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Rescuing Comparative Law and Economics?
Exploring Successes and Failures of an Interdisciplinary Experiment

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THE KEY ROLE OF COMPARATIVE LAW AND ECONOMICS IN THE STUDY OF ESG

Federico Riganti[1]

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In the legal and economic context, sustainability is of paramount importance, as it inspires regulators and investors with their choices. Within this topic, ESG factors have been identified as a crucial factor, as well as the current benchmark adopted by gatekeepers to assess the «quality» of the markets' players. Because of the relevance of the issue, lawmakers and authorities are providing operators with an increasing number of «hard» and «soft» provisions, whose final goal is to make the system compliant with (the best) environmental, social and governance standards. This paper offers a preliminary analysis of the importance of Comparative Law and Economics (CLE) in the subject matter, and then a comparative study of (i) the legal frameworks and the case law of different legal systems on ESG, as well as (ii) the markets' outcomes, grounded on a cost-benefit analysis of the investors' behaviors. More particularly, the paper provides readers with a comparison between different regulatory choices adopted by a selected number of legal systems, so to allow a clear comprehension of the topic, of its cost and of its consequences, also in the light of competition between jurisdictions, and identification of shared solutions amongst players.

I. PREMISE

The issue of sustainability is undisputedly central in economic law: as it is well known, especially after the pandemic, regulators and gatekeepers have begun to devote particular attention to the creation of an economic system - or, to be more precise, a financial system[2] - capable of complying with standards and canons aimed at pursuing goals other than mere profits.

In such a framework, the pre-determination of environmental, social and governance factors (so-called "ESG") represents a particularly important turning point. On the one hand, it provides operators with a useful benchmark for their work. On the other hand, it confirms the importance of "third parties" (*id est* stakeholders) with respect to businesses, with the

[1] Assistant Professor, University of Turin. In writing this article, I remember prof. Rodolfo Sacco, whose brilliance, as a student, I had the pleasure of encountering at the University of Turin.

[2] On this topic see, *ex multis*, D. Bush *et al.* (eds.), *Sustainable Finance in Europe. Corporate Governance, Financial Stability and Financial Markets* (Cham: Palgrave Macmillan, 2021). See also S. Giglio, B. Kelly, J. Stroebel, *Climate Finance,* 13 Annual Review of Financial Economics 15 (2021).

consequent progressive reformulation of certain main principles of the productive-economic-financial system, as well as the re-evaluation of those players who, being excluded from investment processes, historically became the sole bearers of negative externalities of entrepreneurial activities.

Economic considerations, although central, are nevertheless not the only ones to benefit from the current relevance of the general issue of sustainability. Such matter, in fact, offers the possibility of dwelling on a multitude of aspects, linked together by the common denominator here at issue. Among the many possible ones, it is worth recalling the relevance that the subject of sustainability has both for environmental demands and for the "social" dimension of the actors in the various legal systems. Nonetheless, the vastness of the topic imposes the question as to the rationale (and actual possibility) of arriving at an all-encompassing regulation capable of transcending not only geographical borders, but also sectoral ones, by virtue of the so-called holistic approach that is said to characterize the study of the subject under examination.

The multitude of issues highlights that what counts in the sustainable path imposed by policymakers is, first and foremost, the implementation of a method of research and study fully shared and capable of shedding light on the various topics that characterize the subject. A method, in other words, that is necessarily cross-sectoral and intended to take into due consideration the importance of both theoretical and practical-quantitative data, in a constant dialogue between law and economics, as well as between legal systems of different natures and perspectives.

Against this background, given a short introduction (sections I, II, III), this paper intends to analyze the topics of sustainability and ESG (section V) through a comparative law and economics method, paying attention at the relevance of social and governance factors (section VI, VII) and, *inter alia,* suggesting the need to re-discover the importance of privatization for the subject matter (section VIII). All the above, in the light of understanding the effective allocation of cost (section IV), as well as of liabilities (section IX), related to the brand-new "sustainable wave".

II. The issue relating to the method

The methodological approach adopted assumes fundamental relevance in the study and evolution of ESG factors and thus, more generally, in the approach to the issue of sustainability. The reason for this relevance is certainly not trivial and must be sought in the

perimeter of a research that, in the first instance, takes on an ever-changing character, depending on the point of view of the readers.

