



DEVELOPMENT AND HARMONISATION
OF SOCIALLY RESPONSIBLE INVESTMENT
IN THE EUROPEAN UNION



SOCIAL RESPONSIBLE INVESTMENT VIA BENEFIT CORPORATION: THE ROLE OF THE BOARD

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Workshop

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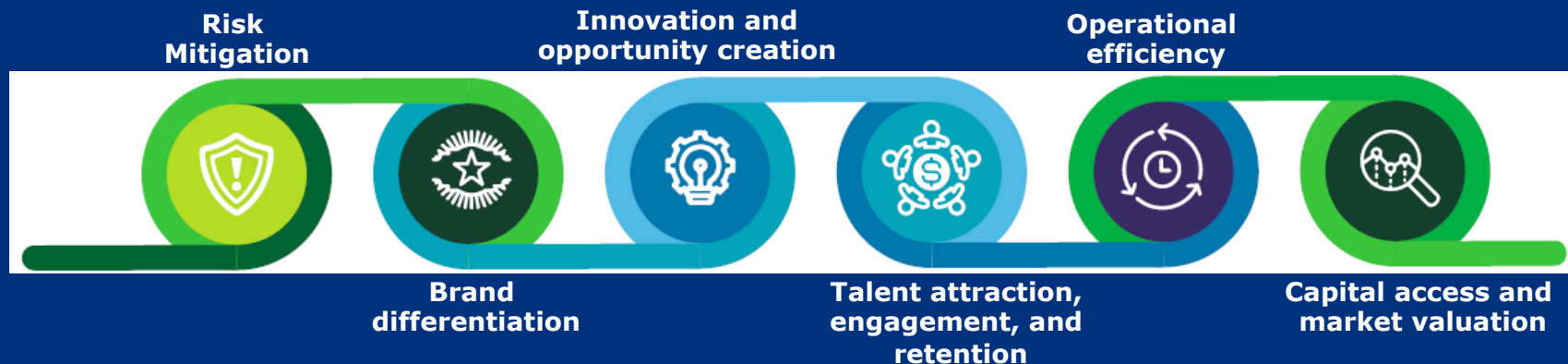
CORPORATE VALUE

Companies today face monitoring from consumers, talent, communities, investors, and governments, as information spreads faster and wider than ever.

Such pressures have called into question the traditionally narrow and short-term view of maximizing shareholder value.

The Advisors found today **six key drivers of corporate value creation** when companies integrate social strategy into core business strategy.

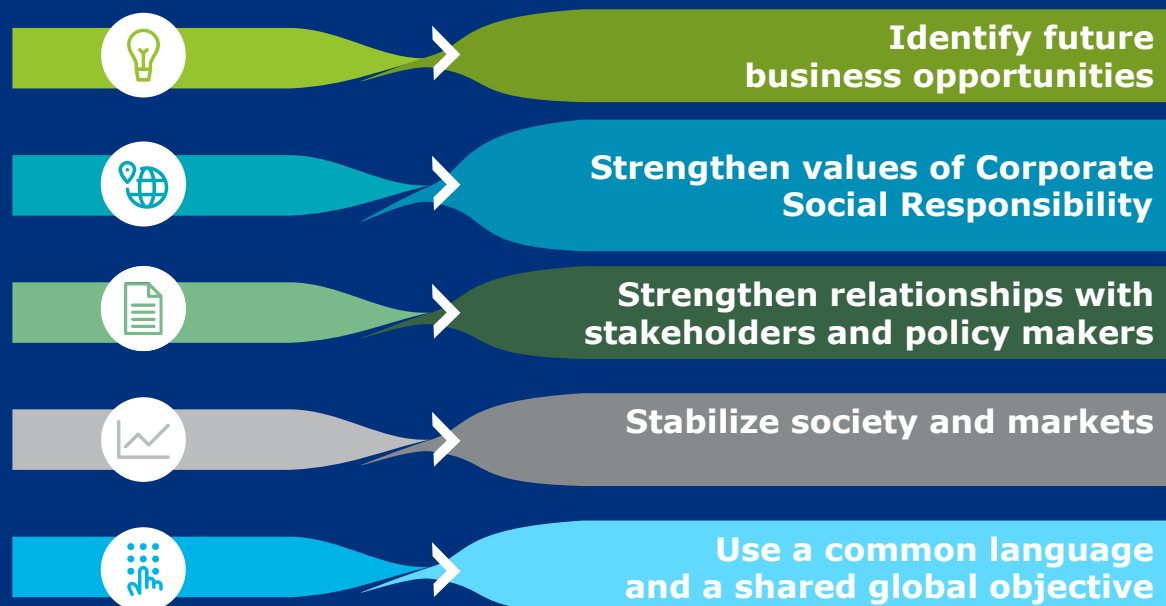
These drivers are: **risk mitigation; brand differentiation; innovation and opportunity creation; talent attraction, engagement, and retention; operational efficiency; and capital access and market valuation.**



