

Internal Control Systems in Listed
Companies: A Comparative Analysis
between Italy and USA

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Introduction	5
Chapter I: Balancing Powers: The role of Internal Control in Italian Listed Companies.....	10
1. Preliminary considerations: definition of listed company and Corporate Governance	10
2. The Regulation of Internal Control Systems: Constitutional Principles and Civil Code Rules	16
2.1 Italian Financial Regulation: The TUF meets Corporate Governance.....	19
2.1.1 The Two-Tier Model: Governance Structure and Oversight Functions	22
2.1.2 The Monistic System: Integration of Management and Control Functions.....	24
3. Board of Directors in the Traditional Model: structure	29
3.1 Directors' Duties and Liability in the Traditional Governance Model.....	30
4. Collegio Sindacale: structure and liability	37
5. The Impact of the Capital Decree on Internal Control Systems.....	42
6. Corporate Compliance in Italy: Decree 231/2001, Internal Audit and Whistleblowing Mechanisms	44
7. Final considerations	51
Chapter II: Checks and Balances: Internal Control Systems in U.S. Public Companies.....	55
1. The Legal and Institutional Architecture of U.S. Corporate Governance.....	55

1.2	The 1933 Securities Act and the Rise of Disclosure-Based Regulation.....	57
1.3	Responsibility as Risk: Rethinking Internal Control in the Age of Sarbanes-Oxley	59
1.4	From Regulatory Oversight to Self-Governance: The Evolution of Internal Controls under the Dodd-Frank and 2018 Acts.....	62
2.	Supervisory and Governance Bodies	64
3.	Board of Directors: role and liability	65
3.1	. Directors' Fiduciary Duties.....	72
4.	Audit Committee.....	80
5.	Chief Compliance Officer (CCO) and Whistleblowing Mechanisms in the U.S.....	86
6.	Final considerations	91
Chapter III:	A comparative analysis of Italy and The United States	95
1.	Model effectiveness: Rule Based USA vs. Principle Based Italy/EU.....	95
2.	Compliance and Business Impact.....	99
3.	Board Accountability with and without the Business Judgment Rule: Contrasting the United States and Italy	102
4.	Institutional Twins or Distant Cousins? Comparing the Italian <i>Collegio Sindacale</i> and the American Internal Audit Committee.....	103
5.	Shared Principles, Different Practices: Whistleblowing and Internal Audit in Italy and the United States	106
6.	The three Watchdogs: External Auditors, SEC and CONSOB.....	110
7.	Which model is more effective?	115
Conclusions	119
Bibliography	126

Webliography	130
Legislation	131
Other sources	132
Jurisprudence.....	133

Introduction

Corporate governance systems across jurisdictions have long reflected the interaction between law, economics and institutional culture. Among the various comparative paradigms, the Italian and American models represent two sophisticated yet conceptually divergent approaches to corporate control and managerial responsibility. While both systems pursue the same ultimate goal—ensuring sound management, protecting shareholders, and safeguarding market integrity—they differ profoundly in their regulatory logic, institutional architecture, and the way in which responsibility operates as a mechanism of control. The purpose of this thesis is to critically examine these differences and explore the ongoing process of convergence between the two models, arguing that the future of corporate control lies in a responsibility-based hybrid system that integrates the preventive strictness of the Italian framework with the transparency and accountability typical of the American model.

In the Italian legal tradition, the notion of internal control has been progressively shaped by statutory reforms and interpretative efforts aimed at enhancing organizational adequacy and managerial diligence. Legislative milestones such as the *Testo Unico della Finanza* (TUF), the 2003 corporate law reform and more recently the introduction of Article 2086, paragraph 2 of the *Civil Code*, have redefined the duties of directors as custodians of an adequate organizational, administrative and accounting structure. Within this framework, responsibility operates as the driving force of control: directors are bound not only to manage but to continuously ensure the reliability of the internal governance system. The *collegio sindacale*—a uniquely Italian oversight body—further reinforces this architecture by linking control to direct accountability, emphasizing the legal and moral dimension of corporate responsibility. However, this normative density often translates into a reactive and formalistic approach, where compliance and *ex post* liability overshadow managerial autonomy and preventive oversight.

By contrast, the American model, historically rooted in the principles of fiduciary duty, disclosure, and market discipline, conceptualizes control through the lenses of efficiency and accountability rather than formal responsibility. The board of directors, guided by the duty of care and the duty of loyalty, is subject to judicial scrutiny primarily through the business judgment rule, a doctrine that protects good-faith decisions while sanctioning gross negligence or conflicts of interest. This internal structure is reinforced by mechanisms such as the audit committee, alongside external oversight from the Securities and Exchange Commission (SEC) and private enforcement actions, which together sustain a culture of transparency and accountability. Yet, despite its apparent flexibility and market orientation, the American system reveals a paradox: responsibility becomes the limit of control. Excessive exposure to litigation and reputational risk can deter strategic initiative, leading to a form of defensive governance that constrains decision-making rather than promoting effective oversight.

This tension—between responsibility as motor and responsibility as constraint—constitutes the central critical axis of the present work. The thesis advances the idea that both systems, though different in origin and structure, are converging towards a shared understanding of control as a dynamic and risk-based process, increasingly oriented toward prediction, prevention, and assurance rather than mere compliance. The emergence of internal audit functions, risk management systems, and soft-law instruments such as corporate governance codes and best practices reflects this trend. Nevertheless, convergence remains partial and imperfect: while Italian corporate law still struggles with over-formalization and limited managerial discretion, the American framework faces challenges of potential conflicts of interest within boards and excessive reliance on private enforcement. The common vulnerability, in both systems, lies in the uncertain definition and calibration of managerial and supervisory liability.

The research is organized in three main chapters followed by a concluding section.

Chapter I analyzes the Italian corporate governance system, tracing its evolution through legislative reforms and focusing on the traditional, dualistic and monistic

models. Particular attention is devoted to the role and responsibility of directors and the *collegio sindacale*, as well as to the structure and function of internal control systems. The discussion highlights how Italian law constructs control as an inherently juridified process, grounded in duties of organization, diligence and vigilance, but often limited by its *ex post* enforcement logic.

Chapter II examines the American model, identifying its main sources and developments—from the early fiduciary duty doctrines of Delaware case law, with a detailed analysis of the board of directors and their fiduciary duties, to the regulatory frameworks introduced by the Sarbanes–Oxley Act and the Dodd–Frank Act. The chapter also analyzes the whistleblowing system and the role of the Chief Compliance Officer, thereby addressing the broader compliance framework in the US. It further explores how accountability is operationalized through the interplay between the board and the audit committee. The analysis underscores the systemic reliance on market mechanisms and disclosure as substitutes for formal legal duties.

Chapter III provides a comparative analysis of the two models, emphasizing the conceptual and functional differences in their approaches to internal control, risk governance, and managerial responsibility. Dedicated sections contrast the Italian *collegio sindacale* with the American audit committee, as well as the two boards of directors and their respective responsibilities. The chapter also compares the compliance systems in Italy and the US, with brief references to external oversight institutions such as the SEC, CONSOB and external auditors. The comparative reflection ultimately reveals that neither system offers a complete response to the challenges of modern corporate governance, yet both display tendencies toward mutual adaptation.

The concluding section advances the central argument of the thesis: that the future of corporate control lies in the hybridization of the Italian and American models. This hybridization does not imply simple convergence or harmonization, but rather a functional synthesis capable of reconciling the Italian emphasis on *ex ante* organizational responsibility with the American commitment to transparency, market discipline and board independence. The proposed responsibility-based

hybrid model envisions responsibility not as a punitive mechanism or a deterrent, but as a forward-looking instrument of governance—a means to internalize risk awareness, ensure reliable information flows and support strategic decision-making in complex corporate environments. Such a model aspires to overcome the dichotomy between legal formalism and market liberalism, promoting instead a culture of proactive accountability, where control and responsibility mutually reinforce each other in the pursuit of sustainable and ethical corporate conduct.

By critically comparing the Italian and American systems through the lens of responsibility, the thesis demonstrates that effective corporate control cannot be achieved through structural reform alone, but through a redefinition of the very meaning of responsibility—understood not merely as liability, but as the cornerstone of trust, legitimacy and long-term value creation.

Chapter I: Balancing Powers: The role of Internal Control in Italian Listed Companies

1. Preliminary considerations: definition of listed company and Corporate Governance

In the realm of law, definitions provided by legal sources may vary across countries depending on the legal system in place. Nonetheless, the fundamental definition of a listed company remains largely consistent internationally, as the operational characteristics of such companies are broadly similar across different jurisdictions. However, the internal organizational structure of a listed company may differ based on the legal framework chosen at the time of its incorporation. To gain a clearer understanding of the regulatory discipline governing listed companies and to delineate the material scope of such regulation, it is essential to examine the criteria that companies must fulfill to achieve listing status, focusing here on the Italian and American legal systems.

Today, on a national level, Article 2325-*bis* of the Italian Civil Code sets the definition of listed companies, establishing that companies whose shares are listed on regulated markets or widely held by the public are classified as companies that access the risk capital market, identifying companies listed on stock exchanges (in Italy or other countries with equivalent regulations) and companies whose shares are broadly distributed among the public, typically meeting thresholds defined by regulations.

On a European level, Article 1, paragraph 2 of the TUF furnishes a definition which states “For the purposes of this law, 'listed companies' refer to companies whose shares are admitted to trading on a regulated market in Italy or another European Union Member State.”

In the United States of America, the true watershed from a federal legislative perspective began during the 20th and 21st century when the Congress decided to act upon the different crisis that had hit the country at the beginning of the century and to fill the legislative caps left by the legislator.

Starting in 1934 with the creation of the federal agency known as the Securities and Exchange Commission (SEC), and the introduction of the corresponding Act, the United States established the first transparency requirements that companies were obliged to comply with in order to operate in the financial markets. Throughout the 20th century, jurisprudence repeatedly intervened, both refining existing legal concepts and contributing to the development of new ones¹. Finally, in 2002, Congress passed the Sarbanes-Oxley Act²—named after its sponsors, Senator Paul Sarbanes and Representative Michael Oxley—marking a significant reform in corporate accountability and financial disclosure³. The act was introduced as a response to the scandals that occurred in 2001 (Enron) and in 2002 (WorldCom); for the second time in American history, it was introduced a Federal law that mandated and still mandates certain practices such as Responsibility and Transparency.

Specifically, to be listed on a stock exchange a company must register its securities with the SEC and provide full disclosure of financial statements, management, and risk factors. It must file ongoing reports, comply with US GAAP

¹ SEC v. Ralston Purina Co. (1953) 346 U.S. 119 in which is stated that securities offered to employees are not automatically exempt from SEC registration unless recipients can make informed investment decisions; Chiarella v. United States (1980) 445 U.S. 222 in which is stated that there is no general duty to disclose non-public information unless a fiduciary relationship exists.; United States v. O'Hagan (1997) 521 U.S. 642 in which the misappropriation theory is adopted: using confidential information in breach of a fiduciary duty is securities fraud; Wharf (Holdings) Ltd. v. United International Holdings, Inc. (2001) 532 U.S. 588 in which is stated that selling a security or option with no intent to honor the promise constitutes fraud under Section 10(b)..

² For a complete analysis of the SOX, see Chapter II, Paragraph 1.3

³ The Sarbanes-Oxley Act of 2002 (SOX) is a U.S. federal law enacted in response to high-profile accounting scandals (such as Enron and WorldCom) to restore investor confidence by strengthening corporate governance, financial disclosure, and audit oversight. It applies primarily to public companies in the United States and to foreign issuers with securities listed on U.S. exchanges, requiring stricter rules for internal controls over financial reporting, independent audit committees, executive certification of financial statements, and enhanced penalties for misconduct. About the SOX: JOHN C. COATES IV AND SURAJ SRINIVASAN, "SOX after Ten Years: A Multidisciplinary Review," *Accounting Horizons*, vol. 28, no. 3 (2014): 627–671; ZABIHOLLAH REZAEE, *Corporate Governance Post-Sarbanes-Oxley: Regulations, Requirements, and Integrated Processes* (Hoboken, NJ: John Wiley & Sons, 2007); ROBERTA ROMANO, "The Sarbanes-Oxley Act and the Making of Quack Corporate Governance," *Yale Law Journal* 114, no. 7 (2005): 1521–1611; MICHAEL W. PEREGRINE AND CHARLES W. ELSON, *The Important Legacy of the Sarbanes-Oxley Act*, in *Harvard Law School Forum on Corporate Governance* (August 30, 2022); SARAH C. RICE AND DAVID P. WEBER, *How Effective Is Internal Control Reporting under SOX 404? Determinants of the (Non-)Disclosure of Existing Material Weaknesses*, in *Journal of Accounting Research*, Vol. 50, No. 3 (June 2012), pp. 811–843; VIDHI CHHAOCHHARIA, YANIV GRINSTEIN, GUSTAVO GRULLON, AND RONI MICHAELY, *Product Market Competition and Internal Governance: Evidence from the Sarbanes–Oxley Act*, in *Management Science*, Vol. 63, No. 5 (May 2017), pp. 1405–1424.

or IFRS, maintain effective internal controls, and adhere to SEC rules on governance, insider trading, and transparency⁴.

As for the concept of corporate governance, it has undergone significant transformation over the past decades, evolving from a general reference to the management and administration of collective enterprises into a multidimensional framework of legal, economic, and institutional mechanisms that define how corporations are directed and controlled. Historically, governance has always existed wherever collective decision-making occurs; yet, the term “corporate governance” as a distinct analytical and legal category gained prominence only in the late twentieth century, especially following the Cadbury Report, which famously defined it as “the system by which companies are directed and controlled⁵.” This foundational definition was later enriched by the OECD Principles of Corporate Governance, which emphasize the distribution of rights and responsibilities among key corporate actors—shareholders, boards, managers, and stakeholders—and the mechanisms through which corporate objectives are set and achieved⁶.

In the American literature, the rise of corporate governance is closely linked to the classic agency problem—the separation of ownership and control⁷. Corporate governance mechanisms, in this sense, represent the set of contractual, institutional, and normative arrangements designed to mitigate agency costs arising from the delegation of authority to managers. The modern corporation can be viewed as a nexus of relationships structured to align managerial discretion with the collective interest of investors and, increasingly, of society at large⁸. Yet, the normative function of governance extends beyond mere efficiency. Recent developments in law and economics have reoriented the theoretical foundation of corporate

⁴ Securities Act of 1933, the Securities Exchange Act of 1934, the SEC regulations, and the Sarbanes-Oxley Act of 2002, listing rules of exchanges such as the NYSE and NASDAQ.

⁵ *Report of the Committee on the Financial Aspects of Corporate Governance* (Cadbury Report), London: Gee and Co., 1992.

⁶ OECD, *Principles of Corporate Governance* (Paris: OECD Publishing, 2015), enacted in 1999, revised 2015.

⁷ MICHAEL C. JENSEN AND WILLIAM H. MECKLING, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, in *Journal of Financial Economics* 3, no. 4 (1976): 305–360.

⁸ REINIER KRAAKMAN ET AL., *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 4th ed. (Oxford: Oxford University Press, 2024).

governance from a narrow focus on shareholder value toward a broader notion of shareholder welfare⁹. It is argued that shareholders are not purely financial actors but moral and social agents whose preferences include ethical considerations. Accordingly, when profit-making and social impact are inseparable, the fiduciary duty of managers should be interpreted as maximizing shareholder welfare rather than profits alone. This debate reflects a growing awareness that governance structures are not only economic instruments for reducing agency costs but also vehicles for channeling corporate power toward socially responsible behavior.

From a comparative perspective, the European—and particularly Italian—approach to corporate governance integrates these economic insights within a deeply institutional and legalistic framework. While the idea of governance is ancient, its juridical formalization is relatively recent: corporate governance is old, only the phrase is new¹⁰. In Italy, the notion has been progressively incorporated into positive law, most notably through Article 123-bis of the *Testo Unico della Finanza* (TUF), which requires listed companies to publish a corporate governance report. Governance, in this context, is both a regulatory concept and an operational reality: a set of legal, procedural, and organizational rules designed to ensure effective management and control¹¹.

Italian doctrine, particularly after the 2003 corporate law reform, has emphasized the functional articulation between management (the board of directors) and control (the *collegio sindacale* and other supervisory bodies)¹².

The fiduciary principle underpins this dual system, concentrating decision-making power in the board while establishing oversight mechanisms that ensure accountability and prevent crises. Italian law has developed a pluralistic control architecture—comprising statutory auditors, external auditors, independent

⁹ OLIVER HART AND LUIGI ZINGALES, *Companies Should Maximize Shareholder Welfare Not Market Value*, in *Journal of Law, Finance, and Accounting* 2, no. 2 (2017): 247–275.

¹⁰ DIEGO CORAPI, *Corporate Governance*, in *Disciplina delle società e legislazione bancaria, Studi in onore di Gustavo Visentini, Principi e metodo, società e organizzazione*, edited by Antonio Nuzzo and Andrea Palazzolo, Luiss University Press, 2020, pp. 87–109.

¹¹ Article 123-bis, *Testo Unico della Finanza* (Legislative Decree no. 58/1998).

¹² Civil Code, arts. 2380–2409.

directors, and supervisory bodies under Legislative Decree 231/2001—that aims to balance autonomy and responsibility¹³.

This evolution reveals a gradual shift from corrective to preventive mechanisms: the traditional judicial remedies of private law are now complemented by organizational remedies embedded in governance structures, transforming internal controls into essential instruments of corporate compliance and crisis prevention.

Unlike the American model, which historically relies on fiduciary duties and market discipline to ensure managerial accountability, the Italian system institutionalizes control within the corporate organization itself. However, both systems converge on a common goal: ensuring the responsible exercise of corporate power. Modern corporate governance must reconcile the autonomy of management with the accountability owed to investors and society¹⁴. This dual function—governing and being governed—constitutes the essence of corporate governance in both legal and economic terms.

Ultimately, corporate governance today represents a hybrid normative order: a dynamic interplay between hard law (statutory rules and judicial principles) and soft law (codes of conduct, self-regulation, and internal policies). It is both prescriptive and procedural, defining not only what corporations may do but how they must act in order to remain legitimate participants in economic and social life. The growing complexity of corporate structures and the diversification of control bodies—ranging from internal auditors to compliance officers—reflect an expanding conception of governance as the “law of organization¹⁵.” In light of this, governance is not merely an administrative practice but a constitutional framework for the corporation: an evolving system of checks and balances through which the legitimacy, efficiency, and responsibility of enterprise are continuously redefined.

¹³ EUGENIO RUGGIERO, *Brevi riflessioni su governo societario e governo dei controlli*, in *Disciplina delle società e legislazione bancaria, Studi in onore di Gustavo Visentini, Principi e metodo, società e organizzazione*, edited by Antonio Nuzzo and Andrea Palazzolo, Luiss University Press, 2020, pp. 399-405.

¹⁴ KRAAKMAN ET AL., *The Anatomy of Corporate Law*, 4th ed., 13–14.

¹⁵ DIEGO CORAPI, *Corporate Governance*, in *Disciplina delle società e legislazione bancaria, Studi in onore di Gustavo Visentini, Principi e metodo, società e organizzazione*, edited by Antonio Nuzzo and Andrea Palazzolo, Luiss University Press, 2020, pp. 87-109.

These developments reflect a growing recognition that corporate governance is not merely a descriptive term but a legal concept with significant normative impact. Corporate governance encompasses “the whole set of legal, cultural, and institutional arrangements that determine what publicly traded corporations can do, who controls them, how that control is exercised, and how the risks and returns from the activities they perform are allocated.” Accordingly, corporate governance includes not only the statutory framework known as corporate law, but also a broader constellation of rules and principles — including internal corporate bylaws, supervisory regulations, and self-regulatory codes — that collectively govern the structure, behavior, and accountability of corporations in modern market economies¹⁶.

Building upon this theoretical framework, the European experience provides a concrete example of how corporate governance principles have evolved from abstract normative concepts into an articulated system of binding¹⁷ and non-binding¹⁸ regulatory instruments. These tools collectively aim to enhance transparency, protect shareholder rights, and foster sustainable corporate behavior.

¹⁶ DIEGO CORAPI, *Corporate Governance*, in A. NUZZO, A. PALAZZOLO, *Disciplina delle società e legislazione bancaria, Studi in onore di Gustavo Visentini, Principi e metodo, società e organizzazione*, Luiss University Press, 2020, pp. 87-101

¹⁷ See Directive 2007/36/EC – Shareholders’ Rights Directive (SRD I) which establishes minimum rights for shareholders in listed companies — voting, participation in general meetings, and transparency of information; Directive (EU) 2017/828 – Shareholders’ Rights Directive II (SRD II) which strengthens long-term shareholder engagement, transparency on remuneration policies and related-party transactions; Directive 2004/25/EC – Takeover Bids Directive which sets common rules for public takeover bids, protection of minority shareholders, and board neutrality during takeovers; Directive 2011/35/EU – Mergers of Public Limited Liability Companies which harmonizes procedures and shareholder protections in mergers of public limited companies; Directive (EU) 2019/2121 – Cross-Border Conversions, Mergers and Divisions Directive (Mobility Directive) which introduces rules to facilitate cross-border corporate mobility while ensuring transparency and employee protection; Directive 2013/34/EU – Accounting Directive which establishes accounting and financial reporting standards and includes non-financial disclosure (amended by 2014/95/EU); Directive 2014/95/EU – Non-Financial Reporting Directive (NFRD) which requires large public-interest companies to disclose ESG information on environment, social, and governance matters; Directive (EU) 2022/2464 – Corporate Sustainability Reporting Directive (CSRD) which expands ESG disclosure obligations, introduces European Sustainability Reporting Standards (ESRS) and extends scope to non-EU companies; Regulation (EU) 2019/2088 – Sustainable Finance Disclosure Regulation (SFDR) which requires financial market participants to disclose sustainability risks and impacts in investment processes; Directive (EU) 2019/2034 (IFD) and Regulation (EU) 2019/2033 (IFR) which establish governance and prudential rules for investment firms (separate from banks); Regulation (EU) 600/2014 (MiFIR) which complements MiFID II with transparency and reporting obligations for market operations.

¹⁸ See Commission Recommendation 2004/913/EC on the remuneration of directors of listed companies —which promotes transparency, shareholder oversight and disclosure of pay policies; Commission Recommendation 2005/162/EC on the role of non-executive and independent directors

This European influence has profoundly shaped the Italian corporate governance landscape, especially in listed companies, where internal control mechanisms — such as those established under Articles 154-bis TUF and 2409 c.c. — serve as the operational core of governance.

This theoretical and comparative understanding of corporate governance provides the conceptual foundation for analyzing internal control systems within corporate structures. Governance defines the architecture of authority and responsibility; internal controls operationalize it. In this sense, control systems represent the procedural dimension of governance — the mechanisms through which accountability, transparency and managerial responsibility are concretely ensured. As subsequent chapters will show, the tension between autonomy and oversight, so central to both the Italian and American models, finds its most tangible expression in these internal mechanisms. The evolution of governance, therefore, cannot be fully understood without examining how these control functions have been institutionalized, balanced, and, increasingly, converged across jurisdictions.

2. The Regulation of Internal Control Systems: Constitutional Principles and Civil Code Rules

The analysis of the regulation of internal control systems in Italy should begin with the constitutional framework, which establishes the fundamental principles guiding such mechanisms—namely, accountability, transparency, and economic oversight. Central to this framework is Article 41 of the Italian Constitution, which guarantees the freedom of private economic initiative while

and the establishment of board committees —it encourages balanced boards and effective internal control; Commission Recommendation 2009/384/EC on sound remuneration policies in the financial services sector —it calls for alignment between pay and long-term company performance; Commission Recommendation 2014/208/EU on the quality of corporate governance reporting, especially regarding the “comply or explain” principle; Commission Recommendation 2021/2279/EU on non-financial and sustainability reporting — precursor to the CSRD, guiding companies on ESG disclosures; Green Paper on the EU Corporate Governance Framework (COM(2011) 164) which opened a debate on board effectiveness, shareholder engagement, and the "comply or explain" approach; Action Plan: European Company Law and Corporate Governance (COM(2012) 740) which outlined EU priorities: shareholder rights, board diversity, transparency, and cross-border mobility; Guidance on Due Diligence for Sustainable Business Conduct which encourages responsible business practices and risk-based due diligence ahead of the CSDDD.

subjecting it to limits rooted in social utility and respect for security, liberty, and human dignity. The Constitution further entrusts the law with the task of determining appropriate programs and controls to ensure that both public and private economic activities are directed and coordinated toward social and environmental objectives. The principles embodied in Article 41 and the activities that derive from its formulation, thus align with broader constitutional values such as social solidarity and the public interest, which together shape Italy's regulatory approach to corporate behavior. The recent amendment of Article 41 of the Italian Constitution, introduced by Constitutional Law No. 1/2022, represents less a normative rupture than a constitutional clarification of the evolving relationship between economic freedom and public oversight. By explicitly introducing environmental aims alongside social ones in paragraph three, the reform reaffirms the long-standing tension at the heart of the Italian economic constitution: the need to reconcile individual initiative with collective priorities. Yet this constitutional "update" should not be read merely as an expansion of policy goals; rather, it reflects a deeper reconfiguration of the normative framework within which economic actors—particularly publicly traded companies—are expected to operate. What emerges is not a redefinition of market logics, but a call for their internal recalibration, guided by values that transcend profitability alone.

This shift must be understood within a broader historical and theoretical trajectory. From its inception, Article 41 was conceived not as an unqualified endorsement of *laissez-faire* economics but as a cautious accommodation of economic initiative within a constitutional system wary of unregulated market dynamics. The persistent ambiguity surrounding the clause of "social utility"—historically seen as both a limiting principle and a potential instrument of dirigisme—has always made the provision a site of interpretative conflict. More recently, doctrinal reflection has highlighted the inadequacy of a merely formalistic reading of economic freedom, pointing instead to the necessity of regulatory instruments that can discipline market failures without undermining constitutional guarantees. In this context, the principle of competition—once implicitly embedded within the notion of economic initiative—has increasingly acquired autonomous constitutional stature, especially under the influence of EU law and jurisprudence.