If on the one hand ESG factors, as singularly understood, represent precise aims of the renewed and virtuous entrepreneurial behavior, on the other hand the general theme of sustainability also outlines a method. This is a method that, on the one side, has a strong practical nature and, on the other side, would seem to implement a methodological *reductio ad unum* able to transcend disciplinary boundaries, with a view to and by virtue of the need to relate to a subject that is so systematic as to require a renewed course of action in its study.

Such a comment, on closer inspection, becomes moreover of central importance when related to the strongly interconnected nature of the issue of sustainability, which in fact has a direct impact on operators, regardless of any geographical and/or ideological barriers. Sustainability, more than other topics, evokes the need to relate to a progressively globalized study of law, and this because (i) it is necessarily aimed at finding general and shared solutions to problems. And (ii) it underlines the importance of paying attention to the cost of regulatory choices, in an economic-financial system of checks and balances, that can no longer be regulated at the local level.

III. RELEVANT ASPECTS: COMPARISON, FORUM SHOPPING

In view of the above, the legal-economic method (which can be traced back to the economic analysis of law or EAL[3]) presents the ideal characteristics for the study of sustainability, on the basis of the - verified - premise that the critical analysis of the rules leads to the creation of an efficient system aimed at the (desirable) minimization of costs and risks (at least internalized) and the maximization of benefits (both at an individual and collective level).

However, this approach, by virtue of the above-mentioned evident interconnected nature of the relevant issues, also finds key support from the comparative methodology, which is unique among other methodologies in providing a reasoned study of many different positions. An essential element, the latter one, especially in the light of a system lacking single and shared regulatory Authorities among the various actors involved.

As pointed out by leading scholars, the discipline known as Comparative Law and Economics (CLE)[4] has developed from the combination of EAL and comparative studies[5]. A discipline that was born out of a constant dialogue between approaches that were once distinct, and then

[3] See S. Shavell, *Foundations of Economic Analysis of Law* (Cambridge, MA: Harvard University Press, 2004). See also G. Alpa, *Il futuro di Law & Economics: le proposte di Guido Calabresi*, in *Contratto e Impresa* (2016), 597.

[4] See N. Garoupa,T. Ulen, *Comparative Law and Economics: Aspirations and Hard Realities*, forthcoming in 70 *Am. J. Comp. L.* (2022); U. Mattei, *Comparative Law and Economics* (Ann Arbour, MI: University of Michigan Press, 1997).

[5] On this topic, *ex multis*, see R. Sacco, P. Rossi, *Introduzione al diritto comparato* 7th ed. (Turin: UTET, 2019).

capable of mutually reinforcing each other, given that: on one hand, "comparative law may gain theoretical perspective by using the kind of functional analysis employed in economic analysis of law"[6]; and, on the other hand, "comparative law enriches EAL with a tank of alternative institutional models that are not merely theoretical but tested by history"[7], thus making it easy for operators "to identify and explain the phenomenon of convergence between systems and to identify the possible implementation by a given legal system" - more, or less, globalized - "of an efficient solution, foreseeing, by means of comparison, consequences that in the medium-to-long term a rule may bring with it"[8].

In other words: it is an excellent way to achieve socially desirable and sharable models (resulting in zero costs and negative externalities from forum shopping phenomena) and, thus, perhaps fully sustainable.

IV. IN PARTICULAR: COSTS AND EFFICIENCY

The subject matter should be closely linked to reasoning of an efficiency type that, overall, should highlight which, among many ways, may be the "best way" to achieve a sustainable system, without losing focus on the economic perspective as well.

In fact, beyond reasoning of a (dangerously) ethical nature - and therefore far away from the sphere of law - it is crucial to emphasize how the complexity of the matter, the multitude of factors established by it as optimal, and the recurrence of other "variables" instead classically characterizing the real and financial market, impose a serious review of the issue, necessary to identify a reliable and shared evaluation and scoring tool for the transition process between systems.

The topic under consideration must be closely linked to an "efficientist" reasoning that, overall, must highlight which, among many ways, may be the "best way" to achieve a sustainable system. On this point, the following can be observed in an exploratory way.

