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Legance

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Recent Developments in Italian Corporate Law

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Sources of Italian Corporate Law

Binding

- Constitution
- EU Treaties
- EU Regulations and Directives
- Italian Civil Code (*Codice Civile*)

Non-Binding

- Interpretation of scholars and case-law
- Corporate Governance Code (Issued by the *Comitato per la Corporate Governance* in 2020)

THE ITALIAN COMPANIES

Corporations

Partnerships

Corporation

- **Plurality** of bodies
- Principle of **majority**
- **Limited** shareholder **rights**
- **Limited/no** personal **liability** of the shareholders
- Main corporate kinds: **S.p.A.** and **S.r.l.**

- *Società per azioni* (s.p.a.)
- *Società a responsabilità limitata* (s.r.l.)
- *Società in accomandita per azioni* (s.a.p.a)

Partnership

- **No plurality** of bodies foreseen
- **Every shareholder** has **unlimited** management **power**
- **Consent of all** shareholders required
- **Personal liability** of the shareholders

- *Società semplice*
- *Società in nome collettivo* (s.n.c.)
- *Società in accomandita semplice* (s.a.s.)

MAIN FEATURES OF THE *SOCIETÀ PER AZIONI* (SPA):

- Main format for **medium** to **large companies**
- Established through **articles of incorporation** and **registration**
- Minimum share capital is **€50,000**
- The capital is divided into **shares** that include the **shareholding** and the **social rights**
- The company meets its expenses and debts only with its **own assets**, *i.e.* with its capital and generally with its own resources
- Shareholders are **not required to pay the debts** with their own personal assets
- **Three** different **management regimes**

Regimes of Management in the SPA

Shareholders may decide which regime to choose:

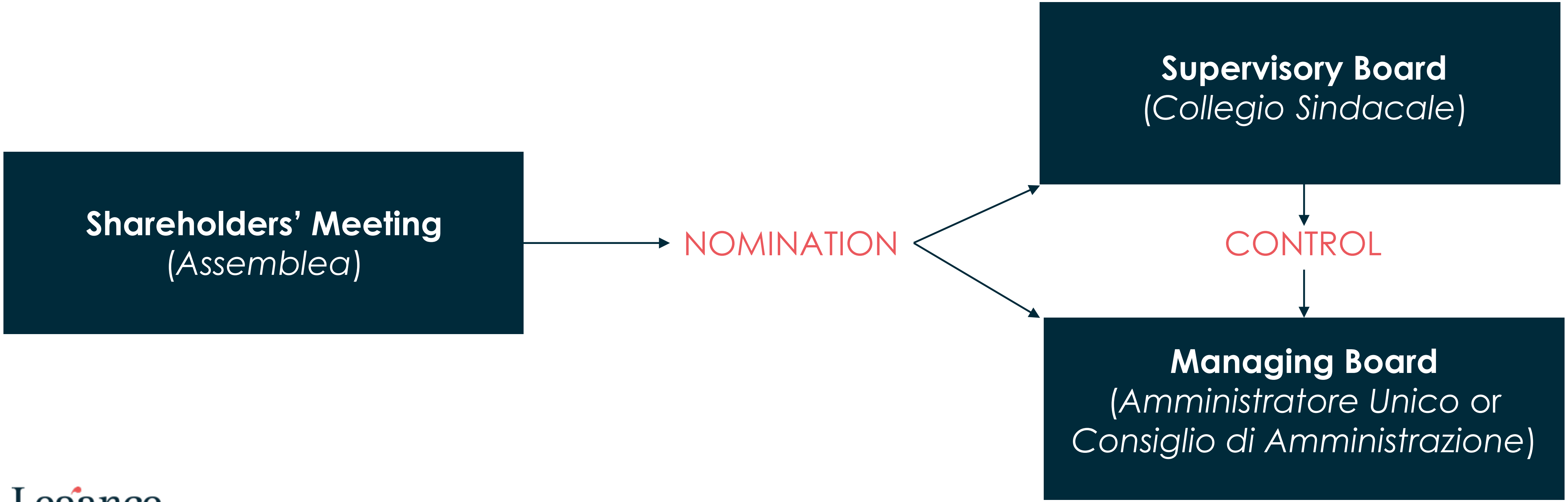
Traditional Regime

Dualistic Regime

Monistic Regime

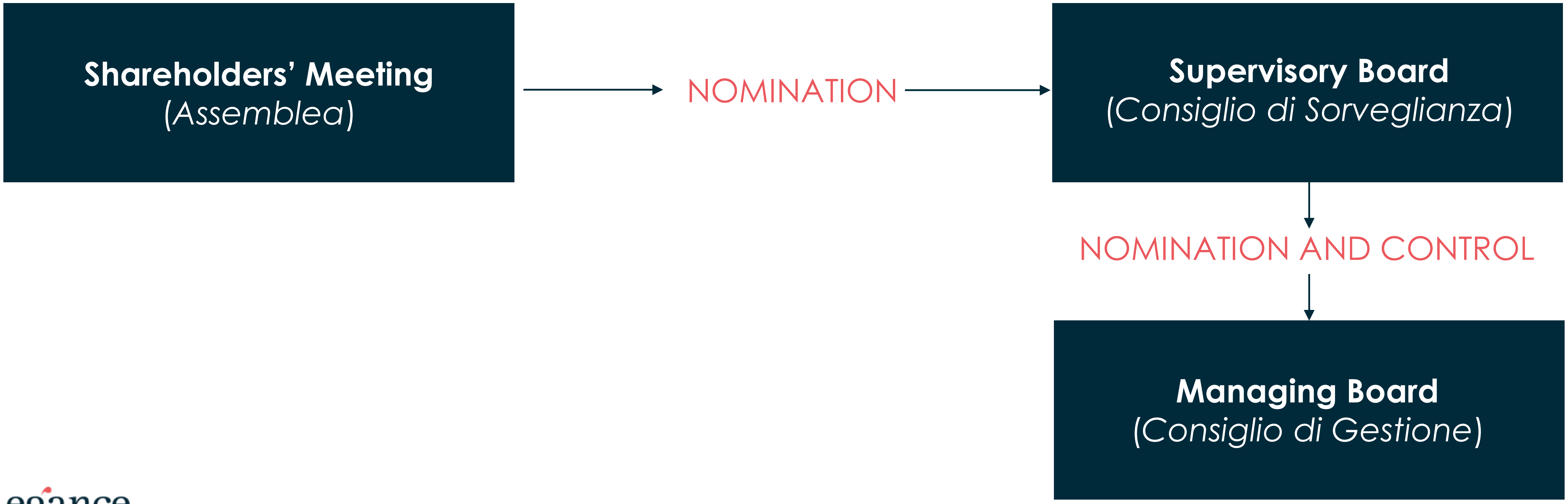
Traditional Regime

- Shareholders elect two boards, one with managerial functions and the second with supervisory functions (*collegio sindacale*)
- The accounting control, as is also foreseen for the companies that choose the dualistic or monistic regime, is entrusted to an external supervisory board



Dualistic Regime

- Shareholders elect one board with supervisory functions which in turn elects a second board with managerial functions



Monistic Regime

- Shareholders elect the Managing Board which "contains" a Supervisory Committee with control powers

