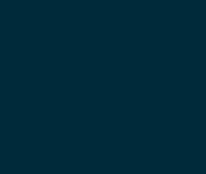


Berlin, December 2022

Legance



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



Corporation

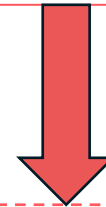
- **Plurality** of bodies
- Principle of **majority**
- **Limited** shareholder **rights**
- **Limited/no** personal **liability** of the shareholders
- Main corporate kinds: **S.p.A.** and **S.r.l.**



- *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



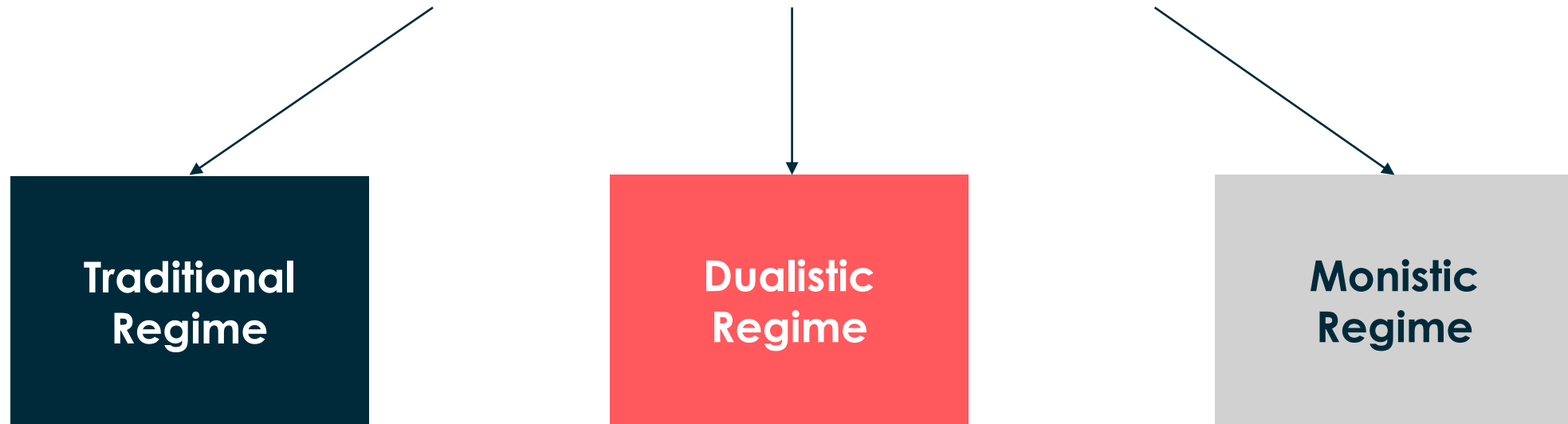
- *Società semplice*
- *Società in nome collettivo (s.n.c.)*
- *Società in accomandita semplice (s.a.s.)*

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**

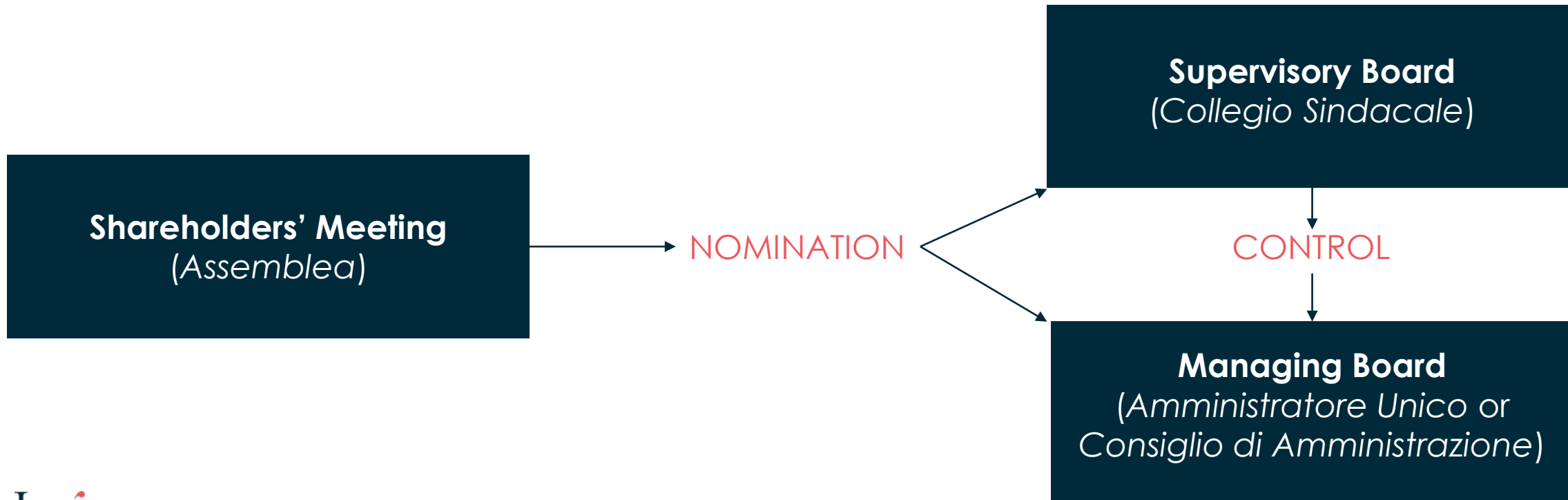
Regimes of Management in the SPA

Shareholders may decide which regime to choose:



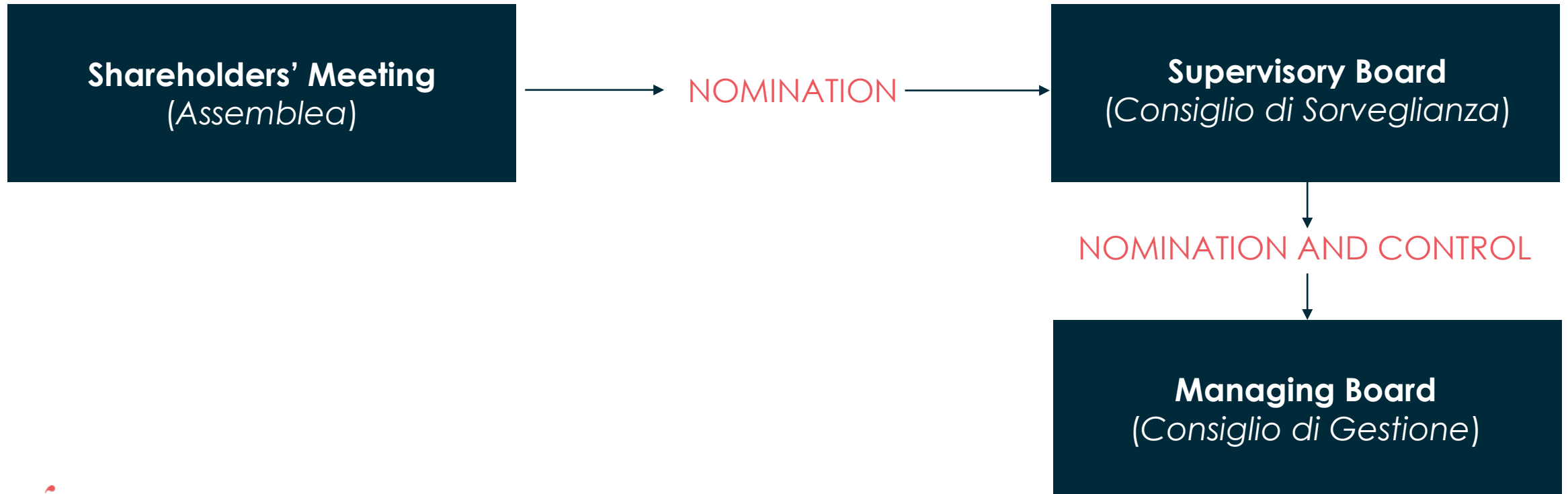
Traditional Regime

- ☛ 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 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 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, procedures 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

Foreign Direct Investments (FDI) Regulations: the Golden Power

Law Decree 21/2012
converted into Law
56/2012 (Golden
Power Law or “**GPL**”)

Introduction of **special powers in favor of the Government** in order to protect the ownership structure of companies operating in **strategic sectors** and in sectors of **national interest** (i.e. Defense, Security, Energy, Transportation, Communication sectors)

Law Decree
23/2020
(Decreto Liquidità)

Extension of the scope of the Law Decree 21/2012, including **food, insurance, healthcare** and **financial** sectors

DPCM 179/2020
and
DPCM 180/2020

Identification of the assets and relationships of strategic importance to the national interest in the sectors referred in the **EU Reg. no 452/2019** and identification of the assets of **strategic importance** in the **energy, transport, communications** and other sectors

FROM THE «GOLDEN SHARE» TO THE «GOLDEN POWER»

GOLDEN SHARE

- > The State holds **special rights** in privatized companies operating in strategic sectors or in the case of «national champions» in order to **maintain some control in these companies**
- > Application **only to companies directly or indirectly subject to the State's control**
- > Exercise of the special rights through **special clauses in the companies' by-laws**
- > **Broad Government discretion** in determining the procedures for the exercise of such special rights and their extent

GOLDEN POWER

- > Special powers in favour of the Government in order to **protect the ownership structure of companies** operating in strategic sectors
- > Application to **all public or private companies**, operating in **strategic sectors**
- > Exercise of the special powers by imposing **requirements or prohibitions** on the execution of **material transactions**
- > Conditions, procedures, modalities for the exercise of these special powers are provided by the **Law Decree 21/2012 in order to limit the Government's discretion**

Sectors and Assets Subject to the Golden Power



**National Defense and
Security**

**RELEVANT ASSET
(art. 1 GPL + DPCM 108/2014):**

Armaments, technologies, communications and control and observation systems **used in the military field** and for national security



**High-Tech, Financial and
other sectors**

RELEVANT ASSETS

(art. 2 GPL + DPCM 179/2020):

