# Directors’ Duties in the European Initiative on Sustainable Corporate Governance: *Implications for the Italian Legal System**

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* This article first appeared in the January 2023 issue of Business Law International (Vol 24, No 1), and is reproduced by kind permission of the International Bar Association, London, UK. © International Bar Association.

RP Legal & Tax

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# Abstract

In the last decade, the integration of sustainability factors in business conduct and corporate governance has come at the forefront of policy developments. Considering the latest adoption of the European Union Directive proposal on corporate sustainability due diligence, this article examines its likely impact on directors' duties and incentives as well as its likely effect on the Italian legal system, used as an example of practices in the EU. Through this analysis, the article aims to highlight the state of the art of the integration of sustainability in corporate governance, the drawbacks and benefits of this integration process, the role of directors with respect to sustainability matters and the steps that still need to be undertaken. On the basis of this analysis, the article calls for a coherent and harmonised approach to sustainable corporate governance in order to achieve a more effective legal framework regarding directors' duties in this context.

# Introduction

On 23 February 2022, the European Commission published the long-awaited proposal for a directive on corporate sustainability due diligence (the 'Directive proposal').[1] This initiative is in line with the commitments defined in the European Green Deal[2] and with the United Nations Sustainable Development Goals to promote a more resilient and sustainable economy.

The proposal is part of the European Sustainable Corporate Governance Initiative, looking to regulate two different dimensions of corporate sustainability. The first dimension is represented by the need to hold companies accountable for negative impacts on the environment and people deriving from their economic activity, including through their global value chain. The second dimension regards the integration of sustainability in corporate governance, looking at directors' incentives and duties.

This article will examine the likely impact of the Directive proposal on the two key aspects of corporate governance: directors' duties and incentives. After discussing general reactions from civil society organisations and academia, it will focus on the benefits and shortcomings of their implementation into national law. In particular, it will look at the way in which the Directive proposal may affect the Italian legal system, considering the hard law and soft law standards already adopted in this Member State, in advance of the Directive proposal, in order to support sustainable business conduct.

# The challenge of short-term decision-making by directors

The European initiative on sustainable corporate governance was preceded by two studies commissioned by the European Commission and delivered in 2020. The former looked at the due diligence requirements through supply chains in order to identify, prevent, mitigate and account for abuses of human rights, including the rights of the child and fundamental freedoms, serious bodily injury or health risks, and environmental damage, including with respect to climate[3] Furthermore, the study was aimed at developing and assessing regulatory options for introducing due diligence requirements as a legal duty of care, including the initial perceptions of stakeholders relating to possible regulatory options. Despite its relevance, this study will not be discussed in this article, being more focused on due diligence obligations in global supply chains.

The second study was conducted by Ernst & Young (the 'EY Study') and focused on the root causes of short-termism in order to identify possible solutions to align corporate governance with the long-term objectives of the UN

1 Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071.

2 Communication from the Commission on the European Green Deal, COM/2019/640 final.

3 Study on due diligence requirements through the supply chain, British Institute of Comparative and International Law www.biicl.org/publications/european-commission-study-on-due-diligence-in-supply-chains?cookiesset=1&ts =1659960620.

Sustainable Development Goals.[4] The starting point of the EY Study was the consideration that, over the period between 1992 and 2018, publicly listed companies in the EU had shown a trend to focus on short-term benefits rather than long-term objectives. [5]

In particular, the EY Study identified the following root causes for this phenomenon:

1. Directors' duties and company's interest are interpreted narrowly and tend to favour the short-term maximisation of shareholder value;

2. Growing pressures from investors with a short-term horizon contribute to increasing the boards' focus on short-term financial returns to shareholders at the expense of long-term value creation;

3. Companies lack a strategic perspective over sustainability and current practices fail to effectively identify and manage relevant sustainability risks and impacts;

4. Board remuneration structures incentivise the focus on short-term shareholder value rather than long-term value creation for the company;

5. The current board composition does not fully support a shift towards sustainability;

6. Current corporate governance frameworks and practices do not sufficiently voice the long-term interests of stakeholders;