The Italian experience, particularly after Law No. 287/1990, confirms a shift away from viewing competition as a matter of private redress toward recognizing it as a structural value requiring active institutional protection. These developments have significant implications for the system of controls applicable to listed companies. In a constitutional framework that no longer treats the market as a self-regulating entity but as a domain of plural and often conflicting interests, corporate control mechanisms become more than instruments of internal compliance—they are expressions of constitutional responsibility. The challenge lies precisely here: how to design systems of corporate oversight that are consistent with a conception of economic freedom which, while “fundamentalized” in its modern reading, is nevertheless subject to balancing with values of equal constitutional dignity. Article 41, paragraph 3 thus does not merely authorize legislative intervention; it establishes a normative horizon in which private power, particularly in capital markets, must be coordinated and, where necessary, redirected toward social and environmental outcomes. This coordination cannot rely on coercion alone—indeed, the constitutional text resists such interpretations—but must occur through governance practices, regulatory incentives and oversight structures that render constitutional aims operational within corporate life. In this sense, the constitutionalization of sustainability and competitiveness becomes a question not of rhetoric, but of institutional design¹⁹.

Moving on to the analysis of the Civil Code, several key provisions must be taken into consideration. It must be said that the provisions introduced by the 1942 Italian Civil Code regarding corporate control were revolutionary in several respects: in fact, for the first time, the legislator institutionalized the control bodies as essential components of joint-stock companies, clearly separating the administrative functions, exercised by the board of directors, from the supervisory functions assigned to the *collegio sindacale*. Prior to 1942, corporate controls were

¹⁹ The analysis and interpretation of Article 41 of the Italian Constitution, as well as the related constitutional and doctrinal debates, draw primarily on Roberto Nania, “*Costituzione e libertà economica: dalle origini alla riforma dell’art. 41*,” in *Diritti fondamentali: aspetti teorici e temi attuali*” edited by Roberto Nania, Turin, Giappichelli, 2024; and Enrico Verdolini, “*La pianificazione economica nella Costituzione italiana: storia, interpretazioni e attuazioni dell’art. 41, co. 3, Cost.*,” in *La pianificazione come metodo di governo e di amministrazione* edited by Daniele Donati, Turin, Giappichelli, 2025.

fragmented and largely dependent on shareholder meetings or judicial mechanisms. The 1942 Code established a unified and permanent system of internal oversight, integrating control into the very governance of the company and this approach was remarkably advanced for its time, anticipating a modern concept of corporate governance in which the company is recognized as an autonomous entity separate from its shareholders and managers. Furthermore, the Code strengthened the *collegio sindacale*'s investigative and informational powers while limiting judicial review, such as challenges to shareholders' resolutions and liability actions, to external and subsequent remedies. By defining a functional hierarchy of controls—from internal to judicial to public oversight—the 1942 framework introduced a multilayered control system that prefigured contemporary models of internal control and compliance, which remain central to modern corporate governance. Nonetheless, many articles were, time after time, reformed due to the various interventions by the legislator.

2.1 Italian Financial Regulation: The TUF meets Corporate Governance

Among the major reforms shaping Italian corporate governance, the Consolidated Law on Finance (*Testo Unico della Finanza, TUF*) stands out as a foundational statute. Enacted through Legislative Decree No. 58 of February 28, 1998, the TUF emerged from a dual need: domestically, to unify financial market regulation under a coherent legal framework, and externally, to align Italy's regulatory system with evolving European Union directives²⁰. The Italian Parliament empowered the government via the 1994 Law No. 146 to implement EU obligations, leading to the TUF's comprehensive overhaul of financial market governance. The statute was prepared under the leadership of Mario Draghi, then General Secretary of the Treasury and chair of the drafting commission, supported by the Treasury Department, CONSOB, and the Bank of Italy. Draghi emphasized the inseparability of financial markets and corporate governance reforms, unified

²⁰ Mainly the seventh directive, which focuses on the consolidated accounts of limited liability companies, ensuring transparency and consistency in financial reporting; and the Eighth directive, which sets out rules for identifying and qualifying individuals responsible for statutory audits.

by core principles of transparency, efficiency, and minority shareholder protection²¹. He further articulated the concept of a checks and balances framework as the structural mechanism through which these principles could materialize in practice—enhancing oversight, protecting minority interests, and bridging the gap between rigid regulation and self-regulatory autonomy in corporate governance.

Draghi emphasized the inseparability of financial markets and corporate governance reforms, unified by core principles of transparency, efficiency, and minority shareholder protection. His vision aimed to enhance market trust, investor confidence, and the competitiveness of Italy's financial system, while balancing mandatory regulation with corporate statutory autonomy to allow flexible self-regulation within firms. Draghi underscored the importance of a checks and balances framework²² to ensure internal oversight and protect minority shareholders, aligning Italian corporate governance with broader international standards.

Key provisions of the TUF regulate the governance structures of listed companies to reinforce controls and oversight. Article 147-*ter* mandates that at least one director on a listed company's board must be elected from the minority shareholders' list, ensuring balanced representation and fostering independence. Article 148 establishes the Board of Statutory Auditors (*Collegio Sindacale*) as a mandatory internal control body overseeing risk management processes and the accuracy of financial reporting²³. Article 154-*ter* requires listed companies to issue periodic financial reports, ensuring transparency and accountability through effective internal control systems. In this context, Article 154-*bis* introduced the role of the manager responsible for preparing the company's financial reports (*Dirigente preposto alla redazione dei documenti contabili societari*). While this figure does not constitute a supervisory body in the strict sense, they play a significant role within the internal control system. Their responsibilities partially

²¹ For a comprehensive overview of Draghi's report, see Atti Parlamentari della Camera dei Deputati, VI Commissione, December 10th 1997, page 6 to 8.

²² The "checks and balances" system refers to a governance model in which powers and responsibilities are distributed among different bodies or authorities to ensure mutual control and prevent any single entity from exercising unchecked power. Originally developed in the context of constitutional systems, it is also applied in corporate governance to balance the roles of shareholders, boards, and management.

²³ For the analysis of the Board of Statutory Auditors see paragraph 3.1.

overlap with the U.S. practice of joint CEO and CFO accountability in certifying the accuracy and completeness of financial disclosures.

The TUF's statutory framework is complemented by the Italian Corporate Governance Code²⁴, which, unlike the mandatory nature of the TUF, operates on a "comply or explain" principle²⁵. This Code provides a set of best practices primarily aimed at companies listed on the Milan Stock Exchange, covering seven key areas: the Board of Directors, internal control and risk management, remuneration policies, related-party transactions, shareholder meetings, and diversity policies. Articles 7 and 8 are particularly relevant, focusing on internal control systems and the management of conflicts of interest. Article 7 tasks the Board with establishing and maintaining effective internal control and risk management systems, including setting strategic guidelines, regularly evaluating system adequacy, and ensuring operational implementation with the support of internal audit and risk management functions. This emphasizes the Board's ultimate accountability for governance and corporate sustainability.

Article 8 addresses the management of conflicts of interest, particularly concerning related-party transactions. It mandates clear and structured procedures to prevent, detect, and manage conflicts transparently throughout directors' mandates, contributing to market integrity and investor protection. Jurisprudence has increasingly reinforced these provisions, clarifying directors' fiduciary duties, particularly their obligation to act in the company's best interests and to avoid conflicts. When companies incorporate the Corporate Governance Code's best practices into bylaws or internal regulations, courts recognize their binding nature, especially under the "comply or explain" regime. Thus, Articles 7 and 8 have evolved into quasi-normative instruments, shaping corporate governance practices and judicial interpretations, significantly advancing internal control frameworks and fiduciary responsibilities in Italian law.

²⁴ The Corporate Governance Code was introduced in 1999 and reformed many times, most recently in 2020.

²⁵ The explain or comply principle is an approach used in the field of corporate governance where instead of setting out binding laws, they which companies may either comply or if they don't comply, explain publicly when they don't.

2.1.1 The Two-Tier Model: Governance Structure and Oversight Functions

The regulatory framework for Italian listed companies has evolved significantly, notably with the 2003 corporate law reform introducing alternative governance models: the two-tier (dualistic) and one-tier (monistic) systems. These models aim to improve internal controls and corporate governance in response to increasing corporate complexity and international standards. This section focuses on the functioning of the two-tier system, its control mechanisms, and the reasons for its limited adoption.

Traditionally, Italian company law adhered to a single governance model comprising the shareholders' meeting, board of directors, and *Collegio Sindacale* (board of statutory auditors). The 2003 reform introduced the dualistic system to enhance transparency and align with European standards, by formally separating management and control functions.

The two-tier system, inspired by the German model, distinctly separates management and control through two bodies: the Management Board (*Consiglio di Gestione*), responsible for daily and strategic management, and the Supervisory Board (*Consiglio di Sorveglianza*), tasked with oversight and appointment of the management. This separation aims to increase transparency, reduce conflicts of interest, and enhance investor confidence by clearly delineating powers.

Pursuant to Article 2409-*novies* of the Italian Civil Code, the Supervisory Board acts as an independent counterbalance to the Management Board, often including representatives of minority shareholders, to safeguard broad stakeholder interests.

The governance framework of the two-tier system is legally grounded in Articles 2409-*novies* and 2409-*duodecies* of the Italian Civil Code, which regulate the appointment, composition, and duties of both boards. Supervisory Board members are generally appointed by the shareholders' meeting, with a minimum of three members to ensure effective oversight and continuity.

Article 2409-*terdecies* expands the Supervisory Board's role to include both control and strategic functions, encompassing the appointment and dismissal of Management Board members and approval of annual financial statements. The

board monitors compliance with laws, bylaws, and good governance (Art. 2403), can initiate liability actions against management, and reports annually to shareholders. It may also be involved in approving strategic and financial plans, preserving a balance between oversight and management autonomy.

Supervisory Board members owe a duty of diligence and share liability with the Management Board for damages preventable through proper oversight. This mechanism enhances internal controls, transparency, and accountability by enforcing separation of powers.

The Management Board, regulated by Article 2409-*novies* of the Civil Code, holds responsibility for ordinary and extraordinary administration of the company, akin to the traditional board of directors. Its members make collective decisions and are jointly accountable, though individual liability may arise based on specific roles or delegated powers.

Article 2409-*novies* requires the Management Board to report quarterly to the Supervisory Board on management activities, financial status, and major transactions, ensuring transparency and enabling effective oversight. Delegations of authority do not diminish the board's collective responsibility.

Members of the Management Board are subject to director liability under Articles 2392-2395 of the Civil Code, accountable to the company, shareholders, and third parties for breaches of duty, negligence, or statutory violations.

From a doctrinal point of view, some authors²⁶ have praised the dualistic system for the capacity to limit managerial opportunism and to enhance the strategic supervision of company activities.

However, some criticism has been shown, particularly over the risk of excessive bureaucracy and the complexity of coordination among the two boards, without taking into account the complexity of the regulatory framework enacted by the legislator, which, being constructed through the technique of cross-referencing, does not fully enhance the potential of the system²⁷. In fact, the two-tier has been implemented in Italy to a limited extent, with most companies remaining with the

²⁶ P. ABBADESSA, F. CESARINI, *Sistema dualistico e governance bancaria*, Giappichelli, Torino, 2009.

²⁷ S. ALVARO, D. D'ERAMO, G. GASPARRI, *Modelli di amministrazione e controllo nelle società quotate, Aspetti comparatistici e linee evolutive*, Quaderni giuridici Consob, 2015.

Mixed system due to familiarity. Nonetheless, the dualistic model remains a credible and sophisticated governance option, especially for companies with dispersed ownership or companies in regulated industries where effective monitoring is particularly valued.

2.1.2 The Monistic System: Integration of Management and Control Functions

Moving on to the second system introduced with the 2003 reform, the one-tier system, it offered an ulterior alternative to the two-tier system and the traditional/mixed system. This system, which takes inspiration from the American board model, centralises management and control functions into the Board of Directors and blends supervisory functions with the same body as an organisational component by creating an internal control committee.

The relevant provisions governing its functioning are set out from article 2409-*sexdecies* to article 2409-*noviesdecies* of the Italian Civil code, being at the same time strictly connected to articles 2086, 2381 and 2391.

While article 2409-*sexdecies* sets out the general structure of the one-tier system, providing that management is exclusively entrusted to the board of directors, which must appoint a control committee from among its members; article 2409-*septdecies*, regulates the composition and requirements of the committee, stipulating that it must consist of non-executive directors, a majority of whom must be independent members and at least one of whom must be entered in the official register statutory auditors.

The internal control committee's power and duties are outlined under article 2409-*octiesdecies*. These powers and duties include verifying observance of law and articles of association, ensuring adequacy of organisational, administrative and accounting organisation of the company, and examining effectiveness of the internal control and risk management systems. The committee also monitors reporting procedures in respect of finance and liaises with external auditors.

Article 2409-*noviesdecies* establishes the liability regime of members of the control committee, expressly subjecting them, in clear terms, to the same legal

provisions governing directors' liability under articles 2392 to 2395 of the Civil Code. As such, members of the committee have the obligation to perform their duties with the diligence of a professional manager and are liable for fault, violation of duty, or failure to discharge statutory obligations.

Additionally, the provisions under article 2381 regarding the delegation of power in the board of directors, and the provisions established by article 2391 regarding conflict of interest of directors, apply within the one-tier system; of particular interest, article 2086, paragraph 2, of the Civil Code reiterates the overall obligation of the directors to ensure the adoption of adequate organisational, administrative, and accounting frameworks structure aimed at safeguarding the company's legal compliance and its management.

Overall, the one tier-system integrates management and supervisory function into a unified board system with the main goal of streamlining corporate governance without sacrificing effective control mechanism. It is argued that the one-tier model, thanks to the positive integration between management and control and to the *ex ante* supervision exercised by board members, ensures more informed and effective governance, eliminates the distance between controllers and those being controlled, and improves coordination²⁸. However, the system also places substantial fiduciary duties and liabilities on directors and therefore it places strong focus on the imperative requirement of due diligence, independence and professionalism. As a consequence, the internal structure of the Board of Directors becomes more complex due to its composition. The strict quantitative requirements—such as the obligation that at least one-third of its members be independent—increases both rigidity and organizational complexity²⁹. Furthermore, in the one-tier system, the distinction between management and control is less clear-cut, unlike the clear separation that characterizes the traditional model³⁰. Accordingly, these factors explain why the one-tier system is the least favored governance model among Italian companies; in fact, it can be defined as

²⁸ S. ALVARO, D. D'ERAMO, G. GASPARRI, *Modelli di amministrazione e controllo nelle società quotate, Aspetti comparatistici e linee evolutive*, Quaderni giuridici Consob, 2015.

²⁹ T.DI MARCELLO, *Sistema monistico e organizzazione delle società di capitali*, Milano, 2013, p. 36 ss.

³⁰ T.DI MARCELLO, *Sistema monistico e organizzazione delle società di capitali*, Milano, 2013, p. 46 ss.

“the younger brother among the organizational models of the *società per azioni*³¹.” Introduced alongside the traditional and dualistic models, it immediately appeared as the least structured and least developed option, occupying the final section of the new provisions on corporate administration and control. With only four specific articles—half as many as the dualistic model—and most of its regulation built through reference to other systems, it was perceived as an incomplete and marginal innovation.

In practice, the model remained almost unused; over time, however, legislative and regulatory developments—especially those concerning internal controls, such as Legislative Decree No. 231/2001 and the introduction of the *dirigente preposto* in listed companies—altered the landscape of corporate supervision. This multiplication of control bodies made the traditional model appear increasingly cumbersome and redundant, suggesting that a renewed monistic model could provide a more coherent synthesis between managerial efficiency and effective oversight.

Nevertheless, within the Civil Code, the monistic system continues to suffer from four fundamental weaknesses. First, issues of independence and stability arise from the procedures for appointing, removing and compensating members of the management control committee, which ultimately undermine their autonomy. Furthermore, removal does not require just cause nor judicial verification and compensation is determined by the board rather than by the shareholders’ meeting.

Second, the system shows an insufficiency of functions. In contrast with the comprehensive supervisory duties assigned to the *collegio sindacale* under Article 2403 c.c., Article 2409-*octiesdecies* confines the committee’s powers to verifying the adequacy of the company’s organizational and accounting structures, omitting any explicit control over legality or sound management.

A third weakness concerns the lack of powers. The committee has no direct inspection rights and cannot independently obtain information or convene the shareholders’ meeting. Moreover, it lacks any explicit authority to initiate liability

³¹ Verbatim GIAN DOMENICO MOSCO, SALVATORE LOPREIATO, *Brevi note su opportunità e limiti attuali del sistema monistico* (doi: 10.1433/83785), in *Analisi Giuridica dell’Economia* (ISSN 1720-951X) Fascicolo 1, giugno 2016, p. 51.

actions against directors, leaving it considerably weaker than the traditional *collegio sindacale*.

Finally, the unity of the organ and responsibility introduces ambiguity between administrative and supervisory roles. Since the same board encompasses both management and control functions, committee members—who are also directors—participate in management decisions and therefore risk being held accountable for the very actions they are meant to oversee³².

For listed companies and banks, subsequent reforms—especially the *Testo Unico della Finanza* (TUF) and the Bank of Italy’s supervisory regulations—have partially addressed these deficiencies by expanding the committee’s information rights, inspection powers, and interaction with auditors and subsidiaries.

A significant development came with Intesa Sanpaolo’s 2016 adoption of the monistic system, marking the first major case of a listed bank transitioning from the dualistic model. The change was justified as a means to overcome certain criticalities of the dualistic experience through a model allowing a more direct relationship between corporate bodies, with evident benefits in terms of alignment and sharing of information flows. The new statute introduced mechanisms to strengthen transparency and minority representation:

- election of five committee members by list voting, ensuring minority representation;
- exclusion of cooptation for replacements, requiring shareholder resolution;
- dismissal only through a “duly motivated” resolution, subject to the opinion of the Nomination Committee.

However, the core structural fragilities persisted. The statute did not mandate *giusta causa* for dismissal, and the *simul stabunt simul cadent* clause allows

³² For critical perspectives on the monistic system, see GIAN DOMENICO MOSCO, SALVATORE LOPREIATO, *Brevi note su opportunità e limiti attuali del sistema monistico* (doi: 10.1433/83785), in *Analisi Giuridica dell’Economia* (ISSN 1720-951X) Fascicolo 1, giugno 2016; DUCCIO REGOLI, *La funzione di controllo nel sistema monistico*, in *AA.VV., Amministrazione e controllo nel diritto delle società – Liber amicorum Antonio Piras*, Torino, 2010; GIAN DOMENICO MOSCO, *Studi sull’effettività delle regole societarie*, Aracne, 2011; FEDERICO MARIA MUCCIARELLI, *Il sistema monistico conviene? In Sistemi dualistico e monistico di amministrazione e controllo nelle società per azioni*, Giappichelli, Turin, 2024; PAOLO VALENSISE, *Spigolature sul comitato per il controllo sulla gestione del sistema monistico, con particolare riguardo alle società per azioni quotate in borsa* (doi: 10.1433/83790), in *Analisi Giuridica dell’Economia* (ISSN 1720-951X) Fascicolo 1, giugno 2016.

majority-induced collective resignations, undermining the committee's independence. Moreover, the coexistence of control and managerial functions continued to raise concerns of overlapping responsibility.

The monistic system, despite its potential advantages, cannot achieve full effectiveness without a comprehensive regulatory reform that goes beyond the mere sphere of corporate self-regulation. While the model represents a desirable simplification and an alignment with international standards of governance, its structural weaknesses—particularly those rooted in the Civil Code—continue to hinder its practical adoption: the risk is that “the monistic system, like almost everything born (or spread) in the United States, is ‘born to run,’ but in a different legal, economic and entrepreneurial reality like ours, it is better that it remains, for a little while longer, close to the starting blocks³³.” However, in this sense, the Intesa Sanpaolo experience represents a significant testing ground and one of the first concrete examples of convergence between the American and Italian governance systems. By adopting the monistic model and introducing statutory safeguards to balance efficiency and control, Intesa Sanpaolo demonstrates how the Italian context can gradually integrate features of the American board system while maintaining its own legal and supervisory traditions. This case, therefore, stands as a prototype for a possible evolution of Italian corporate governance toward a more globally coherent model.

In conclusion, Italian company law permits three distinct governance models for listed companies, among which the traditional system—often referred to as the mixed system—has historically been and remains the most widely adopted. This system combines different governance features and is commonly described in doctrine and case law as a “mixed system” due to the selective application of its mechanisms. It is governed by Articles 2380-*bis* et seq. of the Italian Civil Code. This system is based on a clear separation between management and control functions, assigned to distinct bodies: the shareholders' meeting, the Board of Directors, and the Board of Statutory Auditors.

The traditional system will be examined in further detail in the following sections.

³³ *Ivi*, p. 64.

3. Board of Directors in the Traditional Model: structure

Within the traditional Italian model of corporate governance, the Board of Directors constitutes the central decision-making and management body, entrusted with the broadest powers of administration under Articles 2380-*bis* to 2389 of the Italian Civil Code. This framework reflects a unitary conception of management and oversight, in which strategic direction and control are functionally integrated within a single collegial organ rather than divided among separate entities. Such structural concentration of powers, while enhancing decisional coherence, inevitably magnifies the significance of directors' accountability and internal checks—issues that become particularly salient when compared to more functionally segregated governance systems, such as those prevailing in the United States.

Pursuant to Article 2380-*bis*, the Board exercises all powers necessary to achieve the corporate purpose, save for matters expressly reserved to the shareholders' meeting. Although collective in nature, the Board may delegate part of its authority to one or more managing directors or to an executive committee pursuant to Article 2381, while retaining a residual duty of supervision. This balance between delegation and oversight embodies a structural tension that lies at the heart of the Italian corporate governance model: ensuring managerial efficiency without diluting collective responsibility. The composition of the Board is regulated by Article 2383, which provides for appointment by the shareholders' meeting. The number of directors is generally determined by the by-laws and, in the case of listed companies, is further constrained by the Consolidated Law on Finance and the Corporate Governance Code. In practice, these instruments ensure that the board's composition reflects principles of diversity, independence, and adequate competence. In listed companies, at least one-third of the directors must satisfy the independence requirements set by Article 148, paragraph 3³⁴, of the Consolidated Law on Finance and by the Corporate Governance Code.

³⁴ Article 148 of Legislative Decree No. 58/1998 (the Italian Consolidated Law on Finance) outlines the independence requirements for members of supervisory bodies in listed companies. It establishes the criteria under which individuals are considered independent, aiming to ensure impartial oversight and mitigate conflicts of interest.

Directors are typically appointed for a term not exceeding three financial years and may be re-elected. The *voto di lista* mechanism, introduced by Article 147-ter of the Consolidated Law on Finance³⁵, facilitates the representation of minority shareholders and promotes a more pluralistic board composition. Similarly, Law No. 120/2011 (*Golfo-Mosca Law*³⁶) introduced gender balance requirements, mandating that at least one-third of board members belong to the underrepresented gender—an important step toward aligning Italian corporate governance with international standards of inclusivity and accountability.

The institutional configuration of the Italian board, characterized by its unitary and collegial nature, inevitably influences the way directors' duties are conceived and enforced. Unlike systems where governance and management are functionally separated, Italian law anchors responsibility within a single body, thereby heightening the importance of individual and collective accountability. The next section explores these responsibilities in depth, focusing on the framework established by Articles 2381 and 2392 of the Civil Code.

3.1 Directors' Duties and Liability in the Traditional Governance Model

Having defined the composition and structural features of the Board of Directors, it becomes essential to analyse the substantive legal framework that governs its operation. In this respect, Articles 2381 and 2392 of the Italian Civil Code play a pivotal role, as they establish the informational, supervisory, and diligence duties that form the cornerstone of directors' liability within the Italian corporate governance system.

³⁵ Article 147-ter of the Italian Consolidated Law on Finance governs the composition and appointment procedures of the board of directors in listed companies. It establishes requirements for transparency, shareholder participation, especially of minority shareholders, and ensures compliance with principles of independence and gender balance, in alignment with European corporate governance directives.

³⁶ The Golfo-Mosco Law was introduced in 2011, after many attempts and interventions. The regulation is aimed at improving gender balance on boards of listed companies. It mandates that at least one-third of the members of corporate boards must be of the underrepresented gender, typically women. The law was introduced to significantly increase female representations in top corporate positions.

In light of what has been discussed so far, the most critical issues concerning the regulation of the board of directors in the traditional Italian corporate governance system revolve around the theme of directors' liability, particularly in relation to the duty to establish an adequate organizational, administrative, and accounting structure. This obligation, codified in Article 2086, paragraph 2, of the Civil Code, as amended by the corporate crisis and insolvency reform (Legislative Decree No. 14/2019), imposes on directors the duty to ensure that the company's internal organization is suitable for its nature, size, and complexity. However, despite its apparent specificity, this duty is defined by an open-ended legal clause, leaving broad interpretive discretion to courts. Unlike certain regulated sectors, such as banking and insurance, where detailed regulatory provisions strictly define what constitutes "adequacy," the general corporate framework offers no uniform standard. The resulting indeterminacy raises significant difficulties in assessing both compliance and the corresponding liability of directors. Italian jurisprudence has contributed significantly to delineating the scope of directors' responsibilities by balancing the attribution of liability. In some instances, courts have held directors jointly liable for damages caused to the company due to breaches of their duties, especially when unauthorized or unlawful actions were undertaken without sufficient oversight. The burden of proof in such cases has sometimes shifted to the directors, requiring them to demonstrate that their conduct was lawful and prudent³⁷. At the same time, the courts have reaffirmed that directors bear a general supervisory duty over the company's operations, even in the absence of specific delegations, and that failure to prevent unauthorized or risky activities may constitute a breach of this duty³⁸. Furthermore, jurisprudence has consistently emphasized the necessity for directors to adopt preventive measures by thoroughly

³⁷ Among others Supreme Court of Cassation, Civil Section, 12 May 2021, No. 12567, in which the Court established that in cases where a director withdraws company funds, the director bears the burden of proving the existence of valid, certain, and enforceable credits against the company to justify such withdrawals. Failure to provide such proof results in the director being held liable for damages caused to the company. Liability claims have a contractual nature, requiring the company to prove the director's breach of duties, the damage, and the causal link, while the director must prove compliance with their duties.

³⁸ Among others Supreme Court of Cassation (Italy), Civil Section, 4 April 2011, No. 7606, in which the Court has established that Directors' liability is excluded when decisions are preceded by careful risk assessment and adequate information. Judicial review of business decisions is limited to verifying whether the directors acted diligently and does not extend to the economic merits of the decision, unless the decision is manifestly illogical or unreasonable.

assessing potential risks and ensuring that adequate information and safeguards are in place prior to making business decisions³⁹. This balanced approach has been crucial in defining the limits and obligations inherent to the role of directors in corporate governance.

From a critical standpoint, the concept of adequacy remains highly relative—it depends not only on the company's size and activity but also on its strategic choices, risk profile, and the broader operational environment⁴⁰. Therefore, no universally valid organizational model can be prescribed. Attempts to define adequacy through business management theories, best practices, or sectoral regulations (including the compliance models under Legislative Decree No. 231/2001 and the Corporate Governance Code) provide useful guidance but cannot substitute a legal determination of what the law effectively requires.

