

6. Navigating the Company's Interest in Italy: An Interplay of Legal Concepts

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A. Understanding company's interest in the Italian legal framework

The Italian legal framework contains neither a single definition of company interest, nor a single definition of directors' fiduciary duties. Definitions for these concepts thus must be inferred through a systematic analysis of the current legal framework, which offers several insides.

Notably, the introduction of specific provisions regulating 'benefit' corporations and the updated version of the Corporate Governance Code for listed companies, which mentions corporate 'sustainable success', have revived the discussion surrounding company interest and sustainability.¹ While past debates questioned whether it was possible to distinguish a company's interest from that of its shareholders, the contemporary debate has shifted to how sustainability issues – and, in particular, environmental concerns – enter into corporate governance.² As will be further discussed, we are witnessing an increase in the factual and legal relevance of business risks to corporate stakeholders, such as the environment and local communities; and while until recently it was debatable whether corporate governance law should also address these issues (which were traditionally a matter of other branches of law, like administrative or environmental law), in the light of the current regulatory framework, it is now undeniable that

1 I use the concept of 'company interest' as a synonym for 'corporate purpose', while recognising that the two terms may carry distinct meanings in different jurisdictions. For the Italian legal debate on corporate purpose, see, among others: Busch/Ferrarini/Grünwald/Ferrarini 2021, p. 85; Ferrarini Riv. soc. 2023, 317; Tombari Riv. soc. 2021, 1; Spolidoro Riv. soc. 2022, 322. For an accurate analysis of the differences between the Italian concept of *interesse sociale* (company's interest) and *scopo sociale* (corporate purpose) see Angelici/Ferri Jr./Stella Richter Jr./Tombari 2025, 967.

2 See, among others, Angelici Giur. comm. 2011, 159; Angelici Riv. Soc. 2018, 3; Barcellona; Costi Banca impr. 2023, 503; Libertini Riv. soc. 2009, 1; Maugeri Riv. soc. 2019, 992.

the management of these risks is no longer just a matter of external business compliance.³

A further preliminary remark is also necessary. In Italy, as in many other jurisdictions,⁴ the discussions surrounding company interest have primarily focused on large, limited liability companies. This is because a large, limited liability company's legal identity, the limited liability of its shareholders, and the complexity of its financial structure makes it a subject under the law that is clearly distinct from its shareholders, which raises questions as to whose interests should guide the management of the company. However, Italy's economic landscape, like many others in the European Union, is characterised by micro, small, and medium-sized enterprises (MSMEs), which are often family-owned. For such enterprises, the company's interest converges significantly with the interests of the main shareholders, who appoint the directors and can also dismiss them (in Italy, dismissal without cause is permitted; the only consequence is directors' rights to compensation for any damage incurred, according to Article 2383 of the Civil Code). Nevertheless, the need for more sustainable management of business activities also concerns MSMEs, which brings new challenges in corporate governance; in the Italian debate, these challenges are not so much rooted in the concept of a company's interest or the fiduciary duties of directors, but rather in directors' duty of care.⁵

Thus, in the discussion that follows, reference will be made to large corporations when dealing with company interest, whereas the considerations regarding directors' duty of care will concern – albeit with some differences – both partnerships and limited liability companies. Conversely, the following considerations do not apply to companies that operate in special business sectors such as banking, finance, or insurance, as they are subject to distinct and more detailed rules in terms of corporate purpose and of corporate sustainability.

This chapter will first examine a key legal provision, Article 2247 of the Italian Civil Code, which offers a definition of 'company' and delineates, among its core component, a 'profit purpose' (section B). The discussion will then explore what company interest is not (sections C and D). Subsequently, the analysis will address the Italian '*società benefit*' legislation (sec-

3 Cerrato/Lenzi, p. 233 (256 ff.).

4 For a comparative analysis, see Ferrarini (fn. 1).

5 Under the Italian legal system, directors are subject to two general duties: the duty to act in the best interest of the company (hereinafter, the 'fiduciary duty') and the duty to manage the company with due diligence and care (hereinafter, the 'duty of care').

tion E) and the recent developments in the Corporate Governance Code for listed companies (section F), to explore whether they can offer criteria to help build a definition of company interest. Lastly, some final remarks are offered on how corporate sustainability is affecting the governance of Italian companies and the duties of their directors (section G).

