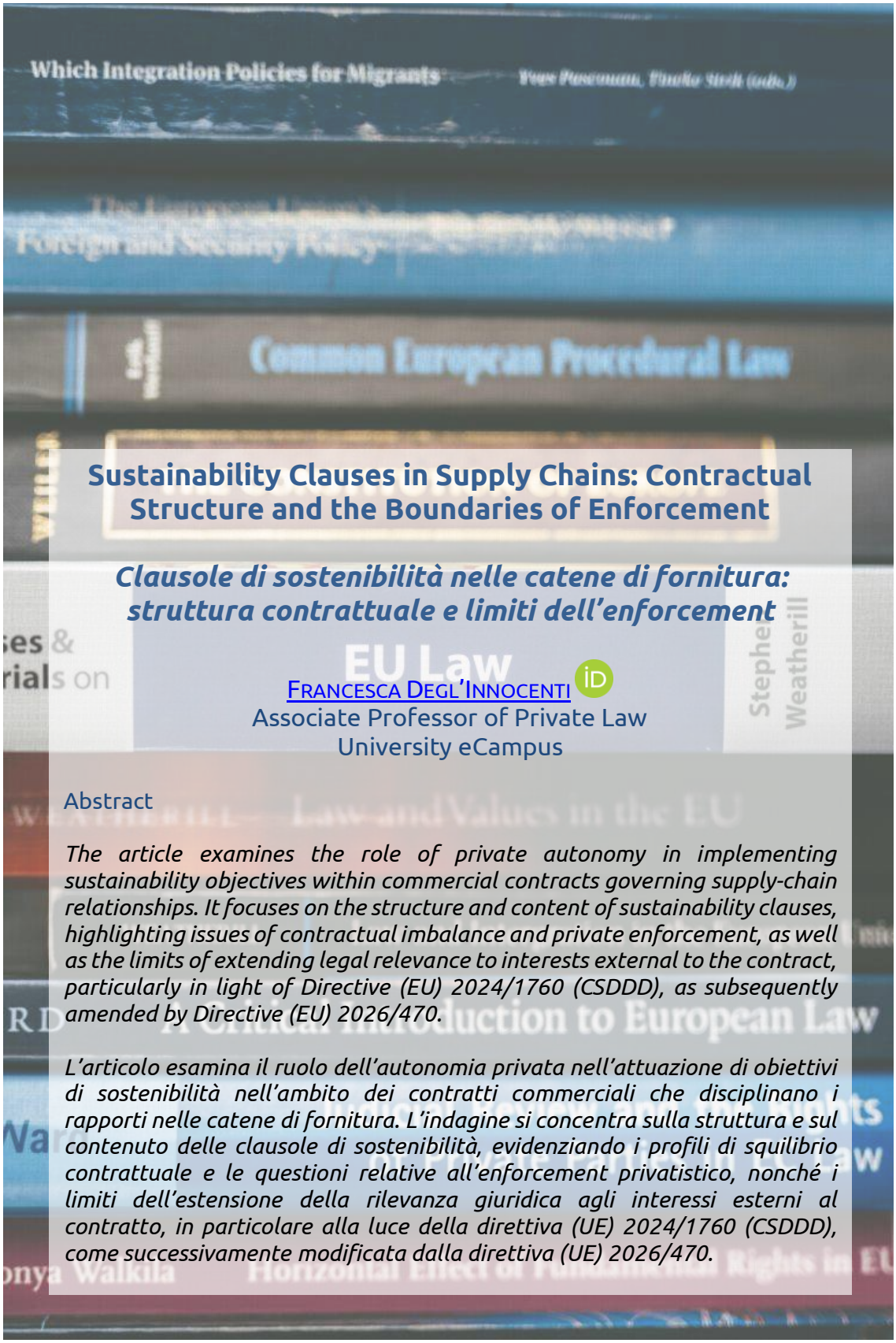
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Sustainability Clauses in Supply Chains: Contractual Structure and the Boundaries of Enforcement

Clausole di sostenibilità nelle catene di fornitura: struttura contrattuale e limiti dell'enforcement

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Abstract

The article examines the role of private autonomy in implementing sustainability objectives within commercial contracts governing supply-chain relationships. It focuses on the structure and content of sustainability clauses, highlighting issues of contractual imbalance and private enforcement, as well as the limits of extending legal relevance to interests external to the contract, particularly in light of Directive (EU) 2024/1760 (CSDDD), as subsequently amended by Directive (EU) 2026/470.

L'articolo esamina il ruolo dell'autonomia privata nell'attuazione di obiettivi di sostenibilità nell'ambito dei contratti commerciali che disciplinano i rapporti nelle catene di fornitura. L'indagine si concentra sulla struttura e sul contenuto delle clausole di sostenibilità, evidenziando i profili di squilibrio contrattuale e le questioni relative all'enforcement privatistico, nonché i limiti dell'estensione della rilevanza giuridica agli interessi esterni al contratto, in particolare alla luce della direttiva (UE) 2024/1760 (CSDDD), come successivamente modificata dalla direttiva (UE) 2026/470.

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Keywords: Sustainability Clauses; Supply Chains; Contract Law; Private Enforcement; Contractual Imbalances; Stakeholder Engagement.

Summary: 1. Introduction. – 2. Sustainability Clauses in Commercial Relationships: Content and Contractual Imbalances – 3. Sustainability Clauses, Third Parties and the Limits of Enforcement.

1. Introduction

In the context of a social market economy increasingly oriented towards sustainability, the attribution to private actors of an active role in rule-making aimed at implementing supra-individual objectives, not directly referable to the logic of economic exchange, raises issues of considerable theoretical and practical significance. The progressive enhancement of private autonomy as an instrument for implementing environmental and social concerns thus calls for reflection on the boundaries and modalities of such "decentralized" normative intervention, as well as on its implications for the traditional categories of contract law.[1]

The notion of sustainability clauses encompasses a broad and heterogeneous set of manifestations of private autonomy, which are difficult to reduce to a unitary classification. This field includes commercial practices and contractual arrangements in which environmental protection, the safeguarding of workers, inclusivity and, more generally, broader ethical and social concerns intersect with the economic interests underlying the legal relationship, giving rise to contractual configurations that vary in structure, function and degree of binding force.

