# Sustainable goals within corporate governance: an Italian model of reputational investment

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Available at http://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev.html
ISSN 1923-6654 (print) ISSN 1923-6662 (online)
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**Abstract:**
The relation between corporate reputation and ethical behavior is easily understandable. Nevertheless, this simple statement hides a complex underlying problem: the critical connection between ethical rules and the assumption of responsibility.
It almost seems a *contradictio in terminis*, to the extent that acting ethically does not always mean acting according to legally binding norms.
This study analyses the important attempt observed in the Italian legal system to connect ethical behaviors to the assumption of responsibility with the introduction of the "legality rating for enterprises", an instrument that gives an answer to the described problem and other relevant issues obstructing the changing process towards sustainable development.
The followed method moves from a corporate governance perspective and consists of externally offering a mechanism of objectification of benefits, correspondent costs and responsibilities in order to overcome frequent obstacles encountered by sustainable businesses.
Preemptively, it is argued that business executives can (and in certain cases must) pursue sustainable goals, at least to preserve corporate reputation. In fact, on the one hand, it is possible to connect responsible business choices to a reputational investment; on the other hand, a real duty of the directors to prevent a reputational risk arises when the shareholder value might be negatively affected.
Afterwards, it is explained how the mechanism of the legality rating works, in which terms it connects reputational returns and sustainable objectives and, finally, how it overcomes the challenges of sustainability.
This instrument acts like a 'special license' issued and monitored by the Italian Antitrust Authority on the basis of the ethical behavior of companies; it is capable of integrating sustainability into business choices, creating shared value while improving economic performances.
For all these reasons and, in particular, for the innovative approach used to connect ethical behavior and responsibility, as well as the costs of sustainability with secure economic benefits, it is overall believed that this model of reputational investment is an effective instrument of sustainable development and presents relevant profiles of interests for an international audience.

**Keywords**: corporate governance; reputational investment; reputational risk; shareholder value; sustainable development.

## Introduction

In the last years, the integration of sustainability matters into business choices by a wide range of actors on an international scale is undergoing a constant and rapid increase, reflecting the urgency of the changing process that is involving the economic reality.
The just mentioned process found its origins in the growing demand for a more ethical behaviour of multinational enterprises, after well-known scandals [1; 2] often related to the localisation of production sites in countries whose legal systems did not provide for a sufficient protection of human rights, labour conditions and environmental necessities [3].
As much as all epochal steps, in fact, the genesis of a global market space certainly created innumerable new opportunities (e.g., the economic growth of nations that have long remained at the margins of world economic development or the reduction of costs for consumers thanks to the increase of competition); at the same time,

though, it dragged important side effects [4], starting with environmental degradation and the increase of social disparities [5].
This created fertile ground for the demand of a «social accountability» of the enterprise and brought to the reconsideration of the classic and neoclassic model of the *homo oeconomicus* – as the dominant pattern of the business activity –, which saw the sudden development of alternative models, interiorizing assorted reasons for the economic activity. General interests – or interests of categories other than the ownership – permeated the corporate scheme [6].
Consequently, the lucrative cause appeared to be accompanied by social purposes, as lastly confirmed by the new «Statement on the purpose of a corporation» updated by the USA Business Roundtable last August, which «supersedes previous statements and outlines a modern standard for corporate responsibility» [7].
Recent studies ascertained a growing interest towards sustainability also in the world of finance, especially after the subscription of the mentioned 17 Sustainable Development goals [8] and this tendency has been confirmed also at European level with the Action Plan of 2018 "Financing Sustainable Growth" [9].
New available financial products classified as sustainable (such as green bonds) are conquering not only non-profit actors but also profit-driven ones, which cover about 80% of the volumes [10] and, in general, it has been noted how ESG investing is playing a central role in strengthening the construction of a broader social conception of the public corporation [11].
To date, the sustainability sector reached volumes never touched before, nonetheless it is still far from fulfilling its utmost potential. Spending on sustainability consulting engagements was expected to barely exceed $1 billion in 2019 on a global level [12], despite, by 2030, the UN Sustainable Development Goals are expected to generate market opportunities of over $12 trillion a year [13].
In the current state, the mentioned changing process towards sustainable development still presents high margins of complexity.
This study aims at proposing an effective model of sustainable business, legally based on an instrument introduced by Italian legislation: the legality rating for enterprises.
The followed method moves from a corporate governance perspective and consists in externally offering a mechanism of objectification of benefits, correspondent costs and responsibilities in order to overcome frequent obstacles encountered by sustainable businesses.
Structurally, this paper can be divided in two main parts. The first (paragraphs 1-3) is dedicated to the delineation of the changing process towards sustainable development and its implications, starting with the frequent obstacles that prevent sustainable businesses to reach its full potential and passing through the key role of corporate reputation in the modern global market space. On this last point it is argued that, on the one hand, it is possible to connect sustainable business choices to a reputational investment (and in this case business executives are certainly allowed to pursue sustainable business goals); on the other hand, a real duty of the directors to prevent a reputational risk arises when the shareholder value might be negatively affected (in this case sustainable investments might be a necessity).
The second part, instead, is dedicated to the Italian model of the legality rating for enterprises as an efficient model of sustainable business and reputational investment. Its discipline and mechanism are explained, with a focus on how it overcomes the aforementioned obstacles of sustainability.
In other words, the first part focuses on general problems concerning the phenomenon of sustainable development from a corporate law perspective, whereas the second aims at presenting a specific and practical solution to the aforementioned problems.
A last paragraph will close the circle, presenting the results of the study, explaining why the mechanism of the legality rating can work in other fields and other countries, which aspects of the legality rating need to be improved and proposing recommendations for further research.

## The challenges of sustainable development

From a corporate law perspective, this analysis addresses four universal issues concerning the phenomenon of sustainable development before presenting the Italian model of the legality rating for enterprises as a possible solution.

1. The first problem arises from the vague and broad identity of sustainability. This causes difficulties in particular in the legal debate, where the concept is often used to remark a wide variety of issues and a wide variety of measures without clear parameters and implications [14]. A clear and updated definition is lacking and it is not always clear whether there is or not a correspondence with the phenomenon of CSR [15].
   By creating ambiguity on multiple levels (above all in terms of costs, benefits, and responsibility), the characteristic of vagueness undermines the considerable potential of the subject and therefore constitutes ground for critics.
2. The second aspect involves a simple fact (with crucial consequences in terms of competition) and namely that embracing sustainability often requires relevant investments, accompanied by a high degree of uncertainty in a risk-return perspective [16].
   While sustainable business is frequently linked to higher costs and uncertain economic returns, doing business in an unsustainable way allows cost-cutting choices.

