

Sistemi di controllo e doveri di vigilanza: considerazioni sulle nuove Norme di comportamento del Collegio sindacale di società non quotate

Monitoring systems and supervision duties: considerations on the new rules of conduct of the Collegio sindacale of unlisted companies

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ABSTRACT

Dal 1° gennaio 2021 saranno in vigore le nuove Norme di comportamento del Collegio sindacale di società non quotate redatte dal Consiglio Nazionale dei Dottori commercialisti e degli Esperti contabili. Il presente contributo analizza il nuovo set di Norme, che si sostituisce a quello precedentemente emanato nel 2015, con l'obiettivo di aggiornare i modelli comportamentali raccomandati ai membri del Collegio sindacale della s.p.a oppure al sindaco unico della s.r.l., per svolgere correttamente l'incarico di vigilanza.

Parole chiave: Collegio sindacale – doveri di vigilanza – sistemi di controllo – norme di comportamento – organo di controllo.

From January 1st, 2021, the new rules of conduct of the Collegio sindacale (Board of Statutory Auditors) of unlisted companies, drawn up by Consiglio Nazionale dei Dottori Commercialisti e degli Esperti Contabili (CNDCEC), the National Council of Chartered Accountants and Accounting Experts in Italy, will enter into force. The present contribution analyses the new set of Regulations, which replaces the one previously issued in 2015, with the aim of updating the behavioural models recommended to the members of the Board of Statutory Auditors of companies listed on the stock market or to the sole member of the Board (sindaco) of a limited liability company, in order to correctly carry out supervisory duties.

Keywords: Board of Statutory Auditors – supervision duties – monitoring systems – rules of conduct – corporate supervisory bodies.

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1. Introduction

Public consultation¹ of the “Rules of conduct of the *Collegio sindacale* of unlisted companies”² ended in November 2020. The new text, applicable from 1st January 2021, replaces the old rules previously established on the subject in September 2015³; it outlines principles, accompanied by application criteria and comments that integrate provisions of a deontological nature compliant with the professional code of ethics. The rules are addressed to the statutory auditors of joint stock companies⁴ that do not operate in sectors subject to specific primary or regulatory provisions⁵ and, while configuring deontological rules of ethics, these rules are in-

¹ Public consultation made it possible to share the solutions identified in the Code of Conduct with subjects outside the task force, particularly experts in the field, in order to provide professionals with unique and shared models of behaviour.

² See MARCELLO-DE ANGELIS, *Nuove norme di comportamento per i collegi sindacali in consultazione*, in *Eutekne.info*, October 21, 2020.

³ For the drafting of the report issued pursuant to art. 2429 of the Civil Code, on the occasion of the approval of the financial statements for the year 2020, therefore, the supervisory body may follow the instructions contained in the document in question.

⁴ The rules refer to the statutory auditors of joint-stock companies and limited liability companies without a statutory audit function and which, in fact, contain provisions regarding, on the one hand, the required opinion of the Board of Statutory Auditors to appoint an auditor (rule 8.2) and the early termination of the same auditor (rule 8.3) and, on the other hand, the exchange of information between the Board of Statutory Auditors and the person in charge of the statutory audit (5.3). The rules in question also highlight the role and powers of the sole auditor in the joint-stock company and thus become reference provisions also for the professionals appointed in a unipersonal company.

⁵ For unipersonal companies – whose category tends to coincide with that of public interest entities pursuant to art. 16 of Legislative Decree no. 39/2010 – the rules of conduct already published for statutory auditors of listed companies must be integrated with the sector provisions. More specifically, pursuant to art. 1 and 2 of Legislative Decree no. 254/2016, it is “Public Interest Entities” (referring to the definition contained in art. 16 of Legislative Decree no. 39/2010 on the statutory audit) of large dimensions to which the regulations apply: Italian companies with securities listed on Italian and European Union regulated markets, banks, insurance and reinsurance undertakings each with an average number

creasingly used as a parameter, even in case law, for assessing diligence in behavioural patterns among the members of the Board of Statutory Auditors.

The 2020 update stems firstly from the need to take into account, on the one hand, the new functions attributed to the supervisory body by the Corporate Crisis and Insolvency Code introduced by Legislative Decree no. 14/2019⁶ and, on the other, the further evolution of case law and procedures that have taken place in recent years.

The document is also characterized by a renewed attention to the subject of organizational protocols and, specifically, information flows commensurate with the positions of the most accredited legal and economic doctrine which assume a central role, as a standard of action of the “good director”, as a guide of “traceability” of behaviour and as a means of reconstructing the profiles of responsibility.

It has been definitively clarified that the Rules of Conduct apply to the Board of Statutory Auditors or to the sole auditor of a limited liability company who has not been appointed by the company itself for which the statutory audit is being carried out.

2. Structure and content of the new regulations

The Rules of Conduct of the Board of Statutory Auditors of unlisted companies suggest and recommend behavioural models to adopt in order to perform the duty of *sindaco* correctly; they are, therefore, of a technical and ethical nature and can function as a useful source of information with regard to the complex activity involved for all those who hold the office of member of the Audit Board of a non-listed company and as such, they are used for the following considerations:

of employees exceeding 500 during the financial year and with total assets of over 20 million euro or with total net revenues from sales and services of over 40 million euros.

⁶ This legislative body intervenes in an incisive manner on corporate governance, re-evaluating the role of corporate bodies in view of the functionalization of the organization of business activity in the timely interception of crisis signals and the safeguarding of business continuity. For further information, please refer to MANCINI, *Adeguati assetti organizzativi, amministrativi e contabili: obbligo giuridico alla ricerca di un contenuto tecnico*, in *Bilancio e Revisione*, 1, 2020, p. 66; MONTALENTI, *Gestione dell'impresa, assetti organizzativi e procedure di allerta*, in AA.VV., *La nuova disciplina delle procedure concorsuali*, edited by di SANDULLI, Torino, 2019, p. 483; ABRIANI-ROSSI, *Nuova disciplina della crisi di impresa e modificazioni del Codice civile: prime letture*, in *Soc.*, 2019, p. 394; P. BENNAZZO, *Il Codice della Crisi di Impresa e l'organizzazione dell'imprenditore ai fini dell'allerta: diritto societario della crisi o crisi del diritto societario?*, in *Riv. dir. soc.*, 2019, p. 275; MARCELLO-DE ANGELIS, *Nuovi poteri, doveri e responsabilità per il collegio sindacale*, in *Eutekne.info*, December 5, 2019; MARCELLO-BAUCO, *Crisi d'impresa e insolvenza nella prospettiva aziendale e giuridica alla luce delle riforme in itinere*, in *Fondazione Nazionale Commercialisti*, February 28, 2017; MARCELLO, *Collegio sindacale strumento volto all'emersione tempestiva della crisi*, in *Eutekne.info*, February 23, 2017.

- in the context of the internal control system of non-listed companies, they define how the Board of Statutory Auditors must report to each of the subjects who perform a supervisory and administration function, what information flows it must implement with each of them, indirectly contributing to greater clarity with regard to the tasks and responsibilities of the various individuals that make up this system;
- in the absence of detailed indications provided by legislation which, as previously mentioned, are more specific for the supervised sectors, they define which specific supervisory activities the Board of Statutory Auditors of an unlisted company must carry out with respect to the individual supervisory duties;
- highlight the importance of planning control activities⁷, of defining periodic as well as episodic information flows in the event that risk situations arise;
- finally, they attach particular importance to the minutes of the meetings of the Board, including the reasons given for any dissenting opinions, as well as the traceability and documentation of all the control activities carried out.

In this regard, the principles in question aim to offer guidelines, from an operational point of view, to the professionals called upon to hold the position of auditor, thus helping to fill the gaps deriving from the sometimes laconic rules dictated by the Civil Code and by the absence of specific principles of reference defined at an international level, contrary to what happens with statutory auditing⁸.

The way the document is structured confirms the previous formulation: it is divided into 11 standards, each of which contains a principle (*principio*) which describes the behaviour principle analysed by the standard. Each principle is accompanied by application criteria (*criteri applicativi*) which provide the statutory auditors with the operational tools for carrying out their duties.

The standard concludes with the comments (*commento*) which analyse the choices made and present the main interpretative problems that emerge from the practices.

⁷Extending the mandatory appointment of the supervisory body or auditor under the Crisis Code does not change the procedures with which it is established. This means of establishing has a practical impact also on the preparation of the activity planning report. See MARCELLO-POZZOLI, *Programmazione dell'attività calibrata in base all'azienda*, in *I focus*, Il Sole 24 Ore, n. 9, 27 March 2019.

⁸This approach meets the appreciable objective of attributing a reasonably binding characteristic to principles and criteria in order to prevent the (possible) configuration such as Recommendations or Guidelines from inducing excessive margins of discretion, generalized derogation, “uncontrollably variable geometry application so as to make them mere optative exhortations, substantially devoid of pre-scriptiveness”. See MONTALENTI, *Collegio sindacale, flussi informativi e governo societario. Novità e prospettive*, in *Nuovo dir. soc.*, 15, 2015, p. 10.

3.1 the main new elements

Among the most innovative regulations, we highlight those relating to independence (Regulation 1.4)⁹ and the causes of ineligibility, adequacy checks and operation of the organizational structure of the company (Regulation 3.4) which is of fundamental importance, as highlighted in Standard 11.1, in order to intercept going concern risks and signs of crisis.

Regulation 6.3 has also been implemented which clarifies the role of the *sindaci* in alleged cases of “bad management” on the directors’ part reported by the shareholders pursuant to art. 2408 of the Italian Civil Code, and Rule 6.4, relating to judicial control, has been amended to take into account the changes made by the Crisis Code regarding the recourse tool pursuant to art. 2409 of the Italian Civil Code, also extended to limited liability companies¹⁰.

