Italy

Serena Triboldi
Pontecorvi Mannaerts & Triboldi

1. Directors' duties

1.1 Who is a director?

Under Italian corporate law, a 'director' is a corporate body – which can be constituted by one or more persons – vested with the power to manage a company pursuant to an appointment normally made by the company's shareholders or unitholders' meeting.

According to the provisions of Article 2380*bis*(1) of the Italian Civil Code, a director is one who has the exclusive power to manage a company and act as necessary in order to achieve the goals of the company. In the event that the management of a company is entrusted to more than one person, they constitute the board of directors (*Consiglio di Amministrazione*).

According to the provisions of Article 2387 of the Italian Civil Code, the company's bylaws can stipulate that a director be subject to specific requirements of honour, professionalism and independence. The management of a joint stock as well as a limited liability company may be entrusted to a non-shareholder.

Article 2381 of the Italian Civil Code states that, if permitted by the bylaws or by the shareholders' meeting, the board of directors is allowed to delegate certain functions to an executive committee composed of some of its members or to one or more of its members. The board of directors establishes the content, limitations or means of performance of the delegated powers.

In Italy, a joint stock company must clearly express in its bylaws the choice between the dualistic or monistic managing and supervisory system.

In a dualistic system, the management of the company is entrusted to a management board (*Consiglio di Gestione*), which is supervised by a supervisory board (*Consiglio di Sorveglianza*).[1] The management board of a dualistic system is normally appointed by the supervisory board and has the same powers as a board of directors. The management board can delegate certain powers to one or more of its members. The supervisory board has the sole objective of controlling the activities of the management board and ensuring that their actions are in the interests of the company.

In a monistic system, the management of the company belongs exclusively to the board of directors, which is supervised by a committee established within the same board of directors (*Comitato per il controllo sulla gestione*).[2] The role of the

1 Article 2409 *octies* of the Italian Civil Code.

committee for the control of the management is similar to that of the supervisory board of the dualistic system, to control the activities of the board of directors so as to ensure that their actions are in the interest of the company. The members of the committee for the control of the management are non-executive directors.

Executive directors, including the chairman of the board of directors, are considered to be managing directors. They are entrusted with individual management powers of the company, are responsible for the day-to-day management of the company and also play a significant role in defining the strategies of the company. Directors that are also members of the executive committee are considered to be executive directors.

Non-executive directors are directors who are not involved in the day-to-day management activities of the company. The main role of non-executive directors is to provide significant assistance and expertise to executive directors, allowing them to carry out their duties in managing the company.

Article 2(1) of the Italian Corporate Governance Code,[3] which deals with the composition of boards of directors of companies listed on the Italian Stock Exchange, states that the board of directors of those companies which voluntarily adhere to the code shall be made up of executive and non-executive directors.

Alongside the definition of 'director' provided by the law, which is substantially based on a formal investiture by the company, Italian case law has elaborated on another type of director – the 'de facto' or 'shadow' director.

A 'de facto/shadow' director is an individual who, in practice, carries out the duties of a director in a company without being formally appointed as a director and/or an individual who instructs or directs appointed directors, whose instructions and directions are implemented by the appointed directors.

A de facto[4] director who acts with the approval of all shareholders, even in the event that this approval is not expressed by a formal decision, is subject to the same rules governing the exercise of the managing powers and civil responsibility as those which apply to an appointed director. However, in order to be qualified as a director, the management function of a de facto director must be systematic and not occasional or heterogeneous.[5]

1.2 Nature of the duties

Under Italian corporate law, company directors (of both joint stock and limited liability companies) are required to manage the company in compliance with the duties imposed on them both by law and by the company's articles of association (see Articles 2392(1) and 2476(1) of the Civil Code), as well as by case law.

These duties fall into two categories:

- specific duties, arising from the law or the company's articles of association; and
- general duties, to be fulfilled while engaging in all management activities.

---

2 Article 2409 *sexiesdecies* of the Italian Civil Code.
3 *Codice di autodisciplina,* issued by Borsa Italiana SpA (March 2006).
4 Tribunal of Milan, December 11 1997, in *Le società*, 1998, p 802.
5 *Corte di cassazione,* September 14 1999 n 9795, in *Le società*, 2001, p 807.

In particular, directors are subject to the following specific duties, among others:

- a duty to convene a shareholders' meeting without delay in the event of losses (Articles 2446 and 2447 of the Civil Code);
- a duty to assess and note in the Companies Register, without delay, the occurrence of a cause for dissolution (Article 2485(1) of the Civil Code) and a duty subsequently to limit management activity only to the preservation of corporate property (Article 2486(1) of the Civil Code);
- a duty to draft, and draft accurately, business-year balance sheets (case law);
- a duty to comply with accounting principles (case law); and
- a duty to comply with all fiscal, welfare and criminal laws (case law).

Directors' general duties are as follows:

- a duty of diligence/care (Articles 2392 and 2476 of the Civil Code); and
- a duty of loyalty – that is, a duty to pursue the interests of the corporation, avoiding conflicts of interest (Articles 2391 and 2475*ter* of the Civil Code).

