. Italian Corporate Law

Italian corporate law prioritizes profit as the goal of corporate directors and denies any general legal duty for directors to consider the interests of stakeholders unless when doing so is

[1] Cf. footnote 178 below.

[2] Relevant examples of commons for this research include, for instance, air, water basins, and land areas.

instrumental to the pursuit of shareholders' interests.[3] This emerges from statutory provisions and recent normative developments.

2.1. The Italian Civil Code and The Profit Purpose

The Italian Civil Code, when outlining the general norms for corporate enterprises, establishes the essential for-profit nature of all company agreements. Article 2247 describes these agreements as contracts in which

> two or more persons contribute goods or services for the joint exercise of an economic activity in order to share the profits deriving therefrom.

While exceptions exist–such as companies operating in a regulated market, which may not pursue profit[4]–scholarly interpretations have commonly viewed the provision as imposing a fiduciary duty[5] on directors to pursue the corporate interest (*interesse sociale*). Most scholars have long interpreted corporate interest as the maximization of shareholder (economic) interests,[6] typically

[3] Otherwise, they would breach their duty of care. See, e.g., Renzo Costi, "Relazione di sintesi" in Aa Vv, ed, *L'interesse sociale tra valorizzazione del capitale e protezione degli stakeholders: in ricordo di Pier Giusto Jaeger: atti del convegno, Milano, 9 ottobre 2009* (Milano: Giuffrè, 2010) 189 at 195.

[4] Art 64 TUF (Consolidated Law on Finance) (Italy). Other examples include benefit companies and social enterprises. For further details, see below subsection 2.3., and Marco Cian, "L'organizzazione produttiva: elementi costitutivi" in Marco Cian, ed, *Diritto commerciale* (Torino: Giappichelli, 2020) 1 at 47–51.

[5] By fiduciary duty, I mean the responsibilities that directors have when managing a corporation on behalf of others. For a description of the relationship between corporations and directors in Italy as fiduciary, refer to Alessandro Ippolito & Cristina Langford, "Compenso degli amministratori di società per azioni ed eccezione di inadempimento: quid iuris?" (2024) 5 Società 576–590 at 576–590. For further discussion on fiduciary duties, see Chapter 4.

[6] Among many others, see Vincenzo Calandra Buonaura, *L'amministrazione della società per azioni nel sistema tradizionale* (Torino: Giappichelli, 2019) at 290; Paolo Montalenti, "Interesse sociale e amministratori" in Aa Vv, ed, *L'interesse sociale tra valorizzazione del capitale e protezione degli stakeholders: in ricordo di Pier Giusto Jaeger: atti del convegno, Milano, 9 ottobre 2009* (Milano: Giuffrè, 2010) 81 at 90; Monica Cossu, *Società aperte e interesse sociale* (Torino: Giappichelli, 2006); Giuseppe Ferri, *Investimento e conferimento* (Milano: Giuffrè, 2001); Pier Giusto Jaeger, "L'interesse sociale rivisitato (quarant'anni dopo)" (2000) 6 Giur comm 795–812. This reading has also been supported by courts; see, most recently, Tribunale Bologna, 10 November 2023, Business Section (Italy) Società 3, 2024, 367 [defining the corporate interest as 'the totality of the interests shared by the shareholders, as parties to the company agreement, which include the generation of profit, *the maximization of corporate profit (i.e., the overall value of shares or equity stakes)*, the control over the management of social activities, the distribution of profits, the transferability of their shares, and the determination of the duration of their investment.'][My translation, emphasis added]. It must be clearly underlined that equating corporate interest with the maximization of shareholder value is an interpretative choice, as the Civil Code remains neutral on this point; see, e.g., Marco Ventoruzzo, "Richiamo e difesa delle radici istituzionali dell'impresa nel codice civile" in Luca Paolazzi, Mauro Sylos Labini & Fabrizio Traù, eds, *Gli imprenditori* (Venezia: Marsilio, 2016) 88 at 110.

in the long run.[7] When the law requires directors to consider external stakeholders' interests,[8] commentators generally consider these as 'external' constraints imposed by regulation to directors' powers, asserting that they should not influence the concept of corporate interest, which remains shareholder oriented.[9]

Integrating social and environmental sustainability into corporate governance raises the question of whether directors in Italy must consider the interests of stakeholders.[10] While scholars generally agree that such interests can be considered if they do not conflict with shareholders' interests, challenges arise when conflicts do occur–for example, in cases of business relocation, hostile takeovers with downsizing plans, or costly environmental or technological improvements. In these situations, directors are typically expected to prioritize shareholders' interests, as they represent the company's core interests due to their investment.[11] However, if legal provisions outside corporate law–such as public law or environmental law provisions–establish a hierarchy

[7] Umberto Tombari, *Potere e interessi nella grande impresa azionaria* (Milano: Giuffrè, 2019) at 88–94; Paolo Montalenti, "L'interesse sociale: una sintesi" (2018) 2 Riv Soc 303 at 304; Vincenzo Calandra Buonaura, "Funzione amministrativa e interesse sociale" in Aa Vv, ed, *L'interesse sociale tra valorizzazione del capitale e protezione degli stakeholders: in ricordo di Pier Giusto Jaeger: atti del convegno, Milano, 9 ottobre 2009* (Milano: Giuffrè, 2010) 101 at 108. Doubting, Mario Campobasso, "Gli amministratori, il successo sostenibile e la pietra di Spinoza" (2024) 1 BBTC 1–19 at 3. See also Mario Stella Richter, "Long-Termism" (2021) 1 Riv Soc 16–52 at 50, supporting the need for balancing short- and long- termism; Carlo Angelici, "A proposito di shareholders, stakeholders e statuti" (2021) 119:2 Rivista del diritto commerciale e del diritto generale delle obbligazioni 213–224 at 217, arguing that the time dimension in which to operate must be determined by directors.

[8] Cossu, *supra* note 4 at 294 ff, recalling the principle of good faith and fairness in contracts (Arts 1175 and 1375 Civil Code (Italy)), accountability of directors towards third parties directly damaged by their behaviour (Art 2395 Civil Code (Italy)), criminal law provisions included in Book V, and the possibility of resorting to judicial oversight in case of serious irregularities in management (Art 2409 Civil Code (Italy)).

[9] Montalenti, *supra* note 7 at 304.

[10] This Chapter mainly focuses on the theory of the Commons, while director liability and remedy issues will be further addressed in Chapters 4 and 5.

[11] Opposition to expanding the range of interests that directors must balance has also been voiced by scholars who advocate for promoting tools that facilitate active stakeholder involvement in enterprises; e.g., Francesco Denozza, "Incertezza, azione collettiva, esternalità, problemi distributivi: come si forma lo short-termism e come se ne può uscire con l'aiuto degli stakeholders" (2021) 2–3 Riv Soc 297–318 at 316. However, it is important to note that the interpretation of corporate interest as either linked to or independent from shareholders' interests has been challenged by the concept of its "neutrality" emerged in minoritarian scholarship; for a commentary, see Mario Porzio, "...allo scopo di dividerne gli utili" (2014) 4 Giur comm 661–668.

Additionally, it is important to note that corporate governance models significantly shape how directors' roles and duties are conceived of in a legal system. In Italy, the prominent corporate governance model (so called 'traditional') is a dual board structure, where a board of directors (*CdA*), appointed by shareholders, holds exclusive management authority over corporate operations. Management tasks may be delegated to individual directors (*AD*) or an executive committee, and board committees may also be established typically to prepare decisions on key issues. While the board retains ultimate responsibility for management, delegated directors handle day-to-day operations. Since 2003, Italy has also permitted alternative governance models, including a one-tier (*monistico*) and a two-tier (*dualistico*) model, which require adoption in a company's bylaws. In the one-tier model there is a supervisory committee of independent directors, combining oversight and management functions, while the two-tier model separates these functions into a management council and a supervisory council. While formally independent from each other, in the traditional governance model shareholders have some influence over management (e.g., through appointment, determining compensation, requesting authorization on certain matters), which varies under alternative models.

of interests or push companies in a specific direction, directors' discretion would be limited, and they would be obligated to follow normative prescriptions, prioritizing non-shareholders' interests.[12] This approach, suggesting the introduction of 'specific' 'external' duties on directors for sustainability purposes, is supported by Italian corporate law scholars today.[13]

Furthermore, Italian corporate law provides no specific remedies for communities affected by corporate actions. Article 2395 of the Italian Civil Code allows individual shareholders and third parties (stakeholders) who are directly impacted by directors' actions to initiate litigation against them for compensation. This provision may theoretically offer some protection for stakeholders communities,[14] although it is challenged by various procedural and substantive obstacles.

Key limitations include the individual scope of the right to redress,[15] the majoritarian interpretation that considers only direct and monetary damages as falling within the provision,[16] and the requirement to assess the "unfairness" of the damage,[17] which typically entails a heavy burden of proof on claimants who must establish that directors acted against their duties.[18] Even

[12] Federico Mucciarelli, "Interesse sociale e sostenibilità: un falso problema" (2023) Rivista ODC, online: <https://www.orizzontideldirittocommerciale.it/wp-content/uploads/2023/05/Mucciarelli_paper-ODC-2023.pdf>.
[13] *Ibid* at 23; Montalenti, *supra* note 7 at 304.
[14] This topic will be further discussed in Chapter 5.
[15] As reflected in the provisions' title as "Individual shareholder and third-party action," which restricts the right to sue to a "single shareholder or third party."
[16] The direct harm feature distinguishes this action from a derivative action, which requires shareholders who have suffered a diminution of corporate assets to sue directors on behalf of the corporation (Arts 2393 and 2393 bis Civil Code (Italy)). Article 2395 explicitly requires the direct nature of damages by using the term "directly". For further details on this requirement see, the most recent jurisprudence, Corte di Cassazione, 28 April 2021, Civil Section I, Order, No 11223 (Italy) as well as Fabrizio Sudiero, "Danno diretto vs riflesso: possibili criteri distintivi ed il danno subito dal terzo – socio" (2019) Giur it 2190–2198; Vincenzo Pinto, "La responsabilità degli amministratori per "danno diretto" agli azionisti" in Pietro Abbadessa & Giuseppe B Portale, eds, *Il nuovo diritto delle società, Liber amicorum Gian Franco Campobasso* (Torino: UTET, 2006) 891.
In contrast, the monetary nature of damages is derived from the interpretation of the damage itself, which should impact the assets of a shareholder or third party. For more information on this element, see Tribunale Catanzaro, 28 March 2018, Business Section (Italy); Francesca Attanasio, "La responsabilità degli amministratori per "danno diretto" agli azionisti fra diritto della responsabilità civile e diritto societario" (2016) 7 Le Società 812–822 at 815.
Corte di Cassazione, 11 December 2013, No 27733 (Italy), may open the door for the compensation of non-monetary damages, establishing that personal damages suffered by shareholders (such as those affecting personal image and honor) cannot be classified as indirect damages eligible for corporate compensation, but must be compensated directly to the affected claimant. However, the ruling involved a claim made by shareholders against a third-party corporation, rather than against directors.
[17] While fairness is not directly mentioned in Article 2395, but only in the provision establishing general tort liability (Art 2043 Civil Code (Italy)), it has been conventionally interpreted as a prerequisite for the success of a claim under Article 2395 due to its widespread interpretation as having a tortious nature.
[18] The breach of directors' duties has been deemed necessary to overcome the corporate veil principle, which would otherwise require that the corporation is liable for all damages caused by those acting on its behalf through its assets. This common interpretation has been challenged by an alternative view that regards unfair damage as an infringement of any valuable interests protected within the legal framework. For a commentary on these developments, see Paolo Giudici, "La responsabilità degli amministratori verso i soci e i terzi: alla ricerca di una teoria fondante" (2015) 11 Le Società 1279–1283 at 1279–1283; Pinto, *supra* note 16.

in *società benefit* (Italian benefit corporations), where directors have a clear duty to balance profit with social goals, only shareholders can sue directors for harm suffered.[19]

2.2. Normative Developments: Reporting Initiatives and the Corporate Governance Code

Growing global awareness of environmental issues and the necessity of corporate engagement in addressing them have led to normative interventions promoting transparency and long-term corporate success, rather than merely focusing on immediate shareholders profits. Italy has been subject to these interventions.

In 2016, the European Non-Financial Reporting Directive (NFRD) was implemented in Italy, mandating large companies to disclose how environmental and social issues impact their operations and how their activities affect society and the environment.[20] Subsequently, the Corporate Sustainability Reporting Directive (CSRD) replaced the NFRD, further expanding its scope of application and clarifying sustainability disclosure obligations.[21] By changing the terminology from "non-financial reporting" to "sustainability reporting", the CSRD has also emphasized the financial relevance of information related to environmental and social issues for companies.[22] Additionally, the latest version of the Borsa Italiana Corporate Governance Code–a set of best practices that companies listed on the Italian stock market can voluntarily adopt[23]–has incorporated the concept of "sustainable success" as a guiding objective for the board of

[19] Calandra Buonaura, *supra* note 4 at 196, note 7 (including additional references); Alessio Bartolacelli, "Le società benefit: responsabilità sociale in chiaroscuro" (2017) 2 Non Profit 253–286 at 270.

[20] EU, *Directive* 2014/95 of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [NFRD], [2014] OJ L 330/1, Art 19a. The NFRD was implemented in Italy through *decreto legislativo 30 dicembre 2016, n. 254*, 30 December 2016, 254.

[21] EU, *Directive 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting* [CSRD], [2022] OJ L 322/15. The CSRD was Implement in Italy by *decreto legislativo 6 settembre 2024, n. 125*, 6 September 2024, 125.

[22] CSRD, Recital 8.

[23] Comitato per la Corporate Governance, *Codice di Corporate Governance* (January 2020), online: <https://www.borsaitaliana.it/comitato-corporate-governance/codice/2020.pdf>. Borsa Italiana is responsible for administering the electronic stock market (MTA). However, adherence to the code gains regulatory significance for listed companies due to Art 123bis, para 2(a) TUF (Italy), which requires issuers to specify in their management report whether they have adopted a corporate governance code of conduct and to explain any deviations (comply or explain). Additionally, when a code is adopted, the audit committee must ensure the proper implementation of the corporate governance rules outlined in the code followed by the company (Art 149, para 1, lett. c bis) TUF (Italy)). For further details, see Aurelio Mirone, "La struttura organizzativa. Introduzione" in Marco Cian, ed, *Diritto commerciale* (Torino: Giappichelli, 2020) 394 at 399–400. The (indirect) regulatory relevance of the Corporate Governance Code is also discussed by Enrico Ginevra, "Il Codice di Corporate Governance: Introduzione e Definizioni (con un approfondimento sul 'Successo sostenibile')" (2023) 5–6 Riv Soc 1017 at 1029.

directors,[24] emphasizing long-term value creation for shareholders while also explicitly requiring consideration of relevant stakeholders' interests.[25]

These measures aim to enhance sustainability in business by leveraging market forces such as informed investing decisions and reputation. Specifically, disclosure requirements push corporations to provide information to investors and the public about the risks that environmental and social challenges may pose to corporate financial performance, as well as the risks that corporations pose to the environment and society. This information enables investors and the public to make informed choices regarding more sustainable investments and purchases.[26] In contrast, the Corporate Governance Code seeks to stimulate sustainable practices in corporate governance by framing them as opportunities for profit rather than merely risks to mitigate.[27]

However, these efforts may fall short in addressing the complex challenges of preventing and compensating stakeholder harm. Reporting requirements focus on disclosure without mandating concrete actions to address human rights or environmental harm.[28] Similarly, the Corporate Governance Code provisions, other than being voluntary[29] and often ambiguous[30], face limited

[24] For a comparative analysis of attempts to integrate sustainability considerations into corporate governance codes of listed companies in EU Member States, see Michele Siri & Shanshan Zhu, "Integrating Sustainability in EU Corporate Governance Codes" in Danny Busch, Guido Ferrarini & Seraina Grünewald, eds, *Sustainable Finance in Europe: Corporate Governance, Financial Stability and Financial Markets* EBI Studies in Banking and Capital Markets Law (Cham: Springer International Publishing, 2024) 175 at 211–262.

[25] Some relevant commentaries on the topic include Campobasso, *supra* note 7; Ginevra, *supra* note 23; Paolo Montalenti, "I problemi della governance" (2024) 2 Giur comm 368–392; Carlo Marchetti, *La nexus of contracts theory: teorie e visioni del diritto societario* (Milano: Giuffrè, 2000).

[26] CSRD, Recital 9: 'If undertakings carried out better sustainability reporting, the ultimate beneficiaries would be individual citizens and savers, including trade unions and workers' representatives who would be adequately informed and therefore able to better engage in social dialogue. Savers who want to invest sustainably will have the opportunity to do so, while all citizens would benefit from a stable, sustainable and inclusive economic system.' Sustainability disclosure is also intended to benefit corporations by, for example, enhancing access to financial capital, see recital 12.

[27] Anna Genovese, *La gestione ecosostenibile dell'impresa azionaria. Fra regole e contesto* (Bologna: Il Mulino, 2023) at 150. This approach aligns with the broader goal of listed companies' regulation of ensuring the effective functioning of the market; see Ginevra, *supra* note 23.

[28] Skylar Shulman, "Corporate Sustainability Due Diligence: Combining Human Rights and the Environment" (2024) 49:2 Columbia Journal of Environmental Law 479–523 at 505; Campobasso, *supra* note 7 at 16. A different reading is offered by Anna Genovese & Serenella Rossi, "Considerazioni conclusive sulle funzioni dell'informazione non finanziaria" (2023) 3 ODC 698–710 at 706–707, arguing that disclosure provisions may impact corporate behavior. See also Chapter 5, footnote 45.

[29] Broadly, on the limits of implementing sustainability in corporate governance, refer to Lucia Calvosa, "La governance delle società quotate italiane nella transizione verso la sostenibilità e la digitalizzazione" (2022) 2–3 Riv Soc 309.

[30] Campobasso, *supra* note 5 at 8, note 32 8: 'The protection of the environment and the benefit to the communities of reference could involve choices and costs that reduce the profitability of the business both in the short term and in the long term, unless a very long-term horizon is considered.' [My translation]

effectiveness unless they can overcome directors' strong incentives to prioritize shareholders' interests.[31]

Finally, the discussed normative measures can risk creating the illusion that narrowly targeted corporate law reforms can solve corporate sustainability issues without addressing their systemic roots.[32] For instance, while the Corporate Governance Code introduces the principle of sustainable success, it does not challenge the underlying ideological assumption that views the corporation as a maximizer of value for shareholders, albeit extending it in the long term.

2.3. Other Normative Developments: 'External' Interests in Corporate Governance

In recent years, Italy has also enacted legal reforms to incorporate interests external to shareholder value in corporate governance. However, these developments have usually been perceived as exceptional and limited to the specific provisions that introduce them.

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[31] For example, director compensation, and particularly stock option plans, aim to align directors act with shareholders' interests; Lucian A Bebchuk & Roberto Tallarita, "Will Corporations Deliver Value to All Stakeholders?" (2022) 75:4 Vanderbilt L Rev 1031–1091 at 1083. For Italy, see Carlo Amatucci, "I riflessi delle stock options sulle cause determinanti della crisi finanziaria" (2009) 5 Riv Dir Civ 547–571; more recently, Ilaria Capelli, "Le politiche di remunerazione degli amministratori nelle società quotate tra la massimizzazione del valore per gli azionisti e il perseguimento della sostenibilità ambientale e sociale: un percorso ancora agli inizi" (2023) 3 ODC 755–782, affirming a progression in remuneration policies, with the increasing relevance of social and environmental interests compared to the past, yet pointing out that many aspects remain anchored in market logic, and that the Italian regulatory framework is still incomplete. Naturally, remuneration could also be used to nudge directors toward sustainability, such as through variable remuneration linked to the achievement of ESG goals, enhancing shareholders' control over executive compensation through "say on pay", and increasing the transparency of compensation policies as required by the EU, *Directive 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement* [SHRD II], [2017] OJ L 132, 20/5/2017. Nevertheless, the effectiveness of these practices may be reduced, considering, for example, the limited impact of variable remuneration, which constitutes only a small portion of total compensation. In Italy, it did not exceed an annual average of 20% of overall remuneration in listed companies in 2023; see *Rapporto 2023 sulla rendicontazione non finanziaria delle società quotate italiane*, by CONSOB (2023) online: <https://www.consob.it/web/area-pubblica/report-dnf>. Regarding SHRD II "say on pay" and transparency measures, these practices remain dependent on shareholders' (especially institutional investors') activism while keeping stakeholders' roles passive, and on limited enforcement mechanisms against directors for violations; see Ilaria Capelli, "La sostenibilità ambientale e sociale nelle politiche di remunerazione degli amministratori delle società quotate: la rilevanza degli interessi degli stakeholder dopo la SHRD II" (2020) 2 ODC 553–588 at 572–582; Ettore Gliozzi, "Lo short-termismo e la direttiva n. 828 Ue del 2017" (2020) 3 Riv Trim Dir e Proc Civ 841–855. For a discussion on the (limited) role of institutional investors in achieving corporate sustainability, see Giovanni Strampelli, "Gli investitori istituzionali salveranno il mondo? Note a margine dell'ultima lettera annuale di BlackRock" (2020) 65:1 Riv Soc 51–71. Finally, pursuing long termism, as the SHRD II aims to do, does not necessarily equate to achieving social and environmental benefits; see Stella Richter, *supra* note 7 at 49–50. For an overview of SHRD II on directors' remuneration and the limitations in pursuing social and environmental sustainability, see Clara De Chirico, *Remunerazione gestoria e sostenibilità d'impresa: la risposta regolativa europea alle nuove sfide dei mercati* 2021), online: <https://www.dirittobancario.it/art/remunerazione-gestoria-e-sostenibilita-dimpresa-la-risposta-regolativa-europea-alle-nuove-sfide-dei-mercati/>. Directors' incentives to prioritise shareholder interests are addressed in detail in Chapter 4.

[32] Francesco Denozza, "La danza del realismo e della critica: riflessioni sul metodo giuridico" (2019) 2 ODC 419–438 at 436.

One relevant example is the introduction of *società benefit*, which requires directors to balance economic interests with the pursuit of the common good.[33] While *società benefit* can be structured as Italian joint-stock companies (hereinafter *S.p.A.*)–commonly profit-driven as defined by Article 2247 of the Civil Code–their introduction did not create opportunities for the latter to pursue social interests, but rather led to opposite outcomes.

Before the introduction of *società benefit*, *S.p.A.* companies were not legally prohibited from pursuing some social and environmental interests, albeit within certain limits established by a common shareholder-oriented interpretation of the corporate interest. However, the introduction of this new company model reinforced the pre-existing shareholder-oriented interpretation, with the result that only *società benefit* can now legally pursue non-profit interests alongside profit, while regular corporations (i.e., those that do not adopt the benefit model) shall primarily focus on profit.[34] Only a few, narrowly framed exceptions have been deemed possible.[35]

Consequently, the consideration of social interests might be seen as restricted to *società benefit*, with no implications for non-benefit corporations, other than alleviating any pressure on regular corporations to consider social interests. This prevailing interpretation is often justified by the incompatibility between the structure of a traditional (profit-driven) company and that of a *società benefit*, suggesting that the introduction of the benefit model in Italy should not undermine the pursuit of profit in traditional, non-benefit corporations.[36]

[33] *legge 28 dicembre 2015, n. 208*, 28 December 2015, 208, subsections 376-383.

[34] For a critical reading of the effects of introducing *società benefit* in Italy on the pursuit of non-shareholder interests in for-profit companies, see Alessio Bartolacelli, "The Unsuccessful Pursuit for Sustainability in Italian Business Law" in Beate Sjåfjell & Christopher M Bruner, eds, *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* Cambridge Law Handbooks (Cambridge: Cambridge University Press, 2019) 290 at 295 ff.

[35] See, e.g., Tombari, *supra* note 5 at 71–76, contending that regular for-profit corporations can only perform occasional and marginal charitable actions, as well as acts that indirectly pursue profit. Furthermore, if shareholders intend to establish a company to pursue the common good, they must choose the benefit model. See also Carlo Angelici, "Società benefit" (2017) 2 ODC 1–12, arguing that Italian regular corporations can pursue non-lucrative objectives when they aim to meet obligations established by law.

[36] A similar case can be observed with the 'social enterprise' label introduced by *decreto legislativo 3 luglio 2017, n. 112*, 3 July 2017, 112 and the renewable energy community (*Comunità Energetica Rinnovbile* or CER) model introduced by *decreto legislativo 8 novembre 2021, n. 199*, 8 November 2021, 199 implementing EU, *Directive 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources,* [2018] OJ L 328/82. Both legislations contain provisions that allow social enterprises and an energy community to take any legal form for collective enterprise. However, these legislations have been interpreted as excluding the possibility for both social enterprises and CERs to adopt the *S.p.A.* model, as it would conflict with some of their socially oriented features. Namely, for social enterprises, there is a ban on engaging in activities for profit purposes. For an overview of the regulations governing social enterprises, see Paola Iamiceli, "Il coinvolgimento dei beneficiari nell'impresa sociale" (2006) 3 Impresa sociale 76–87; Antonio Fici, "La nuova disciplina dell'impresa sociale nella prospettiva dei suoi stakeholder" (2018) 11 Impresa Sociale 7–14. Instead, CERs cannot have as their primary aim the distribution of profit to their members. See Emanuele Cusa, "Sviluppo sostenibile, cittadinanza attiva e comunità energetiche" (2020) 1 ODC 71–126 at 111.

2.4. Scholarly Debate

Since the last decades of the 20th century, Italian corporate law scholarship has discussed whether directors could or should pursue stakeholders' interests alongside those of shareholders. This debate stems from the Civil Code's reference to profit as an essential element of the corporate contract, which has been interpreted as implying that directors' fiduciary duties are shareholder-oriented, while other interests are 'external' to those duties.

A central research question has been whether considering stakeholders' interests breaches directors' duty to pursue the corporate interest (fiduciary duty), making it illegitimate. Foundational to sustainability debates in corporate governance, this focus has overlooked the possibility of grounding stakeholder-oriented governance in the directors' duty of care rather than fiduciary duty.[37] Italian corporate legal scholarship has also shown limited attention to the status and protection of stakeholders within regular corporations.[38] Specifically, the relationship between corporations and affected local communities, and the legal venues available to them for redress, remain largely unexplored. While collective interests have been explored by private law and civil procedure scholars,[39] corporate law literature has largely neglected this topic.

For instance, the introduction of directors' duty to establish and implement adequate organizational, administrative and accounting arrangements under Articles 2086, para 2, and 2381, para 3-5 of the Italian Civil Code,[40] which occurred between 2003 and 2019, created opportunities for corporate scholars to explore stakeholder protection. These provisions, aimed at risk prevention and management, prompted debate over their interpretation and implications for stakeholder-sensitive governance.[41] Scholars have discussed whether the duty to establish and implement adequate arrangements extends to stakeholders, which group are included,[42] and whether environmental risks fall within its scope.[43] This debate is significant because it examines

[37] Refer to subsection 4.2.3. below for a further discussion on how the ToC approach could help reframe directors' duty of care for the benefit of affected communities.

[38] The trend may be traced back to the civil law tradition, which prioritizes codified law. This can limit robust theorizing.

[39] Refer to Romolo Donzelli, *La tutela giurisdizionale degli interessi collettivi* (Napoli: Jovene, 2008); Stefano Rodotà, *Le azioni civilistiche* (Padova: CEDAM, 1976); Vincenzo Vigoriti, *Interessi collettivi e processo: la legittimazione ad agire* (Milano: Giuffrè, 1979); Loriana Zannuttigh, "La tutela di interessi collettivi (a proposito di un recente convegno)" (1975) 98:5 Foro it 71–84.

[40] Introduced by *decreto legislativo 12 gennaio 2019, n. 14*, 12 January 2019, 14. Precisely, the responsibility for establishing adequate structures lies with delegated directors, while the board is responsible for overseeing the adequacy of these structures.

[41] See Fabrizio Di Marzio & Lorenza Calcagno, eds, *Gli assetti organizzativi dell'impresa*, Quaderno 18 (Roma: Scuola superiore della magistratura, 2022).

[42] Enrico Ginevra & Chiara Presciani, "Il dovere di istituire assetti adeguati ex art. 2086 c.c." (2019) 5 NLCC 1209–1238 at 1124–1226. The authors question whether the duty protects anyone who is asked to rely on the corporation and from whom the corporation obtains the financial resources needed to carry out its business, or if it merely protects (economic) efficiency in corporate governance by requiring a specific procedure to be followed in corporate activities that would enable directors to promptly recognize corporate distress.

[43] As emerges from the sentence 'also for the purpose of timely detecting a business crisis and the loss of business continuity'. See Loredana Nazzicone, "L'art. 2086 c.c.: uno sguardo d'insieme" in *Gli assetti organizzativi dell'impresa*

the role of environmental and social harm as relevant risks for corporations that require proper management.

However, detailed analysis of how breaches of the duty to establish and implement adequate arrangements may harm stakeholder communities and how these may seek redress remains underdeveloped.[44] Two major enforcement obstacles have been identified: the difficulty of establishing standing for stakeholders who do not have a contractual relationship with the corporation and the power imbalance between these stakeholders and corporations, which discourages legal action.[45] Despite occasional proposals for solutions,[46] stakeholders' and, above all, community protection remains marginal in Italian corporate law scholarship with no comprehensive studies to date.[47]

(Roma: Scuola superiore della magistratura, 2022) 13; Pierpaolo Sanfilippo, "La tutela dell'ambiente e gli "assetti adeguati"" in *Gli assetti organizzativi dell'impresa* (Roma: Scuola superiore della magistratura, 2022) 235; Sabrina Bruno, "Cambiamento climatico e organizzazione delle società di capitali a seguito del nuovo testo dell'art. 2086 c.c." (2020) 1 Banca Impresa Società 47–66.

[44] So far, Art 2086 Civil Code (Italy) has been enforced in litigation involving contractual corporate stakeholders, such as employees. For instance, see Corte di Cassazione, 7 August 2024, Labour Section, No 22326 (Italy), upholding the employee's right to access salary-backed loans (*cessione del quinto*) without being charged additional fees as compensation for the administrative costs incurred by the employer, the employer being required to establish adequate arrangements for the management of its staff.

Regarding the enforcement of Art 2086 for protecting the environment and non-shareholder stakeholders, the available jurisprudential references to date are not relevant for my purpose. For example, Tribunale Milano, 26 February 2024, Section II, Decree, No 2021 (Italy), upheld the duty of a holding company's auditors to supervise subsidiaries' management in establishing adequate arrangements when significant irregularities in managing assets essential for the group's core activities occurred, causing environmental damage over several years and leading to administrative proceedings against the company.

[45] Sanfilippo, *supra* note 43 at 269. It should also be noted that Italy–unlike the US or some Canadian provinces–does not allow success engagement fees (also called contingency fees or, in Italian, *patto di quota lite*), which are lawyer-client agreements stipulating that the legal counsel's fee will only be paid if the claim/defence is successful, typically as a percentage of the recovery. Refer to *legge 31 dicembre 2012, n. 247*, 31 December 2012, 247, Art 13, para 4 ['The agreements under which a lawyer receives, as compensation, in whole or in part, a share of the asset involved in the service or the disputed matter are prohibited.'][My translation] and Corte di Cassazione, 19 November 1997, Civil Section II, No 11485 (Italy) Mass Giur It, 1997 [establishing that when 'the fee has been conventionally linked to the practical outcome of the activity carried out, this would still result in the (not permitted) participation of the professional in the external practical interests of the service.'][My translation]. For the US, refer to American Bar Association, "Rule 1.5: Fees", s (c)-(d), online: <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_5_fees/>. For Canada, refer to Ontario *Solicitors Act*, RSO 1990, c. S.15, s 28.1.

[46] Such as the possibility of holding several corporate "representatives," including influential shareholders, accountable alongside corporate directors, suggested by Pierpaolo Sanfilippo, "Tutela dell'ambiente e 'assetti adeguati' dell'impresa": compliance, autonomia ed enforcement" (2022) 6 Riv Dir Civ 993–1026 at 999. Unlike Sanfilippo, Onza suggested that if the breach of the duty to establish adequate structures damages stakeholders, they may sue the corporation for redress, and recommended a different basis for their action than tort; see Maurizio Onza, ""Attività funzionale" ed "interessi degli altri" nella gestione dell'impresa (entificata): annotazioni dalla direttiva (UE) 2022/2464" (2023) 5 BBTC 757–768.

[47] Further research has been conducted in private law on the possibility of directors being directly liable for breaching their duty to establish and oversee the setting of adequate organizational structures. However, this view denies that

3. The Influence of the Neoliberalism

The previous paragraphs emphasize the general disregard for communities as meaningful corporate stakeholders within Italy's corporate legal framework and the lack of legal protection afforded to them. To identify viable solutions, it is essential to explore the underlying causes of these gaps.

3.1. Neoliberalism, EAL, and Contractarianism

The shareholder-centric focus of Italian corporate law, initially grounded in the contractarian theory of the corporation–which equates corporate interest with that of current shareholders[48]–has been reinforced and moulded with new ideological significance by the growing influence of Economic Analysis of Law (EAL)[49] and the broader dominance of neoliberal economic thought in Italian law and legal research over the past few decades, accounting for a proper legal 'style'.[50] By EAL, I refer not to the empirical application of economic methods to legal research, which has seen limited uptake among Italian scholars,[51] but to the incorporation of neoliberal economic reasoning into legal thought.[52] This influence is evident, for instance, in the acceptance of cost-

directors' liability towards stakeholders can be automatically inferred from their duty towards them; see Rita Rolli, *L'impatto dei fattori ESG sull'impresa. Modelli di governance e nuove responsabilità* (Bologna: il Mulino, 2021) ch 4, note 41. A different view asserts that directors have a duty to manage the corporation in an environmentally sustainable manner, stemming from their obligation to establish adequate arrangements, interpreted in light of European and national legislation regarding the disclosure and classification of green investments. However, although it is stated that affected stakeholders can enforce this duty directly, the discussion does not delve deeply into the legal foundations and mechanisms for such enforcement; see Genovese, *supra* note 27 at 131; 178. For further discussion on these readings, see Chapter 6.

[48] Refer to Chapter 4 for further analysis.

[49] I consider the expressions Economic Analysis of the Law (EAL) and Law and Economics (L&E) as interchangeable. For an introduction to the economic analysis of law, its application in several legal areas and its main criticisms, see Steven Shavell, *Analisi economica del diritto* (Giappichelli, 2007).Various methodological approaches to EAL/L&E have emerged over time, including positive (descriptive), normative (prescriptive), functional (public choice), and behavioral approaches (see, e.g., Alessio M Pacces & Louis T Visscher, "Methodology of Law and Economics" (2011) Rochester, NY, online: <https://papers.ssrn.com/abstract=2259058>; Avishalom Tor, "The Methodology of the Behavioral Analysis of Law" (11 July 2008) Rochester, NY, online: <https://papers.ssrn.com/abstract=1266169>; Francesco Parisi, "Positive, Normative and Functional Schools in Law and Economics" (2004) 18:3 Eur J Law Econ 259–272; Christine Jolls, Cass R Sunstein & Richard Thaler, "A Behavioral Approach to Law and Economics" (1998) 50:5 Stanford L Rev 1471–1550; Michael J Trebilcock, "An introduction to law and economics" (1997) 23:1 Monash University L Rev 123–158). However, in this study, I do not refer to EAL as a methodology.

[50] Alberto Toffoletto, Roberto Sacchi & Francesco Denozza, *Esiste uno stile giuridico neoliberale?* (Milano: Giuffrè, 2019).

[51] But not nonexistent. The use of EAL as a methodological basis for corporate law research emerges from the contributions on the legal methods of corporate law included in the section 'Metodo del diritto commerciale', ODC, 2, 2019, pp. 387–457.

[52] This is the meaning used by Francesco Denozza, "Lo stile giuridico neoliberale" in *Esiste uno stile giuridico neoliberale?* (Milano: Giuffrè, 2019) 1. However, in Italy and abroad, there have been scholarly positions that have criticized EAL and/or its consequences: e.g., Francesco Denozza; Lynn A Stout, *The shareholder value myth: how putting shareholders first harms investors, corporations, and the public*, 1st ed (San Francisco, CA: Berrett-Koehler, 2012); Colin Mayer, *Prosperity: better business makes the greater good* (Oxford, UK: Oxford University Press, 2018).

benefit analysis as a decision-making standard, which assumes all goods can be quantified, often at the expense of non-measurable values.[53]

The link between neoliberalism and EAL operates on three levels. Chronologically, both have dominated political, economic, and legal discourse over the past four to five decades.[54] Substantively, both prioritize the market and advocate reducing regulatory constraints.[55] Operationally, both focus on individual market transactions, assuming that the transaction-level efficiency leads to overall market efficiency. [56]

The contractarian theory of the corporation, dominant in Italy since the 1950s, highlights the central role of shareholders in the formation of the company, which has a contractual origin. This role is also reflected in corporate governance, as the pursuit of the corporate interest by directors is, in practice, understood as the pursuit of shareholder profit. Originally developed in opposition to fascist corporativism, this theory has a liberal ideological foundation.[57] However, with the rise of neoliberalism and the emergence of the corporate social responsibility (CSR) debate–both gaining traction from the 1970s–this theory has taken on new ideological meaning, foreign to its original version. It is precisely this new ideological imprint of contractarianism, rather than contractarianism itself, that poses challenges to the development of sustainable corporate governance and calls for its reconsideration. The close connection between business law and the market[58] has played a key role in legitimising and embedding neoliberal policies within the legal system,[59] particularly influencing corporate law.

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[53] Francesco Denozza, "Il modello dell'analisi economica del diritto: come si spiega il tanto successo di una tanto debole teoria?" (2013) 2 Ars interpretandi 43–68 at 49. The use of cost-benefit analysis has been broadly endorsed by Italian courts: Francesca Caroccia & Roberto Pardolesi, "Analisi economica del diritto: «the Italian job»" (2014) 137:9 Foro it 193–215. Although scholars have been more attentive to underlining the limits of EAL, this has not weakened their enthusiasm for its methods and underlying concepts: see, in corporate law, Luca Enriques, "Gruppi piramidali, operazioni intragruppo e tutela degli azionisti esterni: appunti per un'analisi economica" (1997) 5 Giur comm 698–730, fn 2. Moreover, even without explicit endorsement, such underlying concepts (profit maximization, efficiency, etc.) have permeated Italian corporate legal thought over the past three decades: see, e.g., Paolo Spada, "C'era una volta la società..." (2004) 1 Riv not 1 [for whom the longstanding corporate aim is to make profit]; Montalenti, *supra* note 7 [who uses the concept of efficiency to define the corporate interest].

[54] Francesco Denozza, "L'ambiguità del potere: La corporation negli scritti di Adolphe A. Berle Jr., alla vigilia della rivoluzione neo-liberale" in Pietro Abbadessa & Mario Campobasso, eds, *Società, banche e crisi d'impresa: liber amicorum Pietro Abbadessa* (Torino: UTET, 2014) 261 at 14.

[55] Denozza, "Il modello dell'analisi economica del diritto", *supra* note 53 at 53.

[56] *Ibid* at 55.

[57] It is important to note that fascist corporativism is one form of corporativism, qualified as *authoritarian corporativism* for its view of societal components as hierarchically subject to the State. Another form of corporativism was that embraced by the German Weimar republic, featuring a more pluralistic and democratic approach. For further details, see Annamaria Monti, *Per una storia del diritto commerciale contemporaneo* (Pisa: Pacini giuridica, 2021) at 213–214. Additional remarks and bibliographic references on corporativism are included in Chapter 4, subsections 2.1.1. and 3.1.c. and accompanying notes.

[58] By 'market', I primarily refer to the stock market, as it is different from the market for products and services, and significantly influences corporate conduct.

[59] Denozza, "Il modello dell'analisi economica del diritto", *supra* note 53.

3.2. Consequences of Neoliberal Postulates for Community Protection

What are the relevant neoliberal postulates for corporate governance, and how have they shaped Italy's legal framework? At least four key points can be identified. Importantly, most of the topics addressed in the following paragraphs will return in Chapter 4, to which the reader is referred for further discussion and details.

a. Market Fundamentalism and the Preference for Individual over Collective Action

Market fundamentalism holds that free markets and individual bargaining are the most efficient means to achieve collective prosperity, and that the state should not interfere in economic life. Rooted in 19th century classical liberalism, this concept has shaped later economic theories, especially neoliberalism, and continues today in a new form. In its most recent form, market fundamentalism indicates the primacy of markets over society, where market practices and needs shape social domains, including law.[60] Market fundamentalism also draws on and reinforces an individualistic philosophy: market actors' interests take precedence over community's interests, privileging individual overcome collective concerns. From now on, I will refer to this last version of market fundamentalism.

The Italian legal framework has embedded market fundamentalism and individualism. As noted in the literature, its evolution since the 20th century has been driven by economic needs.[61] With the shift from liberalism to neoliberalism–that implied redefining the state from an obstacle to a facilitator of markets–law has played a key role in supporting these needs. A relevant example is the strong legal recognition afforded to private enterprise for individual gain through the inclusion of the freedom of economic initiative in the 1948 Italian Constitution–naturally, not an absolute freedom, as it is expressly limited if harm to social utility occurs).

Market fundamentalism's most significant influence on Italian corporate law, however, lies in the the affirmation of shareholder primacy in corporate governance. Originating in US economic thought, shareholder primacy views shareholders' interests as the most relevant actors in corporate governance; consequently, under this view, directors must primarily pursuit shareholders' interests. Shareholder primacy has shaped Italian law by filtering legal interpretation of Italian corporate legislation through this lens. In the case of *S.p.A.* companies, this influence emerged in the extensive debate on corporate purpose during the second half of the 20th century, which led most scholars to equate this purpose with maximizing profit for shareholder.[62] This emphasis on shareholders has elevated the individual interests of corporate

[60] Joseph E Stiglitz, "Moral Bankruptcy" (2010), online: *Mother Jones* <https://www.motherjones.com/politics/2010/01/joseph-stiglitz-wall-street-morals/>.

[61] Ferdinando Mazzarella, "Percorsi dell'individualismo giuridico. Dal proprietario all'azionista delle multinazionali" (2004) 1 Materiali per una storia della cultura giuridica 37–72. On the same topic, see also Raghuram Rajan, *The third pillar: how markets and the state leave the community behind* (New York: Penguin, 2019) at 51–105, 139 ff.

[62] Beyond scholarly interpretation, the centrality of shareholders in Italian corporate law has also emerged in corporate law reforms and legislation. The 2003 reform of private corporations (*società a responsabilità limitata* or *s.r.l.*) intended to strengthen shareholders' freedom to shape corporate structure and governance. In listed public

"owners" over broader collective needs. Neoliberalism assumes that benefiting individuals ultimately benefits society, yet the shareholders' and, more generally, corporations' interests often remain individualistic and diverge from the common good.

By treating individual shareholders as class-A subjects, corporate legal scholarship has marginalised other stakeholders, especially collective ones such as communities, which have hardly received any research attention.[63] While there have been attempts to conceptualise participatory rights in corporate governance for stakeholders, these have left collectivities behind.[64] This marginalization is not limited to corporate law; in other legal fields, too, collectivities have been disfavoured. For example, in Italian property law, collective ownership had long been deemed inefficient, and therefore in need to be avoided or suppressed if already existing.[65] Overall, this disregard for collectivities in the Italian legal framework mirrors the neoliberal tendency to privilege economic individual interests over social and collective ones.

b. Shareholders as a Homogeneous Group of Welfare Maximizers

Second, neoliberalism assumes that shareholders, like all individuals, are rational welfare-maximizers. This simplifies corporate governance by portraying shareholders as a homogeneous group, thereby avoiding the need for directors to reconcile diverse interests.[66] The assumption that shareholders are rational welfare-maximizer legitimizes the focus on shareholder interests, under the belief that protecting them benefits all corporate constituents.[67]

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corporations, shareholder primacy was further reinforced through EU legislation on shareholders' rights from 2007 and 2017, which aimed to enhance stockowner's participatory and oversight prerogatives. See EU, *Directive 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement* [SHRD II], [2017] OJ L 132/1.

[63] This emphasis on the individual aligns with Garrett Hardin's "tragic" view of the commons, which frames individuals as better suited than collectivities to manage these resources; see Garrett Hardin, "The Tragedy of the Commons" (1968) 162:3859 Science (American Association for the Advancement of Science) 1243–1248.

[64] For instance, Marco Palmieri studied the "external participation" of stakeholders to corporate governance, developing a theoretical model in which economically interested stakeholders may claim a right to benefit from a corporation's performance and enforce it if unmet. This model allows stakeholders to influence corporate management, but presents limitations for its extension to communities. In particular, Palmieri's model limits participation only to economically motivated actors and ties it to successful lawsuits for compensation. Conversely, communities as defined in this research, typically suffer non-monetary harm and face challenges in accessing courts as Italy does not allow proper collective standing on a general basis. See Marco Palmieri, *La partecipazione esterna alle società di capitali* (Milano: Giuffrè, 2015).

[65] Refer to Paolo Grossi, *Un altro modo di possedere* (Milano: Giuffrè, 1977) at 279; see also Maria Rosaria Marella, "The Commons as a Legal Concept" (2017) 28:1 Law Critique 61–86 at 76. Illustrative is also the traditional association of local communities with traditional collective land rights (such as *usi civici* and *assetti fondiari collettivi*), sometimes governed by unequal and exclusionary practices. For example, the model of "Masi chiusi" in Italian mountain areas involved land ownership by a single patriarchal family, where inheritance rights were limited to the male heir deemed most capable of continuing the land's management, and selling was not permitted; refer to Fabrizio Marinelli, *Un'altra proprietà: usi civici, assetti fondiari collettivi, beni comuni*, 2nd edn (Pisa: Pacini, 2018) at 150–154.

[66] Denozza, "Il modello dell'analisi economica del diritto", *supra* note 53 at 61–62.

[67] *Ibid*.

However, the neoliberal assumption that shareholders are a homogeneous group of welfare maximizers also reinforces the idea that there is a necessary conflict between shareholder and non-shareholder interests regarding how the corporation should be managed. Under this view, this conflict should be addressed by identifying homogeneous subgroups among constituents,[68] rather than by seeking complementarities among existing groups or balancing benefits and drawbacks among them.

Most Italian scholars have supported the assumption of homogeneous shareholder interests on the grounds that it mitigates a major issue that would arise if directors were viewed as agents of stakeholders with varying interests: namely, the issue of restraining management's discretionary power.[69] This concern has been central in Italian debates on the extension of directors' fiduciary duties to include external stakeholders' interests as well as regarding the introduction of *società benefit*, which require directors to balance profit with common good objectives.[70]

Regarding non-benefit corporations, the concern about excessive managerial discretion and that, therefore, "accountability to everyone means accountability to no one",[71] has supported the argument against the extension of directors' fiduciary duties. Regarding *società benefit*, to prevent excessive managerial discretion in these companies, scholars have proposed solutions such as clearly identifying the common good objectives to be balanced with profit in the corporate articles, assessing the balancing operation based on the decision-making process rather than its outcomes,[72] and adopting third-party standards for the evaluation of the corporate social impact to assist management.[73] Overall, Italian corporate law scholarship continues to treat shareholder profit maximization as a safe (or, at least, safer) harbour of corporate governance and remains wary towards efforts to alter it.[74]

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[68] *Ibid*, 'At the heart of this obsession with segmentation lies a very simple reason: the attempt to isolate groups of individuals who can be imagined as having sufficiently homogeneous interests to allow the assumption that protecting these interests could maximize the well-being of everyone. This approach aims to avoid the insurmountable problems posed by the impossibility of aggregating the well-being of different individuals.' [My translation]

[69] Cf. Francesco Denozza & Alessandra Stabilini, "Principals vs Principals: The Twilight of the 'Agency Theory'" (2017) 3:2 It LJ 511–532 at 522 [who take a critical position on this neoliberal postulate].

[70] For this reason, some authors have argued that the two objectives should be unified, that is, that the social-benefit purpose should not be seen as an exception to the profit motive, but rather as a tool that serves it, within the framework of a "unitary management plan"; see Daniele Stanzione, "Profili ricostruttivi della gestione di società benefit" (2018) 3 Riv dir comm 487–544, esp. at 514.

[71] Cf., e.g., M Stella Richter, "Sostenibilità e doveri, poteri e diritti degli amministratori. Riflessioni sul diritto societario nell'antropocene" (2024) 5–6 Riv Soc 1081–1092 at 1088.

[72] Angelici, *supra* note 35. See also Alessandra Daccò, "Le società benefit tra interesse dei soci e interesse dei terzi: il ruolo degli amministratori e i profili di responsabilità in Italia e negli Stati Uniti" (2021) 1 BBTC 40 at 62–63; Giulio Mandelli, "Oggetto della società benefit e dovere di bilanciamento degli amministratori" (2024) 2 ODC 632–673 at 666.

[73] Marco Palmieri, "Le società benefit" (2023) 6 Giur comm 1030–1056 at 1054.

[74] That this is a safe harbour is challenged by Denozza & Stabilini, *supra* note 69 at 523 [who highlight that adopting the principal-agent model comes at a great theoretical cost: 'This perspective ignores the evident reality of shareholders with diverging interests, especially as to the way in which the profits of the corporation shall be

c. The Principal-Agent View and Incentives to Pursue Shareholders' Interests

Third, the neoliberal approach views corporations as entities with agency problems between shareholders and managers. Agency problems stem from the separation of ownership and control in modern corporations, which are governed by professional managers rather than directly by shareholders. Within this context, managers act as "agents" of shareholders (thereby called "principals"). The costs that shareholders must face to keep managers motivated to pursue their interests rather than the managers' own profit are called "agency costs". These costs are seen as transaction costs that reduce corporate efficiency.[75] To address this concern, rules have been established to ensure directors prioritize shareholder interests (e.g., provisions on directors' conflict of interest and related party transactions), often to the exclusion of other stakeholders.[76]

Moreover, Italian corporations often feature concentrated ownership, with controlling shareholders playing an active role in corporate affairs and closely influencing management, thereby aligning managerial decisions with their interests. Concentrated ownership reduces agency problems. Nonetheless, the principal-agent model of the shareholder-management relationship has gained traction, driven by the contractarian view of corporations, which underscores that, although directors formally owe their duties to the corporate entity, they must meet shareholders' expectations for financial returns to ensure corporate continuity and success.[77]

The concern with managerial discretion noted above is also important to the principal-agent model of the corporation as it reflects not only the desire to ensure efficient decision-making, but also the need to prevent directors from pursuing personal interests over corporate ones. Managerial discretion is a core issue in corporate governance; while it cannot be fully explored

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produced. This is an important point. The agency theory seems to ignore the fact that profits before being *distributed* must be *produced'*].

[75] For a EAL overview of the advantages of adopting the corporate form for business activities and the associated costs, refer to David Gindis & Martin Petrin, "Economic Analysis of Corporate Law" (10 April 2020) Rochester, NY, online: <https://papers.ssrn.com/abstract=3576513>.

[76] Milton Friedman, "A Friedman doctrine-- The Social Responsibility of Business Is to Increase Its Profits", *The New York Times* (13 September 1970), online: <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>. The prioritization of shareholders' interests over those of stakeholders is also evident in cases of hostile takeovers, where accepting the most profitable offer for shareholders often results in high social costs. The desire to mitigate this phenomenon led to the adoption of 'constituency statutes' in the US; for a commentary see David Millon, "Redefining corporate law" (1991) 24:2 Ind L Rev 223–278. Hostile takeovers are relatively rare in Italy, due in part to the more concentrated ownership compared to that in the US; see Federico Picco et al, *Le OPA in Italia dal 2007 al 2019. Evidenze empiriche e spunti di discussione* (2021) at 50–51. Notably, the management of principal-agent relationships between shareholder and managers may differ significantly between Italy and the US; see, e.g., Reinier H Kraakman, *Diritto societario comparato: un approccio funzionale*, Luca Enriques, ed, (Bologna: Il Mulino, 2006) at 83 ff [emphasizing the shareholder-favorable nature of agency problems mitigating strategies adopted in Europe compared to those in the US]; Luca Enriques, "The Law on Company Directors' Self-Dealing: A Comparative Analysis" (2000) Intl Comp Corp LJ 297–333 [comparing the stronger nature of directors' self-dealing regulation in the US to that in European countries].

[77] For an overview of the contractual reading of the corporation in Italy, see Enrico Ginevra, "Premesse a uno studio sulla rilevanza non contrattuale della società" in Pietro Abbadessa & Mario Campobasso, eds, *Società, banche e crisi d'impresa: liber amicorum Pietro Abbadessa* (Torino: UTET giuridica, 2014) 273.

here, this issue requires at least some general references. As is well known, discretion is a double-edge sword: it enables directors to pursue golas beyond profit, yet it offers no guarantee against self-interested behaviour. Italian corporate law scholars have acknowledged the risks of discretion, but have primarily focused on its legal basis and legitimacy. Drawing on a contractual view of the corporation, which emphasises its origin in an agreement among shareholder, these scholars have almost unanimously agreed that, save legislative obligations, directors' discretion must remain within the boundaries of shareholder will.

Essentially, under the discussed view, it is up to shareholders to decide whether and to what extent directors may prioritise stakeholders' interests over profit, by including an explicit clause in the articles of incorporation. Absent such a provision, directors may only undertake socially and environmentally beneficial initiatives if they are occasional and instrumental to the pursuit of profit. In this way, contractarianism, which has marked corporate legal scholarship since the mid-20th century, has reinforced the neoliberal principal-agent model of the corporation.

d. Legal Problems as Efficiency Transaction Problems and Fragmented Legal Analysis

Fourth, the focus on agency costs and the strive for their reduction has led neoliberal corporate law to reduce legal problems to transaction efficiency problems, on the assumption that efficient transactions contribute to the overall efficiency of a political-economical system. Legal reforms and research have generally focused on technical and formal issues, such as whether including stakeholder interests within the corporate interest enhances corporate efficiency and whether legal reforms are coherent with other legal provisions in the system.[78] In other terms, company law rules have come to be assessed based on their effects in reducing agency costs, which is considered the only relevant evaluative criterion.[79]

Conversely, less attention has been given to questions of fairness, such as whether directors should take care to prevent harm to stakeholders and be accountable to them.[80] In particular, under a neoliberal approach to corporate theory, the principles of solidarity, environmental protection, and social utility, established in the Italian Constitution at Arts 2, 9, and 41 are given little attention, as the main focus is on pursuing individual interests. This is a fundamental argument for rejecting this approach and favouring a more socially and environmentally sensitive perspective.

[78] Refer to my previous law and literature review. Additionally, refer to Denozza, "Il modello dell'analisi economica del diritto", *supra* note 53 at 56. The author points out that the problem of the extensive power of managers that used to interest Berle and Means is now read as a problem of transactions between shareholders and directors (i.e., as an agency problem). Similarly, in recent decades in Italy, the problem of corporate social responsibility has also been reduced to a transactional problem between directors and shareholders.
Besides legal analysis, fragmentation also exists in the regulatory framework for sustainable corporate governance in Italy; see Genovese, *supra* note 27 at 95–96.

[79] David Gindis & Eva Micheler, "Institutional theory for corporate law: an invitation" (2024) 24:2 Journal of Corporate Law Studies 399–435 at 406 [who also provide a complete overview of the role of agency costs and transaction efficiency in the UK and North American corporate theory].

[80] Denozza, "La danza del realismo e della critica", *supra* note 32 at 435.

Finally, the focus on transactions has further prioritized contractual relationships in corporate governance, supporting the overlooking of non-contractual relationships.[81] While director-stakeholder relationships can be viewed as transactions–similar to shareholder-director and majority-minority shareholder relationships–the issue, in my opinion, is that these transactions have typically held significance in corporate law only when they are based on a contract. Relationships between directors and non-contractual stakeholders remain outside the scope of legal (relevance and) protection for several reasons, such as path dependence, constraints on access to justice and the weak political role of victims.[82]

The neoliberal postulates of market fundamentalism, homogeneity of shareholders as welfare maximizers, principal-agent model of the corporation, and fragmented legal analysis based on efficient transactions, have shaped the Italian theoretical framework, originally simply based on a contractarian view of the corporation. Building on this quite neutral theoretical premise, neoliberalism has created a value-based corporate legal style that prioritizes market efficiency and shareholder welfare over social and environmental concerns, undermining the recognition of the legitimacy of collective action and corporate accountability to non-contractual stakeholders.[83]

4. The Theory of the Commons (ToC) as a New Approach

The influence of neoliberalism on the Italian corporate legal framework highlights the need for developing more stakeholder-inclusive approaches. As noted in the literature, these approaches should prioritize justice and fairness, safeguarding interests that go beyond those typically valued in the marketplace.[84] Importantly, this does not mean rejecting the significant contributions that neoliberal thought has made to the advancement of corporate legal theory–e.g., understanding the key role of incentives and conflicts of interest in corporate governance–but rather to raise awareness of the topics that neoliberalism has overlooked, namely the relevance of corporate stakeholders in governance, including communities, and to draw attention to them.[85]

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[81] Francesco Denozza, "Sulle tracce di una vecchia talpa: il diritto commerciale nel sistema neoliberale" (2015) 3 ODC.

[82] See Kraakman, *supra* note 76 at 30 [for the identification of relevant agency problems for business corporations] and 95 ff [on the protection of involuntary creditors].

[83] Notably, scholars have prioritized the economic dimension of the law over its sociological dimension. See Tombari, *supra* note 5, who advocates for a shift in the tendency of corporate law scholars to focus more on economics than sociology. See also, Francesco Denozza, "Scopo della società e interessi degli stakeholders: dalla «considerazione» all'«empowerment»" in *L'interesse sociale tra valorizzazione del capitale e protezione degli stakeholders: in ricordo di Pier Giusto Jaeger: atti del convegno, Milano, 9 ottobre 2009* (Milano: Giuffrè, 2010) 63, who seeks to identify a middle ground between the law and economics approach to corporations, supporting the shareholder value theory, and the use of general clauses, such as the principle of good faith, to determine the interests that directors must pursue.

[84] Denozza, "Il modello dell'analisi economica del diritto", *supra* note 53 at 49–50.

[85] For similar approaches see Gindis & Micheler, "Institutional theory for corporate law", *supra* note 82 at 408; Davide Maggi, "Impresa, valore e valori" in Patrizia Riva, ed, *Ruoli di Corporate Governance: adeguati assetti e sostenibilità*, 2nd ed (Milano: Egea, 2023) at 778 [who recalls the business-economic approach of the common good, describing it as an approach that "highlights in particular a category of goods that economic theory had long failed to recognize," namely the so-called "relational goods." With this approach, "one moves beyond (though not replacing) an approach

The prioritization of justice and fairness over market efficiency may be found in the Theory of the Commons (ToC), which emphasizes the collective dimension of the relationship between people and resources. It promotes a solidaristic and inclusive approach to resource governance that addresses the needs of all users. The ToC also adopts an anti-formalist stance, recognizing that resources are key to meet human needs and seeing the law as a tool to protect this function. These attributes make the ToC a promising approach for overcoming the limitations of the current Italian corporate legal framework shaped by neoliberalism and would make it a good fit for investigating the legal protection of communities as corporate stakeholders, which is the aim of this thesis. The ToC could broaden the scope of corporate law by acknowledging the interplay between corporations and external stakeholders, rejecting the narrow focus on contractual relationships involving marketable assets, and embracing a more inclusive view that considers the diverse stakeholders affected by corporate actions.

While the ToC was initially developed in economics by the American Nobel laureate Elinor Ostrom,[86] a "local variation" of the theory has also emerged in Italian legal scholarship[87] and is the primary focus of the following sections. These sections introduce the concept of commons and outline the main developments of this theory in Italy. Subsequently, they discuss the identified drawbacks of EAL and neoliberal approaches (or their underlying principles), to explore how the ToC may mitigate these drawbacks and enhance the protection of community interests within Italian corporate law. This discussion lays the groundwork for the following chapters, which will examine communities as relevant legal groups and the existence of a duty for corporate directors to prevent harm to communities.

4.1. Origins and Development of the ToC in Italy

The concept of commons in Italian law, though historically relevant,[88] gained renewed attention in scholarly debate in the 2010s. Two pivotal events shaped this legal discourse: the 2007 proposal to introduce commons (*beni comuni*) in the Civil Code and the 2011 referendum on the privatization of water supply.[89] Although the proposal was not enacted, the Rodotà Committee's work–tasked with drafting the amendment–significantly advanced legal scholarship on the topic. The referendum also triggered a social movement for recognizing water as a commons,

based exclusively on the contractual dimension (the logic of *do ut des*) toward a *holistic dimension*, where the way decisions in companies are made and shared is based on the recognition of the people involved through the implementation of a common action, while still valuing their different personal motivations."] [My translation].

[86] Elinor Ostrom, *Governing the commons: the evolution of institutions for collective action* (Cambridge, UK: Cambridge University Press, 2015), first published 1990.

[87] Marella, *supra* note 65.

[88] The concept of commons in Italy has usually been linked to the phenomenon of "usi civici" and collective land rights (*assetti fondiari collettivi*). In broad terms, these consisted of public, private, or communal land for collective use, mainly used for harvesting wood and grazing livestock. These phenomena assumed a strictly territorial character, acquiring distinctive names and characteristics depending on where they emerged.

[89] Four referendum questions were presented, two of which concerned the management of the national water supply system.

deepening legal debates on the management of such resources.[90] Italian scholars, primarily including Stefano Rodotà and Ugo Mattei,[91] have since clarified the legal meaning of commons, expanding beyond traditional land use to modern socioeconomic contexts. Notably, unlike previous economic research,[92] this stream of legal research in Italy has highlighted power imbalances between corporations and communities,[93] emphasizing the need for enhanced protection of commons and people connected to them.

Ostrom describes commons as sufficiently large natural or artificial resources from which exclusion of beneficiaries is costly, albeit not impossible.[94] When commons are natural resources, overuse can deplete them and hinder their self-replenishment. [95] Italian legal scholars view commons as resources–either tangible or intangible, natural or artificial–essential to fulfil fundamental rights and permit the free development of human beings.[96] Simultaneously, commons' users contribute to their preservation for present and future generations.[97]

Commons are generally classified into four categories: natural (e.g., water, forests), cultural (e.g., heritage, indigenous knowledge, human genes), urban (e.g., squares, parks), and public services (e.g., public healthcare, education).[98] Some scholars also include in the notion of commons broader political concepts, like democracy.[99] Nonetheless, there is broad agreement among scholars that the scope of commons evolves with changing circumstances and community (e.g., internet access as part of the commons has gained importance with advancements in technology). As such, commons have an open and dynamic nature,[100] defying exhaustive

[90] <https://www.acquabenecomune.org/>. The Italian Forum of Water Movements unites local committees, social organizations, unions, associations, and individual citizens advocating for water as a commons and its public and participatory management within a holistic vision.

[91] Stefano Rodotà, *Il terribile diritto: studi sulla proprietà privata e i beni comuni*, 3 edn, Collezione di testi e di studi (Bologna: il Mulino, 2013); Ugo Mattei, *Beni comuni: un manifesto* (Bari-Roma: Laterza, 2011). Other notable contributions include Maria Rosaria Marella, *Oltre il pubblico e il privato: per un diritto dei beni comuni* (Verona: Ombre corte, 2012); Alberto Lucarelli, "Beni comuni. Contributo per una teoria giuridica | Costituzionalismo.it" (9 January 2015), online: *Costituzionalismo.it* <https://www.costituzionalismo.it/beni-comuni-contributo-per-una-teoria-giuridica/>; Giuseppe Micciarelli, "I beni comuni e la partecipazione democratica. Da un "altro modo di possedere" ad un "altro modo di governare" (2014) 11:1 Jura Gentium 58–83; Francesco Viola, "Beni comuni e bene comune" (2016) 3 DeS 381–398; Olena Nihreieva, "Global commons through the prism of collective rights" (2021) 4 Diritto pubblico comparato ed europeo 791–820.

[92] Ostrom, *supra* note 86 at 31.

[93] Mattei, *supra* note 91 at 79–80. The author argues that addressing the question of managing the commons requires prioritizing the dimension of power and rejects the typically centralized governance inherent in the State-market dichotomy.

[94] Ostrom, *supra* note 86 at 30.

[95] *Ibid* at 32.

[96] *Commissione Rodotà - per la modifica delle norme del codice civile in materia di beni pubblici - Proposta di articolato*, (14 June 2007) art 3, para 3, letter c).

[97] Viola, *supra* note 91 at 386.

[98] Marella, *supra* note 65 at 68.

[99] Marella, *supra* note 91 at 17–19.

[100] However, the extent of this openness is a matter of controversy, as different approaches have been proposed. For instance, Viola, criticizes the excessive breadth of the Rodotà Committee's definition of commons; Viola, *supra* note 91 at 384.

classification; rather, they are identified based on their relevance for people, particularly in fulfilling fundamental rights and supporting free development of human beings. For the purpose of this thesis, commons are intended as natural resources on which users rely to exercise fundamental rights.[101]

To enable the exercise of fundamental rights, commons should share key characteristics, including users access[102] and enjoyment without requiring ownership.[103] The Rodotà Committee's definition of commons illustrates this point. It indicates that while ownership can be held by public or private entities, resources that "serve functional utilities for the exercise of fundamental rights and the free development of individuals" should be protected within the limits and conditions established by law.[104] This concept can be further clarified through the bundle of rights theory, which views property as a collection of entitlements, or "sticks," assigned to the owner (such as possession, control, and disposition rights).[105] Among these, the right to exclude is often

[101] Rodotà, *supra* note 91 ch 5; Marella, *supra* note 91 at 21.

[102] It should not matter whether access is free or not, as long as the potential cost does not factually hinder access and enjoyment. In alignment with the ToC principles of non-marketability and use value (refer to footnote 103 below), paid access should be justified, e.g., on the basis of maintenance needs rather than profit-making purposes; therefore, the requested amount should also be proportionate to those needs.

[103] Lucarelli, *supra* note 91 at 6; Marella, *supra* note 65 at 67.

[104] *Commissione Rodotà - per la modifica delle norme del codice civile in materia di beni pubblici - Proposta di articolato*, *supra* note 96 art 3, para 3, letter c). The Rodotà Commission's definition of commons prioritizes use value over market value, conceiving commons as resources essential for people's lives rather than mere commodities that can be bought and sold at the owner's discretion without regard for their utility to others. Consequently, the value of commons should be determined by their function (use value), not by their price (market value). However, the Commission proposes non-marketability as a feature of the commons, suggesting public ownership of commons, preventing them from being sold to private entities, and restricting their entrustment only through public concession. This strict view of non-marketability has been both supported and challenged by legal scholars studying the commons. For example, Mattei advocated for a radical interpretation, suggesting that the commons should be governed free from profit-driven motives; Mattei, *supra* note 91 at 13–14. Conversely, Marella has argued that the diversity of forms and functions that commons may assume, coupled with the pervasive nature of the market in contemporary society, discourages adding non-marketability to the characteristics of commons, as this would risk significantly narrowing the category of commons; Marella, *supra* note 91 at 21. I support a softer interpretation of non-marketability than that proposed by the Rodotà Commission. In my view, non-marketability should emphasize that commons should remain separate from market-driven logic and profit maximization, ensuring their continued functionality for present and future generations. This perspective does not assert that commons should be non-transferable, as such a stance would not only diminish the value of the underlying assets but also conflate property with its use. This position aligns with the Corte Costituzionale, 15 June 2023, No 119 (Italy) regarding the circulation of lands burdened by rights of civic use.
Use value and non-marketability (in its softer version) also support the idea that, in the context of commons, the logic of production should yield to the contrasting logic of reproducibility. This involves managing resources in a manner that ensures their preservation for the benefit of future generations, refraining from exploiting them for financial gain when doing so could harm people's needs; see Rodotà, *supra* note 91 at 472–473; Mattei, *supra* note 91 at 83.

[105] The theory originated from the work of Wesley N Hohfeld, "Some fundamental legal conceptions as applied in judicial reasoning" (1913) 23:16 Yale LJ. The relevance of the bundle of rights theory for the legal concept of commons is discussed by Marella 2017. In company law, the bundle of rights theory may be compared with the 'nexus of contracts theory'; Italian literature on the topic include, most notably, Marchetti, *supra* note 25.

seen as the most important due to its impact on others.[106] However, in the case of commons, users should retain some of these entitlements, particularly rights to access and enjoyment, while the owner's right to exclude should be limited to ensure the fulfillment of fundamental rights. Thus, commons should exist beyond the traditional constraints of ownership, preventing owners from excluding users from accessing the resource.[107]

Commons should also be governed in a responsible and participatory way, that is, prioritizing their functionality for people than their exploitation for profit[108] and permitting all users to contribute to their management.[109] However, access without ownership and responsible governance are not always present in commons; they are better understood as aspirational goals rather than defining features.

4.2. Advantages of a ToC Approach for Italian Corporate Law

4.2.1. Legitimizing Community Interests in Corporate Governance

The dominance of the neoliberal postulate of market fundamentalism has led to a diminished role for collective stakeholders in corporate governance, favoring (shareholders') individual interests. The ToC may help challenge this drawback–at least within the scope of this research, which considers only certain types of commons and communities–by emphasizing the importance of community interests and providing a foundation for including them in corporate decisions that impact shared resources.

The ToC legitimizes community participation[110] in corporate governance by conceiving of commons ownership rights as shared between users, which include both communities and corporations, among others. This conceptualization of property creates a common framework with a legal basis where communities and businesses are entitled to draw and benefit from shared resources, and the fulfilment of these entitlements justifies restrictions on some other property attributions (e.g., exclusion power) on the parties. Differently put, communities and corporations may take advantage of the same commons; if this is the case, communities become relevant for corporate governance as corporate activities that affect commons may indirectly harm these groups. Within this context, affected communities have an interest in not being limited in their

[106] Jeremy Waldron, "Property and Ownership" in Edward N Zalta & Uri Nodelman, eds, *The Stanford Encyclopedia of Philosophy*, fall 2023 edn (Metaphysics Research Lab, Stanford University, 2023).
[107] Marella, *supra* note 65 at 77.
[108] Commons exhibit a 'functionalist phenomenology', meaning their relevance, including their legal relevance, derives from their social function; Mattei, *supra* note 91 at 58.
[109] Italian legal scholars have expressly recognized collective governance as a defining feature of commons; see Marella, *supra* note 91 at 245; Micciarelli, "I beni comuni e la partecipazione democratica", *supra* note 91; Viola, *supra* note 91.
[110] While stakeholder involvement in corporate governance can take various forms, ranging from active participation in decision-making (as occurs, for instance, in German codetermination) to consultation or simply being informed of corporate decisions, in this paper, I consider stakeholder participation as the consideration of stakeholders' interests by corporate managers within the corporate decision-making process.

access to and enjoyment of commons, even if they do not own the resource.[111] Communities should also be able to enforce their interest against corporations that do not take adequate measures to prevent or mitigate harm. Taking these measures would also be beneficial for corporations–as it has been recognized that enterprises' long-term success relies on resource availability for all stakeholders[112]–and commons–which would be safeguarded from harm.[113]

However, a clarification is needed regarding the scope of the community-corporate framework created by the ToC. For these relationships to be examined under national (Italian) law, rather than international law, a geographically bounded perspective must be adopted. The ToC recognizes that commons can be local or global,[114] with the scale of users depending on the nature of the resource.[115] In academic literature, the concept of "global commons" has emerged to describe resources shared by the international community,[116] including states, present and future generations.[117] By constrast, this study adopts a local perspective that focuses on geographically defined commons and communities within Italy. This approach is preferred as it is assumed it facilitates the study of stakeholder communities.[118]

A second advantage of the ToC in addressing the individualistic focus created by neoliberalism is that it may help tackle collective action challenges and their potential negative impacts on shared resources, such as crowding and overuse.[119] These issues, along with the "open nature" of commons, spurred significant debate, notably between the economists Garrett Hardin and Elinor Ostrom. Hardin argued that privatization was necessary to prevent resource degradation through overuse, while Ostrom demonstrated that local communities could effectively manage commons under certain conditions, suggesting that privatization is not always optimal.[120] Ostrom's

[111] For example, access to a clean environment is vital for the right to life, while internet access promotes cultural and educational development.
[112] Simon Deakin, "The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise" (2012) 37:2 Queen's LJ 339–381 at 377.
[113] Note that in some cases (outside of Italy) natural resources have been granted legal personhood, such as the Magpie River in Québec, Canada: Morgan Lowrie, "Quebec river granted legal rights as part of global "personhood" movement", *CBC News* (28 February 2021), online: <https://www.cbc.ca/news/canada/montreal/magpie-river-quebec-canada-personhood-1.5931067>.
[114] It has been argued that the commons can also be global in nature due to the implication of globalization, thereby benefiting humanity as a whole; see Marella, *supra* note 91.
[115] *Ibid*.
[116] Nihreieva, *supra* note 91.
[117] *Ibid*. While the precise definition of "global commons" remains debated, scholars agree on their essential role for humanity. This quality supports recognizing *erga omnes* obligations for their protection and implementing measures to ensure their preservation.
[118] Indeed, one challenge with global commons (e.g., digital commons) is the difficulty of pinpointing the community to which they belong, which may limit their effective protection. See Rodotà, *supra* note 91 at 472–473.
[119] Ostrom, *supra* note 86 at 32.
[120] Hardin, *supra* note 63; Ostrom, *supra* note 85. An overview of the debate on the governance of commons from an economic perspective is offered by Daniel G Arce, "The Commons" in Robert W Kolb, ed, *The SAGE Encyclopedia of Business Ethics and Society*, 2nd edn (Thousand Oaks, CA: SAGE Publications, Inc., 2018).

research[121] showed that relying solely on state centralization, markets, or profit-driven models is insufficient; instead, empowering local stakeholders to create governance structures suited to their specific contexts, with support from public authorities, can lead to effective management of common resources.[122]

Without intending to suggest the adoption of a multistakeholder governance model in Italian companies,[123] but rather maintaining a contractarian view of the corporation–where directors must pursue the corporate interest that generally equates with profit for shareholders and stakeholders, including communities, remain external to the corporate contract–the ToC provides a new perspective on the inefficiency of collective action and the assumption that the free market is, in any case, the best tool for collective well-being.

4.2.2. Homogeneity of Stakeholders' Interests: The Role of Legal Structures

The second neoliberal postulate discussed above asserts the homogeneity of shareholders as rational, welfare-maximizing agents. This assumption does not imply that conflicts never arise among shareholders, as they frequently do,[124] but rather suggests a common core of interests reflected in corporate articles and bylaws. For example, by choosing a for-profit business model, shareholders determine their shared intent to pursue financial gain alongside the specific business objectives they have selected.[125] In this sense, the alignment of shareholders' interests originates from the corporate contract, the formal mechanism by which these interests are defined and legally established.

In contrast, communities, as non-contractual stakeholder groups, lack such formal structures, making it challenging for managers to address their interests, which may be divergent. Approaching this issue from a ToC perspective does not seek to reject the presumed homogeneity of shareholder interests, at least not within the scope of this study, but rather aims to discuss its basis and whether similar common interests might exist among stakeholder groups as well. The topic relates to the governance of the commons.

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[121] Ostrom identified two critical issues: appropriation, concerning the allocation of resource units and their impact on user benefits, and organization, concerning responsibility for resource maintenance. Ostrom, *supra* note 86 at 47–49.

[122] *Ibid* at 212.

[123] Deakin, "The Corporation as Commons", *supra* note 112 at 379 [suggesting multi-stakeholder governance frameworks to be preferred over shareholder primacy].

[124] For example, in the context of takeovers, as discussed by Jaeger, *supra* note 6. Differences among shareholders' interests may also depend on other factors, such as the class of shares owned or whether one is a majority or minority shareholder; see Cossu, *supra* note 6 at 305–306. See also Denozza, "Il modello dell'analisi economica del diritto", *supra* note 52 at 62: 'Even within individual categories (shareholders, consumers, creditors, contractors, etc.), there are differences and conflicts of interest that rule out the possibility of identifying, in every circumstance, a single set of rules capable of maximizing everyone's well-being. The norms that meet the interests of a long-term investor shareholder, an adjusting creditor, or a risk-averse consumer, for example, cannot simultaneously satisfy the interests of a short-term speculative shareholder, a semi-involuntary creditor, or a risk-taking consumer.'

[125] Referred to in Italy as the corporate *goal*, which differs from the broader corporate *interest* guiding directors' management.

Italian commons theorists have proposed legal structures to manage commons in line with the principles of *commoning*, that indicates collective governance.[126] These principles prioritize inclusiveness of both current and potential users in accessing and enjoying the resource,[127] shared decision-making,[128] a focus on the use value of resources over profit,[129] and the preservation of resources for future generations rather than financial exploitation.[130] Suggested structures include movements, which would offer a flexible, power-diffusing framework that fosters member collaboration and participatory decision-making,[131] and political parties, deemed as stable, democratic entities capable of synthesizing sector-specific goals into a broader collective vision for change.[132]

Additionally, Italy has introduced legal models supporting community welfare, notably renewable energy communities (CERs)[133] and community cooperatives (CCs).[134] CERs are legal entities formed by electricity customers to collectively generate and share renewable energy, providing environmental, economic, and social benefits to their members. CCs, established regionally by

[126] Differences in scholars' positions revolve around whether commons should be directly or indirectly managed by their users. The first position, supported by Viola, *supra* note 85 at 392–393, advocates for direct community management, specifically by establishing a form of self-governance of the common by beneficiaries, i.e., an organization with no external governing authority. The second position, supported by Lucarelli, *supra* note 85, argues for public management, albeit with a focus on ensuring the resource functionality to fulfill the fundamental rights of communities. However, the author allows for the possibility of direct community management, albeit subject to public ownership of the resource and control prerogatives, to ensure free access and management in line with principles of inclusivity, democracy, ecology, and transparency.

[127] Mattei, *supra* note 85; Rodotà, *supra* note 85 at 463, observing that the right to property evolved to encompass not only the right to possess but also the right not to be excluded by others from the use or enjoyment of certain goods. This marks a transition from exclusivity to inclusivity.

[128] Rodotà, *supra* note 91 at 463.

[129] Mattei advocates for governance free from profit motives, while the Rodotà Commission ties non-marketability to public ownership, restricting private sale and allowing only public concession. For example, the *Commissione Rodotà - per la modifica delle norme del codice civile in materia di beni pubblici - Proposta di articolato*, *supra* note 90 art 3, para 3, letter c) suggested the *extra commercium* nature of commons owned by public bodies, limiting their attribution to private subjects for a specified timeframe. Conversely, Marella, *supra* note 85 at 21 has argued that the diversity of forms and functions that commons may potentially assume, coupled with the pervasive nature of the market as an organizational form in contemporary society, discourages the addition of non-marketability to the characteristics of commons. Doing so would risk significantly narrowing down the category of commons. Mattei, *supra* note 91 at 13–14. Sustainable management is essential to ensure commons remain available to present and future generations, see *Commissione Rodotà - per la modifica delle norme del codice civile in materia di beni pubblici (14 giugno 2007) - Relazione*, online: <https://www.giustizia.it/giustizia/it/mg_1_12_1.wp?facetNode_1=0_10&facetNode_2=0_10_21&previsiousPage=mg_1_12&contentId=SPS47617>; Mattei, *supra* note 91 at 82–83; Marella, *supra* note 91 at 21.

[130] Rodotà, *supra* note 91 at 472–473; Mattei, *supra* note 91 at 83.

[131] Mattei, *supra* note 91 at 79–80; contra Marella, *supra* note 91 at 124–125.

[132] Marella, *supra* note 91 at 124–125; contra Mattei, *supra* note 91 at 80. For discussion on the suitability of these legal forms for community representation, see Chapter 6, subsection 4.1.1.c.

[133] *decreto legislativo 8 novembre 2021, n. 199*, 8 November 2021, 199, introduced to implement EU, *Directive 2018/2001*.

[134] Community cooperatives (CCs) are governed by regional laws and have been introduced since 2014. To date, all Italian regions except one (Valle d'Aosta) have either enacted or proposed legislation regarding CCs. Additional models include the citizen energy community and the benefit company model. Further details on these models are provided in Chapter 3.

local residents, serve broader community interests, primarily focusing on social objectives. These community-based models have achieved moderate success in Italy considering their quite recent introduction and, although they operate at the margins of the corporate form–since they may engage in business or business-like activities but exclude profit distribution–they suggest that communities can act with cohesive interests akin to shareholder groups. This acknowledges that communities can organize themselves effectively and that their interests may be more manageable in corporate governance than commonly assumed.[135]

Other possible ways to homogenize community claims could be through litigation. For example, class actions could help to achieve this goal.[136] In Italy, these were first implemented for consumer claims[137] and later expanded to include any tort claims.[138] They protect the "homogeneous individual rights" of claimants,[139] where the content of these claims is similar because it arises from the same unlawful behaviour and the judicial decision involves common factual and legal evaluations.[140] By facilitating a peculiar voluntary joinder of similar individual claims,[141] class

[135] Another potential tool for homogenize community interests may be to allow them to participate in corporate governance, such as by appointing representatives to corporate boards. This approach is exemplified by Germany's codetermination model, which enables workers to participate directly in management. However, similar mechanisms are not yet common in Italy and do not appear close to widespread adoption, so they are excluded from the scope of this discussion.

[136] Further discussion on the suitability of class actions as an effective tool for organizing and protecting community interests is provided in subsection 6.1.1. below and in Chapter 6, subsection 3.

[137] *legge 24 dicembre 2007, n. 244*, 24 December 2007, 244, Art 2, paras 445-449, subsequently modified by *legge 23 luglio 2009, n. 99*, 23 July 2009, 99, Art 49. For further insights on the initial version of class actions in Italy see Giorgio Afferni, "Class Actions in Italy: A Farewell to America" (2015) 23 Nat'l Italian Am B Ass'n LJ 52–64; and, for a comparison with American class actions, Loriana Renzi, "Il modello statunitense di Class Action e l'Azione Collettiva Risarcitoria" (2008) 5 Resp civ e prev 1213B; Martina Lorenzotti, "Azione di classe e diritti individuali omogenei: opportunità o limite?" (2022) 2 Contr Impr 682–698, particularly in note 2, where additional bibliographic indications are included.

[138] *legge 12 aprile 2019, n. 31*, 12 April 2019, 31. Currently, class actions are regulated in Arts 840 bis to 840 sexiesdecies Code of Civil Procedure (Italy). For further information on "new" class actions, see Andrea Piletta Massaro, "The Italian Class Action Reform: A Redesigned Tool beyond Consumer Law" (2020) 28:4 ERPL 841–864 [also comparing the Italian class action with the French one]; in Italian, authoritatively, Claudio Consolo, "La terza edizione della azione di classe è legge ed entra nel c.p.c. Uno sguardo d'insieme ad una amplissima disciplina" (2019) 6 Corr giur 737–743; Antonio Carratta, "I nuovi procedimenti collettivi: considerazioni a prima lettura" (2019) Giur it 2297–2300.

[139] Art 840 bis, para 1 Code of Civil Procedure (Italy). Essentially, class actions have three main purposes: to enhance economic and procedural efficiency in disputes that would otherwise fall under the regulation of voluntary joinder of parties; to ensure effective judicial protection of low-value disputes in accordance with constitutional principles; and to deter mass wrongdoings (*illeciti plurioffensivi*) see Remo Caponi, "Litisconsorzio "aggregato". L'azione risarcitoria in forma collettiva dei consumatori" (2008) 3 Riv Trim Dir e Proc Civ 819–852 at para 3. These purposes have also been identified as the main advantages of class actions by Canadian case law, starting with *Western Canadian Shopping Centres Inc v Dutton*, [2001] 2 SCR 534 at paras 27–29.

[140] Tribunale Venezia, 13 July 2023, Section I, Order (Italy) Quotidiano Giuridico, 2023. On the homogeneity requirement, see also Piletta Massaro, "The Italian Class Action Reform", *supra* note 138 at 848–849; Lorenzotti, "Azione di classe e diritti individuali omogenei", *supra* note 137 [also citing additional scholarship and jurisprudence].

[141] See Caponi, "Litisconsorzio "aggregato"", *supra* note 139 at para 4. While the legal standing of the entity initiating legal action has shifted from representing individual claimants to having autonomous legal standing, the subject of the judgment remains the individual rights that have been infringed upon; therefore, the entity initiating legal action

actions allow for these claims to be consolidated and addressed in a single unitary proceeding, making them an additional way of "homogenizing" interests after damage has occurred and redress is being sought. Furthermore, the relevance of class actions in investigating community protection against corporate harm lies in the fact that, in Italy, they can (only) be initiated against enterprises or entities managing public services or public utilities in relation to acts and conduct carried out in the performance of their respective activities.[142] The protected claims could also include fundamental rights.[143]

Other alternative mechanisms allowing communities homogenize their interests in a litigation setting include public interest actions and direct community actions. In contrast to class actions, these mechanisms allow individual citizens to act on behalf of the public authority when it fails to do so (or even against the public authority if its activity is considered inadequate) and enable representative entities, such as associations or NGOs, to file legal claims to safeguard the interests of a group of affected individuals. These mechanisms will be further analysed below.[144]

4.2.3. The Commons' Property Structure and Impact on Director Duty of Care

The principal-agent model has significantly shaped Italian corporate theory by emphasizing the need for alignment between directors' duties and shareholders' interests. While previous literature has *reimagined the corporation itself as a commons*,[145] this thesis instead applies the concept of commons *to the resources impacted by corporate activity*, provided their relevance to people's fundamental rights. This perspective highlights the significance of the relationships between corporations (and their management) and communities, without altering internal corporate governance structures or broadening directors' fiduciary duties to serve multiple stakeholders.

As anticipated, under the ToC, commons would follow a peculiar regime where ownership rights are limited by the resource's value to a wider group of users. In other terms, commons should be accessible and enjoyable for users even when they are not the owners of the resource,[146] and these features should exist independently of whether ownership is private or collective.

must identify the individuals who claim their rights have been violated: see Consolo, "La terza edizione della azione di classe è legge ed entra nel c.p.c.", *supra* note 138 at 738.

[142] Art 840 bis, para 3 Code of Civil Procedure (Italy). For an extensive discussion on the deterrence efficacy of class actions against corporations in Italy, see Gianluca Scarchillo, *Class action. Dalla comparazione giuridica alla formazione del giurista: un caleidoscopio per nuove prospettive*, 3rd edn (Torino: Giappichelli, 2024) at 196–199. However, this feature could also be seen as limiting access to direct enforcement of community interests against directors, as discussed in Chapter 6, subsection 3.1.2.

[143] Piletta Massaro, "The Italian Class Action Reform", *supra* note 138 at 850.

[144] Refer to subsection 6.1. below.

[145] Deakin, "The Corporation as Commons", *supra* note 112. For further discussion, see subsection 4.3.1. below.

[146] See also the discussion in subsection 4.1. above.

Visualizing property on a continuum, with individual ownership at one end and collective ownership at the other, commons occupy an intermediate position.[147]

Essentially, due to their characteristics, commons should justify limitations to the owner's prerogative to exclude others from their property, to permit users to exercise their fundamental rights.[148] Consider, for example, a company with production sites located near waterways whose operations degrade water quality, preventing the local population from using them for drinking or recreational purposes. If these waterways are understood as commons, this would justify the existence of legal limits on the company regarding the impact of its activities on the surrounding shared resources. Naturally, these limits should not exceed what is necessary to preserve the collective use of the nearby waterways.

Importantly, the relevance of commons for fundamental rights should not lie in their collective ownership (as this would imply a right to exclude non-owners) but in their ability to guarantee access and enjoyment without jeopardizing these prerogatives through exclusion.[149] So, for example, in an idealized, entirely free-market context, corporate ownership of certain resources–such as factory land or emissions quotas–should not extend to the point of infringing on others' rights to access clean air when this (unfairly)[150] undermines fundamental rights to life and a healthy environment. These examples refer, respectively, to the purchase of property rights over production areas and of GHG emission rights. A neoliberal perspective legitimizes corporate appropriation of resources, as these are viewed as monetizable and tradable assets. In contrast, the ToC approach proposed here rejects monetization and tradability, arguing instead that the resources affected by corporate activity (in this case, land and air) must continue to serve the collective interest.

These limits on the right to exclude would affect the corporation by rejecting its sole-profit focus and advocating for the inclusion of community interests in corporate governance. Unlike Italian *società benefit* and other foreign "hybrid" corporate models,[151] this inclusion would not require directors to balance shareholders' and stakeholders' interests as part of their fiduciary duty. Rather, it would emerge through an expanded interpretation of the duty of care that would

[147] Unlike public goods, which are owned by public entities (e.g., a state, a municipality) to serve collective interests, commons are resources with inherent social utility that should be accessible regardless of their (private/public, individual/collective) ownership.

[148] Marella, *supra* note 65 at 64, 73–75.

[149] Accordingly, the term "common" as a quality of a resource does not equate to "communitarian" as an ownership status; refer to Stefano Rodotà, "Postfazione. Beni comuni: una strategia globale contro lo human divide" in *Oltre il pubblico e il privato: per un diritto dei beni comuni* (Verona: Ombre corte, 2012) 311 at 327.

[150] The extent to which a certain degree of restriction on fundamental rights may be admissible cannot be addressed in this paper for obvious reasons. However, some references to this topic are included in subsection 4.2.4. below.

[151] E.g., the Community Interest Company (CIC) model adopted in the UK and Nova Scotia, Canada; the Community Contribution Corporation (C3) model adopted in British Columbia, Canada; as well as the Low-profit Limited Liability Company (L3C) model adopted in some states in the US. For an overview on "hybrid" corporate models, see Carol Liao, "Limits to corporate reform and alternative legal structures" in Beate Sjåfjell & Benjamin J Richardson, eds, *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge: Cambridge University Press, 2015) 274.

include an obligation for directors not to be negligent in protecting stakeholder communities–as defined in the following chapter–by adopting adequate risk-management arrangements.

The duty of care requires directors to serve the interest of the corporation by acting diligently and in good faith,[152] and includes granting compliance with the law. At a broader social level, this compliance legitimizes carrying out corporate activities and pursuing profit; at a narrower corporate level, legal compliance legitimizes managerial decisions, especially when these aren't economically advantageous for the entity and its shareholders. Under a ToC approach, emphasis is given to the principle of social utility established at Article 41 of the Italian Constitution[153] as a limit to private economic initiative. This principle is grounded in the social function of private property[154] that underpins corporate existence.[155] Its formulation indicates that, while private businesses are not required to pursue social goals, they can nevertheless be said to be legitimate only if they do not challenge such goals.[156]

By applying the ToC approach to directors' duty of care, which, as said, includes legal compliance, it emerges that directors must observe social utility when governing the company. The principle of social utility would therefore inform the whole set of directors' duties of care, including their duty to establish and implement adequate organisational, administrative and accounting arrangements to prevent and mitigate harm. In particular, if interpreted in compliance with the principle of social utility, these arrangements should not only prevent harm *for* the company, but also harm *from* the company to stakeholders and the environment. When commons are involved, directors should therefore take into account the possible negative impacts that the corporate activity may have on these resources and mitigate them. If directors disregard this obligation, they violate their duty of care. While this duty is not owed directly to stakeholders, its breach could render managerial conduct unlawful and, under certain conditions, open to third-party claims for redress.[157]

Directors' liability from breaching the duty of care could also provide a stronger incentive for directors to consider community interests than the voluntary and reputational motivations found, for instance, in stakeholder theories.[158] Moreover, clear legal provisions defining the practical meaning of complying with social utility would limit directors' discretion and reduce the risks of

[152] Corte di Cassazione, 24 August 2004, No 16707 (Italy), para. 3.5.1.

[153] Art 41 para 2 Constitution (Italy); *legge costituzionale 11 febbraio 2022, n. 1*, 11 February 2022, 1, has modified the provision establishing that economic initiatives cannot be carried out in a way that harms health and the environment, and that the law shall determine the appropriate programs and controls so that public and private economic activity may be directed and coordinated for environmental purposes.

[154] Art 42 para 2 Constitution (Italy).

[155] The relationship between private property and corporations was famously explored by Adolf A Berle & Gardiner C Means, *The modern corporation and private property* (New York: Macmillan, 1933); and, more recently, John Armour & Michael J Whincop, "The Proprietary Foundations of Corporate Law" (2007) 27:3 OJLS 429–465. In Italy, refer to Enrico Ginevra, "Premesse a uno studio sulla rilevanza non contrattuale della società" in Pietro Abbadessa & Mario Campobasso, eds, *Società, banche e crisi d'impresa: liber amicorum Pietro Abbadessa* (Torino: UTET, 2014) 273.

[156] Marella, *supra* note 65 at 84.

[157] For further discussion, see the continuation of this Chapter as well as Chapters 5 and 6.

[158] Refer to subsection 4.3.2. below.

expanded liability. Finally, using liability rules to protect stakeholders aligns with the evolving role of civil liability in Italy which, as ToC literature notes, have expanded from protecting individual property to safeguarding collective interests.[159] Chapters 4, 5 and 6 will get back to this point to further discuss the legal bases of directors' duty not to be negligent in safeguarding stakeholder communities, and possible enforcement mechanisms.

4.2.4. Considering Fairness in Corporate Governance

Finally, the neoliberal tendency to reduce legal issues to transaction-based efficiency problems has fragmented corporate law analysis and limited attention to fairness. The ToC offers a potential rebalancing by incorporating both efficiency and fairness in considering community interests in corporate governance. From an economic perspective, Ostrom's research shows that shared governance of resources reduces overuse and depletion, benefiting all users, including corporate users.[160] This is an approach that aligns with directors' duty to ensure corporate continuity. From a legal perspective, the ToC emphasizes that corporate activities impact real people as well as the interdependence between human beings and nature. This approach supports a shift in how social and environmental impacts are addressed in corporate law.

To understand fairness in corporate governance, the ToC suggests using constitutional principles as guidance. Relevant principles include solidarity under Article 2, environmental protection under Article 9, social utility, environmental protection and human dignity limiting private economic initiative under Article 41, para 2 of the Italian Constitution. These values have been used by Italian courts to recognize that resources essential for fulfilling human dignity qualify as "commons," irrespective of formal ownership.[161] Another relevant principle is that of the social function of private property under Article 42, para 2 of the Constitution.

In business practice, assessing fairness would inevitably involve comparing interests protected by the legal system, and this comparison would occur both before the conduct and afterward, if litigation occurs. Carrying out this assessment presents challenges. From a pre-behavior perspective, the evaluation would be performed by the director(s) engaging in the behavior and would require adequate knowledge of the legally relevant interests that may be affected by their actions–directors should "put themselves in stakeholders' shoes".

In Italy, to address potential knowledge gaps, directors should implement risk-detection and management arrangements suited to the enterprise's nature and size. For instance, these arrangements may include structures of stakeholder engagement in corporate decision-making, enabling stakeholders to present their interests directly to boards and management.[162] Similar engagement structures may help ensure that all interests are expressed and evaluated in

[159] Rodotà, *supra* note 91 at 168–169.
[160] Ostrom, *supra* note 86 at 207 ff.
[161] Corte di Cassazione, 14 February 2011, No 3665 (Italy). See also the commentaries of Marella, *supra* note 91 at 169–173; Sara Lieto, ""Beni comuni", diritti fondamentali e stato sociale. La Corte di Cassazione oltre la prospettiva della proprietà codicistica" (2011) 2 Politica del diritto 331–350 at 331–350.
[162] Francesco Denozza, "Lo scopo della società tra short-termism e stakeholder empowerment" (2021) 1 ODC 29–60 at 56 ff.

corporate governance,[163] help directors better understand context-specific stakeholder concerns and collaboratively identify ways to mitigate or prevent harm. Chapter 5 will examine risk-detection and management arrangements in detail.

Another key issue is determining fairness in litigation (ex-post perspective), particularly whether directors caused unfair harm to communities, which is a prerequisite for compensation under Italian tort law. In doing so, courts must not only balance competing interests but also assess the broader impact of their decision on businesses and stakeholders. A ruling in favour of communities could increase liability risks for directors, encouraging them to mitigate harm, but may also complicate business decision-making. Conversely, a ruling against communities could deter future claims and signal unchecked managerial discretion, while preserving governance efficiency.

While this overview oversimplifies the matter by excluding factors such as procedural hurdles, standing, the burden of proof, and the scope of the business judgment rule, it underscores the need to balance directors' accountability with operational flexibility. It is essential to assess how far liability could incentivize sustainable corporate behaviour and enhance community protection. I will return to this topic in the final chapters of this work.

4.3. Previous Literature

4.3.1. Corporate Legal Scholarship Incorporating Ostrom's Insights

To address the limitations of the neoliberal approach to corporate theory, this chapter proposes adopting the ToC as different, complementary approach that recognizes the legal relevance of stakeholder communities' interests and their necessary consideration in corporate governance. However, this attempt has relevant precedents in legal literature, particularly in the UK. Namely, Simon Deakin has notably challenged the traditional shareholder-ownership model by proposing a commons-based view of corporate property relationships.[164] Deakin's work envisions the corporation as a common resource, where multiple stakeholders have rights to its outputs.[165]

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[163] *Ibid*. Institutional mechanisms for stakeholder engagement could include establishing external consultations or creating board stakeholder committees with informative and consultative roles; *Ibid* at 58, note 51. A thorough examination of the different forms of stakeholder engagement within the corporate organization, along with their advantages and drawbacks, is offered by Marco Cian, "I comitati rappresentativi degli stakeholders e l'organizzazione societaria" (2023) 3 BBTC 356. Nevertheless, stakeholder engagement should likely be mandated by law, as is already the case for social enterprises (*decreto legislativo 3 luglio 2017, n. 112,* 3 July 2017, 112, Art 11) and companies falling within the scope of CS3D (CS3D, Art 13).

[164] Deakin, "The Corporation as Commons", *supra* note 112. See also the *Commoning the Company*, by Adrienne Buller et al (Common Wealth, 2020), providing recommendations for the operationalization of the corporation as commons in the UK.

[165] In Italy, Marco Palmieri proposed a similar approach, envisioning external stakeholder participation in corporate governance from an economic perspective, as a combination of two rights: the stakeholder's right to receive a good or service from the corporation and the right to sue in case of non-fulfillment; see Palmieri, *supra* note 64. Deakin's work can also be compared to Enrico Ginevra's study advocating shifting from a contractual foundation for the corporation to a proprietary basis; see Ginevra, *supra* note 77.

My approach, however, differs in two key respects. First, while Deakin focuses on stakeholders' claims to the resources created by the firm, I emphasize communities' rights not to be harmed by business activities, particularly concerning natural resources. Second, Deakin's analysis reinterprets the traditional view of the corporation as being owned by shareholders by framing it as a commons. Conversely, my approach defines the commons as the natural resources shared by both the corporation and external stakeholders. These resources form the basis of the relationship between the corporation and local communities, underpinning the communities' claimed rights to hold the corporation accountable for harm.

Another attempt to apply Ostrom's theory to corporate law is found in the work of David Gindis and Eva Micheler.[166] These authors highlight how mainstream corporate law–rooted in neoliberal concepts such as agency relationships, transaction efficiency, and the shareholder as a rational profit-maximizer–while contributing to the development of corporate legal theory, has also narrowed the focus to certain aspects while overlooking others. For instance, mainstream corporate law has neglected the autonomy of the corporation as a legal entity distinct from its shareholders and the role of constituencies beyond shareholders and directors. Up to this point, Gindis and Micheler's critique aligns with the position advanced in this dissertation.

However, unlike the approach taken here, they propose a reconceptualization of corporate governance based on Ostrom's institutionalism and, specifically, on Ostrom's multi-level governance framework. According to this framework, organizations are not atoms but are rather placed in a network of relationships: they participate in higher-level fields while also containing lower-level fields, as any organization is a coalition of diverse interests. Similarly, Gindis and Micheler suggest a multi-layered conceptualization of corporate governance as made not only at the boards level, as agency theory does, but that also involves lower-level actors, such as employees. In the authors' view, this framework provides a more accurate representation of corporate reality than the abstractions of mainstream neoliberal theory. Conversely, this research doesn't attempt a similar reconceptualization nor focus on Ostrom's institutionalism, but rather on Ostrom's insights into common-pool resources.