The definition of sustainability objectives tends to be concentrated, on the one hand, in company statutes and articles of association and, on the other, in commercial contracts along the supply chain. This distribution reflects the operational dynamics of the company, within the global market, in its dual internal and external dimension: the former relating to the corporate purpose and internal organisational arrangements, and the latter concerning contractual relationships functional to the exercise of economic activity.[2]

[1] Under Italian law, the recognition of the power of private parties to self-regulate their relationships in pursuit of general interests is connected to the principle of horizontal subsidiarity set out in Article 118(4) of the Italian Constitution, operating with varying degrees of intensity and corresponding limits depending on whether the private operator is profit-oriented or not. This regulatory competence is expressed through the exercise of private autonomy (Article 1322 of the Italian Civil Code). See P Perlingieri, 'La sussidiarietà nel diritto privato' (2016) Rass. dir. civ. 687; more recently, E Del Prato, 'Sostenibilità, precauzione, sussidiarietà' (2023) 3 Contr. impr. eur. 147.

[2] Attempts to reconceptualise the concept of contract in sustainable terms are more controversial. Particular attention has been devoted to the notion of the "ecological contract" developed by M Pennasilico, 'Sviluppo sostenibile e "contratto ecologico": un altro modo di soddisfare i bisogni' in M Pennasilico (ed), *Contratto e ambiente. L'analisi "ecologica" del diritto contrattuale* (ESI 2016) 299–302. See also M Hautereau-Boutonnet (ed), *Le contrat et l'environnement. Étude de droit interne, international et européen* (Presses Universitaires d'Aix-Marseille 2014); B Lomfeld, 'Sustainable Contracting: How Standard Terms Could Govern Markets' in B Lomfeld, A Somma and P Zumbansen (eds), *Economic Governance, the Global Financial Crisis and Liberal Utopia* (Cambridge University Press 2016) 257.

These instruments are increasingly accompanied by models of "stakeholder engagement" aimed at actively including different stakeholders in the company's decision-making processes, thereby overcoming an approach traditionally based on the dissociation between those who exercise control (shareholders) and those who remain exposed to the risks arising from the negative externalities of economic activity (other stakeholders).

On the basis of these premises, the analysis that follows focuses on the content of sustainability clauses inserted into commercial contracts within supply chains, examining both their operational and pathological aspects, while deliberately setting aside the statutory and governance dimension, as it is referable to mechanisms regulating corporate relationships that are complementary to, yet distinct from, those proper to the contractual discipline of exchange.[3]

2. Sustainability Clauses in Commercial Relationships: Content and Contractual Imbalances

In contractual relationships between companies, the integration of ESG criteria increasingly occurs through the inclusion of contractual obligations of conduct inspired by sectoral practices, standardized models, or safety and ethical standards developed by international organisations or trade associations which, although formally situated outside the traditional sources of contractual obligations, acquire binding force once incorporated into the contractual framework.

From this perspective, the contract does not merely regulate exchange but operates as an instrument for coordinating interests and activities within production structures that are predominantly network-based, thereby contributing to redefining the functions and boundaries of private autonomy in relationships between companies.[4]

In transnational commercial relationships, it is common practice for lead companies operating within global value chains to include, in contracts with commercial partners and suppliers, sustainability clauses characterized by a high degree of standardization, with a view to harmonizing compliance conditions and thereby exercising a regulatory function over the production

[3] Sustainability concerns may also be reflected in articles of incorporation and corporate bylaws through various types of clauses relating, for example, to the corporate purpose, managerial powers, directors' remuneration, ownership structures (e.g., approval clauses), or specific strategic choices. For a discussion also addressing these aspects, see F Degl'Innocenti, 'Clausole di sostenibilità e prassi a tutela degli stakeholders' in P Lucarelli and A Santoni (eds), *Questione ambiente. Itinerari giuridici per l'impresa*, vol II (2025) 223; for a thorough analysis of bylaw clauses, M Cian, 'Clausole statutarie per la sostenibilità dell'impresa, spazi, limiti e implicazioni' (2021) 2–3 Riv. soc. 475 ff.

[4] Among standardised contractual models are those developed in accordance with the *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, the *ABA Model Contract Clauses (MCCs) 2.0* for the protection of human rights in supply chains, and the *Principles for Responsible Investment* (PRI), which are applied in financial and investment contracts to enhance transparency regarding the social impact of investments. The issue is widely addressed in the international literature: E Pannebakker, 'Sustainable Development Clauses in International Contracts through the Lens of the UNIDROIT Principles' (2024) 29 ULR 352 ff.; KP Mitkidis, *Sustainability Clauses in International Business Contracts* (Eleven International Publishing 2015); KP Mitkidis, 'Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements' (2014) 1 NJCL 1 ff.; S Dadush, 'Contracting for Human Rights: Looking to Version 2.0 of the ABA Model Contract Clause' (2019) 68 AULR 1519 ff.

chain. Such commitments impose specific requirements concerning, *inter alia*, environmental protection, working conditions, respect for human rights and the prevention of corruption, and define *ex ante* the allocation of obligations, risks and responsibilities between the parties. Not infrequently, they are conveyed through references, in individual contracts, to codes of conduct or corporate policies in which the guiding principles and prohibited conduct are formulated, depending on the case, in general and abstract terms, with evident implications as regards the determinacy of the resulting obligations.[5]

As is well known, recent initiatives of the European Union – from the Sustainable Finance Disclosure Regulation (SFDR) to the EU Taxonomy Regulation, up to the Corporate Sustainability Reporting Directive (CSRD) and, above all, the Corporate Sustainability Due Diligence Directive (CSDDD) – have further accelerated this process, reinforcing the transition from forms of negotiated self-regulation to mechanisms of private regulation functionally oriented towards the implementation of legal due diligence obligations. In particular, the CSDDD, while not directly imposing specific contractual content, assigns central relevance to the management of contractual relationships along the chain of activities, encouraging recourse to the contract as a preventive tool for addressing ESG risks and shaping the conduct of commercial partners.[6] The centrality of contractual governance remains relevant even after the amendments to the CSDDD introduced by Directive (EU) 2026/470 (Omnibus I), notwithstanding the narrowing of the Directive's personal scope and the simplification of several due diligence requirements.[7]

A paradigmatic shift can be observed: sustainability clauses and standardized contractual models are no longer merely expressions of voluntary self-regulation, but function as instruments for the indirect implementation of monitoring and prevention duties incumbent upon the lead company, thereby structuring and governing contractual relationships across the supply chain.[8]

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[5] With reference to this dual model—consisting, on the one hand, of the direct incorporation of sustainability clauses into individual contracts and, on the other, of references within those contracts to the lead company's code of conduct—see V Ulfbeck, O Hansen and A Andhov, 'Contractual Enforcement of CSR Clauses and the Protection of Weak Parties in the Chain' in V Ulfbeck, A Andhov and KP Mitkidis (eds), *Law and Responsible Supply Chain Management* (Routledge 2019) 46 ff., with further references.

