Corporate Oversight in the Sustainability Era

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ABSTRACT

Unlike previous harmonization efforts, which were primarily aimed at promoting transparency regarding their ESG commitments, the CSDDD Directive requires large enterprises to directly identify, map, and prevent adverse impacts on the environment and human rights. This regulatory shift raises significant questions from a corporate law perspective, particularly regarding its implications for the oversight duties and liabilities of corporate directors. This analysis first aims to demonstrate that the codification of ESG monitoring duties under the Directive does not necessarily imply a substantial expansion of the scope of directors' existing oversight duties. Adverse impacts that directors are now required to consider, thus ensuring compliance with the CSDDD, often entail legal and/or financial risks for the company itself—risks that directors are already obliged to map, identify, and manage, under general corporate law. Nonetheless, this work contends that the Directive's most significant effects may lie in reshaping the criteria for assessing directors' oversight decisions, particularly those concerning internal controls. Specifically, while oversight duties were previously justified

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solely by shareholder interests and evaluated through the lens of the BJR, the Directive reorients these duties towards external interests. This paradigm shift could significantly alter the traditional boundaries of judicial review over directors' oversight and organizational decisions, as the BJR appears inapplicable to duties—however broadly defined—that are specifically intended to protect interests external to the company.

Keywords: Corporate Oversight; CSDDD Directive; Adverse impacts; Directors' oversight decisions; Internal controls

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Introduction

The EU Corporate Sustainability Due Diligence Directive (CSDDD)[1] represents a significant turning point — at least in terms of the message it conveys to companies — aiming to promote (if not mandate) alignment for large enterprises with global sustainability challenges. Until now, previous EU regulatory and harmonization efforts such as the Corporate Sustainability Reporting Directive (CSRD)[2] and the Taxonomy Regulation[3], have primarily aimed at increasing transparency among enterprises about their commitments, providing the market with tools to assess the sustainability of both corporate activities and related financial products, in a context where there is a growing tendency among investors to prioritize 'green' assets[4].

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[1] Directive (EU) 2024/1760

[2] Directive (EU) 2022/2464

[3] Regulation (EU) 2020/852

[4] In the Italian literature, regarding the content of this legislation, see GENOVESE, *La gestione ecosostenibile dell'impresa azionaria,* il Mulino, Bologna, 2023, p. 77 ff. In general, the shifting approach to the topic of sustainability over time has been extensively explored by MACNAIL-ESSER, *From a Financial to an Entity Model of ESG*, in *European Business Organization Law Review*, p. 10 ff.

While these regulations have been primarily focused on transparency and do not, at least indirectly[5], require companies to redefine their corporate policies or risk management systems in a way that would directly contribute to meeting sustainability goals[6], the CSDD Directive represents the first real attempt to compel large enterprises to identify, assess, and mitigate both actual and potential adverse impacts related to human rights and the environment (Articles 5-9)[7]. Furthermore, to ensure compliance, the Directive designates a national authority responsible for overseeing enforcement and imposing fines on non-compliant companies (Articles 24 and 27), as well as provides for civil liability towards stakeholders harmed by irresponsible conducts (Article 29)[8].

The subsequent analysis seeks to explore the potential implications of this regulatory framework for corporate governance, particularly examining the impact of the Directive's provisions on directors' duties and liabilities.

At first glance, the issue seems to have been consciously set aside by the European legislator. The original version of the Directive submitted for approval

[5] While no explicit responsibility arises from such legislation, It should be noted that, the existence of clear and objective criteria to differentiate sustainable from non-sustainable assets promotes alignment with international standards regarding environment and human right protection (on the effect of the EU Taxonomy, see PACCES, *Will the EU Taxonomy Regulation Foster Sustainable Corporate Governance?*, in *Sustainability*, 13, 2021, p. 12316 ff. But see also GENOVESE, *La gestione*, p. 174 ff.).

[6] See STELLA RICHTER JR., Corporate Sustainability Due Diligence: *noterelle semiserie su problemi serissimi*, in *Riv. soc.,* 2022, p. 714. On the effectiveness of this approach, see CIAN, *Sulla gestione sostenibile e i poteri degli amministratori: uno spunto di riflessione*, in *Rivista ODC*, 2021, p. 1146 ff. According to STRAMPELLI, *La strategia dell'Unione europea per il capitalismo sostenibile: l'oscillazione del pendolo tra amministratori, soci e stakeholders*, in *Riv. soc*. 2021, p. 367 this new regulatory strategy is not only due to the now consolidated mistrust in the ability of institutional shareholders to voluntarily encourage companies to adopt sustainable practices, but rather represents an acknowledgment of some objective limitations in the role that institutional investors can play (the issue is extensively explored in STRAMPELLI/BALP, *Institutional Investor ESG Engagement: The European Experience,* in *European Business Organization Law Review*, 2022 p. 869 ss.)

[7] Moreover, the Directive further requires companies to adopt a specific transition plan to ensure their contribution to the climate change mitigation objectives established under the Paris Agreement (Article 22).

[8] According to P. MARCHETTI, *Il bicchiere mezzo pieno*, in *Riv. soc.*, 2021, p. 344, the Directive favors a 'hard' approach to the issue of sustainability (yet it is an alternative to the approach based on 'external' regulation of activities), by requiring companies to implement flexible internal rules for the prevention and mitigation of adverse impacts. Skepticism on this approach has been generally expressed by DENOZZA, *Sostenibilità e corporate governance nel nuovo contesto geopolitico*, in *Riv. soc*., 2023, p. 301 ff, who argues that the best approach would involve the direct participation of stakeholders in the organization.

to the Council[9] contained two provisions directly addressing directors' responsibilities. These provisions required Member States to ensure that directors, acting in the best interests of the company and subject to civil liability, consider the sustainability consequences of their decisions, including their long-term and short-term effects on human rights, climate change, and environment[10]. However, the version of the Directive approved in July excluded these provisions due to resistance from Member States concerned that such rules would interfere with national laws governing directors' fiduciary duties.[11]

Certainly, the issue of directors' duties and liability is of significant importance and must be properly addressed: it is, after all, the directors who are responsible for ensuring corporate compliance with the CSDDD provisions[12].

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[9] See Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM/2022/71). Before submitting the proposal, the Commission published an inception impact assessment titled 'EU Initiative on Sustainable Corporate Governance', which proposed to: (i) clarify that, as part of their duty to act in the corporate interest, directors should consider the interests of all stakeholders relevant to the long-term sustainability of the company or those impacted by it; and (ii) introduce a due diligence duty, which entails the responsibility to take appropriate measures to address the company's adverse impacts.

[10] On the original draft of the proposed Directive, see MC CULLAGH, *The EU Corporate Sustainability Due Diligence Directive: Real Change or More of the Same?*, in *European Business Law Review*, 35, 2024, pp. 603-626. In Italy, this proposal sparked a range of reactions among scholars, which were predominantly critical: see TOMBARI, *Riflessioni sullo statuto organizzativo dell'impresa sostenibile tra diritto italiano e diritto europeo*, in *An. giur. ec.*, 2022, p. 143, arguing that these provisions would not have clarified the role, responsibilities, and duties of directors; but also note the more pronounced criticism expressed by BARCELLONA, *La sustainable corporate governance nelle proposte di riforma del diritto europeo: a proposito dei limiti strutturali del c.d.* stakeholderism, in *Riv. soc.*, 2022, p. 1 ff. But, from a different perspective, see BRUNO, *Il ruolo della s.p.a. per un'economia giusta e sostenibile: la Proposta di Direttiva UE su* 'Corporate Sustainability Due Diligence'. *Nasce la* stakeholder company?, in *Riv. dir. comp*., 2022, p. 318.

[11] In the compromise reached by COREPER on the proposed Directive, it's explicitly stated that: *'Due to the strong concerns expressed by Member States that considered Article 25 to be an inappropriate interference with national provisions regarding directors' duty of care, and potentially undermining directors' duty to act in the best interest of the company, the provisions have been deleted from the text.'* (see Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence – General Approach, COREPER, ST 15024 2022 REV 1) In general, it should be noted that there is a widespread resistance among Member States concerning the harmonization of directors' duties and liabilities. Similar resistance was observed with the Insolvency Directive (Dir. (EU) 2019/1023), where directors' duties lacked clear liability rules.

[12] The European Commission itself acknowledged that 'to ensure that the duty of care becomes part of the overall functioning of businesses, it is necessary to involve directors' (see 'Just and sustainable economy: Commission lays down rules for

First, the absence of such rules in the final text should not be overstated, as it is clear that the Directive will inevitably impact directors' duties: by imposing due diligence obligations on companies, the Directive naturally affects the responsibilities of those institutionally tasked with ensuring the company's compliance with national laws transposing the Directive.[13]. Therefore, there can be no doubt that directors will, first and foremost, bear responsibility for implementing a risk-based due diligence policy, mapping, identifying, and preventing potential adverse impacts related to the company's activities on its behalf.

At the same time, it is essential to note that this will not represent a significant departure from the practices already required under fundamental corporate law principles. In fact, a basic misperception lies in the assumption that such monitoring and prevention duties were not already embedded in directors' fiduciary duties, prior to the Directive. By contrast, the first section of this paper will try to demonstrate, through an analysis of the concept of adverse impact and its relationship to traditional financial or legal risks, that the duty to oversee, manage, prevent and mitigate ESG-related adverse impacts is not entirely new to directors. These duties have always been implicitly included in the broader oversight obligations imposed on directors under corporate law, so the Directive essentially seems to have formalized the obligation for companies to carry out the oversight activities that any diligent director would have been required to perform, to protect the shareholders' interest.

The primary issue, however, as will be explained in the second section, seems to lie in enforcement of such duties. Despite ongoing debates and uncertainties, directors' oversight and organizational duties are traditionally framed as part of the duty of care. Therefore, their proper fulfillment is subject to review under the standard of the business judgment rule. In the third section of this work, an attempt will be made to determine whether the adoption of the Directive and its future transposition may play a pivotal role in changing the *status quo* in this regard. The question from which the present reflections arise, in fact, is not whether it is the directors' duty to promote and pursue interests other than those of the shareholders, or whether the Directive will require revising the concept of 'corporate purpose.'[14] Rather, the real question concerns the limits

companies to respect human rights and environment in global value chains?', European Commission Press Release of February 23, 2022).

