Companies limited by shares

Italian and European Company Law – A.A. 2024/2025

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Administrative body (traditional system)

Structure

→ sole director
→ board of directors (this board may be structured by attributing specific duties to certain members: executive committee and managing directors)

→ listed companies: it's mandatory to have a management board composed by several memebers (to ensure the presence of at least one member chosen from the minority list and at least one independent director, art. 147-*ter*, t.u.f.)

Directors' duties

In broad terms, directors are exclusively responsible for the management of the company, they must carry out all the operations necessary in order to achieve the company's object and they have to act in the interest of the company.
Also, directors are competent to approve all the resolutions that do not fall under the responsibility of the shareholders' meeting.

Then, the law specifies many powers and duties of a precise nature of directors:

- they have the general power to represent the company;
- they have the power to call the shareholders' meeting, drawn up the relative agenda and they have the duty to implement the shareholders' meeting resolutions;
- they are responsible for the company's bookkeeping and accounting records;
- they have the duty to adopt an adequate organizational, administrative and accounting company's structure, also to prevent a situation of insolvency or to detect it timely;
- they have the duty to adopt organization and management models suitable for preventing crimes from which administrative liability of the company may follow (Italian Legislative Decree No. 231/2001);
- they have the duty to prevent any actions that could undermine the company's interest and to adopt any actions to avoid the relative consequences.

All of these responsibilities are mandatory, and therefore cannot be removed or avoided, neither by the bylaws nor by the shareholders' meeting.
They are an expression of the principle of separation of powers among different bodies of the companies limited by shares and serve as a counterbalance to the non-liability of shareholders.
Of these duties the directors are liable civilly and, in some cases, also criminally.

Relationship between shareholders' meeting and directors

→ art. 2364, n. 5 and art. 2380-*bis*, par. 1, c.c.
→ the “management” competence of the shareholders' meeting is limited, the management competence of the directors are general
→ once appointed, have broad decision-making powers, powers that do not derive from appointment by the shareholders' meeting (but by the law) and that they can exercise independently
→ they are the only ones responsible for these powers/duties, not the shareholders
→ authorizations given by the shareholders' meeting to carry out certain operations

Appointment of directors

→ first directors: instrument of incorporation
→ then, ordinary shareholders' meeting
→ the bylaws may provide special rules for the appointment
→ in listed companies, directors are appointed through the slate voting mechanism

→ holders of participating equity instruments (indipendent director)
→ State or public entities (in the event that these entities hold shares in the company)

→ Number of directors is enstablished by the bylaws (also stating the minimum and the maximum number)

→ Requirements: directors can be shareholders or not. The Civil Code does not provide for specific requirements, but the bylaws could provide that directors must meet the requirements of good standing, professionalism, and independence.
For some kind of companies, special laws require them.

A. Causes of inelegibility (2382 c.c.)

→ legal incapacity
→ persons declared bankrupt
→ persons sentenced to a punishment involving the disqualification from public office or the inability to hold management office.
In those cases, the person cannot be appointed as director and if the cause arises after the appointment the director falls from office.

B. Causes of incompatibility provided for by special laws
In the case of appointment, the director must choose...

Duration of the office

→ three financial years (they cease at the date of the shareholders' meeting called to approve the financial statements of the last year of the term of their office)
→ they may be reappointed (unless the instrument of incorporation provides otherwise)

Other reasons for termination of office

→ shareholders’ meeting resolution to remove a director (the ordinary shareholders' meeting may at any time remove directors, but if there is no just cause the director is entitled to compensation for damages)
→ resignation from office
→ the arising of a cause of ineligibility
→ the death

In the event that the director terminates his or her office before the natural term, the law states that the termination of the office will take effect when the director will be replaced and the new director has accepted the appointment (director will remain in office until this time, *prorogatio*). In the case of resignation, if the majority of the other directors remain in office, resignation will take effect immediately.

In certain cases, the cause for termination of office is not or cannot be delayed (*prorogatio* cannot work), so the law establishes replacement mechanisms (art. 2386 c.c.).

Remuneration

→ 2389 c.c.
→ Is established by the bylaws or otherwise by the shareholders' meeting
→ Additional remuneration if directors have specific duties provided by the bylaws (cap to the total remuneration; listed companies: annual remuneration report)

Prohibitions for directors

→ they can't become shareholders/partners with unlimited liability in competitor companies
→ they can't carry out a competing business activity
→ they can't be directors or general managers in competitor companies (but the shareholders' meeting can give an authorisation to do so, also *ex ante* in the instrument of incorporation)

→ listed companies: prohibition of using insider information (inder trading offense)

→ effects of the breach: removal; liability.

How directors work

→ sole director: performs all the duties and the powers of the administrative body

Board of directors - functioning

→ the chairman (appointment and responsibilities, art. 2381, par. 1, c.c.)
→ resolutions (passed jointly, during apposite meetings with a majority vote)
→ validity of board of directors' resolutions (quorum and invalidity, art. 2388 c.c.)

Bodies with delegated functions (art. 2381 c.c.)

→ bylaws clause or shareholders' meeting resolution
→ Executive committee (collective body)
→ Managing director (one-person body; could be one or more, if there are more managing directors they may act separately or jointly)

→ appointment by the board of directors
→ definition of delegated powers (generally deal with operational management, day-by-day)
→ responsibilities that cannot be delegated
→ relation between delegated bodies and other members of the board of directors
→ different responsibilities and liabilities divided between bodies with delegated functions and the board of directors

Board of director and delegated bodies
The different competencies (art. 2381 c.c.)