Finally, commons have so far been explored in the Italian corporate legal framework in a recent, almost unique article by Giacomo Bosi.[167] Similar to my approach, Bosi does not reject the profit motive of corporations,[168] and adopts a broad definition of commons that encompasses both resources used or affected by the corporation–like I do in this research–and the outcomes of the business activity.[169]

However, Bosi's work differs from mine for two reasons: first, Bosi contends that it is the shareholders, not the management, who are the addressees of sustainability restraints; second, the author adopts a neo-functionalist approach that supports a normative definition of the

[166] Gindis & Micheler, "Institutional theory for corporate law", *supra* note 79.
[167] Giacomo Bosi, "Commons rules. Regolazione dei beni comuni imprenditoriali e neo- funzionalismo del diritto commerciale" (2024) 6 Giur comm 1231–1254.
[168] *Ibid* at 1238; 1248–1249.
[169] *Ibid* at 1248.

objectives of the private enterprise.[170] For the reasons discussed above–and for the further discussion that will be included in Chapter 4–I refuse both points: here, the focus is on directors' role in corporate sustainability and a contractarian view of the corporation is upheld.

Finally, to the best of my knowledge, none of the cited literature specifically addresses communities as corporate stakeholders. By combining commons theory, stakeholder communities, and corporate governance, this work offers an original contribution to business law scholarship in Italy and beyond.

4.3.2. Stakeholder Theories

The proposed ToC approach also differs from other previous attempts to promote stakeholder-oriented management of corporations. Particularly, this has been the case with Stakeholder Theories (STs), which have opposed shareholder primacy,[171] arguing that corporate managers have a responsibility to consider the interests of various stakeholder groups in their decision-making.[172] STs have been influential in critiquing the common economic focus on shareholder welfare, exposing its strategic and moral limitations.

However, these theories typically justify the inclusion of stakeholders' interests in corporate decision-making through efficiency arguments and ethical considerations.[173] While stakeholders undeniably contribute to the corporate financial success, the relevance of stakeholders should not be based solely on their usefulness to enhance corporate performance.[174] Otherwise, the interests of stakeholders–such as communities–who may provide minimal or indirect

[170] Bosi, *supra* note 167.

[171] For a definition of this concept see subsection 3.2.a. above.

[172] STs are strategic and ethical managerial theories that highlight the importance of business managers considering the interests of stakeholders relevant to the enterprise. These theories focus on three key issues: a) determining which stakeholders are legitimate and relevant for the firm; b) the strategic benefits of adopting a stakeholder-oriented approach to corporate management in terms of economic advantages for the firm; and c) the ethical nature of managerial action, including identifying ethical obligations for directors to act responsibly towards stakeholders. A landmark work in the development of stakeholder theories is by R Edward Freeman, *Strategic Management: A Stakeholder Approach* (Boston: Pitman, 1984). For a collection of the most relevant contributions to STs see R Edward Freeman, Gianfranco Rusconi & Michele Dorigatti, *Teoria degli stakeholder* (Milano: FrancoAngeli, 2009).

[173] Ethical arguments are used, e.g., by R Edward Freeman & Ramakrishna Velamuri, "Un nuovo approccio alla CSR: responsabilità verso gli stakeholder dell'impresa (Company Stakeholder Responsibility)" in R Edward Freeman, Gianfranco Rusconi & Michele Dorigatti, eds, *Teoria degli stakeholder* (Milano: FrancoAngeli, 2009) 253. Efficiency arguments are used, e.g., by Max B E Clarkson, "A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance" (1995) 20:1 The Academy of Management Review 92–117.

[174] Illustrative of this perspective is the fact that STs generally focus solely on corporate managers, who bear the responsibility of adopting a management strategy that considers the interests of external stakeholders and are expected to implement effective communication and engagement strategies to realize those interests; refer to Richard Harris, "Perché il dialogo è diverso" in Lorenzo Sacconi, ed, *Guida critica alla responsabilità sociale e al governo d'impresa* (Roma: Bancaria, 2005) 217 at 217. However, it is worth noting that there are some exceptions to this trend, namely Mario Tani, *Le reti di stakeholder: i processi di stakeholder engagement* (Padova: CEDAM, 2020); Yves Fassin, "Stakeholder Management, Reciprocity and Stakeholder Responsibility" (2012) 109:1 Journal of Business Ethics 83–96. In this regard, it can be argued that STs do not deviate significantly from the profit-centric approach embraced in neoliberalism; refer to Jeffrey Bone, "Legal Perspectives on Corporate Responsibility: Contractarian or Communitarian Thought?" (2011) 24:2 CJLJ 277–304 at 287–288.

contributions to the company's performance, but can be adversely affected by its activity, would be overlooked.[175] The ToC overcomes this issue[176] by rooting the relevance of communities to corporations into legal arguments.

A second limitation of STs in protecting communites from corporate harm lies in the reliance on voluntary implementation by managers, which can lead to inconsistencies and limited accountability to harmed stakeholders. In contrast, through the ToC, a binding requirement for corporate managers to prevent harm to communities may be grounded in their duties of care.

Section II

Section I presented the ToC and proposed it as a potential solution to the neoliberal disregard for recognising communities as relevant corporate stakeholders deserving protection under corporate law for harm caused by corporate activity. While the ToC promotes the consideration of communities in corporate law, this consideration requires prior recognition of communities as holders of legally relevant interests and the existence of suitable procedural mechanisms for their protection. By *interest* I mean a favourable situation that people seek to achieve, which may or may not have legal relevance depending on whether it is recognised by the legal framework (e.g., referenced in a legal provision or underlying a legal norm). When such a situation is shared by multiple individuals so that satisfying one person's interest also satisfies others', it is a *collective interest*. The concept of interest encompasses that of *right*, i.e., a legally relevant interest protected by the legal system and paired with a duty imposed in others to permit its fulfilment.[177]

Currently, in Italy, both the entitlement of community with relevant legal interests and the adequacy of legal procedures to protect them seem problematic. Substantively, the Italian legal system focuses on individual interests, generally excluding groups from being holders of legally relevant interests. Procedurally, this individual focus makes current mechanisms available for groups to seek relief from violations of their interests or rights, particularly class actions and public interest actions, theoretically inadequate to safeguard the interests of communities as

[175] Refer to *The Illusory Promise of Stakeholder Governance*, SSRN Scholarly Paper, by Lucian A Bebchuk & Roberto Tallarita, SSRN Scholarly Paper ID 3544978 (Rochester, NY: Social Science Research Network, 2020), contending that "stakeholderism", i.e., the commitment of company managers to make decisions to enhance the well-being of stakeholders, not only fails to benefit stakeholders but actually harms them by directing attention towards the role of managers, delaying or avoiding the adoption of regulatory reform measures, which are the only instruments capable of genuinely benefiting stakeholders. Regarding local communities, see Lisa Calvano, "Multinational Corporations and Local Communities: A Critical Analysis of Conflict" (2008) 82:4 J Bus Ethics (Journal of Business Ethics) 793–805 at 798.

[176] A similar criticism could be directed at the 'enlightened shareholder value maximization' theory developed by Michael C Jensen, "Value Maximization, Stakeholder Theory, and the Corporate Objective Function" (2010) 22:1 J Appl Corp Finance 32–42. In order to address the challenges posed by stakeholder theories advocating for multiple stakeholder governance, the American economist argues that the firm's objective should be the maximization of its long-run market value. This conceptualization aims to protect stakeholders, assuming their interests align with the corporation's long-term value maximization, and to provide a guideline for management to make trade-offs among stakeholders, reducing uncertainties. However, the theory is not convincing in its assumptions and may be counterproductive to stakeholders, reinforcing the conventional corporate ideal of profit pursuit.

[177] The definitions of interests and rights are drawn from Donzelli, *supra* note 39 ch 4.

corporate stakeholders. These issues will be addressed in the following paragraphs alongside proposals to overcome them. Procedural mechanisms for community protection are further discussed in Chapter 6.

5. Can Communities Hold Legally Relevant Interests?

Identifying a legal basis for attributing legally relevant interests to collectivities is key for two reasons. First, because only if communities bear interests that are relevant for the law corporations can be legally required to consider them. Second, because commons are functional to the exercise of fundamental rights as they have evolved–such as the right to a clean environment–and these rights have traditionally been associated with individuals rather than groups;[178] so, clarifying whether communities can have legally relevant interests in the form of fundamental rights would further support the connection between commons and communities, where the former permits fulfilling the rights of a whole group besides individuals.

5.1. Boundaries to Fundamental Rights Holding

From a ToC perspective, rights are vested both in individual members and the group, and while there is a connection between them, these dimensions do not completely overlap. The shift from the dimension of the person to that of the community is justified by the fact that fundamental rights, for the exercise of which the commons are functional, can also occur through groups. This point can be illustrated by the evolution of human rights included in the 1948 Universal Declaration.[179]

The Declaration's approach to human rights has evolved over time, moving from an 'individualistic' approach that attributed human rights to individuals solely by virtue of being

[178] Marella, *supra* note 91 at 26. The author highlights that a possible criticism of the collective or participatory governance of the commons could be that such governance relies on the narrative of fundamental rights, which typically operates on the individual terrain. This could potentially obscure or neglect the collective dimension that should characterize the governing of the commons. On a separate note, I would like to clarify that the following discussion will focus on the traditional legal perspective, which considers the pursuit of civil litigation by individuals as dependent on the attribution of specific legal rights. This perspective, known as "anthropocentric," is not the only approach to collective rights. It has been challenged by an "ecocentric" approach to seeking justice for environmental harm, which advocates for a strict environmental protection model that grants individuals and associations representation and fiduciary powers; refer to Fabio Ratto Trabucco, "La tutela dell'ambiente fra diritto, antropocentrismo ed ecocentrismo" (2019) 4 Danno e responsabilità 487–491. Although this approach is captivating, it will not be examined here. This is because it is a minority viewpoint in Italian legal scholarship, and its adoption is unlikely to occur soon.

[179] Here, the term "human rights", understood as inalienable and imprescriptible rights that everyone has as a human being, is used as a synonym for "fundamental rights." While the two concepts are not identical in their history and semantics, they became closely connected when human rights were recognized as fundamental rights in Western countries after World War II. In Italy, this connection is clearly illustrated by the emphasis on the value of the individual and human dignity as opening statements in the Constitution. For further details, see Pietro Costa, "Diritti fondamentali (storia)" in *Enciclopedia del Diritto* Annali II (Milano: Giuffrè, 2008) 365 at 365–366; 397–400.

human, to a 'universal' approach,[180] where the individual nature of human rights has lost its exclusive and absolute character and has been broadened to include collectivities, such as minorities and Indigenous communities.[181] Importantly, this extension does not diminish the relevance of the individual dimension of rights; rather, it delineates a more complex context that requires consideration of an individual's possible belonging to a group that influences their values and expectations, and the existence of group rights that may influence the ability of individual members to fulfill other individual rights.[182]

With the recognition of the dual dimension of human rights, a paradigm shift from individuals to collectivities has occurred, leading to the affirmation of 'third generation' human rights defined by their collective nature as rights that contribute to the fulfillment of individual rights.[183] This evolution arguably indicates that the definition of the right-holder is not objective but rather determined by social-historical factors, suggesting that there should be no insurmountable limits or immutable boundaries to the inclusion of new 'types' of fundamental right-holders. Consequently, this reading suggests that fundamental rights–also including those related to the environment–can be attributed to communities.[184]

5.2. Attributing Legally Relevant Interests to Italian Communities

Related to the recognition of communities as potential fundamental rights-holders is the question of whether Italian law supports the more general recognition of legally relevant interests to such groups. I argue that this is possible, drawing on legal pluralism and traditional Italian forms of collective land use and ownership.

[180] The process of universalization is rooted in a natural law approach that views human nature as a timeless, immutable essence, transcending historical and cultural variables. This perspective is challenged by proponents of the absolute uniqueness and dignity of each culture, affirming the Western origin of human rights included in the 1948 Declaration. For an overview of the debate between universalism and particularism as contrasting approaches to rights in the context of Italian legal philosophy, see Giuseppe Zaccaria, "Universalità e particolarismo dei diritti fondamentali" (2019) 79 Persona y Derecho 133–152; Costa, *supra* note 179 at 402–405.

[181] Costa, *supra* note 179 at 407–409.

[182] Take, for example, minorities. There may not be an exact overlap between the rights of the group and those of individual members. For instance, within a group of people of colour, the conditions and interests of men and women may diverge. See also *Ibid*.

[183] For an overview of the classification of human rights into generations and its evolution, see Spasimir Domaradzki, Margaryta Khvostova & David Pupovac, "Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse" (2019) 20:4 Hum Rights Rev 423–443. A similar paradigm shift has occurred with the proposal of an "animalist" interpretation of fundamental rights, which challenges the traditional "human" nature of those rights based on a cultural theoretical foundation that views humans and non-human animals as inherently different; see Costa, *supra* note 179 at 409. This proposal can be interpreted as a further evolution in the process of 'universalization' of human rights, further supporting the theoretical feasibility of extending fundamental rights to beings other than human individuals.

[184] Initial steps towards recognizing the collective dimension of the right to a healthy environment have been taken by the Inter-American Court of Human Rights; for a discussion and critical remarks, see Lisa Mardikian, "The Right to a Healthy Environment Before the Inter-American Court of Human Rights" (2023) 72:4 ICLQ 945–975.

a. Legal Pluralism

Legal pluralism is a theoretical model of legal systems[185] used by Italian scholars to refer not only to multiple legal sources[186] but also to the collective dimension of human personality. This latter meaning is key here, as it recognises the legal relevance of social groups, viewing group participation as a means of expressing identity and exercising fundamental rights.[187] It expands the recognition of legal relationships beyond individuals to include collectivities,[188] which are seen as holders of specific legally relevant interests and entitled to advocate for their protection. The fulfillment of these collective interests depends on the level of legal protection afforded within the legal system.[189]

Legal pluralism aligns with the ToC through their shared foundation in social solidarity. In legal pluralism, solidarity acts as the cohesive force that unites individuals and groups, enabling conflict resolution between parties with different interests, promotes a sense of social unity and recognizes the connection between law and society.[190] Similarly, the ToC views solidarity as central to the shared management of resources, favouring collective use over exclusive ownership and facilitating cooperation among users.[191]

Italy has a long-standing legal pluralist tradition. The Constitution–though only partially implemented[192]– affirms the central value of the person, alongside that of social formations that support individual development.[193] The term *person*, as opposed to *individual*, stresses not mere singularity but integration within social formations. This emphasis on the person reflects the importance of social formations in people's development, a bond reinforced by several constitutional provisions.

[185] Massimo Corsale, "Pluralismo giuridico" in *Enciclopedia del Diritto* (Giuffrè, 1983) 1003 at 1003.
[186] The concept of legal pluralism has been used to refer to the existence of multiple legal sources in a given system, including sources that are not controlled by the State (known as "pluralism of legal sources"). Refer to Paolo Grossi, *Il diritto civile in Italia fra moderno e postmoderno: dal monismo legalistico al pluralismo giuridico* (Milano: Giuffrè, 2021).
[187] Refer to Pietro Rescigno, *Persona e comunità: saggi di diritto privato* (Padova: CEDAM, 1987); for Canadian scholarship refer to Shai Stern, "Reconsidering "Community": a Normative Model to Address Communities in the Law" (2020) Revue de Droit de l'Université de Sherbrooke 225.
[188] Corsale, *supra* note 185 at 1013.
[189] *Ibid* at 1020–1021.
[190] *Ibid* at 1012.
[191] Rodotà, *supra* note 91 at 472–478; Marella, *supra* note 91 at 21.
[192] For an overview and commentary on "forgotten" Constitutional provisions, i.e., those that have not been implemented, refer to Sabino Cassese, "La Costituzione "dimenticata". Introduzione" (2021) 1 Rivista Trimestrale di Diritto Pubblico 3. Art 46 of the Constitution (Italy) on employee participation in corporate governance has been recently implemented through *legge 15 maggio 2025, n. 76*, 15 May 2025, 76.
[193] Grossi, *supra* note 186 at 102–104.

Article 2[194] of the Italian Constitution recognizes the role of social formations, intermediate bodies between the citizen and the State, in supporting members' personal development.[195] This permits a transition from viewing people as isolated individuals to recognising them as persons. The "personalism" that, according to some important scholars, permeates the Constitution prioritises human dignity as an inviolable value of the democratic State, which economic freedom and business activity must always respect.[196]

Article 41[197] grants private individuals the freedom to exercise economic initiative and connects it to a social function. This function legitimizes economic initiatives and defines their content.[198] The Italian Constitutional Court also supports this perspective. In a recent ruling involving community cooperatives,[199] the court emphasized that social formations are where human personality unfolds and that the duty of solidarity, as outlined in Article 2, indicates that people are free to express themselves through social groups.[200]

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[194] 'The Republic acknowledges and guarantees the inviolable rights of man, both as an individual and within the social groups in which one's personality is expressed. The Republic requires that the fundamental duties of political, economic and social solidarity be fulfilled.'

[195] Rescigno, *supra* note 187 at 32.

[196] Grossi, *supra* note 186 at 123.

[197] 'Private economic enterprise shall have the right to operate freely.
It cannot be carried out in conflict with social utility or in such a manner as may harm health, the environment, safety, liberty and human dignity.
The law shall determine appropriate programmes and checks to ensure that public and private economic enterprise activity be directed at and coordinated for social and environmental purposes.'

[198] Rodotà, *supra* note 91 at 239.

[199] Community cooperatives are a type of cooperative enterprise that actively promotes the common good of local communities by facilitating citizen participation in managing communal resources and services, as well as in enhancing the value, administration, or joint procurement of goods or services beneficial to the community at large. Community cooperatives have been established in various Italian Regions through regional legislation; for example, see Regione Umbria, *Disciplina delle cooperative di comunità* (2019). Attempts to introduce national legislation have failed: *Disciplina delle cooperative di comunità*, C 288 (23 March 2018); *Disciplina delle cooperative di comunità*, C 4588 (13 July 2017). From the Italian Chamber of Deputies website, it appears that the legislative process has stalled after being assigned to the joint committees on Productive Activities and Labor; Camera dei deputati, "XVIII Legislatura - Lavori - Progetti di legge - Scheda del progetto di legge", online: <https://www.camera.it/leg18/126?tab=1&leg=18&idDocumento=288&sede=&tipo=>.

[200] Refer to Alfredo Moliterni & Silvia Pellizzari, "La costituzione "dimenticata". La riserva di attività economiche alle comunità di lavoratori e utenti" (2021) 1 Rivista Trimestrale di Diritto Pubblico 243 at 16. While the ruling dealt with a cooperative, the court's emphasis on social formation as essential contributors to human personality could also be relevant for companies when conflicts arise between profit motives and social solidarity. In these cases, this emphasis can help interpret the social function limit/purpose of private economic initiatives, which can be deemed legitimate only when such initiatives do not negatively impact individuals in both their personal and collective dimensions. On this topic, see also Vincenzo Cariello, "Per un diritto costituzionale della sostenibilità (oltre la 'sostenibilità ambientale')" (2022) 2 ODC 413–447, particularly at 442, note 88, discussing the Italian Constitutional Court's assessment of constitutionally legitimate economic initiatives as related to environmental protection, as well as Stefano Ambrosini, *L'impresa nella Costituzione. Introduzione ai corsi di diritto commerciale e di diritto pubblico dell'economia* (Bologna: Zanichelli, 2024) chs 1–2.

Finally, Article 9[201] underscores the protection of natural and cultural commons, including scientific research, natural beauties, historical and artistic heritage, the environment, biodiversity, ecosystems, and animals. Interpreted through the lens of the person's central role, this provision affirms that safeguarding these resources is essential for the well-being of present and future generations.[202]

b. Italian Forms of Collective Land Use and Ownership

Along with constitutional principles, the collective dimension of legally relevant interests in Italy can also be found in the traditional experiences of *usi civici* and *assetti fondiari collettivi*. These concepts refer respectively to the rights of enjoyment over the land within a structured territorial community exercisable by group members as individuals and as members of such community (*uti singuli et uti cives*)[203] and to a phenomenon of undivided collective property of the land.[204] These collective ownership rights have been considered to have constitutional relevance and be expressions of fundamental rights, despite not being explicitly mentioned in the Constitution.[205]

The constitutional interpretation of collective land rights in Italy sees them as instrumental to the realization of the human person, consistent with Article 2 of the Constitution. These rights also hold cultural and environmental significance: culturally, as expressions of Italy's regional traditions, and environmentally, as subject to the same protective principles applied to the natural environment.[206]

The constitutional principles and the example above suggest that legally relevant interests, also including fundamental rights, in Italy can have both individual and collective dimensions. This opens the door to recognising community interests as relevant for the law and held by the group as a whole. Furthermore, when fundamental rights are exercised collectively, they may be attributed to groups such as stakeholder communities, stressing their connection with commons that permit fulfilling those rights. If such interests and rights are acknowledged, then communities should be able to protect them. This issue is addressed in the following subsection.

[201] 'The Republic shall promote the development of culture and of scientific and technical research.
It shall safeguard the natural beauties and the historical and artistic heritage of the Nation.
It shall safeguard the environment, biodiversity and ecosystems, also in the interest of future generations. State law shall regulate the methods and means of safeguarding animals.'

[202] Lieto, *supra* note 161 at 341.

[203] For an analysis of the definition and characteristics of *usi civici* in Italy, in comparison with the English concept of "commons," refer to Lorenza Paoloni & Flavia Mancini, ""Usi civici": the Italian side of the Commons" (2014) 16 Annali 75–87.

[204] An examination of the differences and similarities between *usi civici* and *assetti fondiari collettivi* is provided by Marinelli, *supra* note 65.

[205] Giuseppe Di Genio, *Gli usi civici nel quadro costituzionale (alla luce della legge n.168 del 20 novembre 2017)* (Torino: Giappichelli, 2019) at 34; 42–44.

[206] Many of the lands where collective rights are exercised are included in protected areas and subject to restrictions on their use and alteration (such as environmental, archaeological, and building restrictions).

6. How Can Communities Protect their Interests?

6.1. Existing Mechanisms to Provide Relief for Harm to Communities

Italian law offers several mechanisms for protecting group interests, including class actions (*azioni di classe*), public interest actions (PIA)–also known as public interest litigation (PIL) in Canada and as *citizen suits* in Italy–and direct (representative) actions. The following paragraphs outline these mechanisms to argue that collective interests are recognized in Italian law and are granted protection, albeit not on a general basis. This subsection also lays the groundwork for the discussion on prevention and compensation of community interests harmed by corporate activity contained in Chapter 6. For now, the focus remains on community interests in general, independent of their stakeholder qualification.

6.1.1. Class Actions

Class actions enable individuals and entities to bring claims on behalf of a group of similarly situated persons. Italian class actions are designed to protect individual rights that are homogeneous among class members, meaning they arise from the same cause of action and require identical judicial evaluation; conversely, proper collective interests are not considered.[207] This individual focus is evident, for example, in the requirement that, when the plaintiff is an entity, such as an association, it must identify the specific rights holders it aims to protect through the class action.[208] Class actions also aim to establish whether each class member's individual rights were violated, not to address harm to a collective interest.[209] This emphasis on individuals reinforces an individualistic conception of legally relevant interests, suggesting that, from a theoretical viewpoint, class actions are inadequate to protect interests or rights belonging to a collectivity (which I refer to as community interests or community rights).

One possible way to practically address this theoretical limitation could be to have class actions filed by associations or NGOs (so-called 'group actions'[210]), which is already a possibility in

[207] See Chapter 6, subsection 3.1. for further discussion on this point.

[208] Consolo, "La terza edizione della azione di classe è legge ed entra nel c.p.c.", *supra* note 154 at 738; Gianpaolo Caruso, *Contributo allo studio delle azioni di classe* (Napoli: Edizioni Scientifiche Italiane, 2021) at 124.

[209] For example, during the third phase of the class action proceeding, the class representative is required to draft a plan for the adherents' individual homogeneous rights to satisfy their claims. An overview of the procedure is provided by Consolo, "La terza edizione della azione di classe è legge ed entra nel c.p.c.", *supra* note 138.

[210] Class actions initiated by associations have also sometimes been referred to as 'collective action'; see, e.g., Giorgetti & Vallefuoco, *supra* note 191 at 411–412, referring to 'collective actions' as actions initiated by associations that act as centers for allocating interests belonging to a collective of individuals, often larger than the group composed solely of its members. In contrast, the term 'group actions' is used to describe actions initiated by individuals, associations, or public entities on behalf of, and for the benefit of, a plurality of people with identical claims. In the former case, a favourable judgment would take effect *erga omnes*; in the latter case, it would apply only to the parties involved in the lawsuit.

Italy[211]–consistent with the European class action model.[212] Having associations or NGOs file class actions has also been suggested as a potential solution to mitigate the problems arising from the separation between victims and law firms filing the claim, which may incentivise lawyers 'to conduct meritless lawsuits and to opt for early settlements that can be disadvantageous for [their] clients.'[213] More generally, this separation leads to problems regarding the effectiveness of protection provided by class actions for communities.[214]

[211] In Canada, class actions initiated by communities have been used to protect collective rights, such as constitutionally protected Aboriginal rights. In these cases, the representative plaintiff is not (and generally cannot be, unless specifically authorized by the group) an individual member, but only the collectivity itself, through its representative entity (e.g., a nation). However, unlike in Italy, in these cases the representative entity of the collectivity is the right holder. See *Kaska Dena Council v Yukon (Government of)*, [2019] YKSC 13 at paras 121–122, which ruled against the possibility for the plaintiff to represent the collective right holder because it was neither a right-bearing group nor authorized by the rights-bearing First Nations to bring a representative action on behalf of its Kaska members.

[212] On American-style vs European-style class actions see Alessandro Giorgetti & Valerio Vallefuoco, *Il contenzioso di massa in Italia, in Europa e nel mondo: profili di comparazione in tema di azioni di classe ed azioni di gruppo ; aggiornato alla Legge finanziaria 2008, Legge 24.12.2007 n. 244 (G. Uff. 28.12.2007 n. 300) introduttiva in Italia della Azione Collettiva Risarcitoria* (Milano: Giuffrè, 2008) at 59; 133, note 1: 'The term "group action," rooted in European tradition and also adopted in Latin American jurisdictions, contrasts with the term "class action," which originates from the U.S. legal tradition. The latter involves the selection of a representative plaintiff for the class, and the outcome of the action is binding on all members of the class, regardless of whether they actively participated in the lawsuit or abstained from it. Conversely, "group action" has a binding effect only on the parties who initiated or joined the action. It is primarily aimed at consolidating multiple lawsuits into a single proceeding, launched simultaneously by several plaintiffs, and sharing more or less extensive commonalities in factual and/or legal elements.' [My translation]

[213] Hans-Bernd Schaefer, "The Bundling of Similar Interests in Litigation. The Incentives for Class Action and Legal Actions taken by Associations" (2000) 9:3 European Journal of Law and Economics 183–213 at 204.

[214] The drawbacks of class actions for effective class protection have been extensively discussed not only by North American scholars, but also by European scholars assessing whether and to what extent importing this legal tool to Europe would be advantageous. Relevant contributions in the US include, among others, Jeremy Kidd & Chas Whitehead, "Saving Class Members from Counsel" (2021) 58:3 San Diego L Rev 579–640; Nicholas Almendares, "The Undemocratic Class Action" (2023) 100 Washington University L Re 611–659 [acknowledging the principal-agent problem that arises between victims and counsel in class actions and suggesting increased court vigilance over the structure of lawyer fee awards and settlements as a way to address it, rather than implementing democratic procedures that would give victims greater control over their attorneys]; John C Coffee, *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation* (Rochester, NY: Social Science Research Network, 2006) [one enforcement limitation highlighted by the author is the low probability of companies with small market capitalizations being sued in securities class actions due to plaintiff attorneys' incentives to pursue claims with higher estimated fee awards]; Jonathan Macey & Geoffrey Miller, "The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform" (1991) 58:1 University of Chicago L Rev, online: <https://chicagounbound.uchicago.edu/uclrev/vol58/iss1/1>, [proposing an auction approach for victims to select attorneys to mitigate agency problems]. In Canada, class actions have been extensively investigated by Professor Jasminka Kalajdzic; for further insights see, most recently, Jasminka Kalajdzic, "For Justice, Not Profit: Public Funding of Collective Redress" (2022) 2022:2 Mass Claims 11–18 [third-party litigation funding can serve as a tool for pursuing small lawsuits with significant public interest, where a lawyer's financial incentive to take on the case would otherwise be minimal.]; see also Jasminka Kalajdzic, "Self-Interest, Public Interest, and the Interests of the Absent Client: Legal ethics and Class Action Praxis" (2011) 49:1 Osgoode Hall LJ 1–37 [distinguishing three common problems in class actions: the entrepreneurial litigation problem, the adversarial void problem, and the absent client problem.]

According to some views, 'group actions' could mitigate these issues through legislation that limits the scope of action for associations, e.g., by introducing 'requirements as to the number of members of the association or the effective representation of the interests of the injured by the association'.[215] Actions brought by associations or NGOs may also be better suited to ensure that lawsuits are conducted by well-reputed lawyers in the long run if internal monitoring rules are established to prevent associations from falling victim to lawyers who intend to use them as 'a key to the courtroom'.[216] Finally, group actions may also address the argument that enhanced democracy in class actions may not benefit class members due to their lack of means and inclination to supervise attorneys[217] as associations can be assumed to possess greater knowledge and skills compared to individual class members, making them better equipped to oversee and manage the litigation effectively.[218]

However, while group actions may better protect the interests of affected communities, they encounter limitations, particularly regarding their motivation to bring the claim to an end. Criticism has pointed out that while associations have an interest in initiating actions to fulfill their legal purpose, gain reputational advantages, and increase membership, they may lack motivation to bring the proceedings to a conclusion, as the costs involved may not be offset by any equivalent benefits for the organization.[219] This criticism can be addressed by requiring that associations acting as representative plaintiffs are internally controlled by the individual victims or overseen by external public interest groups (such as political or social groups, or the State). This oversight would ensure that the association has a direct interest in the continuation of the proceedings and that the reputational disadvantages of failing to do so would outweigh any advantages gained from initiating the class action.[220]

In any case, the criticism discussed regarding the motivation for group actions is significant because it highlights that while group actions may offer several theoretical advantages for protecting collective interests, incentives must be established to stimulate group formation and action; otherwise, they will never be practically efficient.[221] These incentives should primarily

[215] See Schaefer, *supra* note 213 at 205, see also pp 198-200.

[216] *Ibid* at 205. Additional benefits of group actions over individual class actions are provided by Willem H Van Boom & Marco BM Loos, "Collective enforcement of consumer law: securing compliance in Europe through private group action and public authority intervention" (2008), online: <https://www.researchgate.net/publication/254916563>, who advocate for the suitability of group actions in the context of consumer interest protection.

[217] Almendares, *supra* note 214 at 613.

[218] This assumption can become a legal requirement to the extent that legislative bodies assess the adequate representativeness of the associations allowed to bring lawsuits in advance, and further confirm it through their inclusion in a register.

[219] Caruso, *supra* note 208 at 37, note 76. Note that incentivizing group actions in Italy is even more important now that individual standing to initiate class actions is also available.

[220] Cfr. Schaefer, *supra* note 213.

[221] It should be noted that addressing the incentive problem for access to justice meaningfully requires consideration of the potential negative consequences of overly easy access to courts. As observed in the antitrust litigation literature, 'if the class action mechanism makes lawsuits sufficiently cheap and easy to bring, firms may simply accept litigation as a necessary cost of business and engage in even more egregious anti-competitive conduct' (Albert H Choi & Kathryn E Spier, "Class Actions and Private Antitrust Litigation" (1 September 2020) Rochester, NY, online:

focus on providing financial resources for organizations to prepare for and support litigation,[222] especially when other incentives (e.g., reputational) are limited or absent.[223]

6.1.2. Public Interest Actions

Public interest actions (PIAs) allow individual citizens or non-profit organizations (hereinafter "public interest plaintiffs") to act in the public's interest when public authorities fail to do so. The Italian PIA model, called *"azione popolare"*, is generally divided into two subcategories: supplementary PIA (*azioni popolari suppletive*), in which 'the public interest plaintiff replaces the public body to enforce a right or interest of the latter against a third party,' and corrective PIA (*azioni popolari correttive*), which are 'directed at correcting a situation of illegitimacy established by the Public Administration (PA).'[224] This distinction typically rests on two elements: who can be sued (*legittimazione passiva*)–in the first case, individuals or entities other than the PA; in the second case, they the PA–and the ownership of the right asserted–in the first case, the right belongs to the PA; in the second, it belongs to the popular plaintiff.

a. Supplementary PIAs

Supplementary PIAs are limited by their structure, which allows public interest plaintiffs to assert rights that belongs to the PA, substituting it in the lawsuit.[225] This raises three concerns. First, at a theoretical level, it equates collective rights with rights of public authorities. This is a flawed assumption, as public authorities are not always best positioned to protect communities' rights.

<https://papers.ssrn.com/abstract=3329316> at 2. Therefore, the challenge lies in designing incentives for associations to initiate legal action that are proportionate and adequate, ensuring that class actions serve as an effective means of protecting against mass torts without causing unintended consequences.

[222] Van Boom & Loos, "Collective enforcement of consumer law", *supra* note 197 at 12–14, highlight–in the context of consumer protection–the need for funding for associations initiating legal action and suggest possible solutions. At 13, they claim: 'On the other hand, it could be argued that it may seem equally unfair to deny respectable private organizations a subsidy that each individual claimant whose interests are at stake receives. And in any case, would this not be cheaper for the government than subsidizing many individual claimants? In other words, governments may be acting penny-wise but pound-foolish in this respect.'

The authors also highlight other possible areas for incentives, such as monitoring compliance when voluntary compliance does not occur, for example, through civil procedure mechanisms like penalty payments or by allowing the organization to benefit directly from the penalty payment instead of requiring the respondent to make such payment to the state. While the latter does not seem possible in current Italian class actions, as recovery shall go to class members who adhered to the successful class action, the former is currently in place. Furthermore, Italian class action legislation establishes a 'collective enforcement' mechanism (*esecuzione forzata collettiva)*, which is controlled and managed by the judge together with the class representative (*rappresentante comune*), as established by Art 840 terdecies Code of Civil Procedure (Italy).

[223] The need for incentives to mitigate drawbacks is well pointed out by both Pier Filippo Giuggioli, *Class action e azione di gruppo* (Padova: CEDAM, 2006) at 87 ff; Caruso, *supra* note 224.

[224] Chiara Petrillo, *La tutela giurisdizionale degli interessi collettivi e diffusi* (Roma: Aracne, 2005) at 158. [My translation]

[225] Giovanni Bonato, "La tutela dell'ambiente secondo la L. n. 349 del 1986, con le successive modificazioni del d.lgs. n. 267 del 2000" in Lucio Lanfranchi, ed, *La tutela giurisdizionale degli interessi collettivi e diffusi* (Torino: Giappichelli, 2003) 299 at 343.

This point is underscored by 2007-2008 rulings of the Italian Court of Cassation, which recognised that collective bodies and environmental associations could act as civil plaintiffs in criminal proceedings when violation affected 'the right to environmental cleanliness in its collective dimension' or 'the personality rights of the entity related to its statutory purpose', provided a territorial dimension exists.[226] Although later legal development asserted that only the State may seek compensation for environmental harm,[227] these earlier rulings reflect judicial recognition of the limitations of exclusive State action.[228] Moreover, repeated convictions of Italy by international and supranational courts for failing to balance economic, social and environmental interests[229] further support that the protection of collective interests should not rest solely with public authorities (or popular substitutes).

Second, at a substantive level, it must be assessed whether the PA holds a right against the private party that corresponds to the harmed community interest. This requires a case-by-case evaluation of whether the damage caused to the community falls within the legal grounds for state intervention (e.g., in case of environmental harm, through the Ministry of the Environment).[230]

Third, at a procedural level, substitution in a lawsuit limits the scope of favourable *res judicata* by 'consuming' the rights once a final judicial decision is reached. As a result, a favourable ruling, such as an award of compensation, would benefit only the public authority, and affected communities could not independently claim compensation for the same harm, as they would not be recognised as having an enforceable (collective) right.[231]

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[226] Grazia Ceccherini, "Danno all'ambiente e garanzia dell'accesso alla giustizia: una questione aperta" (2021) 2 Riv Dir Civ 347 at 10.

[227] Art 311 TUA (Consolidated Environmental Act) (Italy); Corte Costituzionale, 19 April 2016, No 126 (Italy).

[228] Ceccherini, *supra* note 226 at 10. The risks posed by the approach adopted by the 2016 Constitutional Court decision cannot be fully explored here. However, by denying private parties standing to claim compensation for damage that only indirectly affects them, this ruling has seemed to imply that issues like environmental protection concern only the State, while private individuals or groups aim solely to safeguard their personal interests. This narrow view may undermine comprehensive environmental protection and diminishes the role of private parties in safeguarding environmental commons – contradicting prior legal and judicial recognition of the social dimension of environmental damage. Ultimately, treating community interests as interests of the public authority risks failing to provide them with adequate and effective protection. For further discussion on this topic, see Ceccherini, *supra* note 226; Virginia Cuffaro, "Il danno ambientale e l'azione civile del "singolo" nel processo penale | Il portale giuridico online per i professionisti" (12 June 2020), online: *Diritto.it* <https://www.diritto.it/il-danno-ambientale-e-lazione-civile-del-singolonel-processo-penale/>; Silvia Bolognini, "La natura (anche) non patrimoniale del danno ambientale e il problema della legittimazione attiva" (2009) 9 Resp civ e prev 1841.

[229] E.g., *Locascia and Others v Italy*, 2023 ECtHR; *Cordella Et Autres c Italie*, 2019 ECtHR.

[230] Although Art 300 TUA (Italy) provides a rather broad definition of environmental damage, the scope of extension of the specific cases of ministerial intervention should be evaluated based on the current interpretation of the general clauses contained therein (e.g., "significant deterioration"; "actions that significantly adversely affect"; "significant risk of harmful effects") as well as the relation to any additional regulations that reduce the scope of the provisions of the Consolidated Act, pursuant to Art 3 bis, para 3 TUA (Italy).

[231] Procedural limitations would be further exacerbated by the absence of certain procedural mechanisms to protect collective interests, such as the lack of publicity during the pendency of the case, which hinders the intervention of other entitled parties. Bonato, *supra* note 225 at 343–344.

b. Corrective PIAs

Corrective PIAs have been deemed to be the most suitable tools for the protection of diffuse interests,[232] that are individual interests with collective relevance.[233] This assessment has been based on legislation establishing a form of public interest litigation in cases involving concentration of power within the publishing sector.[234] This provision has been interpreted as removing the requirement for a direct relationship between the public interest plaintiff and public authorities, as well as the need to protect purely public interests. Instead, it allows public interest actions to safeguard individual interests as well. While this reading is suggestive, it does not seem convincing because, in corrective PIAs, the defendant is the public authority, not the third party. A related position advocates for introducing a 'general' public interest action that could be initiated by both individuals and NGOs.[235] However, this position would clash with the fact that PIAs are generally conceived as a closed number of actions, so a generalisation of PIA does not seem possible.[236]

Therefore, rather than protecting community interests, corrective PIAs would be useful in controlling public authorities' acts, ensuring they comply with international and supranational environmental and human rights standards. This appears to be the direction taken by the EU in the field of environmental protection with the introduction of provisions allowing environmental NGOs to submit a request for internal review to the EU institution or body that has adopted an administrative act under environmental law (or, in the case of an alleged administrative omission, should have adopted it).[237] Notably, although the amendment also allows complaints by 'members of the public,' this requires meeting more stringent conditions than those required for NGOs.[238] This difference is intended precisely 'in order to prevent members of the public from having the unconditional right to seek internal review ('actio popularis')'.[239]

The above suggests that PIAs can play a role in protecting community interests, though their scope is limited. Supplementary actions are confined to enforcing public interests, while corrective actions apply when public intervention proves inadequate in safeguarding diffuse

[232] Petrillo, *supra* note 224 at 164, ['absent more advanced tools'].
[233] *Ibid* at 56–59.
[234] *legge* 25 *febbraio 1987, n 67*, February 25, 1987, 67, Art. 3 para 11.
[235] A related position advocates for introducing a 'general' public interest action that could be initiated by both individuals and NGOs. Petrillo, *supra* note 224 at 163.
[236] This feature has been confirmed by Corte di Cassazione, 14 March 2011, United Sections, No 5924 (Italy), para. 7.7): 'Specifically, it is not possible for an individual to protect and represent diffuse or collective interests in opposition to the representative entity and, therefore, for the instrumental exercise of the public interest action, except in cases where it is permitted under our legal system.' For doctrinal positions rejecting PIAs as a close number, see *Ibid* at 162–163.
[237] EU, *Regulation 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies*, [2021] OJ L 356/1, Art 1, para 2.
[238] EU, *Regulation 2021/1767*, Art 1 para 3.
[239] EU, *Regulation 2021/1767*, Recital 19; this point is also highlighted by Marisa Meli, "Inquinamento atmosferico. Inadempimento agli obblighi imposti dalle direttive europee e strumenti di tutela" (2023) 2 NGCC 294–308 at 298.

interests. Furthermore, PIAs are only available when expressly provided by law, which restricts the range of interests they can protect.

Supporting private enforcement of certain community interests does not mean excluding the State from their protection, [240] nor does it imply a fragmentation of fundamental rights granted to all individuals.[241] While I argue that exclusive public authority to seek compensation for environmental damage affecting local communities may not be fully effective, I do not advocate for the opposite extreme–solely relying on private enforcement. Instead, allowing private actions alongside public ones–where appropriate, such as in cases of environmental degradation–can better serve protection goals without undermining the unity of fundamental interests like environmental protection. For instance, public authorities could still play a role in litigation through mechanisms, such as mandatory joinder, requiring their participation for the case to proceed. Additionally, granting standing to communities would strengthen their capacity to prevent and address environmental harm, reflecting not just individual or public concerns, but also the communitarian ones.

6.1.3. Direct Community Actions

While class actions and PIAs protect individual interests shared by many (e.g., a class, regional or national population), direct community actions refer to procedural mechanisms designed to enforce proper collective interests, those that belonging to a group as such. Whether communities can independently take action to protect these interests, without relying on public authorities, is a question raised in the commons literature.[242] I argue that this question can, and should, be answered positively.

The protection of collective interests has been a topic of debate in Italian legal scholarship since the 1970s.[243] At the time, scholars were split between those who believed existing mechanisms already safeguarded collective interests, and those who, citing the individualistic foundations of Italian civil law tradition, argued otherwise.[244] The latter maintained that legal system lacked appropriate tools to protect collective interests,[245] as it relied too heavily on individual private and public actions.[246] In practice, these have proved insufficient: individual actions were often too weak and fragmented, while public authorities struggled to address emerging social

[240] Critical notes in this regard have been raised by Ermanno Vitale, *Contro i beni comuni: una critica illuminista*, 1st edn (Roma: Laterza, 2013) at 58; Riccardo Ferrante, "La favola dei beni comuni, o la storia presa sul serio" (2013) 2 Ragion pratica 319–332 at 328.

[241] These risks are reported by Micciarelli, "I beni comuni e la partecipazione democratica", *supra* note 91 at 77–78. Additional concerns may arise regarding the economic means and incentives for private groups to act, as well as mechanisms for their transparency and accountability; these topics have been addressed above, subsection 5.1.

[242] The problem is raised by *ibid* at 72.

[243] In 1974, a conference was held at the University of Pavia to explore the content, significance, and limits of the legal protection of collective interests in multiple legal areas; refer to Zannuttigh, *supra* note 39 at 71.

[244] *Ibid* at 80.

[245] Rodotà, *supra* note 39 at 81–82.

[246] Class actions as tools for collective redress were introduced later in Italy, as explained in subsection 5.1.1. above. Please refer to that subsection for further discussion on the effectiveness of class actions in protecting community interests.

interests.[247] To overcome these shortcomings, some scholars proposed expanding legal standing to include organised groups, either permanent associations or temporary coalitions, formed to protect specific collective interests, especially in cases were no pre-existing institutional actor was already in place.[248] An key requirement for granting standing to organised groups should be that that the court deems them the most appropriate entities to protect the interests at stake, based on their capacity to navigate legal proceedings and their representativeness of the affected individuals.[249]

Granting standing to organised groups would give rise to a *giudizio collettivo proprio* (direct collective trial), where judicial scrutiny directly addresses collective interests. This differs from a *giudizio collettivo improprio* (indirect collective trial), exemplified by class actions, which aggregate individual homogeneous claims, mainly for improving procedural efficiency and consistency across rulings. Direct collective trials protect a unitary interest of the group members by simultaneously addressing shared concerns among them. Differently put, in direct collective trials, the judge evaluates a single allegedly harmful conduct that affected many people, whereas in indirect collective trials, the judge evaluates multiple allegedly harmful conducts, each of which affected single individuals.[250]

Italy already provides for direct collective trials, primarily including trade unions' actions under Article 28 of the Workers' Statute,[251] actions for collective injunctive relief, and consumers' representative actions. Trade unions' actions under Article 28 of the Workers' Statute allow a trade union to initiate litigation if an employer obstructs or limits its activities and freedoms to seek an order to compel the employer to cease the anti-union behaviour and minimize its impact. [252] The union's claim is made in its own interest, meaning that the organization initiates litigation

[247] In particular, the author argues that narrowing the scope of the conflict to the individual level would tend to make the individual unable to grasp the true complexity of the interests involved. Additionally, it would also allow the investigation to focus only on isolated cases. Therefore, if a violation is judicially established, it could be argued that it was an exceptional case and did not question the overall legitimacy of the behaviour that is assumed to be detrimental to a collective interest; refer to Rodotà, *supra* note 39 at 94.

[248] *Ibid* at 95–97. An opposing proposal was that each individual right holder should have the capacity to initiate litigation, with the possibility of coordinating individual actions to ensure consistent rulings.

[249] See, for example, Mauro Cappelletti, "Formazioni sociali e interessi di gruppo davanti alla giustizia civile" (1975) 2 Rivista di Diritto Processuale 361 at 399–400, underscoring the importance of granting standing to a sufficiently representative entity of a collectivity.

[250] For further details, see Donzelli, *supra* note 39 at 426-427.

[251] Regarding Italian trade unions, while they are, in practice, well-organized groups, it should be noted that they still formally remain 'unrecognized' associations. This, I argue, allows for the expansion of the discussion on trade unions' representative litigation to include communities as well, which, at the most basic level of organization, will take the form of unrecognized associations. Further discussion on community organization is provided in Chapter 3.

[252] Examples of anti-union conduct from 2023 Italian jurisprudence include the failure of the employer to adhere to the consultation procedure with trade unions mandated in cases of collective dismissals (see Tribunale Milano, 28 September 2023, Labour Section, Decree (Italy); Tribunale Foggia, 30 May 2023, Labour Section, Decree (Italy)); the employer's breach of the communication requirements to employees concerning automated labour control tools (see Tribunale Palermo, 3 April 2023, Labour Section, No 14491 (Italy)); the prohibition on trade unions from utilizing the company email for communications to employees in the absence of alternative communication channels (see Corte di Cassazione, 5 December 2022, Labour Section, No 35643 (Italy)).

to protect an interests of the union, specifically the interest of allowing workers to freely engage in union's activities.[253] In these cases, a direct collective trial arises because the union does not only protects the interests of the organization, but also safeguards the collective interests of all workers to freely engage in union activities.[254]

Actions for collective injunctive relief[255] are legal mechanisms designed to stop conduct that adversely affects multiple individuals or entities. These actions may be brought by any interested party[256] as well as by NGOs or associations listed in a specific public registry whose statutory purposes include protecting the affected interests.[257] Organizations may have either extraordinary standing, granted by legislation to protect the interests of multiple individuals, or ordinary standing when asserting their own rights.[258] Although such actions can be also initiated by individuals, their inherently collective nature remains, as the resulting court order benefits all potentially affected parties, not just those formally involved in the proceeding. Unlike individual actions for an injunction, these actions address conduct that harms a plurality of individuals, offering a remedy that protects all of them simultaneously.[259]

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[253] See Romolo Donzelli, "Tutela contro le discriminazioni [dir. proc. civ.]", online: *Treccani* <https://www.treccani.it/enciclopedia/tutela-contro-le-discriminazioni-dir-proc-civ_(Diritto-on-line)/>. 'The parties having standing are the same representative entities – previously mentioned – to whom individual action can be delegated (see above, § 1). *However, it is important to clearly distinguish the exercise of a collective action, which they are entitled to undertake in their own right, from the exercise of an individual action, which is dependent on a mandate from the discriminated party*.' [My translation, emphasis added]. The distinction between the individual interests of workers (represented by the union) and the collective interest of the union itself is also explored in a commentary on a judicial case involving Ryanair's refusal to engage in dialogue with trade unions by Fabrizia Santini, "I diritti dei lavoratori tra dimensione individuale e collettiva delle tutele" (2018) 6 Argomenti di Diritto del Lavoro 1611. The case revolved around the issue of whether Ryanair's conduct constitutes anti-union behaviour under Art 28 Workers' Statute (Italy) or falls under discriminatory practices outlined in *decreto legislativo 1 settembre 2011, n. 150*, 1 September 2011, 150, Art 28.

[254] That interests may be affected by a single behaviour and that the legal claim brought by an organization may (but does not have to) be based on a breach of collective interests alongside the organization's own interests. Furthermore, the individual interests of workers are separate from the union's interest, although it is possible for the organization to act on behalf of specific affected individuals rather than solely for the protection of collective interests; see Santini, *supra* note 253.

[255] They were introduced in Italy in 2019 under Art 840 sexiesdecies Code of Civil Procedure (Italy) by *legge 12 aprile 2019, n. 31*, 12 April 2019, 31.

[256] Art 840 sexiesdecies, para 2 Code of Civil Procedure (Italy).

[257] These requirements allow for an ex-ante verification of the organization's representativeness of the collectivity and ensure their public acknowledgment. Such organizations may also be established after the potentially damaging behaviour has occurred, for the purpose of bringing an injunction request; see Alberto Tedoldi & Gian Marco Sacchetto, "La nuova azione inibitoria collettiva ex art. 840 sexiesdecies c.p.c." (2021) 1 Rivista di Diritto Processuale 230–259.

[258] Such as the rights of consumers to the protection of health; to the safety and quality of products and services; to adequate information and fair advertising; to the exercise of business practices according to principles of good faith, fairness, and loyalty; etc. Ilaria Pagni, "La Class action riformata - L'azione inibitoria collettiva" (2019) 10 Giur It 2297.

[259] Tedoldi & Sacchetto, *supra* note 257 at para 3.

Consumers' representative actions[260] are available to public or private consumer representative bodies and allow for restraining or compensatory measures against professional or business practices harmful to multiple consumers.[261] Standing is limited to organizations listed in a public registry and dedicated to consumer advocacy.[262] Unlike actions for injunctive relief, these are brought on behalf of identified groups of consumers, resembling class actions.[263] When inhibitory relief is sought, the interest protected is unitary, representing the collective interests of the consumer group. Conversely, compensatory actions protected the aggregate individual homogeneous interests of consumers.[264]

These examples[265] show that, in certain cases, the Italian legal system recognises the legal relevance of collective interests and affords them protection through representative entities, potentially paving the way to extending similar protection to stakeholder communities hurt by corporate activity. Particularly, consumer representative actions show that, under Italian law, stakeholder groups harmed by a corporation's conduct can–though still only to a limited extent–seek collective redress against that conduct. The examples above also seem to suggest that direct

[260] The legislation on consumer representative actions can be seen as an evolution of class actions and collective actions for injunctive relief because it combines certain "special" provisions with the "general" collective protection provisions that govern these other types of actions. On one hand, this connection enhances the potential for protecting collective interests, especially considering that the EU Directive chose to exclude acts violating Directive 2004/35/CE on environmental liability from challengeable conduct. This Directive is based on the "polluter-pays" principle and focuses on the prevention and remedying of environmental damage. If the European legislation had included violations of this Directive, it would have allowed consumer representatives to seek inhibitory and compensatory measures for environmental harm caused by business activity. Refer to EU, *Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage*, [2004] OJ L 143/56.

[261] For a comparative study between consumer representative actions, class actions and collective actions in Italy refer to Giovanni De Cristofaro, "Le «azioni rappresentative» di cui agli artt. 140- ter ss. c.cons.: ambito di applicazione, legittimazione ad agire e rapporti con la disciplina generale delle azioni di classe di cui agli artt. 840- bis ss. c.p.c." (2024) 1 NLCC 1–32.

[262] Arts 140 quarter and 140 septies, para 8, letter f) Consumer Code (Italy).

[263] Art 140 ter, para 1, letter e) and 140 septies, para 5 Consumer Code (Italy).

[264] At least, this is the interpretation of the notion of "consumers' homogeneous interests" as included in Art 140 septies, para 8, letter c) Consumer Code (Italy) provided by De Cristofaro, "Le «azioni rappresentative» di cui agli artt. 140- ter ss. c.cons.", *supra* note 261 at para 3.4. The difference between the two types of relief lies in the content of the obligation requested from the defendant: in the case of inhibitory relief, the obligation is the same as that which the defendant already had, while in the case of compensatory relief, it is a different obligation from the original one, consisting of a monetary payment or an obligation to take action to remedy the damage caused.

[265] While these examples belong to private law, similar solutions have been adopted also in administrative law. Italian administrative jurisprudence has a longstanding tradition of recognizing direct community actions, tracing back to the *Italia Nostra* case in 1973. In that case, the Consiglio di Stato (Italy's highest administrative court) upheld the standing of an association dedicated to protecting Italy's historical, artistic, and natural heritage to challenge a governmental decision permitting road construction in the Trentino region. The court rejected the traditional view that only citizens protecting their personal interests could have standing. See Cappelletti, *supra* note 249 at 392–393. Since then, administrative courts have expanded standing to environmental associations to challenge public authority decisions on environmental grounds; see Andrea Quaranta, "Qual è il pensiero della giurisprudenza in merito alla legittimazione dei comitati per la difesa dell'ambiente" (2022) 7 Ambiente & Sviluppo 529. This evolution confirms that, that even within administrative law, traditionally concerned with citizen-state relationship, private entities may be recognised as legitimate actors in the pursuit of the common good.

collective trials may be effective mechanisms for protecting community interests, as they reflect the idea of such interests belonging to a group as a whole, rather than fragmenting them into a set of individual claims.

However, practical limitations remain. First, group standing requires that all group members share identical interests and suffer the same type of loss, whereas other mechanisms–like class actions–permit collective redress for similar, though not identical claims. This stricter requirement may reduce the attractiveness and applicability of direct actions. Indeed, class actions in North America emerged exactly to address this constraint. Second, direct actions are currently limited to specific areas, such as consumer protection, with the sole exception of actions for injunctive relief. However, no general legal mechanism currently allows groups to seek compensation for collective harm. Overcoming this gap would require the creation of a new form of legal action, which poses both political and technical challenges. Finally, collective action problems may also arise, further complicating the effective use of direct collective actions.[266]

7. Chapter Summary

This chapter has addressed the theoretical foundation of this research. It views neoliberalism as a key contributor to Italian corporate law and scholarship blindness to the protection of affected communities by corporate activity and their consideration in corporate governance. Neoliberalism has operated mainly during the last decades of the 20th century, finding a favourable ground in contractarian theories of the firm, which have been largely majoritarian in Italy since the 1950s, already seeing shareholders (and their interests) as the core of the corporation. A different, more stakeholder-sensitive approach based on the ToC has been proposed as a basis for this research, as well as a new possible theoretical approach to promote the protection of stakeholder communities in corporate governance.

With this proposal, I have not rejected the contractarian reading of the corporation, for which the corporation has a contractual basis and that sees shareholders as playing a key role in its existence, nor I have challenged the proprietary basis of corporate law, which sees shareholders as residual claimants on corporate assets and supports their importance in governance as financiers of the entity. Rather, I aimed to offer a complementary perspective on current corporate law that conceives of the natural resources affected by corporate activity as commons, thereby deriving important implications for corporate governance.

Unlike the few previous scholarly attempts to integrate the commons into corporate theory, this chapter does not use the commons to describe corporate structure and ownership allocation in it. Instead, it aims to expand corporate accountability for harm caused to natural resources that also serve to fulfil people's fundamental rights. By advancing a ToC reading of corporate law, this chapter has highlighted that communities can and should be recognised as relevant corporate

[266] Collective action problems occur when there is a conflict within a group between individual short-term interests and the collective long-term interest. These issues have been extensively studied in economic literature, beginning with Mancur Olson, *The logic of collective action* (Cambridge, MA: Harvard University Press, 1965), but they fall outside the scope of this dissertation.

stakeholders with legally relevant interests that should be taken into account by corporations. Importantly, my approach focuses only on communities connected to natural commons that are affected by corporate activities; communities lacking these features, like virtual communities, are excluded from this work. The next chapter further discusses and clarifies the concept of stakeholder community used in this research.

Chapter 3: The Community as a Corporate Stakeholder

1. Introduction

This chapter delves deeper into the concept of communities as corporate stakeholders.[1] Existing legal definitions of community in Italy vary by context and purpose. However, no definition currently addresses communities as corporate stakeholders. Although the concept appears in legislation on corporate sustainability–as is the case with the EU Corporate Sustainability Due Diligence Directive (CS3D), which includes communities among corporate stakeholders[2]–it remains undefined. This gap creates uncertainty about the scope of this concept and may generate inconsistencies in interpreting and applying protective legislation and elaborating proposals to enhance such protection.

This chapter uses three features to identify communities as corporate stakeholders for the purpose of this research: (i) a territorial dimension and connection to natural commons located in such territory, (ii) a shared interest in protecting the commons to which they are connected, and (iii) democratic governance.[3] The first feature requires the presence of a link between the community and one or more natural commons located within a defined territory, as this is what establishes a community's status as a "stakeholder" in relation to a corporation. Connection with the territory and its natural resources may arise from various factors, such as residence or work, and influences both the geographical extent of the community and its interests.[4] Indeed, content-wise, the interest of stakeholder community can be understood as the protection of the "collective destination" of the natural resources to which it is connected. By this formula, I mean that the community has a shared interest in safeguarding the enduring availability of these resources. Finally, democratic governance here indicates broad participation of members in decision-making, participation in the election of the organization's leaders, and the opportunity for members to be elected to those positions.

These features align with the foundational theory underpinning this research and address the practical need for a workable definition of communities that would benefit from the interpretation of the directors' duty of care that this work proposes.

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[1] Notably, the definition of community as a corporate stakeholder outlined in this Chapter is a "workable" definition–one that is functional for the purposes of the research conducted. It does not aim to be a final definition that determines, in every case, which community is legally relevant or deserves legal protection for the harm suffered.

[2] EU, *Directive 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859* [CS3D], [2024] OJ L 2024/1760, Art 3(n). The Directive defines stakeholders as groups "*whose rights or interests are or could be affected* by the products, services and operations of the company, its subsidiaries and its business partners." [Emphasis added]

[3] These features also resemble the three key characteristics used in sociology to define a community: geographical dimension, plurality of members, and group identity; refer to George A Hillery, "Definitions of Community: Areas of Agreement" (1995) 20:1 Rural sociology 111–123.

[4] For an understanding of how a community's connection to its territory relates to its interests within the urban context, refer to Marco Calabrò, "Participatory Urban Regeneration Models: The Inclusive Dimension of Sustainability" in Alessio Bartolacelli, ed, *The Prism of Sustainability. Multidisciplinary Profiles; Law, Economics and Ethics* (Napoli: Edizioni Scientifiche Italiane, 2025) 307.

Theoretically, territorial dimension and collective interest in protecting the commons reflect the ToC's emphasis on the interdependence between people and shared resources. This relationship arises from the recognition that commons permit people to exercise fundamental rights, thereby justifying claims for their protection and preservation of their social function against the overexploitation and degradation fostered under the mainstream neoliberal interpretation of corporate law, as discussed above. Communities bound to a territory and its resources, and committed to their protection, are therefore relevant under the ToC framework as they embody values of collaboration and sharing that are overlooked in the neoliberal approach this Theory aims to counterbalance.[5] Additionally, democratic governance aligns with ToC's personalist values, which view the *person*–not to be confused with the *individual*–as the cornerstone of Italian legal system and Constitutional framework, thereby countering the distribution of decision making powers on economic bases (as in the case, e.g., of corporate shareholder).[6]

Practically, territorial dimension and connection with local commons would permit an easier identification of stakeholder communities in the real world due to both the legal authority that typically derives from longstanding presence in a territory, and the consequent physical nature of communities, which would exist in the real world, rather than being virtual (e.g., communities existing only in the cyberspace). Furthermore, communities' interest in protecting the resources to which they are connected would give them a collective identity and homogenize the individual interests of members, facilitating their identification and recognition by corporate directors as beneficiaries of their protective obligations. Finally, democratic governance may ensure the community's representativeness of multiple individual interests, providing legitimacy to community claims upon commons and against corporations affecting them, and reinforcing community relevance for corporate consideration. For the purpose of this study, communities are not required to take any specific legal form to be considered stakeholders. However, communities that take forms inherently incompatible with one or more of these criteria–such as business corporations, in which participation is generally based on monetary investments–are automatically excluded. Also, other communities lacking democratic governance are excluded, such those living near a factory and who have no community structure or ties other than their shared proximity and vulnerability. While I acknowledge this limitation is significant, as many local

[5] This work focuses solely on the adverse effects of corporations' activities, excluding subsidiaries and business partners. However, if a company is held liable for harm caused to a community and is part of a group or chain of activities covered by the CS3D, the standard rules outlined in the applicable legislation will typically apply. The adverse socio-environmental effects of corporate products are also outside the scope of this work, as these are typically addressed by consumer law.

[6] Sociologists view the presence of diverse members as an ontological aspect of communities that does not necessarily undermine the external unity of the group; refer to Hillery, "Definitions of Community", *supra* note 3. Unlike sociologists, jurists tend to view the presence of multiple members within a group as problematic because diversity can lead to internal conflicts among members, making community identification and action problematic. For instance, Italian administrative jurisprudence interprets collective interest as the interest of all members of a category considered as a whole, excluding collective standing in situations where the claim for protection pertains only to certain members of the community; refer to Gabriele Serra, "Legittimazione ad agire degli enti esponenziali in ipotesi di conflitto di interessi – Il commento" (2015) 5 Urbanistica e appalti 595–602. An organized structure can help address these challenges by providing a legal form that enhances the group's external cohesion and facilitates its interactions with third parties–e.g., by identifying community's representatives–as well as establishing rules for internal organization that effectively manage potential conflicts of interest among members.

communities have these characteristics, the degree of democratic governance required for stakeholder communities under the proposed approach is quite low, making it relatively easy to meet this standard.

Using that the proposed criteria as a workable definition of communities as corporate stakeholders, this chapter analyzes six legally recognized community models from Italy and Canada to assess the extent to which these groups align with the essential characteristics identified, and can thus be regarded as real-world examples of appropriate beneficiaries of the proposal advanced in this research. In Italy, selected models include Renewable Energy Communities (CERs) (including Citizen Energy Communities (CECs)), Community Cooperatives (CCs) and communities with traditional land rights. In Canada, selected models include British Columbia's Community Contribution Corporations (C3s), Nova Scotia's Community Interest Companies (CICs), and Indigenous communities. In all models, communities occupy a central position in their establishment and/or activities. These models also involve some form of connection between communities and businesses–whether through direct entrepreneurial engagement of interaction with businesses operating in their territory. These elements make them particularly relevant for this analysis.

2. Analyzed Community Models: Key Characteristics

Before moving to the analysis, the main characteristics and legal basis of the selected models are briefly outlined.

Renewable Energy Communities (CERs) and Community Cooperatives (CCs) are two legal entity models introduced in Italy to support community welfare.[7] In particular, CERs[8] are groups of electricity end customers who organize themselves to collectively generate and share renewable energy, thereby focusing on environmental, economic, and social benefits for their members.[9] CERs can take various legal forms, both profit-seeking and non-profit[10]–including associations, cooperatives (including CCs),[11] consortia, partnerships, non-profit organizations, benefit corporations, private companies, or temporary business associations. However, CERs must primarily aim to provide environmental, economic, or social benefits for their shareholders, members, or for the local areas where they operate, rather than focusing on financial gains.[12]

[7] See also Chapter 2, subsection 4.2.2.

[8] Literature focusing on this model includes, among others, Nicolò Rossetto, "Le comunità di energia rinnovabile per una transizione energetica più partecipata e sostenibile" in *Rapporto 2022* (Bologna: Il Mulino, 2022).

[9] *decreto legislativo 8 novembre 2021, n.* 199 [*d.lgs. 199/2021*], 8 November 2021, 199.

[10] Italian law simply describes CERs as autonomous legal entities; see *d.lgs. 199/2021*, Art 31. Transitional arrangements established by ARERA in 2020, in force until February 2023, suggest that CERs can be established in any existing legal form under private law.

[11] Autorità di Regolazione per Energia Reti e Ambiente (ARERA), *318/2020/R/eel Regolazione delle partite economiche relative all'energia elettrica condivisa da un gruppo di autoconsumatori di energia rinnovabile che agiscono collettivamente in edifici e condomini oppure condivisa in una comunità di energia rinnovabile* (4 August 2020), online: <https://www.arera.it/it/docs/20/318-20.htm>. The provision aligns with EU, *Directive 2018/2001*, recital 71. The possibility of using the community cooperative model for CERs has been confirmed in two regional laws governing CCs (Emilia Romagna and Piedmont).

[12] *d. lgs. 199/2021*, Art 31, para 1, letter a).

Similarly, Citizen Energy Communities (CECs) are citizen-led entities created to promote the clean energy transition and advance energy efficiency within local communities. Like CERS, CECs can be private law entities established in any legal form, provided that their articles of association comply with relevant legislative requirements.[13] Due to their similar objectives and characteristics, I will primarily focus on CERs, highlighting relevant differences with CECs when necessary.

Conversely, CCs are resident-led organizations primarily designed to address local communities' social needs. These include, for instance, implementing cultural and recreational activities, restoring and managing environmental, cultural, or historical assets for community use, providing local services–such as setting up and managing a local public library–while promoting the integration of vulnerable segments of the local population. Additionally, ecological goals could also be pursued–such as cleaning up littered areas.[14] Legally, CCs operate as cooperatives.

Italian communities with traditional land rights include rural communities with collective property rights (*assetti fondiari collettivi*) or rights of access and use of land (*usi civici*).[15] *Assetti fondiari collettivi* refer to cases in which the land belongs to the community (*iura in re propria*). Specifically, the land is shared by the inhabitants of a given municipality (*Comune*) or district within the municipality (*frazione*) in the form of communion without quotas.[16] Conversely, *usi civici* refer to collective rights pertaining to third-party privately owned land (*iura in re aliena*). These rights grant communities of a certain territory the right to enjoy the land, including the right to carry on certain forestry or pastoral activities upon it (such as the right to harvest wood,

[13] See *d. lgs. 210/2021*, Arts 3, para 3, letter c) and 14, para 6, letter d); EU, *Directive 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU*, [2019] OJ L 158/125, Art 2 (11)(a) and (b); recital 43 provides some illustrative examples of potential legal structures, such as an association, a cooperative, a partnership, a non-profit organization, or a small or medium-sized enterprise.

[14] The environmental goals of CCs are also established in several regional laws. For example, refer to Emilia Romagna regulation, Art 2, available in Table 1. Specifically, that of "CC" is a label. See *Disciplina delle cooperative di comunità* C. 4588 (13 July 2017), Art 1. A map of CCs in Italy is available at https://www.aiccon.it/il-nuovo-portale-delle-cooperative-di-comunita/?fbclid=IwZXh0bgNhZW0CMTAAAR12ypJIAZ5E9VUG8i3Hkq_NSlV5rSiAuCi9J-e69aIHbqVFG8Sx8hEY6jA_aem_WW1T9qoFH8wFiSYChxubjg.

[15] See also Chapter 2, subsection 5.2. Notably, different terminology and classifications have been used by scholars to discuss the experiences of traditional collective land rights in Italy. The separation between *assetti fondiari collettivi* and *usi civici* was upheld by the Corte di Cassazione, 10 October 2018, Civil Section II, No 24978 (Italy).

[16] Giuseppe Di Genio, *Gli usi civici nel quadro costituzionale (alla luce della legge n.168 del 20 novembre 2017)* (Torino: G. Giappichelli, 2019) at 270. Collective landholding experiences existing across Italian regions can be "open" or "close" depending on the extent of land accessibility for residents. In open forms, land ownership and use are shared by all residents of a municipality or district, identified by their registration in the civil registry (*anagrafe*). Conversely, in close forms, land ownership and use are reserved for the descendants of original families in a territory, who inherit their status. Other peculiar types of collective landholdings include *Masi chiusi* (closed farmstead), "Agricultural universities" in central Italy and *Tratturi* in southern Italy. For further information about the different types of collective landsholding see Fabrizio Marinelli, *Un'altra proprietà: usi civici, assetti fondiari collettivi, beni comuni*, 2nd edn (Pisa: Pacini giuridica, 2018) at 147–156.

graze livestock, and draw water).[17] These communities have a peculiar legal status conferred by law, which provides them with legal personhood.

C3s and CICs are corporate models available under British Columbia and Nova Scotia provincial legislation. These models are characterised by a hybrid purpose, meaning they must pursue a "community goal" in addition to profit. Legally, these entities take the form of corporations under Canadian law and provincial legislation; however, they are governed by specific rules in addition to provisions applicable to all corporations.

Finally, I refer to Canadian Indigenous communities to indicate, collectively, First Nation, Inuit, and Métis peoples residing in present-day Canada.[18] Similar to Italian communities with traditional land rights, Canadian Indigenous communities have a peculiar legal status recognized by ad hoc laws.

3. The 'Local' Community

The first proposed defining feature of stakeholder community is its territorial dimension, including a connection with local natural commons. This connection may arise from various factors, such as residence or work, and determines both the geographical extent of the community and its interests. In general, the analyzed models exhibit a territorial dimension, though its strength varies across models–e.g., such a dimension is weak and hardly identifiable in Canadian C3s and CICs. However, not all community models show a connection with commons located in their territory.

3.1. Longstanding Connection with the Land

A strong territorial dimension emerges in Canadian Indigenous communities and Italian communities with collective land rights, where the bond with land underpins both their legal authority within the respective legal frameworks and their external recognizability as communities. In both cases, this dimension is shaped by their connection to the sourrounding natural commons, in line with the analyzed defining criterion of stakeholder communities.

3.1.1. Canadian Indigenous Communities

Canadian Indigenous communities' connection to the land is based on their history, geography, and culture.[19] This connection is fundamental not only for the preservation of Indigenous traditions[20] but also for Indigenous self-determination, understood here as the right of

[17] *Usi civici* is sometimes also used to refer globally to traditional collective land rights that exist across Italian regions. This alternative use derives from the terminology used by *legge 16 giugno 1927, n. 1766* [*legge 1766/1927*], 16 June 1927, 1766. However, this broader meaning is unproper and will not be used in this research.

[18] Aligning with *The Constitution Act*, 1982, s 35(2). Nonetheless, I recognize the diverse and unique nature of Indigenous peoples in Canada.

[19] It should be noted that connection to the land in Indigenous traditions generally involves personal relationships with all living and nonliving things, not only with the land.

[20] Grant Christensen, "Indigenous Perspectives on Corporate Governance" (2021) 23:4 U Penn J Bus L 902–954 at 919; UN, *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* (2007) arts 25, 26 and 29.

Indigenous peoples to determine their own identity.[21] One aspect of self-determination is the affirmation of Indigenous communities' sovereignty and legal authority on ancestral land as autonomous from Canadian law.[22]

Indigenous communities' connection to land was first considered by Canadian jurisprudence and scholarship in the broader context of colonialism and aboriginal land claims to identify Indigenous property rights.[23] Within this context, the intensity of Indigenous communities' connection to territory dictated the scope of recognized Indigenous land rights, which range from occupation and use rights (Aboriginal rights) to rights akin to full property (Aboriginal title). Long-standing land occupation and use are essential elements to recognise Aboriginal title over the land, as established in the Supreme Court of Canada's case law.[24]

Aboriginal title are a specific type of Aboriginal right on the land. They differ from other Aboriginal rights as they arise when a group's connection to a piece of land is of central significance to their

[21] While UN, *supra* note 20 art 33 explicitly mentions this right in relation to Indigenous 'customs and traditions,' there is a substantial body of literature across multiple fields of knowledge that emphasizes the significance of the Indigenous relationship with the land as a determinant of their cultural identity and well-being. In Canada, for example, see Francesca Mussi, "Land and storytelling: Indigenous pathways towards healing, spiritual regeneration, and resurgence" (2023) 58:3 The Journal of Commonwealth Literature 660–676 within social sciences; Krista Stelkia et al, "Letsemot, "Togetherness": Exploring How Connection to Land, Water, and Territory Influences Health and Wellness with First Nations Knowledge Keepers and Youth in the Fraser Salish Region of British Columbia" (2021) 16:2 International Journal of Indigenous Health, online: <https://jps.library.utoronto.ca/index.php/ijih/article/view/33206> within health sciences.

[22] From an Indigenous perspective, the connection with the ancestral land has additional meanings–historical, geographical, and cultural–which contribute to the community's identification with the land (also referred to as "landed narrative"). As such, Indigenous communities use this connection to identify themselves. For instance, the Unilateral Consultation Protocol (UCP)–i.e., a document issued by the Indigenous community to internally regulate the consultation process with the Crown under its duty to consult–by the *Nishnawbe Aski Nation* reports: "The Aboriginal people of the Treaties No. 9 and No. 5 area are known as the Nishnawbe Aski. The name is translated as "the people and the land," which reflects the special relationship the Nishnawbe Aski people have with the land. This relationship is sacred to our people and has been present since time immemorial and will be for future generations." Nishnawbe Aski Nation, *Nishnawbe Aski Nation Handbook on Consultation in Natural Resource Development* (2007).

[23] Relevant jurisprudence includes *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*]; *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257 [*Tsilhqot'in*]. Canadian scholarly contributions on the topic include Angela Cameron, Sari Graben & Val Napoleon, *Creating Indigenous property: power, rights, and relationships* (Toronto, ON: University of Toronto Press, 2020); Douglas Sanderson & Amitpal C Singh, "Why Is Aboriginal Title Property if It Looks Like Sovereignty?" (2021) 34:2 Can J Law Jurisprud 417–460 advocating for a critical reading of Indigenous property rights. In Italy, see Raffaele Volante, "La proprietà aborigena tra esclusività e sovranità" (2016) 45 Quaderni Fiorentini 717–748. For a scholarly analysis of the legal regulation of indigenous spaces in Canada, refer to John Borrows, "Canada's Colonial Constitution" in *The right relationship: reimagining the implementation of historical treaties* (Toronto, ON: University of Toronto Press, 2017) 17 for an indigenous perspective, and Ken Coates & Greg Poelzer, "Re-imagining indigenous space: the law, constitution and the evolution of aboriginal property and resource rights in Canada" in *Land, Indigenous Peoples and Conflict* (Milton, UK: Taylor & Francis Group, 2015) 60.

[24] *Delgamuukw*, *supra* note 23 at paras 143–159; *Tsilhqot'in*, *supra* note 23 at para 50.

distinctive culture.[25] Aboriginal title is inalienable,[26] has a specific legal source,[27] and communal nature.[28] Unlike title, other Aboriginal rights encompass "practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right" which may or may not be specific to a particular site.[29] While a connection to the land is not necessarily required or as strong for Aboriginal rights as it is for Aboriginal title, it becomes more relevant for site-specific rights, which can only be exercised on a specific tract of land.[30] This is especially important for nomadic Indigenous communities, whose settlements may change with the seasons and changing circumstances, but who still depend on the land and its resources for their physical and cultural survival.[31]

Furthermore, Indigenous land rights also derive from treaties signed by Indigenous communities with Canada (or Britain). These are typically referred to as Treaty rights to differentiate them from Aboriginal rights. Treaties are also important in determining the territories where Indigenous rights are exercised, and therefore consultation is required. These territories are referred to as 'treaty territories'. [32] Additionally, Indigenous communities have rights also in relation to 'reserves', which indicate Crown land 'set apart' for the use and benefit of selected Indigenous 'bands', as established in the Indian Act at sec 18(1) and following. These lands can be used for a broad variety of purposes that aim to fulfill the present-day needs of Indigenous communities.

3.1.2. Italian Communities with Collective Land Rights

Similar to Canadian Indigenous communities, Italian experiences of *assetti fondiari collettivi* and *usi civici* show a strong territorial dimension and a deep-rooted connection to the land where rural communities have lived for centuries and upon which they have depended for their essential sustenance. After a period of decline, this connection has been rediscovered and

[25] *Delgamuukw*, *supra* note 23 at para 137. Aboriginal titles encompass 'the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures' and 'those protected uses must not be irreconcilable with the nature of the group's attachment to that land', see *ibid* at para 117.

[26] *Ibid* at para 113 ['lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown and, as a result, is inalienable to third parties'].

[27] *Ibid* at para 114 [the Royal Proclamation of 1763, which recognized titles arising from the prior occupation of Canada by Aboriginal peoples].

[28] *Ibid* at para 115 ['aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community'].

[29] *Ibid* at para 138. The identification of these rights differs from the Aboriginal title test in two ways. First, it requires that the land be integral to the claimants' distinctive culture, whereas for titles, this requirement is subsumed under the requirement of occupancy. Second, the time of identification for Aboriginal rights is the time of first contact, whereas for Aboriginal title, it is the time when the Crown asserted sovereignty over the land; see *ibid* at para 142.

[30] *Ibid*.

[31] *Ibid* at para 139.

[32] Refer to *Ibid* at para 121.

appreciated not only for its historical role as a means of livelihood but also for its contemporary environmental and cultural significance.[33]

In 2017, Italy enacted legislation recognizing the role of traditional collective land rights for the protection of the environment and landscape and introduced restrictions on the alternation of their appearance and destination.[34] This legislation also modified collective lands' management regime, which was until then restricted and mostly attributed to public bodies (mainly municipalities), granting ample space to communities.[35] Although some exceptions occurred,[36] this recognition highlighted the relevance of collective land for meeting local communities' needs, from economic to environmental and social ones.[37]

The 2017 legislation also provides elements to further confirm the anticipated practical relevance of the territorial dimension in enhancing a community's legal authority and external perceptibility. It expressly defines 'collective domains' as 'primary legal system of the original communities',[38] which represents an important recognition of a third property status, distinct from private and public property, directly attributed to the community itself. Furthermore, this law grants these communities self-regulatory powers, enabling them to determine the structure, membership, functions and competences of their representative entities, in compliance with the

[33] Historically, collective rights in Italy have long been opposed by law. Specifically, *legge 1766/1927*–still in force–started a process of dismissal of collective land rights, which were either assigned to the community of users or to a private owner, in both cases upon the payment of a sum of money. This law also prioritized the public management of land (by municipalities or districts within them) to community management (trough private entities created by community members); see *legge 1766/1927,* Art 26, para 2. Various factors influences collective land dismissal, both political–under the Fascist regime, collective rights were expressions of community autonomy and independence from central power, and therefore had to be limited (for this position, see Marinelli, *supra* note 16 at 41)–and legal–shared enjoyment by the owner and communities was considered problematic from a legal standpoint, and its substitution with "full" properties (*piene proprietà*) was preferred (for this position, Vincenzo Cerulli Irelli, *Proprietà pubblica e diritti collettivi*, 42 (Padova: CEDAM, 1983) Pubblicazioni dell'Istituto di Diritto Pubblico della Facoltà di Giurisprudenza Università degli Studi di Roma 3 at 223–224; 228–229). For further insights on Italian collettive land rights, see Paolo Grossi, *Un altro modo di possedere* (Milano: Giuffrè, 1977) at 301 and ff; Cerulli Irelli, *supra* at 219.

[34] *legge 20 novembre 2017, n. 168* [*legge 168/2017*], 20 November 2017, 168, Art 3, paras 3, 6. See also Di Genio, *supra* note 16 at 174 ff. Such restriction also applies to expropriation for public utility as established by *d.P.R. 8 giugno 2001, n. 327,* 8 June 2001, Art 4, para 1-bis.

[35] *legge 168/2017*, Arts 1-2.

[36] E.g., *proposta di legge n. 436 (presentata il 9 maggio 1996); proposta di legge n. 1071 (presetata il 20 maggio 1996)*; *proposta di legge n. 1510 (presentata il 13 giugno 1996)*; *legge 28 febbraio 1985, n. 47*, 28 February 1985*,* 47, Art 32, allowing amnesty for alterations carried out in violation of land use restrictions when the public bodies owning the land encumbered by rights of civic use are willing to grant its collective use, even if under a fee. This incentivizes private appropriation of land for building purposes, undermining its intended forest use; refer to Franco Mastragostino, "La tutela giurisdizionale dei demani civici e delle proprietà collettive" in Pietro Nervi, ed, *I demani civici e le proprietà collettive Un diverso modo di possedere, un diverso modo di gestire Atti della II Riunione Scientifica (Trento, 7-8 novembre 1996)* (Padova: CEDAM, 1998) 31 at 36–37; Luciano Orusa, "Note sui demani civici e le proprietà collettive" in Pietro Nervi, ed, *I demani civici e le proprietà collettive Un diverso modo di possedere, un diverso modo di gestire Atti della II Riunione Scientifica (Trento, 7-8 novembre 1996)* (Padova: CEDAM, 1998) 115 at 112.

[37] The list of interests these resources can fulfill is open-ended and develops in relation to the actual needs of the people; refer to Orusa, *supra* note 36 at 119.

[38] *legge 168/2017*, Art 1, para 1.

Constitution and their local customs.[39] Finally, the 2017 legislation suggests that the community's connection with their land allows it to operate autonomously from public administration. This autonomy permits communities regulate themselves according to their own primary legal order, rather than through government intervention,[40] thus reinforcing their distinct identity as separate groups from public entities.

3.2. Community Benefits and Access to Favourable Norms

Other community models also display a territorial dimension and a connection with local natural commons, although this link is not rooted in historical or cultural factors but rather in technical, social, or economic reasons. Such a territorial dimension generally permits access to favourable regulatory frameworks designed to promote or facilitate their activities. At the same time, it may also align with the defining feature of stakeholder communities identified in this study.

3.2.1. Italian CERs and CCs

Both CERs and CCs show a territorial dimension and, in different ways, a connection between communities and local natural commons.

In CERs, the territorial dimension is clearly required by law and is functional to self-producing and sharing electricity from renewables. To this end, the law requires that control powers within the CER can be attributed exclusively to private individuals or entities that 'are located in the same municipalities as the energy sharing facilities'.[41] Other provisions also require presence within, or operation in, a specific territory. For example, energy produced by a CER can only be shared *within the same electricity market zone*,[42] which correspond to a specific geographical area including one or more Italian Regions.[43]

If renewable energy is considered a commons, these communities satisfy the defining feature discussed here. Energy, including its renewable subtype, can arguably be regarded as a commons, as it represents an essential resource enabling people to maintain adequate living standards and access to basic services, virtually all of which now rely on electricity. Moreover, the natural resources enabling renewable energy generation, such as sunlight in the case of solar panels (the most common form of renewable energy produced by CERs in Italy) can also be seen as commons. They not only allow energy production, thus contributing to the collective benefit mentioned above, but are inherently vital to human life and well-being. If these arguments are persuasive, CERs can be considered to show a connection with local natural commons.

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[39] Raffaele Volante, "Un terzo ordinamento civile della proprietà. La L. 20 Novembre 2017, n. 168, in materia di domini collettivi" (2018) 5 NLCC 1067.
[40] *Ibid*.
[41] *d.lgs. 199/2021*, Art 31, para 1, letter b). This provision is absent for CECs: *d.lgs. 210/2021*, Art 3, para 3, letter b).
[42] *d.lgs. 199/2021*, Art 31, para 2, letter c). Electricity market zones are established by the energy market administrator (*Gestore Mercati Energetici*) and are published online; see https://www.mercatoelettrico.org/it/mercati/mercatoelettrico/Zone.aspx
[43] For example, the north-center zone includes the regions of Tuscany and Marche.

A territorial dimension also characterises CCs, as reflected in several legal requirements summarized in Table 1. First, regional laws governing CCs typically mandate that their articles of association specify the territorial scope of operation and membership criteria.[44] Second, the notion of a CC's "relevant community" is usually defined by law with reference to the geographical boundaries of one or more municipalities, specific areas within them, or territories within the Region.[45] Third, a significant portion of CCs' members must be linked to this territory– either through residence (for natural persons), a registered office (for legal persons), or other form of regular affiliation.[46] Fourth, both the registered office and the cooperatives' activities must be located or carried out within the same territory.[47] Overall, the CC model makes a link between the cooperative, its members, and the territory necessary. Unsurprisingly, this feature has been recognized as central to CCs in legislative proposals aimed at introducing a national framework for these entities.[48]

Is the territorial dimension of CCs shaped by their connection to the natural commons within their territories? As noted, CCs are primarily designed to generate community-wide social benefits. Consequently, their territorial dimension primarily serves to define the community eligible to participate in and benefit from their activities. While this is true for all CCs, many regional provisions regulating these entities explicitly reference their connection to local commons, which may be environmental or include other types of commons (e.g., cultural or historical). This is evident in provisions establishing CCs' objectives or purposes, as reported in Table 2. For instance, they refer to the *management of common goods*, such as *landscape* or *other environmental good*s; the *enhancement or recovery of environmental assets presents in the community*; and the promotion of *well-being among community members facing environmental challenges*. Therefore, although the CC model does not necessarily entail a link between local communities and natural commons in their territory, it allows for such a connection to exist and contribute to shaping the territorial dimension of these groups.

3.2.2. Canadian CICs and C3s

Unlike the previous models, Canadian hybrid corporate models[49] reveal only a weak territorial dimension. Under C3s legislation, beneficiary communities are defined as either "society at large"

[44] Campania, Emilia Romagna, Lazio, Piedmont, Trentino Alto Adige, Veneto*. Regions marked with an asterisk currently lack existing legislation regarding CC, but proposed legislation has been submitted for consideration.
[45] Abruzzo, Apulia, Basilicata, Calabria, Molise*, Sardinia, Sicily.
[46] Apulia, Basilicata, Campania, Emilia Romagna, Friuli Venezia Giulia*, Lazio, Liguria, Molise*, Piedmont, Sardinia, Sicily, Tuscany, Trentino Alto Adige, Veneto*.
[47] Campania, Emilia Romagna, Marche*, Piedmont, Umbria, Veneto*.
[48] See Giovanni Capo, "Le cooperative di comunità" (2021) 4 Giurisprudenza Commerciale 616–632 at 229.
[49] These models are based on the Community Interest Company (CIC) model introduced in the UK in 2005. See *The Community Interest Company Regulations 2005*, 1788 (2005); J S Liptrap, "British social enterprise law" (2021) 21:2 Journal of Corporate Law Studies 595–630. Similar models have been introduced in the Solomon Islands and discussed in Australia. See Vijaya Nagarajan & Terry Reid, "The Community Company as a Vehicle for Sustainability in Solomon Islands" in Beate Sjåfjell & Christopher M Bruner, eds, *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* Cambridge Law Handbooks (Cambridge: Cambridge University Press, 2019) 402; Employee Ownership Australia, "A Community Interest Company structure in Australia - Employee Ownership

or "a segment of society" broader than the persons related to the company.[50] However, the law does not specify their scope, leaving each company to define–typically very broadly–the beneficiary community in its articles of association. The legislation imposes only minimal constraints to the scope of beneficiary communities by prohibiting the company from limiting benefits *solely* to the group of people related to the company.[51] Consequently, the range of possible beneficiary communities could extend from the population of an entire country[52] to as small a group as members of a single family or the employees of a particular business.[53] Additionally, the fact that C3s are incorporated under British Columbia law does not clarify the geographical boundaries of beneficiary communities.[54]

To date, no literature has fully addressed the scope and types of C3 beneficiary communities. To the best of my knowledge, only one commentator has referred to this issue to a limited extent, suggesting that, in the absence of legal guidance, the notion of "society at large" should be interpreted in its ordinary meaning, that is, a community of people belonging to a state, nation, or territory, and sharing a common culture, traditions, and interests.[55] Under this reading, a bond–though rather loose–would still exist between the C3 beneficiary community and territory.

Similar considerations apply to Nova Scotia's CIC model, as its governing legislation largely resembles C3 legislation.[56] Unlike C3s, however, the CIC Act assigns the responsibility for overseeing company documents to the Registrar of Community Interest Companies, both at incorporation and throughout the company's existence.[57] Yet, there is no evidence that the

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Australia" (8 September 2015), online: <https://employeeownership.com.au/resources-2/a-community-interest-company-structure-in-australia/>; Bronwen Morgan, "Legal models beyond the corporation in Australia: plugging a gap or weaving a tapestry?" (2018) 14:2 Social Enterprise Journal 180–193.

[50] According to the BCBCA, related persons include directors, shareholders, associates, or affiliates of the company, as well as directors and shareholders of another related company, or associates or affiliates of any of the above individuals. British Columbia, *Business Corporations Act*, SBC 2002, C 57, s 51.91(2).

[51] The restriction on people related to the company is therefore quite weak. See Kathryn Chan, "Not-for-profit organizations, public law and private law" in *Research handbook on not-for-profit law* (Cheltenham: Elgar, 2018) 211 at 229.

[52] Such as in the case of C3s set up by Indigenous bands and aimed at advancing economic reconciliation throughout Canadian society; see Frankie Young, "Indigenous Economic Development and Sustainability: Maintaining the Integrity of Indigenous Culture in Corporate Governance" (2021) 17:2 McGill Journal of Sustainable Development Law 149.

[53] Chan, *supra* note 51 at 229.

[54] The introduction of the hybrid corporate models in British Columbia implies that C3 companies can only be established under the corporate regulations of this province. By incorporating in this jurisdiction, businesses are permitted to operate within the province. However, this does not prohibit a C3 from seeking a license to conduct business in other provinces under the extra-provincial licensing legislation of the receiving province. Consequently, the provincial incorporation of C3s does not determine the scope of their operations or the communities they serve. Instead, incorporation signifies the governing law that applies to these entities. Similar observations can be made regarding Nova Scotia's CICs.

[55] Michael Peter Mosimann, *Corporate legal aspects of impact investments in British Columbia* University of British Columbia, 2014).

[56] Nova Scotia, *Community Interest Companies Act*, SNS 2012, C 38, s 2(1)(2), 9(1)(2); Nova Scotia, *Community Interest Companies Regulations*, NS Reg 121/2016, s 3(1) (effective June 15, 2016).

[57] *Community Interest Companies Act*, *supra* note 56, s 4(1); 5(4)(d); 6(5)(d); 7(5)(d); 25(1).

Registrar has provided additional clarity on the scope of community purpose in Nova Scotia's CICs.[58] Likewise, the lack of literature on this topic has further limited the understanding of how beneficiary communities are defined in practice and whether they have a territorial dimension.

Some guidance on the matter may come from the objectives pursued in the introduction of CICs 'to advance social, environmental or community goals'[59] and to '*empower communities to undertake initiatives that meet their needs*, enabling new partnerships and providing community organizations with access to additional sources of capital'.[60] These statements highlight the self-directed nature of community interest companies, portraying them as enterprises created *by* and *for* the community. This seems to imply that, at least in theory and without any specific legal requirements on the topic, CICs should benefit communities in the areas where they operate.

The link between C3 or CIC and a defined territory appears to be rather weak. The purposes these corporations indicate on their websites and social media, included in Tables 3 and 4, empirically support this conclusion.[61] In British Columbia, out of the 43 C3s with publicly accessible information, the majority specifically benefitted communities within Canada.[62] In Nova Scotia, all of the 9 CICs with publicly accessible information explicitly benefitted communities within Canada, with 5 of them benefiting communities within specific regions (the Atlantic regions or Nova Scotia). Furthermore, even when the corporate website or social media profile does not provide a geographical description of the beneficiary community, this does not necessarily imply the absence of a territorial dimension. In such cases, this (weak) dimension may be inferred from the corporation's activities (e.g., when these are carried out in specific areas).[63]

These remarks suggest that, with some interpretative effort, a case could be made for a territorial dimension of C3 and CIC beneficiary communities. However, additional challenges arise when one attempts to establish a connection between these communities and natural commons to assess whether they can be regarded as examples of stakeholder communities within the framework of

[58] In the UK, a similar role is carried out by the CIC Regulator, who carries out a community interest test, i.e., an assessment of the company's documents that identify the community purpose (community interest statement) and the activities intended to pursue such interests. The purpose is to ensure that they align with the legal requirements for CICs. However, the assistance provided by the CIC Regulator on filling out the application to form a CIC, as well as annual reports, does not provide additional details about the beneficiary community's scope and features. Please refer to the document samples available at <https://www.gov.uk/government/publications/form-cic36-application-to-form-a-community-interest-company> and <https://www.gov.uk/government/publications/form-cic34-community-interest-company-report> both accessed 2 September 2024.

[59] "New Opportunities for Social Entrepreneurs | Government of Nova Scotia News Releases" (28 November 2012), online: <https://news.novascotia.ca/en/2012/11/28/new-opportunities-social-entrepreneurs>.

[60] *Ibid*. [Emphasis added]

[61] When available, the articles of associations or annual reports were considered. Although sec. 51.96(4) of the BCBCA mandates that C3s publish their annual reports on their publicly accessible website, if they have one, I noticed that these documents are only available in a scant minority of instances. In Nova Scotia, sec. 21(4) of the CIC Act only requires CICs to file a copy of the annual report with the Registrar. Please refer to the relevant tables for details on the methodology and gathered data.

[62] Please refer to the relevant table for further details.

[63] For example, Binkadi Community Services CCC Corp. explicitly carries out two out of four projects in the Victoria area, as stated on their website.

this research. The legal provisions discussed above provide no guidance in this regard, suggesting that any such connection would need to be evaluated on a case-by-case basis. Nevertheless, as it will also be argued below in relation to the second defining criterion, any posive assessment of this connection within the discussed models remains largely unconvincing.

4. The 'Interested' Community

The second proposed feature of stakeholder communities is having a shared interest in protecting natural commons to which the group is connected, and which serves the fulfillment of fundamental rights. Investigating community interests is important because it contributes to distinguishing communities as corporate stakeholders–legally relevant–from other groups without legal relevance. Shared interest is also key to identify a community as unitary over time,[64] thereby ensuring a unique collective identity and homogeneous interests that would make it observable to corporations so as to permit directors to treat them in a manner required by their duty of care. Content-wise, in this study, community interest should be understood as safeguarding the enduring availability of these resources, ensuring they maintain their social function over time and remain accessible to all community members.

The interests of the six analyzed community models significantly vary in content, reflecting their distinct origins, areas of operation, and objectives. Accordingly, not all are consistent with the protection of the "collective destination" of the commons.

4.1. Community Interests in the Analyzed Models

4.1.1. Canadian Indigenous Communities

In Canadian indigenous communities a shared interest can be identified in governing Indigenous lands and participating in the economic advantages offered by the development projects to be carried out on their lands. This interest can be illustrated by the practice of entering Impact Benefit Agreements (IBAs) with proponents.[65] IBAs are legally binding contracts, privately negotiated between project proponents and Indigenous communities with rights on the land

[64] See Dwight G Newman, *Community and collective rights: a theoretical framework for rights held by groups* (Oxford, UK: Hart Publishing, 2011) v 2.

[65] There is not a uniform definition or format for IBAs; see Ken J Caine & Naomi Krogman, "Powerful or Just Plain Power-Full? A Power Analysis of Impact and Benefit Agreements in Canada's North" (2010) 23:1 Organization & Environment 76–98 at 81.

where the project will take place,[66] through which Indigenous consent is gained[67] and accommodation measures are negotiated.[68]

IBAs allow communities to participate in the economic benefits resulting from economic development activities in their territories and ensure that project developers commit to responsibly managing the environmental and social impacts often associated with such activities.[69] While the content of individual IBAs varies depending on the specific case, the community involved, and the contractual counterparts, and despite the challenges these agreements may pose for Indigenous peoples,[70] their popularity suggests they can be viewed as serving a shared interest among Indigenous communities, that can be described as "creating a venue for Indigenous peoples to directly shape a project and ensure some benefits will flow to the communities." [71] Through IBAs, Indigenous communities can participate in the development of their traditional lands, minimizing negative impacts and maximizing potential benefits.[72]

Whether such an interest aligns with the protection of the commons' collective availability–a defining feature of stakeholder communities in this study–may not be immediately clear. Participation in the economic benefits of land development may, in fact, lead to the overexploitation and/or deterioration of natural resources, which would directly conflict with their preservation for collective use. However, if such overexploitation or deterioration does not occur, and resource use remains consistent with Indigenous tradition of environmental

[66] The non-transferability of the honour of the Crown implies that these agreements alone do not satisfy the Crown's obligations for consultation and accommodation. Nonetheless, IBAs significantly shift the negotiation of benefits from the local community to the involved parties, thereby diminishing the government mediating role in the distributive process. See Neil Craik, Holly Gardner & Daniel McCarthy, "Indigenous – corporate private governance and legitimacy: Lessons learned from impact and benefit agreements" (2017) 52 Resources Policy 379–388 at 383.

[67] *Ibid* at 379. The finalization of an IBA before a major development project has become mandatory in some territories; see *Nunavut Land Claims Agreement*, s 26.2.1.

[68] Accommodation arises when there is a strong prima facie case for the claim and the government's proposed decision could significantly adversely affect it. It is achieved through consultation and negotiations, with the aim of finding a compromise between competing interests and preventing irreparable harm or minimizing the effects of infringement. The duty to accommodate, too, cannot be transferred from the Crown to proponents. Refer to *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at paras 47; 49–50 [*Haida Nation*].

[69] Craik, Gardner & McCarthy, "Indigenous – corporate private governance and legitimacy", *supra* note 66 at 379. The direct engagement between Indigenous communities and project proponents is advantageous for proponents in terms of acquiring social legitimacy and reducing uncertainty in project realization; see Dwight Newman & Levi Graham, "Indigenous-Industry Agreements, Legal Uncertainty, and Risk Allocations" in *Indigenous-Industry Agreements, Natural Resources and the Law*, 1st edn (Routledge, 2021) 48 at 50.

[70] Including, primarily, the risks of adopting a tick-box approach at the expense of meaningful participation; compromising informed consent due to knowledge gaps; and exacerbating power imbalances between communities and corporations, rather than addressing them. For a more in-depth discussion on the limitations of IBAs, see Caine & Krogman, "Powerful or Just Plain Power-Full?", *supra* note 65.

[71] See Martin Papillon & Thierry Rodon, "Proponent-Indigenous agreements and the implementation of the right to free, prior, and informed consent in Canada" (2017) 62 Environmental Impact Assessment Review 216–224 at 220.

[72] Some scholars argue that IBAs have public relevance, indicating that these agreements can benefit a broader population beyond just parties directly involved; see Craik, Gardner & McCarthy, "Indigenous – corporate private governance and legitimacy", *supra* note 66; contra Ian Murray, "Indigenous benefits management structures as social enterprises: key challenges for economic development" (2021) 39:2 Journal of Energy & Natural Resources Law 137–158.

stewardship grounded in the interconnectedness between human and non-human beings, then no such conflict would arise. In this latter scenario, Indigenous communities would satisfy the defining feature of stakeholder communities discussed here. Accordingly, the assessment of whether such alignment exists should be conducted on a case-by-case basis.

4.1.2. Italian Communities with Collective Land Rights

Not far from Canadian Indigenous communities, Italian communities with land rights share an interest in protecting their rights to access, use, and enjoy collective land and resources–for their benefit and that of future generations[73]–while safeguarding the "public destination" of such land and resources. This interest can be described as having two *dimensions*: an *individual dimension,* which pertains to each community member, and a *collective dimension*, which refers to the group as a whole. It is the collective dimension that captures what I have referred to as the community interest, which, for these communities, involves protecting the destination of common land and resources for the benefit of the entire group and its future members.[74] Consequently, it is clear that the interest of these communities align closely with that of stakeholder communities as discussed in this subsection.