Further changes were introduced to regulations 3.7 and 7.1 to better clarify, with regard to financial statements, the specific duties and the various different responsibilities attributable to *sindaci* and statutory auditors. In rule 7.1, in particular, the *sindaci* are allowed to not submit a proposal regarding the approval of financial

⁹ Compared to the previous version, the emphasis was placed on the differences between the independence of the accountant and the independence of the auditor. The independence of the auditor is a fundamental aspect in qualifying the role of the accounting professional within the economic-financial system. When the audit is entrusted to the Board of Statutory Auditors, the recent provisions introduced by art. 10, Legislative Decree 27 January 2010, no. 39, must be integrated with the content of art. 2399 of the Italian Civil Code. See Assonime, Circular no. 45 of November 13, 2009, entitled *L’indipendenza dei componenti degli organi di amministrazione e controllo nelle società per azioni*, where there is written “The effectiveness of each control system depends, in fact, not only on the professionalism of the subjects that compose it, but also on the suitability of said subjects to perform his/her function in full autonomy and maintaining equidistance from the conditions deriving from ownership or from the directors of the company itself”. On the other hand, an attempt to provide a positive definition of independence is proposed by FERRO-LUZZI, *Indipendente ... da chi; da cosa?*, in *Riv. soc.*, 2008, p. 204. An extensive examination of the independence is also contained in TANTINI, *L’indipendenza dei sindaci*, Padova, 2010, p. 25 which speaks of “independence of spirit” understood as the ability to consider only the relevant elements in the performance of the assignment (mental independence) and together with an objective condition of not (being in the condition of) being associated with such situations or circumstances as to insinuate doubt about the objectivity of carrying out the assignment (formal independence). For a further study, even if not recent, see MARCELLO, *L’indipendenza del sindaco con incarico di revisore legale dei conti nelle società chiuse*, in *Soc.*, 2, 2001, p. 172.

¹⁰ In particular, the absence of relevant information and adequate information flows was included in the group of reprehensible facts that require the Board of Statutory Auditors to activate its powers/duties to react so that corrective actions are promptly adopted by the Board of Directors or alternatively, so that a shareholders’ meeting is called. Similarly, the Board of Statutory Auditors is entitled to complain to the Court pursuant to art. 2409 of the Italian Civil Code where it has found or has reasonable grounds to suspect that the administrative body is carrying out or has committed serious irregularities that may cause damage to the company, including serious inadequacies of information flows.

statements in the event of the auditor's "no-opinion"¹¹.

It should be noted that in addition to the significant changes and additions made to many extant regulations, 10 new ones have been introduced with respect to the regulations in force since 2015. Among them, two which stand out are regulation 4.3, aimed at clarifying the role of the Board of Statutory Auditors in those cases in which the companies are managed by a sole director¹², as well as Rule 3.9, aimed at emphasizing the confidentiality which *sindaci* are required to maintain with regard to information acquired as part of their control functions¹³.

Regulation 8, relating to the approval of the decisions and opinions of the Board of Statutory Auditors, has also been completely renewed. It includes the approval of the decision of the Board of Directors in case there is a co-optation of directors¹⁴, the mandatory opinion in cases of capitalized costs pursuant to art. 2426 of the Italian Civil Code¹⁵, the opinion regarding the remuneration of directors who hold

¹¹ When the going concern assumption is subject to multiple significant uncertainties, the auditor may conclude that he is unable to express his opinion on the financial statements in consideration of the interaction and possible cumulative effects of the aforementioned uncertainties. The auditor must write in his report the significant events that occurred in management (even those which occurred after the date of the financial statement) outlined in the Management Reporting and Management Assessments regarding the presence of significant uncertainties reported in the explanatory notes. Once the aforementioned events have been reported, reference will be made to them for purposes of making a judgement of the so-called *no opinion*. See Principio ISA 570, *Continuità aziendale*. See D'ALESSIO-BOZZA-ANTONELLI-MARCELLO, *Guida Pratica alla revisione legale nelle PMI*, in *Eutekne*, 2016; D'ALESSIO, BOZZA-ANTONELLI-MARCELLO (eds.), *La revisione legale negli ISA Italia*, Santarcangelo di Romagna, 2015.

¹² In these cases, in fact, the absence of a collegial administration does not allow the statutory auditors to obtain all the information they would become aware of in the shareholdings (to which the supervisory body is obliged) at the directors' meetings. In this regard, it is provided that: 1) The Board of Statutory Auditors is required to request information from the sole director at least every six months in writing. 2) In situations of significant risk assumptions or business crises, it is appropriate that such information be gathered on a quarterly basis.

¹³ It must be specified that, in the fulfilment of its powers/duties, the Board of Statutory Auditors has the right to obtain information on any matter relating to the management and administration of the company and the directors cannot refuse to provide information in relation to the requests made, nor can they obstruct the attainment of information.

¹⁴ The resolution which the Board of Directors provides for co-optation must be approved by the Board. The Board is called to verify the compliance with the procedure used for this exceptional appointment in addition to the co-opted possession of the requisites of professionalism and/or independence that may be required in specific cases, with the corollary that any non-approval will force the directors to make a new designation.

¹⁵ Decree no. 139/2015, incorporating the changes brought by Directive 34/2013, modified and amended art. 2426 of the Italian Civil Code at numbers 3, 5 and 6 on the subject of specific intangible assets and goodwill. With regard to the former, the novelty consists in the fact that the reference to research costs and advertising costs has been eliminated from the long-term costs eligible for capitalization. In addition, with regard to development costs, the amortization and depreciation regime has been modified by providing for the obligation of depreciation over what is considered 'useful life' and main-

particular offices provided for by art. 2386 of the Italian Civil Code, the motivated proposal for the assignment of the statutory audit and the opinions expressed by the supervisory body in conjunction with the termination of the statutory audit assignment.

Some changes also concern the required checks performed by the Board of Statutory Auditors within the context of extraordinary corporate transactions and other corporate events in which the specific duties of the supervisory body relative to company leasing have been clarified (Regulation 10.6)¹⁶, as well as the ‘managing’ position of the Board of Statutory Auditors in the event of the death of the sole shareholder.

4. The supervisory duties of the Board of Statutory Auditors not responsible for the statutory audit

Matters concerning company control have been considerably modified in recent years¹⁷.

At this point, it would be beneficial to our discourse, which will be further developed below, to anticipate what the conclusions should be: the general regulatory

taining the obligation of 5 years only in the event that it is not possible to estimate its duration. Regulation 8.4 specifies that, in order to consent to the registration, the Board must ascertain that “the future utility of these costs is reasonably demonstrated, that there is an objective correlation with the relative future benefits and that their recoverability is, with reasonable clarity is foreseeable”: an essential assumption the auditors use to express their opinion, and in failing to do so, they declare that they are unable to express their consent.

¹⁶ In particular, the application criteria provide that in such cases the statutory auditors must carefully consider, among other things, that:

- the lease is supported by valid reasons and is not carried out with the sole purpose of the segregation of assets in anticipation of a subsequent bankruptcy;
- the contract, if stipulated for the purpose of maintaining business continuity in crisis situations, respects the objective of ensuring the preservation of corporate value;
- the agreed rent is adequate and actually paid by the tenant, also in consideration of what is established in the appraisal report filed by a professional appointed for this purpose.

These indications are functional to avoid any liability of the statutory auditors for concurring with the directors in “bankruptcy facts”, as stated in the comment, and relate to profiles of merit whose assessment is up to the Board of Directors according to the general principles of the legal system.

¹⁷ See ABRIANI, *L’organo di controllo (collegio sindacale, consiglio di sorveglianza, comitato per il controllo della gestione)*, in TOMBARI (ed.), *Corporate Governance e sistema dei controlli nella S.p.A.*, Torino, 2013, p. 134, who states that the concept of control has evolved “*from a predominantly atomistic vision of control, which entrusted purely reactive forms of intervention to specialized functions, to a broader concept of managing risks in anticipatory terms, aimed at identifying them before their manifestation*”.

framework highlights that, despite strong pressure on some parts for a resizing of the concept and, more precisely, of the control framework, relegating these two matters solely and exclusively to the *ex post* verification carried out by the auditor, the legislator continues to rely heavily on the Board of Statutory Auditors which, presumably, continues to prove itself well. And indeed, it does not seem a mere coincidence that the Legislative Decree no. 39/2010 (art. 19) has identified the Board of Statutory Auditors of public interest entities – or the other supervisory bodies of alternative governance systems – as the committee for internal control and account auditing, and that Law no. 183/2011 established that the functions of the Supervisory Board (SB) can be carried out by the Board of Statutory Auditors (or by one of the supervisory bodies of systems alternative to the traditional)¹⁸.

Within this perspective and dwelling further upon the interference with statutory audit, it is appropriate to highlight right from the start, that the internal control and audit committee established pursuant to art. 19 Legislative Decree no. 39/2010 is required by law to supervise:

- the financial reporting process;
- the effectiveness of the systems of internal control, internal audit (if applicable) and risk management;
- the statutory audit of annual accounts and of consolidated accounts;
- the independence of the statutory auditor or statutory audit firm, with particular regard to the provision of non-auditing services to the audited entity.

Nor should it be overlooked that the statutory auditor or the audit firm submits a report to the internal control committee (according to Legislative Decree no. 39/2010, the deadline for the presentation of the report coincides with the end of the financial year) on the fundamental issues that emerged during the legal audit and, in particular, on the significant deficiencies found in the internal control system in relation to the financial reporting process consistent with the working practices of auditing companies.

Although it would be necessary to provide proof of the statement, it can therefore be argued, even based on the statutory audit regulations pursuant to Legislative Decree no. 39/2010, that the Board of Statutory Auditors is placed at the top of the system of controls carried out in the company with respect to which the auditor is a mere external interlocutor¹⁹.

¹⁸ See MARCELLO-BAUCO, *Il controllo dei revisori e dei sindaci di società: elementi di convergenza e distinzione nelle sfere di intervento nelle nuove norme di comportamento del collegio sindacale*, in *Fondazione Nazionale Commercialisti*, January 15, 2016. For more in-depth review, see: CAGNASSO, *Il collegio sindacale nelle s.p.a. e l'organo di controllo o revisore nelle s.r.l.*, in *Nuovo dir. soc.*, 12, 2012, p. 17 ss.; CAGNASSO, *Il collegio sindacale nelle s.p.a.*, in *Nuovo dir. soc.*, 5, 2012, p. 21 ss.; ABRIANI, *Collegio sindacale e sindaco unico dopo la legge di stabilità*, in *Soc.*, 2011, p. 1427 ss.

¹⁹ On the duty of supervision and control of the statutory auditors of unlisted joint-stock companies,

However, it must be said that governance and controls in listed companies are rather complex (some, rightly, speak of an integrated system of controls), since other bodies outside of the Board of Statutory Auditors, or the corresponding body of alternative systems to the traditional, emerge with similar or analogous functions²⁰.