7. Enforcement of the directors' duty to act in the long-term interest of company is limited.

When looking at the causes of short-termism, multiple dimensions have been considered. In the first instance, the EY Study highlights how directors' duties and companies' interests have been interpreted narrowly and, in most jurisdictions, they tend to favour the maximisation of shareholders' value (so-called 'shareholder capitalism').[6] Some exceptions in this regard have also been presented. For example, section 172 of the United Kingdom Companies Act clarifies that directors should consider the success of the company for the benefit of society as whole ('enlightened shareholder value' model). A similar approach has been chosen in the Netherlands, where directors have a duty to exercise due care with respect to the interests of stakeholders and they have an obligation not to harm them. Notwithstanding the attempt to broaden the purpose of the corporation, the impact on directors' incentives is not clear and the EY Study highlighted that the ability of enforcing directors' duties for violating the long-term interest of companies is still limited in many jurisdictions.

An additional source of concern has been identified in the growing pressure from investors with a short-term horizon. Similar worries have been expressed by an organisation of the chief executive officers (CEOs) of the largest companies in the United States called 'The Business Roundtable'. In 2019, this organisation released a 'Statement on the Purpose of a Corporation' signed by 181 CEOs. [7] In this statement, signatories acknowledged that the organisation for many years endorsed the principle according to which the corporation exists primarily to serve shareholders. They recognised that this principle needed to be modernised, in order to consider societal objectives. To do so, they committed to deliver value to all of their stakeholders and they urged investors to support companies in achieving this objective. However, a recent study from Harvard Law School[8] found that most of the companies who were part of this pledge did not implement material changes in favour of stakeholders. For instance, the study looked at companies' policies and by-laws, as well as at their reactions to shareholders' proposals regarding the implementation of the commitments defined in the statement.

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4 Study on directors' duties and sustainable corporate governance, Final Report, Ernst & Young EY for the European Commission DG Justice and Consumers https://op.europa.eu/de/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en.

5 *Ibid.*

6 *Ibid.*

7 Statement on the Purpose of a Corporation, Business Roundtable https://opportunity.businessroundtable.org/ourcommitment.

8 Lucian Bebchuk and Roberto Tallarita, 'Will Corporations Deliver Value to All Stakeholders', Harvard Law School, 23 May 2022 https://corpgov.law.harvard.edu/2022/05/23/will-corporations-deliver-value-to-all-stakeholders.

According to the EY Study, an important cause of short-termism has to be identified in the increasing pressure from investors. This trend has been partially addressed by market-based and regulatory initiatives. In the first instance, it is worth mentioning that an increasing number of investors have been interested in 'sustainable financial products'. A significant initiative in this context is represented by the 'Principles for Responsible Investments' (PRI), a network of investors, supported by the UN, promoting responsible investments through six principles. [9] Since the launch of PRI in 2006, over 4,900 signatories, representing $121tn in assets under management, joined PRI. [10] The six principles of PRI encourage investors to integrate environmental, social and governance (ESG) factors in their investment decisions in order to promote long-term value creation.

The importance of integrating ESG considerations in investment decisions has also been expressed by Larry Fink, CEO of one of the largest investment management corporations in the world. With an annual letter addressed to CEOs published in 2018, he called on companies to promote long-term growth and to pursue a sense of purpose – not only profit maximisation. [11] Since then, Fink's annual letters to CEOs consistently focused on the importance of long-term value and stakeholder capitalism. However, it has to be noted that in his 2022 letter, Fink declared that BlackRock focuses on sustainability 'not because we are environmentalists, but because we are capitalists and fiduciaries to our clients'. [12] In addition, he declared that BlackRock does not pursue divestment from oil and gas companies as a policy, but they do support energy companies who are leading the transition. [13]

The EY Study highlighted how companies often lack a strategic perspective on sustainability, failing to manage the risks of adverse impacts on the environment and people. International standards, such as the UN Guiding Principles on Business and Human Rights (UNGPs) and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises have tried to address these shortcomings. However, voluntary measures have proven to be insufficient and many companies expressed their support in favour of binding measures. [14]

## EU proposal on sustainability due diligence

Following the studies presented above, the European Commission launched a consultation on sustainable corporate governance aimed at identifying possible legislative solutions to address the challenges posed by short-termism. In particular, the consultation focused on two legislative interventions. [15] In the first instance, the introduction of laws mandating sustainability due diligence on companies. In addition, the introduction of regulatory reforms to corporate governance in order to ensure better involvement of stakeholders, and to align directors' incentives and duties with the long-term interest of companies.