The Italian corporate law reform of 2003[6] dramatically changed the legal regime relating to directors' duties and liability, introducing more stringent measures and expanding minority shareholder protection.

1.3 Standards of care

The standard of care required for directors of joint stock companies engaged in management activities is regarded as a general principle established by specific provisions of the Civil Code. It therefore needs to be elaborated on by courts with regard to the particular circumstances of the case at hand. Even though there is no specific provision setting out the standard of care to be followed by directors of limited liability companies, reasons of systematic consistency lead the dominant doctrine to apply the same standard provided by the law for directors of joint stock companies.

According to the provisions of Article 2392(1) of the Civil Code, as amended by the Italian corporate law reform, "directors shall fulfil duties imposed by the law or by articles of association with the diligence required by the nature of their assignment and their specific competence". Further, directors are required to act in an informed manner (Article 2381(6) of the Civil Code) and to do whatever they can to eliminate or diminish harmful consequences, where they learn of facts which are detrimental to the company (Article 2392(2) of the Civil Code).

As a result, directors are no longer subject to the 'reasonable man' standard (the so-called 'diligence of an agent' or 'good family father' standard), but must instead be evaluated while taking into consideration the professional nature of the activity which they carry out, as provided under Article 1176(2) of the Civil Code. The activities carried out by a company director represent a professional activity that requires greater caution and attention than that ascribed to the reasonable man.

The obligation that directors act with the diligence required by their specific

6 The reform of Italian corporate law was implemented through the enactment of Decree-Law 5 of January 17 2003 and Decree-Law 6 of January 17 2003.

competence implies an evaluation of the diligence of each director on the basis of his areas of competence, which was presumably previously taken for granted upon appointment.

According to Paragraph 6.III.4 of the Report on the 2003 Law Reform,[7] the duty to employ the diligence required by the nature of the assignment "does not mean that directors must necessarily be experts in accounting, finance and every field related to the management and administration of their company, but rather, simply, that their choices must be informed and well considered, based upon their respective knowledge, and that decisions must be made based on a calculated risk, rather than an irresponsible or negligent improvisation".

Therefore, a director behaves negligently if he makes management decisions without informing himself of the issues involved or without properly weighing the attendant risks and advantages for the company.

In any case, the standard of care required by law is a general clause to be applied with regard to the unique factual circumstances of each case. Therefore, when examining a particular case to assess whether a director behaved in a way that breached his duty of care to the company or other parties, it is necessary to evaluate all aspects of the situation; such assessment is left to the judge.[8]

The factors weighed by the judge in this assessment may include:

- the kind of company involved;
- its size, field of activity, structure and financial potential;
- the importance and conditions of the discussed operation; and
- the timeframe available for the director to make a decision.

Directors are also subject to a general obligation to pursue the best interests of the company; but it is clear from case law that this duty is not to maximise company profits. Directors are not considered responsible for the company's economic success, and liability for breach of the duty to act in the best interests of the company can arise only from violation of a duty imposed by law or by the company's articles of association.

In fact, the courts have generally applied the 'business judgement rule', stating that "a judge is not allowed to decide upon the opportuneness or appropriateness of directors' management decisions, which pertain to their discretionary powers and are not subject to an *ex-post* judgment; on the contrary, a judge can only check if a decision was made without conflicts of interest and with those preventive cautions, checks and information required by ordinary professional diligence".[9]

The duty to pursue the best interests of the company is not specifically set out under any legal provision and is therefore somewhat nebulous and hard to define. Like the duty of care, it must be defined according to the factual circumstances.

However, with regard to joint stock companies, it may be indirectly inferred from Article 2391(1) of the Civil Code, under which a director must inform other members of the board of directors and the board of auditors of any interest he holds, on his

---

7 The *Relazione Illustrativa* of November 19 2003 can be found on www.judicium.it.
8 Tribunal of Milan, December 1 1988.
9 Court of Cassation, Case 3652 of April 28 1997.

own account or on account of third parties, in a specific company operation. In such situation, a managing director must also refrain from carrying out the interested operation.

In this case, a director is liable for any damage suffered by the company as a result of his act or omission. A director is also liable for any damage suffered by the company if he appropriates corporate opportunities.

A conflict of interest is presumed where a director:

- becomes a shareholder of a competing company with unlimited liability;
- carries out a competing business on his own account or that of a third party; or
- becomes director or general manager of a competing company (Article 2390 of the Civil Code).

In such a case a director who acts without the authorisation of the shareholders' meeting is liable for any damage suffered by the company. Actual examples of such actions might include:

- unauthorised withdrawals and payments; and
- intra-company operations carried out for the benefit of a parent company or other group companies which are damaging to the subsidiary company.

1.4 To whom duties are owed

The legal provisions set out in the Civil Code identify the legal persons to whom directors owe their duties, and who are therefore entitled to bring a liability action against negligent directors.

In both joint stock companies and limited liability companies, directors' duties are owed mainly to four categories of person, as outlined next.

(a) The company

Pursuant to Article 2392(1) of the Civil Code, the members of the board of directors of a joint stock company are jointly liable to the company for damage arising from the non-fulfilment of duties imposed on them either by the law or by the company's articles of association. The same applies to a limited liability company, as set out under Article 2476(1) of the Civil Code.