Let's consider independent directors who have specific powers of direction and control compared to directors with executive powers, the manager in charge of preparing the accounting and corporate documents within the frame of transactions between "related parties", the internal committees of the B of D with proposing and consultative functions – particularly including, when existing, the control and risk committee composed of independent or non-executive directors (mostly independent) with support tasks and, more precisely, with investigatory roles in the B of D relating to the internal control system and risk management. It's a complex and variously articulated system that would require simplification and, more than anything else, reorganization, a need also felt by the drafters of the Corporate Governance Code for listed companies (2014 version), where it is contemplated, with a view to streamlining the governance structures, that the B of D of the issuer may decide to disengage the aforementioned preliminary investigatory activities directly, i.e., without setting up an *ad hoc* committee²¹.

In keeping with general considerations, it should be noted that the evolution of the various functions and duties that carry out controls corresponds to a change in the concept of control itself. This concept, in fact, does not coincide with the traditionally accepted one – based on substance and legality controls²² – since, as already

see CAVALLI, *Osservazioni sui doveri del collegio sindacale di società per azioni non quotate*, in *Il nuovo diritto delle società*. Liber amicorum Gian Franco Campobasso, directed by Abbadessa-Portale, III, Torino, 2007, p. 58 ff. Sui contenuti del dovere di vigilanza e controllo dei sindaci di società per azioni non quotate, cfr., per tutti, CAVALLI, *Osservazioni sui doveri del collegio sindacale di società per azioni non quotate*, in *Il nuovo diritto delle società*. Liber amicorum Gian Franco Campobasso, cit., p. 58 ss.

²⁰ CNDCEC, *Norme di comportamento del collegio sindacale di società quotate*, April 26, 2018.

²¹ COMITATO PER LA CORPORATE GOVERNANCE, *Codice di Autodisciplina, Art. 7, Sistema di controllo interno e di gestione dei rischi, Commento*, July 2014. On January 31, 2020, the Corporate Governance Committee, made up of leading representatives of listed companies and asset management companies, as well as representatives of entities such as ABI, ANIA, Borsa Italiana and Confindustria, published the new Code of Corporate Governance which introduces significant innovations in the field of corporate governance. The new Code – which will replace the current Self-Regulatory Code (the "2018 Code") and which will be applicable starting from the first financial year after 31 December 2020 – has a more schematic and concise structure than the previous version, articulated in Principles and Recommendations.

²² See SALAFIA, *Il collegio sindacale nelle società quotate*, in *Soc.*, 1998, p. 259, according to which the control of the legality of the Board of Statutory Auditors would also include the verification of "compliance with any law relating to the production or commercial process". It should also be pointed out that the statutory auditors of joint-stock companies are required to carry out a legality check that

mentioned, the centre of gravity for controls has shifted to the principles of sound administration and adequacy of the administrative and accounting framework.

Hence, based on what has been stated thus far, the term control includes:

- i) the control of contents and substance;
- ii) the control of administrative soundness and adequacy;
- iii) the control of legality (formal and substantial).

It should be noted the term ‘control’ emancipates itself from the traditional meaning of *ex post* verification and evolves into a co-essential element of the company’s practices and its administrative power²³, in the sense that control itself is not extrinsic to management, but intrinsic to it, representing its natural declination²⁴. In this sense, one must bear in mind the provisions of art. 2381 of the Italian Civil Code by virtue of which the B of D assesses the adequacy of the frameworks adopted by the company, whose care is left to the delegates and which the Board of Statutory Auditors supervises.

In short, the traditional idea of control finds a new place in company law and sets aside the one that is best known to us which would be more correct to say, revolves around the concept of supervision.

As already mentioned, control must be kept separate from supervision: the former, in fact, evokes more pervasive verification tools, the latter refers to a perfunctory and general monitoring function.

Going into the specifics, it must be emphasized that the activity of auditors is a supervisory activity and it is thus qualified by the law.

The reference is obviously to the activity set out in artt. 2403 of the Italian Civil Code and subsequent amendments and in artt. 149 and ss. *Testo Unico della Finanza* (Consolidated Law on Finance or TUF). Therefore, what is excluded is statutory audit, which in companies with shares listed on regulated markets is always carried out by the person in charge of legal review²⁵ while the auditing activity is carried

is not purely formal, but extended to the substantial content of the corporate activity and the actions of the directors, in order to verify that the operations carried out by the latter do not go beyond the limits of proper administration. See ABRIANI, *Controllo di legalità sostanziale e responsabilità dei sindaci*, in *Società & Contratti, Bilanci & Revisione*, 6, 2013, p. 42 commenting on the sentence of the Supreme Court of May 27 2013 n. 13081 which is noted for a rigorous recognition of the obligations and consequent responsibilities incumbent on the control body of joint-stock companies.

²³ MONTALENTI, *Amministrazione e controllo nella società per azioni: riflessioni sistematiche e proposte di controllo*, in *Riv. soc.*, 2013, p. 52.

²⁴ On the relationship between control and administration see ANGELICI, *Organizzazione, governo e controllo*, in *La società per azioni*, I, *Principi e problemi*, in *Trattato di diritto civile e commerciale*, Milano, 2012, p. 371 ss.

²⁵ See art. 16 Decree no. 39/2010. Regarding the so-called special EIP audit referred to in Title V of the Legislative Decree no. 39/2010, DE LUCA, *Sub art. 16*, in *La revisione legale dei conti annuali e dei*

out, on occasion, by the Board of Statutory Auditors in charge of the legal review of public companies or by the sole *sindaco* of a limited liability company²⁶.

Therefore, in defining the scope of the research to the supervisory activity that the Board carries out pursuant to art. 2403 of the Italian Civil Code and art. 149 TUF – Consolidated Law on Finance²⁷, it must be stated that the body is required to:

- enforce compliance with the law and the statute;
- monitor compliance with the principles of appropriate management;
- monitor, in particular, the adequacy of the organizational, administrative and accounting framework adopted by the company and its actual efficiency.

The supervisory activity that the Board of Statutory Auditors is called upon to perform is feasible thanks to a set of legally recognized authorized duties and powers it can exercise in several instances (primarily all inspection and audit activities, requesting information from directors and, alternatively, the power to convene a meeting and to report to the Court)²⁸, and thanks to which it is possible to intervene in Board of Directors meetings, at assemblies and at executive committee meetings which ultimately allows the Board to effectively monitor the situation and the management choices²⁹. The supervisory activity is also permitted by the signifi-

conti consolidati (d.lgs. 27 gennaio 2010, n. 39), Commentary by DE LUCA, in *Nuove leggi civili e commentate*, Milano, 2011, p. 180 ss.

²⁶For a more in-depth review, see CNDCEC, *Linee guida per il Sindaco unico*, December 2015, where interpretative and operational indications have been provided for the performance of the oversight body in its monocratic unipersonal version. On the proposals to revise the parameters referred to in art. 2477 of the Italian Civil Code, please refer to MARCELLO, *Modifiche alla norma sugli organi di controllo nelle srl non condivisibile*, in *Eutekne.info*, May 18, 2019.

²⁷Art. 2403 of the Italian Civil Code bears a symmetrical wording but not perfectly coinciding with that of art. 149 TUF where, among other things, the supervision of the control body is based on the adequacy of the organizational structure of the company in terms of competence, the internal control system and the administrative-accounting system, as well as being based on the reliability of this system in correctly representing the facts (letter c) and it is also based on the methods of concrete implementation of the corporate governance rules provided for by codes of conduct drawn up by management companies of regulated markets or by trade associations, to which the company, through disclosure to the public, declares conformity (letter c-bis).

²⁸These powers-duties are duly addressed in artt. 2403-bis and ss. c.c. and in artt. 151 and ss. TUF. On the powers of the statutory auditors, refer to AMBROSINI, *I poteri dei sindaci*, in ALESSI-ABRIANI-MORERA (eds.), *Il collegio sindacale. Le nuove regole*, Milano, 2007, p. 227 ss.

²⁹Leaving aside for obvious reasons the particular hypothesis of the management control committee in the one-tier system composed of directors even if they are non-executive, the circumstance on the basis of which the legislator only requires (all) the auditors to attend the meetings of the Board of Directors is not without significance. The provision referred to in art. 2405 of the Italian Civil Code, in fact, is not replicated with regard to the members of the supervisory board of the two-tier system that on the contrary, can (and not must) attend the meetings of the management board. In listed companies, the relevance of the protected interests entails the modification *in pejus* of the aforementioned discipline for

cant circumstance that the legislator (even of unlisted companies), on the basis of what has already been conducted with the TUF, places the Board of Statutory Auditors at the crossroads of the exchange of information flows between corporate bodies and non-corporate bodies.

Pursuant to art. 2381 of the Italian Civil Code, analogously to the provisions of art. 150 TUF – Consolidated Law on Finance for listed companies, the delegated bodies – that is to say those that then adopt the adequate organizational, administrative and accounting frameworks – are required to report at least once every 6 months on the general management trend and its foreseeable evolution, as well as on the most important business operations carried out by the company and its subsidiaries based on how large-scale they are and the characteristics.

The Board also periodically exchanges (or rather promptly exchanges, as expressed in art. 2409-*septies* of the Italian Civil Code) information with the person in charge of the statutory audit.

Obviously, then, the Board of Statutory Auditors can effectively carry out all the monitoring and investigation activities that allow it to carry out its functions³⁰. The law provides it with the necessary tools to do so, although there are hypotheses, not so uncommon, in which the administration, being statutorily entrusted to a single person, is not the result of shared decisions of which the Board is informed.

What has been said so far is effectively summarized in the Code of Conduct of the Board of Statutory Auditors (Regulation 3.1. for unlisted companies³¹, relating to the characteristics and procedures of supervisory activity), according to which supervisory activity, in addition to being performed according to the general criteria

a single member of the supervisory board which, pursuant to art. 149, paragraph 4-*bis*, TUF, is required to attend the meetings of the management board. In a completely symmetrical way with the provisions for the so-called ‘closed’ companies, all the members of the board of statutory auditors of listed companies are also required to attend the meetings of the B of D and of the executive committee, failure to do so results in forfeiture of office in the event of absence during the year, at two meetings of the B of D or of the executive committee. The aforementioned difference in treatment may be justified in the different role that the members of the supervisory board of the dualistic system exercise with respect to the management body. These, in fact, have powers of a very different incidence than those recognized to the board of statutory auditors since it is the supervisory board that appoints and dismisses the members of the management board. This attribution specifies if, on the one hand, it appears to derive directly from the new concept of control referred to in the introduction, on the other hand it appears to clash with the concept of supervision as a synthetic and general surveillance activity on the management body which is internal control body.