As noted, Italian communities with collective land rights have an interest in safeguarding the "public destination" of common land, i.e., the function such land performs for the community of users.[75] To protect this function, restrictions apply to both owners and users: the land cannot be used for purposes that do not permit the exercise of community rights, and in cases of collective property (namely, *assetti fondiari collettivi*), the community's proprietary rights must be exercised with respect for other users.[76] Further limitations stem from legal requirements mandating that

[73] Rights for which protection is claimed may be rights of enjoyment and use over someone else's land or property rights on the land, depending on whether civic uses or collective landholdings are considered. Claims can be made for harmful activities against either the public administration (in case of collective landholdings) or private landowner (in case of civic uses). In the former case, claims are brought before administrative courts. In the latter, they are brought before ordinary courts or a special judge called the Commissioner for civic uses.

[74] Typically, these interests are vested in the entity that legally represents the community. See also Vincenzo Cerulli Irelli & Luca De Lucia, "Beni comuni e diritti collettivi" (2014) 1 Politica del diritto 3–36 at 15–16. Administrative jurisprudence has also acknowledged the dual nature of the collective rights of civic use; see TAR Abruzzo L'Aquila, Sez I, 30 August 2011, No 432, Massima Redazionale, 2011, https://onelegale.wolterskluwer.it/ (Italy).

[75] However, a form of public destination for resources can also be identified in the other analysed community models. In Italian CERs and CCs, this destination emerges in their aim to provide or improve access to specific goods or services (e.g., renewable energy) for people living in certain Italian regions. In Canadian hybrid corporations, public destination is evident in their mandate to primarily pursue the well-being of a social group beyond their own members, with their assets locked in for that purpose.

[76] A 'different way of managing' common resources is required; see Luigi Oliveti, "I demani civici e le proprietà collettive: un diverso modo di possedere, un diverso modo di gestire" in Pietro Nervi, ed, *I demani civici e le proprietà collettive. Un diverso modo di possedere, un diverso modo di gestire Atti della II Riunione Scientifica (Trento, 7-8 novembre 1996)* (Padova: CEDAM, 1998) 143 at 147–148.

management of collective land take into account the needs of both present and future generations.[77]

Similarly, for stakeholder communities, the collective destination of natural resources should be understood as ensuring the continued functionality of the good for the fulfillment of rights shared among community members. Accordingly, business activities affecting natural commons must not compromise them in a way that harms local communities. However, while in collective land rights the destination of the land for community use serves the exercise of proprietary or usage rights, in stakeholder communities it serves the exercise of members' fundamental rights, such as the rights to health and to a clean environment. Moreover, a form of ownership regime akin to public property (*parademanialità*) applies to Italian communities with collective land rights because of the land's public destination.[78] Conversely, for stakeholder communities, the collective destination of natural commons would not alter the legal regime (public or private) governing the resources affected by corporate activity. Rather, this destination would emphasize that business activities affecting such resources must be carried out in a manner consistent with their social utility–that is, the utility these resources provide to the community connected to them.

4.1.3. Italian CERs and CCs

The community interest in Italian CERs is to provide environmental, economic, or social benefits for their shareholders, members, or local areas,[79] by producing, consuming, storing, selling, and sharing renewable energy within the community.[80] This interest can be drawn from the primary

[77] See *legge 168/2017*, Art 1, which considers 'natural, economic, and cultural heritage, which belongs to the territorial base of collective property' ad 'inter-generational co-ownership'. The provision underscores the importance of assets subject to collective rights in meeting the needs of future generations, resulting in the need for their sustainable management. See also Giovanni Galloni, "Intervento" in Pietro Nervi, ed, *I demani civici e le proprietà collettive. Un diverso modo di possedere, un diverso modo di gestire Atti della II Riunione Scientifica (Trento, 7-8 novembre 1996)* (Padova: CEDAM, 1998) 203.

[78] Which typically provides for the unmarketability, limits on use, and protection by public authorities; see Art 823 Civil Code (Italy). On collective land in Italy see *legge 168/2017*, Art 3, para 3: 'The legal regime of the assets referred to in paragraph 1 remains one of inalienability, indivisibility, non-acquisibility through prescription, and perpetual designation for agro-silvo-pastoral purposes.' [My translation]. In jurisprudence, see also, Corte di Cassazione, Sez I civ, Ord, 23 April 2021, No. 10837 (Italy), para 9.4; Corte Costituzionale, 15 June 2023, No 119 (Italy).

[79] EU, *Directive 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources*, [2018] OJ L 328/82, Art 2 (16)(c); equally, *d. lgs. 199/2021*, Art 31, para 1, letter a).

[80] EU, *Directive 2018/2001*, Art 22, para 2, letters (a) and (b). Possible further activities are established in *d. lgs. 199/2021*, Art 31, para 2, letter f), and may include producing other forms of renewable energy for members' use, promoting integrated home automation and energy efficiency interventions, providing electric vehicle charging services to members, acting as a retail company, and offering ancillary services and flexibility.
In contrast, CECs are characterized by broader legislative goals (including ensuring affordable and transparent energy prices and costs for consumers, a high level of supply security, and a smooth transition towards a sustainable low-carbon energy system. See EU, *Directive 2019/944*, Art 1, para 2; advantages of CECs are included in recital 43 and can also operate with non-renewable energy sources. Also, a wider range of activities can be carried out by CECs, including distribution, supply, consumption, aggregation, energy storage, energy efficiency services, charging services for electric vehicles, or the provision of other energy services to its members or shareholders; see EU, *Directive 2019/944*, Art 2 (11)(c); *d. lgs. 210/2021*, Arts 3, para 3, letter d) and 14, para 6, letter c).

objective mandated by law, for which CERs must prioritize this aim in line with the legislative rationale behind their introduction as legal models.[81] However, CERs may specify secondary objectives in their articles or bylaws, thereby pursuing additional interests.

Similarly, CCs' community interest can be understood as to address these communities' social needs. These often include–as shown in Table 2–countering depopulation, economic decline, social or urban decay, and environmental issues;[82] strengthening the economic and social fabric of affected communities,[83] for instance, through job creation;[84] empowering citizenship and promoting participation in the management and delivery of public services.[85]

In both models, community interests are shaped by the objectives prescribed or permitted by law. However, some distinctions must be drawn between them.

Regarding CERs, their interests are tied to their core purpose, that is, the production and distribution of renewable energy. So, the question is whether this focus aligns with the protection of the collective use of commons, here understood as a defining feature of stakeholder communities. A connection can indeed be identified. First, the socio-environmental sustainability underlying the objectives and activities of CERs aligns with the broader benefits associated with the protection of commons. Second, as already noted, both renewable energy and the natural resources that enable its production can be considered commons, as they constitute essential resources for human life and permit adequate living conditions and access to basic services. In light of these considerations, CERs' interests appear sufficiently aligned with those of stakeholder communities as defined in this study to warrant an affirmative answer to the question posed earlier in this paragraph.

As for CCs, the objectives they are allowed to pursue under regional legislation are broad enough to encompass the protection of commons to which they may be connected, as discussed above. Indeed, CCs typically aim to generate benefits for local communities while also permitting the pursuit of environmental protection goals.

[81] Advance energy efficiency at the household level, combat energy poverty, increase local citizens acceptance and participation in renewable energy projects and accelerate Italy's sustainable growth path. See EU, *Directive 2018/2001*, recitals 67 and 70 and d*. lgs. 199/2021*, Art 1, para 1.

[82] Campania, Emilia Romagna, Lazio, Marche*, Trentino Alto Adige, Veneto*.

[83] Abruzzo, Apulia, Basilicata, Calabria, Friuli Venezia Giulia*, Marche*, Molise*, Sardinia, Sicily, Tuscany, Trentino Alto Adige.

[84] Apulia, Friuli Venezia Giulia*, Lazio, Liguria, Lombardy, Marche*, Molise*, Sardinia, Sicily, Tuscany, Trentino Alto Adige, Veneto*.

[85] Basilicata, Lombardy, Marche*, Tuscany, Veneto*. Further specifications on how to pursue these goals are contained in the legislation, including placing special emphasis on the inclusion and empowerment of vulnerable individuals, and making use of local natural, economic, and human resources. In certain cases, the legislation provides a list of potential activities that can be carried out by CCs. In other cases, reference is made to the legislation on social enterprises, and its definition of social interest activities. See *decreto legislativo 3 luglio 2017, n. 112*, 3 July 2017, 112, Art 2.

4.1.4. Canadian CICs and C3s

Unlike previous models, Canadian C3s and CICs describe communities only as beneficiaries of their activity.[86] Under C3 and CIC legislation, companies that adopt one of these models are required to pursue a *community purpose*, which they should define in their bylaws. As such, the interest of these communities can be understood as ensuring the corporation's pursuit of the community purpose as established in its bylaws. Notably, this interest can only be factually attributed to beneficiary communities, but there are no legal provisions that recognize it in these terms or permit enforcement by them.

Where expressly regulated by law,[87] only shareholders can file legal complaints about the violation of the duty of directors to pursue the company's community purpose[88]–which in these companies adds to directors' general fiduciary and care duties[89] and can lead to their personal liability.[90] Shareholders can do so either directly[91] or on behalf of the company.[92] When an oversight authority is present, as for CICs, it is unclear whether beneficiary communities can notify it about possible violations of the community purpose, and it is questionable whether its powers could effectively protect the community, as they are generally limited to requesting and reviewing corporate information, evaluating compliance with the law, and, if found to be noncompliant, ordering the dissolution of the company.[93] Finally, the vague description of the community purpose both in legislation[94] and companies' statements[95]–to the limited extent they are reported in the businesses' websites or social media profiles–further exacerbates the indeterminacy of the interests of C3s and CICs beneficiary communities.

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[86] This should not exclude that these companies may have grassroots origins.

[87] To the best of my knowledge, the Nova Scotia CIC legislation and Companies Act do not include provisions in this regard.

[88] *Business Corporations Act*, *supra* note 50, s 51.93; *Community Interest Companies Act*, *supra* note 56, s 12.

[89] At least in BC; see *Business Corporations Act*, *supra* note 50, s 142. No similar provisions were found in NS Companies Act and related regulations.

[90] In BC, the infringement of specific duties imposed on C3 directors may lead to their personal liability to shareholders if they have voted for or authorized any transfer of money or other assets to any person in breach of the asset lock restrictions imposed by law. See *Ibid*, s 154(1)(f); see also Angela Lee, "Vague, voluntary, and void: A critique of the British Columbia community contribution company hybrid model" (2015) 48:1 UBC L Rev 179–220 at 193. In any case, personal liability to shareholders can still arise from infringements of directors' duties under other legal provisions or equity; *Business Corporations Act*, *supra* note 50, s 154(3).

[91] *Business Corporations Act*, *supra* note 50, s 227; see also Lee, "Vague, voluntary, and void", *supra* note 90 at 193.

[92] *Business Corporations Act*, *supra* note 50, s 232.

[93] *Community Interest Companies Act*, *supra* note 56, ss 25, 26.

[94] Provincial legislation provides mere examples on admissible purposes, such as providing health, social, environmental, cultural, or educational services to communities; *Business Corporations Act*, *supra* note 50, s 51.91; *Community Interest Companies Act*, *supra* note 56, s 2(1)(c). Nova Scotia bans CICs from including political activities in their community purposes; refer to *Ibid*, s 2(1)(c).

[95] Indeed, Tables 3 and 4 do not include a *community purpose* section; a few exceptions have been identified: e.g., Clean Valley Bio-filtration Technologies CIC from Nova Scotia, which describes its community purpose as "inventing, developing and promoting innovations that safeguard our oceans. As a B corporation and a CIC we are audited on our ability to do so with the consent of the community and through the fiscal responsibility of being a for-profit organization on the international stage." Yet, this description is still too broad.

These observations suggest that, within these community models, it is difficult to identify a clear alignment with the protection of the collective dimension of the commons. Truly, there are no explicit legal obstacles for this alignment to occur in practice. However, if one accepts that the interests of beneficiary communities depend on the hybrid corporation's effective pursuit of its stated community purpose, then correspondence with the stakeholder communities' interest described in this study would arise only indirectly, and only in the very limited cases where that corporate purpose involves the protection of commons. Ostensibly, this reasoning is quite strained and such cases seem, at best, exceptional. This conclusion is further supported by the fact that current definitions of community purposes in Canadian hybrid corporations, as available online, do not appear to directly involve the protection of commons. For these reasons, these models should be seen as lacking the discussed defining feature.

5. The 'Democratic' Community

A third defining feature of stakeholder communities is being governed democratically. Democratic governance here indicates broad participation of members in decision-making, participation in the election of the organization's leaders, and the opportunity for members to be elected to those positions.[96] All but one of the community models analyzed show, to varying degrees, organizational aspects that can be traced back to democratic governance or at least allow for it. To the extent that these real-world communities operate democratically in practice–and provided that they also meet the other two defining features discussed above–they may be considered examples of stakeholder communities that could benefit from the proposed directors' duty to exercise case to prevent harm to them.

5.1. Democratic Governance in the Analyzed Models

5.1.1. Canadian Indigenous Communities

In Canadian Indigenous communities' consultations, democratic governance clearly occurs both in the appointment of community representatives and in conducting consultations. Regarding the former, in many cases, representatives are elected by the community, ensuring that all members participate in the elections and, therefore, the entire community, as a right holder, has a voice in the consultation process.[97] As for the latter, Canadian literature also suggests that consultations

[96] Additionally, internal democracy includes members' freedom to exit, along with internal provisions ensuring the right to defense and uphold the principle of controversy in cases of conflicts of interest within the organization. The definition of the content of internal democracy for consumers' representative entities is provided by Gianfranco Alfano, *Rappresentatività e democraticità delle associazioni di consumatori* (Napoli: Edizioni Scientifiche Italiane, 2020) at 96–115, to which the reader is referred for further details.

[97] See Ian Peach, "Who speaks for whom? Implementing the Crown's duty to consult in the case of divided Aboriginal political structures" (2016) 59:1 Canadian Public Administration 95–112 [citing Canadian jurisprudence concerned that the entire rights-bearing community should be given a voice in the consultation process] Furthermore, UCPs show that community representative bodies, such as Bands, frequently involve their members in decision-making processes, for example, by organizing community meetings or seeking input through referenda. Additionally, the representative bodies also take responsibility for representing the views of all community members by sharing information about the consultation topic, allowing sufficient time for comments, and establishing mechanisms for

should be collective, with individuals or sub-groups within the community being given authorization by the wider community to conduct consultation on its behalf only in specific circumstances.[98] Overall, this permit fulfilling the ultimate aim of consultation, which is to protect the *collective* rights of Indigenous peoples.[99]

Additionally, members are generally guaranteed the right to exit the legal entity representing the community when conflicts arise. The problem of internal conflicts is particularly evident in the context of consultations with Canadian Indigenous communities. Canadian Indigenous literature acknowledges this issue and, while it emphasizes the need for consultations to involve the entire community to align with the collective nature of Indigenous rights that consultations aim to protect, it also suggests that, when internal conflicts arise, community members should be permitted to leave the initial group and form a new group with their own members and representatives. Specifically, literature acknowledges that organizations representing the community at different levels may have different, possibly conflicting views on the consultation process, and both claim the right to represent the community.[100] In such conflict situations, the creation of separate, new organizations has been deemed as a possible solution, provided that the representative entity has a clear mandate understood by consultation counterparts (proponents or the Crown) and that the community the new entity claims to represent is objectively defined as a rightsholder Indigenous community.[101] These conditions would ensure

members to contest decisions made regarding that topic. See, in particular, Lil'wat Nation, "Lil'wat Nation Land Use Referral Consultation Policy" (2012), online: <https://lilwat.ca/wp-content/uploads/2017/02/Consultation-Policy-ratified-Feb-21-2012.pdf>; Aamjiwnaang First Nation, "Consultation Protocol-Aamjiwnaang" (2010), online: <https://www.aamjiwnaang.ca/wp-content/uploads/2018/07/Aamjiwnaang-Consultation-ProtocolExternal.pdf>.

[98] Authorization to represent the community can also be attributed to individuals or entities, even corporations, that are not right holders. See Peach, "Who speaks for whom?", *supra* note 97 at 100; Karen Drake, "Who Are the Métis? The Role of Free, Prior and Informed Consent in Identifying a Métis Rights-Holder" in *Indigenous-Industry Agreements, Natural Resources and the Law*, 1st edn (Routledge, 2021) 98 at 11 both including relevant bibliography and case law. The principle of collective consultation is further confirmed when specific families or individuals in the community may experience significant negative impacts from the project's implementation. In these cases, additional consultations with these members are required, but typically take place within the community itself, which gathers the input of individual members to shape the community's position regarding the project. See, e.g., Walpole Island First Nation, "Walpole Island First Nation Consultation and Accommodation Protocol," (2009), online: <https://www.walpoleislandfirstnation.ca/wp-content/uploads/2014/06/WIFNCAP.pdf> at 12 [accessible through Internet Archive]

[99] *Behn v Moulton Contracting Ltd*, [2013] 2 SCR 227 at para 35 [*Behn*]. Collective consultations also generally simplify the Crown's task of consultation by avoiding individual-based consultation of everyone impacted by the project, which can be time-consuming.

[100] John Borrows, "Wise practices: exploring Indigenous economic justice and self-determination" in Robert Hamilton et al, eds, *Wise practices: exploring Indigenous economic justice and self-determination* (Toronto [Ontario]; University of Toronto Press, 2021) 236 at 254 citing *Tsilhqot'in*, *supra* note 23. Similar difficulties emerge with reference to Métis people, as their representative organizations have been established by the communities themselves and their governance systems are not statutorily recognized in Canada. On the topic, see Drake, *supra* note 373; Moira Lavoie, "The right to be heard: Representative authority as a requirement in enforcing Metis consultation" (2019) 56:4 Alberta L Rev 1209–1227.

[101] For instance, the new entity must include all members of the community it claims to represent, or at least allow for their participation in the organization based on objective membership criteria. Peach, "Who speaks for whom?", *supra* note 97 at 109.

that the new organization is a legitimate representative of the new community, and is perceived as such by counterparts.[102]

5.1.2. Italian Communities with Collective Land Rights

Similarly, Italian communities with collective land rights govern themselves through representative entities, which typically[103] take the form of private associations[104]–either autonomous or within the municipality (known as ASBUC or ASUC)[105]–with full statutory autonomy.[106] Italian associations are entities with autonomous legal status from their members, which may be either recognized or not–only when recognized they are granted legal personhood.

There are no formal legal requirements for the representative entities of land rights communities to adopt a democratic internal structure. However, while it is debated in the literature whether all associations should adopt a democratic structure,[107] the association model these entities adopt is flexible enough to *permit*, though not always *require*, this structure. Furthermore, in Italy, freedom to associate is grounded in the democratic principles established by the Constitution, and there has been a growing trend in legislation to require or promote democracy in associations as a condition for accessing further tax benefits.[108]

It should be also noted that various specific democratic features have been considered essential in Italian associations. Scholars and, to some extent, jurisprudence, maintain that associates must always be granted the option to exit the entity, a right that cannot be restricted in the articles or

[102] Alternatively, in case of overlapping claims between broader and smaller community groups, it has been suggested adopting a 'one-window approach' that centralizes consultation with the broader group organization while shifting to smaller groups within it when necessary. Drake, *supra* note 98 at 16–17. This method resembles the one adopted in cases where certain families or individuals within the group are significantly affected by projects.

[103] The other residual way, which applies only if a private representative body has not been established, is to entrust representation to the municipality.

[104] A list of representative entities is available at https://www.demaniocivico.it/gestione/2248-enti-collettivi-di-abruzzo-alto-adige-sud-tirol-emilia-romagna-friuli-venezia-giulia-lazio-liguria-lombardia-marche-sicilia-toscana-trentino-umbria-veneto/.

[105] *legge 167/2017*, Art 2, para 4. ASBUC (or ASUC) stand for 'Committees for the Separate Administration of Fractional Civic Use Property', which have been classified among private associations; see Corte di Cassazione, Sez I Civ, Ord, 23 April 2021, No. 10837 (Italy). These committees are governed under *legge 17 aprile 1957, n. 278*, 17 April 1957, 278, and consist of citizens elected by the residents in the relevant municipality or district, who are registered in the municipal electoral rolls. The law provides that ASBUCs *can* be established by 'interested populations (*popolazioni interessate*); for insights on the interpretation of this expression see Volante, *supra* note 39. The municipality must allocate all management income to the improvement of collective property and keep its account in a separate budget. It must also not use collective property in a way that differs from its primary destination; see, *Ibid*.

[106] *legge 167/2017,* Art 1, para 2.

[107] See Gianfranco Alfano, *Rappresentatività e democraticità delle associazioni di consumatori* (Napoli: Edizioni Scientifiche Italiane, 2020) n 121.

[108] See Massimo Basile & Maria Vita De Giorgi, *Le persone giuridiche*, 2nd edn (Milano: Giuffrè, 2014) at 114; 119. See also Arianna Fusaro, "Su partecipazione e democraticità negli enti del primo libro" (2023) 1 NGCC 145–149; Alfano, *supra* note 107 at 92–95.

bylaws.[109] Additionally, a general principle of non-discrimination among associates has been recognized by Italian scholars and courts.[110] Finally, in practice, associations often adopt further democratic governance features by typically applying majoritarian and per capita voting rules in members' deliberations.[111]

5.1.3. Italian CERs and CCs

Some democratic governance features are also present in Italian CERs and, to a larger extent, CCs. As mentioned,[112] CERs may adopt various legal forms, among which the law includes both for profit and non-profit forms. However, their primary aim cannot be profit, as they must prioritize environmental, economic, or social benefits for their shareholders, members, or for the local areas where they operate. Consistent with these essential features, some scholars have maintained that a democratic organizational structure would be more appropriate for these entities than other legal forms based on a plutocratic principle, such as private companies.[113]

Regarding CCs, these generally adopt per capita voting rules for cooperative members deliberations,[114] with some regional laws also permitting non-CC community members to participate in the entity's decision-making processes to enhance community involvement.[115] Additional democratic features in CCs derive from general provisions on cooperatives. These include the possibility (and sometimes the obligation) to establish separate assemblies in various locations where cooperative members reside, allowing for broader participation,[116] and the requirement for the majority of directors to be elected from among cooperative members, which

[109] Francesca Loffredo, *Le persone giuridiche e le organizzazioni senza personalità giuridica: manuale e applicazioni pratiche dalle lezioni di Guido Capozzi*, 3rd edn (Milano: Giuffrè, 2010) at 83–84. The associate can commit to remain in the association for a specified period (generally one year). However, even in this case, immediate withdrawal must be considered permissible if it is based on reasonable grounds (*giusta causa*). See also Alfano, *supra* note 107 at 102–103. On the need for bylaws to always respect constitutional principles see Giovanni Iorio with the collaboration of Giovanni Bonilini, Massimo Confortini & Carlo Granelli, "Art. 16 c.c. - Atto costitutivo e statuto. Modificazioni" at para 11, online: *Codice Civile commentato online* <https://onelegale.wolterskluwer.it/>.

[110] Giovanni Iorio, "Art. 16 c.c. - Atto costitutivo e statuto. Modificazioni" in Giovanni Bonilini, Massimo Confortini & Carlo Granelli, eds, *Codice Civile commentato* at para 11, available at <https://onelegale.wolterskluwer.it/> accessed 5 September 2024.

[111] Loffredo, *supra* note 109 at 80–81.

[112] See section 2 above.

[113] Rossetto, *supra* note 8.

[114] Art 2538, para 2, Civil Code (Italy). In contrast to the per share vote rule applied in business corporations, such as Italian joint-stock companies (S.p.A.). However, there may be some exceptions, as it may be the case for entity members or financing members. See Renato Santagata, "Le società cooperative" in Marco Cian, ed, *Diritto commerciale* (Torino: Giappichelli, 2020) 829 at 853.

[115] e.g., Emilia Romagna. In traditional (mutual) cooperatives governing functions are primarily attributed to cooperative members, which aligns with the traditional self-helping role of cooperatives, whereas non-member directors are allowed but typically for managerial competences. However, it should be noted that this is not the first time that the law in Italy permits citizen participation in the management of organizations with a strong territorial dimension. This has already been established for bank foundations (*fondazioni di origine bancaria*), as stated in *decreto legislativo 17 maggio 1999, n. 153*, 17 May 1999, 153, Art 4, para 1, letter f).

[116] Art 2540 Civil Code (Italy).

underscores the opportunity for members to attain top positions and the importance of shareholder personal involvement in the governance of these entities.[117]

Finally, both CERs (and CECs) and CCs adopt an "open door" policy[118] that enables participation to all individuals who fulfil the necessary legal requirements to join them.[119] While this feature is not directly tied to governance, in entities that already have a democratic structure, it may broaden member involvement and expand participation in decision-making, ultimately enhancing the community's representativeness.

5.1.4. Canadian CICs and C3s

Unlike previous models, C3s and CICs as dual-purpose business entities do not feature democratic governance, as they do not offer a real alternative, stakeholder-inclusive structure compared to for-profit corporations. They differ from regular for-profit corporations only to the extent that they aim to embed stakeholder interests into business practices. However, the duty for directors to act "with a view to the community purpose of the company" or "in accordance with" it,[120] is not supported by enforcement mechanisms that can be activated by beneficiary communities.[121] Furthermore, beneficiary communities also lack participatory rights in the decision-making of C3s and CICs; instead, governance roles are reserved for shareholders and the board, as is usual with for-profit corporations.[122] Therefore, C3s and CICs do not satisfy the stakeholder community feature under discussion.

6. Discussion and Implications for Stakeholder Communities

The analysis of the selected community models from Italy and Canada reveals that most of them either possess or may possess the defining features of connection to a local natural commons, an interest in protecting it from overconsumption or degradation, and democratic governance. Particularly, the models that align with all three characteristics, and can therefore be regarded as real-world examples of stakeholder communities, include Canadian Indigenous communities, Italian communities with collective land rights, CERs and CCs. By contrast, Canadian hybrid corporations fall short of most of these features and, consequently, cannot be considered examples of stakeholder communities for the purpose of this study.

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[117] Art 2545, para 3 Civil Code (Italy).

[118] *d. lgs. 199/2021*, Art 31, para 1, letters c) and d), aligning with EU, *Directive 2018/2001*, Arts 2 (16) and 22, para 4, (f).

[119] CERs also permit cross-border participation according to EU, *Directive 2018/2001*, Art 22, para 6; however, the Italian implementing legislation does not contain a specific provision in this regard.

[120] *Business Corporations Act*, *supra* note 50, s 51.93; *Community Interest Companies Act*, *supra* note 56, s 12.

[121] Another difference is the non-transferability of powers of directors in BC C3s. *Business Corporations Act*, *supra* note 50, s 51.93(3).

[122] For example, beneficiary communities cannot vote in the election of directors. Shareholders and the board have the same definitions and roles they have do other business corporations in BC. This can be inferred from the fact that, for matters not specified in specific C3 provisions, the general provincial business legislation apply. *Community Interest Companies Act*, *supra* note 56, s 3.

The following paragraphs discuss these findings in greater detail. However, it should be observed that the existence of legally regulated community models exhibiting all three defining features confirms that those features are workable criteria for identifying stakeholder communities in real life.

6.1. Territorial Dimension and Connection to Local Natural Commons

Four out of the six community models show a territorial dimension that also includes a connection to local natural commons. In some cases, namely Indigenous communities and Italian communities with collective land rights, this connection is longstanding and carries cultural and historical implications. In other cases, namely CERs and CCs, the territorial dimension is legally required to access to favourable provisions but is not necessarily linked to natural commons. For CERs, this connection depends on recognizing renewable energy and the natural resources used for its generation as commons. For CCs, a link to natural commons is explicitly referenced by law as a possible feature of the community, but to be effective it must be incorporated into its bylaws. Conversely, Canadian C3s and CICs show only a weak territorial dimension and provide no further guidance for identifying an actual or potential link between beneficiary communities and natural commons, indicating that they do not satisfy this requirement.

The analysis has also shown that the more stable the territorial dimension, the stronger the legal recognition and autonomy of the group. This, in turn, facilitates recognizability by external parties, making it advantageous for implementing this study's proposal of a directors' duty of care towards stakeholder communities. This finding further supports the instrumental justifications identified at the outset of this chapter for including connection to the territory and local commons among the defining features of stakeholder communities.

Additional practical benefits of this feature include clarifying the community's geographical boundaries and determining the applicable law and jurisdiction. Furthermore, this feature presupposes that communities are physical groups, i.e., observable in the real world. This further enhances their perceptibility as corporate stakeholders, while excluding virtual communities, which are geographically unbounded and typically formed online, from the definition of adopted in this study.[123] Naturally, this does not mean that virtual extensions of physical communities–e.g., through social media platforms–cannot support their activities, nor does it deny that virtual

[123] Sociologists recognize that technological development has given rise to virtual communities, which exist primarily in cyberspace and are based on shared emotions. Refer to Fabio Berti, *Per una sociologia della comunità* (Milano: FrancoAngeli, 2005) at 127; Anna Rosa Montani, "Gli spazi della comunità" in *Teorie e ricerche sulle comunità locali* (Milano: Angeli, 2003) 37 ch 2. Stakeholder theories also acknowledge the presence of 'virtual communities of support,' consisting of individuals who have conflicting interests with the firm and are united solely by their opposition to it. Refer to Laura Dunham, R Edward Freeman & Jeanne Liedtka, "Enhancing Stakeholder Practice: A Particularized Exploration of Community" (2006) 16:1 Business Ethics Quarterly 23–42.

communities may, to a certain extent, suffer harm from corporate activities that deserves legal protection. Rather, these issues simply lie beyond the scope of this research.[124]

6.2. Interest in Safeguarding the "Collective Destination" of Commons

All the analyzed models feature a community interest, understood as a shared interest among community members. As noted, CICs and C3s are partial exceptions: in their legislation, there are no significant references to beneficiary communities, and such communities are treated as passive groups that simply receive advantages from hybrid corporations' activities. Nevertheless, the requirement to define the community purpose in their articles of association, suggests that beneficiary communities may hold an interest in ensuring that corporations established to benefit them comply with this objective.

A different question, however, is whether the analyzed communities pursue interests consistent with the protection of the "collective destination" of the commons to which they are connected. Several points are relevant in this regard.

First, the analysis confirms that the four community models showing a connection to commons also show to varying degrees, an actual or potential interest in protecting them from overconsumption or degradation. More specifically, Indigenous communities' interests have been defined as exercising governance over their ancestral lands and participating in the economic benefits generated by projects developed on them. This interest is consistent with the protection of their common lands, provided they communities remain loyal to their traditional environmental stewardship. Conversely, if such traditions are disregarded and land use became unrestricted, these communities could no longer be regarded as stakeholder communities as they would fall short of one defining feature.

Italian communities with collective land rights are viewed, according to the conceptual framework developed in Italian scholarship, to have an interest in ensuring that the common land and resources over which they exercise their rights remain available to all members, including future generations. In this light, their interests closely align with that of stakeholder communities. CERs and CCs also appear consistent with this feature. In the case of CERs, their interest must be viewed as intrinsically connected to their core activity of producing and sharing renewable energy. To the extent that renewable energy and the natural resources permitting its production, are considered commons, CERs should be seen as having an interest in their protection, if only because the continuation of their activity and achievement of their objectives depend on the preservation of such resources. By contrast, CCs are primarily aimed at bringing social benefits to a community typically in a limited territory, such as a municipality or a province. These communities may have a connection with commons and, if so, may also pursue their protection.

[124] For example, a virtual community may form on social media platforms in response to harm suffered by consumers due to certain products. In Italy, its members may seek protection through representative actions brought by consumer associations like Codacons; see Codacons, "Chi Siamo" (17 January 2017), online: <https://codacons.it/chi-siamo/>.

Whether these conditions are met requires a case-by-case assessment. When they are, CCs can be considered to satisfy the discussed essential feature of stakeholder communities.

Instead, Canadian hybrid corporations do not show an identifiable interest in protecting commons. Defining a unitary interest within these models proves difficult, as the relevant legal provisions do not offer guidance in this regard, nor do corporate descriptions of their community purpose offer meaningful insights. Admittedly, this analysis relied upon publicly available sources that did not include corporate bylaws. However, it is doubtful that consulting bylaws would have significantly altered this conclusion, as previous literature has also noted the vagueness of such definitions. In any event, the absence of normative or practical guidance leaves room for wide corporate discretion, making it particularly difficult to predict the pursuit of commons protection in these models–unlike CCs. So, a negative stance should be taken. Unsurprisingly, this outcome mirrors the previously discussed lack of connection with commons.

In any case, it is worth noting that, consistent with the ToC framework, the protection of commons and their "collective destination" must represent a primary objective for stakeholder communities. A community whose main goal is the economic exploitation of natural resources for profit cannot be considered as a stakeholder community for the purpose of this research. Likewise, a community that pursues objectives unrelated to natural commons (e.g., managing a public library or offering free guitar lessons) does not fall within the concept of stakeholder community adopted here. As noted, this does not mean these communities lack any relevant interests in relation to enterprises with which they may engage. More simply, those communities will not be considered in this study because it focuses on expanding directors' duty of care only to groups that meet the three identified criteria. It is therefore left to future researchers to address whether such duty should be expanded further. By contrast, communities that pursue the protection of commons alongside other secondary interests remain within this work.

6.3. Democratic Governance in Stakeholder Communities

The third defining feature of stakeholder communities, democratic governance, emerges in most of the analyzed community models, albeit with varying degrees and with certain exceptions. In particular, Italian land rights communities *permit* but do not *require* democratic governance, leaving open the possibility of internal rules with a non-democratic character. This is especially evident in the case of non-recognized associations, which are not bound by detailed nor stringent requirements in this regard. As such, these associations can easily depart from democratic principles in determining their internal governance.

Regarding CERs, these communities generally show elements of democratic governance and thus satisfy the discussed requirement. However, since CERs may adopt different legal forms, this compliance does not hold when they are structured as business corporations, such as private companies. These communities can therefore qualify as stakeholder communities only insofar as they effectively implement democratic governance rules.

By contrast, the standard governance structure of Canadian C3s and CICs closely resembles that of for-profit corporations. Despite their directors being legally required to act in accordance with

the company's community purpose, the beneficiary community itself plays only a passive and secondary role in the company's governance, lacking both participatory rights and enforcement mechanisms to ensure compliance with directors' obligations. Consequently, these entities cannot be regarded as adequate examples of real-world stakeholder communities that meet the criteria specified in Chapter 3.

Finally, Canadian Indigenous communities and Italian CCs provide stronger evidence of employing democratic governance. The former exhibit broad member participation in the appointment of representatives, the conduct of consultations with governmental authorities and private enterprises proposing land development projects, and permit members to exit the formal entity to establish a new organization more closely aligned with their values and interests. The latter adopt per capita voting rules, mechanisms to ensure wide participation in general assemblies, and promote the involvement of members in management positions.

Importantly, democratic governance should not be conflated with a specific organizational structure or legal form. As will be further discussed in Chapter 6, in Italy, legal structures are relevant for stakeholder communities only insofar as they enable direct enforcement of collective rights belonging to the community. Therefore, the legal form adopted by a community determines its suitability as a stakeholder only when it inherently conflicts with one or more of the three defining features discussed in this chapter. This approach serves a dual purpose: first, it avoids the exclusion from the stakeholder community concept of groups negatively affected by corporate activities but lacking formal legal structure or taking a different legal form from those examined above; second, it decouples the definition of stakeholder communities from any specific legal system. In this way, the definition remains adaptable across jurisdictions, while the assessment of a community's capacity to enforce rights is appropriately conducted at the national level.

In any case, the feature of democratic governance should be interpreted contextually and seen as flexible enough to include informal or unwritten governance practices, where relevant.[125] Nonetheless, this feature leaves outside groups in which decisions are adopted only by few individuals, or which attribute voting rights based on the amount and type of investment they have done. As mentioned, this is the case of business corporations, which, for the purpose of this study, cannot offer a legal structure to stakeholder communities. Also excluded from this research are groups that, while lacking a specific legal form, do not operate democratically–such as communities where representatives inherit their roles rather than being elected.

[125] This already occurs for Italian Third Sector Entities (*Enti del Terzo Settore* or ETS), a label for private entities contributing to the common good, for which the law only requires the adoption of democratic governance through certain implementation guidelines–such as establishing non-discriminatory criteria for access to the entity–while allowing ample room for concrete definitions to be determined by the members; see *decreto legislativo 3 luglio 2017, n. 117*, 3 July 2017, 117 [ETS Code]. Specifically, see Arts 21, 24 par 1 and 25, par 2 ETS Code (Italy).

7. Chapter Summary

This chapter investigated the notion of local community as a corporate stakeholder and its practical implementation in real-world communities in Italy and Canada. By analyzing the extent to which the three defining criteria for stakeholder communities–connection to local natural commons, a shared interest in protecting them from overconsumption and degradation, and democratic governance–are present in six community legal models from those countries, the chapter showed that all but Canadian C3s and CICs can be considered real-life examples of stakeholder communities for the purposes of this study. In some cases, the alignment with the three criteria was not *necessary* but *possible*; consequently, the classification of the analyzed models as examples of stakeholder communities depends on the actual presence of features consistent with those criteria in a given community. Instead, Canadian C3s and CICs lack all three defining features, and should therefore be excluded as potential beneficiaries of the directors' duty of care proposed in this study. Naturally, the discussed features can serve to identify other stakeholder communities beyond those analyzed here.

Before moving to the next chapter, it is important to reiterate that the aim of this chapter was to provide a definition of stakeholder communities and identify real-world examples that can benefit from the proposal of this research, which is the recognition of a director's duty of care to protect them from harm caused by corporate activities. These communities both align with core ToC values–collaboration, resource sharing, and personalism–and can benefit from the proposed conception of duty of care. This is primarily because they help directors identify and recognize these communities as relevant stakeholders, thanks to their physical presence and cohesive interests, while also providing high standards of representativeness for collective interests, thereby enhancing the community's legitimacy in advocating for their protection.

However, this chapter does not imply that the identified communities are *formally recognized* as holders of collective rights in the analyzed jurisdictions, nor that they can *effectively enforce* them in any legal system. Specifically, in Italy, the recognition of groups as collective right-holders and their direct enforcement requires a minimum legal status, namely legal subjectivity, which is typically linked to the existence of a formal legal entity that represents the community before the judge. This issue will be covered in Chapter 6, which is dedicated to enforcement. Before that, the next two chapters lay out the premises and arguments for the recognition of a director's duty of care to prevent harm to stakeholder communities.

Chapter 4: Do Directors Have a Fiduciary Duty to Protect Communities?

1. Introduction

This chapter and the next investigate whether corporate directors in Italy have or may have a duty to prevent harm to stakeholder communities. In other words, these chapters examine whether and to what extent the Italian legal framework[1] *permits* or *requires* corporate directors to prioritize stakeholders' protection (particularly, for what it is relevant here, communities) over shareholder gains[2] when pursuing the former would negatively impact the latter. While the previous chapter focused on communities, this one concentrates on corporate directors and officers (from now on, simply *directors*),[3] who are directly responsible for managing corporations and can therefore prevent harm towards stakeholders.[4]

The central role of directors in addressing the various interests relevant to the corporation justifies the focus on their duties. Investigating community protection within directors' duties also aligns with the theoretical framework of this work. The Theory of the Commons (ToC) calls for balancing proprietary prerogatives over commons–within the corporation, comparable with profit for shareholders[5]–with the possibility for third-party users to enjoy those resources–in the

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[1] Also beyond corporate law.

[2] This research focuses solely on cases where a conflict of interest between shareholders and stakeholders may arise–specifically, when these interests are incompatible and/or non-convergent. Therefore, it excludes situations in which pursuing the interests of one group also satisfies the interests of the other. For further details, see Eugenio Barcellona, *Shareholderism versus stakeholderism: la società per azioni contemporanea dinanzi al profitto* (Milano: Giuffrè, 2022) at 5–6.

[3] I use the term *directors* to refer broadly to board members (Italian *amministratori non esecutivi* and Canadian *directors*) and executives/managers (Italian *amministratori esecutivi* and Canadian *executives*), in compliance with the Italian use of the term. For further details on this use and comparative remarks, see the next footnote.

[4] The Italian so called 'traditional' and still most used corporate governance model is a dual board structure with some peculiarities, whereas Canadian corporations typically adopt a unitary board structure. Key differences between Italy and Canada include director powers and delegation of powers. Key similarities include the preferred physical nature of directors and other qualification requirements (legal capacity and the absence of bankruptcy status); the statutory basis for directors' powers and duties; the process for initial and subsequent board elections (by listing first directors in a document filed with the articles of incorporation (Canada) or in the articles (Italy), and by appointment by shareholders through an ordinary resolution for subsequent directors); that shareholder status is not required to be elected as a director unless specified in the articles or bylaws; the collective exercise of powers through resolutions, the maximum term for directors (no more than three fiscal years), the minimum number of directors (a single director is sufficient, except for distributing corporations (Canada) or listed companies (Italy)); the ability of directors to delegate powers–within certain limits–to other directors from their number, specifying the extent of the delegation, and to remove officers with or without cause; the understanding that delegations imply adherence to the same general duties (of care and fiduciary) and liabilities as those of the delegating directors; if a delegated director is an employee of the corporation, this relationship remains separate from their managing position. For an overview of the duties and liabilities of delegates and boards in Italy, see, among others, Francesco Barachini, *La gestione delegata nella società per azioni* (Torino: Giappichelli, 2008); In English see Andrea Tina, "Italy. Chapter 3. Stock corporations: corporate governance" in Andrea Vicari & Alexander Schall, eds, *Company laws of the EU: a handbook* (München: C.H. Beck, 2020) at 509–510.

[5] The equation of shareholders with owners should not be understood in absolute terms, as unlike owners, shareholders hold only a residual claim in relation to their investment in the company. However, the equation is used here to highlight a parallel with the theory of the commons, which more directly concerns issues of ownership.

corporate context, comparable with stakeholders' interests. In corporations, this balancing activity falls within managerial responsibilities, either under the director fiduciary duty (if stakeholder interests are included in the corporate interest) or the duty of care (if stakeholder interests are considered external to the corporate interest but still protected by the law, which directors must comply with). Hence, the focus on directors' duties adopted here is consistent with ToC premises.

Truly, from a ToC perspective, community protection in corporate governance seems better addressed through a duty-of-care approach than through fiduciary duties. Indeed, the ToC envisions limits on private property prerogatives upon commons, a position that appears closer to imposing legal constraints on profit maximization than supporting an expansive interpretation of the corporate interest to encompass stakeholder needs. Nonetheless, any assessment of Italian corporate law safeguards for affected stakeholders must also consider directors' fiduciary duties, as these remain central to the Italian debate on corporate social responsibility (CSR) and stakeholderism.[6]

Fiduciary duties pertain to the pursuit of the interests of the corporation[7] and differ from duties of care, which instead relate to the diligence exercised in performing management functions, requiring, among other things, compliance with the law.[8] This distinction significantly affects both the theoretical meaning and practical application of the investigated duty to prevent harm to communities: if fiduciary, the range of interests considered part of the corporate purpose would be broadened; if duty of care, external limits–i.e. outside of the fiduciary duties–on the pursuit of those interests would be imposed.[9]

More specifically, this chapter compares director duties in Italy and Canada, focusing on the Italian *S.p.A.* model and the Canadian corporation as archetypes of large companies, both listed

[6] Some Italian scholars argue that, in light of recent EU regulatory developments on corporate sustainability, the Italian debate on corporate purpose–which is central to the sustainability discussion and fiduciary duties–has lost relevance, as the new EU legal framework imposes binding external obligations on corporate governance; see Piergaetano Marchetti, "Il bicchiere mezzo pieno" (2021) 2/3 Riv Soc 336–348 at 348. However, I believe that the significance and long-standing nature of this debate in Italy cannot be dismissed with a mere reference to its existence. Instead, the evolution of EU framework should be interpreted in the context of this ongoing discussion.

[7] In this study, I use the term "fiduciary duties" specifically to refer to duties of loyalty. Other classifications may define fiduciary duties as a broader concept that includes both duties of loyalty and duties of care. On the topic, see Bamdad Attaran, "The Directors' Duty of Care – Not a Fiduciary Duty of Care" (17 December 2021) Rochester, NY, online: <https://papers.ssrn.com/abstract=4026618>; Robert Flannigan, "A fiduciary duty of care for Canada" (2018) 134 Law Quarterly Review 368–374; Christopher M Bruner, "Is the Corporate Director's Duty of Care A "Fiduciary' Duty? Does It Matter?" (2013) 48 Wake Forest L Rev 1027–1054.

[8] From an economic perspective, the distinction between fiduciary duties and duties of care has been challenged by Frank H Easterbrook & Daniel R Fischel, *The economic structure of corporate law* (Cambridge, MA: Harvard University Press, 1991) at 103.

[9] Francesco Denozza, "Interesse sociale e responsabilità sociale dell'impresa" in Lorenzo Sacconi, ed, *Guida critica alla responsabilità sociale e al governo d'impresa* (Roma: Bancaria, 2005) 143.

and non-listed. Managing directors[10] and de facto directors[11] are also included to the extent they are subject to the same duties of appointed directors. Although both countries have seen attempts to interpret fiduciary duties broadly encompassing the interests of stakeholders, this chapter explains the inefficiency of this approach, pointing out that a duty to prevent harm to communities should be found elsewhere. Indeed, a broad interpretation of fiduciary duties to include stakeholders' interests would challenge the contractual foundations of corporations, contradicting the prevailing scholarly reading in both countries–which, as noted, is not questioned in this work. Additionally, such a broad interpretation may risk 'functionalizing' business activities by mandating the pursuit of specific (social) goals, thereby constraining the freedom of economic initiative enshrined in the Italian Constitution.[12] These challenges are examined in light of criticism from Italian scholars and, comparatively, with Canadian experience following the 2008 *BCE* ruling adopting this extensive approach on fiduciary duties.

[10] In Canada, managing directors are considered delegates of corporate directors (*Canada Business Corporations Act*, RSC 1985, C-44, s 2(1) and 121), though their authority is subject to the limitations in s 115(3), and, if applicable, to the provisions of a USA binding on the corporation under s 146 (Wayne D Gray, Scott Whitley & Kayla Rice, *Gray's commentaries on federal corporate laws* (Thomson Reuters Canada, 2002) § 115 CBCA). In contrast, the role of the managing directors in Italy (*direttori generali*)–still not clearly defined, lacking a legal definition and precise regulation–differs from that of the delegated managing body, as they primarily implement directives from the board, making them subordinate to it, while retaining broad decision-making autonomy and being subject to a liability regime similar to that of directors (see Art 2396 Civil Code (Italy).

[11] In Italy, to formally assume the role of director, the law requires an official appointment, followed by the individual's acceptance, either explicit or implied, with their name registered in the public registry shortly thereafter. If these formalities are missing but an individual actively engages in the management of the company, they are considered a de facto director (*amministratore di fatto*). Courts have recognized that de facto directors hold the same powers and liabilities as de jure directors. See Art 2383, para 4 Civil Code (Italy); Corte di Cassazione, 8 October 2020, Civil Section II, Order, No 21730 (Italy). They are also exposed to civil liability towards injured third parties under Art 2395 of the Civil Code (Italy), as indicated by Michele Mozzarelli, "Art. 2395 Azione individuale del socio e del terzo" in Pietro Abbadessa et al, eds, *Le società per azioni: codice civile e norme complementari* (Milano: Giuffrè, 2016) 1459, and to criminal liability as per Corte di Cassazione, 4 December 2023, Criminal Section V, No 2514 (Italy). De facto directors can be severally liable with formally appointed directors: see Tribunale Roma, 15 June 2023, Business Section, No 9596 (Italy), Società, 2023, 11, 1299. Essential literature on the topic include: Niccolò Abriani, *Gli amministratori di fatto delle società di capitali* (Giuffrè, 1998); Fabrizio Guerrera, "Gestione «di fatto» e funzione amministrativa nelle società di capitali" (1999) 1–4 Riv dir comm 131–209. In Canada, the development of the concept in jurisprudence and scholarship is traced in *Scavuzzo v The Queen*, at paras 27–33. De facto directors are now addressed in the law; see CBCA s 109(4) and OBCA s 115(4) and (5). Among recent literature on the topic, see Brian Studniberg, "The Uncertain Scope of the De Facto Director Doctrine" (2017) 75:2 University of Toronto Faculty of L Rev 69–97 [confirming the importance of de facto director representation to third parties as an assessment factor, while suggesting that this factor be assimilated into a more holistic evaluation of the circumstances, alongside the "acting as a director" factor].

[12] As discussed in Chapter 2, the freedom of economic activity, which is generally understood as profit or value maximization, must be balanced with other equally important constitutional values (including, e.g., solidarity, the right to life, and a healthy environment).

2. Fiduciary Duties in Italy and the Pursuit of the Corporate Interest

2.1. Legal Requirements

Italian directors are primarily required to pursue the corporate interest (*interesse sociale*).[13] The existence of this fiduciary duty is not explicitly stated in the law but has been affirmed by scholars based on the existence of legal provisions addressing directors' conflict of interest and the role that directors play in fulfilling the specific corporate goal (e.g., producing ice cream).[14] The existence of a duty for directors to pursue the corporate interest has been largely accepted among Italian scholars[15] and has served as the main instrument for directing management functions in the S.p.A. model. It arises from the fact that directors manage the company 'for others', specifically for a legal person (the company) with which they identify (*immedesimazione organica*).

Powers are attributed to directors through the corporate contract, which is a contract between shareholders. This situation resembles the common law classification of director-corporate relationship as a fiduciary relationship,[16] where fiduciary refers to:

> a transfer of powers from the beneficiary (B) to the fiduciary (F). The powers transferred by B to F originally belonged to B and, in fact, still do. B has merely

[13] Recently, on this topic, Diletta Lenzi, "Navigating the Company's Interest in Italy: An Interplay of Legal Concepts" in Anne-Christin Mittwoch & Anne-Marie Weber, eds, *The Interest of the Company – A Driving Concept for Sustainable Business? A European Inquiry Inspired by a Polish-German Comparison* (Baden-Baden: Nomos, 2025). For a comparative overview of corporate interest in European countries, refer to Andrea Vicari, *European Company Law* (Berlin: De Gruyter, 2021) at 217–219.

[14] Vincenzo Calandra Buonaura, "Funzione amministrativa e interesse sociale" in Aa Vv, ed, *L'interesse sociale tra valorizzazione del capitale e protezione degli stakeholders: in ricordo di Pier Giusto Jaeger: atti del convegno, Milano, 9 ottobre 2009* Quaderni di Giurisprudenza commerciale 342 (Milano: Giuffrè, 2010) 101 at 103–104; Vincenzo Calandra Buonaura, *L'amministrazione della società per azioni nel sistema tradizionale* (Torino: Giappichelli, 2019) at 290. However, there are provisions in the Civil Code referring to the corporate interest or similar concepts; see, e.g., Art 2497 Civil Code (Italy) ['*interesse imprenditoriale proprio o altrui*'].

[15] See, e.g., the contributions to the book *Interesse sociale tra valorizzazione del capitale e protezione degli stakeholders* (Milano: Giuffré, 2010). A minority of scholars deny the existence of this duty, affirming that directors only have a duty not to act in conflict of interest according to Art 2391 Civil Code (Italy). For bibliography see Pierpaolo Sanfilippo, "Gli amministratori" in Marco Cian, ed, *Diritto commerciale* (Torino: Giappichelli, 2024) 476 at 523 note 229.

[16] Corte di Cassazione, 20 January 2017, United Sections, No 1545 (Italy). This ruling solved a longstanding debate about the nature of director-corporate relationship, primarily emerged in litigation related to the nature of directors' remuneration. For an overview of this debate, see Alessandro Ippolito & Cristina Langford, "Compenso degli amministratori di società per azioni ed eccezione di inadempimento: quid iuris?" (2024) 5 Società 576–590; Vincenzo Antonini, "Nuovi sviluppi in tema di rapporto di amministrazione nelle società per azioni" (2022) 3 NLCC 823–838; Anna Laura Bonafini, *I compensi degli amministratori di società per azioni* (Milano: Giuffrè, 2005). Criticisms have been expressed by scholars (see, e.g, Marco Saverio Spolidoro, "Amministratori e società tra rapporto organizzativo e contratto" (2022) 5 Società 568–575 at 561 ['In short, the concept of organic identification accurately describes the situation of some directors of corporations, who hold operational roles and have representative powers, but it does not seem as capable of reflecting the situation of independent and non-operational board members.'])

> loaned these powers to F within the scope of their fiduciary relationship; they do not become F's own possession.[17]

In this context, shareholders play a key role because, through the corporate contract, they establish the beneficiary entity and assign powers to the directors. While a fiduciary relationship formally exists between the directors and the corporation, it is fundamentally the shareholders who make this relationship possible and functional, as they created the company and appointed the directors. Consequently, directors owe their roles to the shareholders.

The duty to pursue the corporate interest is typically classified as an internal[18] and general[19] duty, which creates an obligation of means[20] upon directors. As a consequence, they are required to use appropriate instruments to carry out their tasks, regardless of the actual business outcome.

2.1.1 Traditional Interpretation of Corporate Interest as Shareholder Oriented

The main critical issue with the fiduciary duty of directors in Italy has concerned the interpretation of the corporate interest (*interesse sociale*), which, as noted, is not defined by law.[21] This topic has long been discussed by Italian scholars whose positions, since the 1930s, have been divided between institutionalist (*istituzionalismo*) and contractarian (*contrattualismo*) perspectives.[22]

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[17] Leonard L Rotman, "The Vulnerable Position of Fiduciary Doctrine in the Supreme Court of Canada" (1996) 24:1 Manitoba Law J 60–91 at 68.

[18] As opposed to external duties; see above footnote 7. Based on their *source*, directors' duties can be classified as either 'internal' or 'external'. Internal duties arise from corporate law, while external duties originate from other legal areas, such as employment law, environmental law, or human rights law.

[19] Based on their *content*, director's duties may be either 'general' or 'specific'. General duties have an "open" content, meaning that they draw a duty of conduct to be determined with regard to the concrete situations to which they are to be applied. Conversely, specific duties are "obligations with specific content in which the conduct to be performed and the manner of performance are precisely defined by law or contract". The classification is drawn from Calandra Buonaura, *supra* note 14 at 275 ff. The classification of certain duties under the 'general' or 'specific' label may vary among authors.

[20] The content of directors' duty can be described in terms of obligations either of means or of result. While the former focus on the process of fulfilling the obligation and typically refer to discretionary or evaluative tasks, the latter focus on fulfilling the goal outlined in the law or contract. The classification has French origins and was disseminated in Italy by Luigi Mengoni, "Obbligazioni 'di risultato' e obbligazioni 'di mezzi'. Studio critico" (1954) I Riv dir comm 367–382. For further details on the origins and evolution of the classification, see Gianluca Sicchiero, "Dalle obbligazioni "di mezzi e di risultato" alle "obbligazioni governabili o non governabili"" (2016) 6 Contr Impr 1391–1421.

[21] This has been recalled, e.g., by Carlo Angelici, "Note minime sull''interesse sociale'" (2014) 67:3 BBTC 255–264 at 255 ['If the legal issue is about identifying [directors'] rules of conduct, their conditions of applicability, and their practical consequences, a discussion on the "corporate interest" is relevant only if, and only to the extent that, it contributes to this identification – in fact, it is resolved within it.']

[22] Naturally, the opposition of these perspectives is illustrative, and I do not mean to suggest complete homogeneity among the arguments belonging to one category or the other. This issue was analytically addressed by Gastone Cottino, "Contrattualismo e istituzionalismo (Variazioni sul tema da uno spunto di Giorgio Oppo)" (2005) 4 Riv Soc 693.

The institutionalist perspectives, developed based on German theories from the post-World War I period[23] and becoming predominant in the 1930s,[24] argued that the corporate interest encompassed not only the interests of shareholders but also other interests, such as general interests (particularly of economic nature), as well as those of creditors and non-shareholder third parties.[25] The ideological objective was to emphasize the *social function* of the enterprise and to overcome the conflict between capital and labour, which was still deeply felt in Italy at the time.[26] Conversely, contractarian perspectives, developed in opposition to the institutionalist view and to the proximity of some of its supporters to fascism,[27] equated the corporate interest with the interest of the (current) shareholders.[28]

Initially, contractarians held that shareholders were generally free to negotiate, subject to legal limits for the protection of third parties, and conceived of directors as bound to pursue the interests of shareholders as defined in the corporate contract. However, by the late 20th century, shareholder interest became increasingly associated with profit maximization (for the shareholders themselves), aligning with the *shareholder value theories* developed in North America. For these theories the fiduciary duty of directors equated with the goal of maximizing shareholder profit.[29] Consequently, the interests of third parties could only be protected through external regulations, rather than through the concept of corporate interest itself.

These differing interpretations, which originally focused on the role and purpose of businesses in society, regained prominence with the emergence of the debate on corporate social responsibility

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[23] Pier Giusto Jaeger, *L'interesse sociale* (Milano: Giuffrè, 1964) Studi di diritto privato 17 at 14.

[24] Barcellona, *supra* note 2 at 57.

[25] Renzo Costi, "Relazione di sintesi" in Aa Vv, ed, *L'interesse sociale tra valorizzazione del capitale e protezione degli stakeholders: in ricordo di Pier Giusto Jaeger: atti del convegno, Milano, 9 ottobre 2009* (Milano: Giuffrè, 2010) 189 at 198 [distinguishes between two forms of institutionalism: weak institutionalism, which views the corporation as an organization with its own autonomy, separate from the shareholders who enter into the corporate contract; and strong institutionalism, which advocates for including the interests of stakeholders other than shareholders within the notion of corporate interest].

[26] Barcellona, *supra* note 2 at 58.

[27] Mario Libertini, "Economia sociale di mercato e responsabilità sociale d'impresa" (2013) 3 ODC 9–45 at 26–27; Caterina Montagnani with the collaboration of Gastone Cottino, *Il fascismo visibile: rileggendo Alberto Asquini* (Napoli: Editoriale scientifica, 2014) *passim*. See also Barcellona, *supra* note 2 at 65; 58–59 [discussing the influence of fascist culture on Asquini, one of the main proponents of institutionalism. However, not all institutionalists shared the same political stance. Lorenzo Mossa, for example, was influenced by Christian communitarianism]. Moreover, Barcellona highlights the ambiguity of fascist ideology regarding the role of private enterprise, as it simultaneously advocated for its subordination to social objectives while also fully legitimizing its private nature [at 60]. For a critique of the equivalence between institutionalist positions and fascist corporatism, see Cottino, *supra* note 22; partially disagreeing, Emiliano Marchisio, *Sulle "funzioni" del diritto privato nella Costituzione economica fascista* (Macerata: EUM, 2007) at 68.

[28] Ariberto Mignoli, "L'interesse sociale" (1958) Riv Soc 725–763; Tullio Ascarelli, "Considerazioni in tema di società e personalità giuridica" (1954) Riv dir comm. For the proposal to interpret corporate interest as including both current and future shareholders, Mario Libertini, "Impresa e finalità sociali. Riflessioni sulla teoria della responsabilità sociale dell'impresa" (2009) 1 Riv Soc 1 at para 13.

[29] Barcellona, *supra* note 4 at 66 [who explains that the equation of corporate interest with profit maximization stems from an interpretation of the profit motive as the maximization of the company's value, reflected in the value of its shares. Furthermore, it is noteworthy that Article 2247 of the Italian Civil Code defines the pursuit of profit as the purpose (*causa*) of the corporate contract, making it the natural and sole objective of the corporate agreement].

(CSR). In this context, the discussion on corporate interests and the profit motive shifted from debating the role and purpose of businesses in society to exploring how to integrate sustainability into corporate governance.[30] More recently, this discussion has served as a basis for assessing whether (and to what extent) corporate directors *can*–or even *must*–prioritize social and environmental interests over shareholder profits. This means moving away from profit maximization and distribution solely for the benefit of shareholders, to consider the interests of all stakeholders.

However, despite the discussed twofold doctrinal perspectives, Italian corporate law culture has never *truly* abandoned the idea that profit is–and must be–the ultimate purpose of a joint-stock company (*S.p.A.*).[31] In other words, the contractarian point of view still prevails in Italy. As a result, the stance of Italian legal doctrine has largely aligned with North American shareholder value theories, which equate directors' fiduciary duties with the maximization of profit for shareholders.[32]

Specifically, it has been noted that, from the early stages of the Italian debate, institutionalist perspectives primarily aimed to legitimize public intervention in private economic activity. Their focus was essentially on justifying external regulation of businesses rather than introducing a discretionary plurality of interests for corporate directors to pursue. This emphasis on external intervention suggests that profit remains the fundamental goal of the corporation, even if there are cases where it must be moderated by other considerations due to public regulatory action.[33]

Furthermore, in the more recent phases of the debate, the terms *institutionalism* and *contractarianism* have lost much of their descriptive power, and the two positions have somehow merged.[34] Contractarians have shown some regard for non-shareholders, focusing on protecting contractually bound interests that include stakeholders among implicit contractual parties.[35] Simultaneously, institutionalists have increasingly emphasised the goal of corporate efficiency[36]

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[30] Carlo Angelici, "La società per azioni e gli "altri"" in Aa Vv, ed, *L'interesse sociale tra valorizzazione del capitale e protezione degli stakeholders: in ricordo di Pier Giusto Jaeger: atti del convegno, Milano, 9 ottobre 2009* (Milano: Giuffrè, 2010) 45 at 58.

[31] Although not dealing with sustainability-related matters, the Italian Supreme Court has confrimed this point. See, for example, Corte di Cassazione, 12 December 2005, Civil Section I, No 27387 (Italy) ['According to the most recent and well-regarded contractual theories, the corporate interest is understood as the *set of common interests of the shareholders, as parties to the corporate contract, which consist of the pursuit of profit, the maximization of corporate value*—understood as the overall value of shares or quotas—the oversight of management activities, *the distribution of profits*, the transferability of their ownership interests, the ability to determine the duration of their investment, and ultimately, the dissolution of the company.'] [My translation, emphasis added]

[32] Barcellona, *supra* note 2 at 83.

[33] *Ibid* at 62.

[34] *Ibid* at 72.

[35] See Francesco Denozza, "Logica dello scambio e "contrattualità": la società per azioni di fronte alla crisi" (2015) 1 Giur comm 5–41 at 8; 19. Similarly, Agostino Gambino, "L'interesse sociale e il voto in assemblea" in Aa Vv, ed, *L'interesse sociale tra valorizzazione del capitale e protezione degli stakeholders: in ricordo di Pier Giusto Jaeger: atti del convegno, Milano, 9 ottobre 2009* (Milano: Giuffrè, 2010) 67 at 73. *Contra*, Calandra Buonaura, *supra* note 14 at 102.

[36] Mario Libertini, "Ancora in tema di contratto, impresa e società. Un commento a Francesco Denozza, in difesa dello "istituzionalismo debole"" (2014) 4 Giur comm 669–697 at 694.

(sometimes in terms of "survival")[37], which nevertheless ultimately aligns with profit maximization.[38] In this way, both perspectives appear to converge toward the idea that profit is the core objective of the corporation, although some relevance to stakeholders is acknowledge.

Naturally, some exceptions apply. For example, Alberto Mazzoni advocated for a more authentic neo-institutionalist approach, based on the conception of enterprise proposed by Lorenzo Mossa in the 1950s. For Mazzoni, the corporation is a form of collective exercise of enterprise, which is conceived primarily as a social fact with a solidarity function that has been absorbed into the legal framework due to its legal relevance. On this basis, Mazzoni suggests the identification of a statute of enterprises, applicable to corporations as well, which is composed of segments of norms that influence enterprises, including (soft) law on CSR.[39]

Overall, two key points emerge from the above. First, the Italian debate has diverged from the Anglo-American one, where stakeholder theories have aimed to influence managerial discretion from *within corporate law* by introducing a plurality of interests, including those of shareholders and third parties, that directors have been considered either permitted or obligated to take into account.[40] Instead, in Italy, stakeholderism has focused on external (legislative) influence on directors' discretion. Second, Italian corporate law culture has always been inherently *contractarian*, supporting the idea that the corporate interest is defined by shareholders and typically consists of profit for them.

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[37] Angelici, "Note minime", *supra* note 21 at 261. Concurring, Marco Palmieri, *La partecipazione esterna alle società di capitali* (Milano: Giuffrè, 2015) at 131 [who views the interest of the company as one of preserving, or, where possible, increasing its assets]; Marco Maugeri, "Note in tema di doveri degli amministratori nel governo del rischio di impresa (non bancaria)" (2014) 1 ODC, [according to whom directors, as managers of assets belonging to others, are not authorized to undertake operations that could, with a high degree of probability, deplete the company's assets and lead to the end of this activity]. Cf. Candido Fois, "L'interesse sociale tra teorie dello sviluppo dell'impresa e teoria del rischio" in Aa Vv, ed, *L'interesse sociale tra valorizzazione del capitale e protezione degli stakeholders: in ricordo di Pier Giusto Jaeger: atti del convegno, Milano, 9 ottobre 2009* (Milano: Giuffrè, 2010) 153 at 176–177 [who interprets the corporate interest as the pursuit of business continuity, although not in a mere conservative sense, but as a path of development and growth].

[38] Barcellona, *supra* note 2 at 80–84.

[39] Alberto Mazzoni, "L'impresa tra diritto ed economia" (2008) Riv Soc 649–667. *Contra*, Calandra Buonaura, *supra* note 14 at 106–107.

[40] For example, refer to the recent contrast between the stakeholderist approach adopted by the UK scholar Colin Mayer, *Prosperity: better business makes the greater good* (Oxford, UK: Oxford University Press, 2018), advocating for a purposeful interpretation of corporations which should aim to the common good, criticized by Italian scholars such as Marco Ventoruzzo, "Brief remarks on "Prosperity" by Colin Mayer and the often misunderstood notion of corporate purpose" (2020) 1 Riv Soc 43–50 at 47 ['To think that listing different and often conflicting goals in a piece of paper, even if in principle binding, might resolve or even ease the conundrums that corporate leaders face at each and every turn, or clarify the standards of care and loyalty to which they are held, is naïve at best.']. Skepticism on the real-life outcomes of Mayer's theory is also expressed by Guido Ferrarini, "An Alternative View of Corporate Purpose: Colin Mayer on Prosperity" (2020) 1 Riv Soc 27 at 30; Guido Ferrarini, "Redefining Corporate Purpose: Sustainability as a Game Changer" in Danny Busch, Guido Ferrarini & Seraina Grünewald, eds, *Sustainable Finance in Europe: Corporate Governance, Financial Stability and Financial Markets* (Cham: Springer International Publishing, 2021) 85 at 150–151 [arguing for 'keeping the sustainability discussion within the confines of ESV theory'] and at 124 [supporting a view that provides regulation with greater power in disciplining corporations than private autonomy.]

2.1.2. Comparative Remarks: Canada and the Common Law World

Aside from the fundamental difference just mentioned, the contractarian and shareholder value paradigms are cornerstones for defining corporate purpose also in the Anglo-American world, influencing the content of directors' fiduciary duties.[41] Fiduciary obligations originated in equity to govern relationships of reliance marked by power imbalances and vulnerability, and were later incorporated into statutes and contracts. Modern directors' fiduciary obligations maintain these ancient roots but are now primarily grounded in statutory law.[42]

From this evolution, two main views of fiduciary obligations emerged.[43] The traditionalist view treats fiduciary obligations as inherent in the fiduciary's status and the entrustor's reliance on that role. By contrast, the contractarian view, sees fiduciary obligations as mere outcomes of private agreements, with no moral foundations.[44] The latter has prevailed in the US where the shareholder-director relationship has long been framed as an agency relationship and analysed through economic concepts such as transaction costs. Conversely, Canada has historically retained a more equitable view of fiduciary obligations, recognising obligations towards broader social and economic interests beyond individuals.[45] More recently, however, Canada has also shifted towards shareholder value.[46]

a. US and UK

In the US, the idea that a corporation should be managed primarily in the interest of its shareholders dates back to the 1910s.[47] In the 1919 *Dodge v. Ford* ruling, the Michigan Supreme Court upheld that

[41] On the Anglo-American debate on stakeholderism vs shareholderism, refer to Barcellona, *supra* note 2 at 15–56. For a comparative overview of the evolution of directors' duties in common law countries, see Jennifer G Hill, "Evolving directors' duties in the common law world" in Adolfo Paolini, ed, *Research Handbook on Directors' Duties* Research Handbooks in Corporate Law and Governance series (Cheltenham: Elgar, 2014) 3 at 29–42.

[42] For a comprehensive historical overview, primarily focused on the US, see H Justin Pace, "What Equity, the Promise Economy, and Cognition Mean for How Fiduciary Law Should Develop" (2018) 20:3 U Penn J Bus L 684.

[43] For this debate in Canada, see John L Howard, "Fiduciary Relations in Corporate Law" (1991) 19 Can Bus LJ 1–27 [supporting a traditionalist view]; Brian R Cheffins, "Law, Economics and Morality: Contracting out of Corporate Law Fiduciary Duties" (1991) 19 Can Bus LJ 28–48 [supporting a contractarian view].

[44] Pace, *supra* note 42 at 700 ff.

[45] *Hodgkinson v Simms*, 3 SCR 377 at 422. More broadly, on the concept of fiduciary duties in Canada, see Leonard I Rotman, "Understanding Fiduciary Duties and Relationship Fiduciarity" (2017) 62:4 McGill LJ 975–1042.

[46] More precisely, the shareholder primacy model, which originated in the UK, was later adopted in North America as commentators often equated generally incorporated corporations with UK companies (e.g., to receive direction in articulating the foundational rules for the emerging American form of corporations). For a more detailed discussion, see PM Vasudev, "Shareholder primacy - the original sin?" in *Beyond Shareholder Value - A Framework for Stakeholder Governance* (Cheltenham: Elgar, 2021) 134.

[47] Perhaps, even earlier: see *Arbuckle v. Woolson Spice Co*., 1901 WL 708, at 2 (Ohio Cir. Dec. Jan. 12, 1901) observing that '[t]he real object and purpose of a corporation for profit is to make a profit and to make dividends for the stockholders, and a person who holds the stock of a company has a right to have the business of the company conducted, as far as practicable at least, so that it will make profits and pay dividends.' (cited by Jill E Fisch & Steven Davidoff Solomon, "Should Corporations have a Purpose?" (2021) 99:7 Texas L Rev 1309–1346 at 1323).

> A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.[48]

This idea[49] was famously debated between Adolf Berle and Merrick Dodd in the 1930s.[50] However, it was only later that this concept evolved into a model supported by legal scholarship[51] as a governing rule for corporations in the US.[52]

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[48] *Dodge v. Ford,* 170 N.W. 668, 2004 Mich. 459 (Sup. Ct. 1919). This ruling has been deemed an affirmation of the shareholder primacy model by subsequent commentators; however, it is doubtful whether it actually upheld such a general principle. Refer to Vasudev, *supra* note 46 at 173 [who emphasizes the highly contextual nature of the court's statement affirming shareholder primacy]. Relevant US literature on Dodge v. Ford includes, among others: Robert J Rhee, "The Neoliberal Corporate Purpose of Dodge V. Ford and Shareholder Primacy: A Historical Context 1919-2019" (2023) 28:1 Stan JL Bus & Fin 202–254; Stephen M Bainbridge, "Why We Should Keep Teaching Dodge v. Ford Motor Co" (2022) 48:1 Journal of Corporation Law 77–119; Mark J Roe, "Dodge v. Ford: What Happened and Why?" (2021) 74:6 Vanderbilt L Rev 1755–1785; Jonathan Macey, "A Close Read of an Excellent Commentary on Dodge v. Ford" (2008) 3:1 Va L & Bus Rev 177–190; Lynn A Stout, "Why We Should Stop Teaching Dodge v. Ford" (2008) 3:1 Virginia Law and Business Review 163–190.

[49] While the wording of the ruling uses the term "primarily", some commentators have described the Dodge v Ford ruling as an expression of a "shareholder exclusivity model"; Mohamed F Khimji, "Peoples v. Wise - Conflating Directors' Duties, Oppression, and Stakeholder Protection Case Comment" (2006) 39:1 UBC L Rev 209–232 at 241; contra Einer Elhauge, "Sacrificing Corporate Profits in the Public Interest" (2005) 80:3 N Y Univ Law Rev 733–869 at 772–773; doubtfully Bainbridge, *supra* note 48 n 200.

[50] Adolpe A Berle, "Corporate Powers as Powers in Trust" (1931) 44:7 Harv L Rev 1049–1074; E Merrick Dodd, "For Whom Are Corporate Managers Trustees?" (1932) 45:7 Harv L Rev 1145–1163; Adolf A Berle & Gardiner C Means, *The modern corporation and private property* (New York: Macmillan, 1933). For an overview of the debate, see, in the US, Joseph L Weiner, "The Berle-Dodd Dialogue on the Concept of the Corporation" (1964) 64:8 Colum L Rev 1458–1467; in Canada, John C C Macintosh, "The issues, effects and consequences of the Berle–Dodd debate, 1931–1932" (1999) 24:2 Accounting, Organizations and Society 139–153.

[51] In the 1980s, with the neoliberal turn; see Rhee, "The Neoliberal Corporate Purpose of Dodge V. Ford and Shareholder Primacy", *supra* note 48 *passim* [noting, at 224, that in US courts and academia, the ruling had no significance until neoliberalism emerged; even in the Berle-Dodd debate, the ruling is cited in passing]

[52] Between the 1980s-1990s, the shareholder primacy model was affirmed in Delaware case law on corporate sales. Particularly in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,* 506 A.2d 173 (Del. 1986) the court affirmed the directors' duty to secure the highest possible financial return for shareholders, without the need to balance these interests against those of other stakeholders. This model, initially limited to sales or change-in-control cases and relatively flexible (cf. *Unocal v. Mesa Petroleum Co*., 493 A.2d 946 (Del. 1985); *Paramount Communications, Inc. v. Time Incorporated,* 571 A.2d 1140 (Del. SC 1989), has since been expanded and established as a principle for directors' conduct (*In re Citigroup Inc Shareholder Derivative Litigation*, 964 A 2d 106 (Del Ch 2009); *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch 2010); *In re Trados Inc. Shareholder Litigation*, 73 A. 3d 17 (Del. Ch 2013)). For an analysis of the evolution of Delaware interpretation of the corporate purpose and its impact on Canada, see PM Vasudev, "Shareholder value becomes law" in *Beyond Shareholder Value - A Framework for Stakeholder Governance* (Cheltenham: Elgar, 2021) 104. For a US perspective, see Dalia T Mitchell, "From Dodge to Ebay: The Elusive Corporate Purpose" (2019) 13:2 Va L & Bus Rev 155–212; David B Guenther, "The Strange Case of the Missing Doctrine and the Odd Exercise of Ebay: Why Exactly Must Corporations Maximize Profits to Shareholders" (2017) 12:3 Va L & Bus Rev 427–488; David A Wishnick, "Corporate Purposes in a Free Enterprise System: A Comment on eBay v. Newmark Comment" (2011) 121:8 Yale LJ 2405–2419. Italian literature has also addressed this topic; see Carlo Angelici, "Divagazioni sulla "responsabilità sociale" d'impresa" (2018) Riv Soc 3 n 19 [who warns about the limitations of the relevance of the *eBay* ruling for the Italian debate on corporate purpose].

Additionally, the shareholder model has not been contradicted, at least in practice,[53] by the widespread adoption of constituency statutes that occurred from the 1980s onward. These refer to US state legislation implemented in response to the rise of hostile takeovers, allowing directors to consider interests beyond those of shareholders in corporate decision-making. Constituency statutes do not contradict the shareholder model of corporate governance because they are generally enabling rather than mandatory,[54] and do not explicitly permit directors to prioritize stakeholders' interests over those of shareholders.[55] The goal of their introduction was to protect directors from being held liable if they defended against takeovers to protect non-shareholder interests, like those of employees who would lose their jobs if the bid was successful, not to protect stakeholders per se.[56] Moreover, the very existence of constituency statutes may implicitly reinforce the shareholder primacy model by specifying the extent to which non-shareholder interests may be considered rather than fundamentally challenging the principle itself.

Finally, in the US, shareholder primacy has been upheld in rulings concerning the constitutional rights of corporations in connection with the affirmation of the *aggregate theory* of the corporation (also referred to as *associate theory* or *shareholder identity*). The aggregate theory of the corporation, developed in the UK,[57] conceptualizes the corporation as an association of shareholders, emphasizing the fictional nature of corporate personhood.[58] This theory contrasts with the entity theory, which views the corporation as a unitary entity that is more than the sum of its shareholders.[59]

The aggregate theory of the corporation has been upheld by US courts since the 19th century but regained momentum in the 2010s with two rulings concerning the political and religious rights of corporations: *Citizens United v Federal Election Commission* (2010) and *Burwell v Hobby Lobby Inc* (2014). While the latter ruling appears to reflect a more stakeholder-inclusive approach to the

[53] In theory, constituency statutes can be seen as tools for implementing "strong" stakeholderism if they require directors to consider interests beyond just shareholder value.

[54] Where they were initially introduced as mandatory, they were later revised (e.g., Connecticut).

[55] Extensively on why constituency statutes do not contradict shareholder primacy, Stephen M Bainbridge, "The Board of Directors" in Jeffrey Neil Gordon & Wolf-Georg Ringe, eds, *The Oxford handbook of corporate law and governance* Oxford handbooks (Oxford: Oxford University Press, 2018) 275 at 116–118 [adding, at 118, that 'cases in which the statutes have been invoked are extremely rare and cases in which the statutes have been dispositive of the result are essentially nonexistent'].

[56] Bainbridge, *supra* note 48. Consequently, constituency statutes often apply only in takeover scenarios, and stakeholders are generally not granted legal standing to enforce their rights. Furthermore, Delaware has notably not adopted a *constituency statute* at all. These additional factors support the lack of contradiction between these statutes and shareholder primacy. For more on US constituency statutes, see David Millon, "Redefining corporate law" (1991) 24:2 Ind L Rev 223–278; Lawrence E Mitchell, "A theoretical and practical framework for enforcing corporate constituency statutes" (1992) 70:3 Tex L Rev 579–579; for a critical perspective, Kathleen Hale, "Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes" (2003) 45 Arizona L Rev 823–856.

[57] For details, see Vasudev, *supra* note 46 at 150–154.

[58] See Jeffrey Bone, "Legal Perspectives on Corporate Responsibility: Contractarian or Communitarian Thought?" (2011) 24:2 CJLJ 277–304.

[59] *Ibid*. For an overview of the entity theory and its impact on corporate governance see Lynn Buckley, "The foundations of governance: implications of entity theory for directors' duties and corporate sustainability" (2022) 26:1 J Manag Gov 29–53.

aggregate theory,[60] the conceptualization of corporations as aggregates of shareholders has historically supported shareholder primacy, as it aligns with its theoretical foundations: the view of corporations as property of shareholders, the contractual basis of corporations (as a 'nexus of contracts'), and agency theory.[61] These concepts suggest the corporation is merely a sum of individuals (specifically, shareholders) who, by economically participating in the enterprise are its legitimate "owners". Consequently, they are the principals to whom directors (agents) must account.

In the UK, Section 172 of the 2006 Companies Act–which has codified the directors' duty to act in the interests of the company for the first time–has embraced an enlightened vision of shareholder value (Enlightened Shareholder Value or ESV), allowing for the consideration of interests beyond those of shareholders in management decisions.[62] While ESV rejects the pursuit of share value in the short term (so called *short-termism*), it still prioritizes shareholders' interests over those of stakeholders.[63] Despite the innovative purposes that rooted the company law

[60] Vasudev, *supra* note 46 at 156–157 [suggesting that the ruling 'reflects the "community of interests" notion that informs stakeholder theory']

[61] For a perspective that integrates these foundations, refer to the work of Michael C Jensen & William H Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) 3 J Financ Econ 305–360.

[62] An interpretative analysis of the provision included in sec 172(1) is offered by Andrew Keay, "Having regard for stakeholders in practicing enlightened shareholder value" (2019) 19:1 Oxford University Commonwealth LJ 118–138 [concluding that it requires directors to pay attention to all factors listed in the subsection and paragraphs (a)-(f); in the case of failure to do so, directors may incur liability if the claimant can establish that they did not act in good faith and did not believe that it would promote the success of the company, discipline by the board and stakeholder pressures.] For an overview of how ESV in enshrined in the UK statute, see Taskin Iqbal, "The enlightened shareholder value principle" in *The Enlightened Shareholder Value Principle and Corporate Social Responsibility* (Routledge, 2021); Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (London: Routledge, 2021) ch 4.

[63] This aspect has been criticized by scholars advocating for greater promotion of sustainability in corporate law: e.g, Georgina Tsagas, "Section 172 of the Companies Act 2006: Desperate times call for soft law measures" in Nina Boeger & Charlotte Villiers, eds, *Shaping the Corporate Landscape* (Hart Publishing, 2018) 131.

The concept of ESV has been elaborated by Michael C Jensen, "Value Maximization, Stakeholder Theory, and the Corporate Objective Function" (2010) 22:1 J Appl Corp Finance 32–42. Anglo-American literature on ESV primarily includes Keay, *supra* note 62; Richard Williams, "Enlightened Shareholder Value in Uk Company Law" (2012) 35:1 University of New South Wales LJ 360–377; David Millon, "Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose Without Law" in PM Vasudev & Susan Watson, eds, *Corporate Governance after the Financial Crisis* (2012) 68; Virginia Harper Ho, ""Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide" (2010) 36:1 Journal of Corporation Law 59–112.

In Italy, ESV has been supported by Ferrarini, *supra* note 40. Additional Italian literature on ESV and its implementation in the UK includes, e.g., Carlo Amatucci, "Responsabilità sociale dell'impresa e nuovi obblighi degli amministratori. La giusta via di alcuni legislatori" (2022) 4 Giur comm 612–639 at 632–635; Sabrina Bruno, "Profili di diritto societario inglese alla luce della riforma" (2004) 4 Riv Soc 897–961 at 946–950.

The primacy of shareholders' interests mainly stems from the wording of the provision, which requires directors merely to "have regard to" stakeholders' interests. This regard serves the pursuit of shareholders' interests rather than introducing a new, alternative interest that should be balanced with those of shareholders (some scholars, such as Millon, have classified ESV as a "third way" in the opposition between shareholderism and stakeholderism). Additionally, the absence of mechanisms for negatively affected stakeholders to hold directors accountable contributes to this subordination, as derivative actions (those brought on behalf of the company against directors who violated their duties) are limited to shareholders.

reforms occurred in the UK at the turn of the 21st century,[64] in this regard it has simply reaffirmed the pre-existing common law principle that the "best interest of the company" refers to the interests of its shareholders as a whole.[65] This also aligns with the traditional UK conceptualization of corporations as aggregates of shareholders.[66]

b. Canada

Conversely, Canada has traditionally embraced a broader and more nuanced interpretation of the purpose of corporations,[67] and has adopted a more equitable approach to fiduciary duties than the US, showing greater openness to expand these duties to include stakeholders. As early as the *Teck v. Millar* ruling in 1972,[68] the British Columbia Supreme Court (BC SC) rejected the notion that directors should be viewed as mere agents of shareholders.[69] This case involved the hostile takeover of a mining company (Afton) by Teck Corp Ltd. Shortly after, Teck acquired a majority of the shares, and against Teck's wishes, Afton's directors issued shares to rival company Canex to dilute Teck's control. Despite Teck's higher offer, Afton's directors favoured Canex for its stronger mining track record, arguing their decision aligned with Afton's best interests.

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[64] Regarding the scope of company law, that is, in whose interest companies should be managed, refer to *Modern Company Law. A Consultation Document from The Company Law Review Steering Group* (1999) ch 5.1. [on which sec 172 of the 2006 Company Act is based].

[65] *Hellard v Carvalho* [2013] EWHC 2876 (Ch) at para 88. At common law, directors' duty to act in the best interest of the company can be traced back to *In re Smith and Fawcett, Ltd* [1942] Ch 304, 306. For an overview of the history and evolution of the traditional approach to a company's interests in the UK, refer to *BTI 2014 LLC v Sequana SA and others* [2022] UKSC 25 at para 17 ff [the court upheld that when a company is insolvent, the duty should be understood as a duty to act in the interests of the company's creditors as a whole, or to consider the creditors' interests alongside those of the members. It confirmed that outside of insolvency cases, the duty requires directors to act in a manner they believe, in good faith, would most likely promote the success of the company for the benefit of its members as a whole].

[66] For a different view on the origin of the focus on shareholder value in the UK, see Simon Deakin & Ajit Singh, *The stock market, the market for corporate control and the theory of the firm: legal and economic perspectives and implications for public policy* (31 May 2008), online: <https://mpra.ub.uni-muenchen.de/53792/> at 26 ['However, it is important to stress that even in the UK context, the current focus on shareholder value is therefore the consequence not of the basic company law model, but of those institutional changes which have occurred in capital markets and securities law with increasing rapidity in particular since the early 1980s, namely the rise of the hostile takeover bid, and the increasing use of share options and shareholder value metrics.]

[67] Camden Hutchison, "To Whom Are Directors' Duties Owed? Evidence from Canadian M&A Transactions" (2023) 68:2 McGill LJ 123–159 at 126–127; Carol Liao, "A Canadian model of corporate governance" (2014) 37:2 Dalhous Law J 559–600 at 59; PM Vasudev, "Corporate Stakeholders in Canada - An Overview and a Proposal" (2013) 45:1 Ottawa L Rev 137–180 at 138–139. Yet some commentators have claimed that an implicit ESV approach characterised Canadian jurisprudence until the early 2000s; see Darcy L MacPherson, "Supreme Court Restates Directors' Fiduciary Duty - A Comment on Peoples Department Stores v. Wise" (2005) 43:2 Alta L Rev 383–406 at 397.

[68] *Teck Corporation Limited v Millar*, [1972] CanLII 950 at 313–314, (BC SC).

[69] Ian B Lee, "Peoples Department Stores v. Wise and the Best Interests of the Corporation" (2004) 41 Can Bus LJ 212–222 at 214. *Contra*, MacPherson, *supra* note 67 at 392. A definition of agency relationship is provided by Michael C Jensen & William H Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) 3 J Financ Econ 305–360 at 308 ['We define an agency relationship as a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority to the agent.'].

In deciding whether company directors can override the interests of majority shareholders to pursue the best interests of the corporation, the *Teck* ruling paved the way for a stakeholder-oriented view of the role and duties of directors, allowing for a partial sacrifice of shareholder interests in the context of a hostile takeover to prevent harm to employees and local communities.[70] This orientation has also found further confirmation particularly in the 1975 Canada Business Corporations Act (CBCA), which–under certain conditions–allows some categories of stakeholders to take legal action (through the oppression remedy) against corporate management for violating their interests. Moreover, virtually any stakeholder can be recognized as a lawful 'complainant' to bring an oppression claim if approved by the court. This acknowledges the potential legal significance of such interests within Canadian corporations.[71]

Furthermore, the CBCA conceives of corporations as natural persons,[72] not merely as separate legal entities from their members as happens for US and UK corporations. Viewing corporations as natural persons appears to align with communitarian conceptions of corporations, first affirmed in American sociology,[73] which assert that corporations possess both the rights and responsibilities of natural persons.[74] As natural persons, corporations should be seen as integral parts of society, interconnected with individuals and communities, and should be accountable to all stakeholders affected by their activities, not just shareholders.[75]

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[70] For a commentary on this and other evolutions see Vasudev, *supra* note 67 at 139. However, this decision does not reflect a long-standing view of the Court and has traditionally been contrasted with a shareholder-centric approach grounded in the English precedent *Parke v Daily News Ltd* [1962] 1 Ch. 927 (Ch. D.); see Lee, *supra* note 69.

[71] Vasudev, *supra* note 67 at 139. This mechanism is available for "complainants," who, according to *CBCA*, *supra* note 10, s 238(d), may be any person deemed by the court to be a proper individual to make an application under that part.

[72] *CBCA*, *supra* note 10, s 15(1) ['A corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person.']. In my view, the legal significance of conceiving the corporation as a natural person draws on the real entity theory, which holds that the corporation exists as a social entity prior to and independent of legal recognition. For further references on the theories of the corporation, see Rutger Claassen, "Political theories of the business corporation" (2023) 18:1 Philosophy Compass e12892; Eva Micheler, "A Real Entity Theory of Company Law" in Eva Micheler, ed, *Company Law: A Real Entity Theory* (Oxford: Oxford University Press, 2021) 1.

[73] Amitai Etzioni, *The Spirit of Community: Rights, Responsibilities, and the Communitarian Agenda* (Crown Publishers, 1993).

[74] Extensively on North American communitarianism, in comparison with contractarianism, see Robert M Ackerman & Lance Cole, "Making Corporate Law More Communitarian: A Proposed Response to the Roberts Court's Personification of Corporations" (2015) 81:3 Brook L Rev 895–1014 at 969 ff; Bone, "Legal Perspectives on Corporate Responsibility", *supra* note 58; Michael Bradley et al, "The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads" (1999) 62:3 Law & Contemp Probs 9–86 at 34–47; Michael E DeBow & Dwight R Lee, "Shareholders, Nonshareholders and Corporate Law: Communitarianism and Resource Allocation" (1993) 18:2 Del J Corp L 393–424.

Broadly speaking, North American communitarianism can be equated with Italian institutionalism. The "communitarian" nature of Italian institutionalism was noted by Gustavo Minervini, "Contro la funzionalizzazione dell'impresa privata" (1958) Riv Dir Civ 618–636 at 629, which the author critiques.

[75] Furthermore, communitarianism should be linked to good corporate citizenship doctrine, which promotes corporate social and environmental sustainability. This link is highlighted by Bone, "Legal Perspectives on Corporate Responsibility", *supra* note 58 at 302.

In practice, viewing corporations as natural persons should allow for the pursuit of social and ecological goals alongside profit-making and distribution. This would legitimize balancing profit motives with the protection of external interests. At least in theory, this would distinguish Canadian corporations from their US and UK counterparts, which follow a tradition of shareholder primacy (though in the UK, this takes the form of Enlightened Shareholder Value).

Additionally, while there had been Canadian jurisprudence establishing shareholder primacy at the end of the 20th century, this principle was applied narrowly in change-of-control circumstances and was subject to just exceptions (e.g., a founding family refusing to sell to competitors).[76] Finally, more recent rulings confirmed that corporate interests are distinct from those of its shareholders, and that directors may consider the diverse interests that intersect within the corporation, as these contribute to defining its interests as a separate entity.[77]

However, these rulings have also shown a substantial shareholder primacy approach that the SCC has taken for granted, along with a strongly contractarian interpretation of the relevant interests in the corporation. A key case in this shift is *BCE Inc. v 1976 Debentureholders* (2008), which addressed a direct conflict between shareholder and stakeholder (creditor) interests. The case involved a leveraged buyout (LBO) of BCE by a pension fund, the Ontario Teachers' Pension Plan. To finance the acquisition, BCE had to take on a substantial amount of debt, which in turn harmed bondholders by reducing the market price of their bonds and pushing their value below investment grade.

Formally, the SCC made seemingly stakeholder-oriented claims on fiduciary duties, establishing that:

> [40] In considering what is in the best interests of the corporation, directors may look to the interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions.
>
> [66] (…) Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders, such as the debentureholders in these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen. (…)

[76] *Maple Leaf Foods Inc v Schneider Corp*, 1998 CanLII 5121 ON CA [*Maple Leaf*]. A commentary on this case is provided by Vasudev, *supra* note 52 at 107 ff. Ontario case law is relevant for determining Canadian corporate law, as the Toronto Stock Exchange is the only active market in Canada for listed shares. This implies that for takeover bids involving listed companies, Ontario would be the suitable jurisdiction, regardless of whether the companies are incorporated in other provinces or federally. See *Ibid* at 110, note 5.

[77] Yvan Allaire & Stéphane Rousseau, "To Govern in the Interest of the Corporation: What Is the Board's Responsibility to Stakeholders Other than Shareholders?" (2015) 5:3 Journal of Management and Sustainability 1–16 at 7; Vasudev, *supra* note 67 at 142. Key rulings include *Peoples Department Stores Inc (Trustee of) v Wise*, [2004] 3 SCR 461; *Air Canada Pilots Association v Air Canada Ace Aviation Holdings Inc*, [2007] CanLII 337, (ON SC); *BCE Inc v 1976 Debentureholders*, [2008] 3 SCR 560, (SCC) [*BCE*].

Despite these claims, the SCC rejected the bondholders' claim, taking a strongly contractarian stance based on the absence of a contractual clause specifically protecting their interests. Moreover, the Court asserted that creditors could not have reasonably expected BCE's management to reject a transaction that maximized shareholder value solely due to its negative impact on third parties. In doing so, the SCC substantially upheld a strong shareholder primacy perspective of corporate interests.[78]

The paradoxical reasoning behind the decision has led to interpret the Court's stakeholder-oriented claims as little more than formal declarations or, at best, obiter dicta, with no real impact on the outcome for stakeholders in litigation.[79] In fact, the SCC's interpretation of fiduciary duties merely allows directors to consider interests beyond those of current shareholders but does not impose any obligation to do so.[80] Indeed, the debtholders' claim was rejected. Moreover, while the Court formally leaves the prioritization of interests to managerial discretion, it strongly implies the subordination of non-shareholder interests by defining them as merely "ancillary" to those of shareholders.[81] The Court's deference to the Business Judgment Rule (BJR)–preventing judges from second-guessing directors' decisions when based on reasonable grounds[82]–also means that the exercise of this discretion will not be assessed in the merits by the courts, except in limited circumstances.

Additionally, even in earlier cases such as *Peoples Department Stores v Wise* (2004)–which also dealt with a shareholder-creditor conflict of interest, though in a bankruptcy setting–the recognition of the possibility for directors to consider broader interests did not prevent the Court from ultimately grounding its decision in shareholder value principles.[83] The 2019 amendment of Section 122 of the CBCA confirmed the stakeholder approach formally expressed in BCE but not

[78] It has also been observed that even in *Teck*, the court's reasoning did not constitute a definitive rejection of the *shareholder primacy* theory; see J Anthony VanDuzer, "BCE v. 1976 Debentureholders: The Supreme Court's Hits and Misses in Its Most Important Corporate Law Decision since Peoples" (2010) 43 UBC L Rev 205–258 at 236, note 109. It is important to stress that, while shareholder primacy has clearly influenced the decision, it has not been discussed or openly accepted by the Court; refer to Vasudev, *supra* note 46 at 161.

[79] Vasudev, *supra* note 52 at 124–125.

[80] Note the wording: "may look", "may be obliged".

[81] *BCE*, *supra* note 77 at para 40.

[82] For further references and discussion on the BJR, see footnote 123 and Chapter 5, subsection 4.6.

[83] *Peoples Department Stores Inc. (Trustee of) v. Wise*, *supra* note 77 at para 53 excludes the notion that directors owe a fiduciary duty to creditors. At para 31 suggests that it would be legitimate to consider interests beyond those of shareholders, but it does not specify that shareholders' interests may be legitimately compressed to benefit other stakeholders: "I appreciate that it would be a breach of their duty for directors to disregard entirely the interests of a company's shareholders in order to confer a benefit on its employees: Parke v. Daily News Ltd., [1962] Ch. 927. But if they observe a decent respect for other interests lying beyond those of the company's shareholders in the strict sense, that will not, in my view, leave directors open to the charge that they have failed in their fiduciary duty to the company." Furthermore, the notion that shareholders are the owners of the corporation and that the primary purpose of a company is to maximize shareholder value has never been entirely abandoned in Canada. Rather, it has been (at least partially) reiterated even in the most (formally) stakeholder-oriented decisions and in litigation outcomes, as Canadian courts have not been particularly receptive to claims brought by non-shareholder stakeholders. For instance, in *Air Canada Pilots Association v. Air Canada Ace Aviation Holdings Inc.*, *supra* note 77, the Ontario Supreme Court referred to shareholders as the "rightful holders" of corporate assets. More extensively, Vasudev, *supra* note 67 nn 9–10.

applied in practice by codifying the option for corporate management to consider non-shareholder interests.[84]

Therefore, although the Canadian tradition has historically differed from the Italian approach by not being strictly contractarian or focused on shareholder primacy, the current state of Canadian jurisprudence has brought the two countries' conceptions of corporate purpose closer together. Both countries now share a view of corporate purpose that is substantially aligned with the interests of current shareholders.

It should nonetheless be noted that, while in Italy the corporation is legally based on a contract according to Article 2247 of the Civil Code,[85] in Canada the corporation's contractual nature varies among corporate statutes. On one hand statutes such as the British Columbia Business Corporations Act (BCBCA) describe articles of association as a contract under which shareholder grant power to directors.[86] However, on the other hand, most other Canadian statutes and the CBCA directly allocate power to directors,[87] upholding a different view of the corporation than contracts.[88] Furthermore, the case law of the SCC in the 21st century and the subsequent debates support the different functioning of stakeholderism in Anglo-American jurisdictions compared to Italy. Unlike in Italy, where stakeholderism has leaned towards introducing normative limits on directors' pursuit of wealth for shareholders, the debate on stakeholder interests in Canada has been about whether these are or should be formally recognized as part of directors' duties, expanding the range of interests that shape corporate purpose.[89]

2.2. Incentives for Directors to Pursue Shareholder Interests

Besides the interpretations of the corporate interest, practical incentives exist for directors to pursue shareholder value. Accounting for these practical incentives is essential as they can significantly influence directors' behaviour and, consequently, shape the context in which the theoretical frameworks discussed in the preceding sections operate. The following overview on these incentives and their operation in Italy and Canada emphasizes the impact of shareholders' interests on directors, reinforcing the equation between corporate interests and profits for

[84] *CBCA*, *supra* note 10, s 122(1.1.).
[85] Save unipersonal public and private corporations (*S.p.A. unipersonale*; *s.r.l. unipersonale*).
[86] British Columbia, *Business Corporations Act*, SBC 2002, C 57, s 137.
[87] *CBCA*, *supra* note 10, s 102(1); Ontario, *Business Corporations Act*, RSO 1990, c. B.16, s 115(1). However, these statutes also establish that directors' duty to manage or supervise the management of the corporation are "subject to any unanimous shareholder agreement." The contractual nature of unanimous shareholder agreements (USAs) has been upheld by courts, although they are considered a peculiar contract as they can govern the procedure for running the corporation and the personal or individual rights of the shareholders (see *Duha Printers (Western) Ltd v Canada*, [1998] 1 SCR 795 at para 66 [referring to the Manitoba corporate statute, which contains a provision similar to that of the CBCA and Ontario]).
[88] Moreover, some Canadian doctrine has emphasized that it would be more in line with the North American corporate tradition, which is based on statutory law rather than contracts among shareholders, to consider articles of association as a "statutory instrument prepared by incorporators under sanction from public policy, and within the parameters laid down in legislation"; see Vasudev, *supra* note 46 at 165.
[89] Nevertheless, as will be explored further, this formal extension, as proclaimed by the SCC, has sparked significant skepticism and criticism in legal scholarship.

shareholders. Furthermore, this overview offers a basis for assessing proposals to protect stakeholder interests–including the one I will delineate in the next chapter–, whose effectiveness depends on how well they counteract the incentives discussed here.

Before turning to discussing incentives, it is important to highlight the existence of a gap between legal theory and practice. In practice, shareholder activism, both exercising rights and enforcing them through litigation, has been far less extensive than theory suggests. Several reasons explain this "passivity". Market factors play a role, such as diversified investment portfolios limiting attention to individual companies, the ease of exiting the company via stock markets, and the existence of collective action problems. Legal factors also contribute, including, e.g., courts' reluctance to uphold shareholders' claims, high litigation costs, and free riding problems. While exceptions exist, such as hedge fund activism, and regulatory incentives, like the 2017 EU Shareholders Rights Directive II and the (voluntary) Canadian Coalition for Good Governance (CCGG) Stewardship Principles for institutional investors,[90] these have not fully reversed the general pattern of shareholder passivity. As such, this reality must be considered when assessing shareholders' impact on corporate governance. Simultaneously, shareholders' limited exercise of their rights increases directors' freedom, which, absent incentives aligned with stakeholders' interests, often translates into greater managerial unaccountability.[91]

[90] "Stewardship Principles & Endorsers", online: *CCGG* <https://ccgg.ca/stewardship-principles-endorsers/>.