Board of directors

- Define the content and the limits of the delegated powers
- Can issue orders to the delegated bodies and take over the delegated powers
- It evaluates the adequacy of the company's organisational, administrative and accountin structure
- Review the company's strategic , business and financial plans
- Based on the reports from the delegated bodies, it evaluates the general business trend.
- Directors must act in an informed way.
- Each director may ask the delegated bodies to provide the board with information on the management of the company

Executive committee and/or managing director

- Drawn up the company's organisational, administrative and accountin structure and make sure that are adequate for the nature and size of the company
- Report to the board of directors and the board of statutory auditors on the general business trend and businessoutlook, as well on the most significant transactions carried out by the company, at the least every six months (or the lower time provided by the bylaws)
- Directors must act in an informed way.

Directors' interests (2391 c.c.)

A director has an interest in a given operation (on his/her own behalf or on behalf of third parties) not necessary in conflict with the company's interest.

Procedure:

- the director must inform other directors and the board of statutory auditors
- if the director is a managing director, refrain from deciding on the operation by appointing the collective body in charge instead
- in both case, suitably motivate the reasons why the transaction benefits the company
- in the case of sole director, he/she must inform the board of statutory auditors and also the shareholders' meeting as soon as possible

The resolution taken in these cases, wich can harm the company, could be contested:

→ both if the director in conflict of interest voted and his vote was determinant to approve the resolution,
→ and if the obligations in terms of transparency, abstention and justification were not fulfilled.

→ Contracts concluded by the sole director with a conflict of interest are voidable at the request of the company under the general rules of representation (Art. 1394 c.c.)

→ Legitimation to contest the resolution and time limit: 90 days from the date of the resolution, by the board of statutory auditors, the absent and dissenting directors, and also by the directors who voted in favor if the director with a conflict of interest failed to comply with the disclosure requirements.

→ Company may act against the director to claim compensation for the damages arising from his/her actions or omission.

Powers of representation (art. 2384 c.c.)

→ The power of representation concerns the external activity of the company: it is the power to act towards third parties in the name of the company. It is different from the power to manage the company, which concerns the internal activity, that is, the decision-making phase of the company's operations.

→ Board of directors: the bylaws or the appointment resolution must named the directors with the powers of representation.
→ If there are several directors with the powers of representation, it is necessary to enstablish if they can act separately or jointly.

→ The power of representation of the directors is general: this means that it is not limited to matters within the corporate object. If directors perform acts outside the corporate object (*ultra vires acts*), they validly bind the company to third parties (they will be exposed to removal for just cause and, if a damage to the company occurs, to the company's action for liability).

Limitations on the power of representation

→ Maximum protection of third parties' reliance
→ Lack of power of representation due to an invalidity of the appointment resolution is not enforceable against third parties, except upon the proof that the third parties had knowledge of it
→ Limitations on the power of representation provided with the bylaws or the resolution of appointment are not enforceable against third parties, except upon the proof that the third parties acted intentionally to the detriment of the company
→ Legal limits on the power of representation can be always enforced against third parties

Directors' liability

→ liability towards the company
→ liability towards the company's creditors
→ liability towards individual shareholders and third parties

→ Several directors: joint and several liability (art. 2392, par. 1, c.c.)

→ Directors appointed to carry out specific duties (art. 2381, par. 3, art. 2392, par. 2, c.c.)

→ Fault-based liability (art. 2392, par. 3, c.c.)

Limit → directors are not liable for negative economic performance resulting from the company's activities…it applies the so-called *business judgment rule* (it's a rule drafted by the U.S. courts; under this standard, a court will uphold the decisions of a director as long as they are made (1) in good faith, (2) with the care that a reasonably prudent person would use, and (3) with the reasonable belief that the director is acting in the best interests of the corporation).

Liability towards the company (Art. 2392, 2393, 2393-*bis* c.c.)

Directors can be held liable for damages caused to the company if they don’t fulfil the obligations imposed to them by the law or by the bylaws, with a professional diligence.

Who has the legal entitlement to promote the liability action against the directors?

→ ordinary shareholders' meeting (resolution)
[→ directors' removal is not always automatic]

→ board of statutory auditors (resolution passed with the majority vote of two thirds of its members)
→ insolvency procedure: insolvency practitioner

→ liability action taken by the minority (art. 2393-*bis* c.c., 1/5 of the share capital, 1/40 of the share capital for open companies limited by shares)

→ Renunciation to the liability action or settlement (resolution of the shareholders' meeting, but there must be no vote against by the 20% of the share capital or the 5% in open companies limited by shares)

→ Prescription (timelimit): 5 years after the termination of office by directors

Liability action taken by the company's creditors (art. 2394 c.c.)

Directors can be held liable to the company's creditors if they fail to fulfil their obligations to keep the company's assets intact. So, creditors can take a liability action only if the company's assets are insufficient to pay them.

→ Legitimation to take the liability action ex art. 2394 c.c.

→ Prescription (timelimit): 5 years from the day on which the insufficiency of the company's assets becomes apparent or from the day on which creditors could reasonably have had knowledge of it

→ Interference between liability action taken oh behalf of the company and this liability action

Liability action taken by individual shareholders and third parties (art. 2395 c.c.)

Directors may be held liable to individual shareholders and third parties for damages caused to them directly (damage should not only reflect the damage caused to the company), as a result of intentional or negligent actions.

→ Requirement:

1) the directors must have acted unlawfully while performing his/her duties;
2) there must be a direct damage to the individual shareholder's or third party's assets.

→ Prescription (timelimit): 5 years from the time when the act that prejudiced the shareholder or third party was performed

The last liability is very different from the first and the second, because it is not a contractual liability (i.e., it does not arise from the breach of pre-existing obligations). In this case, the burden of proof is much heavier and more difficult.