³⁰ The specific nature of the supervisory function of the Board of Statutory Auditors is highlighted by ABRIANI, *Verso una riforma della disciplina sui controlli interni*, Report presented at the Conference “*Amministrazione e controllo nelle società quotate: prospettive di riforma*”, organized as part of the seminars to celebrate forty years of Consob, Rome, June 6, 2014, and published in *Riv. dir. soc.*, 2014, p. 701 ss.

³¹ CNDCEC, *Norme di comportamento del collegio sindacale, Principi di comportamento del collegio sindacale di società non quotate*, November 2020.

of professional diligence, “*The supervisory activity of the Board of Statutory Auditors is carried out on the basis of the professional diligence required by the nature of the assignment which determines an obligation of means and not of results.*”

Said supervisory activity is carried out taking into consideration the size of the company as well as its complexity and other characteristics specific to the company, including those of an organizational nature.

In its supervisory activity, the Board uses a selection process for the controls based on risk identification and assessment using methods deemed appropriate to the size of the company subject to control as well as other characteristics specific to the company, including those of an organizational nature.

In defining the supervisory methods, the Board of Statutory Auditors plans the activities to be implemented on the basis of the significance of the risks indicated in the information flows acquired by the administrative body, the company management as well as other corporate bodies. It also takes into account the exchange of information with the person in charge of the statutory audit, as well as the results of the inspection and control operations, attributing different intensities and intervals to these results.

In planning supervisory activities, the Board of Statutory Auditors expresses a professional opinion taking into consideration the assessments that an independent, reasonable and informed professional would draw on the relevance of the business risks as indicated in the information flows acquired after having considered the information available to the Board at that time.

Should the supervisory activity highlight significant risks of possibly violating any law or regulation, of incorrect application of the principles of appropriate management, inadequate organizational structure or of the administrative-accounting system, the Board of Statutory Auditors requests the administrative body to adopt corrective actions and it oversees that they are implemented. In the event that the corrective actions are not implemented, or are considered by the Board to be insufficient, or in cases of emergency, particularly serious events, or violation, the Board adopts the initiatives provided for by law to reverse or otherwise remove the violations found”.

The rule of conduct is clear in expressing the ways in which the Board of Statutory Auditors must carry out its supervisory activity in compliance with the provisions of the law and indicates very specific operational directives regarding the important risk assessment activity with respect to the concrete procedures through which supervision is carried out, in consideration of the size and characteristics of the company. It is also clear in identifying the steps that the Board must take with respect to the administrative body. These are the legally recognized powers/duties conferred to the *sindaci* and inherent in art. 2403-bis ss. Of the Italian Civil Code which, according to an upward climax, foresee right from the start, a notification to the administrative body and subsequently, in the event of non-positive outcomes, a con-

vocation of the assembly (to report the facts and incidents), even including reporting to the Court in case of well-founded suspicion of serious irregularities and unsound practices.

Finally, in accordance with the new rules of the civil code introduced by the crisis code, in Regulation 3.4 it is established that the organizational framework is considered adequate if it presents a structure compatible to the size of the company, the nature and procedures and methods of pursuing the business objective of the company, as well as the timely detection of signs of crisis and loss of business continuity and can therefore allow the directors in charge to promptly adopt suitable measures to detect and assess such crisis³².

4.1. “Financial-business” supervisory activities of the Board of Auditors

As part of the powers attributable to the supervisory activity referred to in art. 2403 of the Italian Civil Code, there are areas of intervention on the part of the Board of Statutory Auditors in which the financial-business aspects and competencies are more prevalent compared to those of a typically legal nature.

In particular, we refer to:

1. supervising the adequacy of the accounting framework adopted by the company and its efficient functioning;
2. evaluating the possibility of entering on the balance sheet, through the expression of consent, costs of installation and expansion and development costs, in accordance with art. 2426, first paragraph, n. 5, of the Italian Civil Code, as well as the goodwill pursuant to art. 2426, first paragraph, n. 6 of the Italian Civil Code;
3. supervisory activity in compliance with the law and the bylaws and with the balance sheet.

Points 1 and 3 focus on the annual report drawn up pursuant to art. 2429 of the Italian Civil Code.

In addition to those mentioned above, there are also other specific tasks that are carried out in the event particular circumstances occur in the company, such as:

- expressing an opinion on the fairness of the issue price of shares in the event of excluding or limiting option rights (in accordance with art. 2441, sixth paragraph, of the Italian Civil Code);

³²The document emphasizes the reference made to the nature and size of the company and leaves room for the professionalism of the *sindaco* and his ability to make assessments aimed at the specific case. In this way we intend to avoid (or, at least, limit) inadmissible misreadings on the part of those who may one day intend to mechanically infer from the occurrence of the insolvency the assessment of the inadequacy of the structures, consequently attributing the relative responsibility to managers and controllers.

- expressing observations on the situation of the company in the event that the capital appears to have decreased by more than one third as a result of losses (in accordance with art. 2446, first paragraph, of the Italian Civil Code);
- preparing the accompanying report to the final statement of assets intended for a specific business activity (in accordance with art. 2447-*novies* of the Italian Civil Code).

4.2. Monitoring the adequacy of the administrative and accounting framework adopted by the company

With reference to the adoption and monitoring of the frameworks, art. 2403, first paragraph, of the Italian Civil Code provides for a triplicity of obligations, in the sense that the delegated bodies ensure the use of adequate frameworks, the Board of Directors assesses the adequacy on the basis of the information received and finally, the Board of Statutory Auditors supervises this adequacy and the efficient functioning of the frameworks³³.

In addition to specifying the activities that need to be carried out to monitor the frameworks, the code of conduct 3.6. (Monitoring the adequacy and functioning of the administrative-accounting system) interprets the definition of the administrative-accounting system as follows:

“The administrative-accounting system can be defined as the set of directives, procedures and operational practices aimed at ensuring the completeness, accuracy and timeliness of reliable corporate information, in accordance with the accounting principles adopted by the company.

An administrative-accounting system is adequate if it allows for:

- *complete, timely and reliable accounting recognition and representation of management operations;*
- *valid and useful information to aid in management decisions and in the protection of company assets;*
- *reliable data for the preparation of the annual financial statement”.*

Therefore, monitoring activity carried out by the Board of Statutory Auditors, even through justified sampling techniques, takes the form of compliance analysis in order to check the efficient functioning of the administrative-accounting framework³⁴, and it makes use of the exchange of information with the person in charge

³³ On the frameworks and the adequacy of the frameworks refer to IRRERA, *Assetti organizzativi adeguati e governo delle società di capitali*, Milano, 2005, *passim*.

³⁴ An aspect highlighted by IRRERA, *Collegio sindacale e assetti adeguati*, in ALESSI-ABRIANI-MORERA (eds.), *Il collegio sindacale*, cit., p. 273.

of the statutory audit who functions as an important external and independent reference, especially with regard to the aspects concerning the reliability of the administrative-accounting system.

The supervisory activity of the Board of Auditors is, therefore, aimed at verifying the existence of a suitable system to ensure the completeness and accuracy of the financial data. It should be remembered that this is not a value judgement of the results of the administrative and accounting activities, but a summary judgement on the efficiency and functionality of the system, carried out in light of the significant risks that may have emerged in these operational areas.

For the mere purpose of recognition, with regard to the monitoring activities of the Board of Auditors concerning adequacy of the frameworks, it is necessary to point out the main wording of art. 149 TUF (but in many ways similar to that of art. 2403 of the Italian Civil Code) by virtue of which the supervision of the regulatory board is based, as far as the context, on the adequacy of the organizational structure of the company, the internal control system and the administrative-accounting system³⁵.

4.3. Monitoring financial statements and the management report

Even if it is not in charge of the control, the Board of Statutory Auditors retains some supervisory tasks related to the preparation, approval and publication of the financial statements which are far from being considered residual tasks.

This activity is summarized in both the Code of Conduct 3.7. (Supervision of the financial statement and management report) and 3.8. (Supervision of the consolidated financial statement and the management report).

In all the cases considered above, the Code of Conduct highlights the general principle according to which the Board of Statutory Auditors is required to ensure that the directors comply with the procedural rules relating to the preparation, approval, filing and publication of the financial statements (also consolidated). Furthermore, the listing of the company on the markets will necessitate compliance with the specific rules provided for in the reference standard.

As regards the subject of this contribution, the so-called ‘closed’ companies, in addition to specifying the above, Regulation 3.7 highlights that the Board not in charge of the statutory audit is not required to carry out analytical checks on the content of the financial statements, nor is it required to express an opinion on its reliability. It is, however, required to verify:

– the correspondence of the financial statements and report to the facts and information of which the Board of Statutory Auditors is made aware subsequent to

³⁵ See Regulation Q.3.4. (Monitoring the adequacy of the organizational framework).

participating in the meetings of the corporate bodies, carrying out its supervisory duties and its powers to monitor and control (artt. 2403, 2403-*bis*, 2405 of the Italian Civil Code);

– that the budgetisation of operating costs and goodwill, as well as research, development and advertising costs comply with the requirements of art. 2426, first paragraph, n. 5 of the Italian Civil Code;

– that the budgetisation of goodwill complies with the requirements of art. 2426, first paragraph, n. 6 of the Italian Civil Code³⁶;

– the accuracy and legitimacy of any departure from art. 2423, fourth paragraph, of the Italian Civil Code that the directors have made use of.

The Board of Statutory Auditors summarizes the conclusions of its supervisory activity in a specific paragraph of the report and presents it to the assembly meeting in occasion of the approval of the financial statements.

4.4. Board of Statutory Auditors Report pursuant to art. 2429 of the Italian Civil Code

In terms of content, among the many innovations previously mentioned, Regulation 7 particularly stands out, concerning the report of the Board of statutory auditors at the shareholders' meeting³⁷, where the supervisory board is granted for the

³⁶The inspection that the Board of Statutory Auditors carried out to check the entry of the cost of set-up and expansion, development and goodwill pursuant to art. 2426, first paragraph, nos. 5 and 6 of the Italian Civil Code, although it is not a management task, it is qualified by COLOMBO, *La revisione contabile nelle società non quotate*, in *Amministrazione e controllo nel diritto delle società*. Liber amicorum Antonio Piras, Torino, 2010, p. 523, come atto di controllo anticipato – al tempo della redazione del bilancio – della funzione di controllo, *rectius* vigilanza, esercitato dal collegio sindacale sul bilancio.