With reference to the pre-determination of, and the relationship between, one or more sustainable factors, a useful tool of analysis could well be that offered by the EAL, in its comparative declination, insofar as it is apt to understand what is the ideal - *rectius* optimal - measure of fulfilment of environmental, social and governance goals. In other words, given the clear distinction between the three ESG factors, it is correct to conclude for an inevitable

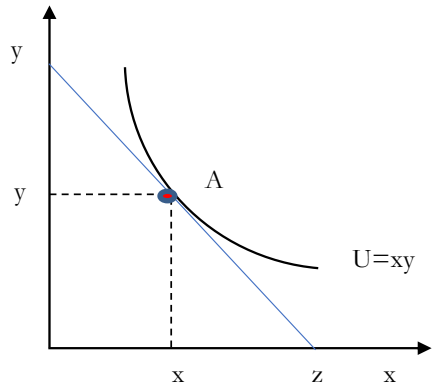
6 See U. Mattei, A. Gallarati, *Economia politica del diritto civile* (Torino: Giappichelli, 2009).
7 *Ibid.* (translation from Italian provided by the author).
8 *Ibid.* (translation from Italian provided by the author).

trade-off between them to be made (unless one utopianly imagines a "perfect world"); therefore, it seems correct, as well as necessary, to resort to certain concepts typical of economic analysis to understand how much of each purpose it is efficient to pursue.

In this regard, it is crucial, on the one hand, to recall the indifference curves and utility functions, which graphically present all the positions in which an objective can be considered satisfied and, on the other hand, to define, in an unambiguous and shared way between legal systems, which concept of efficiency is to be used.

With reference to the first point, it will in fact be possible for a company to understand the "optimal" point, *id est* the position, among all the possible combinations of ESG factors, from which it will obtain (at least theoretically) the greatest utility, also taking into account external variables such as those of the balance sheet (see Figure 1 below).

Figure 1. Optimal combination of ESG factors.



Note:
Imagine the functions "y" and "x" represent different levels of satisfaction of environmental, social or governance (ESG) targets. "U" represents the position in which the subject obtains utility from each combination. Given the budget constraint "z", point "A" represents the optimal sustainable management action, i. e. the best possible choice among all those conceivable, also taking into account external variables.

Reference made to the second point, it will be possible to understand what is the efficiency criterion that the new sustainable market aspires to reach. A criterion which, perhaps, should well recall the teachings of Pareto aimed at "pushing" all market players (including the sustainable ones) towards the highest of the indifference curves, according to a design in which any further modification of the factors (e.g. greater attention towards the environmental factor, to the detriment of the social one) can only lead to an inefficient system insofar as it is capable of correlating the greater utility of one individual with the lesser utility of another. The foregoing, moreover, shall be intended as net of compensatory measures of a public nature, which are, moreover, perfectly plausible (and in part already in place) in the matter under

consideration (and so pointing out the relevance also of the Kaldor and Hicks theory of efficiency in this sector[9]).

Notwithstanding the observations above, it should however be underlined that the issue of sustainability is closely connected to that of efficiency and costs from its very origin: in fact, it relates to the well-known debate on the correct identification of the corporate purpose[10] between shareholders' interests and the position of third parties who, improperly accumulated in the all-encompassing category of stakeholders, have historically been the bearers of the negative externalities of entrepreneurial action.

V. THE ESG FACTORS

The sustainable transition thus represents an optimal testbed for the use of legal-economic methodologies that can outline the most efficient ways to achieve the envisaged aims, even more so in a comparative framework – characterized by (quite often not so clear) rules and regulations.

In fact, with reference to the positive discipline, it is evident that, at the current state, particular attention is paid to the issue of the environment and climate change, which is considered a starting point in the subject matter. In this regard, it is sufficient to recall the centrality assumed, in the European context, by Regulation 2020/852 (the so-called Taxonomy Regulation) and Regulation 2019/2088 (the so-called SFDR) relating to sustainability disclosure in the financial services sector. The same topic is now also subject of interest by the Securities and Exchange Commission (the "SEC" or "Commission") who recently proposed rules for climate change disclosure requirements for both U.S. public companies and foreign private issuers[11].

However, the same degree of accuracy is lacking in relation to the other two pillars of sustainability. Pillars which, presumably, represent the source of innumerable transactional costs and negative externalities.

[9] See U. Mattei, A. Gallarati, *supra* note 5, at 21.

[10] On this topic see E. W. Orts, *The ALI's Restatement of the Corporate Objective Is Flawed*, available at https://clsbluesky.law.columbia.edu/2022/06/06/the-alis-restatement-of-the-corporate-objective-is-seriously-flawed/comment-page-1/#comment-379129.