[13] See LIBERTINI, *Gestione 'sostenibile' delle imprese e limiti alla discrezionalita` imprenditoriale*, in *Contr. impr.*, 2023, p. 85; MOSCO-FELICETTI, *Prime riflessioni sulla proposta di direttiva UE in materia di* Corporate Sustainability Due Diligence, in *An. giur. ec.*, 2022, p. 203; ADDAMO, *Le novità del testo finale della Corporate Sustainability Due Diligence Directive: un cambio di passo per la politica di sostenibilità dell'UE?*, in *Nuove leggi civ. comm.*, 2024, p. 1280.

[14] This issue, undoubtedly raised by recent European initiatives, appears to be far from a clear solution. In Italian literature, see most recently FERRARINI, *Lo scopo della società*

within which the interests of shareholders must be pursued and the effect that the imposition of such limits on economic freedom will have on the directors' position and the internal dynamics of corporate governance[15]. From this perspective, it will be argued that: *(i)* the Directive appears to impose obligations on the company that limit its economic freedom and protect interests external to the company; *(ii)* the monitoring activities currently imposed on directors solely for the benefit of shareholders will become instrumental to the proper fulfillment of a duty the company owes to third parties, and thus, a duty to protect external interests. In conclusion, the purpose of this paper is to demonstrate that, from a corporate law perspective, the revolutionary impact of the directive lies not so much in the scope of these duties but in the function they will reasonably be expected to assume once the Directive is implemented. A significant change that, as will be explained, has the potential to weaken the substantial limits traditionally placed on both judicial and non-judicial control over directors' decisions concerning the company's organizational structure and internal control systems.

I. ESG OVERSIGHT TODAY

1. The Concept of "Adverse Impact"

As noted, the first question this work seeks to address is whether the future obligations arising from the implementation of the Directive will significantly alter or expand the scope of directors' oversight duties under corporate law. The fundamental question is as follows: Are directors currently under no obligation to oversee the company's potential ESG-related adverse impacts?

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tra valore dell'impresa e valore sociale, in *Riv. soc.*, 2023, p. 317 ff.; TOMBARI, *Lo "scopo della società": significati e problemi di una categoria giuridica*, in *Riv. soc.*, 2023, p. 338 ff.; SPOLIDORO, *Interesse, funzione e finalità. Per lo scioglimento dell'abbraccio tra interesse sociale e* business purpose, in *Riv. soc.*, 2022, p. 322 ff.. For an in-depth analysis with comparative references, see also FLEISCHER, *Corporate Purpose: A Management Concept and its Implications for Company Law*, ECGI Law Working Paper n. 561, 2021, available at SSRN.

15 See BALLERINI-(SACCHI), *Profili ESG e politiche di remunerazione*, in *Nuove leggi civ. comm.*, 2023, p. 1476 ff., who, while discussing the issue of directors' remuneration, observe that it is one thing to set limits on the exercise of business activities oriented towards sustainability needs; it is another to oblige companies and their directors to pursue sustainability objectives. This point is strongly highlighted by LIBERTINI, *Gestione 'sostenibile'*, p. 67, who argues that the directive imposes limits on entrepreneurial freedom, without this implying the necessity of pursuing interests other than those of the shareholders or allocating part of the profit to altruistic purposes.
Even when reflecting on the concept of "sustainable success," now incorporated in many Codes of Corporate Governance for listed companies, a similar perspective can be found in M. CAMPOBASSO, *Gli amministratori, il successo sostenibile e la pietra di Spinoza*, in *Banca borsa tit. cred.*, 2024, p. 8.; GINEVRA, *Il Codice di Corporate Governance: Introduzione e Definizioni (con un approfondimento sul 'Successo sostenibile')*, in *Riv. soc.*, 2023, p. 1046 ff.

To answer this, it is essential to first define what the Directive means by 'adverse impact' and determine the specific types of impacts that must be monitored, mitigated, and prevented (art. 5 ff.). These include: (1) environmental impacts, (2) human rights impacts, and, as a subset of both, (3) adverse impacts occurring within the supply chain.

1.1. Adverse Environmental Impacts

Specifically, Article 2 (c), defines environmental adverse impacts as an adverse impact on the environment resulting from the breach of:

- General prohibitions related to environmental protection as outlined in Part I, Section I, points 15-16 of the Annex to the Directive. These cover activities that disrupt natural resources essential for food production, restrict access to drinking water or sanitation facilities, impair land use, and 'substantially adversely affect ecosystem services through which an ecosystem contributes directly or indirectly to human well-being.' (point 15[16])[17].
- Specific duties and prohibitions contained in the international conventions listed in Part II of the annex to the directive, such as those regarding biodiversity protection, marine ecosystem conservation, hazardous waste management, and the export/import of products containing harmful chemicals [18].

1.2. Adverse Environmental Impacts

On the other hand, human rights adverse impacts are defined as impacts on persons resulting from the abuse of:

- Human rights listed in Section I of the Annex to the Directive, such as the right to life; prohibition of torture; the right to liberty and

[16] Point 16 further provides that companies must refrain from activities that harm individuals' or communities' rights to access and use land, forests, and water, especially when these are essential for livelihoods.

[17] Furthermore, these provisions should be interpreted in line with Article 6(1) of the International Covenant on Civil and Political Rights and Articles 11 and 12 of the International Covenant on Economic, Social, and Cultural Rights.

[18] The effect, essentially, is to make binding for companies principles and standards (even very general ones) contained in international agreements that currently do not directly bind companies (see LIBERTINI, *Gestione 'sostenibile'*, cit., p. 65, discussing a phenomenon of *Drittwirkung*).This approach is expressly criticized by MOSCO-FELICETTI, cit., p. 201. Additionally, see VENTORUZZO, *Note minime sulla responsabilità civile nel progetto di direttiva* Due Diligence, in *Riv. soc.*, 2021, pp. 381-382, who argues that the innovative effect of these provisions in terms of civil liability is not entirely clear, as numerous (if not all) human rights violations or negligence causing environmental damage could already, in almost all EU legal systems, be sanctioned with civil liability.

security; the right to privacy; the freedom of thought and religion; the right of the child to the highest attainable standard of health; etc.
- Human rights listed in the agreements and conventions listed in Part I, Section II of the Annex, provided the violation (a) can be directly linked to corporate activities; (b) affects legal interests protected under these human rights instruments; (c) could have reasonably been foreseen by the company, taking into account its own operational context and supply chain.

1.3. Adverse Impacts in the "Chain of Activities"

The duty to identify and map the main adverse impacts, as prescribed in Article 5, letter b, and further articulated in Article 8 of the Directive, does not concern exclusively the negative externalities directly connected to the company's operations. Under Article 8, paragraph 1 (duty to map adverse impacts), as well as Article 10 (duty to prevent potential adverse impacts) and Article 11 (cessation of actual negative impacts), the company shall consider also the adverse impacts likely to be caused by its subsidiaries or commercial partners[19]. The chain of activities, as defined in Article 3, paragraph 1 (g), now includes the activities of both upstream and downstream commercial partners, whether direct or indirect, without the need to establish the existence of a 'consolidated commercial relationship.'[20]

2. Adverse Impacts and ESG Risks from the Perspective of Corporate Directors

The duty to monitor and prevent adverse impacts may initially appear innovative in its substance, particularly when considered from the perspective of stakeholders. Through the lens of CSR[21], one might focus almost exclusively on the fact that the European legislator has finally mandated directors to take into account the negative effects of business operations on the 'external' interests of stakeholders. This is undoubtedly the primary objective underpinning this

[19] The directive's provisions on the supply chain follow the path set by significant reforms introduced in individual member states, particularly in Germany, where the *Lieferkettengesetz* (LkSG) establishes an obligation for companies to implement systems for monitoring ESG risks throughout the supply chain (for an in-depth analysis, see VICARI, *Risikoanalyse e Risikomanagement nella LkSG: spunti in tema di assetti adeguati nella 'catena di fornitura'*, in *Giur. comm.*, 2023 I, p. 757 ff.; BORDIGA-DE MARIA, *Tutela dei diritti umani nelle catene di approvvigionamento nell'ordinamento tedesco: la Lieferkettensorgfaltspflichtensgesetz*, in *Riv. soc.*, 2022, p. 971 ff.).

[20] On the concept of 'chain of activities' and 'business partners' see ADDAMO, cit., p. 1272 ss.

[21] On the distinction between the classic CSR approach to sustainability, focused on business ethics, and the more 'financial' ESG risk-oriented approach, see MACNAIL/ESSER, cit., p. 10 ff.

harmonization effort. At the same time, however, doubts may arise about the actual degree of novelty these provisions present for directors. It does not seem that these obligations impose tasks on directors beyond those they were already required to perform under general corporate law, to safeguard the company's interests. These doubts are grounded in the following key considerations: *(i)* as will be demonstrated in this paragraph, 'adverse impacts' often entail risks for the company itself (at least for large enterprises); *(ii)* as will be explored in the next section, one of the core responsibilities of directors is to map, manage, and prevent risks to which the company is exposed.

Focusing on the first point, the argument here is that the 'external' perspective often adopted when analysing these provisions inevitably obscures the fact that the 'adverse impacts' (referred to in the Directive) do not solely and exclusively carry an 'external' relevance, but also present a fundamental internal dimension[22], as they can impact the operations and even the existence of the company.

This may indeed seem like a banal statement, but it is often underestimated: the external impacts on the environment and human rights discussed in the Directive can potentially be reflected in the company's traditional risks (market risk, credit risk, liquidity risk, operational risk, and reputational risk, etc.)[23]. This does not mean that adverse impacts always and inevitably translate into 'traditional' risks. It is undeniable that, in theory, there may be situations

[22] The position expressed by SINNIG-ZETZSCHE, *The EU's Corporate Sustainability Due Diligence Directive: From Disclosure to Prevention of Adverse Sustainability Impacts in Supply Chains*, June 14, 2024, available at SSRN, pp. 3-4, is not entirely convincing. The authors distinguish between ' adverse impacts' and ' sustainability risks', limiting the latter to systemic risks arising from global phenomena such as sea-level rise and climate change. They argue that directors are generally not obligated to consider or mitigate their external adverse impacts. While this distinction may hold theoretical appeal, it is challenging to comprehend how external impacts could be denied financial relevance in the current economic and regulatory landscape (in German literature, a similar perspective seems to be shared by KOCH, § 91, in KOCH (ed), *Aktiengesetz*, Munich, 18th ed, 2024, Rn. 20). As mentioned, it is not a universally valid rule that adverse impacts translate into legal and financial risks. It is certainly important to maintain this conceptual distinction. However, the argument advanced here is that, within the reality of the European large enterprises, there appear to be few instances in which negative externalities have no effect on a company's economic performance. In most cases, therefore, the ' sustainability risks' that directors must monitor necessarily also include the risks associated with adverse impacts caused by the company itself (in the same sense, see AA.VV., 'Demystifying Sustainability Risk', CoSo 2013, p. 3 ff.)