MANAGING BOARD

- **At least one** director (*amministratore unico*) or *consiglio di amministrazione*
- Possibility to establish **internal committees** (*e.g. comitato esecutivo*)

RIGHTS AND OBLIGATIONS

- Exclusive competence to **manage the company**
- Deliberation on **all matters except** from those reserved to the **shareholders' meeting**
- **Representation** of the company
- **Financial statements**
- **Liability** towards **company** and **third parties**

SUPERVISORY BOARD

Traditional Regime

Collegio Sindacale

- 3 or 5 members + 2 substitutes
- At least one member must be registered in the register of statutory auditors
- The other members must have appropriate professional characteristics

Dualistic Regime

Consiglio di Sorveglianza

- At least 3 members
- At least one member shall be a registered accountant
- The other members do not mandatorily need to be registered in specific professional registers

Monistic Regime

Comitato Interno

- For open companies at least 3 members
- At least one member shall be a registered accountant
- All members must meet the requirements of honourability and professionalism and must be independent

RIGHTS AND OBLIGATIONS:

- ✓ **Control** of the management
- ✓ Right to **intervene** in board and shareholders' meeting
- ✓ Right to **information**

The Shareholders Meeting

- **All shareholders**
- Forming the **common will of the company** in the **matters reserved** by the law or by the company's articles of the association for the shareholders' meeting
- It is a **collegial body** that decide according to the majority principle
- Depending on the subject matter of the resolutions, the shareholders meeting is divided into **ordinary** and **extraordinary meetings**
- **Nomination of the managing board/ supervisory board** (depends on regime, see above)

Internal Control System

Art.6 Corporate Governance Code's definition:

"It consists of the **set of rules, procedu**res and organizational structures **aimed at the effective and efficient identification, measurement, management and monitoring of the main risks** in order to contribute to the sustainable success of the company"

MAIN AIMS:

- **Efficiency** and **effectiveness** of operations
- Adequate **risks control** (risks related to **cybersecurity** and **ESG** as **new primary risks**)
- **Reliability** and **integrity** of internal and external, financial and non-financial **information**
- **Compliance** with legal requirements and internal policies, regulations and procedures

Internal Control: a Three-Steps System

1. Enterprise Risk Management
- Identification of "**risk owners**"
- **Collection of information** by risk owners
- **Evaluation and prioritization** of risks which need mitigation measures
- Periodic risks **monitoring**

2. Internal Regulatory System
By-laws, ethical code and internal normative tools shall **direct roles, responsibilities and behaviors** of corporate functions towards the proper management of risks

3. Controls' System
- First level controls on each corporate process and activity
- Second level controls on the adequacy of the first levels controls
- Third level controls on violations of the Internal Regulatory System

Leading Actors in the Internal Control System

- **Managing Board** → Primary role in guiding and assessing the adequacy of the internal control system
- **Managing Director** → Identification of the main corporate risks
- **Risks and Control Committee** (if present) → Support role for the Managing Board through advices and evaluations
- **Supervisory Board** → Supervision on the efficiency of the Internal Control System

The Code of Corporate Governance for Listed Company

- **Best practices**, in the form of recommendations, **for** the organization and functioning of **Italian listed companies**
- Edited by the Corporate Governance Committee for the first time in 1999

Purposes

→ Respond to growing market expectations for greater sustainability of business activities

→ Create a more open and effective dialogue and promote engagement with investors

Sustainability Integration in 2020 →

- Corporate strategies
- Risk management
- Remuneration policies

Overview of the Code of Corporate Governance

- The recommendations are **not binding**, but there is a **duty to inform the market and shareholders** about its governance structure and the degree of compliance with the Code («***comply or explain***»)
- To this end, listed companies are required to publish a special report when publishing their financial statements, which is made available to the Shareholders' Meeting and simultaneously transmitted to *Borsa Italiana*, which makes it available to the public
- The Code of Corporate Governance was revised in January 2020
- New aspects:
  1) Greater **simplification**: from 10 articles to only 6 articles
  2) Comments are no longer provided
  3) **Neutral** to the corporate model
  4) Introduction of various **definitions** including: directors, managing and supervisory boards, business plan, concentrated ownership company, "large" company and **sustainable success**
  5) Greater **proportionality and flexibility of the regulations**