The uncertainty of economic returns against considerable economic efforts (in proportions that are suitable to determine the success of the whole enterprise) constitutes an undeniable obstacle for a real change towards sustainable development.

**3.** The two above-listed issues are related to a third one concerning the relationship between sustainable investments and the business judgement rule (or correspondent methods to evaluate managers' activity in countries where this rule does not apply). In fact, despite an opening towards stakeholders' interests – as emerging from the mentioned Statement of the USA Business Roundtable of last August [17] – this relation may become complicated when sustainable choices negatively affect the (enlightened) shareholder value [18]; on the point, it has been observed how this kind of risk occurs together with the attempts of rethinking the function of the economic initiative in the light of a will that is different from the one of his promoters [19].

**4.** A last problem emerges when considering that businesses' reputation is deeply related to the adoption of ethical behaviors. This simple statement, in fact, hides a far more complex underlying problem: *videlicet*, the critical connection between ethical rules and the assumption of responsibility.
In other words, associating any liability to the non-compliance with ethical precepts might appear as a *contradictio in terminis* to the extent that acting ethically does not always mean acting according to legally binding norms [20].

The enumerated problems appear interrelated and are all, in the end, dependent on the opaqueness surrounding many of the measures designated to the implementation of sustainability into business choices.
In fact, the frequent lack of objectification of the mentioned measures makes business predictions more difficult, more suitable to be incorrect. On the other hand, it is also not favorable for the stakeholders since the lack of respect of the rules contained therein is hardly suitable to have immediately tangible consequences.
For these reasons, it could be useful to explore the origins of this opaqueness and look for a possible definition of sustainable development on a corporate level in the light of the recent implications of the phenomenon.

## Sustainable development and corporate social responsibility: what space for intersections?

The vagueness that characterizes both corporate social responsibility (CSR) and sustainable development (SD) does not involve only the measures deputed to their implementation, but also their definitions.
It has been observed how a considerable number of Authors uses the concepts as synonyms, while some treat them separately; moreover, some see SD as the ethical justification for CSR and others see CSR as the social pillar of SD [21].
This heterogeneity of visions is probably due to the lack of univocal definitions of the concepts, which, furthermore, are often addressed generally.

### Definitions contained in official documents

While the discussion on SD in its modern connotation arose in the 70s [22], a first official definition of the subject is contained in the report of the UN World Commission on Environment and Development of 1987, also known as Brundtland Report.
There, SD is described as the «development that meets the needs of the present without compromising the ability of future generations to meet their own needs» as well as a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development; and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations» [23].
Similarly to the three-sphere framework proposed by Passet in 1979 [24], this definition is based on three pillars: economic, social and environmental. Nowadays, the aforementioned one is still the most endorsed definition of SD and does not seem to collide with the 2030 agenda for sustainable development released by the United Nations in 2015 [25].
By opposite, although the debate on CSR anticipated the one on SD of at least 20 years, it is probably harder to find a univocal or official definition of the topic.
The concept – which emerged in 50s of the XX century [26] – is frequently associated with a stakeholders-oriented approach [27]; often denoted by voluntariness; and sometimes related to social more than environmental concerns [28].
While the first two mentioned aspects (despite not exempt from discussion) are traceable in both the prevailing literature and official documents referring to the subject, the last point appears weaker, at least on the basis of the definition that the European Commission gave of CSR in the so called «Green Paper» of 2001.
According to the European Commission, in fact, CSR is «a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis» [29].
The Commission will later update its definition of CSR as «the responsibility of companies for their impact on society» [30], perhaps opening up to different perspectives in comparison to the strict voluntariness of the precedent version but falling into an even more general and less useful interpretation.
A similar definition to the one contained in the Green Paper is provided by the United Nations Industrial Development Organization (UNIDO), which describes Corporate Social Responsibility as «a management

concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders».
In addition, UNIDO makes explicit that its CSR program is based on the Triple Bottom Line (TBL) Approach [31] (approach that is essentially related to SD, as it will be explained *infra*).
This is not the first time that the line between the two concepts is blurred by the UN, since also the Global Compact, known as the world largest CSR initiative, explicitly aims at accomplishing SD goals [32].

**Literature review**

Currently, in literature it is possible to identify two prevailing doctrines concerning sustainable development, the so-called triple-bottom-line (TBL or $_3$BL) and the shared value theory.
The triple-bottom-line thinking, groundbreaking expression coined by Elkington in 1994, is described as a «sustainability framework that examines a company's social, environment, and economic impact» [33]. It moves from the model of SD provided by the Brundtland Report and, under certain aspects, recalls the three-sphere-framework proposed by Passet [34].
Conceived as an alternative to the single bottom line thinking – whose cornerstone was individuated by the Author in the double-entry bookkeeping elaborated by Luca Pacioli in 1494 [35] –, TBL is meant to offer a rethought model of capitalism, including sustainability matters directly into business models and not just addressing them as business cases.
According to this innovative approach, together with the 'economic pillar', based on the maximization of profits, companies should equally focus on environmental and social issues. Regardless, the engagement of stakeholders and the outperformance of competitors on all the three pillars is believed to have a relevant impact in terms of corporate reputation in the long run.
Notwithstanding the endorsement of the United Nations, 25 years after its creation, Elkington acknowledged the necessity to rethink the TBL approach. As a matter of fact, it became a branching point for further development, but not always for the better: on the one hand, its numerous variations often constituted an alibi for inaction for companies; on the other hand, it failed to provide for a standard to measure the real impact of the mentioned variations. Finally, TBL certainly did not succeed in replacing the single bottom line thinking [36].
Different premises on how to implement SD on a corporate level are taken into consideration by the shared value theory [37].
While presenting it in 2006, Porter and Kramer observed that the general vision of CSR, from both an environmental and social angle, encounters limits for two orders of reasons: first, business is often seen in contraposition with society, when actually the two present a relation of interdependence; second, the common approach to CSR results too generic, while it would be far more effective to tailor the most appropriate one for each firm's strategy [38].
The TBL approach and the shared value theory move from different premises: the first, in fact, is influenced by the belief that capitalism can cure its own wounds but needs to be reinvented in the aforementioned terms; whereas the second moves from the observation that the recalled 'wounds' are actually caused by a misapplication of capitalism and that admitting the primacy of the economic responsibility (which is also the tip of Carroll's CSR pyramid) is not in contrast with the creation of concrete social and environmental value.
Both theories have in common the belief in the power of business to solve social problems and increase profitability by aligning its commercial and social interests. Nevertheless, Elkington claims that the economic primacy comports the risk of «sweeping aside sustainability in favor of shared value» [39], pointing out the necessity of a new model of capitalism, while Porter and Kramer address the abuse of natural and human resources as a misapplication of capitalism and see shared value as a broader conception of Adam Smith's invisible hand as well as a corporate strategy.
Despite the antithetical starting points, these theories present few but crucial common aspects: in both sustainability is seen as an element from whom business can benefit in the long term; both express the necessity of ending the everlasting antithesis between businesses and sustainable goals; finally, both underline that the success of sustainability depends on governments as well as on business.
The role of governments is difficult for several reasons: not always is possible to impose a cost, especially when considering the necessity of attracting investors in the global market space. It is, then, useful to use incentives, but also incentives present inconveniences as long as the voluntary sustainable conducts that lead to their achievement are not enforceable.
In particular with respect to this last point, which in this study is considered crucial, the legality rating gives evidence of the effective impact that incentivizing policies which also foresee a control mechanism – providing for a sort of direct enforcement of ethical rules – can have on the corporate implementation of sustainability.
Moving onwards to corporate social responsibility, it is essential to admit that in this occasion it is possible to record only incidentally the opposite premises at the basis of the several doctrinal reconstructions of the subject – from altruism [40; 41], to an opening towards economic returns, to the business case of CSR [42]; from pure voluntariness, to an opening towards regulation [43].