B. The company's interest in the Italian Civil Code: The definition of 'Company' under Article 2247

Article 2247 of the Civil Code⁶ has always been a prime reference of the debate around company interest, as it provides that in a 'company contract', two or more parties (individuals or legal entities) provide goods or services for the joint exercise of an economic activity with the purpose of sharing profits.⁷ This provision applies across various corporate forms, including partnerships (*società semplice*; *società in nome collettivo*; and *società in accomandita semplice*), limited liability companies (*società per azioni*; *società a responsabilità limitata*; and *società in accomandita per azioni*), and cooperatives (*società cooperativa*).

The rule seems to imply that companies must generate and distribute profits, but this statement necessitates at least two further clarifications. First, Italian scholars have long distinguished between two dimensions of the profit-making purpose. On the one hand, there is shareholders' right to profit (*lucro soggettivo*), and on the other, there is a company's commitment to generating profit (*lucro oggettivo*). Despite the text of the provision, Article 2247 of the Civil Code has been interpreted to refer exclusively to the latter, while lacking any enforceable right to profit distribution for individual shareholders at the end of the financial year.⁸ Contrarily, shareholders are only entitled to be treated equitably regarding profit distribution.

Second, Article 2247 of the Civil Code includes for-profit companies *stricto sensu*, as well as cooperatives. Consequently, the profit-making requirement of the company's contract referenced in Article 2247 has been read in a broader way, to encompass the company's ability to generate

6 Royal Decree, 16 March 1942, No. 262.

7 Article 2247 of the Civil Code, original text: "Con il contratto di società due o più persone conferiscono beni o servizi per l'esercizio in comune di una attività economica allo scopo di dividerne gli utili."

8 *Ex multis*, Ferrara/Corsi, 185.

an economic advantage capable of benefitting the members of the organisation, which includes savings in expenses (as in consumer cooperatives) or granting access to better job opportunities than those on the market (as in workers' cooperatives), etc.⁹

Given these two specifications regarding the definition of profit purpose, Article 2247 of the Civil Code seems to limit the use of companies (including cooperatives) by qualifying them as associative bodies that operate in order to achieve an economic result for the exclusive benefit of their members. This has long been the prevalent opinion of scholars: unless a specific exception to the profit purpose (in the interpretation described above) is legislated, profit-making remains the default purpose of Italian companies.¹⁰ However, this does not make profit-making the *exclusive* corporate purpose. On the contrary, bylaws could *add* altruistic purposes as long as they do not overrule the profit-making purpose.¹¹ This incorporation of altruistic objectives in the bylaws serves as a constraint on the managerial and representative powers of corporate bodies.¹² At the same time, directors have the authority to undertake 'altruistic' actions, provided they serve as a means to achieve long-term profitability, such as by enhancing the company's market reputation. For example, the Italian Supreme Court decision of September 21, 2015, No. 18449 clarifies that a company's capacity to enter into a donation contract is not inherently restricted by its profit-driven nature or corporate purpose.

Fundamentally, companies remain self-interested entities, characterised by the institutional allocation of the economic benefits generated through business activity to their members (self-allocation). The Supreme Court has also reaffirmed that limited liability companies cannot abdicate their profit-making purpose in favour of a mutualistic agenda without formally

9 The main argument was a highly formal one: Article 2247 of the Civil Code is placed in the introductory section of the chapter regulating partnerships, limited liability companies, and cooperatives, making it applicable to all these models. Moreover, the provision is titled '*contratto di società*' (company's contract), and the Italian term '*società*' includes cooperatives as well.

10 Campobasso, p. 26. The reform on company law itself does not appear to have questioned the profit purpose, thus implicitly confirming it. See Oppo/Oppo, p. 346; Spada, p. 3886.

11 Colombo/Portale/Stella Richter Jr., p. 165 (242); Rossi ODC 2017, 6.

12 Corte di Cassazione, 21.09.2015 – 18449.

transforming themselves into cooperatives, thus assuming a difference in purpose between the two.¹³

However, since the late 20th century, a minority of Italian scholars, influenced by US models, have argued that companies – particularly limited liability companies – can operate under any lawful purpose. Challenging the prevailing scholarly consensus, these scholars contend that companies should be interpreted as ‘purpose-neutral organisational structures’,¹⁴ freely available for private ordering. This perspective is based on the idea that the corporate model is inherently beneficial and thus deserving of legal protection, not primarily for profit-making, but rather for its ability to safeguard assets and establish a legal entity with an autonomous status.