[6] In Italian scholarship, see F Degl'Innocenti, *Verso un'autonomia contrattuale sostenibile. Profili regolatori europei delle catene globali del valore* (Pacini 2024); see also, *inter alia*, L Ruggeri, 'La due diligence della sostenibilità: l'impatto sul diritto contrattuale' in L Ruggeri and S Zuccarino (eds), *Persona e mercati nel prisma della sostenibilità* (ESI 2024) 25 ff.; A Addante, 'Il dovere di diligenza nell'attività di impresa fra meccanismi cogenti e clausole di sostenibilità' (2025) 1 Giust. civ. 57 ff. For a recent analysis of the role of contracts under the CSDDD, see S Dadush, D Schönfelder and M Streibelt, 'What Does the EU CSDDD Say About Contracts?' (2025) 21 NYU JLB 245 ff.

[7] Directive (EU) 2026/470 (Omnibus I), Article 4, point (2), amended Article 2 of the CSDDD by raising the application thresholds to companies with more than 5,000 employees and a worldwide net turnover exceeding EUR 1.5 billion. This marks a significant shift from the 2024 original thresholds (1,000 employees and EUR 450 million), reflecting the Union's intention to concentrate the regulatory burden on the largest market players to ensure proportionality and strengthen European competitiveness. For third-country companies, the threshold for EU-generated turnover has been similarly aligned to EUR 1.5 billion.

[8] The regulatory functions of transnational commercial contracts within supply chains are extensively analysed by F Cafaggi, 'The Regulatory Functions of Transnational Commercial Contracts: New Architectures' (2013) 36 Fordham ILJ 1557 ff.

At the level of contractual technique, the analysis of the principal types of sustainability clauses makes it possible to grasp how the conformative function of the contract is operationally articulated.

Legal scholarship has emphasized that supply chains are better understood as networks of interconnected relationships rather than as mere aggregations of isolated contracts. Within this framework, the organisation and coordination of production in complex, multi-level supply chains are structured through two complementary instruments operating on distinct planes: on the one hand, the supplier qualification systems, governing access to, permanence within and exit from the chain; on the other hand, the contractual architecture, composed of General Terms and Conditions, Supplier Codes, codes of ethics and framework agreements, through which sustainability standards are translated into binding contractual constraints.[9]

These standards thus affect the contractual relationship at different stages, from formation to performance and remedies.

With regard to the requirements upon which the establishment or continuation of the relationship is made conditional, it may be observed that their inclusion may depend not only on the autonomous choice of the parties, but also on regulatory provisions that (sometimes only indirectly) limit the freedom to select the commercial partner, as occurs, in particular, within chains of activities governed by Directive (EU) 2024/1760, where the counterparty's ability to share and comply with certain ethical and sustainability values may constitute a prerequisite for access to or permanence within the contractual relationship.[10] A comparable logic may also be observed, in a more sector-specific and public-law oriented context, in green public procurement, where

[9] An in-depth analysis of supplier qualification systems and compliance with ESG standards, for the purposes of access to and continued participation in the value chain, is provided by F Cafaggi, 'Transnational Private Regulation of Environmental Sustainability through Commercial Contracts: Reassessing Contractual Governance in Global Supply Chains' (2024) 20(1) ERCL 37; more recently, F Cafaggi, P Iamiceli and F Pistelli (eds), *Sustainability, Due Diligence and Value Chain Governance* (Edward Elgar 2025). The functional and organisational perspective on production is particularly emphasised in the context of corporate groups and business networks; see, among others, G Scognamiglio, 'Gruppi di imprese e politiche di sostenibilità' (2024) 2 Riv. dir. imp. 253 ff.; within a broader study on value chains, G Gereffi (ed), *Global Value Chains and Development* (Cambridge University Press 2018).

[10] For further discussion, see F Degl'Innocenti, *Verso un'autonomia contrattuale sostenibile* (n 6) 146 ff. More recently, Directive (EU) 2025/794, the so-called "stop-the-clock" Directive, postponed certain application dates under the CSRD and the CSDDD, while Directive (EU) 2026/470, adopted within the *Omnibus* I simplification package, introduced substantive amendments to Directive (EU) 2024/1760 (CSDDD), with the aim of, *inter alia*, reducing the regulatory burdens and compliance costs arising from the implementation of sustainability due diligence obligations. In particular, Articles 10(6) and 11(7), as amended, no longer refer to termination of the business relationship as an EU-level measure of last resort. They instead provide for a combination of measures, including refraining from entering into new or extending existing relationships, suspending the business relationship where the applicable law so allows, and adopting enhanced prevention or corrective action plans. This confirms a legislative preference for preventive, conservative and leverage-oriented measures, while leaving any contractual power to terminate the relationship to the parties' contractual framework and to the applicable national law. It should also be noted that, under Article 18, as amended, the Commission shall adopt guidance on voluntary model contractual clauses by 26 July 2027. On the development of model contractual clauses in the post-Omnibus framework, see S Dadush and D Schönfelder, 'Moving Toward Shared Responsibility: How the EU's CSDDD and Omnibus I Reimagine Contracting for Human Rights and Environmental Due Diligence' (Oxford Business Law Blog, 1 May 2026). Nevertheless, a mere power to suspend the relationship risks proving ineffective unless accompanied by a conformative or deterrent effect, which may ultimately derive from the contractual power to terminate the relationship. For a more detailed analysis of the amendments introduced by the Omnibus package, see G Portonera, '"Dovere di diligenza" e tutele civili nella Corporate Sustainability Due Diligence Directive' (2025) 4 Jus 242 ff., esp. 258.

environmental criteria guide the selection of the contractual partner and shape the content of the contractual relationship.[11]

This regulatory profile of private autonomy emerges in certain interpretative orientations adopted in the case law of European and national courts.

One may consider, for example, certain judgments of the Court of Justice in the field of labour law, in which judicial review has been deemed admissible to verify the conformity of the dynamics leading to the termination of an individual relationship or to its non-renewal with overriding principles of non-discrimination.[12]

In a similar perspective, recent cases of judicial administration that have affected, within the Italian legal system, certain well-known companies operating in the fashion sector testify to a growing attention towards the fault profiles of contracting companies also in relation to unlawful acts attributable to indirect partners. In such cases, the "facilitating conduct" justifying preventive measures was identified, on the one hand, in the failure of the lead company to comply with monitoring duties along the supply chain and, on the other hand, already in the negligent selection of production contractors deemed to lack adequate production capacity and, for that reason, inclined to outsource stages of processing to entities characterized by systematic practices of labour exploitation.[13] In this context as well, permanence within the production chain appears conditional upon an organisation and management of economic activity effectively compliant with the protection of fundamental rights, with a specific duty of vigilance incumbent upon the lead company, functionally correlated with, and proportionate to, its economic and contractual power of influence and regulation over the value chain.[14]

As regards the content of sustainability obligations, these are, for the most part, ancillary to the principal economic obligation or contribute to defining its standard of performance and may be extended to commercial partners along the value chain through cascading compliance mechanisms. Clauses may be formulated in an imperative form, such as the obligation to comply with certain environmental regulations or to provide periodic reporting on environmental and social sustainability indicators; in a prohibitive form, for instance through the prohibition of child labour or forced labour; or in an incentive-based form, as in sustainability-linked loans, where the cost of financing is linked to the

[11] Under Italian law, in line with the EU promotion of green public procurement, contracting authorities are required to take minimum environmental criteria (CAM) into account when drafting tender documents, thereby steering contractual choices *ex ante* towards environmental sustainability; see M Renna, 'Dinamiche negoziali e sostenibilità ambientale: spunti dai CAM, dall'EPC e dagli accordi di sostenibilità' (2024) 2 Contr. impr. eur. 256 ff.