- **Critical infrastructure**, physical or virtual, including: energy, transport, water, health, communications, media, processing or storage of data, aerospace, defence, electoral or financial infrastructure and sensitive facilities, investments in land and buildings essential for the use of such infrastructure
- **Critical technologies** and **dual-use items** (*i.e.* civil and military use), including: artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum nuclear technologies, nanotechnology, biotechnology
- **Security of supply of critical production factors**, including: energy and raw materials, food security
- **Access to sensitive information**, including personal data, or the ability to control such information
- Freedom and pluralism of the **media**, **credit and insurance** sectors, **agrifood** sector, **steel** industry, **medical**, surgery and protection devices

Energy, Transportation and Communications

RELEVANT ASSET (art. 2 GPL + DPCM 180/2020):

- **Energy:** natural gas transport networks and related compressor stations, dispatching centres, and gas storage facilities; electricity and gas supply infrastructures from other States (including regasification plants); national electricity transmission grid and related control and dispatching systems; management activities of the networks and infrastructures mentioned in the previous points
- **Transport:** ports of national interest; airports of national interest; national railway network of relevance for transeuropean networks
- **Telecommunications:** end user access to TLC networks; long distance TLC networks; facilities for the provision of access to end users of universal service and broadband and ultra-broadband services; equipment for connectivity, security, control and management of telecommunications access networks at a fixed location

National Defense and Security

Material transactions

- Any acquisition by extra EU or EU (including Italian) entities of at least 3% in companies active in the defense sector and subsequent acquisitions that determine the exceeding of the thresholds equal to 5%, 10%, 15%, 20%, 25% and 50%
- Resolutions on mergers, demergers, transfer of the company, transfer abroad of the registered office, change of the corporate purpose, dissolution of the company, amendment of specific clauses of the articles of association, transfer of real or use rights relating to tangible or intangible assets
- The acquisition in these companies, by a party other than the Italian State, of a level of shareholding capable of compromising the defence and national security

Special powers

- Imposition of specific requirements or conditions to the acquisition of shares
- Exercise of the **veto right** on corporate resolutions
- Objection** to the acquisition of shares



Energy, Transportation and Other Sectors

Material transactions

- ☛ The **acquisition**, by an Italian or foreign entity (EU or extra EU), **of the control** over a company operating in such sectors
- ☛ The **acquisition**, by any non-EU entity, **of shares** in companies operating strategic assets or activities **of at least 10%** of the share capital or voting rights; the **subsequent acquisitions** will also be subject to filing **whenever the thresholds of 15%, 20%, 25% and 50% are exceeded**
- ☛ Any **resolution**, or transaction related **resulting in a modification of the ownership, the control, the availability of such assets** or the purpose of the company's asset and that benefits an extra-EU or EU company (including Italian)

Special powers

- ☛ Imposition of **specific requirements or conditions to the acquisition of shares**
- ☛ Exercise of the **veto right** on corporate resolutions
- ☛ **Objection** to the acquisition of shares

Law Decree No. 21/2022's Modifications

The new regulation 5G, Cybersecurity and Cloud Technologies

Goods or services related to the **design, construction, maintenance and management of 5G, cybersecurity and cloud technologies have a special regime**. Indeed, the regulation no longer concerns specific agreements, but requires the **notification of an annual plan concerning the intention to purchase from any supplier the above mentioned goods**. The government can authorise such plan, with or without imposing conditions, approve only a part of it or prohibit it

The **violation of the duty of notification** of the plan leads to:

- **Invalidity of the agreements** that were part of the plan
- **Financial penalty** up to 3% of the turnover of the party meant to notify
- **Restoration of the situation** previous to the execution of the agreements

The Procedure for the Exercise of the Golden Power

1. Formal Notification

- ✓ Depending on the transaction, the acquirer or the company operating in the strategic sector shall **notify to the *Presidenza del Consiglio dei Ministri*** the transaction, attaching the relevant documentation
- ✓ **The notification** shall take place **before the transaction is completed** or - with reference to the acquisition - **not later than 10 days after the closing**

2. Exercise of Power

- ✓ The Presidency of the Council of Ministers shall **analyze the information** provided and assess whether or not there is a serious threat affecting public interests
- ✓ **The special power shall be exercised within 45 days from the receipt of the notification**
- ✓ If the 45 days period elapses without any governmental action, the Golden Power shall be understood not to have been exercised and the operation is considered authorized



Silent = Consent



The New Mechanism of Pre-Notification

Law Decree No. 80/2022 has introduced a new mechanism of pre-notification:

- ✓ **Less formal** preventive notification, when the application of the Golden Power is uncertain, and **Golden Power Coordination Group's reply in 30 days**
- ✓ **Silence** from the Coordination Group = **formal notification necessary**
- ✓ **The unanimity vote of the Coordination Group on the non-application of the Golden Power precludes the involvement of the Presidency** of the Council of Ministers
- ✓ Advantage: **cases where the Golden Power are clearly inapplicable are quickly dismissed**



Penalties System

If the obliged entity does not fulfil the obligation to notify then:

In case of **resolutions, deeds or transactions** adopted or carried out by a company managing or owning strategic assets:

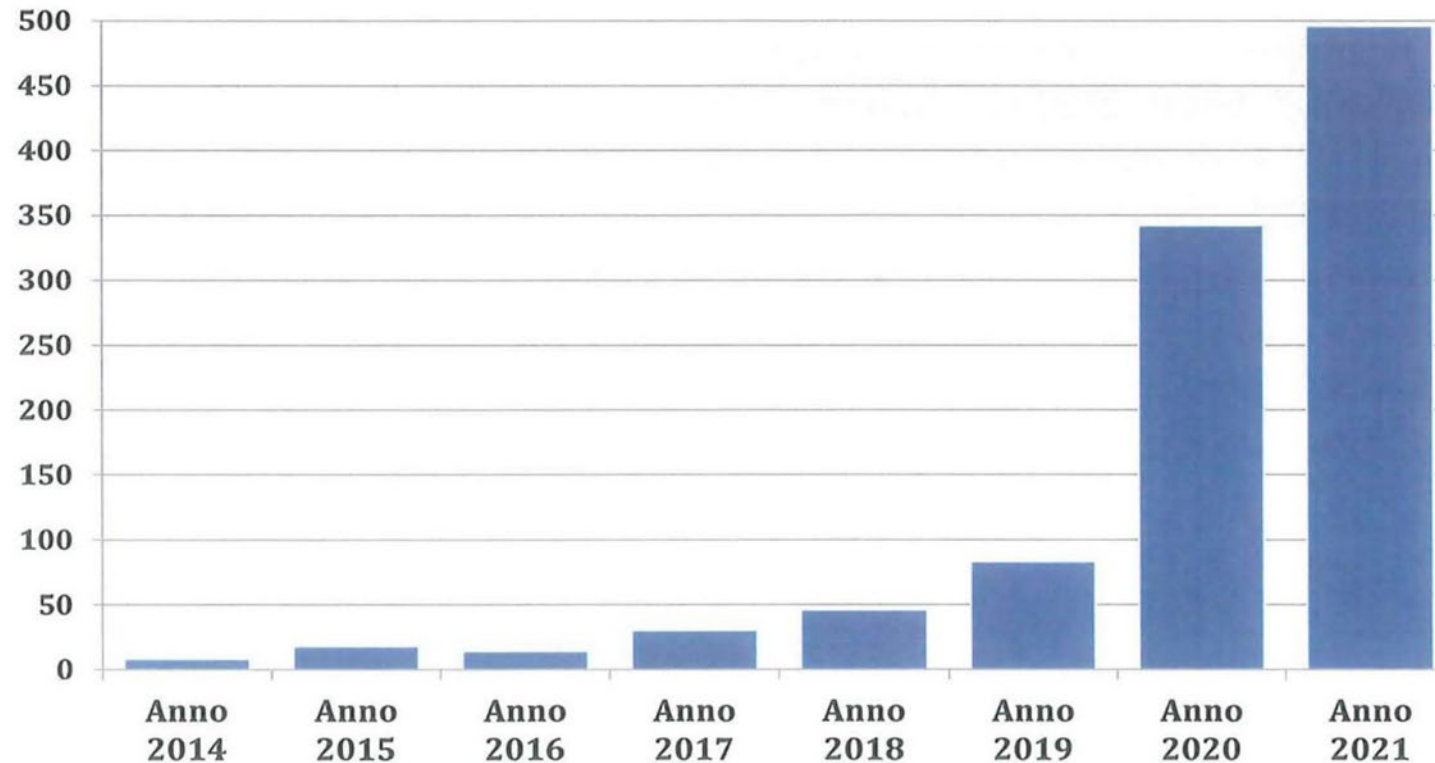
In case of acquisition of equity interests:

- The **relevant resolution, deed or transaction** is **void**
- The government may require **restoration of the status quo** ante at the expense of the obligated entity
- **Financial penalties** up to twice the transaction's value and not lower than 1% of the overall turnover

- **The voting rights are suspended** and the **resolutions, deeds and transactions** adopted or carried out with its decisive vote are **void**
- In case of objection to the acquisition, the acquirer shall transfer the shares within one year and, in the event of non-compliance, the competent Court may order the sale of the shares
- **Financial penalties** of up to twice the transaction's value and not lower than 1% of the overall turnover shall apply

