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OF YOUNG LAWYERS

Who is not afraid of being a company director ?

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The position of a director/managing director of a company has changed substantially during the past couple of years. Legislative changes, close monitoring by shareholders and the international economic and financial crisis have contributed to an increased attention towards management of companies. The expectations towards directors and managing directors have become much higher. Last but not least, also the media have developed a particular interest in company management, in particular, the remuneration of top management.

1. The legal position/status of a director and/or managing director in the different jurisdictions ?

From a strictly legal standpoint, according to Italian legislation the Director of a Company – both a sole Director, a Managing Director granted with specific powers or a simple member of the Board – can be liaised to the Company either by an employment relationship or by a consultancy agreement.

As it is generally known, consultancy agreements do not undergo the majority of the restrictions and labour guarantees characterizing the employment relationship. Currently consultancy agreements in Italy can be divided into two main fields: consultancy agreements with professionals (ruled by Art. 2222 of the Italian Civil Code), generally free of restrictions provided are entered into with individuals registered with Public Bars (such as lawyers, engineers, doctors, notaries, labour consultants, etc.), and consultancy agreements on a specific project (ruled by Art. 61 and subsequent of the Legislative Decree 276/2003) that can be entered into with every individual but are subject to severe formalities aiming to guarantee the genuine nature of the consultancy (formal requirements on the exact description of the reasons grounding the appointment; exact setting of the final term; limits on the prosecution of the contract; limits in the number of appointments from the same contractor; etc.).

Although Directors are usually not professionals, Paragraph 3 of Art. 61 of the Legislative Decree 276/2003 allows Companies to appoint Directors utilizing the format of simple consultancy agreements.

This legislative approach significantly affects the applicable discipline: employment rules and guarantees do not usually apply, since the appointment of a Director falls under the provisions on civil *mandate*; the contents of the appointment and the tasks to be performed – when stated – are usually set within the Resolution of appointment (a resolution that can be issued either by the Shareholders' Meeting or by the Board of Directors).

Duties and responsibilities are set by the Civil Code under separate and dedicated Articles: Directors are entitled to “*manage the Company in compliance with the Law and the Company' bylaws*” (art. 2476 of the Italian Civil Code) and, for Limited Companies, “*shall perform their tasks with the necessary diligence as the nature of appointment requires and their personal expertise allow*” (art. 2392 of the Italian Civil

Code); the test of fulfillment is generally considered the one set forth by 2nd Paragraph of Art. 1176 of the Italian Civil Code, outlying the diligence required in the fulfillment of a professional obligation.

With the exception of the specific duties which might be included in the Articles of Association or in the Appointment Resolution, responsibilities lying on Directors are those described by the Law, and can be summarized in (i) the management of the Company's business for the achievement of the Company's scope; (ii) the corporate governance, with specific reference to the relationship between the Board / Sole Director and the Shareholders / Stakeholders' Meeting; (iii) the administration upon dissolution of the Company.

Claims pertaining the Directors' management shall be brought in front the s.c. "Special Chambers on Corporate Law" (despite those limited cases where a Director assumes to be an Employee of the Company, irrespective its appointment, in which cases Labour Court are always competent); claims against the Directors on the performance of their tasks shall be limited to the non fulfillment of said duties and cannot investigate the merits of the managerial choices taken (see Supreme Court Judgments n. 280/1982; 3652/1997; 5718/2004; 16707/2004; 18231/2009).

Since the relationship is construed as a consultancy agreement, claims upon termination are not significant; firstly, it is to consider that there is no proper *termination*: the Director shall leave the appointment (i) because the appointment (which is always subject to term of maximum three years) expires (ii) when provided for by the Bylaw, because the majority of the Board's Directors resigns, in which case the entire Board is dismissed (the s.c. "*simul stabunt simul cadent*" clause) (iii) legal termination (as in the case of personal bankruptcy) (iv) revocation by the Shareholders / Stakeholders' Meeting (v) resignation; secondly – despite the case when the Director claims to be considered a regular employee, as mentioned above – employment rules upon termination are not applicable; therefore, cases usually put forward upon termination are (i) by the Director against the Company, for the compensation of the damages suffered by the Director for its early termination and/or (ii) by the Company against the Director, for the compensation of the damages suffered by the Shareholders and/or the Company itself for the non fulfillment of the managerial obligations.

2. What is the impact of corporate governance legislation or soft-law (such as corporate governance codes) for the position of a director / managing director ?

The impact of corporate governance and soft-law on the position of a Director is rather limited: recalled the above concerning the *nature* of the appointment, the relationship with the Company and the applicable discipline, further aspects governed by these sources might result in additional commitments for the Director (such in the case of listed Companies) and limited liability aspects.

Art. 2381 and subsequent of the Italian Civil Code describe the different corporate governances allowed under Italian legislation: Sole Director, Board of Director, Management Committee; within the Board of Director, the Company can appoint one or more Managing Directors or an Executive Committee.

Under a liability perspective, as commented above, the Director can be sued by the Company or by the Shareholder for the damages suffered as a consequence of the Director's conduct; he could also be sued by a Company's creditor, in case the Company's assets cannot pay its credit.