[12] See Court of Justice of the European Union, Case C-356/21, judgment of 12 January 2023, reported in Foro it., Rep. 2023, 'Unione europea e Consiglio d'Europa', no 1297.

[13] The Court of Milan (Autonomous Section for Preventive Measures), by decree of 10 July 2025, ordered the judicial administration of Loro Piana SpA, following a series of similar measures previously adopted by the same court against other well-known fashion companies indirectly involved in labour exploitation schemes. For a commentary, see F Degl'Innocenti, 'Doveri di controllo nella filiera della moda: ripensando i confini dell'autonomia privata' (2026) 2 Giur. it. 337 ff.

[14] The powers and oversight duties of the lead company at the apex of the supply chain under the CSDDD are analysed by G Piepoli, 'La grande impresa quale ordinamento giuridico privato nella Proposta di Direttiva sul dovere di diligenza' (2023) 3 Giust. civ. 597 ff., with further references to the relevant foreign literature.

achievement of specific ESG targets, such as predetermined thresholds for the reduction of emissions or the improvement of working conditions.[15]

The mechanisms of reaction to non-performance remain, in principle, those traditionally left to private self-regulation, such as termination rights, express termination clauses, penalty clauses or other forms of contractual self-help. These instruments are frequently supplemented by monitoring and verification mechanisms – which may include on-site inspections or recourse to third-party certifiers – aimed at ensuring that the lead company retains the power to assess supplier performance, both for the purposes of permanence within the chain and from a preventive standpoint with regard to potential violations or the production of negative externalities.

Termination of the relationship typically represents the *ultima ratio*, to which the company resorts only after unsuccessful intermediate measures designed to foster continued cooperation even post-breach, such as temporary suspension of the relationship or the adoption of improvement or corrective action plans aimed at restoring compliance with the required standards.[16] Such an approach is consistent with a relational conception of the contract that privileges the continuity of the relationship and the preventive management of risks over the mere sanctioning of breach and compensation for damages.[17]

On the other hand, it is precisely the centrality assumed by such powers of control and reaction, and their interaction with contractual arrangements often unilaterally drafted, that renders the structural profile of sustainability clauses particularly delicate, giving rise to recurrent critical issues.

The first concerns the degree of determinacy of the obligations imposed. A mere reference to codes of ethics or policy statements devoid of prescriptive content – such as the prohibition of discriminatory conduct or the exhortation to respect the environment – would not appear suitable to configure legally binding obligations, as they amount to programmatic declarations. As a rule, such provisions merely reproduce the commitments undertaken by the lead company in its codes of ethics, which regulate the chain by referring to general principles of conduct intended to guide the various economic operators involved in the production process.[18]

Conversely, where performance is defined in analytical terms, verification of compliance may be immediate – where the performance itself, whether

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[15] Although Directive (EU) 2026/470 deleted Article 22 CSDDD on climate transition plans from the due diligence framework, climate-related targets may still acquire contractual relevance where incorporated as voluntary standards, KPIs or contractual performance parameters.

[16] See F Cafaggi, 'The Regulatory Functions of Transnational Commercial Contracts' (n 8) 1587 ff., emphasising that priority is typically accorded to restorative and cooperative post-breach mechanisms, rather than to purely compensatory remedies. Such an approach reflects the logic of relational and long-term contracts, which rely on maintenance-oriented and collaborative enforcement tools, including the provision of capacity-building measures (e.g., training or technical assistance) by the buyer to the supplier.

[17] Relational and corrective remedies are discussed by KP Mitkidis, 'Sustainability Clauses in International Supply Chain Contracts' (n 4) 6, 15, 20 ff.; C Poncibò, 'The Contractualisation of Environmental Sustainability' (2016) 12(4) ERCL 350 ff.

[18] According to F Pistelli, 'Efficacia e opponibilità dei patti di sostenibilità' (2024) 1 N. dir. civ. 100, a functional interaction emerges between different instruments of private regulation, giving rise to a specific hierarchy of sources: general terms and conditions and various codes of ethics or health and safety codes, which enable the lead company to define its overall corporate policy; and tender documents or bilateral supply contracts, which contain the detailed technical regulation tailored to the specific needs of individual commercial relationships. See also C Poncibò, 'The Contractualisation of Environmental Sustainability' (n 17) 335 ff.

consisting of an act or an omission, entails the achievement of the sustainability objective pursued – or may require measurement of the impact of conduct through performance parameters (Key Performance Indicators), with the attendant difficulties involved in translating technical benchmarks into legally ascertainable standards.[19]

Such drafting of clauses easily results in an aggravation of the position of the weaker party to the contractual relationship, often coinciding with the supplier or sub-supplier. This outcome is the product of an asymmetrical contractual arrangement unilaterally defined by the lead company, which concentrates in its hands not only the power to regulate contractual conditions but also the power to redefine over time the standards of conduct and compliance applicable to the counterparty. The consequence is the establishment of a strongly imbalanced legal relationship, particularly as regards the allocation of risks and contractual responsibilities, as well as the remedies available.

These circumstances, combined with the difficulty of identifying adequate benchmarks or uniform criteria for measuring sustainability commitments — especially where such commitments are framed in broad or generic terms —, contribute to rendering indeterminate both the content of performance and the standard against which compliance is assessed. The practical consequence is a transfer of difficult-to-manage risks onto suppliers.[20]

One example is the requirement imposed on the supplier to comply, throughout the duration of the contract, with any applicable legislative, regulatory or environmental standard. In a transnational context, such a clause exposes the supplier to legislative developments and technical modifications that are scarcely foreseeable and hardly calculable.[21]

The exercise of contractual powers thus remains subject to judicial scrutiny aimed at assessing compliance with requirements of good faith and fairness and, more broadly, with the legal worthiness of the interests underlying the contractual arrangement in light of protective regimes designed to safeguard weaker contracting parties.[22] Indeed, a contract cannot serve as an adequate vehicle for a sustainability-oriented legal and socio-economic order if its content, or the exercise of the powers and remedies it confers, is shaped by structural imbalances of power, exploitation of dominance or situations of economic dependence.