³⁷As is known, the board of statutory auditors may make observations and proposals regarding the financial statements and the approval of said statements with particular reference to the exercise of derogation or exemption pursuant to art. 2423, fourth paragraph, of the Italian Civil Code. In this regard, it should be noted, as a preliminary, that the power to make observations and proposals mentioned in the provisions pursuant to art. 2429 of the Italian Civil Code is limited to the budget and the approval of said budget, and to any derogation from the provisions dictated in the drafting and structure. It is appropriate to point out that the delimitation of the “competences” of the board of statutory auditors of unlisted companies is not perfectly replicated within the framework of the regulations dictated for listed companies.

For the sole purpose of acknowledgment, it should be noted here that the control body of listed companies, pursuant to art. 153 TUF, is on the one hand called to report to the shareholders' meeting called for the approval of the financial statements on the supervisory activity carried out and on the omissions and for reprehensible facts found, and on the other hand, it is entitled to make proposals regarding the approval of the financial statements as well as with regard to the matters within their competence (art. 153, second paragraph, TUF). See Standard Q.7.1. Structure and content of the statutory

first time the possibility not to comment on the approval of the financial statements in case the auditors do not express an opinion³⁸.

As mentioned, the legislator has used rather broad and generic terms to indicate the content of the report pursuant to art. 2429 of the Italian Civil Code³⁹.

Although the statutory audit has been removed from the powers of the Board of Statutory Auditors, with the exception of the express statutory provision of the cases indicated in art. 2409-*bis* of the Italian Civil Code, the observations made pursuant to art. 2429 of the Italian Civil Code could in principle be in conflict with the conclusions of the person in charge of the statutory audit regarding the correct application of the law and auditing standards.

The observations expressed at the moment of derogation from the criteria identified for the drafting of the financial statements and the budgetary structure must therefore not be limited to indicating the reasons that motivated the derogation which have already been indicated in the explanatory notes, but must focus on the validity and rationality of it: in this case it must be an analytical control.

On a systematic level, the greater flexibility introduced by the new rules would make it possible to offset the gap between the provisions of art. 2429 of the Italian Civil Code and the provisions of art. 153 TUF, pursuant to which the Board of Statutory Auditors “can express” and not “must express” an opinion on the approval of the financial statement⁴⁰.

auditors’ report, in Cndceec, Rules of conduct of the board of statutory auditors of listed companies, Application criterion, C.7 Proposals regarding the statutory and consolidated financial statements, their approval and matters pertaining to the board of statutory auditors, April 26, 2018. This propositional power appears symmetrical to that recognized to the body in art. 2429 of the Italian Civil Code although, adhering to a rigorous literal interpretation of art. 153 TUF, the board of statutory auditors of listed companies does not have the power to make observations at the shareholders’ meeting but acquires the power to make proposals regarding the matters within its competence, meaning those referred to in art. 149 TUF. The proposals assume the observations that *sindaci* are required to freely express in the exercise of these powers (see Standard Q.7.1). The wording of art. 153 TUF is most likely due to the need to reaffirm the clear separation of the supervisory activity on the management of the board of statutory auditors from the statutory audit function.

³⁸ Even in the (rare) case the auditor fails to express his/her opinion due to multiple significant uncertainties, with regard to the directors’ use of the going concern assumption and the appropriate information on the financial statements, and having made the specific assessments of the case and in the event that the auditors agree with the conclusions, the board of statutory auditors is allowed to report to the shareholders that it is unable to formulate the proposal regarding the approval of the financial statements.

³⁹ This vagueness also remains in the provisions of the TUF where it is specified that the board of statutory auditors, the supervisory board and the management control committee, in cases in which the company adopts one of the two alternative governance systems, report to the meeting called for the approval of the financial statements or convened pursuant to art. 2364-*bis*, second paragraph, of the Italian Civil Code for the supervisory activity carried out and for the omissions and reprehensible facts found. On this occasion, as seen, the board of statutory auditors can make proposals as indicated above.

⁴⁰ Part of the doctrine had already, by way of interpretation, recognized the admissibility of a condi-

In addition to regulating the filing of the draft budget and any attachments at the registered office, art. 2429 of the Civil Code describes the content of the report drawn up by the Board of Statutory Auditors⁴¹.

In regulating the procedure for filing the draft budget and the attached reports, the legislator has set two deadlines.

Art. 2429 of the civil code, in fact, first specifies that the draft budget must be disclosed to the statutory auditors as well as to the professional in charge of the audit at least 30 days before the date set for approval, and the draft budget together with the reports from the monitoring bodies must remain deposited at the registered office 15 days preceding the assembly meeting and until it is approved by the assembly.

It is therefore clear that the Board of Statutory Auditors, as well as the statutory auditor, has at least 15 days to prepare the report pursuant to art. 2429 of the Italian Civil Code.

There is a widespread belief that the term provided for in the first paragraph has been placed in favour of the statutory auditors, in the sense that the Board could tolerate a late communication from the directors, as long as it is able to report to the assembly within the term provided for in the second paragraph.

The absence of disclosure within the term referred to in the first paragraph does not imply a procedural irregularity in the budget approval decision when the draft

tional opinion by valorising the possibility, recognized to the board of auditors by the paragraph of art 2429 of the Italian Civil Code, to formulate «observations and proposals» on the financial statements (see MANCINELLI, *I risultati dei controlli sull'amministrazione ed il parere condizionato: aspetti della relazione dei sindaci al bilancio*, in *Soc.*, 11, 2000, p. 1071 ss. However, on the basis of the new ethical regulation, the Board of Statutory Auditors of unlisted companies may also choose not to express its opinion).

⁴¹ Incidentally, it should be pointed out that the provision has been modified by Legislative Decree no. 39/2010 which, in line with the new regulations on the statutory audit, expressly provided for the communication of the project to the person in charge of the statutory audit and the suppression of the last period of the second paragraph where it was attributed to the board of auditors in charge of the preparation of the report pursuant to art. 2409-ter of the Italian Civil Code.

The foregoing arises from the reorganization of the controls in terms of separating the function of monitoring legality and the function of auditing and outsourcing the latter, so that in cases where the board of statutory auditors carries out the statutory audit, it will also be responsible for drafting the report pursuant to art. 14 of Legislative Decree no. 39/2010, which can formally be contained in the same document. In other words, it will be a single dual-content report, inherent on the one hand to the control of legality and control over compliance with the principles of correct administration, on the other hand to the typical statutory audit function.

On the possibility that the board or one sindaco in charge of the statutory audit may express himself/herself through a single report containing the contents established for both the first and second report, see CNDCEC, *L'applicazione dei principi di revisione (ISA Italia) alle imprese di minori dimensioni*, December 2015, p. 287,. In this case, the report assumes the form of an "accounting report". Refer to MARCELLO-POZZOLI, *Le indicazioni del Cndcec sulla relazione unitaria del sindaco-revisore*, in *Guida alla Contabilità e Bilancio*, 5, 2020, p. 48; MARCELLO-BOZZA, *Le indicazioni del Cndcec sulla relazione unitaria del sindaco-revisore*, in *Eutekne.info*, March 21, 2020.

budget and the attachments are made available to the shareholders at least 15 days before the date scheduled for the convening of the assembly.

That being said, to those who argue that in any case the waiver on the part of the Board of Statutory Auditors to make use of this term provided for in the first paragraph would not allow for a careful assessment of the draft budget thus the correct drafting procedure could be impaired, it was replied that the activity of the statutory auditors must be continuously carried out as the law requires (see artt. 2403 and 2403-*bis* of the Italian Civil Code): the correct fulfilment of the assignment could, in fact, allow the Board of Statutory Auditors to accept a reduction of the deadline when the body is able to comply with the established terms for disclosing the documents to the shareholders and, more importantly, is able to draw up the report according to the criteria of professionalism in deference to the standards of due diligence based on the nature of the assignment⁴².

Moving on to examine the provision in question in more detail, it is clear that the content of the report pursuant to art. 2429 of the Italian Civil Code is generically described.

This provision requires that the report relate to the results of the financial period and the activity carried out by the Board of Statutory Auditors, and that the Board of Statutory Auditors can make observations and proposals regarding the financial statements and the approval of it with particular reference to cases of derogation provided for in art. 2423, fourth paragraph, of the Italian Civil Code.

As can be inferred, this is a general identification of the contents of the report and that it will be up to the professional to fill it with definition, making use of the provisions dictated by the powers and duties of the Board of Statutory Auditors.

More specifically, with regard to the results of the financial period on which the Board of Statutory Auditors must report, it should be specified that since this is not a value judgement expressed with reference to the activities of the directors (known as the so-called business judgment rule)⁴³, nor an opinion on the financial statements similar to that expressed by the statutory auditor, the Board of Statutory Auditors is called upon to express an assessment on the general performance of ma-

⁴² It should be noted that art. 2429 of the Italian Civil Code provides for no other term. This could call into question the real possibility for the board of statutory auditors and the auditor to examine the respective reports with the due accuracy and necessary weighting. See DE ANGELIS, *Elementi di diritto contabile, Disciplina civilistica e principi contabili internazionali*, Milano, 2015, p. 78 ss.

⁴³ The principle of the business judgment rule finds its foundation in the possibility of examining the work and decisions of the body that administers a company (board of directors) and in the presumption that the actions of the board members are correct and not open to criticism unless there is evidence of a violation of the “duty of care”. With a view to balancing interests, the business judgment rule helps to reconcile the interests of shareholders in proper administration, with the need for directors to be able to manage the company with certain entrepreneurial discretion, as long as their responsibility does not violate the so-called fiduciary duties required by law.

management operations and how it is represented in the financial statements. By way of example, the internal control body must indicate whether it has obtained information from the directors on the activity carried out as well as on the most significant economic and financial operations approved and implemented during the year (see artt. 2381 and 2403-*bis* of the Italian Civil Code).

The part concerning the account of the activity carried out in the fulfilment of one's duties consists of a concisely expressed judgement which will have as its subject the activity carried out pursuant to artt. 2403 and ss. of the Italian Civil Code.