[23] And this is why, for several years now, 'for many organizations, sustainability has evolved from a 'feel-good' exercise to a strategic imperative that focuses on economic, environmental, and social risks and opportunities which, left unattended, can potentially threaten the long-term success of strategies and the viability of business models' (see 'Demystifying Sustainability Risk', cit., p. 2).

where an 'adverse impact' does not necessarily result in legal or economic-financial consequences. From a legal compliance standpoint, a legal risk arises only where there is comprehensive and enforceable sector-specific regulation. Regarding the financial dimension, in markets entirely indifferent to sustainability concerns, it is challenging to argue that ESG issues would have a meaningful effect on a company's economic performance. However, the key point is that, within the European context—where harmonized legislative instruments exist to evaluate corporate sustainability—it seems increasingly implausible to claim that companies could cause adverse impacts without expecting at least some financial repercussions.

Viewed from the perspective of the company and its directors, the sustainability risks linked to violations of the rights and prohibitions provided by the Directive do not appear to be anything other than compliance risks and financial risks, simply representing, within these two categories, the risk factors arising from issues related to environmental and/or human rights issues[24]. Some examples, although simple, may contribute to greater clarity.

a) *Environmental Adverse Impacts*

a1) Regulated Issues

If an environmental issue is directly regulated by sector-specific laws, it is evident that the company primarily faces a legal risk, often accompanied by a reputational risk. Consider, for instance, a company handling radioactive materials that fails to implement precautions to prevent leakage into the ground, leading to groundwater contamination. In such scenario, the company would inevitably face criminal or administrative proceedings – proceedings that could lead to substantial economic penalties on one hand, and significant damage to its public image on the other. While such unlawful conduct directly inflicts damage on the local community, it concurrently creates economic harm for the company itself. Specifically, the risk of incurring in administrative/criminal sanctions constitutes a legal risk, arising from the breach of mandatory compliance requirements, whereas the potential damage to the company's market reputation constitutes a reputational risk—a classic economic-financial risk.

This scenario mirrors that of the *Dieselgate* scandal involving major car manufacturers, when companies such as Volkswagen were found to have manipulated their engines to falsely appear compliant with pollutant

[24] Even with regard to sustainability risks that are subject to regulation, see the observations of BAINBRIDGE, *Don't compound the Caremark mistake by extending it to ESG oversight*, in *Business Lawyer*, 2021, p. 3 ff., who argues against extending oversight liability to situations where a company fails to align with mere aspirational standards (a position notably supported by STRINE, JR.-SMITH-R. STEEL, *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy,* in *Iowa L. Rev*., 106, 2021, p. 1885 ff.

emission standards. The aftermath was severe: the company faced billions of dollars in fines across Europe and the United States and suffered significant reputational damage. This was evidenced by a sharp decline in its stock price immediately following the revelation, a covert reduction in sales, and a dramatic increase in litigation-related expenses.

a2) Unregulated Issues

It may, however, happen—and it very often does—that a particular environmental issue is not specifically regulated, or that national (or EU) regulations impose standards that are less strict than those suggested by international institutions. In such cases, the company does not violate any specific legal constraint, but, at the same time, it is difficult to argue that the failure to align with certain standards—although aspirational and not legally binding—often entails a financial risk, at least in the form of reputational risk. Consider, for instance, a company that, during its production process, discharges chemical agents into the environment that remain unclassified or for which neither national nor EU regulations establish specific threshold values. In the Italian context, this situation occurred in the cases of manufacturing companies accused of polluting groundwater with PFAS (perfluorinated alkylated substances), for which no legal limits existed until recently. Many of these companies, beyond causing significant harm to nearby communities, later suffered a crisis of credibility and reputation, coupled with a surge in litigation, ultimately leading, in some instances, to bankruptcy[25].

Moreover, it is essential to recognize that even when a company complies with all sector-specific regulations, tools like the European Taxonomy now allow investors to assess and compare how well a company's activities align with sustainability objectives, such as climate change mitigation, using objective criteria and standards that are often non-binding. As these tools are designed to meet the increasing demand from investors for 'green' products, they are set to play a crucial role in directing financial resources toward companies that adhere to these standards, while simultaneously diverting capital from activities that, despite being legally compliant, do not align with these sustainability benchmarks. Consequently, it is entirely plausible that, even in the absence of explicit regulatory requirements or legal violations, conduct inconsistent with voluntary or aspirational standards could not only generate negative externalities but also expose the company to significant economic and financial risks.

[25] In Italy, the issue involved, for example, the company Miteni S.p.A. in Trissino (VI), which filed for bankruptcy in 2018 following years of intense and widespread criticism regarding its alleged responsibility for contaminating groundwater (for an in-depth analysis of the case, see MARCOLUNGO, *Riflessioni a margine del 'caso Miteni': oltre la stasi?*,in federalismi.it 28.6.2023, p. 88 ff.)

b) *Human Rights Adverse Impacts*
What has been stated above equally applies to cases involving the violation or abuse of human rights, which are almost always governed by specific criminal laws. In such instances, compliance with both national and international legal frameworks designed to protect fundamental human rights primarily entails a legal risk, often accompanied by significant financial exposure, particularly in the form of reputational damage[26].

c) *Adverse Impacts in the Supply Chain*
There are other cases where a company may indirectly contribute to practices that conflict with environmental protection and/or human rights without breaching any laws. This typically occurs when violations are committed by other entities within the company's supply chain. While the Directive may seem to introduce a significant innovation by requiring companies to monitor risks beyond their own operations, it is difficult to argue that such risks were irrelevant to the company, given that these situations almost always entail reputational risks, which, in turn, could translate into financial losses. An emblematic case, at least in the Italian context, is the one involving Benetton group following the collapse of Rana Plaza in Bangladesh[27]. In that case, the group faced widespread controversy and legal challenges due to its business relations with the company managing the building that collapsed. These disputes finally compelled Benetton to allocate several million euros to a trust fund created to compensate the families of the victims. While this financial outlay did not stem from legal liability, it nonetheless represented a financial risk that materialized as a consequence of the company's decision to collaborate with third-party entities that were evidently misaligned with international human rights standards.

3. The Duty to Monitor and Prevent "Adverse Impacts": Something New?

If we accept the premise that, for large enterprises, 'adverse impacts' frequently translate into what can be described as 'sustainability risks,' which are

[26] For an overview of the most well-known cases in which large multinational companies have had to address issues related to human rights and/or environmental compliance see RASCHE-MORSING-MOON-KOURULA, *Corporate sustainability*, Cambridge University Press, Cambridge, 2023 (although the volume, in its previous edition, was harshly criticized for its lack of order and methodology by BASSI, *La CSR doctrine di fronte ai creditori, stakeholders di prima istanza*, in *Giur. comm*. 2022, I, p. 178 ff.).
[27] See the statement 'The Rana Plaza Tragedy', released by the Benetton Group.

essentially subsets of legal or economic-financial risks, it becomes hard to argue that the European Directive, from the perspective of directors, introduced substantial innovations to their oversight duties (even in its original version). The core argument presented here is that no regulatory gap concerning fiduciary duties related to ESG impacts existed prior to the Directive, at least for large enterprises.

In nearly any legal system, among the duties of directors is certainly the duty to map, monitor, and prevent risks that threaten the survival of the company, through the establishment of an integrated risk management and reporting system. Given the difficulty to imagine adverse impacts that do not have some significant repercussions on the company's financial or economic performance, at least in the form of reputational risk[28], it is therefore reasonable to deduce that the vast majority of what we define as 'adverse impacts' is necessarily and generally covered by the monitoring duties that corporate law assigns, almost everywhere, to directors.

This duty is explicitly codified, for instance, in the German system under § 91, second paragraph, of the Aktiengesetz (AktG) [29]. Similarly, in Spain, Article 225, second paragraph, of the Ley de Sociedades de Capitales is interpreted by scholars as imposing on directors the responsibility to design an organizational structure that ensures effective reporting mechanisms and a risk management system.[30] In Italy, prior to the 2019 insolvency reform, such duties were derived from Law 231/2001 (regarding legal risks) and, in general, from Article 2380-bis, third and fifth paragraph, and Article 2403, first paragraph, of the Civil Code[31]. After the 2019 reform, a comprehensive oversight duty was essentially codified for all types of companies in Article 2086, second paragraph, of the Civil Code, which explicitly

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[28] On the usefulness of integrating sustainability factors into risk management systems to mitigate reputational risks, see PÉREZ-CORNEJO - DE QUEVEDO-PUENTE, *How corporate social responsibility mediates the relationship between corporate reputation and enterprise risk management: evidence from Spain*, in *Eurasian Business Review*, 13(2), 2022, p. 363 ff.

[29] Which provides that 'Der Vorstand hat geeignete Maßnahmen zu treffen, insbesondere ein Überwachungssystem einzurichten, damit den Fortbestand der Gesellschaft gefährdende Entwicklungen früh erkannt werden.' For a more in-depth analysis of this provision, see FLEISCHER, § 91 in HENSSLER (dir. by), STILZ-VEIL (eds), *Beck Online Grosskommentar AktG*, 1.2.2024; KOCH, § 91, cit.

[30] See CEBRIÀ, *La buena fe en el marco de los deberes de los administradores de las sociedades de capital: viejos hechos, nuevas implicaciones*, *ADC*, tomo LXIX, 2016, p. 1395. On directors' oversight duties see also v. GUERRERO TREVIJANO, *El deber de diligencia de los administradores en el gobierno corporativo de las sociedades de capital*, Editorial Civitas, Madrid, 2015, 178 ss.