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A LOOK AT THE GLOBAL CONTEXT

Companies can play a key role in reaching the UN Sustainable Development Goals, that are the product of the joined work of different stakeholders. The SDG Compass identifies the **benefits** that companies can obtain in pursuing SDGs, as follow:



THE BARNIER DIRECTIVE EU 2014/95

On September 29th, 2014 the **European Council** adopted a **Directive on disclosure of non-financial and diversity information**, already approved by the **European Parliament** during its general assembly on **April 15th, 2014**. This directive is about **environmental and social aspects, employment aspects, human rights, anti-corruption, board member diversity as well as other aspects related to sustainability**.

When
came into
force
in Italy?

In Italy, the **Legislative Decree n. 254** has been issued on the **December 30th, 2016** and the undertakings subject to this Decree shall disclose on non-financial information starting from **2017 reporting year**.

To whom it
will apply?

Subject to this directive are those who fulfil the following criteria:

- **Large undertakings***;
- **More than 500 employees** (at consolidated level for groups);
- **Public interest entities***, i.e. listed companies, banks, insurances or other companies considered of public interest because of their nature, activities, dimensions or company structure.

It is estimated that this new directive will be applied to more than 6.000 companies in Europe and more than 300-400 companies in Italy.

* As stated in the Directive 2013/34/EU.

The objective of this directive is to improve transparency and accountability of some large enterprises on non-financial matters.

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THE ITALIAN LEGISLATIVE DECREE 254/2016

**METHODOLOGY
and PRINCIPLES**

The non-financial statement has to follow a recognized **reporting framework** either national or international (e.g. GRI)

**Reporting
BOUNDARIES**



In case of group of companies, the report has to be prepared as a **consolidated statement**, whose **scope** has to include information about the **parent company** as well as **fully consolidated subsidiaries**.



**Reporting
INFORMATION**

The statement covers aspects such as **environmental, social, employee-matters, human rights, anti-corruption** and **bribery**, including:

- the **business model**;
- **policies** and achieved **outcomes**;
- **main risks**, related to those matters linked to the undertaking's operations



**Terms for the
PUBLICATION of the
statement**

The non-financial statement may either:

- be **integrated within the management report**;
- constitute a stand-alone report (e.g. **Sustainability Report**).

In this second case, after its **approval by the Board of Directors**, it has to be **published on the Business Register together with the management report**.



ASSURANCE

The **statutory auditor** checks whether the non-financial statement has been provided.