This conclusion was reached via several arguments. First, Article 2332 of the Civil Code does *not* include the lack of profit-making purpose as a reason for the declaration of the nullity of the corporate constitutive act.¹⁵ Second, consortium companies, namely companies with economic but *not* profit-making goals, do in fact exist. This thesis has been further supported by the argument that since individual entrepreneurs are not required by law to reveal the rationale behind their business activity, no rationale should be needed when the activity is run via a corporate structure.¹⁶

Another argument in favour of this interpretation is that it is neither uncommon to have companies whose members do not share the corporate purpose (whether profit-making or mutualistic), as in the case of financial investors in cooperatives, nor to have non-members who do share the corporate purpose, as in the case of holders of participatory financial instruments for limited liability companies under Article 2346, last paragraph, of the Civil Code. In light of all these arguments, the definition of company interest should be left to the contractual autonomy of the members.¹⁷

Finally, there are those who argue that companies should also be used for purposes other than profit-making, but believe that this result cannot be achieved by interpretation alone, given the wording of Article 2247 of the

13 Corte di Cassazione 12.04.2005 – 7536, and already Corte di Cassazione 14.10.1958 – No. 3251.

14 Santini Riv. dir. civ. 1973, 151; Perlingieri/Di Sabato, p. 45; Carrabba, p. 65. *Contra* Campobasso (fn. 10), 25.

15 Santini (fn. 14). *Contra* Campobasso (fn. 10), 28; Iudica/Zatti/Buonocore; Iudica/Zatti/Marasà; Spada Riv. dir. civ. 1985, 129.

16 Porzio Giur. comm. 2014, 661 (665). See also Bigiavi, 42.

17 Oppo/Oppo, 302.

Civil Code.¹⁸ They therefore advocate *de iure condendo* for an amendment to Article 2247 to incorporate sustainability imperatives, redefining companies as ‘functionally oriented’ models. In line with this view, Article 2247 should be amended to allow shareholders to set the specific purpose of the company in the bylaws. The specific purpose could be: (i) an exclusively profit-making purpose; (ii) a hybrid purpose where shareholder value maximisation should be balanced with other interests as specified in the bylaws (in line with what is today legally required for Italian *società benefit* – see section E, below); or (iii) an exclusively non-profit purpose.¹⁹

C. The company’s interest versus the shareholders’ interest

Establishing the purpose for which a company is founded (see section B, above) is distinct from identifying the interests guiding its management by directors after incorporation. Considering the semantic complexities related to company interest, it is beneficial to approach this matter more pragmatically and a unified notion of ‘company interest’ should be rejected, in favour of the position of scholars who discuss company interest separately, with reference to the assessment of either the behaviour of shareholders or that of corporate directors.²⁰ While directors are required to manage the company in the company’s interest (see section D, below), the shareholders participate in *shaping* that interest.²¹ This is illustrated by Article 2484(6) of the Civil Code, which empowers shareholders to determine the continuation of the company’s operations by voting on its liquidation. This indicates that directors lack the authority to independently decide whether the business can continue. On the contrary, directors have the duty of running the company and cannot determine its liquidation or undertake actions that make liquidation inevitable, within the limits dictated by bankruptcy law and creditors’ protection.

Debates surrounding the shareholders’ ability to define the company’s interest tend to polarise around two predominant theories: the contract

18 Tombari.

19 Tombari (fn. 18), p. 94.

20 Angelici, p. 45; Angelici BBTC 2014, 25; Mengoni Riv. soc. 1956, 455; Minervini Riv. dir. civ. 1956, 332; Colombo/Portale/Preite, p. 9. See also Tribunale di Palermo Sezione imprese 15.10.2015; Tribunale di Palermo Sezione imprese 5.11.2015.

21 Cicu/Messineo/Angelici, p. 390; Angelici, p. 45.

theory (*contrattualismo*) and the institutional theory (*istituzionalismo*).²² The contract theory identifies company interest as the common interest of shareholders in the exercise of a profit-making economic activity, in line with a narrow interpretation of Article 2247 of the Civil Code. This theory empowers shareholders by supporting greater shareholder freedom in defining the contents of the company's bylaws. The institutional theory, by contrast, holds that company interest extends beyond the common interests of shareholders to include third-party interests, such as those of employees, suppliers, and creditors. These diverse interests collectively shape the company's overarching interest, which emerges as an autonomous and distinct interest that directors must prioritise in their decision-making. 'Institutionalist' elements are given credence by the choice to exclusively assign the company's management to directors under Article 2380-*bis* of the Civil Code.

Both perspectives converge with the idea that the shareholders' interest is defined as the interest of shareholders as a *category* (with all the difficulties connected to its concrete definition) rather than individual shareholder gain. Article 2373 of the Civil Code reinforces this distinction by addressing conflicts of interest among shareholders in the shareholder general assembly, specifying that “*a decision taken with the deciding vote of those who have, on their own behalf or on behalf of third parties, an interest in conflict with that of the company may be challenged (...) if it may cause damage to the company*” (unofficial translation), thereby assuming a difference between the company's interest and the single shareholder interest.