The main difficulty consists in the fact that, despite a physiologic evolution of the concept in a parenthesis of 70 years, many of these doctrines coexist. Nevertheless, while voluntariness is still perceived by many scholars as unavoidable, a purely philanthropic idea of CSR, can be considered outdated.

Already in the '90s, it has been observed that business has no significant problem embracing the role of corporate citizenship «under the rubric of enlightened self-interest» [44], while, more recently, the European Competitiveness Report 2008 explicitly stated that «CSR is not just philanthropy» and that, at least in certain circumstances, it «can contribute to cost savings»[45].

On the point, eminent literature argued that, far beyond philanthropy, CSR «addresses how companies manage their economic, social, and environmental impacts, as well as their relationships in all key spheres of influence: the workplace, the marketplace, the supply chain, the community, and the public policy realm» [46].

From this last viewpoint the resemblance between the concepts of CSR and sustainable development emerges clearly and it appears even more evident when taking into consideration the perspective adopted by Carroll in his milestone studies on CSR [47].

In particular, according to the Author, to be accepted as legitimate, CSR should include the entire range of business responsibilities; hence, he proposed a pyramidal structure of CSR including four level of responsibilities: economic, legal, ethical and philanthropic, specifying that «all other business responsibilities are predicated upon the economic responsibility of the firm, because without it the others become moot considerations»[48].

In other words, *socially responsible firms* should make profits while respecting the law, ethical rules and trying to be good corporate citizens.

Correspondent considerations can be moved with respect to *sustainable businesses*.

**Interim conclusions**

On a corporate level, the concept of sustainable development appears connected to the production of a shared value for both the ownership of the company (shareholders) and the other stakeholders (including the civil society). In these terms, the topic finds its collocations amongst business strategies and seems less prone to the criticism affecting the attempts to rethink the function of the economic initiative according to interests that are alien to the ones of its promoters.

It might be interesting to look at sustainable development also from a semantic perspective, as an expression composed of two words: 'sustainable' and 'development'.

The noun 'development' indicates a process, more precisely, a process of growth, of improvement, of progress. The adjective 'sustainable', 'able to sustain' – from latin *sustĭnēre*, composed by *sus*-, variant of *sub*- «under», and *tenere* «to hold», meaning holding up something from underneath, handling its weight [49] – can be replaced by endurable. It indicates resistance against different things, starting with the massive exploitation of resources.

At last, it should not be forgotten that the measurement of sustainability ("endurability") has always two ways: on the one hand, the economic development should be endurable from a social and environmental perspective, on the other hand, the environmental and social investments should be sustainable from an economic perspective. As a matter of fact, the enterprises (which are not non-profit organizations) should be able to 'endure' (sustain) the eventual costs of environmental and social responsibility (beyond mandatory costs).

It is possible to find endorsed theories in the prism of both the debate on CSR and the one on SD sharing a common aim and namely the necessity to safeguard environmental and social interests without sacrificing the legitimate right of businesses to make profits.

In essence, it can be affirmed that the differences between SD and CSR do not emerge with respect to the addressed values (which appear correspondent), but with respect to the addressed subjects – and, secondarily, with respect to the element of voluntariness: discussed in CSR and irrelevant to the general concept of SD.

As a matter of fact, while CSR necessarily entails enterprises, SD invokes all the subjects that may have an impact on the pursued changing process.

The actors of SD are many:

1) First, the people. SD involves everyone: even a person can conduct a sustainable life and make a difference. Even for a person sustainability presents costs and gains, as emerging from the obvious consideration that, for instance, while recycling or biking to work may be costless practices (or even cut costs), biological products are on average more expensive than their regular correspondents.
2) Second, institutions. Governments play a crucial role in delivering SD policies and steering the process of change. Incentives and legislation are determinant factors to influence both people and enterprises.
3) Just in third instance, the World Commission on Environment and Development addressed the «private enterprise, from the one-person business to the great multinational company with a total economic turnover greater than that of many nations, and with possibilities for bringing about far-reaching changes and improvements» [50].

On the basis of these brief considerations, it is already possible to argue that CSR and SD are not completely separate phenomena and CSR is certainly not limited to the social pillar of SD.

Even the circumstance that CSR is frequently identified with a stakeholder approach does not mean that the environmental and economic pillars assume a secondary importance compared to the social one.