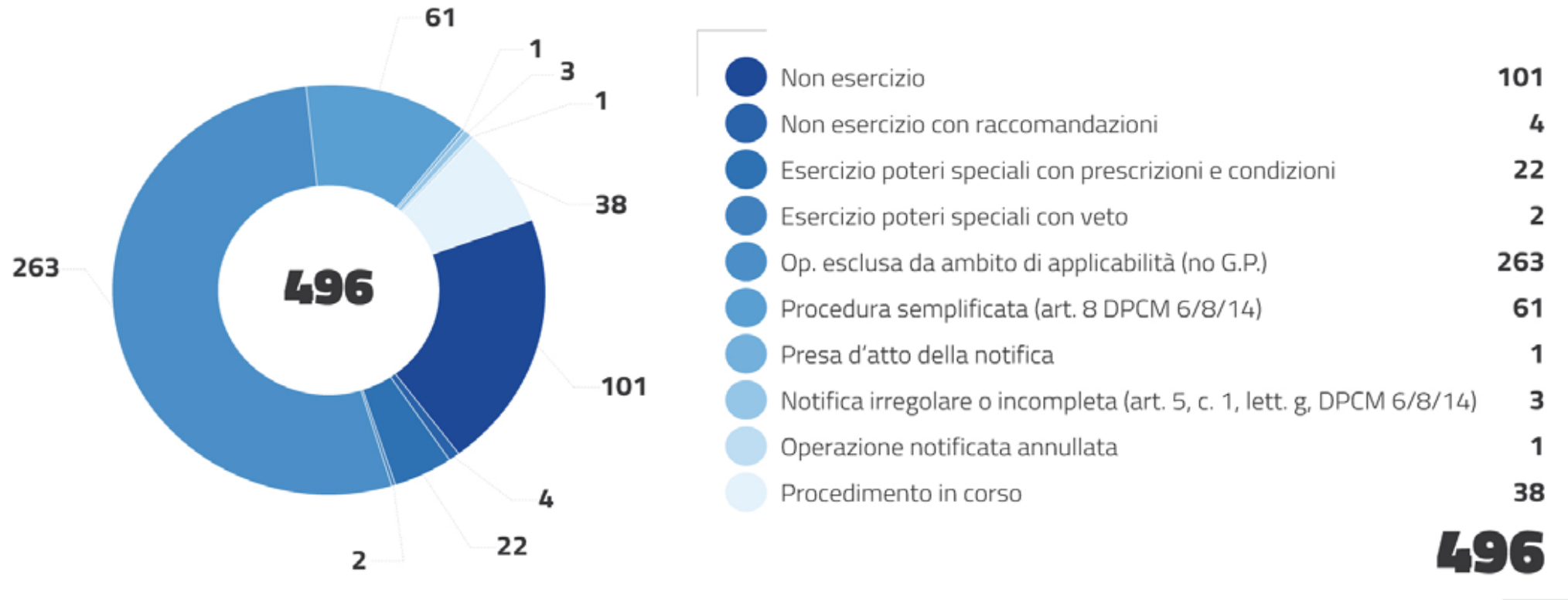
The Golden Power's Notifications: Numbers per Year

Grafico n. 3: notifiche su base annua (dal 2014 al 2021)



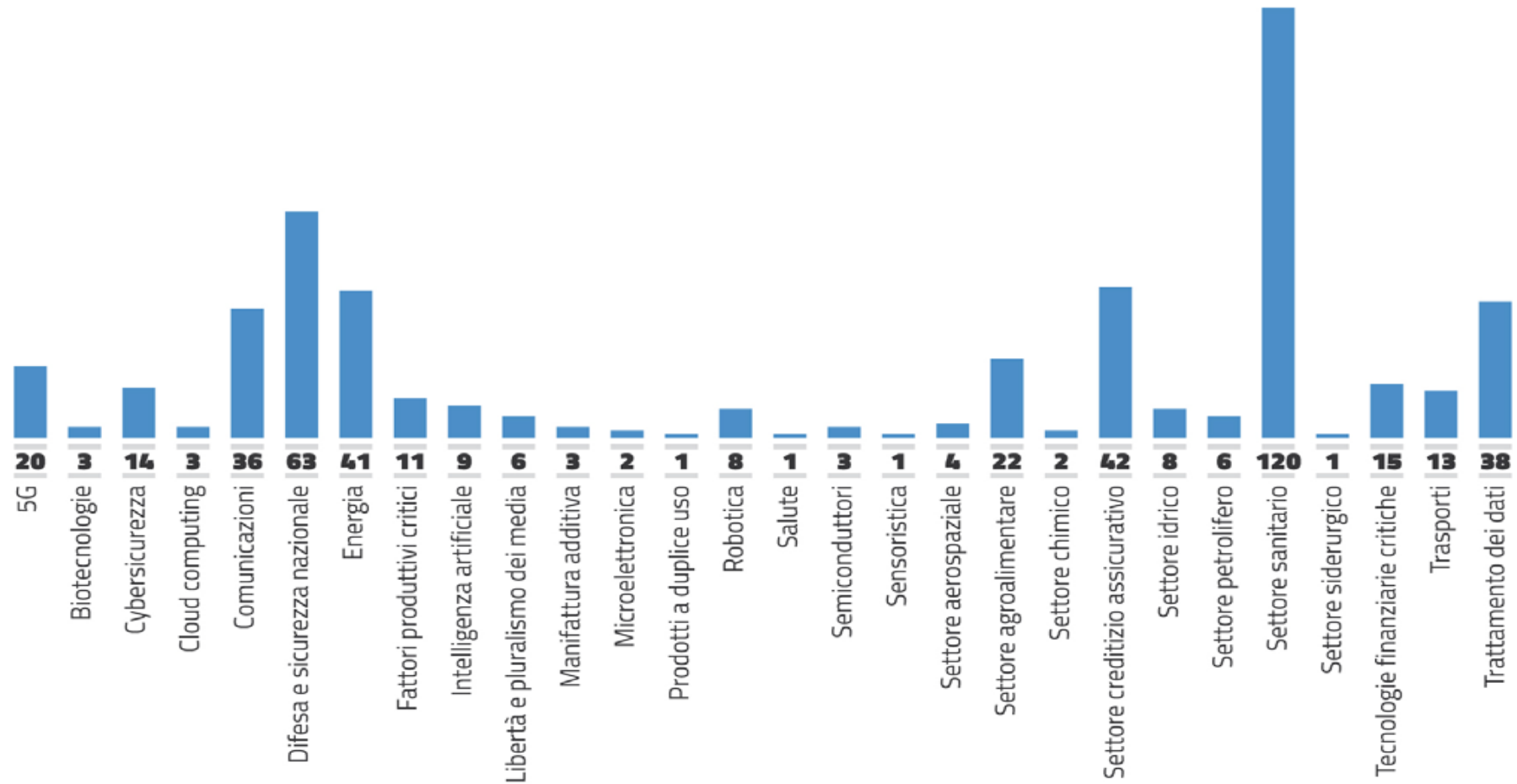
Source: Governo Italiano - Presidenza del Consiglio dei Ministri, Relazione al Parlamento «Golden Power», data from 1 January to 31 December 2021