Italian jurisprudence has not explicitly taken a position between these two doctrinal theses, but prevailing case law seems to lean toward the institutionalist view. See, for example, the decision of the Supreme Court, September 29, 2020, No. 20625, which establishes that the annulment of shareholder general meeting resolutions for abuse of majority power may also occur when the resolution lacks any justification in the company's interest, and the vote of the majority shareholders is driven by the pursuit of a personal interest contrary to that of the company.²³ This ruling reflects

22 Among the many, Mignoli Riv. soc. 1958, 725; Asquini, 221; Jaeger; D'Alessandro Foro It. 1988, 48; Jaeger Giur. comm. 2000, 795; Cottino Riv. soc. 2005, 693; Galgano, p. 154; Montalenti 81. See also the debate on the company's interest between Francesco Denozza and Mario Libertini in the law journal 'Giurisprudenza commerciale': Denozza Giur. comm. 2013, 480; Libertini Giur. comm. 2014, 669.

23 Corte di Cassazione 29.09.2020 – 20625.

an implicit recognition of a distinction between the company's interest and that of its shareholders, even in the case of the majority shareholder(s).

D. Directors' duties in limited liability companies: The company's interest versus the directors' interest

In the search of what company interest is *not*, a significant aspect is that it is distinct both from the shareholders' interest (as just discussed in section C) and from the directors' interest. Article 2391 of the Civil Code explicitly regulates the directors' duty of loyalty.²⁴ Under Article 2391, directors must disclose any interest they may have in a particular transaction or decision of the company, whether individually or through third parties, to the full board of directors and the company's internal supervisory board by specifying nature, conditions, origin, and extent of the interest. If the director is an executive director, he or she shall also refrain from carrying out the transaction and leave the decision to the board of directors. In the case of a company managed by a single director (thus with no board of directors), the director may adopt the decision, but should then inform the shareholders and the internal supervisory board. In any event, the decision must identify and specify the company's interest in the transaction: this implicitly recognises a difference between the company's interest and the interest of the directors.

However, to the extent that they do not allow their personal interests to interfere with their fiduciary duty, directors are the only ones in charge of managing the company. As mentioned above, in the case of limited liability companies, the company law reform of 2003–2004 has granted the 'exclusive' power to manage the company to the directors (according to Article 2380-*bis* of the Civil Code). In 2019, this provision was further strengthened by extending this 'exclusive' management power for directors to all companies (including partnerships).

In addition, the new version of Article 2086 of the Civil Code entrusts the collective entrepreneur, *ergo* its directors, with the task of setting up an organisational, administrative, and accounting structure *also* capable of detecting a corporate crisis in a timely manner, and of adopting the measures necessary to deal with such a crisis. Some scholars believe that the

24 Pacchi Giur. comm. 2004, 680; Spolidoro (fn. 1); Enriques; Jaeger, p. 13; Libonati/Stella Richter Jr., p. 281.

word 'also' implies that directors are allowed to set up an organisational, administrative, and accounting structure capable of doing things other than preventing and managing the company's financial crisis, such as considering the interests of stakeholders.²⁵ Under this interpretation, directors' discretion could be extended, and sustainability interests could be included in corporate governance considerations. In other words, directors could set up functional structures not only to prevent corporate financial crises, but also to take account of third-party interests such as environmental interests, within the limits that will be further discussed below (see section G).

E. The *società benefit* legislation

In 2015,²⁶ following the example of the United States, the Italian legislature introduced the *società benefit*, the Italian equivalent of benefit corporations.²⁷ Since 2016, partnerships, limited liability companies, and cooperatives²⁸ can qualify as '*società benefit*' by amending their bylaws to include

25 Cossu ODC 2023, 783 (792); Lucarelli/Santoni/Lenzi, p. 121 (133); Sanfilippo Riv. dir. civ. 2022, 993. Specifically on directors' management duties arising from sustainability disclosure obligations, see Rescigno ODC 2023, 630.

26 *Legge di stabilità* 2016 – Law 28 December 2015 No. 208.