The same audit firm, or another audit firm specifically appointed, is in charge of verifying the **compliance with the reporting standards adopted and with the Legislative Decree requirements**, through a separate Auditor's Report

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THE ITALIAN LEGISLATIVE DECREE 254/2016 (2)

**In relation to the topics and scopes, the statement shall include at least
the following **INFORMATIONS****



Use of **energy resources**, distinguishing between renewable and non-renewable sources, and the **water use**



Greenhouse gases emissions and **air pollution**



Current and expected impact on **environment, health and safety** associated with the risk factors

Social aspects of **employee related matters**, actions to ensure **gender equality**, implementation of **international conventions** and procedures for dialogue with the **trade unions**



Respect for human rights, measures adopted to prevent violations, actions taken to prevent discriminatory attitudes or actions



The fight against corruption both active and passive, with an indication of the instruments adopted



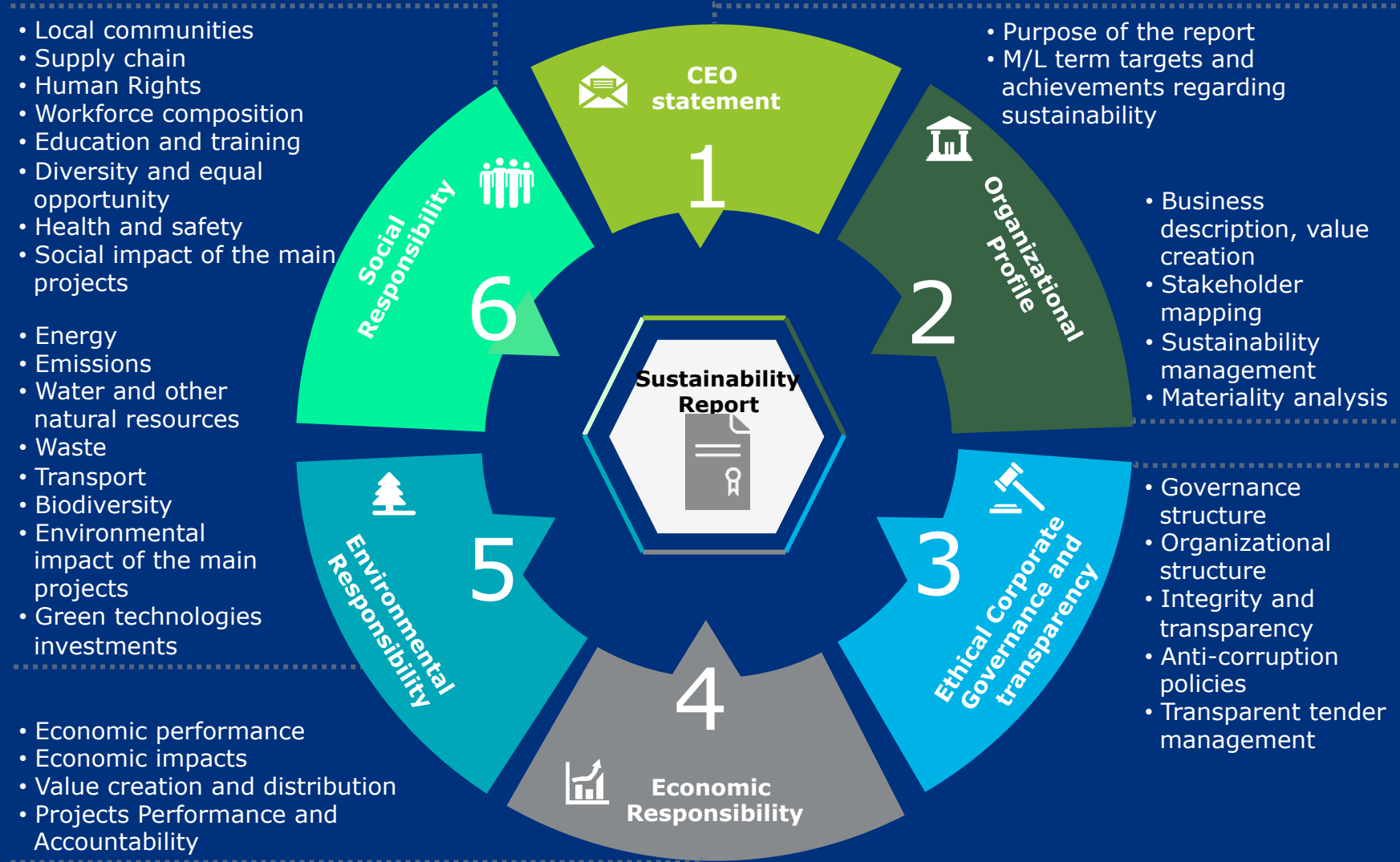
Article 3 (paragraph 3) stresses out the **importance of including a comparison with previous years' figures and information.**