On the other hand, all the pillars of sustainable development take into consideration the stakeholders: the definition of SD itself moves from the necessity of preserving the needs of present and future generations, which certainly are stakeholders' needs.
Hence, CSR could well correspond to the implementation of SD on a corporate level. Moving from these premises, a definition of CSR as 'the corporate instrument of sustainable development' could be abstractly expressed with the following equation:

$$R = \{y, z, w\}, \forall x \in R\colon\ CSR = E + x$$

Where:
R = set of variables ≠ economic responsibility
y = environmental responsibility
z = social responsibility
w = y + z
E = economic responsibility

As it emerges from Eq. (1), $x$ is suitable to have infinite combinations of environmental and/or social measures. It should not be assumed that companies that implement only social or only environmental measures present a lower level of sustainability in comparison to companies that implement measures of both types, since the level of sustainability cannot be computed only on the basis of the variety or amount of the adopted measures, but also (and in particular) on the basis of their effectiveness. Furthermore, the necessity to adopt voluntary CSR measures and, even more, the determination of their content may vary case by case considering the different legal systems, sectors, and types of enterprise.

**Connecting corporate reputation to sustainable investments**

When Milton Friedman argued that «the social responsibility of business is to increase its profits», he was expressing an indisputable but assumed truth: that the main purpose of businesses is to make profits is sacrosanct; on the other hand, the reality in which firms operate implies that a lot of different instances come into play [51].
International literature has been dealing with reputational issues since the '60s. Stigler associated reputation to the «persistence of quality», arguing that it «commands a price or exacts a penalty because it economizes on search» [52]. Shapiro later affirmed that «a firm which has a good reputation owns a valuable asset» [53].
Towards the last decade of 1900, the topic started to interconnect with the debate on CSR.
In particular, it has been seen how by proposing a pyramidal construction of CSR (including economic, legal, ethical and philanthropic responsibilities), Carroll observed that many business executives encompassed philanthropic programs in their firms' range of activities «under the rubric of enlightened self-interest» [54].
Such a viewpoint signs a landmark in both debates: the one on corporate reputation and the one on CSR, connecting the second to an enlightened shareholder value and depicting reputational investment as a value that benefits both the shareholders and the stakeholders.
At present, the relationship between corporate reputation and sustainable investments reached a new level of evidence due to the incredibly fast digital transformation of global economy. The so-called 'digital age' is comparable to other historical revolutions [55], which radically transformed business transactions, working schemes and sometimes the way people enter into contracts and fulfil their contractual obligations [56].
The boosted speed of communications as well as the circulation of information created that the instances of stakeholders started to have a bigger echo and, amongst them, consumers appeared to be able to influence the market with a new strength [57; 58; 59], unknown before.
As a result of billions of everyday online connections amongst people, businesses and data, the digital economy is weakening the conventional notions concerning the structure of businesses [60], sealing the role of corporate reputation as a central asset and encouraging the adoption of CSR measures.
From a recent research based on samples of executives from around the world [61; 62], evidence was found challenging the way managers' beliefs about the business case for CSR are often addressed.
In particular, from the aforementioned study, it emerged than more than 80% of corporate executives worldwide believe in the business case for corporate social responsibility, in opposition with the diffused assumption that most executives are skeptical about the existence of such a business case.
On the other hand, the cited statement of the USA Business roundtable seems to suggest a change from a solely market perspective, while also at European level sustainable business conducts are increasingly taken into consideration [63].
Nevertheless, even in this scenario, it is not believed that the market perspective or the capitalistic model are being challenged at their basis. It is, instead, suggested the necessity to acknowledge that, on the same market scene, other factors came into play and assumed a renewed importance. It is the case of corporate reputation and its switch from side topic (which it was at the beginning of its introduction in the corporate governance debate) to its current primacy in corporate governance.
On the point, despite moving from different premises, a recent study clarified how «sustainability-related issues have become mainstream business topics» and the reputational damage to companies «that fail to properly manage risk is substantial» [64].

Given that investing in sustainability provides for a reputational return, not only such business choices do not imply lower economic returns for the investors in the medium/long term, but they also provide for a strategy to prevent potential reputational risks.
From a similar perspective, eminent Italian literature contextualized the legality rating for enterprises (which will be analyzed *infra*), in the reputational debate as an instrument to prevent a nowadays unaffordable – and not just for big firms – reputational risk, defining it as the sublimation in legal terms of corporate reputation [65].
In conclusion, it is possible to frame is a duty of the directors to prevent potential reputational risks (affecting the – enlightened – shareholder value), which may derive from unsustainable corporate conducts.
Realistically, consumers and investors are increasingly attentive to corporate sustainability; hence, sustainable business choices would have reputational repercussions whatever is the intention behind their implementation.
Not to mention that, in order to survive on a highly competitive market, reputational returns are necessary to compensate for the high costs of sustainability; it would be a sufficient example to consider the necessity to attract consumers notwithstanding the higher prices of sustainably produced goods.
The intention behind sustainable business choices is, therefore, irrelevant to the purpose of linking them to corporate reputation. What is, instead, crucial is making CSR measures transparent in terms of both benefits and responsibilities, in the interest of both shareholders and stakeholders. Benefits, in fact, are suitable to incentivize their application and responsibilities to ensure their correct execution.

