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PUBLIC CONSULTATION IN THE CONTEXT OF SUSTAINABILITY REPORTING. LESSONS FROM THE ENVIRONMENTAL LAW FIELD

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1. INTRODUCTION

This paper aims at assessing the 'amount' and type of participation of the public in the draft of the Corporate Sustainability Reporting Directive (CSRD) and its standards, the European Sustainability Reporting Standards (ESRS).

This topic is particularly relevant for two main reasons. First of all, there is an undeniable gap both in literature and in case-law about the issue of participation in the decision-making process in general. Second, since participation represents one of the most important procedural aspects of what is known as social sustainability, it appears necessary to shed light on its consideration by the European Union in the development of directives on sustainability reporting[2].

Sustainability reporting, in the definition provided by the CSRD, consists of information relevant not only to understand the undertaking's impact on environment and on

[2] Sustainability reporting cannot properly be considered as a field of law or economics, or, better said, it is not yet considered as a field of law, a part from certain authors supporting the inclusion of sustainability reporting in the field of Corporate Sustainability Law. The worldwide consideration of sustainability reporting in this field of law is of course desirable but it is unfortunately too soon for its global acceptance. So, for the moment, a comparison with the environmental law field represents a solution that could be accepted by the most. However, a comparison with other fields of law (for instance, commercial law) or of management (for example, accounting) could also be argued. The author nevertheless believes that the environmental law field is the one that is more suitable to comprehend also the issues arising in the commercial law and accounting fields thanks to its broad perspective and principles it is based on. Moreover, sustainability reporting concerns not only environmental and social aspects but also governance once, which could lead to question the comparison with environmental law. But, also in this case, it is essential not to omit that governance topics are strongly related to environmental and social ones and are capable to affect them. So, the environmental law field presents itself again as the most efficacious comparison.

society but also to understand how the undertaking's activities and performance are impacted by sustainability matters[3].

We are usually brought to think that only topics like GHGs emissions, waste, hazardous substances, animal welfare, among others, should be considered under the realm of environmental law. However, also sustainability reporting should fall into this realm and finally be categorized as one of those activities that are not only strongly connected to the environment but that can even exert a profound impact on it (which is namely the purpose for which sustainability reporting was created).

Within this paper a distinction between the participation of the public in the legislative and in the administrative process is traced. More precisely, with regard to the CSRD, the paper refers to the public's participation in the legislative process, whereas, with regard to the ESRS, it refers to the administrative process. This distinction is essential because, even though the forms of participation might be similar, the purposes are different: while the legislative participation aims at shaping what the law should be, the administrative participation focuses on how the law should be implemented.

2. METHODOLOGY

This paper adopts a qualitative methodology based on the content analysis of the main sources of law, case-law, doctrine, and academic literature of the international and European environmental law and sustainability reporting. Moreover, this study uses the comparison to identify a field that shares similar characteristics with the one of sustainability

[3] Directive 2022/2464/EU of the *European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting*.

reporting and that has rules that could potentially be applied, even though of course ad hoc shaped, to the main field of research of this study. The selected field is environmental law.

3. AN OVERVIEW OF PUBLIC CONSULTATION IN THE EU

Both the CSRD and the ESRS underwent a phase of public consultation, open to everyone in the European Union having access to an internet connection[4]. A real disproportion in the categories of the stakeholders who provided their comments emerged and led to question the democratic process followed and the respect of international rules on participation in decision-making. Both in the case of the CSRD and of the ESRS more than two thirds of the total number of feedback came from the following three categories of stakeholders: business association, NGOs, and company/business[5]. This can be explained by

[4] The feedback could be sent via the 'Have your Say Platform' at this link.

[5] With regard to the CSRD, prior to the collection of the final feedback coming from different categories of stakeholders that are reported in the official website with the pertaining statistics, the Commission already undertook both general and targeted consultation activities. Unfortunately, the official documents of these previous consultations are not available online. From March to July 2018, an open public consultation was conducted in the framework of the fitness check on the EU framework for public corporate reporting. In October 2018, an open stakeholder meeting was also organized in the context of the fitness check. In March 2019 a targeted online consultation on a draft version of the guidelines on climate-related reporting was carried out. In November 2019 expert workshops took place on the application of the materiality principle in the context of non-financial reporting and in December of the same year the audit and assurance of non-financial information were conducted. Moreover, in January 2019, the Technical Expert Group on Sustainable Finance organised an online call for feedback on its report on climate-related reporting [19]. Finally, the consultation period for providing the final feedback was established between January 30th, 2020 and February 27th, 2020. 78 feedbacks were received coming from the following categories of respondents with the respective percentages: business association (34.62%), NGO (20.51%), company/business (19.23%), other (12.82%), EU citizen (5.13%), public authority (5.13%), trade union (1.28%), and academic/research institution (1.28%). The top 3 countries that provided more feedbacks were Belgium, Germany and France. See this link. With regard to the adoption of the ESRS, for the first set of the feedback period went from June 9th, 2023 to July 7th, 2023. 604 feedback were received from the following categories of respondents

the fact that the CSRD and the ESRS are inherently related to the life of businesses and firms and that their actions could cause harm to other subjects (ex. people) theoretically represented by NGOs. However, the disproportion between the feedback received by the categories of single business or business association and those from all categories representing either independent (ex. academia) or opposing interests (ex. citizens) cannot be omitted.

Public consultation finds its roots in Articles from 9 to 11 TEU, in the principle of political equality and equal treatment[6].

with the respective percentages: company business (26.66%), business association (24.17%), NGO (14.07%), EU citizens (13.25%), other (10.60%), academic/research institutions (3.31%), trade union (3.31%), public authority (2.48%), environmental organization (0.99%), non-EU citizens (0.83%), and consumer organization (0.33%). The top 3 countries that provided more feedbacks were Germany, Belgium, and the Netherlands. The EFRAG also organised, prior to the submission of its technical advice to the Commission, multiple events with various stakeholders from May to July 2022 and ran a public consultation on 13 EFRAG exposure drafts. In addition, also the Commission held some meetings with stakeholders to their views on the draft of the standards. See at this link.

[6] At the light of these data, it appears fundamental to assess whether these principles have been respected or not. Article 9 states that "*In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies*." It is not possible to affirm that in these cases the principle of political equality has been respected since more than half of the feedback came from exponents of companies, businesses and business associations. The remaining half is split among categories having different objectives among each other that do not directly counterpose the view of the former half, leading in this way to an unequal distribution of attention of the Union towards its citizens. Citizens which, as clearly shown by the statistics, express their views only (in most cases) when part of a category (ex. NGOs). According to Article 10 par. 3 "*Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen*." The right of citizens to participate in these initiatives by providing their feedback has been guaranteed by the possibility of providing their views through the so-called 'Have Your Say' platform. However, the citizens expressing their views alone, without being part of an organization, were only a small minority: 5.13% for the CSRD and 14.08% (0.03 of which were non-EU) for the ESRS. Since they are primary stakeholders, their participation should be incentivized. Namely, Art. 11 rules that " *1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. 2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society. 3. The European Commission shall carry out broad*

These articles are to be found in Title II of the TEU and are indexed as 'Provisions on democratic principles'. Not by chance, the foundation of public consultation is considered to be the 'participatory democracy[7]'. Participatory democracy represents one of the democratic foundation of the European Union[8] and can be defined as a model foreseeing the possibility for those having an interest in taking part in the proceeding due to the peculiar bounding existing between the interested person and the *locus* where the administration's decision will exert its effects, affecting in this way the interested person[9]. It is however fundamental to understand the extent to which there should be an institutional capacity for the public at large to have a final say on a public policy issue[10]. The public should be involved during the entire process, from the agenda setting through the monitoring and evaluation of existing policies[11]. Even though the final decision is taken by the administration, the public

consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent. 4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties."