Legislative Reference: article 2 (paragraphs 2 and 3) of Legislative Decree 254/2016

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ILLUSTRATIVE,
NOT EXHAUSTIVE

EXAMPLE OF SUSTAINABILITY REPORT CONTENT INDEX



THE BENEFIT CORPORATION

Italian Stability Law n. 208/2015, ART. 1, PAR. 380-381

first approach: legal recognition as an important tool for spreading the new entrepreneurial approach;

second approach: this new way of doing business will encounter difficulties of implementation in the Italian scenario.

A new philosophy that Italy has approached as the first Country of the EU.

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**The three distinct aspects of the
Benefit Corporation are that it has**

1) a corporate purpose to create a material positive impact on society and the environment;

2) expanded fiduciary duties of directors that require consideration of nonfinancial interests;

3) an obligation to report on its overall social and environmental performance as assessed against third-party standards

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THE U.S. ROOTS

Under the prevailing corporate law of Delaware, the corporation has only one legitimate purpose: maximizing stockholder welfare.

The benefit corporation changes the game because it turns the corporation into a dual-purpose entity with the twin purposes of optimizing stockholder welfare and creating general public benefit. It expressly authorizes corporations to provide a material positive effect on society and the environment while pursuing profits as usual.

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DIRECTORS' DUTIES

According to the Italian Law (n. 208/2015, Art. 1, par. 380-381), at the heart of being a benefit corporation is the requirement that directors consider the effects of any corporate action or inaction on all of the corporation's stakeholders, including employees, customers, suppliers, the communities in which the corporation is located, society, the environment, and stockholders.

Dodge v. Ford Motor Co., 170 N. W. 668 (Mich. 1919)

eBay Domestic Holdings, Inc. v. Newmark, 16 A. 3d 1 (Del Ch. 2010)

DIRECTORS' LIABILITY

The actual set of rules allows stockholders and directors a right of action (they CAN file an action) to bring a benefit enforcement proceeding to compel a benefit corporation to create general public benefit, but the benefit corporation cannot be liable for monetary damages for failing to create general public benefit.

Directors are protected by the *business judgment rule* in fulfilling these expanded fiduciary duties. In addition, directors' and officers' liability insurance is generally as available to benefit corporations as it is to conventional corporations.

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THE BENEFIT DIRECTOR

Under the control of the board, the benefit director is charged with the duty of preparing the annual benefit report and opining on whether the corporation created general public benefit and whether the officers and directors considered the effects of corporate action upon all of the corporation's stakeholders and, if applicable, how the corporation failed to consider the effects of corporate action on such stakeholders.

A COMPARISON: THE DELAWARE'S "BALANCE TEST"

Delaware created a **tripartite balancing test** under which directors must balance:

*"the **pecuniary interests** of the stockholders, the **best interests** of those materially affected by the corporation's conduct, and the **specific public benefit** or **public benefits** identified in its certificate of incorporation".*

CONCLUSIONS: LIABILITY VS. EXEMPTION

The key objectives of the legislation are to ensure that directors and officers of the benefit corporation do not incur liability for considering the interests of constituencies other than shareholders and to ensure that the directors and officers do not incur monetary liability for failing to fulfill the organization's general or specific benefit purposes.

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Probably, a “benefits enforcement action” could be found in the provisions dedicated to the external controls lead by the Italian National Authority for Competition, but this should be a different topic.

In other words, notwithstanding the seed of a different liability protections (not sure an exemption) in the latter Italian Law, directors and officers of a benefit corporation continue to face the possible liability exposures and defense expense exposures.

THANK YOU FOR YOUR ATTENTION