Even though the majority of respondents (including businesses and business associations) have been shown to be in favour of regulatory interventions in both areas, criticisms were raised with regard to corporate governance initiatives. [16] Interestingly, nearly unanimous support was expressed in favour of the need to integrate the long-term interests of stakeholders in the business strategy of companies.[17] However, mixed reactions emerged with regard to the introduction of clear obligations for directors to take into account sustainability factors in their decision-making process, as well as with regard to the enforcement of these duties.

On 23 February 2022, the European Commission presented the Directive proposal, through which both due diligence obligations and directors' duties have been regulated.

9 Principles for Responsible Investment www.unpri.org/about-us/about-the-pri.

10 Quarterly signatory update, Principles for Responsible Investment www.unpri.org/signatories/signatory-resources/quarterly-signatory-update.

11 A Sense of Purpose, Larry Fink's 2018 Letter to CEOs www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter.

12 The Power of Capitalism, Larry Fink's 2022 Letter to CEOs www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.

13 *Ibid.*

14 See n 4 above.

15 Sustainable corporate governance initiative, Public consultation https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en.

16 *Ibid.*

17 *Ibid.*

### *Directors' duties*

Looking at directors' duties, two main provisions must be considered. In the first instance, according to Article 25, Member States shall ensure that, when fulfilling their duty to act in the best interest of the company, directors of companies based in the EU must 'take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term'. The Directive proposal imposes on Member States the duty to make sure that their national legal provisions regulating directors' duties are also extended to include the obligations mandated in Article 25 of the Directive proposal.

### *Directors' liability*

In addition, Article 26 mandates that Member States shall ensure that directors of companies based in the EU are responsible for adopting and overseeing sustainability due diligence introduced with the Directive proposal, including the integration of sustainability in corporate policies, with due consideration for relevant inputs from stakeholders and civil society organisations. Directors are expected to report to the board of directors on these aspects, and Member States will need to take steps to adapt the corporate strategy to take into account actual and potential human rights and environmental impacts.

### *Criticisms*

The introduction of directors' duties in the Directive proposal has been accompanied by mixed reactions from both civil society organisations and academia. A first criticism was raised with regard to the absence of clarity with respect to the sustainability matters directors could be responsible for. The term has been regarded as excessively vague, with a risk of making the legislation ineffective [18] or the opposite risk of leading to excessive litigation. [19] In addition, some organisations advocated for the clarification of the role that sustainability matters should play, when looking at the decision-making process of directors. A more conservative approach would regard sustainability as a constraint that limits corporate action from the outside, in case this may have negative environmental and social impacts. A more progressive approach would regard sustainability as an objective that directors need to take into account in order to act in the interest of the company and consistently with its purpose. [20] In addition, more guidance and clarifications may be needed on the way in which directors can balance different stakeholders' demands and requests, when they diverge.

Furthermore, some criticised the absence of an explicit reference to the possibility for third parties to bring legal actions against directors for failing to comply with their sustainability obligations, as defined in Article 25(1). [21] In many jurisdictions, actions against directors can only be brought by shareholders and creditors, and without this clarification, the provisions introducing directors' liability may simply be ineffective. In addition, considering that the laws regulating directors' duties vary in the different Member States, the absence of greater details may lead to an uneven playing field and regulatory arbitrage.

Finally, when looking at Article 26, it is necessary to clarify whether the responsibility to implement and oversee due diligence should be imposed on directors or managers. Some have argued that the actual wording of the article creates some confusion, with possible negative consequences for the effective enforcement of the provision.

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18 See, for instance, the response of Forum Disuguaglianze Diversità (Forum DD) https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Governo-societario-sostenibile/F3263431_it, *Ibid*.

19 See, eg, the response of the European Confederation of Directors' Associations (ecoDa) https://ecoda.eu/policy-updates, *Ibid*.

20 See n 18 above.

21 *Ibid.*

# Directors’ liability in the Italian legal system

In order to assess the likely impact of the introduction of the Directive proposal on corporate sustainability due diligence in Member States, we will look at the Italian legal system. Even though stakeholder capitalism is not integrated in Italian company law, recent reforms (eg, as the law on benefit corporations and amendments to the Corporate Governance Code) have opened the way to embedding sustainability in business practices and directors’ duties.