27 Benefit corporations originated in the United States, driven by the non-profit organisation *B Lab*. Founded in 2006, *B Lab* was established to create an international community for certifying *B Corp* or *B Corporation* companies. This certification is granted to businesses that voluntarily commit to generating a positive social and environmental impact while adhering to specific standards of transparency, accountability, and sustainability. To obtain certification, companies must pass the *B Impact Assessment*. Notably, this certification is available to any company, regardless of whether it is legally structured as a benefit corporation or equivalent. Alongside its certification efforts, *B Lab* has been a key advocate for legislative initiatives on benefit corporations. It played a pivotal role in drafting the *Model Benefit Corporation Legislation*, which has influenced various state laws in the U.S.A., including Washington's *Social Purpose Corporation*, introduced in 2012. Since Maryland enacted the first benefit corporation law in 2010, nearly every U.S. state has adopted similar legislation, with minor variations, including differences in terminology. Italy's *società benefit* law seems to have drawn inspiration from *B Lab*'s *Model Benefit Corporation Legislation*, with one notable distinction: the Italian definition of common benefit is broadly defined, resembling the 'general public benefit' concept found in Delaware's *Public Benefit Corporation* framework.

28 Pursuant to Article 1, Paragraph 377, of Law 208/2015, any company regulated under Book V, Titles V and VI of the Civil Code may qualify as a benefit company. The lack of an explicit restriction on single-shareholder *società per azioni* or *società a*

one or more common-benefit purposes. These purposes are defined as “*the pursuit, in the exercise of the economic activity of the benefit corporations, of one or more positive effects, or the reduction of negative effects, on one or more categories outlined in Paragraph 376*” (Paragraph 378, lett. a), Law No. 208/2015 – unofficial translation). These categories include “*persons, communities, territories and the environment, cultural and social goods and activities, bodies and associations and other stakeholders*” (Paragraphs 376, Law No. 208/2015 – unofficial translation), such as “*workers, customers, suppliers, lenders, creditors, public administration and civil society*” (Paragraphs 378, lett. b), Law No. 208/2015 – unofficial translation).²⁹ In other words, *società benefit* carry out economic activities not only for mutualistic or profit-making purposes (depending on whether they are cooperatives, partnerships, or limited liability companies), but also for one or more specific ‘common benefit’ objective(s). Further, *società benefit* are required to be managed in a responsible, sustainable, and transparent manner towards any corporate stakeholders (Paragraph 376, Law No. 208/2015).

Amending its bylaws to include ‘common-benefit purposes’ is a necessary and sufficient condition for an existing company to qualify as *società benefit*.³⁰ This decision must be made and executed in accordance with the rules governing the chosen corporate form, which always requires shareholder approval, whether by unanimous consent or majority vote.³¹ Indeed, despite differences in the decision-making process, the choice to adopt the *società benefit* status ultimately lies with the shareholders. On the other hand, it is the directors’ responsibility to fulfil the company’s common-benefit purpose while balancing shareholder interests with the

responsabilità limitata suggests that these corporate forms are also eligible to adopt benefit company status.

29 Among others, see Assonime, La disciplina delle società benefit, Circolare No. 19, 20 June 2016; Calagna RDS 2016, 709; Corso NLCC 2016, 894; Lupoi Riv. not. 2016, 811; Ventura Contr. e impr. 2016, 1141.

30 A company that adopts common-benefit provisions in its bylaws may include, on a voluntary basis, the term ‘benefit company’ or the abbreviation ‘SB’ in its corporate name (Paragraph 379, Law No. 208/2015).

31 When an amendment to the bylaws is not adopted unanimously, the question arises as to whether a dissenting shareholder has the right to withdraw. Law No. 208/2015 does not explicitly address this issue, meaning that the rules governing the specific corporate form will apply. As a result, no universal solution can be established; instead, it must be assessed on a case-by-case basis whether the introduction of a common-benefit purpose constitutes valid grounds for withdrawal: Corso (fn. 29).

specific social or environmental goals outlined in the company's bylaws (Paragraph 380, Law No. 208/2015).³²

The law requires these 'common-benefit' purposes to be *balanced* with the interests not just of shareholders, but of all relevant stakeholders, i.e., those affected by the company's activity (Paragraph 377, Law No. 208/2015). While the term 'balancing' might suggest conflicting priorities, the common benefit is not a distinct objective, but rather is an integral part of the company's purpose. Here, the obligation to pursue multiple objectives arises not from external legal imposition but instead from the shareholders' own decision. Shareholders of benefit corporations are therefore able to define the company's interest via a legal solution that strengthens contractual autonomy by allowing a self-imposed limitation on profit maximisation.

