COLLANA DEL DIPARTIMENTO DI GIURISPRUDENZA
UNIVERSITÀ DEGLI STUDI DI BRESCIA

PRODUCTION AND CIRCULATION OF WHEALTH PROBLEMS, PRINCIPLES AND MODELS

Summer school, Brescia 8-12 luglio 2019

Edited by

Maurizio Onza e Antonio Saccoccio

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Terza Serie – 28

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VIA PO, 21 - TEL. 011-81.53.111 - FAX 011-81.25.100
http://www.giappichelli.it

ISBN/EAN 978-88-921-4114-8
ISBN/EAN 978-88-921-9843-2 (ebook - pdf)

La pubblicazione di questo volume è stata subordinata alla valutazione positiva espressa da due docenti esterni, anonimi, sorteggiati dalla Direzione scientifica all'interno del Comitato editoriale permanente, secondo il modello della "revisione fra pari in doppio cieco". I relativi giudizi sono conservati a cura della Direzione scientifica.

Il presente volume è pubblicato con il contributo del Dipartimento di Giurisprudenza dell'Università degli Studi di Brescia.

Printed by Stampatre s.r.l. – Turin (TO) - Italy
February 2022

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CORPORATE SOCIAL RESPONSIBILITY AND CORPORATION

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1. *Corporate social responsibility: An introduction*

I would like to seek to address the issue of Corporate social responsibility from a strictly legal perspective.

This is so because, to a certain extent, in Italy and more generally, in the European legal area, corporate social responsibility evokes aspects that often involve other fields of science, ranging from philosophy (in particular ethics) to sociology.

Well, concentrating the analysis on the legal profile, it seems beneficial to proceed expressly from the words that isolate the subject under investigation: that is to say, "Corporate social responsibility".

Thus, if we reflect on these words, we can see that:

(*A*) the mentioned theme concerns *enterprises*.

Therefore, entities carrying *a professional activity for the production of goods and services* [1] or, in adhering to the perspective of European Union competition law, that is to say any entity that carries out an *economic activity which produces wealth* [2] (while the latter definition is broad, on the one hand, it is inclusive of the intellectual professions while, on the other hand, it is excluded from the Italian definition of the enterprise); [3]

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[1] Art. 2082 of Italian Civil Code.

[2] For example, see Judgment January 10, 2006, Court of Justice of the European Union (C-222/04).

[3] Art. 2238 of Italian Civil Code.

(*B*) carrying out the activity that can generate a (*B'*) *"responsibility"* and qualified as (*B''*) a *"social"* one. The two expressions should be analysed separately.

(*B'*) In legal terms, the word "responsibility" can generally mean either of two concepts:

1) with reference to the debt (responsibility *stricto sensu*) *as asset guarantee*, *i.e.* subjection of assets to the enforcement action of creditors aimed to satisfy its obligation; [4] or

2) with reference to the obligation (liability) *as obligation for compensation of the damage caused by* non-jure *conduct*, *because such is either contrary to law* (tort liability) *or in breach of the contract* (contractual liability).

With respect to this second meaning [above, *sub* 2)] of liability, it is furthermore to be noted that:

2.1) the difference between tort and contractual liability is based, as far as Italian law is concerned, *on a disciplinary difference* regarding the distribution of the burden of proof and the prescription (the limitation of action), the contractual liability *showing more advantages for the damaged party*. In particular, the burden of proof is assigned to the damaging party in contractual liability. The damaged party is to prove only the breach of contract whereas the damaging party is to prove the correct fulfilment of the obligation or that the breach depends on a fact caused without fault. Conversely, in tort liability, the damaged party is to prove all the elements (Article 2043 of Italian Civil Code which states that: «*whatever intentional or negligent act, which causes unjust damage to another person, obliges the responsible party to pay the relevant compensation*»). Concerning the limitation of action (the prescription) provided for by contractual liability, this prescription period is of 10 years (instead of 5 years as provided for in cases of tort); [5]

2.2) in case of conflict between tort and contractual liability, *it is necessary to find operative solutions* that resolve this conflict (thus making it possible to hypothesize, as a decisive criterion, the cumulation or exclusion of one or the other); and

2.3) between one and the other, the *difference tends to diminish* according to a reconstruction that *directs towards a contractual qualification of liability* (with the already mentioned advantages, for the damaged party) if there is a legally *qualified relationship* (although not contractual) between the damaged party and the damaging party (so-called social contract liability).