**The legality rating for enterprises as an effective response to the challenges of sustainable development**

The legality rating is based on companies' non-financial performances and it can be defined as an operational tool evaluating the general reliability, in terms of both legality and ethics, of the firms operating on the national market.
In particular, the rating attribution presents an 'entry level' depending on the absence of criminal and administrative convictions of the apical subjects operating within the company, and two further levels depending on the adoption of virtuous behaviors.
Its main purpose is the promotion of legality (in particular the prevention of the infiltration of criminality in economic activities) and ethical behaviors within companies in order to guarantee safety and fair competition in the carrying out the economic activities of its applicants.
In order to reach these objectives, the Italian Antitrust Authority (AGCM), which is competent for its issuance, assigns a score to the applicant enterprises that attests the respect of legality standards as well as the conformity to correct management principles and the implementation of virtuous behaviors.
Before clarifying how does this instrument work, it is important to explain why, despite its national relevance, the legality rating for enterprises presents aspects of interest for an international audience.
To this purpose it is necessary to recall the four individuated issues that the implementation of sustainable development presents on a corporate level (see *supra*, section 2) and namely: its broadness and vagueness [66]; high costs vs uncertain economic returns [67]; potential profiles of directors' liability in case of damage of the (enlightened) shareholder value [68]; lack of enforceability of ethical rules [69].
The legality rating offers a solution to the addressed issues throughout an innovative mechanism.
First and foremost, it precisely identifies the sustainability measures to adopt and clarifies which economic benefits derive from them, overcoming the first addressed problem: the broadness and vagueness of sustainability. Thanks to the clarity of its mechanism, therefore, the legality rating succeeds to give precise borders to reputational and sustainable investments. Furthermore, by doing so, the rating facilitates the schematization of those investments under the business judgment rule, given that, until business predictions seem uncertain, it may be easier to judge them as anti-economic.
Indeed, despite it is possible to observe a general acceptance of stakeholder approaches – as lastly confirmed by the mentioned and widely celebrated Business Roundtable statement –, these perspectives often hide a rhetorical basis more than an effective change, given the risk of rethinking the function of the economic initiative in the light of a will that differs from the one of his promoters [70].
On the point, some Authors observed that the Business Roundtable statement presents ambiguity with respect to the debatable space given to stakeholder interests beyond what would be useful for shareholder value (stating that an enlightened shareholder value falls within the shareholder primacy); furthermore, it neglects «the legal constraints that preclude many companies from pursuing stakeholder interests as an independent end» [71].
According to the cited study, in fact, «about 70% of the US companies that joined the Business Roundtable statement are incorporated in Delaware», a state whose corporate law is clearly shareholder oriented [72].
At the basis of these concerns, the fiduciary duties of the directors. Hence, adopting a stakeholder approach to the detriment of the (enlightened) shareholder value would result *contra legem*, determining liability profiles for the directors.
It has also been correctly observed that – when not contained in legal rules of conduct supported by effective sanctions –, a company can afford independent ethical choices only if these choices correspond to positive or, at least neutral, results in terms of production efficiency [73; 74].
In other words, a question emerges and namely whether risk mitigation techniques, also through the pursuit of CSR purposes in terms of investment, could go against the shareholder value and, therefore, cause a conflict within the company between shareholder and stakeholders [75; 76; 77; 78; 79].

In the light of these brief considerations, it is, therefore, possible to understand why, by objectifying the reputational investment in terms of costs and benefits, the legality rating overcomes eventual obstacles encountered by the board of directors in their decisions concerning the inclusion of sustainable policies in business choices (the third of the enumerated problems).
Finally, with respect to the fourth and last listed issue, the legality rating contributes to fill the gap between ethical precepts and the assumption of responsibility, connecting practical consequences to the non-compliance with certain rules, many of which of ethical origin.
To this extent, the efficiency of the instrument under exam does not lie in the imposition of legal obligations, but in the use of incentivizing techniques (and here lies its peculiarity). As a matter of fact, while connecting practical consequences to the lack of respect of ethical rules, the legality rating does not abandon the volunteer perspective of CSR. At the same time, though, it succeeds to give a valid response to one of the biggest problems addressed to CSR measures: the non-binding character, which can lead to the criticized green-washing operations.
Also from this perspective, the legality rating appears to objectify the reputational investment, this time in terms of responsibility.
The mechanism of the instrument under exam is based on a scoring system measured in stars (min. 1, max. 3) that connects the possession of the rating with tangible economic benefits in three fields:

- access to back credit;
- obtaining public funding;
- public procurement.
- Not to mention the general reputational investment deriving from this rating.

In the first case, the benefits regard time and conditions of the access to credit (time and cost reduction in the access to bank credit as well as a preferential assessment in the context of the verification of creditworthiness) [80]. Furthermore, credit institutions that do not take the legality rating into consideration must send the Bank of Italy a detailed report on the reasons of their decision and publish it on their websites [81].
In the second case, the possession of the rating entails: a ranking preference for the allocation of public funding; the attribution of an additional score or reserve of part of the allocated funds; the exemption from the declaration of requisites already contained in the rating [82].
In public procurement the legality rating involves a preferential score.
It is important to notice that the consequences of non-conformity with the rating rules or inexact declarations go from the lowering of the rating score to the revocation of the license, passing from its suspension [83].
Hence – despite the instrument under exam does not operate in the field of compliance with legal obligations, but more correctly in a voluntary process of conformity with specific onuses – the lack of respect of those onuses will lead to the decadence from the achieved economic benefits (achieved with relevant investments).

**The discipline**

The legality rating has been introduced by Law-Decree No.1/2012, Article 5-ter [84], modified by Law-Decree No. 29/2012 [85], converted, with amendments by Law No. 62/2012 [86].
Its regulation has been then completed by the Executive Regulation of the Ministry of Economy and Finance and the Ministry of Economic Development [87] – concerning the identification of the methods used to consider the legality rating for the purposes of granting public funding and accessing bank credit – and the Executive Regulation of the Antitrust Authority (AGCM) [88].
It is possible to request the rating – which lasts 2 years and is renewable upon request – to the AGCM for companies that are operating in Italy, registered in the registry of businesses for at least two years and have achieved a minimum turnover of two million euro in the fiscal year closed the year before the request.
Art. 2 of the lastly mentioned regulation [89] highlights the relevant behaviors for the attribution of the legality rating (with the minimum score: 1 star), which include:

- the absence of precautionary measures or convictions of company representatives or even shareholders (with at least relative majority) for crimes concerning the administrative responsibility of entities, tax crimes, crimes concerning the protection of health and safety in the workplace, crimes against the public administration. The absence of initiated criminal trials for crimes aggravated by the fact that they were committed within the framework of a criminal organization;
- the absence of measures or convictions concerning the criminal liability of entities (Legislative Decree No. 231/2001);
- the absence of convictions for the violation of antitrust regulations;
- the absence of convictions for unfair commercial practices;
- the absence of tax penalties for failure to pay taxes, insurance and social security contributions (with a margin of tolerability of 5% of revenues);
- the absence of penalties for violating the regulations on health and safety on the workplace;
- the absence of convictions for violations of anti-money laundering regulations;
- the absence of public funding revocation;
- the absence of sanctions issued by the Anti-corruption Authority (ANAC);
- the absence of anti-mafia interdictory information or communications (pursuant to Law decree No. 90/2014).