Exercise of the Golden Power: Outcomes of the Proceedings



Source: *Governo Italiano - Presidenza del Consiglio dei Ministri, Relazione al Parlamento «Golden Power»*, data from 1 January to 31 December 2021

Notifications per Settore



Source: Governo Italiano - Presidenza del Consiglio dei Ministri, Relazione al Parlamento «Golden Power», data from 1 January to 31 December 2021

Exercise of the Golden Power in Practice

- The Government shall exercise the special **powers in case of threat of serious damage and exclusively on the basis of objective and non discriminatory criteria**
- **Until recently, the special powers were always exercised by imposing requirements and conditions.** The compliance with the requirements and the conditions is monitored by a specific committee at the Presidency of the Council of Ministers, which shall inform the Government in case of non-compliance in order to apply penalties

Examples of exercise of Golden Power where the Government objected to an acquisition

- **18 November 2021**, acquisition by Zhejiang Kesheng Intelligent Equipment Company Ltd (China) of Applied Materials Italia Srl (active in the microchip sector)
- **31 May 2022**, acquisition by Efort Intelligent Equipment (China) of the source codes used for the manufacturing of robot and automated machines by Robox SpA
- **1 June 2022**, acquisition by Rusatom GasTech (Russia) of Faber Industrie Spa (active in the management of hydrogen)

The Tim-Vivendi Case

NATIONAL DEFENSE AND SECURITY SECTOR - COMMUNICATION SECTOR

- On November 2, 2017 the Government decided to exercise the **Golden Power** in relation to the acquisition by Vivendi SA of an equity interest in Tim S.p.A. Indeed, following such acquisition, **Vivendi would have had a 23,68% stake** (relative majority) in Tim and, therefore, would have obtained, de facto, **the control of the company**
- The Government imposed **specific requirements** and **conditions** both on Vivendi, as the entity required to notify the transaction, and on Tim, Telecom Italia Sparkle and Telsy Elettronica e Telecomunicazioni, as companies managing strategic assets



Requirements and Conditions in Tim-Vivendi

- **Stable nationwide maintenance of management** and security functions related to networks, services and supplies that support strategic activities
- Assumption of commitments to **guarantee the continuity of activities linked to strategic activities**
- Establishment of specific corporate units in charge of security, with economic, financial and functional autonomy
- **Appointment of a director in charge of security-related activities, subject to government approval**
- Adoption of plans for the development, investment and maintenance of networks and facilities, in order to **guarantee the operation, integrity and continuity of the universal service provision**
- Adoption of appropriate technical and organizational measures to manage risks
- **Advance notice to the Government in case of: modification or reorganization of the company asset**, transfer of asset and resolution of the managing board affecting the security, the availability or the functioning of networks and installations

Recent Exercise: the Alpi Aviation Case

🗨️ First case where the proceedings led to the retroactive invalidity of the acquisition

In 2018, a Hong Kong company bought 75% of the share capital of Alpi Aviation, an Italian drones' manufacturing company. Subsequent investigations detected that the ultimate shareholders were two government-controlled companies of the People's Republic of China. This circumstance had not been disclosed at the time of the notification nor could it have otherwise been detected earlier for it was kept in confidential agreements between the parties.

