

## A NEW CHALLENGE FOR DIRECTORS OF ITALIAN COMPANIES

Article 2086 of Italian Civil Code has been modified by legislative decree no. 14/2019 (which includes the new Code for Crisis and Insolvency) imposing on Directors *“the duty to establish an organizational, administrative and accounting structure adequate to the nature and size of the company, also for the timely detection of the crisis of the company and the loss of the business continuity, as well as to take action without delay for the adoption and implementation of one of the instruments provided for by the law for overcoming the crisis and recovering business continuity”*. This article, unlike the Code for Crisis and Insolvency which entry into force has been postponed due to the Covid-19 pandemic, is already effective - starting from 16 March 2019 - and has been enforced by a few Court cases.

With ruling dated 18 October 2019, the Court of Milan assessed that the director’s duty imposed by the new article 2086 of the Italian civil code had been breached and decided to revoke the sole director. Based on the director’s defense, the company for which he was acting as sole director needed additional funding and did not have the resources to reimburse the accrued indebtedness.

In this situation, the director - in taking office - did not decide to prepare an updated financial statement which was judged by the Court of Milan as a sign of careless management. Moreover, the fact that the director had contacted a fund to sell the shares of the company and had declared its intention to consider the sale of certain assets appeared insufficient for the Court. According to the ruling, the director should have set up a business plan or a plan to restructure the company’s indebtedness, acknowledging the state of crisis and adopting one of the instruments provided by the Italian law to overcome such crisis.

With ruling dated 15 September 2020, the Court of Rome specified that directors, in deciding to adopt an adequate *“organizational, administrative and accounting structure”* make a business decision subject to the business judgement rule and therefore can be deemed as inadequate only if the directors’ decision appears irrational considering the information available to the same when taking it.

Both proceedings were started following a request filed by the Statutory Auditors.