[7] R. SHIPLEY – S. UTZ, *Making it Count: A Review of the Value and Techniques for Public Consultation*, in *Journal of Planning Literature*, 27, 1, 2012, pp. 22–42.

[8] O. AMMANN – A. BOUSSAT, *The Participation of Civil Society in European Union Environmental Law-Making Processes: A Critical Assessment of the European Commission's Consultations in Connection with the European Climate Law*, in *European Journal of Risk Regulation*, 14, 2, 2023, pp. 235–252.

[9] Theorization of the so-called 'interesse comune'. See, V. CERULLI IRELLI- L. DE LUCIA, For another definition of participatory democracy, 2014. See also: M. DELL'OMARINO, *La funzione democratica della partecipazione al procedimento: alcune considerazioni a partire dalle recenti riforme in materia di dibattito pubblico*, in *federalismi.it*, 2024.

[10] A. WEALE, *Democracy*, London, Macmillan, 1999.

[11] A. ALEMANNO – J. ORGAN, *The Case for Citizen Participation in the European Union: A Theoretical Perspective on EU Participatory Democracy*, in *SSRN Electronic Journal*, 2020.

must be given a clear and transparent explanation on the reasons for the adoption of the decision. This is what effective participation means, that before the adoption of the final policy decision, all members of the public "must have equal and effective opportunities for making their views known to the other members as to what the policy should be[12]".

The European Commission started to adopt policies to consult interested parties a long time ago, already at the beginning of the EU integration process[13]. The increasing

[12] In its book R.A. DAHL, *On Democracy*, New Haven, Yale University Press, 1998, identifies five principles or standards which should be understood as criteria for a democratic process. They are effective participation, voting equality, enlightened understanding, control of the agenda, and inclusion of adults.

[13] Different phases of the evolution of the EU Commission's consultative history can be identified. See A. ALEMANNO – J. ORGAN, *The Case for Citizen Participation in the European Union: A Theoretical Perspective on EU Participatory Democracy*, in *SSRN Electronic Journal*, 2020. A first phase, at the beginning of the EU integration process, saw the development of tools to secure the efficient performance of the Commission's decision-making prerogatives. A second phase started in 1992 when the European Commission published the communication "An open and Structured Dialogue between the Commission and Special Interest Groups". The communication, which should be seen in the context of a larger debate on access to information, strengthens the legitimation of the Commission in collecting information and in ensuring wider participation. In 2001, a third phase started with the "White Paper on Governance" which identified an autonomous, not merely instrumental, "democratic quality" of participatory processes. See A. ALEMANNO – J. ORGAN, *The Case for Citizen Participation in the European Union: A Theoretical Perspective on EU Participatory Democracy,* cit. In 2003, with the Inter-Institutional Agreement on Better Law-Making, consultations were eventually integrated and became part of the impact assessment analysis. Nowadays, we find ourselves in the fifth phase which focuses on a more in depth understanding of public consultation and its democratic power. This phase started with the new Inter-Institutional Agreement on Better Law-Making signed in 2016. The Agreement outlines various commitments of the three signing institutions to deliver high quality Union legislation in order it to be efficient, effective, simple, clear, not overregulated or burdensome. The Agreement has been enacted through the so-called "Better regulation guidelines" published in 2021 and "Better regulation toolbox" in 2023.

importance of consultation culminated with the Inter-Institutional Agreement on Better Law-Making enacted through the Better Regulation Toolbox and Better Regulation Guidelines[14].

The notorious democratic deficit of the European Union, which led to the erosion of citizens' beliefs necessary for the stable existence of the system, represented one of the priorities of the European Commission. Namely, when Ursula von der Leyen became President of the Commission, one of her main focuses was citizen participation in the democratic life of the Union.

Even though, with regard to environmental matters, the stalls of members of the public having an interest in the policy is particularly broad since environmental decision are

[14] Brussels, 3.11.2021, SWD(2021) 305 final, COMMISSION STAFF WORKING DOCUMENT, Better Regulation Guidelines; European Commission, 'Better Regulation toolbox, July 2023.

The Better regulation guidelines define "better regulation" as designing EU policies and laws so that they achieve their objectives at minimum cost. The purpose is to ensure that "political decisions are prepared in an open, transparent manner , informed by the best available evidence and backed by the comprehensive involvement of stakeholders." Stakeholders should theoretically be consulted through the whole policy cycle, however, formal stakeholder consultation can only be launched for initiatives that already received political validation at the appropriate political level. The consultation process is structured in three phases: establishing the consultation strategy, conduction consultation work, and informing policy making. It is interesting to note that the minimum standards define three stakeholder types: who is affected by the policy, who will have to implement it, and who has a stated interest in the policy. Namely, a narrow definition of stakeholder is adopted. Stakeholders include employees, customers, suppliers, stockholders, banks, environmentalists, government and other groups who can help or hurt the corporation." With regard to the consultation methods, there are two main typologies: public consultation and targeted consultation, the choice of which is determined by the use of the consultation tools and must take into account: proportionality, degree of interactivity needed, accessibility considerations, and timing requirements. The conduction of the consultation work can be divided in the following steps: announce and communicate, run consultations, inform on contribution, and analyse content. To conclude a synopses report should be drawn up on the results of the consultation activities.

capable of generating very widespread impacts[15], participation (and consequently consultation) in policy decision-making is not properly and concretely effective yet[16]. As a matter of fact, as already seen in the case of the CSRD and ESRS, there is a lack of engagement of stakeholders from certain categories. Furthermore, there is a lack of platforms where citizens can directly talk to each other without being subject to divisive national discourses[17].

Participation in the legislative process can be seen clearly in the adoption of the CSRD. As a matter of fact, the CSRD is a directive, a typical legislative instrument adopted by the European Parliament and Council under the ordinary legislative procedure. The public is allowed to participate in various forms: starting or taking part in new initiatives, taking part in discussion on ad hoc EU platforms, expressing their feedback through the "Have your say" platform as a form of public consultation, contributing through panels, or presenting a petition to the EU Parliament. In the case of the CSRD, the public was only limitedly consulted and informed about this possibility. As already written before, there was a huge disproportion between the categories of stakeholders who provided their feedback. Even though it is necessary to acknowledge that public participation in the legislative procedure is encouraged but not enforceable, such weak and informal participation has evident and dangerous consequences. The possibility of defining frameworks and participation in the

[15] M. DELL'OMARINO, *La funzione democratica della partecipazione al procedimento: alcune considerazioni a partire dalle recenti riforme in materia di dibattito pubblico*, cit.