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



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

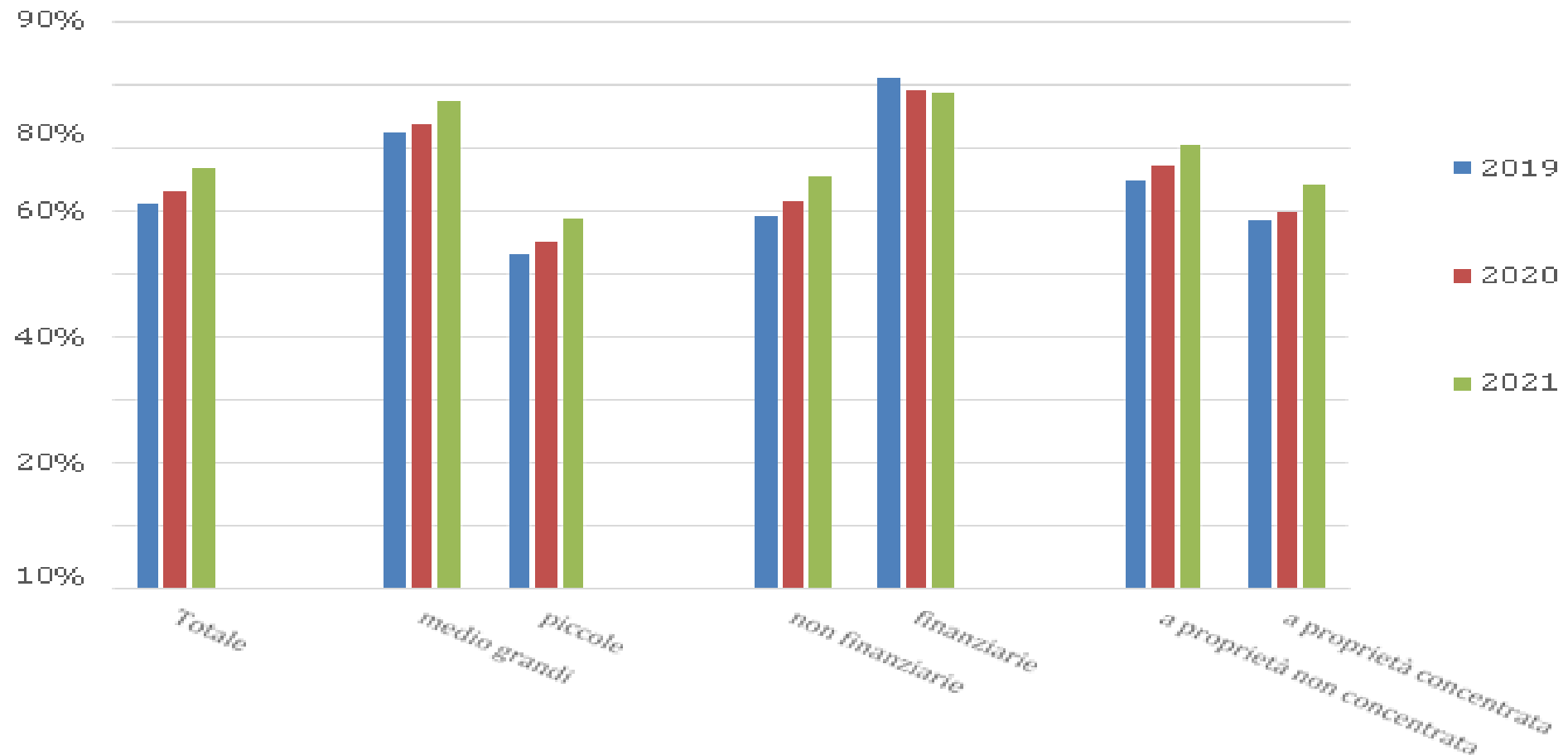
Articles Content



- ✓ 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

Grado di adesione e caratteristiche delle società



Law no. 120/2011: the So-Called «*Quote Rosa*» Regulation



Scope



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



Discipline

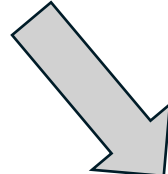


The so-called “**Legge Golfo Mosca**” initially provided a 20% presence of the least represented gender in the managing and supervisory boards. **From 2015, such percentage has been raised to 33,3% and has reached 40% in 2019. The regulation was meant to apply for 3 consecutive mandates of the boards, starting from the first application, but has been extended to 6 mandates**

Non-Financial Reporting and Corporate Sustainability



EU measures



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

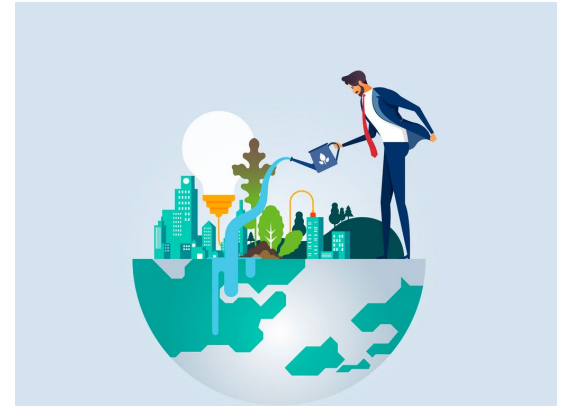
Commission adopted a proposal for a **Directive on Corporate Sustainability Due Diligence**

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)**

Information to be disclosed under the NFRD

- ☛ **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



- ☛ Following the **Parliament's request to revise the NFRD**, in 2021 the **Commission has started working to a new and more complete discipline: the Corporate Sustainability Reporting Directive (CSRD)**
- ☛ The CSRD's proposal 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

- ☛ **The CSRD's proposal has been approved by the Parliament on 10 November 2022**
- ☛ **The Council has approved the directive on 28 November 2022**
- ☛ The directive will enter into force 20 days after publication. The 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**