[31] In general, see MONTALENTI, *Amministrazione e controllo nelle società per azioni: riflessioni sistematiche e proposte di riforme*, in *Riv. soc.*, 2013, p. 42 ff.; ID., *Il sistema dei controlli interni: profili critici e prospettive,* in *Riv. dir. comm.*, 2010, p. 935 ff. This topic was extensively addressed in the volume *Assetti adeguati e modelli organizzativi,* directed by IRRERA, Bologna, 2016.

provides that 'The entrepreneur, operating in corporate or collective form, has the duty to establish an organizational, administrative, and accounting structure adequate to the nature and size of the enterprise, also for the purpose of timely detection of the crisis of the enterprise and the loss of business continuity, and to act immediately to adopt and implement one of the tools provided by the legal system to overcome the crisis and recover business continuity. '

Common law jurisdictions exhibit analogous solutions, albeit with some distinctions. In the United Kingdom, following the *Barings* case, courts have upheld the principle that a director's failure to implement an effective internal risk management system constitutes a breach of fiduciary duties, exposing the director to liability[32]. This principle aligns with the *Caremark* doctrine, established by the Delaware Court of Chancery in 1996, which has since become a cornerstone of Delaware case law[33]. While there is not enough space here to retrace in detail the development of the Caremark doctrine, suffice it to say that this theory takes its name from a seminal case discussing the directors' liability for failing to establish an effective compliance monitoring system. In that instance, the Delaware Court of Chancery, partially overturning earlier case law[34], seized the opportunity to clarify doubts regarding the existence of a general directors' duty to be active monitors not only on compliance, but also on business performance and financial risks[35].

[32] See *Secretary of State for Trade and Industry v. Baker* (No. 5), 1999, 1, BCLC 433; *Secretary of State for Trade and Industry v. Baker*, (No. 6), 2001, BCC 273. For further details, see MOORE-PETRIN, *Corporate governance: law, regulation and theory, London*, 2017, p. 225

[33] See *In re* Caremark Int'l Inc. Deriv. Litig., 698 A.2d 959 (Del. Ch. 1996). For an overview, see ARLEN, *The Story of Allis-Chalmers, Caremark, and Stone: The Directors' Evolving Duty to Monitor*, in RAMSEYER (ed), *Corporate Law Stories*, Foundation Press, New York, 2009, p. 327 ff.

[34] *Graham v. Allis-Chalmers Mfg. Co*. 188 A.2d 125, 130 (Del. 1963).

[35] *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 123 (Del. Ch. 2009). However, this conclusion has been widely questioned in subsequent case law: see N RE *In re* Proassurance Corp. Stockholder Derivative Litigation, C. A. 2022-0034-LWW, 36 (Del. Ch. 2023); *Constr. Indus. Laborers Pension Fund v. Bingle*, LEXIS 223 (Del. Ch. 2022); *Firemen's Ret. Sys. v. Sorenson*, LEXIS 234 (Del. Ch. 2021); *In re* Clovis Oncology, Inc. Deriv. Litig., 2019 WL 4850188, 12 (Del. Ch. 2019); *In re Facebook, Inc. Sec. 220 Deriv. Litig.*, LEXIS 197 (Del. Ch. 2019); *Tilden v. Cunningham*, LEXIS 510 (Del. Ch. 2018); *Reiter v. Fairbank*, LEXIS 158 (Del. Ch. 2016); *Okla. Firefighters Pension & Ret. Sys. v. Corbat*, LEXIS 848, (Del. Ch. 2017); *Asbestos Workers Local 42 Pension Fund v. Bammann*, WL 2455469 (Del. Ch. 2015); *In re* Goldman Sachs Group, Inc. S'holder Litig., 2011 Del. Ch. LEXIS 151 (Del. Ch. 2011). In the literature, the issue remains highly controversial: see MILLER, *Oversight Liability For Risk-Management Failures at Financial Firms*, in *Southern California Law Review*, 84, 2010 p. 96; BAINBRIDGE, *Caremark and Enterprise Risk Management*, in *Journal of Corporation Law*, 34, 2009, p. 979; PAN, p. 738 ff.)

III. Corporate Oversight and the Business Judgment Rule

1. Enforcing Directors' Oversight Duties: is It a Question of Business Judgment Rule?

Once it is clarified that the monitoring duties generally imposed on directors by corporate law also encompass what are referred to as sustainability risks arising from potential adverse impacts, as well as all monitoring activities that directors will be required to undertake following the implementation of the Directive, attention can then shift to what seems to be the real issue concerning these duties: their enforcement. In fact, it is noteworthy that oversight duties are often formulated in a very general way, and their content is quite indeterminate. As has been emphasized in German literature, given the different theoretical approaches to the business organization and, especially, the various characteristics of businesses, it is not only difficult but also inappropriate for specific organizational standards to be incorporated into the law[36]. Very often, the law resorts to broad legal terms, setting flexible evaluative parameters (adequacy, appropriateness, etc.) in relation to the pursuit of a broad goal (preventing illegal behavior; preventing insolvency; preserving going concern etc.). In other words, the content of these duties seems to always leave the directors with a margin of discretion and judgment. Since corporate law has a rule — the Business Judgment Rule — that specifies the conditions under which a discretionary decision by the directors may lead to liability, it can be argued — as is often done — that compliance with such oversight duties should be evaluated through the lens of the *Business Judgment Rule*.

Without delving into the details of the next paragraphs, it can be summarized that the BJR essentially prevents courts from questioning the substance of a decision, provided that there is no conflict of interest, and the decision-making process was adequately informed. This presumption means that, if these criteria are met, directors' are deemed diligent and are therefore immune from liability.

Traditionally, this rule applies exclusively to the duty of care, i.e., the duty to pursue the interest of the shareholders. However, its application becomes more contentious and uncertain when the law imposes on directors specific duties without clearly detailing the required conduct, as it exactly happens, as explained, in areas related to organizational responsibilities or corporate governance. For instance, in the German system, such a problem arose with respect to the

[36] On the limits of normative standardization of corporate organization, see extensively SPINDLER, *Unternehmensorganisationspflichten*, Universitätsverlag Göttingen, Göttingen, 2011, p. 403 ff.

application of § 91, second paragraph, of the AktG[37]. In the Italian system, the relevance of this issue has been accentuated by the introduction of the second paragraph of Article 2086 of the Civil Code[38]. This provision outlines general objectives for directors' organizational duties, such as ensuring the organization's appropriateness for the company's activities and functionality for the early detection of a crisis. However, the law merely states that the organizational structure must be 'adequate' to achieve these goals, thus raising critical questions about the extent to which directors' organizational decisions are shielded by the BJR.

2. On the First (and Most Important) Pre-requisite of the BJR

The Business Judgment Rule (BJR) is a legal principle that has evolved over time to serve important objectives, such as avoiding hindsight bias and encouraging directors to take balanced risks without undue fear of liability[39]. As previously mentioned, in many jurisdictions it is widely accepted the idea that such a rule applies to both purely business decisions and oversight/organizational decisions. It is therefore appropriate to now focus on the reasoning behind this conclusion, examining whether it is genuinely well-founded in light of the underlying prerequisites of such a rule.

According to Italian case law and scholarship[40], the rule typically applies when the following conditions are met: (i) there is a 'business decision'; (ii) the

[37] See KOCH, § 91, cit., Rn. 16 and specifically OTT, *Anwendungsbereich der Business Judgment Rule aus Sicht der Praxis - Unternehmerische Entscheidungen und Organisationsermessern des Vorstands*, in *ZGR*, 2, 2017, p. 162 ff.

[38] It should be noted that this rule is, first and foremost, regarded by the legislator as the cornerstone of the new national framework aimed at preventing business crises and insolvency. Specifically, this rule is enshrined in Article 3, paragraph 1, of the Italian Insolvency Code (Legislative Decree no. 14/2019), where it is elevated to the status of a general principle of insolvency law (as Article 3 is included in the chapter dedicated to "general principles"). Furthermore, Article 3, paragraph 4, establishes minimum requirements for the adequacy of organizational structures and identifies warning signals to be monitored, such as significant debts to suppliers, employees, banks, and public creditors. While this provision outlines the conduct expected of directors, it appears to demand compliance with only very basic and elementary requirements (see DI CATALDO, *Assetti organizzativi della società per azioni e adeguatezza. Alcuni profili fin qui un po' trascurati*, in *Giur. comm*., 2024, I, 250 ff. who calls for legislative intervention in corporate law to provide clear guidance on the design of organizational structures).

[39] For an in-depth analysis see FLEISCHER, § 93, in HENSSLER (ed. by), STILZ-VEIL (eds), *Beck Online Grosskommentar AktG,* 1.2.2024, Rn. 79-86; ID., *Die „Business Judgment Rule' im Spiegel von Rechtsvergleichung und Rechtsökonomie*, in *Festschrift für Herbert Wiedemann zum 70*, Beck, Munich, 2002, p. 827 ff.

[40] See Cass., 28.4.1997, no. 3652; Cass. 23.3.2004, no. 5718; Cass. 27.8.2004, no.16707; Cass. 12.8.2009, no. 18231; Cass. 12.3.2012, no. 3902; Cass. 12.3.2013, no. 3409; Cass. 2.3.2015,

decision is free from conflicts of interest; (iii) the decision is based on adequate information; and (iv) the decision is not manifestly irrational, in light of the information gathered within the decision-making process.[41]

Nevertheless, both scholars and Courts appear to have focused almost exclusively on the latter three requirements, often overlooking a thorough analysis of the first, which ultimately defines the scope of the rule[42]. On this point, it is

no. 1783; Cass. 31.8.2016, no. 17441; Cass. 8.9.2016, no. 17761; Cass. 22.6.2017, no. 15470; Cass. 16.12.2020, no. 20718; Cass. 15.7.2021, no. 20252.