[16] The Better Regulation Guidelines establish general principles and minimum standards for consultation. The relations with stakeholders are governed by four general principles: participation, openness and accountability, effectiveness, and coherence. These principes are further complemented by five minimum standards that apply to all consultations: clarity, targeting, outreach, sufficient time for participation, and publication of contributions and results. For more detailed information, see this link.

[17] F. CENGIZ, *Bringing the citizen back into EU democracy: against the input-output model and why deliberative democracy might be the answer*, in *European Politics and Society*, 19, 5, 2018, pp. 577–594.

decision-making process already at its very beginning represents an essential instrument to ensure democratic legitimacy of legislative acts, even outside the circuit of the political representation. This is particularly relevant with regard to matters concerning the negative impacts on the environment and the connected consequences on society.

On the other hand, the democratic principle and the administrative proceeding are more evidently and strongly related. As a matter of fact, not only the latter enables the concretization of the democratic will expressed in the law but also reinforces the legitimacy of the administration's democratic action through the participation and collaboration of public and private actors. At the same time, it is fundamental to stress that participation in an administrative proceeding does not transmit *per se* a stronger democratic legitimacy to the action of the administration. As a matter of fact, participation is a tool to enrich the democratic action thanks to its capacity of complementing and providing continuity to what is establish by the law. The creative and innovative character of the citizen participation in administrative proceeding is particularly evident in environmental related matters. The Aarhus convention, for example, requires a broad participation of the public, which is considered as a right for it[18]. In so establishing, public administrations are obliged to ensure the participation of the public in all phases of the proceeding and to take into account the comments provided by the public in determining the final decision. The right to participate is based on inclusiveness, universality, integrity, continuity and discursiveness[19]. This example of public participation in administrative proceeding for environmental matter should serve as a model. However, in the development of the ESRS by EFRAG, the consultation of the public was very limited and, also in this case, restricted to certain categories of

[18] Artt. 6,7,8 of the Aarhus Convention.

[19] Please see: J. BARNES, *Towards A Third Generation Of Administrative Procedures*, in *Conference On Comparative Administrative Law*, 2016; J. BARNES, *Buena administración, principio democrático y procedimiento administrative,* in *Revista Digital de Derecho Administrativo*, 2018; D. BELLIS, *Le ispezioni nei procedimenti europei e la tutela del privato: problemi e prospettive*, in *Torvergata.it*, 2017, pp. 153–189.

stakeholders. The EFRAG, acting under delegated mandate from the EU commission, put in place a clear administrative procedure to set these standards but, despite participation being a procedural right, it has not been duly enacted. Public participation is fundamental not only for the concretization of the already established law or policy but represents an essential tool that should also be adopted in an earlier phase of the decision-making process. For instance, allowing the public to participate in policy formulation also enhances the governments' policy capacity by narrowing the understanding gap.

The methods and the timing of consultation are aspects of utmost importance to move from a 'passive' type of consultation to an 'active' one[20]. Not by chance, already in 1969 Arnstein created the metaphor of the 'ladder' to show the importance of empowerment in consultation[21]. Although it can be correct to think that citizens cannot usually fully grasp the complexity of the situation, it is problematic when powerholders continue to refuse to offer any agenda-setting role to stakeholder. In the light of this reasoning on empowerment, other authors have supported and further developed Arnstein's thinking[22].

[20] The term 'passive' is used in this paper to refer to the limited pawer of the public when consulted, since it only has the change to answer questions or to provide feedback to drafts that have already been formulated. The term 'active' is used to refer to a type of engagement that is concretely capable of lead to a change in the proposed policy, even in the earliest phases of the formulation of its draft.

[21] The author adopted a poster painted in 1968 by French students to explain the student-worker rebellion because it perfectly highlighted the fundamental point that participation without redistribution of power is an empty and frustrating process for the powerless. At the bottom of the ladder there is manipulation and therapy which can be considered methods of 'non-participation'. Their objective is not to enable people to participate in planning and conducting programs. Informing, consultation and placation are three degrees of tokenism, representing that through these methods citizens can hear and be heard but they lack the power to ensure that their views will be really taken into consideration. For further information, see S.R. ARNSTEIN, *A Ladder Of Citizen Participation*, in *Journal of the American Institute of Planners*, 35, 4, 1969, pp. 216–224.

[22] For instance, Johnson and Howsam, starting from the metaphor of Arnstein, developed two ladders: a ladder of forms (based on power) and a ladder of ends (based on ethics). Among the forms of consultation identified in the ladder of forms the advisory mini-publics could be an interesting method to be adopted for public consultation at

Despite all the criticism, it is also necessary to recognize the efforts made by the European Union to ensure a stronger public participation. The push towards a stronger participation of citizen in the decision-making process is evident but the Commission should better clarify what type of participation is expected, the extent of the participation, and the timing for the involvement. This is particularly relevant to make clear for what concerns the field of environmental law and sustainability reporting.

4. ENVIROMENTAL LAW AS A TERM OF COMPARISON

A solution to the problem of sustainability reporting not being subsumed under the rules on public consultation established for other environmental law matters can be found in the adoption of the comparison.

To verify whether the literature and law sources on environmental law can be applied also to public participation in the sustainability reporting field, it is essential to assess if the rules dictated with regard to the former can apply also to the latter and if common characteristics exist between these two fields.

EU level to ensure a more active participation of citizens because they offer multilateral discussion, greater elaboration of reasonings and are very inclusive. The matching of the means with the ends is fundamental for practitioners to achieve their goals. In the case of public consultation in the EU, it would be ideal to set the goal of Policy Justice and Legitimacy, which is defined by the authors as an ethical domain where the process is designed to achieve a larger social goal: the empowerment of non-elite actors. This shows clearly the link between ends and means: policy makers designing consultative efforts, by first recognizing the danger of lower-rung ends, can use the appropriate tools of empowerment to avoid pitfalls. For further information, see G. F. JOHNSON- R. HOWSAM, *Can consultation ever be collaborative?,* in *Policy Design and Practice*, 1:4, 2018, 253-268.

Environmental law can be defined as a law concerned with environmental problems, involving a range of different legal and regulatory techniques[23].The purpose of this field of law is to protect the environment, to create rules about how people can use natural resources[24], to mitigate the impact on ecosystems, ensure a sustainable use of natural resources, and finally to protect human health from environmental hazards[25]. However, the field of environmental law is always evolving and adjusting to the newest phenomena that need to be somehow regulated. The 'quite' new necessity of creating a set of rules for firms whose action has an impact on environment can, and actually should, become a necessity for the environmental law field. Sustainability reporting, by covering if not all but at least most of the potential threats to the environment, requires a stronger recognition which can only be given by its incorporation within environmental law. This branch is the only one capable of giving dignity to a topic that is sometimes dealt by accountants and some other times by various categories of jurists. Environmental law encompasses all these fields of study thanks to its broad but never generic perspective.