[91] For an overview of the gap between theory and practice of shareholder activism see Brian R Cheffins, *Advanced Introduction to Corporate Governance Law and Regulation* (Cheltenham: Elgar, 2024) at 193 ff. For further readings on shareholder activism and litigation in Canada, see Cynthia A Williams, "Stewardship Principles in Canada" in Dionysia Katelouzou & Dan W Puchniak, eds, *Global Shareholder Stewardship*, 1st edn (Cambridge: Cambridge University Press, 2022) 437; Hugo Margoc, "Shareholder Activism in Canada: A Deliberate Policy Choice" (2016) 31 BFLR 291–324; Brian R Cheffins, "Hedge Fund Activism Canadian Style" (2014) 47:1 UBC L Rev 1–33; Vanessa Serret & Sylvie Berthelot, "Shareholder Activism in Canada: The Emergence of a New Tool for Improving Corporate Governance Practices" in Sabri Boubaker, Bang Dang Nguyen & Duc Khuong Nguyen, eds, *Corporate Governance* (Berlin, Heidelberg: Springer, 2012) 89; Ann M Scarlett, "Imitation or Improvement - The Evolution of Shareholder Derivative Litigation in the United States, United Kingdom, Canada, and Australia" (2011) 28:3 Ariz J Int'l & Comp L 569–628; Stephanie Ben-Ishai & Poonam Puri, "The Canadian oppression remedy judicially considered: 1995-2001" (2004) 30:1 Queen's LJ 79–113. For a European and Italian perspective limited to literature in English, see Tom Vos, "Shareholder Activism in Europe: A Rising Trend?" (2023) 20:6 European company law 127–132; Matteo Erede, "Governing Corporations with Concentrated Ownership Structure: An Empirical Analysis of Hedge Fund Activism in Italy and Germany, and Its Evolution" (2013) 10:3 ECFR 328–393; Kristoffel Grechenig & Michael Sekyra, "No derivative shareholder suits in Europe: A model of percentage limits and collusion" (2011) 31:1 International Review of Law and Economics 16–20; Erik P M Vermeulen & Dirk A Zetzsche, "The Use and Abuse of Investor Suits – An Inquiry into the Dark Side of Shareholder Activism" (2010) 7:1 ECFR 1–62; James D Cox & Randall S Thomas, "Common Challenges Facing Shareholder Suits in Europe and the United States" (2009) 6:2–3 ECFR 348–357.

2.2.1. Legal Incentives

a. Appointment and Remuneration Determination

A primary legal incentive for directors to pursue shareholder interests lies in the process of their appointment and compensation, which typically falls under shareholder control and has been largely seen as a tool to mitigate agency costs.[92]

In Italy, the appointment of directors in *S.p.A.* companies is exclusively entrusted to the shareholders' meeting.[93] Generally, provisions in the company's bylaws that attempts to delegate this appointment to a single shareholder or an external third party would be invalid.[94] However, some flexibility is allowed in the appointment process (e.g., separate elections may be made by holders of participatory financial instruments[95] or by public entities holding shares in the company) and bylaws can introduce specific nomination procedures to ensure minority shareholder representation. In these companies, shareholders can also remove directors,[96] who can be dismissed without cause,[97] and are typically responsible for determining directors' overall compensation, covering both board members and, if applicable, the executive committee.[98]

These rules promote an alignment between shareholder interests and those pursued by directors, as shareholders exert broad control over their appointment and pay. Consequently, the more a director acts in the interests of those who appointed them, the greater their chances of being reappointed for subsequent terms, receiving higher compensation, and building a strong reputation that may facilitate future positions in other companies.

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[92] Jensen & Meckling, "Theory of the Firm", *supra* note 61 at 308; Reinier H Kraakman, *The anatomy of corporate law: a comparative and functional approach*, 3rd edn (Oxford: Oxford University Press, 2017) at 36–37; 55–57; 66–68. However, many scholars have been critical to the actual minimization of agency costs, mainly with regard to directors' remuneration: see Bryce C Tingle, "Framed! The Failure of Traditional Agency Cost Explanations for Executive Pay Practices" (2017) 54:4 Alberta L Rev 899; Lucian A Bebchuk & Jesse M Fried, "Pay Without Performance: Overview of the Issues" (2005) 30:4 Journal of Corporation Law 647–673; Guido Ferrarini, "Grandi paghe, piccoli risultati: "rendite" dei managers e possibili rimedi (a proposito di un libro recente)" (2005) 4 Riv Soc 879–890.

[93] Art 2383, para 1, Civil Code (Italy).

[94] See Sanfilippo, *supra* note 15 at 479.

[95] Pursuant to Article 2351, para 5, of the Civil Code (Italy), the company's bylaws may grant holders of financial instruments other than shares the right to appoint an independent member of the board of directors. Since, under Article 2349, para 2, such participatory financial instruments may be allocated to employees, the bylaws may enable a form of employee representation in company management. More extensively on the appointment of a director by holders of participatory financial instruments, see Alessio Bartolacelli, *La partecipazione non azionaria nella S.p.A.: gli strumenti finanziari partecipativi* (Milano: Giuffrè, 2012) at 262 ff.

[96] Except for those appointed by public entities, who can only be removed by the same entities that appointed them.

[97] Though in such cases, the company may be liable for damages; see Art 2383, para 3 Civil Code (Italy). For a broad commentary on directors' remuneration in Italy, see Ettore Gliozzi, "Gli alti compensi dei top managers" (2018) 72:3 Riv Trim Dir e Proc Civ 961–976.

[98] In the latter case, the board of directors may assume this responsibility instead. The board also determines the remuneration of the chairperson and individual CEOs in consultation with the audit committee (*collegio sindacale*).

This alignment between shareholder interests and managerial decision-making is also reflected in the most recent EU Shareholder Rights Directive II (SHRD II), concerning the exercise of certain rights of shareholders in listed companies. SHRD II has expanded shareholder rights to have a say on executive remuneration (*say on pay*).[99] While this Directive states its intention to promote long-term corporate objectives, including social and environmental considerations, it simultaneously strengthens shareholder control over executive compensation–a tool explicitly described as 'one of the key instruments for companies to align their interests and those of their directors'.[100]

Moreover, the structure of executive compensation itself can serve as an incentive to prioritize shareholder interests. For instance, it is common practice to remunerate directors through the allocation of shares or financial instruments, such as stock options granting the right to subscribe to or purchase company shares (*stock option plans*).[101] These mechanisms incentivize directors to pursue shareholder value by directly tying their personal wealth to the company's economic performance. The pursuit of shareholder value may also be incentivized by linking the variable portion of directors' compensation to stock price performance.[102]

Regarding director appointments, the Canadian framework closely resembles the Italian system, so reference can generally be made to the discussion already provided. Like in Italy, in Canada, directors are elected by the assembly at annual meetings, except for the initial directors,[103] and election procedures may vary from corporation to corporation, as specific rules for elections may be adopted.[104] Shareholders also have the power to remove a director by an ordinary resolution without providing a reason,[105] though additional requirements apply if the director was elected by a specific class or series of shareholders.

One difference concerns executives. While these are appointed by the board in both Italy and Canada, only in Italy must executives always be chosen from among board members. Although

[99] Implemented in Italy through d. *lgs. 10 maggio 2019, n. 49,* 10 *May 2019,* 49, amending Art 123-ter TUF.

[100] EU, *Directive 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement* [SHRD II], [2017] OJ L 132/1, Recital 28. Similarly, regarding the long-term values of shareholder activism in Canada, see Anita Anand with the collaboration of Susan Watson & P M Vasudev, "Implications of shareholder activism" in *Global Capital Markets* (Cheltenham: Elgar, 2017) 17 at 24–27.

[101] These remuneration structures are permitted by Arts 2389, para 2 Civil Code (Italy); 114-bis TUF (for listed companies). For their success in Italy, see Alessandra Zanardo, "I piani di stock option dall'esperienza anglosassone alla disciplina e diffusione nell'ordinamento italiano" (2006) 5 Giur comm 768–764.

[102] This practice has been largely criticized by scholars: e.g, Lynn Stout, ""Maximizing Shareholder Value" Is an Unnecessary and Unworkable Corporate Objective" in Dominic Barton, Dezsö Horváth & Matthias Kipping, eds, *Re-Imagining Capitalism* (Oxford: Oxford University Press, 2016) 159 at 170.

[103] Who are listed in a specific document filed with the articles of incorporation. See *CBCA*, *supra* note 10, s 106(3).

[104] Such as slate elections, individual voting for each nominee, and majority voting for individual elections. *Ibid*, s 106(3.3), (3.4). However, some directors may be appointed by elected directors, provided that the articles do not specify otherwise and that the total number of directors appointed does not exceed one third of the number of directors elected at the previous annual meeting of shareholders; *ibid*, s 106(8).

[105] *CBCA*, *supra* note 10, s 109(1), (2). For further details, seeJ Anthony VanDuzer, "Shareholder Remedies" in *The law of partnerships and corporations*, 4th edn (Toronto, ON: Irwin Law, 2018) 440 at 302–305.

external executives may theoretically have less incentives to pursue shareholders' interests since they are not directly appointed by them, it is doubtful whether this is the case in practice. Executives, even when external, remain delegates of a board appointed by shareholders and can be removed at any time by shareholders' decision.

Regarding compensation, Canadian law differs from Italian law as the remuneration of directors and officers of a corporation is fixed by the directors themselves,[106] albeit this provision can be subject to indirect shareholder control.[107] In determining their own remuneration, directors are subject to fiduciary duties and must act in the best interest of the corporation, ensuring that their compensation is fair.[108] Generally, directors receive fixed (salary) and variable (bonuses) compensation, with the latter theoretically linked to corporate economic performance, although this connection does not always occur in practice.[109]

While self-determined compensation reduces directors' incentives to maximize share value, it can also create harmful conflicts of interest between directors and the corporation that shareholders may find difficult to address.[110] This situation may increase directors' discretion in their own favour rather than effectively motivating them to consider external interests. To prevent this outcome, compensation structures generally include bonuses linked to corporate performance, thereby increasing the incentives for directors to pursue value for shareholders.

b. Directors Holding Shares via Compensation

Connected to the previous point is the fact that directors may also be shareholders of the companies they manage. In Italy, directors of S.p.A. companies can be either shareholders or not. Similarly, in Canada, directors may be shareholders, employees, or external individuals (outside directors). In both countries, public corporations are characterised by a management structure

[106] *CBCA*, *supra* note 10, s 125; see also s 120(5), which establishes that they can vote on resolutions concerning their remuneration. However, this exemption from the voting restriction does not apply if the director enters into a contract with the corporation, where he serves as a director, indirectly through a personal-services corporation; Gray, Whitley & Rice, *supra* note 10 §125 CBCA.
in which he has an interest or in respect of which he also stands in a fiduciary relationship

[107] Though articles, by-laws, or unanimous shareholder agreements (USAs); see *CBCA*, *supra* note 10, s 125.

[108] *Wonsch v Wonsch*, 2005 CanLII 29056 (ON SC) at para 70. See also *Radtke et al v Machel et al*, [2000] OJ No 3019 cited by J Anthony VanDuzer, *The law of partnerships and corporations*, 4th edn (Toronto, ON: Irwin Law, 2018) at 313–315.

[109] David Macdonald, "Company men - CCPA" (2 January 2025), online: <https://www.policyalternatives.ca/news-research/company-men/, https://www.policyalternatives.ca/news-research/company-men/>.

[110] Shareholders' tools to challenge excessive director remuneration typically include oppression claims, derivative actions on behalf of the corporation, or the removal of incumbent directors; see See Gray, Whitley & Rice, *supra* note 10 §125 CBCA. Oppression claims may not be a practical recourse if the financial harm suffered by each individual shareholder is small, making legal action less appealing or worthwhile; see VanDuzer, *supra* note 108 at 314–315. While class actions may theoretically help in this regard, this has proved limited in practice; see *Ibid* at 581, notes 8-9; Hutchison, "To Whom Are Directors' Duties Owed?", *supra* note 67 at 143 [recalling the "English rule" of cost shifting, lower damages awards, and lower counsel fees for plaintiff attorneys as reasons why class actions are less common in Canada for a number]; Sean McGinty, "The Courts and Executive Compensation in Canada" (2021) 14:2 Law and Development Review 753. Derivative actions face additional hurdles, primarily related to the determination that the corporation suffered damage due to the adopted remuneration structures.

that typically relies on professional or senior management, which is better equipped to oversee complex and large-scale operations. Also, corporate and securities law rules limit the number of inside directors.[111] Therefore, shareholder-directors are less common than in close corporations. However, the phenomenon of directors holding corporate shares cannot be entirely ruled out in public corporations, particularly because compensation mechanisms often involve equity-based financial instruments. As discussed, such instruments turn directors into shareholders, encouraging them to prioritize shareholder interests–especially as their own financial interests become directly linked to company performance–and take on greater risks in decision-making.[112]

While it is widely recognized that granting shares to directors may increase risks for the market, such as increasing volatile share value,[113] this practice remains prevalent in Italian corporations, particularly in large, publicly traded companies.[114] Moreover, this trend is reinforced by the *Borsa Italiana* Corporate Governance Code, which actively recommend stock-based compensation as a means of aligning management incentives with shareholder interests.[115] Similarly, executive compensation through shares is common in Canada and is supported by policy recommendations

[111] E.g., *Business Corporations Act*, *supra* note 87, s 115(3).

[112] With regard to stock option plans, see Zanardo, "I piani di stock option", *supra* note 101. To be exact, financial instruments (such as derivatives) have been used to shield directors from a drop in share value; see Yvan Allaire with the collaboration of Canadian Electronic Library, Institute for Governance of Private and Public Organizations Working Group on Compensation, & Institute for Governance of Private and Public Organizations, *Pay for value cutting the Gordian knot of executive compensation* (Montréal, QC: Institute for Governance of Private and Public Organizations, 2012) at 43 and footnote 16. More extensively on the use of derivatives for similar purposes, see Pinghsun Huang, M Humayun Kabir & Yan Zhang, "Does Corporate Derivative Use Reduce Stock Price Exposure? Evidence From UK Firms" (2017) 65 The Quarterly Review of Economics and Finance 128–136.

[113] For example, taking on excessive risks to boost stock value in the short term while shifting the costs onto shareholders; Zanardo, "I piani di stock option", *supra* note 101 at 4. Recognizing the risks posed by stock-based remuneration, SHRD II has introduced a binding shareholder vote on remuneration policy, which must provide a detailed description of its components and explain how the policy contributes to the company's long-term performance; EU, *Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies,* [2007] OJ L 184/17, Art 9b as amended.

[114] According to the 2024 Borsa Italiana report on the application of the Corporate Governance Code, in Italy, among companies adhering to the Code–typically listed companies–90% of remuneration policies include a variable component for executive directors (at 58). Additionally, in 54% of the companies that provide variable remuneration, the variable component is explicitly linked to the market value of shares (stock-based plans). Finally, both the inclusion of "business" objectives and the linkage of at least part of the variable remuneration to stock performance is more common among larger companies (at 62). See *Relazione 2024 sull'evoluzione della corporate governance delle società quotate. 12° rapporto sull'applicazione del Codice di Autodisciplina.*, by Comitato Italiano Corporate Governance (2024) online: <https://www.borsaitaliana.it/comitato-corporate-governance/documenti/comitato/rapporto2024.pdf>.

[115] To incentivize directors (Principle XV), the Code recommends a remuneration policy in which the variable component represents a significant portion of the total remuneration (Recommendation 27, a)) as well as the adoption of remuneration plans for executive directors and top management based on shares – albeit with a vesting period and a minimum holding period of at least five years for the majority of the allocated shares (Recommendation 28). See Comitato per la Corporate Governance, *Codice di Corporate Governance* (January 2020), online: <https://www.borsaitaliana.it/comitato-corporate-governance/codice/2020.pdf>.

issued by the *Canadian Coalition for Good Governance* (*CCGG*), a coalition of Canadian institutional investors.[116]

c. Exposure to Liability: Derivative and Direct Claims, and Shielding Mechanisms

Another legal factor that can incentivize directors to pursue shareholder value is their exposure to liability actions brought by shareholders. This mechanism has also been considered as another tool for reducing agency costs associated with the misalignment of interests between shareholders and managers.[117]

In both Italy and Canada, shareholders can hold directors liable for damages caused either to the company or directly to their own assets. In the first case, the action is brought on behalf of the company (*azione sociale di responsabilità*/ shareholder derivative action). In the second case, the claim is made in the shareholder's own name (*responsabilità degli amministratori verso i singoli soci*/ oppression claim). Notably, in both countries, corporate law limits the ability of third parties harmed by directors' behaviour to seek compensation through legal action.[118]

The exposure of directors to liability claims brought by shareholders increases their fear of being sued, thereby incentivizing them to act in the interests of those who have the power to hold them accountable (the shareholders). This is especially true given that such claims do not have a corresponding counterbalance in the form of legal actions from other stakeholders who may be

[116] CCGG, *Management-Shareholder Alignment: Effective Equity Ownership Policies* (2023), online: <https://ccgg.ca/download/5042/>. In North America, a surge in the use of executive stock options followed the shift from managerial capitalism to financial capitalism that occurred in the 1980s, along with the publication of influential papers claiming that traditional executive compensation forms were value-destroying for shareholders. This, in turn, made shareholders, especially institutional investors, more adamant about directors promoting their interests; see Allaire, *supra* note 112 at 33–34. Additionally, Canada was also affected by a legislative change in 2000 that made stock options much more tax favourable, aligning Canadian tax treatment of options with U.S. tax treatment; see Richard J Long & Parbudyal Singh, *Strategic compensation in Canada*, 6th edn (Toronto, ON: Nelson, 2018) chs 6-Executives. For more recent trends in executive compensation in Canada, refer to David Milstead, "Out of options? Increasingly, companies find they have other ways to pay their CEOs", *The Globe and Mail* (24 June 2024), online: <https://www.theglobeandmail.com/business/article-out-of-options-increasingly-companies-find-they-have-other-ways-to-pay/> [reporting a decline in the use of stock options among large Canadian corporations in favour of other forms of equity-linked compensation. This shift has been influenced, among other factors, by a change in Canadian tax law starting in 2021 that has reduced the number of corporations eligible for preferential stock treatment.]

[117] Kraakman, *supra* note 92 at 43; 68-71.

[118] In Canada, there have been openings in this regard, particularly through an expansive interpretation of the oppression remedy by the SCC, such as in the *People's* decision. However, this interpretation remains highly debated in its practical meaning. For example, in People's, the SCC's opening to stakeholders' interests has been considered an obiter dictum given that it did not help the creditors' claim, which they lost (on this point, see Vasudev, *supra* note 48 at 117). As noted above, the absence of explicit mechanisms to protect third-party interests from harms caused by managerial decisions can be linked to the influence of the US shareholder-centric approach to corporate law.
In Italy, third-party actions are regulated by Article 2395 Civil Code (Italy). Compared to shareholders' actions on behalf of the corporation, limitations include, e.g., the type of damage that can be compensated, the burden of proof, and the limitation period. These limits can be attributed to the traditionally contractarian and shareholder-centric approach, which has also manifested in corporate models that are explicitly required by law to balance shareholder interests with those of third-party beneficiaries (notably, benefit corporations). Even in these models, there are no specific provisions allowing third parties to bring actions against directors.

harmed. One possible solution could be to limit shareholders' ability to hold directors liable for failing to pursue the corporate interests by relying, for example, on shareholders' duty to act in good faith. This would prevent shareholders from holding directors liable for not prioritizing profit when doing so would harm external interests. However, at present, good faith obligations primarily serve other purposes–typically related to majority-minority dynamics–and are therefore unlikely to provide effective protection for stakeholders.[119]

However, the level of actual exposure to liability risk varies across jurisdictions.[120] Where the risk is higher, and given the challenging role assigned to directors as well as the complexity of the assessments required in making management decisions—particularly concerning standards of care and diligence—greater protections are (or can be put) in place to safeguard managerial discretion.[121] These protections can be either regulatory or contractual. In Italy and Canada, the risk of facing liability actions for directors is–at least in theory–relatively high, as there are no particularly restrictive procedural hurdles to initiating litigation for shareholders.[122] Accordingly, shielding mechanisms are available, primarily including:

- *Applying the business judgment rule (BJR).* As mentioned, the BJR prevents courts from second-guessing directors' decisions based on reasonable grounds. This rule is widely accepted and applied by Italian courts, despite not being explicitly codified in statutory law,[123] and operates through judicial restraint in assessing the merits of managerial

[119] In Italy, a significant form of shareholder liability in this context arises in cases of shareholder abuse of rights. However, such cases–typically majority or minority abuse–pertain to conflicts between shareholders when voting in pursuit of interests extraneous to the corporate interest (e.g., solely to harm majority or minority shareholders). In contrast, when a shareholder exercises a liability claim against directors, it would be difficult to argue that this constitutes an abuse, as the pursuit of shareholders' economic interests is traditionally seen as aligned with corporate interest. The notion that shareholders are subject to a duty of good faith in their contractual relationships has also been upheld in Canada: see *Ponce v Société d'investissements Rhéaume ltée*, 2023 SCC 25.
Regarding directors' liability towards the corporation, it cannot be viewed as a counterbalance to direct shareholder claims for personal damages, since it does not provide a defence mechanism for directors against shareholders' liability claims. On the contrary, it is a tool used to challenge directors' conduct when they have failed to pursue the corporate interests (or, in Canada, the best interest of the corporation).

[120] Kraakman, *supra* note 92 at 69–71.

[121] *Ibid* at 70. In Italy, see Pier Giusto Jaeger & Piergaetano Marchetti, "Corporate governance" (1997) 5 Giur comm 625 at para 3 ['A broader entitlement to bring a derivative action against directors raises the issue of allowing the company to bear the costs of insurance coverage for them. This aligns with a framework identified by law and economics analysis as the most suitable for addressing the risks associated with hazardous activities.'][My translation. Note that the claim preceded the introduction of derivative actions brought by minority shareholders under Art 2393-bis Civil Code (Italy).]

[122] Unlike in the UK: Kraakman, *supra* note 92 at 70. Perhaps the burden of proof can be an obstacle when it rests on claimants. However, in practice, there has been some empirical work in Canada showing that oppression claims and derivative actions are relatively uncommon in relation to public companies; see, e.g., Ben-Ishai & Puri, "The Canadian oppression remedy judicially considered", *supra* note 91.

[123] On the application of the BJR in Italy, see also Federico Briolini, "Riflessioni in materia di «specifiche competenze», Business Judgment Rule ed estensione della responsabilità degli amministratori di società di capitali (parte prima)" (2024) Riv Soc 29–72; Eugenio Barcellona, *Business judgment rule e interesse sociale nella "crisi": l'adeguatezza degli assetti organizzativi alla luce della riforma del diritto concorsuale* (Milano: Giuffrè, 2020); Davide Cesiano,

decisions under dispute, provided that the defendant made the decision in an informed manner and that such decision is not manifestly unreasonable.[124] Similarly, in Canada, the BJR is recognized and applied by the courts, with the Supreme Court of Canada (SCC) notably showing significant deference to directors' decisions.[125]

- *Lowering liability standards or opting out of liability for directors.* In Italy, directors' fiduciary and care obligations are considered non-waivable.[126] However, despite their joint liability, dissenting directors may avoid liability if they properly express their opposing opinion, under article 2392 of the Civil Code.[127] Additionally, under the same provision, the liability standards for directors should be evaluated based on the director's expertise. In Canada, too, waiving directors' obligations is not possible; however, through Unanimous Shareholder Agreements (USAs), shareholders can transfer certain directors' duties to themselves.[128]
- *Indemnification and insurance*. In Italy, indemnification of directors is allowed for the costs incurred in the exercise of their functions, in analogy with the rules governing proxy

"L'applicazione della "Business Judgement Rule" nella giurisprudenza italiana" (2013) 40:6 Giur comm 941–965; Carlo Angelici, "Diligentia quam in suis e Business Judgement Rule" (2006) 10–12 Riv dir comm 675–693. Further Italian literature on the BJR include Danilo Semeghini, "Il dibattito statunitense sulla business judgment rule: spunti per una rivisitazione del tema" (2013) 2 RDS 206–232; Paolo Piscitello, "La responsabilità degli amministratori di società di capitali tra discrezionalità del giudice e business judgment rule" (2012) 57:6 Riv Soc 1167–1183.

[124] Art 2381, para 6 Civil Code (Italy); see also, Corte di Cassazione, 25 March 2024, Civil Section I, Order, No 8069 (Italy).

[125] E.g., *BCE*, *supra* note 77.

[126] With regard to Italian derivative actions, which requires a resolution of the ordinary shareholders' meeting, any shareholders' agreement that binds shareholders to vote against a potential proposal to initiate a derivative action against directors is null and void as it would conflict with the mandatory provisions of Articles 2392 and 2393 of the Italian Civil Code; Corte di Cassazione, 28 April 2010, Civil Section, No 10215 (Italy). On the invalidity of shareholders' agreement constraining the exercise of Italian derivative actions, see also Tribunale Napoli, 23 February 2022 (Italy), commented by Gianluca Florian, "La meritevolezza dei patti "successivi" di rinuncia ad esercitare l'azione sociale di responsabilità nei confronti degli amministratori" (2024) 1 BBTC 129–153. However, some other trial courts have upheld a partially different position: Tribunale Roma, 28 September 2015, Business Section (Italy), commented by Andrea Tina, "Clausole di garanzia, patti parasociali ed esonero da responsabilità degli amministratori nel trasferimento di partecipazioni societarie" (2017) 5 Giur comm 904–916 [the ruling upholds the validity of shareholders' agreement to vote in favour of renouncing the exercise of a derivative action for conduct undertaken prior to the agreement]; affirmed Tribunale Milano, 31 March 2021, Business Section (Italy), summarized by Pasquale Di Marino, "Il cessionario della totalità del capitale sociale non acquista il diritto all'azione ex art. 2395 c.c." (31 March 2021), online: *Giurisprudenza delle imprese* <https://www.giurisprudenzadelleimprese.it/il-cessionario-della-totalita-del-capitale-sociale-non-acquista-il-diritto-allazione-ex-art-2395-c-c/>. Relevant literature on this topic includes Antonio Franchi, *La responsabilità degli amministratori di s.p.a. e gli strumenti di esonero da responsabilità* (Milano: Giuffrè, 2014) at 122–161; extensively, Andrea Tina, *L'esonero della responsabilità degli amministratori di S.P.A.* (Milano: Giuffrè, 2008) at 4 and ch 2.

[127] Under this provision, a director is not liable for damages caused to the company by their acts or omissions if, without fault, they promptly record dissent in the board meeting and resolution book and immediately notify the chair of the audit committee in writing.

[128] *CBCA*, *supra* note 10, s 122(3). For a brief Italian commentary on this possibility in the common law world, see Angelici, "Diligentia quam in suis", *supra* note 123 n 2. However, the relevance of USAs for public corporations is quite limited due to the practical impossibility of getting unanimous agreements among shareholders; see VanDuzer, *supra* note 108 at 326.

(*mandato*),[129] although it is still debated whether this also extends to criminal proceedings.[130] Italian companies can also subscribe to an insurance policy in favour of directors (whether their own or those of controlled companies) to mitigate their liability risks.[131] Clauses exempting directors from the economic consequences of their liability towards the corporation (or creditors and third parties) are also considered lawful.[132] However, both of these options cover only ordinary negligence and do not extend to willful misconduct (*dolo*) or gross negligence (*colpa grave*).[133] Similarly, Canadian directors may receive voluntary indemnification from the corporation for any costs, charges, and expenses they have incurred in relation to their activities for the corporation, although it does not cover unreasonable or bad-faith behaviour.[134] Mandatory indemnification is also available for directors, but does not cover actions brought by the corporation (directly or derivatively)–except with court approval.[135] It is also subject to the director not having been judged by the court or another competent authority to have committed any fault or omitted to do anything they ought to have done.[136] Additionally, Canadian corporations

[129] Giovanni Bevilacqua, "Art. 2389 c.c. - Compensi degli amministratori", in Giovanni Bonilini, Massimo Confortini & Carlo Granelli, *Codice Civile commentato online* <https://onelegale.wolterskluwer.it/>; Bonafini, *supra* note 16 at 323 ff.

[130] On this issue, see Corte di Cassazione, 14 December 1994, United Sections, No 10680 (Italy) [upholding a negative answer]; contra, Alberto Mazzoni, "Spese di assistenza legale e di difesa sopportate da un amministratore di s.p.a. e rimborsabilità delle stesse da parte della società" (1998) 3 Giur comm 375 [who contends that it is legitimate for the corporation to indemnify directors for the costs incurred in the exercise of their function, even when litigation ascertains the responsibility of the director, provided that such responsibility is not due to a breach of their fiduciary duties]; Giuseppe B Portale & Aldo Angelo Dolmetta, "Limiti di rimborsabilità delle spese per assistenza legale sopportate da amministratori di società per azioni" (1998) 3 Giur comm 349.

[131] In Italy, there is no specific regulation governing insurance contracts for company directors; therefore, this matter is left to insurance companies. Extensively, on directors' insurance, Franchi, *supra* note 126 at 145–159; Umberto Tombari, "L'assicurazione della responsabilità civile degli amministratori di società per azioni" (1999) 2 BBTC 180.

[132] Namely, contractual reliefs from (negligent) liability (*manleva)*. This is an 'atypical' contract as it is not regulated by any provisions. These closely resemble the waiver of the action for directors' liability towards the corporation deliberated through a shareholders' meeting (Art 2393 para 6 Civil Code (Italy)). For further information, Franchi, *supra* note 126 at 123–143; Tina, *supra* note 126 at 335–347. A limitation of responsibility has recently been introduced for auditors. Specifically, *legge 14 marzo 2025, n. 35*, 14 March 2025, 35, amended Article 2407 of the Civil Code, capping the damages auditors can be required to pay to the company, shareholders, or third parties, based on their remuneration, unless they acted with intent. The previous provision for solidarity in liability with directors has also been removed.

[133] Art 1229, para 1 Civil Code (Italy) establishes that any agreement that excludes or limits a debtor's liability for willful misconduct or gross negligence in advance is invalid.

[134] *CBCA*, *supra* note 10, s 124(3); *Blair v Consolidated Enfield Corp*, [1995] 4 SCR 5. Accordingly, directors may be indemnified in civil actions in which they acted in accordance with their applicable fiduciary duty as well as in any criminal, administrative, investigative, or other action or proceeding where they not only satisfy the applicable fiduciary duty but also have reasonable grounds for believing that their conduct was lawful; Gray, Whitley & Rice, *supra* note 10 §124 CBCA. See also *Ayers v CPC Networks Corp*, 2016 Court of Appeal for Saskatchewan at para 81 [Directors and officers should be made whole in relation to costs they incur in connection with actions taken in the best interests of the corporations they serve]. The burden of proving that the conduct of the director did not satisfy this requirement is upon the corporation opposing the indemnification; *Blair v. Consolidated Enfield Corp.*, *supra* at para XXXV.

[135] *Cytrynbaum v Look Communications Inc*, 2013 Court of Appeal for Ontario ['Section 124(4) of the CBCA is not restricted to derivative actions and also applies to actions brought by the corporation.'].

[136] *CBCA*, *supra* note 10, s 124(5). Importantly, indemnification is possible for a breach of the duty of care.

may purchase and maintain insurance for directors and officers (D&O Coverage),[137] with a virtually unlimited scope (and therefore the coverage).[138]

- *Reliance on experts*. In Italy, while consulting experts does not constitute a shield or mitigation of managerial liability,[139] it may impact the assessment of directors' compliance with their duties in their decision-making process (i.e., whether the decision was made in an informed manner).[140] Conversely, Canadian law expressly permits reliance on experts as a defence to statutory liabilities in some circumstances and in the case of the CBCA breaches of the duties of care and loyalty.[141]

However, these shields against directors' liability are rooted in the complexity of their duties, which, if left unchecked, could make the management role excessively burdensome and deter risk-taking necessary for corporate growth.[142] Therefore, they do not aim to be counterincentives for directors to pursue shareholder value. In fact, these protective mechanisms are typically limited by the requirement of legitimate management, which means compliance with fiduciary duties. Consequently, if the fiduciary duty is interpreted as requiring the pursuit of shareholders' economic interests, and if other incentives exist in this direction (such as shareholders' primacy in bringing liability claims), then these shields cannot be deemed sufficient to justify a shift in the interpretation of the function of directors. While the discussed shields can give directors more leeway in how they discharge their responsibilities, allowing them to take into account non-

[137] *Ibid*, s 124(6).

[138] The CBCA leaves its determination to the insurance marketplace. Therefore, where provided, insurance may also cover those costs (for breach of directors' statutory duties) that were not covered by indemnification. The power of this shield is even more emphasized when considered that directors are expressly entitled to vote on a resolution to approve the corporation's purchase of D&O Coverage, even though the directors are personally interested in the contract. *Ibid*, s 120(5).

[139] As the duty of care required from directors remains non-waivable. Notably, when directors possess a high level of expertise, this does not increase the degree of diligence required but rather influences how diligence is concretely applied; Tina, *supra* note 126 at 36, note 68. *Contra*, e.g., Calandra Buonaura, *supra* note 14 at 280 [who refers to a different degree or gradation of the duty of care, though never to its exclusion].

[140] Angelici, "Diligentia quam in suis", *supra* note 123 at 692–693 [who highlights the reasonableness of the reliance of the individual director on the information received from the delegated directors (or from external experts)]. Regarding the first point, if seeking external advice is necessary due to directors' lack of knowledge or the high complexity of a decision, failing to recognize this necessity (either individually or as a board) may result in liability.[140] Additionally, the selection of the expert is itself part of the directors' decision-making process and could lead to liability if not carried out properly; see Mario Stella Richter, "I nuovi protagonisti del governo della società azionaria: gli outside consultants ovvero outsourcing corporate governance" in Piergaetano Marchetti et al, eds, *La S.pA nell'epoca della sostenibilità e della transizione tecnologica Atti del convegno internazionale di studi, Venezia, 10-11 novembre 2023* (Milano: Giuffrè, 2024) 1223 at 1233. Similarly, in Canada (see above, note 119) and, in the US, (Maria Lucia Passador, "Exploring Governance Gambits and Business Judgment in In/Out-Sourcing Tactics" (21 March 2024) Rochester, NY at 34.)

[141] *CBCA*, *supra* note 10, s 123(4), (5).

[142] For example, the BJR has been described as recognizing a "right to error" for directors, as reported by Angelici, "Diligentia quam in suis", *supra* note 123 at 687. Another risk that is intended to be mitigated is the phenomenon of adverse selection, wherein competent, prudent, and conscientious individuals may refrain from assuming the role of director due to the prospect of becoming easy targets for liability lawsuits. This issue is highlighted by Briolini, "Riflessioni in materia di «specifiche competenze»", *supra* note 123 n 19, to whom further bibliographic references are deferred.

shareholder's interest, it is doubtful whether, in practice, such discretion would generally result in this outcome if no other incentives or obligations nudge directors towards social responsibility.

d. Listed vs Non-Listed Companies

Finally, a brief discussion should be conducted regarding whether the regulatory framework for listed companies in Italy serves as an incentive for directors to pursue shareholder value. I support a positive answer.

Unlike non-listed companies, which lack similar explicit guidance, the regulatory framework for listed companies mandates additional rules aimed at safeguarding the market and investors.[143] According to one interpretation, this market-oriented approach underscores a stronger need to ensure the long-term stability of listed companies, which in turn influences directors' duty to pursue the company's long-term success.[144] This aspect is also reflected in the *Borsa Italiana*'s Corporate Governance Code, which recommends for corporate directors to pursue 'sustainable success',[145] defined as the

> long-term value creation for the benefit of shareholders, while considering the interests of other stakeholders relevant to the company.[146]

These elements–the emphasis on long-term success in listed companies and the explicit reference to relevant corporate stakeholders within the Code–may prompt questioning whether they endorse the consideration of stakeholders' interests in such companies, even when these interests are in conflict with those of the shareholders.[147] Additionally, it is relevant to reflect on

[143] Understandably, this heightened focus is justified by the presence of listed companies' shares on the market.

[144] Both in the previous editions of the Code and in the economic policy of the European Union; extensively, Enrico Ginevra, "Il Codice di Corporate Governance: Introduzione e Definizioni (con un approfondimento sul "Successo sostenibile")" (2023) 5–6 Riv Soc 1017 at para 5.2.

[145] *Ibid* at 1050 [according to whom the reference to sustainable success would entail consideration of stakeholder interests as an integration of the corporate interest, serving as a parameter for directors' conduct. However, the author specifies that this would not imply an indiscriminate stakeholderism, but rather taking into account only the interests of stakeholders relevant to the company.]

[146] Comitato per la Corporate Governance, *supra* note 115 arts 1 and definitions. For further remarks on this point, see Lenzi, *supra* note 13; Paolo Cuomo & Piergiuseppe Spolaore, "Il ruolo dell'organo amministrativo" in Amal Abu Awwad & Francesco Bodriga, eds, *Codice di Corporate Governance Commentario* (Torino: Giappichelli, 2025) 43 at 46 ff; Marco Ventoruzzo, "Osservazioni sulle conseguenze applicative dell'adozione di clausole statutarie (e di autodisciplina) sul "successo sostenibile"" (2024) 1 Riv Soc 129–152 at 139 ff; Ginevra, *supra* note 144; Mario Stella Richter, "Il "successo sostenibile" del Codice di corporate governance e le possibili modificazioni statutarie conseguenti" (2021) 2 Vita Notarile 739–741. More generally, on the interpretation of the Code's provisions and its impact on the responsibilities of governing and oversight bodies, see

[147] Some Italian scholars have emphasised that the pursuit of long-term shareholder value indirectly safeguards stakeholders' interests, as they also share a long-term perspective: e.g., Roberto Sacchi, "L'interesse sociale nelle operazioni straordinarie" in Aa Vv, ed, *L'interesse sociale tra valorizzazione del capitale e protezione degli stakeholders: in ricordo di Pier Giusto Jaeger: atti del convegno, Milano, 9 ottobre 2009* (Milano: Giuffrè, 2010) 135 at 149–152. However, another part of Italian scholarship has highlighted that a long-term focus does not necessarily align with stakeholder interests; Mario Stella Richter, "Long-Termism" (2021) 1 Riv soc 16–52.

the implications for non-listed companies, particularly regarding incentives to maximize shareholder value.

Regarding the first point and aligning with the scholarly opinion emphasizing that long-termism does not equate to stakeholder interests, the pursuit of corporate interest over the long term cannot, in general, impose a limitation on the pursuit of shareholder value.[148] On the contrary, emphasizing the long-term horizon may reinforce the subjective nature of the interest pursued, which remains the corporate interest understood as the economic interest of shareholders.[149]

As for the second point, the focus on long-term success in Italian listed companies would not affect how fiduciary duties are carried out in non-listed companies. This is because the long-term perspective refers to the timeframe within which shareholder interests are pursued, rather than challenging the notion that these interests–rather than those of other stakeholders–are paramount. Even if one were to argue that long-term success (albeit occasionally and incidentally) aligns with stakeholder interests, the emphasis on long-termism in listed companies adopting the Corporate Governance Code could suggest that, by contrast, in non-listed companies and listed companies that have not adopted the Code, the long-term perspective (and thus the interests of stakeholders, to the extent they are conflated with it) is not as relevant to corporate management. Consequently, the principle of shareholder value in non-listed companies and listed companies that have not adopted the Corporate Governance Code could even be strengthened.

Overall, the regulatory framework for Italian listed companies appears to be reinforcing or, at most neutral, regarding the pursuit of shareholder value, both in listed and non-listed firms.

2.2.2 Non-Legal Incentives

In addition to the incentives arising from the corporate regulatory framework, there are also non-legal (economic and cultural) incentives for directors to pursue shareholder value. These include the corporate ownership structure, competition among directors, the market for corporate control, and board culture.[150] A brief summary of these incentives is provided below to enhance the contextualization of the discussed directors' duties.

[148] Mario Campobasso, "Gli amministratori, il successo sostenibile e la pietra di Spinoza" (2024) 1 BBTC 1–19 at 11 ['Like it or not, shareholders retain a central role in the organization of business companies. A director who believes they can downgrade shareholders' interests to the level of merely one of the various interests involved in management, to be balanced with those of other stakeholders, does so at their own risk.']

[149] To be fair, the Corporate Governance Code presents a specific interpretation of corporate interest (ad equating with shareholders' interests) that is not included in the Civil Code; on this point, albeit referred to a previous version of the Corporate Governance Code, see Marco Ventoruzzo, "Richiamo e difesa delle radici istituzionali dell'impresa nel codice civile" in Luca Paolazzi, Mauro Sylos Labini & Fabrizio Traù, eds, *Gli imprenditori* (Venezia: Marsilio, 2016) 88 at 110.

[150] With 'board culture' I mean to use a short formula that includes both non-executive and executive directors.

a. Ownership Structure

Regarding ownership structure, the concentration that characterizes public corporations in both Italy[151] and Canada[152] results in a few shareholders holding a large percentage of shares or owning shares with enhanced voting rights. Consequently, majority shareholders have control over the appointment process of directors, which, as seen, affects the alignment of management with the interests of the shareholders who appointed them.[153] This situation has also been viewed as an obstacle to effective sustainability-oriented action by institutional investors within EU Member States.[154]

b. Competition among Managers

Secondly, competition among managers influences their compensation levels and their alignment with shareholder interests. Essentially, to attract or retain the best directors in a global market, corporations increase compensation to exceed that of their competitors. This high level of pay and the competitive mechanism behind it lead directors to pursue shareholder value, ensuring they maintain a reputation that allows them to stay competitive in the corporate governance

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[151] *Rapporto 2023 sulla rendicontazione non finanziaria delle società quotate italiane*, by CONSOB (2023) online: <https://www.consob.it/web/area-pubblica/report-dnf> [which confirms the high ownership concentration of Italian listed companies and the limited contestability of corporate control, which is primarily in the hands of families.] In literature, see *Ownership, Governance, Management and Firm Performance: Evidence from Italian Firms*, by Audinga Baltrunaite et al, in *Bank of Italy Occasional Paper No 678* (16 March 2022) online: <https://papers.ssrn.com/abstract=4090769> [reporting the differences in firm ownership between Northern and Southern Italy]; Marcello Bianchi, Magda Bianco & Luca Enriques, "Pyramidal Groups and the Separation Between Ownership and Control in Italy" in Fabrizio Barca & Marco Becht, eds, *The Control of Corporate Europe* (Oxford, UK: Oxford University Press, 2002) 154; "History of Corporate Ownership in Italy" (ECGI - Finance Working Paper No. 17/2003) Alexander Aganin & Paolo F Volpin, (1 March 2003). For a comparative analysis of corporate ownership and its impact on governance models, see Francesca Rossignoli, "Gli assetti proprietari delle società quotate: evidenze empiriche in Italia, negli Stati Uniti e in Germania" (2011) 1 Riv dott comm 101–117; Brian Cheffins, "Current Trends in Corporate Governance: Going from London to Milan via Toronto" (1999) 10:1 Duke J Comp & Int'l L 5–42.

[152] Hutchison, "To Whom Are Directors' Duties Owed?", *supra* note 67 at 143. For further details, see Ronald J Daniels & Edward M Iacobucci with the collaboration of Randall K Morck, "Some of the Causes and Consequences of Corporate Ownership Concentration in Canada" in *Concentrated Corporate Ownership* (Chicago: University of Chicago Press, 2019) 81; Randall K Morck et al with the collaboration of Randall K Morck, "The Rise and Fall of the Widely Held Firm: A History of Corporate Ownership in Canada" in *A History of Corporate Governance around the World* (Chicago: University of Chicago Press, 2019) 65; Narjess Boubraki et al, "Incorporation Law, Ownership Structure, and Firm Value: Evidence from Canada" (2011) 8:2 J Empir Leg Stud 358–383; Yoser Gadhoum, "Power of Ultimate Controlling Owners: A Survey of Canadian Landscape" (2006) 10:2 Journal of management and governance 179–204; Diane Francis, *Controlling interest: who owns Canada?* (Toronto: McClelland-Bantam, 1987). For critical views see Leon Yehuda Anidjar, "Toward Relative Corporate Governance Regimes: Rethinking Concentrated Ownership Structure Around the World" (2019) 30:1 Stan L & Pol'y Rev 197–262 at 223 ff. For an economic perspective, see Randall K Morck, "On the economics of concentrated ownership" (1996) 26 Can Bus LJ 63.

[153] For a discussion on how concentrated ownership leads to holdup issues because of the significant impact shareholders have on management decisions, refer to "The Dark Side of Shareholder Influence: Toward a Holdup Theory of Stakeholders in Comparative Corporate Governance" (ECGI - Law Working Paper No. 096/2008) Martin Gelter, (2008).

[154] Dan W Puchniak, "The False Hope of Stewardship in the Context of Controlling Shareholders: Making Sense Out of the Global Transplant of a Legal Misfit" (2024) 72:1 The American Journal of Comparative Law 109–169.

services market and demand increasingly higher salaries. For example, in Canada, a convergence with the compensation levels of US directors was observed starting in the early 2000s, when Canadian companies began to consider US corporations in defining the pay packages for their executives.[155] Similarly, in Italy, the growth in the use of stock option plans for executive compensation is linked, at least in theory, to the aim of enhancing companies' ability to attract and retain capable directors.[156]

c. Fear of Loss in Share Value

Thirdly, if corporate management does not pursue profit or value maximization, the shares of the managed corporation may become less popular in the market, as it would be hard to find prospective shareholders who are willing to invest in the company with low expectations for financial returns. This diminished popularity may have a personal impact for executives in terms of loss of (economic) performance bonuses, which generally accompany their compensation plans.[157]

d. Market for Corporate Control

Fourthly, the market for corporate control has played a primary role in the institutionalization of shareholder value in liberal market economies.[158] Maximizing share value can prevent the corporation from becoming a target for takeover bids as this eliminates a key incentive for potential bidders: the potential for profit. For management, preventing hostile takeovers means protecting their positions, as these operations generally result in a change in management.[159]

The deregulation of markets and the takeover revolution led to the rise of shareholders from mere financiers of the firm to controllers of management, aligning their interests and reducing agency costs.[160] Specifically, this has occurred primarily in Anglo-American countries, including

[155] Allaire, *supra* note 112 at 24. See also Rosa Saba, "Here's how much Canada's highest-paid CEOs earned in 2023", *Global News* (2 January 2025), online: <https://globalnews.ca/news/10939707/highest-paid-ceos-2023-report-canada/>.

[156] Zanardo, "I piani di stock option", *supra* note 101.

[157] Pursuant to Article 84-quater, paragraph 2-bis, b), of the Italian Issuers' Regulation (which integrates the TUF), listed companies in Italy must annually prepare a remuneration report outlining their remuneration policy for directors. This includes 'defining the various components of remuneration and, where variable pay is granted, establishing clear, comprehensive, and differentiated criteria based on financial and non-financial performance objectives, potentially including corporate social responsibility (CSR) criteria.' While the regulation promotes transparency in remuneration, it merely allows–without requiring–companies to align their remuneration policies with CSR principles. This implies that while companies may introduce 'sustainability performance bonuses' for directors, it is not required.

[158] Deakin & Singh, *supra* note 66 at 10.

[159] *Ibid* at 39 ['In practice, this means that companies have to satisfy, on a continuing basis, shareholders' expectations for high rates of return on equity.']

[160] *Ibid*. In Italian literature, the controlling aim of hostile takeovers has been discussed, e.g., by Ferrarini, "Le difese contro le o.p.a. ostili: analisi economica e comparazione" (2000) 5 Riv Soc 737–791 at para 2 and note 6. In theory, the justification of political economy for facilitating hostile takeovers is based on the idea that the market can ensure the efficiency of companies and protect investors by exposing firms to the risk of becoming takeover targets if they

Canada, where the 1980s witnessed a boom in hostile takeovers. However, as noted earlier, attempts by the judiciary to protect management from liability for opposing takeovers have not weakened but rather strengthened the principle of shareholder value. As seen above, the 1970s Canadian stakeholder-oriented case law, such as the *Teck* decision does not represent a cemented view of Canadian courts on corporate interests. This is shown by the presence of opposing precedents cited in subsequent jurisprudence and the negative outcomes of later litigation involving stakeholders.[161]

Conversely, Italy has historically taken a restrictive approach to takeovers, due to "structural" reasons (primarily, concentrated ownership) and because of its relatively rigid corporate legal framework,[162] which has encouraged the adoption of preventive mechanisms that have deterred hostile takeovers in advance (so-called "technical" barriers, such as shareholder agreements and limits on share ownership).[163] Although the 2004 EU Takeover Directive[164] aimed to facilitate hostile takeovers, which were considered beneficial for economic growth and for management oversight,[165] these European aspirations have not been fulfilled in Italy. The two key regulatory provisions introduced by the Directive on a voluntary basis, namely the board neutrality and break-through rules,[166] have been only partially implemented in Italy, reflecting a reluctance toward the market for corporate control.[167]

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fail to achieve such efficiency. A hostile takeover, which occurs without the consent of the target's management, leads to the substitution of this management with one that is closer to the acquirer. In this sense, the market for corporate control serves a monitoring function for businesses. Whether this theoretical justification has been reflected in practice is a separate issue that cannot be addressed here. For a counterargument to the facilitation of the market for corporate control, see, e.g., Deakin & Singh, *supra* note 66.

[161] See above, subsection 2.1.2.

[162] Especially when compared to the US corporate law framework.

[163] For details on classification, see Ferrarini, *supra* note 160 [who notes that regulatory restrictions on these barriers have been relatively ineffective and easy to circumvent through alternative instruments].

[164] EU, *Directive 2004/25/EC of the European Parliament and of the Council of 21 april 2004 on takeover bids* [Takeover Directive], [2004] OJ L 142/12.

[165] EU, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Application of Directive 2004/25/EC on Takeover Bids*, COM(2012) 347 final (28 June 2012) at 2 online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52012DC0347>.

[166] "Death by a Thousand Cuts: The Hostile Bids Regime in Europe, 2004-2023" (ECGI - Law Working Paper No. 755/224) Luca Enriques & Matteo Gatti, (1 February 2024) n 11 ['The board neutrality rule requires directors of the target to obtain a shareholders' authorization before adopting takeover defenses. The break-through rule eliminates certain pre-bid defenses if an offer wins a considerable amount of support.']

[167] *Ibid* at 12. Other factors that have led to increased "technical" protections against hostile takeovers in Italy, moving away from the Directive's original intent, also included the easing of restrictions on mechanisms that enhance voting power (e.g., multiple-vote shares); and the Corporate Governance Code recommendation for listed companies against linking executive compensation policies to shareholder value in the event of a hostile takeover. See *d.l. 24 giugno 2014, n. 91, converted by legge 11 agosto 2014, n. 116*, 11 august 2014, 116, Art 20*; legge 5 marzo* 2024, n. 21, 5 March 2021, 21, arts 13 and 14; Comitato per la Corporate Governance, *supra* note 115 arts 5, Recommendation 27.

However, the rationale behind this reluctance is not a desire to protect stakeholders[168] suffering from the consequences of takeovers.[169] Rather, the goal can generally be described as preserving the "Italian corporate identity", that is, ownership.[170] Therefore, while the market for corporate control in Italy has not significantly driven shareholder value as it has in Canada and the US, it has not promoted stakeholderism either. Instead, the Italian safeguarding mechanisms against hostile takeovers have strengthened shareholder power.[171]

e. Board Culture

Finally, board culture, which includes the values, principles, and motivations of individuals who sit on the board of directors and executives, also influences corporate governance beyond the formal duties of directors.[172] While these factors are in turn influenced by the regulatory

[168] European legal scholarship has noted a link between the rising prominence of stakeholder-oriented approaches in recent years and the declining effectiveness of the 2004 Takeover Directive; see Enriques & Gatti, *supra* note 166 at 7–9.

[169] E.g., due to massive layoffs following restructuring, as happened in the famous acquisition of Twitter by Elon Musk in 2022 (Michelle Toh Liu Juliana, "Elon Musk says he's cut about 80% of Twitter's staff", *CNN* (12 April 2023), online: <https://www.cnn.com/2023/04/12/tech/elon-musk-bbc-interview-twitter-intl-hnk/index.html>) or, before, in the 2010 Cadbury acquisition by Kraft (Zoe Wood, Kraft to shed 200 British jobs but denies breaching no-cuts pledge to MPs, *The Guardian* (6 December 2011), online: <https://www.theguardian.com/business/2011/dec/06/kraft-axes-200-uk-jobs>).

[170] Lorenzo Baldacci, "La "difesa dell'Italianità"" (2020) 5 Giur comm 920. This is evident considering the broader economic context in Italy, primarily including issues of regulatory competition and companies' migration abroad – primarily, the Netherlands –; the entry of foreign investors with controlling aims; the 2008-9 financial crisis (famous is the attack by the US hedge fund Elliott against the telecom company TIM: Milena Gabanelli, "Telecom: come si uccide un'azienda strategica per soldi" (24 January 2022), online: *Corriere della Sera* <https://www.corriere.it/dataroom-milena-gabanelli/telecom-come-si-uccide-un-azienda-strategica-soldi/574c7106-7c70-11ec-8a2d-4c61d1a6b1fa-va.shtml>; relevant is also the attempted acquisition of Mediaset by the French Vivendi: "Cos'è la questione "Vivendi-Mediaset"", *Il Post* (18 November 2020), online: <https://www.ilpost.it/2020/11/18/vivendi-mediaset/>; Paolo Colonnello, "Mediaset-Vivendi, l'inchiesta è finita con l'archiviazione" (13 July 2023), online: *La Stampa* <https://www.lastampa.it/economia/2023/07/13/news/mediaset_vivendi_scalata_archiviazione-12938418/>); the critics to hostile takeovers' limits as actually favourable for shareholders (among others, Luca Enriques, "In tema di difese contro le opa ostili: verso assetti proprietari più contendibili o più piramidali?" (2002) 1 Giur comm 108. More recently, Enriques & Gatti, *supra* note 166 at 8–9 [including relevant bibliography].).

[171] A clarification is necessary. On one hand, some legal provisions explicitly require considering the interests of non-shareholder stakeholders (e.g., employees) regarding the potential consequences of a takeover bid. Art 103, para 3-bis TUF mandates that the board of directors of a (listed) target company issue a statement assessing, among other things, the potential impact of the bid's success on the company's interests, employment levels, and the location of production sites. This statement must be disclosed to the market and transmitted to the company's employee representatives–or, in their absence, directly to the workers themselves. If received in time, employee representatives' opinion on employment repercussions must also be attached to the document. On the other hand, this requirement should not be overrated. It merely establishes an obligation to disclose information, without imposing any binding obligation on the corporate management or shareholders to take stakeholder interests into account when making a final decision.

[172] Poonam Puri, "The future of stakeholder interests in corporate governance" (2010) 48:3 Can Bus LJ 427–445 at 429. In Italy, this is evident, for example, in the importance given to ensuring a board composition that is as diverse as possible, both in terms of expertise and gender, as these aspects concretely impact corporate management–see

framework,[173] they play a significant role in guiding management due to the broad discretion that characterizes its activities. Indeed, when directors face multiple options, all theoretically aligned with corporate interests, their values, principles, and personal motivations can be decisive in the decision-making process.[174] Although it is not possible to delve deeply into Italian and Canadian managerial culture here, it is important to highlight that, in practice, the extent to which corporations adopt a shareholder-oriented approach can be significantly influenced by the values of their directors.[175]

3. Expanding Directors' Fiduciary Duties: Going Down the Wrong Path?

So far, we have seen that a contractarian perspective on corporate interests exists in Italy, based on a longstanding tradition, and is also present in Canada, although its affirmation followed a different path there. This perspective views profit as the core goal of corporations and is supported by practical incentives of both legal and non-legal nature.

Given this context, what are the challenges of extending directors' fiduciary duties to include the interests of stakeholders and, particularly, communities? As illustrated below, these challenges arise not only from theoretical arguments but also from practical considerations. Examining the challenges associated with an 'extensive' stakeholderist approach to directors' fiduciary duties supports the argument that a duty to prevent harm to communities should not be pursued in this manner. Rather, as will be discussed in the following chapter, an alternative solution grounded in the duty of care should be preferred.

3.1. An Ineffective Solution

3.1.1. Theoretical and Practical Concerns

Italian legal scholarship has widely criticized the proposal to extend directors' fiduciary duties to include stakeholder interests within the concept of corporate interest. These critiques emerged in Italy in the aftermath of World War II, opposing institutionalist interpretations such as that of Lorenzo Mossa, and continued in later years against stricter stakeholder-oriented theories, both authentic neo-institutionalist, as advocated by Alberto Mazzoni, and contractarian, as supported by Francesco Denozza. More recently, criticisms have extended to international scholarship, including primarily Colin Mayer's proposal to reconceptualize the purpose of the corporation, shifting from a model of profit maximization for shareholders to one focused on the pursuit of the common good. The main criticisms are summarized below and range from arguments that

Comitato per la Corporate Governance, *supra* note 115 arts 2, Principle VII. In Canada, see *Beyond Compliance: Building a Governance Culture*, by Joint Committee on Corporate Governance (2001) [*Saucier Report*].]

[173] Vasudev, *supra* note 52 at 132.

[174] See Bruno S Frey, *Non solo per denaro: le motivazioni disinteressate dell'agire economico* (Segrate: Mondadori, 2005) [who highlights the importance of motivations in human action within the entrepreneurial context compared to monetary incentives]; in the same vein, Mauro Magatti, *L'impresa responsabile* (Torino: Bollati Boringhieri, 1999).

[175] Directors' values have been identified as a relevant factor in determining their shareholderist or stakeholderist orientation; see Renée B Adams, Amir N Licht & Lilach Sagiv, "Shareholders and Stakeholders: How Do Directors Decide?" (2011) 32:12 Strategic Management Journal 1331–1355.

such an extension would be simply unsuitable to the claim that it would be fundamentally incompatible with the current legal framework.[176]

a. No Duties for Directors to Pursue Stakeholder Interests

Firstly, the extension of fiduciary duties to include the pursuit of interests beyond shareholders' profit has been criticized due to the absence of any general legal provision that permits or mandates corporate directors to balance stakeholder interests–thus, including the interests of communities not to be harmed by corporate activities in their enjoyment of commons–over those of shareholders.[177] In fact, this broad interpretation would clash with Article 2247 of the Italian Civil Code, which establishes the pursuit of profit as the goal for corporations[178] and has, in practice, morphed into the 'social norm' of profit maximization,[179] which may have negative consequences for non-shareholder groups, like communities. Consequently, directors are left to determine the means by which they achieve the profit goal.[180]

The idea that Article 2247 mandates a profit purpose for corporations has been opposed by the theory of the "decline of the profit motive in corporations," for which both the Civil Code and corporate practice provide grounds to support the idea that the cause of the corporate contract is essential, but it does not have to be profit-oriented.[181] Examples include the application of Article 2247 to cooperatives and mutual insurance companies, which pursue a mutualistic purpose–which is not primarily for profit–and corporate structures managing public utility assets, such as highways. This perspective asserts the neutrality of corporate structure, which can be shaped by a purpose that is not necessarily profit-driven.[182] So, according to this view, if profit is

[176] For an alternative review of the critiques regarding the expansion of corporate interest, see Stefano A Cerrato, "Appunti per una «via italiana» all'ESG. L'impresa «costituzionalmente solidale» (anche alla luce dei «nuovi» artt. 9 e 41, comma 3, Cost.)" (2022) 1 AGE 63–114 at 94 ff.

[177] Vincenzo Calandra Buonaura, "Responsabilità sociale dell'impresa e doveri degli amministratori" in *Studi in ricordo di Pier Giusto Jaeger* (Milano: Giuffrè, 2011) at 262. Regarding special legal provisions, both benefit corporations and social enterprises require attention to external interests.

[178] Note that until 1993, the heading of the article was 'Notion of Company'.

[179] Beate Sjåfjell et al, "Shareholder primacy: the main barrier to sustainable companies" in Beate Sjåfjell & Benjamin J Richardson, eds, *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge: Cambridge University Press, 2015) 79-147.

[180] Mignoli, *supra* note 28 at 743–744; Monica Cossu, *Società aperte e interesse sociale* (Torino: Giappichelli, 2006) at 310 [who describes the role of directors as the implementation of corporate interest, not the determination of its content.] From an enforcement perspective, it has also been noted that no legal provisions grant stakeholders a positive (actionable) claim to the satisfaction of their interests: Angelici, *supra* note 30 at 59; Marco Saverio Spolidoro, "Appunti sull'interesse sociale nelle operazioni straordinarie" in Aa Vv, ed, *L'interesse sociale tra valorizzazione del capitale e protezione degli stakeholders: in ricordo di Pier Giusto Jaeger: atti del convegno, Milano, 9 ottobre 2009* (Milano: Giuffrè, 2010) 179 at 182; Palmieri, *supra* note 37 at 187.

[181] Gerardo Santini, "Tramonto dello scopo lucrativo nelle società di capitali" (1973) 1 Rivista di Diritto Civile 151–173. Also supported by Giorgio Marasà, *Le "società" senza scopo di lucro* (Milano: Giuffrè, 1984); Franco Di Sabato, *Manuale delle società* (Torino: UTET, 1995) at 32; Francesco Goisis, *Contributo allo studio delle società in mano pubblica come persone giuridiche* (Milano: Giuffrè, 2004) at 219; Francesco Denozza, "Verso il tramonto dell'"interesse sociale"?" in *La dialettica degli interessi nella disciplina delle società per azioni* (Napoli: Jovene, 2011) 77.

[182] Santini, *supra* note 181 at 155.

not established by shareholders as the goals of the corporation, then directors are not obligated to pursue it but must instead work towards the alternative purpose set by the shareholders.[183]

This theory has, in turn, faced criticism from scholars highlighting that non-profit companies are, in reality, associations.[184] This criticism is rooted in the fact that profit-making typically distinguishes companies from associations, along with the nature of the entity's activity. However, legal developments have allowed the corporate structure to be used for purposes that are not exclusively or strictly profit-driven, such as social enterprises and benefit corporations.[185]

Nevertheless, the introduction of corporate forms with social purposes–social enterprises and benefit corporations[186]–has reinforced the idea that, outside of these specific cases, the purpose of corporations remains exclusively profit driven.[187] In other words, if shareholders had intended to establish an *S.p.A.* company for non-profit purposes, they could have (and should have) done so by structuring it as a social enterprise or a benefit corporation. If they did not do so despite having the appropriate legal instruments available, the resulting company cannot pursue interests beyond profit for shareholders.[188]

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[183] *Ibid* at 164.

[184] Walter Bigiavi, *La professionalità dell'imprenditore* (Padova: CEDAM, 1948) at 51 ff; Francesco Galgano, *Delle associazioni non riconosciute e dei comitati: art. 36-42* (Bologna: Zanichelli, 1967) at 81; Giuseppe Ferri, *Le società* (Torino: UTET, 1971) at 10–11. See also Giuseppe Ferri jr, *Investimento e conferimento* (Milano: Giuffrè, 2001) at 110.

[185] Mario Porzio, "Associazioni, fondazioni e società nell'evoluzione dell'ordinamento italiano" (2021) 2 Giur comm 221–229.

[186] With reference to profit, the difference between a social enterprise and a benefit corporation is that the former primarily pursues altruistic interests, while the latter balances altruistic and self-interested goals.

[187] Despite certain regulatory statutory suggesting otherwise; Art 1, para 1 of the Business Crisis and Insolvency Code (Italy), which seems to permit it for non-profit companies. This view is not unique to Italy but has also been supported in other jurisdictions with benefit corporations. For Canada, see Carol Liao, "A Critical Canadian Perspective on the Benefit Corporation" (2017) 40:2 Seattle University Law Review 683–716 [for whom "the adoption of the benefit corporation may only confuse or misrepresent the current state of Canadian corporate law"].

[188] See, *ex multis*, Barcellona, *supra* note 2 at 97; Elisabetta Codazzi, "Scopo di lucro e di beneficio comune nel passaggio da società non benefit a società benefit" (2021) 3 ODC 1243–1289 at 1259–1260 [for whom non-benefit corporations may engage in acts of common benefit only on a residual basis and strictly in connection with profit maximisation]; Daniela Caterino, "Denominazione e labeling della società benefit, tra marketing "reputazionale" e alterazione delle dinamiche concorrenziali" (2020) 4 Giur comm 787–809 at 798 [who refers to 'the joint pursuit of self-interested goals and common benefit objectives.']; Marco Maugeri, "Informazione non finanziaria e interesse sociale" (2019) 5 Riv Soc 992–1031 at 1002–1003; Francesco Denozza & Alessandra Stabilini, "La società benefit nell'era dell'investor capitalism" (2017) 5:2 ODC 1–15 at 10; Alessio Bartolacelli, "Le società benefit: responsabilità sociale in chiaroscuro" (2017) 2 Non Profit 253–286 at 278–279 [who excludes the systematic pursuit of common benefit objectives in non-benefit corporations and social enterprises]; Carlo Angelici, "Società benefit" (2017) 2 ODC 1–12 at 7–8 [for whom the provisions on società benefit reserve to this corporate "model" to pursue the common benefit in addition to profit by establishing a managerial program; however, this does not ban directors of non-benefit corporations to make single acts that pursue the common good (e.g. a one-time donation to a museum)]; Diletta Lenzi, "Le società benefit" (2016) 6 Giur comm 894–920 at 898–899 [who refers to the "weakening of Article 2247" in benefit corporations, implying that for non-benefit corporations, the profit motive established by this provision applies exclusively]. For different views, Giorgio Marasà, "Scopo di lucro e scopo di beneficio comune nelle società benefit" in Barbara De Donno & Livia Ventura, eds, *Dalla benefit corporation alla società benefit* (Bari:

The above, however, does not imply that for-profit corporations cannot undertake individual acts with social or environmental objectives. Indeed, even after the introduction of Italian benefit corporations (*società benefit*) in 2016,[189] most Italian scholars consider individual corporate acts with common benefit objectives to be legitimate under the profit-making motive established by law, provided that these acts do not sacrifice profit and are standalone–meaning that they are not part of a comprehensive process to achieve a common benefit purpose.[190] However, despite their apparent openness to stakeholders' interests, these readings confirm that for-profit corporations have the sole, actual purpose of profit for shareholders, while other purposes can only be ancillary.[191]

Therefore, proposing a general, interpretative extension of the corporate purpose to include stakeholder interests does not appear feasible, particularly in those companies that have not adopted any clauses requiring directors to account for stakeholders' interests or adhered to the Corporate Governance Code.[192] Such an extension to all corporations would likely conflict with

Cacucci, 2018) 49 at 54; Mario Stella Richter, "Società benefit e società non benefit" in Barbara De Donno & Livia Ventura, eds, *Dalla Benefit Corporation alla Società Benefit* (Bari: Cacucci, 2018) 58 at 64–65.
More precisely, Italian legal doctrine on benefit corporations is divided into two main perspectives. The majority views the pursuit of social benefit required of benefit corporations as separate from, and typically opposed to, the profit objective, with which it should be balanced. Conversely, the minority considers the social benefit an obligation for directors to adopt a specific business model that serves profit-driven interests through altruistic activities. This minority view is supported by Marco Palmieri, "Le società benefit" (2023) 6 Giur comm 1030–1056 at 1042.

[189] Notably, Italian *società benefit* include all collective enterprises, not only corporations.

[190] Among others, Codazzi, *supra* note 188 at 1259–1260; Angelici, *supra* note 188 at 8. This position was even broader before the introduction of benefit corporations in Italy: Angelici, *supra* note 30; Calandra Buonaura, *supra* note 177 at 268 [both supporting the discretion of directors to consider interests beyond those of shareholders, but only if compatible with shareholder interests and not detrimental to them]. Similarly, Paolo Montalenti, "Interesse sociale e amministratori" in Aa Vv, ed, *L'interesse sociale tra valorizzazione del capitale e protezione degli stakeholders: in ricordo di Pier Giusto Jaeger: atti del convegno, Milano, 9 ottobre 2009* (Milano: Giuffrè, 2010) 81 [arguing that the compliance of directors' actions with corporate interest should be assessed based on the economic rationality of the operation in relation to the company's management choices, whose ultimate goal remains profit. This view allows management actions that pursue external interests, provided they ultimately align with profit-oriented governance]. This is also consistent with Costi, *supra* note 24 at 193 [who acknowledges that shareholders may choose to include stakeholder interests among those to be considered and protected, but only if this remains consistent with Article 2247, meaning it must still align with the profit motive].

[191] Alessio Bartolacelli, "The Unsuccessful Pursuit for Sustainability in Italian Business Law" in Beate Sjåfjell & Christopher M Bruner, eds, *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge: Cambridge University Press, 2019) 290 at 291. Similarly, see also Monica Cossu, "Tassonomia finanziaria e normativa dei prodotti finanziari sostenibili e governo societario" (2022) 3 Banca Impresa Società 433–487 at 474.

[192] There have been affirmations of the legitimacy of clauses in articles or bylaws that establish the undertaking of an economic activity based on criteria other than mere profit maximization; see Ventoruzzo, *supra* note 146; Comitato Interregionale Dei Consigli Notarili Delle Tre Venezie, "ESG e clausole di sostenibilità" (2023), online: <https://www.notaitriveneto.it/dettaglio-massime-triveneto-300-esg-e-clausole-di-sostenibilita.html>; Marco Cian, "Clausole statutarie per la sostenibilità delle imprese: spazi, limiti e implicazioni" (2021) 2–3 Riv Soc 475–507.

the primacy of the profit motive in regular for-profit ones by requiring a balance with external interests.[193]

b. Clash with the Competitiveness of the EU's (Social Market) Economy

Another criticism concerning the expansion of directors' fiduciary duties in Italy lies in its conflict with the principle of competitiveness within the EU internal market. This principle is established in Article 3, paragraph 3, of the Treaty on European Union (TEU):

> The Union shall establish an internal market. It shall work for the *sustainable development* of Europe based on balanced economic growth and price stability, a *highly competitive* social market economy, *aiming at full employment and social progress*, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.[194]

Essentially, according to the discussed criticism, if the profit motive is the foundation of market competitiveness, diluting it with stakeholder interests would contravene one of the key pillars of the EU's economic and legal framework.

However, Article 3, paragraph 3 of the TEU establishes that the EU adopts the Social Market Economy (SMEco) model, which refers to an economic system where market freedom is complemented by state intervention to ensure social justice.[195] Furthermore, according to this provision, the market should work towards sustainable development, and the SMEco model should be geared towards full employment and social progress. These elements may suggest that the provision–and, consequently, the fundamental law of the EU–supports the inclusion of stakeholder interests within the corporate purpose, as these interests contribute to achieving sustainability and social progress.

A leading voice in Italian legal scholarship has interpreted this provision in the opposite way. Mario Libertini has argued that while the SMEco model is a fundamental pillar in the regulation of the European market, it does not directly impact managerial duties. This is because the model requires the state, not private entities operating in the market, to intervene when necessary to ensure the social dimension of the European economic system.[196] Differently put, for Libertini,

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[193] Naturally, the law could be changed, removing the for-profit motive of regular corporations. However, this research primarily focuses on the current legal framework and how it could be (re-)interpreted to address stakeholder concerns in corporate governance. Furthermore, any potential legal reform of the core features of regular corporations should be evaluated against the current level of political willingness to undertake such changes, which, for now, does not seem to be among the main priorities in Italy nor in the EU.

[194] Art 3, paragraph 3 TEU [Emphasis added]. However, the principle of competitiveness in the EU has been mitigated concerning third-sector entities; see ECLI:EU:C:2014:2440; ECLI:EU:C:2006:568.

[195] For a summary of the fundamental principles of the SMEco, see Mario Libertini, "Un commento al manifesto sulla responsabilità sociale d'impresa della Business Roundtable" (2019) 3 ODC 627–636 at 37–38; in English, Mario Libertini, "A "Highly Competitive Social Market Economy" as a Founding Element of the European Economic Constitution" (2011) 1 Concorrenza e mercato 491–507.

[196] Mario Libertini, "Economia sociale di mercato e responsabilità sociale d'impresa" (2013) 3 ODC 9–45 at 44; this interpretation is also shared by Barcellona, *supra* note 2 at 94.

the provision in Article 3, paragraph 3 of the TEU refutes the idea that the SMEco model supports corporate social responsibility by expanding the interests directors can pursue. Instead, it establishes a clear separation between the roles of the state and the market: the state is responsible for ensuring the social dimension of the market through external interventions; the market, and specifically the companies operating within it, are required to respect these state-imposed limits but, within those limits, compete fairly with one another.[197]

Consequently, the references to sustainability and the social dimension of the economic system in the mentioned provision should be understood as indicative of the neutrality of European economic law or, at most, as a voluntarist endorsement of sustainability and social objectives pursued by individual economic operators or, where applicable, mandated by law.[198] Therefore, it has been observed[199] that, in defining the purpose of businesses, the SMEco model aligns closely with Milton Friedman's pure liberal model, which views market actors as pursuing profit and separate from the state, while requiring compliance with the legal framework established by the state.[200] This separation of market actors from the state and pursuit of profit for shareholders is also present in the SMEco model discussed here.

Furthermore, the competitiveness of businesses in the European market raises another critical issue regarding the extension of directors' fiduciary duties, particularly concerning the voluntary adoption of social responsibility standards by individual corporations. In this context, it has been observed that in the absence of regulations requiring businesses to engage in certain 'socially responsible' behaviours, accompanied by appropriate sanctions, companies operating in a competitive market cannot afford to adhere to high ethical standards of conduct without suffering a competitive disadvantage compared to other businesses that have not adopted such standards.[201]

In other words, if the state does not protect businesses from the risks of competition, it is unlikely that companies will pursue social responsibility objectives on their own, as this would put them at a competitive disadvantage–for instance, by incurring higher costs to offset environmental

[197] Mario Libertini, "Impresa e finalità sociali. Riflessioni sulla teoria della responsabilità sociale dell'impresa" (2009) 1 Riv Soc 1 at para 6 [the author describes the relationship between the state and markets not as one of integration but rather as one of complementarity, following the model of "horizontal subsidiarity." According to this model, the state should refrain from direct intervention and first allow markets and civil society to carry out all the functions they can effectively perform]; for a summary in English, see Libertini, *supra* note 195.
[198] Libertini, *supra* note 27 at 44–45.
[199] Barcellona, *supra* note 2 at 95. It goes without saying that the author notes that these two perspectives differ in other respects, primarily regarding the role of state intervention in the economy.
[200] Milton Friedman, "A Friedman doctrine-- The Social Responsibility of Business Is to Increase Its Profits", *The New York Times* (13 September 1970), online: <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>.
[201] Libertini, *supra* note 28 at para 11; see also Mario Libertini, "Gestione "sostenibile" delle imprese e limiti alla discrezionalità imprenditoriale" (2023) 1 Contr Impr 54–87 at 70 ff [discussing the competitive disadvantages that the introduction of the CS3D may pose for EU businesses compared to businesses from other countries that have not adopted similar provisions]. Most recently, see EU, *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 'A Competitiveness Compass for the EU',* [2025] COM(2025) 30 final.

impacts or by using more sustainable materials in production.[202] Naturally, the situation would be different if the adoption of sustainable behaviour standards resulted in other advantages, such as reputational benefits, that offset these potential disadvantages. However, predicting these benefits (assuming they materialize) and assessing them in economic terms can be quite complex.

c. "Functionalization" Private Corporations to Public Purposes

Closely related to the previous points and widely shared among skeptics of institutionalism,[203] is the critique that introducing the interests of stakeholders into corporate interest would lead to the so called "functionalization" of the corporate purpose (and consequently of directors' actions) toward public interests.[204] The term functionalization refers to an external determination of the corporation's purpose, independent of the contract among shareholders, which would limit their contractual freedom and restrict their ability to conduct private economic activities.

In other words, the functionalization of the corporation implies the (improper) use of a strictly private legal structure for public purposes, i.e., the pursuit of stakeholder interests or their protection at the expense of profit for shareholders. Although the focus here is on managing the social and environmental risks of corporate activity, rather than on using the for-profit corporate model to pursue social goals, the critique of functionalization remains relevant. This is particularly true when such risk management is pursued through an expanded notion of corporate interest, which aligns with institutionalist claims.

The arguments supporting this critique are numerous. One argument has focused on refuting the legal foundations on which institutionalist theories were based, namely the direct applicability of Article 41, paragraph 2, of the Italian Constitution, which states that private economic initiative cannot be carried out in contrast with social utility.[205] According to the critics of functionalization, asserting the direct applicability of this constitutional provision supports the institutionalist claim that private economic activities are legitimate only if they pursue social goals.[206] These critics

[202] Furthermore, a voluntary approach to CSR or sustainability would leave the social reorientation of capitalism to the good intentions of business operators and the preferences of the consumers they serve. However, both factors assume a cultural shift that is unlikely to fully materialise in the market without regulatory incentives; see Barcellona, *supra* note 2 at 34.

[203] Mignoli, *supra* note 28; Minervini, *supra* note 74. For an overview of the evolution and decline of corporativism in Italy, and its impact on the Civil Code, see Annamaria Monti, *Per una storia del diritto commerciale contemporaneo* (Pisa: Pacini giuridica, 2021) at 213 ff; Nicola Rondinone, *Impresa e commercialità attraverso il "lato oscuro" dell'unificazione dei codici* (Torino: Giappichelli, 2020); Montagnani, *supra* note 27; Raffaele Teti, *Codice civile e regime fascista: sull'unificazione del diritto privato* (Milano: Giuffre, 1990); for a broader historical overview, see Raffaele Teti, *Un diritto per gli imprenditori: il diritto commerciale dalle codificazioni ottocentesche al Codice civile del 1942* (Roma: Donzelli, 2018).

[204] For a more recent version of this critique see, e.g., Francesco Fimmanò, "Art. 41 della Costituzione e valori ESG: esiste davvero una responsabilità sociale dell'impresa?" (2023) 50:5 Giur comm 777–806.

[205] For a thorough analysis of the provision, see Vincenzo Spagnuolo Vigorita, *L'iniziativa economica privata nel diritto pubblico* (Napoli: Jovene, 1959) at 234 ff.

[206] For full bibliographic details, see Minervini, *supra* note 74, fn 4, but also the text at 629. Importantly, direct applicability of the mentioned constitutional provision does not necessarily lead to the functionalization of the

counter this conclusion by arguing that the limit of social utility established by the Constitution operates only when implemented through ordinary legislation, as constitutional provisions are not self-executing,[207] but since ordinary law has yet to be implemented, the freedom of economic initiative set out in the first paragraph of the same provision is the widest.[208]

Another argument upholding the critique to the functionalization of private companies is based on the refusal of the institutionalist claim for which the references in the Civil Code to the "unitary interest of national production" justify the use of private enterprise for public purposes.[209] Critics have deemed this argument as incompatible with the constitutional legal framework that opposed fascist corporativism. While corporativism viewed private enterprise as a tool to serve the national interest, in the constitutional context, private enterprise contributes to the fulfilment of individual freedom.[210]

Finally, institutionalists argued that references in the Civil Code to the "interest of the enterprise"[211] refer to something different from the interest of the entrepreneur (in other terms, the interest of shareholders), and would more likely refer to something broader, presumably in line with public needs. This argument is rejected on the basis that the meaning of "enterprise" varies among legal provisions and, in the case of the recalled Civil Code provisions, refers to the technical organization of labour, not the abstract aim the enterprise is meant to fulfil.[212]

More recently, critics of functionalization have observed that it would conflict with both the primary function of the *S.p.A.* company–namely, collecting capital–and its essential characteristic–the voluntary decision-making of shareholders. Critics noted that the external determination of the interests a corporation must pursue would discourage equity investments that are not (fully) aligned with those interests. Furthermore, such external determination implies a form of paternalism toward shareholders, imposing upon them an interest they may not even recognize as their own.[213]

These criticisms affirm that the protection of interests external to the company–such as those of stakeholder communities–is a task for legislative bodies, which should establish (public) normative safeguards to complement private autonomy without imposing an institutional

private enterprise. For instance, some scholars have supported the direct applicability of Art 41, para 2, without interpreting it as imposing social objectives to corporations: Carlo Esposito, "I tre commi dell'art. 41 della Costituzione" (1962) Giur cost 33–39.

[207] Minervini, *supra* note 74, at 621.

[208] Both because the law should determine its content and the sanctions for violations, and because this constitutional provision is the result of a compromise between political forces in the Constituent Assembly. Therefore, it should be subject to a historical criterion of interpretation which would lead conclude that where the legislator has not explicitly defined the collective interest to be protected, it has implicitly deemed the full exercise of economic initiative as consistent with social utility.

[209] Arts 2085, 2089, 2104 para 1 Civil Code (Italy).

[210] Minervini, *supra* note 74 at 626 ff; Mignoli, *supra* note 28 at 744–745.

[211] Arts 2082, 2104 para 1, 2105, and 2109 para 2 Civil Code (Italy).

[212] Minervini, *supra* note 74 at 629 ff.

[213] Angelici, "Note minime", *supra* note 21 at 258; paternalism was already opposed by Minervini, *supra* note 74 at 636.

interest over private corporations.[214] This must be achieved through provisions outside corporate law, such as environmental or labor regulations, which impose specific obligations that corporations (and, consequently, directors) must comply with, without requiring that the corporation's activities be aimed at benefiting parties other than its shareholders.

It should also be acknowledged that an alternative interpretation suggests that functionalization of corporate interest is already embedded in Article 2247, as this provision mandates the pursuit of profit, thereby reflecting a legislative choice concerning shareholder interests.[215] However, this interpretation is misleading. Indeed, rather than functionalizing private enterprise to public purposes, the discussed provision upholds a private purpose that aligns perfectly with shareholders' economic freedom.[216] Without digging up the issue of the neutrality of corporate purpose,[217] it is essential to recognize that the *S.p.A.* corporate model is one of the several collective enterprise models provided by the Italian legal system. In other words, for organizational and regulatory purposes, the legal system offers a "menu" of models from which private individuals can freely choose based on their preferences and the objectives they wish to pursue through the entity. The *S.p.A.* model is structured around the goal of profit (making and distribution). Therefore, if the prospective shareholders are not interested in maximizing this, they can opt for alternative forms (such as cooperatives or, more recently, benefit corporations, in which profit-making is allowed, but distribution is restricted). However, if they choose the *S.p.A.* model, they must adhere to its profit-maximizing purpose.[218]

To conclude, the risk of functionalizing private enterprise for public objectives, thereby effectively restricting private economic freedom, remains a pressing concern in relation to expansive theories on the interests that corporate directors must consider in managing a company. Beyond reviving the threat of fascist corporativism, such an interpretation has weak roots in the Italian normative framework and may undermine the fundamental freedom of economic activity[219] and

[214] Mignoli, *supra* note 28 at 736.

[215] This view is referenced by Angelici, *supra* note 188 at 4. Similarly, Umberto Tombari, *Potere e interessi nella grande impresa azionaria* (Milano: Giuffrè, 2019) at 62 [describing the "functionalization" of directors' power to shareholders' interest in generating and distributing profits].

[216] See, e.g., Berardino Libonati, "Il governo del consiglio di amministrazione di società per azioni" in Luigi Arturo Bianchi, Federico Ghezzi & Mario Notari, eds, *Diritto, mercato ed etica dopo la crisi Omaggio a Piergaetano Marchetti* (Milano: Egea, 2010) 371 at 373–374 [who highlights that the corporate interests is aimed at protecting the private initiative of individual shareholders, as it establishes that the corporation is instrumental to shareholders, albeit not some of them, but rather *all*.][Emphasis added].

[217] Angelici, *supra* note 188 at 4–5 [who resolves this matter by referring to the "actual" interest of shareholders, meaning the one they express within the corporate contract].

[218] Naturally, the categorization of corporate models has its limits, as it may not fully accommodate all the specific needs of shareholders. When selecting from the menu, they will prioritize certain features while accepting the rules applicable to their chosen model in other respects.

[219] As well as the underlying primary value attributed to private property in liberal systems: see Barcellona, *supra* note 2 at 20 [who, with reference to the Anglo-American world, states: "The conception of the *corporation* is, therefore, explicitly 'proprietary' and thus 'contractual': the private and free enterprise is nothing more than the counterpart of a legal system that protects private property as well; as a result, *profit maximization* is simply the direct corollary of the 'proprietary' principle, according to which it is the owner who defines their '*desired ends*,'

deter investment. As will be discussed in the following paragraph, it is doubtful whether these risks can be adequately mitigated by the potential benefits that an expansive interpretation of fiduciary duties might offer in protecting stakeholders.

d. Potential Inefficiency in Fulfilling Stakeholders' Interests

Introducing other interests into the corporate purpose means opening the door to the potential sacrifice of profit if it conflicts with other equally ranked interests according to the law. This position has been recently upheld by Colin Mayer,[220] who argued that the goal of corporations should be to pursue the common good. Profit-making is not excluded, but rather than being seen as the primary purpose of the business, it is considered a derived benefit that can be achieved while the company fulfills its (true) mission–namely, providing solutions for people and the planet.[221] Consequently, in Mayer's view, profit should be pursued only if it does not come at the expense of stakeholders.

However, sacrificing profit for shareholders to pursue the common good should not be viewed as automatically leading to a better world. Since the last century, traditional liberalism has supported the idea that pursuing shareholders' common advantage is the best way to achieve public interest in economic expansion. For instance, in the 1970, Milton Friedman wrote:

> To illustrate, it may well be in the long-run interest of a corporation that is a major employer in a small community to devote resources to providing amenities to that community or to improving its government'. That may make it easier to attract desirable employees, it may reduce the wage bill or lessen losses from pilferage and sabotage or have other worthwhile effects. [222]

Clearly, this rather strict liberalist perspective, according to which the economic well-being of shareholders coincides with the achievement of the public interest, has proven flawed, as the economic, human, and environmental crises have shown.[223] These crises have placed communities at risk, showing that relying solely on the pursuit of profit cannot effectively improve the common good; in fact, it is likely to create or exacerbate social distress. However, one cannot

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which, naturally, in the case of an owner engaged in business activity, coincide with monetary profit."] [My translation, emphases in original]; previously, Mignoli, *supra* note 28 at 739 [with reference to the German system: "In the proposals recently put forward by the commissions appointed by the 39th *Deutsches Juristentag* (...), there is a firm refusal to recognize the interest of the enterprise as having a public law character, based on the assumption that business law should always be grounded in property rights, even if interpreted with a social function."]

[220] Mayer, *supra* note 40. Similarly, Alex Edmans, ed, *Grow the Pie* (Cambridge: Cambridge University Press, 2020). For a commentary on the two books, see Holger Fleischer, "Corporate Purpose: A Management Concept and its Implications for Company Law" (2021) 18:2 ECFR 161–189.

[221] Mayer, *supra* note 40 at 109.

[222] Friedman, *supra* note 200; in Italy Mignoli, *supra* note 28 at 757.

[223] See, e.g., Joseph E Stiglitz, "Rethinking Macroeconomics: What Failed, and How to Repair It" (2011) 9:4 Journal of the European Economic Association 591–645; Michael Magill, Martine Quinzii & Jean-Charles Rochet, "A Theory of the Stakeholder Corporation" (2015) 83:5 Econometrica 1685–1725.

assume a direct and automatic correlation between sustainable management and economic well-being either.

Indeed, limiting profit sacrifices for socio-environmental goals may not always–and not always to the expected extent–lead to better social or environmental outcomes. An example proposed by an Italian scholar may illustrate this: a restaurant self-imposing to employ only workers with disabilities may reduce its potential for growth and limit its capacity to hire more disabled workers. Conversely, a profit-maximization approach that meets the normative requirement to employ a certain number of disabled workers but does not go further than that if employing disabled workers is not followed by positive outcomes for the company (e.g., in term of reputation), could enable growth, allowing the company to employ more disabled workers and better fulfill its social mission.[224]

Naturally, this example is not exempt from potential criticism–e.g., highlighting that, from a stakeholder-oriented or CSR perspective, social needs (such as the employment of workers with disabilities) should be balanced with economic interests, without sacrificing one in favour of the other[225]–nor it reflects my opinion. Nevertheless, it emphasizes that the correlations between profit and unsustainability, and social needs and sustainability, are not axiomatic. Rather, they must be assessed contextually, possibly yielding to results divergent from commonly assumed correlations. Since such a case-by-case assessment cannot be conducted here, for the purpose of this discussion, the reported criticism deserves at least the benefit of the doubt.

e. Strengthening of the Position of Directors at the Expense of Shareholders

Another critical issue in extending directors' fiduciary duties is that it would require directors to mediate not only among shareholders' interests, as they already do,[226] but also between shareholders and stakeholders. This would significantly expand their discretion, weakening shareholder oversight and altering the core features of the *S.p.A.* model.[227] Additionally, requiring directors to pursue also stakeholders' interests would mean asking them to reconcile the various, potentially conflicting interests of stakeholders.[228] This challenge is particularly true for stakeholder communities, whose interests are hard to identify due to their collective nature.

This task would be considerably burdensome for directors and–what concerns legal scholars the most–would expose the company and its shareholders to the risk of opportunistic behavior by

[224] Barcellona, *supra* note 2 at 33. For additional critiques of Mayer's position in Italy, see footnote 40.
[225] Furthermore, in my opinion, references to profit-maximization in the example should not be understood narrowly as direct monetary returns to shareholders, but also as encompassing indirect economic advantages, such as reputational benefits that may offset the limited profits associated with socially beneficial choices (e.g., employing workers with disability who may have a limited capacity to work).
[226] Shareholders' interests may differ significantly; see Pier Giusto Jaeger, "L'interesse sociale rivisitato (quarant'anni dopo)" (2000) 6 Giur comm 795–812 [regarding takeovers]; Cossu, *supra* note 180 at 244 ff [who refers to "the fragmentation of corporate interest"].
[227] See Mignoli, *supra* note 28 at 740 [who highlights that the expansion of directors' responsibilities may risk shifting the joint-stock company (*S.p.A.*) towards a partnership limited by shares (*società in accomandita per azioni* or *S.a.p.a.*)]
[228] Libertini, "Un commento", *supra* note 195 at 630 ff.

directors. The application of the BJR, which shields directors' discretionary decisions from judicial review on the merits, would further limit the scrutiny of their actions, making it more difficult to oversee their conduct.

For example, in Italy, Vincenzo Calandra Buonaura has observed that the distinction between corporate interest (which he interprets as long-term shareholder value) and stakeholder interests is useful in clearly demarcating the boundaries between the two. This distinction sets a limit on excessive managerial discretion and allows for an objective assessment of directors' actions, which is essential in evaluating their performance.[229] Therefore, allowing or requiring directors to consider stakeholders' interests would weaken managerial accountability towards the corporation and shareholders, as it would enable directors to avoid liability for breaching fiduciary duties by justifying their decisions based on the necessity of considering stakeholder interests from a long-term perspective.[230]

Criticism of the excessive managerial discretion resulting from an extension of fiduciary duties in a stakeholder-oriented direction has been further reinforced in response to specific national or international developments. For example, according to the Team Production Theory developed by Margaret Blair and Lynn Stout,[231] directors are not merely agents of the shareholders but have the task of solving the team production problems faced by the corporation. Their role is to mediate between the claims of all corporate constituents and fairly distribute the outcomes of production among them. However, this theory does not provide clear guidance on how directors should carry out this mediation, such as establishing a hierarchy among the interests they must consider,[232] and it has been criticized for granting excessive discretion to directors, leading to their de facto irresponsibility, as there are no clear parameters for judicial review.[233] Similarly, Italian scholars have echoed the criticisms raised by US commentators regarding the excessive managerial discretion resulting from anti-takeover legislation, particularly the enactment of constituency statutes.[234]

More recently, an additional stimulus for criticism of excessive managerial discretion has come from the introduction of *società benefit* in Italy. In this context, scholars have highlighted the reduced accountability of directors' decisions towards shareholders and their near-total lack of

[229] Calandra Buonaura, *supra* note 14 at 107.

[230] Calandra Buonaura, *supra* note 177 at 275. Supporting this argument, the author refers to the fact that, where the consideration of stakeholders' interests is mandated by law, such as in the UK with Section 172 of the 2006 Companies Act, there is no direct or indirect form of enforcement available to stakeholders against directors.

[231] Margaret M Blair & Lynn A Stout, "A Team Production Theory of Corporate Law" (1999) 85:2 Va L Rev 247–328. For a Canadian version of the theory, see Stephanie Ben-Ishai, "A team production theory of Canadian corporate law" (2006) 44:2 Alberta L Rev 299–322.

[232] Provided that this could (or should) be done; cf. Spolidoro, *supra* note 180 at 181 [arguing that such a specification would diminish the utility of the concept of corporate interest, as it is akin to a principle, dynamic and ambiguous by nature, not to a rule in which all the practical interests involved in the concept can be reconciled.]

[233] Sacchi, *supra* note 147 at 145; Spolidoro, *supra* note 180 at 185.

[234] Montalenti, *supra* note 190 at 96. For US literature, in addition to the references in Montalenti, see James J Hanks, "Playing with Fire: Nonshareholder Constituency Statutes in the 1990s Symposium" (1991) 21:1 Stetson L Rev 97–120.

accountability towards third parties–so much so that some have referred to this phenomenon as the "benefit judgement rule."[235]

Perhaps increased accountability for directors could be obtained by enhancing judicial supervision. Yet this point is hard to make. The BJR and the limited resort to shareholder remedies restrict judicial oversight, confining judges to a marginal role in disputes over directors' duties. This marginality is further defended in theory to avoid an excessive expansion of the judicial function. If corporate interest were broadly defined without a clear indication of the hierarchy among the interests to be pursued, the responsibility for determining this hierarchy would be entirely delegated to judges.[236] In this scenario, judicial review would assume an unacceptably broad role, extending well beyond its traditional function of ensuring that directors act in pursuit of corporate interest.[237]

3.1.2. Foreign Experiences

The inefficiency of extending directors' fiduciary duties has also emerged in foreign experiences where directors have been allowed or required to consider social and environmental interests in addition to profit. Among the various experiences,[238] the French and Canadian models are particularly relevant here, respectively due to their similarity to the Italian legal model[239] and the comparative methodology adopted in this research.

a. France: Loi PACTE

In 2019, with the Loi PACTE,[240] France amended Article 1833 of the Civil Code, establishing that companies must be managed in the interest of the company while taking into account the social

[235] "La società benefit: tendenze e problematiche in prospettiva comparatistica" Cecilia Sertoli, Roma (2017) at 110 cited by Mario Stella Richter, "Società benefit e società non benefit" in Barbara De Donno & Livia Ventura, eds, *Dalla Benefit Corporation alla Società Benefit* (Bari: Cacucci, 2018) 58 at 65. However, it has also been noted that the expansion of discretion is counterbalanced by greater attention to the decision-making process, which is not shielded by the BJR; Alessandra Daccò, "Le società benefit tra interesse dei soci e interesse dei terzi: il ruolo degli amministratori e i profili di responsabilità in Italia e negli Stati Uniti" (2021) 1 BBTC 40 at 76.

[236] Spolidoro, *supra* note 180 at 182.

[237] As noted, citing American literature, by Daccò, *supra* note 234 at 12. For that matter, these observations are not entirely new. This criticism had already been raised in the 20th century concerning institutionalist interpretations that deemed legitimate only business activities pursuing social utility; Minervini, *supra* note 74 at 636 [who notes that "the transfer of control to the ordinary judge constitutes a true economic absurdity, one that could even rehabilitate the much condemned corporativist system"; similarly, at 619, Minervini discusses the submittal of businesses to judicial oversight regarding their legitimacy.]

[238] E.g., the UK with Section 172; the US with constituency statutes.

[239] France also adopts a unitary system of company law; refer to Carlo Angelici, ""Potere" e "interessi" nella grande impresa azionaria: a proposito di un recente libro di Umberto Tombari" (2020) 1 Riv Soc 4 at 8.

[240] "Plan d'action pour la croissance et la transformation des entreprises"; *LOI n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises (1)*, 2019-486 2019. The scope of the reform applies to all companies, whether publicly traded or not. For an outline of the reform evolution, see "Codification in Company Law of General CSR Requirements: Pioneering Recent French Reforms and EU Perspectives" (ECGI - Law Working Paper No. 639/2022) Alain Pietrancosta, (20 July 2022) at 47 ff. For a first analysis on the reform, see Sophie Schiller, "L'évolution du rôle des sociétés depuis la loi PACTE" (2019) 3 ODC 517–531.

and environmental interests related to their activities.[241] The new legislation also introduced an optional provision allowing companies to include a *raison d'être* clause in their articles, through which the corporate objective(s) can be specified.[242] Finally, these changes have also permeated the Code of Commerce, where Articles L225-35, para 1, first part, and L225-64, para 1 respectively establish that

> The board of directors determines the company's strategic directions and ensures their implementation in accordance with its *corporate interests, taking into account the social and environmental issues related to its activities*. It also considers, where applicable, the *company's purpose* as defined under Article 1835 of the Civil Code.
>
> The executive board is vested with the broadest powers to act on behalf of the company in all circumstances. It exercises these powers within the limits of the corporate purpose and subject to those expressly granted by law to the supervisory board and shareholder meetings. It defines the company's strategic directions and ensures their implementation *in accordance with its corporate interests, taking into account the social and environmental aspects of its activities*. It also considers, where applicable, the *company's purpose* as defined under Article 1835 of the Civil Code.[243]

The legislative innovation has sparked mixed reactions among commentators. Some have argued that it has expanded the scope of directors' discretion by introducing a plurality of interests within the notion of corporate interest.[244] Others have maintained that such pluralism cannot truly take place, as profit remains the priority. [245]

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[241] The inclusion of the term 'corporate interest' in Article 1833 of the French Civil Code should not be considered a substantial modification of the previous wording, which merely required companies to have a legitimate purpose and to be established in the common interest of the partners. Rather, it represents a simple legislative confirmation of a jurisprudential evolution; see *Étude d'impact du projet de Loi Pacte jointe au dossier législatif relatif à la croissance et la transformation des entreprises*, NOR: ECOT1810669L/Bleue-1 (juin 2018) app 61, para 3.1. (at 545) online: <https://www.assemblee-nationale.fr/dyn/15/textes/l15b1088_etude-impact.pdf>. It may be noteworthy to mention the similarity between this provision and Section 172 of the 2006 UK Companies Act.

[242] Art 169 Loi PACTE, which amended Art 1835 of the Civil Code (France).

[243] [My translation, emphasis added].

[244] See, e.g., Pierre-Henri Conac, "Le nouvel article 1833 du Code civil français et l'intégration de l'intérêt social et de la responsabilité sociale d'entreprise: constat ou révolution?" (2019) 3 ODC 497–516 at 504 ['The broadening of corporate interest introduces a legal risk. Indeed, the requirement to consider social and environmental issues cannot simply mean that the company must comply with existing social and environmental regulations. Such a clarification would be redundant. This implies that directors and executives must go beyond mere compliance with current legislation. The reform thus creates a grey area, leaving room for significant subjectivity that judges will need to define over time'.] [My translation]. More generally, the author highlights the possible negative consequences, both legal and non-legal, of the French reform.