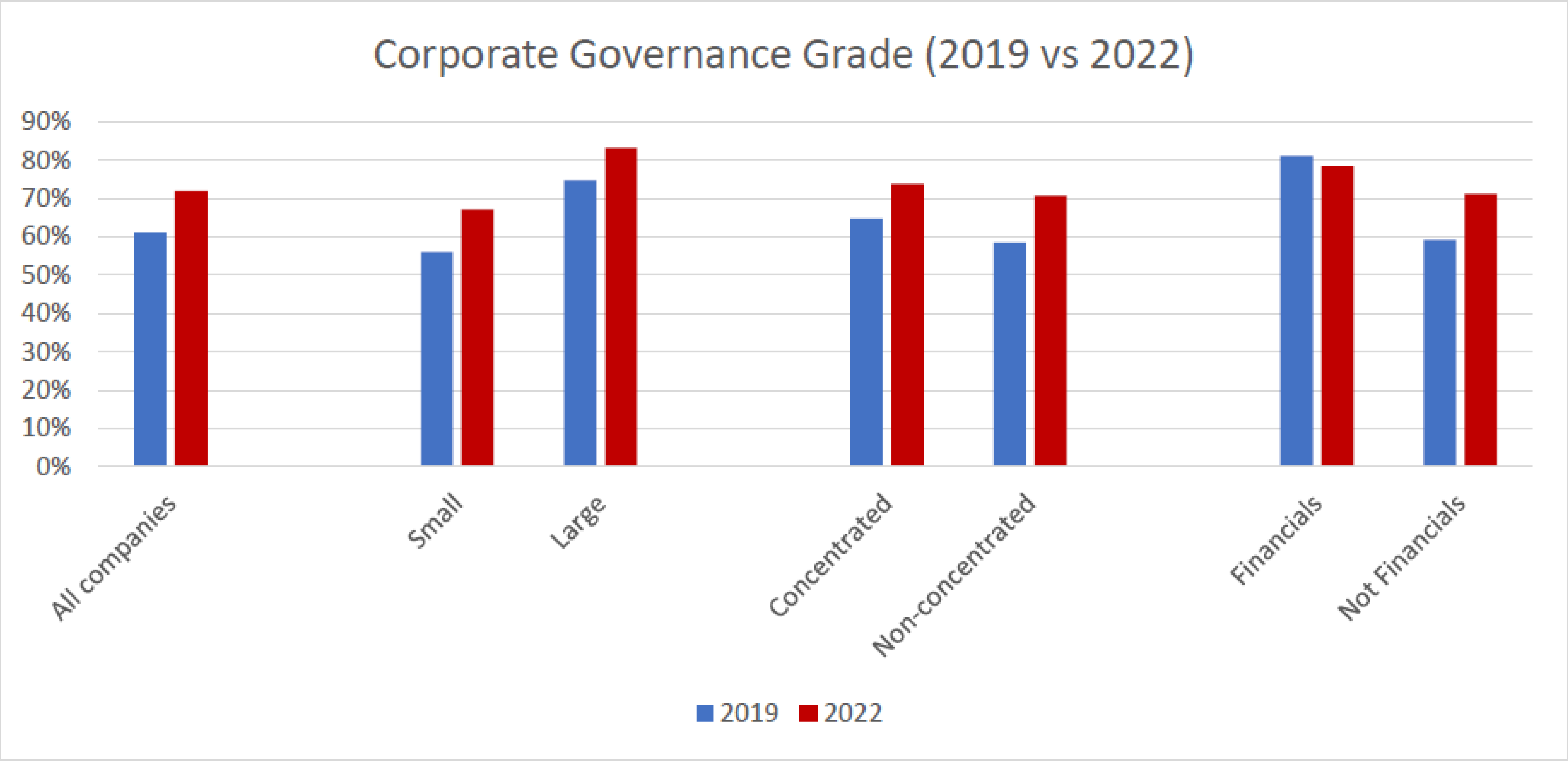
Structure and Content of the Code

Guiding Principles
- ✓ Represent guidelines for the application of the Code

Articles structure
- ✓ Principles
- ✓ Recommendations

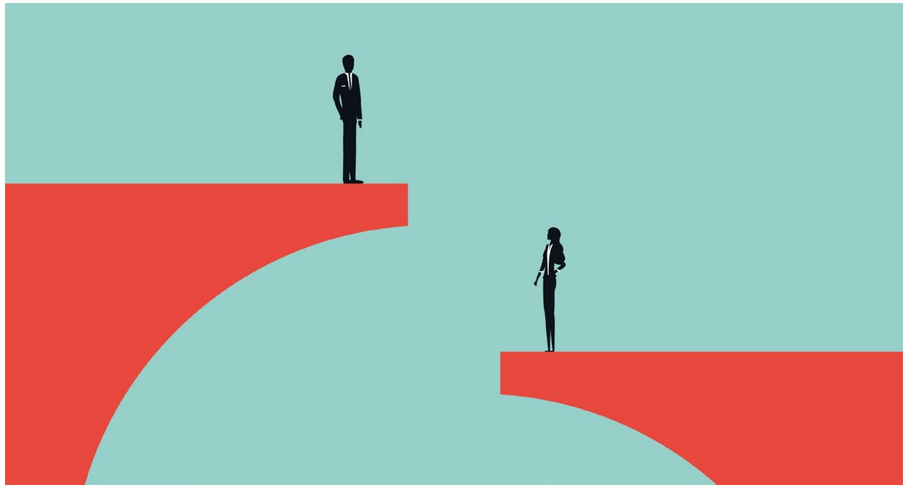
Articles Content
- ✓ Role of the managing board
- ✓ Composition of corporate bodies
- ✓ Functioning of the governing body and role of the chairman
- ✓ Appointment of Directors and self-assessment by the governing body
- ✓ Remuneration

Adherence to the Code



Source: Comitato Italiano Corporate Governance, 2022 Report

Law no. 120/2011: the so-called «*Quote Rosa*» Regulation



Scope

Law no. 120/2011 established a **mandatory percentage of both genders in boards of listed and publicly controlled companies**, in order to have an equal gender representation

Discipline

The so-called "***Legge Golfo Mosca***" initially provided a 20% presence of the least represented gender in the managing and supervisory boards. **The regulation was meant to apply for 3 consecutive mandates of the boards**

The Female Quota Regulation and the Evolution

- The **2020 Italian Budget Law** (Law no. 160/2019) modified, **for listed companies**, the term of application **from 3 to 6 consecutive mandates of the boards** and the **least represented gender** shall obtain **2/5 (40%) of the elected members of the managing and controlling boards** - before it was only 1/3 of the board (only France has a higher mandatory quota of 45%)

- Law no. **162/2021** has extended the **same new provisions also to publicly controlled companies, only with regard to managing boards**

- Decree no. **152/2022** has introduced the **Certification of Gender Equality** parameters

Authorities and Penalties System

Listed Company:
CONSOB

1. **Notice to comply** within 4 months

2. **Administrative fine**:

From 20,000 euro to 1,000,000 euro
+
Notice to comply within 3 months

3. The members of the board concerned shall cease from office: **the entire board shall be reappointed**

Publicly Controlled Companies:
President of the Council of Ministers/
Minister for Equal Opportunities

1. **Notice to comply** within 60 days

2. Second notice to comply within 60 days

3. The members of the board concerned shall cease from office: the entire board shall be reappointed

The Corporate Governance Code on gender equality

The Corporate Governance Code for Listed Companies of 2020 includes a **specific recommendation (no.8) on gender equality:**

- The company shall define **diversity criteria for the composition of the managing and of the controlling boards** and organise the appropriate tools for their implementation
- **At least 1/3 of the managing and controlling boards shall be members of the least represented gender**
- Companies shall take measures to **promote equal treatment** and opportunities between genders **within the entire corporate organisation**, supervising on their concrete implementation

Also the Central Bank of Italy has promoted a gender equality policy in its banking regulation: the ***Circolare 295/2013*** on the composition of the managing and controlling boards; the ***Diversity Benchmark of 2015***,which has introduced a 20% presence of the less represented gender in the managing board; and the ***2020 Public Consultation on modifications of Circolare 295/2013*** to raise such presence in the managing board to 33%

Issues to Resolve in the Regulation

The Equal Opportunity Department, CONSOB and the Bank of Italy agreed to establish an **Observatory on women's participation in the boards of Italian companies,** which has released a Report with data from 2011 to 2019. The Report stresses that, in order to reach gender equality, the Italian **regulation needs to resolve the following issues:**