In the literature, see F. BONELLI, Gli amministratori di s.p.a. dopo la riforma delle società, Giuffrè, Milan, 2004, p. 183 ff.; ANGELICI, *La riforma delle società di capitali*, Cedam, Padua, 2006, p. 182 ff.; ID., Diligentia quam in suis *e business judgment rule*, in *Riv. dir. comm*., 2006, I, p. 675 ff.; AMBROSINI, *La responsabilità degli amministratori*, in COTTINO (ed.), *Trattato di diritto commerciale*, IV-1, *Le società per azioni*, Cedam, Padova, 2010, p. 658; G. E. COLOMBO, *Amministrazione e controllo,* in AA.VV., *Il nuovo ordinamento delle società. Lezioni sulla riforma e modelli statutari,* Ipsoa, Milan, 2003, p. 175; FERRI JR., *Ripartizione delle funzioni gestorie e nuova disciplina della responsabilità degli amministratori di s.p.a.*, in SCOGNAMIGLIO (ed.), *Profili e problemi dell'amministrazione nella riforma delle società*, Giuffrè, Milan, 2003, p. 39; RORDORF, *La responsabilità civile degli amministratori di s.p.a. sotto la lente della giurisprudenza (I parte),* in *Società*, 2008, p. 1193 ff.; MAZZONI, *La responsabilità gestoria per scorretto esercizio dell'impresa priva della prospettiva di continuità aziendale*, in AA.VV., *Amministrazione e controllo nel diritto delle società. Liber amicorum Antonio Piras*, Turin, 2010, p. 829 ff.; VASSALLI, *L'art. 2392 novellato e la valutazione della diligenza degli amministratori*, in SCOGNAMIGLIO (ed.), *Profili e problemi*, cit., p. 29; NIGRO, *'Principio' di ragionevolezza e regime degli obblighi e delle responsabilità degli amministratori,* in *Giur. comm*., 2013, I, p. 468 ff.

[41] In case law, the reference to 'reasonableness' as a limit to the application of the BJR is also common (see Cass. 22.6.2020, no. 12108; Cass.15.7.2021, no. 20252; Cass. 22.6.2017, no. 15470, where it is reiterated that such a valuation must be made both ex ante and considering the failure to adopt the precautions, checks, and preventive information normally required for a choice of that type and the diligence shown in assessing in advance the risk margins related to the operation to be undertaken.

[42] It is noteworthy that American literature also regards the 'business decision' as a prerequisite for the application of the business judgment rule. However, scholars and the case law seem to have largely neglected an in-depth examination of such a prerequisite (see RADIN, *The Business Judgment Rule*, Aspen Publishers, 2009, vol. 1, p. 87 ff.). In contrast, German literature has recognized the importance of defining the concept of '*Unternehmerische Entscheidung*' to which § 93, Abs. 1, Satz 2 AktG applies the BJR (see FLEISCHER, § 93 in SPINDLER- STILZ (ed.), *Kommentar zum Aktiengesetz*, 2nd ed., Beck, Munich, 2007, Rn. 63; SCHÄFER, *Die Binnenhaftung von Vorstand und Aufsichtsrat nach der Renovierung durch das UMAG,* in *ZIP*, 2005, p. 1255. for a detailed analysis of the concept see FLEISCHER, § 93 (2024), cit., Rn. 88 ff.; SPINDLER, § 93, in GOETTE-HABERSACK (eds), *Münchener Kommentar zum Aktiengesetz*, 6th ed. Beck, Munich, 2023, Rn. 48 ff.; HOPT-ROTH, § 93, in HIRTE-MÜLLBERT-ROTH (eds), *AktG: Großkommentar der Praxis*, 5th ed., De Gruyter, Berlin, 2015, Rn. 80 ff.; CAHN, § 93, in NOACK-ZETSCHE (eds), *Kölner Kommentar zum Aktiengesetz*, 4th ed., 2023, Rn. 35 ff.).

generally agreed that the category of 'business decision' should be defined negatively, as opposed to 'legally bound' decisions[43]. This raises the critical question of what constitutes a 'legally bound' decision, an issue that Italian doctrine has traditionally addressed by focusing on the nature of the duty compelling directors to act, relying on the classic distinction developed by F. Bonelli[44] between: (a) 'duties with generic content' and (b) 'duties with specific content.' However, this categorization has been interpreted and applied in varying ways in the literature. The dominant view holds that the distinction should be understood literally, with generic duties differentiated from those with detailed content, for which directors would have no real discretion, whereas a minority of scholars seems to emphasize the distinction between decisions required by the general duty of care, covered by the BJR, and decisions required by duties (even if generic in content) specifically imposed by the law.

Based on these two theoretical approaches, part of the Italian literature has attempted to define, for example, the extent of judicial review over the adequacy of the organizational structure that directors are required to establish under Article 2086 of the Civil Code.

The prevailing view among scholars and courts asserts that, since the aforementioned provision relies on a flexible standard of adequacy and does not define with precision the characteristics that should distinguish the organizational structure, such decisions necessarily fall within the protection of the BJR.[45] According to this perspective, directors are only required to ensure that the company has some form of organization, while the assessment of its adequacy remains a fundamentally entrepreneurial judgment, protected by the BJR: as a result, their liability would be limited to situations where no organizational structure has been implemented at all. It should be observed that this conclusion aligns closely with the prevailing approach in Delaware case law, where Caremark liability is articulated through two exclusive prongs requiring plaintiffs to plead either that: (i) directors utterly failed to implement any reporting or information

[43] In this regard, based on the Federal Government's explanatory statement regarding UMAG (see BT-Drucks. 15/5092, p. 11), most German scholarship seems to be aligned as well (see FLEISCHER, § 93 (2024), cit., Rn. 88-89; HOPT-ROTH, § 93, cit., Rn. 69 ff; SPINDLER, § 93, cit., Rn. 49.; CAHN, § 93, cit., Rn. 35.)

[44] See F. BONELLI, cit., p. 179

[45] Above all, see L. BENEDETTI, *L'applicabilità della business judgment rule alle decisioni organizzative degli amministratori*, in *Riv. soc*., 2019, p. 424 ff.; E. BARCELLONA, Business judgment rule *e interesse sociale nella crisi*, Giuffrè, Milan, 2020, p. 51 ff.; FORTUNATO, *Atti di organizzazione, principi di correttezza amministrativa e* Business Judgment Rule, in *Giur. comm*., 2021, II, p. 1380 ff.; ID., *Assetti organizzativi dell'impresa nella fisiologia e nella crisi*, in *Giur. comm*., 2023, I, p. 908 ff.; DI CATALDO-ARCIDIACONO, *Decisioni organizzative, dimensioni dell'impresa e* business judgment rule, in *Giur. comm.*, 2021, I, p. 69 ff. In the German literature, the same conclusion has been reached by OTT, *Anwendungsbereich*, cit., p. 166 ff.

system to monitor the company's legal compliance and business performance, or (ii) directors consciously failed to oversee their concrete functioning, ignoring "red flags". In other words, liability for poor oversight can only be established where there is evidence of a conscious disregard of fiduciary duties on the part of directors, thereby acting in bad faith and breaching their duty of loyalty[46]. Conversely, decisions regarding the specific configuration of internal control systems would fall within the unreviewable discretion of directors, meaning directors cannot be held liable for establishing an organizational structure that is merely inadequate. This is precisely why, despite its theoretical significance, the *Caremark* doctrine remained largely dormant for years, particularly regarding financial risks oversight[47]. Even following the 2007-2008 financial crisis, which

[46] *Stone v. Ritter*, 911 A.2d 362 (Del. 2006). Subsequent rulings have consistently reaffirmed these principles: see *La. Mun. Police Emples. Ret. Sys. v. Pyott*, 46 A.3d 313, 341 (Del. Ch. 2012); *Horman v. Abney*, LEXIS 13 (Del. Ch. 2017); *In re* Massey Energy Co. Derivative & Class Action Litig., LEXIS 83 (Del. Ch. 2011); *Am. Int'l Group, Inc. v. Greenberg*, 965 A.2d 763, 777 (Del. Ch. 2009); *Desimone v. Barrows*, 924 A.2d 908, 935 (Del. Ch. 2007). The classification of the oversight duty within the duty of loyalty has sparked considerable debate in the literature. Some scholars argue that the rulings in *Caremark*, *Stone*, and *Citigroup* have significantly narrowed the scope of oversight duties, if not rendered them virtually ineffective (see MITCHELL, *The Import of History to Corporate Law*, in *Saint Louis University Law Journal,* 59, 2015, p. 697 ff. See also GEVURTZ, *Corporation Law*, West Academic, St. Paul, 2020, p. 289, for further analysis of the issue.)

[47] In the *Citigroup* case, the Court of Chancery emphasized that directors are obligated to implement and monitor a system for overseeing business performance, while reaffirming that this duty does not undermine the protections afforded by the Business Judgment Rule. The combined effect of the Business Judgment Rule, exculpatory provisions under §102(b)(7) of the Delaware General Corporation Law, and the high burden of proving a *Caremark* claim creates a significant hurdle for plaintiffs seeking to hold directors personally liable for failing to recognize business risks. This is why liability for oversight failures, particularly those related to business performance oversight, remains one of the most challenging claims in corporate law, as previously observed in the *Caremark* case (*In re* Citigroup Inc. S'holder Derivative Litig., p. 125). On this issue see LANGEVOORT, *Caremark and Compliance: A Twenty-Year Look Back,* in *Temple Law Review*, 90, 2018, p. 731. In the literature, support for strengthening monitoring duties, particularly with regard to financial risks, has also been expressed by GEVURTZ, *The Role of Corporate Law In Preventing a Financial Crisis: Reflections On In re Citigroup Inc. shareholder Derivative Litigation,* in *McGeorge Global Business & Development Law Journal*, 23, 2010, p. 148 ff.; POLLMAN, *Corporate Oversight and Disobedience*, in *Vanderbilt Law Review*, 72, 2019, p. 2031 and 2043; PAN, *A Board's Duty to Monitor*, in *New York Law School Law Review*, 54, 2009, p. 718 ff.; HILL-MCDONELL, *Reconsidering Board Oversight Duties After The Financial Crisis,* in *University of Illinois Law Review,* 2013, p. 859 ff. Conversely, critics on the general foundations of the Caremark doctrine are expressed by BAINBRIDGE, *Corporate governance after the financial crisis*, Oxford University Press, Oxford-New York, 2012, p. 147 ff.

highlighted glaring deficiencies in risk oversight within financial institutions, this doctrine saw limited application[48]. It is only in recent times that certain decisions, such as those in the *Marchand*[49] and *Boeing*[50] cases, have marked a turning point, occasionally delving into minimal evaluations of the adequacy of internal controls formally established by directors. However, it is still difficult to determine whether these are isolated cases (involving companies where risk monitoring is a mission-critical issue) or if the case law is shifting toward more penetrating standards of review regarding directors' oversight decisions.[51]

Conversely, the alternative approach considers the duty in question as a 'specific' duty (even though, in reality, not entirely specific in its content) and argues that this duty, grounded in principles of administrative and managerial fairness (Article 2403 of the Civil Code), falls outside the scope of the BJR's protections.[52] Accordingly, directors' liability could be triggered not only for utterly failing to establish internal control mechanisms but also if the internal monitoring structures are not aligned with organizational standards developed within management sciences, which should be applied in accordance with the principles of proportionality and reasonableness.