In the Italian legal system, the liability of directors is regulated by Articles 2392–2396 of the Italian Civil Code for Joint Stock Companies and Article 2475 of the Italian Civil Code for Limited Liability Companies.

Article 2392 of the Civil Code provides that directors must carry out the duties imposed on them by the law and by-laws with the diligence required by the nature of the office and by their specific responsibilities. According to the provision, directors are jointly and severally liable for damages resulting from their failure to comply with such duties, except for functions vested solely in the executive committee or one or more directors. In any case, they are liable jointly if, being aware of prejudicial acts, they did not do what they could to prevent their performance, or to eliminate or mitigate their harmful consequences. Furthermore, liability for the acts or omissions of directors does not extend to the director who, being without fault, has had his/her dissent recorded without delay in the book of meetings and resolutions of the board of directors. The provision embraces any act of mismanagement (***mala gestio***). Thereafter, pursuant to Article 2393 of the Civil Code, the liability action against directors is brought upon the resolution of the shareholders’ meeting, even if the company is in liquidation, and it may be exercised within five years after the director ceases to hold office. The resolution of the liability action shall involve the removal from office of the directors against whom it is proposed.

According to unanimous opinion, the directors’ liability analysed above has a contractual nature. This nature implies that the company has only the burden of proving the existence of the violations and the correlation between them, and the damage suffered, while it is up to directors to prove that the damaging event is not attributable to themselves by providing positive proof, with reference to the contested charges, ***of the observance of duties and fulfilment of the obligations imposed on them*** (Cass No 2975 of 2020; Cass No 17441 of 2016; Cass No 14988 of 2013; and Cass No 22911 of 2010). [22]

Furthermore, the decisions of directors can be reviewed only within the limits of the business judgment rule. [23] Indeed, pursuant to consistent scholarly opinion, since the balancing of the company’s interests typically represents a managerial responsibility of directors, the assessment of directors’ liability should not concern the merits of their choices, but rather the adequacy of the process through which directors made the decision. [24] Following the same rule, directors cannot be held liable for risks that the company ordinarily runs throughout its life. As a matter of fact, pursuant to consistent case law (Cass No 3652 of 1997 and Cass No 3409 of 2013 recalled by Cass No 15470 of 2017), ‘the director of a company cannot be held liable under Article 2392 of the Civil Code for making economically inappropriate choices’. This assessment is indeed a matter of entrepreneurial discretion and could eventually be relevant as cause for the director’s removal and not as a source of contractual liability to the company. Indeed, it must be noted that directors have an obligation of means and not an obligation of result [25] and, in order to establish their liability, the judge can only verify if they have diligently observed the specific obligations of conduct and the general obligation of diligent administration.

In light of the above, it must be concluded that, in any case, the merits of entrepreneurial choices can be reviewed unless, in the case of an assessment ex ante, they are manifestly reckless and imprudent (Cass No 17441 of 2016 and Cass No 2975 of 2020). [26]

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22 Cass civ, Sez I, Ord (data ud 10 November 2020) 16 December 2020, n 28718.

23 Diritto commerciale, Le società, Gian Franco Campobasso, 382.

24 La responsabilità degli amministratori per ‘cattiva gestione’ ( mala gestio ) nei confronti della società, Avv Cosimo Di Bitonto, Studio Rinaldi e Associati.

25 See n 23 above.

26 See n 22 above.

Directors can also be held responsible for harms imposed on third parties, deriving from their conduct. In this respect, pursuant to Article 2395 of the Civil Code, the regulation provided by Articles 2392, 2393 and 2394 does 'not affect the right of compensation for damages of an individual member or a third person who has been directly injured as a result of malice, fraud or negligence of the directors'. The article outlines a form of non-contractual liability based on a wrongful act performed by the directors, which has directly harmed the assets of an individual shareholder or third party, without necessarily affecting corporate assets. Therefore, there may be wrongful acts performed by directors that do not affect the assets of the company, but directly affect the assets of third parties, as well as wrongful acts that affect both the assets of the company and third parties.

The aforementioned provisions, which regulate the liability of directors in general, may lay out a solid foundation for the further specification of directors' duties with respect to sustainability.