In particular, the Board of Statutory Auditors must comment on:

i) the monitoring activities with regard to compliance with the law and bylaw and, therefore, with regard to the control carried out in order to ascertain the legality of corporate action (both with reference to the activity of the bodies, and in relation to the company's direct application of the statutory regulations);

ii) the monitoring of compliance with the principles of appropriate management.

With reference to what is expressed under ii) it is hardly necessary to specify that monitoring compliance with the principles of appropriate management consists of verifying the conformity of management decisions to the general criteria of economic rationality: what can be subject to control and to consequent assessment by the Board of Statutory Auditors is, in fact, the rationality and the appropriateness of the choices management makes.

In fulfilling this duty, the legislator has equipped the Board of Statutory Auditors with multiple tools that characterize the continuity of the control entrusted to it and on which we have focused on previously.

In light of this, in the report drawn up pursuant to art. 2429 of the Italian Civil Code, the Board of Statutory Auditors must briefly describe the results of the monitoring activity performed. More specifically, any action taken should be mentioned wherever omissions on the part of the directors have emerged from the monitoring activity and the Board, acting as a substitute, has called an assembly meeting, as required by art. 2406, first paragraph, of the Italian Civil Code. Similarly, the Board of Statutory Auditors must promptly identify whether in performing its duties it has identified particularly serious or critical occurrences in the company (not only caused by directors but, for example, also by general managers) necessitating a convocation of an assembly meeting and an urgent intervention (pursuant to art. 2406, first paragraph, of the Italian Civil Code).

In this part of the report, we will speak about the complaints received by the Board from the shareholders and the investigations carried out following these complaints as required by art. 2408 of the Italian Civil Code, or any appeals pursuant to art. 2409 of the Italian Civil Code presented to the Court on the basis of well-founded suspicion of serious irregularities and/or potentially damaging situations on the part of the directors.

A report that meets the parameters identified in art. 2429 of the Italian Civil Code must necessarily, albeit briefly, take these aspects into account, as well as inform the shareholders present at the meeting in cases which the monitoring activities did not reveal significant irregularities.

With regard to the oversight of the adequacy of the organizational, administrative and accounting framework adopted by the company and its efficient functioning, as mentioned above and as highlighted in the Rules of Conduct of the Board of Statutory Auditors, it is necessary to evaluate the efficiency of the procedures, methodologies and the corporate tools adopted to carry out the activity in consideration of the nature, structure and characteristics of the company. A summary of the control carried out with reference to this typical aspect is stated in the report pursuant to art. 2429 of the Italian Civil Code.

The above assertion finds support in the aforementioned Rules of conduct (Rule 7.1.), according to which the structure and contents of the report could be as follows:

Title of the report

“Report of the Board of Statutory Auditors presented at the Shareholders’ Meeting pursuant to art. 2429, co. 2 of the Italian Civil Code”.

Addressees of the report

The report is addressed to the assembly of shareholders.

Section A

Summary and results of the activity carried out-omissions and reprehensible facts

The content of this section concerns the activity undertaken by the Board of Statutory Auditors which has been carried out in compliance with the regulations in force.

As mentioned, the Board of Statutory Auditors must briefly report to the assembly on the activity carried out in the fulfilment of its duties and, in particular, about the conclusions reached from the outcome of said activity.

On the basis of the information acquired, the Board of Statutory Auditors reports on the following evaluation profiles:

- compliance with the law and the bylaw (see Regulation 3.2);
- compliance with the principles of appropriate management (see Regulation 3.3);
- adequacy and efficient functioning of the organizational structure and the internal control system (see Standards 3.4 and 3.5);
- adequacy and efficient functioning of the administrative-accounting framework (see Regulation 3.6);
- statement of accounts and management report (see Standard 3.7).

In this section, the Board of Statutory Auditors also reports any omissions and delays on the part of the directors and relates any complaints made by the shareholders, giving an account of the actions taken and the results obtained. The Board advises if any opinions have been issued during the year.

Section B

Proposals regarding financial statements, its approval and matters reserved for the Board of Statutory Auditors

The Board of Statutory Auditors must make its own observations and proposals with reference to the financial statement having particular regard to the timeliness and accuracy of the documentation that it is composed of, as well as of the procedure with which they were prepared and presented to the shareholders' meeting, in accordance with its duties.

As previously mentioned, the report must contain a specific reference to the derogation or exemption pursuant to art. 2423, fifth paragraph, of the Italian Civil Code and, if it does contain this reference, it must state the reasons and express the observations made by the Board of Statutory Auditors regarding the validity of said reasons. If the conditions are met, the report must also express – as already mentioned – the consent of the Board of Statutory Auditors to enter set-up and expansion costs as assets in the balance sheet as well as multi-year development costs (art. 2426, no. 5 of the Italian Civil Code), and goodwill costs (art. 2426, n. 6, of the Italian Civil Code).

As mentioned, in fact, the Board of Statutory Auditors must make its observations and proposals regarding the approval or non-approval of the financial statements; in this regard it should be reiterated that the law does not appoint the Board to make assessments on the accounting aspect which is entrusted exclusively to the person in charge of the legal audit. The Board of Statutory Auditors, in fact, has no obligation, even acting as a substitute, to audit the annual and the consolidated financial statements when the task has been commissioned to an auditor or an audit firm. The person in charge of the statutory audit is the person responsible for making the professional judgement on the annual and consolidated financial statements, pursuant to art. 14 of Legislative Decree no. 39/2010, and based on the statutory audit. The Board will exchange relevant information with the auditors in charge pursuant to art. 2409-*septies* of the Italian Civil Code.

Therefore, in expressing its observations and proposals to the shareholders' meeting, the Board must take into account the opinion on the financial statements expressed by the statutory auditor pursuant to art. 14 of Legislative Decree 39/2010 and the information exchanged with the statutory auditor pursuant to art. 2409-*septies* of the Italian Civil Code.

In those cases of audit reports containing modified opinions, the Board will have to analyse the underlying reasons for the opinion in order to make its own observations and proposals regarding the approval of the financial statements.

Modified opinions can, in fact, derive from different circumstances:

a) *A qualified opinion in which there are deviations from the regulations and reference accounting standards*

This judgement is made in the event of errors not corrected by company management deemed by the auditor to have a significant but not a pervasive effect⁴⁴. In these cases, having made specific assessments of the case in review and assuming it shares the auditor's conclusions, the Board, following the request to correct the errors, represents at the assembly that there is no reason to decline approval of the financial statements.

b) *Qualified opinion stemming from limitations in audit procedures*

The opinion under consideration is issued by the auditor when, in carrying out the necessary audit procedures to acquire sufficient and appropriate evidence to express an opinion, he/she has found inherent limitations deemed potentially significant but not pervasive.

The limitations may arise from objective situations, that is to say not dependent on company management, or from restrictions imposed by company management.

In the first case, having made the specific assessments of the case in review and in the event it agrees with the auditor's conclusions, the Board represents at the assembly the absence of impediments to the approval of the financial statements, highlighting the limitations found by the auditor and their relevance to the date of approval of the financial statements.

In the second case, the board will always have made the specific assessments of the case in review and in the event it agrees with the auditor's conclusions, it represents at the assembly the absence of reasons impeding the approval of the financial

⁴⁴ See CNDCEC, *L'applicazione dei principi di revisione internazionali (ISA Italia) alle imprese di minori dimensioni*, cit., p. 288, who appropriately distinguishes between the hypotheses considered above. In cases where the auditor issues: a qualified opinion due to deviation from the reference rules having a non-pervasive effect, a qualified opinion due to limitations of non-pervasive effect attributable to objective circumstances, the declaration of impossibility of expressing the opinion due to limitations, due to objective circumstances, of pervasive effect, or due to serious uncertainties, the board of statutory auditors will not invite the assembly not to approve the financial statements, as it must do if the auditor's report contains a negative opinion due to deviation from the reference rules, having a pervasive effect, a qualified opinion for limitations attributable to management having a non-pervasive effect and the declared impossibility of expressing a judgment due to limitations attributable to management, having a pervasive effect.

statements following the request made to the directors to eliminate the limitations which led to the modified opinion.

Of particular interest is the case in which the statutory auditor deems that the financial statements have been prepared in view of business continuity, but in the auditor's opinion, the management's use of the going-concern assumption is inappropriate. As required by the auditing standard (ISA Italia) no. 570 "Going Concern", the auditor is required to express a negative opinion. It should be noted that the statutory auditor is required to request that the management body⁴⁵ carry out or extend its assessment⁴⁶ and take into account any neglectful behaviour or omissions it may have made in writing out the report⁴⁷. Regarding interactions with other governance bodies and, to the extent of our interest, with the Board of Statutory Auditors, the auditor is required to provide adequate information on the circumstances and events that have given rise to significant doubts on the company's ability to continue as a going concern. Having been informed by the auditor, the Board of Statutory Auditors should at least ask the management body directly for information and clarifications on the matter or the adoption of timely and appropriate measures in the event significant doubts are confirmed⁴⁸. If neglectful behaviour and omissions are observed on the part of the administrative bodies with respect to the above, given that it coincides perfectly with the assessments of the statutory auditor, in exercise of the power recognized to them to put forward proposals regarding the approval of the financial statements, Board of Statutory Auditors should invite the assembly not to approve the financial statements.

c) Disclaimer of opinion related to the financial statements

The auditor's disclaimer of opinion related to the financial statements may arise in two circumstances:

- i) if the auditor has found limitations in audit procedures deemed to have a potentially pervasive effect;
- ii) In extremely rare situations characterised by multiple significant uncertainties about the management's use of the going concern assumption and appropriate disclosure of financial reporting.

⁴⁵ Altrimenti inteso come Direzione. Cfr. CNDCEC, *L'applicazione dei principi di revisione internazionali (ISA Italia) alle imprese di minori dimensioni*, cit., p. 12.

⁴⁶ Principio di revisione (ISA Italia) n. 570, *Continuità aziendale*, par. 22.

⁴⁷ Formulating a modified opinion which also includes the declaration of impossibility to express an opinion.

⁴⁸ See CNDCEC, *Norme di comportamento del collegio sindacale, Principi di comportamento del collegio sindacale di società non quotate*, cit., Regulation 11.1, *Vigilanza del Collegio sindacale per la rilevazione tempestiva della perdita delle continuità*.