3. Some Critical Reflections on the Dominant Opinion

Such a divergence among interpreters is also likely to arise with regard to the national rules transposing the CSDDD Directive, as incorporating specific organizational standards for ESG risk management into legislation appears not only highly challenging but perhaps even inappropriate[53]. Resolving this

In the UK system, by contrast, it is questioned if decisions related to supervision and monitoring are not considered business judgments protected by the BJR (see KEAY-LOUGHREY, *The Concept of Business Judgment*, in *Legal Studies*, 39, 2020, p. 62 ff.)

[48] On this issue, see extensively POLLMAN, cit., p. 2035.

[49] *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019)

[50] *In re* Boeing Co. Derivative Litig., LEXIS 197 (Del. Ch. 2021)

[51] At present, Delaware case law appears to provide conflicting and controversial signals (for cases reaffirming the traditional approach to evaluating oversight duties, see *Segway, Inc. v. Cai*, No. 2022-1110-LWW (Del. Ch. 2023); *In re* Proassurance Corp. Stockholder Derivative Litigation, cit.)

[52] See MONTALENTI, *I problemi della corporate governance*, in *Giur. comm.*, 2024, I, 376-377; MONTALENTI, *Assetti organizzativi e organizzazione dell'impresa tra principi di corretta amministrazione e* business judgment rule: *una questione di sistema*, in *Nuovo dir. soc.*, 2021, p. 21 ff.; ID., *Il Codice della Crisi d'impresa e dell'insolvenza: assetti organizzativi adeguati, rilevazione della crisi, procedure di allerta nel quadro generale della riforma*, in *Giur. comm.*, 2020, I, p. 829 ff.; IRRERA, *Adeguatezza dell'assetto organizzativo, amministrativo e contabile*, in DONATIVI (ed.), *Trattato delle società*, Milano, 2022, p. 1553 ff; AMATUCCI, *Adeguatezza degli assetti, responsabilità degli amministratori e* business judgment rule, in *Giur. comm.*, 2016, I, p. 661 ff.

[53] See footnote no. 36

interpretative conflict and finding a balanced solution is therefore crucial, on the one hand because the future implementation of the Directive will inevitably bring this dilemma to the forefront, and on the other hand because such issues are likely to multiply over time due to the growing legislative trend to impose organizational constraints on companies.

Nonetheless, neither of the aforementioned approaches seems adequate to fully address the issue at hand.

Addressing the problem by relying solely on the distinction between duties with 'generic content' and those with 'specific content' leads to overly simplistic and approximate conclusions: indeed, the majority of obligations regarding the organization of companies—and more generally, corporate governance—despite their increasing complexity, are inherently generic in nature and are often structured around broad legal terms and general clauses. Thus, following this reasoning, it would lead to the conclusion that almost no judicial control can be exercised over nearly all decisions that the law specifically requires of directors.

On the other hand, the opposing solution seems to lead to the inverse conclusion that the application of the BJR is excluded whenever the law specifically provides for a duty on directors.

It is crucial to navigate a way out of this interpretative deadlock, which risks leading to unsatisfactory conclusions.

A valuable starting point lies in recognizing that, while it is commonly accepted that duties with specific content preclude discretion and, by extension, the application of the Business Judgment Rule (BJR), it cannot similarly be presumed that, whenever the law refrains from prescribing the specific conduct required of directors, leaving them room to choose among viable options, the resulting decision is automatically shielded from any substantive scrutiny. In other words, this means that not all discretionary decisions— i.e., those imposed on directors by a generic duty—can be automatically deemed to fall under the protection of the BJR.

As suggested by prominent scholarship,[54] even with regard to duties that allow for discretion, it is crucial to understand whether directors, in performing these duties, are vested with the kind of evaluative and decision-making powers that corporate law seeks to shield from judicial review. This requires more than an examination of the content the duty; rather, it demands a deeper analysis of its underlying purpose and the protected interests. Indeed, the law grants directors non-reviewable powers solely to ensure the realization of the company's interest — defined as the shareholders' interest in maximizing their wealth —, and this interest not only underpins directors' discretionary authority but also establishes its most significant limitation. Therefore, if the law imposes a specific duty with a

[54] See KOCH, § 93, cit., Rn. 29; ID., *Pflichtaufgaben mit Entscheidungsspielraum*, in DAUNER-LIEB–HENRICHS-HENSSLER-LIEBSCHER-MORELL-MÜLLER-SCHLITT (eds), *Festschrift für Barbara Grunewald*, Otto Schmidt, Köln, 2021p. 547 ss.

margin of manoeuvre, it cannot be automatically assumed that directors enjoy an unreviewable discretion in its execution, but it is crucial to assess the hierarchy of interests underlying that specific duty. If it is aimed at detailing (even in broad terms) the duty of care, imposing constraints to which directors must adhere exclusively to realize the company's interest, then this duty should be regarded as a mere 'internal limit' to discretion and may be reviewed by the courts within the boundaries established by the Business Judgment Rule (BJR) [55]. Conversely, if the duty aims to protect interests external to the company or stems from corporate obligations owed to third parties, it represents an 'external limit' on discretion, leaving no room for the application of the BJR[56].

III. ESG Oversight Tomorrow: Navigating Future Trajectories

1. ESG Oversight Duties: Searching for the Appropriate Standard of Review and Why It Matters for Corporate Governance

In the previous section, an attempt was made to outline a theoretical framework defining the limits of the Business Judgment Rule (BJR) in a manner consistent with its intended function and the interests that justify its existence. Building on this approach, the question now arises as to whether the BJR—which, according to prevailing opinion, applies to directors' oversight duties—will also extend to ESG oversight obligations stemming from the implementation of the CSDDD Directive. Before addressing this issue in detail, it is necessary to briefly reflect on the practical significance of the problem.

From an 'external' perspective, focused on the effectiveness and efficiency of the Directive's provisions, the applicability (or non-applicability) of the BJR to directors' ESG monitoring and organizational duties seems to be a question that is

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[55] In the Italian literature, regarding the relationship between directors' discretion, corporate interests, and the business judgment rule, see extensively ANGELICI, *Le società per azioni: principi e problemi*, in *Trattato di diritto civile e commerciale fondato da A. Cicu, E. Messineo, L. Mengoni*, Giuffrè, Milan, 2012, p. 403 ss; ID., Diligentia quam in suis *e business judgment rule*, in *Riv. dir. comm*. 2006, I, p. 675 ss.; ID, Interesse sociale e *business judgment rule*, in *Riv. dir. comm*., 2012, p. 583; ID., *Profili dell'impresa nel diritto delle società*, in *Riv. soc*., 2015, p. 237 ss.

[56] In the literature, for the view that the BJR does not apply to directors' organizational duties, as these are oriented towards the protection of external interests, see: GINEVRA - PRESCIANI, *Il dovere di istituire assetti adeguati* ex *art. 2086 c.c*., in *Nuove leggi civ*., 2019, p. 1209 and, apparently, A. BENEDETTI, *Principi (definitori) e clausole generali (ambulatorie): «assetti organizzativi adeguati» e (nozione di) «impresa» nell'art. 2086 c.c*., in *Riv. dir. civ*., 2023, p. 924 ff. Based on a different line of reasoning, LIBERTINI, *Principio di adeguatezza organizzativa e disciplina dell'organizzazione delle società a controllo pubblico*, in *Giur. comm*., 2021, I, p. 7, also argues that the BJR, understood as a rule providing complete immunity to directors, cannot be applied to the organizational duty set forth in Article 2086, second paragraph, of the Italian Civil Code.

resolved primarily at the level of liability. In this regard, it is evident that the threat of personal liability serves as a powerful incentive for directors to diligently fulfill their duties, including those designed to protect stakeholders, as mandated by the Directive. Conversely, if directors' liability is significantly curtailed in this context, doubts may arise about the real preventive effectiveness of the Directive's provisions[57].

At least on a theoretical level, it cannot be denied that this issue is fundamentally a matter of liability. At the same time, however, it is worth emphasizing that the analysis of this problem often appears conditioned and limited by what has been described as an 'external' perspective. This perspective tends to focus exclusively on liability as the primary determinant of the effectiveness and efficiency of regulatory tools aimed at ensuring the company's sustainability.

That said, while the BJR traditionally applies in liability cases, it also has broader implications for corporate governance. Specifically, the BJR addresses the broader issue of the nature and scope of directors' powers, establishing the boundaries within which their authority cannot be challenged—not only by courts but also by internal or external bodies responsible for supervising management. As a result, uncertainties regarding the scope and application of the BJR not only render liability conditions less predictable but also carry implications for corporate governance in other significant ways.

Firstly, the issue could theoretically arise in the context of actions challenging the validity of board resolutions related to the organizational structures for managing ESG-related risks[58].

Secondly, and more significantly, the same problem may take on critical importance within the institutional relationship between the board of directors

[57] It could indeed be argued that, in any case, even if a restrictive solution were adopted (the non-applicability of the BJR), the liability action, as regulated in many legal systems, could not play a truly decisive role in compelling the board to comply with the monitoring duties regarding ESG risks: simply because the remedy is typically exercised by the company, and it is quite unlikely, in practice, that the majority will bring action against directors they themselves appointed. This observation, upon closer inspection, highlights some characteristics of the remedy that seem to inherently reduce the scope and relevance of the issue, since, in practice, very few cases would arise in which such an action would be initiated against the directors. However, at the same time, it is believed that this argument is not sufficient to eliminate the problem or negate its concrete relevance, because the derivative liability action can also be exercised by the minority (see art. 2393-bis of the Civil Code), by auditors (see art. 2393, par. 3 of the Civil Code) and, when the company becomes insolvent and enters insolvency proceedings, by the insolvency practitioner of the insolvency procedure

[58] See PALAZZOLO, *Adeguatezza, legalità e sostenibilità. La delibera istitutiva degli assetti organizzativi e le sue 'patologie'*, in *Giur. comm.*, 2024, I p. 323 ff. In the German literature, see also KOCH, *Pflichtaufgaben mit Entscheidungsspielraum*, cit., p. 562.

and the supervisory body. Pursuant to Article 2403, first paragraph, of the Italian Civil Code, statutory auditors are responsible for supervising the adequacy of the company's organizational structure and a considerable debate exists in the literature as to whether auditors themselves remain bound by the constraints imposed by the BJR[59]. The implementation of the Directive, which will inevitably extend this supervisory task to include oversight of ESG risk management systems, is likely to reignite this debate, making it essential to determine whether directors' decisions on ESG oversight fall within the protective scope of the BJR.