## Sustainability and directors' liability in the Italian legal system

Based on the above analysis, it can be concluded that, currently in Italy, directors act by pursuing the economic interests of the company and in order to pursue the corporate objective (Article 2380 ***bis*** Civil Code). Indeed, as stated in Article 2247 of the Civil Code, a for-profit company is incorporated in order to share the profits of the undertaken economic activity. Therefore, in light of the regulation of the Civil Code, it can be asked whether in the Italian legal system, directors can consider interests other than the profit-making interests of shareholders. The answer should be partially positive. Indeed, even if the current Italian corporate management regulation does not explicitly take into account the interests of parties other than shareholders, two elements must be considered. First, corporate law already safeguards some stakeholders, such as employees (Articles 2349, 2558 and 2112 of the Italian Civil Code), creditors (Article 2394 of the Italian Civil Code) and third parties (Article 2395 of the Italian Civil Code) and, at the same time, it allows a broadening of interests that may be considered by directors through statutory autonomy. [27]

Second, the climate crisis, human rights due diligence, ESG and impact investing have resulted, in the EU, as well as Italy, in the introduction of soft law and hard law instruments opening up to stakeholder capitalism, broadening the boundaries of directors' liability. [28]

In the Italian legal system, this approach can be found in the new Italian Code of Corporate Governance, in the spread of social and environmental policies, in the regulation of the administrative liability of legal persons, in the proliferation of purpose-driven companies and in the regulation of non-financial reporting. More specifically, it can be stated that these instruments have anticipated forms of corporate accountability tied to broader interests other than those strictly of the shareholders. [29] For instance, the regulation on the administrative liability of legal persons (Legislative Decree No 231/2000) provides for the administrative liability of corporations failing to prevent specific crimes, among which human rights (eg, human trafficking) and environmental violations are included. The administrative liability of corporations does not preclude the criminal liability of the individual employees (including top-level managers) involved.

As for the Corporate Governance Code (the 'Code'), it is an instrument of soft law – a code of self-regulation – adopted in 2020 in order to identify best practices for listed companies. The Code has introduced the notion of 'sustainable success' (***successo sostenibile***), which is defined as the 'goal that guides the actions of the board of directors and is embodied in the creation of long-term value for the benefit of shareholders, taking into account the interests of other stakeholders relevant to the company'. Article 1 of the Code expressly provides that the board of directors should lead the corporation in pursuing its sustainable success, defining the needed strategy and monitoring its enforcement. Thereafter, pursuant to paragraph IV of the article, directors further the exchange between shareholders and the relevant stakeholders. Since the Code does not define how to establish this exchange, the dialogue could be

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27 'Doveri degli amministratori e sostenibilità', Rapporto Assonime, 18 March 2021, 10.

28 'Impact Economy Digital Edition 2021', Introduction, in Roberto Randazzo, Emiliano Giovine, Fabio Gallo Perozzi and Federico Longo, Lexology .

29 See n 27 above, 2.

found in the traditional functions of the Sustainability Committee. Furthermore, as provided in the recommendations of Article 1 of the Code, in order to achieve sustainable success, the board of directors may, inter alia:

- examine and approve the strategic plan;
- periodically monitor the implementation of the strategic plan and evaluate the general performance of management, periodically comparing achieved results with those planned;
- identify the nature and level of risk compatible with the corporation's strategic objectives; and define the corporate governance system.

In conclusion, it can be stated that the main innovation of the Code is represented by the identification of the ***successo sostenibile*** as an integrated and fundamental goal of the board of directors.

## Purpose-driven companies: the benefit corporation

Another validation of the aforementioned trend can be found in the proliferation in the Italian legal system of purpose-driven companies, which can have different legal status, such as social enterprises, benefit corporations, innovative startups with social vocation and social cooperatives. Of particular interest are benefit corporations, regulated by Law 208/2015, at paragraphs 376–383 and annexes 4 and 5. According to these provisions, the status of a benefit corporation can be acquired by any corporation that, in carrying out an economic activity, is willing to pursue one or more purposes of 'common benefit', operating in a responsible, sustainable and transparent way towards people, communities, territories and the environment. The regulation does not provide any limitations to the distribution of profits and to the devolution of the assets in case of liquidation.