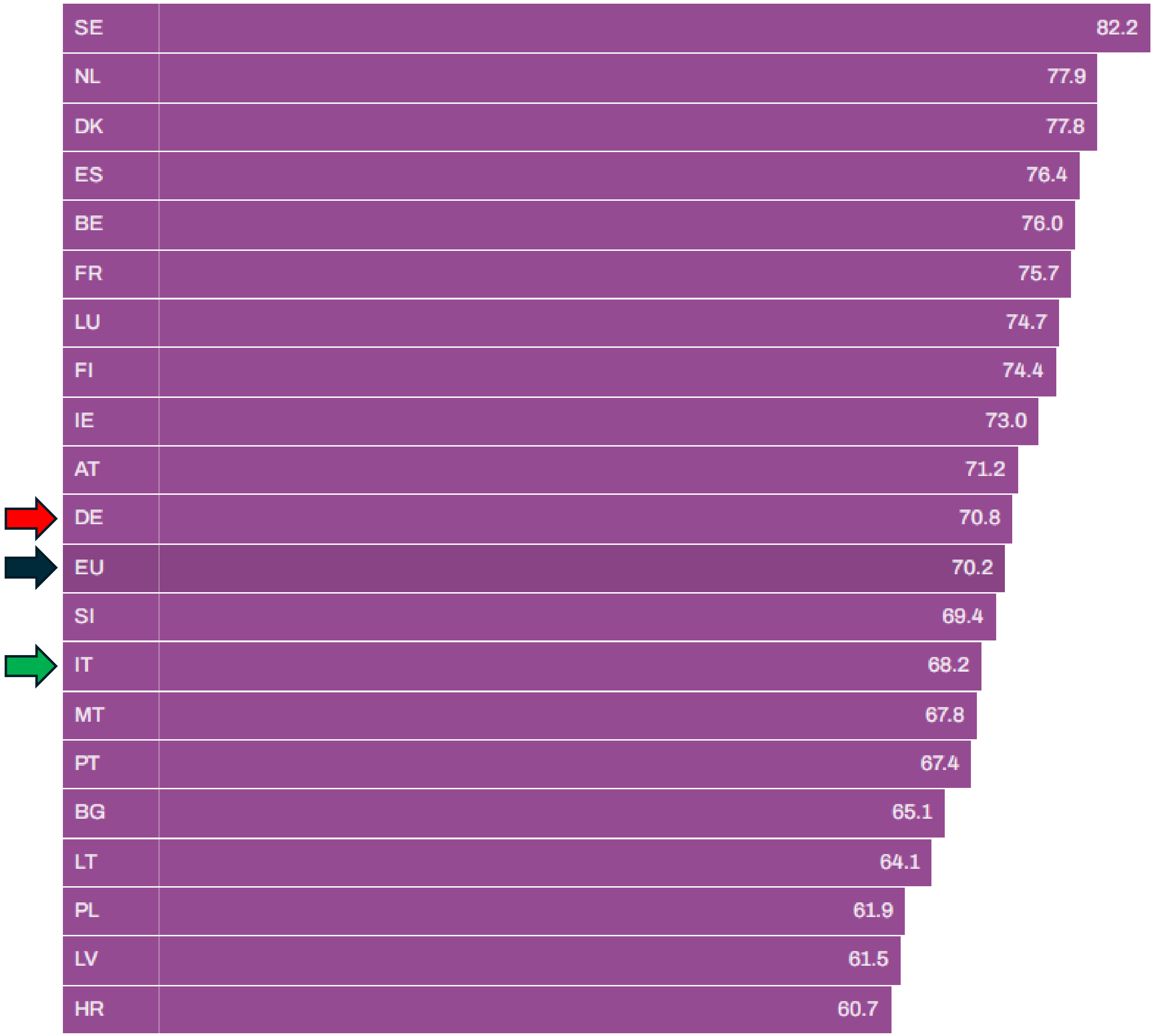
- **Too many companies** are **excluded** from the legal framework
- **In companies without constraints, the increase of female presence in boards is scarce**
- **Lack of women in** the most **relevant positions** of the boards
- **Publicly controlled companies** are **a step behind** listed companies on gender equality

The Gender Equality Index

- The **European Institute for Gender Equality** (EIGE) has developed the **Gender Equality Index,** which measures the **progress of gender equality in the EU**. It gives **more visibility to the single areas that need improvement** and ultimately supports policy makers to design more effective gender equality measures

- 6 core domains: **work, money, knowledge, time, power and health**

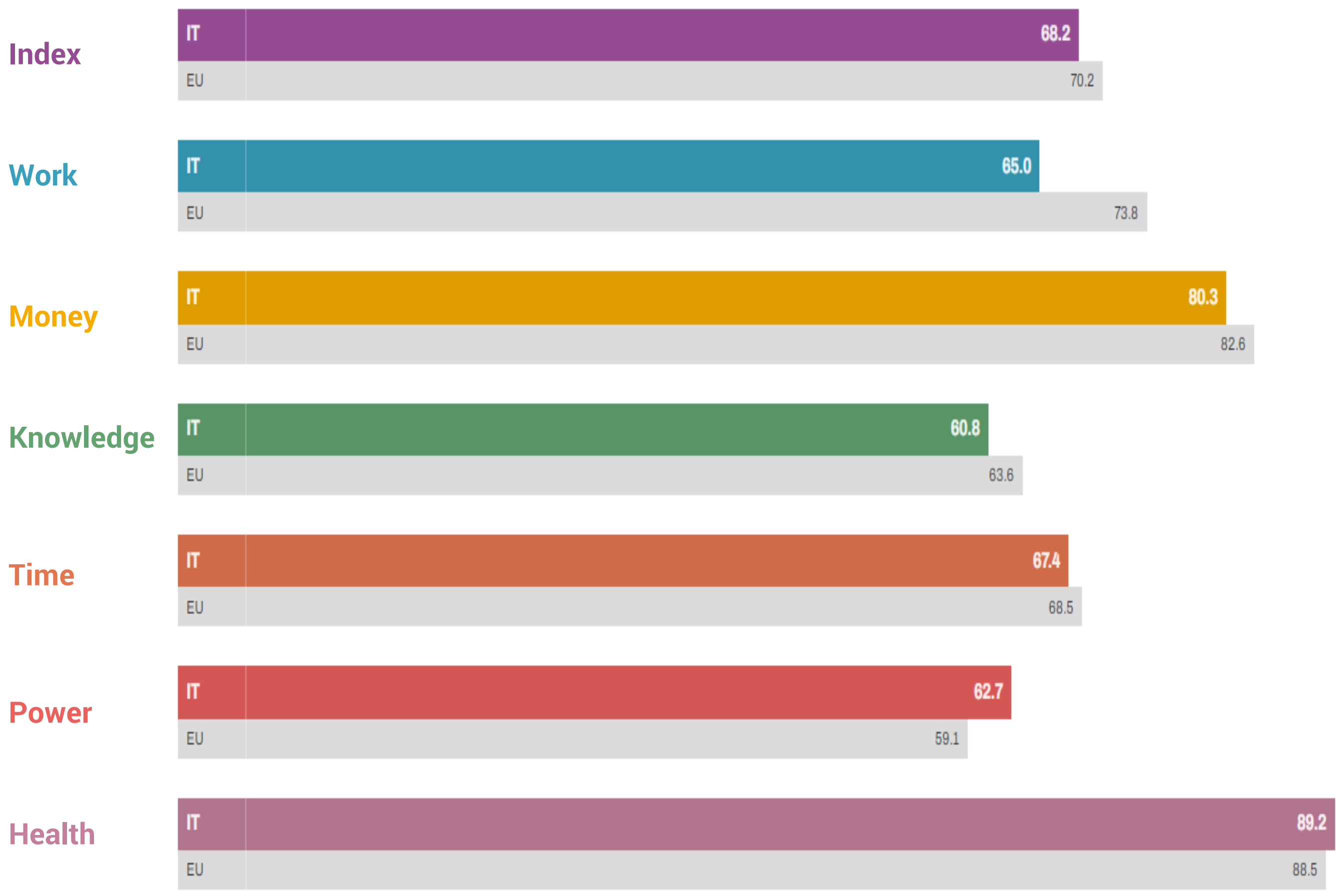
- The **EU average is 70.2, Italy's is 68.2 and Germany's 70.8**



Source: Gender Equality Index, European Institute for Gender Equality (EIGE), 2023

Italy in the Gender Equality Index

- Italy is one of those countries that show a **great difference between the results in female presence in boards of listed companies and overall results given by the Gender Equality Index**
- In particular, **Italy is under the EU average in 5 out of 7 domains** considered by the Index
- The data demonstrates that despite having female quota policies in companies' boards, **the country is still deficient with respect to gender equality in other areas**



Source: Gender Equality Index, European Institute for Gender Equality (EIGE), 2022