4.1 Public consultation in environmental law

As already seen, public participation is difficult to define and to articulate because it can take many different forms[26]. In the meantime, public participation is encouraged or,

[23] E. FISHER, *Environmental Law: A Very Short Introduction*, Oxford, Oxford University Press, 2017.

[24] S. VIGNINI, *Environmental Law*, Cham, Springer, 2020, pp. 1–4.

[25] Please see this link.

[26] M.G. KWEIT – R. KWEIT, *Implementing Citizen Participation in a Bureaucratic Society: A Contingency Approach*, New York, Praeger, 1983.

more often, mandated (even though not usually enforced) at all stages of the decision-making process[27].

EU primary law contains a strong commitment to enhance the participation of civil society[28]. Since the early 2000s, the European Commission has been relying on public consultation, including in environmental policy, and has distinguished itself as "one of the stronger promoters of environmental interests of the Union". The rationales for public participation in current EU policies can be drawn from three documents that set fundamental standards regarding participation rights: the EC Public Participation Directive (PPD), the Aarhus Convention, and the EC Water Framework Directive[29]. Of particular importance, is

[27] The EU has been repeatedly criticised for its "democratic deficit". Its failure to involve civil society actors in an equal and balanced way appears in strong contrast with the EU primary law. For a further in-depth analysis, see A ALEMANNO, *Beyond Consultations: Reimagining EU Participatory Politics*, cit.; A ALEMANNO, *Levelling the EU Participatory Playing Field: A Legal and Policy Analysis of the Commission's Public Consultations in Light of the Principle of Political Equality*, cit. See: N.P. SPYKE, *Public Participation in Environmental Decision-Making at the New Millennium: Structuring New Spheres of Public Influence*, in *Boston College Environmental Affairs Law Review*, 2022.

[28] Art. 11.3 TEU; A ALEMANNO, *Beyond Consultations: Reimagining EU Participatory Politics*, cit., A Alemanno, *Levelling the EU Participatory Playing Field: A Legal and Policy Analysis of the Commission's Public Consultations in Light of the Principle of Political Equality*, cit.

[29] Directive 2003/35/EC of the *European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC*; UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters; Directive 2000/60/EC of the *European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy*; Directive 2007/60/EC of the *European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks*. For further information on the WFD, see J. NEWIG - E. CHALLIES - N. JAGER – E. KOCHSKÄMPER, *What Role for Public Participation in Implementing the EU Floods Directive? A Comparison With the Water Framework Directive*, *Early Evidence from Germany and a Research Agenda*, in *Environmental Policy and Governance 24*, 275–288 (2014). With regard to the rationales, they can be subsumed under two categories: effectiveness and legitimacy. Effectiveness refers to the effective attainment to a certain environmental goal, whereas legitimacy refers to a

the ratification of the Aarhus Convention in 2005, which states that the public must be able to participate in environmental law making[30]. The participation of the public appears to be particularly significant in the context of sustainability development. As a matter of fact, sustainability depends mostly on the way in which economic, social and environmental aspects are taken into consideration in the decision-making process[31]. In the decision-making

inclusive, democratic and legitimate decision-making. For all the identified rationales, see Table 1 p.55 in J. NEWIG, *Does public participation in environmental decisions lead to improved environmental quality?: towards an analytical framework. Communication*, Cooperation, Participation International Journal of Sustainability Communication, 1, 51-71. See also: J. NEWIG, *Does Public Participation in Environmental Decisions Lead to Improved Environmental Quality?: Towards an Analytical Framework*, in *International Journal of Sustainability Communication*, 2017.

[30] Reg. (EC) 1367/2006. See also: O. AMMANN – A. BOUSSAT, *The Participation of Civil Society in European Union Environmental Law-Making Processes: A Critical Assessment of the European Commission's Consultations in Connection with the European Climate Law*, cit.

[31] When writing about sustainability, a reference is always made to the so-called 'three pillar conception' of sustainability according to which sustainability is based on economy, environment, and society. Everything started with early political economists, such as Ricardo and Malthus, who questioned the limits of economic growth and recognised the inherent trade-offs between wealth generation and social justice. After the second World War, the notion of 'economic development' evolved to refer to a rise in material well-being which can be measured by an increase in the flow of goods and services as well as a growth in income per capita as indicated by Arndt in 1969. With the famous Limits to Growth of 1972, the modern growth-based economic approach began to be questioned and it was finally recognized, that given that natural resources are finite, this Western approach was inherently incompatible with the ecological perspective of sustainability. In the UN Conference held in Stockholm in 1972 a first major attempt to reconcile economic development with environmental integrity was tried. After a first period of time where the attention was focused on the binomial economy-environment, in the 19080s a wave of radical social movement arose in parallel with the already existing environmental ones leading to a recognition of the other aspect of sustainability – the social one - as the other main actor in the evolution towards sustainable development. From that moment on, sustainability started to be seen as a triad of economy, environment and society. As a matter of fact, in 1987, two authors conceptualized the three pillars structure in different ways. On the one hand, Barbier affirmed that the three elements of sustainability are three interacting systems, whereas Brown argued that they should be seen and treated differently and distinctly even though strongly interrelated.

process, there are different participants, each representing different interests and competing preferences. Public participation could help in balancing them and in enhancing the acceptance of decisions[32]. Public participation is also expected to enhance the level of environmental protection, due to the fact that in taking decisions where values are concerned, regulators 'need' the public[33]. The benefits of public participation in environmental matters, more specifically in Environmental Assessment (EA), have been deeply described and discussed in academic literature and also in the praxis. Adding to what has just been mentioned, public participation actualizes and strengthens essential democracy principles[34] and enables individual and social learning/education that can foster the transition to sustainability[35]. Among the 'practical' benefits, it is possible to acknowledge the followings: access to local and traditional knowledge from different sources, broader range of possible

[32] Please see: J. EBBESSON, *The Notion of Public Participation*, in *International Environmental Law*, cit. and B.J. RICHARDSON – J. RAZZAQUE, *Public Participation in Environmental Decision Making*, in *Environmental Law for Sustainability*, Oxford, Oxford University Press, 2006, pp. 165–194.

[33] J. STEELE, *Participation and Deliberation in Environmental Law: Exploring a Problem-Solving Approach*, in *Oxford Journal of Legal Studies*, 2001.

[34] R. PARENTEAU, *Public Participation in Environmental Decision-Making*, Ottawa, Minister of Supply and Services, 1988; A. SHEPHERD – C. BOWLER, *Beyond the Requirements: Improving Public Participation in EIA*, in *Journal of Environmental Planning and Management*, 40, 6, 1997, pp. 725–738; J. PETTS, *Barriers to Deliberative Participation in EIA: Learning from Waste Policies, Plans and Projec*ts, in *Journal of Environmental Assessment Policy and Management*, 5, 3, 2003, pp. 269–293; B. RADU, *The Impact of Transparency on the Citizen Participation in Decision-Making at the Municipal Level in Romania*, in *Central European Public Administration Review*, 17, 1, 2019, pp. 111–130.