Given the broad scope of common-benefit purposes permitted by law, directors must navigate potential conflicting interests. Consequently, managerial discretion in benefit corporations may be broader than in conventional companies,³³ especially when the common benefit is only vaguely defined in the company's bylaws, as is often the case.³⁴

Further, the legal provisions governing *società benefit* contain ambiguities, leading to interpretative challenges and scholarly debate over the meaning of 'balancing'. Different legal provisions support contrasting conclusions. One interpretation, based on Paragraph 376, suggests that profit remains the primary objective, and the common benefit is only legitimate if it serves long-term profitability. This opinion is strengthened by Article 2247 of the Civil Code, which remains applicable to benefit corporations since it is not explicitly overridden by Law No. 208/2015. Under this view, the company's core purpose remains unchanged, and the bylaws merely require that directors pursue the specific common benefit as long as it aligns with a profitable strategy.³⁵

Conversely, another interpretation, which is supported by Paragraphs 377 and 380, considers the common benefit and profit-making to be equal-

32 For an analysis of the duties and liability of directors of benefit corporations see Denozza/Stabilini ODC 2017, 1; Lenzi Giur. comm. 2016, 894; Palmieri BIS 2017, 201; Pratavia Riv. soc. 2018, 919; Rossi (fn. 11).

33 Some have even proposed that, in the context of benefit corporations, the traditional *business judgment rule* should be reframed as a *benefit judgment rule*: Stella Richter Jr. Vita not. 2017, 953.

34 See, on this point, Denozza/Stabilini (fn. 32) and Tombari (fn. 18).

35 Palmieri (fn. 32) and Mosco AGE 2018, 81.

ly important. This view aligns with the legislative intent behind *società benefit*, which seeks to institutionalise ‘dual-purpose companies’. Moreover, as previously noted, even prior to the introduction of the *società benefit* regulation, some Italian scholars had already acknowledged that companies could integrate social or environmental objectives alongside profit-making purpose, without compromising their inherently lucrative nature (see section B, above). Also, directors were acknowledged as having the discretion to undertake ‘altruistic’ actions as long as they contributed to long-term financial success, such as enhancing corporate reputation. For the *società benefit* legislation to represent true legal innovation, benefit corporations must be empowered to transcend the traditional corporate model. In particular, shareholders should have the authority to require that directors limit profit distribution and allocate a portion of the company’s revenue to common-benefit objectives, provided that such allocations do not compromise the company’s financial stability or solvency. Despite their benefit mission, indeed, *società benefit* remain fully subject to general corporate law, including obligations related to financial sustainability and capital preservation.³⁶

Regardless of the preferred interpretative approach, according to Paragraphs 376 and 378 of Law No. 208/2015, the common benefit must be pursued as an integral part of the company’s business activity. These provisions define *società benefit* as entities that carry out common-benefit objectives “*in the exercise of an economic activity*” (unofficial translation). Consequently, a company seeking to fulfil its common-benefit purpose exclusively through activities unrelated to its core business operations would likely fall outside the scope of the law.

Regarding directors’ duty of care in *società benefit*, the introduction of common-benefit purposes serves as a benchmark for assessing directors’ behaviours, while staying within the boundaries of the business judgment rule. Consequently, despite the silence of Law No. 208/2015 on the matter, failure to pursue the common benefit may constitute grounds for directors’ removal without compensation.³⁷ However, it remains uncertain whether directors’ failure to uphold this hybrid purpose – specifically, neglecting to pursue the common-benefit goal – can give rise to liability. Paragraph 381 of Law No. 208/2015 explicitly states that directors’ liability will be determined by the regulatory framework established in the Civil Code for the chosen

36 Cordeiro Guerra/Lenzi Riv. tel. dir. trib. 2021, 1.

37 Lenzi (fn. 32) and De Donno/Ventura/Angelici, p. 19.

corporate form. This raises significant interpretative challenges, primarily because civil liability for directors generally requires the existence of economic harm. Under directors' civil liability rules, liability claims for failing to pursue the common benefit would be precluded unless the directors' conduct resulted in a measurable reduction in the company's asset value. Outside of scenarios involving reputational damage or loss of business opportunities, however, failing to pursue the common benefit may not cause quantifiable economic harm. Consequently, directors' civil liability for failing to pursue the common-benefit objective appears to be limited to exceptional circumstances. Furthermore, if, as mentioned, *società benefit* status extends directors' discretion, it likewise also extends the protective scope of the business judgment rule.