[11] The proposed rules and the relevant press release are available at https://www.sec.gov/news/press-release/2022-46. On this topic see Professor Sean Griffith's comment letter, available at https://www.professorbainbridge.com/professorbainbridgecom/2022/06/sean-griffiths-comment-letter-to-the-sec-re-climate-change-disclosure.html.

VI. THE "SOCIAL" ISSUE: THE REBIRTH OF THE BEHAVIORAL PARAMETER

It is precisely the social issue that becomes the point where opposing visions of sustainable transition could meet and clash. This is because, while the environmental dimension and the regulatory approach (governance topic) are important (see below), it is clearly on the social side that conflicting visions, even opposing demands and, above all, solutions that are probably neither objective nor scientifically probable (as is the "E" factor) could clash and, therefore, easily be enmeshed in a debate that is more political than legal.

This systemic issue enables to dwell, among many other things, on a key aspect: that of the re-evaluation of the classic categories typifying the *homo oeconomicus* (as it is well known, driven by rationality and the exclusive interest in looking after individual interests) in favour of players capable of assessing, in their own decision-making process, also the social aspects of their investment. Social aspects, however, which, as mentioned above, have not yet found a clear classification and which, indeed, could well become the subject of countless readings and classifications, perhaps even conflicting with each other.

As pointed out by legal scholars, behavioral law and economics is crucial as it "imports the findings of cognitive and social psychology into legal and economic decision making. The importance of this innovation is that it replaces the mechanical and unrealistic view of decision making (called "rational choice theory") that has long been the prevailing theory of decision making in microeconomics, with a more realistic view of fallible human decision making"[12].

Sustainability, therefore, offers the ideal opportunity to consider such a methodological question and - precisely starting from the centrality of the "S" factor - to rediscover the importance of the behavioural approach and thus also of that behavioural law and economics that favour the "real mankind" to the "economic mankind", as such, oriented in its choices (sometimes even irrational) by cognitive biases, social beliefs and reputational issues (or even just anagraphical ones) that usually escape the strictest boundaries of numerical-legal analysis.

[12] See N. Garoupa, T. Ulen, *supra* note 4.

All of the above is without prejudice to the centrality of the ethical-emotional sphere[13], and the hypothetical relevance in this regard of the theory of legal origins[14].

VII. THE GOVERNANCE ROLE: THE MEANING OF RULES

A further crucial and problematic aspect refers to regulation, regarding which an initial paradox must be highlighted: namely the "unsustainability"[15] of the discipline dictated on the subject of sustainability[16].

The regulatory framework is constantly evolving and must be related to an interconnected system of sources, in which a problem of hierarchy and alignment between hard law and soft law provisions (as much as between lawmakers on the one hand, policy makers on the other, as well as the European Supervisory Authorities – ESAs) frequently arises.

In particular, and focusing on the European system, which is the reference context for civil law, it must be underlined that the relationship between the European Commission and the ESAs is of particular importance; as recently pointed out, from a scholarly point of view, the issue revolves around questioning "the unity of the (substantive) action of the European Institutions and Authorities", as well as the need for a "correct and timely coordination at European level of the sources, which do not develop on a single level, but are layered in a multilevel system that sees its foundations in the freedoms and principles contained in the Treaties (TEU and TFEU). Such a system includes first level derivative law (directives and regulations) and second level derivative law (for example, delegated and implementing regulations, including those aimed at the adoption of the regulatory or implementing technical standards, known as RTS and ITS, prepared by the European Supervisory Authorities at the request of the Commission and formally adopted by the latter pursuant to Art 290 TFEU),

[13] See E. Zamir, B. Medina, *Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of Law*, in 96 *Cal. L. Rev.* 323 (2008).

[14] On this topic, see R. La Porta *et al.*, *The Economic Consequences of Legal Origins*, in 46 J. *Econ. Lit.* 285 (2008). See also M. Gelter, M. Siems, *Language, Legal Origins, and Culture before the Courts: Cross-Citations between Supreme Courts in Europe,* in 21 *Sup. Ct. Econ. Rev.* 215 (2013).

[15] See J.L. Hansen, *Unsustainable Sustainability*, in *Oxford Business Law Blog*, 8th March 2022.

[16] See R. Cooter *et al.*, *Il mercato delle regole. Analisi economica del diritto civile* 2nd ed. (Bologna: il Mulino, 2006). See also F. Denozza, *Norme efficienti. L'analisi economica delle regole giuridiche.* (Milano: Giuffré, 2002).

often in turn supplemented and detailed by third level acts, in some cases of non-binding nature (for example, guidelines and guidance of the European Supervisory Authorities)"[17, 18].