From this perspective, the assessment of the worthiness of the interests pursued operates as a criterion for rationalizing contractual autonomy, guiding

[19] On the measurement tools for ESG factors and related issues, see R Rolli, *L'impatto dei fattori ESG sull'impresa. Modelli di governance e nuove responsabilità* (Il Mulino 2020) 98 ff.

[20] V Ulfbeck and O Hansen, 'Sustainability Clauses in an Unsustainable Contract Law' (2020) 16(1) ERCL 199–200. On the shift from traditional risk-shifting contractual models to due diligence-aligned and shared-responsibility contracting under the CSDDD, see S Dadush, D Schönfelder and M Streibelt, 'What Does the EU CSDDD Say' (n 6) 255–266.

[21] On the use of certification schemes in supply chains, which may influence the standards against which the parties' conduct is assessed, see F Cafaggi, 'The Regulatory Functions of Transnational Commercial Contracts' (n 8) 1618 ff.; F Cafaggi and P Iamiceli, 'Contracting in Global Supply Chains and Cooperative Remedies' (2015) 20 ULR 148.

[22] V Ulfbeck and O Hansen, 'Sustainability Clauses in an Unsustainable Contract Law' (n 20) 200, explore whether extending the doctrine of unconscionability—originally devised as a tool of consumer protection—might also provide an adequate safeguard for suppliers.

the exercise of contractual powers and preventing distortive outcomes arising from structurally unbalanced contractual arrangements.

More recently, a similar concern has also been reflected at the regulatory level. In this regard, Directive (EU) 2026/470, albeit primarily in the context of sustainability reporting, introduces the category of "protected undertakings" — undertakings in the value chain not exceeding, on average, 1,000 employees — and limits excessive value-chain information requests addressed to them, thereby seeking to prevent sustainability compliance from turning into a disproportionate transfer of organisational and informational costs onto smaller business partners.[23]

Alongside these profiles, a further level of conflict emerges, which must be addressed through an interpretative reading of sustainability clauses integrated with the conditions more properly relating to economic exchange. It may, in fact, occur that violations attributable to the supplier with respect to sustainability standards are the consequence of conditions and production schedules incompatible with the required standards, for example because delivery deadlines are excessively tight or the price of the order is excessively low. It follows that even the reaction to "sustainability-related" non-performance requires an assessment, in a collaborative and systemic perspective, considering the concrete contractual conditions relating to the productive and economic programme.

This, on the one hand, points towards the adoption of maintenance-oriented remedies functional to the achievement of sustainability objectives, such as the renegotiation of contractual terms; on the other hand, it calls for particular caution with regard to possible extensions of standing to demand performance in favour of those who are entirely extraneous to the economic programme underlying the contract, an issue to which we shall return below.

To the issues connected with the internal balancing between the various interests of the contracting parties must be added a further difficulty, concerning the search for equilibrium between the (this time external) claims of different stakeholders, often marked by conflicts between categories exposed to the externalities of business activity. The plurality and heterogeneity of the interests at stake — economic, social, environmental, reputational — may in fact imply that the protection of one interest comes at the expense of others, requiring constant and dynamic balancing. In this respect, the narrowing of the scope and procedural relevance of stakeholder engagement introduced by Directive (EU) 2026/470 may be read as an attempt to reduce the risk of an indeterminate balancing of heterogeneous and potentially conflicting interests, by linking participation to subjects directly affected by the relevant stage of the due diligence process.[24]

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[23] See recital 12 and Article 2(4)(b)(i) of Directive (EU) 2026/470, amending Article 19a(3) of Directive 2013/34/EU. The Directive defines "protected undertaking" as an undertaking in the value chain of a reporting undertaking which does not exceed, on its balance sheet date, an average number of 1,000 employees during the preceding financial year, and limits excessive value-chain information requests for sustainability reporting purposes, without prejudice to information gathering carried out for other purposes, including due diligence or risk management.

[24] The original version of Directive (EU) 2024/1760 adopted a particularly expansive definition of stakeholders. By contrast, Directive (EU) 2026/470 significantly narrowed the scope of stakeholder engagement under the CSDDD, focusing it on workers, their representatives, including trade unions, and individuals or communities whose rights or interests are or could be directly affected by the products,

This tension reflects the inherently relational character of sustainability, which does not translate into a fixed or static outcome, but rather into an ongoing process of balancing competing interests, guided by standards of reasonableness and proportionality.

3. Sustainability Clauses, Third Parties and the Limits of Enforcement

The use of sustainability clauses in commercial contracts prompts reflection on the resilience of the classical conception of contractual autonomy and on the new limits to its exercise.

It is well known that the traditional archetype of the contract, understood as a bilateral instrument for regulating and immediately satisfying the individual interests of the parties, generally opposed to one another, has progressively been called into question, in commercial relationships between companies, by relational theories, which have emphasized its collaborative and long-term dimension within a broader economic and organisational context, as well as by network theories, which have highlighted the role of the contract as a coordinating node within complex production arrangements.[25]

From this perspective, the inclusion of sustainability clauses in contracts, while remaining consistent with theoretical developments in the field of long-term and network contracts — insofar as it enhances the temporal projection of the contractual bond, including in light of the protection of future generations, and its capacity to produce effects extending beyond the immediate relationship between the parties — also marks a further step beyond the traditional paradigm of the commercial contract.

The transition from commercial exchanges, in which the contractual programme is predominantly centred on the type, quality or quantity of the product or service and on the timing of performance, to contractual arrangements, in which production models and the integration of behavioural standards inspired by supra-individual or public-interest objectives (the so-called ESG factors) also acquire relevance, introduces new parameters for assessing performance and the exercise of contractual powers.

It is precisely this "functional" extension of the contract, however, that makes it necessary to reflect on the limits within which private autonomy may legitimately serve as a vehicle for claims that transcend the exchange between

services and operations of the company, its subsidiaries and its business partners, with engagement being required only where relevant to the specific stage of the due diligence process being carried out. In particular, the reform confines stakeholder engagement to certain stages of the due diligence process and no longer requires it with regard to the decision to terminate or suspend a business relationship or to the development of monitoring indicators; see recital 45 and Article 4, points (3)(a) and (10), of Directive (EU) 2026/470, respectively amending Article 3(1), point (n), and Article 13(3) CSDDD. The revision also excludes consumers from the relevant category of stakeholders for these purposes. The literature has offered numerous attempts to conceptualise the category of stakeholders; a detailed survey is provided by E D'Orazio, 'Verso una teoria normativa degli stakeholders' (2006) 22(82) Politeia 40 ff.