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[4] Art. 2740 of Italian Civil Code.

[5] Artt. 2043 and 1218 of Italian Civil Code. Regarding the limitation of action (the prescription) see Art. 2947 of the Italian Civil Code (for the tort liability) and the precedent Art. 2946 (for contractual liability).

In light of the aforementioned, it seems to me that the *legal problem of social responsibility, firstly, points to the second meaning of the word responsibility* [above, *sub* 2)]: *i.e.* as an obligation to compensate the damage caused by *non-jure* conduct because it is contrary to law (tort liability) or in breach of contract (contractual liability). Therefore, the issue lies on the question as to whether, when, and under what conditions one can *identify this obligation*.

Accordingly, this means searching for rules which: (*a*) based on an agreement or law, impose an *obligation to follow a specific conduct*; and (*b*) if this obligation is not fulfilled or not appropriately fulfilled, *oblige the non-performing party to compensate damages*.

The other meaning of the word "responsibility", as asset guarantee [above, *sub* 1)], in fact, is concerned with the *assets* subject to the claims of the creditors aimed to satisfy their obligation, assuming *ex ante* the identification, subjective and objective, of a fact that legally entitles the action against the assets of a debtor.

(*B''*) Yet more complex is the identification of the meaning of the word "social".

It is a word that projects *the non-jure conduct* (that has caused damage) *into a "social" dimension*.

Therefore, this damage, in the first place, should be able to be *qualified as "social damage"* thus damage that brings an effects on a (or the) community (as a plurality of human beings living together in an organized way) which is taken as a point of reference.

It is therefore necessary to clarify *when damage can be considered as "social damage" in the following meaning*.

In a first approximation, it could be said that damage is likely to be qualified as "social damage": (*a.1*) because of its "*extent*", as to the *damaged party*; (*b.1*) because of its "*economic entity*", the economic entity of the obligation to pay compensation. In this regard, to avoid misunderstandings, it should be noted that, on another level, there is a difference between economic and non-economic damage. Such refers to the *type* of damage (which may or may not affect an *economic interest*) and not to its economic relevance for the purposes of the quantity of the compensation; and (*c.1*) by its "quality", affecting goods, values, "social principles" which are particularly felt by the community or in reference to the community in a particular historical moment.

In short, the characteristics of corporate social responsibility *damage* can be summarized as follows: *the extent with respect to the damaged parties*, *the extent with respect to the economic value* and *quality*.

This leads to two orders of considerations.

The first.

In order to avoid such damage, *the corporation must adopt rules* (based

on law: Tort liability; or based on contract: Contract liability) *to prevent the damages* de quibus.

Thus, it seems to me, that the juridical sense of "corporate social responsibility" can (and should) arise if:

i. there are *unwritten* rules bearing an *obligation to follow a specific conduct*, *the violation of which generates an obligation for compensation for damages*;

ii. there are *unwritten* rules that connect to *voluntary* conduct, and one such conduct is actually performed, *the duty to compensate for the damage caused thereafter is triggered*;

iii. the law *provides* for *mandatory conduct* but does not establish the *consequences of the breach of the obligation*;

iv. the law *provides* a type of conduct that is performed *voluntarily act* but does not determine *the consequences in the event of damage resulting from the conduct in question*; or

v. due to an *eventually grey zone of the written rules* applicable to a concrete case on the qualification of the liability (whether such falls under contractual or tort liability), the "corporate social responsibility" *determines the qualification of such liability*. Moreover, such qualification, if contractual, may have a strong juridical consequence, thus generating the said advantages [regarding the burden of proof and the prescription; *supra*, *sub* (*B'*), 2.1 and 2.3] in favour of the damaged party.

Finally, corporate social responsibility has a juridical sense, at least from the point of view of the damaged party, if it: (*a.2*) introduces *new "unjust damages"* (*i.e. non-jure* conducts) in tort liability; (*b.2*) it is able *to "convert"* tort liability that occurred in a concrete case thus *into contractual liability* (facilitating the damaged party); and (*c.2*) *in pre-existing legal relations*, introduces *new obligations,* the violation of which trigger *compensation for damages* caused by such violation.