In addition to the above-mentioned topic and as precisely underlined by prominent scholars, it is worth focusing on another key aspect of sustainability regulation, particularly important for the CLE approach: the cost of regulations and their consequent (in)efficiency.

Over-abundant regulations, unclear in their application and lacking a concrete, serious and transparent enforcement mechanism, entail high costs for operators who, according to the classic EAL reasoning, will consider it more efficient to transgress the regulatory dictates, as the possible sanction - if ever imposed - will cost less than that of compliance.

With reference, furthermore, to the comparative point of view, it is worth recalling the diversity of approaches with which, as of today, the issue of sustainability has been addressed, even between neighbouring systems belonging to the same legal family. By way of example, it should be recalled that the Italian model - where the issue of sustainability has been codified at a constitutional level and by self-regulation - and the French model - instead characterized by a more precise first degree regulatory provision on the subject (the Loi Pacte of 22 May 2019) - appear to be pursuing two distinct paths, although directed towards the achievement of the same ends and, moreover, within the same European Union macro-system.

In the light of the foregoing, it is precisely the comparative examination - reinforced by the EAL approach - that makes it possible to ascertain (i) hypotetical improvements in a national regulatory framework; (ii) potential competitive disadvantages within the European territory; as well as (iii) the actual distinct balance between public intervention and private autonomy in the subject matter.

More specifically, the appropriateness of investigating this difference in regulatory solutions, among other things, stems from the general observation that, while the Italian Civil Code continues to lack a specific rule expressly requiring directors to take into account interests other than those of the shareholders, [Article 2247 of the Civil Code limiting itself to mentioning, as the purpose of the economic activity underlying a company's funding contract, the aim of profit ("with a view to sharing its profits")], the French legal system has opted for a general amendment of the definition of a company itself. Indeed, Article 169 of the Loi Pacte

[17] See F. Urbani, *Rassegna dei principali interventi legislativi, istituzionali e di policy a livello europeo in ambito societario, bancario e dei mercati finanziari*, in *Riv Soc.* 196 (2021) (translation from Italian by the author). Please note that the same issue has been addressed by me in *The Regulation on European Crowdfunding Service Providers for Business: a Commentary* (Cheltenham: Elgar Publishing, forthcoming 2022).

[18] On this topic, see F. Annunziata, *The Remains of the Day: EU Financial Agencies, Soft Law and the Relics of Meroni,* (November 19, 2021), in *EBI Working Paper Series No. 106/2021*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3966980; N. Moloney, P.H. Conac, *EU Financial Market Governance and the Covid-19 Crisis: ESMA's Nimble, Responsive, and Speedy Response in Coordinating National Authorities through Soft-Law Instruments,* in 17 *Eur. Company & Fin. L. Rev.* 363-385 (2020).

amended Article 1833 of the French Civil Code, which merely provided that the company should be managed in the social interest, stipulating that it should pursue the interests of its shareholders while also considering social and environmental challenges. The foregoing with obvious consequences in terms of power and (efficient?) allocation of liabilities to board members (see below).

Nevertheless the environment is certainly taken into consideration by the Italian legal system, as of 9 February 2022 also at a constitutional level: in fact, a reform of the Italian Constitution, recently approved, introduced in Article 9, dedicated to the territory ("*paesaggio*"), and in Article 41, on economic initiative, an explicit provision for the protection of the environment and biodiversity.

In any case, a comparative and "efficientist" evaluation of the different choices adopted by the two legal systems, and of how these have been put into practice, may also usefully be included in the debate, which followed the recent Italian constitutional reform, on whether the need to introduce the environmental purpose at the level of primary legislation remains.

Such a topic also assumes importance in view of the similarities that characterize the regulations, given also that a greater and more complete harmonization, in terms of sustainability, may instead be noted (and deserves to be explored in depth) with regard *inter alia* to listed companies. The corporate governance codes adopted in various European legal systems, which listed companies are called to abide by and implement, in accordance with the "comply or explain" principle, tend to progressively promote a greater consideration of stakeholders' interests and, above all, of the values of environmental sustainability.