Gender Quota Regulation in EU Countries

Due to the lack of agreement between countries, **EU Institutions have for a long time postponed the intervention of a EU binding regulation on gender quota**. EU countries have therefore followed different paths:

- **Eight EU countries have adopted national mandatory gender quota** for listed companies (Belgium, France, Italy, Germany, Austria, Portugal, Greece, the Netherlands)
- **Ten have taken a softer approach**, using non-binding measures (Denmark, Estonia, Ireland, Spain, Luxembourg, Poland, Romania, Slovenia, Finland, Sweden)
- **Nine countries have not taken substantial action** (Bulgaria, Czech Republic, Croatia, Cyprus, Latvia, Lithuania, Hungary, Malta, Slovakia)

"Women on Boards": a EU Gender Quota Regulation

- Finally, in November **2022**, the European Union adopted a **Directive on improving the gender balance among directors of listed companies**, so-called **"Women on Boards Directive"**

- The Directive aims for gender balance among listed companies directors. However, **small and medium-sized companies** are excluded from the sphere of application of the Directive. Member States must transpose the Directive by 28 December 2024

"Women on Boards": the discipline

- By mid-2026 every stock-listed company within the European Union shall guarantee that:
  - **members of the underrepresented gender hold at least 40% of non-executive director positions; or**
  - **members of the underrepresented gender hold at least 33% of all (executive and non-executive) director positions**
- **Companies that do not meet the target** shall set quantitative objectives and **adjust the process** for selecting candidates. Moreover, **when 2 candidates are equally qualified, the underrepresented sex must be chosen**. The company must motivate its decision upon request
- Each State will have to foresee **penalties that are effective, proportionate, and dissuasive**, such as fines or annulment of nominations

Corporate Sustainability

EU measures

Directives **NFRD** and **CSRD** on non-financial disclosure

Directive on Corporate Sustainability Due Diligence

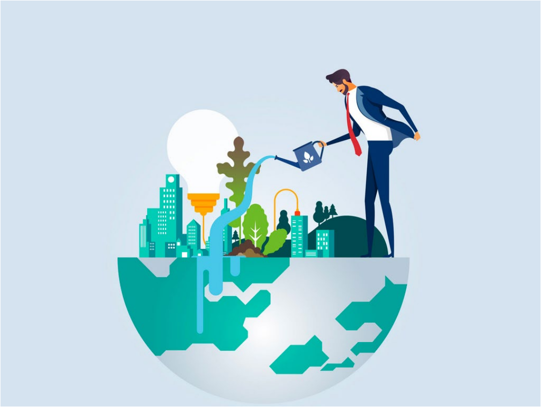
Non-Financial Reporting: NFRD

- ✓ **The NFRD** (**Non-Financial Reporting Directive** 2014/95/EU) **introduced a requirement for certain large companies to include a non-financial statement in their annual report**

- ✓ Specifically, **large companies that constitute public interest entities and have an average number of employees employed during the fiscal year of 500 are regulated by the directive (11,700 companies involved)**

<u>Information to be disclosed under the NFRD</u>

- **Environmental matters**
- **Social** matters and treatment of employees
- Respect for **human rights**
- Anti-corruption and bribery
- **Diversity on company boards** (age, gender, educational and professional background)



The NFRD has been often **perceived as largely insufficient and unreliable**

Non-Financial Reporting: the New CSRD

- In order **to revise the NFRD**, on 22 June 2022 the Council and the Parliament reached a political agreement for the **Corporate Sustainability Reporting Directive (CSRD)**, which **entered into force on 5 January 2023**
- The CSRD introduces **more detailed reporting requirements** on companies' impact on the environment, human rights and social standards. In particular, the new regulation:
  - ✓ **Extends the scope to all large companies. Non-EU companies with substantial activity in the EU (with a turnover over €150 million euro in the EU) will also have to comply. Listed SMEs will also be covered (50,000 companies involved)**
  - ✓ **Requires the audit** (assurance) **of reported information**

Next Steps for the CSRD

- On 31 July 2023, the Commission adopted **the European Sustainability Reporting Standards (ESRS) for use by all companies subject to the CSRD**
- The CSRD's rules will start applying between 2024 and 2028:

> - From 1 January **2024, for large public-interest companies (with over 500 employees) already subject to the NFRD**, with reports due in 2025
> - From 1 January **2025, for large companies that are not presently subject to the NFRD (with more than 250 employees and/or €40 million in turnover and/or €20 million in total assets)**, with reports due in 2026
> - From 1 January **2026,** for **listed SMEs and other undertakings**, with reports due in 2027. **SMEs can opt-out until 2028**
> - From 1 January 2028, **for Companies outside the EU that generate sales of more than €150 million in the EU and have at least one subsidiary or branch within the EU, with reports due in 2029**

Corporate Sustainability Due Diligence (CSDDD)

- In 2017, following multiple legislative proposals and lengthy negotiations, **France became the first EU Member** State **to adopt** a cross-sectoral **law on Corporate Sustainability Due Diligence** ("*Loi de Vigilance*")
- On 10 March 2021, **the European Parliament adopted a resolution requesting that the European Commission submit a legislative proposal on mandatory supply chain due diligence,** to be based upon a proposed directive annexed to the Parliament resolution
- The resolution proposes the introduction of a **mandatory corporate due diligence** obligation to identify, prevent, mitigate and account **for human rights violations and negative environmental impacts in business' supply chains**
- In parallel, in 2021, the **German parliament passed the "Law on corporate due diligence in supply chains"** ("*Lieferkettensorgfaltspflichtengesetz*"), in force as of 1 January 2023. It requires companies to establish complaint mechanisms and report on their due diligence activities in order to prevent human rights violations in their supply chains

Next Steps for the Proposal

- After the Parliament's resolution of March 2021, **the Commission has proposed the final text for a directive on 24 February 2022**
- **On 1 December 2022, the Council adopted its position**
- **On 1 June 2023, the Parliament** adopted amendments that **reinforce the proposal**
- **Interinstitutional negotiations** between the Parliament, the Council and the Commission **are ongoing**
- Once adopted by the Parliament and the Council, **Member States will have two years to transpose the directive into national law**

The Commission's Proposal for a Directive

Obligations

- **Corporate due diligence duty:** identifying, bringing to an end, preventing, mitigating and accounting for **negative human rights and environmental impacts in the company's own operations**, their subsidiaries and their value chains. In addition, certain large companies need to have **a plan** to ensure that their **business strategy is compatible with limiting global warming to 1.5 °C in line with the Paris Agreement**

- **Duties for the directors of the EU companies covered:** setting up and **overseeing the implementation of the due diligence processes** and integrating due diligence into the corporate strategy. In addition, when fulfilling their duty to act in the best interest of the company, directors must take into account the human rights, climate change and environmental consequences of their decisions

- **Grievance mechanism for stakeholders**: duty to provide a complaint procedure

Companies covered

- **Large EU limited liability companies:**
  - ✓ Group 1 (+/- 9,400 companies): **500+ employees** and net **EUR 150 million+ turnover** worldwide
  - ✓ Group 2 (+/- 3,400 companies in high-impact sectors): **250+ employees** and net **EUR 40+ million turnover** worldwide and operating in defined high impact sectors, e.g. textiles, agriculture, extraction of minerals