In this regard, a critical issue arises concerning the possible overlap between the directors' duty to ensure an adequate organizational system and the tasks assigned to the *Organismo di Vigilanza* (Supervisory Body) established under Legislative Decree No. 231/2001. While the latter is primarily responsible for monitoring the effectiveness of compliance models to prevent corporate offenses, directors retain ultimate responsibility for the overall adequacy of the organizational structure. This overlapping sphere of responsibilities can generate ambiguities in practice, requiring a clear delineation of roles to avoid duplications or gaps in governance and control.

The legal notion of adequacy should not be confused with managerial efficiency or economic optimality; rather, it is functional to ensuring the reliability of information, the transparency of decision-making, and the lawful and prudent management of corporate activities. In this perspective, directors are not required to adopt the most efficient organizational model but one capable of guaranteeing reliable data flows, clear hierarchies, and effective risk oversight—all preconditions for sound administration.

³⁹ Among others Supreme Court of Cassation (Italy), Civil Section, 9 November 2020, No. 25056, in which the Court established that if directors' actions are not explicitly forbidden, the plaintiff must prove not only the act but also the context showing a breach of loyalty and diligence duties. Once the breach is established, the director must provide evidence to exclude or lessen their responsibility.

⁴⁰ GIOVANNI MERUZZI, *Adeguatezza degli assetti*, Zanichelli, 2016; V. DE SENSI, *Adeguati assetti organizzativi e continuità aziendale: profili di responsabilità gestoria*, in *Riv. soc.*, 2017, p.357 ss.

In this regard, a particularly problematic area concerns the internal control system, which represents the core of directors' organizational duties. While corporate law does not explicitly impose the establishment of such a system, the Consolidated Law on Finance (TUF) and the Corporate Governance Code implicitly make it a necessity, especially for listed companies. Articles 149 and 150 of the TUF assign to the board of statutory auditors the duty to monitor the adequacy of internal controls and risk management, while Article 123-*bis* requires disclosure of their main features in governance reports. Moreover, the Corporate Governance Code mandates that the board of directors define the guidelines of the internal control and risk management system, determine its compatibility with strategic objectives and ensure that the internal audit function—hierarchically independent and reporting directly to the board—continuously verifies its effectiveness. These developments reflect the European influence and the gradual internalization of governance standards such as the COSO framework, which stress risk identification, measurement, and monitoring as key elements of corporate accountability.

Nevertheless, a critical tension persists between regulatory ambition and practical feasibility. For unlisted or small companies, the absence of a codified obligation to establish a full-fledged internal control system reflects the legislator's intent to avoid imposing excessive organizational burdens that could hinder operational efficiency. Yet, even in such contexts, the duty of adequacy obliges directors to assess whether the company's risk exposure requires adopting specific internal controls to ensure lawful and reliable management. Failure to perform this assessment may expose directors to liability, as courts increasingly interpret organizational deficiencies as breaches of fiduciary duties, especially when such weaknesses contribute to financial distress or legal non-compliance.

Having examined the duty to ensure an adequate organizational structure and the critical aspects of its regulation, it is important to consider other duties of directors that also raise significant issues. Particularly, the duty of directors to act in an informed manner, codified in the final paragraph of Article 2381 of the Italian Civil Code, represents a cornerstone of the broader duty of care. This obligation requires directors to make decisions only after having acquired adequate and

reliable information concerning the company's affairs. However, both doctrine and case law⁴¹ have clarified that this duty does not entail an individual investigatory power of non-executive or delegating directors within the company's structures. Rather, the law envisages a collective information flow, whereby directors obtain information through the board and, in particular, from the managing directors or general manager, without directly intervening in day-to-day management.

From a liability perspective, Article 2392 paragraph 2 limits the responsibility of delegating directors to cases where they were—or should have been—aware, based on the information provided in the board, of prejudicial facts and failed to act to prevent or mitigate the resulting harm. In this sense, the duty to act in an informed manner operates as a reactive rather than proactive obligation⁴²: directors are not expected to seek further information beyond that provided, unless the data received appear incomplete, contradictory, unreliable, or there are “warning signs” (*segnali d'allarme*⁴³) of organizational or managerial dysfunctions⁴⁴.

Critically, this framework reflects the delicate balance between oversight and managerial non-interference that characterizes modern corporate governance. While directors must ensure the adequacy of information flows and respond to anomalies, the law deliberately avoids imposing a generalized surveillance duty that would blur the boundary between supervision and management. The challenge, therefore, lies in operationalizing the standard of diligence without transforming it into an unrealistic expectation of omniscience—preserving both the board's supervisory autonomy and its reliance on delegated management.

⁴¹ LUCIA CALVOSA, *Sui poteri individuali dell'amministratore nel consiglio di amministrazione di società per azioni*, 2010; VINCENZO CALANDRA BUONAURA, *L'amministrazione della società per azioni nel sistema tradizionale*, Torino, Giappichelli Editore, 2019.

⁴² VINCENZO CALANDRA BUONAURA, *L'amministrazione della società per azioni nel sistema tradizionale*, Torino, Giappichelli Editore, 2019, p. 314 ss.

⁴³ S. SEMINARA, *Diritto Penale Commerciale, Vol. II, I reati societari*, Giappichelli, 2021.

⁴⁴ The Italian Supreme Court has repeatedly confirmed this interpretation: Cass. 31 August 2016, n. 17441, and Cass. 29 December 2017, n. 31204, which emphasized that liability arises only if the diligent exercise of the information duty would have allowed the director to become aware of the prejudicial act and prevent or limit its consequences. The same logic has been extended into criminal law, where the duty has been analyzed in connection with directors' *posizione di garanzia* (position of guarantor) under Article 40(2) of the Criminal Code. The Court of Cassation (e.g., Cass. Pen., 19 June 2007, n. 23838; Cass. Pen., 2 November 2012, n. 42519) clarified that criminal liability requires actual knowledge—or at least conscious awareness—of the unlawful event, not mere *negligent ignorance*. Thus, only the perception of evident “red flags” can trigger a penal duty to intervene.

Alongside the duty of care, Italian company law recognizes a distinct duty of loyalty (*dovere di fedeltà*), which requires directors to pursue the company's interest and to refrain from conduct that conflicts with it. This duty finds expression in several statutory provisions—most notably Articles 2391 and 2391-*bis* of the Civil Code on directors' interests and related-party transactions, and Article 2390 on the prohibition of competition. Collectively, these provisions embody a fiduciary principle akin to the American duty of loyalty⁴⁵, aimed at ensuring that directors act with undivided commitment to the corporate interest.

The prohibition on competition under Article 2390 exemplifies the preventive function of the loyalty duty. It forbids directors from engaging in competing activities on their own or for third parties, from serving as directors or general managers in rival companies, and from holding unlimited liability positions in competing partnerships, unless expressly authorized by the shareholders' meeting. The rationale is to avoid even potential conflicts of interest that could compromise a director's impartiality in pursuing the company's objectives. The 2003 corporate law reform clarified that the prohibition also covers managerial positions in competing corporations, resolving prior ambiguities.

The scope of competition, however, has been interpreted broadly by doctrine and case law⁴⁶ to include not only direct competitors but also entities operating in neighboring or potentially competing markets. The prohibition thus extends to situations of proximate or potential competition, where products or services, though different, satisfy similar market needs or are likely to converge in the future. Within corporate groups, this rule raises complex questions: the prevailing view excludes its application when the overlapping directorships serve legitimate group coordination, though a potential conflict may still arise between non-dependent group entities operating in the same market.

From a remedial perspective, the breach of Article 2390 allows the company to revoke the director for just cause and seek damages, though liability is contractual rather than tortious in nature. The damage must be concrete—such as loss of

⁴⁵ For a complete analysis of this duty see Chapter II, paragraph 2.1.1.

⁴⁶ M.S. SPOLIDORO, *Il divieto di concorrenza per gli amministratori di società di capitali*, in *Rivista delle società*, 1984; F. BONELLI, *Gli amministratori*, Giuffrè, 1985; Court of Cassation, judgment no. 3091 of 1975.

business opportunities or market share—since the mere violation of the prohibition does not automatically entail harm. Moreover, authorization by the shareholders' meeting, whether prior or subsequent, can legitimate otherwise conflicting activities, reflecting a pragmatic balance between fiduciary rigor and corporate flexibility.

In sum, the duty of loyalty in Italian law reflects a functional convergence with its common law counterpart: it constrains the exercise of managerial discretion in the presence of conflicts of interest, while recognizing that informed consent by shareholders may restore legitimacy. In this sense, the *dovere di fedeltà* operates as a normative counterweight to the business judgment rule, anchoring directors' discretion to the overarching imperative of fidelity to the company's interest.

Finally, a key development in Italian company law concerns directors' duties during financial distress. Historically, the law offered little guidance on how directors should act once insolvency became foreseeable, leading courts to infer a duty to safeguard the company's assets and protect creditors. The 2017 reform and Article 2086 paragraph 2 of the Civil Code have now codified this principle, requiring directors to maintain adequate organizational structures to detect early signs of crisis and to intervene promptly.

This evolution signals a shift from a purely shareholder-oriented view toward one that incorporates creditor protection. However, the growing duty of prudence must not erode directors' entrepreneurial discretion: while they must avoid worsening the firm's financial position, they remain responsible for pursuing viable recovery strategies based on sound information and reasonable judgment. The *Codice della crisi d'impresa e dell'insolvenza* reinforces this through early-warning mechanisms, though critics warn that excessive formalism could turn managerial oversight into mere compliance, highlighting the ongoing tension between accountability and business autonomy. While these instruments aim to ensure timely detection and intervention, their excessive formalization risks transforming directors' managerial judgment into a bureaucratic compliance exercise. The resulting tension between prudential oversight and entrepreneurial autonomy epitomizes the modern challenge of defining directors' responsibility in times of

crisis: how to impose accountability for organizational adequacy without suffocating legitimate business risk-taking.

Ultimately, the discipline of the board of directors reveals a structural ambiguity: the law demands adequacy without defining its parameters, thereby shifting the burden of interpretation—and potential liability—onto directors and supervisory bodies. This ambiguity, while allowing flexibility, also creates uncertainty and uneven enforcement, undermining the predictability of corporate responsibility. From a critical standpoint, the Italian framework reflects a tension between principle-based regulation and prescriptive governance, where the lack of normative precision transforms the duty of adequacy into a dynamic but risky standard, constantly shaped by evolving best practices, judicial interpretation and market expectations⁴⁷.

4. *Collegio Sindacale*: structure and liability

The *Collegio Sindacale* remains one of the most distinctive features of the Italian corporate governance system—a hybrid institution that embodies both supervisory and compliance functions within a single collegiate body. Historically rooted in the model of legality control, its identity has been gradually reshaped through successive reforms that have transformed it into a key component of the risk governance architecture. Articles 2403–2409 of the Civil Code delineate the legal duties of the *Collegio*, entrusting it with oversight of legal and bylaw compliance, evaluation of the adequacy of organizational, administrative and accounting structures, and verification of their effective implementation. The reforms enacted by Legislative Decree No. 6 of 2003 and, subsequently, by the *Codice della Crisi d'Impresa e dell'Insolvenza* have expanded this role, reorienting it from a retrospective legality check to a proactive and continuous supervision. The introduction of Legislative Decree No. 39 of 2010, implementing Directive

⁴⁷ VINCENZO CALANDRA BUONAURA, *L'amministrazione della società per azioni nel sistema tradizionale*, Giappichelli, Turin, 2019, pp. 286-300; CARLO ANGELICI, *Interesse sociale e business judgment rule*, in *Responsabilità degli amministratori di società e ruolo del giudice*, p. 9; CARLO AMATUCCI, *Adeguatezza degli assetti, responsabilità degli amministratori e Business Judgment Rule*, in *Giur. comm.*, 2016, I, p. 648.

2006/43/EC, further strengthened this evolution by designating the *Collegio Sindacale* of public interest entities as the audit committee responsible for monitoring the financial reporting process, internal controls, risk management, and the independence of the external auditor.

This layered regulatory framework reflects an ambition to integrate diverse oversight functions—legal, financial, and ethical—within a unified control body. Yet, as Italian doctrine has repeatedly observed, this very concentration of duties has produced an intrinsic tension between accountability and authority. The *Collegio Sindacale* exercises oversight, not management: its powers are primarily of observation, reporting and denouncement, but not of direct intervention in the administrative sphere. This structural limitation—already noted by early commentators as a potential source of dysfunction—has become even more pronounced as legislative reforms have progressively expanded the *Collegio's* responsibilities without a corresponding increase in its operational powers.

From a judicial perspective, the Italian Supreme Court has consistently confirmed this extensive interpretation of the *sindaci's* duties. The Court of Cassation has affirmed that the liability of statutory auditors arises not only when they directly contribute to a corporate wrongdoing but also when, through omission or negligent supervision, they enable or fail to prevent the administrators' unlawful acts⁴⁸. This jurisprudence has gradually refined the causal nexus in cases of omission, recognizing that inaction may constitute concurring causation whenever timely control could have averted or mitigated the harm to the company. More recent judgments have extended this principle even further. In fact, the Court of Cassation reaffirmed that the *sindaci* must exercise oversight with diligence, fairness and good faith, and that their liability may arise from failure to scrutinize major transactions that—if properly verified—could have avoided significant patrimonial losses⁴⁹. Likewise, it has been clarified that in the field of administrative pecuniary sanctions, auditors may be held liable for insufficient supervision of disclosure obligations under Article 94, paragraph 7 of the *Testo*

⁴⁸ Court of Cassation, Sec. II, 6 September 2021, No. 24045.

⁴⁹ Court of Cassation., Sec. I, 27 August 2025, No. 24004.

Unico della Finanza, even in the absence of direct participation in drafting the prospectuses⁵⁰.

The criminal dimension of oversight liability has been equally emphasized. In fact, the Court has underscored that the auditors' obligation extends beyond formal verification of accounting records to the substantive congruity between bookkeeping and the company's actual operations⁵¹. This jurisprudential evolution confirms a trend towards the materialization of oversight responsibility, where liability is no longer limited to gross negligence but encompasses a failure to maintain an active and continuous vigilance over the company's management conduct.

The most significant recent legislative intervention concerning the liability of the *sindaci* is undoubtedly Law No. 35 of March 14, 2025, which introduced substantial amendments to Article 2407 of the Italian Civil Code. This reform responded to long-standing critiques regarding the disproportionate exposure of statutory auditors to unlimited civil liability, which was seen as discouraging qualified professionals from undertaking such roles and inflating insurance premiums for professional indemnity⁵².

The core innovation lies in the introduction of a proportional cap on the economic liability of auditors for non-willful violations, calibrated according to the annual compensation they receive⁵³. This tiered "cap" mechanism is entirely excluded in cases of intentional misconduct, preserving the full scope of liability for willful or fraudulent behavior⁵⁴.

The rationale behind this legislative choice reflects a policy balance between protecting corporate and shareholder interests and limiting the financial exposure of auditors relative to their economic benefits. By anchoring liability to the compensation actually received, the reform aligns with principles of proportionality

⁵⁰ *Ibidem*

⁵¹ Court of Cassation, Sez. V, 19 September 2025, No. 32560, in which the Court held that members of the *Collegio Sindacale* of a bankrupt company may be criminally liable for abetting in bankruptcy offenses when, by omitting their supervisory duties, they have allowed directors to perpetrate fraudulent acts.

⁵² Italian Law No. 35/2025, *Gazzetta Ufficiale* No. 73, 28 March 2025.

⁵³ Article 2407, second paragraph, amended which establishes three tiers of compensation brackets—up to €10,000, between €10,000 and €50,000, and above €50,000—with corresponding liability ceilings fixed at 15, 12, and 10 times the annual remuneration, respectively.

⁵⁴ Article 2407, exception for willful misconduct.

and fairness, aiming to reduce the unpredictability of damages claims and enhance the sustainability of professional activity in the auditing sector. Moreover, this liability cap is expected to influence the insurance market positively by lowering risk premiums and encouraging wider coverage.

Another noteworthy amendment introduced by Law No. 35/2025 is the establishment of a five-year limitation period for the exercise of shareholder derivative actions against auditors, commencing from the filing date of the auditors' report pursuant to Article 2429 of the Civil Code⁵⁵. This temporal boundary replaces the previous framework, where the statute of limitations began at the moment the damage was perceived, a point often difficult to determine and liable to generate prolonged uncertainty for auditors⁵⁶. The fixed term aims to balance the interests of shareholders in obtaining redress with the auditors' need for legal certainty and finality.

Italian jurisprudence and doctrine have already engaged extensively with the interpretation and application of these new provisions. Early decisions by courts of first instance have uniformly rejected the retroactive application of the liability cap to conduct predating the law's entry into force, adhering to the principle of non-retroactivity in criminal and quasi-criminal liability contexts⁵⁷.

Doctrine has contributed to this debate with different perspectives, enriching the understanding of the reform's practical and theoretical implications. It has been discussed about the reform's potential to mitigate the disproportionate burden on auditors, warning at the same time of unintended consequences related to the solidarity principle in multi-defendant scenarios⁵⁸. The reform has been described as a "medicine with side effects," highlighting the risk that reduced liability

⁵⁵ Law No. 35/2025, new Article 2407, fourth paragraph

⁵⁶ GUIZZI, R., "Spigolature intorno all'applicazione del nuovo art. 2407 c.c.," *Società* (2025): 675–690.

⁵⁷ Tribunale Venezia, 4 July 2025; however, Tribunale Bari, Ordinanza, 24 April 2025 took a divergent stance, holding that the new liability cap could apply to antecedent facts, characterizing it as a procedural provision concerned with damage quantification rather than the substance of liability itself.

⁵⁸ AMBROSINI, E., "Vincolo di solidarietà, danno risarcibile e prescrizione nel nuovo art. 2407 c.c.," *Società* 2025.

exposure may dilute the deterrent function of statutory auditors and potentially weaken corporate governance safeguards⁵⁹.

Therefore, the Italian approach, by explicitly legislating proportional caps and limitation periods, marks a distinctive attempt to balance accountability and economic sustainability in the audit function. It reflects a broader European trend toward tailoring auditor liability frameworks to support market stability without compromising shareholder protection, but also invites ongoing scrutiny regarding its long-term impact on audit quality and corporate governance effectiveness. This complexity requires a nuanced understanding of the underlying principles and a vigilant assessment of how these reforms interact with the evolving role of the *Collegio Sindacale* within the Italian governance ecosystem.

From a comparative perspective, the Italian approach partially resonates with liability limitations seen in other jurisdictions, such as France and Germany, where proportionality and caps are also employed to shield auditors from disproportionate exposure. However, a distinctive feature of the Italian reform is its explicit linkage of the cap to compensation tiers, reflecting an effort to concretely correlate economic risk with remuneration, which may be less pronounced or codified in other European regimes.

Contrastingly, the United States offers a notably different model of auditor liability. There, the liability regime, largely shaped by common law principles, centers on the concept of fiduciary duties of directors and officers, with statutory auditors playing a more circumscribed role in governance oversight⁶⁰. Auditor liability in the U.S. is often driven by securities laws and class action litigation risks rather than civil code provisions. The absence of a statutory liability cap comparable to Italy's reform reflects a fundamental difference in legal culture: the U.S. system prioritizes shareholder protection through extensive disclosure requirements and the accountability of directors via fiduciary duties, while the auditor's role is more

⁵⁹ DE LUCA, M. - HOUBEN, P., *Limitazione di responsabilità dei sindaci: una medicina con effetti collaterali maggiori degli effetti curativi?*, in *Società*, 2025. In the opposite direction: GUIZZI, R., *Spigolature intorno all'applicazione del nuovo art. 2407 c.c.*, in *Società* 2025; PICCIAU, L., *La nuova disciplina della responsabilità dei sindaci: appunti su profili letterali e sistematici*, in *Società* 2025, 644-660; RORDORF, M., *La responsabilità dei sindaci alla luce del novellato articolo 2407 c.c.*, in *Società* 2025, 625-640.

⁶⁰ For a complete analysis of the American liability regime, see Chapter II, paragraph 3 and 3.1.

procedural and less directly linked to liability for company losses. This divergence underscores the contextual specificity of reforms; Italy's system, historically characterized by strong auditor involvement in governance, necessitates balancing professional risk with encouraging effective oversight.

The limitation on auditor liability in Italy may be viewed as a structural compensation for the absence of a formalized audit committee regime in many Italian companies, which the American model institutionalizes to diffuse and clarify governance responsibilities.

Critically, while the reform's proportional liability caps mitigate the risk for auditors, questions remain about potential unintended consequences. The concern is that a financial ceiling on liability could dilute auditors' deterrence against negligence, especially for those receiving higher compensation but potentially facing less stringent consequences proportionate to corporate damage caused.

In conclusion, the 2025 reform of statutory auditors' civil liability represents a significant recalibration of the Italian corporate governance landscape, marrying principles of proportionality, economic fairness, and legal certainty. While echoing certain comparative European trends, the reform's distinctive features address Italy's unique auditor-centered governance tradition. The emerging case law and doctrinal discourse underlines the dynamic nature of the reform's application and invite further scholarly and judicial engagement to refine its contours. As the corporate oversight environment evolves, balancing accountability and risk allocation remains a delicate task—one that Italy's reform exemplifies with both promise and challenges.

5. The Impact of the Capital Decree on Internal Control Systems

The Capital Decree of March 14th, 2024 represents a significant step in aligning Italian corporate governance with international standards, primarily by simplifying listing procedures and updating governance frameworks. Beyond technical adjustments, the reform seeks a cultural shift among Italian listed companies, fostering openness towards European and global financial markets and

institutional investors. This legislative innovation indirectly affects internal control systems by reshaping governance practices.

Despite its main focus on market access, the reform's amendments to the Consolidated Law on Finance (TUF) have notable implications for internal controls, particularly through modifications in governance that affect oversight and information flows within listed companies.⁶¹

Two key governance innovations merit attention for their potential impact on internal controls: the option for outgoing boards to submit candidate lists for the Board of Directors renewal (new Article 147-*ter* TUF), and the possibility of holding shareholders' meetings exclusively via a designated company representative (Article 135-*undecies* TUF).

Article 147-*ter* TUF allows outgoing boards, under specific conditions, to present lists of candidates for board renewal. These conditions ensure a controlled nomination process, with lists requiring a two-thirds board approval, candidate numbers exceeding vacancies by one-third, and timely publication before shareholders' meetings. This procedural clarity enhances predictability in board elections, which may affect governance stability and oversight continuity.

When multiple lists compete, the reform details voting mechanisms: the outgoing board's list is prioritized if it obtains the highest votes, with candidates elected based on individual votes and established tie-breaking rules. Such structured procedures aim to balance majority control with electoral transparency.

Minority representation is safeguarded by guaranteeing at least 20% of board seats to minority lists securing sufficient votes, either through a minimum threshold or proportional allocation. This mechanism promotes inclusivity and balanced oversight, reinforcing internal control robustness.

Effective from January 1st, 2025, the new system still faces interpretative challenges, particularly concerning the election outcome when the outgoing board's list fails to secure a majority, reflecting ongoing practical uncertainties.

Article 135-*undecies* TUF permits shareholders' meetings to be conducted exclusively via a designated company representative, facilitating remote

⁶¹ GIULIANA MARTINA, MARILENA FARINA RISPOLI, VITTORIO SANTORO, *Legge Capitali (5 marzo 2024, n. 21). Commentario*, Giappichelli, 2024; LUCIANO VASSALLO, *Il rilancio del mercato di capitali italiano*, in *Ius societario*, 22 May 2024.

governance and potentially increasing participation. Proposals and questions must be submitted in advance, with clear deadlines and publication obligations, promoting transparency and orderly conduct in shareholder decision-making.

All in all, the Capital Decree played a key role in reshaping internal control systems within Italian listed companies. By redefining the structure and responsibilities of internal committees, strengthening the flow of information among control functions, and clarifying the oversight duties of corporate bodies, the reform set the foundation for a more integrated and effective control framework. However, its actual efficiency will largely depend on how rigorously companies implement these changes in practice. If applied merely as a formal compliance exercise, the impact is likely to remain limited. Only where the reform is embraced as a tool to enhance governance culture and risk management can it truly lead to stronger, more transparent internal control systems.

6. Corporate Compliance in Italy: Decree 231/2001, Internal Audit and Whistleblowing Mechanisms

The introduction of Legislative Decree No. 231 of 2001 represents a landmark in the evolution of Italian corporate governance, as it introduced the concept of administrative liability for legal entities—an innovative framework designed to promote accountability and prevent corporate misconduct. The reform responded both to domestic demands for greater regulatory coherence and to international pressures, particularly from the OECD and the European Union, to align national law with emerging standards of corporate criminal liability. At the core of the Decree lies the principle that effective corporate governance must rely on preventive compliance mechanisms. This principle finds its institutional expression in the *Modello di Organizzazione, Gestione e Controllo* (MOG) and in the *Organismo di Vigilanza* (OdV), whose role is to supervise the adequacy and implementation of internal control systems. The following analysis explores the legal framework of Decree 231 and the supervisory function of the OdV as an essential component of corporate risk governance.

The reform introduced by Decree 231 filled a long-standing gap in the Italian legal system by establishing, for the first time, a mechanism of corporate accountability for criminally relevant conduct. The new framework created a *hybrid* form of liability—commonly defined as “administrative liability of entities”—which, while substantially analogous to criminal responsibility, preserves the constitutional principle of personal criminal liability enshrined in Article 27 of the Italian Constitution. As a result, the entity’s liability coexists with that of the natural person who committed the offense, forming a dual-layered system aimed at both punishment and prevention. This paradigm shift marked the transition from a purely punitive model to a governance-oriented approach, whereby legal persons are incentivized to adopt internal controls and organizational structures capable of preventing unlawful acts.

Among the most innovative features of Legislative Decree 231 is its conceptual reorientation from a punitive logic to a preventive one. The *Modello 231* thus operates as a governance instrument designed to institutionalize compliance and risk management within corporate structures. This preventive perspective aligns the Italian system with international best practices, recognizing that the deterrence of economic crime depends less on ex post punishment and more on the creation of transparent and accountable organizational environments.

To understand the scope of this framework, it is necessary to examine its core provisions. Article 1 establishes the broad applicability of Decree 231 to all juridical persons, regardless of their organizational form, size, or sectoral activity. This includes corporations, partnerships, cooperatives, and even associations without legal personality⁶², thus extending the culture of compliance to the entire spectrum of business entities.