In particular, Article 1, 1.1, of the French *Code de gouvernement d'enterprise des sociétés cotées*, and Article 1, I, of the Italian Corporate Governance Code, both referring to the board of directors, emphasize the need, albeit with partly different terminology, for 'considering the social and environmental issues of [the company's] activities' ("*en considérant les enjeux sociaux et environnementaux de ses activités*") and to "pursue sustainable success" ("*perseguire il successo sostenibile*").

Lastly (and with reference to a Common Law system), it must be remembered that under section 172, letter (d), of the UK Companies Act of 2006, it is stated that "A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to […] the impact of the company's operations on the community and the environment".

Thus, the distinction between civil law and common law systems appears to be smoother in the context of sustainability. This is a field within which the theory of legal families seems unable to perfectly explain different regulatory choices.

VIII. THE WORLD IN A LAKE: THE PARADOX OF THE "COMMON GOOD" AND THE RENAISSANCE OF PRIVATIZATION

The topic under consideration, examined according to the approach given by CLE, allows to be addressed a key aspect of sustainability and EAL, namely its positioning between the public and private sectors.

The issue is central and may be analyzed under two distinct perspectives: the first relating to costs, the second inherent to solutions that, in this matter, may be offered precisely by a re-elaboration of the more classic distinctions between public and private operators (and the relevant areas of competence and influence), aimed at identifying new and more efficient solutions.

On both profiles, the CLE approach proves to be fundamental, even more so in view of the involvement of classic categories of law and a multitude of solutions in the reasoning in question, which, in comparative terms, could be observed also among countries belonging to the same legal families.

As far as the first subject is concerned, I consider crucial to offer a preliminary and critical remark: the subject of sustainability tends, first and foremost, to achieve objectives with a strong "public nature" (think of the environment and social issues). However this involves "offloading" the costs of the transition onto private operators.

The examples are manifold and, even before drawing attention to the more general theme of the efficiency of the rules (analyzed below), reference can be made either to "compliance costs", "disclosure costs" or, finally, to the more general category of "confusional costs" (this is how I'd call them) arising from a regulatory and operational framework still in (perpetual) development. In this framework, the economic analysis of law in its comparative dimension should permit a more careful examination of the various market failures (of the regulatory market), with the consequent reallocation of costs also to public entities (which, in many cases, appear to be anything but sustainable).

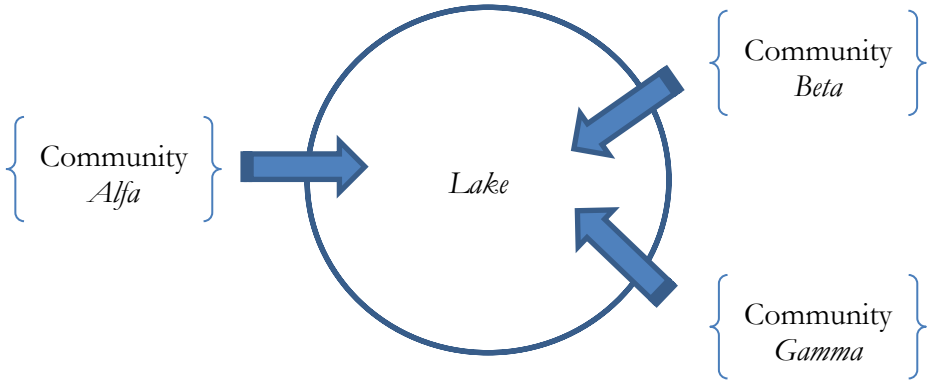
With reference to the subject matter, CLE could - and in my opinion should - lead to a serious reconsideration of some classic concepts, starting with the distinction between public and

private players and the mistrust with which the topic of privatization of public assets[19] is often approached.

In a framework in which, as it is evident and also due to technological evolution, there is a rapid progress towards the increasingly massive use of primary goods, privatization seems in fact to be a sensible remedy in order to avoid the risk of overgrazing and, therefore, excessively exploiting.

On this matter, one could consider the most classic of examples, typical of the economic analysis of law: that of the three fishing communities living on the shores of the same lake.

Figure 2. Commons management and sustainability.



In this context, where resources (fish) certainly do not abound, the various communities cannot continue their respective exploitation activities undisturbed, leading to the extinction of the resource itself. The solution, as is well known, should therefore be found in the privatization of the lake. In fact:

— in the case of a single owner, (i) such an owner would have incentives to slow down fishing activities, in recognition that overgrazing (short-term perspective) would lead to the cessation of activity at an early stage (long-term perspective); and (ii) the community, among the other two, wishing to increase its economic activity would be required to internalize the costs (no longer passed on to the others) by purchasing from the owner in question the relevant right to carry out particularly intense activity;

[19] On this topic see the explanations of Mattei, Gallarati, *supra* note 6; P. Gallo, *Introduzione al diritto comparato. Analisi economica del diritto* (Turin: Giappichelli, 1998) for further bibliographical references.