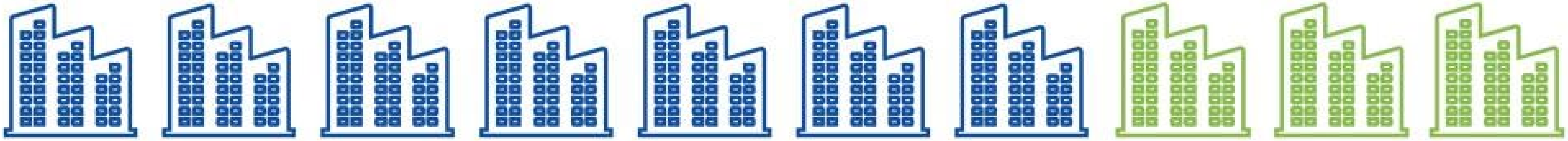
- **Non–EU companies:**
  - ✓ Third country companies active in the EU with **turnover threshold aligned with Group 1 and 2**, generated in the EU
  - ✓ +/- 2,600 companies in Group 1 and +/- 1,400 in Group 2

- **SMEs:**
  - ✓ Micro companies and SMEs **are not concerned by the proposed rules**. However, the proposal provides supporting measures for SMEs, which could be indirectly affected

Enforcing the new rules

The rules on corporate sustainability due diligence will be enforced through:

- **Administrative supervision**: Member States will designate **an authority to supervise and impose effective, proportionate and dissuasive sanctions**, including fines and compliance orders. Sanctions include measures such as “naming and shaming”, taking a company’s goods off the market, or **fines of at least 5% of the net worldwide turnover**. Non-EU companies that fail to comply with the rules will be banned from public procurement in the EU
- **Civil liability**: Member States will ensure that **victims get compensation** for damages resulting from the failure to comply with the obligations of the new proposals
- **The rules of directors' duties** are enforced through existing Member States' laws. The directive does not include an additional enforcement regime in case directors do not comply with their obligations under this directive



Issues debated amongst the EU institutions

Due to several differences between the three proposals for the CSDDD, subjects that still need negotiations include:

- The **turnover** and **employee thresholds** for companies in scope
- The **applicability** of the Directive to **financial service companies**
- The scope of **directors' duties** regarding due diligence
- The scope of due diligence requirements across the **"supply chain," the "chain of activities," or the "value chain"**
- The **type of adverse human rights and environmental impacts** that should be identified in due diligence
- The **civil liability** regime

The "Sustainable Success" of the Corporate Governance Code

- **Principle I of the Corporate Governance Code**: recommendation to the board to guide the company "**by pursuing its sustainable success**", understood as "the objective that guides the board's action and is embodied in the creation of long-term value for the benefit of shareholders, taking into account the interests of other stakeholders relevant to the company"

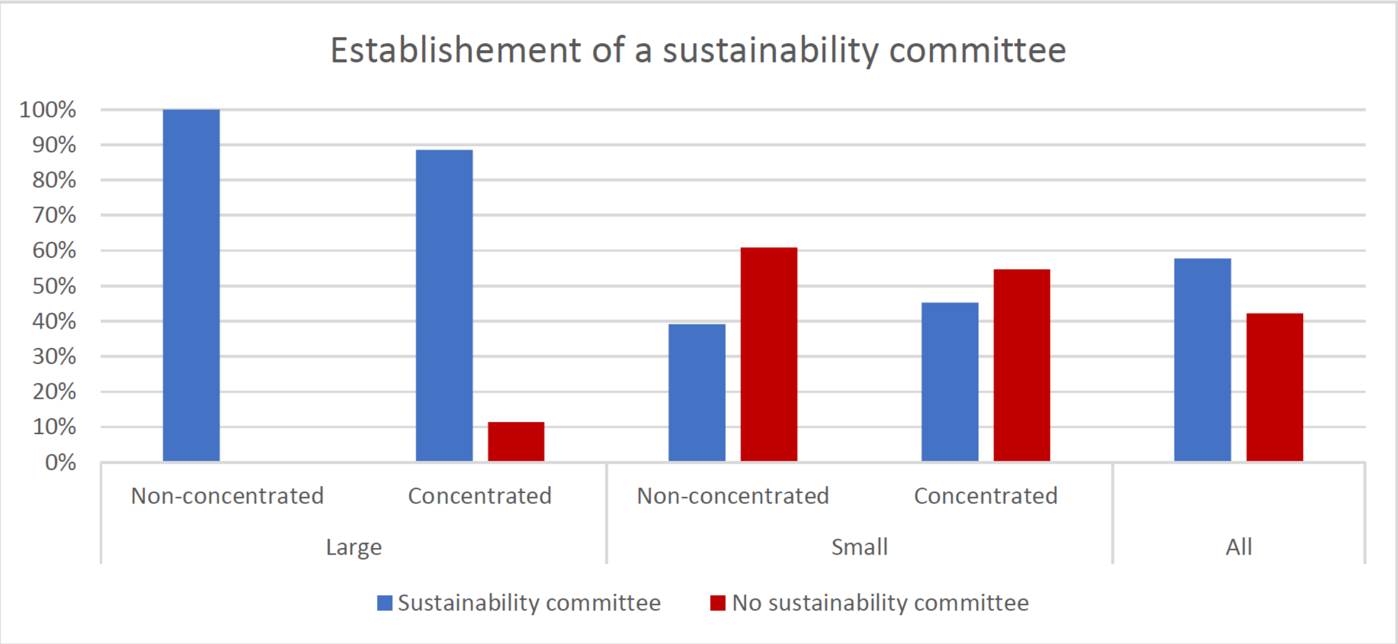
2022 Report of the Italian Committee on Corporate Governance

- **84%** of the companies **declare the pursuit of sustainable success (42% in 2021)**
- **64%** of the companies **provide detailed information** regarding the tools through which this objective is implemented
- **60%** of the companies state that the board **review and approval of the business plan is based on a materiality analysis of factors that are relevant for the long-term value generation**

First results of the “Sustainable Success”

- The Report on Corporate Governance in Italy underlines that **the degree of implementation of the sustainable success according to the Code’s recommendations highly differs from large and small companies** (69% and 40% respectively)
- **Larger companies have a longer experience in the ESG** due to several factors (early provision of disclosure standards by legislators and higher exposure to stakeholders’ claims), while **mid and small size companies are at the beginning of this process** (new sustainability reporting obligation has still to apply, reporting standards are still to be developed, stakeholder pressure is still low) **but are on the right path**
- Sustainability is assuming a growing **relevance on executives’ remuneration policies**, including **targets linked to long-term strategy and/or more specifically “ESG targets”**.