Indeed, potential friction between the supervisory body and the board could escalate into intra-organizational conflicts that destabilize the company, particularly considering that statutory auditors are vested with significant enforcement powers vis-à-vis directors, including the right to invoke judicial control over management under Article 2409 of the Italian Civil Code. This provision allows a qualified minority of shareholders or the supervisory body to petition the court when well-founded suspicions of serious irregularities by directors arise that could harm the company. Should the court find these suspicions justified, it may adopt appropriate measures, including the removal of directors, although it is generally accepted that, even in such cases, the court must respect the boundaries established by the BJR. For this reason, it becomes even more crucial to determine whether ESG oversight decisions are immune from substantive scrutiny, as this remedy could be leveraged by the supervisory body to prevent potential breaches of CSDDD duties. This concern is far from theoretical[60]: in Italy, for instance, the practical application of Article 2086, paragraph 2, of the Civil Code demonstrates that issues concerning the adequacy of a company's organizational structure—albeit in the context of business crisis prevention—have so far only been raised in lawsuits brought against directors under Article 2409 of the Civil Code[61].

[59] For a summary of the debate, with the necessary references, see SFAMENI, *Art. 2403*, in ABBADESSA-PORTALE (eds), *Le società per azioni*, Giuffrè, Milano, 2015, I, p. 1578 ff. In the sense that the BJR could not be applied with regard to the auditors' control on the adequacy of the company's organizational structure under Article 2403, first paragraph of the Italian Civil Code, see in particular AMATUCCI, *Adeguatezza,* cit., p. 643 ss.; MONTALENTI, *Amministrazione e controllo nella società per azioni: riflessioni sistematiche e proposte di riforma*, in *Riv. soc*., 2013, p. 50 ff.

[60] Even prior to the reform of insolvency law, the majority of scholars recognized the possibility of invoking the remedy in cases of organizational irregularities: see GIANNELLI, *art. 2409 c.c.*, in ABBADESSA-PORTALE (eds.), *Le società per azioni*, Giuffrè, Milan, 2015, p. 1744-1746; VANONI, *Denunzia al tribunale. Art. 2409 c.c.*, in BUSNELLI (dir.), *Il Codice Civile. Commentario fondato da P. Schlesinger*, Giuffrè, Milan, 2017, p. 46; PRINCIPE, *Il controllo giudiziario nel governo societario*, Giuffrè, Milan, 2008, p. 128 ff.

[61] See Trib. Milano, 29.2.2024, in *Fallimento*, 2024, p. 707 ff.; Trib. Catanzaro, 6.2.2024, in *Giur. it.*, 2024, p. 1894 ff.; Trib. Catania, 8.2.2023, in *Fallimento*, 2023, p. 817; Trib. Cagliari,

2. Why the CSDDD Might Be a Game-Changer

To thoroughly understand the real impacts and effects of the CSDDD and how it will clarify the discussed issues, we must await its concrete implementation[62]. However, as previously mentioned, expecting definitive and clear answers from the transposition efforts of individual Member States should not be overestimated. This is because, as anticipated, the provisions ultimately enacted are expected to remain vague and broadly framed : as a result, the question of the scope of managerial discretion is likely to remain unresolved and continue to feature prominently in discussions surrounding the implementation of these future rules.

That said, based on the methodological approach outlined in the previous section, it can be stated that the Directive already provides interpreters with useful elements to identify the nature of directors' ESG oversight duties and, most importantly, the type of interests they are designed to protect.

(I) First, the orientation of ESG oversight duties towards the protection of interests external to the company is clearly evidenced in many recitals of the Directive[63], which can be utilized by interpreters to delineate the scope of the provisions set forth in the legislative text[64].

(II) Furthermore, it is the structure of the duties regulated by the Directive that provides significant indications supporting the idea that this set of measures prioritizes the external interests of stakeholders. This conclusion can be reached by reflecting for a moment on *who* is formally tasked with oversight and *what* the Directive mandates to be monitored.

19.1.2022, in *dirittodellacrisi.it*; Trib. Roma, 15.9.2020 in *Dejure*; Trib. Milano, 18.11.2019 in *Nuovo dir. soc.*, 2020, p. 71 ss.

[62] With regard to the Italian legal system, it is reasonable to assume that the transposition of the CSDDD will also require amendments to Article 2086, second paragraph, of the Civil Code, specifying that organizational structures must be adequate not only for crisis prevention but also for the prevention of environmental and human rights adverse impacts.

[63] Recital 16 of the Directive: '*The Directive aims to ensure that companies active in the internal market contribute to sustainable development and the sustainability transition of economies and societies through the identification, and where necessary, prioritisation, prevention and mitigation, bringing to an end, minimisation and remediation of actual or potential adverse human rights and environmental impacts connected with companies' own operations, operations of their subsidiaries and of their business partners in the chains of activities of the companies, and ensuring that those affected by a failure to respect this duty have access to justice and legal remedies. This Directive is without prejudice to the responsibility of Member States to respect and protect human rights and the environment under international law.*'

[64] See KLIMAS-VAIČIUKAITĖ, *The Law Of Recitals In European Community Legislation*, *in ILSA Journal of Int'l & Comparative Law*, 2008, p. 23 ss.

(II.1) In the first instance, it is worth examining to whom the Directive assigns such oversight duties. From this perspective, it has been noted that the Directive requires Member States to transform what were previously viewed, at least, as directors' duties into obligations imposed on the company toward its stakeholders. This transformation is neither trivial nor should it be underestimated, as legislation that imposes obligations directly on the company, rather than on the directors, rarely aims to protect entrepreneurial freedom (from which the extent of managerial discretion naturally derives). Instead, in such cases, the legislator's perspective tends to be the opposite: to externally limit the freedom of entrepreneurs and the company itself. As aptly observed, the objective here is not to supplant the traditional profit motive that characterizes companies with sustainability goals but to prevent profit-making objectives from being achieved at the expense of other legally relevant interests. In the Italian system, these external constraints, which define the boundaries within which private individuals enjoy full economic freedom, are justified by Article 41, paragraph 2 of the Constitution, recently amended to specify that private enterprise freedom 'cannot be exercised in conflict with social utility or in a manner harmful to health, the environment, safety, liberty, and human dignity.'[65]

From these 'external' obligations and limits imposed on the company—however general and indeterminate—arise corresponding 'internal' duties for directors, who must ensure the company's compliance with European and national regulations. It is clear that if the transposition rules of the CSDDD are framed using broad legal terms, the duties of directors stemming from them will likewise be highly general. Nevertheless, conceptually, the duty to monitor ESG risks must be distinguished from the equally broad duty of care, for the simple reason that it is necessary, for the purposes of applying the Business Judgment Rule (BJR), to differentiate between the directors' duty of care and those obligations of the company that directors must fulfill on its behalf, to protect external interests[66].

(II.2) Additionally, further confirmation of the validity of these conclusions—that the approach adopted by the European legislator is exclusively stakeholder-oriented—can be drawn

[65] Constitutional Law of 11 February 2022, No. 1.

[66] In the Italian literature see ANGELICI, *Le società per azioni,* cit., p. 403 ss, footnote 122

from the content of the duties imposed on the company. As explained in the first section of this work, the focus of monitoring and prevention must be on the 'adverse impacts' on the environment and human rights, which, however, very often entail risks—defined as 'sustainability risks' or 'ESG risks'—for the company itself (risks that arguably should have already been monitored prior to the entry into force of the CSDDD). Conceptually, however, imposing the monitoring of adverse impacts does not equate to requiring the monitoring of all sustainability risks to which a company may be exposed, for the simple reason that the category of ESG risks encompasses not only risks linked to harmful company conduct (adverse impacts), but also, traditionally, risk factors associated with broader sustainability-related phenomena[67]. This latter type of risks, traditionally considered financial in nature, does not appear to fall within the scope of the CSDDD, in contrast to provisions found in other EU regulations focusing on corporate sustainability. For instance, the CSRD requires sustainability reporting to cover both adverse impacts for stakeholders and risks related to other sustainability issues (notably, systemic risks associated to climate change). The 'double materiality' principle underpinning the CSRD clearly demonstrates that the EU legislator's perspective in that context diverges from that underlying the CSDDD: while the CSRD emphasizes both inside-out and outside-in perspectives, the CSDDD focuses exclusively on adverse impacts, prioritizing the inside-out perspective with the aim of safeguarding external interests[68].

Therefore, there are compelling arguments to conclude that, in fulfilling these duties, directors will not benefit from the safe harbor traditionally afforded by the Business Judgment Rule[69]. This does not mean, however, that directors will lack discretion, provided the term is clearly defined. If discretion is understood as the ability to choose among various viable courses of action, it is evident that the generality of these duties will require directors to exercise judgment in selecting

[67] See SINNIG-ZETZSCHE, *The EU's Corporate Sustainability Due Diligence Directive*, cit., p. 3-4, where reference is made to phenomena such as extraordinary climate events, etc. (although the opinion that the category of sustainability risks is limited exclusively to this type of risk—and not also to those arising from adverse impacts caused by the company itself—is not entirely convincing).
[68] The point has also been highlighted by GINEVRA, *Il Codice di Corporate Governance*, cit., p. 1048, footnote 97. A similar opinion can be found in MACNAIL-ESSER, *From a Financial to an Entity Model of ESG*, cit., p. 40 ff.
[69] In this regard, see also LIBERTINI, *Gestione 'sostenibile'*, cit., p. 63.

among different options[70]. Of course, the company's obligations remain obligations of means rather than results[71], furthermore based on particularly generic content, which leaves open the possibility of choosing among various organizational solutions that could theoretically be deemed adequate for achieving these objectives.

However, discretion should not be conflated with immunity from any scrutiny or control, not only because external interests are at stake, but, more importantly, because otherwise directors would essentially be entrusted with an almost unlimited power that could be exercised with impunity to the detriment of those who the directors are meant to serve—the shareholders.