— in the case of three owners, those - among them - "forced" to suffer the excessive and, at this point, unlawful activity of one of the three, could reallocate (for example through a lawsuit) the loss suffered to the one who caused it through conduct contrary to law.

In such terms, and as pointed out by scholarship, if precise forms of ownership are lacking, the risk of overexploitation and, as a consequence, the 'tragedy of the commons' (resources) is extremely high, with the consequence that forms of individual exploitation are much more efficient, sustainable, and rational than collective ones. The foregoing, however, should also be read bearing in mind the opposite example of the tragedy of the anticommons, e.g. the risk and externalities arising from the disproportionate existence of property rights on the same asset[20].

It is true that, with reference to hypothesis (i) (e.g. single owner), if on one hand economic theory suggests allocation of the lake be made to a single subject, on the other hand it does not specify whether this subject should be public rather than private. Nonetheless, and based on past and comparative experience - and here the relevance of the CLE approach is crucial once again - the public allocation of the lake could entail further transaction costs and potential negative externalities, starting with the barriers posed by an inevitable widening and sophistication of the relevant rules (not to mention the problems likely to arise in terms of competition).

The issue of the lake, here-above briefly summarized, should be emblematic of the sustainability theme, particularly with regard to the solutions that could be envisaged regarding the "E" factor. This is a central element insofar as it dangerously straddles the line between "environmentalist" visions and the needs of an economy which sees its key in the exploitation of raw materials, today more than ever.

IX. ALLOCATION OF LIABILITIES AND INFORMATION ASYMMETRIES

The methodology provided by Comparative Law and Economics also offers valuable insights when dealing with a topic typical of economic analysis and critical of market and corporate law: that of the efficient allocation of liability.

In fact the evolution of the regulation of sustainability and the - perhaps confusing - pre-determination of environmental, social and governance factors not only presents a necessary element for the transition of markets towards sustainable structures and patterns, but also creates a further benchmark for assessing the correctness of the activities carried out by the players of the economic system and thus of their managers and board directors.

[20] Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, in 111 *Harv. L. Rev.* 621 (1997).

The point is crucial and must be investigated from a twofold perspective: that of corporate compliance with sustainable rules and that of management discretion in the hands of the executive directors.

Regarding the first perspective, a well known and growing concern regarding these phenomena is that they are more and more frequently catalogued under the label "greenwahisng". The topic is extremely important and makes it possible to question, first, the critical nature of a regulatory framework that not only allows, but perhaps even encourages, phenomena of this kind, and which is considered likely to be competitively advantageous with respect to the costs of compliance.

In other words, faced with the obvious difficulty of local and global enforcement of rules that are still in the making and, in any case, difficult to implement, and the high costs of complying with them, it is not surprising that abuse and misuse of the tools provided by sustainable regulation is a common occurrence. Furthermore, this can occur simply because it is more efficient (hence less costly) to bear the cost of a possible sanction (assuming it is eventually imposed) rather than to adapt *ex ante* to a regulatory set of overly complicated implementation. In this respect, therefore, CLE proves to be of central importance, inasmuch as it is capable - perhaps uniquely and even more so after the unfortunate experience of the so-called corporate social responsibility[21] - of designing suitable instruments to correctly balance prescriptions and sanctions and thus avoid passing on to third parties the costs of the transition[22].

With reference, instead, to the second topic, one of the weak points of the current regulatory framework and, more generally, of the discussions that take place daily about sustainability, refers to the need for directors of companies - mostly listed and therefore large - to pursue (not so clear) ESG factors.

The issue, which is part of the broader debate between shareholders and stakeholders' interests[23], with consequences for corporate governance[24], and which assumes particular

[21] See S.L. Gillan *et al.*, *Firms and Social Responsibility: A Review of ESG and CSR Research in Corporate Finance*, in 66 *J. Corp. Fin.* 101889 (2021).