[35] See: P. FITZPATRICK – A. SINCLAIR, L*earning through Public Involvement in Environmental Assessment Hearings*, in *Journal of Environmental Management*, 67, 2, 2003, pp. 161–174; T. WEBLER – H. KASTENHOLZ – O. RENN, *Public Participation in Impact Assessment: A Social Learning Perspective*, in *Environmental Impact Assessment Review*, 15, 5, 1995, pp. 443–463; J.R. PALERM, *An Empirical-Theoretical Analysis Framework for Public Participation in Environmental Impact Assessment*, in *Journal of Environmental Planning and Management*, 43, 5, 2000, pp. 581–600.

solutions, balanced decision-making, avoidance of litigation[36]. Despite the benefits, there is still a lot of dissatisfaction from participants, who are raising critiques on the procedure adopted to ensure a meaningful public participation. Lack of information, late involvement in the decision cycle, lack of financial supports are only some of the issues mentioned[37].

5. THE RIGHT TO PARTICIPATE IN ENVIROMENTAL LAW

When writing about public consultation, one cannot but refer to the second pillar of the Aarhus Convention on Public Participation in Decision-making.

More precisely, it is necessary to focus on articles 6, 7 and 8, which provide the fundamental definitions of 'public' and 'public concerned', as well as other essential characteristics that participation in environmental related matters should possess[38]. A more

[36] For more information on the outcome of education as a benefit of public participation, refer to A.J. SINCLAIR – A. DIDUCK – P. FITZPATRICK, *Conceptualizing Learning for Sustainability Through Environmental Assessment: Critical Reflections on 15 Years of Research*, in *Environmental Impact Assessment Review*, 28, 7, 2008, pp. 415–428; C. PATEMAN, *Participation and Democratic Theory*, Cambridge, Cambridge University Press, 1970; C. O'FAIRCHEALLAIGH, *Public Participation and Environmental Impact Assessment: Purposes, Implications, and Lessons for Public Policy Making*, in *Environmental Impact Assessment Review*, 30, 1, 2010, pp. 19–27.

[37] J. PETTS, *Public Participation and Environmental Impact Assessment, in Handbook of Environmental Impact Assessment,* Oxford, 1999, pp. 145–177; A. SHEPHERD – C. BOWLER, *Beyond the Requirements: Improving Public Participation in EIA, i*n *Journal of Environmental Planning and Management*, 40, 6, 1997, pp. 725–738; A.J. SINCLAIR – M. DOELLE, *Using Law as a Tool to Ensure Meaningful Public Participation in Environmental Assessment*, in *Journal of Environmental Law and Practice*, 12, 1, 2003, pp. 27–54.

[38] Artt. 6, 7, and 8, Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Related Matters. This Convention was signed at Aarhus, in Denmark, on June 25th, 1998

in-depth analysis of these provisions is done in the Maastricht recommendation on participation in the decision-making process under the Aarhus convention[39].

From the analysis of such provisions, it is possible to affirm that, despite the restriction to a certain type of public, the so-called 'public concerned', there is a strong push for an active, effective, timely, and concrete participation in the decision-making process.

With regard to public participation during the legislative process, article 8 is of utmost importance since it refers essentially to public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments. The steps to be followed to ensure such public participation are explicitly stated. First, time-frames for participation should be sufficient and clearly fixed. Second, the drafts should be published or made publicly available. Third, the chance to comment should be granted to the public. Moreover, the results of the participation should be properly considered. These are the steps that should have been followed to engage the public in the development of the CSRD. Some of them have been followed, for instance the possibility of commenting, but the lack of sufficient information of the public availability of the draft, as well as the lack of consideration of the outcomes, led to a weak and almost useless engagement of the public.

With regard to public participation in the administrative procedure, it is essential to consider articles 6 and 7.

Article 6 represents the core provision for the participation in administrative decision-making. It applies to permit procedures but can also include activities not explicitly mentioned in Annex I of the Convention. This article is very precise in stating the required activities to be undertaken for an effective public participation. Major attention is put on the necessity of properly informing the public on the opportunities to participate (time and venue) and on the importance of an early participation, when all options are still open. Moreover,

[39] The Maastricht recommendation on participation in the decision-making process under the Aarhus convention.

the outcomes of the public participation should be taken in due account in the final decision. In the administrative procedure for the development of the ESRS, the public, as shown in the previous paragraphs, was not sufficiently informed and properly considered. Moreover, the competent authority did not ensure the consideration of the public's feedback in the development of the standards.

Article 7 is of particular importance for the purpose of this paper since it refers to the public participation concerning plans, programmes and polices relating to the environment. Even though less detailed than article 6, it reinforces early and effective participation.

Thanks to the adoption of extensive interpretation as suggested in the Maastricht recommendation, it could be possible to include the development of standards on sustainability reporting under Articles 6 and 7 of the Convention since the activities (art. 6), the plans, programs, and polices (art. 7) are to be considered as all those having an effect - even though not necessarily significant - on the environment. Legislative acts, like the CSRD, could consequently fall into this category of art. 8 and the EU Delegated Act through which the ESRS have been adopted in articles 6 and 7.

At the EU level, the once European Community adopted the directives 2003/4/EC and 2003/35/EC: the former focuses on the access to information and the latter on the topic of participation in the decision-making process. These two directives amended previous directives to conform the EU rules to the Aarhus convention[40]. Other two fundamental directives on the matter are the Environmental Impact Assessment (EIA) directive and the Strategic Environmental Assessment (SEA) directive, which must not be confused with the SEA Protocol. The EIA directive refers in its preamble to art. 191 TFEU, which affirms that

[40] I. CENEVSKA, *The European Union and Environmental Democracy: The Aarhus Convention in EU Law*, in *Justinianus Primus Law Review*, 4, 11, 2015; L. LAVRYSEN, *The Aarhus Convention: Between Environmental Protection and Human Rights,* in *Liège, Strasbourg, Bruxelles: parcours des droits de l'homme*, 2010, pp. 647–671.

the EU environmental policy is based on fundamental principles like the precautionary and the preventive one[41]. In stating this, the EIA affirms something different but in line with the Aarhus Convention, which is that effective participation of the public concerned in decision-making is needed because it enables the public to provide their comments and views in a moment when decision-makers are still capable to consider them[42]. So, it is possible to affirm that the principle of public participation in environmental law also implements the precautionary principle and the preventive principle[43]. It is consequently possible to derive

[41] See: P. WATHERN, *Environmental Impact Assessment. Theory and Practice*, London, Routledge, 2013; A. Ryall, *EIA and Public Participation: Determining the Limits of Member State Discretion*, in *Journal of Environmental Law*, 19, 2, 2007, pp. 247–257.