The second.

Having already attributed to the term "social damage" the aforementioned meaning, it is normally (but not necessarily) required that an enterprise that tends to be of a "big-size", is capable, as such, to cause quantitatively and qualitatively significant damage. Additionally, it may be said that according to Italian and EU law, *"big-size" enterprises are (again: normally but not necessarily) run by corporations* (or – perhaps in the future – by private limited companies open to the public): corporations which may be stand-alone or integrated in a group. This legitimizes the conduct of the investigation by "looking" at the corporation.

2. *Techniques of protection in the event of liability for damages in a corporation: A map*

We can now focus on the techniques of protection in the event of liability for damages in the corporation, with respect to which one must distinguish: (*A*) *the liability for damages caused by the corporation* (corporation as the damaging party); and (*B*) *the liability for damages caused by the directors and auditors of the corporation* (the directors and the auditors as the damaging parties).

(*A*) The corporation as damaging party.

There are *no specific rules* with reference to the liability of the corporation as damaging party.

In principle, *the common rules of contractual and tort liability apply*.

We can only point out that:

i. in the absence of specific rules, corporate social responsibility could be used *to oblige a corporation which is head of a group of companies* (the parent corporation) *to pay compensation for damages* (if identified as "social" in the sense of the term) *caused by the conduct of the subsidiary companies*. This is due to the fact that according to Italian law only the parent company's liability for damages caused to the shareholders and creditors of the subsidiaries is regulated, regardless of whether the management and coordination of the group have been conducted by the parent corporation in a *non-jure* way; [6]

ii. there are provisions that "*punish*" (also) the corporations (indeed all type of companies, not just the corporations) [7] *with a fine when crimes are committed*.

At this point, it is important to focus on a further aspect, since it is a very new rule introduced in Italy which overrules the traditional principle of "*societas delinquere non potest*" (*i.e.* a corporation can not commit crimes).

This is the so-called administrative liability of legal entities provided for by Legislative Decree No. 231/2001, which establishes the administrative liability of the corporation when crimes are committed by directors and auditors of the corporation *in the interest or to the advantage* of the corporation itself. [8]

This liability:

1) *always* [9] generates *the obligation to pay a sum of money* (not as compensation but *as a fine*) for the corporation, an obligation of the corpora-

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[6] Artt. 2497 ss. of Italian Civil Code.

[7] As well as entities other than companies.

[8] Art. 5, § 1, of Legislative Decree No. 231/2001.

[9] Art. 10, § 1, of Legislative Decree No. 231/2001.

tion *that must be fulfilled by using only the assets of the latter* [10] and an obligation which can *be accompanied by other types* of sanctions; [11]

2) is excluded if the corporation proves to have adopted a model «*of organization and management suitable for preventing crimes within the type of crime that is similar to that which has occurred*» (so-called models of prevention crime), the contents of which *are set out by law*, also basing itself on codes of conduct drawn up by associations representing the category of producers to which the corporation belongs. [12]

The administrative liability of legal entities is, therefore, a very detailed discipline which stimulates the adoption of instruments (the models of prevention of crime), possibly taken from the so-called rules of soft law (the codes of conduct), aimed at preventing particular "social damages" characterized by the breach of those interests of life which are considered fundamental by the community, and as a consequence are protected, by the criminal laws.

Indeed, a balance between "social damages" of a corporation which has been considered liable under this law (and therefore which has been sanctioned) is provided for by an Article of Legislative Decree No. 231/2001, by which, "if as a consequence of the commission of a crime, the sanction of the interruption of the activity of the corporation has been disposed, the Judge can order the continuation of the activity if, after taking into account the dimensions and the economic conditions of the territory in which it is situated, there is a possibility that this interruption may produce relevant repercussions on employment".[13]

For qualified administrative violations (therefore lacking criminal character), a similar system is structured by the Banking law.[14]

(*B*) The directors and the auditors as damaging parties.

On the other hand, specific rules are set out when the *damaging parties are the directors and auditors of the corporation*.

With respect to the conditions, there must be at least a *negligent breach of law or by-laws* [15] (and additionally, the degree of care required is extraordinary diligence).

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[10] Art. 27 of Legislative Decree No. 231/2001.