Article 5 of Legislative Decree 231/2001 defines the subjective scope of liability, establishing that an entity may be held responsible when an offence is committed, in its interest or to its advantage, by individuals in top management or supervisory positions. This category encompasses *de jure and de facto* directors, chief executive officers, liquidators, controlling shareholders, and managers vested

⁶² In Italian law, legal personality implies the full legal autonomy of an entity from its members, allowing it to be the holder of assets and to be liable for obligations in its own name.

with autonomous decision-making powers. The provision reflects a functional notion of corporate leadership—one that associates responsibility with the power of direction and control, regardless of formal title. The Decree thus recognizes that liability should attach to the organizational reality of governance rather than its merely formal structure.

Conversely, individuals entrusted exclusively with supervisory or auditing duties—such as statutory auditors or members of the *collegio sindacale*—are excluded from the direct scope of liability, insofar as their institutional function is not managerial but rather one of oversight. Their accountability derives instead from civil law provisions (notably Articles 2403 et seq. of the Civil Code), which sanction the failure to exercise adequate control over management. Similarly, individuals who operate under the direction or supervision of senior management—such as employees, consultants, agents, franchisees, or sales representatives—do not act as representatives of the entity. Their conduct does not influence corporate policy, as they merely execute decisions made by the entity’s governing or managerial bodies, to which they do not belong.

The liability of the entity further presupposes that the offence was committed in its interest or to its benefit, as established by Article 5, paragraph 1. Jurisprudence has distinguished these concepts: “interest” refers to the *ex ante* intention to pursue an advantage for the entity, whereas “benefit” pertains to the *ex post* material gain deriving from the offence. In this respect, liability arises even if only one of the two elements is satisfied. However, paragraph 2 excludes liability where the offence was committed exclusively in the personal interest of the perpetrator or of a third party. This interpretative balance, developed by courts and doctrine, serves to delimit corporate liability and preserve the principle of proportionality in governance sanctions. Both from the prevailing approach in legal doctrine and case law, the two terms (interest/advantage) must be read disjunctively, not cumulatively. If and when the offence is committed by the organisation, it does not necessary mean that the organisation itself gains from the result of the offence, and of course this applies vice versa: meaning that when the organisation has benefitted from the offence, it may have not been committed in its interest. The exclusivity of the agent's interest therefore renders any indirect advantages gained by the entity

immaterial for the purpose of imposing sanctions. The entity is in such situations usually considered to be the injured party⁶³.

The second part of the Decree enumerates the so-called predicate offences capable of triggering corporate liability. Initially limited to a few crimes against the public administration, the catalogue has been progressively expanded to include a wide range of offences—among them corporate, environmental, tax, financial, and occupational safety crimes. The legislative choice to adopt a closed system ensures legal certainty, while its gradual expansion reflects the evolving understanding of corporate risk and the need for comprehensive compliance systems. To the initial list of predicate offences, the following have been progressively added over time, *inter alia*: corporate offenses contemplated in the Civil Code (falsity of corporate information, falsity of prospectuses, illegal distribution of profits or reserves, illegal transactions in shares or quotas of the company or parent, transactions prejudicial to creditors, manipulation of the market); terrorism-related offenses, slavery, people trafficking, child prostitution and pornography, and female genital mutilation, offenses of negligence regarding work place health and safety and public safety, money laundering and cybercrime; environmental offenses; tax offenses.

Exemption from liability under Decree 231 depends on the entity's ability to demonstrate the adoption and effective implementation of an adequate Organizational, Management, and Control Model (MOG). This defense—central to the governance architecture introduced by the Decree—embodies the preventive rationale of corporate responsibility. The MOG must be not merely formal, but substantively effective in preventing offences, and tailored to the company's size, operations, and risk profile. Judicial evaluation follows two complementary logics: an *ex ante* analysis of whether the model, if properly applied, could have prevented the offence; and an *ex post* assessment of its corrective adequacy in response to discovered deficiencies.

Article 6, paragraph 2 enumerates the essential elements of a compliant MOG: (i) risk mapping to identify sensitive activities; (ii) adoption of protocols governing decision-making; (iii) financial control procedures; (iv) information

⁶³ PULITANÒ, *La responsabilità "da reato" degli enti: i criteri di imputazione*, in *riv. it. dir. e proc. pen.*, 2002, 425

flows to the OdV; and (v) a disciplinary system for breaches. These elements correspond to an integrated model of risk governance, where prevention and control are embedded into the corporate decision-making structure rather than treated as external compliance functions.

When it comes to the necessity of adopting an Organizational, Management, and Control Model (MOG) and appointing a Supervisory Body (OdV), both legal scholarship and case law agree that, although the MOG is not an essential structural element of an entity, it remains crucial for benefiting from the exemption under Article 6, paragraph 1, of Legislative Decree 231/2001. In support of this interpretation, the Italian Supreme Court has established a significant principle, stating that an entity that has failed to adopt and implement an organizational and management model may still be held liable for offenses committed by its senior executives.⁶⁴

Therefore, adopting a MOG is not mandatory in a formal sense, but it is a necessary condition for an entity to shield itself from liability when crimes are committed by its representatives, unless it can be shown that the misconduct was entirely for personal or third-party gain⁶⁵.

All in all, while the Italian Legislative Decree 231/2001 was introduced to encourage companies to adopt ethical management systems and prevent corporate crimes, its practical effectiveness has been limited. One of the main reasons for its lack of success lies in the predominantly formalistic approach adopted by many organizations, where compliance models are often implemented only to fulfill legal obligations, rather than being integrated into the company's culture and daily operations. Additionally, the limited enforcement by authorities and the absence of significant sanctions for non-compliance have contributed to a general perception of the Model 231 as a bureaucratic burden rather than a strategic asset. As a result, many companies in Italy fail to fully embrace the model's potential for improving governance and reducing legal risks, undermining its intended preventive function.

⁶⁴ Cass, May 10th 2022, n. 18413; January 21st n. 2544.

⁶⁵ G. LATTANZI & P. SEVERINO, *Responsabilità da reato degli enti*, Diritto Sostanziale, Vol I, Torino, Giappichelli, 2020, pp 241-261; D'Arcangelo, *I canoni di accertamento della idoneità del modello organizzativo nella giurisprudenza*, in *resp. amm. soc. ed ent*, 2011, 2; V. CONFINDUSTRIA, *Linee Guida per la costruzione dei modelli di organizzazione, gestione e controllo ai sensi del decreto legislativo 8 giugno 2001, N. 231*, Marzo 2014, 30.

Within the broader architecture of internal controls, it is essential to consider the interplay between the *OdV* and the internal audit function. The latter, although not introduced by Decree 231, has evolved as a fundamental component of modern corporate governance and is expressly recognized by the Italian Corporate Governance Code. Internal audit operates as an autonomous and permanent assurance function that reports directly to the board of directors and the control and risk committee. While the *OdV* focuses on the compliance and monitoring of the MOG, internal audit provides a systemic evaluation of governance and risk management frameworks. The interaction between these two functions strengthens the overall integrity of corporate oversight: audit activities may reveal organizational weaknesses that the *OdV* subsequently verifies within its supervisory mandate. This functional complementarity exemplifies the progressive integration of compliance and governance principles within the Italian corporate system.

Ultimately, the coexistence of the internal audit and the *OdV* illustrates the ongoing evolution of Italian corporate governance toward an integrated and proactive system of responsibility—one that privileges prevention, transparency, and ethical management over ex post sanctioning approaches⁶⁶.

Following the examination of the organizational and supervisory roles played by the *Modello 231*, the Organismo di Vigilanza (*OdV*), and the Internal Audit function in the Italian internal control framework, it is essential to consider the specific legal and operational framework governing whistleblowing in Italy. While these bodies form the backbone of compliance monitoring and risk mitigation, whistleblowing serves as a crucial reporting mechanism that feeds into this system, enabling the early detection of misconduct or breaches.

The legislative cornerstone for whistleblowing in Italy is Legislative Decree No. 24/2023, which transposes the EU Whistleblower Protection Directive (Directive 2019/1937). Italy's current whistleblowing framework introduces binding obligations for both public and private entities to implement confidential and accessible reporting channels. The law ensures strong protection against retaliation and requires prompt and effective follow-up on reports. Although

⁶⁶ PAOLO CASATI, MARTA FRAGRANZA, *Sistema di controllo interno: misurazione e valutazione: metodologie per il presidio di obiettivi sostenibili*, Giappichelli, Turin, 2025.

internal channels are prioritized, external reporting is also permitted, notably through ANAC, in cases where internal mechanisms are inadequate. These provisions, while comprehensive, rely heavily on actual implementation and organizational commitment to foster a genuine culture of reporting and ethical compliance⁶⁷.

Despite the robustness of the legal framework, the effectiveness of whistleblowing in practice is influenced by several factors. The optional nature of adopting the *Modello 231* for many companies limits the diffusion of structured compliance frameworks that integrate whistleblowing effectively. Additionally, cultural factors in Italy—including concerns about loyalty, fear of isolation and a historically low propensity to report wrongdoing—pose challenges to widespread whistleblower engagement. Awareness and training on whistleblowing rights and protections remain uneven, affecting the practical utilization of these channels⁶⁸.

Nonetheless, Legislative Decree No. 24/2023 marks a significant advancement, embedding whistleblowing within the broader compliance ecosystem alongside the *OdV* and Internal Audit. Whistleblower reports serve as critical inputs that help these bodies identify emerging risks and tailor their oversight activities, thereby strengthening organizational resilience and ethical governance. This integrated approach contrasts with the U.S. system, where whistleblowing is often

⁶⁷ Legislative Decree No. 24/2023 applies broadly to both public administrations and private entities, with specific obligations imposed on organizations employing over 50 individuals or those adopting formal compliance programs, such as the *Modello 231* organizational model. Under this framework, whistleblowing channels must ensure the anonymity and confidentiality of the reporter, safeguarding them from any form of retaliation—including dismissal, demotion, or discriminatory treatment. These protections extend beyond the immediate employer environment, covering indirect retaliatory actions and encouraging a reporting culture free from fear of reprisal. Entities failing to comply with these obligations risk administrative sanctions, including fines between €10,000 and €50,000. While internal reporting mechanisms are prioritized, the law also provides for external reporting channels managed by competent authorities, such as the *Autorità Nazionale Anticorruzione* (ANAC), allowing whistleblowers an alternative when internal channels are ineffective or compromised. Confidentiality requirements are stringent, with unauthorized disclosure of a whistleblower's identity subject to legal penalties. Upon receipt of a report, organizations are obliged to conduct prompt, thorough investigations and implement corrective measures when necessary, ensuring that whistleblowing functions not merely as a reporting tool but as an active element of internal control and risk management

⁶⁸ For a comprehensive analysis of the functioning of the whistleblowing system in Italy, see Cantone RAFFAELE, NICOLETTA PARISI, DOMENICO TAMBASCO, *Whistleblowing: commento sistematico alla disciplina del D.Lgs. n. 24/202: ambiti applicativi, governance, strumenti di segnalazione e protezione*. Milano, Lefebvre Giuffrè, 2025.

more externally focused, relying heavily on regulatory enforcement and legal remedies⁶⁹.

7. Final considerations

The analysis conducted throughout this chapter reveals that the Italian system of internal controls—particularly as applied to listed companies—stands at the intersection of formal legal precision and functional complexity. Rooted in the Civil Code and reinforced by financial regulations such as the *Testo Unico della Finanza* and the *Capital Decree*, the framework reflects a gradual yet decisive evolution toward a risk-based and accountability-oriented governance model. Each of the control actors contributes to an increasingly articulated ecosystem of checks and balances, designed to safeguard transparency, sound management, and market integrity.

From a comparative perspective, the Italian model offers both strengths and weaknesses. Its principal merit lies in the systemic integration of control functions within a cohesive legal framework, where the *Collegio Sindacale* acts as a permanent supervisory body bridging management, auditors and shareholders. Unlike the fragmented oversight mechanisms typical of the American system—where audit, risk and compliance committees operate separately—the Italian structure favors continuous and holistic monitoring. This integration enhances information flow and allows for earlier detection of irregularities. However, the same centralization that ensures coherence also risks functional overload and diffusion of responsibility. The *Collegio Sindacale*, while formally independent, often lacks the operative powers necessary to intervene preventively, creating a tension between its broad statutory duties and its limited capacity for action.

Directors' and statutory auditors' responsibilities thus emerge as the critical nodes of the Italian control architecture. Recent legislative reforms, including the *Codice della Crisi d'Impresa*, have reinforced the notion that directors must not

⁶⁹ For a complete analysis of the functioning of the Whistleblowing system in American public companies, see Chapter II, paragraph 2.3.

only manage efficiently but also anticipate risks, ensure adequate organizational structures, and act promptly in the face of potential distress. Similarly, *sindaci* are expected to exercise vigilant and continuous oversight, with liability arising not merely from acts of commission but from omissions in the presence of concrete warning signs. This reflects an underlying shift from formal compliance to substantive accountability, aligning Italian corporate law with international trends that emphasize governance quality and early risk detection.

Yet, these advancements are not without drawbacks. The expansion of liability boundaries, especially for the *sindaci*, risks blurring the distinction between control and management, exposing supervisory bodies to disproportionate responsibility relative to their powers. Furthermore, the heavy proceduralization of control—driven by the layering of civil, criminal and regulatory obligations—can transform governance into a compliance exercise, diverting focus from strategic and ethical dimensions of oversight.

In comparative terms, Italy's model contrasts with jurisdictions such as the United States, where fiduciary duties are primarily judicially constructed and managerial discretion enjoys broader protection under doctrines like the business judgment rule. The Italian approach, more prescriptive and codified, prioritizes *ex ante* prevention over *ex post* adjudication, thereby reducing ambiguity but increasing the burden of formal compliance. The challenge, therefore, lies in preserving the preventive virtues of the Italian model without suffocating managerial initiative under excessive procedural expectations.

In this evolving landscape, the increasing relevance of organizational compliance models, particularly those pursuant to Legislative Decree No. 231/2001, marks a further step toward a more proactive and ethically grounded governance culture. Although originally focused on preventing corporate criminal liability, these models have progressively integrated into broader internal control architectures, reinforcing risk-awareness and accountability mechanisms across the organization. Equally significant is the growing institutionalization of whistleblowing systems, which not only enhance transparency but also function as early-warning tools, empowering internal stakeholders to report misconduct without fear of retaliation.

Far from being mere formalities, these instruments reflect an innovative functional shift in the Italian system. While challenges remain, particularly in balancing procedural compliance with managerial discretion, the Italian internal control framework has demonstrated a remarkable capacity to adapt, evolve, and deliver effective safeguards, positioning itself as a model of systemic coherence and preventive orientation in the comparative context.

Ultimately, the evolution of internal control systems in Italy reveals an ongoing search for equilibrium: between autonomy and accountability, between legal form and managerial substance.

Chapter II: Checks and Balances: Internal Control Systems in U.S. Public Companies

1. The Legal and Institutional Architecture of U.S. Corporate Governance

Having examined the internal control framework within Italian listed companies, it is now essential to shift focus to the United States — a jurisdiction where corporate governance and regulatory oversight have evolved through a distinct legal, economic and cultural context. The U.S. system, shaped by historical financial scandals and driven by strong federal regulation, offers a different approach to internal controls, centered around transparency, accountability, and investor protection.

In fact, in the United States, the corporate governance structure for listed companies embodies a complex and diverse interplay between federal securities regulations, state corporate laws and institutional practices; these mechanisms are designed not only to protect shareholders' interests but also to guarantee transparency, ethical conduct, and the sustainable creation of long-term value.

While both the Securities Act of 1933 and the Securities Exchange Act of 1934 set minimum standards for disclosure and investor protection at the federal level, they serve distinct but complementary purposes. The 1933 Act primarily regulates the offering of new securities, requiring companies to file registration statements and provide full disclosure to prevent fraud during initial offerings. In contrast, the 1934 Act focuses on the secondary trading of securities, granting broad authority to the newly established Securities and Exchange Commission (SEC) to oversee stock exchanges, broker-dealers, and to combat practices such as insider trading. As will be discussed in the following paragraph, the 1934 Act not only created the SEC as the central regulatory authority, but also introduced the principle of ongoing disclosure, thereby significantly expanding the scope and reach of federal securities regulation beyond the initial framework set by the 1933 Act.

Given the federal structure of the United States, corporate law primarily falls under the jurisdiction of individual states rather than the federal government. This

decentralized approach allows each state to develop its own legal framework for corporate governance. Among these, the State of Delaware has emerged as the most influential and preferred jurisdiction for corporate incorporation. Delaware's dominance in this field is not accidental, but rather the result of a well-established combination of different factors⁷⁰. One of the primary reasons companies choose to incorporate in Delaware is the Delaware General Corporation Law (DGCL), which is widely recognized for its clarity, flexibility, and stability. Carefully drafted by leading corporate law experts, the DGCL remains largely free from the influence of special interest groups, offering a high degree of legal predictability for businesses. The Delaware legislature also reviews and updates the DGCL regularly to ensure it remains responsive to evolving corporate needs and emerging legal issues.

Another major factor contributing to Delaware's appeal is its exceptional judicial system, which plays a central role in shaping and interpreting the state's corporate law. Delaware is internationally renowned for its well-developed courts and highly qualified, impartial judges who specialize in corporate matters. At the core of this system is the Delaware Court of Chancery, a specialized court of equity with exclusive jurisdiction over corporate disputes. This court operates without juries and is composed of seven expert jurists selected through a bipartisan, merit-based process, ensuring efficiency, consistency, and a high level of specialization in corporate adjudication. Appeals from the Court of Chancery go directly to the Delaware Supreme Court, the state's highest judicial authority, which consists of five justices with significant experience in business and corporate law.

Equally important is Delaware's rich body of case law, which has developed alongside the work of its specialized courts. Both the Court of Chancery and the Delaware Supreme Court have a long tradition of issuing detailed, reasoned opinions that clearly explain the legal rationale behind their decisions. Over time, this practice has produced an extensive and coherent set of precedents that provide valuable guidance and predictability for companies, lawyers, and judges. Because corporate cases in Delaware are decided by judges rather than juries, and because

⁷⁰ This third factor—namely, the case law developed by the Delaware courts—is best illustrated by landmark rulings such as *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), and *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985), which have significantly shaped directors' fiduciary duties, judicial standards of review, and the permissible defensive measures against hostile takeovers.

those judges must articulate the reasoning behind their rulings, Delaware corporate law benefits from an exceptional degree of clarity, consistency, and reliability.

The development of corporate governance has also been shaped by key federal laws, particularly the Sarbanes-Oxley Act of 2002, the Dodd-Frank Act of 2010 and as of 2018 and the Economic Growth, Regulatory Relief and Consumer Protection Act. These laws have redefined board responsibilities, strengthened disclosure requirements and enhanced oversight mechanisms—particularly in areas such as financial reporting, executive compensation and risk management. At the same time, the rising power of institutional investors, proxy advisory firms and stock exchanges played a crucial role in establishing governance provisions and market expectations that often go beyond basic legal requirements; the next paragraphs will be focused on these three federal laws and their role.

In the following sections, the analysis will focus on the main legislative reforms that have progressively shaped the internal control and corporate governance systems of U.S. listed companies. Particular attention will be devoted to the Securities Act of 1933, the Sarbanes–Oxley Act of 2002, the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010, and the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018. Each of these reforms has contributed to redefining the scope of directors’ duties, strengthening accountability standards, and enhancing the transparency of corporate operations. Building on this regulatory foundation, the discussion will then examine the primary governance and control bodies within the U.S. model—namely, the Board of Directors, the Audit Committee and the Chief Compliance Officer—focusing on their respective roles, interrelations, and responsibilities in ensuring effective oversight, risk management, and ethical conduct within corporations.

1.2 The 1933 Securities Act and the Rise of Disclosure-Based Regulation

The Securities Act of 1933 was enacted in the aftermath of the 1929 Wall Street Crash, a financial collapse that exposed the absence of effective regulation and internal control mechanisms in U.S. capital markets. Aware of the urgent need

to restore investor confidence and market stability, the Roosevelt Administration introduced the Act as the first comprehensive federal legislation aimed at ensuring transparency, fairness, and accountability in securities offerings.

Rather than merely addressing fraudulent conduct *ex post*, the Act established a preventive framework based on the principle of mandatory disclosure. Companies seeking to offer securities to the public were required to file a registration statement and a prospectus containing all material information concerning their financial condition, business operations, and management. This disclosure duty effectively created a form of external oversight by enabling the Securities and Exchange Commission (SEC) and investors to verify the accuracy and completeness of corporate information.

From a corporate governance perspective, the 1933 Act redefined the boundaries of managerial and directorial responsibility. Section 11 introduced a specific regime of civil liability for directors, officers, underwriters, and accountants in the event of material misstatements or omissions in registration statements. This provision strengthened the accountability of the board and external auditors, laying the groundwork for the development of modern internal control systems and compliance procedures. In this sense, the Securities Act marked the transition from an unregulated, trust-based market to a governance model grounded in transparency as a tool of internal and external control.

By introducing enforceable disclosure duties, the 1933 Act effectively blurred the boundary between external regulation and internal governance. It transformed transparency from a mere reporting obligation into a governance principle, requiring boards to adopt structured procedures for the collection, verification, and communication of financial information. In this respect, the Act represents the first step toward the institutionalization of internal controls in corporate America, a development that would later culminate in the establishment of the SEC under the 1934 Securities Exchange Act⁷¹.

⁷¹ For a complete analysis of the SEC, see Chapter 3, paragraph 6.

1.3 Responsibility as Risk: Rethinking Internal Control in the Age of Sarbanes-Oxley

The Sarbanes-Oxley Act redefined not only the structural architecture of internal control but also the philosophy of responsibility that underpins corporate governance in the United States. Before 2002, the U.S. system primarily relied on fiduciary duties and common-law principles of care and loyalty, enforced through shareholder litigation. SOX, however, transformed this paradigm by introducing statutory duties of certification and oversight, thereby institutionalizing a legal culture of managerial accountability. Sections 302 and 404, in particular, made executives legally responsible for the effectiveness of internal control systems and for the accuracy of financial statements filed with the Securities and Exchange Commission (SEC).

This statutory formalization of responsibility marks a fundamental divergence from the pre-SOX governance culture, where, as already discussed, the line between managerial discretion and oversight obligations was often blurred. Under Section 302, CEOs and CFOs must personally attest to the adequacy of disclosure controls and internal controls, creating a direct link between corporate conduct and individual liability. In addition, SOX introduced criminal penalties for false certifications, reinforcing the notion that financial misrepresentation is not only a breach of fiduciary duty but also a potential offense against public trust⁷².

In practice, this evolution parallels the logic of the Italian system, where directors and statutory auditors (the *Collegio Sindacale*) bear personal responsibility for breaches of diligence and oversight duties. Yet, while Italian law grounds responsibility within a collegial model of internal supervision, the American framework individualizes accountability, emphasizing personal liability of executives. This divergence reflects a broader cultural contrast: in the United States, responsibility operates as a deterrent mechanism tied to personal ethics and compliance enforcement; in Italy, it serves as an institutional guarantee embedded in a layered control architecture.

⁷² MICHAEL W. PEREGRINE AND CHARLES W. ELSON, “*The Important Legacy of the Sarbanes-Oxley Act*,” Harvard Law School Forum on Corporate Governance, August 30, 2022.

The SOX framework also strengthened the interconnection between internal audit, external audit and the board of directors, leading to the rise of the modern audit committee⁷³ as a cornerstone of governance. Section 301 requires that audit committees of listed companies consist entirely of independent directors and that at least one member possess financial expertise. These committees are directly responsible for the appointment, compensation, and oversight of external auditors, a shift that removed such functions from management and thereby reinforced independence in the auditing process.

Empirical research following SOX⁷⁴ found that disclosure of internal control weaknesses under Section 404 increased transparency, but also led to strategic under-reporting in some cases, as managers feared reputational damage and potential market penalties. This finding underscores a paradox within the system: the very mechanisms designed to promote honesty can generate incentives for concealment when responsibility is framed primarily as liability.

At the same time, it can be argued that the introduction of SOX fostered internal governance competition, encouraging firms to strengthen control mechanisms to meet investor expectations and restore legitimacy⁷⁵. This dynamic has been particularly visible in companies that suffered reputational damage after the Enron and WorldCom collapses⁷⁶, where improved internal control reporting became a strategic asset for market credibility. The Enron case remains emblematic of how weak internal oversight can enable complex financial manipulations. The failure of Arthur Andersen to maintain auditor independence and to challenge

⁷³ For a complete analysis of the Audit Committee see paragraph 3.

⁷⁴ SARAH C. RICE AND DAVID P. WEBER, *How Effective Is Internal Control Reporting under SOX 404? Determinants of the (Non-)Disclosure of Existing Material Weaknesses*, *Journal of Accounting Research* 49, no. 3 (2011): pp. 811–843.

⁷⁵ VIDHI CHHAOCHHARIA, YANIV GRINSTEIN, GUSTAVO GRULLON, AND RONI MICHAELY, *Product Market Competition and Internal Governance: Evidence from the Sarbanes–Oxley Act*, in *Management Science* 62, no. 8 (2016): 2483–2503

⁷⁶ The Enron and WorldCom Corporate Scandals: Enron Corporation, once a major U.S. energy and commodities trading company, collapsed in December 2001 after revelations of extensive accounting fraud involving the use of off-balance-sheet entities and deceptive financial reporting. The scandal led to multiple criminal convictions of top executives and the dissolution of its auditor and ultimately triggered the enactment of the Sarbanes-Oxley Act of 2002. *WorldCom*, once the second-largest U.S. long-distance telecommunications company, collapsed in 2002 after its internal audit department discovered the fraudulent capitalization of over \$11 billion in expenses, inflating assets and concealing massive losses. The case resulted in criminal convictions for CEO Bernard Ebbers and other executives and reinforced the urgency of stronger auditing and internal control standards.

management's off-balance-sheet practices exposed the absence of effective control culture. SOX directly addressed such failures by creating the Public Company Accounting Oversight Board (PCAOB), tasked with supervising audit firms, registering auditors, and enforcing standards of independence and quality control. Since its inception, the PCAOB has sanctioned several audit firms for violations of auditing standards, thereby restoring a measure of public confidence⁷⁷.

Similarly, the WorldCom scandal demonstrated the need for stronger managerial accountability. CEO Bernard Ebbers and CFO Scott Sullivan manipulated accounting entries to inflate earnings, actions that might have been prevented by the certifications required under Section 302. In this respect, SOX operationalized a legal expectation that had previously existed only as a fiduciary ideal: that senior officers must actively ensure—not merely assume—the accuracy of financial reporting.