[245] Based on note 226 art 61, para 3.1. (at 546) [which specified that considering social and environmental interests is an obligation of means and, as such, does not determine the direction or content of management decisions, but merely mandates a step in the decision-making process]. See also Pietrancosta, *supra* note 239 at 51 ['Contrary to

However, whatever the preferred interpretative option,[246] the introduction of interests beyond profit in the notion of corporate interest is unlikely to make directors effectively liable to stakeholders harmed by corporate activities. This is because the extension of their duties in a pluralistic sense makes the behavior expected from directors more uncertain and increases the difficulty of controlling their discretion, while the opposing interpretation strengthens profit primacy (albeit in a long-term sense), relegating other interests to a subordinate role.[247] This confirms the point made above regarding Italy;[248] however, the confirmation is merely theoretical as, to the best of my knowledge, no judicial decisions have been rendered so far on the basis of a breach of the French duty to account for social and environmental issues related to corporate activities.

b. Canada: BCE Ruling

As seen, the *BCE* ruling issued by the SCC addresses the issue of what is required to establish oppression of debentureholders in a situation where a corporation is facing a change of control. More generally, the ruling concerns the fiduciary duty of directors, a violation of which, among other things, can lead to the determination of oppression. Within this framework, the SCC established that

> Directors, acting in the best interests of the corporation, *may be obliged to consider the impact of their decisions on corporate stakeholders*, such as the debentureholders in these appeals. This is what we mean when we speak of a director being required to *act in the best interests of the corporation* viewed as a good corporate citizen. However, *the directors owe a fiduciary duty to the corporation, and only to the corporation*.[249]

The court thus interpreted the best interest of the company, which guides managerial activity, as including the possibility for directors to consider the impact of their decisions on stakeholders. This decision has been seen as a confirmation of the pluralist interpretation of fiduciary duty already advanced in the *Peoples'* ruling. However, while on the one hand this ruling clarifies the content of the best interests of the corporation, on the other hand, the endorsement of a pluralist

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what some have argued, the new law does not impose on companies an equation intended to equally maximize three major variables: economic and financial value, social value, and environmental value. It reverses even less the causal relationship between profit and stakeholder or social value, which some call for. And if shareholder personal values may enlighten it, they are not intended to replace the traditional concept of shareholder value'.]
This thesis has also been shared by Italian leading scholars: see, e.g., Barcellona, *supra* note 2 at 52; Amatucci, "Responsabilità sociale dell'impresa e nuovi obblighi degli amministratori", *supra* note 63 at 637.

[246] Taking a position on the issue would require an in-depth analysis of the regulation, which falls outside the scope of this research.

[247] Cf. Pietrancosta, *supra* note 239 at 53 ff. The author also notes that the introduction of the duty to consider external interests may have the indirect consequence of making directors more susceptible to being dismissed and/or seeing their compensation reduced depending on their management practices, whether perceived as more or less "responsible." However, the new regulation does not introduce any substantial obligation for directors to forgo long-term profit in favor of social or environmental interests.

[248] Refer to subsection 3.3.1.e. above.

[249] *BCE*, *supra* note 77 at para 66. [Emphasis added]

interpretation of fiduciary duty extends the discretion of directors, making not only their required activity more uncertain but also their oversight more difficult.[250]

Furthermore, unlike the French legislation discussed above, the *BCE* ruling introduced a mere possibility for directors to consider the interests of stakeholders in management. This formulation diminishes the innovative impact of the provision and, above all, contributes to increasing the discretion of directors in deciding whether and to what extent to act "responsibly".[251] This discretion is further expanded by the application of the BJR, which results in broad deference by Canadian courts to the discretionary managerial choices.[252]

Finally, while the extension of directors' duties could have had a significant impact on the protection of stakeholders by making directors accountable to them by way of oppression claims,[253] this outcome is challenged by the reaffirmation that the duty is owed to the corporation alone.[254] Therefore, the failure to consider social and environmental interests that causes harm to stakeholders but not to the company is not a breach of the fiduciary duty, thereby preventing an oppression claim from being based on these grounds.[255]

The remarks above regarding *BCE* can be extended to section 122(1.1) of the CBCA, which has "statutorized" the notion of "best interests of the corporation". The provision uses language that suggests an open list of possible interests for management to consider, thereby granting directors significant discretion in possibly–*though not necessarily*–accounting for interests beyond shareholders' and emphasising that the primary beneficiary of their duties is the corporation. This provision reinforces the concept that that, in Canada, the "best interest of the corporation" is not solely connected to shareholders' needs but also includes the interests of stakeholders. However, its formulation, which draws on the *BCE* ruling, exposes this concept to the same criticisms outlined above.

4. Chapter Summary

This chapter has highlighted the limitations of extensive interpretations of fiduciary duties, suggesting that this approach is quite challenging both within the Italian legal framework and internationally, and is likely ineffective in protecting stakeholders, and particularly communities,

[250] VanDuzer, "BCE v. 1976 Debentureholders", *supra* note 78 at 255; Ed Waitzer & Johnny Jaswal, "Peoples, BCE, and the good corporate "citizen"" (2009) 47:3 Osgoode Hall LJ (1960) 439–496 at 455 ff.

[251] Edward Iacobucci, "Indeterminacy and the Canadian Supreme Court's Approach to Corporate Fiduciary Duties Symposium on the Supreme Court's BCE Judgment" (2009) 48:2 Can Bus LJ 232–254 at 234.

[252] Vasudev, *supra* note 67 at 140, 171 ff; Iacobucci, *supra* note 250 at 242 ff.

[253] Based on the reasonable expectation that directors consider stakeholders' interests as part of their fiduciary duty. A breach of directors' duties is one possible ground for reasonable expectations; the violation of these expectations constitutes unfair disregard of stakeholders' interests, meeting the minimum threshold to grant oppression relief.

[254] See Iacobucci, *supra* note 250 at 246.

[255] Perhaps a counterargument could be that such failure may challenge the best interest of the corporation *viewed as a good corporate citizen*. However, the concept of good corporate citizenship appears quite hard to enforce, primarily because it lacks a unitary definition and analysis in the SCC jurisprudence. An exploration of the meaning has been conducted by Bone, "Legal Perspectives on Corporate Responsibility", *supra* note 58 at 299 ff.

from corporate harm. Therefore, as I will argue in the next chapter, an alternative path should be preferred, one that focuses on directors' duty of care.[256]

It has been discussed that Italian legal scholarship on corporate interest and CSR has tended to overlook directors' duties of care, with most scholars focusing on fiduciary duties.[257] The reason behind this preference is that while fiduciary duties are seen as defining the content of managerial obligations, duties of care dictate how those obligations should be carried out, thereby making them ancillary to the former.[258] Based on this distinction, when considering whether directors may or must pursue or take stakeholders' interests into account in corporate governance, Italian corporate law scholars have primarily focused on the aspect of managerial duties that determines their content (namely, fiduciary duties).

This classification (fiduciary duties = content; duties of care = procedure) should be shared but requires some important clarifications. First, it is important to highlight that claiming that the debate on corporate interest directly defines the content of directors' duties would be incorrect. In terms of directors' duties,[259] this debate primarily concerns the identification of the parties to whom directors are accountable for their management (in theory, the company; in practice, the shareholders). In other words, the debate on the corporate interest contributes to addressing the questions: "For whose benefit do directors manage the company? How should such benefit be intended?" Naturally, the answers to these questions impact the content of directors' duties, as these duties are generally understood to be shaped by the interests of those for the well-being of whom the company exists. However, the interpretation of corporate interest does not, in itself, define the specific obligations to which directors are subject. These obligations can only be identified in the law and the company's articles, as established in Article 2392, paragraph 1, first part of the Civil Code

> Directors must fulfil the duties imposed on them by law and the company's articles with the diligence required by the nature of their role and their specific expertise.

In other words, directors' activity is generally guided by fiduciary duties which, through reference to corporate interest, indicate the overall objective that the company must pursue. At the same time, managerial activity is subject to the obligations imposed by law and contract (corporate

[256] A preference for the duty of care is also expressed by Lenzi, *supra* note 13.

[257] Naturally, exceptions apply. For example, Anna Genovese, *La gestione ecosostenibile dell'impresa azionaria. Fra regole e contesto* (Bologna: Il Mulino, 2023); Cerrato, *supra* note 176.

[258] See, e.g., Libertini, "Un commento", *supra* note 195 at 630; see also Fimmanò, "Art. 41 della Costituzione e valori ESG", *supra* note 204 [who affirms that 'The [CS3D] proposal, in an almost paradoxical (and regrettable) way, establishes duties of diligence without defining the mandatory obligations to which they would be related or at least referable. In essence, it represents a peculiar case of an obligation without a guiding principle – like a father telling his child to behave well without first explaining what "good" behavior means (…).']; similarly, M Stella Richter, "Corporate Sustainability Due Diligence: noterelle semiserie su problemi serissimi" (2022) 4 Riv Soc 714–725 at 720.

[259] A different perspective, e.g., concerns the legitimacy of business activity, which has been partially referenced in the preceding paragraphs. However, this aspect falls only marginally within the scope of the present work.

articles), which define the parameters within which this private interest can be legitimately achieved.[260]

Conversely, duties of care define how the obligations imposed by law and the company's articles must be fulfilled. In Italy, these duties primarily require directors to carry out their responsibilities with a level of diligence appropriate to the nature of their role and their specific expertise. The law therefore imposes higher standards than those normally required of an agent, namely, the diligence of a prudent and reasonable person (*responsabilità del buon padre di famiglia*).[261] These standards vary in their application depending on whether the director possesses specific expertise.[262] In this work, duties of care are relevant for the management of business risks, which, based on the principle of double materiality,[263] must be understood not only as risks *for* the company but also as risks *from* the company to stakeholders. The following chapter will address the existence of a suitable legal basis in Italy for a directors' duty to prevent harm to communities.

[260] It could be argued that this distinction (fiduciary duties – general objective; duty of care – legitimacy parameters) mirrors that outlined in Article 41 of the Italian Constitution, where paragraph 1 guarantees the freedom of economic initiative, while paragraph 2 sets boundaries to this freedom, stating that it cannot be exercised in ways that conflict with social utility or cause harm to health, the environment, safety, liberty, or human dignity. Since paragraph 2 has been widely understood as subject to ordinary legislative reservation, corporate law (Article 2392, paragraph 1 Civil Code (Italy)) reaffirms this reservation by referring to legal provisions (whether commercial law or not) to define the limits within which directors must pursue the corporate interest. Therefore, 'absent any legal or regulatory norms that impose certain standards of conduct, the managerial discretion inherent in the recognition of business freedom re-emerges'; Libertini, "Gestione "sostenibile" delle imprese", *supra* note 201 at 80.

[261] Art 1710, para 1, first part, Civil Code (Italy). Rather, for corporate directors, the second paragraph of the same provision is applicable.

[262] Briolini, "Riflessioni in materia di «specifiche competenze»", *supra* note 123 n 3.

[263] The concept originated from EU, *Communication from the Commission — Guidelines on non-financial reporting: Supplement on reporting climate-related information C/2019/4490,* [2019] OJ C 209/1.

Chapter 5: The Avenue of Directors' Duties of Care

1. Introduction

A duty to prevent harm to communities for corporate directors should not be sought among fiduciary duties, but rather among duties of care. As this chapter discusses, in Italy, such a duty can be primarily identified in the obligation for directors to establish adequate organizational, administrative, and accounting arrangements under Articles 2086 and 2381 paras 3 and 5 of the Civil Code. These arrangements should be understood as serving to prevent and mitigate economic, social and environmental risks posed *for* and *by* the corporation to third parties, for the benefit of both corporate interests and affected third parties. Under the proposed interpretation, this duty would reflect the limitations that the Italian Constitution allows on the freedom of economic initiative in relation to other fundamental interests (Article 41).

As noted at the outset of Chapter 4, addressing stakeholder protection from corporate harm through directors' duties aligns with the Theory of the Commons (ToC) and its call to balance proprietary prerogatives over commons with users' needs.[1] This balancing entails limiting proprietary rights to ensure users' access to and enjoyment of those resources, which arguably supports a preference for grounding stakeholder protection in duties of care rather than fiduciary duties. The ToC framework also provides conceptual continuity with the model of communities as corporate stakeholders developed in Chapter 3. Indeed, the model is grounded in three defining features that have been drawn from ToC principles, as more fully discussed at the outset of such chapter.

Furthermore, the stakeholder community model developed in Chapter 3 also offers practical support for the proposed argument. Indeed, communities with the features identified in that chapter are most feasibly taken into account by directors due to their territorial dimension, cohesive interests, and high standards of representativeness of collective interests. Therefore, it can be argued that communities generally should be considered corporate stakeholders, I maintain that at least communities with these characteristics should be qualified as such.

The following discussion should therefore be understood in this light. While it will focus primarily on directors' duties to *stakeholders*, *including communities*–rather than on communities strictly featuring the three essential characteristics discussed above–and the argument advanced will suggest that directors owe a duty of care not only to communities more broadly than those defined in Chapter 3, the model of stakeholder communities presented there remains relevant as it provides theoretical continuity with the principles underpinning the whole research and offers practical advantages for the concrete application of the proposed duty.

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[1] Here, the discussion is framed in general terms, but it is acknowledged that it raises both quantitative and qualitative issues. This means that the extent to which the social function of the commons must be safeguarded remains to be assessed based on a constitutional balancing of private economic activity and social utility. Such a balance does not seem to be something that can be determined in advance; rather, it must inevitably be left to judicial evaluation in accordance with the law and equity.

2. Standards of Care and Their Development in Italy

Directors' duties of care dictate how directors' powers should be exercised. In Italy, these duties primarily include:[2]

i. A duty to act diligently (*dovere di diligenza*) to be exercised in accordance with the nature of the role and the specific expertise of the director (Article 2392 of the Civil Code). The violation of the duty of diligence serves both as a basis for the director's liability (since it requires intent or negligence) and as a measure of such liability.[3]
ii. A duty to act fairly and in good faith (*dovere di correttezza e buona fede*), pursuant to Articles 1175 and 1375 of the Civil Code, of which the duty of diligence is an expression.[4] This duty requires directors to act in compliance with the regulatory framework and the corporate interest.[5]
iii. A duty of sound management (*dovere di corretta amministrazione*), mandating directors to act in accordance with the principles of sound corporate and business management, as set out in Articles 2403 and 2497 of the Civil Code.[6]
iv. A duty of expertise (*dovere di perizia*), requiring directors to possess at least a basic understanding of sound management principles as established by business science, unless specific qualifications are mandated to them by a statutory provision under Article 2387 of the Civil Code.[7]

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[2] The following list is for descriptive purposes only and does not exclude connections between these duties, as also noted in the subsequent footnotes. On a different note, it should be highlighted that directors' duties may either directly bind the directors or arise from obligations imposed on the company. In the following discussion, these duties will be considered jointly, except where specific distinctions are necessary.

[3] Pierpaolo M Sanfilippo, "Gli amministratori" in Marco Cian, ed, *Diritto commerciale* (Torino: Giappichelli, 2020) 465 at 528. Naturally, establishing liability for the purpose of compensation also requires that the breach of managerial duty has caused harm. For a discussion on how the duty to act diligently has diminished as an integrative factor in the conduct of directors, being supplanted by the duty of sound management, refer to Maurizio Irrera, *Assetti organizzativi adeguati e governo delle società di capitali* (Milano: Giuffrè, 2005) at 53.

[4] This duty is crucial in corporate management as it involves handling the assets and interests of others; see Marco Fratini & Gabriele Baschetti, *Le società di capitali: percorsi giurisprudenziali* (Milano: Giuffrè, 2010) at 380. For the widely accepted applicability of (objective) good faith in corporate governance, refer to Giovanni Meruzzi, "L'informativa endo-societaria nelle società per azioni" (2010) n 58 [including additional bibliographic notes]. For the definition of the duty of fairness as adopting management decisions that comply with the law and align with corporate interests, see *Ibid* at 765–767.

[5] Meruzzi, *supra* note 4 at 765–766.

[6] For the distinction between this duty and the duty to act fairly and in good faith, see *Ibid* at 765–767; contra Maurizio Irrera, "L'obbligo di corretta amministrazione e gli assetti adeguati" in *Il nuovo diritto societario nella dottrina e nella giurisprudenza: 2003-2009* (Bologna: Zanichelli, 2009) 549 at 553 ss. For key bibliographic references on the recognition of sound management principles as an integral part of directors' duties, see Meruzzi, *supra* note 4 n 66.

[7] Vincenzo Calandra Buonaura, *L'amministrazione della società per azioni nel sistema tradizionale* (Torino: Giappichelli, 2019) at 275 ff; Gian Domenico Mosco & Salvatore Lopreiato, "Doveri e responsabilità di amministratori e sindaci nelle società di capitali" (2019) 117–148 Riv Soc at 127. For further bibliographic references and an overview on the doctrinal debate about this duty, see Giovanni Petroboni, "Diligenza degli amministratori di società per azioni e allocazione della responsabilità. Un confronto con il company law inglese" (2019) 4 Riv Soc 795–840 nn 6 and 7; Sabrina Bruno, "Dichiarazione "non finanziaria" e obblighi degli amministratori" (2018) 4 Riv Soc 974–1020 n 76; Monica Cossu, *Società aperte e interesse sociale* (Torino: Giappichelli, 2006) n 126.

v. A duty to act in an informed manner (*dovere di agire informato*), which serves to ensure that the board adopts conscious and well-founded decisions. This duty arises when delegated directors fail to provide adequate information to the board, or when other circumstances suggest that further information is required.[8] The adequacy of the information upon which a decision is based serves as a key criterion for evaluating whether a director has fulfilled their duties.[9]

vi. A duty to establish and implement organizational, administrative, and accounting arrangements appropriate to the nature and size of the business (*dovere di istituire assetti adeguati*) (Article 2086 Civil Code).[10] This duty has a twofold nature: on one hand, the establishment of such structures (the question of *whether* they should be set up) directly shapes the responsibilities of directors, as it requires them to fulfil a specific task; on the other, ensuring that these structures are *adequate* affects *how* the establishment should be carried out.[11] Specifically, depending on whether it concerns executives or the board, the requirement involves either *taking care of* or *evaluating* adequacy (Article 2381, paras

[8] Calandra Buonaura, *supra* note 7 at 314 ff. Differently, Meruzzi, *supra* note 4 at 772 [who frames this duty as a specification of the duty of sound management].

[9] For further details, see, Giovanni Meruzzi, "Il dovere degli amministratori di agire in modo informato e l'organizzazione interna della società per azioni" in Giovanni Meruzzi & Giovanni Tantini, eds, *Le clausole generali nel diritto societario* (Padova: CEDAM, 2011) 105; Giorgio Maria Zamperetti, *Il dovere di informazione degli amministratori nella governance della società per azioni* (Milano: Giuffrè, 2005); specifically on delegating directors, see Oreste Cagnasso & Federico Riganti, "L'obbligo di agire in modo informato a carico degli amministratori deleganti" (2017) 2 Giur it 388–391. On the connection between adequate arrangements and information flows, see Meruzzi, *supra* note 4.

[10] Establishing arrangements refers to the prior definition of the production means and the allocation of tasks among the corporate bodies. For the content of this duty, refer to Michele De Mari, "Gli assetti organizzativi societari" in Maurizio Irrera & Carlo Amatucci, eds, *Assetti adeguati e modelli organizzativi nella corporate governance delle società di capitali* (Bologna: Zanichelli, 2016) 23; Irrera, *supra* note 6 at 558; Irrera, *supra* note 3 at 74 ff.

[11] Refer to Giovanni Meruzzi, "L'adeguatezza degli assetti" in Maurizio Irrera & Carlo Amatucci, eds, *Assetti adeguati e modelli organizzativi nella corporate governance delle società di capitali* (Bologna: Zanichelli, 2016) 41 at 42; 53.

3 and 5 of the Civil Code).[12] Today this duty constitutes a general principle of collective enterprise[13] and beyond.[14]

The 2003 corporate law reform marked the beginning of an expansion of directors' duties of care, introducing higher standards.[15] Duties of care relate to how managerial powers are exercised and serve to promote corporate interests and protect shareholders for entrusting management to directors. Due to the peculiarity of the corporate setting, directors' behaviours allegedly in breach of their duties of care typically fall under the scope of the Business Judgment Rule (BJR), which prevents judges from second-guessing directors' decisions when based on reasonable grounds.

However, as discussed in the following sections, some duties of care also protect third parties outside the corporation, which may also include stakeholder communities. These duties mainly include the duty to act fairly and in good faith, and the duty to establish and implement adequate arrangements.

[12] Relevant literature on the topic includes, among others, Giovanni Meruzzi, "Il riparto di responsabilità per inadeguatezza organizzativa" in Gianluca Romagnoli & Matteo De Poli, eds, *Le azioni di responsabilità nei confronti degli amministratori di società di capitali: profili sostanziali e processuali*, 1st edn (Pisa: Pacini, 2020) 13; Alessandra Zanardo, "La ripartizione delle competenze in materia di assetti organizzativi in seno al consiglio di amministrazione" in Maurizio Irrera, ed, *Assetti adeguati e modelli organizzativi nella corporate governance delle società di capitali* (Bologna: Zanichelli, 2016) 249; Irrera, *supra* note 3 at 217–294. Furthermore, the oversight of adequacy is entrusted to the audit committee, in accordance with Art 2403 Civil Code (Italy). The duty to establish adequate arrangements has been described as a 'specific duty with an open-ended content' by Vincenzo Calandra Buonaura, *L'amministrazione della società per azioni nel sistema tradizionale* (Torino: Giappichelli, 2019) at 294, meaning that the concept of adequacy is left to interpretation; similarly, Irrera, *supra* note 6 at 559 [who emphasizes both the open content and flexibility of the duty]. For the origins of this duty, see the bibliographic references in Meruzzi, *supra* note 4 n 60.

[13] Refer to Art 2086, para 2 Civil Code (Italy), introduced in 2019. In the literature see, among many others, Paolo Montalenti, "Il Codice della Crisi d'impresa e dell'insolvenza: assetti organizzativi adeguati, rilevazione della crisi, procedure di allerta nel quadro generale della riforma" (2020) 5 Giur comm 829–846; Niccolò Abriani & Antonio Rossi, "Nuova disciplina della crisi d'impresa e modificazioni del codice civile: prime letture" (2019) Società 393–412 at 394; Gianluca Riolfo, "Il nuovo codice della crisi d'impresa e dell'insolvenza e le modifiche al codice civile: il diritto societario tra "rivisitazione" e "restaurazione"" (2019) 2 Contr Impr 399–422 at 405–406. In English see Maurizio Bianchini, "Some Backdrops and Prospective Scenarios About the Emerging 'Law of Sustainable Business Organizations'" (2024) 10:1–2 Ita LJ 297–343 at 332. However, a similar duty applies to individual entrepreneurs under article 3, para 1 Business Crisis and Insolvency Code (Italy), which provides: 'The sole proprietor must adopt appropriate measures to promptly detect any state of crisis and take without delay the necessary steps to address it'. For commentary on the similarities and differences between this duty and the obligation to establish adequate arrangements in collective enterprises see Oreste Cagnasso, "Scelte degli amministratori, attività preparatoria e istruttoria e assetti adeguati. Nota a Tribunale Roma Sez. spec. in materia di imprese Ord., 08 aprile 2020" (2021) 1 Giur it 110–115.

[14] See Meruzzi, *supra* note 12 at 16 [who, based on the requirement of adequate arrangements for third sector entities under Art 30, par 6 of the ETS Code, argues that this is a foundational principle for to all organized collectivities, regardless of whether they conduct entrepreneurial activity].

[15] See Meruzzi, *supra* note 4 at 753; Irrera, *supra* note 6 at 549–550.

3. The Duty to Establish and Implement Adequate Arrangements

3.1. Economic Profiles

The duty to establish and implement adequate arrangements is particularly relevant for identifying a duty of preventing harm to stakeholder communities.[16] This duty has evolved since the beginning of the century, expanding to protect interests beyond those of shareholders. Furthermore, unlike the duty to act fairly and in good faith, the duty to establish and implement adequate arrangements mandates more precise behaviour from directors, which assists in identifying what is expected from them.

The relevance of the discussed duty also stems from interpreting it as a limitation on the freedom of economic initiative set out in Article 41, para 1 of the Italian Constitution, enacting the principle of social utility included in paragraph 2.[17] This interpretation has been proposed by two Italian scholars[18] who, rejecting the opposing view that the duty to establish and implement adequate arrangements is merely a specification of the obligations of diligence and fairness–thus aimed solely at improving the effectiveness and efficiency of management decisions–have argued for a different reading.[19] This critical perspective is based on the inclusion of this obligation within the broader Italian corporate law framework, since 2003, when a systematic reform occurred.

Scholars proposing this interpretation argue that from 2003 on, there has been a gradual reduction in the autonomy previously granted to businesses, aimed at strengthening the connection between their powers and risks.[20] This shift led to the introduction of the duty to establish and implement adequate arrangements for corporate directors in *S.p.A.*,[21] with the goal of limiting the dangers associated with the use of external financing for stakeholders such as

[16] More broadly, this duty is significant as it not only serves as the primary means of fulfilling other, more general managerial duties but also tends to shield directors from liability for those duties (at least the more general ones). Conversely, a violation of this duty makes it easier to establish the existence of additional breaches. See Meruzzi, *supra* note 4 at 769.

[17] Regarding the link between the Constitution and corporate law, see Vincenzo Cariello, *Il Codice di corporate governance: da soluzione a problema* (Torino: Giappichelli, 2024) at 223 ff [who promotes the need for a more thorough investigation of this link in Italy]; Stefano Ambrosini, *L'impresa nella Costituzione. Introduzione ai corsi di diritto commerciale e di diritto pubblico dell'economia* (Bologna: Zanichelli, 2024).

[18] Enrico Ginevra & Chiara Presciani, "Il dovere di istituire assetti adeguati ex art. 2086 c.c." (2019) 5 NLCC 1209–1238.

[19] See also Alberto Maria Benedetti, "Gli "assetti organizzativi adeguati" tra principi e clausole generali. Appunti sul nuovo art. 2086 c.c." (2023) Riv Soc 964–984 at 978 [who suggests that the duty to establish adequate organizational arrangements *may* constitute an application of Article 41 of the Italian Constitution].

[20] Ginevra & Presciani, *supra* note 18 at 1217–1218. For an overview of the main innovations introduced by the 2003 reform, see Paolo Montalenti, "I principi di corretta amministrazione: una nuova clausola generale" in Maurizio Irrera & Carlo Amatucci, eds, *Assetti adeguati e modelli organizzativi nella corporate governance delle società di capitali* (Bologna: Zanichelli, 2016) 3 at 3–5 [including relevant bibliography].

[21] Previously, the duty applied only to listed companies pursuant to Art 149 TUF and in specific sectors, such as banking (*decreto legislativo 1 settembre 1993, n. 385*, 1 September 1993, 385 [TUB], Art 53, para 1, *d*), finance (Art 6, para 2 bis, and 21 para 1 d) TUF), insurance (*decreto legislativo 17 marzo 1995, n. 174*, 17 March 1995, 174, Art 20, para 4; *decreto legislativo 17 marzo 1995, n. 175*, 17 March 1995, 175, Art 41, para 4).

investors and creditors.[22] Formally, the duty was introduced in article 2381 paras 3 and 5 of the Civil Code.

The reported interpretation is supported by the fact that the 2003 reform extended to all *S.p.A*. a duty that was already in place for specific sectors, such as banking, finance, and insurance, where the protection of the public interest has always played a paramount role.[23] Furthermore, before the 2003 reform a reference to adequate arrangements was included in legislation aimed at preventing corporate crime.[24] Finally, a 2019 amendment to the Civil Code expanded this duty to all collective enterprises beyond *S.p.A*. This innovation marked a further step towards strengthening controls over business conduct.

Therefore, according to the discussed interpretation, while the duty to establish and implement adequate arrangements is acknowledged as an expression of the broader duties of diligence and sound management,[25] it should be distinguished from them in its ultimate purpose. The duties of diligence and sound management primarily serve corporate interests; by contrast, the duty to establish and implement adequate arrangements extends beyond this[26] to protect broader third-party interests,[27] such as fostering market trust in business activities. This broader orientation is

[22] Ginevra & Presciani, *supra* note 18 at 1226 ['the protected value is the *sustainability* of the enterprise']. For a contrary view, see Meruzzi, *supra* note 4 at 768 [who argues that this duty should be regarded as a specification of the duty of sound management (to be distinguished from the duty of fairness)]; Irrera, *supra* note 3 at 11, n 43.

[23] See also Art 47 of the Italian Constitution [which establishes the safeguard of savings].

[24] *decreto legislativo 8 giugno 2001, n. 231*, 8 June 2001, 231.

[25] For bibliographic notes on the connection between the duty to establish adequate arrangements and the duties of diligence and sound management, see Marco Maugeri, "Note in tema di doveri degli amministratori nel governo del rischio di impresa (non bancaria)" (2014) 1 ODC n 12.

[26] A similar view has been upheld by Massimo Franzoni, "La responsabilità aquiliana tra civile e commerciale" in Pier Giuseppe Monateri, ed, *Scritti in Memoria di Rodolfo Sacco* (Torino: UTET, 2024) 661 at 677–678 [who argues that the lack of inadequacy of preventive measures can create a reliance of third parties on corporate and director behaviour, which can lead to unfair damage that can be addressed through civil liability rules]. The protective purpose toward third parties (specifically, creditors) embedded in the new Article 2086 of the Italian Civil Code is also supported by AM Benedetti, "Gli "assetti organizzativi adeguati" tra principi e clausole generali", *supra* note 19 at 969.

[27] Ginevra & Presciani, *supra* note 18 at 1220–1221. A similar argument is made by Anna Genovese, *La gestione ecosostenibile dell'impresa azionaria. Fra regole e contesto* (Bologna: Il Mulino, 2023) at 137 ff [who includes the duty to establish adequate arrangements, interpreted as encompassing ESG risk management, among the duties of sound entrepreneurial management *(doveri di corretta amministrazione "imprenditoriale"*). These differ from duties of sound corporate management (*doveri di corretta gestione "societaria"*) in that they aim to protect third parties, not just shareholders]. See also Meruzzi, *supra* note 11 at 57–58 [who identifies among the interests safeguarded by the adequacy standard those of third parties "not to suffer undue restrictions or harm to fundamental rights in conflict with entrepreneurial freedom"; and Gianluca Riolfo, "L'adeguatezza degli assetti organizzativi, amministrativi e contabili nella S.p.A.: dal sistema tradizionale ai modelli alternativi di amministrazione e controllo" in Giovanni Meruzzi & Giovanni Tantini, eds, *Le clausole generali nel diritto societario* (Padova: CEDAM, 2011) 139 at 208 [who distinguishes between internal and external adequacy].

confirmed by the 2019 amendment to the Civil Code, introduced alongside the new Insolvency Code[28]–a field in which public interests play a particularly significant role.[29]

More specifically, the duty to establish and implement adequate arrangements is viewed as a means of embedding in corporate law the constitutional limits placed by the principle of social utility on the freedom of economic initiative. While firmly upholding the guarantee of this freedom–expressed in the shareholders' ability to freely choose the type of business activity to pursue and its scope (i.e., the corporate nature and size to which the arrangements must be adequate)–corporate law recognizes the existence and significance of other interests beyond profit, which can act as external limits to its pursuit. This limitation is not only exercised through a specification of directors' duties (i.e., the establishment of organizational, administrative, and accounting arrangements) but also through the definition of the objective that such establishment must achieve (i.e., adequacy to the specific corporate features). An example of adequate arrangement comes from the 2019 reform, which suggests a minimum time frame of one year for directors to forecast and mitigate risks.[30]

Regarding adequacy, this is a "general clause"[31] without a specific regulatory definition, aside from its reference to the nature (type of activity and legal form[32]) and dimension (size) of the business.[33] Therefore, defining its meaning is key to understanding the significance of establishing

[28] *decreto legislativo 12 gennaio 2019, n. 14*, 12 January 2019, 144 [Insolvency Code].

[29] Actually, some Italian scholars had already seen a similar "altruistic" purpose in Articles 2381 paras 3 and 5 before 2019. See Vincenzo Buonocore, "Adeguatezza, precauzione, gestione, responsabilità: chiose sull'art. 2381, commi terzo e quinto, del codice civile" (2006) 33:1 Giur comm 5–41 at 29; see also Meruzzi, *supra* note 11 at 54 [for whom the duty to establish adequate arrangements limits the freedom of economic initiative regarding *how* to conduct business]. For a contrary view, see Maugeri, *supra* note 25 at 11.

[30] Art 2, para 1 *a* Insolvency Code (Italy), which adopts a 12-months financial sustainability perspective; see also Diletta Lenzi, "Navigating the Company's Interest in Italy: An Interplay of Legal Concepts" in Anne-Christin Mittwoch & Anne-Marie Weber, eds, *The Interest of the Company – A Driving Concept for Sustainable Business? A European Inquiry Inspired by a Polish-German Comparison* (Baden-Baden: Nomos, 2025) at 14.

[31] Meruzzi, *supra* note 11 at 43 [including further bibliography on adequacy]. For further readings on how general clauses operate in corporate law, see, among others, Giovanni Meruzzi & Giovanni Tantini, eds, *Le clausole generali nel diritto societario* (Padova: CEDAM, 2011); Francesco Denozza, "Clausole generali, interessi protetti e frammentazione del sistema" in *Studi in ricordo di Pier Giusto Jaeger* (Milano: Giuffrè, 2011) 25; Francesco Galgano, "Le clausole generali fra diritto comune e diritto societario" in Giovanni Meruzzi & Giovanni Tantini, eds, *Le clausole generali nel diritto societario* (Padova: CEDAM, 2011) 1; Mario Libertini, "Clausole generali, norme di principio, norme a contenuto indeterminato, una proposta di distinzione" in *Studi in ricordo di Pier Giusto Jaeger* (Milano: Giuffrè, 2011) 113; Giuliana Scognamiglio, ""Clausole generali", principi di diritto e disciplina dei gruppi di società" (2012) 1 ODC. Among Italian private law scholars who dedicated significant work to general clauses is Stefano Rodotà: Stefano Rodotà, "Le clausole generali nel tempo del diritto flessibile" in *Lezioni sul contratto* (Torino: Giappichelli, 2009) 97; Stefano Rodotà, "Il tempo delle clausole generali" (1987) II:4 Riv crit dir priv 709–733; Stefano Rodotà, "Ideologie e tecniche della riforma del diritto civile" (1967) 1 Riv dir comm 83–99. For a recent overview of Rodotà's position within the Italian debate on general clauses in private law see Giovanni D'Amico, "Rodotà e la stagione delle clausole generali" (2018) 1 Giustizia Civile 129–146.

[32] The legal form adopted, whether a company or a partnership, is relevant because this duty applies to all business organizations.

[33] Irrera, *supra* note 6 at 560.

adequate arrangements in devising a managerial duty to prevent harm to stakeholder communities.

Two interpretations of adequacy can be identified, aligning with the differing views on this duty as outlined above–one aiming to profit and the other aiming at protect broader (market) interests.[34] The first reading considers adequacy solely as a means to achieve more efficient and effective managerial decisions for the benefit of the corporation and its shareholders.[35] The second, based on a view of the duty under discussion as aimed at protecting investors, considers adequacy as a criterion for ensuring the long-term sustainability of corporate activity, assessed based on the company's ability to withstand adverse market conditions without taking excessive risks that could potentially harm third parties.

While these interpretations are not necessarily incompatible–as long-term corporate sustainability often benefits the corporation and shareholders–the latter should be preferred as it better aligns with the evolution of the legislative approach discussed earlier. This reading is further supported by the 2019 reform, which has explicitly provided for the establishment of adequate arrangements to serve, *among others*, the purpose of '*timely detection* of a business crisis and the loss of business continuity' (Article 2086, para 2, Civil Code).[36] This provision makes sense if adequate arrangements are considered as risk management measures in the interest of maintaining market trust[37]–or, when interpreted under the CS3D in its current form, as tools to address corporate environmental and human rights risks, as further discussed below–thereby

[34] For a third, more neutral interpretation of the concept, see Buonocore, "Adeguatezza, precauzione, gestione, responsabilità", *supra* note 29 at 19–20.
[35] Irrera, *supra* note 6 at 564; Maugeri, *supra* note 25 at 11.
[36] [My emphasis]. This new provision has a particularly significant impact on Italian *S.p.A.* companies, for which the duty to establish adequate arrangements was already in place before 2019.
[37] Ginevra & Presciani, *supra* note 18 at 1233–1234.

having a preventive goal.[38] The (arguably primarily[39]) preventive nature of adequate arrangements might lead to the protection of 'external' interests to the corporation, such as stakeholder interests.

Moreover, the retention of the first paragraph of Article 2086 after the decline of fascism[40] can only be justified by attributing a broader protective function to the second paragraph, which extends beyond the interests of shareholders to include third parties. The first paragraph states: 'The entrepreneur is the head of the enterprise, and his collaborators are hierarchically subordinate to him/her.' This provision made sense under the corporativist legal framework, which placed both entrepreneurs and workers within a hierarchical system aimed at safeguarding the unified interest of the national economy, to which production and trade were functionally subordinated (Article 2088 Civil Code). However, today, its validity has been explained by

[38] For a similar view before the 2019 amendment, see Giuliana Scognamiglio, "Recenti tendenze in tema di assetti organizzativi degli intermediari finanziari (e non solo)" (2010) 2 BBTC 137–165 at 163 [who refers to financial intermediaries]; conversely, contending that the duty to establish adequate arrangements aims to manage risks rather than reducing them, see Maugeri, *supra* note 25 at 10. The divergence among these interpretations can be explained by the distinction between economic risk (which falls within managerial discretion) and legal risk (which concerns compliance with external limits to managerial discretion). From this perspective, the interpretation that adequate arrangements aim to prevent risk seems to categorize these as legal risks, that is, the risk of the corporation incurring liability and related expenses. Therefore, liability risks are always detrimental to the corporation and must be minimized. Conversely, the interpretation that adequate arrangements aim to enhance governance seems to view risks as economic risks, which are neutral and inherent to business activity and must solely be managed (not prevented). The distinction between legal and economic risk was proposed by *ibid* at 8 ff. in relation to the difference between adopting organizational models aimed at preventing corporate crimes (under *decreto legislativo 8 giugno 2001, n. 231*, 8 June 2001, 231, Art 6) and establishing adequate organizational structures under Article 2381 prior to the 2019 reform. However, this distinction can now be considered outdated. The 2019 reform positioned the establishment of adequate organizational structures not only as a tool for ensuring a company's economic success but also as a mechanism for protecting market trust in business activities. For a comparison of organizational requirements between *decreto legislativo 8 giugno 2001, n. 231*, 8 June 2001, 231, and Art 2381 (now 2086) Civil Code (Italy) see Maurizio Irrera & Elena Fregonara, "I modelli di organizzazione e gestione e gli assetti organizzativi, amministrativi e contabili" in Maurizio Irrera & Carlo Amatucci, eds, *Assetti adeguati e modelli organizzativi nella corporate governance delle società di capitali* (Bologna: Zanichelli, 2016) 889.

[39] See Eugenio Barcellona, *Business judgment rule e interesse sociale nella "crisi": l'adeguatezza degli assetti organizzativi alla luce della riforma del diritto concorsuale* (Milano: Giuffrè, 2020) at 2–3 [who highlights that the wording of the provision acknowledges the presence of other, previously established objectives of the duty]; see also Beatrice Scappini, "Le informazioni non finanziarie quali elemento dell'assetto amministrativo-contabile" in Andrea Panizza, ed, *Adeguati assetti organizzativi, amministrativi, contabili per prevenire la crisi* (Milano: Wolters Kluwer, 2023) 228 *passim* [who highlights the role of adequate arrangements in ensuring both business continuity and corporate sustainability, noting that the latter also serves the former.]. For a different (perhaps opposite) view, see Stefano Ambrosini, *Diritto dell'impresa in crisi: crisi e insolvenza, early warning e assetti adeguati, soluzioni negoziate e responsabilità degli amministratori: aggiornato alla legge n. 147 del 21 ottobre 2021* (Pisa: Pacini, 2022) at 265 [who contends the central role of the duty for the timely detection of business crises].

[40] Notably, the Italian Civil Code entered into force in 1942, during the Italian fascist era, and many of its articles have not been amended since.

interpreting it as a restatement that both internal (shareholders' interests) and external (investor and public interests) converge within the management of the (collective) enterprise.[41]

These elements lead to an initial observation: the duty to establish and implement adequate arrangements as outlined in Articles 2086 and 2381 paras 3 and 5 of the Italian Civil Code signals the presence–or, at least, the admissibility–of a principle of double materiality within the Italian corporate legal framework. This principle requires businesses, including corporations, to organize themselves in a manner that mitigates and absorbs economic risks, supporting crisis prevention for the benefit of both the company (including shareholders) and its creditors.

It is noteworthy that enforcement mechanisms for breaches of the duty to establish and implement adequate arrangements are primarily reserved for shareholders or other corporate bodies, particularly concerning preventive protections.[42] In accordance with Italian corporate law, creditors and other stakeholders are limited to pursuing legal action for compensation only after damage has occurred, as per Articles 2394 and 2395 of the Civil Code.[43] This imbalance should not be interpreted as diminishing the 'external' significance of the duty to establish and implement adequate organizational, administrative, and accounting structures (in favour of creditors and stakeholders). On the contrary, it should prompt a broader discussion on the expansion of protective mechanisms (including preventive measures) for the latter, which, regarding communities, is the objective of the present and following chapters.

However, the discussion so far has been limited to economic risks for both corporations and stakeholders. However, for this research, we need to investigate whether the duty to establish and implement adequate arrangements can also encompass the eco-social risks posed by business activities. These risks concern stakeholder communities, as defined in this study (groups of people connected to commons negatively affected by business activities). This inquiry is addressed in the following paragraphs, aiming to expand on the premises now discussed regarding the external relevance of the duty to establish and implement adequate arrangements.

3.2. Social and Environmental Profiles

3.2.1. Sustainability Disclosure

One step towards expanding the scope of duties of care to protect stakeholders has been taken in Italy by two scholars who have argued that the director's duty of sound management in Italian

[41] Marco Saverio Spolidoro, "Note critiche sulla «gestione dell'impresa» nel nuovo art. 2086 c.c. (con una postilla sul ruolo dei soci)" (2019) 2 Riv Soc 253–273 at 261 [albeit offering a critical perspective on the usefulness of the 2019 reform].

[42] For a review of these mechanisms, see Meruzzi, *supra* note 11 at 72–75.

[43] In private corporations (s.r.l.), directors' liability towards third parties is established in Art 2476, para 7 Civil code (Italy). This form of direct liability applies regardless of the governance structure adopted by the corporation–whether the Italian 'traditional', unitary, or dual board structure; see Vincenzo Pinto, "La responsabilità degli amministratori per "danno diretto" agli azionisti" in Pietro Abbadessa & Giuseppe B Portale, eds, *Il nuovo diritto delle società, Liber amicorum Gian Franco Campobasso* (Torino: UTET, 2006) 891 n 1.

S.p.A. benefits not only the corporation but also its stakeholders.[44] Particularly, one of them has viewed the obligation on adequate arrangements as a further specification of this duty.[45]

This latter argument is based on the EU sustainability disclosure regulatory framework–formerly the Non-Financial Reporting Directive (NFRD), now the Corporate Sustainability Reporting Directive (CSRD)–and complemented by the Taxonomy Regulation, which defines the criteria for classifying an economic activity as sustainable. By requiring sustainability reporting and disclosure to the market, this regulatory framework aims to enhance the information available to investors and civil society, enabling them to better direct their investment or purchase choices towards sustainable entities or products.[46] While primarily focusing on corporate disclosure, this framework acknowledges the materiality of social and environmental risks for businesses, creditors, and other stakeholders, based on the recognized interconnectedness between the economy and social and environmental well-being.[47] This framework is indeed part of the broader European Green Deal, an EU growth strategy initiated in 2019 to modernize and enhance the European economy while safeguarding, conserving, and improving its natural capital and protecting the health and well-being of its citizens from environmental risks and impacts.[48]

In light of this framework and its goals, corporate directors would not only be responsible for identifying and providing information to the market on sustainability-related business aspects but also for mitigating social and environmental risks arising from corporate operations and the supply chain. These risks may have negative consequences for the corporation, the market, and other stakeholders.[49] Similarly, another scholar has argued that the sustainability disclosure

[44] Genovese, *supra* note 27 at 137 ff; Luigi Papi, "Crisi del sistema "volontaristico" e nuove frontiere europee della responsabilità sociale d'impresa" (2019) 1 Riv dir comm 109–163 at 155 ff [drawing on Art 2497 Civil Code (Italy) on corporate groups].

[45] Genovese, *supra* note 27 at 131. Similar positions include that of Sabrina Bruno, "Cambiamento climatico e organizzazione delle società di capitali a seguito del nuovo testo dell'art. 2086 c.c." (2020) 1 Banca Impresa Società 47–66 [who argues that the duty to establish adequate arrangements required to all collective enterprises under article 2086 of the Italian Civil Code shall apply even outside the scope of the NFRD. According to this view, all companies must implement arrangements that adequately account for the risks posed by climate change, as this is an integral part of the duty of care. Unlike Genovese's interpretation, and similarly to the views of Ginevra and Presciani, Bruno contends–albeit not explicitly–that this duty is aimed at protecting companies and, at most, their economic stakeholders. Conversely, there is no express recognition of the direct relevance of this duty for safeguarding the well-being of other stakeholders]; Bruno's position is further supported by Loredana Nazzicone, "L'art. 2086 c.c.: uno sguardo d'insieme" in *Gli assetti organizzativi dell'impresa* (Roma: Scuola superiore della magistratura, 2022) 13 at 44–46. See also Gabriella Opromolla, "Due diligence di sostenibilità e business judgement rule" (27 September 2024), online: *IUS* <https://ius.giuffrefl.it/>.

[46] Recital 9 CSRD.

[47] Recital 8 CSRD. Furthermore, this framework is part of the broader European Green Deal, a growth strategy of the EU launched in 2019 aiming to both modernize and enhance European economy as well as to protect, conserve and enhance its natural capital, and protect the health and well-being of its citizens from environment-related risks and impacts.

[48] EU, *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'* [2019] COM/2019/640.

[49] Genovese, *supra* note 27 at 131.

obligations imposed at the EU level entail a substantive duty for directors to pursue the policy goals that are disclosed.[50]

On one hand, it is now well established that sustainability-related information is a fundamental component of corporate administrative and accounting arrangements in large *S.p.A*. This information is essential not only for ensuring legal compliance but also for guiding strategic decisions and informing investor choices.[51] On the other hand, there is increasing research establishing a connection between certain corporate activities and consequences (e.g., resource extraction, GHG emission, etc.) and environmental and social distress.

For Italian directors, these responsibilities would fall under the duty to establish and implement adequate arrangements under Article 2086 of the Civil Code (and the more general duty of sound management) as it introduces administrative and accounting requirements upon corporate management. Therefore, according to the discussed view, directors would be required to develop arrangements that could prevent, manage, and mitigate socio-environmental risks in addition to reporting them.[52]

This view aligns with the interpretation of the discussed duty as not only aimed at the timely detection of corporate crises *but also* at the prevention and mitigation of other external risks. Specifically, the risks addressed in this case are environmental and social risks, which pose threats to both the company and stakeholders. As a result, this duty would serve the dual purpose of protecting the company (and its shareholders) while also safeguarding third parties who may be affected by the risks that corporate activities generate for people and the environment.[53]

Unlike the interpretation discussed in the previous subsection, the approaches outlined here extend the scope of arrangements under Article 2086 to include social and environmental risks, based on the EU regulatory framework on sustainability disclosure. Notably, this extension operates through a modification of the decision-making process, which should be governed by adequate arrangements rather than an expansion of the notion of corporate interest, which remains centred on profit–aligning with the perspective adopted in this research and the outcomes of the previous chapter.

The discussed views are significant for this study also because they seek to attribute substantive value to the procedural disclosure rules by situating them within the context of the EU growth policy reform and the reform's objectives. Rather than merely viewing disclosure as a tool for sustainability left to market judgement and to the willingness of companies to implement effective measures to mitigate the socio-environmental risks posed by their activities, this interpretation strives to see, albeit indirectly, the disclosure obligation as a requirement for businesses to identify the risks to be communicated to the market and to mitigate them to the

[50] Papi, *supra* note 44 at 143; 147; 151.
[51] See Scappini, *supra* note 39; Bruno, *supra* note 45 at 52–54.
[52] In similar terms also Maurizio Irrera & Bianca Maria Scarabelli, "I comitati di sostenibilità nella governance delle società quotate: tra funzioni gestorie e di controllo" (2023) 11 nuovo dir soc 1583–1623 at 1620 ff [discussing sustainability board committees].
[53] Genovese, *supra* note 27 at 131; 133.

extent covered by the obligation to establish adequate arrangements under the Italian Civil Code.[54]

3.2.2. Corporate Sustainability Due Diligence

A further step towards recognising a duty for directors to consider the negative socio-environmental impacts of business activities can be taken based on the EU Corporate Sustainability Due Diligence Directive (CS3D).[55] Unlike the CSRD, which primarily aims to provide market information to encourage socially and environmentally sustainable investments, the CS3D introduces binding due diligence obligations for large European companies throughout their supply chains, also including, through a cascade effect, large non-European and smaller European companies.[56]

Under the CS3D, due diligence refers to the corporate duty to identify and assess actual or potential risks related to human rights, the environment, and good governance as well as to develop strategies for their elimination, mitigation, and remediation. Notably, the directive requires targeted companies to incorporate these strategies into their business plans to achieve these objectives,[57] thereby imposing an obligation of means[58] rather than an obligation of results, which would have required corporations to achieve specific sustainability goals under any circumstances. Regarding the scope of protection–namely, the human and environmental rights safeguarded by the CS3D–they are included in an annex to the directive that lists various international treaties and conventions governing these rights.

Significant doubts have arisen in Italian legal scholarship regarding the actual meaning of the CS3D.[59] Given that the regulation establishes a due diligence duty for corporations, questions have emerged as to whether the directive also implies a new duty for directors to go beyond

[54] For opposite opinions see, e.g., Mario Campobasso, "Gli amministratori, il successo sostenibile e la pietra di Spinoza" (2024) 1 BBTC 1–19 at 16; Matteo Rescigno, "Note sulle «regole» dell'impresa «sostenibile». Dall'informazione non finanziaria all'informativa sulla sostenibilità" (2022) 1 AGE 165–184 at 170; Marco Maugeri, "Informazione non finanziaria e interesse sociale" (2019) 5 Riv Soc 992–1031. For a milder position, arguing that sustainability reporting obligations do not *mandate* but *nudge* corporate directors to protect stakeholders' interests, see Giovanni Strampelli, "L'informazione non finanziaria tra sostenibilità e profitto" (2022) 1 AGE 145–164 at 156–157.

[55] EU, *Directive 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859* [CS3D], [2024] OJ L 2024/1760.

[56] Art 2 CS3D. The directive also introduces obligations related to combating climate change. However, the discussion here is limited to considering the due diligence obligations outlined in the text. Furthermore, it is worth noting that the extensive interpretation of the CSRD discussed above does not diminish the scope or importance of the CS3D. On the contrary, it is consistent with their shared roots in the European Green Deal.

[57] Eugenio Barcellona, *Shareholderism versus stakeholderism: la società per azioni contemporanea dinanzi al profitto* (Milano: Giuffrè, 2022) at 131.

[58] Recital 19 CS3D.

[59] Which was originally expected to be transposed into Italian law by July 26, 2026. However, the recent so-called 'Stop-the-clock' directive has delayed the transposition deadline by one year along with the first phase of application covering the largest companies; see EU, *Directive 2025/794 of the European Parliament and of the Council of 14 April 2025 amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements,* [2025] OJ L 2025/794.

mandatory environmental and social regulations or merely requires compliance with already existing law.[60]

Some scholars[61] have favoured a restrictive interpretation of the innovative scope of the directive. Based on a perceived contradiction between the lack of a specific legal provision regarding the lawfulness of an activity and the imposition of costs on directors for failing to meet their duties, these views argue that the CS3D does not introduce new duties for corporate directors but rather promotes compliance with existing ones. In other words, paraphrasing this critical stance, an activity is either permitted or it is not. In the first case, no liability can arise from not having done *more* than the law requires, while in the second case, liability stems from violating the prohibition. Otherwise, with a "contentless" obligation, it would be impossible to determine whether a violation of directors' duties has occurred.

I find this "restrictive" interpretation overly dichotomous and excessively limiting regarding regulatory intervention in corporate governance. It is dichotomous because it appears to assume that rules affecting managerial activity must necessarily have an imperative character (e.g., do/do not; pollute up to a set threshold/do not pollute). This interpretation, focused on what Calabresi and Melamed[62] would have called 'inalienability' rules–that is, an entirely ex-ante choice reserved for the lawmaker about the balancing of interests related to corporate sustainability–fails to adequately consider other types of rules, namely 'liability rules.' These rules allow for a partial delegation of the balancing act to private parties by imposing a duty on *how* to act rather than on *whether* to act. In the context of corporate sustainability, which requires a delicate balance of

[60] While the CS3D, in its final version, does not explicitly establish a duty and related liability for directors to comply with its provisions, it cannot be excluded that the obligations it imposes on corporations also have implications for directors. For one, directors owe a duty of care towards the corporation, which they may violate if they do not meet the requirements imposed by law, including sustainability obligations under the CS3D. Moreover, when directors disclose information regarding this compliance, that information may be used by affected stakeholders to question the adequacy of the adopted measures or to file disclosure requests that can serve as a basis for lawsuits. Finally, the increasing liability risks for directors related to corporate sustainability are evidenced by the rise of lawsuits filed against boards regarding climate change (e.g., Kim Min et al v. Kim Tal-Hyun et al, 2024 (South Korea); Métamorphose v. TotalEnergies, 2023 (France); ClientEarth v. Shell's Board of Directors, 2023 (UK)). See "Global trends in climate change litigation: 2025 snapshot", online: *Grantham Research Institute on climate change and the environment* <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2025-snapshot/>; Beate Sjåfjell, "Between a Rock and a Hard Place: Corporate Boards under the Omnibus proposal" (4 June 2025), online: <https://www.jus.uio.no/english/research/areas/sustainabilitylaw/blog/2025/between-a-rock-and-a-hard-place.html>; "Climate Risk, Directors' Duties and Sustainability Disclosures" (26 September 2024), online: *Climate Governance Initiative* <https://hub.climate-governance.org/Resource/directors-duties/directors-duties-and-sustainability-disclosure-obligations>; "ESG and potential director's liability: taking the lead in the transition to more sustainable business operations" (22 December 2023), online: *Stibbe* <https://www.stibbe.com/publications-and-insights/esg-and-potential-directors-liability-taking-the-lead-in-the-transition>.

[61] Barcellona, *supra* note 57 at 132 ff; see also M Stella Richter, "Corporate Sustainability Due Diligence: noterelle semiserie su problemi serissimi" (2022) 4 Rivista delle Società 714–725 at 720. For a optministic view, see Fabrizio Sudiero, "Il contributo della sostenibilità ad una teoria dell'interesse legittimo di diritto societario" (2024) 1 ODCC 81–112 at 107 ff; Mario Libertini, "Gestione "sostenibile" delle imprese e limiti alla discrezionalità imprenditoriale" (2023) 1 Contr Impr 54–87 at 65 ff.

[62] The reference is to the famous work of Guido Calabresi & A Douglas Melamed, "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 6 Harv L Rev.

constitutionally significant interests (economic freedom vs. the right to health, life, human dignity, etc.), the flexible strategy of liability rules typically appears better suited than inalienability rules to avoiding risky regulatory rigidity.[63]

Secondly, the discussed interpretation is limiting because it supports the view that the sources of managerial duty violations should be clearly defined by one or more imperative norms, explicitly specifying what is lawful and to what extent. Conversely, when directors' responsibilities are expressed more flexibly, such as through general clauses (e.g., adequacy) or references to international regulations, this approach is perceived as undesirable due to concerns over legal certainty and the need to limit corporate (and directors') exposure to liability.

While I agree that the use of general clauses is not always or necessarily free from risks, I believe that in the case of directors' duty to prevent harm to local communities, these risks can be considered—at least in theory—limited. On an operational level, the content of the duty of diligence is clearly specified in the directive, leaving little room for uncertainty on the required conduct. On a teleological level, the rights protected by sustainability due diligence obligations can be interpreted in relation to the adequacy criterion for corporate arrangements under Articles 2086 and 2381, paragraphs 3 and 5 of the Italian Civil Code.[64] In other words, the due diligence obligation mandated by the CS3D pertains to corporate governance risks that must be addressed, as they may negatively affect fundamental rights that are equally important as business freedom.

Instead, it would be preferable to provide an affirmative answer to the question about the innovative meaning of the CS3D. Indeed, this directive imposes an obligation of means and emphasizes diligence, thereby introducing procedural duties that must be followed by in-scope corporations and their partners. However, these procedures are explicitly aimed at protecting human rights and the environment. Therefore, setting aside whether this regulatory technique is ideal for the intended purposes, the fact that the directive introduces procedural duties does not imply a denial of the substantive value of such duties.

Conversely, by imposing a *way* of acting for directors and establishing the *purposes* underlying the required performance of their duties, the directive seems to promote a coherent balance in corporations between pursuing economic interests, namely profit,[65] and mitigating the risks that

[63] *Ibid*. In response to the provocation (Barcellona, *supra* note 57 at 147; 153), suggesting that it should be politics – rather than private entities – who makes a "bold" choice by introducing mandatory rules to protect the environment and society, one could argue that the efficiency and appropriateness of such a choice should be assessed besides its boldness. In other words, while the introduction of mandatory rules undoubtedly requires a political courage that may be lacking, it does not necessarily follow that such an introduction is always required if the sustainability objective can be more appropriately achieved through other mechanisms (such as liability rules). The position I find more convincing supports a balance between various legislative techniques.

[64] As mentioned earlier, these provisions set a duty for directors to establish organizational, administrative, and accounting arrangements appropriate to the nature and size of the business. Depending on whether it concerns executives or the board, the requirement involves either *taking care of* or *evaluating* adequacy.

[65] Which is not denied but affirmed, as rightly noted by Barcellona, *supra* note 57 at 143 [referring to the shareholder-centered approach of the directive].

such pursuit can entail for stakeholders and the environment.[66] It is precisely the intervention on the duty of care that helps avoid the risk of falling into a multi-stakeholder perspective or an expansion of corporate interest. That interest remains unchanged; what changes are the ways of achieving it, which lie in avoiding profit by 'externalizing' its social and environmental 'costs'. Differently put, while multi-stakeholderism is concerned with prioritizing certain interests (specifically, those of stakeholders) among the many legally permissible interests a corporation may pursue, the issue here is one of legal boundaries: that is, making profit at the expense of people and nature *should not* constitute a legally available option.

Despite its apparent simplicity, my argument is that the CS3D requires that companies (and, by extension, directors) operate for profit while avoiding harm to external stakeholders. This does not imply that the directive merely reiterates pre-existing duties. Rather, this directive has enhanced the preexisting legal framework that, through international treaties–signed and transposed at the national level–already imposed compliance with human and environmental rights on corporations (and thus on their management), among other recipients. Specifically, the CS3D has mandated EU member states to adopt hard law measures requiring corporations to conduct a thorough risk assessment–both internally and across their chain of activities–and to take steps to prevent, mitigate, and remediate identified risks by establishing adequate organizational, administrative and accounting arrangements.

The obligation introduced by the CS3D through national implementation should therefore be understood as a new duty that requires corporations to put in place the means (risk assessment measures and adequate arrangements) to achieve the end (effective management of human and environmental risks posed by in-scope companies and their business partners). This way, the CS3D also reinforces the corporate duty to adequately assess and mitigate risks for external stakeholders based on previous national and international provisions as identified above.[67]

A similar process of "mandatorization"[68] of international law regarding environmental and human rights protection among private entities had already occurred in Germany in 2021 with the introduction of the Supply Chain Act, a due diligence law for German companies and those operating within Germany, aimed at preventing human rights violations in the supply chain.[69] The German Supply Chain Act can be described as rule-based legislation as it enshrine rights derived from international human rights and environmental regulations within commercial law, by mandating compliance from companies falling within its scope.

[66] This view is supported by scholars who argue that legislation requiring corporations to consider sustainability impacts or pursue sustainability goals aligns with directors' duties of care under Italian law, which mandates this consideration to ensure corporate continuity. See Maurizio Onza, ""Attività funzionale" ed "interessi degli altri" nella gestione dell'impresa (entificata): annotazioni dalla direttiva (UE) 2022/2464" (2023) 5 BBTC 757–768 at para 6.3.

[67] It can be argued that the disclosure requirements imposed by the CSRD presupposed procedural mechanisms to–at least–identify risks. However, this position is debatable as there wasn't an explicit mention of putting in place identification, prevention, and mitigation strategies.

[68] The term is used by Barcellona, *supra* note 57 at 174 [who refers to an "*imperativizzazione"* of international law].

[69] Lieferkettensorgfaltspflichtengesetz vom 16 Juli 2021 (BGBl. I S. 2959).

The CS3D also introduces a rule-based legislation, drawing on preexisting international law on environmental and human rights. However, the CS3D goes further than that.[70] It imposes a standard-based duty on corporate directors by requiring them to establish mechanisms and procedures aimed at achieving the social and environmental protection objectives targeted by the directive in compliance with international environmental and human rights law. Importantly, this obligation covers both in-scope companies and their value chains. I refer to a standard-based duty because the directive requires the establishment of procedures and means that are *adequate* to its pursued objectives. This represents a significant innovation compared to the previous European legislative framework.

As a result, the due diligence obligation introduced by the CS3D includes both imperative rules for corporations and standards of conduct that are implicitly required of directors. These elements coexist and jointly serve the purpose of mitigating the risks posed by business activities to people and the environment.

Finally, the impact of the EU corporate sustainability framework on corporate governance has been acknowledged by Assonime, the Association of Italian Listed Companies.[71] In a recent research paper on the evolution of the corporate governing body, Assonime affirmed that both business planning and day-to-day management must now account for, integrate, and evaluate the effects of business activities on individuals and the environment. This implies a 'new role' for corporate directors in terms of their scope of responsibilities and liability.[72]

These elements suggest that the CS3D, by requiring corporations to implement adequate measures to prevent and mitigate environmental and social risks, underscores the socio-environmental function of corporate organizational, administrative, and accounting arrangements, in addition to their economic function. Differently put, the procedural due diligence obligations recently introduced by the EU support the argument that corporate arrangements must serve to manage broader risks than just economic distress for corporations.

While I have so far generally referred to corporate stakeholders, both the disclosure and due diligence provisions discussed contain explicit references to communities, indicating that they can be regarded as beneficiaries of this new legal framework on corporate sustainability. Including communities among the beneficiaries of EU due diligence legislation implies recognizing them as beneficiaries of the measures established by corporate directors to mitigate the negative environmental and social impacts of the corporation, providing them with a role in the enforcement of corporate due diligence duties.[73]

[70] Contrary to what is noted by Barcellona, *supra* note 57 at 172 ff.

[71] *L'evoluzione dell'organo amministrativo tra sostenibilità e trasformazione digitale (Note e Studi 1/2023)*, by Assonime at 30 ff online: <https://www.assonime.it/attivita-editoriale/studi/Pagine/Note-e-Studi-1_2023.aspx>.

[72] *Ibid* at 31.

[73] Regarding enforcement, see also Chapter 6.

3.2.3. Relevance of Disclosure and Due Diligence Provisions for Local Communities

The CSRD includes references to stakeholder communities as groups that interact with corporations and may be affected by the negative impacts of their business activities.[74] However, an examination of the provisions referencing communities reveals that they are viewed as objects of reporting due to the impacts they experience, rather than having an active role as rights-holders and potential claimants seeking redress for harm suffered. This is evident in the requirement that, in accordance with the sustainability reporting standards, undertakings subject to the directive shall report information related to 'the *management and quality of relationships* with customers, suppliers, and *communities affected by the activities of the undertaking'*.[75]

A partial exception may be found in Recital 14, where communities are included among the stakeholders affected by business activities that can hold undertakings accountable for their impacts on people and the environment. According to this provision, the disclosure required by the CSRD would theoretically facilitate their ability to do so.

However, this principle does not translate into a binding provision in the amended text of the directive. The CSRD only requires companies to report information on the impacts on communities but does not include specific provisions on how this information can be used to hold corporations accountable by affected stakeholders. This discrepancy can likely be explained by the reporting nature of the obligations imposed by the directive and the fact that the primary recipients of the information are investors (particularly institutional ones), with the expectation that they will make more sustainable choices in the allocation of their capital.[76]

Conversely, the CS3D acknowledges communities as having a more active role, not merely as groups adversely affected by business activities but also as rightsholders whose violated rights may lead to claims for compensation. Notably, this directive explicitly identifies communities as beneficiaries of its provisions, categorizing them–and not just by means of their representatives–as stakeholders whose rights are or may be compromised by products, services, or business operations.[77] Moreover, by referring to the treaties and international law conventions included in the Annex I, it is possible to identify the rights of communities defined as groups of individuals who are geographically connected to natural resources adversely affected by business activities.[78]

Although framed as "negative rights," community rights would encompass the right to protection against harm to their well-being resulting from the adverse effects of business activities on natural resources, the right to land and resources, and the right to not be deprived of their means of subsistence.[79] Furthermore, affected communities are recognized as having the right to receive

[74] Recitals 14, 32, and 50; Art 29ter, para 2 (c)(v) CSRD.
[75] Art 29b, para 2, (c)(v) NFRD, introduced with CSRD. [Emphasis mine]
[76] Recital 9 CSRD.
[77] Art 3, par 1., *n* CS3D.
[78] Annex I CS3D. Further details are included in the following footnotes.
[79] See, particularly, Part I, n 1, Arts 15, *e* and 16 of the Annex I.

full compensation for the harm incurred as a consequence of the actions of the responsible companies.[80]

Finally, while the international law sources referenced in Annex I, Part I, of the CS3D (particularly points 15 and 16, which are the most pertinent here) do not explicitly refer to communities in their wording,[81] it is nonetheless possible to discern a broader reference in these provisions that encompasses not only the individual but also a collective dimension among the rights enshrined therein. This is evident from the references to peoples, minority groups, and families and is upheld in the reference in point 16 of the Annex ('individuals, groupings and communities'). A similar duality of levels can also be found in the preambles of the referenced sources, which address the duties of the individual toward others and the community to which they belong.

These references appear to confirm that the limitations imposed by European provisions on the organizational discretion of businesses–intended to prevent and mitigate social and environmental risks associated with profit-driven activities–may well serve the interests of stakeholder communities, particularly in light of their potential exposure to such risks.

3.2.4. Direct Applicability of Constitutional Provisions: A Choice to be Avoided

Before analysing in detail the central argument of this research–that company directors should have a duty to take care to prevent harm to stakeholder communities–it is important to clarify that I reject the view that such a duty arises directly from Italian constitutional provisions allowing restrictions on economic freedom when it conflicts with social utility (primarily Article 41, paragraph 2). Contrary to various scholars who rely on this argument to support corporate sustainability, I support the view that constitutional norms do not apply directly to private relationships.[82] Instead, they must be implemented through primary legislation, which, in the case under discussion, consists of civil law provisions concerning adequate arrangements.

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[80] Recital 58; Art 3, par 1, *t*; Art 29 CS3D. Corporate civil liability is one of the two mechanisms established by the CS3D to ensure the implementation of measures aimed at preventing, mitigating, ceasing, or minimizing the negative impacts of activities carried out by in-scope companies and within the chain of activity, alongside the administrative sanctions provided for in Article 27 of the same Directive. Notably, the CS3D seems to distinguish between the general right to *"reparation"* of damage–meaning the restoration of the situation prior to the damage–and the right to *"full compensation"*, whether financial or non-financial, *provided by the company to the person or persons affected by the adverse impact.* On the one hand, the right to full compensation would fall within the broader right to reparation. On the other hand, the adoption of reparative measures by the company–even following an order to this effect imposed by the national supervisory authority–does not seem to limit the ability of affected parties to pursue additional compensatory measures through judicial means if necessary.

[81] The International Covenant on Civil and Political Rights, particularly Articles 1 (Right to self-determination), 6, para 1 (Right to life), 27 (Rights of ethnic, religious, and linguistic minorities); the International Covenant on Economic, Social and Cultural Rights, particularly Articles 1 (Right to self-determination), 2 (Right to obtain from adhering States the implementation of the rights recognized in the Covenant), 11 (Right to an adequate standard of living and the continuous improvement of living conditions), 12 (Right to enjoy the highest attainable standard of physical and mental health). Both Covenants were adopted by the UN in 1966 and ratified by Italy in 1978.

[82] This position is consistent with the wording of Art 41, para 3 Constitution (Italy): 'The law shall determine appropriate programmes and checks to ensure that public and private economic enterprise activity be directed at and coordinated for social and environmental purposes.'

a. Arguments for Direct Application of Constitutional Provisions

Notably, limits to economic freedom are permitted under the Italian constitution, particularly when conflicting with social utility (Article 41, paragraph 2), and various Italian scholars have argued for the direct application of this provision to promote corporate sustainability. However, this view should be rejected as constitutional provisions in Italy cannot be directly applied to private individuals; rather, their application must occur through implementation in primary legislation, such as the Civil Code. I argue that such legislation includes provisions on adequate arrangements. This subsection provides further remarks on this issue and clarifies the position adopted in this research.

According to one interpretation,[83] constitutional provisions would directly apply to private relationships, including those involving corporations. The statutory reserve (*riserva di legge*) for the application of Article 41, paragraph 2 of the Italian Constitution[84] should be understood broadly (*riserva "a maglie larghe"),* allowing the content of the interests referred to by the provision to justify limitations on economic freedom. Consequently, legal provisions like the NFRD (now CSRD)–more precisely, its Italian implementation legislation–and the Taxonomy Regulation, which clarify the scope of environmental protection in economic activities, would permit the direct application of the constitutional norm.

The direct applicability of constitutional provisions has been widely debated within Italian civil law scholarship[85] and has been invoked in the context of corporate sustainability by other scholars as well.[86] One key advantage is that it would allow for social and environmental protection in business activities, even in the absence of specific implementing rules that clearly define how economic freedom should be limited.[87]

Another advantage of the direct application of constitutional provisions is that it would avoid imposing rigid rules upon directors that may conflict with the fundamental principles of Italian corporate law, namely, rules that unduly expand fiduciary duties beyond profit.[88] From this perspective, constitutional principles would instead function as external limits affecting the decision-making process without requiring a balancing of goals (profit vs. social and

[83] Genovese, *supra* note 27.

[84] This reserve is considered implicit in the provision. For further details on the debate of whether a reserve applies or not, see Raffaella Niro, "Art. 41" in Raffaele Bifulco, Alfonso Celotto & Marco Olivetti, eds, *Commentario alla Costituzione* (Torino: UTET, 2006) 846 at 852–854[who provides a positive answer, highlighting that it would be especially useful to define the content of social utility].

[85] For an overview, see Giovanni D'Amico, "Problemi (e limiti) dell'applicazione diretta dei principi costituzionali nei rapporti di diritto privato (in particolare nei rapporti contrattuali)" (2016) 3 Giustizia Civile 443–508 at 446–460.

[86] See Stefano A Cerrato, "Appunti per una «via italiana» all'ESG. L'impresa «costituzionalmente solidale» (anche alla luce dei «nuovi» artt. 9 e 41, comma 3, Cost.)" (2022) 1 AGE 63–114 at 105 [suggesting viewing the corporation as bound by a duty of solidarity, as it is part of society. From a comparative perspective, cf. the good citizenship doctrine developed in Canada]. See also Piergaetano Marchetti, "Il bicchiere mezzo pieno" (2021) 2/3 Riv Soc 336–348 at 343. On the principle of solidarity in corporate governance, see Guido Alpa, *Solidarietà: un principio normativo* (Bologna: Il mulino, 2022) at 275 ff.

[87] Genovese, *supra* note 27 at 107–108.

[88] Cerrato, *supra* note 86 at 77.

environmental benefits). Instead, they require integrating social and environmental interests within the corporate decision-making process aimed at the pursuit of profit, thereby mitigating the risks associated with an excessive expansion of fiduciary duties.[89]

Although this latter objective is indeed commendable–and represents a primary goal of this dissertation, which, as extensively explained at the beginning of the chapter, aligns with "shareholderist" perspectives–it can be questioned whether it might not be achievable through alternative pathways rather than the direct application of constitutional norms. Indeed, the direct application of constitutional principles would raise significant issues.

b. Arguments against Direct Application of Constitutional Provisions

Firstly, the direct application of constitutional provisions regarding limits to other constitutional principles should not occur when primary legislation protecting such principles exists. Invoking limitative constitutional provisions to override such legislation would indeed bypass the formal constitutional review process.[90] Among Italian legislation grounded in the freedom of economic initiative, I think primarily about the corporate profit purpose under Article 2247 of the Civil Code, read in light of the introduction of limited-profit corporate forms (such as benefit corporations and social enterprises). As seen above, this provision implies that the profit objective cannot be disregarded in corporations that have not opted for such alternative forms. In other words, current corporate law allows shareholders to freely choose the strategic direction of their enterprise (profit-oriented through the traditional form, or hybrid/non-profit through alternative ones). However, once that choice is made, it must be pursued consistently, unless the corporate articles are amended.

Secondly, another scholar advocating for the direct applicability of constitutional provisions to corporate sustainability argues that the statutory reserve is unnecessary to provide further normative specification of broad constitutional concepts, such of solidarity or social utility. According to this scholar, these concepts are already sufficiently defined through case law.[91] However, the absence of even minimal normative specification (e.g., through general clauses) could generate significant challenges, particularly in the practical application of those provisions.

For one, it could complicate the decision-making process for directors, making it difficult to predict how to adequately account for social utility or solidarity when pursuing profit. This would require directors to stay constantly informed of evolving case law, imposing an undue burden that could also be inconsistent with the civil law nature of the Italian legal system.

Furthermore, relying solely on judicial interpretation to define constitutional concepts could excessively expand judicial oversight of managerial decisions without explicit legislative authorization. This might risk granting judges a quasi-legislative role in defining such concepts, conflicting with the separation of powers. A different case would be if primary legislation exists

[89] *Ibid* at 110.
[90] D'Amico, *supra* note 85 at 461.
[91] Cerrato, *supra* note 86 at 108 ff.

that applies such concepts, albeit with general clauses to allow for flexibility. In this latter case, the lawmaker would deliberately delegate the interpretation of the clause to the judge, which should be consistent with the constitution.[92] The absence of any legislative guidance, however, is fundamentally different from delegating interpretation through general clauses.

Lastly, if social utility is defined solely through case law, this may weaken the enforcement of directors' violations of the injured party's legitimate expectations (*legittimo affidamento*) about how the corporation or its directors should have acted. In Italy, these expectations may offer claimants a favourable position similar to that of creditors; however, for expectations to be considered legitimate, and thus capable of offering such a better position, a clear and detailed normative framework is required. Relying only on jurisprudential development may not provide a sufficiently precise or stable legal basis to deem expectations legitimate, especially when the relevant decisions are few or inconsistent.[93]

These observations lead to a two-fold conclusion: on one hand, the direct application of constitutional provisions in Italy is rather problematic and, therefore, inadvisable; on the other hand, it seems that the interpretations discussed attribute a meaning to the direct application of constitutional norms that, in my view, does not appropriately belong to them.

For example, in referring to the broad interpretation of the statutory reserve, one of the cited scholars[94] seeks to balance the need to uphold a legislative reservation consistent with established constitutional interpretation and the need to establish a strong legal basis for new corporate sustainability obligations in Italy. While this mediating intent can be shared, I do not believe this reading implies a direct application of the constitutional provision. As previously noted, direct application would only occur in the absence of primary legislation–even if expressed through general clauses–which, according to this view, is present in the form of disclosure regulations.

Conversely, when primary legislation implementing a constitutional provision exists, direct applicability cannot be invoked. At most, if such legislation is expressed through general clauses, the constitutional provision may assist the judge in interpreting its content.[95] However, it will not be directly applicable, as it is mediated by the general clause contained within a primary norm that the judge must interpret.

[92] See, e.g., Libertini, "Gestione "sostenibile" delle imprese", *supra* note 61 at 77.

[93] Further discussion on the topic of reliance is included below and in the following Chapter.

[94] Genovese, *supra* note 27.

[95] For a further discussion on the various doctrinal positions in Italy on the judge's role in interpreting general clauses, see Libertini, *supra* note 31 at 117–120. My position aligns with the author's argument that a general clause does not constitute a "blank delegation" (*delega in bianco*) from the Parliament allowing the judge to entirely create the content of the rule. Instead, the judge must always base their reasoning on a normative foundation (typically constitutional principles) to justify the decision. An essentially similar position had previously been advocated by Stefano Rodotà, as reported by D'Amico, *supra* note 31 at 134.

c. Preferred Position

In my view,[96] in Italy, primary legislation implementing the constitutional provision exists and lies in the requirement for adequate arrangements under Articles 2086 and 2381, paras 3 and 5 of the Civil Code. This legislation benefits the company by requiring directors to act fairly in the corporate interest to prevent or promptly detect crises. It also benefits third parties (both economic and non-economic stakeholders) who interact with the company. As aptly pointed out by other scholars cited above,[97] the duty to establish and implement adequate arrangements represents an application, within collective enterprise regulation, of the broader constitutional principle of social utility as a limitation on the freedom of economic initiative (Article 41).[98]

In fact, social utility can be understood as referring to

> those goods that are not only considered as such by the lawmaker but also, and above all, enjoy direct protection and guarantee under the Constitution», coinciding with other constitutionally protected interests or rights, such as health, the environment, the right to work, and so forth, interests and rights whose protection requires, in balancing with private economic initiative, a limitation of the latter […]. [99]

This definition highlights that the law doesn't need to explicitly refer to social utility for the constitutional principle to apply and contribute to its definition and implementation. It is sufficient that primary legislation expresses constitutionally protected interests, an illustration of which can be found in the same paragraph 2 (although this does not indicate the full scope).[100] This would be the case with the provision on adequate arrangements under the Italian Civil Code: although it does not expressly mention interests falling within social utility beyond preventing corporate crisis and instead leaves interpretation open through adverb "also", if read as protecting both economic and non-economic interests of corporate stakeholders, this provision can be understood as implementing Article 41, paragraph 2 of the Italian Constitution.

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[96] Which largely aligns with the dominant Italian scholarly position on the relationship between general clauses and constitutional principles that has traditionally been reluctant to directly apply constitutional principles to private relationships–until the recent trend towards so-called *unmittelbare Drittwirkung*. This trend has led to a decline in the use (and usefulness) of general clauses, which, in my opinion, should be reevaluated in accordance with the teachings of Stefano Rodotà. For further details on this decline, see D'Amico, *supra* note 31 at 142 ff.

[97] Ginevra & Presciani, *supra* note 18.

[98] The idea that the imposition of limits on the freedom of economic initiative must align with social utility is widely accepted in legal scholarship; see Francesco Fimmanò, "Art. 41 della Costituzione e valori ESG: esiste davvero una responsabilità sociale dell'impresa?" (2023) 50:5 Giur comm 777–806 at 5. For further discussion on the nature on the freedom of economic initiative see Mario Libertini, "Sulla nozione di libertà economica" (2019) 4 Contr Impr 1255–1286.

[99] Niro, *supra* note 84 at 855. [the author also notes that, although a precise definition of social utility cannot exist–since it requires a balancing of conflicting constitutionally protected interests, a task entrusted to the Constitutional Court–it can nonetheless be outlined in broad terms by referring to the common rationale underlying the Court's rulings regarding this concept].

[100] See *ibid* at 854 ff.

Furthermore, and consequently, this definition of social utility also reveals an alignment between Italian laws on corporate arrangements, integrated with the EU provisions on corporate sustainability (CSRD and, above all, CS3D), and the concept of social utility.[101] The provisions on adequate arrangements would fall within the definition of social utility insofar as they aim, through disclosure and due diligence obligations, to consider, prevent, and mitigate the negative impact of business activities on the environment and people.

However, since the referred legislation includes a general clause, namely the requirement for adequacy, it must be interpreted in light of the constitutional provision it is connected to, specifically considering the limitation of economic freedom to protect equally significant interests, primarily social utility, and comply with the solidarity principle under Article 2 of the Constitution. Economically speaking, this means that the adequacy of corporate arrangements should be assessed based on their contribution to corporate long-term sustainability, since short-termism typically externalizes profit costs onto third parties and thereby conflicts with the solidarity principle. From a socio-environmental dimension, the adequacy of arrangements should be evaluated based on their efforts to prevent profit-driven management from harming corporate stakeholders.

In practical terms, the adequacy of corporate arrangements should be assessed based on procedural regulations and best practices relevant to the specific type of company under consideration, as it will be further explored below.[102] However, as a first approximation, from a socio-environmental perspective,[103] sources of adequacy include both hard law, such as sustainability disclosure and due diligence requirements, and soft law, such as industry-specific sustainability guidelines (like the Borsa Italiana Corporate Governance Code and other relevant indications, e.g., from professional accounting bodies and relevant associations). They also encompass corporate internal codes of conduct.[104]

In summary, attributing the rise of a directors' duty to consider and mitigate social and environmental risks to Civil Code provisions on corporate governance, rather than directly to the Constitution, would avoid the practical inefficiencies and theoretical challenges that the latter solution might entail. Simultaneously, the reference to adequacy included in these provisions would allow for the identification of the duty's content based on precise (albeit various) regulatory sources, rather than solely through judicial interpretations. In this way, the Constitution functions not as a direct basis for directors' duties but as a tool for interpreting those sources. This would facilitate the identification of the required conduct both ex ante by directors

[101] In addition to these provisions, corporate criminal law and non-corporate law are also relevant, such as the criminal liability of legal entities and environmental law. See, e.g., Pierpaolo Sanfilippo, "Tutela dell'ambiente e "assetti adeguati" dell'impresa": compliance, autonomia ed enforcement" (2022) 6 Rivista di Diritto Civile 993–1026 at 999–1000.

[102] See subsection 3.3 in this Chapter.

[103] Economic and socio-environmental aspects are not strictly separate. For instance, it is now widely acknowledged that sustainability disclosure significantly impacts a company's financial performance. This recognition led to replacing the term *'non-financial disclosure* with *'sustainability disclosure'* in the transition from NFRD to CSRD.

[104] For an overview of the sources of adequacy, see Buonocore, "Adeguatezza, precauzione, gestione, responsabilità", *supra* note 29 at 11–17.

and ex post in judicial assessments. Finally, the proposed solution could also offer advantages in terms of enforcement through the application of the principle of legitimate expectation.

3.3. Sources of Adequacy

The diverse range of regulatory provisions that may shape the concept of adequacy–and thereby define the duty of directors to identify, prevent, mitigate, and compensate for the negative impacts of business activities on society and the environment–necessitates a more in-depth examination of these sources.[105] The following paragraphs address this topic by focusing on legal sources.[106] Supplementary to these, and only residually, technical or scientific knowledge may be employed (e.g., reporting criteria outlined by business science).

Defining the sources of adequacy helps limit (albeit not eliminating)[107] discretion in determining the behaviour mandated by the norm, thereby addressing the traditional reluctance of Italian scholars to employ general clauses due to concerns about potential increases in legal uncertainty.[108] It also emphasizes the important role that scholarship plays in interpreting these norms in alignment with the overall legal framework.[109] Given the focus of this thesis, socially and environmentally relevant corporate law sources are analysed, with particular attention to

[105] The reference to secondary sources is not limited to appropriate arrangements in corporate governance. For example, it is also included in workplace safety legislation, which refers to codes of ethics and codes of conduct adopted by companies or trade unions (*decreto legislativo 9 aprile 2008, n. 81*, 9 April 2008, 81, Art 6, para 8, *h*).

[106] This position has been defined as "moderate legal positivism" by Libertini, *supra* note 31 at 121.

[107] Eliminating discretion (assuming it is even possible) would instead result in an overly rigid legal framework for corporate sustainability. On one hand, it is necessary to limit "openness" to facilitate the clear determination of the content of the duty. On the other, it is crucial to recognize that some duties inherently require balancing conflicting interests, as is the case for obligations arising from the restriction of economic freedom under Article 41 of the Constitution. By "balancing," I do not mean functionalizing corporate interests but rather giving due consideration to external and opposing interests to prevent the pursuit of one from imposing untenable costs on others. This is not about aligning social activity with specific goals but rather legitimizing it through the acknowledgment of risks that such activity may pose to people and the environment.

[108] The argument that general clauses do not inherently represent a source of "openness" within the legal system is articulated by Francesco Denozza, "Clausole generali, interessi protetti e frammentazione del sistema" in *Studi in ricordo di Pier Giusto Jaeger* (Milano: Giuffrè, 2011) 25 *passim*.

[109] Libertini, *supra* note 31 at 121–122. Naturally, decisions interpreting general clauses are open to judicial review; see *ibid* at 140.

references to affected communities,[110] to provide minimum guidelines on how adequacy should be assessed in relation to the goal of fairly treating local communities in corporate governance.[111]

3.3.1. Nature and Dimension of the Business

The nature and size of the business are the only two parameters indicated by Article 2086 of the Civil Code for assessing adequacy.[112] The first refers to the type of activity carried out, particularly whether it is subject to sector-specific regulations (e.g., banks, companies operating in the financial or insurance sectors). The second pertains to the scale of the business structure, especially whether the company is listed or has securities distributed in the market.

As for the business nature, sector-specific regulations generally require a more precise arrangement of organizational, administrative, and accounting arrangements to meet specific needs relevant to the regulated sector. For example, in the financial sector, Regulation (EU) 2019/2088 mandates the identification (for disclosure purposes) of the negative externalities of relevant business activities and the inclusion of these risks in business models, investment processes, and financial advisory practices. The assessment of the sustainability of an investment or financial product shall primarily be based on specific regulations, including the Taxonomy Regulation (Regulation (EU) 2020/852), the Disclosure Regulation itself (Art. 1, No. 17) and its delegated acts (Delegated Regulation (EU) 2022/1288), and the Benchmark Regulation (Regulation (EU) 2016/1011, amended in 2019).[113]

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[110] General clauses are typically considered norms that reflect the existence of a conflict between principles and require the interpreter to balance them. The structure of general clauses consists of a *context*, specifying *when* the norm applies (i.e., to which situations), and a *criterion,* defining *how* to carry out the balancing, thereby determining the required behaviour (refer to Mario Libertini, "A "Highly Competitive Social Market Economy" as a Founding Element of the European Economic Constitution" (2011) 1 Concorrenza e mercato 491–507; Denozza, *supra* note 31). From this perspective, the following discussion will focus on the second element (the criterion), while the first has been addressed in previous Chapters, where the relationship between community-stakeholders and the corporation was analysed, highlighting how this relationship aligns with cases of limitations on the freedom of economic initiative, of which the duty to establish adequate arrangements is a specification.

[111] While this analysis contributes to determining the behaviour expected of directors, it does not cover it completely, as some level of discretion in determining the actual structure remains. For further discussion on this discretion, see subsection 4.6 below.

[112] This phrasing is justified by the applicability of the provision to all collective enterprises. Its apparent vagueness is mitigated by the presence of more detailed provisions in commercial law and other legal areas that complement it; see Meruzzi, *supra* note 11 at 60.

[113] These regulations establish that a sustainable investment must: avoid significant harm to social or environmental objectives specified by EU legislation (e.g., use of renewable energy, land use, waste management, social cohesion); substantially contribute to achieving one or more environmental goals (e.g., pollution prevention and reduction); respect minimum safeguards, meaning the business activity must align with the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights; meet specific technical screening criteria established by the European Commission; EU, *Regulation 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector* [Disclosure Regulation], [2019] OJ L 317/1, Art 1, n 17; EU, *Regulation 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088* [Taxonomy Regulation], [2020] OJ L198/13, Art 3. For a comprehensive overview of the relevant

As for the business size, being listed or having a significant dimension implies, e.g., the application of the TUF (Consolidated Law on Finance) regulations or compliance with the corporate governance code. Detailed regulations based on the scale of business activity and the distribution of securities are justified by specific needs, primarily ensuring market efficiency and protecting investors. However, recent EU legislation also aims to promote or mandate the pursuit of socio-environmental sustainability objectives. For example, the cited CS3D applies only to large companies.[114]

In summary, directors must establish and implement arrangements that, based on the specific needs arising from the type of activity and corporate size, are reasonably effective in identifying, preventing, mitigating, and remedying the risks posed to local communities and their environment. On the one hand, this means that sector-specific or size-related regulations apply to companies that qualify as belonging to specifically regulated categories. On the other hand, it does not preclude these norms from serving as one potential benchmark for evaluating the adequacy of arrangements in companies that, while not formally part of such sectors, share similar characteristics or face comparable issues addressed by the specific regulations.[115]

This point is significant as it highlights the relevance of EU disclosure and, more importantly, of sustainability due diligence requirements, even for companies that do not directly fall within the scope of the norm but still pose substantial sustainability risks. This does not imply extending EU norms beyond their intended scope but merely suggests that these provisions may play a role in contributing to the definition and assessment of adequacy of companies posing similar concerns but not directly covered by their scope of application. Certainly, the relevance of those provisions as a potential benchmark for the assessment of corporate arrangements must always be balanced against the size of the enterprise and the actual risks its activity poses. For instance, a small company posing limited environmental and human right risks would not be expected to meet the same level of compliance as a larger one. Moreover, it is worth noting that the directive already

regulations on sustainable finance in Italy, see https://www.consob.it/web/area-pubblica/finanza-sostenibile-regolamentazione.

[114] If European, these are companies that have on average more than 1,000 employees and a net worldwide turnover exceeding EUR 450 million in the last financial year for which the annual financial statements were prepared or should have been prepared. If non-European, the regulation applies to companies that generated a net turnover of more than EUR 450 million within the Union in the financial year preceding the most recent one. Additionally, parent companies of groups meeting these thresholds and those that have entered into franchising agreements (subject to specific thresholds for licensing fees and turnover) are also covered; see Art 2 CS3D.

[115] Meruzzi, *supra* note 11 at 62. Recall that the duty to establish adequate arrangements applies to all collective enterprises. This duty reflects, within Italian business law, the constitutional principle that limits the freedom of economic initiative in favour of social utility. As previously discussed, this utility encompasses both economic and socio-environmental dimensions. However, such limitations must be proportionate to the specific circumstances of the enterprise and the actual risks it poses to social utility–that is, to interests other than economic freedom, but of equal importance–taking into account primarily the nature and size of the enterprise.

has a broad scope due to the so-called "cascade effect," whereby due diligence requirements extend throughout the entire supply chain.[116]

Finally, the reference to the nature and size of the business also serves to underline the need for evaluating the context in which the arrangements are adopted. This aligns with the general clause nature of adequacy, which requires a concrete assessment of the context in which the agent operates. This contextual evaluation applies to directors and judges and must be based on the factual circumstances present at the time the behaviour was carried out.

3.3.2. Normative Provisions

Secondly, a setup can be considered adequate when it aligns with the applicable legal provisions (*hard law*) relevant to the specific corporation, the sector in which it operates and, as noted, to the specific risks posed. It may not be necessary to elaborate further on this point, as current binding sustainability legislation relevant for this analysis in Italy essentially includes the previously mentioned EU frameworks on disclosure and due diligence. The specific requirements and objectives of these frameworks serve as key reference points for directors of in-scope and non-in-scope-but-similarly-positioned companies in determining what arrangements can be deemed adequate to meet them. These norms, which introduce risk management provisions, should be interpreted in light of the precautionary principle, which considers specific indicators of risk as sufficient grounds for adopting preventive or mitigating measures.[117]

In addition to business law provisions, legislation from other legal domains must also be considered when assessing the adequacy of corporate arrangements, such as criminal corporate law, environmental law and human rights law. Finally, relevant hard law should include international law ratified by Italy. While international treaties and covenants typically bind states rather than private entities, they nonetheless establish principles and values that may pertain to business activities and may serve as benchmarks for determining the adequacy of corporate arrangements. Typically, these principles and values are implemented through national legislation applicable to private parties.

3.3.3. Case Law

Case law may also contribute to defining the concept of adequacy. General clauses allow the law to evolve through shifts in judicial interpretation[118] though such changes must still be grounded

[116] While the CS3D provides a valuable benchmark, its currently limited scope of application remains a constraint on the widespread adoption of its provisions. A future expansion of its scope, following the model of non-financial/ sustainability reporting, would therefore be welcome.
[117] Buonocore, "Adeguatezza, precauzione, gestione, responsabilità", *supra* note 29 at 31. For the precautionary principle in EU law, see Art 191 TFEU; EU, *Communication from the Commission on the precautionary principle,* [2000] COM/2000/0001 final. For a relevant application of this principle in relation to Italy, see ECLI:EU:C:2003:431.
[118] Galgano, *supra* note 31 at 7.

in and justified by the norms and principles of the legal system.[119] Italian courts have recognized the role of judicial interpretation in shaping the content of adequacy, affirming that

> the formula adopted by the lawmaker is deliberately flexible, since the notion of adequacy must adapt to the specific nature of the company being assessed.[120]

Courts that have addressed the issue of evaluating the adequacy of corporate arrangements have done so by verifying the presence of an up-to-date organisational chart, clear job descriptions, a system for managing and monitoring key business risks, a budget supported by forecasting tools, reporting mechanisms, and the preparation of a business plan. The assessment has also covered the presence of general accounting to meet deadlines for drafting the financial statements and to allow for proper financial analysis, as well as the adoption of a formal procedure for the management and monitoring of receivables.[121] When some services, such as accounting, are outsourced, the evaluation of adequacy encompasses the presence (and the effectiveness) of internal controls over the consultancy services provided externally.[122]

3.3.4. Soft Law

Adequate arrangements must also take into account the broader set of soft law instruments, such as regulations, guidelines, and recommendations, as well as the self-imposed rules in corporate articles and bylaws (such as ethical codes or detailed clauses translating external business standards).[123] As for soft law instruments, these may originate from a variety of actors, including regulatory authorities, market operators, industry associations, foundations and research institutions. As with hard law, the relevance of soft law norms must be assessed in light of the specific circumstances of the enterprise (its nature, size, and the risks it poses). Although these instruments are diverse and wide-ranging, they play a key role not only in interpreting and systematizing binding regulations, but also in offering practical guidance for their application in real-world scenarios. While it is not possible to provide an exhaustive list of soft law instruments that may be relevant to assessing the adequacy of sustainability-related arrangements, a selection of key Italian sources is outlined below.

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[119] Libertini, *supra* note 31. Similarly, Rodotà, *supra* note 31 at 106 [who refers to the "homeostatic" function of general clauses].

[120] Tribunale Brescia, 23 October 2024, Business Section, Decree (Italy) para 3.5.

[121] Tribunale Catanzaro, 6 February 2024, Business Section (Italy) commented by Elena Fregonara, "La centralità degli assetti adeguati nella fisiologia e nella crisi dell'impresa. Nota a Tribunale Catanzaro Sez. spec. in materia di imprese, 06 febbraio 2024 e Tribunale Milano Sez. spec. in materia di imprese Decr., 29 febbraio 2024" (2024) 8–9 Giur it 1900–1903. Similarly, Tribunale Milano, 29 April 2025, Section II, No 331 (Italy), commented by Fregonara, *supra* note 127.

[122] Tribunale Milano, 29 February 2024, Business Section, Decree (Italy) commented by *Ibid*.

[123] Buonocore, "Adeguatezza, precauzione, gestione, responsabilità", *supra* note 29 at 17. More recently and extensively on the topic, Marco Ventoruzzo, "Osservazioni sulle conseguenze applicative dell'adozione di clausole statutarie (e di autodisciplina) sul "successo sostenibile"" (2024) 1 Riv Soc 129–152 [including further bibliographic notes].

a. *Borsa Italiana* Corporate Governance Code

The Code is binding for Italian listed companies and for those that have adopted it, while serving as a set of recommended best practices for others. It establishes sustainable success as the guiding principle in the management of the company, reflecting the broader OECD principles on sustainability and stakeholder inclusion in decision-making processes. In this framework, sustainability should be assessed based on the company's actual promotion of dialogue with stakeholders, including local communities.[124] Therefore, under the Corporate Governance Code, the adequacy of governance structures depends on the establishment of arrangements for stakeholder consultation and their effective implementation.

b. Notary Statements

Soft law instruments also include statements of Italian notary councils (*massime notarili*), which provide interpretative principles, opinions, and guidance on specific legal issues, including corporate law. These statements primarily assist practitioners in solving such issues and foster consistent interpretation and application of the law.

Regarding adequate arrangements, notary statements have so far focused on the possibility of delegating their establishment to individual directors.[125] However, it is likely that future statements will address the assessment of adequacy more in detail.[126]

c. Documents by the Italian Financial Markets Supervisory Authority (CONSOB)

The Italian financial markets supervisory authority (CONSOB) publishes documents relevant to defining adequacy of corporate arrangements for sustainability purposes. For example, in addition to studies and research, CONSOB issues notices to draw operators' attention to the correct application of regulatory obligations.[127]

d. Guidelines by the National Council of Accounting Professionals (CNDCEC)

In its recent document *"Value and Sustainability – Reflections for Business Dialogue,"* the National Council of Accounting Professionals (CNDCEC) provides businesses and other stakeholders with guidance on how to align value creation with sustainability. It emphasizes that assessing the

[124] *Assonime's guide to the G20/OECD principles on corporate governance (Note e Studi 2/2024)*, by Assonime online: <https://www.assonime.it/attivita-editoriale/studi/Pagine/Note-e-Studi-2_2024.aspx>.

[125] Consiglio Notarile di Firenze, statement No 74/2020, online: https://www.fondazioneanselmoanselmi.it/amministrazione-in-generale-e-sistema-tradizionale-nelle-spa;
Comitato Interregionale Dei Consigli Notarili Delle Tre Venezie, Orientamenti Societari, Amministrazione in generale e sistema tradizionale, H.C.16 (September 2019), online: https://www.notaitriveneto.it/dettaglio-massime-triveneto-54-spa---amministrazione-in-generale-e-sistema-tradizionale.html.

[126] For an initial attempt, see Daniela Boggiali, *Il concetto di organizzazione adeguata al tipo di impresa (art. 2086, comma 2, c.c.): assetti organizzativi e obblighi degli organi di gestione e di controllo* (2023).

[127] Most recently, CONSOB, *Richiamo di attenzione n. 1/25 dell'11 febbraio 2025 - L'adeguamento agli obblighi in materia di "finanza sostenibile" da parte dei gestori* (11 February 2025), online: <https://www.consob.it/web/area-pubblica/-/richiamo-di-attenzione-n-1-25-dell-11-febbraio-2025>.

sustainability of corporate behavior should go beyond legal compliance and consider the company's intentions, its institutional nature, the social context in which it operates, and the development and specific outcomes of its actions.[128]

According to this document, sustainable behaviour in relation to communities includes:

i. Aligning the company's mission with attention to the community, territory, and society.
ii. Incorporating goals such as inclusivity and support for local communities into the business strategy.
iii. Considering the outcomes of community engagement initiatives (if implemented) in decision-making processes and including members of the local community in governance bodies.
iv. Implementing indicators to measure the corporation's impact on the community, territory, and society; carrying out initiatives to engage and support local communities; promoting territorial development; providing economic support; launching social development programs (e.g., educational initiatives); and contributing to local employment growth.

e. Documents Issued by the Italian Association of Internal Auditors (AIIA)

The practical guide published by Italian Association of Internal Auditors (AIIA) on mitigating risks related to climate change and environmental sustainability may also be relevant to assess adequacy of sustainability arrangements.[129]

3.3.5. Other Relevant Documents

To assess the adequacy of sustainability frameworks, studies and guidelines published by the Association of Italian Joint Stock Companies (Assonime) may also be relevant. Generally, these are explanatory documents primarily aimed at listed companies. For example, regarding sustainability reporting, guidelines have been issued that contain recommendations on the content and drafting methods of sustainability reports for companies that are subject to voluntary application of the CSRD.[130]

[128] Francesca Mobili, "Valore e Sostenibilità - Spunti per una discussione nelle imprese | Consiglio Nazionale dei Dottori Commercialisti e degli Esperti Contabili" (18 October 2024) at 113, online: <https://commercialisti.it/documenti-studio/valore-e-sostenibilita-spunti-per-una-discussione-nelle-imprese/>.
[129] *Practical guidance on climate change and environmental sustainability How to tackle associated risks and harness opportunities?*, by Associazione Italiana Internal Auditors (2021) online: <https://www.aiiaweb.it/practical-guidance-climate-change-and-environmental-sustainability-how-tackle-associated-risks-and>.
[130] These guidelines aim to support companies listed on the Euronext Growth Milan market, most of which are not bound by CSRD's provisions. See *Linee Guida per il reporting di sostenibilità delle società quotate su Euronext Growth Milan (Note e Studi 1/2024)*, by Assonime online: <https://www.assonime.it/attivita-editoriale/studi/Pagine/Note-e-studi-01_24.aspx>.