[11] Listed in art. 9 of Legislative Decree No. 231/2001: *i.e. prohibition sanctions* (*i.e.*, prohibitions to carrying out the activity; suspension or revocation of authorizations, licenses or concessions functional to the commission of the crime; prohibition of contracting with the public administration, except for obtaining the services of public service; exclusion from subsidies, financing, contributions or subsidies and possible revocation of those already granted; prohibition of advertising goods or services), *confiscation* and *publication* of the sentence.

[12] Art. 6, §§ 1, let. *a*), and 3, of Legislative Decree No. 231/2001.

[13] Art. 15, § 1, let. *b*), of Legislative Decree No. 231/2001.

[14] Art. 144 of Legislative Decree No. 385/1993.

[15] Art. 2392, § 1, of Italian Civil Code.

With respect to the characteristics of the protection, we can remark that the liability is directed to compensate the damage caused: i. to the *corporation*; ii. to the *creditors of the corporation*; iii. to the *single shareholder or the third party*.

And so, in detail:

i. liability towards the corporation and the creditors of the corporation is a liability that aims at compensating *"collective damage"*, shared by all those included within a damaged class. In short, all shareholders or all creditors damaged; [16]

ii. liability towards the individual shareholder or third party is a liability that compensates for damage which is *not shared with others*, i.e. *damage directly caused to the assets of the shareholder or third party* (so-called direct damage);[17] *damage that does not "pass" through the assets of the corporation* (*e.g.* when the value of the shares, of all the shares, decreases because the assets of the company have decreased as a result of the *non-jure* conduct of the directors. In this case, the damage is located in the assets of the corporation: so that the relevant and appropriate protection is the action for liability towards the corporation).

Therefore, more specifically:

1) in case of liability towards the corporation, the assets directly damaged (and therefore compensated) are the assets of the corporation, *the shareholders suffering only a "reflected damage"* that is compensated by reimbursing the corporation;

2) in case of liability towards the creditors of the corporation, the damage is the insufficiency of the assets of the corporation to satisfy the claims of the creditors due to the failure (of the directors and the auditors) in observing the obligations inherent in the conservation of such assets.[18]

Well, among these techniques of protection, the technique provided for in the case of liability for compensation towards the single shareholder or the third party [above, in this §, *sub* (*B*), ii.] seems to have a conceptual space and a wider operative margin to act as corporate social responsibility.

This is because, in effect, liability towards the corporation and liability towards the creditors of the corporation *not only presuppose a qualified and pre-existing relationship* (between the corporation and the directors/auditors; and between the corporation and the creditors); but also, and above all, at least with respect to the liability towards the creditors of the corporation, that *the damage is pre-required*: the reduction of the assets of the corporation. With respect to these cases, it becomes difficult, alt-

[16] Artt. 2393, 2393 *bis* and 2394, of Italian Civil Code.

[17] Art. 2395 of Italian Civil Code.

[18] Art. 2394, § 1, of Italian Civil Code.

hough perhaps not impossible, *to find those elements* which make corporate social responsibility useful from a juridical perspective and which have been identified before [above, § 1, *sub* (*B''*), i.-v.]; and additionally *to find the requirements with reference to the "social" damage* qualified, as we said before, by "extension, entity, and quality" [above, § 1, *sub* (*B''*), (*a.1*), (*b.1*), (*c.1*)].

On the contrary, in case of *liability towards third parties (also shareholders) directly damaged* by the *non-jure* conduct of the directors and the auditors, *there is no pre-existing relationship* (the shareholder, in this case, is considered a third party) and *the damage is "open"*, qualified as *any economic reduction of the assets of the damaged third party*.

For completeness sake, on the system of liability faced by the corporation, I would like to conclude with a short note on the problem of *liability faced by the shareholders of the corporation*.

Even in this case, the two meanings of the word responsibility [above, § 1, *sub* (*B'*)] can be used: (*a*) to *indicate the assets of the shareholders destined to satisfy the obligations of the corporation*, overruling the principle by which a corporation is a legal person responding to its obligations exclusively with its own assets and, therefore, raising the question of the so-called lifting of the veil (*i.e.* abuse of the legal entity); and (*b*) to indicate the liability of shareholders for compensation for damages caused by non-judicial conduct of the corporation, thus evoking the issue of the *liability of shareholders for the exercise of the right to vote* and, more generally, for the management of the corporation.