However, the success of SOX in fostering a “culture of responsibility” has been uneven⁷⁸. Large corporations with sophisticated compliance infrastructures have integrated SOX mandates into a broader ethics-based governance model, while smaller issuers often experience compliance as a formalistic burden disconnected from substantive risk management. This two-tier effect raises important questions about the scalability of regulatory governance and the balance between oversight and operational flexibility.

Criticism of SOX has evolved over time. Initially praised as a necessary response to corporate misconduct, it later faced scrutiny for its high costs and perceived rigidity. The literature suggests that SOX was not a purely symbolic law designed for public appeasement, but rather a complex reform that achieved real but uneven regulatory effects. Its governance mandates were costly, yet not superficial: they altered the corporate compliance landscape by embedding control and responsibility into daily managerial practice.

Still, the disproportionate compliance burden for smaller firms remains one of its greatest weaknesses. Increased audit fees, costly internal documentation and

⁷⁷ See PCAOB disciplinary proceedings, e.g., *In the Matter of Deloitte & Touche LLP*, PCAOB Release No. 105-2016-001 (2016).

⁷⁸ PEREGRINE AND ELSON, *The Important Legacy of the Sarbanes-Oxley Act*, in *Harvard Law School Forum on Corporate governance*, 30 August 2022.

board restructuring obligations have discouraged many smaller companies from going public or have led them to delist. Foreign issuers, too, have sought listings in London or Hong Kong to avoid SOX compliance, potentially reducing the global attractiveness of U.S. capital markets⁷⁹. These developments reveal an inherent tension between regulatory assurance and economic efficiency, a theme central to modern debates on corporate control.

Ultimately, SOX embodies the idea that responsibility is the engine of control—a concept that resonates deeply with the Italian approach to corporate governance. In both systems, the credibility of financial information and the stability of markets depend on the willingness of corporate actors to internalize accountability. Yet the American model, by emphasizing individual liability and legal sanctions, often transforms responsibility into risk, potentially discouraging proactive governance.

1.4 From Regulatory Oversight to Self-Governance: The Evolution of Internal Controls under the Dodd-Frank and 2018 Acts

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 represented the most comprehensive overhaul of the U.S. financial regulatory system since the Great Depression. Enacted in response to the 2008 financial crisis, it sought to address the deficiencies in oversight, risk management, and accountability that had allowed systemic misconduct and excessive risk-taking to proliferate across financial institutions. From a governance standpoint, Dodd-Frank shifted the U.S. regulatory model toward a more integrated framework of supervision, transparency, and corporate responsibility, placing particular emphasis on internal control functions and the accountability of senior executives.

Among its most relevant innovations for corporate governance were the introduction of the say-on-pay mechanism, enhanced disclosure obligations in merger and acquisition contexts (the so-called golden parachute provisions), and the formal recognition of whistleblower protections under the SEC. Collectively,

⁷⁹ ROBERTA ROMANO, *The Sarbanes–Oxley Act and the Making of Quack Corporate Governance*, in *Yale Law Journal* 114, no. 7 (2005): 1521–1611

these measures reinforced the principles of transparency and oversight by strengthening the informational link between management, boards of directors, and shareholders. The say-on-pay provision institutionalized periodic, non-binding shareholder votes on executive compensation, thereby subjecting remuneration policies to external scrutiny and encouraging boards to align pay structures with long-term performance and risk objectives. Similarly, the golden parachute rules required clear and comprehensive disclosure of any compensation agreements linked to extraordinary transactions, ensuring that shareholders could evaluate whether management incentives were compatible with the company's best interests. Although these mechanisms do not directly alter fiduciary duties, they indirectly expand board accountability by exposing compensation decisions to market discipline and investor evaluation.

In parallel, the whistleblower framework—though primarily designed as a tool for regulatory enforcement—has had significant implications for internal control culture. By granting legal protection and financial incentives to individuals reporting securities law violations, Dodd-Frank encouraged firms to strengthen their internal reporting systems and compliance channels to detect misconduct before it escalates into regulatory violations. In this sense, the Act contributed to the consolidation of a “culture of vigilance” within listed companies, linking compliance performance to overall governance quality⁸⁰.

The subsequent Economic Growth, Regulatory Relief and Consumer Protection Act (EGRRCPA) of 2018, enacted under the Trump administration, partially recalibrated the Dodd-Frank framework. While its stated goal was to alleviate regulatory burdens—particularly for small and mid-sized financial institutions—it also redefined the distribution of governance responsibilities within corporate structures. By raising the asset threshold for mandatory board-level risk committees from \$10 to \$50 billion and relaxing supervisory stress-testing requirements, the Act reduced the number of institutions formally subject to enhanced prudential standards. This shift effectively transferred greater responsibility for risk oversight from external regulators to boards of directors

⁸⁰ D. S. HUNTINGTON, *Corporate Governance and Executive Compensation Provisions of the Dodd-Frank Act*. Harvard Law School Forum on Corporate Governance, July 8th 2010,

themselves. Rather than weakening control systems, the reform emphasized the principle of proportional governance: the expectation that internal controls and risk management procedures should be calibrated to the complexity and risk profile of each institution.

At the same time, the Act's relaxation of disclosure and reporting obligations introduced a tension between efficiency and transparency. By easing compliance requirements, particularly for smaller banks, the EGRRCPA lowered administrative costs but also heightened the need for voluntary disclosure and internal accountability mechanisms. Boards and audit committees were thus required to ensure that governance standards did not deteriorate as a result of regulatory simplification. In this regard, the 2018 reform can be interpreted not as a retreat from oversight but as a shift in emphasis—from formal compliance to substantive, self-driven control.

Taken together, the Dodd-Frank and EGRRCPA reforms illustrate the evolving balance between state regulation and corporate self-governance within the U.S. model. The 2010 Act expanded the scope of external supervision and accountability through legally mandated disclosure and whistleblower protections, whereas the 2018 Act delegated greater discretion and responsibility to corporate boards to maintain robust internal control environments in a less prescriptive framework. Both measures, though opposite in their regulatory intensity, converge on a shared principle: that effective corporate governance depends not solely on external enforcement, but on the internalization of control, ethics, and risk-awareness within corporate decision-making structures.

2. Supervisory and Governance Bodies

Having examined the most significant legislative acts shaping internal control systems in publicly traded companies, it is now essential to turn to the key corporate bodies responsible for implementing and overseeing these controls in practice.

The American system has one main body that is to be considered as the core corporate organ in a listed company, which is the Board of Directors; however, it

appears that the American system presents differences compared to the Italian system, analysed in the first chapter.

First of all, in American corporate law, it does not exist a rigid provision that lists all the requirements and bodies that the listed company needs to adopt in order to be legally recognized, unlike the Italian corporate law, as seen previously, having specific requirements and corporate organs.

Secondly, it has multiple legal sources, with each disciplining a different aspect of the board of directors, starting from federal legislation all the way to state legislation and stock exchange regulations.

Finally, the American system is based solely on the so-called “pure monistic system,” also known as the “one-tier system,” meaning the presence of only one main body, which is the Board of Directors, whereas the Italian system has two main bodies.

While it is true that in the U.S. corporate system the Board of Directors is regarded as the single governing body, entrusted with managerial and oversight functions, the board delegates parts of its responsibilities, to three specialised committees each entrusted with very specific competences. The next paragraph will explain the composition of the Board, its functions and its responsibilities.

3. Board of Directors: role and liability

The Board of Directors in American listed companies represents the core body governing the companies, tasked in particular with directing the company’s affairs and safeguard the shareholder’s interests. When analysing the regulatory framework governing the Board of Directors in public traded companies, or also known as listed companies, it would be wise to proceed in an orderly manner, starting the state-level provisions, which represent the primary source of corporate law and then the federal regulation which mainly intervenes to ensure principles such as transparency, protecting investors and market integrity.

Starting from the state jurisdiction, as already stated, the leading State in the U.S in the subject of corporate law is Delaware; the State of Delaware established itself as the leading jurisdiction, making the Delaware General Corporation Law

particularly influential and serving as a model for many other jurisdictions. The code per se outlines the fundamental role of the Board, its composition, as well as the fiduciary duties of directors, but at the same time it leaves ample flexibility for companies to structure their governance according to its needs.

Paragraph 141 of the Delaware Code disciplines the powers, number, qualifications, terms and quorum; section a) of paragraph 141 states that “The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation⁸¹”.

This part of Delaware law makes it clear that, by default, a company’s business is run by its board of directors. However, it also allows for some flexibility. If the certificate of incorporation states otherwise, certain powers can be given to other people or groups. In that scenario, the board does not have full control; it only acts within the limits set by the charter. This illustrates how U.S. corporate law enables companies to design their own governance structure, as long as it is clearly defined from the beginning.

Section b) of paragraph 141 of the Delaware Code, disciplines the composition of the Board “The board of directors of a corporation shall consist of 1 or more members, each of whom shall be a natural person. The number of directors shall be fixed by, or in the manner provided in, the bylaws, unless the certificate of incorporation fixes the number of directors, in which case a change in the number of directors shall be made only by amendment of the certificate. Directors need not be stockholders unless so required by the certificate of incorporation or the bylaws. The certificate of incorporation or bylaws may prescribe other qualifications for directors. Each director shall hold office until such director’s successor is elected and qualified or until such director’s earlier

⁸¹ See Delaware General Corporation Law, Title 8, Chapter 1, Subchapter IV – Directors and Officers, §§ 141–147, which outlines the powers, duties, and governance structures of corporate directors and officers under Delaware law.

resignation or removal. Any director may resign at any time upon notice given in writing or by electronic transmission to the corporation. A resignation is effective when the resignation is delivered unless the resignation specifies a later effective date or an effective date determined upon the happening of an event or events. A resignation which is conditioned upon the director failing to receive a specified vote for re-election as a director may provide that it is irrevocable. A majority of the total number of directors shall constitute a quorum for the transaction of business unless the certificate of incorporation or the bylaws require a greater number. Unless the certificate of incorporation provides otherwise, the bylaws may provide that a number less than a majority shall constitute a quorum which in no case shall be less than $\frac{1}{3}$ of the total number of directors. The vote of the majority of the directors presents at a meeting at which a quorum is present shall be the act of the board of directors unless the certificate of incorporation or the bylaws shall require a vote of a greater number⁸²”.

Looking at letter d) of paragraph 141, the disposition is dedicated to the classification of directors in three different classes, each class serves for a different term length. In fact, “the directors of any corporation organized under this chapter may, by the certificate of incorporation or by an initial bylaw, or by a bylaw adopted by a vote of the stockholders, be divided into 1, 2 or 3 classes; the term of office of those of the first class to expire at the first annual meeting held after such classification becomes effective; of the second class 1 year thereafter; of the third class 2 years thereafter; and at each annual election held after such classification becomes effective, directors shall be chosen for a full term, as the case may be, to succeed those whose terms expire⁸³”.

This structure is also known as classified board, and it serves three main purposes: it provides continuity by ensuring that not all directors are replaced at the same time, thus maintaining stability within the board. Moreover, this structure can serve as a defense against hostile takeovers, as it makes it more difficult for external parties to gain rapid control of the board. Finally, it offers companies greater

⁸² *Ibidem.*

⁸³ *Ibidem.*

flexibility in designing their governance framework within the certificate of incorporation.

Passing onto letter e) of the paragraph in question, the letter establishes that the directors are fully protected when “in relying in good faith upon the records of the corporation and upon such information, opinions, reports or statements presented to the corporation by any of the corporation’s officers or employees, or committees of the board of directors, or by any other person as to matters the member reasonably believes are within such other person’s professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation⁸⁴”.

Lastly, looking now at paragraph 142 of the Delaware Code, it deals with corporate officers and in particular their roles, titles, appointment and how vacancies are handled. Letter a) of the paragraph states “Every corporation organized under this chapter shall have such officers with such titles and duties as shall be stated in the bylaws or in a resolution of the board of directors which is not inconsistent with the bylaws and as may be necessary to enable it to sign instruments and stock certificates which comply with §§ 103(a)(2) and 158 of this title. One of the officers shall have the duty to record the proceedings of the meetings of the stockholders and directors in a book to be kept for that purpose. Any number of offices may be held by the same person unless the certificate of incorporation or bylaws otherwise provide.” Furthermore, letter b) establishes the procedure for the choosing of the director, and it states, “Officers shall be chosen in such manner and shall hold their offices for such terms as are prescribed by the bylaws or determined by the board of directors or other governing body. Each officer shall hold office until such officer’s successor is elected and qualified or until such officer’s earlier resignation or removal. Any officer may resign at any time upon written notice to the corporation.”

As for the Federal jurisdiction, many laws were already explained in detail in the previous paragraphs of this chapter: starting from the SEC, which enforces the 1934 act and indirectly influences board practices through disclosure obligations; moving to the SOX which explicitly introduced responsibilities for the CEO and

⁸⁴ *Ibidem*.

CFO and boards as well regarding financial reporting and internal controls; and lastly, the Dodd-Frank Act of 2010 further impacted board responsibilities with provisions on executive compensation, risk oversight, and shareholder rights.

Just as in the Italian corporate governance system the question of directors' liability represents the cornerstone of the internal control structure: in the U.S. framework the notion of responsibility equally stands at the heart of corporate law. Although the regulatory architecture differs substantially—with the American model being primarily rooted in state law, particularly Delaware corporate law—the underlying rationale remains the same: directors are entrusted with fiduciary duties designed to ensure that corporate power is exercised with integrity, diligence, and loyalty. The American system, through the elaboration of judicial doctrines such as the business judgment rule and the fiduciary duties of care, loyalty and good faith, has developed a sophisticated equilibrium between accountability and entrepreneurial freedom. In this sense, the central question is not merely what directors must do, but how far their discretion extends before liability arises. The debate over directors' duties in the United States thus mirrors, in a different legal and economic context, the same tension found in the Italian model—between the protection of shareholders and creditors, and the preservation of managerial autonomy as a necessary condition for efficient corporate governance.

The evolution of directors' liability in the United States reveals a gradual yet significant expansion of fiduciary responsibility, particularly concerning oversight and compliance duties. Traditionally, under Delaware law, the business judgment rule shielded directors from personal liability for honest mistakes in decision-making, provided their actions were informed, made in good faith and free from conflicts of interest. Early case law⁸⁵ confirmed that directors could rely on the integrity of subordinates and had no affirmative duty to install monitoring systems unless there were concrete signs of misconduct. This framework offered broad protection and reflected a deferential judicial approach toward managerial discretion.

A decisive turning point came with the Delaware Court of Chancery's landmark decision in *Caremark International Inc. Derivative Litigation* (1996). The

⁸⁵ *Graham v. Allis-Chalmers Manufacturing Co.* (1963).

court articulated, for the first time, that directors could be liable for failing to implement or monitor a reasonable compliance and reporting system. However, liability would arise only in cases of a “sustained or systematic failure of oversight”—an utter failure to ensure adequate information flows to the board. This established the so-called Caremark standard, setting a high threshold for proving breaches of oversight duties, but marking a conceptual shift: directors now had a positive obligation to ensure the existence of corporate monitoring mechanisms.

This principle was later endorsed and refined by the Delaware Supreme Court⁸⁶, which identified two bases for liability: the total failure to implement internal controls (Caremark prong one), or the conscious failure to monitor existing systems (prong two). Subsequent cases⁸⁷ continued to apply these principles strictly, dismissing most derivative suits for lack of evidence of bad faith or conscious disregard.

Following the 2008 financial crisis, however, the adequacy of these doctrines was increasingly questioned. Scholars and regulators criticized boards for neglecting their oversight roles and for viewing compliance as a formal rather than substantive exercise. In response, Delaware courts gradually adopted a more rigorous scrutiny of directors’ risk oversight obligations⁸⁸ allowing a Caremark-based claim to survive a motion to dismiss, emphasizing that directors must monitor mission-critical risks essential to the company’s operations⁸⁹.

The contemporary reading of the Caremark–Stone line thus reflects a broader conception of fiduciary duty, aligning corporate governance with compliance culture and risk management. Directors are expected not only to refrain from misconduct but to actively ensure the existence and effectiveness of internal control and reporting systems. While courts continue to apply the business judgment rule to protect honest managerial discretion, the modern interpretation of fiduciary responsibility imposes an affirmative expectation of vigilance and proactive

⁸⁶ Stone v. Ritter (2006), which confirmed Caremark as binding precedent.

⁸⁷ Guttman v. Huang, Desimone v. Barrows, and David B. Shaev Profit Sharing Account v. Armstrong.

⁸⁸ Marchand v. Barnhill (2019)

⁸⁹ JULIE MANNING MAGID AND ROBERT C. BIRD, *Operational Risk and the New Caremark Liability for Boards of Directors*, in *Boston University Law Review*, Vol. 103, No. 6 (2023), pp. 1544-1549.

governance⁹⁰—bridging the divide between traditional corporate law and the demands of a compliance-driven regulatory environment.

A particularly thought-provoking development in the U.S. debate on directors’ oversight liability concerns the operational dimension of Caremark duties. Modern boards can no longer limit their role to ensuring that management complies with the law in a formal or minimalist sense. In firms exposed to significant operational risk—such as those operating in highly regulated sectors—mere adherence to the legal minimum may itself constitute a breach of fiduciary responsibility. The evolving Caremark liability thus requires boards to move “beyond compliance,” adopting proactive and ethically grounded governance systems capable of anticipating failures before they occur. This jurisprudential trajectory, crystallized through landmark Delaware cases¹, reflects a broader reconceptualization of directors’ duties from a reactive model of supervision to a forward-looking model of risk governance.

From a critical perspective, this shift blurs the traditional boundary between legality and prudence, turning directors’ oversight into a form of strategic risk management. While this evolution strengthens accountability and reinforces the ethical dimension of corporate governance, it also expands the potential scope of directors’ liability in a way that may discourage legitimate entrepreneurial initiative. The requirement to operate “above the legal minimum” risks imposing a quasi-regulatory role on boards—an expectation that is neither clearly defined by law nor easily reconcilable with the protective rationale of the business judgment rule⁹¹.

Ultimately, the discussion underscores a tension that parallels the Italian debate on the “adequacy” of organizational structures: both systems are converging towards a model where the directors’ duty of oversight is not limited to formal

⁹⁰ *Marchand v. Barnhill* (Del. 2019) – Involving the Blue Bell listeria outbreak, the Court held that where compliance is “mission critical” (e.g., food safety), a total lack of board-level monitoring can sustain a Caremark claim. The case expanded oversight duties in heavily regulated or single-line businesses; *McKesson Corp. Derivative Litigation* (N.D. Cal. 2020) – Shareholders alleged that directors ignored compliance failures in the opioid distribution system. The case settled for USD 175 million, reflecting growing expectations for board oversight in regulated sectors; *Boeing Co. Derivative Litigation* (Del. Ch. 2021) – Following the 737 MAX crashes, the Delaware Chancery Court approved a USD 237.5 million settlement, the largest Caremark-type resolution to date. The case underscores board liability for lapses in safety and operational risk oversight.

⁹¹ JULIE MANNING MAGID AND ROBERT C. BIRD, *Operational Risk and the New Caremark Liability for Boards of Directors*, in *Boston University Law Review*, Vol. 103, No. 6 (2023), pp. 1570-1580

compliance, but extends to the active cultivation of a corporate culture of integrity and prevention. Yet, the challenge remains the same—how to promote responsible governance without transforming directors into guarantors of perfection.

In conclusion, the evolving framework of directors' liability in the United States reflects a shift from a merely reactive conception of oversight to one grounded in proactive and risk-sensitive governance. The jurisprudence from Caremark to Boeing demonstrates that fiduciary responsibility now extends beyond formal compliance, requiring boards to ensure that adequate reporting and monitoring systems are not only implemented but effectively functioning. This development underscores a broader understanding of directors' duties as dynamic and context-dependent, particularly in sectors characterized by heightened regulatory or operational risks. The following sections will examine each of these fiduciary duties—care, loyalty, good faith, oversight, and disclosure—in greater detail, to illustrate how they collectively define the contemporary boundaries of directors' accountability.

3.1 Directors' Fiduciary Duties

Directors are entrusted with a set of fiduciary duties that constitute the foundation of their role; these duties, which typically are developed under corporate law (mostly developed by the Delaware code of corporate law), define how directors must act in the exercise of their authority⁹². As seen before, while federal laws such as the SEC Act or the Sarbanes-Oxley Act strengthened disclosure and accountability mechanisms, the core of director's responsibility finds its roots in those fiduciary duties.

⁹² M. I. STEINBERG, *Corporate Director and Officer Liability: "Discretionaries" Not Fiduciaries*, Oxford University Press, Oxford, 2025; E. N. Veasey, I. M. MILLSTEIN, *Board Excellence and the Fiduciary Duties of Corporate Directors*, Millstein Center for Global Markets and Corporate Ownership, Columbia Law School, New York, 2017; E. J. ODONER, S. A. RADIN, L. A. GOLTSER, A. E. BLUMBERG, *Fiduciary Duties of Corporate Directors in Uncertain Times*, Millstein Center for Global Markets and Corporate Ownership, Columbia Law School, 2017; DAVIS POLK & WARDWELL LLP, *The Fiduciary Duties of Directors of Troubled Companies*, in *ABI Journal*, February 2015.

The duty of care is one of the most fundamental fiduciary obligations of corporate directors and officers. It requires them to make informed, deliberate, and prudent decisions that serve the best interests of the corporation. In the United States, this duty is primarily evaluated under the business judgment rule, a judicial doctrine that protects board decisions from court interference. Under this rule, courts generally defer to the board's judgment unless there is evidence that directors failed to inform themselves adequately before acting or that their decision was compromised by a conflict of interest—potentially implicating the duty of loyalty as well.

According to the American Law Institute's Principles of Corporate Governance, the duty of care obliges directors and officers to perform their functions in good faith, with the reasonable belief that their actions are in the corporation's best interests, and with the level of care that a reasonably prudent person would exercise under similar circumstances. Courts applying the business judgment rule focus on the decision-making process rather than the outcome itself, intervening only when directors' conduct falls outside the bounds of reasonable business judgment. A valid business judgment comes from financially unaffected directors and officers who are well-informed before making decisions and who act in good faith to promote corporate interests, as a reasonable person would. In this sense, courts have determined the board's decision-making process is required to be based on well-informed considerations, with a rational belief that the decision was in the best interest of the company and its shareholders.

To highlight the importance of the business judgement rule and its core functionality, the study case *Simeone v. The Walt Disney Company*⁹³ has become the landmark for jurisprudence and doctrine. In 2023 the Disney company decided to speak and criticize publicly against Florida's HB 1557-a bill which limited instruction on sexual orientation or gender identity in Florida classrooms. Although this decision led to political backlash and market repercussions, the Delaware Chancery Court held that Disney's directors and officers had not breached their fiduciary duties. The court reaffirmed that deciding whether to speak on social or

⁹³ *Simeone v. The Walt Disney Company*, Court of Chancery of Delaware, C.A. No. 2022-1120-LWW, decision of June 27, 2023, 302 A.3d 956.

political issues is an ordinary business decision protected by the business judgment rule.

Vice Chancellor of the Court emphasized that Delaware law grants directors wide discretion to guide corporate strategy, including on controversial matters, provided their actions are informed, disinterested, and in good faith. The court found no evidence of conflicts of interest, bad faith, or gross negligence, recognizing that considering employee and stakeholder interests can be rationally related to long-term shareholder value. Ultimately, the decision illustrates how the business judgment rule shields directors from liability when making reasoned, good-faith decisions, even amid divisive and politically charged circumstances.

In practice, courts have been highly deferential to directors, and findings of a breach of the duty of care are exceedingly rare. Even when a decision ultimately proves mistaken, judicial scrutiny is limited so long as directors can show that they engaged in a minimally informed decision-making process. The rule operates with particular force in favour of outside directors, who are generally entitled to rely on information and representations provided by management in the absence of evident “red flags⁹⁴.”

Furthermore, most U.S. corporate statutes allow companies to include exculpatory clauses in their charters, shielding outside directors from monetary liability for breaches of the duty of care—provided that the director’s conduct did not involve bad faith, intentional misconduct, or knowing violations of law.

Regarding well-informed considerations, directors must consider all material information that is reasonably available when making a business decision. This interpretation was confirmed by the court in the case *Brehm v. Eisner*, where the court found that ponderation must be exercised by directors to avoid any excessive waste of the corporate assets of the company.⁹⁵

⁹⁴ DAVID LARCKER, BRIAN TAYAN, *Corporate Governance Matters*, 4th Edition, Chapter III.

⁹⁵ *Brehm v. Eisner* (2000) reaffirmed and clarified these principles, emphasizing that courts will not “second-guess” business decisions merely because they appear unwise in hindsight. Instead, liability arises only where the board’s process is so deficient as to constitute gross negligence; prior to this decision *Smith v. Van Gorkom* (1985), where the Delaware Supreme Court imposed personal liability on directors who approved a merger without adequate information or deliberation. The decision marked a turning point: while reaffirming the autonomy of boards, it underscored the procedural nature of the duty of care — that is, the need to demonstrate a rational and informed decision-making process; and *Cede & Co. v. Technicolor, Inc.* (1993) in which is stated that once a

If the court finds bad faith, gross negligence, or bad processes, the court will subject the directors' decision to judicial review to analyze whether there was a breach of duty or not⁹⁶.

The second most important fiduciary duty is the Duty of Loyalty; the duty of loyalty requires directors to prioritize the interests of the company and shareholders over their own personal and financial interests⁹⁷. Actions like diverting corporate assets, opportunities, or information for personal gain clearly violate this duty; furthermore, this duty can also be violated when a director takes a corporate opportunity by using valuable information meant for the company and instead profits from it for personal gain. In addition, the duty of loyalty creates more responsibilities for the directors: they must keep information they get as directors confidential; they cannot disclose or misuse this information. Directors also need to report any conflicts of interest, whether real or perceived, to the company, and when conflicts do exist, they should share all relevant information to avoid breaking duty. This allows the board to vote without their input. Additionally, directors need to be ready to present any opportunities that relate to the corporation to the board before trying to benefit from them⁹⁸.

The third duty that directors must follow is the Duty of Good Faith; this type of duty usually derives and can be considered part of the Duty of Care and Duty of Loyalty. This type of duty requires directors to act honestly and in the best interest of the corporation and in a manner that is not knowingly unlawful or contrary to public policy. Only recently this particular duty was recognised by the court as a distinct directional duty, through the ruling *Cede & Co. v. Technicolor, Inc*⁹⁹.

breach of care is alleged, the burden shifts to directors to prove that the transaction was "entirely fair."

⁹⁶ See *Legal Information Institute*, "Duty of Care," Cornell Law School, available at https://www.law.cornell.edu/wex/duty_of_care

⁹⁷ In this regard *Gaillard v. Natomas Co.* (1989), in which a California court held that directors breached their duty of loyalty by approving self-serving executive contracts ("golden parachutes") that lacked genuine arm's-length negotiation.