In order to achieve the basic score of one star, all the requirements of Art. 2 must be respected.
The basic score can be incremented of one star (for a maximum of 3 stars) every three met requirements expressed by Art. 3 of the same regulation [90], which include:

- the adoption of the legality protocols signed by the Ministry of the Interior or by Prefectures with business and professional associations;
- the use of payment traceability systems even for lower amounts than those established by law;
- the adoption of an organizational structure, also in outsourcing, that carries out the control on the compliance of the business activities with the norms of corporate law or with an organizational model pursuant to Legislative Decree No. 231/2001;
- the adoption of processes aimed at guaranteeing forms of corporate social responsibility through adherence to programs promoted by national or international organizations and the acquisition of sustainability indexes;
- to be registered in one of the lists of suppliers, service providers and executors of works (established pursuant to the current legal provisions) who have not been subject to attempts of mafia infiltration (so called 'white list');
- to have adhered to self-regulatory ethical codes adopted by trade associations or to have provided for mediation clauses (when not required by law) for the resolution of disputes or to have adopted protocols for the implementation of joint conciliations;
- to have adopted organizational models aimed at preventing and combating corruption.

Already from this synthetic list of the requirements for the rating attribution (Art. 2) and for the score improvement (Art. 3), it is possible to observe that the rating issuance depends on negative requisites (e.g. not having reported certain sanctions); on the other hand, in order to increase the basic score, positive requisites are necessary (concerning the carrying out of virtuous behaviors). Crucial, at this last purpose, the adoption of virtuous behaviors on the organizational level, since reputational risks frequently derive from the absence or bad functioning of the organizational models [91].
The possession of the requirements is attested with a self-certification, subject to all the norms that sanction, even with criminal penalties, false and mendacious declarations pursuing to the Presidential Decree No. 445 of December 28th, 2000, except for the presence of 'anti-mafia interdictory communications or information' issued by ANAC, which is directly attested by the Antitrust Authority by consultation of the national database of anti-mafia documentation.
Within 60 days from the receipt of the rating request – which is submitted online through the so called "WebRating-platform" –, the AGCM decides on the rating attribution. The mentioned term remains suspended for a maximum of 45 days when information is requested from other public administrations.
When the verification phase has a positive outcome, the applicant is registered in the list of the companies to which the legality rating has been attributed or renewed, published on the Authority's website with the relative starting date [92].
The list is updated on a weekly basis with attributions, suspensions, revocations, and cancelations, with the relative dates. This also gives an impression of how much this instrument is related to corporate reputation and, once more, how much corporate reputation can impact the market (so much so that, in this circumstance, the Competition Authority is involved in its evaluation).
Once the rating has expired (two years from the date of its issuance), the company no longer appears on the list of companies published on the site.
Whereas, instead, during the verification of the requirements carried out by the AGCM, any reason occurs that is suitable to prevent the rating attribution (or its maintenance, in case of renewal demands), a notification must be sent to the applicant, which has the right to submit written observations within fifteen from the communication [93].
When changes emerge with respect to the data reported in the company's chamber certificates, or any event occurs that is likely to affect the conditions for the rating attribution or for the determination of the score, the rating holder is required to inform the AGCM within ten days from the occurrence of the event [94] by accessing the web-rating platform and filling in the application for the occurred variation.
The same variation procedure applies also in case the rating holder does not lose but acquires one or more of the requirements pursuant to Art. 3, paragraph 2, of the Executive Regulation. In this circumstance the company may submit a request for a score increase, providing reference for each additional acquired rewarding requisite.
In case of loss of one of the requirements referred to in Art. 2, the Authority orders the revocation of the rating with effect from the moment the requirement ceases.
Nevertheless, also when the rating has been issued on the basis of false statements on the qualifications listed in Art. 3, the AGCM declares the rating revocation (which produces its effects from the moment the Authority becomes aware of the false nature of the statements) [95].
By opposite, the simple loss (*ex post*) of one or more qualifications listed in Art. 3, par. 2 entails the reduction of the rating score.

Different is, at last, the case in which the rating has been issued or renewed in absence (*ex ante*) of one or more requirements. In particular, in absence of the conditions referred to in Art. 2 the Authority orders the cancellation of the rating [96].

As previously mentioned, the legality rating can also be suspended. This occurs in the event of the adoption of precautionary measures in the context of a criminal proceeding for one of the crimes referred to in Article 2. Furthermore, the suspension of the rating may also be ordered when some of the provisions recalled in Art. 2 are subject to opposition and the final judgment of the Judicial Authority is pending.

Before enacting the revocation, score reduction, suspension or cancellation of the legality rating, the Antitrust Authority discloses to the company the reasons at the basis of its decision. Within fifteen days from the receipt of the communication, the company has the right to submit its written observations.

**Results and discussion: an inspiring model for other countries and fields?**

This study moved from the premise that corporate reputation – in both its declinations of investment and risk – is the key for business executives to include sustainability in their governance choices.

Nonetheless, if reputational investment is without any doubts connected to the increase of the enlightened shareholder value and should be considered a legitimate governance choice, this statement is not a given result, but the final evaluation of a not always one-directional hermeneutical process and, in case of litigation, it could lead to different results.

Hence, the implementation of instruments such as the legality rating and, more generally, the development of incentivising policies by national governments appeared to be crucial for the promotion of sustainable investments.

In particular, it has been seen how the legality rating entails the representation of how a company is placed on the market with respect to the relationship with its stakeholders, which is evaluated according to a point-system and rewarded with the mentioned economic benefits.

In absence of a similar system, the competitive advantages enjoyable by sustainable companies (epitomized in reputational returns and prevention of reputational risk) might be difficult to quantify despite they require costly investments. This has been previously addressed as a possible discouragement towards the adoption of sustainable measures.

Table 1 displays three macro-types of economic operators – divided on the basis of how sustainably they run their business activities – showing their general costs and competitive advantages.

**Table 1:** Macro-types of economic operators.

| | **1) Unsustainable operators** | **2) Average operators** | **3) Sustainable operators** |
|---|---|---|---|
| **Description** | Economic operators willing to:<br>• run the risk of illegality **or**<br>• take advantages of unregulated (or insufficiently regulated) subjects. | Economic operators conforming to the minimum standards imposed by law. | Economic operators conforming to standards that go beyond the law. |
| **Competitive advantages** | Lower production costs. | | Reputational returns (difficult to quantify); prevention of reputational risk. |
| **Costs** | Potential costs of legal sanctions; potential losses deriving from reputational risks. | Potential costs deriving from reputational risks. | Higher costs due to sustainable investments. |

From the illustrated perspective, it seems quite unique and certainly interesting that, through the legality rating, a public authority can contribute to quantify and evaluate these advantages by rewarding with peculiar benefits the prevention of reputational risk (before it happens) and its management (when it has already arisen).