[25] V Ulfbeck and O Hansen, 'Sustainability Clauses in an Unsustainable Contract Law' (n 20) 190. On relational contracts, classic references in the literature include IR Macneil, 'Contract: Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law' (1978) 72 Nw. U. L. Rev 854–905; IR Macneil, 'Relational Contract: What We Do and Do Not Know' (1985) Wis. L. Rev. 483 ff.; S Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 ASR 55 ff.

the substantive parties to the relationship and that, in some cases, may even conflict with their specific interests.

In particular, the issue of enforcement of sustainability clauses in favour of third parties calls for a comparison with the doctrinal constructions developed in civil law scholarship, especially in Italy and Germany, concerning obligations with protective effects towards third parties (*Vertrag mit Schutzwirkung für Dritte*).[26]

According to this approach, the protective function of the obligation may extend beyond the legal sphere of the parties to the relationship, allowing the third party exposed to risks arising from performance or non-performance to benefit indirectly from the rules of conduct established to protect the creditor's interest, with effects that, unlike in the case of a contract in favour of a third party, remain confined to compensatory protection.[27]

However, the reference to obligations with protective effects towards third parties, when invoked to justify the enforceability of sustainability clauses by "stakeholders", is open to multiple critical objections, in addition to the well-known difficulties relating to the identification of a unitary theoretical foundation for the protective effect.[28]

Under Italian law, while it is undisputed that a contracting party may be driven by non-patrimonial or altruistic interests, pursuant to Article 1174 of the Italian Civil Code, and that the contract may serve to pursue them, it remains difficult to infer a general contractual duty on the parties to protect third parties in the absence of an express grant of a right or benefit in their favour (Article 1411 of the Italian Civil Code).[29]

More generally, within the framework of the foregoing analysis, it is necessary to dispel a recurrent misunderstanding that tends to conflate two conceptually distinct situations: on the one hand, the incorporation of interests external to the exchange as parameters shaping the required conduct; on the other hand, the recognition to third parties of directly enforceable positions, grounded on a renewed qualification of the obligatory relationship as a

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[26] For classic references, see C von Bar, 'Vertragliche Schadensersatzpflichten ohne Vertrag?' (1982) Jus 641; K Larenz, *Lehrbuch des Schuldrechts*, vol I: Allgemeiner Teil (C.H. Beck 1987) 208 ff.; C Castronovo, 'Obblighi di protezione e tutela del terzo' (1976) 1–2 Jus 123 ff.

[27] A Nicolussi, 'Obblighi di protezione' in *Enciclopedia del diritto – Annali* (Giuffrè 2015) 659 ff.

[28] A critical discussion of the different doctrinal reconstructions is offered by M Maggiolo, 'Effetti contrattuali a protezione del terzo' (2001) I Riv. dir. civ. 39 ff. Doubts as to the recognition of a general positive claim by third parties to the performance of contractual sustainability clauses were already raised by F Degl'Innocenti, *Verso un'autonomia contrattuale sostenibile* (n 6) 129, esp. 137. In German law, case law has identified a number of criteria aimed at delimiting the scope of obligations with protective effects in favour of third parties; these criteria variously rely on the third party's proximity to the contractual performance, the creditor's interest in extending protection to the third party, the debtor's ability to foresee that the performance may also affect third parties, and the third party's need for protection. With regard to these interpretative approaches, A Di Majo, 'La protezione contrattuale del terzo' in L Vacca (ed), *Gli effetti del contratto nei confronti dei terzi nella prospettiva storico-comparatistica* (Giappichelli 2001) 112–113, expresses reservations, considering them excessively empirical and therefore exposed to a wide margin of interpretative discretion. See also G Alpa and A Fusaro (eds), *Effetti del contratto nei confronti dei terzi* (Giuffrè 2000).

[29] On the requirements and limits of Article 1411 of the Italian Civil Code, see, *inter alia*, U Majello, *L'interesse dello stipulante nel contratto a favore di terzi* (Jovene 2010, repr.); F Messineo, 'Contratto nei rapporti col terzo' in *Enciclopedia del diritto*, vol. X (Giuffrè 1962) 196 ff.

subjectively complex structure that does not exhaust itself in the parties alone.[30]

In civil law doctrine, the extension of the protective function of the obligation does not, as a rule, entail the attribution to the third party of an autonomous right to performance, but rather the recognition of a compensatory claim.[31]

Transposed into the context of sustainability clauses, this distinction is crucial, since the contractual incorporation of ESG standards allows supra-individual interests to operate as internal criteria for qualifying the contractual programme and the exercise of contractual powers, without thereby legitimizing the attribution to third parties of a direct action.[32]

Were it otherwise, the parameter of liability would be surreptitiously transformed into an autonomous source of rights, in the absence of an express normative foundation or classification within the scheme of a contract in favour of a third party.

Nor are attempts to generalize the protective obligation on the basis of good faith entirely convincing. [33] Recourse to this paradigm encounters structural limits when applied to sustainability clauses inserted into supply chain contracts that are not oriented towards the protection of a determined or determinable individual sphere, but rather towards diffuse or collective

[30] According to C Poncibò, 'The Contractualisation of Environmental Sustainability' (n 17) 348, sustainability standards may qualify as product quality requirements within the meaning of Article 35(2) CISG. See also KP Mitkidis, 'Sustainability Clauses in International Supply Chain Contracts' (n 4) 17–18, exploring the potential qualification of certain sustainability commitments under the *unilateral contract* doctrine and the conditions for their legal effectiveness. For a broader account of regulation through supply-chain contracting, see F Cafaggi, 'Regulation through Contracts: Supply-Chain Contracting and Sustainability Standards' (2016) 12(3) ERCL 218–258, esp. 221, emphasising that embedding sustainable sourcing principles into commercial contracts reshapes the very concepts of performance, compliance and breach within supply-chain governance.

[31] Conceptually distinct from the perspective considered here is the standing granted to third parties, in certain legal systems and interpretative approaches, to challenge a company's failure to comply with the statutory obligation to adopt vigilance plans aimed at protecting human rights and the environment. In such cases, third-party standing is confined to reviewing the existence and general adequacy of the plan, while scrutiny of the specific content of the measures adopted — which remains within the company's discretion — is excluded. Nor do these forms of standing operate at the contractual level, nor do they entail the attribution of rights to performance or legal positions deriving from individual contractual relationships. In this vein, the judgment of 5 December 2023, delivered by the Tribunal judiciaire de Paris (No. RG 21/15827), addressed claims brought by the trade union *SUD PTT* against *La Poste* concerning the obligation of large companies to adopt a *plan de vigilance*, introduced by Law No 2017-399 of 27 March 2017 and now incorporated into the French Commercial Code.