⁹⁸ See *Legal Information Institute*, "Duty of Loyalty," Cornell Law School, available at https://www.law.cornell.edu/wex/duty_of_loyalty

⁹⁹ *Cede & Co. v. Technicolor*, in which the Delaware court emphasized that even where directors satisfy the procedural requirements of care, transactions tainted by self-interest must still meet the stringent test of entire fairness, both in process and price.

The fourth duty is the Duty of Oversight, which derives from the Duty of Loyalty; this specific duty requires the Board to expand already existing systems or controls in order to identify and handle risks that might come from oversight duties¹⁰⁰.

The fifth and final duty is the Duty of Disclosure; often this duty is also seen as an extension of the duty of loyalty, but it has developed over time into a critical obligation, by simply requiring that information's must be shared with shareholders when they are called upon to make decisions. Typically, federal laws tend to reinforce this duty through the disclosure provision established by the SEC Act and through the Sarbanes Oxley Act.

To better understand the functioning of fiduciary duties in the American corporate governance model, it is helpful to briefly focus on the banking sector. This industry is where the duty of oversight has been most clearly linked to internal control systems and risk management frameworks, making it a key context for exploring how fiduciary responsibilities interact with regulatory requirements, especially following the financial crisis. The concept of fiduciary duty in the U.S. corporate governance framework extends beyond the classical state law principles of loyalty and care to encompass a complex interaction between corporate law and financial regulation.

The Supreme Court¹⁰¹ clarified a foundational legal principle: there is no federal common law imposing a uniform federal standard of care on directors and officers of national banks or federal savings associations. Instead, the duties of care and loyalty remain grounded in state law, but with an important federal overlay. Specifically, under §1821(k) of the Federal Deposit Insurance Act (FDI Act), the minimum standard of care applicable to these directors cannot be lower than gross negligence. This creates a federal “floor” beneath which states cannot descend, though states remain free to impose stricter standards—such as ordinary negligence or strict liability. This nuanced division underscores that banking fiduciary duties,

¹⁰⁰ In this regard: *Citigroup Inc. Shareholder Derivative Litigation* (2009), in which the Delaware Chancery Court rejected an attempt to impose liability for poor risk management leading to the 2008 financial crisis, emphasizing that proof of conscious disregard for known “red flags” is required.

¹⁰¹ *Atherton v. FDIC* (1997) .

while influenced by federal banking laws, remain firmly tethered to the foundational principles of corporate law.

Furthermore, national banks enjoy the option to select the corporate law governing their fiduciary duties—often favoring Delaware or the Model Business Corporations Act¹⁰²—providing potential advantages such as the well-developed Delaware business judgment rule and indemnification protections.

The post-2008 financial crisis regulatory landscape marked a significant shift in how fiduciary duties of IDI directors are conceptualized. Federal regulators, such as the Federal Reserve and the Office of the Comptroller of the Currency (OCC), increasingly emphasized a macroprudential view, expanding the fiduciary role beyond mere shareholder interests to encompass the stability of the entire financial system.

This shift was concretized in the OCC’s 2014 “Heightened Standards” guidelines, which formally recognized the strategic and oversight role of boards in managing risk governance frameworks for large financial institutions. The guidelines emphasized that boards must actively oversee risk-taking and challenge management decisions to preserve institutional safety and soundness. Importantly, the OCC explicitly avoided language that would impose direct managerial duties or require boards to guarantee outcomes, thereby maintaining the traditional separation between management and board oversight. Instead, boards are tasked with requiring management to establish and implement an effective risk management framework, aligning fiduciary duties with regulatory oversight responsibilities without crossing into operational management.

Despite these advancements, uncertainty persists regarding the legal force of these “heightened expectations¹⁰³.” Regulators have yet to clarify whether these supervisory standards effectively create a new, quasi-regulatory fiduciary liability

¹⁰² The *Model Business Corporation Act* (MBCA) is a model statute first developed by the American Bar Association in 1950 and periodically updated, most recently by its Corporate Laws Committee. It serves as a framework for state corporation laws in the United States, providing standardized provisions on corporate formation, governance, fiduciary duties, and shareholder rights. Although it has no binding force, many U.S. states have adopted it wholly or in part, making it one of the primary references for corporate legislation and governance practices across the country.

¹⁰³ Federal Register, Vol. 79, No. 176, Department of Treasury, Office of the Comptroller of the Currency, OCC Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches; Integration of Regulations; Final Rule.

regime distinct from state corporate law. Scholars caution against federal regulators converting prudential expectations into enforceable fiduciary duties, warning that such a shift could deter qualified individuals from serving as directors, potentially undermining governance quality¹⁰⁴.

Practically, directors and officers of IDIs must navigate this complex landscape by engaging in meticulous advance planning and documentation to demonstrate compliance with their duty of care. They should seek legal counsel to understand the scope and rigor of due diligence and ensure their decision-making processes are well-documented to invoke protections like the business judgment rule. Moreover, regulators' emphasis on boards' responsibility for compliance—particularly with enforcement orders—has intensified. While regulators often use the term “ensure” to describe directors' obligations, this has been criticized as overly burdensome and inconsistent with the supervisory guidelines that distinguish oversight from management.

A more balanced articulation comes from the Basel Committee on Banking Supervision, which interprets “ensure” to mean that boards are ultimately responsible for the adoption and resourcing of appropriate policies, procedures, and controls, rather than guaranteeing specific compliance outcomes. This distinction is crucial in delineating the scope of directors' liability and their practical obligations.

Finally, boards must also consider the heightened regulatory scrutiny when addressing civil money penalties and enforcement actions, which can impose personal liability beyond traditional corporate law duties. This regulatory overlay reinforces the importance of proactive governance measures, including rigorous risk oversight, compliance monitoring, and effective engagement with management.

In conclusion, the fiduciary duties of directors and officers of U.S. IDIs occupy a unique, hybrid space at the intersection of corporate law and financial regulation. While state law remains the primary source of fiduciary standards, federal banking statutes and regulatory guidelines have introduced supplementary expectations that broaden fiduciary accountability to include systemic risk and

¹⁰⁴ Rodney R. Peck, Michael J. Halloran, *Fiduciary duties of financial institution directors and officers in the post-Dodd–Frank era*, in *International Journal of Disclosure And Governance*, Vol. 13, pp. 221-235, 2016

financial stability concerns. This evolving paradigm requires directors to balance traditional corporate governance responsibilities with enhanced oversight demands, underscoring the critical importance of clear governance frameworks, legal guidance, and robust internal controls in navigating fiduciary obligations in the modern financial landscape.

Beyond the doctrinal articulation of fiduciary duties under state corporate law, the regulatory practice in the banking sector has progressively translated these duties into concrete governance and oversight mechanisms. The best practices illustrate how the traditional fiduciary obligations of care and oversight have evolved into a procedural and evidentiary framework aimed at ensuring demonstrable accountability of directors. Measures such as systematic director training, comprehensive documentation of board deliberations, internal tracking of supervisory findings, and the establishment of robust compliance infrastructures collectively reflect a broader cultural shift: the transformation of fiduciary responsibility from an abstract legal standard into an operational discipline embedded in the institution's governance architecture¹⁰⁵.

From a critical perspective, this evolution reveals a dual function of fiduciary duties in modern financial governance. On the one hand, they continue to serve as a legal benchmark of directors' conduct—providing the normative basis for potential liability under the duty of care. On the other, they operate as a regulatory instrument through which supervisory authorities shape board behavior and strengthen risk management practices. The increasing emphasis on documentation, demonstrable diligence thus represents a shift from substantive judgment to procedural accountability: directors are expected not only to make prudent decisions, but to evidence that prudence through verifiable processes.

This proceduralization of fiduciary oversight underscores the growing convergence between corporate governance and prudential supervision. In the banking context, fiduciary duties no longer protect only shareholders' interests but extend to the stability and integrity of the institution—and, indirectly, of the financial system as a whole. Accordingly, the responsibility of directors and oversight bodies becomes both individual and systemic: they are held accountable

¹⁰⁵ *Ivi*, pp. 231-233

not merely for managerial failures, but for deficiencies in governance processes, internal controls, and regulatory responsiveness. The fiduciary duty of oversight thus emerges as a central mechanism of accountability at the intersection of private corporate law and public financial regulation.

4. Audit Committee

After examining the role of the Board of Directors in U.S. internal control systems, attention now turns to the Audit Committee, a key board subcommittee responsible for overseeing financial reporting, internal controls, and risk management. By providing focused supervision, the Audit Committee strengthens corporate governance and supports the board in fulfilling its fiduciary duties.

Within the American corporate framework, the Audit committee is considered to be one of the most important mechanisms for ensuring transparency, accountability and investor confidence. While the Board of Directors have the final responsibility for overseeing the corporation, the U.S. system has gradually handed critical monitoring tasks to specialised board committees. The Audit committee, among the other specialised boards, is the most central, having been established by federal laws and supported by stock exchange listing rules.

The legal foundation of the Audit Committee lies in the Sarbanes-Oxley Act of 2002: section 301 of the SOX, which amends Section 10A of the SEC Act of 1934, requires that all listed companies listed on the U.S. securities exchange must adopt an Audit Committee, otherwise the provision clearly established that “The Commission, shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that is not in compliance with the requirements of any portion of paragraphs (2) through (6)¹⁰⁶.”

The same section, at paragraph number 3, established that the committees must be composed in its entirety of independent directors, meaning that executive

¹⁰⁶ See SANJAY ANAND AND JAYNE WILKINSON, *The Sarbanes-Oxley Act: An Introduction*, Van Haren Publishing, 2011. Page 59

officers and individuals with significant ties to the company cannot be part of the committee. In fact, looking at the criteria established by the letter B of paragraph 3, the section lists two main “requirements” in order to be classified as an independent director, which are¹⁰⁷:

- i. “a member must not accept any consulting, Advisory, or another compensatory fee from the issuer; or
- ii. be an affiliated person of the issuer or subsidiary thereof”.

The goal of this requirement was to protect financial oversight from management influence and to regain investor trust after the corporate failures of the early 2000s.

Furthermore, the SOX increased the Audit committee's responsibility regarding the external auditor. Now, the committee has the sole authority to hire, pay and supervise the registered public accounting firm instead of management. This change emphasizes that the integrity of financial reporting should be maintained by an independent body that answers to shareholders, not the company's executives.

Beyond federal legislation, U.S. stock exchanges have a key role in shaping both the composition and functions of Audit committees; according to the NYSE Listed Company Manual, Section 303A.06, the Audit committee must consist solely of independent directors. All members need to be financially literate and at least one member should have expertise in accounting or related financial management. In the same way, Nasdaq Listing Rule 5605, letter c) sets similar requirements, emphasising independence, financial literacy, and the ability to understand financial statements.

These listing standards show how corporate governance in the U.S. works at the intersection of federal law, regulatory enforcement and private rulemaking by exchanges, creating a layered oversight system.

In the context of responsibilities and duties, the audit committee is entrusted with a set of responsibilities that may be grouped into distinct areas:

¹⁰⁷ See SANJAY ANAND AND JAYNE WILKINSON, *The Sarbanes-Oxley Act: An Introduction*, Van Haren Publishing, 2011. Page 60

- i. Oversight of Financial Reporting: the committee monitors the accuracy and integrity of the company's financial statements. It ensures compliance with Generally Accepted Accounting Principles (GAAP) and supervises the fulfillment of disclosure obligations.
- ii. Internal Controls and Risk Management: according to Sections 302 and 404 of the Sarbanes-Oxley Act, the Audit committee evaluates the adequacy and effectiveness of internal controls over financial reporting. This includes reviewing management and internal audit reports and overseeing corrective actions for any deficiencies found.
- iii. Supervision of External Auditors: the committee is responsible for appointing, compensating and monitoring the work of the external auditor, it approves both audit and non-audit services to make sure that auditors stay independent and avoid any conflicts of interest.
- iv. Whistleblower Mechanisms: following Section 301, paragraph 4 of SOX, the Audit committee must set up and maintain procedures for the confidential and anonymous submission of complaints about accounting or auditing matters. These mechanisms improve internal accountability and encourage employees to help prevent misconduct or fraud.
- v. Regular communication: the audit committee communicates regularly with regulators, including the Securities and Exchange Commission (SEC)¹⁰⁸ and indirectly with the Public Company Accounting Oversight Board (PCAOB). This interaction helps ensure that the company's governance and reporting practices stay in line with changing regulatory standards.

Following the reforms that took place after the financial scandals of the years 2000s, the goal of establishing the audit committee was to create a sort of a guardian of financial integrity, explicitly tasked with in bridging the gap between management, auditors and shareholders. The mandatory independence and financial expertise requirements have improved board oversight, they have also

¹⁰⁸ See U.S. Securities and Exchange Commission, *Standards Relating to Listed Company Audit Committees*, Final Rule, Release Nos. 33-8220; 34-47654; IC-26001; File No. S7-02-03, April 25, 2003.

encouraged a culture of transparency and discipline in corporate financial practices; by including the audit committee in both federal law and exchange rules, the U.S. system has created a governance model. Within this model, investor protection and market confidence are maintained through specific, rule-based mechanisms.

The issue that frequently arises when discussing the duties of such committees concerns whether the legislator has, over time, established a specific liability regime applicable exclusively to the directors serving as committee members, or whether the general liability framework governing directors continues to apply to them. In order to address this question, a study¹⁰⁹ indicated that the liability regime applicable to directors is likewise extended to those who serve on the committees.

However, the study highlights the difference of the underlying causes that lead to its application. First of all, the U.S. Supreme Court¹¹⁰ held that the seventh amendment (which guarantees the right to a jury trial in suits at common law), applies to issues in shareholders derivative suits, allowing consequently shareholders to file a lawsuit against top managers and directors, including Audit committees' members, who allegedly engaged in illegal activity. According to the study conducted, the legal liability towards audit committee members needs to be divided into three different grounds: the first ground coming from common law and the two remaining grounds coming from statutory law.

The first ground for shareholders to file a lawsuit arises from a breach of fiduciary duties. Similar to the regime applicable to directors on the board, the requirements for shareholders to bring an action against committee members appear to closely mirror those previously established for breaches of duty by board directors.

Unlike directors engaged in broader managerial functions, committee members are typically held accountable for failures in oversight or for not adequately responding to those so-called “red flags” indicating possible misconduct. The *David Shaev Profit Sharing Account v. Riggio*¹¹¹ ruling

¹⁰⁹ STEPHEN ERROL BLYTHE, “Legal Liability of Audit Committee Members in U.S. Shareholder Derivative Cases: Lessons Learned from Recent Litigation,” *Journal of Accounting, Ethics & Public Policy* 21, no. 2 (2020): 213–247, Tarleton State University.

¹¹⁰ *Ross v. Bernhard*, 396 U.S. 531, 534 (1970)

¹¹¹ *David Shaev Profit Sharing Account v. Riggio*, 2014 NY Slip Op. 31776(U) at 8, (N.Y.)

exemplifies this distinction: the Court reaffirmed that committee members cannot evade liability merely by relying on management's assurances when clear warning signs exist. Thus, the standard of liability is formally identical, yet its practical enforcement tends to focus more narrowly on the committee's monitoring and reporting functions rather than on discretionary business decisions.

At this point, following the critical distinction just made, the question that is often asked is if Audit members have a greater degree of fiduciary duties than any other member of the Board of Directors. Plaintiffs in shareholder derivative cases frequently argue that Audit Committee members should be subject to higher fiduciary obligations due to their special responsibilities in overseeing financial reporting and internal controls¹¹².

However, courts have been reluctant to embrace the notion of an automatically elevated fiduciary standard for Audit Committee members. Jurisprudence¹¹³ has suggested that such duties must be established on a case-by-case basis, depending on the firm's governing documents, the Audit Committee's charter and its actual operational practices. Where these sources indicate an expanded scope of authority or supervision, Courts may infer a correspondingly broader fiduciary responsibility. Conversely, in the absence of specific evidence, mere membership in the Audit Committee does not in itself imply scienter, a knowing breach of fiduciary duty, or active participation in wrongdoing.

The second ground for shareholders to file lawsuit arises from violating Section 10(b) of the Securities Exchange Act and the SEC Rule 10b-5.

The analysis of cases laws highlights a persistent ambiguity in defining the extent of Audit Committee members' liability for misleading financial disclosures; in fact, Courts have adopted divergent approaches, oscillating between an expansive interpretation that attributes liability where committee members failed to act upon clear warning signs, and a more restrictive one requiring explicit proof of actual

Cty. S.Ct. 2014).

¹¹² *Montini v. Lawler (In re Moduslink Global Solutions Inc. Deriv. Litig.)*, Civil Action No. 12-11296-DJC (D. Mass. 2014): the plaintiff claimed that Audit Committee members were "particularly culpable" because their charter explicitly required them to coordinate directors' oversight of financial reporting.

¹¹³ *Pedroli v. Bartek*, 564 F.Supp.2d 683, 692 (E.D.Tex. 2008)

knowledge or intent¹¹⁴. These decisions underscore that Audit Committee members cannot rely passively on external auditors' assurances; rather, they have an affirmative duty to "guard the guardians" by critically overseeing both management and auditors, since the Courts found that the members' inaction in the face of concrete evidence of wrongdoing constituted recklessness sufficient to establish scienter under Rule 10b-5.

Conversely, another case law¹¹⁵ demonstrate judicial restraint in extending liability: the Courts emphasized that absent particularized facts establishing actual knowledge of falsity, mere membership on the Audit Committee or awareness of internal control deficiencies does not meet the scienter threshold. Even when an Audit Committee is charged with monitoring duties by its charter, this "heightened duty to monitor" alone is insufficient to infer intent or knowledge of fraud.

A third potential ground of liability for Audit Committee members arises under Section 20(a) of the Securities Exchange Act, which establishes the so-called "control person" liability. This provision extends responsibility beyond those who directly commit securities violations to individuals who exercise control, directly or indirectly, over the primary wrongdoers. It therefore operates as a complementary and alternative theory of culpability to Section 10(b) and Rule 10b-5, targeting those in a position to influence or prevent the underlying misconduct.

In principle, this doctrine aims to ensure that individuals occupying positions of oversight cannot escape liability merely because they did not personally execute the fraudulent acts. Courts have interpreted the concept of "control" broadly, emphasizing its flexible and context-dependent nature. However, its application to Audit Committee members has raised significant interpretive challenges.

On the one hand, their structural role—overseeing financial reporting and interacting with both management and external auditors—places them in a position of potential influence that could satisfy the statutory notion of control. This, in turn,

¹¹⁴ In *Lernout and Sunshine Products* Courts imposed liability on Audit Committee members who had been alerted by auditors to serious accounting irregularities yet continued to authorize or endorse misleading statements.

¹¹⁵ *Risberg v. McArdle*, 529 F.Supp.2d 213, 221-22 (D. Mass. 2008), in which the court dismissed the claim, holding that the plaintiff had failed to show the committee's actual awareness of the misleading nature of the financial statements.

raises a final question in the legislator's mind: what if audit committee members were themselves to be considered "control persons"? Under Section 20(a) of the Securities Exchange Act, liability extends to individuals who exercise control over primary violators. However, courts have held that mere membership on the Audit Committee is insufficient. Plaintiffs must allege that members had actual power to approve financial statements, authorize SEC filings, or oversee audits¹¹⁶.

On the other hand, the court have found control-person liability where plaintiffs alleged that Audit Committee members signed SEC filings containing false statements, controlled financial reporting, oversaw audits and regularly interacted with internal and external auditors¹¹⁷. Similarly, more recent cases held members liable when they were board members with stock ownership, had access to reports and press releases, could prevent or correct dissemination and monitored financial statements, internal controls, and compliance.

5. Chief Compliance Officer (CCO) and Whistleblowing Mechanisms in the U.S.

Following the analysis of the Board of Directors and the Audit Committee, it is also essential to examine other key components of the U.S. internal control framework. In particular, the roles of the Chief Compliance Officer and the whistleblowing system represent crucial mechanisms in ensuring ethical conduct, regulatory compliance, and effective corporate governance.

The role of the Chief Compliance Officer in the last two decades has evolved dramatically: historically tasked with the supervision of regulatory adherence, today the CCO works alongside CEO's, CFO's and CRO's and other top corporate managers to embed compliance into corporate strategy and help shape the organisation's risk culture.

This shift of role within corporate organisations has highlighted not only a major valuation towards this corporate figure, but it reflects a broader

¹¹⁶ In re Alstom SA, 406 F.Supp.2d 1149 (D.Ariz. 2005), in which the court dismissed claims based solely on vague membership without specifying the member's role or service period.

¹¹⁷ In re Hayes Lemmert International Inc. Sec. Litig., 271 F.Supp.2d 1007, 1029-30 (E.D. Mich. 2003).

understanding that compliance is not just about voiding penalties, but it's also about enabling trust, protecting reputation and creating a resilient organisation.

The position of the Chief Compliance Officer gradually emerged during the 1990s. In 1991, the Federal Sentencing Guidelines for Organizations made it clear by explicitly encouraging companies to adopt effective compliance and ethics programs overseen by high-level personnel. The message became very clear: preventing misconduct and through internal vigilance was more efficient than pushing it fact after fact. Due to the financial scandals that occurred in the beginning of the year 2000s, the 2002 Sarbanes-Oxley Act although it did not explicitly made any reference to the CCO, it effectively institutionalised the role by requiring corporations to designate responsible officers to ensure compliance with securities and accounting laws. Its role was solidified even more by the 2010 Frank-Dodd Act, which linked compliance oversight to whistleblower protections mechanisms, recognising that internal reporting and ethical governance are indeed deeply interconnected.

CCOs are now expected not only to enforce compliance policies, but also shape the organisation's ethical culture, identify risks, and act as advisors to the board and executive management. In this sense the CCO in reality serves as a bridge between legal compliance and corporate integrity, ensuring that the company's pursuit of profit remains aligned with its regulatory and ethical responsibility.

The CCO can basically be defined as a compliance manager, with three main oversight functions that start from financial regulations all the way to privacy and data regulation. The primary functions can be regrouped in ten different functions and these are: Regulatory Compliance which means ensuring the organization complies with applicable laws, regulations, and industry standards; Risk Management which is explicated through identifying, assessing, and mitigating compliance risks; Policy Development which consists in creating and maintaining compliance policies and procedures; Training and Education which translates into organising and promoting compliance training programs for employees and management; Monitoring meaning overseeing internal controls, audits, and compliance reporting; Whistleblower Protection which establishes mechanisms for employees to report misconduct without fear of retaliation; Internal Investigations

which allows the CCO to conduct internal reviews of potential compliance breaches and coordinating with legal teams; Stakeholder Communication which allows reporting to executive leadership, the board of directors, and regulatory bodies; Enforcing Disciplinary Measures that translates into recommending and enforcing corrective actions in response to non-compliance¹¹⁸.

A central question that has emerged in recent years concerns whether a distinct department, led by the Chief Compliance Officer, should exist within the corporate hierarchy. The answer largely depends on the qualifications and training of the individual appointed to the role, as well as on how effectively he or she performs the associated duties. In practice, different models of the CCO position have developed, reflecting how compliance is structured and integrated within large publicly traded corporations. The discussion, however, goes beyond the personal attributes of the CCO, focusing instead on whether this role should operate independently rather than reporting directly to the General Counsel¹¹⁹. Historically, in large publicly traded corporations, the compliance and ethics function was typically overseen by the Chief Legal Officer (CLO) or General Counsel (GC). In many cases, the compliance function reported directly to the GC, who often also served as the Chief Compliance Officer — a structure that still exists in some organizations today¹²⁰. Yet, and in no small part due to corporate scandal after scandal upon industry during the past 10 years, there has been a growing trend toward separating the compliance function from the legal department by creating independent compliance departments comprised of people with legal training. These independent compliance departments are developing programs aimed at preventing violations and ensuring adherence to legal and ethical standards.

In recent years, there has been a noticeable trend toward reducing the number of Chief Compliance Officers who report directly to the General Counsel. This shift reflects a broader movement aimed at strengthening the independence of the compliance function within corporate governance structures. While this structural

¹¹⁸ *The Chief Compliance Officer. "CCO: Role, Responsibilities, Future Outlook." The Chief Compliance Officer*, <https://www.chief-compliance-officer.org>.

¹¹⁹ MICHELE DE STEFANO, *The Chief Compliance Officer: Should there be a new "C" in the C-Suite?* in *The Practice* (vol. 34, n. 3, July/August 2016), Harvard Law School Centre on the Legal Profession.

¹²⁰ For instance, Mark Chandler of Cisco holds both the GC and CCO titles

change is often portrayed as a best practice, particularly among companies recovering from compliance failures, its effectiveness and underlying motivations remain open to debate. Proponents argue that separating compliance from legal enhances transparency, fosters ethical culture, and allows greater independence in uncovering corporate misconduct. Critics, however, warn that departmentalization risks inefficiency, internal conflicts, and confusion over accountability, especially when both legal and compliance officers operate within overlapping domains¹²¹.

Ultimately, the question of who should lead compliance is not merely organizational but philosophical. It reflects competing interests between legal protection and ethical transparency, between internal control and external accountability. Understanding these tensions and the potential unintended consequences of departmentalization is essential to assessing whether the modern CCO truly strengthens corporate governance or merely reconfigures the flow of responsibility within the corporation.

In this sense, while the establishment of an independent CCO represents a significant step toward ensuring ethical integrity and compliance oversight within corporations, it remains only one piece of a broader regulatory framework. To further strengthen transparency and accountability, the U.S. legislator introduced external mechanisms designed to encourage individuals to report wrongdoing even when internal systems fail to respond. Among these, the creation of the Whistleblower Office marked a pivotal evolution in corporate governance and enforcement practices.

The United States has a long tradition of supporting whistleblowing, with data consistently showing that American citizens are among the most proactive in reporting misconduct. This is remarkable given the lack of a single, unified federal framework; instead, whistleblower protections have evolved through multiple laws targeting specific sectors.

The first major recognition of whistleblower protection came with the Lloyd–La Follette Act of 1912, which safeguarded federal employees from retaliation when reporting corruption or incompetence directly to Congress. Protections

¹²¹ MICHELE DESTEFANO, «*The Chief Compliance Officer*», *The Practice Magazine*, July/August 2016, Harvard Law School Center on the Legal Profession.

expanded in the 1970s, following several environmental scandals, through legislation such as the 1972 Water Pollution Control Act, the 1974 Safe Drinking Water Act, and the 1976 Solid Waste Disposal Act. These reforms were driven by incidents such as the Michigan chemical contamination case, where the suppression of employee reporting led to severe public health consequences and enormous economic damage¹²². A further turning point was reached with the 1986 amendments to the False Claims Act, which enhanced the government's ability to detect fraud and introduced economic incentives and stronger anti-retaliation protections to encourage insiders to come forward.