[42] See: B. CLARK, *Environmental Impact Assessment (EIA): Scope and Objectives*, Berlin, Springer, 1984, pp. 3–13; K. ARABADJIEVA, '*Better Regulation' in Environmental Impact Assessment: The Amended EIA Directive*, in *Journal of Environmental Law*, 28, 1, 2016, pp. 159–168. A.N. GLUCKER – P.P.J. DRIESSEN – A. KOLHOFF – H.A.C. RUNHAAR, *Public Participation in Environmental Impact Assessment: Why, Who and How?,* in *Environmental Impact Assessment Review*, 43, 1, 2013, pp. 104–111. A. SHEPHERD – C. BOWLER, *Beyond the Requirements: Improving Public Participation in EIA*, in *Journal of Environmental Planning and Management*, 40, 6, 1997, pp. 725–738. C. O'FAIRCHEALLAIGH, *Public Participation and Environmental Impact Assessment: Purposes, Implications, and Lessons for Public Policy Making,* in *Environmental Impact Assessment Review*, 30, 1, 2010, pp. 19–27. E. Zębek, *Principle of Public Participation in EU Environmental Policy as the Public's Fundamental Right to Participate in the Implementation of Projects Negatively Impacting the Environment,* in *Wydawnictwo Naukowe UKSW*, 2020.

[43] The precautionary principle was first established in 1982 by the UN General Assembly and took further shape in 1992 in Principle 15 of the Rio Declaration "*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*." The EU introduced this principle with the Treaty of Maastricht in the realm of the principles informing the action of the EU. More precisely, art. 191(2) TFEU lists the principles that rule the environmental policy of the European union, among which the precautionary and the prevention principles. It is fundamental to clarify that the Treaties do not precise the content of such principles but every source of law (ex a directive) adopting such principle gives them a concrete and effective application (for instance, the Habitat directive). Both the doctrine and the CJEU qualifies it as fundamental and essential for the evolution of the environmental policy of the EU. For academic literature on the matter, see: F. FERRARO, *I grandi principi del diritto*

that in front of a sustainability reporting policy potentially able to cause negative effects on the environment and on society, under the light of Art. 191 TFEU and the principles it is based on, the public has the right to be publicly consulted in an effective manner. The SEA Directive regards all those plans and programmes "which are likely to have significant effects on the environment"[44]. Art. 3.2 better defines what type of plan and programmes are to be considered under this directive[45]. Considering that the CSRD has to be followed by firms

dell'Unione europea in materia ambientale, DPCE online, Sp-2/2023; A. ALEMANNO, L*e principe de précaution en droit communautaire,* in *Revue du droit de l'Union Européenne*, 2001; N. DE SADELEER, *Environmental principles*, Oxford, 2002; A. TROUCHE, *Le principe de précaution : entre unité et diversité, in Cahiers de droit Européen*, 2008; L. KRÄMER, *EU Environmental law,* London; J. L. DA CRUZ VILLAÇA, *EU law and integration. Twenty Years of Judicial Application of EU law*, Oxford, 2014, p. 322 ss. For decision fo the CJEU, see opinion 6-12-2001, C-2/00; decision 9-12-2008, C-121/07, Commission v. Francia; decision 4-3-2015, C-543/13, Fipa Group, decision, 17-12-2015, C-157/14, Neptune Distribution, opinion 6-12-2001, Protocole de Cartagena sur la prevention des risques biotchnologique, decision 9-12-2008, C-121/07, Commission v. French Republic. Just like the precautionary principle, also the preventive principle falls into the category of those principles operating *ex ante*. The prevention principle is most of the time considered together with the precautionary one leading to a situation in which it is hard to identify the differences exiting between them. As a matter of fact, these two principles should not be confused since their basis are different: while the prevention principle addresses tangible risks, the precautionary one deals with scientific uncertainty. So, in a scenario f unknown probability of serious or irreversible damage, precautionary measures should be adopted. On the other hand, in the case of a probability of a significant risk, preventive measures should be taken. For case-law, see, C-175/98, C-177/98, C-400/08, C-461/13, C-399/14, C-387/15, and C-388/15.

[44] Art. 1 SEA Directive. Please see also: L. FELDMANN, *The European Commission's Proposal for a Strategic Environmental Assessment Directive: Expanding the Scope of Environmental Impact Assessment in Europe,* in *Environmental Impact Assessment Review*, 18, 1, 1998, pp. 3–14; V. THEOPHILOU – A. BOND – M. CASHMORE, *Application of the SEA Directive to EU Structural Funds: Perspectives on Effectiveness*, in *Environmental Impact Assessment Review*, 30, 2, 2010, pp. 136–144; T. JACKSON – B. ILLSLEY, *An Analysis of the Theoretical Rationale for Using Strategic Environmental Assessment to Deliver Environmental Justice in the Light of the Scottish Environmental Assessment Act*, in *Environmental Impact Assessment Review*, 27, 7, 2007, pp. 607–623.

[45] "*2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes, (a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or (b) which, in view of*

working in all these fields and such firms have to report with the ESRS that also focus on such topics, it appears logical to include sustainability reporting policies like the CSRD under this directive. It is also interesting to note how the SEA Directive concentrates on the topic of consultation by dedicating the entire Article 6 to them[46].

The difference between 'public' and 'public concerned', adopted both at international level and at EU level, should consequently be applied also to public consultation in the sustainability reporting field if sustainability reporting is to be considered as a new branch of environmental law, at least with regard to the aspects concerning the environment and society.

the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC."

[46] Article 6 "*1. The draft plan or programme and the environmental report prepared in accordance with Article 5 shall be made available to the authorities referred to in paragraph 3 of this Article and the public. 2. The authorities referred to in paragraph 3 and the public referred to in paragraph 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure. 3. Member States shall designate the authorities to be consulted which, by reason of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes. 4. Member States shall identify the public for the purposes of paragraph 2, including the public affected or likely to be affected by, or having an interest in, the decision-making subject to this Directive, including relevant non-governmental organisations, such as those promoting environmental protection and other organisations concerned. 5. The detailed arrangements for the information and consultation of the authorities and the public shall be determined by the Member States*." Directive 2001/42/EC of the *European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment*.

6. THE VIEW OF THE CJEU AND OF THE ECHR

The right to participate in the decision-making process in environmental related matters has been also under the lens of the CJEU. Namely, the CJEU has jurisdiction to make preliminary decisions on the interpretation of the Aarhus Convention as it became an integral part of EU legislation and is consequently binding for the Member States according to article 261(2) TFEU.

Most of the decisions of the CJEU deal with the rights to access to information and access to justice, whereas only few of them cover the topic of the right to participation in the decision-making process, even though just indirectly or conditionally to the previously mentioned rights[47]. As a consequence, the trends established in the jurisprudence of the CJEU on participation in the decision-making process cannot exclude the right to access information and justice. There are two trends that are worth analysing.

The first one regards the relationship between participation in the decision-making process and access to justice.

According to the Court, the purpose of Article 9.2 of the Aarhus Convention is to guarantee the right to bring an action against decisions and other acts only to members of the 'public concerned' who meet certain conditions. (C-826/18, par.36 and 45). However, the access to justice is not to be hindered to members of the public if the national law of a Member States grants a more extensive right to participation in the decision-making process. In such case, legal actions fall under the scope of article 9.3 of the Convention. So, the right to participate in the decision-making process and the right to access justice are two separate rights for the applicability and recognition of which different conditions are to be fulfilled.

