

## DIRECTORS' LIABILITY AND SUSTAINABILITY OBJECTIVES

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### SUSTAINABILITY OBJECTIVES AND CORPORATE LIFE

As sustainable development is now an imperative for governments, it is clear that sustainability objectives are impacting businesses and their managing bodies under Italian law.

In fact, certain new regulations have already introduced the concept of sustainability to business management, albeit primarily limited to providing relevant information in certain specific instances, including:

- (i) Legislative decree n. 254 of 2016, which implements Directive 2014/95/EU on the disclosure of non-financial and diversity information, requiring large companies that qualify as relevant public interest entities to draw up and publish a so-called “non-financial statement”, which must contain information relating to their support for environmental, social and personnel issues, respect for human rights and anti-corruption measures. These rules are binding on the company and its directors and carry penalties for failure to provide information, or for providing inaccurate information, to the market; and
- (ii) Directive 2017/828/EU which promotes long-term shareholder engagement, implemented in Italian law by legislative decree n. 29 of 2019 (the “Shareholders Rights Directive 2”), which – with reference to the remuneration policies of directors and management – sets out an obligation to provide evidence of the connection between such policies and the “corporate strategy, long-term interests and sustainability of the company”.

Sustainability-related measures could become even more important if the approval process for the proposed Directive of April 21 2021 (the “Directive”), amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) n. 537/2014, on corporate sustainability reporting, is completed.

In the Directive recitals it is stated that *“better data from companies about the sustainability risks they are exposed to, and their own impact on people and the environment, is essential for the successful implementation of the European Green Deal and the Sustainable Finance Action Plan. By making companies more accountable for and transparent about their impact on people and the environment, this proposal can also help strengthen relations between business and society. It will also create opportunities for companies, investors, civil society and other stakeholders to radically improve the way sustainability information is reported and used thanks to digital technologies”*.

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Further, "[i]n its Action Plan: Financing Sustainable Growth the Commission set out measures to achieve the following objectives: reorient capital flows towards sustainable investment in order to achieve sustainable and inclusive growth, manage financial risks stemming from climate change, resource depletion, environmental degradation and social issues, and foster transparency and long-termism in financial and economic activity. The disclosure by undertakings of relevant, comparable and reliable sustainability information is a prerequisite for meeting those objectives".

The Directive, therefore, is directed towards strengthening disclosure requirements relating to sustainability, envisaging, *inter alia*, an integration of EU Directive 2013/34 regarding annual financial statements and consolidated financial statements, with a detailed indication of the information to be provided. This includes a description of the company's business model and strategy including the resilience of and opportunities relating to its sustainability initiatives; a description of its sustainability-related targets and how they relate to the role of its administrative, management and supervisory bodies; a description of its policies, diligence processes implemented and principal risks as regards sustainability matters.

Indeed, the Directive introduces in detail a series of disclosure requirements on sustainability targets, while also expanding the range by making it applicable to small and medium-sized listed companies as of 2026.

## CORPORATE GOVERNANCE AND SUSTAINABILITY

The above laws also invite reflection on how sustainability issues may affect the duties of directors.

A useful analysis on this topic was provided by Assonime in its 2021 study "*Duties of directors and sustainability*", which concludes by advocating that the EU advise its member states ensure their national legal systems:

- recognise the fiduciary duty of directors of large companies to take into account the environmental and social impact of business activity in the pursuit of long-term value creation, as stated in the new Italian Code on Corporate Governance for listed companies;
- entrust directors with the task of weighing up the interests of relevant stakeholders within the scope of their management responsibilities; and
- safeguard the exclusive responsibility of shareholders to act in relation to breaches of fiduciary duties taking into account their interests.

In fact, the aforementioned Corporate Governance Code adopted on November 3 2020 by the Corporate Governance Committee for listed companies (which may adopt the Corporate Governance Code on a voluntary basis starting from the 2021 financial year), places particular importance on sustainability, introducing the concept of “sustainable success” defined as the *“objective that guides the action of the board of directors and that is substantiated by the creation of long-term value for the benefit of shareholders, taking into account the interests of other stakeholders relevant to the company”*.

However, one may ask whether, in the absence of specific regulations, there is currently scope to go beyond soft law rules and create an effective liability for directors failing to pursue sustainability objectives.

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## REFLECTIONS ON DIRECTORS' LIABILITY

As is well known, directors' liability is governed by the jurisprudential rule of business judgement, which sanctions the discretionary nature of management decisions made by directors, who can never be held responsible for decisions resulting in the economic failure of their company.

Directors are required to make informed and well-considered decisions based on a calculated risk and non-negligent improvisation. Therefore, the aspects of directors' actions that can be reviewed by a judge are those relating to the adoption of such decisions, on the basis of an *ex-ante* evaluation at the time the relevant acts were carried out, taking into account all the circumstances of the case and not solely focussing on the failure to achieve certain objectives (provided there are no negligent acts or omissions involved).

In this context – except in cases of specific regulatory violations (such as those relating to disclosure obligations) – it seems difficult to imagine that issues relating to sustainability could lead to censuring directors' conduct when certain objectives are not achieved. However, it is clear that care taken over non-financial interests should be taken into account when assessing the diligence of a director in carrying out their duties.

**"There are numerous indicators suggesting evaluating the pursuit of non-financial objectives when examining the conduct of a company's managing body."**

Having said this, it will be necessary to consider whether sustainability can be considered part of a company's corporate purpose, or whether it should still be considered as exclusively in the context of adding value for shareholders. At present – in the absence of explicit references to sustainability objectives in a company's corporate purpose- it seems difficult to deny that the objective of directors' activity remains that of pursuing a profit to be distributed to shareholders. Consequently, it is difficult to imagine a situation leading to damages (an essential element of any liability action against a director), where a director's negligent conduct concerning sustainability doesn't result in a loss of assets, whether in the form of lost opportunities (e.g. losing possible investments) or damage to the company's reputation.

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It is also helpful to consider which parties are entitled to act against directors in such circumstances. Directors owe duties to their company, shareholders and creditors; it is therefore necessary that any lack of diligence towards the interests of other stakeholders involved causes damage directly to the company, its shareholders or creditors, otherwise such subjects would not be entitled to act.

Therefore, although it is hard to argue that sustainability concerns can currently directly impact on directors' liabilities, it is clear that there are numerous indicators suggesting evaluating the pursuit of non-financial objectives when examining the conduct of a company's managing body. Moreover, this is a constantly evolving subject and will need to be taken into consideration both by companies when configuring their corporate governance and directors when carrying out their duties.

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