[32] The issue is addressed from different perspectives by KP Mitkidis, 'Sustainability Clauses in International Supply Chain Contracts' (n 4) 16 ff., 18; C Poncibò, 'The Contractualisation of Environmental Sustainability' (n 17) 351 ff.

[33] According to R Fadda, *La sostenibilità tra disciplina del contratto e tutela del consumatore* (Jovene 2024) 56 ff., esp. 63 ff., sustainability obligations should be based on objective good faith and directed towards "potential customers" of contractual relationships, who are not clearly identified. However, in the absence of a *de facto* relationship or at least a "qualified contact" with the company, the mere status of potential customer does not seem sufficient to give rise to objective reliance regarding a specific course of conduct. According to M Pennasilico, 'Sviluppo sostenibile e "contratto ecologico": un altro modo di soddisfare i bisogni' (2016) 4 Rass. dir. civ. 1319 ff., the foundation of protective obligations towards third parties should instead be found in the principle of solidarity under Article 2 of the Italian Constitution. It seems preferable, however, to avoid conflating the good faith clause—aimed at ensuring fairness in the performance of the individual contractual relationship—with constitutional solidarity under Article 2 of the Italian Constitution, which more properly concerns the broader social effects of contractual activity.

interests — such as the environment or local communities — which are difficult to reconcile with the structure of the obligatory relationship.[34]

In such cases, the tension between internal contractual interests and external interests becomes particularly evident: while the former find regulation and protection through the typical instruments of private autonomy and contractual enforcement, the latter lack a qualified relationship with the contracting parties, which constitutes the prerequisite both for the application of the scheme of a contract in favour of a third party (which requires an express attribution of the right to at least identifiable subjects) and for that of the protective obligation. Such phenomena therefore require regulatory responses that exceed the ordinary structure of the duty of protection and cannot be automatically subsumed within it without generating systematic distortions.[35]

From a comparative perspective, consideration of third-party interests has predominantly developed at the interpretative level, without generally leading to recognition of direct standing.

In European contract law, the Draft Common Frame of Reference provides interpretative criteria inspired by the protection of human rights and fundamental freedoms (Article I.–1:102(2) DCFR), and recognizes third-party reliance as a relevant interpretative factor where the contract affects their position, providing that the agreement is to be interpreted according to the meaning that a reasonable person would attribute to it, provided that the third party has relied in good faith on its content (Article II.–8:101(3) DCFR). Even here, however, the opening towards protective effects remains confined to interpretation and does not entail recognition of direct standing or a generalized erosion of the principle of privity of contract.

In this context, the question has been raised whether it is possible to envisage an integration of the contract through implicit sustainability obligations, situating the reflection within the framework of the third-party beneficiary doctrine. However, even in common law systems, where terms implied by law are well established, such mechanisms have traditionally been used to integrate and rebalance the contractual relationship itself, rather than

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[34] It is true, however, that the progressive reconfiguration of subjective legal positions in a non-individualistic direction—driven by the growing significance of protecting collective or diffuse interests, such as the ecosystem, the climate, business networks and "future generations" (Article 9 of the Italian Constitution)—invites a broader reflection on the continued viability of the traditional structure of obligations conceived in strictly individualistic terms, between determined or determinable parties. The issue, particularly with regard to the protection of future generations, is also addressed by C Camardi, 'Diritto civile e nuovi valori costituzionali. Qualche suggestione da recenti riforme' in *Liber Amicorum per Paolo Zatti*, vol. I (Jovene 2023) 240–241. From this perspective, any extension of third-party standing to challenge the non-performance of sustainability obligations would appear more coherently framed within collective forms of judicial protection, including injunctive relief such as class actions, rather than through a generalised opening to individual actions seeking to enforce a positive claim in relation to a single contract.

[35] In Italian civil law scholarship, divergent views emerge as to the relevance of protective obligations in the present context. In this respect, F Di Ciommo, 'La responsabilità civile di inizio millennio. Il caso del nuovo art. 2086 c.c. in tema di responsabilità di imprenditore e amministratori' (2022) Danno e resp. 422, supports an interpretative approach that frames the liability of the entrepreneur and directors in terms of "social contact", in light of the duty to ensure adequate organisational arrangements pursuant to Article 2086(2) of the Italian Civil Code. A different and more cautious approach as regards the relevance of protective obligations in this context is adopted by A M Benedetti, 'Principi (definitori) e clausole generali (ambulatorie): "assetti organizzativi adeguati" e (nozione di) "impresa" nell'art. 2086 c.c.' (2023) Riv. dir. civ. 930; R Rolli, *L'impatto dei fattori ESG sull'impresa. Modelli di governance e nuove responsabilità* (Il Mulino 2020) 152, notes 85 and 170.

to provide direct protection to external interests, as illustrated, inter alia, by *Liverpool City Council v Irwin* and *Mahmud v BCCI SA (in liquidation)*.[36]

Similarly, in areas characterized by heightened policy sensitivity, such as product liability, the extension of effects *ultra partes* follows sector-specific and typified paths, without entailing a general reconfiguration of contract law categories.[37]

Part of U.S. scholarship has nevertheless suggested a possible evolution of the third-party beneficiary doctrine, proposing a "modified" interpretation of the requirement of the parties' intent, capable of justifying third-party claims where functional to ensuring contractual performance or supported by independent policy considerations.[38]

Such proposals acquire relevance in the field of sustainability clauses, especially where the parties — and notably the lead company — lack sufficient incentives to ensure effective implementation of the agreed standards, thereby relegating sustainability commitments to a merely reputational or declaratory function. In such circumstances, third-party action is conceived as a potential enforcement mechanism.

Nevertheless, these theoretical reconstructions, although intellectually stimulating, remain confined within a limited interpretative perimeter and do not justify a generalized departure from the principle of privity of contract, which would expose companies to an uncontrolled expansion of liability.

Considering these limits, the orientation adopted in positive EU law appears coherent. In particular, the CSDDD, while acknowledging the relevance of stakeholders' interests, does not attribute contractually enforceable subjective rights to stakeholders and instead privileges procedural and organisational mechanisms. The Directive, even as amended by Directive (EU) 2026/470, emphasizes *meaningful stakeholder engagement* as a tool for identifying negative impacts and guiding corrective action, without granting stakeholders the power to impose strategic decisions or to demand performance of sustainability clauses to which they are not parties or designated beneficiaries.[39]

At the intra-corporate level, managing bodies of companies subject to due diligence obligations cannot disregard such interests in their decision-making processes, yet they retain final discretion over strategic choices and the

[36] *Liverpool City Council v Irwin* [1977] AC 239; *Mahmud v BCCI SA (in liquidation)* [1998] AC 20. For a discussion of these cases and a comparative analysis of interpretative approaches aimed at extending third-party standing through the contract's protective effects, see V Ulfbeck and O Hansen, 'Sustainability Clauses in an Unsustainable Contract Law' (n 20) 195–196.