In case i), having made the specific assessments of the case in review and in the event that it agrees with the auditor's conclusions, the Board can:

- invite the assembly not to approve the financial statements where the limitations found by the auditor are attributable to company management;
- if the limitations depend on objective situations, make its observations on the financial statements with regard to supervisory activities, relating in the report to the shareholders that it is unable to make a proposal regarding the approval of said financial statements due to the limitations reported by the auditor which may have a potentially pervasive effect.

In case ii) having made the specific assessments of the case in review and in the event it agrees with the auditor's conclusions, the Board can make its own observations on the financial statements with respect to supervisory activities, relating in its report to the shareholders that it is unable to make an approval proposal due to the multiple significant uncertainties reported by the auditor *vis-a-vis* the financial statements as a whole.

d) Adverse Opinion

The auditor expresses an adverse opinion when, after acquiring sufficient and appropriate evidence, he concludes that the misstatements or errors found, whether they are considered individually or collectively, are significant and pervasive for the financial statement. Having made the specific assessments of the case in review and assuming it agrees with the auditor's conclusions, the Board will invite the assembly not to approve the financial statement.

Dissent

The dissenting *sindaco* has the right to have the reasons for his dissent recorded in the minutes and has the right to report his opinion at the assembly even if it differs from the report approved by the majority of the members of the Board of Statutory Auditors.

In case of dissent, the report can be drawn up by the majority of the Board, providing evidence of a statutory auditor's disagreement and the underlying reasons. The report thus prepared is signed by all the statutory auditors. In the event that the dissenting *sindaco* does not intend to sign the report, for example because he does not agree on the reasons for the dissent as expressed in the report, it is signed by the majority of the auditors specifying the existence of the dissent, without prejudice to the dissenting author's right to express the contrary as specified above.

The aspect concerning dissent is of particular interest. The position taken by the Rules of Conduct, and reported above, originates from the orientation of the prevailing doctrine which has not failed to underline that, being a collegial act, any dissent expressed by one of the auditors does not affect the validity of the report. In

any case, this adverse or otherwise contrary opinion, in addition to being duly recorded at the meeting (the minutes are transcribed in the minute book provided for pursuant to art. 2421, first paragraph, no. 5, of the Italian Civil Code) could be noted in the report and presented to the assembly: the report, in fact, assumes the important function of disclosing information on shareholders and making the information easier to understand with respect to the data shown in the financial statements. This would lead us to believe that the dissenting *sindaco* can adequately inform the assembly of his adverse opinion by providing information relating to it prior to the deliberation.

The qualification of the report pursuant to art. 2429 of the Italian Civil Code as a collegial act, is cause to deny the dissenting *sindaco* the possibility drawing up his own alternative report to the one presented to the collegial body.

Section C

Procedural aspects

The report at the shareholders' meeting concludes with the approval by the Board of Auditors: the location and date of drafting and the signature of each of the auditors are therefore affixed, indicating their role within the Board of Auditors (president or statutory auditor).

As mentioned, the report of the Board of Statutory Auditors is collegial and its approval is recorded in the minutes; these minutes are transcribed in the minute book of meetings and deliberations of the Board of Statutory Auditors.

Except as provided for in case of dissent, the report is signed, either with a handwritten or electronic signature, by all the members of the Board of Statutory Auditors. In the event that the report is approved with unanimous consent, it can be signed by the president alone, specifying this condition⁴⁹.

The report, approved by the Board of Statutory Auditors, is filed at the company's headquarters at least 15 days before the date of the meeting summoned for the approval of the financial statement.

⁴⁹ On this point, in fact, the Court of Milan has long pointed out that the signing of the report pursuant to art. 2429 of the Italian Civil Code by the chairman of the board of statutory auditors alone does not invalidate the resolution approving the financial statements when it is possible, as stated above, because of the collegial nature of the relationship, to attribute the "authorship" to the body in its entirety. See Tribunale Milano, September 3, 2003.

5. Participation of the corporate bodies in the meetings

Among the most significant changes, there is the revision of the regulation regarding participation in meetings of the Board of Directors or of the Executive Committee (Rule 4.2), with the express provision for the Chairman of the Board of Directors to provide adequate information⁵⁰ to the statutory auditors on the matters that will be subject to evaluation and deliberation by the advisors⁵¹.

As is well known, in art. 2381 of the Italian Civil Code, the legislator prescribes that adequate information on the items on the agenda be provided to all directors however it does not mention the statutory auditors; the principles of the Code of Conduct therefore fill this particularly important void.

Among the application criteria, it is also considered appropriate that the statutory auditors, even on an individual basis, request that the Chairman of the Board of Directors send the directors and the Board of Statutory Auditors the supporting documentation for the decisions on the agenda concurrently with the notice of call of the Board of Directors. In the event the President refuses to comply with the request, the statutory auditors proceed to inform all the members of the Board of Directors for the purpose of requesting a resolution.

Sindaci are always permitted, even on an individual basis, to request further information, documentation and clarifications from the chairman and the delegated body in addition to those sent to them prior to or at the same time as the board meeting.

It would also appear appropriate, if applicable, for the *sindaci* to note in the minutes of the meeting the lack of prior information that prevented the exercise of a timely and concurrent supervision of the items on the agenda.

In particular, the *sindaci* are required to intervene in the course of the debate if they identify any violations of the law or of the company bylaws or of the principles of appropriate management by expressing their motivated reasons for dissent or

⁵⁰“The hypothesis of an undifferentiated duty of informative interaction of the chairman towards all the participants in the meetings of the board of directors seems to find reason in the centrality of information as an instrument of transparency and counterweight to the freedom of conformation of the management structure, in the unitary character of the board meeting, as well as in the marked rapprochement that the reform has had between the administrative and control functions”. Citation by ZAMPE-RETTI, *Il dovere di informazione degli amministratori nella governance della società per azioni*, Milano, 2005, p. 140 ss.

⁵¹“The adequacy of the pre-board information must refer not only to its quantitative and qualitative content, but also to the fact that the related documentation, supporting the items on the agenda, is provided reasonably in advance, in order to allow this context, for both the statutory auditors and the directors, to be able to identify, among the matters under discussion, those matters that deserve a more detailed examination than what emerges from the content of the information flows transmitted by the Chairman”. See MONTALENTI, *L'intervento dei sindaci alle adunanze del consiglio di amministrazione nelle società per azioni non quotate*, in *Nuovo dir. soc.*, 5, 2014, p. 33.

their reservations and requesting the recorded minutes, if necessary, even an analytic review of them.

The Regulations, therefore, place the Board of Statutory Auditors at the centre of the system of corporate information flows. In particular, within the Board, in addition to the information flow generated by the items set out on the agenda and by the related requests for details and clarifications, even those relating to the performance of company operations or specific business activities, the statutory auditors benefit from the whole set of information contained in reports including the reports of delegated legislative bodies pursuant to art. 2381, third and fifth paragraphs of the Italian Civil Code (information on management performance, corporate structures, strategic, industrial and financial planning, relevant transactions, etc.) and, in this context, it should be added that it is also the directors' duty to communicate items of interest either on their own behalf or on behalf of third parties, related to the operations carried out by the company pursuant to art. 2391, first paragraph.

The *sindaci* therefore become beneficiaries of a flow of information of specific content related to corporate management which constitutes the information base for identifying the critical areas that require any intervention measures.

The new Regulations clarify that whenever the decisions of the directors are taken in the absence of adequate information, "they affect the dynamics of the board and the consequent decision-making process, affecting the procedural modalities of the shareholders' resolutions and, therefore, the very legality of the management activity", going so far as to state that "The *sindaci* will have to assess whether the management of information flows will reach a point where it is considered invalid".

6. The activities of the board of statutory auditors in a business crisis

In the new Code of Conduct, particular attention is placed on the function undertaken by the Board in the area of crisis prevention and emergence⁵². In anticipation of a definitive regulatory framework of reference related to business crises and insolvency, alongside the remaining regulations up to now unchanged, it is our aim to highlight the new appendices with regard to the statutory auditors' oversight activities intended for the timely detection of the losses on a going concern basis and of

⁵² Rule 11 is dedicated to the various types of business crises, aimed at regulating the activity of the Board in a business crisis, taking care to indicate which behaviours should be considered appropriate for each case.

company crisis (Regulations 11.1. and 11.2.)⁵³ derived directly from the provisions contained in art. 2086, paragraph 2, of the Italian Civil Code.

The reform of the Crisis Code brings out the versatility of the functions of the internal control body within the corporate organization⁵⁴.

According to art. 2403 of the Italian Civil Code, aside from the traditional supervisory task the internal control body has, it becomes a driving force for the directors and, in the event of inaction on the part of the latter, it will take appropriate initiatives in its place. The functions that this body is called upon to perform in the emergence of the first signs of crisis require continuous monitoring of management activity in order to promptly intercept the existence of a crisis; moreover, if the control and reporting activity is timely, the alert function carried out by the internal control body can turn into an alternative corporate recovery tool that ultimately avoids recourse to insolvency procedures.

However, this broad spectrum of power attributed to *Collegio sindacale* entails a considerable amount of responsibility.

On the one hand, to encourage the use of the alert procedure, the legislator provides for the possibility of exempting the supervisory body from joint and several liability with the administrative body for damages deriving from actions taken subsequent to the alert warnings, on the other hand this mechanism would constitute a “green light” to unchecked and premature reports that do not include a clear assessment of the crisis indices and an effective application to entrepreneurial activity.

More specifically, the legislation has been intent on identifying and investing a specific responsibility on the entrepreneur and the bodies in charge of governance and control functions, attributing to each of them specific functions aimed at dealing with and promptly identifying any situation of crisis. Among the provisions issued

⁵³ The supervisory activity entrusted to the corporate control body on the possible occurrence of a business crisis has a consequent impact on the minutes. Refer to MARCELLO-POZZOLI, *Nel report anche le misure adottate dagli amministratori*, in *I focus*, Il Sole 24 Ore, n. 9, March 27, 2019.

⁵⁴ This aspect was highlighted by BAUCO, *Il ruolo dell'organo di controllo nelle procedure di allerta e composizione assistita della crisi*, in AA.VV., *Crisi di impresa e insolvenza. Diritto ed economia delle crisi aziendali*, Santarcangelo di Romagna, 2020, p. 89 ss.