Issues similar to these have been the centre of much debate in Italy (as well as in Europe) and as far as Italy is concerned, it has been chiefly, due to the absence of rules of the written law (except for the private limited companies):[19] therefore, on this point, I would like to highlight the fact that a part of the doctrine is inclined towards recognizing liability, according to the two meaning aforementioned, *i.e.* the liability of the shareholders; while the decisions of the Courts substantially tend not to recognize such liability.

3. *Investigation on the normative system of written law*

In this way, I would like to try to share with you some attempts to identify some possible hypotheses of corporate social responsibility based on written law.

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[19] In private limited companies, where the quota-holders, in certain cases of participation in the decision, may be liable together with the directors for the damage occurred (art. 2476, § 8, of Italian Civil Code).

A. The first hypothesis could arise from legislative Decree No. 254/2016. Such law implemented Directive 2014/95/EU [20] and imposed to the listed corporation and big-size corporation (in terms of assets and/or net revenues) [21] the obligation to draw up *a statement of a non-financial nature*, for each financial year to be *made public* on the market. Such statement is to describe the policy of the corporation with respect to "the impact of business activity on the environment (in relation to the use or lack of use of renewable energy, gas emissions, etc.), on the reference community, on the personnel (health, safety, gender equality), on the respect of human rights, on the fight against active and passive corruption", describing, among other things, the organizational models adopted [including the models of prevention of crimes provided for by the Legislative Decree No. 231/2001 of which we have spoken before: above, § 2, *sub* (*A*), ii.]. [22]

This obligation, however, is not technically followed by a "real" juridical consequences in case of breach: in fact, on the one hand, the corporation can declare, providing reasons, why it did not adopt those policies,[23] thus bearing the possible (only) reputational consequences on the market (in terms of loss of customers); on the other hand, the directors and the auditors are liable (in addition to a fine) in the event of failure to declare or of non-conformity of the declaration with the legal model,[24] including non-compliance and incorrect declarations. In these cases (*non-jure* conducts), the relevant point focuses on the type of liability that can be triggered. There is no doubt that if this *non-jure* conduct causes damage to the corporation or the creditors of the corporation, the system of protection will be the liability towards the corporation and towards the creditors [*supra*, § 2, *sub* (*B*), i.]. But it could also be assumed that, if the non-financial statement has been made but is incorrect, damage may also be suffered by those who rely on that statement in their relationship with the corporation. Damage that may entitle to an action grounded on corporate social responsibility: *i.e.* new unjust damage, possibly to be restored with the rules of contractual responsibility and, even, new obligations contained in a pre-existing legal relationship [*supra*, § 1, *sub* (*B''*), (*a.2*), (*b.2*), (*c.2*)].

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[20] With this respect, see also: (*i*) the Proposal for a Directive of the European Parliament and of the Council regarding the corporate sustainability reporting (21 April 2021); (*ii*) the Motion for a European Parliament Resolution with recommendations to the Commission on corporate due diligence and corporate accountability (19 September 2020); and (*iii*) the Regulation (EU) No. 852/2020 on the establishment of a framework to facilitate sustainable investment.

[21] Art. 2, § 1, of Legislative Decree No. 254/2016.

[22] Art. 3, § 1, of Legislative Decree No. 254/2016.

[23] Art. 3, § 6, of Legislative Decree No. 254/2016.

[24] Art. 3, § 7, of Legislative Decree No. 254/2016.

This is especially true if the corporations (other than those which are obliged) voluntarily decide (not being specifically obliged) to publish the non-financial declaration; such is a possibility allowed by law[25] but without any type of consequences arising from this voluntary adoption.

B. The second hypothesis is made with regard to the so-called benefit corporations, introduced in Italy by Law No. 208/2015.[26]

Benefit corporations are lucrative companies that "pursue one or more purposes of common benefit and operate in a responsible, sustainable and transparent way towards people, communities, territories and the environment, including cultural and social assets and activities, bodies and associations and other stakeholders (in particular, workers, customers, suppliers, lenders, creditors, public administration and communities of reference)", so-called benefit activities. Objectives, indicated in the corporate purpose, that must be pursued "through a management aimed at balancing the interests of shareholders and the interests of those on whom the corporate activity may have an impact". This balance legitimizes the *qualification of the corporation as a benefit corporation*, which can thus present itself on the *market* by *indicating this qualification* in its corporate name and *communicating it to the market*, in a special report, the so-called benefit activity carried out. This "presentation to the market" is likely to deceive the market if the corporation "presented" as a benefit corporation does not concretely pursue the benefit activity: such deception is sanctioned by the written rules under the realm of misleading advertising.