3.4. Discussion: The Duty to Prevent Harm to Stakeholder Communities as a Duty of Care

The previous paragraphs have argued that a duty to prevent harm to stakeholder communities can be identified within the duty to establish and implement adequate arrangements–part of the broader duties of care, as these define how management activities are to be carried out. The duty to adequate arrangements serves to protect not only shareholders and creditors, but also third parties with non-necessarily economic interests, such as local communities. This argument is based on recent regulatory developments concerning corporate crisis management and socio-environmental protection at the EU level, including sustainability reporting and due diligence obligations.[131]

The discussed duty is not merely procedural, but it also affects the substantive content of directors' obligations, as the establishment of organizational, administrative, and accounting structures must serve to identify, prevent, mitigate, and compensate the negative risks associated with corporate activity. However, this does not imply a redefinition of the corporate purpose, which remains profit oriented. Rather, it reinforces the boundaries within which profit may be legitimately pursued, ensuring that the benefit of some (the corporation and its shareholders) does not come at the expense of others (stakeholders, including local communities).

To the extent that the duty to establish and implement adequate arrangements protects third parties, it requires directors–albeit with differences depending on their role, whether non-executive or executive–to take care to prevent harming people who could be negatively affected by corporate activities. Since stakeholder communities are among such third parties, the duty to establish and implement adequate arrangements indeed entails a duty to effectively prevent, mitigate and compensate harm to them. Under the proposed interpretation, this duty would enact the broader constitutional principle that economic freedom may be limited when necessary to protect social utility, that is, to safeguard interests that are different from, but equal or superior to, that of economic initiative. The well-being of stakeholder communities may fall within the constitutional notion of social utility when tied to the fundamental rights included therein, thus constituting a limit to the freedom of economic initiative.

Imposing limits on the freedom of economic initiative essentially means requiring behaviour that differs from what directors would otherwise adopt in their unrestricted pursuit of corporate interests–understood as shareholders' economic interests. It entails a curtailment of the pursuit of profit to prevent harm to other constitutionally protected interests (e.g., the right to a healthy environment). This limitation is also reflected in the duty to take care to prevent harm to communities.

[131] Some Italian scholars have also argued that the duty to establish and implement adequate arrangements for the benefit of third parties can be derived from the constitutional amendments to Articles 9 and 41 of the Italian Constitution. This interpretation supports the view that businesses must contribute to the realization of constitutional values; see Alberto Maria Benedetti, "Principi (definitori) e clausole generali (ambulatorie): «assetti organizzativi adeguati» e (nozione di) «impresa» nell'art. 2086. c.c." (2023) 5 Riv Dir Civ 907–931 at 927; similarly, Monica Cossu, "Stakeholders Theory, obiettivi ESG e interesse sociale" (2023) 3 ODC 783–804 at 798.

However, in both cases (the duty to take care to prevent harm to communities and the duty to establish and implement adequate arrangements) harm is not entirely excluded. Under Article 2086 of the Italian Civil Code and the other complementing legislative provisions discussed above, directors are required to implement measures to prevent such harm or, when prevention is not possible, to minimize and/or compensate for it. Nevertheless, stakeholder protection is achieved through the adequacy clause, which mandates a balance between economic and socio-environmental interests in risk-management structures.

Before discussing enforcement and possible limitations of the proposed duty to take care to prevent harm to stakeholder communities, the following paragraphs will critically examine its placement among directors' duties of care through the lens of Canadian experience.

4. Directors' Duty of Care to Stakeholder Communities: Insights from Canada

In the 2004 *Peoples* case, the Supreme Court of Canada (SCC) "proposed a more robust role for the duty of care in corporate governance"[132] by expanding this duty to include stakeholders.[133] Although the ruling focused on creditors, the principles established by the court may be extended to other categories of stakeholders as it gave limited attention to the contractual relationship.[134] This ruling has raised numerous theoretical and practical questions that have been discussed in subsequent academic debates and are highly relevant to the present analysis.

The Wise brothers, owners of a company bearing their name, acquired Peoples from another company (M&S) through a leveraged buyout with financing from TD Bank. The acquisition was not immediately followed by a merger, as per the agreement with the vending company. However, since the Wise and Peoples shared warehouse facilities, the directors implemented a joint inventory policy that favoured Wise, nearly eliminating the debts it owed to Peoples, which was negatively affected as a result.[135]

Following Peoples' declaration of bankruptcy, this arrangement prevented the full satisfaction of Peoples' creditors, with only the seller and the financier being paid in full. To protect the interests of the unpaid creditors, the bankruptcy trustee filed a liability claim against the directors, seeking a finding that they had breached their duty of care.

[132] Stéphane Rousseau, "Directors' Duty of Care after Peoples: Would It Be Wise to Start Worrying about Liability" (2005) 41 Can Bus LJ 223–235 at 223–224.

[133] Catherine Francis, "Peoples Department Stores Inc. v. Wise: The Expanded Scope of Directors' and Officers' Fiduciary Duties and Duties of Care" (2004) 41 Can Bus LJ 175 at 183. However, there have been criticisms regarding the court's focus on the duty of care, with claims that this emphasis was misplaced, as issues of fiduciary duty were at stake; Edward M Iacobucci, "A Wise Decision-An Analysis of the Relationship between Corporate Ownership Structure and Directors' and Officers' Duties" (2002) 36:3 Can Bus LJ 337–367 at 361.

[134] To avoid casting directors as guarantors of the corporation; see Rousseau, "Directors' Duty of Care after Peoples", *supra* note 132 at 232.

[135] For further information on the facts and the first two stages of litigation, see Wayne D Gray, "Peoples v. Wise and Dylex: Identifying Stakeholders Interests upon or Near Corporate Insolvency-Stasis or Pragmatism Commentary" (2003) 39:2 Can Bus LJ 242–261 at 244 ff.

In its ruling, the SCC recognized that creditors may bring direct claims against directors for breaching the duty of care under Sec 122(b) of the CBCA or seek the oppression remedy under Section 241 of the CBCA. Specifically, for the court, directors do not owe a fiduciary duty to creditors, as this duty is owed exclusively to the corporation itself, as clearly stated in Section 122(1)(a) of the CBCA.[136] In contrast, they owe a duty of care to creditors due to the broader wording of Section 122(1)(b) which allows for a wider interpretation that includes corporate stakeholders.[137] The Court also ruled that the determination of directors' liability should be based on an objective standard of conduct as required by law and an assessment of the context.[138] However, to avoid hindsight bias, the BJR applies.[139]

This ruling raises important questions regarding the protection of stakeholders under the duty of care, relevant to the proposed duty to take care to prevent harm to communities in Italy. One key issue is identifying the duty's beneficiaries, that is, to whom these duties are owed. This permits clarifying whether affected communities may seek legal remedies for directors' harmful conduct. If so, it also becomes necessary to consider the nature of the protection afforded–whether direct or indirect.

Furthermore, the *Peoples* decision viewed the liability that may arise from a breach of directors' duties toward creditors primarily as extra-contractual (tort) liability. This qualification suggests the need to investigate, in relation to our proposal regarding Italy, the nature of any potential liability for directors. A direct consequence of this investigation is the necessity to define the regulation of the burden of proof.

Thirdly, the *Peoples* decision dismissed the bankruptcy trustee's claim by applying the BJR to directors' conduct. For the SCC, such conduct was an exercise of managerial discretion under the duty of care. This reasoning is key to evaluating the proposed duty to take care to prevent harm to communities in Italy, where the BJR similarly protects directors from liability for failed business decisions. Assessing how the BJR would apply to our proposal is essential to determine its practical feasibility.

Finally, expanding directors' duty of care requires an assessment of its implications, including increased liability risks for directors, potential misuse for shareholders' benefit, and consistency with the corporate framework of the reference system.

Despite the differences between the *Peoples* case and the protection of local communities examined here, the issues discussed justify the comparison.[140] The following analysis treats

[136] *Peoples Department Stores Inc (Trustee of) v Wise*, [2004] 3 SCR 461 at paras 42–43.
[137] *Ibid* at para 57.
[138] *Ibid* at paras 61–62.
[139] *Ibid* at para 64.
[140] Some relevant differences include the focus on creditors rather than non-economic stakeholders such as communities, the bankruptcy context in which the claim was brought by the trustee as opposed to the going-concern scenario considered in this research, and the objective standard of care under Canadian law, which differs from the Italian one. However, these distinctions do not, in my view, significantly affect the legal principles developed by the Court.

delegating and delegated directors under a unified framework, noting distinctions only when relevant. The same approach applies to listed versus unlisted companies.

4.1. To Whom Are Duties of Care Owed?

> This [the court's determination that creditors are entitled to sue directors and officers directly for breach of the duties of care] is in contrast with the court's reiterated statement that directors' fiduciary duties are owed to the corporation, not to its creditors and not, by implication, to the corporation's other constituencies.[141]

Firstly, the *Peoples* decision has been criticized for misidentifying the beneficiaries of the directors' duty of care.[142] The central issue was whether creditors harmed by a breach of this duty could bring directs claims against directors provided that, under the *Foss v Harbottle* principle, directors owe their duties to the corporation, not to third parties.[143] Critics also argue that the court relied too heavily on a textual argument–namely, that the wording of s. 122(1)(b) does not explicitly mention the corporation, unlike paragraph (a) on fiduciary duty–a variation that may simply reflect an effort to avoid redundancy.[144] Moreover, treating the beneficiaries of the duty of care differently from those of the fiduciary duty would yield an illogical result, i.e., allowing creditors to sue directors for negligence, but not for breaches of fiduciary duties.[145]

This criticism is particularly significant for my argument, as it calls for a deeper examination of to whom the duty to take care to prevent harm to communities is owed. This is essential for the theoretical framing of the proposal and for determining who is entitled to enforce it. I argue that this duty should be owed not only to the company and shareholders but also to stakeholders, including communities. Under the proposed interpretation of Article 2086 of the Italian Civil Code, the duty to establish and implement adequate arrangements would protect both the company and its shareholders, as well as the interests of stakeholders like communities. Consequently, as communities benefit from the protective scope of this duty, they can reasonably expect directors to fulfill their obligations. Any breach that harms communities should give rise to compensatory claims under Article 2395 of the Italian Civil Code.

Does this interpretation risk blurring the line between fiduciary duty and duty of care? Both duties serve the proper functioning and success (or at least survival) of the corporation, ultimately advancing the interests of its shareholders. In Italy, the duty to pursue the corporate interest, which underpins directors' fiduciary duties, is understood as serving solely to benefit the

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[141] Jacob S Ziegel, "The Peoples judgment and the Supreme Court's role in private law cases" (2005) 41:2–3 Can Bus LJ 236–246 at 240.

[142] Other critiques have addressed different aspects. For an introduction and further references, see Ian B Lee, "Peoples Department Stores v. Wise and the Best Interests of the Corporation" (2004) 41 Can Bus LJ 212–222.

[143] Ziegel, *supra* note 141 at 240; Rousseau, "Directors' Duty of Care after Peoples", *supra* note 132 at 225.

[144] Mohamed F Khimji, "Peoples v. Wise - Conflating Directors' Duties, Oppression, and Stakeholder Protection Case Comment" (2006) 39:1 UBC L Rev 209–232 at 224.

[145] *Ibid* at 224–225.

company and its shareholders, ensuring alignment between their interests and the directors' management decisions.

Conversely, duties of care not only protect business continuity–e.g., by preventing poorly informed decisions and thereby shielding the company from potential harm–but may also serve to safeguard external interests. While this external protective function is not inherent in all duties of care, it is present in the duty to establish and implement adequate arrangements that support corporate continuity and serve a socio-environmental function by identifying, preventing, mitigating, and compensating risks that the company's activities may pose to people and the environment.

Therefore, insofar as the duty to establish and implement adequate arrangements also protects interests external to the company, those for whose benefit such arrangements are intended must be considered at minimum holders of a legitimate expectation–if not a proper right–that directors comply with this duty and do not cause them harm.

The argument presented does not give rise to a third-party beneficiary contract (*contratto a favore di terzo*) under Article 1411 of the Italian Civil Code, as the duty to prevent harm to communities would stem directly from the law, rather than from a contract. As noted, the relationship between the company and its directors is typically described as organic identification. While there are contractual elements, such as those related to director liability towards the corporation, these elements do not render the relationship contractual. Furthermore, even assuming a contractual relationship exists between the company and the director, the obligation to take care to avoid harming stakeholders, as proposed here, would be imposed by law–through Arts 2086 and 2385 paras 3 and 5 of the Italian Civil Code–and not by a contractual clause.[146] Duties imposed by law do not depend on the will of the contracting parties, as would be the case in a third-party beneficiary contract.

Rather, this should be considered an obligation of protection (*obbligo di protezione*) upon directors towards stakeholder communities, arising from the law and directors' position.[147] Given the duty to establish and implement adequate arrangements, its role in safeguarding broader interests, and the professional standard of diligence required from directors, a relationship of reliance arises between the corporation and the stakeholders affected by its activities. This reliance entails the expectation that directors will exercise reasonable diligence in managing the

[146] Save in exceptional cases not considered here.

[147] For a historical and evolutionary overview of protective duties and non-performance obligations in Italian legal doctrine and case law, see Maria Feola, "Prestazioni non dovute, "contatto sociale" e obblighi di protezione "autonomi"" in Pier Giuseppe Monateri, ed, *Scritti in Memoria di Rodolfo Sacco* (Torino: UTET, 2024) 609 [including references to relevant bibliography]. The proposed reading aligns with a respected, albeit minoritarian, strand of Italian legal scholarship, which has considered the violation of directors' duties toward individual shareholders and third parties under Article 2395 of the Italian Civil Code as a breach of protective obligations. See Franco Bonelli, *Gli amministratori di s.p.a.: dopo la riforma delle società* (Milano: Giuffrè, 2004) at 225; Anna Rosa Adiutori, *Funzione amministrativa e azione individuale di responsabilità* (Milano: Giuffrè, 2000) at 79–80; Carlo Angelici, "Società per azioni e in accomandita per azioni" in *Enciclopedia del diritto* (Milano: Giuffrè, 1990) at 1009.

company to prevent harm to third parties.[148] Recognizing that third parties expect directors to take care to prevent harm–operationalized through the establishment of adequate risk-management structures–implies that when this duty is breached and an harm occur, affected parties should be entitled to seek legal protection for the infringement of their expectation.[149]

Allowing stakeholders to sue directors directly should not prevent the corporation from bringing a damage compensation claim against its directors if a breach of the duty of care has harmed the company. Company harm may include be, for instance, amounts paid or allocated to compensate third parties affected by the directors' conduct. However, unlike stakeholders' claims–which aim to protect specific stakeholder rights–corporate claims aim to protect the rights of the entity itself.

4.2. Direct Stakeholder Claims Against Directors

One consequence of stakeholders' enforcement of their expectations towards directors is that their claim would qualify as a direct claim rather than a derivative action. Derivative actions are brought for the benefit of the corporation to protect a right belonging to the company itself, while direct claims aim to protect a personal right of the claimant or a related party (e.g., a represented individual). Although the distinction between derivative actions and direct claims is typical of common law systems, a similar distinction exists in Italian law–e.g., between Article 2393-bis (shareholder derivative actions) and Article 2395 (personal damage claims) of the Civil Code.

Personal damage arises when an individual suffers economic loss from directors' managerial actions, such as when stakeholders make investment decisions based on misleading information provided by corporate directors. In the context of this study, personal damage may result from the adoption of cheaper but polluting production methods, leading to health issues and limiting residents' access to nearby natural resources. In similar cases, the harm affects exclusively the stakeholders, while the corporation benefits economically from cheaper production methods. However, if the corporation incurs liability, e.g., through compensation orders, it would also suffer a loss, making a derivative action possible to address the directors' decision and protect corporate interests. Yet, in Italy, derivative actions are reserved for shareholders; conversely, third parties cannot file these actions as they, by definition, have no direct interest in the corporate survival. Consequently, in this legal framework, derivative actions cannot protect third parties and are thus irrelevant for the purposes considered here.[150]

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[148] Andrea Nicolussi, "Obblighi di protezione" in *Enciclopedia del Diritto* (Milano: Giuffrè, 2015) 659 at 660–661.

[149] A protective obligation upon corporate directors towards stakeholders has also been supported by Papi, *supra* note 44 at 148–149; 160 ff; contra, Rita Rolli, *L'impatto dei fattori ESG sull'impresa. Modelli di governance e nuove responsabilità* (Bologna: il Mulino, 2021) at 170.

[150] Notably, the situation is different in Canada, where the categories of persons entitled to seek leave to bring derivative claims are broader. Under s 238(d) CBCA, complainants may include anyone the court considers a proper person to bring the action. However, in practice, derivative claims have been typically brought by shareholders, making stakeholder use largely theoretical; see J Anthony VanDuzer, *The law of partnerships and corporations*, 4th edn (Toronto, ON: Irwin Law, 2018) at 540. Furthermore, since derivative claims are pursued on behalf of the corporation and in its interests, any compensation awarded goes to the corporation rather than the complainant. This makes the derivative actions of limited utility for harmed stakeholders.

Another consequence of enforcing stakeholders' expectations concerns the nature of the underlying relationship between the company and affected third parties. Although the claim would be direct, a pre-existing relationship would not be required for the harm to be enforceable. In most cases, the relationship would be non-contractual, as the expectation that third parties place on directors to comply with their duties does not depend on a prior agreement between them. However, this does not exclude that, when a pre-existing relationship (contractual or similar) occurs between the affected community and the company, liability arising from a breach of a legitimate expectation could be characterized as contractual or quasi-contractual in nature.[151]

Finally, the discussed stakeholders' claims would not seek to compensate for the violation of directors' duties *per se*, but for the harm resulting from it. The violation is legally relevant because it stems from a general duty of directors and because it impacts an interest that the law has intended as deserving protection. Clearly, defining the content of this general directors' duty is essential to determine when legal protection is available for negatively affected stakeholders.

As previously mentioned, this duty involves setting up and overseeing the internal organizational structure of the corporation which includes defining roles, allocating resources, and adopting accounting systems to identify, prevent, mitigate, and compensate for social and environmental risks or damages arising from corporate activities, in the interest of the corporation and affected third parties. Conversely, determining the adequacy of arrangements is more complex and should be evaluated primarily based on the nature and size of the business, the legal provisions aimed at achieving the objectives for which adequacy is required (in this research, the protection of third parties), and other relevant soft law instruments applicable to the company in question.

4.3. Assessment of Directors' Conduct

Another issue with rooting of directors' duty to prevent harm to stakeholder communities in the duty of care concerns how their conduct is assessed. This was addressed in the *Peoples* case under review, where the general civil liability standard in Article 1457 of the Civil Code of Quebec (C.C.Q.),[152] usually interpreted as intentional fault, was informed by the negligence standard from section 122(b) of the CBCA.[153] This marked a shift to a broader standard of conduct.[154]

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[151] Calandra Buonaura, *supra* note 7 at 397–398 [referring to creditors]; see also Paolo Giudici, "La responsabilità degli amministratori verso i soci e i terzi: alla ricerca di una teoria fondante" (2015) 11 Le Società 1279–1283 at 1282. This should occur for directors' arrangements: the existence of specific legislation mandating such measures can create a legitimate expectation among those third parties, who benefit from the legislation, that directors will act with due care to avoid causing them harm.

[152] 'Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.
Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature. […]'

[153] Rousseau, "Directors' Duty of Care after Peoples", *supra* note 132 at 229. The court establishes that 'for the purpose of determining whether the Wise brothers can be held liable, only the CBCA is relevant'; see *ibid* at para 63.

[154] Which raises the standard for evaluating D&O conduct by rejecting previous characterisations of the duty of care that combined subjective and objective elements (originated in *Soper v Canada (CA)*, [1997] 1 FC 124), opting instead

This shift has been criticized for potentially allowing 'every negligent act on the part of directors' to 'open the door to potential liability toward third parties, irrespective of whether or not the act was committed in the course of functions qua directors'.[155] This criticism arises from the fact that, although the decision to implement the contested procurement policy was clearly made within the scope of the directors' responsibilities, the court seemed open to the possibility that it could be considered actionable conduct if it met the criteria for negligence.[156]

This concern can be dismissed regarding my proposal, as Italian law provides two applicable provisions for harm caused to stakeholders (excluding creditors): Article 2043, which outlines the general rule of non-contractual (tort) liability, and Article 2395, which addresses directors' liability for direct harm to third parties. The first provision applies when harm is caused by any individual, such as a director acting outside their functions. The second applies when harm results from actions taken in performing directors' responsibilities. Although Article 2395 is often seen as a corporate law specification of Article 2043, the two provisions do not completely overlap. Unlike Article 2043, Article 2395 specifically refers to directors and therefore applies only when harm is caused in the exercise of managerial duties.[157]

Moreover, the standard of conduct required of directors in Italy would not permit an extension such as the one under criticism in Canada. According to the interpretation widely accepted in the Italian legal scholarship, directors are currently expected to devote to the performance of their managerial duties an effort and level of commitment proportionate to the (higher) knowledge, skills, and experience each possesses.[158] This results in a standard of conduct that is, on one hand, objective, as it refers to the nature of the role and requires professionalism in carrying out managerial activities, which must be adequate to the particular skills of the director in question.[159] However, it also has a subjective profile, as it considers the individual competencies of each director.

The *Peoples* decision has also been criticized for lacking guidance on how standards of conduct should be adapted to protect creditors. While the court appears to reject a link between breach of the duty of care and breach of contract between the creditors and the corporation, it fails to

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for a purely objective standard; see Francis, "Peoples Department Stores Inc. v. Wise", *supra* note 133 at 183. For a commentary on the evolution of the duty of care from *Soper* to *Peoples*, see R Lynn Campbell, "The Supreme Court's Decision in Peoples: A New Standard of Directors' Liability" (2007) 55:3 Can Tax J 465–480.

[155] Rousseau, "Directors' Duty of Care after Peoples", *supra* note 132 at 229.

[156] *Ibid* at 229–230.

[157] See, in the literature, e.g., Bonelli, *supra* note 147 at 223. In jurisprudence, see, e.g., Corte di Cassazione, 1 April 1994, Civil Section I, No 3216 (Italy). While this position is largely accepted, there have been rulings that uphold the opposing view, e.g., Corte di Cassazione, 28 March 1996, Civil Section I, No 2850 (Italy). Italian scholarship has debated whether this liability is contractual and non-contractual; for bibliographic references, see footnotes 195-196 below.

The typical case of liability under Article 2395 is that of inaccurate information provided to an investor to induce them to invest in financial instruments; see Giudici, *supra* note 151 at 1280.

[158] Without, however, turning those directors with greater expertise into guarantors of the company's success; see Federico Briolini, "Riflessioni in materia di «specifiche competenze», Business Judgment Rule ed estensione della responsabilità degli amministratori di società di capitali (parte prima)" (2024) Riv Soc 29–72 at 36.

[159] *Ibid* at 72.

take an explicit stance on the matter.[160] A related concern is the legitimacy of the judiciary in redefining directors' statutory duties.[161] In this research, the former critique is irrelevant, as local communities typically have no legal ties with the company, and their harm is non-contractual. The second critique, however, regarding the judiciary's role in shaping directors' duties, is central to our analysis.

a. Harnessing Judicial Discretion

According to my proposal, judges would be asked to assess the adequacy of corporate arrangements by considering multiple legal and non-legal sources, as well as contextual factors.[162] Through this process, judges would integrate the adequacy clause, resulting in sub-rules that would create additional specific duties beyond those established by statutory law and non-legal sources, reinforcing private individuals' expectation that directors will exercise reasonable diligence in managing the company to prevent harm to third parties.[163]

If this is the case, judicial discretion should be guided to preserve legitimacy and avoid undue interference with economic freedom. I argue that the interpretation of adequacy should be grounded primarily in legal sources–including, primarily, hard law and, secondarily, soft law–with non-legal sources–such as social, technical or scientific sources–supplementing them only where the legal framework is insufficient.[164] This approach prioritises democratically established rules subject to public oversight, thereby respecting the separation of powers. By contrast, equating non-legal sources with legal ones could risk undermining democratic legitimacy, as such sources would be defined by a narrow group of experts without broader accountability.

Moreover, judicial review should be guided by the principle of proportionality: any restriction of economic freedom must be justified by the protection of constitutionally relevant interests and must also respect business freedom and efficiency.[165] Assessing the adequacy of arrangements requires weighing economic sustainability against the protection of external interests. As noted, the duty to establish and implement adequate arrangements serves both internal corporate aims–such as business continuity–and external interests, including those of creditors and local communities. These goals may not always align; in such cases, directors must engage in a genuine balancing exercise to determine appropriate organisational, administrative and accounting measures.[166]

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[160] Rousseau, "Directors' Duty of Care after Peoples", *supra* note 132 at 232.
[161] Darcy L MacPherson, "Supreme Court Restates Directors' Fiduciary Duty - A Comment on Peoples Department Stores v. Wise" (2005) 43:2 Alta L Rev 383–406 at 401.
[162] Meruzzi, *supra* note 11 at 45 and n 13.
[163] *Ibid* at 54.
[164] Libertini, *supra* note 31. For a contrasting view, see Meruzzi, *supra* note 11 at 53.
[165] Meruzzi, *supra* note 11 at 68.
[166] This balancing does not stem from a duty to *pursue* stakeholders' interests (such a duty does not exist, nor, in our view, could it exist within traditional for-profit companies). Rather, it arises from the obligation to avoid externalizing the costs of corporate activity onto third parties.

This process would grant operators (judges and, as we will see below, directors) limited discretion–not over the objectives themselves of the arrangements, but–in selecting the most suitable measures to achieve them, reconciling potentially conflicting interests. These measures should be assessed proportionally to avoid unjustified compression of fundamental values, including economic freedom and rights, such as health and environmental protection.[167]

Naturally, even when legal sources guide the interpretation of adequacy, judicial discretion cannot be entirely eliminated. To prevent unchecked discretion, the Supreme Court of Cassation will serve as the ultimate guarantor of judicial decisions, reviewing whether general clauses have been understood appropriately by checking not only the absence of adequate fact-finding or reasoning, but also the interpretative criteria used by the judge and their alignment with the broader public goals pursued by the law under interpretation.[168]

b. Judicial Deference to Managerial Decisions

Judicial discretion is closely connected to another issue, that is, the deference courts typically show to managerial decisions through the Business Judgment Rule (BJR). This issue is significant because, if judicial discretion–though limited, as previously noted–results in such deference, managers are effectively granted a sphere of irresponsibility that can, in turn, limit the effectiveness of community lawsuits for redress. This issue is addressed in detail in subsection 4.6. below, where I argue for a restrictive interpretation of the BJR in relation to governance structures, as opposed to its more typical application to ordinary management decisions, thereby justifying only a narrowly confined shield, provided that diligence has been exercised.

In essence, I contend that the BJR, as traditionally conceived–namely, to prevent second-guessing of managerial decisions and to avoid judicial substitution for directors in area beyond the court's expertise–cannot apply to decisions concerning adequate arrangements. This is because such arrangements do not involve managerial discretion but rather compliance with clearly defined or definable legal duties. Accordingly, both the existence and adequacy of these arrangements must be subject to substantive judicial review. That said, a degree of discretion remains with respect to identifying the sources upon which adequacy is assessed. However, this is a limited (or technical) form of discretion, which can provide only a correspondingly limited shield from managerial liability.[169]

[167] Meruzzi, *supra* note 11 at 58.

[168] Libertini, *supra* note 31 at 140 ff.

[169] This view is not far from the authoritative position expressed by Vincenzo Calandra Buonaura, who differentiates *organizational measures*, to which the typical BJR assessment applies, from *organizational arrangements aimed at fulfilling specific legal duties* (such as ensuring the health and safety of employees), to which the BJR is inapplicable–at least in its typical form–given that only a limited margin of discretion is allowed. Naturally, it remains to be seen whether this scholar includes sustainability duties among the specific legal duties to which such arrangements are directed. See Vincenzo Calandra Buonaura, "Amministratori e gestione dell'impresa nel Codice della crisi" (2020) 1 Giur comm 5–22 at 12.

4.4. Damage and Causation

a. Direct Harm

Regarding damage,[170] the *People's* judgment has been criticized for conflating breaches of duty with direct harm to stakeholders, i.e., independent of any potential harm to the corporation. Critics argue that the SCC seems to suggest that defendants should indemnify creditors only if their breach of the director duty of care in adopting the contested procurement policy is established. Failing to examine the requirement of direct damage in detail could lead to double recovery by disconnecting compensation from the actual harm suffered and violate the principle of equal treatment among creditors in the event of the corporation's insolvency.[171]

Direct harm is a requirement for individual non-creditor stakeholders to act against directors under Article 2395 of the Italian Civil Code.[172] However, the current remedy is ineffective because affected individuals often choose to live with the problem and are unwilling to make the effort and incur the cost to bring a legal action against directors. The problem is more serious when an entire community is affected by corporate conduct. There is, presently, no effective remedy to hold directors accountable for such larger externalities because of the procedural hurdles discussed earlier.

The requirement of direct harm is less problematic when the damage is suffered by a stakeholder with no contractual relationship with the company than when the injured party is a shareholder, since stakeholders have no direct interest in the company's capital.[173] Conversely, as noted above, corporations may benefit from externalities affecting stakeholders due to the possible (and arguably typical) conflict between the interests of third parties and profit.[174]

The requirement of direct harm implies that it results from intentional or negligent conduct, whether through action or omission, that constitutes a breach of duties directors owe in their capacity to third parties. Importantly, this breach must arise from an obligation owed directly

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[170] According to Tribunale Bologna, 30 July 2021, Business Section, No 1821 (Italy), the obligation to establish adequate arrangements cannot be separated from the harmful consequences directly caused by its violation; therefore, the absence of any alleged damage renders the claim of liability baseless.

[171] Rousseau, "Directors' Duty of Care after Peoples", *supra* note 132 at 230.

[172] Consequently, affected non-creditor stakeholders always act in their own name, not on behalf of the company, and if the claim is successful, compensation is paid to them directly and not to the company. The case is different for creditor stakeholders who, under Italian law (Art 2394), also have action against directors for losses to the corporate assets. In this second case, if the claim is successful, compensation will be paid to the company (to reintegrate its assets), not to creditors directly. Direct and indirect harm (*danno riflesso*) can coexist; see Pinto, *supra* note 43 at 932. For further bibliography, see Gianluca Riolfo, *L'impresa "sostenibile". La rilevanza esterna degli obblighi e delle responsabilità degli amministratori* (Padova: CEDAM, 2024) ch 4, n 20.

[173] Pinto, *supra* note 43 at 921. For a detailed discussion of direct and indirect harm, see Vincenzo Pinto, *La tutela risarcitoria dell'azionista fra danno diretto e danno riflesso* (Pisa: Pisa University Press, 2012). For an innovative interpretation of the meaning of direct harm towards the individual shareholder, see Fabrizio Sudiero, "Alla ricerca del danno diretto subito dal socio: è davvero una fattispecie "introvabile"?" (2022) 7 Società 805–819. For a definition of direct harm by Italian courts, see Corte di Cassazione, 20 June 2019, Civil Section III, No 16581 (Italy).

[174] Of the same opinion is Riolfo, *supra* note 172 ch 4, n 7.

between the third party and the director.[175] For our purposes, since the obligation to establish adequate arrangements is here intended as to be owed both to the company and to third parties, in the latter case, this obligation would create a duty of protection on the part of directors toward stakeholders who are damaged (or threatened) by the lack of adequate risk-management corporate structures. Consequently, directors could be held directly liable for breaching this protective obligation.

However, when the performance of the obligation is required of the corporation–as in the case of CS3D obligations–the direct harm does not exclude a concurrent liability between the director and the corporation. Particularly, this would apply when the director's intentional or negligent conduct contributed to the corporation's non-compliance with the law. In these cases, compensation must not be duplicated but rather allocated between the responsible parties (directors and the company).[176]

Furthermore, the requirement of intent or negligence in a director's conduct requires distinguishing between delegating and delegated bodies in corporate governance. While the latter are responsible for *establishing and implementing* adequate governance structures, the former must *assess* their adequacy considering the company's size and nature and the other sources discussed above. The liability of delegating bodies is therefore limited to the assessment of the presence and adequacy of organizational, administrative and accounting arrangements[177] and they cannot be liable if the damage results from a failure in the establishment or implementation of adequate arrangements, provided they have properly exercised their oversight duty–e.g. by signalling the inadequacy and/or providing directions to delegates on how to establish adequate arrangements.[178] This is because, unlike directors' liability toward the corporation under article 2392 of the Italian Civil Code, there is no automatic joint and several liability among directors for damages caused to individual shareholders or third parties.[179]

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[175] Alessandro Borgioli, "La responsabilità degli amministratori per danno diretto ex art. 2395 c.c." (1981) 2 Giur comm 699–716 at 712 ff; Francesca Attanasio, "La responsabilità degli amministratori per "danno diretto" agli azionisti fra diritto della responsabilità civile e diritto societario" (2016) 7 Le Società 812–822 at 813; 816. The requirement for a "direct" harm is also examined by Riolfo, *supra* note 172 at 265 ff.

[176] Riolfo, *supra* note 172 at 262.

[177] Meruzzi, *supra* note 11 at 70.

[178] More uncertain is the scope of delegating directors' liability when delegated bodies fail to establish arrangements or do not follow the directions received from delegating directors. One position holds that the ultimate responsibility for arrangements lies with the entire board; accordingly, if delegating bodies detect inadequate or missing arrangements, they must exercise their concurrent responsibility and introduce arrangements themselves (see Meruzzi, *supra* note 12 at 22). Another position contends that the scope of delegation over arrangements is mandated by law; accordingly, once delegates are appointed and regardless of the scope of their delegation, delegating directors cannot intervene to establish the arrangements themselves, unless they first withdraw the entire delegation, thereby restoring full managerial authority to the board (see Irrera, *supra* note 3 at 260–261). On the application of Article 2395 to both delegating and delegated bodies, see also Pinto, *supra* note 43 at 918.

[179] Borgioli, *supra* note 175 at 714. Similarly, corporate auditors (*sindaci*) could, in principle, be held liable for failing to oversee the establishment of adequate arrangements if they did not identify the breach–e.g., by failing to obtain the information necessary for proper supervision–and did not act to address it; see Meruzzi, *supra* note 11 at 71.

b. Unjust and Monetary Harm

In addition to direct harm, Italian law requires two other elements for directors' liability: the injustice and the monetary nature of the harm.[180] Injustice (*ingiustizia del danno*) stems from the majoritarian interpretation of liability under Article 2395 of the Italian Civil code as non-contractual and consists of breaching duties stemming from a legal norm or corporate articles/ bylaws. This violation must be assessed based on the deservingness the harmed interest.[181] For my proposal, this means that the affected community would need to prove that the breach of the duty to establish and implement adequate arrangements caused harm to interests that deserve legal protection.

Regarding the nature of the damage, it is generally affirmed that it must be monetary in nature (*danno patrimoniale*). Although Article 2395 does not explicitly require patrimonial harm, this requirement has traditionally been inferred from the notion of "direct" harm. By asserting that compensable harm to individual shareholders and third parties must affect their personal sphere, case law and literature have come to interpret this as requiring a direct loss to the individual's assets.[182] The patrimonial nature of harm under Article 2395 is also consistent with its typical field of application (the protection of investors and savers from misleading corporate disclosures).[183]

This requirement is significant for this research, as local communities have been defined here based on the negative effects of corporate conduct on their fundamental rights. While such harm may have an economic component, its primary nature is biological or existential rather than monetary. For example, air pollution near industrial plants may cause health impairments that lead to economic losses, such as the inability to work. However, there is also biological harm to health itself and existential harm resulting from the infringement of the right to life and to a healthy environment. Consequently, to effectively protect local communities, it is crucial to recognise that harm caused by corporate activity can also be non-monetary.[184]

Some Italian scholars have provided a positive answer, noting that Article 2395 aims to limit reparability to shareholders and third parties for direct harm, i.e., harm that is not merely a consequence of the company's financial loss but does not restrict compensable harm to

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However, this type of liability would be difficult to enforce, as it would not only require proving that the oversight duty regarding adequacy is owed to third parties (as should be the case for directors) but also that the auditors' detection and intervention would have prevented the harm, despite the directors' breach. Such proof is likely to be very difficult to establish, as it involves a hypothetical assessment.

[180] These elements are relevant for our discussion albeit they were not directly addressed in the *Peoples* decision.

[181] Pinto, *supra* note 43 at 919 [who argues that this assessment connects liability under Article 2395 to corporate law, thereby avoiding complete overlap with tort liability under Article 2043].

[182] E.g., among many others, Tribunale Catanzaro, 28 March 2018, Business Section (Italy); Attanasio, *supra* note 175 at 815–816.

[183] Sudiero, *supra* note 173 at 808. Indeed, the typical scenarios targeted by this provision involve losses due to investment, divestment, or failure to invest resulting from flawed information disclosed by directors; Attanasio, *supra* note 175 at 819.

[184] This limitation is identified as a critical issue in using Article 2395 liability to protect harmed stakeholders; see Riolfo, *supra* note 172 ch 4, n 39.

patrimonial (economic) rights alone.[185] In other words, the provision itself does not define the legal interest eligible for protection–which must be assessed in light of the broader values and norms of the Italian legal system–but merely excludes reparation for one specific type of patrimonial harm (indirect harm resulting from a financial loss suffered by the company).

This interpretation is persuasive because it aligns with the historical rationale behind Article 2395, which is to prevent shielding directors from liability when their conduct harms interests beyond those of the corporation. Moreover, this interpretation does not pose interpretative difficulties, as it operates within the framework of general legal principles that allow courts to identify legally protected interests that may give rise to the direct liability of directors toward third parties.[186] The real challenge in extending liability to non-patrimonial harm lies in determining the damage itself, which would need to be assessed on an equitable or lump-sum basis.[187] However, this issue will be addressed alongside enforcement in the following chapter.

c. Causation

Finally, causation between directors' conduct and harm must be proven by the claimant according to the "more likely than not" standard. In other words, the claimant must demonstrate that the directors' conduct caused the harm they suffered.[188]

Regarding arrangements, their absence or inadequacy is typically not, in itself, directly harmful for stakeholders. Rather, harm results from managerial conduct that, due to ineffective arrangements negligently established or left unaddressed, or a failure to follow adequate ones, caused negative environmental or social impacts or other avoidable externalities.[189] For example,

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[185] Rolli, *supra* note 149 at 146. A similar view is shared by Franzoni, *supra* note 26 at 687; Federico M Mucciarelli, *Società per azioni e offerta pubblica d'acquisto: le difese successive contro offerte pubbliche d'acquisto di azioni quotate* (Milano: Giuffrè, 2004) at 247 ['The key distinction in determining whether a shareholder's loss is compensable is therefore between "direct" and "indirect" damages.'][My translation]. Relevant for affirming the significance of directors' liability under Article 2395 of the Civil Code (Italy) for non-monetary damages to third parties is also the position of Luca Enriques, "Società per azioni" in *Enciclopedia del Diritto* Annali X (Milano: Giuffrè, 2017) 958 at 974 [who reports that this form of liability is the only corporate law provision that allows for the mitigation of the social and environmental risks posed by corporate activity, incentivised by shareholders' limited liability for corporate negative externalities].

[186] The interpretation of the damage under Art 2395 Civil Code (Italy) as both monetary and non-monetary has been upheld by the Court of Cassation, which established that a damage can be considered direct 'in the case of harm caused to the personal sphere of a shareholder (such as the right to honor or reputation), or for financial damages such as those resulting from the loss of personal, economic, and professional opportunities, or from the reduction of so-called creditworthiness, which must indeed be compensated to the shareholder by the third party responsible.' Corte di Cassazione, 20 June 2019, Civil Section III, No 16581 (Italy) [My translation]

[187] Riolfo, *supra* note 172 at 271 ff; 307 ff.

[188] Tribunale Milano, 20 February 2024, Business Section (Italy), citing Corte di Cassazione, 8 September 2015, Civil Section I, No 17794 (Italy) at 811; see also *ibid* at 266.

[189] *Ibid* at 277. See also Carlo Amatucci, "Adeguatezza degli assetti, responsabilità degli amministratori e Business Judgment Rule" (2016) 5 Giur comm 643–670 at 666 [who argues that the inadequacy of arrangements emerges when certain directors' decisions turn out to be ill-informed, poorly educated, or poorly documented, as well as when the information flow is short-circuited, meaning that the procedures for transmitting information are

a harmed community seeking redress must prove the inadequacy or absence of governance systems that, if properly established, could have prevented the harmful conduct.[190] Alternatively, if adequate arrangements existed but were not implemented, the community must demonstrate that proper implementation would have prevented the harm or reduced its impact.

4.5. Claim's Nature and Burden of Proof

In the *Peoples* decision, the Canadian court classifies directors' liability towards third parties for breach of their duty of care as non-contractual (tortious)[191] based on Article 1457 C.C.Q.[192] Under this provision liability arises when a person causes harm to another by breaching applicable rules of conduct. These rules are assessed using an objective (abstract) standard of the reasonable person, while also considering any specific knowledge or expertise of the actor. This approach is not dissimilar to that adopted in Italy under Article 2043 of the Civil Code and in Canadian common law.[193]

For this research, the classification of the nature of directors' personal liability towards third parties as non-contractual is relevant as it may significantly impact how liability operates. In Italy, the contractual or non-contractual nature of liability affects key factors that determine the

ineffective for the directors. In these circumstances, they will likely have made decisions detrimental to the company [and, I would add, to stakeholders] or omitted decisions essential for its proper management.]

[190] In my view, the absence of adequate arrangements may give rise to directors' liability towards the corporation, as it constitutes a breach of a specific duty, provided the company has suffered harm from this breach. Alternatively, it can be a reasonable cause for shareholders for withdrawing a director from their role. For stakeholders, redress requires that they have suffered actual damage due to the directors' negligent conduct (e.g., failure to establish arrangements that would have prevented the damage); if there is no damage nor negligence, stakeholders cannot seek or obtain redress. However, where risks of harm exist, stakeholders may bring preventive claims.

[191] *Peoples Department Stores Inc. (Trustee of) v. Wise*, *supra* note 136 at para 55. The application of tort liability under Canadian common law is not straightforward and has been subject to judicial debate. This tension revolves around whether to prioritize commercial law principles (particularly the concept of the corporate veil) or tort law principles (especially the notion of personal accountability). For further discussion on this topic, see Shannon O'Byrne, Yemi Philip & Katherine Fraser, "The Tortious Liability of Directors and Officers to Third Parties in Common Law Canada" (2017) Alberta L Rev. In Italy, the classification of directors' personal liability within civil or business law has been extensively analyzed by legal scholars, especially in the context of determining the applicable legal framework in cases where Article 2395 of the Civil Code, while expressly providing for the personal liability of directors, remains silent on the specific regime to be applied. A recent commentary on this issue has been provided by Franzoni, *supra* note 26.

[192] The assessment carried out by civil law judges does not necessarily diverge from that undertaken in Canadian common law. For instance, a convergence between the two legal traditions has been observed in the evaluation of negligent conduct; see Marel Katsivela, "Le manquement à la norme de diligence et la faute dans le cadre du délit de négligence (Common Law) et de la responsabilité extracontractuelle du fait personnel (Droit civil) au Canada: une étude comparée" (2017) 95:2 Revue du Barreau canadien 535. At common law, the leading precedent for tortious liability is *Donoghue v Stevenson* [1932] A.C. 562.

[193] *Ibid* at 541.

success of a legal action, such as the burden of proof and the limitation period for bringing a compensatory claim.[194]

Prevailing Italian legal scholarship and case law have long supported the non-contractual nature of directors' liability toward individual shareholders and third parties. This view is primarily based on the idea that such parties are external to the directors' duty of performance, which derives from the relationship of directors with the corporation.[195] However, a minority of scholars has challenged this interpretation. While accepting that shareholders and third parties are indeed external to the directors' relationship with the entity, they argue that liability under Article 2395 of the Civil Code is essentially contractual in nature.

This minority view draws on third-party beneficiary contracts (*contratti a favore di terzi*) and protective obligations,[196] which illustrate how a contract (or the law) can generate protective effects for third parties external to the main contractual (or legal) relationship when the primary performance is owed to someone else (the contracting or legal creditors).[197] I have already excluded the applicability of third-party beneficiary contracts to the proposed duty to take care to prevent harm to stakeholder communities,[198] so I will focus on protective obligations. The view that liability under article 2395 may have contractual nature based on protective obligations has been challenged on three main grounds.

First, critics argue that the conditions for establishing liability based on protective obligations towards third parties are not satisfied. These conditions require: (i) a "qualified social contact" between the debtor and the third party, which distinguishes protected individuals from the

[194] The allocation of the burden of proof is addressed in the following paragraphs. As for the limitation period, generally, contractual liability is subject to a ten-year term starting from the moment the injured party became aware of the damage, whereas tort liability is subject to a five-year term beginning on the day the wrongful act causing the damage occurred; see Arts 2946 and 2947 Civil Code (Italy).

[195] Pinto, *supra* note 43 at 899; Sudiero, *supra* note 173 n 5. The authors also highlight how this framework aligns with foreign legal systems, particularly those of France, Germany, and Spain. For further references, see also Attanasio, *supra* note 175 nn 5, 6; Adiutori, *supra* note 147 at 77–78. The non-contractual nature of directors' liability towards third parties is also supported by AM Benedetti, "Gli "assetti organizzativi adeguati" tra principi e clausole generali", *supra* note 19 at 981.

[196] Protective obligations are also referred to as obligations without performance (*obbligazioni senza prestazione*), as they are not linked to a contractual obligation to do or refrain from doing something. Instead, they are based on principles of care and good faith, aiming to prevent damage from occurring to another individual or group. For this position see, e.g., Papi, *supra* note 709 at 151 ff; Carlo Angelici, *Società per azioni. 1: Principi e problemi* (Milano: Giuffrè, 2012) at 427; 436; Angelici, *supra* note 812 at 1009; Bonelli, *supra* note 812 at 225; Adiutori, *supra* note 812 at 79–80; Fabrizio Guerrera, *Illecito e responsabilità nelle organizzazioni collettive* (Milano: Giuffrè, 1991) at 231. For alternative positions arguing that the nature of director liability depends on the legal provisions that have been violated, see Franco Di Sabato, *Manuale delle società* (1995) at 507; Borgioli, *supra* note 175 at 702 ff [notably, the author argues for a contractual liability arising between the affected third party and the corporation, not the director(s)].

[197] However, while the former relates to the origin of the protective obligation, focusing solely on contracts as sources of this obligation, the latter concentrates on the legal relationship that either a contract or the law can create between a contractual party and a third party. See, more thoroughly, Pinto, *supra* note 43 at 900 ff.

[198] See subsection 4.1. above.

general public, and (ii) a legal basis that extends the duty of protection to third parties.[199] Since corporate governance rules do not recognize a sufficiently close relationship between directors and stakeholders, no legitimate reliance can arise. Legally, directors have relationships only with the corporation.[200] Second, the role of fault in Article 2395 is deemed to overlap with that in non-contractual liability, supporting the view that this provision belongs to the domain of tort rather than contractual liability.[201] Third, it is argued that directors' liability for failing to implement adequate arrangements cannot constitute a suitable legal basis to extend the duty of protection to third parties, as it does not entail a duty to protect them nor require specific performance directed at external interests, thereby failing to give rise to a "qualified social contact". Rather, it simply broadens the scope of those who may directly seek redress from directors for harm that could have been mitigated or prevented through proper arrangements.[202]

These criticisms should be reconsidered as directors' liability toward third parties could be framed as (quasi-)contractual. While I acknowledge that stakeholder communities are not part of the corporate contract, their status as third parties does not preclude the existence of a qualified relationship with directors.

As discussed, the duty to establish adequate arrangements protects both corporate interests–including shareholders–and third parties potentially affected by corporate activities. Accordingly, directors have an obligation to protect third parties that stems directly from the duty to establish adequate arrangements (articles 2086 and 2381 paras 3 and 5 of the Civil Code) and is grounded in the risks posed by mismanaged or poorly organized corporate governance. By contrast, the corporate contract remains the constitutive act of the company and the basis for appointing its initial directors.[203] This way, the duty to protect third parties would be connected to, but not necessarily concurrent with, the directors' obligations to the company. The two duties need not align perfectly or serve non-conflicting interests but rather reflect the principle of double materiality.

Furthermore, for protective obligations to arise, more than an incidental relationship between the directors and third parties is required (*qualified social contact*).[204] For local communities, such a relationship may stem from their connection to natural resources impacted by corporate activity. Viewed through the lens of double materiality, the duty to establish adequate arrangements mandates directors to adopt measures that identify potentially affected local communities and mitigate risks to them, while also preventing and mitigating potential harm that environmental and human rights breaches can cause to the corporation itself. This involves distinguishing between those entitled of protection due to specific exposure to risks and the

[199] Adiutori, *supra* note 147 at 74–75. See also Corte di Cassazione, 26 June 2007, United Sections, No 14712 (Italy), classifying protective obligations as obligations rooted in law.
[200] Pinto, *supra* note 43 at 905–906.
[201] *Ibid* at 906.
[202] AM Benedetti, "Gli "assetti organizzativi adeguati" tra principi e clausole generali", *supra* note 19 at 982.
[203] Although the formal acceptance of office is not required for managerial duties to arise, as the duties of de facto directors has been aligned with those of formally appointed ones; see Corte di Cassazione, 6 March 1999, No 1925 (Italy) and, more recently, Corte di Cassazione, 22 March 2023, Criminal Section V, No 16269 (Italy).
[204] Feola, *supra* note 147 at 632.

general public. A qualified relationship may also be triggered by a community-led engagement with the corporation.

Moreover, the qualified nature of the relationship should be grounded in the professional status of the directors, whose conduct must be assessed according to a standard of professional diligence.[205] Since the duty to establish adequate arrangements lies with individuals presumed to have the expertise to fulfill it effectively, this professional standard could help create legitimate reliance by third parties who may be harmed by the corporation. [206]

The requirement for professional diligence also addresses the second criticism regarding the overlapping fault requirement between liability under Article 2395 and the non-contractual liability rule. Professional diligence differs from the fault required under non-contractual liability by imposing higher standards of care in fulfilling the obligation.[207] While the former is assessed based on the expertise expected of a professional, the latter is evaluated based on the knowledge of an average person, which is lower than that of a professional who has undergone specific training and typically passed a qualifying examination to obtain professional certification. This difference prevents equating directors' liability to general non-contractual liability.

Regarding the third criticism–directors cannot owe obligations to third parties under the duty to establish and implement adequate arrangements due to the absence of specific performance requirements upon them–it must be clarified that the required performance is, in fact, the creation of arrangements that can prevent or mitigate harm to stakeholders, among others. The relevance of this duty for stakeholders lies in its function to protect interests external to the corporation, with economic, environmental, and social nature. This interpretation supports the argument developed earlier in this chapter.

Based on the above, a qualified social contact may arise between corporate directors and stakeholder communities, which allows the relationship to be framed as quasi-contractual. This

[205] This standard is expressly provided for in relation to directors' liability toward the company (Article 2392 Civil Code (Italy)), but it may also be extended to cover liability toward creditors, individual shareholders, and third parties. See Franzoni, *supra* note 26 at 676.

[206] See *Ibid* at 677–678 [who argues in favour of establishing third-party reliance due to the absence or inadequacy of preventive organisational arrangements]. The professional status as a qualifying element of the relationship was first recognized by Italian courts in the context of a physician employed by a healthcare facility and held liable for harm caused to a patient. In such cases, the contractual relationship exists between the patient and the healthcare facility. Nonetheless, the physician's professional status was deemed sufficient to generate the patient's reliance on their care; see Corte di Cassazione, 11 January 1999, No 589 (Italy). However, unlike the case of the physician, who has been classified as an auxiliary of the healthcare facility, this qualification should not apply to company directors if one seeks to argue for the contractual nature of their liability. This is because the liability of auxiliaries in Italy typically falls within the scope of non-contractual (tort) liability; see Feola, *supra* note 147 at 635. It must be noted that, although the physician liability framework gave rise to numerous judicial decisions that shaped the theory of qualified social contact in Italy, it is now expressly classified as non-contractual under *legge 8 marzo 2017, n. 24*, 8 March 2017, 24.

[207] Franzoni, *supra* note 26 at 680.

framing would afford greater protections to the harmed party compared to the regime of non-contractual liability.

A key distinction lies in the burden of proof upon claimants. Under contractual liability, the claimant must only establish the existence of a legal relationship with the debtor (the credit) and allege non-performance. The burden then shifts to the defendant to prove proper performance or a valid excuse for non-performance. Conversely, under non-contractual liability, the claimant must prove harm, causation, and the defendant's negligence or intent.

For this reason, non-contractual liability can be particularly burdensome for the claimant, particularly when the defendant is a complex entity like a corporation, which is difficult for outsiders to investigate. Quasi-contractual liability based on a breach of a protective duty may alleviate this by adopting a burden of proof similar to that of contractual claims, favouring the claimant. In this model, the claimant would need to prove the harm and its link to a protective duty owed by the defendant, while the latter can avoid liability by showing either the duty's absence in the specific case or that the conduct was excusable.[208] Beyond alleviating the burden of proof on claimants, the proposed allocation would also align with the proof-proximity principle (*principio di vicinanza della prova*), holding that the party with easier access to the relevant information should be responsible for proving it.[209]

4.6. The Impact of the Business Judgment Rule (BJR)

In *Peoples*, the SCC not only strengthened the role of the duty of care in corporate governance but also 'reaffirmed the importance of deference toward directors' decisions through a new version of the business judgment rule'.[210] The BJR was central to this decision as it formed the basis for dismissing the claim. As a shield against liability for alleged breaches of the duty of care, the BJR protects directors' discretionary decisions from judicial review.[211] Unlike fiduciary duties,

[208] On the evidentiary features of damage arising from the breach of a protective duty, see Tommaso Pellegrini, "L'onere della prova nella responsabilità ex art. 2087 c.c. e gli obblighi di protezione" (2018) 6 Giur it 1350.

[209] This principle is largely applied by courts in corporate lawsuits: see, e.g., Corte di Cassazione, 18 September 2023, Civil Section I, Order, No 26742 (Italy); Corte di Cassazione, 25 November 2021, Civil Section VI, Order, No 36690 (Italy). In the literature, notably, Renato Rordorf, "Onere della prova e vicinanza della prova" (2023) 1 Jus Civile 11–18; Massimo Franzoni, "La «vicinanza della prova», quindi..." (2016) 2 Contr Impr 360–375.

[210] Rousseau, "Directors' Duty of Care after Peoples", *supra* note 132 at 224.

[211] There are some differences between the North American and Italian approaches to the BJR. In Italy, it has a procedural nature as courts will not review the merits of a business decision if the decision-making process complies with certain standards, particularly regarding the information acquired by the directors before taking the decision and the absence of conflicts of interest (see Corte di Cassazione, 23 March 2004, No 5718 (Italy)). By contrast, in the United States, the BJR operates as a rebuttable presumption: it assumes that directors acted on an informed basis, in good faith, and in the best interest of the corporation. However, this presumption can be overcome by the plaintiff, who bears the burden of proving that the directors breached any of these elements–for instance, by acting uninformed, in bad faith, or in violation of the duty of loyalty. For further details, see Stephen Bainbridge, "The Business Judgment Rule as Abstention Doctrine" (2004) 57:1 Vanderbilt L Rev 83.

which address conflicts of interest between directors and the company, the duty of care concerns business judgment, which courts cannot second-guess.[212]

Furthermore, some have argued that the *Peoples* decision introduced a revised version of the BJR, permitting greater scrutiny of directors' conduct than earlier formulations. This version is based on two conditions: first, as in previous versions, the decision-making process must be prudent and reasonably informed; second, the decision itself must be reasonable and assessed in light of what the director knew or ought to have known at the time.

One main issue with this BJR version is that the second criterion plays a crucial role in evaluating conduct, as the application of BJR ultimately depends on the interpretation of the reasonableness standard. If interpreted narrowly, it preserves the courts' traditional deference to directors' decisions, while if interpreted broadly, it could grant courts greater discretion and increase directors' exposure to liability.[213]

For our analysis, the SCC's formulation and application of the BJR in *Peoples* is relevant for two reasons: first, to assess whether, in Italy, the BJR applies to management decisions regarding the establishment and implementation of adequate arrangements, especially in cases where inadequate structures have harmed local communities; and second, to examine scope and depth of judicial scrutiny permitted in Italy and how it compared to the Canadian approach.

a. Application of the BJR to Decisions on Adequate Arrangements

Regarding the first question, Italian jurisprudence and legal scholarship offer both negative and positive views. Since its earliest recognition by courts, the BJR in Italy has been tied to the assessment of directors' general duties–particularly the duty of diligence.[214] By contrast, it does not apply to breaches of specific duties–i.e., obligations expressly mandates by law or the corporate articles.[215] This distinction rests on the premise that only general duties involve managerial discretion, which courts must not second-guess. Judicial review cannot involve the merits of business decisions but only ensure that the decision-making process was informed and met the precautions typically required for such decisions, regardless of its outcome.[216]

[212] Through the application of the BJR, the duty of care is subject to a lower standard of judicial scrutiny compared to the fiduciary duty. From a contractarian perspective, this reduced scrutiny is well justified–particularly in cases of concentrated ownership–as concentrated ownership aligns the interests of management with those of shareholders, thereby reducing incentives to breach the duty of care (the so-called "shirking"). Iacobucci, *supra* note 133 at 352 ff. However, starting from a different premise–one that views the duty of care also as a tool for protecting stakeholder interests (as in the Theory of the Commons underlying this research)–the duty of care takes on greater significance and a more central role than the fiduciary duty. This shift may justify a more rigorous level of scrutiny than is typically applied.

[213] Rousseau, "Directors' Duty of Care after Peoples", *supra* note 132 at 234.

[214] Corte di Cassazione, 28 April 1997, Civil Section I, No 3652 (Italy).

[215] For a distinction between general and specific duties, see Chapter 4.

[216] Corte di *Cassazione,* 28 April 1997, Civil Section I, No 3652 (Italy).

The Italian Supreme Court–along with some scholars[217]–has classified the duty to establish and implement adequate arrangements in S.p.A. as *specific*.[218] Based on the reported distinction, this duty should fall outside the scope of the BJR. In other words, since adequate arrangements do not concern managerial choices but rather compliance with clearly defined legal rules of conduct, both the existence and adequacy of such structures should be subject to judicial scrutiny on the merits.

This negative view has also been supported by other Italian scholars based on the different aims of the BJR (to protect the pursuit of corporate interests) and adequate arrangements (to safeguard the continuity of business operations and the interests of third parties).[219] While the BJR prevents courts' interference with directors' decisions, adequate arrangements protect the very existence of the corporation and the interests external to it, thereby constituting a prerequisite for the exercise of managerial decision-making.

Other scholars contend that establishing and implementing adequate arrangements does not involve selecting relevant interests for corporate efficiency, as business decisions do. Instead, it ensures the proper functioning of decision-making processes. According to this view, this justifies why the law requires structures tailored to the company's risk-management needs.[220] Accordingly, the BJR's protection of discretionary choices cannot be analogically extended to adequate arrangements. Nor would such an extension be appropriate since–as noted–the adequacy of these structures reasonably suggests that discretionary decisions will be made correctly. A similar conclusion is reached also by those who argue for a distinction between decisions concerning merits and decisions concerning methods: adequate arrangements would typically fall within the latter category, which excludes the application of the BJR. Indeed, it is argued that if the BJR entails replacing a review of the merits with one focused on methods (i.e., the proceeding leading to such choice), then decisions concerning arrangements are already decisions about methods. Consequently, applying the BJR in such cases would amount to "doubling the check on the methods", which would be paradoxical.[221]

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[217] Amatucci, *supra* note 176 at 648; Maddalena Rabitti, *Rischio organizzativo e responsabilità degli amministratori: contributo allo studio dell'illecito civile* (Milano: Giuffrè, 2004) at 86. For further bibliographic references see Lorenzo Benedetti, "L'applicabilità della business judgment rule alle decisioni organizzative degli amministratori" (2019) 2–3 Riv Soc 413–452 at 420 ff [albeit the author supports an opposing view that considers the duty to establish adequate arrangements as a duty defined through general clauses].

[218] Corte di Cassazione*,* 23 March 2004, Civil Section I, No 5718 (Italy*).*

[219] See Ginevra & Presciani, *supra* note 18 at 1236 ff [who include in footnote 69 additional references supporting their view on the inapplicability of the BJR to organizational structures]. See also, Calandra Buonaura, *supra* note 169 at 12 [although only limited to the establishment of *organizational arrangements aimed at fulfilling specific legal duties*].

[220] Amatucci, *supra* note 189 at 668–669.

[221] Alice Briguglio, "Applicabilità della business judgment rule alle scelte in materia di assetti societari adeguati, nota a Tribunale di Roma, Sezione specializzata in materia di impresa, ordinanza 8 aprile 2020" (2021) 2 RDS 279–303 at 298.

However, this negative view faces challenges. On one hand, recent trial court rulings have classified the duty to establish and implement adequate arrangements as a general obligation,[222] arguing that the concept of adequacy is a general clause and involves managerial discretion. On the other hand, some scholars have pointed out that directors' liability under Article 2395 of the Italian Civil Code arises only when harm results from (unlawful) *managerial acts* (*atti gestori*). If such *acts* are interpreted as involving discretion, the BJR could apply.[223] However, the BJR would not shield directors in cases where organizational structures are clearly *unreasonable* or adopted through an *imprudent* or *uninformed* process.[224]

These opposing views highlight the inherent complexity in assessing the adequacy of corporate arrangements and related directors' liability. Given this complexity, two phases in this assessment should be distinguished: whether arrangements *exist*; and, if they do, whether they are *adequate*.[225] The first phase involves no managerial discretion, as the establishment and implementation of adequate arrangements is mandatory under the law.[226] As previously noted, for in-scope companies, the EU due diligence legislation requires these structures to prevent, mitigate, or remedy harm to the environment and human rights. Nonetheless, the mandatory nature of arrangement does not mean that their existence is always straightforward to establish, as they may necessarily take the form of a written document.

The second phase (assessing adequacy) raises the question of whether this assessment falls within managerial discretion and is thus subject to the BJR, a point that is still contested among Italian courts and scholars.[227] I contend this issue should be reframed around the proper scope of

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[222] *Tribunale Bari, 3 November 2022, Business Section, No. 4028 (Italy);* see also Giovanni Iorio with the collaboration of Giovanni Bonilini, Massimo Confortini & Carlo Granelli, "Art. 16 c.c. - Atto costitutivo e statuto. Modificazioni" at 744, online: *Codice Civile commentato online* <https://onelegale.wolterskluwer.it/>.

[223] Riolfo, *supra* note 159 at 267; see also Ambrosini, *supra* note 34 at 47 ['a negative judgment regarding the adequacy requirement can only be well-founded when there is a violation of the elementary paradigms developed over time by business sciences, consolidated practices, and essential commonly adopted principles']; and at 54; 263 [noting that the directors' margin of discretion is more narrowly defined].

[224] Riolfo, *supra* note 172 at 277–278. Other scholars supporting a positive answer to the application of the BJR to adequate arrangements include, e.g., Luca Petrone, "La governance d'impresa e gli assetti adeguati" (2024) 3 Contr Impr 775–815 at 809; L Benedetti, *supra* note 217 at 448; Guido Ferrarini, "Controlli interni e strutture di governo societario" in *Nuovo diritto delle società* (2006) 5 at 25–26. This position has also been upheld by recent jurisprudence: Tribunale Roma, 15 September 2020 (Italy); Corte di Cassazione, 24 January 2023, Order, No 2172 (Italy). In the US, the application of the BJR to risk management systems has been supported since *In re Caremark Intern, Inc Derivative Litigation*, [1996] 698 A2d 959 (Del Ch).

[225] Naturally, this distinction serves to clarify and evaluate the managerial process, although in practice it is likely that the two phases occur simultaneously. Moreover, this distinction applies to delegated bodies, whereas for other board members, who are responsible for assessing adequacy, this assessment would represent the first phase, followed by a second phase involving their activation to resolve the identified inadequacy.

[226] In this regard, see Petrone, *supra* note 224 at 805; AM Benedetti, "Gli "assetti organizzativi adeguati" tra principi e clausole generali", *supra* note 19 at 980; Amatucci, *supra* note 189 at 665.; along with the *almost unanimous* position of Italian legal scholarship, as cited by these authors.

[227] For an overview of this divide, see Petrone, *supra* note 224 at 803 ff; Amatucci, *supra* note 189 at 667. The first author takes a positive stance on the applicability of the business judgment rule (BJR) to adequate organizational structures; while the second support a negative answer. An overview of the debate is also provided by *I controlli*

judicial scrutiny of setup adequacy, rather than around the applicability of the BJR. This approach would allow for thorough judicial review while respecting directors' diligent assessment of adequacy and avoid imposing strict liability.[228] This proposal is more fully argued below.

b. Type and Degree of Judicial Scrutiny

The BJR was originally designed as a tool to protect economic freedom and applied to purely business decisions. Discussing the BJR in relation to corporate arrangements is inappropriate, as these structures serve to ensure business continuity and protect external interests affected by corporate activities. As noted, adequate arrangements constitute one form of application of Article 41, paragraph 2 of the Constitution (social utility) within corporate governance. Their implementation *limits*, rather than *enacts*, entrepreneurial freedom. Moreover, adequate arrangements are preconditions for exercising this freedom because they legitimize economic activity (which must not conflict with social utility or harm third-party interests for shareholder gain) and provide foundation for enduring business and informed decision-making.[229]

Given the mismatch between the BJR and adequate arrangements, it seems more appropriate to frame the issue in terms of *admissibility and scope of judicial review* of their adequacy. Alternatively, if the BJR is invoked, it should be redefined, not as a protection of managerial freedom, but as the exercise of *limited discretion* directed towards legally defined objectives, like business continuity, creditor protection, and the safeguarding of social and environmental interests. Framed this way, and in the context under investigation, judicial review should address the adequacy of arrangements by assessing whether directors met the standard of diligence in determining such adequacy. Judicial scrutiny is essential to preserve the duty's purpose and objectives, while discretion in assessing adequacy, albeit limited, must be exercised diligently. Therefore, liability should not arise when decisions are informed, prudent, and neither unreasonable nor illogical.

While adequacy is rightly described as a general clause and thus somewhat indeterminate, discretion in defining what is "adequate" is limited.[230] The assessment is complex and requires considering case-specific circumstances, but the law clearly sets out the objectives and partially defines assessment criteria,[231] such as the nature and size of the company, and objectives, such as crisis prevention, that such structures are meant to achieve.[232] Additional legal sources, such as case law and soft law instruments, and non-legal sources, such as studies and guidelines from joint-stock company associations, further guide adequacy determination.[233] Consequently,

interni nelle società quotate. Gli assetti della disciplina italiana e i problemi aperti, by Giorgio Gasparri, in *Quaderni giuridici*, 4 (Roma: CONSOB, September 2013) at 40.

[228] See subsection 4.9. below.

[229] AM Benedetti, "Gli "assetti organizzativi adeguati" tra principi e clausole generali", *supra* note 19 at 978.

[230] As noted by *ibid* at 976.

[231] See subsections 3.3.1. and 3.3.2. above.

[232] AM Benedetti, "Gli "assetti organizzativi adeguati" tra principi e clausole generali", *supra* note 19 at 968.

[233] See subsections 3.3.3. and 3.3.5. above.

discretion here is narrower than in typical management decisions, warranting a correspondingly limited use of liability shields.

Furthermore, for liability under Article 2395 to arise, it is sufficient that the wrongful conduct was carried out in the exercise of managerial functions. By contrast, it is *not* required that the act be discretionary in the sense of expressing entrepreneurial freedom, as some scholars appear to suggest.[234] The establishment of arrangements and the assessment of their adequacy clearly fall within managerial duties. Therefore, any unlawful conduct in this regard may give rise to liability toward third parties if other elements are also established. Under the suggested (quasi-) contractual nature of liability, these elements include the harm suffered by stakeholder communities and its genesis in the negligent[235] breach of a protective duty owed by the defendant director(s) to them.

The limited discretion directors have in establishing adequate arrangements can be referred to as *technical discretion*.[236] It involves diligently identifying adequacy criteria from legal and non-legal sources and prudently, and with informed judgment, considering the objectives these arrangements must pursue. For example, in a large extractive corporation, arrangements must be complex enough to manage the company's specific risks and information flows. Establishing a board committee on social and environmental risks that includes geologists, environmental scientists and social experts can reasonably be considered adequate to prevent and mitigate risks associated with corporate activities. Conversely, a committee lacking similar expertise would likely be inadequate. In cases of alleged director liability for inadequate arrangements failing to prevent environmental or social harm, courts should consider a failure to meet these standards–such as in the latter scenario–as negligent if not unreasonable, leading to liability for damages that proper arrangements could have avoided.[237]

The proposed interpretation–that the adequacy of arrangements should be subject to judicial review focused on directors' diligence in assessing adequacy, but not to the BJR as traditionally conceived–occupies a middle ground (or perhaps an alternative one) between positions that reject and those that accept the application of the BJR to adequate arrangements. It calls for a reinterpretation of managerial discretion specifically regarding arrangements, allowing for only a limited shield of protection for that discretion, provided it has been exercised diligently.

This intermediate position aligns with other doctrinal views, whether for or against the application of the BJR to the duty to establish arrangements, as both converge on the need for judicial review of adequacy. Favourable view to applying the BJR argue that without scrutiny the

[234] Riolfo, *supra* note 172.

[235] Negligence, that is, the failure to meet the relevant standard of care in relation to the person who suffered harm, should be considered the standard for liability.

[236] Ginevra & Presciani, *supra* note 18 at 1238; AM Benedetti, "Gli "assetti organizzativi adeguati" tra principi e clausole generali", *supra* note 19 at 976.

[237] The establishment of a risk management board committee, with the task of supporting the assessments and decisions of the board of directors relating to the internal control and risk management system and the approval of periodic financial and non-financial reports, is recommended by the Borsa Italiana's Corporate Governance Code, Recommendation No 35.

duty to establish adequate structures would be meaningless, allowing directors to avoid liability even when inadequate arrangements caused harm to the company, creditors, or third parties.[238] Opponents, while rejecting the application of the BJR, acknowledge a limited *technical* discretion in assessing adequacy of arrangements, due to the variety of their possible arrangements and the partly defined assessment criteria (nature and size of the company) set out in the Civil Code, which must be supplemented by further sources.[239]

The proposed reinterpretation also avoids the uncertain distinction between general and specific duties. By moving beyond the traditional BJR framework, this distinction–previously used to determine its application in discretionary business decisions–becomes irrelevant.

c. Higher Liability Risks for Directors

Finally, it is worth considering whether the proposed Italian approach to assessing arrangement adequacy risks excessively increasing directors' exposure to liability, and whether such risks are justified. A similar concern also emerged in critiques of the *Peoples* decision, though the standard applied there (irrationality) differs from the one suggested here (negligence). I contend that while the risk of increased liability exposure is real, it is justified by the specific features of the duty to establish adequate arrangements and the liability framework under Article 2395 of the Italian Code. To support this argument, some key points previously discussed must be reiterated.

First, the establishment of adequate arrangements would differ from business decisions in that the former are subject to a more limited technical discretion compared to the latter. This should justify a more intensive judicial review of corporate arrangements compared to the deference granted to business decisions under the BJR.

Second, the suggested standard of care required of directors is one of professional negligence as it goes beyond that of a reasonably prudent person (*buon padre di famiglia*) and explicitly takes into account the nature of the role and the director's specific skills.[240] A more thorough assessment of directors' conduct and the adequacy of corporate structures, would therefore align with this higher standard of care, especially when diligence is specifically applied to identifying risks and determining how to mitigate them.[241]

Third, the rationale behind the broader legislative frameworks promoting corporate sustainability like the CSRD and CS3D, which inform the duty to establish adequate arrangements for in-scope companies, must also be considered. These frameworks explicitly aim to increase these companies' accountability for potential harm to stakeholders, including local communities and

[238] Riolfo, *supra* note 172 at 277–278.
[239] Ginevra & Presciani, *supra* note 18 at 1238.
[240] While there is no legal requirement to appoint only expert individuals as directors, it remains true that, with regard to the expected standard of diligence and the liability incurred for its breach, accepting a directorship without the necessary competence is done at the individual's own risk.
[241] Ginevra & Presciani, *supra* note 18 at 1238.

the environment. Even if they do not explicitly impose liability on directors, they implicitly raise their standard of care by requiring in-scope companies to pursue broader protective objectives.

Fourth, extending directors' liability aligns with the purpose of Article 2395 of the Italian Civil Code, which seeks to prevent directors from avoiding liability when their actions cause harm and to deter misconduct. As highlighted in the literature, exposing directors to liability fosters responsible behaviour[242] and enhances the deterrent effect traditionally associated with this provision in Italian legal scholarship.[243]

4.7. Expansion of Potential Claimants

Another potential downfall of asserting a duty of directors to take care to prevent harm to communities is the expansion of potential claimants entitled to seek damages. A similar critique was raised against the *Peoples* decision, arguing that expanding the duty of care could create a personal right of action for every shareholder and stakeholder of the corporation, raising concerns about opportunistic strike suits, frivolous or groundless claims, and an overall increase in litigation.[244] According to this critique, under Canadian common law, stakeholders have traditionally relied on the oppression remedy to bring direct claims against directors, a route that requires demonstrating status as a proper claimant.[245] Recognizing a direct right of action for breaches of the duty of care damaging stakeholders would remove this procedural barrier, enabling third parties to sue directors more easily by simply proving direct harm, the director's fault, and causation.[246]

While similar features do not characterize Italian stakeholder actions under Article 2395 of the Civil Code, this critique is nevertheless interesting as it invites an assessment of how easy it is for a stakeholder–especially a community–harmed by managerial conduct to bring a direct claim against directors. At first glance, such actions do not seem easy to initiate,[247] making concerns about opportunism, frivolous lawsuits, and a proliferation of claims rather unlikely in practice.

More specifically, the nature of directors' liability under Article 2395–which has been traditionally interpreted as non-contractual–implies that third-party claimants must prove the director's fault or intent (so-called 'subjective element'). This can be particularly challenging for stakeholders lacking access to corporate information and expertise in the functioning of a complex entities. Conversely, if, Article 2395 liability were reinterpreted as contractual under the qualified social contact doctrine, the burden of proof would be partially eased: other than proving harm and causation, claimants would need only to allege a breach of the directors' duty of protection. Still, this approach would not eliminate procedural hurdles. Claimants would have to prove the existence of a qualifying social contact, showing they reasonably relied on the director's conduct,

[242] Borgioli, *supra* note 175 at 707.
[243] Giudici, *supra* note 151 at 1282, n 18.
[244] Rousseau, "Directors' Duty of Care after Peoples", *supra* note 132 at 226–227.
[245] See, e.g., sec 238(d) and 241 CBCA.
[246] Rousseau, "Directors' Duty of Care after Peoples", *supra* note 132 at 226 ff.
[247] Further research is necessary for a deeper analysis, especially concerning practice, which has not been possible for the purposes of this dissertation.

which resembles the procedural threshold of the oppression remedy, where standing must also be established.

Moreover, when the claimant is a stakeholder community and acts through a direct group claim, it must demonstrate a minimum level of organization to obtain legal recognition and standing, as discussed in Chapters 2 and 3. This requirement presents a significant challenge: informal or loosely organised groups face practical difficulties in coordinating and in establishing their legal status. As such, the position of a harmed community does not suggest an ease of access to litigation and thus does not support the concerns raised in the Canadian critique regarding the proliferation of opportunistic or frivolous claims.

Finally, outside of the class action framework, claimants would bear the initial legal costs and face the risk of reimbursing the defendants' legal expenses if the case is unsuccessful.[248] This financial burden acts as a further deterrent, limiting the risk of overly accessible litigation by stakeholders.

4.8. Counter-incentives

Another criticism of the *Peoples* decision is that, despite affirming creditors' standing under the oppression remedy and strengthening the rationale for holding directors accountable to stakeholders, it fails to consider the reality of Canadian corporate governance,[249] which limit the protection this remedy affords creditors. In particular, the BJR shield,[250] the widespread use of directors' and officers' liability insurance, the generous indemnification under the CBCA, and reliance on expert advice–such as in *Peoples* itself–can substantially dilute the deterrent effect of personal liability,[251] weakening incentives for directors to consider stakeholder interests. This criticism offers insight into whether a similar issue could arise in relation to proposed duty of directors to take care to protect communities.

First, reconsidering the application of the BJR[252] in relation to directors' duty to establish and implement adequate arrangements for managing adverse socio-environmental risks becomes especially relevant when viewed through the lens of the Theory of the Commons (ToC). As discussed earlier, the adequacy of arrangements falls within the duty of care. Under mainstream corporate theory, where directors are seen as shareholders' agents, judicial deference is generally justified: directors face reputational and career-related costs for negligence, and ownership concentration typically aligns shareholder and director interests, reinforcing diligent

[248] On class actions see also Chapter 2, subsection 6.1.1. and Chapter 6.
[249] Warren Grover, "The Tangled Web of the Wise Case Symposium on the Supreme Court's Judgment in the Peoples Department Store Case" (2004) 41 Can Bus LJ 200–211 at 201–202.
[250] *Ibid* at 205.
[251] *Ibid* at 207–209. Regarding expert advice, see *Peoples Department Stores Inc/Magasins à rayons Peoples inc (Faillite de)*, 2003 QC CA at para 89. For a commentary on how the Peoples case has impacted the reliance of nominal or passive directors on appointees in family-owned corporations, see Campbell, "The Supreme Court's Decision in Peoples", *supra* note 131 at 478 [who argues that the shift to an objective standard of conduct has increased the standard of care expected of nominal or passive directors].
[252] This topic has been discussed in subsection 4.6. above.

management.[253] However, under the ToC, the central concern shifts: the issue is no longer whether directors' interests are aligned with shareholders' interests, but whether profit-seeking imposes externalities on third parties–namely, local communities and the environment–and, if so, what directors are supposed to do to address such issue.

From a ToC perspective, the goal is not to align directors with shareholders, but to constrain corporate activity where it infringes upon commons-based interests. Judicial deference is therefore unjustified in such cases, and concentrated ownership may heighten the need for judicial oversight, as it amplifies incentives to prioritise profit at the expense of stakeholders. Accordingly, the ToC framework supports closer scrutiny on directors' conduct affecting social and environmental interests.

Second, other shields against managerial liability, such as lowered liability standards, opt-outs, indemnification and insurance, and reliance on expert advice, may reduce directors' responsiveness to liability actions brought by third parties. However, the extent of this risk should not be overstated as far as Italy is concerned. In this legal framework, liability standards are considered non-waivable and thus cannot be contractually lowered or waived.[254] Similarly, in Italy, indemnification and insurance coverage may mitigate directors' exposure to liability, but they are unavailable in cases of gross negligence or wilful conduct, which would exclude a portion of breaches.[255]

Moreover, indemnification and insurance depend on corporate policy and market conditions. Companies may choose not to offer such protections, or may limit them, especially when doing so could entail reputational or financial risks, such as public backlash or economic consequences arising from failure to implement adequate risk-detection and management arrangements. Additionally, in situations where the risk of liability is high or potential compensation is substantial–such as if courts are empowered to thoroughly assess directors' compliance with the duty of care–insurance providers may limit coverage or demand higher premiums. This would reduce the risk of insulating directors from liability, even when they have purchased insurance individually rather than through the corporation. Overall, these dynamics suggest that directors are unlikely to be entirely free from liability and may still be incentivised to mitigate the risks of harming third parties.

Finally, the increasing reliance on external experts–particularly in addressing cutting-edge governance challenges such as environmental and social sustainability[256]–should not be interpreted as undermining the effectiveness of protections for third parties. On the contrary, when directors engage qualified professionals to assist in designing and assessing the adequacy of risk-management arrangements, this practice generally enhances the reliability of those

[253] Iacobucci, *supra* note 133 at 348 ff.
[254] See Chapter 4, subsection 2.2.1 c.
[255] As noted above–Chapter 4, note 134–Canada permits indemnification to cover breaches of the duty of care.
[256] Maria Lucia Passador, "Exploring Governance Gambits and Business Judgment in In/Out-Sourcing Tactics" (21 March 2024) Rochester, NY at 12.

structures. Importantly, consulting experts does not absolve directors of their legal responsibilities: liability for breaches of the duty of care remains with the directors.[257]

External experts may be also subject to professional liability if they fail to meet the standards of diligence required in their advisory role. This introduces an additional layer of accountability that can further reinforce the robustness of governance structures. At the same time, when consulting external experts, directors must carefully assess the appropriateness of doing so, as overreliance on outsourcing can increase the risk of fiduciary breaches.[258] This may happen when expert consultation leads to so-called "theater boards," that is, boards losing their actual control over corporate governance. In such cases, boards appear compliant with their duty to oversee the governance of the corporation but, in practice, they are externalizing this task. If this happens, directors' accountability is weakened, and they may incur liability for breaching their duties. Therefore, reliance on experts should not be seen as a cost-free shield against directors' liability. Rather, it must be balanced with directors' duty to maintain active oversight of corporate governance.

4.9. Process-Oriented Approach to Directors' Duties

> With a process-oriented approach to determining the appropriateness of board of director decisions, control group camouflage is easy to engineer. That is what the Supreme Court of Canada decision in the Wise case has cemented.[259]

This final critique to be addressed concerns the risk that proceduralizing corporate management may facilitate the exploitation of power by controlling shareholders, by shifting oversight away from the substance of corporate decisions and toward mere adherence to formal procedures. *Proceduralization* here refers to a governance model that prioritises compliance with formal decision-making protocols rather than substantive evaluation of the decisions themselves.[260] This trend is evident across both regulatory frameworks and judicial review practices in Europe and North America.[261]

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[257] *Ibid* at 28 [who argues that resorting to specialized consultants does not externalize directors' liability risks to these consultants; rather, it serves as a tool for directors to enhance the quality of their decision-making process]. A similar conclusion is reached, with regard to the opinions of stakeholder committees, by Marco Cian, "I comitati rappresentativi degli stakeholders e l'organizzazione societaria" (2023) 3 BBTC 356 at 380.

[258] Passador, *supra* note 256 at 5; 39 ff.

[259] Grover, *supra* note 249 at 209.

[260] Regarding adequate arrangements, this term is used by Irrera, *supra* note 3 at 75 ff.

[261] In Europe, this procedural trend regarding sustainable corporate governance is exemplified by recent EU regulations on corporate sustainability; see Florian Möslein & Karsten Engsig Sørensen, "Sustainable Corporate Governance: A Way Forward" (4 January 2021) Rochester, NY, online: <https://papers.ssrn.com/abstract=3761711>. However, proceduralization has been discussed also in relation to other legal areas; for example, in Italy, it has been discussed in relation to workplace safety regulations *(decreto legislativo 19 settembre 1994, n. 626*, 19 September 1994, now replaced by *decreto legislativo 9 aprile 2008, n. 81*, 9 April 2008, 81), privacy laws (*decreto legislativo 30 giugno 2003, n. 196*, 30 June 2003, 196), and entity criminal liability (*derceto legislativo 8 giugno 2001, n. 231*, 8 June 2001, 231); see Rabitti, *supra* note 217 at 38–39. In North America, a process-oriented approach originated with the

This critique is particularly relevant for this research as it underlines a core issue in Italian legal scholarship: whether the directors' duty to establish and implement adequate arrangements risks overemphasizing formal procedures at the expense of directors' accountability towards affected parties.[262] Key concerns include the possibility that directors may avoid liability by merely demonstrating compliance with formal procedures, without any genuine assessment of the quality of their decisions,[263] and that affected third-parties may struggle to prove causation between the inadequate arrangements and harm suffered. These risks could undermine the effectiveness of recognising a duty to take care to prevent harm to communities within the broader obligation to establish adequate arrangements.[264] Ultimately, this raises a critical question: is proceduralization–through adequate arrangements–a sufficient tool for protecting stakeholders from harm or should a substantive legal duty toward stakeholders be explicitly codified? These concerns should be addressed jointly. Proceduralization, if properly designed, can be viewed with cautious optimism[265] as part of a sustainable corporate governance framework.

To properly address this "box-ticking" problem, it is first necessary to clarify the notion of proceduralization as it applies to the duty to establish adequate arrangements under Italian law. This duty requires directors to ensure the existence of appropriate organisational, administrative and accounting structures relative to the nature and size of the corporation. Importantly, the law does not demand establishing specific types of arrangements, instead leaves the assessment to directors, only setting a "direction" for their activity based on adequacy.[266] In this context, the

Caremark decision in the US and later influenced Canada as well, as noted by Lorie Waisberg & Robert Vaux, "Board Governance: The Importance of Process" in *The Future of Corporation Law* Queen's Annual Business Law Symposium (1997) 97.

[262] As noted, *inter alia*, by Pierpaolo Sanfilippo, "La tutela dell'ambiente e gli "assetti adeguati"" in *Gli assetti organizzativi dell'impresa* (Roma: Scuola superiore della magistratura, 2022) 235 at 268. In the context of the CS3D and the practice of requiring contractual assurances from business partners, see, e.g., "Analysis of EU Commission's proposal on due diligence" (2022) at 5; 12, online: *ECCJ* <https://corporatejustice.org/publications/analysis-of-eu-draft-directive-on-due-diligence/>. For a similar argument, but focused on agency costs, see Passador, *supra* note 256 at 4.

[263] While the earlier discussion concerned the assessment of the design and adequacy of organizational arrangements–*prior* to the harmful decision–here the focus is on the *adoption* of the harmful decision–*after* those structures have been put in place. It is worth emphasising that, in my view, compliance with procedures is part of directors' duties, but there is also the assessment of adequacy, which varies depending on their role and must be continuous throughout the life of the corporation.

[264] Aurelio Mirone, "L'organizzazione dell'impresa societaria alla prova del codice della crisi: assetti interni, indicatori e procedure di allerta" (2020) 1 ODC 23–54 at 35 [who highlights the limited practical impact of the duty to establish adequate arrangements on managerial liability due to the difficulty of proving a causal link between the breach of the adequacy obligation and the resulting damage].

[265] In the sense previously clarified.

[266] In addition to the law, corporate articles and bylaws also contribute to defining the directors' duty to establish adequate arrangements. This contribution may occur in various ways and at different levels. First, management activity is closely tied to the pursuit of the purpose set out in the articles, which provides an initial framework within which directors must establish such arrangements and assess their adequacy. The corporate purpose is also relevant, for example, when it marks the transition from a regular for-profit company to a benefit corporation. Moreover, the bylaws may themselves establish certain arrangements, such as prohibiting the outsourcing of managerial functions or requiring the election of directors or board committees with specific tasks. Finally, the bylaws should also delineate

procedural dimension of this duty does not concern the *creation* or *assessment* of arrangements but rather their *implementation* in the company's ongoing activity. The core of proceduralization, therefore, lies in the requirement that directors govern the company in line with these pre-established frameworks and internal processes. From a liability standpoint, this means that assessing of a potential breach of the duty of care requires verifying whether adequate procedures were put in place and, if so, whether directors followed them or, if not, whether they acted to remedy the inadequacy.

This being said, it is important to move beyond ideological positions on whether shielding directors from liability through procedural compliance, such as under the BJR, is inherently good or bad. In the complex environment of a corporation, it is unrealistic to expect directors to evaluate every managerial decision against the backdrop of the company's organisational, administrative and accounting arrangements.[267] For example, in a control and risk committee composed of members lacking sufficient expertise, only those that–after accepting the appointment–realistically had the opportunity (and responsibility) to detect and address the structural inadequacy that led to the harmful decision may be exposed to a high risk of liability.[268]

Naturally, the assessment of adequacy and, therefore, directors' liability, must also consider the roles of the directors within the corporation, particularly whether they are delegating or delegates–the latter having a duty to establish and implement arrangements, while the former have a duty to oversee the adequacy of such arrangements and intervene when necessary–and the flow of information within the corporation. For example, if delegating directors rely on information provided by delegates, it may limit their ability to identify inadequacies in the organizational structures. At the same time, however, this reliance should not be overestimated. When fulfilling their duty to oversee the adequacy of arrangements, delegating bodies are required to request additional information, investigations or verifications whenever they deem it necessary.[269]

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a boundary for directors' liability for failing to establish adequate arrangements: directors should not be held liable for the inadequacy of arrangements determined in the articles or bylaws, since such determination lies exclusively with the shareholders. At most, they may have a duty to highlight such inadequacy. Overall, the adequacy of arrangements set out in the articles or bylaws precedes and underpins the duty of directors. Relevant reading on this topic include, among others, Michele Lobuono, "Gli assetti organizzativi dell'impresa: spunti per una riflessione di diritto civile" (2023) 4 Giustizia Civile 825–875; Aurelio Mirone, "Assetti organizzativi, riparti di competenze e modelli di amministrazione: appunti alla luce del "decreto correttivo" al Codice della crisi e dell'insolvenza" (2022) 2 Giur comm 183–209; Marco Cian, "Clausole statutarie per la sostenibilità delle imprese: spazi, limiti e implicazioni" (2021) 2–3 Riv Soc 475–507.

[267] Moreover, the proceduralization of corporate activity, along with internal transparency, helps promote the efficiency of the corporation; see Rabitti, *supra* note 217 at 87–88.

[268] In a similar case, it can be expected that components lacking adequate expertise decline their appointment. If they do not so, they are still liable but may avoid liability by proving they were not culpable. Regarding the control and risk committee, Borsa Italiana's Corporate Governance Code, Recommendation No 35, suggests that the committee *as a whole* possess adequate expertise in its area of responsibility.

[269] See Paolo Montalenti, "La responsabilità degli amministratori nell'impresa globalizzata" (2005) 4 Giur comm 435–455 at 449.

Furthermore, explicitly codifying the duty of directors to take care to prevent harm to stakeholders may be unnecessary or even undesirable. It is unnecessary because the procedural dimension of directors' duties already shapes their substantive obligations. Procedures are designed for a specific purpose, e.g., in the case of arrangements, preventing and mitigating economic, social, and environmental risks, both for the company and affected third parties, thereby influencing the interpretation of the duty of care in Italy. It may also be undesirable as a statutory duty to take care to prevent harm to stakeholders may suffer from excessive vagueness. Key questions would arise: What constitutes "care"? Who are the relevant stakeholders? What kinds of harm are included? As this chapter argues, a duty of care toward communities can be interpretatively derived from existing Italian law.

Even though explicit codification may also have positive consequences for stakeholders–e.g., allowing judges to examine directors' conduct and its consequences for stakeholders more thoroughly and render more effective judgments–it does not seem to outweigh the discussed drawbacks. The absence of such a duty from explicit statutory provisions does not weaken its normative weight, both because the interpretative construction of duties is common in legal systems, and because it avoids the ambiguities that a broadly framed legal standard could entail.

To address both the risks of a box-ticking approach and the difficulty of proving causation between inadequate structures and harm, a unified solution could be shifting the burden of proof, as discussed in subsection 4.5. of this chapter. If directors were required to demonstrate the adequacy and proper implementation of arrangements to avoid liability, this would reduce enforcement barriers for harmed parties and discourage mere formal compliance by directors. These would thus have to show that the procedures followed were substantively appropriate.[270] Notably, this solution does not constitute strict liability.

Generally, strict liability refers to liability that does depend on fault or intent. However, there is no uniformity between legal frameworks in how strict liability applies, and even in the same countries there may be differences according to the requirement established by the provision introducing it.[271] For this research, I understand strict liability as requiring the utmost level of diligence to avoid liability, whereas negligence-based liability requires only the diligence appropriate to the circumstances.

In this study, directors' liability would be "strict" only if they were required to do everything possible to prevent the harm to communities, even at the expense of other interests (such as shareholders, investors, and even other stakeholders). This, however, is not the model I propose. Instead, I suggest directors should be liable for failing to establish and implement adequate arrangements to prevent harm to communities and they should pursue this duty as professionals; however, this goal must nevertheless coexist with other relevant interests in the corporation. Consequently, my proposal is best described as a heightened, professional standard of liability

[270] This argument is also made in the context of the CS3D by Alessio M Pacces, "Civil Liability in the EU Corporate Sustainability Due Diligence Directive Proposal: A Law & Economics Analysis" (16 March 2023) Rochester, NY, online: <https://papers.ssrn.com/abstract=4391121> at 13.

[271] As happens in Italy, see Guido Alpa, "Strict Liability in Italian Law" (2006) 17:5 EBLR 1441–1471.

with a reversal burden of proof regarding directors' diligence, though still rooted in negligence. This proposal aligns with Italian business law since Article 2395 of the Italian Civil Code grounds managerial liability towards third parties in intentional misconduct or negligence.

5. Chapter Summary

This chapter has discussed the possibility of identifying a directors' duty to take care to prevent harm to communities through the obligation to establish and implement adequate organizational, administrative and accounting arrangements under Italian corporate law. A positive position has been taken, based on three main points: (1) that the purpose of these arrangements extends beyond protecting the corporation from insolvency, encompassing the interests of external investors and the market; (2) that, in light of evolving EU corporate sustainability legislation and the principle of double materiality addressing large corporations, such arrangements must also encompass the risks the corporation poses to external stakeholders, including local communities and the environment; and (3) that the recent CS3D imposes a substantive duty on in-scope corporations–and, by extension, on directors–to prevent and mitigate harm to human rights and the environment, explicitly mentioning the protection of local communities.

In light of these foundations, the proposed duty should primarily rest upon directors of corporations within the scope of EU sustainability law legislation, but could also expand to their business partners and, arguably, inform the duties of care of directors of other large corporations posing threats to communities. Naturally, the limited scope of application of this legislation[272] may risk undermine the extension of the proposed duty to all Italian S.p.A., thereby reducing its practical impact and protective effect communities. However, this concern may be mitigated if one considers the indirect (and broader) scope of this legislation. Specifically, as noted above, the CS3D features a "cascade effect" that extends its due diligence obligations to all companies within the value chain of the in-scope companies. Additionally, it is possible–though admittedly optimistic in light of the EU's recent to water down the discussed obligations[273]–that the scope of the directive could be expanded in the future, as occurred with the EU legislation on sustainability reporting, in the transition from the NFRD to the CSRDI will get back to these concerns in the conclusions when addressing the broader positive and negative prospects of this research. For now, another issue remains to be addressed: the enforcement mechanisms potentially available to communities.

[272] The CS3D's scope is quite limited, involving only very large European and non-European companies. As for EU companies, the directive applies to large, limited liability companies and partnerships with at least 1,000 employees and a worldwide net turnover of at least EUR 450 million, involving about 6,000 companies. Regarding non-EU companies, the directive applies to large companies with a net turnover of EUR 450 million in the EU, encompassing about 900 companies. The scope of the directive has been drastically reduced compared to the initial proposal, which set broader thresholds (500 employees on average and a net worldwide turnover of more than EUR 150 million) and would have covered about 13,000 EU companies and about 4,000 third-country companies.

[273] The reference here is, as well known, to the Directive (EU) 2025/794 (so called "Stop-the-clock Directive"), which delays the transposition of the CS3D by Member States and the reporting obligations it imposes, and the Omnibus Package, aiming to which to reduce the obligations set forth in the CSRD and CS3D in order to ease administrative burdens on European businesses and increase their competitiveness.

Chapter 6: Enforcement Mechanisms

1. Introduction

Chapter 2 discussed the instruments through which communities can protect their rights, both preventively and reparatively. Chapter 5 analyzed the challenges and opportunities for stakeholders to take direct action against directors who have breached their duty of care and caused them harm. This chapter revisits those discussions to provide an overview of the enforcement tools currently and potentially available to local communities harmed by business activities in violation of the duty to take care to prevent harm to commons, on the assumption that the interpretation of this duty as advanced in the previous chapter is accepted.

While shareholders and some categories of stakeholders, such as creditors, have instruments to enforce directors' duties,[1] other groups, such as communities, lack such tools. Providing these latter groups with enforcement mechanisms would empower them, permit them to play an active role in protecting their interests, and improve the effectiveness of their protection. In the case of stakeholder communities, this aligns with the principles of the Theory of the Commons (ToC). Theoretically, such empowerment is further justified by the fact that directors' duty to establish adequate setups–which, in my proposal, underpins the duty to prevent harm to commons in Italy–should be understood as functioning *also* to protect stakeholders, including local communities. Therefore, a violation of this duty that affects communities should permit them to bring claims to remedy the harm suffered.

Affected communities' claims can be either preventive or compensatory. In Italy, preventive lawsuits primarily include collective actions for injunctive relief. Conversely, compensatory claims are typically filed through class actions. The following paragraphs discuss the features, advantages, and drawbacks of these mechanisms, along with potential adjustment to improve community protection.

2. Preventive Mechanisms

2.1. Collective Actions for Injunctive Relief (Injunctive Class Actions)

A first level of protection for community rights can be achieved through collective injunctive actions, which primarily aim at preventing future harm from unlawful conduct. Unlike compensatory actions, which traditionally claim monetary damages,[2] injunctive relief allows for

[1] Therefore, this chapter excludes claims that other corporate constituencies beyond stakeholders can bring to address directors' violations of the duty to establish adequate setups that harm local communities, such as challenges to the council resolution determining assets under Article 2388 of the Civil Code (Italy). For further readings on these claims, see, e.g., Andrea Palazzolo, "Adeguatezza, legalità e sostenibilità. La delibera istitutiva degli assetti organizzativi e le sue "patologie"" (2024) 2 Giur comm 323–367.

[2] As seen in subsection 3.1.3. c. below, Italy allows for both market-based monetary and in-kind compensatory measures. However, it has long been argued in scholarship that the former takes precedence over the latter.

"full" protection of the right by preserving it from future or further impairment.[3] However, as discussed below, collective injunctive actions may also restore the status quo ante, potentially eliminating the need for compensation by addressing harm at its source.[4]

2.1.1. Relevance for the Protection of Community Interests

Since 2019, Italy has permitted general collective actions for injunctive relief, as outlined in Article 840 sexiesdecies of the Civil Procedure Code.[5] These actions can be initiated by any interested party,[6] including non-profit organisations, against enterprises, such as corporations, as well as public service or public utility entities for acts that have caused harm to multiple interests.

Collective injunction actions play a key role in the preventive protection of communities harmed by business activities.[7] These mechanisms protect against any potential harm from business activities affecting a wide range of individuals. The directors' duty of sound risk management under Article 2086, as interpreted in this study, extends beyond the interests of the company and its shareholders, to include broader third-party interests. A breach of this duty may therefore constitute a multi-offensive conduct that collective injunctive actions are designed to prevent.[8]

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[3] Angelo Danilo De Santis, "L'inibitoria collettiva: profili processuali" in Ugo Ruffolo, ed, *Class action ed azione collettiva inibitoria: la nuova disciplina Commento sistematico alla legge 12 aprile 2019, n 31* (Milano: Giuffrè, 2021) 267 n 18. Naturally, if damage has already occurred, achieving a 'full' protection would require a combination of injunctive and compensatory remedies.

[4] While restorative relief aims to reverse the alteration of the factual or legal situation that has occurred, regardless of whether any damage was actually produced, compensatory relief seeks to place the injured party's assets in the same quantitative (through compensation by equivalent) and, where possible, qualitative (through specific performance) condition as before the breach, based on a hypothetical assessment: *ibid* at 280. See also subsection 3.1.3.c. below.

[5] *legge 12 aprile 2019, n. 31,* 12 April, 2019, 31. These actions have been extensively commented in literature; in addition to the contributions cited in the following footnotes, see Antonio Gerardo Diana, *Class action e inibitoria collettiva: nuova disciplina* (Padova: CEDAM, 2020) ch 10; Aldo Angelo Dolmetta, "Profili emergenti nelle azioni di classe" (2019) 3 Rivista di Diritto Bancario 289–296. See also previous discussion in Chapter 2, subsection 6.1.