Whistleblowing in the private sector received major attention only after the Enron and WorldCom scandals. Previously, protection against retaliation depended on the uncertain public policy exception to the employment-at-will doctrine, and was limited mostly to threats to public health and safety. Corporate financial misconduct was not yet widely viewed as harmful to society. This changed drastically with the Sarbanes–Oxley Act of 2002, followed by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which introduced robust protections and monetary rewards for whistleblowers reporting securities law violations.

Established in 2011, the SEC Office of the Whistleblower administers the SEC Whistleblower Reward Program, which has proven highly effective in exposing securities fraud and improving investor protection. Since its inception, the Office has awarded over \$381 million to whistleblowers whose information led to successful enforcement actions exceeding \$1,000,000 in monetary sanctions.

To be eligible for an award, a whistleblower must: voluntarily provide information—before any government request; provide original information, based on independent knowledge or analysis; assist in an action where the SEC imposes sanctions greater than \$1 million; be an individual though joint submission are allowed; not fall within specifically excluded categories such as attorneys representing the wrongdoer, compliance personnel, officers with reporting responsibilities, or external auditors acting under federal securities laws¹²³.

¹²² *Il whistleblowing negli Stati Uniti: che cos'è e perché è così efficace?*, in *Crystal, Lawyers for Lawyers and International Matters*, October 29, 2014.

¹²³ *SEC Whistleblower Program*, in *Church Law firm*.

Notably, a whistleblower does not need to be employed by the offending entity and because exceptions can be complex, the SEC strongly encourages potential whistleblowers to consult specialized counsel before filing a claim.

Under Dodd-Frank, eligible whistleblowers may receive 10% to 30% of the monetary sanctions collected by the SEC. The exact percentage depends on a balancing of positive and negative factors. Between 2007 and June 2024, the U.S. Internal Revenue Service (IRS) awarded over \$1.2 billion in whistleblower rewards, leading to the recovery of approximately \$7 billion in unpaid taxes. In 2023 alone, whistleblower tips contributed to the recovery of \$338 million, with \$88.8 million in rewards distributed. The number of claims has been rising steadily; in fiscal year 2024, the IRS received 16,932 claims, a 44% increase compared to the previous four-year average¹²⁴.

In summary, the evolution of the Chief Compliance Officer and the establishment of robust whistleblowing mechanisms illustrate the multifaceted approach of the U.S. internal control system. The CCO has shifted from a primarily legal oversight role to a strategic position that shapes corporate culture, manages risk, and ensures ethical conduct across the organization. Meanwhile, whistleblower protections complement internal compliance efforts by providing external channels for reporting wrongdoing, reinforcing accountability, and promoting transparency. Together, these mechanisms underscore that effective corporate governance in the United States relies not only on formal structures and regulations but also on fostering an environment where ethical behavior and responsible reporting are integral to organizational resilience and public trust.

6. Final considerations

In this chapter, the legal and institutional architecture of U.S. corporate governance has been critically examined, with particular attention to the historical evolution of the regulatory framework—from the foundational 1933 Securities Act

¹²⁴ FABRIZIO ORTU, *Usa: dai whistleblower 7 miliardi di recupero dell'evasione fiscale*, in *FiscoOgg*, September 26, 2024.

to the more recent Sarbanes-Oxley, Dodd-Frank and Economic Growth Acts—and to the internal dynamics of corporate supervision through the Board of Directors, the Audit Committee and the compliance system. The analysis has highlighted how the U.S. system, rooted in the principles of fiduciary responsibility and managerial accountability, seeks to balance entrepreneurial discretion with mechanisms of oversight designed to preserve market integrity and investor confidence.

At the same time, the discussion has revealed that the system of directors' responsibility represents both a cornerstone and a point of fragility within American corporate law. While the business judgment rule protects managerial risk-taking and innovation, the Caremark line of cases has progressively outlined a duty of oversight that, though conceptually preventive, remains limited in its deterrent effect. Courts continue to impose a high threshold for liability—an “utter failure” to implement or monitor compliance systems—thus rendering accountability largely exceptional.

From a comparative perspective, this reveals a fascinating paradox. The U.S. corporate system is fundamentally preventive, oriented toward compliance, disclosure, and *ex ante* control. Yet, paradoxically, directors' liability—the very mechanism that should reinforce this preventive logic—remains non-preventive, shielding decision-makers rather than disciplining them. Conversely, the Italian system, typically punitive and *ex post* in nature, displays the opposite inconsistency: while it is generally repressive, directors' liability is marked by weak enforcement and low deterrence, failing to realize the punitive potential of its own framework. In both systems, therefore, responsibility emerges as the structural weak point—either because it is too insulated from sanction or because it is too diluted in enforcement practice.

These opposing distortions underscore a deeper convergence: the persistent struggle to reconcile accountability with autonomy in corporate management. Both models ultimately oscillate between the fear of over-deterrence, which could stifle business initiative and the risk of under-deterrence, which erodes trust in governance. The next chapter will build on this comparative perspective, assessing how rule-based and principle-based approaches influence the overall effectiveness of internal control systems and contrasting the different internal control bodies

analyzed throughout these chapters to determine which model achieves a more balanced integration of compliance, responsibility, and business efficiency.

Chapter III: A comparative analysis of Italy and The United States

1. Model effectiveness: Rule Based USA vs. Principle Based Italy/EU

The study of corporate governance gains depth when approached comparatively, since no single model can be claimed universally. The United States, with its rule-based approach, and Italy, which aligns itself with the European principle-based traditions, offer a clear contrast that shows how different regulatory approaches and institutional structures respond to the same global challenges of transparency, accountability and investor protection.

The U.S. approach emphasises a more legalistic or rule-based approach, which results in even more layers of compliance reflecting even more layers of regulatory intervention; the adoption of the rule-based approach has become more dominant following the Enron and WorldCom scandals which led to the adoption of the Sarbanes-Oxley Act. The adoption of the Act demonstrated the American Legislator's preference for the application of principles of hard law, meaning that listed companies must comply to the obligations established by the Act or else they will not be allowed to operate in the markets. This reliance on binding statutory rules reflects a widespread cultural belief that effective corporate governance cannot rely solely on voluntary adherence to principles; rather, it must be enforced through detailed legal requirements and the threat of sanctions. Culturally, this mindset fosters greater investor confidence in the system and ensures a high degree of transparency in corporate operations within the markets.

However, the reliance on the rule-based philosophy in the United States has significant implications beyond just adopting laws. From a theoretical point of view, it shows the impact of agency theory. This theory suggests that managers, if given too much freedom, might prioritize their own interests over those of shareholders; thus, law in the American context is seen not as a flexible set of values but as a specific list of rules designed to limit self-serving behavior. This explains why U.S. lawmakers typically prefer strict legal measures over softer approaches like self-regulation.

Practically speaking, such an approach leads to significant compliance challenges for listed companies: corporations must invest heavily in internal control systems, auditing processes and reporting systems, which raises costs. While this promotes standardization and makes financial statements easier to compare for investors, it can also create a series of obstacles for smaller firms that do not have the resources to meet the same strict standards and in addition, the inflexibility of the system limits firms' ability to adjust governance practices to fit their specific ownership structures, industry conditions, or cultural contexts.

The benefits arising from the adoption of this approach are evident. It enhances comparability, consistency, and standardisation across corporate practices, which in turn increases regulators' confidence in the system. By placing a strong emphasis on form and structure, it also contributes to more accurate and transparent financial reporting, allowing investors to make better-informed decisions. Furthermore, this framework helps create a safer and more predictable working environment, reinforcing trust at multiple levels within the market¹²⁵.

At the same time however, this approach presents disadvantages as well, making it one of the most controversial approaches in this case.

However, this approach is not without its drawbacks. One of the main concerns is the potential rigidity it introduces into corporate processes, which can limit flexibility and adaptability. The sheer volume of rules and exceptions may overwhelm the underlying principles, reducing their practical relevance. In some cases, companies may feel compelled to comply with formal requirements even when the outcomes do not fully reflect a "true and fair" view of their financial situation. Moreover, a strict rules-based framework can shift focus away from fostering genuine competitiveness, and in doing so, may also lead organisations to lose sight of their broader ethical responsibilities.

In summary, the U.S. rule-based model represents a view of corporate governance based on clear laws, strict enforcement and limited decision-making by managers. While it certainly improves transparency and protects investors, it also

¹²⁵ SURENDRA ARJOON, *Striking a Balance Between Rules and Principles-based Approaches for Effective Governance: A Risks-based Approach*, *Journal of Business Ethics*, vol. 68, no. 1, July 2006, pp. 53–82

brings rigidity, high compliance costs and the chance of a purely formal approach to governance.

In contrast, Italy and many other European jurisdictions have adopted a so-called “principle-based” approach. The principle-based approach does not directly prescribe detailed rules for corporate behaviour but provides overarching principles or ethical guidelines to lead business operations. The focus is less on detailed rules and more on the ability of companies to show responsibility, fairness, and transparency in ways that fit their unique structures and situations.

Philosophically, this approach reflects a European legal and cultural tradition that is more contextual and interpretative than the American legal mindset. Instead of believing that managers will always act opportunistically and need to be tightly controlled, the principle-based philosophy is based on the idea that corporate actors can and should be held accountable through disclosure, reputation, and stakeholder engagement. A principle-based governance system describes laws and regulations as broad standards rather than specific rules; these standards define what is true and expected, but they allow for interpretation in implementation across different sectors. For instance, in finance, the UK’s Financial Conduct Authority (FCA), which works under a principle-based system, requires firms to treat customers fairly without listing the exact steps they must follow. Companies are invited to apply these general principles in their own way, deciding how their actions can meet the overall norms of fairness and ethical concern. This shows the key idea of principle-based governance: flexibility, responsibility, and transparency take priority over strict uniformity¹²⁶.

In this way, the principle-based model relates to the “comply or explain” rule. This rule requires companies to either follow established codes of best practice or explain why they chose to deviate from them. This specific approach emphasises that the usage of flexibility and transparency can lead to better outcomes compared to strict adherence from companies; in fact, the presence of this kind of flexibility appears to be the biggest advantage in the principle-based approach.

¹²⁶ MIRIAM GANDE, ANGELINE N. KAIYO, KUDAKWASHE ARTWELL MURAPA, AND MUNASHE NAPHTALI MUPA, *Navigating Global Business: A Comparative Analysis of Rule-Based and Principle-Based Governance Systems in Global Strategy*, IRE Journals, pp 517-518

Flexibility enables companies to keep pace with the rapid developments in sectors such as technology, pharmaceuticals, and finance, where constant innovation can quickly make rigid rules obsolete. A principle-based system allows firms to adapt more effectively, ensuring that regulations remain relevant and aligned with broader ethical standards and societal norms¹²⁷.

In fact, this flexibility allows companies to shape their compliance strategies to meet business needs: retailers can innovate, create custom compliance workflows and respond to market demands, which enables businesses to be competitive and swift, especially in innovating sectors that play in global markets, making a significant impact. According to this, principle-based systems lead to improved ethical decisions and corporate responsibility as well as it may encourage accountability and integrity, forcing companies to adjust principles to fit their values and social responsibilities, which might upset some companies.

Unlike the American rule-based system, where trust is built through detailed laws and strict enforcement, the European and Italian principle-based model aims to create trust in a more conversational and relational way. In this system, confidence in the market does not mainly come from strict laws. Instead, it results from ongoing interactions among regulators, companies, and investors. This process is supported by disclosure requirements, reputational incentives, and the unification of norms. In this context, trust is not forced; it develops gradually through transparency and the voluntary adjustment of corporate practices to shared principles.

Beyond flexibility—which is widely regarded as the main advantage of this system—there are several additional benefits. It grants companies greater freedom to present information in a way that truly reflects their financial position, supporting a "true and fair" view. This approach also encourages the development of a dynamic and responsive workplace culture, while placing greater emphasis on the quality of corporate practices rather than mere compliance. Moreover, it offers a behavioural

¹²⁷ *Ibidem*

framework that helps corporations better understand the ethical boundaries of their operations, promoting responsible decision-making¹²⁸.

Like the rule-based system, the principle-based approach also presents certain drawbacks. One key concern is the risk that individuals might manipulate information under the guise of flexibility. Additionally, implementing this system can lead to higher short-term costs, especially as companies invest in training and internal processes to interpret and apply principles effectively. Another challenge lies in the broad nature of existing principles, which may be difficult to interpret consistently at an individual or organisational level. As a result, compliance can vary significantly across companies, potentially undermining uniformity and accountability.

Ultimately, the comparison between the U.S. rule-based model and the European principle-based model shows that corporate governance relies on two competing but complementary logics. One is based on legal certainty and enforcement, while the other values flexibility and dialogue. Neither approach is perfect, but both demonstrate that the foundation of any governance system is the ability to build trust, whether created through rules or nurtured through principles. This trust is essential for maintaining transparent, responsible, and resilient markets.

2. Compliance and Business Impact

When corporate governance is viewed from a perspective of business and compliance, the contrast between the American rule-based system and the Italian or broader European principle-based model becomes particularly clear. In rule-based systems, compliance is typically enforced in a strict and often aggressive manner. Regulators in such frameworks tend to play a highly interventionist role, with the authority to conduct audits, impose fines, and even initiate legal action in cases of non-compliance.

¹²⁸ SURENDRA ARJOON, *Striking a Balance Between Rules and Principles-based Approaches for Effective Governance: A Risks-based Approach*, *Journal of Business Ethics*, vol. 68, no. 1, July 2006, pp. 53–82.

In fact, to avoid fines or even imprisonment, it is not uncommon for penalties to be sufficiently severe as disincentive against companies that engage in risky business practices. Because businesses face such high stakes, businesses in regulated and rule-based environments often have little choice but to prioritize compliance. In fact, due to this strict enforcement, companies must adapt their internal systems and strategies to a rigid legal framework which compliance are prescribed in advance and strictly enforced¹²⁹. This makes governance a key part of the business model: audit committees, internal control systems, risk management structures and mandatory reporting processes are required by law. In such systems, compliance effectively becomes a routine operational cost. While this ensures predictability and consistency across listed companies—enhancing comparability and reducing uncertainty for investors—it also imposes significant compliance burdens. Smaller firms, in particular, often struggle to meet the financial and administrative demands required, which can ultimately act as a barrier to accessing capital markets.

In contrast, the principle-based approach adopted in Italy and other European jurisdictions does not view compliance as strict adherence to detailed rules. Instead, it emphasizes the application of broad standards rooted in fairness, accountability, and transparency.

Laws and governance codes express general expectations instead of specific duties: this gives companies the freedom to interpret and implement them based on their size, sector, and ownership structure. Mechanisms present in the Italian systems, such as the comply or explain, emphasises the principle of freedom of companies to interpret and implement specific duties, allowing the shifting focusing from a rigid conformity to reputational accountability: in this case companies that do not comply with governance code will not be immediately sanctioned, but they must explain their choice of not adhering to the code. As stated before, this possibility granted to companies, allows a certain degree of flexibility and adaptability; at the same time, it allows governance practices to be shaped with

¹²⁹ SURENDRA ARJOON, *Striking a Balance Between Rules and Principles-based Approaches for Effective Governance: A Risks-based Approach*, *Journal of Business Ethics*, vol. 68, no. 1, July 2006, pp. 53–82.

specific realities of each firm, reducing compliance cost and allowing governance to evolve together with market innovations.

However, the price to pay for this kind of flexibility can be ambiguous, due to the fact that without strict rules, companies deal with uncertainty in how to interpret rules, making enforcement harder, some may take advantage of the situation by masking their actions as voluntary interpretation.

Companies must adopt a proactive approach to compliance, guided by a risk-based perspective. Within a principle-based system, meeting regulatory and ethical standards of operational excellence requires more than simply following rules—it demands the ability to identify a wide range of risks, implement effective internal control systems, and continuously monitor business practices to ensure alignment with core principles. At the same time, ongoing communication with regulators is essential to ensure that the interpretation and application of these principles remain consistent and accurate¹³⁰.

These differences show deeper cultural and legal traditions: in the U.S. compliance is seen as a legal requirement aimed at minimizing agency problems and stopping managerial misconduct; it builds trust through rules, enforcement and consequences. In Europe, compliance is more about relationships and conversation, where trust is developed through transparency, disclosure, and voluntary agreement on shared values. For businesses, this means that in the American context, compliance provides legal certainty but can also lead to rigidity. While the European approach allows for adaptability but can result in inconsistency.

Ultimately, this comparison reveals that compliance is not a neutral idea, but it reflects two distinct philosophies: one focused on obeying rules and the other on honoring principles. The real challenge for global markets is to strike a balance that blends the clarity of rules with the flexibility of principles.

¹³⁰ *Ibidem*.

3. Board Accountability with and without the Business Judgment Rule: Contrasting the United States and Italy

Having examined the differing approaches to corporate governance in the United States and Italy, it is now appropriate to undertake a comparative analysis of the principal oversight bodies within their respective systems.

When comparing boards of directors across different corporate governance systems, particularly between the U.S. and Italy, it is essential to focus not on the structural features or general responsibilities—which have been addressed extensively earlier—but rather on the nuanced analogies and divergences that characterize their fiduciary duties and interaction with regulatory environments. Despite shared foundational principles such as the duties of care and loyalty, the practical application, legal frameworks and regulatory overlays demonstrate notable differences that shape the governance dynamics and accountability mechanisms of corporate boards.

At the core, the fiduciary duties of directors across systems universally emphasize loyalty to the corporation and its shareholders, coupled with a duty of care that requires informed and prudent decision-making. In the United States, these duties are deeply rooted in state corporate law, with Delaware’s legal framework serving as a benchmark. The business judgment rule exemplifies the U.S. approach by strongly protecting directors’ decisions from judicial second-guessing, provided those decisions arise from informed deliberation and good faith. This principle, underscores a judicial deference to boards, even amid controversial decisions affecting social or political issues, so long as directors demonstrate rationality, absence of conflicts of interest and procedural rigor.

By contrast, while Italy maintains similar fiduciary concepts, its judicial review mechanisms can be less deferential. The provisions that prescribe the fiduciary duties remain somewhat vague and open to interpretation within the statutory framework. It has been primarily Italian jurisprudence that has sought to concretize these broad principles—transforming general clauses into more specific rules. However, this judicial “interpretation” risks blurring the boundary between interpretation and judicial lawmaking, raising concerns about the extent to which

courts are creating obligations rather than merely applying the law in a system that is deeply rooted in the principle of the separation of powers and in the resulting clear distinction between the roles of the legislature and the judiciary.

This situation creates uncertainty for directors, as the scope and content of their duties depend heavily on evolving case law rather than clear statutory guidance, unlike the more predictable standards found in U.S. corporate governance under the business judgment rule.

Moreover, in Italy, criminal liability against directors tends to be more frequently pursued in relation to corporate misconduct, such as false accounting or abuse of office, reflecting a more active role of criminal law enforcement compared to the United States, where criminal prosecutions are generally reserved for more serious violations and are less common. And again, this difference likely stems from the strength of the business judgment rule and the widespread use of exculpatory charter provisions in the U.S., which mitigate legal risks for directors and reduce the reliance on criminal law as a mechanism of accountability.

From a cultural and institutional perspective, these differences affect how boards engage with their fiduciary duties. The U.S. model's emphasis on legal protections and board discretion fosters a governance environment where innovation and risk-taking can coexist with accountability, albeit with increasing regulatory scrutiny. Conversely, jurisdictions with stricter liability and regulatory frameworks may prioritize risk mitigation and compliance over strategic risk-taking, shaping distinct board dynamics and decision-making cultures.

In conclusion, the understanding of these nuances is crucial for comparative corporate governance analysis, as they directly impact board behavior, accountability, and ultimately, corporate performance and stakeholder trust.

4. Institutional Twins or Distant Cousins? Comparing the Italian *Collegio Sindacale* and the American Internal Audit Committee

A meaningful way to illustrate the divergent approaches to corporate oversight in different governance models is to examine the respective roles of the

American audit committee and the Italian *Collegio Sindacale*. Both strive to ensure transparency, accountability, and reliable financial reporting, but they embody distinct governance philosophies, each with unique strengths and weaknesses.

The *Collegio Sindacale*, rooted in Italy's civil law system, benefits from legal authority and independence from the board, as its statutory role gives it binding powers and a strong position, acting as a safeguard against managerial misconduct. However, this model may be too rigid or formal, limiting its ability to adapt quickly to changing corporate environments. Additionally, its closeness to legal enforcement might hinder a more collaborative and advisory relationship with management.

In contrast, the Audit Committee, influenced by Anglo-Saxon common law, is generally more flexible and integrated into the company's governance structure; its strengths include being responsive, aligned with board-level strategic oversight and able to include independent experts. However, its dependency on the board may compromise its independence and its advisory role can lessen its effectiveness in enforcing corrective actions, especially where corporate culture is weak or accountability structures are unclear.

In a comparative perspective, this reveals a fundamental distinction between two models of oversight: the Audit committee is part of the Board's group decision-making process, with its independence relying on the governance culture and its independent directors. On the other hand, the *Collegio Sindacale* illustrates a distinct solution: it is a Statutory Board that operates independently from management, having its own legal powers and responsibilities.

Given their differing levels of independence, the next critical question concerns how these organs engage with external auditors and shareholders, since these relationships largely determine the credibility and impact of their oversight.

In the Italian system, the *Collegio Sindacale* is not the sole point of interaction for external auditors; the auditors may also report or communicate directly with the shareholders, through the reports periodically presented in their annual meeting. The content in the report goes from raising all kinds of concerns, to locate findings and even call the shareholder's meeting in case of serious irregularities. The

relationship with the shareholders appears to be immediate, but very institutionalised, representing a very strong case of collaboration between the two.

On the other hand, the Audit Committee in the U.S. model interacts exclusively with the Board of Directors. While it plays a key role in ensuring that shareholders ultimately receive reliable financial information, it does not report directly to them. Instead, its accountability is mediated through the Board's internal reporting channels. The reason why the committee appears to be strictly connected to the Board it's because the same committee originally comes from the structure of the Board, which then through its creation, separates itself from the Board, forming an independent organ that directly answers to the Board.

Lastly, one of the most highlighted differences lies in the liability and responsibility framework. The Statutory Auditors (members of the *collegio sindacale*) face both civil and criminal liability if they fail or commit any actions that results in failing their obligations and they can be held personally responsible for damages caused to the company, shareholders and third parties. Inevitably this great responsibility that falls on the body reflects the body's statutory nature and its role as a guardian of legality and proper administration.

Members of the Audit Committee, as directors, are subject to fiduciary duties such as the duty of care and the duty of loyalty, which means they may be held liable in cases of gross negligence or misconduct. However, the rules governing their liability are generally less direct and less stringent than those applied to members of the *Collegio Sindacale* under Italian law. Their role is primarily advisory and supervisory within the Board of Directors, rather than one of independent legal oversight or enforcement.

The contrast between the Italian *Collegio Sindacale* and the American Audit Committee highlights two fundamentally different approaches to corporate oversight. The Italian model is based on a statutory body with independent powers and personal legal responsibility, focusing primarily on legality, compliance, and formal control mechanisms. In contrast, the American system integrates oversight within the Board of Directors, emphasizing financial transparency, disclosure, and the protection of investors.

Although both systems aim to ensure integrity, responsibility and reliability in corporate governance, they are rooted in two different legal traditions: a formalistic and rule-based approach on the one hand, and a flexible, board-centered model on the other.

5. Shared Principles, Different Practices: Whistleblowing and Internal Audit in Italy and the United States

Building upon the comparative analysis of governance and oversight bodies, it is essential to consider how internal control systems are supported by other mechanisms designed to prevent and detect corporate misconduct. Among these, whistleblowing stands out as a critical tool for reinforcing compliance, transparency and ethical behavior within complex organisations. The comparison between Italy and the United States reveals significant convergences but also important divergences in the regulatory design, scope of application, protective mechanisms and their integration into models of internal control – a particularly pertinent matter in listed companies and in organisations subject to internal audit and organisational models such as Italy's Legislative Decree no. 231/2001.

When comparing the two systems, several salient points emerge. Firstly, the scope of applicability: Italy's D.Lgs. 24/2023 adopts a broader general coverage (public and private sectors, many types of wrongdoing including administrative or accounting offences and requiring internal channels) than the U.S. SOX regime, which is more narrowly focused on fraud against shareholders and publicly-traded companies. Secondly, the obligatory nature of internal channels is more pronounced in the Italian regime: Italian companies above a threshold must adopt internal reporting mechanisms integrated into internal control systems, whereas in the U.S., while many large companies have hotlines and internal procedures as a matter of governance best practice, the statute focuses on protections rather than prescribing a mandatory internal channel for all organisations.

In addition, the protections and incentives differ: in Italy, the emphasis is on protecting the identity of the reporter and preventing retaliation, and while there are

administrative sanctions for non-compliance by organisations, there is no statutory system of financial rewards to individual whistleblowers within D.Lgs. 24/2023. Conversely, in the U.S., beyond SOX's protective regime, certain statutes provide substantial monetary incentives for effective whistleblowing and finer-tuned remedial frameworks, which arguably spur greater reporting of serious violations.

Furthermore, there is the integration with internal audit and organisational models: Italy's connection between whistleblowing and the internal control models (especially the "231" model) emphasises the preventive role of signalling internal misconduct before it escalates, thereby reinforcing the role of internal audit and the *ODV*. In the U.S., internal audit and compliance functions are likewise vital but the architecture may place greater emphasis on external enforcement (via SEC, DOL) and market discipline.

Also, in the U.S. corporate governance framework, the Chief Compliance Officer (CCO) plays a pivotal and centralized role in overseeing whistleblowing systems, compliance and internal control mechanisms. As the primary figure responsible for ensuring adherence to regulatory requirements, the CCO coordinates reporting channels, manages investigations of reported misconduct, and acts as a key liaison between the board, audit committees, and enforcement authorities. This centralization facilitates clear accountability and streamlines the integration of whistleblowing into the company's broader risk management and compliance strategies, fostering a proactive culture of ethical conduct and regulatory adherence.