The central argument advanced here is straightforward: 'immunity' is a privilege that directors enjoy only insofar as they are tasked with materializing shareholder interests. By contrast, when it comes to complying with legal limits designed to protect external interests—as is the case here—the substance of directors' discretionary decisions will not only be open to review by courts or supervisory bodies but must necessarily be subject to such scrutiny. This ensures that those limits are respected while also guaranteeing that the solution reached is well-balanced and does not impose an unreasonable sacrifice on shareholder interests.

Certainly, it must be acknowledged that directors' task will be particularly challenging, given the difficulty of striking an appropriate balance not only between the need to avoid adverse impacts and the pursuit of shareholders'

[70] In German literature, the necessity of distinguishing, on a doctrinal level, this type of discretion from that protected by the BJR is emphasized by FLEISCHER, § 93 (2024), cit., Rn. 91: '*Auch bei gebundenen Entscheidungen stehen Vorstandsmitgliedern auf der Tatbestands- oder Rechtsfolgenseite mitunter Beurteilungs- oder Ermessensspielräume zu. So hat der BGH dem Vorstand bei der positiven Fortführungsprognose im Rahmen der Insolvenzantragspflicht einen „gewissen Beurteilungsspielraum' zugebilligt. Ähnliches gilt bei der Beurteilung einer unsicheren Rechtslage und der Auslegung unbestimmter Rechtsbegriffe. Dogmatisch sollte man solche Fälle einer eigenständigen Kategorie zuweisen und sie nicht mittels einer Analogie zur „Business Judgment Rule' lösen; § 93 Abs. 1 S. 2 enthält bei dieser Lesart nur eine Teilkodifikation unternehmerischer Entscheidungsspielräume. In der Sache gibt es bei den Prüfkriterien für unternehmerische Entscheidungen und für rechtlich gebundene Entscheidungen mit Beurteilungs- oder Ermessensspielraum freilich Überlappungen, weil beidesmal eine sorgfältige und sachgerechte Entscheidungsvorbereitung geboten ist*'.

[71] Recital n. 19 of the Directive states that: '*Companies should take appropriate steps to set up and carry out due diligence measures, with respect to their own operations, those of their subsidiaries, as well as those of their direct and indirect business partners throughout their chains of activities in accordance with this Directive. This Directive should not require companies to guarantee, in all circumstances, that adverse impacts will never occur or that they will be stopped. (…) Therefore, the main obligations in this Directive should be obligations of means. The company should take appropriate measures which are capable of achieving the objectives of due diligence by effectively addressing adverse impacts, in a manner commensurate to the degree of severity and the likelihood of the adverse impact*'.

interests, but also between the interests safeguarded by the CSDDD and other ESG interests that appear to fall outside the Directive's scope (such as the interest in preserving employment stability). It is also clear that there is no single point of equilibrium that can be determined in advance : therefore, the decision of the directors will inevitably remain a discretionary one (in the sense clarified above), requiring the adoption of a standard of review that ensures flexibility, such as one grounded in the principles of proportionality and reasonableness[72].

However, assessing whether a director's decision is reasonable and proportionate is fundamentally different from determining whether it is manifestly irrational, as is the threshold when applying the Business Judgment Rule (BJR)[73]. Indeed, the principle of proportionality entails an effective review of the balancing of interests undertaken, requiring verification that the directors' decision is suitable to ensure compliance with the constraints set by the CSDDD and, at the same time, that the means adopted do not result in an unjustified impairment of shareholders' profit expectations and other relevant interests[74].

3. What About SMEs?

Based on the foregoing, there are strong reasons to support the view that, with respect to what could be categorized as directors' 'CSDDD duties,' the BJR does not apply. However, this conclusion does not fully resolve lingering concerns

[72] Even before the amendment of the second paragraph of Art. 2086 of the Civil Code, some scholars emphasized that any scrutiny of organizational adequacy should be grounded in a balance of interests, including those external to shareholders, to be assessed through criteria of proportionality and reasonableness (see MERUZZI, *L'adeguatezza degli assetti*, in IRRERA (dir by), *Assetti adeguati e modelli organizzativi,* Zanichelli, Bologna, 2016, p. 53 ff.). On the distinction between the principle of reasonableness and the principle of rationality in assessing directors' conduct, see NIGRO, *'Principio' di ragionevolezza e regime degli obblighi e delle responsabilità degli amministratori*, in *Giur. comm*., 2013, I, p. 457 and esp. 470. However, the topic remains highly debated (for a comprehensive overview, see CAPRARA, *I principi di corretta amministrazione. Struttura funzioni e rimedi*, Giappichelli, Turin, 2021, p. 102 ff.), raising the key question that would arise if the BJR were to be set aside: what standard of review should be applied?

[73] The solution could only differ if, at its core, one was to admit that the BJR should also apply in cases concerning the company's liability towards third parties. This issue has recently been raised in German literature concerning obligations arising under the LkSG: see FLEISCHER, *Grundstrukturen der lieferkettenrechtlichen Sorgfaltspflichten*, in *CCZ*, 2022, p. 213).

[74] The solution that the adequacy of organizational systems for preventing negative environmental externalities should be subject to judicial review, but based on the criterion of proportionality, has been supported by SANFILIPPO, *Tutela dell'ambiente e "assetti adeguati" dell'impresa: compliance, autonomia ed* enforcement, in *Riv. dir. civ*., 2022, p. 1008 ff.

regarding the effectiveness of the European framework on corporate due diligence. The Directive, by specifically targeting large enterprises, exempts the vast majority of European companies —a regulatory approach that raises significant criticalities doubts arise: How can the business world be expected to align with a global effort when this responsibility is placed exclusively on large enterprises, which, in countries like Italy, account for only a small percentage of the total number of enterprises? Is it prudent to neglect precisely those enterprises —SMEs—that often exhibit a chronic lack of oversight and the absence of basic internal risk monitoring systems?[75]

However, it should not be forgotten that, as mentioned at the beginning of this work, the duty to monitor adverse impacts and connected sustainability risks already appears to constitute an integral part of the general directors' duty to oversee risks that could compromise the survival of the company. Whether they are financial or legal risks, ESG risks must therefore be integrated into the monitoring system, if they are relevant to the company's performance. It is certainly true that, in the current economic context, small and medium-sized enterprises (SMEs) are generally less exposed to financial risks arising from unsustainable practices. At the same time, however, it must be acknowledged that for a significant portion of these enterprises, the implementation of the CSDDD will likely amplify and reinforce the economic and financial dimension of the adverse impacts they generate. This is particularly true for companies operating within the supply chain of large enterprises subject to the CSDDD: in such cases, insufficient attention to sustainability aspects in business operations could lead to the termination of commercial relationships—relationships that many small companies heavily rely upon for their survival[76].

At this point, the analysis effectively circles back to its starting premise, as it becomes necessary to ask whether the duty to monitor business risks entails purely business judgments by directors on the most appropriate way to fulfill this duty, specifically in relation to the design of corporate organizational structures. The question, once again, is whether the duty to monitor business performance serves solely the shareholders' self-interest or also extends to protecting interests external to the company itself. The solution, as extensively discussed in Section II, remains uncertain and largely depends on the specific features of each Member State's legal system. With regard to the Italian system, the key issue lies in understanding the

[75] The importance of including small and medium-sized enterprises (SMEs) within the framework of corporate due diligence regulation is clearly highlighted in the OECD Guidelines for Multinational Enterprises (2011). This principle is further reinforced in the OECD Due Diligence Guidance for Responsible Business Conduct (2018), which explicitly extends its applicability to SMEs.

[76] See above, I.B.3. For a study on the opportunities and uncertainties arising for SMEs from the implementation of the Directive, see HANLEY-SEMRAU-STEGLICH-THIELE, *Study requested by the INTA Committee of the European Parliament*, 2023, available at www.europarl.eu.

underlying rationale of Article 2086, second paragraph, of the Civil Code, which structures directors' organizational duties towards the preservation of business continuity. Specifically, the question is whether the provision treats business continuity as an autonomously protected value, around which both internal and external interests converge.

The issue, however, is particularly complex and warrants further examination in a separate context. At this stage, it suffices to note that, despite ongoing debate within legal scholarship[77], Italian courts generally support the view that directors' organizational/oversight decisions are indeed shielded by the Business Judgment Rule (BJR)[78].

CONCLUSION

The analysis aimed to demonstrate that, for most large European enterprises, the entry into force of the CSDDD is unlikely to substantially extend the oversight duties already attributed to corporate directors under general corporate law. Since adverse impacts on the environment and human rights, in most cases, entail legal and/or financial risks for the company, it is reasonable to conclude that such duties were already part of directors' oversight responsibilities under corporate law principles.

The primary innovation introduced by the Directive seems to lie instead in the transformation of directors' duties into corporate obligations towards third parties, which directors are required to fulfill on the company's behalf. This shift significantly alters the hierarchy of interests that must guide the board's actions: whereas previously the board was tasked with overseeing ESG issues solely to safeguard shareholders' interests, it now seems difficult to deny that these duties are primarily grounded in ensuring the company's respect for external interests. Such a paradigm shift carries substantial implications for the role and liability of directors and, more broadly, for corporate governance.

Even if these monitoring obligations were to remain generic in content following the Directive's implementation—thus leaving room for discretion in their execution—it can still be argued that directors would likely not benefit from the safe harbor afforded by the Business Judgment Rule (BJR). While the BJR provides directors with a degree of immunity, this protection is inherently limited to decisions required by the general duty of care and the shareholders' interests. By contrast, when directors are required to fulfill legal obligations designed to protect external interests—such as those imposed by the CSDDD—they cannot invoke the BJR, and their decisions must be reviewed by courts and the supervisory body according to a more stringent standard.

The key challenge, however, lies in formulating an appropriate standard of review that ensures a degree of flexibility, as directors will face the difficult task of

[77] See footnotes 45-52-56.

[78] See footnote 61

balancing not only the need to avoid adverse impacts with shareholder interests but also competing ESG interests, which may sometimes be at odds. As suggested, the principles of reasonableness and proportionality may serve as a foundation for this standard. However, while these principles offer conceptual clarity, they require further elaboration and contextualization: future research and interpretative efforts will therefore be crucial to delineate the precise conditions and limits under which directors may be held liable for the inadequate or improper oversight of adverse impacts.

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