[6] On this topic, see Ugo Ruffolo, "Tutele super-individuali: la class action come via statunitense e la azione collettiva "rappresentativa" come logica europea. Il (poco coordinato) "ibrido" italico" in Barbara Randazzo, Albert Henke & Stefaan Voet, eds, *L'azione di classe italiana nel quadro europeo: profili sostanziali e processuali* (Torino: Giappichelli, 2025) 93 at 98 [who criticizes the possibility for individuals to initiate litigation to protect collective rights under the recalled provision, arguing instead that such rights should be safeguarded through representative actions]. See also Davide Amadei, "L'azione inibitoria collettiva" in Bruno Sassani, ed, *Class action: Commento sistematico alla legge 12 aprile 2019, n 31*, 2nd ed (Pisa: Pacini, 2024) 319 at 323 [who emphasises that an individual's action may generate issues of adequacy of protection, as the law does not require any prior control regarding representativeness and the capacity to navigate the legal procedure]. While I share these skeptical views, it's important to emphasize that this Chapter discusses whether and to what extent current mechanisms in Italy can protect communities affected by corporate activity. This does not imply agreement with legislative choices, such as allowing any interested party–including individuals–to bring claims to protect collective interests.

[7] On the preventive protection of injunctive relief, see Adolfo Di Majo, "Tutela (dir. priv.)" in *Enciclopedia del Diritto* (Milano: Giuffrè, 1992) 360 at 388 ff.

[8] The key role that collective injunction actions could play in protecting stakeholders impacted by business activities has also been recognized in Italian commercial law scholarship (e.g., Francesco Fimmanò, "Art. 41 della Costituzione e valori ESG: esiste davvero una responsabilità sociale dell'impresa?" (2023) 50:5 Giur comm 777–806 at 804–805).

This preventive role is further reinforced by the action's broad applicability to any legal situation potentially impacted by corporate conduct.[9] Additionally, these actions offer significant advantages for protecting affected local communities.[10]

First, collective injunctive actions have a distinct collective dimension, both in the interests they protect (acts or conduct detrimental to a plurality of individuals or entities) and in standing (which includes any interested individuals and organisations that statutorily protect the affected

Scholars have also recognized their role for preventing and mitigating environmental damage (Mario Renna, "Attività di impresa, sostenibilità ambientale e bilanciamento tra diritto alla salute e iniziativa economica privata" (2022) 2 Contr Impr 537 at 29) and climate change (e.g., Roberta Tiscini, "Tutela inibitoria e cambiamento climatico" (2024) 2 Rivista di Diritto Processuale 331–366; Riccardo Fornasari, "La struttura della tutela inibitoria ed i suoi possibili utilizzi nel contrasto al cambiamento climatico" (2021) 6 Resp civ e prev 2061–2084) caused by business activities. Relevant is also the injunction action filed before the Milan Tribunal by a number of Taranto residents against the ILVA corporation for the adverse environmental and health impacts of its steelwork factory in the city (Tribunale Milano, XV Business Section, RG 1066/2021 (Italy)); Italian judges raised some interpretative questions to the CGUE, which has been decided on 25 June 2024 (ECLI:EU:C:2024:542). A final decision on the injunction action has not been reached yet. For further details, see Lottie Limb, "Inside Taranto's 12-year wait for EU action on steel plant pollution", *euronews* (4 June 2025), online: <https://www.euronews.com/green/2025/06/04/shadows-of-indifference-eu-faces-heat-over-inaction-on-pollution-from-italys-biggest-steel>; Emanuele Bonini, "EU court: "Ilva to be suspended in the name of the environment and health"", *eunews* (25 June 2024), online: <https://www.eunews.it/en/2024/06/25/eu-court-ready-to-shut-down-ilva-operation-to-be-suspended-in-the-name-of-the-environment-and-health/>.

[9] Initially, the action was limited to harm to consumers. The provision regulating collective injunctive actions does not contain specific indications regarding the types of substantive relationships to which the injunction applies, nor does the rule provide any classification of the legal situations that can be protected through collective injunctions; see Alberto Tedoldi & Gian Marco Sacchetto, "La nuova azione inibitoria collettiva ex art. 840 sexiesdecies c.p.c." (2021) 1 Rivista di Diritto Processuale 230–259 at 241.

[10] For completeness, it is worth highlighting a longstanding Italian debate regarding the admissibility of atypical injunctive relief (*tutela inibitoria atipica*), that is, outside the cases expressly provided for by law. Uncertainty over whether injunctive protection can be granted for harm caused by business activities to communities might lead to view the creation of an ad hoc remedy as advantageous, since it would definitively rule out a negative answer to that question and avoid excluding preventive protection in the cases under consideration. However, the view in favour of the admissibility of atypical injunctive relief is now well established in Italian legal scholarship. As a result, the value of an ad hoc legal provision is somewhat diminished. For further details on this debate and additional bibliographic references, see, e.g., Daniela Maria Frenda, "Appunti per una teoria dell'inibitoria come forma di tutela preventiva dell'inadempimento" (2016) 3 Europa e Diritto Privato 721–801; Di Majo, *supra* note 7 at 389 [who excludes the atypicality of injunctive relief with no limits whatsoever]; Aldo Frignani, "Inibitoria (azione)" in *Enciclopedia del Diritto* (Milano: Giuffrè, 1971) 559 at 564 ff [who supports the existence of atypical injunctions].

interests).[11] Essentially–and at least in theory[12]–these actions safeguard true collective interests, understood as belonging to a group as a whole rather than being a mere sum of individual interests. This marks a departure from the traditional individualistic model of civil liability and distinguishes collective injunction from compensatory class actions, which protect homogeneous individual interests.

In practice, this means that collective injunctive relief can be sought even when no individual right has yet been violated nor actual damage has occurred, provided there are adequate signals of imminent harm if the conduct in question is not restrained.[13] For example, collective health interests may be threatened by the distribution of harmful cancer-causing products even before anyone has bought or used them.[14] Similarly, environmentally harmful corporate conduct, like having inadequate environmental risk management structures, can damage a community's interest in a clean environment even if no specific individual has yet suffered personal loss (e.g., property damage or health effects).

Arguably, the scope of these actions could be even broader. Some scholars have observed that the provision governing this mechanism does not explicitly require "damage" or "unlawful conduct".[15] This omission may suggest that injunctive relief can be sought even against conduct

[11] Mario Renna, "Le azioni inibitorie collettive: profili funzionali e regolatori" (2025) 1 Dialoghi di diritto dell'economia 23–53 at 32 ff; Tedoldi & Sacchetto, *supra* note 9 at 237–238 [who contend that the injunctive action in question remains collective even when brought by individual claimants, since its effects extend ultra partes]. For a critique of the collective dimension of this action, see Alessandra Belelli, "Riflessioni critiche sull'azione inibitoria collettiva nella nuova formulazione introdotta nel codice di procedura civile" (2021) 6 NGCC 1429–1434 at 1430 ff; Marcello Stella, "La nuova azione inibitoria collettiva ex art. 840 sexiesdecies c.p.c. tra tradizione e promesse di deterrenza" (2019) 12 il Corr giur 1453–1459 at 1456 [who emphasizes that individual standing, combined with the limited procedural and admissibility filters (which will be discussed shortly), risks allowing a hasty and inadequate protection of collective interests].

[12] In a recent collective injunctive lawsuit concerning the construction of the Strait of Messina bridge, the court interpreted the rights protected by such actions as homogeneous individual rights, identical to those protected by compensatory class actions. On this ground, and for the lack of legal interest upon the claimants, the claim was rejected. Commentators have criticized the court's equation of collective rights with individual homogeneous rights: see Tribunale Roma, 18 December 2024 (Italy) par 4.2. (commented by Andrea Giussani, "L'azione inibitoria quasi di classe nel labirinto dell'azione collettiva" (2025) 3 NGCC 698–713). Nevertheless, there decision may still be subject to review in appeal.

[13] For some scholars, even if the damage has not yet occurred, there must have been an infringement of the claimant's interest (Di Majo, *supra* note 7 at 389). Conversely, other scholars only require that the conduct has violated a legal obligation expressly indicated in the law, with no need for the conduct to breach others' rights (De Santis, *supra* note 3 at 271).

[14] This example is made by Ugo Ruffolo, "Interessi collettivi (e diffusi), azione inibitoria collettiva e "misure idonee" correttive" in Ugo Ruffolo, ed, *Class action ed azione collettiva inibitoria: la nuova disciplina Commento sistematico alla legge 12 aprile 2019, n 31* (Milano: Giuffrè, 2021) 233 at 244. Consequently, if an individual rights have been harmed, an injunction protecting the broader collective interest may not be sufficient to fully redress the individual harm. Referring to the example in the text, the injunction to withdraw all cancer-causing products from the market does not protect the rights of those who have already used the product. These individuals must therefore seek compensatory redress.

[15] Amadei, *supra* note 6 at 326; Renna, *supra* note 8 at 35–36; Tedoldi & Sacchetto, *supra* note 9 at 241 ff. See also Fornasari, *supra* note 8 at 268–269. Furthermore, courts have acknowledged this extensive interpretation; yet a

that is formally lawful, where such conduct is nonetheless capable of harming collective interests if allowed to continue. As a result, the protective reach of this mechanism appears to be particularly wide.

Second, collective injunctive actions allow organisations to bring claims on behalf of affected communities. This enhances their protection by overcoming common collective action problems that would likely arise if only individual claims were permitted. Such problems include uncertainty about the nature of the rights at stake and the procedural tools available for their protection, psychological reluctance to initiate legal proceedings, and an unfavourable cost-benefit assessment for pursuing individual litigation.[16]

Unlike Italian class actions,[17] collective injunctive actions allow representative organizations to be specifically established for the purpose of bringing such claims. Moreover, claimants don't need to prove they can adequately represent the asserted rights in each case, as this is pre-emptively assessed through inclusion in an official register set up by the Ministry of Justice,[18] which directly confers standing. This register primarily serves to identify organizations eligible to file class actions or collective injunctive actions (both mechanisms being subject to this requirement) and to permit ongoing oversight of compliance with the legal requirements for standing. These conditions aim to ensure the collective representativeness of registered organisations and prevent the protection of collective interests from being undermined by profit motives.[19] These features, i.e., ad hoc establishment of representative organizations and prior assessment of representativeness though inclusion in the Ministry of Justice's register, expand the practical accessibility of the mechanism and enhance its utility for stakeholder communities seeking preventive relief.[20]

Third, collective injunctive actions are subject to low admissibility requirements–i.e., the substantive conditions the claim must meet to be considered on the merits–making these actions straightforward and quick. For example, they do not require the claimant to have previously filed

stricter interpretation has been preferred. See Tribunale Roma, 18 December 2024 (Italy) par 4.2. (commented by Giussani, *supra* note 12).

[16] This is highlighted in EU legislation on consumer protection, which enables consumer associations to file lawsuits to protect the collective interests of consumers: see EU, *Directive 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC,* [2020] OJ L 409/1, recital 9.

[17] See subsection 3.1.2. below.

[18] According to Tedoldi & Sacchetto, *supra* note 9 at 239–240, this difference can be explained by the nature of the protection sought, which, in the case of injunctions, does not prejudice the individual (monetary) rights of the affected individuals.

[19] Since the register is publicly available, it also ensures publicity and transparency. The requirements for registration, confirmation, removal, and other practical aspects related to the maintenance of the register are set out in a regulation issued by the Ministry of Justice: *decreto ministeriale 17 febbraio 2022, n. 27*, 17 February, 27. Some scholars have expressed concern about this legislative technique; see Romolo Donzelli, "L'ambito di applicazione e la legittimazione ad agire" (2019) 9 Foro it 339–344 at 343.

[20] The lack of control on representativeness may be problematic when the action is brought by an individual; see footnote 6 above.

a notice to desist to the defendant or attempted arbitration.[21] Additionally, there is no need for a pre-existing qualified legal relationship between the claimant and the defendant; the claimant only needs to identify the harmful conduct adopted in the course of business activity.[22] These features render the mechanism particularly well-suited to addressing harm involving sensitive natural resources, where timely intervention is key to prevent irreversible damage.

Fourth, collective injunctive actions offer a wide range of remedies with potentially far-reaching effects. It has been argued that these measures can not only serve a preventive function but may, in certain cases, substitute for restorative measures that would otherwise be available only through compensatory mechanisms, such as class actions. This is because the law allows the court, when ordering the cessation of potentially harmful conduct, to mandate the adoption of appropriate actions aimed at eliminating or reducing the effects of the established violations.[23] This 'expansive' effect of injunctive relief is considered permissible as long as it does not extend to restitution and monetary compensation, which remain the exclusive domain of compensatory actions.[24]

Expansive effects may also concern the content of the judicial finding and its implications for related compensatory lawsuits. On the one hand, when a court confirms the harmful nature of a conduct targeted by an injunctive action, this finding may serve as evidence of a legal violation in subsequent claims for damages, thereby easing the burden of proof for claimants.[25] This evidentiary effect is explicitly recognised in the EU legislation on consumer representative actions, which is the source of the Italian mechanism.[26] On the other hand, when the harm results from

[21] Tedoldi & Sacchetto, *supra* note 9 at 235.

[22] Renna, *supra* note 8 at 8. Doubtful about this legislative solution is Ilaria Pagni, "La Class action riformata - L'azione inibitoria collettiva" (2019) 10 Giur it 2297 at 2331.

[23] Art 840 sexiesdecies, para 7 Civil Procedure Code (Italy).

[24] Tribunale Torino, 23 April 2024, Business Section, Decree (Italy) para 4.3, commented by Geo Magri, "Presupposti e confini dell'azione inibitoria collettiva" (2024) 5 NGCC 1086–1099; Tedoldi & Sacchetto, *supra* note 9 at 253 ff; Pagni, *supra* note 22 at 2331 ff.

[25] Tedoldi & Sacchetto, *supra* note 9 at 253. For a critique on this point, see Stella Marcello, *supra* note 11 at 1457–1458. According to one scholar, the claimants' burden of proof may be further alleviated when the defendant breaches an injunctive order, as such a breach aggravates the defendant's liability – not only for having caused harm, but for having done so in spite of an explicit obligation to refrain from the harmful conduct. In such cases, the violation of the injunctive order could give rise to a presumption of harm to be compensated, even in the absence of monetary loss. See Claudio Consolo, *Spiegazioni di diritto processuale civile*, 13th edn, 1: Le tutele (di merito, sommarie ed esecutive) e il rapporto giuridico processuale (Torino: Giappichelli, 2023) at 81–82. See also Ruffolo, *supra* note 6 at 102–103 [according to whom, since, in the case under consideration, injunctive orders are intended to protect collective interests rather than solely those of the claimant, non-compliance with the order that results in harm to a third party (who belongs to the protected group but did not participate in the injunction lawsuit) entitles that third party to bring an action for non-compliance].

[26] EU, *Directive 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC,* [2020] OJ L 409/1, recital 40 ['Injunctive measures could also include measures that declare that a given practice constitutes an infringement, in cases where that practice ceased before the representative actions had been brought but where there is still a need to establish that the practice constituted an infringement, for example, in order to facilitate follow-up actions for redress measures.']. However, this provision has not been incorporated into Italian legislation on

a breach of a generic obligation, injunctive relief may also have a 'determinative effect', that is, it helps concretely define the content of the obligation breached.[27] This happens because, when a courts grants an injunction, it orders the defendant to cease the harmful conduct by imposing an obligation to take or abstain from specific actions.[28] In doing so, the court clarifies the expected conduct of the defendant.[29] This clarification ultimately facilitates the assessment of whether the expected conduct (compliance with the obligation) has been breached in any subsequent compensatory claims. Given its open-ended nature, the obligation to establish adequate setups could particularly benefit from such a clarification.

Finally, collective injunctive actions also provide enforcement mechanisms that, if adequately calibrated to the defendant, can effectively restrain socially and environmentally harmful corporate conduct. These mechanisms include the setting of a compliance deadline and the imposition of a monetary penalty for each day of delay in fulfilling the order (so called 'indirect coercive measures').[30] The law does not impose a cap on the penalty, but identifies certain criteria to inform its amount, such as the value of the dispute, the nature of the performance, the quantified or foreseeable damage, the personal and financial conditions of the parties, alongside any other relevant circumstances.[31] This allows the court to structure the penalties so that the cost of non-compliance exceeds that of ceasing the harmful conduct. If this condition is met, these enforcement measures can serve as a meaningful deterrent, even for wealthy corporations.[32]

2.1.2. Drawbacks and Potential Solutions

Alongside advantages, Italian collective injunctive actions also suffer from certain limitations, which must be considered when assessing the effectiveness of their protection. These limitations primarily stem from:

i. The fact that such actions can be brought only against business entities, excluding directors as potential defendants and, therefore, preventing their use to enforce breaches of the proposed duty of care, which would primarily constitute a basis of directors'–not corporate–liability.
ii. The lack of clarity regarding the requirements for granting the injunction, which makes the outcome of such claims more uncertain.
iii. The uncertainty about the beneficiary of the monetary payment required for non-compliance under indirect coercive measures.

consumer representative actions (Arts 140-ter and following of Consumer Code (Italy)) or collective injunctive actions (Art 840 sexiesdecies Civil Procedure Code (Italy); see Amadei, *supra* note 6 at 342 ff.

[27] Consolo, *supra* note 25 at 81–82.

[28] On the admissibility of injunctive relief for omissive conduct, see De Santis, *supra* note 3 at 274 ff.

[29] Consolo, *supra* note 25 at 81–82.

[30] For an overview on these measures and further bibliographic references, see Salvatore Mazzamuto, *Dell'esecuzione forzata: art. 2910-2933* (Bologna: Zanichelli, 2020) at 102 ff.

[31] Art 614 bis, par 1 Code of Civil Procedure (Italy).

[32] Tiscini, *supra* note 8 at 365.

Regarding the first point, the inability to bring an injunction claim against company directors reduces the effectiveness of the protection offered by this procedural mechanism, as it prevents action against those directly responsible for managing the company. As has been observed in relation to compensatory actions under Article 2395 of the Civil Code, and regardless of the effectiveness of the remedy granted in a particular case, the possibility of acting directly against the responsible director typically increases the deterrent effect on directors in adopting harmful conduct toward third parties, as it exposes them personally to legal proceedings.[33] If, in the context of civil liability, the law ensures that those in managerial roles are not immune from compensation claims by harmed parties, then similar direct actions should be allowed for injunctive relief, permitting proceedings against those who, in practice, act on behalf of the company.

A possible solution[34] could lie in a broad interpretation of defendants to include professionals,[35] based on the wording used in consumer representative actions.[36] This solution, which could be justified on the similarities between these actions and class actions,[37] would permit to bring injunctive actions directly against professionals with managing tasks in a corporation. While there do not seem to be significant obstacles to carrying out the role of director in a professional

[33] See Chapter 5, subsection 4.6.; Giuliana Scognamiglio, "La responsabilità gestoria: le azioni" in Carlo Ibba & Giorgio Marasà, eds, *Le società a responsabilità limitata* (Milano: Giuffrè, 2020) 1829 at 1846. More generally, on the deterrent function of civil liability, see Pietro Sirena, *La funzione deterrente della responsabilità civile alla luce delle riforme straniere e dei principles of European Tort Law* (Milano: Giuffrè, 2011).

[34] The CS3D does not offer any insights to this end as Article 29, paragraph 3 (c) allows harmed parties to seek injunctive measures against companies that have violated their obligations but does not introduce any additional requirements beyond those already established under Italian collective injunction actions.

[35] See Tedoldi & Sacchetto, *supra* note 9 at 240 ff. By professional I mean "natural or legal person[s] acting in the course of their trade, business, craft, or profession, or an intermediary thereof"; see Art 3 of the Consumer Code (Italy).

[36] See Article 140-ter Consumer Code (Italy), which uses the term "professionals" to include both individuals and legal entities engaged in professional or entrepreneurial activities. The relationship between professionals and entrepreneurship has been addressed by Eva Desana, *L'impresa fra tradizione e innovazione* (Torino: Giappichelli, 2018) [who, *passim*, refers to legislative examples in which there has been a convergence of these two qualifications to ensure effective protection for certain 'weaker' categories, such as consumers].

[37] Consumer representative actions–introduced in Italy with *d.lgs. 10 marzo 2023, n. 28*, 10 March 2023, 28, implementing EU, *Directive 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC,* [2020] OJ L 409/1–aim to protect the collective interests of consumers, offering both injunctive and compensatory protection. However, only the former protects collective interests–at least, according to the majoritarian view; for a skeptical position, see Amadei, *supra* note 6 at 335. By contrast, compensatory protection follows the individualistic model used in class actions by referring to the concept of homogeneous individual interests: see Art 140 septies, para 8, c) Consumer Code (Italy), which requires homogeneity among the individual interests to be protected as an admissibility requirement for the action, when compensatory relief is sought. Therefore, the limitations discussed regarding this point in relation to class actions extend also to compensatory consumer actions. For further details on the similarities and differences between consumer representative actions and class actions, see Annamaria Iandoli, "La Class action consumeristica: il nuovo ventaglio di tutele offerto dalla direttiva n. 2020/1828 si innesta sulle orme della legge n. 31/ 2019" (2024) Judicium, online: <https://www.judicium.it/wp-content/uploads/2024/09/Iandoli.pdf>; Miriam Martino, "Sulla difficile convivenza tra le azioni rappresentative a tutela degli interessi collettivi dei consumatori e le azioni collettive ex artt. 840- bis e ss. c.p.c." (2024) 4 Riv dir proc 1222–1244.

capacity,[38] such an extensive interpretation would not generally cover all directors, but only those who perform their activity in a professional manner. Indeed, although directors' diligence is assessed as professional diligence, in Italy there are no general legal requirements for professional qualifications applicable to all S.p.A. at the time of director appointment.[39]

Moreover, the admissibility of the proposed extensive interpretation is debated among legal scholars. Some reject this possibility arguing that the inclusion of professionals among defendants marks the distinction between collective injunction actions and consumer injunctions, which explicitly permit it.[40] Therefore, a better solution–albeit not free from potential criticism–would be to advocate for a legislative amendment of Article 840 sexiesdecies of the Italian Civil Procedural Code that expressly includes directors among possible defendants in collective injunction actions.[41]

In any case, it is worth highlighting that although injunctive actions can currently be filed only against corporations, this does not shield directors from liability towards the corporation if they

[38] At least when managerial and professional activities are closely tied (e.g., in the case of accountants). The position taken in the text accompanying this note is rooted in the recognition, established by Italian tax jurisprudence, that revenues from managerial activity qualify as professional self-employment income when such a connection exists: see Giorgio Emanuele Degani & Damiano Peruzza, "Consulente e amministratore di Srl: stop alla riqualificazione del reddito" (13 March 2023), online: *NT+ Fisco* <https://ntplusfisco.ilsole24ore.com/art/consulente-e-amministratore-srl-stop-riqualificazione-reddito-AE3eTkzC>. The link between managerial and professional activities, and the resulting unitary nature of the remuneration derived from them, suggest that the professional qualifications influence the role as a director.

[39] Unlike what is required for auditors and unless specific provisions are set out in the company's bylaws (Art 2368, para 1, and Art 2387 of the Civil Code (Italy)), or unless directors are appointed in listed companies (Principle I.2 of the Borsa Italiana Corporate Governance Code), or companies subject to special regulatory regimes, such as banks, insurance companies, financial advisory firms, or regulated market operators (see Arts 13, para 2, 18-ter, para 2 and 64-ter, para 1 TUF; Arts 7 and 8 of the Italian Ministry of Economy and Finance *decreto ministeriale 23 novembre 2020, n. 169*, 23 November 2020, 169).

[40] This point is highlighted, in relation to Italian class actions (but extensible to collective injunction actions) by Andrea Giussani, "La riforma dell'azione di classe" (2019) 6 Rivista di Diritto Processuale 1572 at 1574.

[41] Admittedly, this proposal might be criticized for its "piercing of the corporate veil" effect, as it could undermine the integrity of the corporation as a separate legal person. Although originated in common law countries, the corporate veil principle has also been adopted in civil law systems like Italy; for a comparative analysis, see Roberto Dante Cogliandro, "Crediti involontari nel Common law e nel nostro ordinamento: strumenti a tutela dei creditori in posizione di debolezza" (2020) 4 Giustizia Civile 839–887. While the veil shields individuals within the entity, such as shareholders and directors, from liability for conduct undertaken on behalf of the entity, it is not without limitations. For instance, it cannot be abused (i.e., employed to avoid accountability for personal wrongdoing). For further readings, for Italy, see most recently Enrico Ginevra & Sebastiano Costa, "Rapporto organico e responsabilità della società di capitali per il fatto illecito del proprio amministratore" (2025) 1 Riv Soc 43–66; Giusi Nicolosi & Paolo Bogani, "L'abuso della personalità giuridica. Analisi della fattispecie e profili di responsabilità risarcitoria" (2025) 3 Danno e responsabilità 342–351; Chiara Prevete, "Quando la responsabilità per inquinamento ricade sugli amministratori?" (2025) 4 Ambiente & Sviluppo 280–282; Paolo Montalenti, "L'abuso del diritto nel diritto commerciale" (2018) 4 Riv Dir Civ 873. For Canada, see, most recently, Douglas Sarro, "Corporate Veil-Piercing and Structures of Canadian Business Law" (2022) 55:1 UBC L Rev 203–251; Michael Marin, "Third-party liability of directors and officers: Reconciling corporate personality and personal responsibility in Tort" (2019) 42:2 Dalhous Law J 335–370; Shannon Kathleen O'Byrne & Cindy A Schipani, "Personal Liability of Directors and Officers in Tort: Searching for Coherence and Accountability" (2019) 22:1 U Penn J Bus L 81–134; Mohamed F Khimji & Christopher C Nicholls, "Piercing the corporate veil reframed as evasion and concealment." (2015) 48:2 UBC L Rev 401–447.

fail to ensure compliance with an injunctive order received by the corporation. Likewise, directors remain liable to the corporation where their conduct has caused damage to the entity, such as when the company incurs expenses to remove or limits the negative effects of violations of directors' duties. Thus, while the inability to sue directors directly may reduce deterrence, some deterrent effects persist, as directors remain exposed to liability towards the corporation through the harm caused to the corporation. Naturally, this liability could be claimed primarily by the corporation itself, its shareholders on its behalf, and perhaps creditors if the damage has reduced the corporation's capacity to repay its debts.

The second limitation, concerning the lack of clarity regarding the substantive requirements for granting the injunction claim, arises from the absence of specific legislative guidance[42] on their concrete interpretation and application.[43] These requirements consist of a preliminary assessment of the merits of the claim (*fumus boni iuris*) and the existence of an actual and imminent risk of harm resulting from the continuation of the allegedly harmful conduct (*periculum in mora*). These requirements need an ad hoc interpretation that is autonomous from the interpretation of the requirements for the award of damages in compensatory claims (unlawful conduct and unjust harm). This is because injunctive relief has a different function than compensatory relief[44] and may be granted even in the presence of conduct that is lawful yet harmful and/or prior to the occurrence of any actual damage.[45]

One solution may be to interpret the *fumus boni iuris* as the assessment of whether the defendant's conduct may infringe upon a right of the claimant.[46] In cases where a company fails to establish appropriate structures to identify and mitigate the social and environmental risks of its business activity, it should generally be considered that such conduct may infringe upon fundamental rights, such as the right to a healthy environment and the right to life, of the affected parties. Naturally, where equally significant interests are at stake, such as freedom of economic

[42] Both in the Civil Code provisions and in the CS3D.

[43] For a discussion of the challenges this limitation poses, particularly in relation to the protection of climate-related harms, see Tiscini, *supra* note 8 at 350 ff; Fornasari, *supra* note 8.

[44] Art 2043 Civil Code (Italy).

[45] See above subsection 2.1.1. The availability of injunctive relief against lawful conduct might suggest that imposing a duty of care on directors to prevent harm to communities is redundant since potential victims could obtain protection regardless. In my view, this objection is misplaced. First, as noted above, the possibility of granting injunctive relief for lawful conduct is still unsettled and would, in any case, complicate judicial assessment. Second, the proposed duty to take care to prevent harm to communities applies only to larger companies, primarily those within the scope of the CS3D. For companies outside this scope, the establishment of adequate arrangements to prevent harm to communities is not generally mandatory, so inadequacies could be deemed legitimate. The broad reach of injunctive relief may therefore extend protection even beyond the scope of the duty of care proposed here to include these latter companies.

[46] Tiscini, *supra* note 8 at 347; 353; Fornasari, *supra* note 8 at 2074–2075. See also Ruffolo, *supra* note 14 at 245 [who highlights that collective injunctive actions focus on the (unlawfulness of the) conduct that the claim seeks to stop].

initiative or the protection of employment positions, these must be weighed against the interests harmed by the damaging activity.[47]

Regarding the *periculum in mora*, it should be interpreted as the outcome of an assessment of the degree of risk that may materialize if the harmful conduct is not restrained. This assessment must be forward-looking, since the function of injunctive relief is not to compensate for harm that has already occurred, but rather to prevent the occurrence or recurrence of harm in the future. The degree of risk required to grant protection should also be evaluated in light of the possibility of effective redress if the harmful conduct is not limited. Accordingly, the less likely it is that the potential harm can be adequately remedied, the more appropriate it will be to grant the injunction. This solution aligns with the general principles underpinning the granting of injunctive relief, as well as with the precautionary principle.[48]

The third limitation concerns the recipient of the enforcement measures' payment and arises from the lack of directives in the law regarding the application of these measures in the specific context of injunctive class actions. Generally, this payment is paid to those who obtain the injunctive order, and this has been deemed the rule to follow in collective injunctive actions as well.[49] However, in these actions, the injunctive order benefits a collectivity, which goes beyond the party that initiates the lawsuit and the other individuals who participated in it. Payments for non-compliance serve to reinforce the effectiveness of the injunctive order and thereby indirectly protect the affected interests.[50] For this reason, it would be inappropriate for such payment to be paid to the claimant alone as they represent only a fraction of the affected collectivity.[51] Additionally, directing payments for non-compliance to the protected collectivity would better align with the equity principle underlying this mechanism.[52] For instance, for the legally regulated community models discussed in Chapter 3, the organization representing the whole community would be the recipient of any payment.

This issue should be addressed by law, ideally by ensuring that payments benefit the entire affected collectivity, not just those who pursued enforcement. One solution may be to require recipients to use the funds to mitigate the harm caused by non-compliance, e.g., through environmental restoration. However, assigning this responsibility to individual claimants may discourage enforcement, as they may lack the capacity or willingness to manage such funds.

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[47] As noted in literature, the collective injunctive action 'aims to redefine the standards of commercial conduct within the boundaries of legality, without, however, overstepping into a tool intended to neutralise entrepreneurial discretion, which is protected under the Constitution'; see Renna, *supra* note 11 at 36.

[48] Fornasari, *supra* note 8 at 2076. The author further specifies (and, I believe, rightly) that where the harmful conduct is only one among several contributing actions by multiple parties, as in the case of climate change, injunctive relief should nonetheless be available based on its proportionality to the harm caused, as it occurs for liability; see *ibid* at 2077–2078.

[49] Tedoldi & Sacchetto, *supra* note 9 at 256–257; Diana, *supra* note 5 at 460.

[50] Mazzamuto, *supra* note 30 at 159.

[51] Amadei, *supra* note 6 at 331 and, similarly, Renna, *supra* note 11 at 32.

[52] Mazzamuto, *supra* note 30 at esp. 155. The proposed destination of non-compliance payments would not be at odds with the private nature civil litigation as the protected interests remain private, but simply belong to collectivities rather than individuals.

Other solutions may be for the law to create specific organizations or trusts to manage payments on behalf of the affected collectivity or, following the model of consumer representative actions, funds could be to allocated to public authorities for initiatives that enhance collective protection.[53] In both cases, the award would be paid to a third party, either private or public, responsible for ensuring that it benefits all affected groups, ideally in proportion to the risk suffered. This approach would detach the management of the award from the claimant community, tie its use to the purpose it was paid for, and, assuming the managing entity has better skills and expertise than the affected communities themselves, promote a more effective use of the funds.[54]

Within this research, the uncertainty surrounding the recipient of monetary sanctions for non-compliance also raises the question of whether such funds *can* be directed to an affected community since, in Italy, monetary rights are considered individual.[55] The issue is important as it touches on the broader topics of the legal nature and form of stakeholder communities, to which I will return at the end of this chapter.[56] For present purposes, assuming non-compliance payments to communities are possible under Italian law, the recipient community must at least hold legal subjectivity[57] to be eligible to receive such payments. Legal subjectivity creates a formally individual right (albeit substantially it may serve collective interests) that can be satisfied through monetary compensation. Without such status, access to compensation is difficult, if not impossible, under current law, as no individual right would exist to justify the payment. The community models discussed in Chapter 3 would, once again, be particularly suited for this purpose as they possess this legal status.

3. Compensatory Mechanisms

Injunctive actions allow harmed parties to request the restoration of the situation as it was before the harmful conduct, whereas compensation for damages can only be obtained through the activation of compensatory remedies. Such remedies are also necessary when the harmful conduct has already caused damage, thereby requiring restorative intervention in relation to the past.[58] In cases of conduct affecting multiple parties, compensatory relief in Italy can be obtained through class actions (*azioni di classe*).[59]

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[53] In consumer cases, funds are split equally between the Ministry of Justice, to support institutional services, and the Ministry of Enterprises and Made in Italy, to improve the registry of organizations eligible for cross-border actions. See Art 140 terdecies of Consumer Code (Italy).

[54] Collective action problems and free-riding concerns would, of course, remain. However, these could be mitigated through measures such as ensuring an effective reimbursement of litigation costs to claimants.

[55] Unlike collective rights, monetary rights can only be satisfied if each affected individual's assets are restored from their losses. Conversely, collective rights are satisfied collectively with a single act or behaviour from the debtor, such as stopping a risky activity.

[56] See subsection 4 below.

[57] See below, footnote 66, for differences from legal personality.

[58] By contrast, injunctive actions aim to prevent the occurrence of damage in the future.

[59] Also referred to as *azioni di classe risarcitorie*, to distinguish them from collective actions from injunctive relief, referred to as *azioni di classe inibitorie*.

3.1. Italian (Compensatory) Class Actions

3.1.1. Relevance for the Protection of Community Interests

Compensatory class actions (or, simply, class actions) are regulated by Articles 840 bis and following of the Italian Civil Procedure Code.[60] They provide protection for groups of affected individuals with homogeneous claims, where homogeneity arises from being harmed by the same behaviour.[61] While these actions safeguard individual homogeneous interests rather than collective interests, they are nonetheless important for protecting communities affected by directors' breaches of their duty of fair treatment towards them.[62]

Similar to collective actions for injunctions, class actions in Italy can be initiated by any class member or non-profit associations or organisation–including unrecognised ones[63]–that, according to their articles or bylaws, protect the interests of the affected class, and are listed in a specific register at the Ministry of Justice.[64] The plurality of affected individuals and the standing of organisations provide a collective dimension to this mechanism, which specifically addresses multiple individual damages caused by the same harmful behaviour. Additionally, the attribution of standing to both individual class members and representative organisations strengthens the private enforcement effect of class actions by expanding standing beyond those who are individually affected.[65]

The collective dimension of Italian class actions is further reinforced by the possibility for class members to include both natural persons and, arguably, *legal persons* (or even *legal subjects*, which have legal status and standing but have not sought State recognition).[66] Legislation governing class actions in Italy does not specify the concept of class member nor contain any

[60] For an historical overview of the evolution of class actions in Italy, see Gianluca Scarchillo, *Class action. Dalla comparazione giuridica alla formazione del giurista: un caleidoscopio per nuove prospettive*, 3rd edn (Torino: Giappichelli, 2024) at 151 ff.

[61] Andrea Giussani, "Azione di classe" in *Enciclopedia del Diritto*, Annali VII (Milano: Giuffrè, 2014) 132 n 40. This broad interpretation of the concept of homogeneity has also been supported by Tribunale Venezia, 12 January 2016, Order (Italy). However, there has been fluctuation between broad and narrow interpretations in Italian courts; see Fabio De Dominicis, "I numeri e lo stato dell'arte dei primi dieci anni di vita dell'istituto" in Vittoria Barsotti et al, eds, *Azione di classe: la riforma italiana e le prospettive europee* (Torino: Giappichelli, 2020) 261 at 274–275.

[62] Cf. Sofia Caruso, "La legittimazione attiva nell'azione di classe" in Barbara Randazzo, Albert Henke & Stefaan Voet, eds, *L'azione di classe italiana nel quadro europeo: profili sostanziali e processuali* (Torino: Giappichelli, 2025) 247 at 266 [who highlights the polymorphous nature of Italian class actions, which serve both the protection of widespread interests and narrower community interests].

[63] The difference between recognised and unrecognised associations in Italy is reported in Chapter 3.

[64] Art 840 bis para 2 Civil Procedure Code (Italy).

[65] Antonio Carratta, "I nuovi procedimenti collettivi: considerazioni a prima lettura" (2019) Giur it 2297–2300 at 2298.

[66] In Italy, entities may have two different legal statuses: legal personality and legal subjectivity. Legal personality grants members limited liability for entity's debts and is typically acquired through state recognition or incorporation. Legal subjectivity, instead, is attributed to entities lacking legal personality and simply denotes a degree of autonomy from members (e.g., the ability to have rights and duties), though these two levels are not entirely distinct.

elements that could exclude legal persons from affected class members.[67] If this interpretation is correct, including legal persons as class members highlights the collective nature of the protection offered by the class action mechanism, particularly when such an entity seeks to safeguard interests of collective relevance–as in the case of an environmental association harmed by a business activity that undermines the achievement of its statutory objectives.[68]

Moreover, characterising the protected interests in terms of homogeneous individual interests may be more advantageous in practice than framing class actions as instruments for the protection of collective rights. While the violation of collective rights creates an identical harm among affected collectivity members, Italian class action legislation merely requires that class members suffer *similar* harm, that is, harm originating in the same conduct. However, the notion of similarity is broader than identity; therefore, similar harm includes identical harm.[69]

A further advantage of Italian class actions for stakeholder community protection is that they cover any type of harmful conduct as well as any type of damage, both material and immaterial.[70] This implies that class actions can provide comprehensive and enhanced protection for affected communities, regardless of the specific context in which the damage has occurred. Specifically, the ability to recover for immaterial harm is fundamental for affected communities to address issues such as diminished access to natural resources, degraded landscapes, and others.

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[67] This position is supported by Caruso, *supra* note 62 at 251; Manuela Malavasi & Giacomo Ricciardi, "La nuova class action: analisi delle principali disposizioni" (10 September 2019) n 26, online: *DB* <https://www.dirittobancario.it/art/la-nuova-class-action-analisi-delle-principali-disposizioni/>. See also Giorgio Afferni, "La nuova azione di classe antitrust" in Vittoria Barsotti et al, eds, *Azione di classe: la riforma italiana e le prospettive europee* (Torino: Giappichelli, 2020) 123 at 124; Aurora Saija, "Il punto di vista dell'impresa: rischio o opportunità?" in Vittoria Barsotti et al, eds, *Azione di classe: la riforma italiana e le prospettive europee* (Torino: Giappichelli, 2020) 305 at 305 [who recognize that enterprises can also initiate class actions].

[68] Clearly, when an entity acts as a member of the class, it does so in defence of its own individual interest. It therefore holds ordinary standing. Conversely, when the entity acts as a representative of the class, it does so to protect the interests of others (i.e., the class members) through a mechanism of extraordinary standing conferred by law.

[69] For a discussion on the transition from identity requirement (*same* harm, required in the previous consumer class action under Art 140-bis of the Italian Consumer Code before *decreto legge 24 gennaio 2012, n. 1*, 24 January 2012, 1) to homogeneity requirement (*similar* harm, required under current 'general' class action), see Martina Lorenzotti, "Azione di classe e diritti individuali omogenei: opportunità o limite?" (2022) 2 Contr Impr 682–698; Andrea Piletta Massaro, "The Italian Class Action Reform: A Redesigned Tool beyond Consumer Law" (2020) 28:4 ERPL 841–864 at 847 ff. It may also be worth noting that a proposal for the reform of class actions in Italy from 2013 referred to both homogeneous individual rights and collective interests; however, the proposal was not successful. See *proposta di legge n. 1335 (presentata il 9 luglio 2013*), Art 1.

[70] See Cassazione civile, 31 May 2019, Section III, No 14886 (Italy), para 16 ['The class action remains compatible with claims for compensation of non-monetary damages, provided that the common features of such damages among all class members are clearly emphasized, adequately specified, and proven. As a result, the original claimant has the burden of seeking compensation for a non-monetary harm that is not individualized, but rather based on circumstances shared by all members of the class.'][My translation] For a comment to this ruling, see Vincenza Clelia Castaldo, "Il danno non patrimoniale nell'azione di classe: il quantum sul letto di Procuste" (2020) 7 Corr giur 954–962. On the compensation of non-monetary harm through class actions, see also Giulio Ponzanelli, "Risarcimento del danno e class action" in Vittoria Barsotti et al, eds, *Azione di classe: la riforma italiana e le prospettive europee* (Torino: Giappichelli, 2020) 31 at 34 ff.

More generally, class actions have been introduced in Italy to reduce collective action problems and facilitate access to justice for those who do lack economic means or have suffered minimal damage that would warrant protection through traditional compensatory actions.[71] While class actions' structure has been criticized for not perfectly aligning with this intention,[72] their introduction in Italy has been an important step forward for addressing damages to groups, including local communities.

3.1.2. Drawbacks

However, the protection of community interests through Italian class actions also features limitations.[73] For one, class actions are ultimately ground in an individualistic structure rather than a truly collective one.[74] This is evident, for instance, in the standing of representative organizations. This is extraordinary standing granted by law, meaning that the claimant organization does not hold the right it aims to protect but acts on behalf of class members who do.[75]

Furthermore, standing is granted only to organizations that meet eligibility requirements for inclusion in a specific register established by the Ministry of Justice. This includes, among other things, being a third-sector entity and having carried out statutory activities continuously and adequately for at least two years.[76] Limiting standing to Third-Sector Entities could be a restrictive requirement for community representative entities, as this qualification is granted only when strict formal and substantial requirements are met and the entity is included in a list of Third Sector Entities. For communities that satisfy the three criteria discussed in Chapter 3, this requirement would not pose a significant obstacle, as associations, CERs and CCs can all qualify

[71] Ponzanelli, *supra* note 70 at 31–32; Giussani, *supra* note 61 at 133 ff.

[72] Especially in comparison with US class actions from which Italy has drawn; see e.g. Giussani, *supra* note 61 *passim*. For example, to mitigate collective action problems law firms must be encouraged to identify potential causes of action and pursue them, with the possibility of obtaining significant gains if the claim is successful. These factors are strong in North American class actions but are lacking in Italian ones. As noted in Chapter 2, footnote 45–to which the reader is referred for further details–Italy does not allow lawyer-client agreements stipulating that the legal counsel's fee will only be paid if the claim/defence is successful, typically as a percentage of the recovery (success engagement fees or contingency fees; in Italian, *patto di quota lite*).

[73] The discussion here is limited to the most relevant drawbacks for community protection. However, class actions also face other, more general limitations (e.g., unattractiveness to law firms that possess appropriate financial and technical means to effectively protect class interests). For a critical overview of these limitations, see Bruno Sassani, "Il paesaggio ostile: nodi e snodi dell'italica azione collettiva" in Barbara Randazzo, Albert Henke & Stefaan Voet, eds, *L'azione di classe italiana nel quadro europeo: profili sostanziali e processuali* (Torino: Giappichelli, 2025) 109 as well as the previous footnote.

[74] Among many others, e.g., Ruffolo, *supra* note 14 at 234; Sebastiano Costa, *Organizzazione dei servizi di investimento e rapporti con la clientela* (Milano: Giuffrè, 2020) at 301 ff [who excludes the suitability of Italian class actions to protect the collective interest to direct savings into investments that may benefit the collectivity].

[75] However, class actions cannot and should not be considered mere joinders of individual actions, as they have specific features and objectives; see Bruno Sassani, "Il paesaggio ostile: nodi e snodi dell'italica azione collettiva" in Barbara Randazzo, Albert Henke & Stefaan Voet, eds, *L'azione di classe italiana nel quadro europeo: profili sostanziali e processuali* (Torino: Giappichelli, 2025) 109, *passim*.

[76] Ministry of Justice, *decreto ministeriale 17 febbraio 2022, n. 27*, 17 February, 27, Arts 1 and 3.

as Third-Sector Entities–if certain legal requirements are satisfied.[77] However, other stakeholder communities adopting different models, may not meet this requirement; if they do not, they could not resort to class actions. Although Italian courts have, in some cases, extended standing to non-profit entities outside the Third Sector, such as trade unions, this judicial recognition has not yet been formally codified into a statutory provision.[78]

Additionally, the requirement of having carried out statutory activities for at least two years implies that standing is granted only to organizations that existed prior to the occurrence of the harm. This excludes the possibility of creating ad hoc organizations, even by members of the harmed class themselves, for the purpose of initiating a class action. Such a restriction is difficult to justify in terms of reasonableness, especially when compared to the previous version of the Italian class action (which was limited to consumer matters), where the formation of ad hoc organizations was allowed[79] as well as compared to the rules governing collective injunctive actions. Moreover, preventing the formation of ad hoc entities for the protection of class interests significantly limits access to justice for individual victims, who, by organizing collectively, could lower the costs and difficulties of initiating the proceedings, thereby challenging the achievement of class actions' objectives.

Regarding standing as defendants, class actions only include business entities (as well as public service providers), excluding direct compensatory actions against directors.[80] This feature is shared with the injunctive actions analyzed above. As discussed, such limited standing diminishes the protection of affected parties and reduces the deterrent effects of liability mechanisms for those who concretely engage in harmful conduct.[81] Given that this research proposes a directors' duty of care to prevent harm to communities, thus establishing grounds primarily for director liability, the discussed limitation would significantly undermine the effectiveness that the proposal seeks to achieve in terms of community protection.

Italian class action's limitations also concern the concrete availability and type of compensation. As noted, they permit compensation for non-monetary harm (or immaterial harm), as explicitly recognised in 2019 by the Italian Court of Cassation. However, in the same ruling, the court dismissed the claim for compensation for immaterial harm suffered by a class of train users due to recurrent service disruptions, holding that this type of harm grants the right to compensation

[77] *d.lgs. 3 luglio 2017 n. 117*, 3 July 2017, 117, Art 5.
[78] TAR Lazio, 5 April 2023, No. 10653 (Italy).
[79] Art 140 bis Consumer Code (Italy), now repealed.
[80] Art 840 bis para 3 Civil Procedure Code (Italy).
[81] Naturally, the greater deterrent effect that could be achieved through a direct compensatory class action against directors does not exclude that the use of collective redress mechanisms against the company may already produce deterrent effects on directors themselves. This happens mainly through the possibility of recovery by the entity against its directors, should the harm to collective interests stem from management conducted in breach of their duties. As noted by Scarchillo, *supra* note 60 at 197, from a Law and Economics perspective, class action lead to greater internal awareness within companies on the part of directors and officers; these individuals will be more inclined to ensure the company's compliance not only due to their general duty to promote the success of the company, but also for fear of being held liable for the damage caused by the company following a class action, which could result from misconduct attributable to mismanagement by the directors, in breach of their fiduciary duties and duty of care.

only if it results in *considerable* harm.[82] In doing so, the court not only excluded trivial harm but also precluded arguments that the aggregation of minor harm across all class members could amount to substantial damage. This interpretative approach had already been adopted in Italian jurisprudence in the context of individual lawsuits. However, its application to class actions raises concerns as it risks undermining one core objective of class actions–namely, to facilitate access to justice for individuals who have suffered minor damages that would not be economically viable to pursue individually–and limits the practical effectiveness of this tool.[83]

Regarding the type of compensation, class actions provide only for monetary compensation and restitutions.[84] This emerges from the law, which establish that, upon acceptance of the request for membership in the class, the delegated judge orders the defendant to pay each joining member "the *sums* or items owed as compensation or restitution."[85] The sole availability of monetary compensation in class actions raises two key issues for affected communities.

First, monetary redress may not be the most appropriate remedy for the non-monetary harm suffered by communities. For example, when business conduct has compromised the cleanliness of a watercourse, impairing a community's access to and usage for drinking or other relevant purposes, monetary compensation is inadequate. A better solution would include restorative measures to reintegrate the community's ability to access and use the resource, alongside public apologies and commitments to implement specific actions to enhance future access, as a way to address the loss of use and enjoyment experienced by the community during the period preceding the restoration.[86]

In particular, restoration is key for the effective protection of community interests. While restorative measures can be obtained through collective injunctive actions, such relief may not always be available or sufficient. For instance, injunctive relief cannot be sought if the damaging conduct has already ceased, and even when sought, courts are not obliged to order restoration from the defendant. Class actions should therefore be able to accommodate such claims. otherwise, the protection offered to affected communities.[87]

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[82] Corte di Cassazione, 31 May 2019, Civil Section III, No 14886 (Italy), para 16. The court requires the claimant to identify 'the concrete terms of the actual seriousness and severity of the harm caused and the injury suffered, which must not be confused with mere discomfort, annoyance, disappointment, anxiety, or any other form of dissatisfaction relating to various aspects of life.' [My translation]

[83] Sassani, *supra* note 73 at 123–124.

[84] Malavasi & Ricciardi, *supra* note 67 [who also note that non-monetary compensation in is rather a feature of so-called public class actions].

[85] Art 840 octies, para 5 Civil Procedure Code (Italy). [My translation]

[86] However, as of now, this outcome does not seem achievable through interpretation in Italian compensatory class actions. Different is the case of injunctive actions, as they allow the judge to order any measures deemed appropriate to eliminate or limit the negative effects of the defendant's conduct.

[87] Naturally, the argument for non-monetary compensation does not exclude the possibility for harmed individuals to seek compensation (including monetary compensation) for the individual harm suffered. In my example, this may apply to people who experiences health issues for drinking polluted water. Furthermore, when restoration or other more appropriate forms of redress are not available, payment should certainly be granted to compensate for the loss suffered.

When monetary compensation is granted, a second issue arises: whether monetary compensation can be awarded to affected parties collectively rather than individually. This element is key for local communities, which, as understood in this research, operate as groups with collective interests rather than as a mere sum of individuals. Three situations can be identified, depending on the claimant:

a. The action is filed by a representative entity of the community that acts in its own interest.
b. The action is filed by a representative entity of the community that acts on behalf of community members.
c. The action is filed by a community member.

In case a), the community's representative entity is acting to protect its own interests as an affected class member. If the claim is successful, the entity may obtain monetary compensation, thereby indirectly benefiting the whole community it represents. Naturally, monetary compensation will also be granted to other affected class members in addition to the community's representative entity. Conversely, in case b), the entity acts to protect someone else's interests, specifically the (homogeneous) individual interests of community members. Consequently, only the represented community members can benefit from monetary compensation if the claim is upheld. Finally, similar to case b), in case c), affected community members are also represented in the lawsuit; however, like case a), the claimant acts as a class member. In this case, the claiming community member will receive compensation as a member of the affected class, along with other class members, who may include other community members.

As shown, all three cases grant compensation on an individual basis, whether the individual is a natural person or an entity. Therefore, under the current Italian legal framework, monetary compensation cannot be paid to communities as collectivities. However, this obstacle can be overcome to a certain extent when the community has its own representative entity, which statutorily aims to protect community interests. In this case, the community may seek redress through the entity, which is suitable to obtain monetary compensation. Importantly, in such a case, the right protected would not be the rights of community members nor the collective right of the community as a whole, but rather the individual interest of the community's representative entity. Conversely, in the remaining cases, monetary compensation can only be awarded to affected individuals who have joined the class. Finally, in both individual and collective compensation through a representative entity, the law provides no guarantee that the sum awarded will be used to remedy harm to the commons. A better solution, as argued below, would be resorting to in-kind compensation.[88]

[88] See subsection 3.1.3.c. below.

3.1.3. Proposals for Improved Community Protection

To enhance community protection from corporate harm, several adjustments could be made to class actions to address the limitations identified above. The most important ones are discussed below.

a. Protecting Collective Harm

A key issue with compensatory class actions is their inherently individualistic nature, as these actions address harm suffered by multiple individuals rather than collective harm affecting a group as a whole. This limitation is evident in both standing and compensation, particularly when representative organizations bring the claim.

To address this limitation, possible recommendations include:

a. Recognizing collective harm as a compensable damage in its own right, rather than merely as the sum of individual losses.
b. Expanding standing to include representative organizations beyond the restrictive requirements outlined in the Italian Ministry of Justice Decree No. 27/2022.
c. Permitting monetary remedies to be awarded to collectivities instead of individuals.

Solution a) is the most disruptive, and perhaps the most difficult one. It implies transforming the compensatory class action into a tool not only for the protection of homogeneous individual interests, but also for the protection of collective interests. Admittedly, the requirement of homogeneity does not, in itself, exclude the protection of identical individual interests underlying collective rights. However, it has been shown that the individualistic characterization of class actions manifests across all aspects of the procedure, from standing to the allocation of compensation. Expanding the scope of class actions to include the protection of collective interests would therefore require an overhaul of the entire mechanism, for example, by granting standing to representative entities that advocate for collective interests, and by awarding compensation to the affected community rather than to individual members.

This solution has been supported by an authoritative scholar.[89] However, despite its merits, expanding the scope of class actions to include collective interests appears unlikely to succeed, both because of its revolutionary nature and the fact that it is supported only by a minority of scholars. Therefore, alternative, and perhaps more modest, approaches to mitigate the consequences of the individual nature of class actions should also be considered.

Regarding standing, the eligibility of representative entities for inclusion in the register at the Ministry of Justice could be broadened beyond the current restrictive requirements (solution b). This would allow a wider range of organizations to register, even if they do not qualify as Third-Sector Entities–perhaps simply because they have not applied for registration in the appropriate registry. Nonetheless, these entities could still be suitable for protecting homogeneous individual interests. Furthermore, a revision should also be proposed regarding the requirement of

[89] Stefano Rodotà, *Le azioni civilistiche* (Padova: CEDAM, 1976) at 97.

existence in the two years prior to the representative entity's application for registration. A possible model could be that of the injunctive class action, which allows actions to be brought even by entities established for that specific purpose. Indeed, it is unclear why compensatory class actions should be subject to a more restrictive standing than collective injunctive actions, especially considering the increasing convergence between the two mechanisms.

Regarding remedies, solution c) suggests permitting monetary compensation to be awarded to collectivities rather than individuals. This would improve community protection for two reasons. First, it better aligns with the collective nature of the damage, which is suffered by the community, not just by its individual members. Second, and consequently, the awarded compensation would benefit the entire recipient community. This solution could be achieved by making the payment to a representative entity of the affected community, either pre-existing or created for the occasion, with the obligation to use the money for activities advantageous to the community as a whole.[90] In the Italian legal system, this could occur by establishing separated assets for a specific purpose (*patrimonio destinato ad uno specifico affare*), when possible.[91] Alternatively, a trust could be established to manage the money on behalf of the community.

b. Directors as Defendants

Another issue with compensatory class actions is that they do not include corporate directors as possible defendants. This limits communities' recourse to enforce harmful violations of directors' duties of fair treatment. A potential solution, similar to what has been suggested for injunctive class actions, could be to expand the scope of possible defendants to include professionals. However, as noted, not all directors are professionals, so this solution, while avoiding formal legal amendments, may not be very effective.

Alternatively, a formal amendment of class action provisions could be proposed to explicitly include corporate directors as potential defendants. This amendment could be supported by the Civil Code provision that allow affected third parties to bring compensatory claims against directors for harm caused by their conduct (Article 2395), together with the general nature of the current class action mechanism, which may be used to enforce claims arising from unlawful conduct of any kind. If the purpose of class actions is to provide an instrument to seek redress for harm caused by companies, and if Italian commercial law expressly permits claims to be brought against directors responsible for such harm–both to promote responsible conduct and to enhance

[90] Theoretically, this solution may generate skepticism as it would limit the discretion of directors in how to use the awarded money. However, I argue that this limitation would be justified by the remedial nature of the compensation.
[91] According to Italian law, the establishment of separated assets is available for Third-Sector Entities when they are registered enterprises with legal personality or religious entities; cf. *d.lgs. 3 luglio 2017, n. 112*, 3 July 2017, 112, Art 1, and *d.lgs. 3 luglio 2017 n. 117*, 3 July 2017, 117, Art 10. Therefore, unrecognized associations, foundations awaiting legal recognition, and companies other than corporations and cooperatives are excluded. Practically, the establishment of separated assets is subject to the concrete possibility of separating the community involvement from the other activities carried out by the entity. For an initial overview of separate assets, see Renato Santagata, *Dei patrimoni destinati ad uno specifico affare* (Milano: Giuffrè, 2014).

protection for the affected parties–then there seems to be no valid reason why class actions should not also be applicable directly against responsible directors.

Another alternative, which sets aside the class action mechanism, could involve associations or organizations whose statutory objectives have been undermined by managerial conduct and that are representative of the affected community bringing a compensatory claim under Article 2395 of the Italian Civil Code. In this case, although the protection remains individual and aims to compensate the damage suffered by the entity itself, it could still result in a form of indirect group protection. This would be achieved through the entity acting as an intermediary, reducing litigation and legal defense costs, which would be borne by the organization.

A further possibility could be that each individual member of the community harmed by the managerial conduct brings a direct action against the director(s). In this case, the individual lawsuits could be consolidated based on the connection between the claims, thereby ensuring procedural efficiency and avoiding potential inconsistencies in judgments. This would also be a solution that requires no legislative amendment, as it is already viable under the current Italian legal framework. However, this approach cannot be defined as collective redress, even if a broad interpretation of this concept is adopted, as it happens with class actions. This is because, unlike in a class action, a consolidation of individual lawsuits would involve no judicial determination of the claimants' belonging to a group of similarly affected individuals. Instead, there would only be a limited assessment of the connection criteria required to consolidate the cases.

Whatever solution is preferred, if the claim is based on Article 2395 of the Italian Civil Code, further adjustments may be necessary to make it more effective for the protection of local communities. As noted in the previous chapter, this provision has generally been interpreted as establishing non-contractual liability. This has led to the application of the relevant rules for tort liability, which impose a heavier burden of proof on the claimant, particularly requiring proof of the subjective element (fault, including negligence, or intent).

To address this issue, it would be advisable to reinterpret Article 2395 as establishing a quasi-contractual liability in cases where directors have violated a protective obligation (*obbligo di protezione*) towards the harmed community. As previously discussed, the duty to establish adequate organizational structures, when interpreted as aimed at protecting both internal and external interests of the company, may give rise to such a duty of protection, thus justifying the application of quasi-contractual liability rules. Importantly, since a breach of a protective duty presupposes a qualified relationship between the damaging and the damaged party, this relationship must be proved by the claimant community when acting through one of the previously discussed mechanisms involving Article 2395.[92]

[92] This topic has been discussed in greater detail in Chapter 5.

Moreover, Article 2395 establishes a five-year limitation period, which starts from the date of the harmful conduct.[93] This limitation period–which is expressly established in the provision–is quite restrictive, as five years may not be sufficient for the damage to materialize or become apparent, leaving victims without effective legal protection. This is especially problematic in cases involving harm to stakeholder communities as understood in this research, where the damage to the community arises from environmental harm, which typically develops and becomes evident only over extended periods of time.

Possible solutions could be either formal or interpretative. Formally, a legislative amendment could be proposed to revise the duration and starting point of the limitation period, either by extending the five-year term and/or modifying the trigger so that it begins from the day the damage becomes apparent. Interpretatively, if the compensation claim is based on a violation of a duty of protection–and therefore regarded as quasi-contractual–an analogical application of the ten-year limitation period for contractual liability could be pursued, starting from the moment the damage occurred.

Furthermore, Article 2395 limits compensation to monetary harm. However, as discussed in the previous chapter, there are no compelling obstacles to rejecting a narrow interpretation in favour of a broader one that includes non-monetary harm.[94] A further confirmation of this view, at least regarding class actions filed under the discussed provision, can arguably be found in the 2019 Court of Cassation ruling,[95] which confirmed the protection of non-monetary damages in class actions. If this broader interpretation is accepted, a related issue arises regarding whether this provision adequately protects non-monetary harm by providing redress beyond monetary compensation. This concern is also shared and even heightened in class actions, which, although permitting redress for non-monetary damages, typically provide only monetary compensation. Therefore, this limitation will be addressed in a specific paragraph below.[96]

Recognizing the possibility of bringing direct liability actions against corporate directors also raises the issue of whether the same harm can generate both managerial liability and corporate liability. This topic has been subject to debate in Italy, particularly in connection with Article 2395 of the Civil Code, specifically regarding whether the company can also be held liable for the director's wrongful conduct.[97] Important scholars have provided an affirmative answer to this question.

[93] Notably, the limitation period set out by Article 2395 is even more restrictive than the one applicable to non-contractual liability in Italy, which, although also five years, is traditionally interpreted as running from the moment the damage manifests.

[94] Chapter 5, subsection 4.4.b.

[95] See footnote 81 above and accompanying text.

[96] Chapter 6, subsection 3.1.3.c.

[97] For completeness, it is worth noting the inverse issue under corporate criminal liability legislation. According to *decreto legislativo, 8 giugno 2001, n. 231*, 8 June 2001, 231, Art 5, a director's wrongful conduct performed in the corporate interest triggers liability for the entity. In this context, the question becomes whether directors can also be held personally liable in addition to the corporation. However, this issue falls outside the scope of the present research.

On a functional level, allowing for both types of liability (directors' and the company's) would enhance the damaged party's chances of recovering compensation, while also encouraging the company to exercise greater care and diligence in selecting its directors and overseeing their actions.[98] On a technical level, this affirmative answer has traditionally been grounded in either the theory of organic identification between the director and the company, or in the principle of vicarious liability of employers and principals, as established in Article 2049 of the Civil Code.[99]

Finally, supporting the possibility for harmed communities to bring liability actions against directors requires consideration of the effectiveness of such a solution in light of the liability shields that often apply to directors, especially indemnification and insurance coverage. A discussion of these instruments has already been provided in a previous chapter.[100] There, it was emphasized that such shields are justified by the peculiar duties and risks that directors face. Consequently, it does not seem appropriate to advocate for their elimination.

Rather, a better solution appears to be adjusting insurance premiums to reflect the actual costs that directors may incur in the event of established liability and an order for compensation.[101] In this way, the payment of a high premium by the company should encourage more careful oversight of management's conduct. Instead, when the director takes out personal insurance, setting a maximum coverage cap could have a deterrent effect, as it would expose the director to the risk of personally bearing part of the compensation, an amount that could be very substantial. The adjustment of insurance premiums may be left to the market while imposition of caps may be implemented through legislation.

[98] Scognamiglio, *supra* note 33 at 1846 ff.

[99] However, it has recently been observed that organic identification is the most appropriate, as, when properly interpreted, it frames corporate liability as liability for the entity's own conduct, rather than for the conduct of its directors. Specifically, directors' liability should be viewed as arising from the corporation's inadequate organizational structure, which is an entity's responsibility aimed to protect third parties potentially affected by its activity. Accordingly, the corporation itself would be liable for organisational deficiencies that permitted the directors' wrongful conduct. This corporate liability would be autonomous but coexist alongside the personal liability of the responsible director. See Ginevra & Costa, *supra* note 41 at 62. The authors leave open the question of the nature of corporate liability, whether it is non-contractual or contractual. In a previous work, one of the authors suggested that the non-contractual liability framework does not adequately address corporate liability for inadequate arrangements. Instead, a more suitable framework is provided by injunctive class actions under Article 840 sexiesdecies of the Italian Civil Procedure Code (Costa, *supra* note 74 at 230 ff and 295 ff). While I agree with this perspective, it does not fully resolve the issue of the nature of this liability, as injunctive protection lies outside the contractual/non-contractual liability dichotomy, which pertains to compensatory claims. This issue requires thorough analysis, which is beyond the scope of this research. Broadly speaking, it seems challenging to apply a purely contractual liability framework, as such liability could arise even outside formal contractual relationships. Therefore, further studies on this topic may consider the possibility of adopting a quasi-contractual framework for corporate liability in the discussed case.

[100] Chapter 4, subsection 2.2.1.c.

[101] Obviously, provided that these costs, in turn, adequately reflect the nature and degree of harm caused.

c. In-Kind Compensation for Non-Monetary Damages

When corporate activities impact commons and the connected communities, the damage is not exclusively financial but also social, existential, biological, or moral.[102] To effectively address this type of harm, compensation must go beyond monetary payments based on the market value of the affected asset (*risarcimento per equivalente*) and include in-kind remedies (*risarcimento in forma specifica*).[103] These may include non-monetary measures (such as restoring the previous environmental state, issuing public apologies, participating in cleanup efforts, or organizing and sponsoring community-benefitting activities) as well as monetary compensation (such as reimbursing restoration costs borne by the damaged party). In other words, because the harm limits communities' access to and enjoyment of shared resources, it cannot be adequately redressed through market-based compensation, as it is not a financial loss. The primary objective of non-monetary measures against corporations should be to restore the community's ability to enjoy these resources.[104] The non-financial nature of the harm being discussed should also be reflected in the compensatory measures sought from directors when they are held personally accountable for the damage.

Under Article 2058 of the Italian Civil Code, judges can award in-kind remedies at the claimant's request, provided they are practicable and not excessively burdensome for the defendant. Their use, however, is constrained by uncertainties that undermine their flexibility and effectiveness, especially in addressing non-monetary harm. Specifically, it remains unclear: i) whether such harm can be redressed through in-kind remedies; ii) whether judges may grant them absent explicit legal provision; iii) what criteria guide the choice of appropriate measures. When in-kind redress is not possible, a further challenge is determining the appropriate amount of equivalent monetary compensation.[105]

Regarding the first point, Italian legal scholarship is divided on whether non-monetary damage can be redressed through in-kind remedies.[106] However, the arguments supporting an affirmative

[102] In Italy, various categories of non-monetary damage have been developed (e.g., moral, biological, existential). For an overview of the debate on the unitary nature of non-pecuniary damage, see Angelo Viglianisi Ferraro, *Il controverso statuto del danno non patrimoniale in Italia: fra cortocircuiti giurisprudenziali e prospettive di riforma* (Napoli: Edizioni Scientifiche Italiane, 2024) at 225 ff. However, given the scope of our discussion, which broadly concerns damage caused by business activities to local communities, a unitary approach to non-monetary damage is preferred here.

[103] Italian literature on non-monetary (or in-kind) redress in Italy is extensive. For an initial overview, see Chiara Angiolini, "Risarcimento in forma specifica - Commento all'art. 2058 c.c." in Emanuela Navarretta, ed, *Codice della responsabilità civile* (Milano: Giuffrè, 2021) 1548 [including numerous bibliographic references]; Alessandro Gnani, *Il risarcimento del danno in forma specifica* (Milano: Giuffrè, 2018); Alessandro D'Adda, *Il risarcimento in forma specifica: oggetto e funzioni* (Padova: CEDAM, 2002).

[104] Aligning with the use value of the affected resources, as emphasised in the ToC. See Stefano Rodotà, *Il terribile diritto: studi sulla proprietà privata e i beni comuni*, 3rd edn (Bologna: il Mulino, 2013) at 169.

[105] For a detailed analysis of the use of in-kind remedies in Italy, including a comparison between common law and civil law traditions, see Maria Rosaria Marella, *La riparazione del danno in forma specifica* (Padova: CEDAM, 2000).

[106] This issue is relevant because, in Italy, a longstanding majoritarian view has conceived of damage compensation as merely monetary, rejecting the possibility of including restorative and other in-kind redress measures, as reported

answer appear compelling.[107] They emphasize the need for effective protection of non-monetary interests, which, by nature, resist economic quantification. If reparation is understood as addressing both the subjective and objective consequences of harm, then in-kind remedies may be particularly well-suited to achieve this goal.[108] Additionally, in-kind redress holds particular value in compensating communities for harm to degraded natural commons. It better serves community interests by aiming to restore the use value of the affected resources, making it more appropriate than market-based monetary compensation in such cases.[109] Finally, in-kind remedies can also serve preventive functions, such as avoiding further damage or harm to others. For instance, ordering the damaging party to restore damaged assets or recreate similar assets can help prevent the ongoing effects of the unlawful conduct.[110]

Once the possibility of in-kind reparation for non-monetary damage is established, the question arises whether this is always available at the injured party's request or only when expressly provided by law. There are opposing positions in Italian scholarship on this topic. One thesis contends that in-kind redress could be granted only when provided by law, based on a presumption of primacy of monetary redress over in-kind redress.[111] Another thesis suggests that there is no hierarchy between these two compensatory measures, and the choice should be based depending on the circumstances of the case (harm suffered, interest protected, concrete availability of in-kind redress).[112]

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by Grazia Ceccherini, "Risarcimento in forma specifica e funzioni della responsabilità civile" (2017) 3 Resp civ e prev 724–738 at 730.

[107] A similar position is shared by Angiolini, *supra* note 103 at 1563.

[108] Carlo Castronovo, *La nuova responsabilità civile*, 3rd edn (Milano: Giuffrè, 2006) at esp. 816, 836; Cesare Salvi, "Risarcimento del danno" in *Enciclopedia del Diritto* (Milano: Giuffrè, 1989) 1084 at 1104. Unlike monetary compensation, which is based on the market value of the affected asset, in-kind redress should consider its emotional value (*valore d'affezione*) to the claimant.

[109] Andrea Montanari, "Il risarcimento in forma specifica e la rilevanza giuridica dell'attività di compensazione del danno" (2013) 2 Eur dir priv 505–527 at 516–517. Importantly, in-kind relief refers only to the format of compensation, not to a separate obligation; the duty to redress the harm remains one. Consequently, if one form of compensation is unavailable, the other must be applied, as discussed below. See also D'Adda, *supra* note 103 at 12 [who emphasizes the suitability of in-kind redress for compensating damages to emerging rights that lack monetary value].

[110] Emanuela Navarretta, "Il risarcimento in forma specifica e il dibattito sui danni punitivi tra effettività, prevenzione e deterrenza" (2019) 1 Resp civ e prev 6–26 at 11 ff. See also Ceccherini, *supra* note 106 *passim* [who highlights the various functions of in-kind redress (such as prevention, deterrence, and punishment) beyond mere compensation].

[111] This presumption is rooted in a two-fold argument: i) the reference to "burdensomeness" in Article 2058 of the Italian Civil Code, which allows for non-monetary reparation for pecuniary damage at the claimant's request unless it is too costly for the damaging party, implies a preference for monetary compensation over in-kind compensation; and ii) according to Article 23 of the Italian Constitution, any performance obligation should be based on the law; see Salvi, *supra* note 108 at 1104.

[112] For example, it has been argued that the reference to burdensomeness in Article 2058 and its inapplicability to non-monetary damages is misleading. According to this view, the concept of burdensomeness should be understood as implicitly included in the provision regulating compensation for non-monetary damage (Article 2059). Consequently, there would be no need for specific provisions allowing for the award of in-kind measures. See Navarretta, *supra* note 110 at 14–15. The exclusion of a hierarchy between pecuniary and non-pecuniary measures is also supported, among others, by Ceccherini, *supra* note 106 at 735; Montanari, *supra* note 109 at 514.

The latter thesis should be preferred, both for the strength of its reasoning and because it helps mitigate the risks posed by the opposing view. Explicit legal authorization and determination of the in-kind compensatory measures available to courts would prevent creative jurisprudence–often disfavored in civil law systems like Italy's–and enhance legal certainty. However, this may limit the effectiveness of protection, as reparative measures must be tailored to the specific circumstances of each case. Additionally, accepting the former thesis would necessitate legislative intervention to introduce provisions authorizing in-kind redress for harm caused to corporate stakeholders, which is unlikely to occur due to Italian political apathy regarding these issues. Conversely, if the preferred view is accepted, no legislative change would be needed for Italian judges to impose in-kind remedies on damaging corporations and directors.[113]

However, it remains the challenge of determining which remedies judges may impose–whether any suitable measure, only certain types, and under what criteria. This question is complex and requires deeper analysis beyond the scope of this research. Identifying an exhaustive list of suitable remedies is challenging, as their appropriateness depends heavily on case specifics, and should be updated based on current protective needs.[114]

Nevertheless, for the purposes of this research, in-kind reparation for corporate damages to local communities should at least include restorative measures. Ordering restoration of damaged common resources to their pre-damage condition aligns with Italy's foundational principle of damage compensation, i.e., its solidaristic-reparative function.[115] Moreover, restorative measures may provide indirect preventive protection by limiting further harm or violations of additional rights and, when the cost to the wrongdoer exceeds any benefit gained from the harmful conduct, such measures may also deter future misconduct by the damaging party or other individuals in similar situations.[116]

[113] It should also be noted that, in Italy, the granting of atypical measures is possible within the framework of preventive relief (Art 700 of the Code of Civil Procedure). Without disregarding the ontological and functional differences between preventive and compensatory remedies, one might ask whether an analogical interpretation of compensatory relief, in line with preventive relief, could be applied with reference to non-monetary compensatory measures. To address this question further research is required.

[114] An Italian scholar has argued that judges in Italy may award any type of measures they deem appropriate to reintegrate the harmed interest, based on Article 2058 of the Civil Code; see Mario Libertini, "Le nuove frontiere del danno risarcibile" (1987) Contr Impr 85–123 at 108 ff.

[115] This means that compensation for damage is rooted in solidarity towards the victim, in compliance with Article 2 of the Italian Constitution, and aims to repair the injury suffered by the damaged party. This function typically contrasts with the punitive function of damage compensation recognized in other legal systems, such as in the USA.

[116] Navarretta, *supra* note 110 *passim*. Conversely, when restoration costs less than the benefit gained from the harmful conduct, the deterrent effect of the remedy is weakened. In such cases, restorative measures may need to be tailored to the wrongdoer's specific situation to avoid legitimizing harmful conduct through compensation. This is especially relevant given the regulatory goals behind corporate and director liability for harm to stakeholders. If Italian rules on adequate setups and European due diligence legislation aim to ensure early identification and mitigation of environmental and human rights risks, then compensatory measures must be sufficient to deter strategically planned violations calculated by businesses through a cost-benefit analysis.

A comparative look at foreign remedies can support the arguments for increased flexibility and scope in Italian compensatory remedies. The Canadian oppression remedy[117] is particularly relevant in this respect, as its high degree of remedial versatility could serve as a model for Italian in-kind remedies addressing corporate harm, thereby contributing to enhance stakeholder protection.

The oppression remedy is a statutory remedy under the CBCA and mirrored in every Canadian provincial and territory corporate legislation. While it originated as a protective mechanism for minority shareholders alternative to winding-up,[118] the remedy is now available, at least in theory, to virtually any corporate constituent–including creditors and other stakeholders who are granted complainant status by the court[119]–to address harm suffered due to the oppressive, unfairly prejudicial, or disregardful conduct of corporate directors when acting in their roles.

[117] Canadian literature on this topic is vast. See, e.g., Poonam Puri, "Green but Not Enough: Sustainability in Canadian Corporate Governance" in *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge: Cambridge University Press, 2019) 146; Alex Fomcenco & Dave Deonarain, "'A Bridge Too Far': A Critique of Canada's Oppression Remedy" (2018) 39:I Bus L Rev 12–16; Jassmine Girgis, "The Oppression Remedy: Clarifying Part II of the BCE Test" (2018) 96:3 Can Bar Rev 484–525; Brooke Neal, "Rea v. Wildeboer: The Oppression Remedy and the Requirement of Unique Harm" (2016) 22:2 Law and Business Review of the Americas 121–130; J Anthony VanDuzer, "BCE v. 1976 Debentureholders: The Supreme Court's Hits and Misses in Its Most Important Corporate Law Decision since Peoples" (2010) 43 UBC L Rev 205–258; Ed Waitzer & Johnny Jaswal, "Peoples, BCE, and the good corporate "citizen"" (2009) 47:3 Osgoode Hall law journal (1960) 439–496; Mohamed F Khimji, "Peoples v. Wise - Conflating Directors' Duties, Oppression, and Stakeholder Protection Case Comment" (2006) 39:1 UBC L Rev 209–232; Jacob S Ziegel, "The Peoples judgment and the Supreme Court's role in private law cases" (2005) 41:2–3 Can Bus LJ 236–246; Stephanie Ben-Ishai, "The Promise of the Oppression Remedy: A Review of Markus Koehnen's Oppression and Related Remedies" (2005) 42:3 Can Bus LJ 450–462; Stephanie Ben-Ishai & Poonam Puri, "The Canadian oppression remedy judicially considered: 1995-2001" (2004) 30:1 Queen's LJ 79–113; Jason W Neyers, "Is There an Oppression Remedy Showstopper: O'Neil v. Phillips" (2000) 33:3 Can Bus LJ 447–464; J Anthony VanDuzer, "Who May Claim Relief from Oppression: The Complainant in Canadian Corporate Law" (1993) 25:3 Ottawa L Rev 463–484; Jeffrey G MacIntosh, "The Oppression Remedy: Personal or Derivative" (1991) 70:1 Can Bar Rev 29–70; Brian Cheffins, "The Oppression Remedy in Corporate Law: The Canadian Experience" (1988) 10:3 U Penn J Int'l L 305. The oppression remedy originated in the UK, but since 1980, the English version of the remedy has diverged from the Canadian one. This change occurred when oppression claims in the UK (governed by s 210 of the 1948 UK Companies Act) were replaced by unfair prejudice petitions (governed by s 459 1985 UK Companies Act, now s 994 of the 2006 UK Companies Act).

[118] First in the UK (Great Britain Board of Trade Company Law Committee with the collaboration of David Llewelyn Jenkins, *Report of the Company Law Committee* (London: H.M.S.O., 1962) 1749 at 73 ff); then in Canada (*Proposals for a New Business Corporations Law for Canada*, by Robert W V Dickerson, John L Howard & Leon Getz (Ottawa, ON: Information Canada, 1971) at 162 ff).

[119] Importantly, as noted in the previous chapter, oppression remedy also has limitations, such as the difficulty for stakeholders to obtain standing–as they must be recognised as appropriate persons by the court–and the categories of interests protected are generally limited to creditors' monetary interests. These limitations impact the possibility to effectively resort to this remedy for stakeholder communities and may explain why, as of today, there has never been an application for standing by a community or anyone on behalf of a community. A possible solution, as suggested by some Canadian scholars, could be expanding the categories of interests protected under this remedy; see Edward J Waitzer & Douglas Sarro, "Protecting Reasonable Expectations: Mapping the Trajectory of the Law" (2016) 57:3 Can Bus LJ 285–313 at 300. However, until that is done, it is hard to see how the remedy could be used by communities to seek redress for corporate harm.

Canadian law provides basic direction to courts with respect to relief under the oppression remedy. Section 241(2) CBCA establishes that

> the court may make an order to rectify the matters complained of

and, at (3), specifies that

> In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
>
> (a) an order *restraining the conduct complained of*; […]
>
> (h) an order *varying or setting aside a transaction or contract* to which a corporation is a party and *compensating* the corporation or *any other party to the transaction or contract*; […].[120]

Given the minimal statutory guidance, courts have broad discretion to craft remedies suited to the specific needs of each case. They may draw from legislative examples or adopt measures beyond them. In any case, in doing so, courts must consider the circumstances of the case, aim to correct the harm and, when possible, restore the relationship between the involved parties,[121] provided the measures do not exceed what is necessary to remedy the wrong.

The Canadian oppression remedy, as summarized above, may offer valuable insights for increasing the flexibility of Italian remedies. It could inspire law reform in Italy by showing the advantages of a broader application of these remedies to redress non-monetary harm. For the purpose of this research, an oppression remedy-inspired approach could allow for more adequate compensation for social and environmental harm caused by corporate activity. Indeed, thanks to its flexibility and case-to-case adaptability,[122] the oppression remedy has been increasingly proposed by Canadian scholars as a powerful tool for addressing broader corporate non-monetary harm,[123] including climate change,[124] environmental damage,[125] and other corporate

[120] [Emphasis mine]. Notably, letter (h) of the cited provision allows compensation of an aggrieved party other than the complainant.

[121] No punitive goals can be pursued. See *Hurontario Property Development Corp v Pinewood Business Interiors Inc*, [2011] 108 OR (3d) 359 at para 31.

[122] Other advantages of using the oppression remedy to protect environmental and social interests include the fact that standing to bring these claims can, at least in theory, be granted to anyone considered a "proper person" by the court under Section 238(d) of the CBCA. Unlike derivative actions, which can only be initiated by shareholders and require prior court approval, the oppression remedy is a more suitable and adaptable mechanism for addressing these concerns and can also be claimed by stakeholders. Furthermore, the oppression remedy safeguards reasonable expectations, which require less formality than established rights and may be grounded in the increasing scientific understanding of the environmental and social impacts of corporate activities. Finally, the oppression remedy has a relatively low standard of conduct, defined as unfair disregard for the claimant's reasonable expectations.

[123] Ben-Ishai & Puri, "The Canadian oppression remedy judicially considered", *supra* note 117 at 82.

[124] Janis Sarra with the collaboration of Norie Campbell, *Banking on a net-zero future: Effective climate governance for Canadian banks* (October 2022) at 57 ff; Janis Sarra, "Fiduciaries' Obligations and Climate Governance" in *From Ideas to Action* (Oxford, UK: Oxford University Press, 2020) 63 at 78–80.

[125] Puri, *supra* note 117 at 153–154.

externalities affecting stakeholders.[126] Additionally, its prioritization of tailored, case-specific remedies over monetary awards strengthen its potential to protect stakeholders who typically suffer non-financial losses. Arguably, it may also serve as a stronger deterrent to corporate harmful conduct, as defendants in oppression cases cannot typically avoid liability by simply offering monetary compensation when more effective remedies are available and have been sought by the claimant.[127]

Nonetheless, it is necessary to acknowledge that the oppression remedy *at its current state* is *not* available to stakeholder communities for redressing corporate harm. Significant obstacles remain to this end, particularly regarding standing, the scope of protected interests,[128] and judicial application.[129] So, to unlock its potential to safeguard corporate stakeholders from corporate harm, legal reform or reinterpretation of the remedy is required. Furthermore, to date, Canadian class actions provide more effective mechanisms for protecting stakeholder communities than oppression claims. This is partly because corporate and director liability often arises under environmental and safety laws, as well as tort or consumer protection law, making the resort to corporate law remedies unnecessary. Furthermore, despite their inherent individual nature, Canadian class actions present fewer obstacles than Italian ones regarding rules governing representative entities. Communities have indeed used them–through their representative entities–to safeguard collective rights, such as Aboriginal rights of Indigenous communities.[130]

When in-kind reparation is impossible or too costly,[131] monetary compensation should be awarded. Although monetary payments cannot truly redress non-financial harm, they remain justified by the solidaristic function of damage compensation. In these cases, the challenge lies in identifying appropriate criteria for determining the amount of compensation.

Generally, the amount of compensation is determined at the judge's equitable discretion, guided by the functions of the remedy, primarily to redress the harm suffered. For pecuniary losses, this

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[126] Waitzer & Sarro, "Protecting Reasonable Expectations", *supra* note 119 at 290.

[127] An exception would be situations involving majority share buy-backs; see Neyers, "Is There an Oppression Remedy Showstopper", *supra* note 117 at 456 ff.

[128] See footnote 118 above. Furthermore, remedies granted by courts thus far have primarily compensated for monetary harm to corporate shareholders and creditors. These remedies have largely included share purchases by the corporation or majority shareholders, as well as corporate dissolution and liquidation. Other frequently awarded remedies include direct payments by shareholders to the corporation or its creditors, orders for statutory compliance, directives regarding director replacement or receiver appointment, amendments to shareholder agreements, rectification of shareholder records, investigations, and the creation of pre-emptive rights. See J Anthony VanDuzer, "Shareholder Remedies" in *The law of partnerships and corporations* Essentials of Canadian law, 4th ed (Toronto, ON: Irwin Law, 2018) 440 at 492 ff [including references to relevant case law].

[129] PM Vasudev, "The stakeholder journey – so far" in *Beyond Shareholder Value -A Framework for Stakeholder Governance* (Cheltenham: Edward Elgar Press, 2021) 259 at 307; Ben-Ishai, "The Promise of the Oppression Remedy", *supra* note 117.

[130] See also Chapter 2, footnote 210. Naturally, Canadian class actions have also faced criticisms regarding their benefit for actual victims of corporate/director negligence or wrongdoing; see Chapter 2, footnote 213.

[131] Impossibility should be evaluated both objectively and relatively, considering the concrete possibility of restoring the damaged good and the wrongdoer's ability to make the restoration based on their personal situation. Excessive onerousness should be assessed based on the content of the reparation measure, specifically the cost the wrongdoer would incur for the compensatory performance. See Montanari, *supra* note 109 at 518–519.

typically involves a hypothetical market evaluation, estimating the value the loss would have in the market. Clearly, this method is not well-suited for non-pecuniary damages, which inherently resist economic evaluation. Therefore, non-pecuniary damages should be assessed based on a concrete assessment that considers the actual value of the damaged good for the claimant.[132]

Finally, the monetary award for non-pecuniary damage should also reflect the defendant's economic position. This helps ensure that the remedy is not disproportionate to their actual financial capacity, particularly in relation to any benefit gained from the harmful conduct. For example, assuming equal harm, a wealthy multinational corporation should not owe the same amount as a small business. If larger, wealthier businesses were required to pay the same amount as smaller companies, they will not be effectively deterred from causing harm as the award paid would not represent a significant cost for them.[133]

3.1.4. Compensatory Claims under Article 29 CS3D

I have so far outlined several proposals to address the limitations of the current Italian procedural mechanism in protecting stakeholder communities from corporate harm. It remains to be seen whether any of these proposals may be supported by compensatory actions under the Corporate Sustainability Due Diligence Directive (CS3D).

Article 29 of the CS3D establishes the civil liability of in-scope companies when harm to natural or legal persons results from the company's intentional or negligent failure to prevent, mitigate or address adverse impacts. The directive addresses certain practical and procedural barriers to justice, but it leaves other key aspects to member states.[134] Although the CS3D has not yet being implemented in Italy, and it remains unclear which procedural mechanism will govern this liability in this country,[135] Article 29 already introduces minimal requirements that could enhance the protection of local communities.

Substantively, Article 29 establishes the several liability of business partners of in-scope companies when they contribute to harm. This provision is significant because it clarifies that liability for breaches of CS3D provisions can extend to companies that do not meet the directive's (high) thresholds for in-scope status. Nonetheless, these businesses may still be held accountable if their conduct results in social or environmental harm. Importantly, in these cases, in-scope

[132] See Marella, *supra* note 103 at 170.

[133] This approach is consistent with the solidaristic function of compensation and does not equate to punitive damages. Although punitive damages consider both the gravity of the conduct and the wrongdoer's financial status, the aim here is not to punish but to uphold the effectiveness of the violated rule.

[134] Such as rules on causation; Recital 82. Notably, companies are not liable if the harm is caused solely by business partners in their value chains; Recital 79.

[135] Class actions are likely to be used to this goal since the CS3D explicitly excludes the option of consumer representative actions. Furthermore, class actions already satisfy the minimum requirements set by the CS3D (e.g., allowing organisation to bring the claims; employing an authorizing mechanism for the class representative to initiate the lawsuit). For references to the role of class actions in enforcing corporate sustainability due diligence obligations in Italy, see Luca Boggio & Maurizio Pinto, "Sostenibilità e responsabilità degli amministratori" (2024) 5 Giur it 1235–1252 at 1251; Pierpaolo Sanfilippo, "Tutela dell'ambiente e "assetti adeguati" dell'impresa": compliance, autonomia ed enforcement" (2022) 6 Rivista di Diritto Civile 993–1026 at 1026.

companies remain *severally* liable alongside their partners; this reinforces their duty to oversee their value chain.

Procedurally, Article 29 explicitly allows claims by natural and legal persons, as well as representative organisations. Allowing legal persons to bring claims on their own behalf could enhance community protection when community interests are pursued through entities with legal personality–such as Italian recognized associations.[136] Although the protected interest remains formally individual, that is, linked to the harm suffered by the legal person, the collective interests the entity represents may be indirectly safeguarded. As seen above, Italian class actions do not exclude this possibility; however, its express recognition under the CS3D would help strengthen its admissibility. Furthermore, Article 29 guarantees full compensation for loss, both though financial and non-financial measures.[137] This provision potentially paves the way for a broader acceptance of in-kind remedies to address non-monetary loss.[138]

Nonetheless, the enhanced protection offered to communities by the CS3D remains limited. First, according to the directive,[139] defendants can only be companies, not directors.[140] In fact, provisions directly addressing directors' duties and liability originally included in the directive's proposal (arts 25 and 26) were erased at a later stage of the legislative process. Furthermore, the Directive excludes liability for harm caused solely by business partners of in-scope companies,[141] significantly reducing its protective scope.

One way to address this obstacle when the business partner is subject to Italian law could be to ground its liability in the duty to establish adequate arrangements, interpreted as protecting (also) a company's external stakeholders. However, while grounding liability in an extensive interpretation of adequate arrangements might allow liability for harm caused by Italian partners, it would remain inapplicable to foreign ones. Beyond limiting the effectiveness of the discussed duty, a similar solution could also raise serious concerns about the competitiveness of Italian businesses vis-à-vis other EU countries. Exposing Italian firms to higher liability risks could, in turn,

[136] For further discussion, see Chapter 3.

[137] Recital 58 CS3D.

[138] Truly, the fact that this specification appears in the preamble of the Directive rather than in its enacting terms may raise doubts about its binding force on domestic lawmakers. CJEU case law establishes that EU law preambles do not carry binding legal force and cannot be used to derogate from the enacting terms or to interpret them in a manner contrary to their wording (e.g., ECLI:EU:C:2019:1113 at para 76). However, in the case under consideration, the cited recital may play an important interpretative role as its suggested interpretation of Article 29 is not at odds with the wording of this enacting term, but rather consistent with it (as well as with the Directive's objectives).
For literature on the role of recitals in EU law, see Maarten den Heijer, Teun van Os van den Abeelen & Antanina Maslyka, "On the Use and Misuse of Recitals in European Union Law" (30 August 2019) Rochester, NY, online: <https://papers.ssrn.com/abstract=3445372>; Humphreys Llio et al, "Mapping Recitals to Normative Provisions in EU Legislation to Assist Legal Interpretation" in *Frontiers in Artificial Intelligence and Applications* (IOS Press, 2015) 41; Tadas Klimas & Jurate Vaiciukaite, "The Law of Recitals in European Community Legislation Articles & Essays" (2008) 15:1 ILSA J Int'l & Comp L 61–94.

[139] Naturally, this does not preclude member states from extending liability to directors in their implementing legislation.

[140] Recital 58; Art 29 para 1 CS3D.

[141] Recital 58; Art 29 para 1 CS3D.

risk incentivizing entrepreneurs operating in Italy to relocate abroad or, if already established abroad, to retain foreign incorporation to benefit from more favourable legislation. If this were to happen, such dynamics could conceivably harm the Italian economy and make the heightened liability regime useless, as it would no longer apply to former Italian companies that moved abroad nor to foreign companies operating in Italy under another European jurisdiction.[142] To prevent these drawbacks, a harmonized approach at least across EU member states would be essential.

In light of the above, a broader liability regime within the CS3D would have been preferable. Although imposing such obligations on business partners, particularly SMEs, may rise economic and competitive concerns, lawmakers cannot continue to shy away from raising sustainability standards for all businesses. Instead, they should work on proactively identifying and mitigating these concerns.

4. Direct Enforceability of Community Rights under Italian Law

Earlier in this chapter, I noted that for communities to receive non-compliance monetary payments in Italy, they must hold legal subjectivity. This status indicates the existence of an entity, which I will also refer to as a *community representative entity*, partially distinct from its members and capable of holding rights and duties, while leaving members personally liable for its debts. More broadly, legal subjectivity is a necessary condition for groups to being recognised as rights-holders and enforce their rights.

At present, Italy lacks a legal framework to determine under what conditions stakeholder communities may be recognized as collective rights-holders and be entitled to enforce their rights.[143] Chapter 2 discussed the theoretical viability of recognizing collective rights to stakeholder communities in Italy, and indicated that this requires identifying a legal entity to which formally attribute such rights and which may act to enforce them.[144] Chapter 3 outlined

[142] On this point, refer to the recent ECJ ruling (ECLI:EU:C:2024:348), which held that a Member State's provision requiring the application of national law to the acts of management of a company established in another Member State but carrying on the main part of its activities in the first Member State is incompatible with Articles 49 and 54 TFEU, which establish the freedom of establishment (the judgment specifically concerned an Italian provision establishing that Italian law would apply to companies incorporated abroad but conducting the core of their business activities in Italy). While restrictions on freedom of establishment are permissible only if they are justified by overriding reasons in the public interest, these reasons have so far been understood as including the protection of creditors, employees and minority shareholders. If the proposal of a directors' duty of care to communities is accepted, it would therefore remain debatable whether the protection of these stakeholders could likewise constitute a legitimate ground to restrict that freedom.

[143] See Chapter 2, section 6 for the theoretical justifications supporting the recognition of communities as rights-holders in Italy and practical examples.

[144] Similarly, in Canada, the federal government created localized entities legally representing Indigenous communities. Under the Indian Act, First Nations are organized into *bands*–groups collectively using and benefiting from their lands and resources–governed by democratically elected *councils* with managerial and self-regulatory powers. See *Indian Act*, (RSC, 1985, c I-5), s 2(1), 2(3), 10(3), 81. Although the Indian Act does not explicitly state that Indian bands have legal personality, they have been deemed to possess this status under Canadian common law as

three defining characteristics of stakeholder communities to identifying, on a practical basis, those falling within the scope of the present research. Chapters 4 and 5 explored the connection of stakeholder communities' rights with corporate obligations and suggested the existence of a duty for corporate directors to take care to prevent harm local communities. The first part of this chapter has discussed indirect enforcement mechanisms available in Italy to stakeholder communities to protect their rights and proposed ways to improve them. What is left to be explored is stakeholder communities' direct enforcement of rights. Direct enforcement implies capacity to hold rights, which, in turn, requires stakeholder communities to have a legal form that provides them with such capacity.

While direct enforcement of collective rights is only one way for protecting community interests from corporate harm, it is an essential one to consider for a complete examination of protective mechanisms. Focusing on Italy, the following subsections will discuss the legal forms through which stakeholder communities may obtain capacity to hold rights and sue. Italian associations are suggested as the best suited legal forms to this end. Importantly, this does not mean that stakeholder communities must always adopt this form nor that direct enforcement of rights should be preferred over indirect enforcement mechanisms discussed above.[145] More simply, the discussion below suggests that such a legal form is a minimum requirement for direct enforcement of community rights in the discussed jurisdiction.

4.1. Comparison of Relevant Legal Forms for Stakeholder Communities

Legal forms are organizational structures that enable groups to pursue specific interests, offering varying advantages for that purpose. Accordingly, legal forms for stakeholder communities should be functional for their interests, which, as noted, would be the protection of commons to which the community is connected. Simultaneously, such legal forms should also align with the other defining features of stakeholder communities, that is territorial dimension and democratic governance.

Regarding Italy, Chapter 3 has identified groups with collective land rights, Renewable Energy Communities (CERs), and Community Cooperatives (CCs), as suitable examples of legally recognized models of stakeholder communities. As discussed, these models satisfy, or may satisfy, the three defining features of stakeholder communities, provided that, when the law allows for multiple legal forms (as in the case of CERs), they do not adopt forms inherently incompatible with those features, namely the business corporation form.

In light of Chapter 3 discussion, the relevant legal forms to consider in Italy for the representation of communities and enforcement of the duty of care directors owe to them under the proposed approach, include private associations and cooperatives. The private association form occurs in

they are created by the Act itself and can own property separately from their members; Michael Welters, "Towards a Singular Concept of Legal Personality" (2014) 92:2 Can Bar Rev 417–455. Importantly, bands do not necessarily reflect Indigenous peoples' own conceptions of constitutional rights, citizenship, and membership.

[145] See Chapter 2, subsection 6.1.3.

Italian land rights communities,[146] and is broad enough to permit the inclusion of commons protection in their objective, without limiting its scope to certain types of commons nor requiring specific historical and cultural backgrounds. By contrast, the cooperative form underpins Italian community cooperatives.

4.1.1. Italian Private Law Associations

Italian private law associations provide a suitable legal form for stakeholder communities. These have autonomous legal status separate from their members, which grants them the capacity to hold rights and enforce them. Associations also generally align with democratic governance and territorial dimension features of stakeholder communities. Finally, their neutrality regarding the objective pursued permits using this form for protecting commons to which stakeholder communities are connected.

a. Legal Capacity

Italian associations may either be recognized or unrecognized.[147] Recognized associations have legal personality, which can be obtained by fulfilling certain legal requirements including having a written and public memorandum of association,[148] having a social utility purpose,[149] having a name and a defined headquarters, to be included in the memorandum of association and publicly available,[150] public disclosure of the association's representatives through inclusion in a public

[146] And, perhaps, to some extent, this form is resembled in Canadian Indigenous communities through their organization into bands. Focusing solely on their organizational structure, bands resemble Italian associations in that they consist of groups of people with shared values coming together to pursue common goals and organising themselves according to their preferences and values. Furthermore, like associations, bands are subject to minimum standard requirements for governance structure, bodies, and principles, including democratic processes and majoritarian voting rules, as well as oversight by public authorities.

[147] The distinction between legal personality and mere subjectivity may be absent in other jurisdictions. For example, in Canada, legal personality is typically attributed to either natural persons or corporations, with no third category. In Canadian law, corporations (entities with legal personality) are characterized by perpetual succession (separate holding of property) and state sanction (state approval of corporate existence). These minimal features align with the Italian concept of legal personality. However, unlike Italy, where the acquisition of limited liability by an association results from state recognition, in Canada, limited liability may not always result from incorporation, as seen with certain unlimited liability company models available in some Canadian provinces. See Welters, *supra* note 144 at 426–427. Furthermore, unlike in Italy, where the capacity to own property, the ability to sue and be sued, and the ability to contract are recognized for entities with mere legal subjectivity, in Canada, these features are considered ancillary to legal personality. For Italy, see, Art 75 Code of Civil Procedure (Italy), establishing that entities without legal personality stand in court through the individuals to whom the chairmanship or management is entrusted according to the articles of incorporation or the bylaws; on Canadian associations see *Ibid* at 425.

[148] Art 14 Civil Code (Italy); Massimo Basile & Maria Vita De Giorgi, *Le persone giuridiche*, 2nd edn (Milano: Giuffrè, 2014) at 117; Francesca Loffredo, *Le persone giuridiche e le organizzazioni senza personalità giuridica: manuale e applicazioni pratiche dalle lezioni di Guido Capozzi*, 3rd edn (Milano: Giuffrè, 2010) at 40. It is important to note that the verification conducted by the administrative authority on recognized associations has the sole purpose of determining the legitimacy of the entity and the adequacy of its assets to pursue its purposes, not to select the associations and foundations that would be granted legal capacity, as occurred in the past with the concessionary regime; refer to Basile & De Giorgi, *supra* at 173–174.

[149] Loffredo, *supra* note 148 at 207.

[150] Basile & De Giorgi, *supra* note 148 at 138. Loffredo, *supra* note 148 at 53; 218.

registry.[151] Recognized associations also ensure members limit liability from the entity's debts, as it entails a full separation of the entity's assets from members' assets. By contrast, unrecognized associations[152] have mere legal subjectivity, which implies that their assets are not fully separate from the members' assets, who remain liable for the entity's debts. Unlike recognized associations, their creation and recognition as legal subject is independent from the fulfillment of legal requirements. Nonetheless, unrecognized associations are still legally relevant entities, capable of holding rights and sue.[153]

These characteristics suggest unrecognized associations as the minimum legal form that stakeholder communities must take in Italy to be entitled rights and enforce them directly. Legal subjectivity already grants unrecognized associations legal status and capacity to sue, which are essential to protect stakeholder communities from corporate harm. Similarly, while the ability of members of non-legal-person entities to enjoy limited liability can be advantageous, such as avoiding negative financial consequences from a lawsuit, the absence of limited liability does not appear to be a significant hindrance in such cases and cannot be regarded as essential under any circumstances.