Finally, following the introduction of the *società benefit* model, some scholars questioned whether this new legal form effectively precludes traditional companies from considering altruistic objectives. Specifically, after 2016, could a company seeking to balance profit with social or environmental goals continue to operate under the conventional corporate structure, or would it be obligated to instead adopt the *società benefit* status? In short, the dominant scholarly consensus rejects the idea of an absolute restriction, asserting that non-benefit corporations remain capable of incorporating altruistic considerations into their governance frameworks.³⁸

F. 'Sustainable success' in the Corporate Governance Code for listed companies

The evolving discourse on sustainability in corporate governance is also confirmed by the Corporate Governance Code for listed companies. The revised 2020 version introduces the concept of 'sustainable success' in Principle 1(I) on the 'Role of the board of directors'.³⁹ Principle 1(I) emphasises the role of the board of directors in guiding the company toward 'sustainable success', which is defined as the creation of long-term value for the

38 The main advantage of the benefit corporation "appears to be on communication grounds, for the recourse to this form of company is a potent signal of the company's commitment to the care of stakeholder interests and social values, in addition to the pursuit of profit which remains a core component of corporate purpose also in benefit corporations": Gilson/Isaksson/Lidman/Munck/Sjöman/Ferrarini/Zhu, p. 469 (486).

39 Callegari/Cerrato/Desana/Siri, p. 326.

benefit of the shareholders, taking into account the interests of other stakeholders relevant to the company. ‘Sustainable success’ must be embedded in the company’s strategies, including those of any corporate group to which the company belongs.⁴⁰ Furthermore, according to Principle 1(IV), the board of directors is required to promote dialogue with shareholders and other stakeholders relevant to the company, “*in the most appropriate way*”.

The Corporate Governance Code operates on a ‘comply or explain’ approach.⁴¹ Principle 1 is meant to serve as a signal to capital markets, particularly to international investors who increasingly prioritise companies’ ESG performances, indicating the company’s awareness of sustainability-related matters.

Also, principle 1 aligns with the latest version of the *G20/OECD Principles of Corporate Governance* (2023), particularly with Chapter VI, which is dedicated to business sustainability and resilience, and it also follows the path set by foreign corporate governance traditions of ‘enlightened shareholder value’.⁴² The principle also aligns with the Italian constitutional framework; Article 41 of the Constitution safeguards business freedom while imposing limits to ensure compliance with social utility and the protection of the environment, as well as human health, security, and dignity.⁴³

In the end, rather than altering the company’s interest, the approach of Principle 1 of the Corporate Governance Code reshapes directors’ duties by requiring a long-term perspective while granting them greater discretion in considering environmental and social factors. Directors of Italian listed companies then:

- 1) *May* consider the interests of stakeholders and support the associated costs when a cost-benefit analysis demonstrates that such actions will positively influence the company’s long-term value (e.g., by enhancing its market reputation or making it more attractive to sustainability-con-

40 Among the earliest comments on the legislative amendment, see, *ex multis*, Alpa Contr. impr. 2020, 567 and Ventoruzzo Soc. 2020, 439.

41 *Ex multis*, Birkmose/Neville/Sørensen/Siri/Gargantini, p. 85.

42 The Principle, in particular, recalls the wording of Section 1 of the English Corporate Governance Code, as amended in 2018.

43 Assonime, Doveri degli amministratori e sostenibilità. Rapporto Assonime, Note e studi, No. 6, 18 March 2021. On Article 41, Italian Constitution and business sustainability see Cariello ODC 2022, 428 and Cerrato AGE 2022, 101.

scious investors),⁴⁴ and these decisions will be protected by the business judgment rule;

- 2) *Must* take sustainability factors into account when the risks of neglecting them could harm the company's value and its long-term profitability.

As a result, any lingering resistance to the compatibility between profit-making and sustainability concerns effectively fades.

G. Final remarks: Sustainability and directors' duty of care

An analysis of the ongoing debate regarding company interest in Italy shows that the legal framework allows for the consideration of sustainability concerns through two avenues. The first avenue is through shareholder decision. Shareholder decisions can introduce sustainability concerns as a company interest. This could be done in two main ways: either by establishing the company as a benefit corporation (*società benefit*), thereby integrating profit-oriented objectives with the pursuit of additional social or environmental goal(s), or by including altruistic elements in the bylaws of non-benefit companies; these altruistic elements orient the actions of directors but do not modify the company's fundamental purpose to be profit-driven.

The second avenue allows directors to consider sustainability concerns, even in the absence of a shareholder decision. Directors *can* indeed consider stakeholders' interests when pursuing the profit-making purpose of the company – which, as previously discussed, extends beyond shareholders' interests (and differs from that of the majority shareholders)⁴⁵ – whenever they determine that including sustainability efforts contributes to the profit-making ability or long-term value of the company. This aligns with the predominant institutionalist theories, which emphasise long-term value creation.

However, the latest debate on corporate sustainability has shifted attention from directors' fiduciary duty to their duty of care, and it becomes necessary to make some further considerations. First, despite potential slow-

44 Consequently, it increases directors' freedom in managing the company: Calvosa Riv. soc. 2022, 318; Tombari (fn.1), 14.