- **The Corporate Governance Code** does not recommend companies to establish a specific **"sustainability committee"**, envisaging only the possible support of a board committee or a committee composed of both managers and directors in the identification of relevant sustainability matters



- **58% of all companies entrusted a committee with the task of supporting the board on sustainability matters**. The establishment of sustainability committee **is increased if compared to 2021 (41%)** and is **more common in larger (93%) than in smaller (25%) companies**

New Trends: “Say on Climate”

- The term refers to the shareholders meeting’s possibility to have an **advisory vote on the sustainability policy** promoted by the Managing Board
- In 2022, **48** managing boards of listed companies presented to the shareholders’ meeting **proposals and relations on climate** (24 in 2021), receiving an average **89% consensus**
- **Europe has accounted for 80% of say on climate votes**, with France, the UK and Spain heading the country ranking
- Several **requests of institutionalization of the “say on climate”** were presented by shareholders in the last years, but they **rarely received approval** by the managing boards

Source: BNP Paribas Asset Management, August 2023

The First Italian Case of "Say on Climate"

- On 29 April 2022, **the Managing Board of Atlantia S.p.A. promoted a non-binding advisory vote of the shareholders meeting on the Climate Action Plan** already approved by the Board, receiving **98% of consensus**

- According to the Managing Board "though [...] the climate strategy is the sole responsibility of the Managing Board, **the importance and topicality of the subject have led the Managing Board to submit the Climate Action Plan to the shareholders' meeting**"*

    - **The 2021 Report of the Italian Committee on Corporate Governance** shares the opinion that a policy of dialogue with the generality of shareholders and with other relevant stakeholders can be a useful tool for developing sensitivity to their interests, in order to take them into account when defining strategic environmental and social objectives

*__Source:__ *Verbale dell'assemblea* del 29 Aprile 2022, Rivista delle Società, n.2-3/2022

New Trends: Sustainable IPOs

- There is no mandatory legal regulation on ESG disclosure duties in IPOs: Regulation (EU) 2019/980 recognises the inclusion of ESG information in the IPOs' prospectus, but only on a voluntary base

- In light of the primary focus of investors on sustainability issues, it seems in any case imperative that the ESG perspective is also taken into account at the IPO stage: ESG strategy, due diligence, governance and disclosure are all tools that go in that direction

New Trends: Sustainable IPOs

- ✓ Deliveroo Holdings plc at London Stock Exchange in 2021: the share price closed the day at -26%. Important investment funds have refrained from subscribing Deliveroo's shares, attributing their opposition to **customers' expectations of their commitment to support investments in line with ESG issues**. The **economic repercussions of a poor ESG strategy** were also considered: in particular, the treatment of the so-called riders had already generated numerous legal disputes

- ✓ Reti S.p.A. at AIM Italia Stock Exchange in 2020: the IPO **prospectus illustrated the ESG strategies already implemented and the intention to become Italy's first listed Benefit Corporation**

- ✓ Eni gas e Luce was reorganized and rebranded in 2021/2022, to focus on renewables and distribution of gas and electricity and electricity recharges with a focus on sustainability targets. Plenitude set up as a benefit corporation. The initial plan was for Plenitude to go public but for the moment, the IPO has been postponed to 2023

New Trends: Rating ESG

- Agencies that provide ESG information and sustainability performance evaluations were born in response to the **investors' demand of social and environmental information before investing in companies**
- Some ratings exclusively rely on extra-financial data, while others combine **financial and extra-financial data** in order to assess the long-term sustainability value of a company
- Scholars and the scientific community often also rely on ESG rating, thus confirming that **ESG rating is influencing a growing number of players**
- Nonetheless, some **doubts remain as to the transparency and objectivity** of the methodologies used by the agencies

And New Risks: Greenwashing

- Greenwashing constitutes the **act of providing the public or investors with misleading or outright false information about the environmental impact of a company's products and operations**
- Consumers are induced to prefer a «greener» product since:
  - ✓ There is growing awareness on the environmental impacts of our choices
  - ✓ There is the general belief that a «green» product is a better product
- When the claimed sustainability (or green claim) is not actually reflected in the characteristics of the goods or services offered, the company may be exposed to legal, economical and reputational consequences. In particular, Greenwashing disputes are on the rise

And New Risks: EU's Response to Greenwashing

- On 22 March 2023, the European Commission has published a **proposal for a Directive on green claims**. Amongst the others, the proposal aims to:
  - ✓ **Ban the use of general environmental claims** like "environmentally friendly", "natural", "biodegradable", "climate neutral" or "eco**" if these do not come with detailed evidence**
  - ✓ Ban environmental claims that are based solely on carbon offsetting schemes
  - ✓ Allow that only **sustainability labels based on official certification schemes** or established by public authorities can be used
  - ✓ **Fight against early obsolescence** of products

- On 11 May 2023, the Parliament approved the proposal and the negotiations with the Council have started

And New Risks: Climate Change Litigation

- Climate change litigation represents the legal practice to **sue governments and companies in order to foster climate change mitigation efforts**
- Claims are usually based on constitutional law, administrative law, private law or human rights
- Children, local communities and NGOs, among others, are taking a prominent role in bringing these cases

And New Risks: Climate Change Litigation

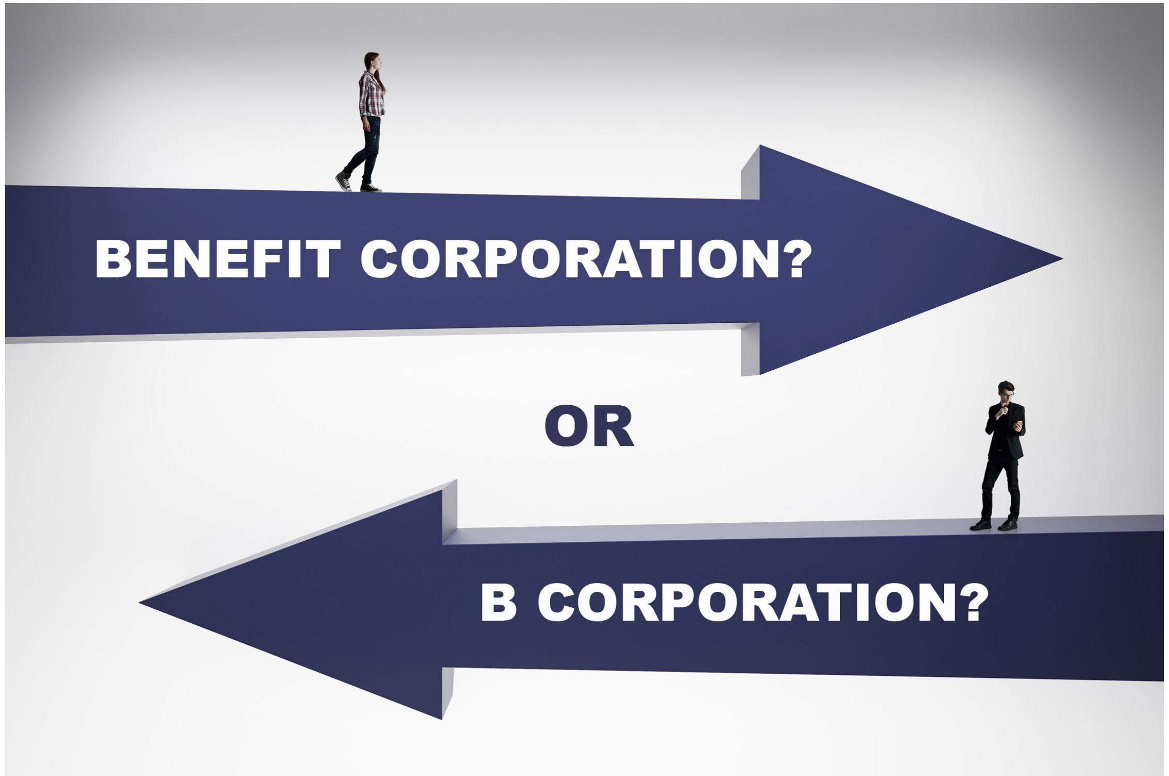
- **As of 31 May 2023, 2,341 cases** have been captured in the Sabin Center's climate change litigation databases. Of these, **190 were filed in the previous 12 months**. Around two-thirds (1,557) have been filed since 2015, the year of the Paris Agreement
- Claims usually require governments and corporations to **align their policies in order to meet the international recognized climate-change goals** (*i.e.* limit the temperature increase to 1.5°C above pre-industrial levels) or to **bear the economic costs of the effects of climate change** by paying damages to those affected
- **Claims against corporations present several legal issues**. Amongst the others: <u>international obligations non-binding for corporations, justiciability</u>, problematic nature of climate change (extra temporal, multi-factorial and interspatial phenomenon), <u>**causation**</u>