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[151] *d.P.R. 10 febbraio 2000, n. 361*, 10 February 2000, 361, Art 4, para 2; Loffredo, *supra* note 148 at 79; 226–227.

[152] For comparison purposes, it is worth noting that Italian recognized associations have a counterpart in Canadian non-for-profit corporations. These corporations are statutorily governed and share similar features with Italian recognized associations regarding purpose, direction of corporate activity, and legal status. Federally, by the *Canada Not-for-profit Corporations Act*, 2009; for references to provincial statutes, see Donald J Bourgeois, *The law of charitable and not-for-profit organizations*, 5th edn (Toronto, ON: LexisNexis Canada, 2016) at 27, nt 16. They pursue a non-profit purpose, further evidenced by their establishment as corporations without share capital; see *Canada Not-for-profit Corporations Act*, s 4; Bourgeois, at 27 ff. Their activities are typically inward-looking, aiming to fulfill the interests of their associates rather than solely benefiting external beneficiaries (unlike charities); see *Ibid* at 2. They also possess legal personality. These and other related aspects, such as democratic governance, generally present the same issues as Italian recognized associations. For example, sec 154 of the Act allows for the constitution of different members' classes or groups and attaches different voting rights to each; therefore, this provision possibly limits the one-person-one-vote rule and even permits excluding voting rights from one or more classes; see *Canada Not-for-profit Corporations Act*, s 154(2)-(5). However, discussing Canadian non-for-profit corporations falls outside the scope of this Chapter.

[153] This capacity importantly distinguishes Italian unrecognized associations from Canadian unincorporated associations, which are regulated under common law [see *Clarke v The Earl of Dunraven and Mount-Earl (The "Satanita")*, 1897 En CA] and defined as contractual agreements among members who agree to pursue non-profit purposes and establish rules to govern their common enterprise [see Stephen Aylward, *The law of unincorporated associations in Canada* (Toronto, ON: LexisNexis Canada, 2020) at 3]. Canadian unincorporated associations share several similarities with Italian unrecognized associations. For example, both are the simplest legal form available for individuals coming together to pursue a common non-profit goal and are established without formalities. Additionally, their internal organization is determined by agreements among associates; see Stephen Aylward, *The law of unincorporated associations in Canada* (Toronto, ON: LexisNexis Canada, 2020). Canadian unincorporated associations also play a significant role in Canadian social life [Acknowledged by Statistics Canada, *Cornerstones of Community: Highlights of the National Survey of Nonprofit and Voluntary Organizations* (2003)] and can be complex organizations, such as the National Hockey League. However, they are typically unable to sue or be sued–unless a special capacity is conferred upon them by statute–because they lack legal capacity (they 'do not exist in the eye of the law'); see *JRS v Glendinning*, [2000] CanLII 22641 (ON SC); Bourgeois, *supra* note 152 at 24. This limitation makes them unsuitable legal forms for representing stakeholder communities.

Furthermore, unrecognized associations offer practical advantages in terms of formality requirements for their establishment, which are essentially non-existent. This makes this association form very easy to create and virtually present anytime a group of people organize itself for the pursuit of a common goal, e.g., without the need of formalizing its establishment in a written document.

Certainly, a higher degree of formalization, publicity and organization, typically required to obtain recognition, could strengthen the associations' legal status, for example making it existence easier to ascertain and facilitating third parties, including corporations, to engage with the entity. Additionally, a formalized and more stable organizational structure could facilitate the associations' activity and prevent or mitigate potential conflicts between members. Recognition would also facilitate public control over the entity's activity, better ensuring its adherence to the declared goals.[154]

However, these features are not essential for stakeholder communities to directly protect their rights, nor it can be excluded that unrecognized associations may voluntarily meet the discussed higher standards. Moreover, a higher level of formalization and transparency is required to unrecognized associations in specific contexts, such as when they purchase real estate. In these cases, Italian law requires the association to provide information–including its name, headquarters, tax code, and representatives–that is recorded in a public registry.[155] Such requirements mitigate the gap between recognized and unrecognized associations.

It should also be rejected the idea that unrecognized associations always have a diminished or less significant social role compared to recognized ones. For instance, both Italian political parties and workers' unions, which largely contribute to shape Italian politics and safeguarding workers' rights, are unrecognized associations.

Overall, these elements suggest that legal personality should be viewed as a preferred albeit not essential qualification for stakeholder communities' representative entities. Accordingly, both recognized and unrecognized Italian associations would constitute suitable legal forms to hold standing in protect community interests and, where necessary, to obtain monetary compensation as discussed above. Further details on the requirements that association must meet to represent community interests are provided in subsection 4.2.2. below, to which the reader is referred.

[154] An additional argument in favor of the legal personality of stakeholder communities' representative entities lies in Art 29, par 1 of the CS3D, which establishes the civil liability of companies for damages caused "to a natural or legal person." Accordingly, acquiring legal personality would enable the entity itself, if harmed in its own legal sphere, to claim compensation for its own interests, in addition to acting on behalf of the affected community. Direct protection of the entity's interests would be advantageous because it would broaden the scope of parties entitled to seek compensation and because, as an action grounded in the body's own rights, it would not require prior authorization from the represented community, thereby streamlining the activation process. Conversely, the cited provision appears to exclude entities without legal personality, such as unrecognised associations, from pursuing claims for their own interests, unless national implementing legislation provides otherwise.

[155] Art 2659 Civil Code (Italy); see also Basile & De Giorgi, *supra* note 148 at 216.

b. Democratic Governance, Pursuable Goals and Territorial Dimension

Regarding governance, associations are typically subject to minimum standard rules, which generally serve the purpose of obtaining state recognition. These include the presence of an assembly of associates with general authority over the entity's management, as well as specific competencies on relevant managerial issues.[156] Generally, members' resolutions are adopted by majority rule,[157] and associates appoint a board of directors with day-to-day managerial responsibilities.[158] Specific governance requirements may be introduced by special legislation for certain types of associations, and additional bodies may be established by the entity in its articles.[159] Furthermore, associations' governance is typically non-hierarchical, with per capita voting rules, and pursuing profit for member distribution is excluded.[160] Therefore, as already noted in relation to Italian land rights communities, associations are flexible enough to either fulfill democratic governance or exclude it.[161] Consequently, adherence with the democratic governance feature of shareholder communities is up to each associations' articles or practices.

Regarding pursuable goals, associations offer a neutral framework for seeking any objective that is permitted by law and is either specified in the articles or bylaws or, at least, determinable from them or practice. While social or ideological goals are typical in associations, economic goals are also allowed[162]–with the sole exception of profit for members. These features enable stakeholder communities to adopt this form to pursue the protection of commons to which they are connected. Likewise, the association form is neutral regarding their territorial dimension and connection with commons, further confirming the suitability of this form for stakeholder communities' representative entities.

[156] Such as annual budget approval, amending the articles of association, winding up the entity, and other major organizational matters.

[157] Arts 20 ff Civil Code (Italy).

[158] These must be specified in the articles of associations as established under Art 16 Civil Code (Italy).

[159] For further information refer to Basile & De Giorgi, *supra* note 148 at 264 ff.

[160] This is due to the ideal nature of interests that can be pursued by associations but is also supported by provisions that exclude that associates may set forth economic claims towards the association's assets; see Arts 24 and 37 Civil Code (Italy). Profit for members is generally regarded as a criterion to distinguish associations from enterprises; see also Loffredo, *supra* note 148 at 51–52. For a more comprehensive analysis of this distinction, see Mario Porzio, "Associazioni, fondazioni e società nell'evoluzione dell'ordinamento italiano" (2021) 2 Giurisprudenza Commerciale 221–229.

[161] Flexibility also characterises other types of associations, such as shareholder associations. These aim to protect the shareholders of listed companies by exercising representation powers, providing financial advice, circulating informational materials, and coordinating legal initiatives among their members. See Legislative Decree No. 58 of February 24, 1998, *Testo unico delle disposizioni in materia di intermediazione finanziaria, ai sensi degli articoli 8 e 21 della legge 6 febbraio 1996, n. 52 (*so called *TUF)*, art 141); Emma Chicco, "Associazioni di azionisti (art. 141, D.Lgs. 24.2.1998, n. 58)" in *Codice delle società*, 2nd edn (Torino: UTET, 2016) 3420. However, unlike regular associations, shareholder associations do not adhere to principles of equal treatment among members but grant voting rights based on the number of shares owned. For this reason, they may be considered 'atypical' associations; see *ibid* at 3422.

[162] Porzio, *supra* note 160; Loffredo, *supra* note 148 at 51–52, 207; Basile & De Giorgi, *supra* note 148 at 98–100.

c. Other Similar Legal Forms

Associations should also be preferred over other similar legal forms available in Italy, such as social movements, foundations, and committees. Social movements are organizations without legal personality and ad hoc legal regulation.[163] Although some Italian scholars have suggested social movements as suitable structures for commons management,[164] their legal features indicate they are not appropriate legal forms for stakeholder communities. Movements do not seem capable of offering legal protection to community interests, and the uncertainty regarding their structure hinders any evaluation of their potential alignment with communities' democratic governance and territorial dimension. In contrast, associations provide legal status and organizational certainty that better meet the needs for protection of stakeholder communities.

Foundations are private entities regulated in Italian Civil Code alongside associations. While associations typically require broad participation, emphasizing the personal element over the entity's assets, and permit democratic governance, foundations emphasize the monetary element, that is assets to be allocated by directors for altruistic goals. Furthermore, participation in foundations is limited to founders, and they lack democratic governance. These features are also present in participated foundations (*fondazioni di partecipazione*), a subtype of foundations that allows for the involvement of associates beyond founding members and includes the presence of an assembly alongside directors.[165] While participated foundations share an open structure with associations,[166] they still retain the prevalence of the monetary element over the personal and a non-democratic structure.[167]

Finally, compared to committees (*comitati*),[168] which are regulated in the Italian Civil Code alongside associations and foundations, associations offer greater stability over time and ensure

[163] Corte d'Appello Napoli, Sez I, of 30 June 2011, No 2457 (Italy).

[164] Due to their participatory nature, historical political role, and non-hierarchical structure. See Ugo Mattei, *Beni comuni: un manifesto* (Bari-Roma: Laterza, 2011) at 80; on the social role of movements refer to Ruggero D'Alessandro, *Dal voto alla piazza: Partiti e movimenti nella società globale* (Roma: Carocci, 2013).

[165] Participated foundations originated in practice and were later recognized by law; see Arts 23–25 ETS Code (Italy). Extensively on the topic, see Gianluca Sicchiero, ed, *Le fondazioni di partecipazione* (Milano: Giuffrè, 2024).

[166] Which, in participated foundations too, is most likely subject to limitations or conditions included in bylaws.

[167] See Massimo Basile, Maria Vita De Giorgi & Aldo Laudonio, *Le persone giuridiche*, 3rd edn (Milano: Giuffrè, 2020) at 67, 599.

[168] Committees, as autonomous legal entities, differ from committees established within corporate structure. A relevant example of the latter is stakeholder committees introduced in Italy for social enterprise and sport clubs to enhance stakeholder involvement in management processes and improve corporate sustainability. The voluntary introduction of stakeholder committees has also been recommended for large companies by Comitato per la Corporate Governance, *Codice di Corporate Governance* (January 2020), online: <https://www.borsaitaliana.it/comitato-corporate-governance/codice/2020.pdf> Principle IV. Stakeholder committees can be seen as organizational forms for stakeholder initiative and coordination, particularly when they have involvement rights beyond being informed. However, their effective participation in corporate governance seems limited to cases where corporate bylaws require directors to balance stakeholder and shareholder interests. Furthermore, the fact that they are established within the corporate structure suggests that they may lack legal independence to effectively protect community interests. For these reasons, stakeholder committees are beyond the scope of this discussion. Specifically on the topic, see Marco Cian, "I comitati rappresentativi degli stakeholders e

autonomous legal capacity for the entity (the ability to have its own rights and duties). Indeed, committees are defined as 'numerically restricted, voluntary-based, often temporary organizations that pursue aid or promotional purposes through funding obtained from donors'.[169] Additionally, like associations, committees may or may not be recognized entities, thereby obtaining legal personality. While this is true, the legal status of unrecognized committees has been a topic of debate in the literature[170] with some arguing that temporary committees should be distinguished from stable committees and that only the latter should be granted legal subjectivity and reclassified as associations,[171] while the former–which are typically the most common type[172]–would lack any legal status, including mere subjectivity.[173] This controversial legal status places unrecognized committees in the weakest position among Italian legal entities, leading to a preference for associations over them.[174]

4.1.2. Italian Cooperatives

Cooperatives present several features useful for stakeholder communities. They have legal personality that permits direct enforcement of rights, democratic governance, a possible (and in sometimes mandatory) territorial dimension, and allow for pursuing interests beyond profit. Nonetheless, the cooperative's inherently socio-economic and entrepreneurial nature makes it a less suitable legal form for entities representing stakeholder communities and enforce their rights against directors. However, a partial exception is found in the case of CCs, which, as discussed in Chapter 3, temper this entrepreneurial nature through a strong emphasis on community benefit.

a. Legal Capacity

Italian cooperatives have legal personality, which is obtained through registration in the national business registry (*Registro delle Imprese*) and in a dedicated registry (*Albo delle società cooperative*).[175] As noted, like legal subjects, legal persons can hold rights and sue but, unlike legal subjects, also grant limited liability to members for entity's debts.

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l'organizzazione societaria" (2023) 3 BBTC 356. It is important to note that the topic should not be confused with that of board committees.

[169] Basile & De Giorgi, *supra* note 148 at 237. Committees are governed by arts 39-42 of the Italian Civil Code.

[170] While registered committees have legal personality, which includes subjectivity.

[171] Basile & De Giorgi, *supra* note 148 at 240–241.

[172] Loffredo, *supra* note 148 at 270 who highlights the exceptional nature of committees pursuing permanent purposes.

[173] As they lack a stable purpose and structure for achieving it; see Basile & De Giorgi, *supra* note 148 at 240–241.

[174] Further evidence of the temporary and unstable nature of committees can be seen in the funding they receive. Unlike associations, committees do not consider these funds as assets of the group, nor are they subject to strict usage restrictions. As a result, they lack inalienability forms of protection. Instead, they are governed by a rule of accountability to the committee administrators. See *Ibid* at 244–246.

[175] Arts 2511 and 2518 Civil Code (Italy). Regional laws on CCs also provide the option to register in a regional registry to obtain further benefits.

b. Democratic Governance, Pursuable Goals and Territorial Dimension

Cooperatives' structure includes a deliberative body (the assembly of cooperative members), a managing body (the board of directors), and, when applicable,[176] a supervisory body (the board of auditors). Cooperative members have per capita voting rights and, as noted in Chapter 3,[177] they require most directors to be elected from among cooperative members, which underscores the opportunity for members to attain top positions and the importance of shareholder personal involvement in the governance of these entities.[178] Indirect contributions to democratic governance also come from the adoption of an 'open door policy' and the possibility (and sometimes obligation) to establish separate assemblies in various locations where cooperative members reside, allowing for broader participation.[179]

Regarding pursuable goals, cooperatives permit pursuing the personal gains for members.[180] In predominantly mutual cooperatives, however, profit distribution is capped, which makes collective benefit goals predominant.[181] These goals may either have an inward direction that benefits only cooperative members (*mutualità interna*), or an outward direction that benefits more interests beyond those of members (*mutualità esterna*), as happens with CCs.[182] Consequently, predominantly mutual cooperatives do not pose significant obstacles to pursue collective goals such as protecting the commons. Similarly, a territorial dimension typically emerges in cooperatives and, in some cases, such as CCs, is even required by law. In these cooperatives, such a dimension may also imply a connection with local natural commons, as explicitly mentioned by law.

These features seemingly suggest the suitability of the cooperative model, in its predominantly mutual form, as a possible legal form for stakeholder communities to obtain rights and enforce them directly. The altruistic nature of community cooperatives may even justify a preference for this model over the association model, in which outward benefits are not always required by law. However, at a closer look, the concrete suitability of mutual cooperatives, globally understood, for stakeholder communities becomes more debatable.

Since their origins, cooperatives have featured a socio-economic and entrepreneurial nature, which mismatches stakeholder communities' nature as outlined in the first chapters of this work. Essentially, while cooperatives are legal forms for collective entrepreneurship aimed at offering

[176] Art 2543 Civil Code (Italy).
[177] See Chapter 2, subsection 5.1.3.
[178] Art 2542, para 3 Civil Code (Italy).
[179] Art 2540 Civil Code (Italy).
[180] Naturally, bylaws may exclude profit distribution.
[181] Arts 2512, 2513 and 2514 Civil Code (Italy).
[182] For a peculiar reading, see Antonio Fici, "La funzione sociale delle cooperative: note di diritto comparato" in *Diritto dell'economia sociale* (Napoli: Editoriale Scientifica, 2016) 257 [who questions the alignment of the CC model with the traditional mutual cooperative model based on the direction of their activities]. Cooperatives may also offer services to third parties (so-called *impure* cooperatives) rather than solely to their members (so-called *pure* cooperatives). On the historical debate about pure and impure cooperatives refer to Luigi Filippo Paolucci & Lucia De Angelis, "Art. 2511 c.c. - Atto costitutivo e statuto. Modificazioni" in Giovanni Bonilini, Massimo Confortini & Carlo Granelli, eds, *Codice Civile commentato* (Torino, 2012).

economic and social advantages (e.g., in terms of lower prices or higher employment opportunities) to members or the broader society, [183] stakeholder communities have completely different nature and goals. These communities are determined in relation to commons and are interested in their protection, not in undertaking enterprise. Furthermore, unlike cooperatives, stakeholder communities pursue socio-environmental goals rather than socio-economic ones. For these reasons, predominantly mutual cooperatives do not seem a perfect match for stakeholder communities, suggesting that associations should be preferred.

However, as noted in Chapter 3, a different conclusion should be reached regarding CCs. While these entities draw from the more general Italian cooperative model, they present innovative features that prioritize their social dimension and aim to bring benefits to communities over the entrepreneurial aspect.

4.2. Practical Considerations on Direct Enforcement of Community Rights

If the above reasoning is accepted, the "entified" community–that is, the community representative entity–would be able to directly enforce its rights when violations occur. Although the legal grounds for such actions have been extensively discussed in the preceding chapters, it is useful to briefly retrace it for better clarity, as well as enrich the discussion regarding the entity's standing. In line with the premises of this research, the focus will be on the exercise of compensatory remedies.

4.2.1. Legal Basis

The legal basis for direct enforcement of community rights against corporate directors for breach of their duty of care to prevent harm to communities is primarily found in Article 2395 of the Italian Civil Code, read in conjunction with Articles 2086 and 2381, paras 3 and 5. The first provision establishes directors' direct liability for harm caused to third parties in the exercise of their functions as directors, while the second and third provisions define the underlying duty whose violation results in harm to communities. Other relevant provisions that support the inclusion of environmental and social dimensions in the scope of this duty, are constitutional provisions–primarily Articles 2, 9 and 41–and CS3D provisions–especially Article 29 and the international law sources listed in Annex I.

As noted in the previous chapter, commons and community safeguard would be best served if directors' liability were framed as quasi-contractual. The relevant legal basis of quasi-contractual liability lies in Articles 1175 and 1375 of the Italian Civil Code, which impose duties of fairness and good faith in performing contractual obligations, and in scholarly literature and judicial

[183] Based on their core activity, cooperatives are classified as *cooperative di produzione e lavoro* (production and employment cooperatives), which aim to offer members better paid employment opportunities than those available in the market; *cooperative di utenza* (user cooperatives), which produce goods and services for use by user-members, at favorable economic conditions; *cooperative di supporto* (support cooperatives) which optimize the production of goods or the provision of specific services by its members; *cooperative sociali* (social cooperatives) which promote the social integration of citizens by managing social, health, and educational services, or creating employment opportunities for disadvantaged people in the community.

precedents recognising protective obligations. An arguably weaker alternative is to simply frame directors' liability as tort liability under Article 2043 of the Civil Code.

As for corporate liability, this may also be grounded in the general tort law provisions. However, if the obligations under Article 2086 and 2381 paras 3 and 5 of the Civil Code–requiring the establishment and implementation of adequate risk-identification and management arrangements, and which, in the approach proposed here, inform directors' duty of care towards communities–are interpreted as both corporate and directors' responsibilities, then the company itself could be held directly liable for personal fault on the basis of those provisions. Alternatively, the company may be held liable for directors' misconduct under Article 2049 of the Civil Code, which establishes the strict vicarious liability of masters and principals.

4.2.2. Standing and Interest to Sue

Insofar as the association acts to protects the rights of the affected community it represents, its activation would require a statutory provision expressly legitimizing the representation of such rights, following the model of consumer associations.[184] However, at present, Italian law lacks such a provision for stakeholder communities. Therefore, as of now, the standing of an entity bringing a lawsuit on behalf of the community vis-à-vis the company must be based on the authorization by community members. This solution aligns with what is envisaged in the CS3D for compensatory claims brough by representative entities.

Understanding the association as a representative of the community would also justify the need for a link between the two, to ensure the entity adequately represent community interests. To this end, the CS3D suggests some preliminary requirements to be included in national implementing legislation, such as stability over time and stable connection with the territory, absence of commercial activity, long-term commitment to promoting the rights protected by the Directive or national law. Control over their adequate representativeness seems to be conducted by courts when assessing standing.[185] Importantly, members of the affected community would in any case retain the possibility to assert their individual rights, in line with Article 24 of the Italian Constitution.

Beyond enforcing communities' rights, the community representative entity may also act in defense of its own rights. Article 29, para 1 of the CS3D suggests that 'Member States shall ensure that a company can be held liable for damage caused to a natural or legal person (…)'. However, this would only be possible if the entity has legal personality. In a similar case, the damage to the

[184] These are granted standing by being included in a public registry, thus are subject to preventive administrative control; see Arts 137, par 2, lett a) and 14 quater Consumer Code (Italy). Nonetheless, they also undergo substantive scrutiny by the court when assessing the admissibility of the claim; see Art 140 septies, par 8, letter f) Consumer Code (Italy).

[185] Donzelli, *supra* note 19. Court control on the appropriateness of the class representative is also a criterion used in North America to certify a class action. Certification is the court's approval of the class action as an appropriate mechanism for advancing issues that are common to the class. For the US see Federal Rules of Civil Procedure, Rule 23(a); for Canada, see, e.g., Ontario *Class Proceedings Act*, 1992, s 5(1)(e)(i); Ward K Branch & Mathew P Good, *Class Actions In Canada* (Thomson Reuters Canada, 2024) at para §4:7.

entity would consist of obstacles to the entity's pursuit of its goals, which, for stakeholder communities, would involve safeguarding the interest of the represented community in protecting the "collective destination" of the affected natural commons to which the community is connected.[186] The entity's objective, as defined in its memorandum or bylaws, would also justify its interest to sue, i.e., the existence of a benefit to the claimant from obtaining the required judicial relief.

4.2.3. Judicial Representation

Judicial representation refers to the natural person who appears in court on behalf of the entity. For stakeholder community representative entities, this issue can be addressed by reference to the entity's legal form. Under Italian law, recognized associations are represented in court by their legal representative, generally indicated in the memorandum of association or bylaws.[187] Conversely, unrecognized associations are represented by their president or executive director.[188]

4.3. Other Advantages of "Entified" Communities

Direct enforcement of community rights through a legal entity safeguards the collective destination of commons as a unitary interest belonging to the group. While individual claims may also generate indirect collective benefits–such as when recognition of one person's right facilitates other right-holders obtaining the same recognition[189]–proper protection of collective rights requires an action by an entity representing the community. Adopting a legal form through such an entity provides this channel to stakeholder communities.

A legal form also offers these communities a framework of standard provisions regulating internal structure, functioning, and representativeness. Even if Italian associations are subject to minimal and flexible standard rules, these nonetheless can offer some advantages. Regulation of internal functioning can help manage potential internal conflicts though exit: when members' interests diverse in a way that they are no longer compatible and concurrent, exit preserves internal

[186] On the interest of stakeholder communities see Chapter 2, subsection 6.2. The entity's action in defense of community interests does not exclude the possibility of also protecting an individual interest of a single community member, even if not shared with others. However, this scenario concerns the procedural representation of individual, non-collective interests, and therefore falls outside the scope of this research.

[187] Art 75 Code of Civil Procedure (Italy).

[188] Art 36 Civil Code (Italy).

[189] With respect to third parties, a final judgment (*sentenza passata in giudicato*) in Italy can at least serve as evidence, or as an element of documentary evidence, regarding the legal situation that was the subject of the judicial determination; see Corte di Cassazione, Sez Lavoro, 29 January 2003, No 1372 (Italy) Mass Giur It, 2003, at 143 In the case of third parties holding rights that are dependent on or subordinate to those determined in a judgment among other parties (*inter alios*), a 'reflective effect' (*efficacia riflessa*) of res judicata is generally recognized in Italian literature and jurisprudence. For further details, see Luigi Paolo Comoglio with the collaboration of Giovanni Bonilini, Massimo Confortini & Carlo Granelli, "Art. 2909 c.c. - Cosa giudicata", online: *Codice Civile commentato online* <https://onelegale.wolterskluwer.it/>.

coherence, stability, and ensures the entity's legitimacy,[190] From a ToC perspective, the possibility of exit also reinforces democratic participation.[191]

Standard organizational rules may also facilitate third parties, such as corporations, to clearly identify community representatives, enabling engagement. Finally, recognised legal forms may strengthen public monitoring of representativeness and alignment of the entity's stated purpose with community interests' protection. Such oversight would help ensure the entity is genuinely used to protect communities and should be both formal and substantive. It can also be justified on the public relevance these interests also have as connected to commons.

5. Chapter Summary

This chapter has discussed the enforcement of the proposed directors' duty of care to prevent harm to communities. Assuming that the proposed interpretation of this duty is accepted, the discussion has covered both preventive and compensatory mechanisms currently available to affected communities in Italy, as well as advanced proposals to improve such mechanisms–either within the boundaries of the existing legal framework or, where necessary, through targeted legal interpretation or reforms. The mechanisms reviewed include collective actions for injunctive relief (injunctive class actions) and compensatory class actions. While these instruments have certain, and sometimes significant, limitations in protecting collective interests–particularly regarding compensatory class actions, as they are designed to protect individual interests rather than collective ones–they nonetheless retain some potential to this end. Suggested improvements include recognizing collective harm as compensable in its own right, allowing direct enforcement against directors, and providing in-kind redress measures.

The second part of the chapter discussed the possibility of direct enforcement of community rights. As holding rights and seeking protection in court would require the community to adopt a legal form, this discussion has primarily focused on appropriate forms for community representation in Italy. Private law associations and, to some extent, CCs appear the most suitable form under Italian law. Practically, it has been suggested that these entities could bring legal claims against directors or corporations responsible for harms to communities, although, under current law, they would need an express authorization from community members to act in their name. Naturally, the proposals advanced here should be regarded as mere preliminary steps towards filling a gap in the Italian legal framework, which remains silent on the legal status and protection of communities as corporate stakeholders. Further studies are needed to confirm

[190] Considerations regarding the potential monetary implications of leaving an organization, such as the reimbursement of contributions to the common fund, remain outside the scope of this discussion.

[191] Truly, allowing exit and the creation of new representative entities may raise concerns about fragmentation, duplication of claims, and opportunism from corporate counterparts–who, e.g., may selectively enter relationships only with the groups they find most advantageous. However, the principles of pluralism, self-determination, and freedom of association that underpin the Italian legal framework, favour such plurality. Therefore, the presence of multiple groups advancing community interests would not violate these principles but rather uphold them. Practically, the discussed risks are mitigated by understanding the duty of directors to take care to prevent harm to communities as a requirement to consider the overall interests of multiple entities and by ensuring that a successful legal action by one group precludes repetitive claims by others.

these proposals and their practical feasibility, for instance, by addressing the existence or introduction of adequate incentives for affected communities to initiate compensatory lawsuits.

Conclusion

This research has addressed the complex issue of corporate harm to local communities, aiming to enhance their protection within the Italian legal framework through corporate law measures by drawing comparative insights from Canada. Local communities (or simply "communities") have been understood here as corporate stakeholders: democratically governed groups connected to local natural commons–such as water basins, land, air–and sharing an interest in safeguarding their integrity and availability from corporate impacts. Among corporations, the focus has been on large corporations identified through a type-based approach that has included Italian S.p.A. and Canadian corporations–primarily public ones–while excluding companies with socially-oriented legal forms or qualifications (e.g., Italian *società benefit*, Canadian non-for-profit corporations). Adopting a commons-inspired theoretical framework and a comparative methodology with Canada, where debates around corporate social responsibility and director duties towards stakeholders have been particularly rich over the last few decades, and where the law has offered some openings to stakeholder protection compared to other Western legal systems, this study developed around a core question: *Does Italian corporate law provide a suitable basis for recognizing a director's duty not to harm stakeholder communities?*

This question arises from two main observations. First, Italian law and legal scholarship have so far paid little attention to communities as corporate stakeholders, which have been lacking a legal definition, status, and dedicated legal analyses. Second, existing international and sectorial domestic law promoting corporate social and environmental sustainability in Italy are insufficient to effectively protect communities from corporate harm. Their limitations stem primarily from weak enforceability (especially in the case of international law) and poor adaptability to the needs of specific types of stakeholders like communities (as seen, for example, in consumer or environmental law). These factors suggest that the legal protection for stakeholder communities in Italy remains underdeveloped and that further, dedicated attention is needed. This research has concentrated its attention on corporate law measures, which can act directly upon corporate entities and governing bodies and may extend to a wider range of organizations beyond particular sectorial contexts (e.g., market-based relationships or environmental damage). In doing so, corporate law measures can also signal that corporations, while allowed to make profit, also bear social and environmental responsibilities for the risks they create.

A positive answer has been provided to the central research question of this study, which has identified, in directors' duties of care, a suitable basis for recognizing a duty not to harm stakeholder communities. In particular, drawing on previous scholarly interpretations that advocated for an outward-looking dimension of Italy's corporate risk-management framework, and considering recent normative developments at the European level to mandate corporate social and environmental sustainability, the study has recognized the obligation under Articles 2086 and 2381, paragraphs 3 and 5 of the Civil Code as particularly relevant to this goal. Under these provisions, directors and officers (here collectively referred to as "directors") are required to establish, implement and maintain organizational, administrative and accounting arrangements adequate to prevent corporate risks. The study has argued that this obligation

should not be understood solely as protecting the corporation from external risks it may face, but also as protecting external parties from threats posed by the corporation itself.

The duty to establish and implement adequate arrangements, as interpreted in this work, should, at minimum, apply to directors of companies falling within the scope of application of EU corporate sustainability legislation–particularly the scope of the Corporate Sustainability Due Diligence Directive (CS3D), which is narrower than that of other corporate sustainability provisions. Arguably, this duty could also extend to directors of corporations that, by virtue of their size and nature of their business, pose levels of socio-environmental risks comparable to those generated by in-scope companies. Naturally, a preemptive identification of such corporations would be a challenging task, which, absent any legislative intervention, could perhaps be addressed only by courts.

In terms of effectiveness, the proposed duty to take care to prevent harm to communities would benefit from a limited application of liability shields for directors. The obligation to establish and maintain adequate arrangements, on which the proposed duty is based, has both substantive and procedural dimensions: the former requires the assessment of arrangements' adequacy; the latter requires directors to act in accordance with those arrangements. Although assessing adequacy allows a certain degree of discretion for directors, the wide range of legal and non-legal criteria available for this assessment–as discussed in Chapter 5–suggest this discretion is *technical*, rather than *entrepreneurial*. Consequently, the assessment of adequacy would fall outside the traditional broad scope of the business judgment rule (BJR) and its protective shield, thereby strengthening the enforceability of the proposed directors' protective obligation toward communities. Finally, the proposed obligation would be owed to stakeholder communities and would further benefit them by recognizing their entitlement to seek redress for harm suffered as a result of its violation.

This research contributes in several ways to corporate legal literature in Italy and Canada. First, by adopting a transformative yet conservative approach to corporate law, this research promotes innovation without requiring structural normative reforms, which are often difficult to achieve and depend largely on political will that is frequently lacking. The use of the Theory of the Commons (ToC) as a foundational theoretical framework has offered a fresh and relatively unprecedented perspective on corporate legal issues, trying to overcome mainstream neoliberal views and seeking to balance the economic interests associated with shared resources (the *commons*) with social and environmental considerations, particularly when the pursuit of economic interests threatens fundamental human rights. The approach adopted could therefore be easier to implement than legal reforms, even if challenges remain, such as those linked to the cultural and shift necessary to make the proposed innovation possible. Encouraging signs in this direction could be found in the growing understanding of profit-making as an objective to be pursued in an "enlightened" or long-term manner (i.e., less narrowly and more responsibly toward stakeholders), but is yet to be seen if these will continue to grow and solidify.

Another contribution of this study lies in its focus on local communities, a category of stakeholders that has thus far been largely overlooked by corporate legal doctrine. Other than

identifying protective mechanisms against corporate harm and recognizing communities as relevant corporate stakeholders, this research has laid the groundwork for their acknowledgment as legally relevant subjects and developed a general framework for identifying communities as corporate stakeholders that could serve both as a basis for identifying the beneficiaries of the proposed directors' duty of care and as a foundation for future research specifically dedicated to these groups and, more generally, to communities affected by corporate harm.

In particular, communities that satisfy the three characteristics discussed in Chapter 3 align with core ToC values–collaboration, resource sharing, and personalism–thereby ensuring conceptual coherence with the theoretical framework underpinning this research and, consequently, with the resulting proposal for a duty of care towards stakeholder communities. This proposed duty would, in turn, particularly benefit communities with those characteristics because their physical presence and cohesive interests, grounded in their connection to local natural commons and interest in their conservation, would facilitate directors in identifying and recognizing them as relevant stakeholders. Furthermore, the high standards of representativeness for collective interests that derive from their democratic governance can enhance these communities' legitimacy in advocating for the protection of such interests against corporations. By focusing on collective interests and community standing in litigation, this study also contributes to the variegated strand of Italian scholarship that has addressed these issues since the 1970s.

Further contributions of this research lie in the hard-law statutory foundation of its main argument and comparison with Canada. The first aspect has helped overcome the weaknesses of previous scholarship that relied on constitutional or voluntary provisions to support directors' responsibilities toward stakeholders. Indeed, constitutional norms are generally not directly applicable to private entities, while voluntary provisions can be easily bypassed by corporations choosing to opt out of them. Moreover, the comparison with Canada has offered important insights into the potential challenges of grounding a directors' duty not to harm communities within the framework of their duties of care. The 2004 ruling of the Supreme Court of Canada (SCC) in the *Peoples Department Stores Inc. (Trustee of) v. Wise* and the extensive scholarly debate it generated have provided a rich foundation to reflect on the features of this proposal, thereby contributing to its refinement and consolidation.

In particular, the comparative analysis has helped clarify:

- The scope of the duty, which *is owed by directors to communities* by virtue of the inward and outward dimensions of the obligation to establish adequate arrangements and should be intended as a "protective duty".
- The standing to sue, which should be granted to affected communities and directly exercised against responsible directors if the harm suffered was personal–i.e., harm directly caused by managerial conduct–and a qualified relationship existed between the affected community and the responsible directors–i.e., the affected community was among the stakeholders whom the directors were expected to protect.
- The standard of liability of directors, which should be a professional standard of negligence.

- The grounds for compensation, which should include (a) a damage occurred in the performance of managerial duties; (b) unjust harm, either monetary or not, deriving from the violation of a protective duty; (c) causation, following the "more likely than not" standard.
- The nature of the claim, which should be intended as quasi-contractual, that is, deriving from (i) the protective obligation imposed by the duty to establish adequate arrangements upon directors; (ii) the connection between stakeholder communities and the territory, which qualifies their relationship with the company and its management; and (iii) the professional (or akin to professional) status of directors, which justifies the expectation of diligent performance of their protective obligation owed to third parties.
- The application of the BJR, which should be excluded in its traditional form; only a narrow, technical margin of discretion would remain in the assessment of adequacy in risk-identification and management arrangements.
- That the risk of excessive claims is likely unfounded given the evidentiary, organizational and legal costs communities would bear in pursuing claims for redress.
- That, while directors may continue to be subject to incentives to pursue shareholders' interests, these should not be overstated but rather viewed critically as partially necessary to balance directors' exposure to liability with the effective protection of harmed parties.
- That the risks of excessive proceduralization of directors' conduct are mitigated by the substantial nature of the creation and assessment of protective corporate arrangements.

Regarding Canadian corporate law, more direct contributions of this study lie in enriching the existing literature on the scope and content of managerial obligations and in integrating it through a focus on communities as corporate stakeholders. Moreover, this research has established a basis for further comparative analyses in the area of corporate law between Italy and Canada, which are currently not widely developed.

Despite its innovative character, this research remains grounded in prior literature and policy proposals. The promotion of corporate sustainability through directors' duties has long been advocated in Italy, initially by the supporters of institutionalist views and later by those concerned with corporate responsibility, although primarily with reference to fiduciary duties. The fewer attempts to rely on duties of care have faced the persistent challenge of identifying a solid legal basis on which to build a convincing argument. While sustainability has been a long-standing concern, particularly within the EU framework, its translation into binding legal measures is a relatively recently phenomenon and still marked by significant limitations in terms of scope, interpretation, applicability–especially on non-EU countries–and legislative stability.

This study also aligns with the traditional Italian contractarian view of the corporation, for which the corporate interest should not be legally mandated to include social or environmental objectives but rather be determined by shareholders and may lawfully consist in profit-making. The proposal advanced here explicitly rejects an expansion of directors' fiduciary duties, which tie management to pursue the corporate interest. Other than facing theoretical challenges, as noted above, such an expansion would also likely fail produce the desired effects, as suggested by the limited use of non-profit or hybrid corporate models to date. The ultimate task of corporate

law to promote sustainability should be to ensure for-profit enterprises deliver better social and environmental outcomes, in light of a cooperative framework that engages various societal sectors while preserving the distinct roles and functions of each. Accordingly, this study does not seek to redefine the content of the corporate interest; rather, it maintains that sustainability-oriented obligations for directors are embedded in specific legal provisions, whether within corporate law or other areas of law, external to the notion of corporate interest.

In terms of policy proposals, a similar preference for integrating sustainability concerns into corporate governance through duties of care was expressed in a 2021 report published by the Association of Italian Listed Companies (Assonime). While there are notable differences between Assonime's position and the one advanced here–such as its preference for a voluntary rather than a mandatory approach, its more optimistic assessment of Italy's progress on corporate sustainability so far, and its limitation of direct enforcement mechanisms against directors to corporate shareholders–this study nonetheless shares a line of continuity with earlier policy recommendations developed in Italy.

These final remarks should not be complete without a discussion of the study's limitations and proposals for future research. First, it should be noted that the theoretical framework adopted here has so far been supported by only a minority of Italian legal scholars.[1] While using an innovative theoretical perspective constitutes a valuable contribution of this research, it may also raise concerns about its applicability in contexts where the underlying theoretical premises are not broadly accepted. Given the limited body of scholarship on commercial law engaging with this perspective,[2] further research aimed at reinforcing its use and emphasizing its benefits in relation to corporate law issues is desirable.

A similarly minoritarian position is reflected in the interpretation of directors' duty to establish and maintain adequate arrangements in light of socially and environmentally oriented legal norms. This interpretation relies on the use of the adverb "also" in the provision defining the functions of implementing such arrangements,[3] understanding it as allowing the pursuit of additional purposes beyond those explicitly stated, such as social and environmental protection.

[1] Among commercial law scholars, to the best of my knowledge, a commons-inspired framework has so far been employed only by Giacomo Bosi. Among private law scholars, this framework has been used and/or explored most notably by Stefano Rodotà, Ugo Mattei, and Maria Rosaria Marella. It is also worth mentioning the important contribution to commons-related topics offered by the Italian legal historian Paolo Grossi. For a more detailed discussion of previous literature adopting similar frameworks, both in Italy and abroad, see Chapter 2, subsection 4.3.

[2] Simon Deakin, "The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise" (2012) 37:2 Queen's LJ 339–381; David Gindis & Eva Micheler, "Institutional theory for corporate law: an invitation" (2024) 24:2 Journal of Corporate Law Studies 399–435; Giacomo Bosi, "Commons rules. Regolazione dei beni comuni imprenditoriali e neo- funzionalismo del diritto commerciale" (2024) 6 Giur comm 1231–1254.

[3] The provision cited in the text–Article 2086, para 2, Civil Code (Italy)–reads: 'The entrepreneur, whether operating in a corporate or collective form, has a duty establish organizational, administrative, and accounting arrangements adequate to the nature and size of the business, also for the purpose of timely detecting any business crisis and the loss of business continuity, as well as to promptly take action for the adoption and implementation of one of the instruments provided by law for overcoming the crisis and restoring business continuity.' [My translation]

However, more restrictive interpretations have also been advanced, rejecting the idea that "also" could extend the use of arrangements for purposes not mentioned in the provision. The persistence of this reading suggests that the argument advanced in this study may face challenges from scholars who endorse similar positions. To address this potential limitation, further research should seek to strengthen the case for extensive interpretations of this duty, and to provide doctrinal and empirical evidence in support of these interpretations.

Another important aspect requiring attention concerns the scope of sustainability due diligence obligations, as their application to very large corporations may restrict the generalization of this research's findings to all Italian public corporations.[4] As noted in Chapter 5, however, this aspect should not be overstated given the potential cascading effect of such obligations along in-scope companies' value chains and the possibility that their scope of application will expanded in the future, as has already occurred with sustainability reporting legislation. Truly, these prospects appear to be weakening in the light of recent EU developments under the "Stop-the-Clock" Directive, which have postponed the deadline for Member States' transposition of the CS3D and its reporting obligations. Additionally, under the stated aim of easing administrative burdens on European businesses and increase their competitiveness,[5] the "Omnibus Proposal" is seeking to further dilute sustainability reporting and due diligence requirements[6] as well as revoke the requirement for Member States to allow actions by representative trade unions and NGOs for harmed caused by violations of CS3D obligations.[7] This latter change would have negative implications for the protection of communities, as it would permit Member States to provide only

[4] Importantly, while the duty to establish adequate setups under Art 2086 applies to all Italian collective enterprises, the sustainability reporting and due diligence duties apply to a narrower range of companies, primarily large companies and their business partners. This difference is crucial in clarifying the scope of application of the proposed duty of fair treatment towards local communities. This duty has been based on both the duty to establish adequate setups and the sustainability obligations introduced by EU laws. Therefore, by way of first approximation, it could apply only to corporations that fall within both legislative scopes. For example, individual enterprises and small to medium companies that do not have business partners classified as EU sustainability-in-scope companies should be considered as falling outside the scope of our proposal.

[5] The Omnibus I Package, to which the text refers, includes the following proposals: EU, *Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements,* [2025] COM/2025/80 final; EU, *Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements*, [2025] COM(2025) 81 final; EU, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2023/956 as regards simplifying and strengthening the carbon border adjustment mechanism* [2025] COM(2025) 87 final.

[6] EU, *Directive 2025/794 of the European Parliament and of the Council of 14 April 2025 amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements,* [2025] OJ L 2025/794. This directive also provides for a postponement of the reporting obligations imposed by the CSRD. For an overview of the amendment proposals see https://ec.europa.eu/commission/presscorner/detail/ent/qanda_25_615. For a summary of changes on the EC proposal see https://en.frankbold.org/news/what-does-the-omnibus-story-of-this-week-tell-us.

[7] COM(2025) 81 final, Art 4, (12).

for individual actions, thereby increasing the costs of access to justice and potentially creating disparities in the protection of these groups across European countries.[8]

These developments, combined with the current climate of global political uncertainty and growing public spending on rearmament, may be read as suggesting that the EU is taking a step back on its corporate sustainability commitments. However, I believe this conclusion should be treated with caution. A reversal of EU's sustainability agenda would generate paradoxical outcomes, such as undermining three decades of progress at the EU level, and appearing outdated in the face of the growing environmental crisis, potentially provoking protests from civil society. It would also create new uncertainty in the EU market, which may betray, at least to some extent, the competitiveness goals underpinning the Omnibus Proposal,[9] and potentially placing the EU at odds with national sustainability-oriented legal developments, such as the recent amendments to Articles 9 and 41 of the Italian Constitution, which prohibit private economic initiatives to be carried out in contrast with environmental and social protection.[10] For these paradoxical consequences, I share the view that EU's sustainability achievements are unlikely to be easily reversed.[11] Nevertheless, against this fast changing backdrop, it is likely that the findings of this research will soon need to be updated.

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[8] For a more optimistic perspective, see Luca Enriques, Matteo Gatti & Roy Shapira, "How the EU Sustainability Due Diligence Directive Could Reshape Corporate America" (31 December 2024), online: <https://papers.ssrn.com/abstract=5083571> at 46 ['Still, we should not overstate the impact of these proposed amendments: even if all three pass, they will lower the CS3D's regulatory burden only moderately.'] Other relevant amendments suggested by the Omnibus proposals to the CSDDD include relieving companies of the obligation to systematically conduct in-depth assessments of adverse impacts for indirect business partners, unless the company has specific information indicating a risk of adverse impacts; removing the duty to terminate the business relationships in the case of both actual and potential adverse impacts; limiting the required engagement with stakeholders only to "relevant" stakeholders; extending the interval between regular periodic assessments and updates from one year to five years; clarifying that the requirement to put into effect the transition plan for climate change mitigation should include implementation actions planned and taken. See COM(2025) 81 final, at 17 ff.

[9] Some Italian scholars have maintained that these developments exert an autonomous impact on corporate governance, separate from the influence of EU law; see Monica Cossu, "Stakeholders Theory, obiettivi ESG e interesse sociale" (2023) 3 ODC 783–804 at 798; Alberto Maria Benedetti, "Oltre il profitto: «assetti organizzativi adeguati» - «sostenibilità» - «impresa»" (2025) 2 Riv Trim Dir e Proc Civ 241–254 at 250.

[10] The Omnibus proposal have sparked significant criticism among scholars and other stakeholders: see, e.g., "Broad support for the CSDDD", online: *IDVO - Initiative for Sustainable & Responsible Business Conduct* <https://www.we-support-the-csddd.eu/>; Sabrina Bruno & Mario Manna, "More on the Omnibus Package and the Future of European Global Leadership on Sustainability" (22 May 2025), online: *BIICL Blog* <https://www.biicl.org/blog/107/more-on-the-omnibus-package-and-the-future-of-european-global-leadership-on-sustainability>; note 5; Frances Schwartzkopff, "EU Plan to Water Down ESG Rules Risks Wave of Litigation, Legal Scholars Warn", *Bloomberg.com* (9 May 2025), online: <https://www.bloomberg.com/news/articles/2025-05-09/legal-scholars-reveal-risks-in-eu-plan-to-water-down-esg-rules>; Josef Baumüller, "EU omnibus package on sustainability -something we don't want to ride (yet)?" (20 March 2025), online: <https://papers.ssrn.com/abstract=5195189>.

[11] See, e.g., Guido Ferrarini, "The Geopolitics of Corporate Sustainability Due Diligence: A Preliminary Analysis" (12 June 2025), online: <https://papers.ssrn.com/abstract=5308753> [confirming that the commitment to corporate sustainability is a general trend in Europe]; Beate Sjåfjell, "Between a Rock and a Hard Place: Corporate Boards under the Omnibus proposal" (4 June 2025), online: <https://www.jus.uio.no/english/research/areas/sustainabilitylaw/blog/2025/between-a-rock-and-a-hard-place.html>.

A third research limitation concerns the exclusion of corporate groups, cross-border harm to communities, and private companies. Although these aspects are all highly relevant to the protection of communities from corporate harm, they present specific characteristics that require dedicated analysis and therefore could not reasonably be included in this study. Addressing corporate groups and cross-border harm, in particular, would have required extending the research beyond the Italian and Canadian contexts, demanding resources and methodological breadth beyond those available. Consequently, applying the findings of this study beyond the boundaries of Italian private international law[12] will require further investigation.[13]

Similarly, extending the findings of this research to *società a responsabilità limitata* (s.r.l.), i.e., Italian private companies, will require additional research. There is growing recognition in international literature of the risks private companies pose to people and the environment, especially as they operate under more lenient regulatory frameworks than public companies.[14] At first glance, several factors seem to support a possible extension of this study's conclusions to s.r.l.: the application to their directors of the same duties of care imposed on directors of S.p.A.,[15] including the duty to establish and maintain adequate arrangements; their similar exposure to liability for damages caused to third parties;[16] the applicability of EU sustainability legislation, insofar as the relevant size and financial thresholds are met;[17] the increasing convergence with the S.p.A model,[18] and their widespread use in Italy.[19] However, certain structural differences

[12] Refer to *legge 31 maggio 1995, n. 218*, 31 May 1995, 218, Art 25, for further details.

[13] For a relevant contribution in this area, see Maria Vittoria Zammitti, *La responsabilità della capogruppo per la condotta socialmente irresponsabile delle società subordinate* (Milano: Giuffrè, 2020).

[14] Cem Veziroğlu & Abdurrahman Kayıklık, "The Climate Crisis and Private Companies: How to Address the Sustainability Arbitrage Problem" (2023) 24:4 EBOR 585–621; Alperen A Gözlügöl & Wolf-Georg Ringe, "Private companies: the missing link on the path to net zero" (2022) 22:2 Journal of Corporate Law Studies 887–929.

[15] For a discussion of the features of directors' duties of care in *s.r.l.* compared to *s.p.A.* and further bibliographic references, see Matteo Rescigno, "La responsabilità gestoria: profili generali" in Carlo Ibba & Giorgio Marasà, eds, *Le società a responsabilità limitata* (Milano: Giuffrè, 2020) 1765 at 1768 ff.

[16] Arts 2475 and 2476 Civil Code (Italy). The responsibility to establish adequate setups is among the few powers exclusively attributed to directors in the s.r.l. model, as other managerial powers are attributed to shareholders by law or may be attributed by company articles. On this point, Renato Santagata, "Assetti organizzativi adeguati e diritti particolari di "ingerenza gestoria" dei soci" (2020) 5–6 Riv Soc 1453–1480; Gian Domenico Mosco, "Funzione amministrativa e sistemi di amministrazione" in Carlo Ibba & Giorgio Marasà, eds, *Le società a responsabilità limitata* (Milano: Giuffrè, 2020) 1625 at 1650 ff.

[17] Art 3 CS3D; Art 1(1)(a) Directive 2013/34/EU.

[18] E.g., through a gradual opening to equity capital markets (most recently, through *d. lgs. 10 marzo 2023, n. 30*, 10 March 2023, 30). For further information and bibliographic references on this topic, see Silvia Guizzardi, "La s.r.l. che si apre al mercato" (2024) 1 Europa e Diritto Privato 147–167; Giuseppe Zanarone, *La s.r.l. A vent'anni dalla riforma del diritto societario* (Milano: Giuffrè, 2023) at 484 ff and 599 ff. This opening may create issues in s.r.l. where shareholders play a significant role in management. In an 'open' s.r.l., the apathy of shareholders who are merely investors could threaten the functioning of the corporation, as noted by *ibid* at 602. The convergence of s.r.l. towards s.p.A. has also concerned governance rules, see Oreste Cagnasso, "Profili organizzativi e disciplina applicabile alle S.r.l. e PMI" in Paolo Montalenti & Mario Notari, eds, *Società a responsabilità limitata, piccola e media impresa, mercati finanziari* (Milano: Giuffrè, 2020) 59 at 71 ff.

[19] Luciano De Angelis, "Spa dimezzate in venti anni. Srl con più appeal: ecco perché", *ItaliaOggi* (25 May 2025), online: <https://www.italiaoggi.it/diritto-e-fisco/diritto-e-impresa/spa-dimezzate-in-venti-anni-srl-con-piu-appeal-ecco-perche-gvt33gfo>.

between these two models–such as in terms of governance structure flexibility,[20] the managerial role of shareholders,[21] and lower capitalization–suggest the need for deeper analysis. This should not only confirm whether a managerial duty to take care to prevent harm to communities can be identified in s.r.l. but also assess the advisability of such a duty in that context.[22]

Finally, this work will benefit from further empirical research to complement its primarily theoretical nature. Such research could, for instance, take the form of a prospective implementation analysis of the proposal advanced here, conducted through selected case studies. This would allow for an assessment of potential implementation challenges, such identifying appropriate remedies for non-monetary and non-monetizable harm, and ultimately contribute to refining and further strengthening the proposal.

Overall, coming back to the words of the 1994 White Paper cited in the introduction, it is clear that, more than thirty years later, the search for a balance between economic needs, social well-being, and the responsible use of natural resources remains a major political and scientifical challenge, not only for Europe but for the whole world. As we approach environmental tipping points, pursuing this balance should be an absolute priority and would require coordinated and inclusive efforts across countries and disciplines. The road ahead is still long, but this study will hopefully be a small step forward towards a better future.

[20] See, e.g., Rescigno, *supra* note 14 at 1767.

[21] Notwithstanding the 2019 reform of Art 2475 Civil Code (Italy), which extended to *s.r.l.* the principle of public corporations that management of the company is exclusively the responsibility of the directors; Mosco, *supra* note 1155 at 1633.

[22] For example, the economic impacts of sustainability obligations on *s.r.l.*, which are generally SMEs, should be thoroughly assessed and balanced with the need to promote socially and environmentally friendly business practices. Moreover, the key role that shareholders typically play in the management of these companies – and the liability to which they are subject severally with directors *also* for the damages caused to third parties – suggests considering whether it might be more advisable for s.r.l. to impose sustainability obligations on shareholders rather than on directors (this point has been supported, in the S.p.A. model, by Giacomo Bosi, “Commons rules. Regolazione dei beni comuni imprenditoriali e neo- funzionalismo del diritto commerciale” (2024) 6 Giur comm 1231–1254). Alternatively, to the extent they have contributed to the harmful management, shareholders could be held liable alongside directors, who still main a "filter" function over the managerial decisions taken by shareholders. For a further discussion on s.r.l. managing shareholder liability, see, among others, Rescigno, *supra* note 14 at 1796 ff; Giuliana Scognamiglio, “La responsabilità gestoria: le azioni” in Carlo Ibba & Giorgio Marasà, eds, *Le società a responsabilità limitata* (Milano: Giuffrè, 2020) 1829; Stefano Bonora, *La responsabilità del socio “gestore” di società a responsabilità limitata* (Milano: Giuffrè, 2013) at 323 ff.

Tables

Table 1

Region	Provisions highlighting the local dimension of Community Cooperatives
Abruzzo *l.r. 8 ottobre 2015, n 25*	(Article 4) 1. For the purposes of this law, "community" refers to municipalities, any districts provided for in the statutes of the municipalities themselves, and associations of municipalities. 2. The community cooperative must have a number of members, as identified in Article 3 of this law, that represents the following percentages of the total resident population in the reference community, as determined by the latest official census: a) 1% of the population for districts, municipalities, and associations of municipalities with a population of up to 5,000 inhabitants, and in any case, the number of members cannot be fewer than 12; b) 0.8% of the population for districts, municipalities, and associations of municipalities with a population of 5,000 to 15,000 inhabitants, and in any case, the number of members cannot be fewer than 25; c) 0.5% of the population for districts, municipalities, and associations of municipalities with a population of 15,000 to 50,000 inhabitants, and in any case, the number of members cannot be fewer than 50; d) 0.1% of the population for districts, municipalities, and associations of municipalities with a population over 50,000 inhabitants, and in any case, the number of members cannot be fewer than 100. 3. If the number of members falls below the parameters outlined in paragraph 2, it must be replenished within one year.
Apulia *l.r. 20 maggio 2014, n. 23*	(Article 3) 1. "Community cooperatives", by virtue of the mutual exchange that occurs, can be established as production and work cooperatives, user cooperatives, support cooperatives, social cooperatives, or mixed cooperatives. The members are those specified by cooperative legislation in the categories of working members, user members, and funding members, who operate with and within the reference community in various capacities. 2. By virtue of the mutual exchange realized, the following can qualify as members of community cooperatives: a) natural persons; b) legal entities; c) non-profit associations and foundations that have their residence or legal headquarters in the reference community of the cooperative. 3. Public entities, including local authorities where the community cooperative operates, can also qualify as members. (Article 4) 1. For the purposes of this law, "community" refers to municipalities and any potential districts provided for by the statutes of the municipalities themselves. 2.The community cooperative must have a number of members, as specified in Article 3, which, relative to the total resident population in the reference community as determined by the latest official census, must represent: a) 10% of the population for districts and municipalities with a population of up to 2,500 inhabitants; b) 7% of the population for districts and municipalities with a population of up to 5,000 inhabitants; c) 3% of the population for districts and municipalities with a population exceeding 5,000 inhabitants. 3. If the number of members falls below the thresholds specified in paragraph 2, it must be restored within one year, otherwise, the cooperative will be removed from the register referred to in Article 5.
Basilicata *l.r. 20 marzo 2015, n. 12*	(Article 12) 3. For the purposes of this law, "community" refers to municipalities and the aggregate areas provided for in the statutes of the municipalities themselves and/or the relevant regulations. 4. By virtue of the mutual exchange that occurs, the following qualify as members of community cooperatives: a) natural persons; b) legal entities; c) non-profit associations and foundations with legal headquarters in the reference community of the cooperative; d) local authorities in which the community cooperative operates. 5. The Regional Council, within one hundred and twenty days from the entry into force of this law and after consulting the relevant committee, shall adopt a regulation to define the requirements for registration in the section of community cooperatives and for maintaining the Regional Register, taking into account the representativeness of the number of members relative to the resident population in the reference community.
Calabria *l.r. 2 dicembre 2024, n. 40*	(Article 2) 1. For the purposes of this law, the designation of “community cooperative” and registration in the register referred to in Article 3 is reserved by the Calabria Region for cooperatives that meet the following requirements: (…) b. A membership made up of at least 80 percent of individuals who belong to the local community of reference; (…) 2. The “local community of reference” for community cooperatives is composed of the community of natural persons, legal entities, public bodies, businesses, professionals, third sector entities, entities and organizations that are resident in, have their headquarters in, or conduct their activities on a regular basis, or use services in a “specific territory” identified in one of the following areas within the regional territory: a) mountain areas, internal areas, or areas at risk of depopulation, or regions characterized by socio-economic difficulties and environmental issues; b) particular contexts such as metropolitan areas or urban peripheries, characterized by reduced social, economic, and market accessibility, leading to a scarcity of services and the presence of social marginalization; c) specific contexts, both urban and rural, experiencing economic, social, and environmental transitions where there

	are untapped opportunities and the potential for innovation to address community needs related to quality of life that are not yet or not fully met. 3. The “specific territory” of the “local community of reference” may include an entire municipal area, part of it, or have an inter-municipal nature.
Campania *l.r. 2 marzo 2020, n. 1*	(Article 2) 1. For the purposes of this law, community cooperatives are defined as cooperative companies established under Articles 2511 and following of the Civil Code and registered in the Register of Cooperatives referred to in Article 2512 of the Civil Code and Article 223 sexiesdecies of the provisions for the implementation of the Civil Code. These cooperatives, to counteract depopulation, economic decline, social or urban degradation, must establish their legal headquarters and operate primarily: a) in one or more municipalities of the Region falling under the National Strategy for the Development of Internal Areas of the Country (SNAI); b) or in one or more municipalities falling under the types provided in Article 1, paragraph 2, of Law No. 158 of October 6, 2017 (Measures for the support and enhancement of small municipalities, as well as provisions for the redevelopment and recovery of the historic centers of the same municipalities); c) or in degraded urban areas identified according to the criteria established by Article 2, paragraph 2 of the Annex to the Decree of the President of the Council of Ministers No. 90975 of October 15, 2015 (Interventions for the social and cultural redevelopment of degraded urban areas). 3. The provisions of this law also apply to consortia constituted as cooperative societies whose social base is 100% made up of community cooperatives, even if operating in different areas or territorial sectors of the Region. (Article 3) 1. The act of incorporation of the community cooperative, subject to the provisions of Article 2521 of the Civil Code, must indicate: (...) b) the delimitation of the operational territorial scope and the requirements for members' affiliation or connection to their community or territory; (...). (Article 4) 1. The members of community cooperatives are: a) natural persons who are residents, or were residents, or who operate continuously in the affected community, or who are connected to it in a non-occasional manner; b) legal entities that have established their legal or operational headquarters in the affected community, or that operate continuously within it.
Emilia Romagna *l.r. 3 agosto 2021, n. 12*	(Article 2) 1. For the purposes of this law, community cooperatives are defined as cooperative companies established under Articles 2511 and following of the Civil Code and registered in the Register of Cooperatives referred to in Article 2512 of the Civil Code. These cooperatives, to counteract depopulation, economic decline, social or urban degradation, and environmental issues, must establish their headquarters within the regional territory and operate in mountainous areas, internal areas, or areas at risk of depopulation, or in zones characterized by socio-economic difficulties and environmental criticalities.(Article 3) 1. The bylaws of the community cooperative, subject to the provisions of the Civil Code concerning cooperative enterprises, must indicate:(...) b) the delimitation of the territorial scope of the reference community; c) the requirements for members' affiliation or connection to their community or territory; (...)(Article 4) 1. For the purposes of this law, the members of community cooperatives are: a) natural persons who are residents, or hold property rights or other real rights on properties registered in the affected community, or who operate or commit to contributing to the achievement of social goals through their work or professional activity continuously within the affected community, or who are connected to it in a non-occasional manner; b) legal entities, subjects, and organizations that have established their headquarters in the affected community or that operate continuously within it.
Friuli Venezia Giulia* *Proposta di l. 16 giugno 2025, n. 55*	(Article 2) 1. For the purposes of this law, community cooperatives are defined as cooperatives established to meet the needs and enhance the resources of a well-defined geographical area, constituted in accordance with Articles 2511 and following of the Civil Code, and registered in the Regional Register of Cooperatives referred to in Article 3 of Regional Law No. 27 of December 3, 2007 (Comprehensive regulations on the promotion and supervision of the cooperative sector), and created to meet the needs and enhance the resources of a well-defined geographical area. (Article 4) 2. The community cooperative must be representative of the community of reference, including in its actual membership structure, which must be composed of at least 50 percent individuals or legal entities residing or based within the cooperative’s area of reference. (Article 5) 1. Members of community cooperatives include: a) natural persons with residence or domicile in the interested community; b) legal entities with headquarters or activities in the interested community; c) non-profit associations and foundations with legal headquarters in the reference community of the cooperative.
Lazio *l.r. 3 marzo 2021, n. 1*	(Article 2) 1. For the purposes of this law, "community cooperatives" are defined as cooperative societies: (...) b) with their headquarters in the regional territory and operating primarily: 1) in mountainous areas, internal areas, or areas at risk of depopulation, or in regions characterized by socio-economic distress and environmental criticalities; 2) in specific contexts, such as metropolitan areas or urban and peri-urban peripheries, characterized by reduced social, economic, and market accessibility, resulting in a scarcity of services, school dropout, and social marginalization. 4.The provisions of this law also apply to consortia constituted as cooperative societies whose social base is 100% made up of community cooperatives, even if operating in different areas or territorial sectors of the Region. (Article 3) 2. The members of community cooperatives may include natural persons who reside or operate continuously in the territory of the reference community, as well as legal entities, subjects, and organizations that have their headquarters in the same territory or operate continuously within it. 3. The act of incorporation of the community cooperative must specify: (...) b) the delimitation of the operational territorial scope and the requirements for members' affiliation or connection to their community or territory. (...)

Liguria *l.r. 7 aprile 2015, n. 14*	(Article 3) 1. Members of community cooperatives include those specified by national cooperative legislation (working members, user members, funding members) who belong to the affected community or operate with it in various capacities, selecting it as their own. 2. The following can become members of community cooperatives: a) natural persons; b) legal entities; c) Third Sector organizations defined by Title II of Regional Law 42/2012 and subsequent amendments and additions. 3. Entities specified in paragraph 2, letters b) and c), must have their legal headquarters in the affected community and explicitly declare their intent to be affiliated with that community. 4. Local authorities in whose territory the community cooperative operates, as well as other public entities, can also qualify as members.
Lombardy *l.r. 6 novembre 2015, n. 36*	(Article 11) 2. Community cooperatives, by virtue of the mutual exchange that occurs, are established as production and work cooperatives, user cooperatives, social cooperatives, or mixed cooperatives. The members are those specified by cooperative legislation in the categories of working members, user members, and funding members, who operate with and within the reference community in various capacities.
Marche* *Progetto di l. 16 settembre 2019, n. 305*	(Article 2) 1. For the purposes of this law, and in the absence of national regulations recognizing them, "Community Cooperatives" are cooperative companies (...) and that, while adhering to the provisions of the Civil Code concerning cooperative societies: a) establish their headquarters and operate in one or more municipalities within the Region; (...).
Molise* *Progetto di l. 13 settembre 2019, n. 89*	(Article 3) 1. "Community cooperatives", by virtue of the mutual exchange that occurs, may be established as production and work cooperatives, user cooperatives, support cooperatives, social cooperatives, or mixed cooperatives, and their members are those specified by cooperative legislation in the categories of working members, user members, and funding members, who operate with and within the reference community in various capacities. 2. By virtue of the mutual exchange realized, the following can qualify as members of community cooperatives: a) natural persons; b) legal entities; c) non-profit associations and foundations that have their residence or legal headquarters in the reference community of the cooperative.3. Public entities of the local authorities where the community cooperative operates can also qualify as members. (Article 4) 1. For the purposes of this law, "community" refers to municipalities and any aggregations such as districts with a population of more than 100 inhabitants. 2. The community cooperative must have a number of members, as specified in Article 3 of this law, which, relative to the total resident population in the reference community as determined by the latest official census, represents: a) 1.5% of the population for districts and municipalities with a population of up to 5,000 inhabitants; b) 1% of the population for districts and municipalities with a population exceeding 5,000 inhabitants. 3. If the number of members falls below the thresholds specified in the previous paragraph, it must be restored within one year, otherwise, the cooperative will be removed from the register referred to in the following Article 5.
Piedmont *l.r. 18 maggio 2021, n. 13*	(Article 2) 1. For the purposes of this law and pending national regulations, cooperative companies (...) are recognized as Community Cooperatives (...) that: a) Establish their headquarters in the regional territory and operate predominantly within it, in areas that are at risk of phenomena such as depopulation, economic decline, deterioration of the building stock, and social marginalization; b) Have the majority of their members residing in the municipality where the headquarters is located and in adjacent municipalities or municipalities within the same pre-defined territorial scope; these restrictions do not apply to funding members; c) Specify in their bylaws the reference territorial area to which they particularly direct the social benefits derived from their activities; (...).
Sardinia *l.r. 2 agosto 2018, n. 35*	(Article 2) 1. For the purposes of this law, "Community Cooperatives" are cooperative companies that have the explicit goal of providing benefits to a community to which the members belong or choose as their own. (...) (Article 3) 1. For the purposes of this law, the "reference community" refers to the municipality or municipalities and their potential districts where the community cooperatives operate. (Article 4) 1. The members of community cooperatives are those specified by national cooperative legislation (working members, user members, funding members) who belong to the reference community or operate with it in various capacities, designating it as their own. 2. In addition to natural persons and third sector organizations, local authorities within the territory where the community cooperative operates, as well as other public entities, may also become members, provided they have their legal headquarters in the reference community and explicitly declare that they predominantly conduct their activities for the community.
Sicily *l.r. 27 dicembre 2017, n. 25*	(Article 3) 1. The members of a community cooperative can be natural or legal persons who operate with and within the reference community and who have their residence, domicile, or legal or actual headquarters in the territory where the cooperative is established. This requirement does not apply to funding members. (Article 4) 1. For the purposes of this law, the "reference community" refers to the territories of one or more municipalities, or municipal districts, or parts of them, that are similar in geographic, cultural, or economic characteristics.
Tuscany *l.r. 14 novembre 2019, n. 67*	(Article 2) 4. The membership of community cooperatives consists of: a) Natural and legal persons who belong to the affected community or provide funding or operate with it; b) Third sector organizations as defined by Legislative Decree No. 117 of July 3, 2017 (Third Sector Code, pursuant to Article 1, paragraph 2, letter b), of Law No. 106 of June 6, 2016) that have their legal headquarters in the

	reference community and explicitly declare that they predominantly carry out their activities for the benefit of the community.
Trentino Alto Adige *l.r. 31 gennaio 2022, n. 1*	(Article 2) 3. The bylaws of the community cooperative must specify: (...) b) The delineation of the operational territorial scope; (...) d) The functional link between the cooperative's purpose, the reference community, and the operational territorial scope; (...) (Article 3) 2. The membership of the community cooperative must consist of at least 40% of individuals who are residents or domiciled within the cooperative's area of operation. 6. Public or private legal entities with their legal or operational headquarters in the territory, and who carry out their activities for the benefit of the reference community, may also be admitted as members of community cooperatives.
Umbria *l.r. 11 aprile 2019, n. 2*	(Article 2) 1. For the purposes of this law and in the absence of national regulations recognizing them, "community cooperatives" are defined as cooperative companies (...) which, while adhering to the provisions of the Civil Code concerning cooperative companies, meet the following criteria: a) Establish their headquarters and operate in one or more municipalities within the Region; (...).
Veneto *l.r. 12 agosto 2025, n. 21*	(Article 1) 1. The Veneto Region, (...), recognizes and promotes the role and function of community cooperatives for those cooperative whose objective is to provide services that meet the needs of a defined territorial community, to which the founding members belong or which they choose as their own. (Article 2) 1. For the purposes of this law, "community cooperatives" are defined as cooperatives: (...) b) With their headquarters in the regional territory and operating predominantly: 1) in mountainous areas, internal areas, or areas at risk of depopulation, or in zones characterized by socio-economic distress and environmental criticality; 2) in specific contexts, such as metropolitan areas or urban and peri-urban peripheries, characterized by reduced social, economic, and market accessibility, resulting in service scarcity, school dropouts, and the presence of social marginality (…). 2. The provisions of this law also apply to consortia established as cooperative with a membership base made up 70% of community cooperatives, even if operating in different areas or territorial domains of the Region, including municipalities contiguous with other Regions. (Article 3) 2. By virtue of the mutual exchange carried out, individuals who reside or operate on a continuous basis within the territory of the community of reference, as well as legal entities, entities, and organizations that are based in or operate on a continuous basis within the same territory, may qualify as cooperative members of the cooperative. 3. The majority of the members of community cooperatives must consist of individuals residing in, and/or legal entities and organizations that have their registered office in or operate on a continuous basis within, the territory of reference.

Note: Information updated on October 5, 2025.

Table 2

Region	Provisions highlighting the purpose of Community Cooperatives
Abruzzo *l.r. 8 ottobre 2015, n 25*	(Article 2) 1. “Community Cooperatives” are recognized as cooperative companies, established in accordance with Articles 2511 and following of the Civil Code, and registered in the Cooperative Register as per Article 2512 of the Civil Code and Article 223-sexiesdecies of the provisions for the implementation of the Civil Code. These cooperatives, by enhancing the skills of the local population, cultural traditions, and territorial resources, aim to meet the needs of the local community, improving its social and economic quality of life through the development of eco-sustainable economic activities aimed at the production of goods and services, the recovery of environmental and monumental assets, and the creation of job opportunities.
Apulia *l.r. 20 maggio 2014, n. 23*	(Article 2) 1. "Community Cooperatives" are recognized as cooperative companies established under Articles 2511 and following of the Civil Code, and registered in the Cooperative Register pursuant to Article 2512 of the Civil Code and Article 223-sexiesdecies of the provisions for the implementation of the Civil Code. These cooperatives, by enhancing the skills of the resident population, cultural traditions, and territorial resources, aim to meet the needs of the local community, improving its social and economic quality of life. They achieve this through the development of eco-sustainable economic activities aimed at producing goods and services, recovering environmental and monumental assets, creating job opportunities, and generating local “social” capital.
Basilicata *l.r. 20 marzo 2015, n. 12*	(Article 12) 2. Community cooperatives are considered to be cooperative companies established under Article 2511 and following of the Civil Code and under Article 223-sexiesdecies of the provisions for the implementation of the Civil Code, which aim to empower citizens and meet the needs of the local community through the development of eco-sustainable activities aimed at producing goods and services, recovering environmental and monumental assets, creating job opportunities, and generating social capital.
Calabria *l.r. 2 dicembre 2024, n. 40*	(Article 2) 1.a) 2) [Community cooperatives must have] the intention to pursue, in addition to the typical mutualistic purpose, one or more of the following objectives: 2.1 To counteract phenomena of depopulation, economic decline, and social or urban decay by promoting citizens’ participation in the management of collective goods or services, as well as in the enhancement, management, or collective acquisition of goods or services of general interest; 2.2 To sustainably meet the needs of the local community of reference; 2.3 To strengthen the social and economic fabric of the local community of reference by increasing employment opportunities, creating new sources of income, and, in particular, by producing and managing goods and services primarily aimed at ensuring the full enjoyment of citizenship rights and meeting the needs of the citizens belonging to it. 1.a) 3) The corporate purpose must include the performance of one or more of the following activities typical of community cooperatives: 3.1 Enhancement of cultural and environmental common goods; 3.2 Management of social, health, and social-healthcare services, through authorization or accreditation; 3.3 Protection and promotion of local traditions and heritage; 3.4 Training and development of human resources; 3.5 Production, management, and sale of services aimed at enabling the community’s use of common goods; 3.6 Promotion and production of distinctive local products and features; 3.7 Promotion and development of productive and economic activities; 3.8 Promotion of new employment opportunities; 3.9 Organization of cultural and recreational activities aimed at fostering community engagement; 3.10 Recovery and management of environmental assets to ensure better enjoyment of the community’s ecosystem; 3.11 Redevelopment of public and private infrastructure and real estate assets; 3.12 Promotion of the area’s resources and potential, including for tourism purposes; 3.13 Provision of proximity services, particularly fostering the inclusion and empowerment of vulnerable groups; 3.14 Maintenance or restoration of places with a high social and community value; 3.15 Self-production and self-consumption, including of energy; 3.16 Promotion and dissemination of technological and digital services; 3.17 Other activities that make it possible to sustainably meet the needs of the local community of reference.
Campania *l.r. 2 marzo 2020, n. 1*	(Article 2) 1. For the purposes of this law, community cooperatives are defined as cooperative companies established under Articles 2511 and following of the Civil Code and registered in the Register of Cooperatives referred to in Article 2512 of the Civil Code and Article 223 sexiesdecies of the provisions for the implementation of the Civil Code. These cooperatives, to counteract depopulation, economic decline, social or urban degradation, must establish their legal headquarters and operate primarily: (...) (Article 3) 2. Community cooperatives, under penalty of cancellation from the Regional Register of Community Cooperatives referred to in Article 5, must in any case perform one or more activities of general interest as specified in Article 2, paragraph 1, of Legislative Decree 3 July 2017, No. 112 (Revising the discipline on social enterprises, in accordance with Article 1, paragraph 2, letter c) of Law 6 June 2016, No. 106), or other services for the community and the territory, including: a) interventions for the requalification, enhancement, and adaptation of public or private properties serving a public interest, including historical or artistic value: 1) aimed at improving the quality of urban decor, or reducing marginalization and distress;

	2) targeting the activation of services to meet family needs, care for children and the elderly, or stimulating the establishment of new youth entrepreneurial activities; b) interventions for eco-compatible integrated urban regeneration, self-recovery, and management of disused or abandoned real estate for social and collective purposes, including self-construction practices; c) initiatives for the development of social housing activities; d) promotion of eco-tourism activities and sustainable mobility services; e) interventions to promote residency and combat depopulation; f) activities involving the sale of foodstuffs, essential products, and the resale of newspapers, daily papers, and magazines; g) payment services, upon obtaining the relevant authorization or license; h) IT services; i) assistance services for the telephone or online booking of medical visits and technical support for health services; l) services for the collection and subsequent sending of correspondence in populated areas without a postal office, subject to an agreement with the postal service provider; m) library services and book rentals; n) mobility services; o) activities for the enhancement of local traditions and the intergenerational transmission of knowledge.
Emilia Romagna *l.r. 3 agosto 2021, n. 12*	(Article 2) 1. For the purposes of this law, community cooperatives are defined as cooperative companies established under Articles 2511 and following of the Civil Code and registered in the Register of Cooperatives referred to in Article 2512 of the Civil Code. These cooperatives, to counteract depopulation, economic decline, social or urban degradation, and environmental issues, must establish their headquarters within the regional territory and operate in mountainous areas, internal areas, or areas at risk of depopulation, or in zones characterized by socio-economic difficulties and environmental criticalities. 3. The Board of Directors of the cooperative shall prepare a report at least annually to inform the community of reference about the programmed objectives and the activities to be undertaken to achieve the community purpose, and to account for the results of the activities carried out in the previous year. 4. To be listed in the Register referred to in Article 7, community cooperatives must carry out, in the areas referred to in paragraph 1 of Article 2, one or more of the activities or services in the general interest of the community and the territory, consistent with the objectives indicated in Article 1.
Friuli Venezia Giulia*	(Article 1) 2. The Region promotes and supports community cooperatives that aim to meet the needs of the local community, improving its social and economic quality of life through the maintenance of services, the creation of employment opportunities, and the development of sustainable economic activities. (Article 2) 2. The cooperatives referred to in paragraph 1 pursue the following objectives: a) To meet the needs of the local community in which they operate, improving its social and economic quality of life through the development of eco-sustainable socio-economic activities, the promotion of cultural activities, the recovery of environmental or monumental assets, and the creation of employment opportunities; b) To pursue the general interest of the community in which they operate and to promote citizens' participation in the management of collective goods and services.
Lazio *l.r. 3 marzo 2021, n. 1*	(Article 1) 1. The Region, in compliance with Articles 45, first paragraph, 117, and 118, fourth paragraph, of the Constitution and state legislation, as well as Articles 7, second paragraph, letters l), m), n), and o), and 8 of the Statute, recognizes and promotes the role and function of community cooperatives, which aim to create benefits for a defined territorial community to which the founding members belong or which they choose as their own, within the scope of initiatives supporting economic development, cohesion, and social solidarity, aimed at strengthening the integrated productive system and enhancing the resources and territorial vocations of local communities. (Article 2) 1. For the purposes of this law, "community cooperatives" are defined as cooperative companies: (...) which, to counteract depopulation, economic decline, social and urban decay, and environmental issues, promote the participation of the resident population in the management of collective goods or services, enhance the skills of the population, cultural traditions, and territorial resources through the development of sustainable economic activities aimed at mutual exchange of goods and services, recovery of environmental and cultural assets, upgrading of infrastructure and public real estate, as well as creating new job demand and income opportunities; (...) 2. The sustainability of economic activities should be particularly focused on promoting the integration and enhancement of the most vulnerable members of the territorial community through cooperative activities. These activities should bring well-being to individuals facing psychological, economic, social, or environmental challenges, by supporting their development and facilitating their right to work, the transmission of intergenerational experiences within the community, and assisting workers with disabilities, according to Law No. 68 of March 12, 1999 (Norms for the Right to Work for Disabled Individuals) and subsequent amendments, benefiting the entire active supply chain in the region and fostering the inclusive culture of the community.
Liguria *l.r. 7 aprile 2015, n. 14*	(Article 2) 1. For the purposes of this law, and in the absence of national regulations recognizing them, community cooperatives are defined as cooperative companies aimed at strengthening the social and economic fabric of the involved communities, by increasing employment opportunities, creating new income opportunities, and, in particular, producing and managing goods and services primarily focused on the full enjoyment of citizenship rights and meeting the needs of the citizens who belong to these communities. In pursuing this goal, cooperatives enhance human resources, innovations, traditions, and the cultural, environmental, and common goods present in the community. If they are social cooperatives, they are registered in the Regional Third Sector Register as per Regional

	Law No. 42 of December 6, 2012 (Consolidated Text of the Third Sector Regulations) and subsequent amendments and additions. (Article 4) 1. The cooperatives referred to in Article 2, in order to adequately meet the needs of the communities, may develop integrated projects that involve, in whole or in part, the following activities related to the concerned communities: a) Enhancement of common, cultural, and environmental goods; b) Care for and enhancement of the community ecosystem; c) Protection and promotion of typical local traditions; d) Enhancement of human resources; e) Production and management of services intended for use by community members; f) Promotion and production of typical local characteristics; g) Promotion and development of productive and economic activities; h) Promotion of new employment opportunities.
Lombardy *l.r. 6 novembre 2015, n. 36*	(Article 11) 1. For the purposes of this law, "Community Cooperatives" are defined as cooperative companies established under Articles 2511 and following of the Civil Code and registered in the Cooperative Register pursuant to Article 2512 of the Civil Code and Article 223-sexiesdecies of the provisions for the implementation of the Civil Code, which promote citizen participation in the provision of public and local services, as well as public utility services, and in the enhancement and management of common goods such as, by way of example, health, culture, landscape, education, and in the collective purchase of goods or services of general interest.
Marche* *Progetto di l. 16 settembre 2019, n. 305*	(Article 2) 1. For the purposes of this law, and in the absence of national regulations recognizing them, "Community Cooperatives" are cooperative companies established under Articles 2511 and following of the Civil Code and registered in the Cooperative Register pursuant to Article 2512 of the Civil Code and Article 223-sexiesdecies of the provisions for the implementation of the Civil Code, which, also aiming to counteract phenomena of depopulation, economic decline, and social and urban degradation, pursue the general interest of the community in which they operate by promoting citizen participation in the management of collective goods or services, as well as in the enhancement, management, or collective purchase of goods or services of general interest (...).
Molise* *Progetto di l. 13 settembre 2019, n. 89*	(Article 2) 1. “Community Cooperatives” are recognized as cooperative companies established under Articles 2511 and following of the Civil Code and registered in the Cooperative Register pursuant to Article 2512 of the Civil Code and Article 223-sexiesdecies of the provisions for the implementation of the Civil Code, which, by enhancing the skills of the resident population, cultural traditions, and territorial resources, aim to meet the needs of the local community, improving its social and economic quality of life through the development of eco-sustainable economic activities aimed at producing goods and services, recovering environmental and monumental assets, and creating job opportunities. (Article 8) 1. The cooperatives referred to in Article 3, in order to adequately address the needs of the communities, may develop integrated cooperation projects that involve, in whole or in part, the following activities related to the concerned communities: a) Enhancement of common, cultural, and environmental goods; b) Care for and enhancement of the community ecosystem; c) Protection and promotion of typical local traditions; d) Enhancement of human resources; e) Production and management of services intended for use by community members; f) Promotion and production of typical local characteristics; g) Promotion and development of productive and economic activities; h) Promotion of new employment opportunities.
Piedmont *l.r. 18 maggio 2021, n. 13*	(Article 2) 1. For the purposes of this law and pending a national reference regulation, cooperative companies established under Articles 2511 and following of the Civil Code and registered in the Cooperative Register pursuant to Article 2512 of the Civil Code and Article 223-sexiesdecies of the provisions for the implementation of the Civil Code are recognized as Community Cooperatives, provided they meet the requirements of Article 2, paragraph 2, of Regional Law October 13, 2004, No. 23 (Interventions for the Development and Promotion of Cooperation). These cooperatives, also aiming to counteract phenomena of depopulation, economic decline, and social and urban degradation, develop economic activities aimed at fostering community development and maximizing collective well-being, by promoting citizen participation in the management of collective goods or services, as well as in the enhancement, management, or collective purchase of goods or services of general interest, which: (...) f) Carry out one or more activities of general interest as defined in Article 2, paragraph 1, of Legislative Decree No. 112 of July 3, 2017 (Revised Regulations on Social Enterprises, in accordance with Article 2, paragraph 2, letter c) of Law No. 106 of June 6, 2016).
Sardinia *l.r. 2 agosto 2018, n. 35*	(Article 2) 1. For the purposes of this law, "Community cooperatives" are cooperative companies that have the explicit goal of providing benefits to a community to which the members belong or choose as their own. This goal is pursued through the production of goods and services intended to have a lasting impact on the social and economic quality of life of the community. 2. Community cooperatives aim to increase employment opportunities, create new income opportunities, and, more broadly, strengthen the economic and social fabric of the communities involved, achieved through the production and management of goods and services primarily focused on meeting the needs of the citizens who belong to these communities. In pursuing this goal, cooperatives enhance human resources, traditions, and the cultural and environmental assets present in the community.

Sicily *l.r. 27 dicembre 2017, n. 25*	(Article 2) 1. Community cooperatives are cooperative companies established under Articles 2511 and following of the Civil Code and registered in the Cooperative Register pursuant to Article 2512 of the Civil Code and Article 2[2]3-sexiesdecies of the provisions for the implementation of the Civil Code and transitional provisions, which, by enhancing the skills of the resident population, cultural traditions, and territorial resources, aim to meet the needs of the local community, improving its social and economic quality of life through economic activities for sustainable development, as defined by Article 3-quater of Legislative Decree No. 152 of April 3, 2006, aimed at producing goods and services, recovering environmental and monumental assets, and creating job opportunities for the community itself.
Tuscany *l.r. 14 novembre 2019, n. 67*	(Article 2) 3. Community cooperatives are cooperative companies established under Article 2511 and following of the Civil Code, registered in the Cooperative Register pursuant to Article 2512 of the Civil Code and Article 223-sexiesdecies of the provisions for the implementation of the Civil Code, which aim to meet the needs of the local community in which they operate, improving the social and economic quality of life through the development of cultural activities, eco-sustainable socio-economic activities, recovery of environmental or monumental assets, and creation of job opportunities. Community cooperatives pursue the general interest of the community in which they operate and promote citizen participation in the management of collective goods and services.
Trentino Alto Adige *l.r. 31 gennaio 2022, n. 1*	(Article 1) 1. The Region recognizes and promotes, in accordance with the constitutional principles of solidarity and horizontal subsidiarity, “community cooperatives” as enterprises suited to fostering the sustainable and integrated development of local communities, particularly municipalities or areas within them at risk of depopulation, economic decline, or social hardship. (Article 2) 1. Community cooperatives aim to promote the integrated, economic, social, and cultural development of their respective territories. They address a range of community needs through the coordinated execution of various economic activities involving community participation and having an impact on the local area.
Umbria *l.r. 11 aprile 2019, n. 2*	(Article 2) 1. For the purposes of this law, and in the absence of national regulations recognizing them, "community cooperatives" are defined as cooperative companies established under Articles 2511 and following of the Civil Code, and registered in the Cooperative Register as per Article 2512 of the Civil Code and Article 223-sexiesdecies of the provisions for the implementation of the Civil Code, which, also aiming to counteract phenomena such as depopulation, economic decline, and social or urban degradation, pursue the general interest of the community in which they operate, by promoting citizen participation in the management of collective goods or services, as well as in the enhancement, management, or collective acquisition of goods or services of general interest (...).
Veneto*	(Article 2) 1. For the purposes of this law, "community cooperatives" are defined as cooperatives: a) Constituted in accordance with Articles 2511 and following of the Civil Code and registered in the register of cooperatives referred to in Article 2512, paragraph two, of the Civil Code and in Article 223-sexiesdecies of the provisions for the implementation of the Civil Code, which, in order to counteract phenomena of depopulation, economic decline, social, urban, and environmental degradation, promote citizens’ participation in the management of public and private assets and collective services through the development of sustainable economic activities in all sectors, with particular attention to the mutual exchange of goods and services, the recovery and management of environmental and cultural assets, and the redevelopment of public and private infrastructure and real estate.

Note: Information updated on October 5, 2025.

Table 3

	Company Name	Registration	Articles/ Reports Publicly Available	Website/ Social Media	Business Area	Primary Beneficiaries
1	3343624 NOVA SCOTIA C.I.C.	2021	No	No		
2	ANHART HOMES NOVA SCOTIA CIC	2019	No	Yes	Affordable housing; Social investment	Urban and rural communities across Canada; Individuals and families
3	CAPE BRETON ISLAND AIRPORT COMMUNITY INTEREST COMPANY	2019	No	No		
4	CLEAN VALLEY BIO-FILTRATION TECHNOLOGIES CIC	2019	No	Yes	Sustainable aquaculture	[Canadian] Oyster farmers
5	EPILOG TRANSITION SERVICES CIC	2022	No	Yes	Funeral services and end-of-life care	Nova Scotian seniors and their families
6	EVERBLOOM HOMES CIC	2019	No	Yes Yes Yes	Affordable housing	Atlantic Canadians
7	GROWBETA FERTILIZER COMMUNITY INTEREST COMPANY	2025	No	No		
8	MENTAL HEALTH AND WELLNESS NOVA SCOTIA CIC	2021	No	Yes/ Yes	Mental health and wellness navigation and education services	Nova Scotians, focusing on (but not limited to) youth ages 15 to 30
9	PLACEMAKING 4G CIC	2017	Yes	Yes	HR services	[Atlantic Canadians]
10	RESTORATIVE CHANGE LAB CIC	2025		Yes	Research and social innovation	People and communities in our backyard and around the world
11	SQUARE ROOTS FOOD SERVICES C.I.C.	2019	No	Yes	Food waste management	Nova Scotian communities
12	PACE ATLANTIC CIC	2020	No	Yes	Carbon reduction solutions for homeowners	Canadian municipalities and homeowners

Note: Data were sourced from the Nova Scotia Registry of Joint Stock Companies website (https://rjsc.novascotia.ca/), using the keywords “Community Interest Company”, “société d’intérêt Communautaire”, “CIC” and “SIC”, aligning with Section 10 CIC Act c. 38, which requires companies to include these terms in their corporate name. The results were filtered to include only active companies classified as “Community Interest Company.” After removing duplicates, 12 CICs remained. The *primary beneficiaries* column reproduces the wording from consulted sources; where unavailable, it has been supplemented by the author, in square brackets, based on the activities and areas of operation described by companies. Information updated on October 5, 2025.

Table 4

	Company Name	Registration	Articles/ Reports Publicly Available	Website/ Social Media	Business Area	Primary Beneficiaries
1	1297584 B.C. COMMUNITY CONTRIBUTION COMPANY LTD.	2024	No	Yes	Literary arts	[People in Vancouver and beyond]
2	1340611 B.C. COMMUNITY CONTRIBUTION COMPANY LTD.	2021	No	No		
3	AFRI-CAN SOCIAL ENTERPRISES (CCC) INC.	2018	No	No		
4	AFRICAN ART & CULTURAL CCC INC.	2019	No	Yes	Promotion of African and Caribbean culture	Black Communities in British Columbia; people of African Descent; African and all People of African Descent community of the Greater Victoria area
5	ALBERNI VALLEY MEDIA CCC	2023	No	Yes	Media	Residents of the Alberni Valley
6	ANHART CONSTRUCTION CCC LTD.	2018	No	Yes	Affordable Housing; Construction	[Communities across Canada]
7	ANHART HOMES CCC LTD.	2017	No	Yes	Affordable Housing; Social Investment	Urban and rural communities across Canada; Individuals and families
8	ANHART HOUSING SOLUTIONS CCC LTD	2017	No	No		
9	ANHART TENANT SERVICES COMMUNITY CONTRIBUTION COMPANY LTD.	2018	No	No		
10	ARION THERAPEUTIC FARM COMMUNITY CONTRIBUTION COMPANY LTD.	2016	No	Yes	Educational, Agricultural, Tourist and Therapeutic Services	(Initially) persons with disabilities; people of all ages and abilities
11	BCOUTDOORZ COMMUNITY CONTRIBUTION COMPANY CORP.	2025	No	Yes	Lifestyle	Iranian-Canadian Community in BC
12	BINKADI COMMUNITY SERVICES CCC CORP.	2016	No	Yes	Social services	Youth in government care, individuals living with developmental disabilities, fetal alcohol syndrome, mental illness, addictions, recovering from trauma, at risk of or recovering from homelessness and youth / young adults who have aged out of government care
13	BOUNDARY VOLUNTEER DRIVER PROGRAM CCC LTD.	2024	No	Yes	Social services; Transport	People in the Boundary (Grand Forks Area) who are unable to access public or private transportation to attend essential, non-emergency appointments.
14	BUDGIEBOX GIFT CO. CCC INC.	2021	No	Yes	Business services	Canadian small businesses
15	BUILD UP CANADA NETWORK CCC INC.	2025	No	Yes	Construction	Canadian producers and manufacturers
16	BUMBLEBEE SOLAR CCC INC.	2022	No	No		
17	BUY SOCIAL CANADA CCC LTD.	2014	No	Yes	Social procurement	Communities across the country
18	CHUZU RIDES CCC CORP.	2023	No	No		
19	CLEANSTART PROPERTY SERVICES CCC INC.	2022	No	Yes	Employment	People with barriers to employment
20	D.I.C.E.D. CULINARY EDUCATIONAL CCC INCORPORATED	2021	No	Yes	Food services;	Homeless, first nations, marginal, transitional and disadvantaged individuals

					Culinary education	
21	DO SOME GOOD COMMUNITY CONTRIBUTION COMPANY INC.	2018	No	Yes	Social services	Companies, community organizations, individuals across Canada
22	DRIVEN PROJECT CCC INC.	2021	No	Yes	Social services	Critically ill children
23	DUCKS IN A ROW EXECUTIVE SERVICES CCC INC.	2017	No	No		
24	EAST VAN ROASTERS CCC INC.	2021	No	Yes	Employment	Women living in Vancouver's Downtown Eastside
25	EKOYA LANDSYSTEMS CCC LTD.	2025	No	No		
26	FB HEALTH SUPPORT CCC CORP.	2021	No	No		
27	FOCUS ABILITY COMMUNITY CONTRIBUTION COMPANY INC.	2019	No	Yes	Employment	People with Autism Spectrum Disorder (ASD)
28	FORESTOURISM COMMUNITY CONTRIBUTION COMPANY CORP.	2023	No	No		
29	FOUR PILLARS COMMUNITY HOUSING CCC INC.	2024	No	Yes	Housing	Canadian housing charities, homeowners, community members, realtors, and non-profits
30	GATEWAY NAVIGATION CCC LTD.	2017	No	Yes	Inclusive technology	People with disabilities
31	GIV RETAILER CCC INCORPORATED	2023	No	No		
32	GOOD VENTURES COMMUNITY CONTRIBUTION COMPANY LTD.	2014	No	No		
33	HARMONY HABITAT SUSTAINABLE BUILDING SOLUTIONS CCC INC.	2013	No	Yes	Housing	[Canadian communities]
34	HUDSON BAY MOUNTAIN RESORT COMMUNITY CONTRIBUTION COMPANY LTD.	2024	No	Yes	Sport facility; Wellness	[Hudson Bay Mountain communities and local businesses]
35	J.C. CAN & COMPANY MINISTRIES CCC INC.	2025	No	No		
36	JONNON DESIGNS CCC INC.	2018	No	Yes	Employment	(Vancouver-based) sewers and artists who face barriers to traditional employment--like newcomers, new parents, people living with or recovering from mental illnesses, or people with physical barriers to full-time work
37	JOURNEY HOME COMMUNITY CCC LTD.	2015	No	Yes	Social services	Refugee claimant families arriving in Canada
38	LEAF CANADA COMMUNITY CONTRIBUTION COMPANY LTD.	2022	No	No		
39	MARKET FIT CCC INC.	2016	No	Yes	Business services	Small businesses; those without shelter, seniors, and at-risk youth (through fund programs, grants, and donations)
40	META-RELATIONAL TECHNOLOGIES CCC LTD.	2025	No	Yes	Research and development	Individuals, groups, and organizations
41	MUTIMA CANADA CCC INC.	2023	No	Yes	Newcomer services and support	Newcomers in Canada (individuals and families)
42	NUSHANA WELLNESS COLLECTIVE CCC LTD.	2025	No	No		
43	OPEN DOOR VENTURES CCC LTD.	2014	No	Yes	Entrepreneurial business development; Social	N/A; Individuals who are interested in preparing for, finding, and keeping meaningful employment as well as individuals facing mental health

					impact investing	challenges in both Vancouver and Kamloops (by financially supporting the parent company Open Door Group)
44	PHS COMMUNITY INITIATIVES CCC INC.	2013	No	No		
45	PUP-N-CUP FAMILY CAFE & SHOP CCC CORP.	2025	No	Yes	Food service; animal service	Local non-profit that empowers people with diverse-abilities through employment and social engagement
46	PURPPL COMMUNITY ENTERPRISE ACCELERATOR CCC INC.	2016	Yes	Yes	Business services; Social enterprise accelerator	Women-led, Indigenous, Black or People of Colour-led organizations, organizations located in small cities, town, rural/remote areas, mainly nonprofits (clients in 2023)
47	REBUILD CONSTRUCTION (CCC) INC.	2016	No	Yes	Renovation and building maintenance	Tenants living in Anhart's housing across BC
48	ROYA HEALTH CCC INC.	2023	No	No		
49	RYLEE O'CONNOR BUSINESS SERVICES CCC LTD.	2017	No	Yes	Bookkeeping and IT services for small to medium sized business	Charities that are working with people living in poverty in Canada and around the world (by financially supporting them)
50	SALISH CIRCLE FACILITATION CCC INC.	2024	No	Yes	Event venue	Indigenous Host Nations
51	SATURNA OUTDOOR RESEARCH CCC LTD.	2019	No	Yes	Ethical product design	[Community and environment]
52	SEMICOLON SKATEBOARDS - COMMUNITY CONTRIBUTION COMPANY LTD.	2025	No	Yes	Social services	People with mental health and addiction issues [particularly in Golden, BC]
53	SMART ANT SOLUTIONS CCC LTD.	2019	No	Yes	Business services	Community-based business start-ups globally
54	SPICE AID FOLK FOODS (CCC) INC.	2017	No	No		
55	STRONGER TOGETHER ACADEMY CCC INCORPORATED	2023	No	No		
56	THE LOCAL GIFT CARD COMMUNITY CONTRIBUTION COMPANY	2020	No	Yes	Business services	Local businesses in Kelowna (BC), Warman Area (SK), Hwy 49 East Area (SK), Vermilion Area (AB), Yukon (YT) or St. Albert Area (AB)
57	THRIFT TOWN COMMUNITY CONTRIBUTION COMPANY LTD.	2020	No	No		
58	TRI-JUBILEE INTER-COMMUNITY CONTRIBUTION COMPANY LTD.	2013	No	No		
59	TWO EYED SEEING CONSULTING CCC INC.	2019	No	Yes	Consulting	Indigenous communities and partners [in BC]; Youth and adults Indigenous people (by financially supporting programs involving them)
60	U GROW GIRL SOCIAL ENTERPRISE (CCC) INC.	2020	No	Yes	Social services	Adult female survivors of child sexual abuse
61	UNIFIED PRODUCE CCC INC.	2024	No	Yes	Sustainable agriculture	Local farmers
62	URBAN MATTERS CCC LTD.	2014	No	Yes	Social innovation	Municipalities, communities, cities, governments, NPOs, First Nations, social entrepreneurs, and socially conscious business leaders across Western Canada
63	WASHINGTON COMMUNITY MARKET CCC LTD.	2023	No	Yes	Retail groceries	Vancouver Downtown Eastside residents
64	WAYFINDING COMMUNICATIONS CCC INC.	2017	No	No		

65	WORLD HOUSING CCC INC.	2013	No	Yes	Sustainable housing	Most vulnerable people across the world (El Salvador, Mexico, Haiti, Cambodia, Colombia, Philippines, Canada, Brazil, Zambia)

Note: Data were sourced from the ORGbook BC website (www.orgbook.gov.bc.ca), using the keywords "Community Contribution Company" and "CCC" aligning with Section 51.921 BCBCA Part 2.2, which requires companies to include these terms in their corporate name. The results were filtered to include only active companies classified as "BC Community Contribution Company." After removing duplicates, 65 C3s remained. The *primary beneficiaries* column reproduces the wording from consulted sources; where unavailable, it has been supplemented by the author, in square brackets, based on the activities and areas of operation described by companies. Information updated on October 5, 2025.

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