Benefit corporations have represented the anticipation, in the EU, of a specific model of a for-profit company that also pursues the interests of stakeholders by virtue of an express statutory decision.[30] As a matter of fact, paragraph 377 states that the goals identified in the company's objective are pursued through management aimed at balancing the interest of the shareholders and the interest of those on whom the social activity may have an impact. Furthermore, paragraph 380 expressly provides that a:

> 'benefit corporation shall be administered in such a way as to balance the interests of the shareholders, the pursuit of the purposes of common benefit, and the interests of the categories specified in Paragraph 376, in accordance with the provisions of the bylaws. The benefit corporation, subject to the provisions of the regulations for each type of corporation set forth in the Civil Code, shall identify the responsible person or persons to whom it entrusts functions and tasks aimed at the pursuit of the above purposes.'

Thereafter, as provided by paragraph 381, if directors fail to comply with the provisions set forth in paragraph 380, the violation may constitute a breach of the duties imposed on directors by law and the by-laws. Furthermore, pursuant to paragraph 382, the benefit corporation must draft an annual report concerning the pursuit of common benefit.

In light of the above, it can surely be stated that for benefit corporations, sustainability is a mandatory element of their activity and their directors have to take into account the purposes of common benefit, together with the shareholders' interest.[31] As a matter of fact, through the introduction of special provisions in the corporate's objective, the economic activity of the company and the board of directors' management can be oriented towards directions respectful of social and environmental factors.[32]

The explicit and voluntary regulation of a such an innovative business structure could set an example for other Member States and its widespread use in Italy could be interpreted as a facilitating element for the adoption of the Directive proposal on mandatory sustainability due diligence.

30 See n 27 above, 12.

31 'Sostenibilità: quali doveri per gli amministratori?', Emiliano Giovine e Giuseppe Taffari, 5 May 2022, ESG & Legal Impact news RPLT.

32 'Long-termism', Rivista dalle società, Anno LXVI Fasc.1 22021, Mario Stella Richter Jr, 35.

## The Non-Financial Reporting Directive

The Non-Financial Reporting Directive 2014/95 (NFRD), adopted in 2014 and entered into force in 2018, has represented a boost to the aforementioned transition. The disclosure requirements imposed with regard to the management of environmental and social risks associated with the company's activities have certainly created a strong empowerment of directors who have started to consider sustainability issues as a structural component of corporate strategies. The NFRD has therefore broadened the scope of directors' fiduciary duties, even if its effects have been mitigated by the introduction of the principle of 'comply or explain' and of the materiality principle. [33] More specifically, the NFRD forces large companies of public interest to publish a statement of a non-financial nature, aimed at guaranteeing the full understanding of the company's business, its performance, results and the impact of its activities. To this end, the statement must provide information on environmental, social, personnel-related, human rights issues, and the fight against active and passive corruption, which are understood to be relevant. The NFRD has therefore represented a historic turning point since, with disclosure requirements on environmental and social risk management policies, sustainability has become a structural component of corporate strategies and an integral part of directors' responsibilities. [34] In Italy, the NFRD has been enforced through Legislative Decree No 254/2016.

In conclusion, the same trend can also be found in Legislative Decree No 49/2019, which has enforced the revised Directive on Shareholders' rights 2017/828 on the encouragement of long-term shareholder engagement. The decree has partially revised the remuneration policies, clarifying that they should promote the pursuit of companies' 'sustainable success' and, in doing that, contribute to the process of aligning directors' interests with the company's strategic goals. [35]

Both directives have been expeditiously demonstrating a strong interest in the expansion of sustainability in corporate strategies.

## Implications of the EU directive on sustainability due diligence for the Italian legal system

The introduction in the Italian legal system of a law explicitly mandating directors' duties to pursue sustainability, with liability consequences for failure to do so, would represent an important change in the existing legal framework. As discussed above, this change would not happen in a vacuum, as recent regulatory and soft law standards have already favoured the shift from shareholder to stakeholder capitalism.

However, some clarifications may still be necessary. In the first instance, the term 'sustainability' should be clarified with a more explicit reference to the types of stakeholders' interests directors should be looking at. Greater clarity is needed in order to grant legal certainty and to avoid two possible risks. On the one hand, excessive discretion could reduce the accountability of directors because they may justify their conduct on the basis of a vague concept of pursuing 'sustainability matters'. On the other hand, uncertainty could lead to excessive litigation, considering that potentially, all third parties could be entitled to bring legal claims.