[47] I. ILGAUSKIEN, *Public Participation in Environmental Decision-Making Process: EU Position*, in *Mokslinės konferencijos pranešimų rinkinys, Visuomenės Saugumas Globalizacijos Kontekste*, 2010.

The Court explicitly stated that "*participation in an environmental decision-making procedure […] is separate and has a different purpose from a legal review*". (C-263/08 par. 38)[48]. So, the right of the public concerned to have access to a review procedure and the right to participate in the administrative procedure are to be considered two separate rights, having consequently the concerned members of the public the right to challenge a decision of the court even when the concerned public has previously been given the opportunity to take part in the decision-making procedure. However, the GA Boebek affirmed that it is possible to require participation in decision-making as a precondition to access to justice (Opinion AG Boebek on C-263/08), which was also confirmed the CJEU in the decision C-644/15 (C-664/15, par. 68, 69).

With regard to the right to participation, the Court went even further by stating, firstly, that the concerned public is guaranteed effective participation in environmental decision-making procedures with regard to projects likely to have significant effects on the environment (C-263/08, par.36, Reichel, 2010). Secondly, it affirmed that even if some conditions for participation are set (ex. payment of fees), such conditions cannot represent obstacles to participation in decision-making hindering in this way the effectiveness of the EIA directive (C-216/05).

The second trend regards the establishment of a clear *favor* for NGOs. They are seen as bearers of collective interests undoubtedly deserving to enter into court proceedings and therefore considered equal to the 'public concerned' when the requirements of the Convention are fulfilled[49]. Article 9.2 of the Convention requires the existence either of an

[48] This view has been supported also in other judgements. For instance, C-664/15 par. 62, Opinion GA in case C-826/15, par. 128, 137.

[49] For more information on the evolution of the role of NGOs and the discussion on the ‚association claim' in Germany, see: *Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG (Umwelt-Rechtsbehelfsgesetz),*7. Dec. 2006, BGBl. I S. 2816.; M. ELIANTONIO, *Case note on case C-240/09 Lesoochranárske zoskupenie and case C-115/09*, Common Market Law Review, 2012; A. KOCH, *Die Verbandsklage im Umweltrecht*, 2007, NVwZ, 370 et seq.; R. ALLEWELDT, *Verbandsklage und gerichtliche*

interest or of the impairment of a right as conditions to exercise the right to access justice. However, NGOs "need to do nothing to prove that they have such an interest, but are treated as though in fact they had proved it" (Opinion of the GA Sharpston in case C-115/09, par. 65). Moreover, "*non-governmental organisations […] are to be regarded as having either a sufficient interest or rights capable of being impaired, depending on whether national law makes use of either of those admissibility criteria*" (C-826/18, par. 57)[50]. NGOs consequently have an independent and automatic right to both administrative participation and access to justice since they fulfil the conditions set by the EIA directive and by the Aarhus Convention[51].

Furthermore, in line with the first trend, the admissibility of an action brought by a NGOs does not depend on the role it may have played in the participatory phase of the decision-making procedure (C-826/18, par.58, C-263/08, par. 38, 39,48). As a consequence,

Kontrolle von Verfahrensfehlern: Neue Entwicklungen im Umweltrecht, 2006, DÖV, 623; J. ZIEKOW, *Das Umwelt-Rechtsbehelfsgesetz im System des deutschen Rechtsschutzes*, 2007, NVwZ, 259; L. ROLLER, *Standi for environmental NGOs in Germany: The (non-)implementation of the Aarhus Convention by the Umweltrechtsbehelfsgesetz*, (E. Pallemaerts ed.), *The Aarhus Convention atTen – Interactions and Tensions between Conventional International Law and EU Environmental Law*, Europa Law Publishing, 2011, p. 363. See also: S. Pitto, *A chi interessa l'ambiente? La "globalità" dei diritti di partecipazione e l'accesso alla giustizia*, in *DPCE online*, 2021; B. NEAMTU – D.C. DRAGOS – L. CAPRARU, *Public Participation in Environmental Decision Making in Romania*, in *Central European Public Administration Review*, 12, 2-3, 2014, pp. 63–80; J. CZUCZAI – F. NAERT, *The EU as a Global Actor – Bridging Legal Theory and Practice*, Leiden, Brill, 2017.

[50] Similar wording expressing the same view can be found in other decisions, for instance C-115/09, par. 50, 59, C-240/09, par. 15, Opinion GA in case C-826/15, par.46.

[51] Please see: M. ELIANTONIO, *Case C-240/09, Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011,* in *Common Market Law Review*, 49, 2, 2012, pp. 767–791; J. REICHEL, *Judicial Control in a Globalised Legal Order – A One Way Track? An Analysis of the Case C-263/08 Djurgården-Lilla Värtan*, in *Review of European Administrative Law*, 3, 2, 2010.

the participatory right of NGOs cannot be impaired nor can their right to access justice, and the latter does not depend on the exercise of the former.

Considering case-law, it is worth mentioning the KlimaSeniorinnen Schweiz vs Schweiz before the European Court of Human Right.[52] The claimant was an organisation of elderly women that argued that the Swiss Government was not taking sufficient action to meet the climate change goals of the CO2 act, which would lead to warmer temperatures and consequently representing a threat for their health. The Grand Chamber ruled in 2024 in favour of the group in what is to be considered the first environmental law decision brought before the ECHR. The Court required the state to reassess and address its climate change goals, with these efforts to be overseen by government representatives from the Council of Europe[53]. This case is particularly important because when fundamental rights of individuals[54] are at stake, also a legal person representing them can require public authorities not only a duty of care but also the respect of the right to access information, to participate in the decision-making process, and consequently to access justice.

This is particularly relevant for the development for sustainability reporting policies. Since such polices are also capable of having negative impact on the environment and on society, the participation of all of the stakeholders (especially natural persons and association

[52] European Court of Human Rights, Grand Chamber, Case Of Verein Klimaseniorinnen Schweiz And Others v. Switzerland, Application no. 53600/20, 9 April 2024.

[53] C.C. BÄHR – U. BRUNNER – K. CASPER – S.H. LUSTIG, *KlimaSeniorinnen: lessons from the Swiss senior women's case for future climate litigation,* in *Journal of Human Rights and the Environment*, 9, 2, 2018, pp. 194–221. A. HOFFMANN, *Five Key Points from the Groundbreaking European Court of Human Rights Climate Judgment in Verein KlimaSeniorinnen Schweiz v Switzerland,* in *Environmental Law Review*, 26, 2, 2024, pp. 91–99. A. HÖSLI – M. REHMANN, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland: The European Court of Human Rights' Answer to Climate Change,* in *Climate Law*, 14, 3-4, 2024, pp. 263–284.

[54] In this specific case, individuals are to be considered in the light of intra-generational equity.

for environmental protection) is required and should be as established by the ECJ effectively and timely.

7. CONCLUDING REMARKS

Three main categories of principles can be identified to ensure an effective public involvement when dealing with environmental law matters: timeliness, active participation, and education.