However, every time the management body is collective (Board or Management Committee), the liability is meant to be liable: this implies that the action – if brought towards only one or few Directors – shall be grounded on the assessment of specific conducts that need to be precisely identified.

The Italian Civil and Criminal Codes set specific provisions on the liability of a Director of listed Company: increased sanctions in case of false assessments in the balance sheet (art. 2622 of the Italian Civil Code) and lower *quorum* allowing the legal action against the Director.

Finally, it is worth recalling the Legislative Decree 231/2001 on the Administrative liability of Companies: the Act does not directly impact the position of the Director, but entails the enforcement of an organizational structure within the Company, precisely detailing the different authorities, relevant powers, controls and responsibilities; this have an immediate effect on the management of the Company distributing managerial functions, and it is often used by the Board in order to allocate duties and limit the risk of liabilities.

3. Liability of a company director / managing director ?

Please see under 1 and 2.

4. Are there any recent changes in remuneration legislation / policies for company directors / managing directors ?

Directors' remuneration are set by the Shareholders / Stakeholders' Meeting or upon appointment; the remuneration of a Managing Director is set by the Board; the

consideration can be paid either in a fixed amount or (entirely or partially) with shares / stocks (Art. 2389 of the Italian Civil Code).

Art. 6 of the Self-discipline Code for Listed Companies states that the amount paid as remuneration shall be “*sufficient for attracting , retaining and motivating individuals asked to successfully manage the Company*” and that should be meant to align “*their personal interests with achievement of profit for the stakeholders*”.

Larger companies often provide internal guidelines on remuneration (such as remuneration policies and “say on pay” resolutions on incentive plans) but their enforcement is mostly aimed to disclose the schemes adopted, not to set limits to Company’s resolutions, and their provisions are not always mandatory for the Board of Directors.

5. Has it occurred in your jurisdiction that management decisions were revised after being challenged by stakeholders (e.g. consumers) ?

I am not personally aware of any significant case on this topic.

However, it is to consider that the impact of actions brought by *consumers* in Italy is rather limited: legislation introducing the *class action* is still quite recent (2008) and – on October 2013 – approximately only 30 proceedings were pending and only two have come to final Judgments.

More severe impact usually have Antitrust Regulations and the relevant assessments made by those Authorities (both National and European).

6. Has your jurisdiction issued specific legislation on female presence in the board of directors ?

L. 120/2011 introduced that Boards of listed Companies shall include at least one third of female Directors; Presidential Decree 251/2012, into force as of February 2013, introduced the duty for Public (not listed) Companies to secure one third of the seats in their Board of Directors to women.

Apparently, for the majority of Italian Companies (private, not listed) still the subject is not ruled.

7. Is there in your jurisdiction an obligation to have a minimum of independent and/or non-executive directors in the board ?

No, but Art. 3 of the Self-discipline Code for Listed Companies promotes the appointment of independent/non-executive Directors, setting the minimum requirements to consider them so.

8. Are there in your jurisdiction certain obligations that are different for private and for publicly owned companies and which are not yet covered by the above topics ?

The discipline does not differ significantly with respect to the Director's role in a private or public Company.

However, as of April 1st 2014, pursuant to Law Decree 166/2013, the compensation for the s.c. "Public Managers" (and, among them, the Managing Directors of Public Companies) should not exceed approximately 311.000 euros; it is worth pointing out that in these very days the Government proposed the introduction of a new cap in the compensations of the s.c. "Public Managers" that will further reduce the remuneration to approximately 240.000 euros.

9. Position of directors/ managing directors in the event of disposal and/or merger of the company ?

Since – as described under paragraph 1 – Directors are not employees of the Company but are appointed by the Shareholders Meeting to lead the Company, usually upon transfer of the Company or simply change of the shareholders, Directors are usually not retained under the new management.

As a consequence, usually the only covenants pertaining to the Directors are those concerning the discharge for possible misconducts and the renounce to bring legal actions on the relevant liabilities; although often included in the SPA or in the Transfer Agreement, these declaration shall (also) be included in Meetings' Resolutions in order to be effective and enforceable.

10. Are there in your jurisdiction minimum requirements to become a company director ?

It is not necessary that the Director has any specific expertise on the Company business: Art. 2387 of the Italian Civil Code leaves the subject to the Company's Articles of Association that can subject the appointment as Director to the assessment on the titles and qualities of the candidate; on the other hand it is to recall that, as commented

above, the diligence degree according to which the Director's conduct is tested is the one of a "professional degree" as per Art. 1176, 2nd paragraph, of the Italian Civil Code.

11. Does a company director has specific obligations with regard to:

Art. 2390 of the Italian Civil Code expressly set the non-compete covenant for Directors, forbidding them from assuming the quality of unlimited liable shareholders in competing companies, or simply performing (directly or through third parties) other businesses in competition with the one they are managing.

Art. 2391 further set the duty for each Director to inform the Board every time a resolution might be issued under conflict of interest; should this be the case, the Director shall thoroughly report on the possible conflict and extensively debate on the benefits for the Company. Missing the disclosure obligations above, the Resolution can be opposed within the term of 90 days.