Corporate Sustainability Due Diligence

- ☛ 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**
- Once adopted by the Parliament and the Council, Member States will have two years to transpose the directive into **national law** and communicate the relevant texts to the Commission



The Parliament's Proposal

- ☛ Scope: (i) **large companies** governed by the law of an EU Member State or established in EU territory; and (ii) **publicly-listed small and medium-sized companies** and high-risk small and medium-sized companies
- ☛ Value chain due diligence should be proportionate and commensurate to the likelihood and severity of potential or actual adverse impacts
- ☛ The proposal covers “**potential or actual adverse impact(s) on human rights**” that may impair full enjoyment of human rights by individuals or groups and “**potential or actual adverse impact(s) on the environment**”
- ☛ **Civil liability**: undertakings will be held liable and be made to provide remediation for harm arising out of actual or potential adverse human rights and environmental impacts
- ☛ Undertakings must provide a **grievance mechanism for stakeholders**, acting as an early-warning mechanism for risk-awareness, and as a mediation system



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

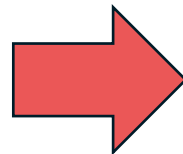
Enforcing the new rules

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. At European level, the Commission will set up a European Network of Supervisory Authorities that will bring together representatives of the national bodies to ensure a coordinated approach
- 🗨️ **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

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”



- 👉 **43%** of the companies **provide information on the pursuit of sustainable success**
- 👉 **43%** of the companies **has established a Committee on Sustainability** (82% in companies that also provide information on the pursuit of sustainable success)

“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 2021, 26 Managing Boards of listed companies (19 European) presented to the shareholders' meeting proposals and relations on climate, receiving 95% of consensus
- ☛ 88 requests of institutionalization of the “say on climate” were presented by shareholders in the same year, but they rarely received approval by the Managing Boards

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 Relation 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

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

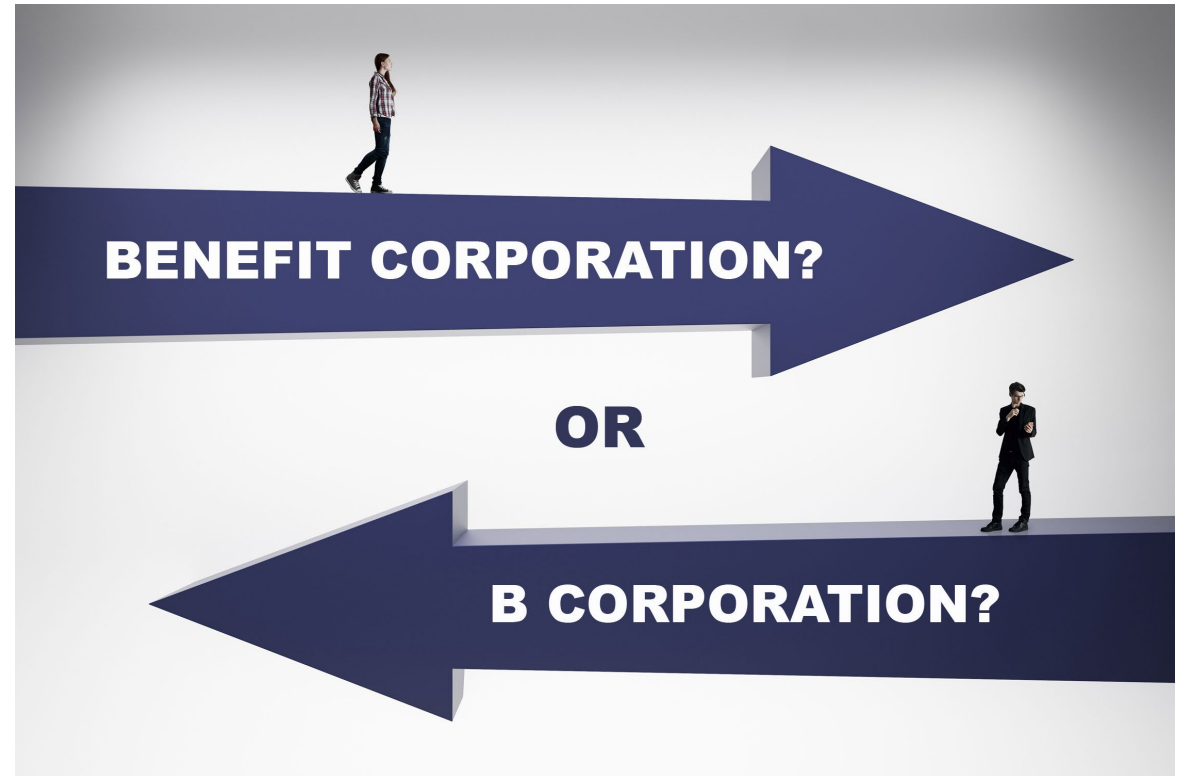
The Benefit Corporations



- ☛ To date, Italy is the only European 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 \geq 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 **finances 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 June 2022 in Italy there were **2146 Benefit Companies**. In 2021 there were 926 and in 2020 only 511
- Services (976), manufacturing (254) and trade (169) are the sector that showed the major increase



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