Timeliness is an essential feature for a well-functioning public consultation. The timely involvement of the public is fundamental because it allows the interested subjects to be aware of initiative already at a preliminary phase, when the so-called 'zero-option' is still available. A later involvement would not only make the recovery of information more complicated and consequently more complicated would be for the public to keep up, but it would also be deleterious for the public and for the purpose of public consultation itself because the public would not have anymore the possibility to comment and to eventually provide feedbacks to modify the proposed initiative or policy draft[55].

Second, an 'active' participation is required. The public cannot be merely passively consulted on decisions that have already been taken or on policies that have already been

[55] See: M.F. DELLINGER, *Public Participation: A Bottoms-Up Approach to Law-Making and Enforcement*, in *SSRN Electronic Journal*, 2013; N. HARTLEY – C. WOOD, *Public Participation in Environmental Impact Assessment—Implementing the Aarhus Convention*, in *Environmental Impact Assessment Review*, 25, 4, 2005, pp. 319–340; Y. ZHAO – B. BUTCHER, *Coming to Terms with Public Participation in Decision Making: Balancing Clarity and Impact in the Aarhus Convention,* in *Review of European, Comparative & International Environmental Law*, 31, 2, 2022, pp. 210–221; M. LEE, *Environmental Democracy and Law on Public Participation*, in *SSRN Electronic Journal*, 2023; M.F. DELLINGER, *Public Participation: A Bottoms-Up Approach to Law-Making and Enforcement,* in *SSRN Electronic Journal*, 2013; J. EBBESSON, *Public Participation and Privatisation in Environmental Matters: An Assessment of the Aarhus Convention*, in *Erasmus Law Review*, 2011.

drafted without the possibility for their comments to be concretely taken into account. This means that also a duty of properly consider and comment the feedback received arises on the public authorities. An active participation also makes it more likely that comments and recommendations during the consultative process are finally implemented[56]. Furthermore, an active participation enriches the background and knowledge of the public leading to a diffusion of learning.

This leads to the third point, education. By granting the public access to information, a sufficient time to understand the data, and the participation in the consultative process, public education on environmental related matters can be enhanced[57]. Education is essential in dealing with environmental matters because without it the opinion of the public could be (and sometimes should even be) less considered due to a lack of knowledge in the subject matter. The solution is consequently to enhance the public's education and not its estrangement from the environmental policy development procedure[58].

[56] M. LEE – C. ABBOT, *The Usual Suspects? Public Participation Under the Aarhus Convention,* in *Modern Law Review*, 66, 1, 2003, pp. 80–108; K. GETLIFFE, *Proceduralisation and the Aarhus Convention*, in *Environmental Law Review*, 4, 2, 2002, pp. 101–116; M.F. DELLINGER, *Public Participation: A Bottoms-Up Approach to Law-Making and Enforcement,* in *SSRN Electronic Journal*, 2013; N. HARTLEY – C. WOOD, *Public Participation in Environmental Impact Assessment—Implementing the Aarhus Convention*, in *Environmental Impact Assessment Review*, 25, 4, 2005, pp. 319–340; E. MORGERA, *An Update on the Aarhus Convention and its Continued Global Relevance,* in *Review of European Community & International Environmental Law*, 14, 2, 2005, pp. 138–147.

[57] Not by chance, a specific method developed for adult learning with reference to environmental related matters has been developed: the critical EA education.

[58] Please see: A.P. DIDUCK – A.J. SINCLAIR, *The Concept Of Critical Environmental Assessment (EA) Education,* in *The Canadian Geographer / Le Géographe canadien*, 41, 3, 1997, pp. 294–307; A. DIDUCK, *Critical education in resource and environmental management: Learning and empowerment for a sustainable future,* in *Journal of Environmental Management*, 57, 2, 1999, pp. 85–97; C. PATEMAN, *Participation and Democratic Theory*, Cambridge, Cambridge University Press, 1970.

This was all confirmed by a strong case-law of the ECJ which, in the last decades, has been establishing a clear trend in recognizing the rights to access to information, to participate in the decision-making process, and to access justice, setting very broad requirements by adopting an extensive interpretation of the normative for the identification of all those subjects holding these rights.

Sustainability reporting, by covering - if not all - at least most of the potential threats to the environment and society, requires a stronger recognition which can only be given by its incorporation within environmental law, the only branch capable of giving proper recognition, regulation and, consequently, dignity to a field that is not even recognized as such and at the moment interpreted (but not regulated) by to many professional in other sectors having no expertise in corporate sustainability reporting.

The possibility of incorporating the sustainability reporting field in environmental law is also supported by the Aarhus convention, which, in Articles 6 and 7, opens to public participation concerning specific activities, plans, programmes and polices relating to the environment, and, in Article 8, to legislative decision-making by referring to legally binding normative instruments concerning the environment. Sustainability reporting policies not merely can but rather should be considered polices falling into this category and consequently been applied the rules dictated in this Convention and the principles included in it, among which timeliness, active participation and information.

Sustainability reporting is also strongly connected with principles first set at international level and then also recognized and constitutionalized in the TEU. More precisely, sustainability reporting policies, by establishing strategies to limit (and if possibly avoid) the negative impacts of the activities of undertaking on the environment and on society, are pursuing and enacting the precautionary principle and the preventive principles, which are the pillars of environmental law.

European case-law on environmental matters represents another element supporting the recognition of sustainability reporting in the field of environmental law. Thanks to the ECJ and to the ECHR case-law, it is possible to identify those subjects having the right to

participate in the decision-making process relating to environmental law matters, among which the drafting of environmental law policies. This identification is fundamental because it is still unclear who is to be considered public and who is public concerned. This identification is especially relevant in the hypothesis in which sustainability reporting is included in environmental law because it could help defining who are the subjects holding the rights to access information, to participate in the decision-making process, and even to access justice.

To conclude, the sustainability reporting field, by acquiring increasing attention and becoming almost a mainstream concept, is at risk of becoming disregarded in its utility and becoming another source of obligations and costs without leading to the environmental and social purposes it was created for. It is urgent to include sustainability reporting in a certain and clearly determined branch of law to provide clear rules to be followed and consequently to avoid professionals from other areas but without expertise in this field to become 'jackals' of this relatively new field seen only as a source or profit. Environmental law, as shown in this paper, represents the most suitable field in which sustainability reporting could be included.

Abstract. *This paper aims at analysing the role of public consultation in the adoption of the CSRD and the ESRS. In particular, the focus is on the difference between 'passive' and 'active' forms of public consultation. The study will adopt a comparative approach which, by borrowing from the environmental law field, will help to verify the main hypothesis of this research: can the normative and case-law based on environmental law be applied to sustainability reporting? The hypothesis is confirmed since the possibility of incorporating the sustainability reporting field in environmental law is supported by normative both at international level, with the Aarhus convention, and at EU level, with the TEU and the decisions of the CJEU.*
This study contributes by filling the gap in academic literature on the issue of public participation in drafting sustainability reporting legislation and helps to better define and frame sustainability reporting as a newly emerging field of law in the EU to which, for the time of its development, environmental law normative can be applied. This paper distinguishes for its originality due to the fact that it addresses the issue of sustainability reporting not being included into a specific law field nor framed as a new autonomous branch of law yet.