At the same time, the undeniable impact of the reputational factor on market dynamics – together with the relevance, for the rating issuance, of the verification of anticompetitive behaviors – explain the *ratio* of the attribution of competence to the Antitrust Authority.

Furthermore, the rating contributes to restore a situation of unfair competition deriving from the adoption of unfair commercial practices, civil or administrative irregularities or even illegal practices.

In this sense, the rating compensates for the illegitimate competitive advantages that unsustainable businesses can enjoy [97; 98; 99].

The AGCM relates on the legality rating activity on a yearly basis and, from the data made available by the Authority, it emerges that, after the first sixth year of functioning, the instrument continues to attract an increasing number of enterprises.

Fig. 1 shows the adoption of the legality from its implementation until 2018.

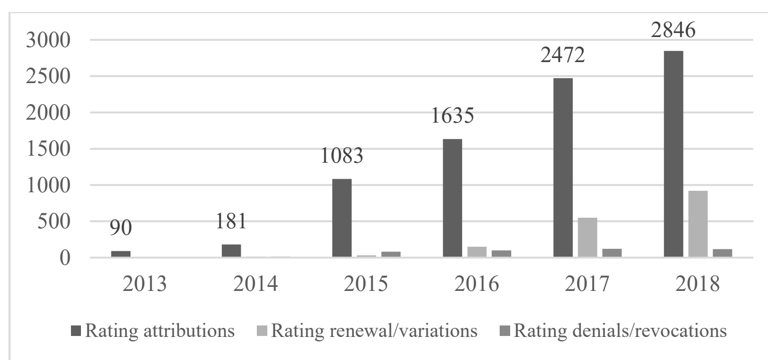


**Figure 1:** Rating applications in the period 2013-2018
Source: AGCM [100]

According to the data published in December 2019 by the Bank of Italy [101], in 2018, with 6975 companies holding legality ratings and financed by the banking system, there has been a sharp increase compared to the previous two years (4,400 in 2017 and 3,265 in 2016). Even the percentage of companies that received actual benefits from the legality rating in the banking sector increased significantly, reaching 48% (vs 40% in 2017, 34 in 2016).

The benefits in this sector have consisted in the reduction of the investigation time and in the application of better economic conditions when the loan is granted or renegotiated. For new customers, the most significant benefits concerned the reduction of time and costs of the investigation phase for the grant of a loan.

A recent research underlined that the legality rating represents one of the most important attempts to support the voluntary adoption of responsible practices by companies and its relevance is confirmed by the results of an analysis showing how the use of ratings generates, on average, the best results in terms of economic, financial and equity performance [102].

While the use of the instrument is remarkably increasing, a lot of work is dedicated to its improvement. Just at last, since October 21st, 2019, the Antitrust Authority has also made available a web platform for the compilation and submission of applications and for the communications on the subject, which allows companies to upload all the necessary data to obtain the rating (as well as the relevant data variations) in a simpler and faster way, increasing transparency and mutual collaboration.

In general, it has been noted how the legality rating had the crucial merit to have objectified some types of reputational and sustainable investments, thus overcoming: *(a)* the broadness and vagueness of sustainability, specifying with sufficient clarity what CSR instruments are relevant for the rating issuance; *(b)* the uncertainty of the economic returns deriving from the mentioned investments and, consequently, a possible negative evaluation of the directors' activity in the light of the business judgement rule (or correspondent rules in countries that do not refer to the aforementioned method); *(c)* the absence of concrete responsibility from the lack of respect of voluntarily adopted ethical rules, connecting practical consequences to the non-compliance with the same (and namely the revocation of the license or score downgrade and the decadence from the achieved benefits).

By opposite, the legality did not overcome the frequent problem of the high costs of sustainable investments – especially with respect to the investments aimed at obtaining a score which is higher than the basic –, *de facto* limiting the system to the medium to big enterprises. Indeed, despite the rating in itself has no costs for companies, it is necessary to admit that only non-small companies could be able to afford the significant investments at the organizational level necessary to increase the rating score (like the adoption of the required organizational models, the adoption of international and national CSR programs and sustainability indexes, the adoption of anti-corruption protocols, etc.).

On the other hand, it has been seen how the instrument under exam compensates this downside with tangible and competitive economic benefits and, from a certain perspective, the high costs sustained to increase the rating score could also act as a trigger to conform to the voluntarily adopted ethical rules in order not to lose the benefits (achieved with relevant economic efforts). Hence, paradoxically, the high costs of the 'second and third rating stars' are suitable to strengthen corporate responsibility.

In essence, the legality rating appears adequate to overcome three of the four addressed problems related to the corporate implementation of sustainability.

**A form of direct enforcement of ethical rules?** The legality rating for enterprises constitutes a unique example in the sustainability panorama also because it seems to give to the AGCM a possibility of direct enforcement of ethical rules.

In fact, although it is possible to find studies of great interest and relevance on the creative use of law to enforce voluntarily adopted ethical rules [103], this outcome requires the finest jurists' interpretation: a pivotal step in the debate on CSR, but, unfortunately, without stable results yet.