The Benefit Corporations

- Italy was the fist European and second global country that has specifically regulated "**benefit corporations**"
- In particular, under Italian law benefit corporations (***società benefit***) are regulated by **Article 1, paragraphs 376-384** of **law no. 208** of **28 December 2015** (the "*Benefit Companies Law*")

Benefit corporations/companies ≠ B-Corps

B-Corps are entities that – regardless of their nationality and corporate category under Italian law – have obtained **a specific certification** by the non-profit organization named B-Lab and must meet performance targets determined by B-Lab and measured through the international standard B Impact Assessment



The **main differences** between **Benefit Companies** and **B-Corps**

Requirement	B-Corps	Benefit Companies
Accountability	Directors must take into account the effects of their decisions on both shareholders and stakeholders.	Equal to certified B-Corps.
Transparency	The company must make public a report assessing its overall impact, drawn up according to an independent standard.	Equal to certified B-Corps.
Performance	Performance is verified and certified by B Lab through the BIA standard. Performance >= 80 points out of 200 must be demonstrated.	Self-declared.
Continuing verifications	Must renew certification every two years.	The only verification over time relates to transparency requirements.
Support and use	Access to a range of services and support from B Lab. Certified B Corporations can use the "Certified B-Corp" brand and logo on their products and in all their communications.	No formal support from B Lab. The B-Corp brand cannot be used.
Recipients	Any private enterprise anywhere in the world.	Only in the US states that have passed the Benefit Corporation Act and in other countries (such as Italy) where the b-corporation legal form was introduced.
Charges	The annual fee for B-Corp certification varies between Euro 500 and 50,000, depending on the company's annual turnover.	In Italy expenses are those linked to changes in company by-laws and company organizational chart.

The legal requirements for a conversion into a Benefit Company

1. The **existence of a company**, as defined under the Civil Code (including **joint stock companies**)

2. That the company carries out a **for-profit business**. However, **besides the profit purpose**, the company must also pursue **one or more purposes of common benefit**. Purposes of common benefit are defined by the Benefit Companies Law as the **pursuit of one or more positive effects**, **or the reduction of negative effects** provoked by the business of the company, **in favor of one or more categories of beneficiaries** (people, communities, territories and environment, as well as cultural and social goods and activities)

3. The Benefit Companies must **operate** in a **responsible, sustainable and transparent way**

4. Already-existing companies that want to become Benefit Companies must **amend their by-laws.** The revised by-laws must be filed and published with the Companies Register of the Chamber of Commerce; and

5. The Benefit Company shall identify **one or more responsible persons** to whom it entrusts functions and tasks aimed at pursuing the purposes of common benefit

The choice to become a Benefit Company is completely **voluntary** and has **no impact** on existing companies in terms of **general liability principles** and/or **business operations**

Shareholders of Benefit Companies enjoy the **same protections** and **rights** as in other corporations, but they **shall hold the company accountable for its stated benefit mission**

Advantages to both shareholders and corporate stakeholders:

i. The obligation of directors to **pursue not only profit purposes**, but also **common benefit goals** by balancing financial and non-financial interests

ii. The **ability to attract impact investment capital** (i.e. from those investments made with the intention to generate positive, measurable social and environmental impact alongside a financial return)

iii. The ability to gain a **reputational advantage** as a company that operates responsibly; and

iv. The possibility to **access to a network of socially responsible companies**

THE BENEFIT COMPANY REGIME

- As a consequence of the conversion into a Benefit Company, the company shall have an **additional annual reporting obligation**. In particular, when making decisions, the directors and officers of a Benefit Company are obliged to **consider the impact** not only on their shareholders, but also **on non-financial interests**, such as the community, the local and global environment, and the company's employees, suppliers and customers

- Moreover, a company's **failure to pursue the stated public benefit mission** could expose directors, officers, and the company itself to **claims for monetary damages** (i.e., for breach of fiduciary duties)

RIGHT OF WITHDRAWAL IN CASE OF CONVERSION INTO A BENEFIT COMPANY

- **Issue:** whether, when an existing company decides to **convert into a Benefit Company**, the amendment of the by-laws required for this purpose **gives rise to a right of withdrawal** for those shareholders who did not take part in the formation of the relevant resolution
- In fact, Article 2437 of the Italian Civil Code provides for the modification of the company's corporate purpose to be a possible ground for withdrawal, when it permits a significant change in the company's activities

- **Solution:** according to the majority of scholars, this provision must not be construed in a too formalistic manner. **The right of withdrawal of a shareholder may arise only when the change determines a significant change in the company's business that is reflected in the risk conditions of the shareholders' investment**.
- It follows that an assessment of the need for protection of dissenting shareholders shall be made on a **case-by-case basis**

CONTROL OVER BENEFIT COMPANIES

- A specific controlling function is entrusted to the Italian Competition and Market Authority ("AGCM"), which is also entitled to impose **fines on Benefit Companies in case of breach of their obligation to pursue common benefit purposes**, on the basis of the provisions of legislative decree no. 145 of 2 August 2007 on misleading advertising and of the provisions of the Italian Consumer Code. In particular, the AGCM may:

  ✓ Prohibit the company from carrying out further incorrect advertising activity and impose a **fine** ranging from Euro 5,000 to Euro 500,000

  ✓ **Prohibit the use of the acronyms "SB" or "Società Benefit"** in the correspondence and in the company name

  ✓ In case of any failure by the company to comply with the AGCM's requirements, impose further fines and, in cases of repeated non-compliance, **suspend of the company's activity** for a maximum period of 30 days

The purpose of this provisions is to **ensure the correctness and truthfulness of communication to the market** that a company actually pursues interests other than only those of its shareholders and to prevent companies that do not actually pursue those objectives from benefiting from a competitive advantage over other companies and from deliberately misleading consumers

THE BENEFIT CORPORATIONS IN ITALY

- As of 31 December 2022, **in Italy** there were **2626 Benefit Companies.** In 2021 there were 926 and in 2020 only 511

- Professional, Scientific and Technical Activities (28,81%,) Information and communication services (19,08%), manufacturing (13,02%) are the sectors that showed the major increase

Source: InfoCamere and Assonobenefit

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Vielen Dank!

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