In addition, it would be necessary to clarify whether directors' duties to consider sustainability matters have to be interpreted as a negative or positive constraint. In the first instance, directors would be liable only in cases in which their actions led to adverse impacts on the environment and on people. In the second case, they may be regarded as liable for failing to have a positive impact from a sustainability standpoint. The second interpretation may be more problematic for several reasons. In the first instance, the broad concept of positive sustainable outcomes would be more difficult to measure, when assessing whether directors have failed to promote this

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33 See n 27 above, 6.

34 See n 27 above, i.

35 See n 31 above.

objective. In addition, overlaps with laws regulating purpose-driven companies and, in particular, benefit corporations, may occur.

An additional aspect regards the definition of the actors in charge of bringing legal action against directors. It is true that, different from other legal systems, in Italy there is an explicit provision allowing third parties to bring legal claims against directors. However, this action is of an extra-contractual nature, with implications from a legal standpoint. Indeed, the different regime between contractual and non-contractual liability cannot be underestimated. Contractual liability, that is, from a breach of obligations, is regulated by Article 1218 of the Italian Civil Code, which provides that 'the debtor who does not exactly render due performance is liable for damages unless he proves that the non-performance or delay was due to impossibility of performance for a cause not imputable to him'. Non-contractual liability is instead regulated by Article 2043 of the Italian Civil Code, which provides that 'any fraudulent, malicious, or negligent act that causes any unjustified injury to another obliges the person who has committed the act to pay damages'. The former, which arises when an obligation is not fulfilled and thus requires a pre-existing relationship between the parties, differs from the latter since, in this case, the relationship between the parties arises precisely with the unjustified injury. The different structure implies a distinct regulation. The main implications are:

1. the extra-contractual tort violates an absolutely protected subjective legal situation, while the contractual tort regards the violation of a right of claim arising out of activity of a contractual nature;
2. in the extra-contractual liability, the injured party has the burden of proving the damage, the fault (or the intent) of the agent, and the causal link between the two; in the contractual liability, the fault of the defaulting party is presumed; and
3. the action for non-contractual damages is prescribed in five years, while the action for contractual damages is prescribed in ten.

Even if the path is still uncertain and challenging, defining all the afore-mentioned aspects would finalise the integration of sustainability in the regulation of Italian corporate governance.

## Conclusions

This article has analysed the rules introduced by the Directive proposal on corporate sustainability due diligence and sought to understand the limits and benefits of this regulation with regard to directors' liability. Even though this Directive proposal appears to represent a step forward in the debate between stakeholder and shareholder capitalism, some aspects need to be clarified. In the first instance, it is necessary to specify the concept of 'sustainability matters' that directors may be accountable for. In addition, the directive should clearly state whether the obligations to consider sustainability matters imposed on directors are of a positive or negative nature. As discussed, this may have important consequences on the way in which non-performance may be measured. In addition, the active legitimisation to bring legal claims against directors should be further expanded. In particular, it is of the essence to clarify whether third parties or shareholders only are included and to reflect on the implications of not specifying the concept of 'sustainability matters'. Not providing this definition could indeed cause a fragmented application of the directive across Member States, with the risk of making legislation ineffective or leading to excessive and non-homogenous litigation. Furthermore, if the goal of the Directive proposal is to hold directors accountable for their inaction with respect to sustainability matters, in the absence of a definition of what these matters really are, directors could easily avoid their own liability.

In the second place, it cannot be underestimated that, in order to guarantee the effective implementation of the directive, elements of 'integration' and 'coherence' need to be introduced. As stated in the proposal, large companies across the board have indeed asked for greater harmonisation in the area of due diligence to improve legal certainty and create a level playing field. If these objectives are not achieved, companies based in countries with higher standards may be at a competitive disadvantage.

Finally, when looking at the implications for the Italian legal system, it appears that the introduction of the measures provided for under Articles 25 and 26 of the Directive proposal would not occur in a vacuum. As discussed, the Italian legal system has already introduced legal provisions aiming at expanding the scope of directors' duties and the purpose of corporations. The introduction of additional provisions, such as those in Articles 25 and 26 of the Directive proposal, would need to happen in an integrated and coherent manner in the current legal framework. It can therefore be concluded that, regardless of what each Member State's starting point is, it will be essential to find a common end point in order to make the directive truly effective.

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