[37] On the parallel between product liability and supply chain liability, see V Ulfbeck, 'Supply Chain Liability for Workers' Injuries: Lessons to Be Learned from Product Liability?' (2019) 9(3) JETL 269-288.

[38] MA Eisenberg, 'Third-Party Beneficiaries' (1992) 92 Colum. L. Rev. 1358.

[39] The importance of *stakeholder engagement* is now firmly established both in EU legislation—from the CSRD, by virtue of its connection with the principle of "double materiality", to the CSDDD, which introduces consultation and engagement obligations—and in international standards, such as the *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* and the *UN Guiding Principles on Business and Human Rights*, which identify it as a structural component of due diligence processes relating to human rights and the environment. An operational framework outlining the different modalities of stakeholder engagement is provided by G Strampelli, 'La strategia dell'Unione europea per il capitalismo sostenibile: l'oscillazione del pendolo tra amministratori, soci e stakeholders' (2021) 2–3 Riv. soc. 371 ff.

balancing of competing interests.[40] Stakeholder engagement thus operates not as a source of external powers to shape corporate decision-making, but as a mechanism of preventive conflict management and risk mitigation.

It strengthens corporate accountability and promotes decentralized oversight, without translating into direct accountability towards an indeterminate plurality of subjects.

This conclusion is confirmed by the structure of the CSDDD, which, although innovative in its engagement mechanisms, does not establish a remedial framework ensuring satisfaction of positive stakeholder claims. Stakeholders may lodge complaints through the company's complaints procedure, while any natural or legal person may submit substantiated concerns to competent supervisory authorities concerning adverse impacts, within the procedural framework laid down by the Directive.[41]

The effects of such mechanisms are primarily procedural and informational: they trigger the company's duty to examine and respond to the complaint and entitle stakeholders to be informed of the authority's decision, subject to judicial review of that decision.[42]

Private enforcement therefore remains anchored, in the context analysed here, to compensatory protection for violations of the principle of *neminem laedere*, while contractual liability continues to operate within the traditional boundaries of the obligatory relationship.[43] The deletion, by Directive (EU) 2026/470, of the EU-level civil liability regime originally contained in Article 29(1) CSDDD does not alter this distinction. Rather, it confirms that the Directive, as amended, does not confer contractual rights on third parties and leaves compensatory protection to the liability regimes of the Member States.[44]

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[40] The expansion of the range of constituencies involved in corporate decision-making has, however, given rise to concerns regarding opportunistic conduct by directors and the procedural overcomplication of decision-making processes, potentially undermining the company's managerial efficiency. On these aspects, see M Cian, 'Clausole statutarie per la sostenibilità dell'impresa, spazi, limiti e implicazioni' (2021) 2–3 Riv. soc. 502; H Fleischer, 'La definizione normativa dello scopo dell'impresa azionaria: un inventario comparato' (2018) Riv. soc. 810 ff.

[41] On public enforcement, Directive (EU) 2026/470 amended Article 27 CSDDD by replacing the previous requirement that the maximum limit of pecuniary penalties be set at not less than 5% of the company's net worldwide turnover with a maximum limit of 3% of that turnover in the financial year preceding the fining decision.

[42] Indeed, the power to submit substantiated concerns to supervisory authorities is conferred upon any natural or legal person (Article 26 CSDDD), thereby encompassing a category of persons significantly broader than that of "stakeholders". By contrast, stakeholders are vested not only with the power to submit such concerns, but also with a specific right to lodge complaints through the company's complaints procedure (Article 14 CSDDD), insofar as they are affected—whether as potential victims or by virtue of their proximity to the company's activities—by actual or potential adverse impacts linked to the company's failure to comply with its due diligence obligations, including through representative organisations such as trade unions.

[43] See S Vogenauer and J Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (OUP 2009) article 5.2.1 para 11, noting that third-party rights can arise only from promissory obligations intended to benefit others and not from mere obligations not to harm. This distinction supports the view that duties reflecting the *neminem laedere* principle do not, as such, generate direct contractual rights for third parties, although they may resonate, in the sustainability context, with standards such as the Do No Significant Harm principle.

[44] Such a development does not alter, in the context analysed here, the underlying structure of liability, which remains essentially tortious, although the conditions for its operation depend on the applicable national law. The abandonment of harmonisation through the introduction of a common civil liability framework — rather than effectively simplifying compliance or reducing regulatory burdens — may instead

Without prejudice to the residual possibility of recognizing contractual protection in favour of determined or determinable third-party beneficiaries — where the contractual arrangement can be qualified as a contract in favour of a third party, or where the stakeholder has been involved in a sufficiently qualified manner in the definition or implementation of sustainability clauses so as to generate reasonable reliance — the prevention of conflicts and the balancing of external interests are entrusted not to an expansion of contractual enforcement, but to the proceduralization of corporate decision-making and supply chain governance.[45] Such an approach is consistent with Article 41(2) of the Italian Constitution, insofar as sustainability is not conceived as an autonomous end of economic activity, but as an intrinsic limit structuring its exercise within a regulatory framework aimed at preventing and containing negative externalities.

In this perspective, sustainability clauses confirm the growing regulatory function of contract law in supply chain governance. Yet their effectiveness depends on the determinacy of the obligations assumed, on the fairness of the allocation of risks between lead companies and suppliers, and on the preservation of the boundary between contractual enforcement and the protection of external interests. Sustainability may therefore shape contractual performance and the exercise of private powers, but it does not, absent an express legal or contractual basis, automatically confer direct contractual claims on stakeholders.

increase normative fragmentation and legal uncertainty across Member States. A comparable logic can be observed with regard to directors' liability under Article 2395 of the Italian Civil Code: liability towards third parties is generally characterised in Italian scholarship as tortious in nature, thereby confirming the persistence of an extra-contractual paradigm in the protection of external interests.

[45] An indication in this direction may already be found in F Degl'Innocenti, *Verso un'autonomia contrattuale sostenibile* (n 6) 139. See also F Pistelli, 'Efficacia e opponibilità dei patti di sostenibilità' (n 18) 112–114. It may be observed that a tendency persists within certain strands of Italian civil law scholarship—particularly those influenced by doctrinal solutions developed in German law—to extend the domain of contractual autonomy, together with its associated remedial framework, to situations that would more appropriately fall within the sphere of tort liability. Such an approach could be justified if it led to a genuine strengthening of third-party protection through the recognition of enforceable positions within the contractual relationship. In practice, however, it often results merely in a reclassification of the source of liability, without any corresponding expansion of the legal positions effectively protected.