

## DUTY OF TRANSPARENCY FOR DIRECTORS: A NEW RULING APPLIES IT VERY BROADLY, AGAIN

Article 2391, first paragraph, of the Italian Civil Code imposes on each Director the duty to notify to the fellow Directors and to the Board of Statutory Auditors any interest that, on his/her own behalf or on behalf of third parties, he/she has in the company's activity or transaction. In such case, a Director must specify the nature, the terms, the origin and the scope of such interest. In the event the interested Director (i) is a managing director, the latter shall refrain from performing the activity and defer the resolution on the same to the entire Board, or (ii) is the sole director, he/she must inform the shareholders at the first shareholders' meeting.

The Italian Supreme Court, through a recent ruling (no. 126/2019), clarified the scope of the duty of transparency set forth under the abovementioned article of the Italian Civil Code, confirming the broad interpretation given in other decisions (please refer, *inter alia*, to ruling no. 32573/2018).

The Court was called to judge on a case of failed notification by one of the Directors of his "interest" to the internal control committee of the company (*comitato di controllo interno*). This committee is a surveillance and non-executive body set up by Italian listed companies pursuant to the *Corporate Governance Code (Codice di Autodisciplina)* issued by the Italian Stock Exchange (*Borsa Italiana*). In the ruling, the Court clarified that the Directors' duty of transparency applies irrespective of the body called to resolve upon the activity/transaction of the company, thus also towards non-executive bodies as the internal control committee (*comitato di controllo interno*), and regardless of the specific role of the interested Director (i.e. whether it is an executive, non-executive or an independent Director).

Confirming the broad interpretation of the Directors' duty of transparency, the Italian Supreme Court, in ruling No. 126/2019, further clarified that such duty is always applicable and linked to specific activities or transactions of the company and must be complied with also if the information underlying the interest of the Director concerned by the matter is publicly available or has already been provided to the other Directors.

In particular, in the case at hand, the Court held that the notification to the internal control committee was due even though the Director's interest emerged clearly from publicly available documentation that had already been submitted by the same Director to the company prior to his appointment.

The Italian Supreme Court, in its arguments, also recalled its previous case law (ruling no. 29605/2014) and confirmed the nature of the violation of the duty set out under Article 2391, first paragraph, of the Italian Civil Code, which may assume criminal relevance for the Director of a listed company if the infringement results in a damage to the company, also if the damage is not economical.