[22] As part of its Green Deal, the European Commission issued in March new proposals to make sustainable products the norm. The Plan also includes proposed changes to the Unfair Commercial Practices Directive, as to update the EU consumer rules to empower consumers for the green transition and ban greenwashing. The proposal is available at https://ec.europa.eu/info/publications/proposal-empowering-consumer-green-transition-and-annex_en.

[23] On this topic see L.A. Bebchuk, R. Tallarita, *The Illusory Promise of Stakeholder Governance*, in 106 *Cornell L. Rev.* 91-178 (2020); O. Hart, L. Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, *ECGI - Finance Working Paper* no. 521/2017; C. Mayer, *Prosperity: Better Business Makes the Greater Good* (Oxford: Oxford University Press, 2018).

[24] See, again, N. Garoupa, T. Ulen, *supra* note 4. Reference can be made to the business law field, see A. Engert *et al.*, *Business Law and the Transition to a Net Zero Economy* (Munich: Beck, 2022). With reference to corporate law, see M. Gelter, *Comparative Corporate Governance: Old and New*, *ECGI Law Working Paper* no. 321/2016.

centrality also in view of the (un)fortunate formulations of the Italian Corporate Governance Code (which, as noted above, mentions the "sustainable success"), could lead to "catastrophic" consequences: beyond theoretical issues, it is in fact evident that the disproportionate - and on closer inspection, unjustified - extension of behavioural duties and managerial objectives upon the directors, corresponds to an equally (too) broad (and costly) extension of the liabilities potentially falling upon them, in contrast with some cornerstones of the subject matter, as designed by corporate law.

Cornerstones that clearly make management responsible, however, in the awareness that it must recognize the necessary decision-making autonomy (the so-called business judgment rule) in the pursuit of the company's interests and in "strict" compliance with that principal and agent relationship that exists solely and exclusively towards shareholders and not towards third parties or the community[25]. In this regard, Articles 25 and 26 of the proposed Directive on Corporate Sustainability Due Diligence (CSDD)[26] are of particular concern due to their vagueness regarding the role and duties of companies' directors. Vagueness that could prove counter-productive as to abovementioned directors' necessary autonomy in decision making when managing a company. Heterodox solutions with respect to the one outlined above, for instance because the latter are intended to guarantee greater attention to stakeholders, could improperly subvert the reference framework, with the consequence of designing an asymmetric system, characterized by an undue allocation of risks and liabilities and, therefore, by excessive costs of the office with respect to the real "gain" deriving from it. This, too, is a profile that represents the ground for serious comparative and legal-economic analysis and, hopefully, free of moral bias.

X. FINAL REMARKS

In conclusion, the need to rediscover the centrality of the comparative law and economics approach in the study - and preparation - of a sustainable transition is, in my view, evident. The risk of adopting other methods of study and research is, in a nutshell, that of dwelling on a parceled-out examination of the issue and not paying attention to the real theme: that of the

[25] On this topic see A. Orowitz, R. Kumar, H*ow Investors are Assessing Directors on ESG Matters,* in *Harvard Business Law Forum*, 11th April 2022; S. Bainbridge, *Don't Compound the Caremark Mistake by Extending it to ESG Oversight*, in *UCLA School of Law, Law-Econ Research Paper* no. 21-10.

[26] The text of the Proposal is available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071. See also P. Davies *et al.*, *Commentary: The European Parliament's Draft Directive on Corporate Due Diligence and Corporate Accountability*, April 2021 at https://ecgi.global/news/commentary-european-parliament%E2%80%99s-draft-directive-corporate-due-diligence-and-corporate.

transaction costs of transition. Clearly high costs and, therefore, to be allocated with the utmost care among the actors involved, in a global and necessarily interconnected framework. At the risk of espousing an excessively pragmatic and 'efficientist' vision, the central point of the question will then be that of the convenience of one solution over another, in terms of a costs/benefits analysis, and of the distribution of negative externalities. This is a key element, to which only the methodological path outlined here seems capable of providing an adequate response.

It is true that, as recently pointed out by important scholars, "the relationship between comparative law and law and economics has been, in a word, uneasy. They are like relatives who can trace some familial connections but for whom those connections have not been enough to overcome a visceral dislike. Periodically they must come together, but no such meeting has been a cause for rejoicing and "How long has it been?"[27]. This, however, must not interrupt the path of mutual influence and inter-sectorality, even about such crucial matters as it is sustainability. A subject that, it is certainly true, is anything but local and sectorial in its scope.

[27] N. Garoupa, T. Ulen, *supra* note 4.