Conversely, the Italian system lacks a directly equivalent single-role figure; instead, compliance responsibilities are distributed among multiple actors, notably the Compliance Officer, the *Organismo di Vigilanza* and the Internal Audit function. While this distribution can enrich the corporate culture by involving diverse perspectives and promoting collective responsibility for compliance, it also risks diluting individual accountability. In the absence of a clearly defined "owner" of compliance and whistleblowing processes, the logic of "everyone is responsible" may paradoxically lead to ambiguity about who ultimately bears responsibility. This fragmentation can hinder swift decision-making and reduce the effectiveness of preventive controls, especially when timely intervention is crucial to mitigate risks

and respond to whistleblower reports. Therefore, while the Italian multi-actor model fosters a broad-based compliance culture rooted in shared oversight, it must carefully balance this with clear lines of responsibility to avoid the pitfall where diffusion of duties leads to a lack of ownership.

Moreover, from a procedural and evidentiary standpoint, the U.S. regime has developed case law clarifying the burden of proof, including the “contributing factor” standard and recent Supreme Court guidance that ease the claim for whistleblowers¹³¹. In Italy, given the recentness of the regulatory reform, the practical application of channels, company culture around reporting, and interplay with internal audit procedures remain evolving – an area ripe for study in the context of listed companies and internal control effectiveness.

Finally, a distinctive feature of the Italian whistleblowing system lies in its, as previously examined, close connection with the administrative liability regime for legal entities under Legislative Decree 231/2001. By embedding whistleblowing within the preventive mechanism of entity liability, Italy’s approach potentially enhances the system’s effectiveness by encouraging early detection and correction of misconduct. Conversely, the U.S. whistleblowing framework focuses primarily on protecting individual whistleblowers and facilitating enforcement through external agencies, without a direct link to a comprehensive preventive liability regime for the entity itself. This model relies more on post-violation enforcement and external incentives, which, while effective in encouraging disclosures, may not always foster the same degree of internal integration and proactive corporate governance as seen in Italy.

Therefore, the Italian system’s integration of whistleblowing into the entity’s compliance model theoretically offers greater potential for preventive control and internal risk mitigation. However, the actual efficiency of this system is significantly influenced by the limited diffusion of the *modello 231*, which remains voluntary and is not mandated for all companies. This absence of an explicit obligation to adopt the organisational model restricts the widespread implementation of formal internal reporting channels and comprehensive

¹³¹ HUGHES, MELISSA, CHRISTOPHER BOSCH, *U.S. Supreme Court Endorses Low Burden of Proof for Whistleblowers*, in *The National Law Review*, February 15, 2024.

compliance frameworks. Consequently, many entities may lack robust whistleblowing mechanisms or the dedicated supervisory bodies necessary to fully leverage whistleblower reports for preventive purposes.

From the vantage point of listed companies subject to comprehensive internal control frameworks – including audit committees, internal audit functions, compliance units and organisational models – these differences have concrete implications. For instance, Italian listed companies must assess how their whistleblowing channel aligns with their organisational model under D.Lgs. 231/2001, how the internal audit function receives, escalates, investigates and reports on whistleblower reports, and how confidentiality, prevention of retaliation, and follow-up mechanisms operate in practice. In the U.S., listed companies must ensure that their internal audit and compliance functions support the protections under SOX and other relevant statutes (for example by ensuring adequate escalation to the board and the audit committee), and appreciate the external enforcement dimension (e.g., SEC investigations and possible whistleblower awards). The U.S. model of incentives may drive higher volumes of whistleblower-initiated disclosures, but also places heavy emphasis on documented internal control systems and timely external reporting. Meanwhile, Italian companies may focus more on embedding the whistleblowing mechanism within their overall governance and control architecture as a preventive and cultural tool.

In conclusion, whistleblowing systems, while shaped by different legal frameworks in Italy and the U.S., play an increasingly central role in supporting internal control and audit processes in listed companies. Their real effectiveness, however, depends not only on regulatory compliance but also on how well they are integrated into internal audit workflows and governance structures. In the Italian context, this integration is often linked to the *modello 231* and the *Organismo di Vigilanza*, whereas in the U.S. it interacts more directly with audit committees and SEC oversight. Yet across both jurisdictions, cultural barriers, structural weaknesses and limited organisational follow-up can hinder their practical utility. For whistleblowing to serve as a truly effective tool of corporate governance, it must be embedded within a culture of accountability, with clear channels, protections, and a proactive role for internal audit in assessing, escalating and

addressing reports. This alignment is essential to ensuring that whistleblower mechanisms contribute not only to legal compliance, but to the broader integrity and resilience of internal control systems.

6. The three Watchdogs: External Auditors, SEC and CONSOB

Having analyzed in detail the internal governance structures and control mechanisms in listed companies, both in Italy and in the United States, a comparative study would remain incomplete without considering the role of external auditors and supervisory authorities. These actors represent an essential layer of oversight, reinforcing corporate accountability and ensuring compliance with financial reporting and market integrity obligations.

In this context, particular attention must be paid to the function of external statutory auditors in Italy and independent public accountants in the U.S., both of whom are entrusted with certifying the accuracy and fairness of financial statements. Equally important is the role played by external regulatory bodies, namely the Securities and Exchange Commission (SEC) in the United States and the *Commissione Nazionale per le Società e la Borsa* (CONSOB) in Italy. These authorities serve as the ultimate enforcers of transparency, investor protection, and market supervision, complementing internal control systems by exercising public regulatory powers and imposing sanctions where necessary.

The following section therefore offers a comparative overview of these external control actors, analyzing their responsibilities, powers and interactions with corporate governance systems in both legal frameworks.

External auditors serve as a pivotal element in corporate governance and financial reporting assurance in both Italy and the United States, albeit within distinctly different institutional frameworks. In Italy, statutory audit of the annual and consolidated financial statements is governed by Legislative Decree 39/2010, which mandates that auditors be appointed by the shareholders' meeting, respect strict independence rules and operate within a public oversight regime coordinated with CONSOB and the Ministry of Economy and Finance. The Italian external auditor must monitor the financial disclosure process and assess the adequacy of the internal control and risk-management systems, reporting any serious

irregularities to the board and to shareholders via the audit report¹³². Meanwhile in the United States, the external audit of public companies is regulated primarily through the Sarbanes–Oxley Act of 2002 and the oversight of the Public Company Accounting Oversight Board (PCAOB). Under SOX, the audit committee—composed of independent directors—holds the authority to appoint, compensate and oversee the external auditor, which must be registered with the PCAOB and adhere to rigorous inspection and quality-control standards.

From a comparative perspective, both systems strive to assure the integrity, independence and competence of auditors and thereby reinforce reliability of financial reporting. However, differences are notable: In Italy, the audit function operates within a multilayered governance framework, where it coexists and systematically interfaces with internal oversight bodies—most notably the *Collegio Sindacale* (board of statutory auditors)—in accordance with formalised information flows and legal obligations. Rather than acting in isolation, the external auditor contributes to a broader compliance ecosystem, embedded in the liability architecture established by Legislative Decree No. 231/2001. In this context, statutory auditors and external auditors may exchange findings and observations, particularly in relation to financial integrity, risk exposure, and irregularities that could give rise to the administrative liability of the entity. This integrated structure is designed to enhance transparency and early detection of misconduct, although it also raises questions about role overlap and the practical boundaries of independence. On the other hand, in the U.S. the audit function is more tightly bound to market-based regulation and investor-protection mechanisms, with audit committees playing a central role. The U.S. system places greater emphasis on external enforcement, partner rotation and strong inspection and sanctioning regimes, whereas the Italian model emphasises institutional continuity and integration within the broader governance architecture.

Ultimately, while both regimes aim to ensure high-quality auditing, the Italian model features a potentially greater degree of integration between external auditors and internal oversight bodies, particularly the *Collegio Sindacale*. This structural

¹³² For a comprehensive examination of the reporting duties of external auditors, see GIOVANNI PETROBONI, *I doveri di segnalazione di sindaci e revisori alle autorità di vigilanza*, Giuffrè, 2018.

proximity may enhance the flow of information and the early detection of irregularities. However, it also raises concerns about role clarity and perceived independence, as the auditor is required to cooperate with governance bodies that are themselves charged with monitoring audit performance. Although the law expressly prohibits overlap in appointments, the closeness of institutional roles can blur operational boundaries if not rigorously managed.

After detailing the liability, independence and oversight of external auditors in Italy and in the United States, it is now appropriate to broaden our lens to the supervisory authorities that sit above and around the audit-profession framework and ensure systemic integrity. In Italy, the regulatory role of the *Commissione Nazionale per le Società e la Borsa* (CONSOB) and the Ministry of Economy and Finance intersects with the external audit regime (notably under Legislative Decree No. 39/2010) to monitor the statutory auditors and auditing firms, enforce sanctions and safeguard investor trust. Meanwhile, in the U.S., the Securities and Exchange Commission (SEC), supported by the Public Company Accounting Oversight Board (PCAOB), exercises broad powers over public-company audits, auditor registration, inspection, rule-making and enforcement, thereby underpinning the market-oriented governance model. Understanding how these supervisory bodies function—how they interact with audit firms, audit committees, boards of directors and external auditors—is essential to comprehending the full architecture of external oversight in each jurisdiction. The following section explores their mandates, institutional design, enforcement capabilities and comparative significance within Italian and U.S. corporate governance systems.

The Securities and Exchange Commission (SEC) in the United States and the *Commissione Nazionale per le Società e la Borsa* (CONSOB) in Italy both serve as pivotal external supervisory authorities tasked with safeguarding market integrity and investor protection, albeit within differing legal and institutional frameworks. Established under the Securities Exchange Act of 1934, the SEC's mandate includes enforcing disclosure requirements, preventing fraud, and promoting fair corporate governance among publicly traded companies.¹ Its organizational structure, comprising five commissioners and specialized divisions such as Enforcement and Corporation Finance, facilitates rigorous oversight of market participants and

corporate disclosures¹³³. The SEC's whistleblower program, as previously mentioned, has notably expanded enforcement capabilities by incentivizing internal and external reporting of securities violations with significant financial rewards and protections against retaliation. This external enforcement focus has historically driven improvements in corporate governance standards, particularly following high-profile scandals like Enron¹³⁴, which catalyzed legislative some of the most important reforms in the American corporate governance system¹³⁵.

Conversely, CONSOB operates within the framework of the Italian civil law tradition, with its regulatory functions anchored in Legislative Decree No. 58/1998 (*Testo Unico della Finanza*). CONSOB oversees transparency in financial markets, supervises issuers and intermediaries and ensures compliance with disclosure obligations imposed on listed companies¹³⁶.

From a comparative perspective, while the SEC's role emphasizes proactive enforcement and investor protection through a quasi-judicial apparatus, CONSOB's approach is more administrative and supervisory, focusing on ensuring accurate financial reporting and adherence to governance principles articulated in Italian corporate law and European regulations. CONSOB's powers include sanctioning violations and requiring issuers to provide corrective measures, which complements the roles of the internal audit and supervisory boards (*Organismo di Vigilanza*).

In both jurisdictions, external oversight by these regulators interacts closely with internal governance mechanisms, yet the integration manifests differently. In the U.S., the SEC's robust enforcement and disclosure regime pressures companies

¹³³ P. GRATTON, *Understanding the SEC, a guide to the Securities and Exchange Commission's history, divisions and recent developments*, in *Investopedia*, 2024.

¹³⁴ On the Enron case, see: C. W. THOMAS, *The Rise and Fall of Enron*, in *Journal of Accountancy*, 2002, pp. 41–48; P. HEALY – K. PALEPU, *The Fall of Enron*, in *Journal of Economic Perspectives*, vol. 17, no. 2, 2003, pp. 3–26. The scandal, which erupted in 2001, revealed massive accounting irregularities and the use of special purpose entities to conceal debt, ultimately leading to Enron's bankruptcy and the collapse of the auditing firm Arthur Andersen. Its magnitude directly triggered the enactment of the Sarbanes–Oxley Act of 2002, aimed at strengthening internal controls and transparency in U.S. financial markets.

¹³⁵ Sarbanes-Oxley Act of 2002, Pub.L. 107-204; U.S. Securities and Exchange Commission, “Enron and Corporate Governance Reform,” <https://www.sec.gov/spotlight/enron.htm>

¹³⁶ *Riflessi economici della corporate governance e dei controlli esterni per le società quotate*. Fondazione Costantino Bresciani Turrone, edited by GIANANDREA GOISIS, PAOLA PARRAVICINI, LED Edizioni Universitarie, 2007.

to maintain high standards of internal controls to avoid penalties and reputational damage, often relying on audit committees and external auditors to ensure compliance¹³⁷. The SEC's influence extends beyond mere market regulation, shaping corporate governance culture and internal risk management indirectly through its regulatory and enforcement powers¹³⁸.

In Italy, CONSOB's role dovetails more explicitly with internal control frameworks, as the regulatory environment encourages the adoption of formal compliance models—such as those under D.Lgs. 231/2001—which typically include whistleblowing mechanisms and internal audit functions. Although CONSOB does not directly enforce the adoption of these models, its supervisory effectiveness is closely tied to their actual implementation. When internal compliance systems are robust and well-integrated, CONSOB can operate in synergy with them, exercising its regulatory powers on the basis of structured internal controls. However, where such models are absent or adopted merely in formal terms, CONSOB's ability to intervene meaningfully is diminished, as it lacks a solid internal governance structure within companies to leverage for enforcement and oversight purposes.

Ultimately, while both the SEC and CONSOB aim to protect investors and ensure market transparency, their differing institutional contexts reflect distinct balances between external enforcement and internal control reliance. The U.S. model privileges external enforcement backed by market mechanisms and financial incentives, while the Italian system leans on formalized compliance structures with a stronger administrative supervisory tradition.

This comparison underscores the differing governance philosophies that shape how internal control systems and external regulatory oversight interact to foster corporate accountability in Italy and the United States.

¹³⁷ STEPHEN M. BAINBRIDGE, *Corporate Governance after the Financial Crisis*, Oxford University Press, 2012.

¹³⁸ ROBERTA ROMANO, *The Genius of American Corporate Law*, AEI Press, 1993.

7. Which model is more effective?

Determining which corporate governance model is more effective goes beyond simply comparing the American rule-based system and the Italian/EU principle-based framework; it's important to look at each approach in the context of ownership structures and cultural attitudes.

In the U.S. system, characterized by widespread ownership, the shareholder model has traditionally prevailed, with the primary objective of corporate governance being the protection of investors and the maximization of shareholder value. In such a fragmented market, trust is established through strict compliance, rigorous external oversight, and formal mechanisms like whistleblower protections and mandatory disclosures.

On the other hand, many European countries, including Italy, operate within an insider system, where ownership tends to be influenced by families or banks. This setup supports the stakeholder model of governance, which emphasises protecting a wider range of interests, as for instance: creditors, employees, and local communities as well. With the adoption of this model, principles and codes of self-discipline, based on the principle "comply or explain", serves as a way to encourage dialogue and not only compliance. This approach allows governance to meet the various needs of stakeholders while at the same time promoting accountability in reputation.

The internal governance structure reinforces this divergence between the two models, as on one side, the American systems adopt the One-tier (Monistic) board system, while on the other side the traditional system is adopted in the Italian system.

While the monistic system centralises managerial and monitoring functions through the presence of a single board, supported by independent directors, the traditional system separates management and supervision into distinct bodies with specific duties and powers assigned to them.

It is obvious that both of these structures represent different conceptions of control: the One-tier system prioritises efficiency and investor protections, the Traditional system emphasises layered checks and balances. However, despite their

differences, both systems converge on the fundamental duties of directors demonstrating that certain governance principles are universal, even if their enforcement varies.

The question of which corporate governance model works best can be better framed as “Which combination of rules and principles can effectively tackle the challenges of modern markets?” Effectiveness does not come from choosing either the U.S. rule-based system, which focuses on shareholders, or the European principle-based system, which prioritizes stakeholders, in isolation. Instead, it relies on blending both models; the U.S. model offers legal certainty, uniform standards, and investor confidence, at the same time it reduces opportunistic behavior by enforcing strict compliance, mandatory disclosure and strong whistleblowing mechanisms. However, this model can be inflexible, expensive, and often leads to a focus on merely meeting minimum requirements instead of fostering genuine ethical engagement.

On the other hand, the European model provides more flexibility, proportionality, and encourages ethical considerations; it allows companies to adjust their governance structures based on their ownership patterns, market situations, and stakeholder needs. By leaning on principles, reputational accountability and mechanisms, like comply or explain, it promotes discussion and the adoption of ethical standards, nevertheless, enforcement can be uneven and heavily influenced by a company's culture.

Ultimately, modern governance is shifting toward hybridization, as U.S. law is increasingly incorporating principle-oriented aspects, such as ESG¹³⁹ disclosure, while the EU has put in place binding regulations in areas like whistleblower protection and financial rules. At the same time, the discussion between shareholder and stakeholder models has become more important worldwide; sustainability and corporate social responsibility are encouraging even shareholder-focused systems to consider wider stakeholder interests.

¹³⁹ See Corporate Finance Institute, *ESG Disclosure – Definition, Importance, Uses, Attributes*, available at [corporatefinanceinstitute.com](https://www.corporatefinanceinstitute.com). ESG disclosure refers to public reporting by a company’s management on its performance across Environmental, Social, and Governance (ESG) issues, helping stakeholders assess how the company manages ESG-related risks and opportunities.

In this changing environment, the best corporate governance framework does not rely solely on rules or principles, nor does it focus only on shareholders or stakeholders, instead it is a hybrid model that combines the clarity and enforceability of rules with the flexibility of principles, balancing at the same time the valid claims of shareholders with the duties owed to stakeholders. This combination allows transparency, accountability, resilience, and trust in increasingly complex and interconnected global markets.

Conclusions

The comparative analysis conducted in this thesis demonstrates that corporate governance cannot be reduced to a simple legal framework, but must be understood as a cultural and institutional architecture that balances control, accountability and market trust. Both the Italian and the American systems represent complex and evolving responses to the same fundamental question: how can power within corporations be exercised, monitored and made responsible in a way that protects the integrity of markets and the interests of all stakeholders?

The Italian system, rooted in civil law traditions and principle-based flexibility, shows how governance evolves through the interaction of supervisory bodies such as the *Collegio Sindacale*, internal audit, the mechanisms introduced by the *Testo Unico della Finanza* and Legislative Decree 231/2001. Its reliance on proportionality and the comply or explain model reflects a governance philosophy that prioritizes dialogue, adaptability, and the integration of stakeholder concerns. It is a model that conceives internal control as an organic and ethically grounded process rather than a purely procedural or punitive one.

Conversely, the American system embodies a more legalistic and rule-based approach, where the SEC, the Sarbanes-Oxley Act and the Dodd-Frank Act have institutionalized rigid standards of control, transparency, and whistleblowing. Governance here is designed to guarantee investor protection in a dispersed-ownership market, with a strong emphasis on fiduciary duties, regulatory enforcement, and formal accountability. Yet, behind this apparent rigidity lies a system that has progressively developed an advanced culture of prevention, in which compliance, disclosure and internal auditing are conceived as proactive risk-management tools rather than mere bureaucratic obligations.

The comparison between these two paradigms highlights both strengths and weaknesses. The U.S. model provides uniformity, robust enforcement and effective shareholder protection, but at the cost of rigidity and a potential “checklist” mentality that may discourage innovation. The Italian and EU system fosters flexibility, adaptability and the ethical internalization of norms, but risks inconsistency and weaker deterrence in the absence of strong enforcement mechanisms. Effectiveness, therefore, cannot be assessed in absolute terms: it

depends on the legal, economic, and cultural context in which governance operates. Outsider systems with fragmented ownership may benefit from prescriptive regulation, while insider systems with concentrated ownership structures may be better served by principle-based flexibility.

However, what clearly emerges from this study is that in both systems the architecture of responsibility—that is, the way in which duties, liabilities, and oversight obligations are distributed among corporate actors—remains the true critical point. In Italy, despite the expansion of compliance-oriented structures such as the *Organismo di Vigilanza* under Decree 231, directors and auditors often face limited practical accountability, especially when failures occur in complex decision-making contexts. In the United States, by contrast, the doctrine of Caremark and its subsequent case law (*Stone v. Ritter*, *Marchand v. Barnhill*, *In re Boeing Co. Derivative Litigation*) have gradually expanded the duty of oversight, but the threshold for liability remains extraordinarily high, shielding directors from most derivative actions. Thus, paradoxically, both systems appear to struggle in precisely that area which should represent the cornerstone of good governance: the concrete attribution of responsibility.

As discussed throughout this work, this paradox becomes even more striking when examined comparatively: the American model is typically preventive in spirit—it builds controls to avoid failure before it happens—yet when it comes to directors' responsibility, it becomes largely reactive and punitively oriented, intervening only after catastrophic breaches of oversight occur. The Italian model, on the other hand, is generally punitive and formalistic—relying on *ex post* sanctions and civil or criminal liability—yet in the field of directors' responsibility, it adopts a more elusive and less effective preventive stance. The result is a form of specular weakness: in both systems, the mechanisms of liability do not fully align with the preventive and ethical aspirations of modern governance.

The comparative reflection therefore reveals an important conceptual tension. Corporate governance, in both the Italian and the American traditions, increasingly aspires to be a system of prevention, integrity and sustainable accountability, yet the legal instruments that should enforce these values often remain trapped in reactive or symbolic logic. Strengthening responsibility does not necessarily mean

introducing harsher sanctions, but rather designing more coherent institutional incentives—ensuring that boards, auditors and compliance officers not only act within the law but actively shape corporate culture in its broadest sense.

From this perspective, the future of corporate governance seems to lie in convergence and hybridization. The U.S. is progressively incorporating principle-based considerations, particularly in the field of ESG disclosure and sustainability, while the EU and Italy are strengthening their reliance on hard law, as demonstrated by the Whistleblower Directive and the increasing formalization of non-financial reporting obligations. The shareholder-versus-stakeholder debate, once confined to distinct legal traditions, has become global, reshaped by sustainability, digitalization, and the demand for ethical corporate behavior.

This convergence is not merely theoretical: it can already be observed in the practices of large multinational corporations that operate across both regulatory spheres. Companies such as Eni, Stellantis, or General Electric have developed governance frameworks that combine the procedural rigor typical of the U.S. system with the integrated, principle-based logic of European internal control. Similarly, U.S.-listed European issuers often adapt their governance to satisfy both SEC standards and EU sustainability directives—effectively acting as laboratories of hybrid regulation. This *de facto* convergence suggests that the global economy increasingly rewards governance systems that are both compliant and adaptive, both rule-bound and value-driven.

Nevertheless, convergence should not be seen as an unqualified good. The risk is that in striving for harmonization, regulators and corporations alike may emphasize formal alignment at the expense of substantive accountability. A hybrid governance model that borrows rules and principles from both systems will only succeed if it also internalizes a renewed culture of responsibility—one that moves beyond mere formal compliance to embrace ethical accountability as a strategic asset. Otherwise, convergence may merely reproduce the weaknesses of both models, without correcting their structural imbalances.

From a reform-oriented perspective, the comparative analysis highlights the need to strengthen directors' and auditors' oversight duties in both systems, though in distinct ways. The U.S. model, supported by the business judgment rule and the

evolving Caremark doctrine, provides a coherent framework that shields directors acting in good faith while preserving accountability for serious failures of supervision. This balance between discretion and responsibility remains one of the most solid features of American governance. In Italy, however, a similar jurisprudential path cannot realistically develop, since the definition of liability boundaries cannot be left to the courts. Nevertheless, a more targeted legislative intervention appears necessary to better delineate the positive duties of vigilance and control of both directors and statutory auditors. Otherwise, the system risks oscillating between excessive immunity and excessive concentration of liability at the top, potentially discouraging entrepreneurship and slowing down corporate decision-making in an increasingly globalized economy.

In this respect, Italy could move toward clearer statutory standards of oversight and internal control, drawing inspiration from the U.S. experience in preventive due diligence, risk assessment and board-level compliance responsibilities. Strengthening the practical application of the COSO framework and introducing mandatory periodic reporting and traceable audit registers could also facilitate the evidentiary burden in litigation, a recurrent weakness in both jurisdictions. Furthermore, a more effective use of the powers already vested in supervisory authorities—both in their monitoring and sanctioning capacity—could reinforce the deterrent effect against misconduct, bridging the gap between formal compliance and substantive accountability.

At the same time, certain Italian developments deserve specific appreciation and should be viewed as assets to be further enhanced. The adoption of a monistic governance model by institutions such as Intesa Sanpaolo represents a significant step toward structural convergence, minimizing fragmentation among oversight bodies and promoting more integrated decision-making. Even more notably, the compliance system established by Legislative Decree 231/2001 stands out as one of the most sophisticated frameworks of corporate accountability in comparative perspective. It created a hybrid form of entity liability—administrative in nature but functionally close to criminal responsibility—thus overcoming the traditional focus on individual liability. It established dedicated supervisory bodies, defined clear mechanisms for exemption through the adoption of compliance models, and

coordinated its operation with whistleblowing mechanisms and sectoral oversight authorities. More than twenty years later, this system continues to provide a highly coherent model of preventive governance, capable of reconciling legal certainty with ethical accountability. Nevertheless, its full potential has not yet been fully realized in Italy. For a long time, Legislative Decree 231/2001 was perceived as a merely formal compliance requirement, rather than as a strategic tool of corporate governance. As a result, its diffusion remained limited for many years, despite its structural coherence and preventive logic. In recent years, however, the growing number of companies adopting 231 models indicates an increasing awareness of its value, suggesting a gradual cultural shift toward a more mature understanding of organizational accountability. It is arguably one of the most original European contributions to the theory and practice of internal control.

Conversely, the U.S. could draw valuable lessons from this Italian and European emphasis on structural prevention and organizational liability. Introducing a more formalized notion of entity responsibility—beyond the current corporate criminal liability under the *respondeat superior* doctrine—could enhance the alignment between corporate culture and individual accountability. Moreover, a more principle-based approach to sustainability, stakeholder engagement, and non-financial disclosure could further integrate ethical considerations into the American compliance culture, which still tends to prioritize procedural uniformity over substantive governance quality.

In the final analysis, the comparative perspective on liability reveals that the effectiveness of internal control ultimately depends on the ability of governance systems to assign responsibility in a clear, proportionate, and functional manner. Both the Italian and the U.S. frameworks, albeit from opposite directions, struggle to achieve this equilibrium: formalism and weak enforcement on one side, and excessive procedural rigidity on the other, risk undermining the preventive and ethical purpose of governance. Yet, these weaknesses are not irreconcilable. They can, in fact, be addressed if each system draws on the other's strengths—the U.S. by embracing the principle-based flexibility and ethical grounding of the European model, and Italy by incorporating the more structured enforcement and clearer accountability mechanisms characteristic of American oversight. In this sense, the

cross-fertilization of legal and governance cultures offers the most credible path towards a model of responsibility that is both effective and sustainable—one that transforms liability from a reactive constraint into a genuine architecture of trust.

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