With respect to such written discipline, one could hypothesize *a corporate social responsibility for damages suffered by those who have relied on the congruence of the name in the act of carrying out the activity of the corporation that was "presented" under the benefit scope but in reality was operating in a non-benefit way*.[27]

C. Within the law of the financial markets, we can see significant *use of codes of conduct as models of conduct*, standards and guidelines by professional associations, which can be *voluntarily adopted by a declaration to the market*. For example, the report on the directors of listed corporations must declare «*the compliance to a code of conduct on corporate governance promoted by companies managing regulated markets or by professional as-*

[25] Art. 7 of Legislative Decree No. 254/2016.

[26] §§ 376-384.

[27] The social enterprise, provided for the Legislative Decree No. 112/2017, is different from the benefit corporation. The social enterprise produces, without profit, "social" goods and services designed to meet (just for this purpose and for non-profit) the needs of a community (for example: health care and services, education, etc.). Here, the point of attention is focused on whether the social enterprise satisfies the need to which it aims exclusively (or substantially exclusively).

sociations, giving reasons for any failure to comply with one or more provisions».[28] Well, again, one could ask whether the (voluntary) adoption of a code generates an expectation which if unfulfilled (such as in the case when the corporation has declared to adhere to the provisions of the code but has not actually complied with them) and cause damages, such can *be repaired by assuming corporate social responsibility* [a case of optional conduct: see above, § 1, *sub* (*B''*), ii. and iv.].[29]

D. Finally, the last example could be illustrated by reading Article 2086 of Italian Civil Code, recently modified by Legislative Decree No. 14/2019 (Code of Insolvency and Enterprises' Crisis). The current text provides, in the second paragraph, that «*the entrepreneur* [i.e.: the corporation] *has the duty to establish an organizational, administrative and accounting structure appropriate to the nature and size of the enterprise, also in relation to the timely detection of the crisis of the enterprise and the loss of business continuity, and to take due action without delay for the adoption and implementation of one of the tools provided by the system for overcoming the crisis and the recovery of business continuity*». One could then ask whether this obligation is imposed to protect not only those who have *a pre-existing legal relationship with the corporation* (creditors, workers, suppliers and so on) but also in favour of *those who can actually suffer a (new) unjust damage from a crisis*: and then, if so, whether, with respect to both cases, the *breach of this obligation generates the right to compensation for damages to be claimed under the rules of contractual liability*, assuming, in fact, a case of corporate social responsibility [still see above, § 1, *sub* (*B''*), *(a.2*), (*b.2*), (*c.2*)].

4. *Two questions about the future*

So far, we've seen a possible current scenario for corporate social responsibility. I would like to end by looking at the future. Conceivably, in the future, corporate social responsibility could play a significant role, stimulating virtuous behavior,

a) for corporations operating in specific markets (*i.e.* listed corporations, banks, insurance companies, etc.), conceptualizing *liability of such corporations towards all participants (for whatever title) in a*

[28] Art. 123 *bis*, 2nd §, let. *a*), of Legislative Decree No. 58/1998.

[29] And in particular, see the relevance of the "sustainable success" as criterion of the management the corporation (defined as «*the objective that guides the actions of the Board of Directors is to create long-term value for the benefit of shareholders, taking into account the interests of other stakeholders relevant to the corporation*») provided for by the Italian Code of the corporate governance for the listed corporation (January 2020).

specific market that have been damaged (*e.g.* protecting the shareholder of company "A" which suffers damages caused by *non-jure* conduct of a director of company "B" causing the reduction in the value of transactions on the market in which its share are listed); and

b) preventing and fighting the damages caused *by the use of artificial intelligence*, as a "risk factor" *towards all the participants of a specific community to be "governed" by the technique of corporate social responsibility*.

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