By opposite, the legality rating gives to the Antitrust Authority the possibility of connecting to the failure to conform with the declared rewarding requisites [104] the cancellation, suspension, score reduction or revocation of the rating [105], entailing the loss of the achieved benefits.
It has been seen how this peculiar enforcement mechanism does not properly operate in the field of compliance with legal obligations, but more in a voluntary process of conformity with specific onuses.
As a matter of fact, despite the relevance of certain legal provisions for the achievement of the minimum score [106]' for the purposes of the legality rating, the reference to those norms is functional to build a voluntary 'public license of legality' and appears totally decontextualized from their normal application in the different fields of law to which they belong.
Yet, the volunteer and rewarding nature of the instrument under exam emerges even more clearly with respect to the rewarding qualifications for the upgrade of the rating score contained in Art. 3 of the Executive Regulation.
Indeed, unlike Art. 2, which contains negative requirements consisting in not having been subject to certain sanctions – Art. 3 refers to positive qualifications concerning the actual carrying out of virtuous behaviors, detached from the respect of any legal norm.
The requisites enlisted in Art. 3, therefore, constitute the heart of the question addressed in this paragraph (the enforcement of ethical rules).
As it might be expected, it is still possible to detect differences concerning the relevance of the mentioned requirements, given that the lack of the above-listed legal sanctions naturally represents the minimum standard for the issuance of the rating. Hence, it has been noted how the loss of a prerequisite mentioned in Art. 2 has heavier consequences than the loss of a qualification listed in Art. 3.
Notwithstanding, it is interesting to observe how not just in case of loss of one of the requirements referred to in Art. 2, the Antitrust Authority enacts the revocation of the rating, but also when the rating has been issued on the basis of false statements concerning the qualifications listed in Art. 3.
In this last case, in fact, even in presence of the requirements for the minimum score, the AGCM does not downgrade the rating, but directly revokes it, with effects from the date of the acknowledgement of the false declarations [107].
The same is not valid for the loss (*ex post*) of one or more qualifications listed in Art. 3, par. 2, which entails only the reduction of the rating score – and the downgrade is recorded in the rating holders register on the AGCM website [108].
Both measures, to different extents, appear adequate to incentivize the adoption of virtuous corporate behaviors, but also suitable to ensure their actual respect, given that – as observed *supra* – the costs sustained to increase the rating score can act as a trigger to conform to the voluntarily adopted ethical rules in order not to lose the achieved benefits.
A substantial problem might, nonetheless, emerge when considering three rewarding requirements mentioned in Art. 3, and namely the adoption of:

- legality protocols;
- processes aimed at guaranteeing forms of CSR through adherence to programs promoted by national or international organizations;
- self-regulatory ethical codes adopted by trade associations.

In particular, the utilised terminology leads to a crucial question: in case an ethical code (or any of three mentioned instruments) has been adopted, can the lack of its «respect» effectively lead to a downgrade of the rating when the regulation simply speaks of «adoption»?
In other words, is the control of the AGCM on these three requisites formal or substantial?
It might be of help to consider that, while the actual regulation literally speaks about «adoption» [109] the previous legislative text was using the word «respect», at least when referring to legality protocols (*rectius*: legality protocol) [110].
This circumstance – far from suggesting that according to the actual normative the simple adoption of such instruments constitutes a sufficient condition for the rating purposes – seems to underline the necessity of a formal commitment that, nonetheless, also implies the respect of the adopted rules.
Certainly, an official adoption may interest the moment of the rating issuance, since the rating application is based on a declaration, but it would not have much use for an eventual control of the Antitrust Authority on the rating holders.
Another important aspect to consider in order to give an answer to the outlined question could be the nature of the control of the AGCM on the rating requisites in general.
On the point, already in the phase of the evaluation of the rating applications, the Antitrust Authority conducts a deep verification of the requirements; to this end, it communicates and exchanges information with the interested public administrations. The procedure is, furthermore, suspended when behaviors that are objectively relevant for the evaluation of the rating applications emerge or are reported by institutions that are responsible for the control on legality – and, to this extent, also the violation of diligence rules is relevant [111].
As argued by recent jurisprudence, the suspension of the evaluation phase is aimed at allowing a deep and complete investigation on the existence of the necessary requirements [112].

In addition, AGCM's verification powers in the issuance phase of the rating find their completion in the monitoring phase, with the same type of control that finds its own acknowledgement [113].
In this perspective – besides described sanctions pursuant to Art. 6 –, Art. 7 sets informative duties for the rating holders, stating that they are required to communicate any event affecting the possession of the requirements to the Antitrust Authority.
To complete the picture, the public administrations involved in the verification of the requirements for the rating attribution, as soon as they become aware of it, notify the Authority of any changes (rule that mirrors the issuance phase).
In essence, all these elements seem to suggest that the formal adoption of legality protocols, CSR programs or self-regulatory ethical codes is not sufficient alone to constitute a rewarding requisite for the upgrade of the rating score; it appears necessary, instead, the respect of the rules stated therein [114]. Nevertheless, it would be useful to clarify the point by updating the Executive Regulation.

**Conclusive remarks**

Businesses are the engine for a change towards sustainable development, howbeit, the role of people, legislators, and policy makers is crucial for its full achievement.
In the first part of this paper, an attempt has been made to define sustainable development and CSR, as well as their main actors. In this sense, CSR has been depicted as the implementation of SD on a corporate level.
It has also been noted that for business executives the adoption of ethical behavior represents an effective strategy to improve corporate reputation; at the same time, though, the implementation of SD on a corporate level (CSR) encounters several challenges that impede it to reach its full potential.
Hence, despite sustainable investments are intrinsically related to reputational returns (and therefore, economic returns), it has been argued that an objective connection (*a priori*) between those investments and the deriving economic benefits could have a serious impact on the allocation of sustainability amongst business strategies.
In the outlined context, the legality rating has been presented as 'an instrument of sustainable development' capable of integrating ethical behaviors into business choices [115], creating shared value while improving economic performances.
In fact, despite it certainly reveals margins of improvement, its mechanism appears highly innovative for the described process of objectification of the reputational investment under two different profiles: the one of the economic benefits, but also the one of the deriving responsibilities.
In this way, the legality rating gives answers to great part of the previously addressed problems that, still today, present obstacles for the integration of sustainable choices in corporate governance.
The strength of this pioneering instrument, after all, emerges from its increasing appreciation by economic operators, as demonstrated by the growing applications recorded year after year by the AGCM [116].
In conclusion, the rating ensures transparency for stakeholders and safety for directors, benefits the shareholder value and leads to a concrete assumption of responsibility.
Therefore, for all the exposed reasons and especially for the innovative approach used to connect ethical behavior and responsibility, providing for a form of direct enforcement of ethical rules, it is believed that this model of reputational investment and its mechanism could inspire similar measures for the implementation of sustainable goals and could be appreciated in other countries.
Interpretation is the highest manifestation of the legal profession; it is essential to keep up with new emerging needs and problems. Nevertheless, a clear rule is always the most direct way to secure a result, even when it takes the shape of an incentivizing technique instead of hard law. In essence, a correct use of incentivizing techniques is crucial [117] and, when combined with objectification mechanisms, it becomes the key for a simpler and faster move towards sustainable development.
At last, it would be interesting in further researches to find out if (and how) the legality rating could open up also to small and medium enterprises and how can similar instruments be conceived in order to pursue different sustainable goals and/or be exported in other legal systems.

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