A director's liability towards the company is generally considered to be a form of contractual liability and is therefore regulated by the general principles governing contractual liability under Italian law.

(b) Shareholders

According to Article 2395 of the Civil Code, an individual shareholder of a joint stock company can bring a liability action against directors for "damages suffered as a direct result of intentional or negligent acts committed by the directors". In this case, the damage must directly affect the assets of the individual shareholder.

As provided under Article 2476(6) of the Civil Code, an individual shareholder of a limited liability company is also entitled to bring an individual action against directors under the same conditions specified under Article 2395. An individual action brought by an individual shareholder is considered to be a tort liability action.

(c) *Creditors*

According to Article 2394 of the Civil Code, the directors of a joint stock company are liable towards creditors of the company "for non-fulfilment of their duties concerning the preservation of the integrity of corporate assets. Creditors can bring a liability action when the corporate assets prove insufficient to satisfy their credit".

Directors are under an obligation not to jeopardise the so-called "creditors' guarantee", which is constituted by the corporate assets. If they breach this duty, they cause damage to the creditors by non-fulfilment of the creditors' expectation of satisfaction of their claims.

The nature of a director's liability towards company creditors is controversial; some argue that it should be regarded as contractual in nature, while others consider it to be tortious.

Since the concept of 'insufficiency of corporate assets' is considered even more serious than the notion of 'simple insolvency', this action is usually brought within the scope of a bankruptcy proceeding. In this situation, however, only the bankruptcy receiver can bring the action, and not the creditors.

(d) *Third parties*

Third parties have the same right under Article 2395 of the Civil Code as individual shareholders to bring a liability action against directors of a joint stock company. As in the case of individual shareholders, the damage must have directly affected the assets of the third party.

The same type of individual action is recognised under Article 2476(6) of the Civil Code for third parties that suffered damage as a direct result of the misconduct of directors of a limited liability company.

1.5 Common defences to and exemptions from liability

Depending on the nature of the action being brought against company directors – contractual or tortious – the plaintiff must comply with different burdens of proof. Failure to do so will result in the action being rejected by the judge.

In the case of a contractual action (eg an action brought by the company under Article 2392 or 2476(1) of the Civil Code), the burden of proof is established pursuant to the principles set out under Articles 1218 and following of the Civil Code. A claimant need only prove the following elements of the cause of action:

- the director breached a duty imposed on him by the law or the company's Articles of association;
- damage resulted; and
- a causal link exists between director's misconduct and the damage.

Directors seeking exemption from liability must prove that they did not act negligently.

On the other hand, when an action is brought in tort (eg an action brought by an individual shareholder or by a third party under Article 2395 or 2476(6) of the Civil Code), the burden of proof is borne by the parties according to the criteria set out under Article 2043 of the Civil Code. The plaintiff must prove all elements of the cause of action – that is, a breach of duty, intentional or negligent conduct, the damage suffered and the causal link between the misconduct and the damage.

In addition to the situation where the plaintiff fails to prove the elements of the relevant cause of action, the law sets out specific defences and exemptions. In particular, Articles 2392(2) and (3) of the Civil Code set out two cases of exemption from liability for the directors of a joint stock company. Directors are generally liable for the mismanagement of the company, except where:

- liability relates to specific functions which have been entrusted to an executive committee or one or more directors. However, this exemption does not exclude a director's general duty to monitor the activity of the individuals who have been entrusted with those functions. In fact, under Article 2392(2) of the Civil Code, "directors are jointly liable if, being aware of detrimental acts, they did not do whatever they were able to do in order to prevent these acts or to negate or minimise harmful consequences". Further, according to Article 2381 of the Civil Code, directors are under a duty to act in an informed manner and have an individual right to ask the delegated directors to give the board of directors information regarding the management of the company; or
- an individual director, who was not negligent, has registered his disagreement in the board of directors' meetings and resolution book (or has requested to do so), also giving immediate communication in writing to the president of the board of auditors. The request to register the director's disagreement must be promptly submitted during the meeting deciding on the specific item, before the relevant resolution becomes effective.

A similar exemption is provided under Article 2476(1) of the Civil Code with regard to limited liability companies.

Directors may also be exempted from liability to the company as a result of an express resolution by which the company waives its right to bring a liability action against its directors. Waivers by joint stock companies are regulated under Article 2393 of the Civil Code, whereas limited liability companies waive their right under Article 2476(5) of the code. The relevant procedures are dealt with in detail in section 4.

2. Who can bring claims?

The legal persons to whom directors owe their duties are entitled to bring claims against the same directors.

2.1 The company (and its liquidators)

Where there is a violation of directors' duties, a solvent joint stock company can bring a liability action against the directors under Article 2393 of the Civil Code. The decision to bring the action must be resolved by the ordinary shareholders' meeting in compliance with the relevant quorum requirements set out under Article 2368; the shareholders who attend must represent at least half of the corporate capital; and the resolution must be approved by an absolute majority of the shareholders present, unless a greater majority is required by the articles of association.