45 Cian Riv. soc. 2021, 449 (502).

downs due to the latest international political events, legislative attention to the socio-environmental impact of business activities is unlikely to be reversed. Instead, companies across the European Union are expected to face increased sustainability compliance requirements, particularly concerning environmental sustainability, which includes bans on production activities deemed harmful to ecosystems and the climate. Second, regardless of the regulatory landscape, environmental risks – especially climate-related risks – have become potential *financial* risks for companies even in a pure ‘profit-centric’ vision.⁴⁶ As a result, companies must account for environmental risks in terms of financial impact, irrespective of shareholders’ or directors’ ethical preferences.

Moreover, sustainability is gaining importance among consumers, employees, and investors. Even banks in the EU now consider climate risk when assessing company creditworthiness.⁴⁷ As a result, environmental sustainability has transcended mere regulatory compliance; it has become a strategic business imperative, not just in terms of economic opportunity, but also as a crucial element of risk management. The ecological transition and the effects of climate change represent today’s exogenous risk factors that affect all businesses, with significant economic implications.⁴⁸ This is particularly relevant for companies operating in Italy, as it is a country that is increasingly vulnerable due to climate-related disasters such as floods and droughts.⁴⁹

If environmental risks lead to cost increases, they must be incorporated into the corporate risk management function, which traditionally falls within the board’s responsibility. Consequently, these risks should be addressed both in the company’s internal management and control systems, as outlined in Article 2086 of the Civil Code,⁵⁰ and in organisational models for preventing environmental crimes under Legislative Decree No. 231/2001.⁵¹ From this perspective, diligent directors can no longer ignore the environmental impact of business activities. At the very least, they must equip

46 Lucarelli/Santoni/Lenzi (fn. 25), p. 122.

47 In Italy, see Lener/Lucantoni BBTC 2023, 8; for an international perspective, amongst the most recent contributions, see Auzepy/Bannier.

48 Genovese.

49 CMCC Foundation, *Analisi del rischio. I cambiamenti climatici in Italia*, 2020, at <https://www.cmcc.it/it/analisi-del-rischio-i-cambiamenti-climatici-in-italia>.

50 Lucarelli/Santoni/Santoni, p. 107.

51 For environmental crimes, see Article 25-*undecies*, Legislative Decree No. 231/2001. See also, Maugeri ODC 2014, 1.

themselves to understand and assess the environmental profile of their specific business operations to make informed management decisions.

In conclusion, while company interest in Italy retains the traditional definition that companies will be profit-driven *stricto sensu* (or mutualistic in the case of cooperatives), the evolving legal framework – especially sustainability reporting obligations⁵² – imposes new responsibilities on directors. They are now required to consider and act upon information that may influence the company's profitability, which includes 'material' sustainability information.

Furthermore, depending on the specific characteristics of the business, directors' duty of care requires to integrate sustainability considerations into strategic planning. For instance, in energy procurement strategies, the phase-out of fossil fuel-based energy sources represents a critical issue that directors of energy-intensive companies cannot afford to overlook. However, an unresolved question persists: are directors obligated to act today to address a foreseeable, yet not immediately urgent, issue? For non-listed companies, there is no direct equivalent of Principle 1 of the Corporate Governance Code, which mandates a long-term perspective. However, Article 2086 of the Civil Code and Article 2 of the new Bankruptcy Code⁵³ offers some guidance for non-listed companies. The new Bankruptcy Code calls for a 12-month financial sustainability outlook (Article 2), which also applies to corporate governance structures under Article 2086 of the Civil Code. This suggests that diligent directors must evaluate relevant risks and regulatory developments at least annually.⁵⁴ In conclusion, a director of any type of corporation must integrate (at least) environmental impact assessments into profit-driven decision-making. The intensity of this integration will vary depending on the type of activity carried out, the industrial sector, and other relevant factors in accordance with the risk management function. In conclusion, for all corporations besides *società benefit*, the ultimate goal remains profitability, albeit with a long-term horizon of at least twelve months.

52 See Legislative Decree 6 September 2024, No. 125 on corporate sustainability reporting obligations, implementing the Corporate Sustainability Reporting Directive (CSRD – Directive EU 2022/2464). Assonime, La nuova disciplina sugli obblighi di rendicontazione e informativa societaria in materia di sostenibilità, Circolare No. 21, 7 November 2024.

53 Legislative Decree 12 January 2019, No. 14.

54 Lucarelli/Santoni/Lenzi (fn. 25), p. 134.

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