As known, with Legislative Decree 12 January 2019, n. 14 (published in the Official Gazette no.38 of 14 February 2019) after a long and tortuous approval process, the second major reform of the insolvency procedures was implemented (the first reform was implemented in the 2015-2017 two-year period) which substantially shed light on the new “Code of Business Crisis and Insolvency” in implementation of Law 19 October 2017, n. 155 (from hereon in the “Crisis Code”). With the reform, the legislator intended to restructure the bankruptcy law by placing the emphasis not so much on the situations in which the company had irreversibly reached its terminal prodromal phase, therefore on the declaration of bankruptcy, but rather on the case in which it was still possible to stage an intervention to safeguard its survival on the market. In other words, the legislator was particularly interested in defining the functional rules for a preventive and timely diagnosis of a possible phase of crisis, in order to facilitate an intervention aimed at preventing this state from converging into a structural and irreversible insolvency.

with the aforementioned intent, we must consider the modifications to art. 2086, second paragraph, of the Italian Civil Code which to present day emphasizes the role of the entrepreneur operating as part of a collective or corporate model; it outlines an adequate organizational, administrative and accounting framework even for the *timely detection of a company crisis and the loss on a going concern basis*, as well as the need for the entrepreneur to take prompt action through use of one of the appropriate tools to overcome the crisis identified by legislation, in those cases which the emergence of a crisis becomes a real threat to business continuity. A similar type of responsibility lies with the directors of the company, who are required to answer to corporate creditors *for non-compliance with the obligations inherent to the conservation and integrity of the corporate assets* (art. 2476 of the Civil Code).

The most relevant circumstance, however, lies in the charge of statutory auditors and auditors to comply with specific communication obligations in the event that there is any indication of the emergence of a crisis. In effect art. 14 of the decree regulates this circumstance, governing that: *“the corporate governance bodies, the auditor and the audit firm, each within the scope of their functions, have the obligation to verify that the administrative body continuously evaluates if the organizational structure of the company is adequate, if there is economic and financial equilibrium and what the foreseeable management operations are, as well as the obligation to promptly report the existence of tangible indications of a crisis to the governance body”*. Therefore, the Board of Statutory Auditors as well as the statutory auditor have a preeminent role in identifying and reporting a company crisis. The regulation provides for three types of obligations the supervisory bodies have to abide by: 1) they must verify that the administrative body constantly evaluates the adequacy of the company’s organizational structure, the sound economic and financial equilibrium of the company and the foreseeable management operations⁵⁵; 2) they must report the existence of tangible indications of a crisis to the administrative body; 3) they must inform the crisis management team without delay in the event the administrative body provides an inadequate reply or fails to reply⁵⁶.

⁵⁵ This means that in the context of its supervisory tasks on the adequacy and fair functioning of the internal control system (which are carried out, for example, through the examination of job descriptions and internal manuals containing company procedures, periodic meetings and interviews with management, directors and statutory auditor, sample compliance checks on company procedures and their correct operation ...), the Board of Statutory Auditors must verify that the company’s procedures are able to systematically and promptly produce periodic economic and financial situations, cash budget and past due situations (employees, suppliers, VAT, contributions ...), useful for bringing out the crisis indicators provided for by art. 13 of the Crisis Code. See MARCELLO-BOZZA, *Controllo delle situazioni contabili trimestrali da chiarire*, in *Eutekne.info*, November 14, 2019; MARCELLO-POLLIO, *Normalizzate le informative*, in *Italia Oggi*, November 4, 2019.

⁵⁶ ASSONIME, with Circular no. 19 of 2 August 2019, *Le nuove regole societarie sull’emersione anticipata della crisi d’impresa e degli strumenti di allerta*, illustrates the provisions of the new Code of

These obligations, together with the new definition of the concept of crisis, express an organizational duty aimed at the constant monitoring of imbalances related to income, assets and finance, detectable through specific indicators⁵⁷ that give evidence of the non-sustainability of debts for at least the following six months, as well as of the prospect of going concern⁵⁸.

While the administrative body is called to “deal with” and “evaluate”, the Board of Statutory Auditors “supervises” the adequacy of the organizational, administrative and accounting frameworks put into place by the directors as well as the efficient functioning of these frameworks⁵⁹.

The new role attributed to the Board of Statutory Auditors according to the rules on company crises must therefore be traced back to its traditional functions entrusted to it by legislation on the basis of the general principles referred to in art. 2403 of the Italian Civil Code, which outline a concept of supervision intended as general and indirect surveillance of the adequacy of the company’s organizational, administrative and accounting structures⁶⁰.

the business crisis with particular regard to the provisions concerning the strengthening of the organizational aspects and the duties of the corporate bodies in order to effectively detect situations of crisis and loss of business continuity, the introduction of the alert procedures and assisted settlement of the crisis and the provision of rewarding measures to incentivize the entrepreneur to take timely action in dealing with the crisis.

⁵⁷ The CNDCEC, with the publication of the document made available on October 20 2019, the first indices developed what must be submitted for final approval by the Ministry of Economic Development. This processing is the result of a precise analysis carried out with the support of Cerved Group through tests carried out on extensive and representative samples, and taking into consideration the signs of crisis most frequently used in business practice, through the examination of about fifty financial indicators attributable to the following management areas: sustainability of financial charges and debt, degree of capital adequacy and composition of liabilities by nature of sources, financial balance, profitability, development and indicators of specific late payments.

⁵⁸ Among the most important innovations of the new Crisis Code, in addition to the identification of a specific responsibility of the statutory auditors and auditors regarding the reporting of any corporate crisis situations, there is the identification of a series of indicators that are able to diagnose insolvency situations in advance. For an in-depth analysis of the indicators and the most suitable methods for monitoring the crisis, see MARCELLO-CAFARO, *Gli indici di allerta: dalla diagnosi all'emersione della crisi*, in *RIREA*, 2019, p. 135. MARCELLO-OCCHINEGRO, *Indici predittivi dell'insolvenza a rischio di eccessiva soggettività*, in *Eutekne.info*, September 17, 2019; MARCELLO, *Indicatori della Relazione sulla gestione “tagliati su misura”*, in *Eutekne.info*, June 29, 2018; BOZZA-LUCIDO-MARCELLO, *La crisi d'impresa*, Napoli, 2011.

⁵⁹ According to AMBROSINI, *Aspetti adeguati e 'ibridazione' del modello S.r.l. nel quadro normativo riformato*, in IRRERA (ed.), *La società a responsabilità limitata, un modello trans tipico alla prova del Codice della Crisi. Studi in onore di Oreste Cagnasso*, Torino, 2020, p. 435, i compiti previsti dall'art. 2381, comma 3, c.c. “*si completano l'un l'altro in vista del Comune obiettivo di corretta gestione, ma che restano, anche concettualmente, fra loro distinti*”.

⁶⁰ Refer to BAUCO, *Il ruolo dell'organo di controllo nelle procedure di allerta e composizione assistita della crisi*, cit., p. 96.

Even in the warning phase, just as in the physiological phase of the life of an entity, going concern⁶¹ is an element that guides the duties and actions of the corporate bodies and it must be taken into consideration by the internal control body when assessing the performance of corporate management.

That is why each time the Board of Statutory Auditors, even following the exchange of information with the person in charge of the legal audit, or information obtained from the reports drafted by the management body at least every six months, deems that the internal control and structures are not adequate to detect signs that could raise significant doubts regarding the ability of the company to continue operating as a going concern, it is advisable to:

- verify compliance with current legislation on the assessment of business continuity;
- take note of the existing conditions and circumstances that generated the loss of going concern;
- request information and clarification from the management body (See Regulations 4.2. and 5.2.);
- ask the administrative body to promptly intervene by putting in place suitable measures to guarantee going concern in the event doubts arise or the information and clarifications received from the directors is insufficient by using one of the tools provided by the law for the recovery of continuity (such as capital transactions, modification, other extraordinary operations and transactions, corporate restructuring plans, recovery tools provided for by the law, etc.);
- oversee the implementation of the measures adopted by the administrative body, urging compliance with the implementation times of the various actions established by said body aimed at restoring business continuity.

It is advisable for the Board of Statutory Auditors to carefully supervise and carry out controls and inspections; the more significant the circumstances are, all the more targeted the supervision should be, to the point of even intensifying inspection.

⁶¹ For a more in-depth review see MARCELLO, *La continuità aziendale nella crisi d'impresa*, Document of October 15, 2015, Fondazione Nazionale dei Commercialisti (FNC); MARCELLO, *L'accertamento della continuità aziendale nella crisi di impresa: metodologie e prassi professionale*, in *Società e Contratti, Bilancio e Revisione*, 10, 2015, p. 84; MARCELLO, *Misurare la continuità aziendale non sarà solo ai fini del bilancio*, in *InstantBook Italia Oggi, Il Codice della crisi d'impresa*, 2019; MARCELLO-POZZOLI, *Per la continuità rilevano anche i fatti post chiusura*, in *I focus*, Il Sole 24 Ore, n. 6, 27 February 2019.

7. Relations with the *Organismo di vigilanza*

In the context of the Code of Conduct for the Board of Statutory Auditors, the Rule 5.5 that addresses relations with the *Organismo di vigilanza* (Supervisory Body) certainly deserves some reflection, particularly in light of the new duties placed on the supervisory body by both the business crisis code as well as, albeit indirectly, the growing list of predicate offenses in terms of partial inclusion of tax offences covered by the liability of the entities.

The reform of the Crisis Code is inspired by the logic of the risk approach, already typically used in the drafting and evaluation of Model 231 where the prevention of corruptive acts and the sharing of information become functional and effective for a sound and adequate company management⁶².

It is well known that the efficiency and adequacy of Model 231 will depend on its being constantly and continuously updated⁶³.

Furthermore, the adequacy assessment⁶⁴ constitutes the central element of the whole system provided for by Legislative Decree n. 231/2001, since it is on this that effectiveness depends exempting the entity's liability. The organizational model is part of the protocols set out in the new art. 2086 of the Italian Civil Code and imposed on all companies and must be, as mentioned, adequate to the nature and size of the company, with respect to which the need arises to make an assessment of the adequacy of the organizational, administrative and accounting framework in relation to the specific corporate reality.

Adequacy is a requirement that must necessarily be implemented in a practical manner⁶⁵, characterized by a proactive collaboration between the various bodies

⁶² See RUTOLO, *Organizzazione di impresa e prevenzione del rischio insolvenza: dai modelli 231 ai sistemi di allerta del CCII*, in *Soc.*, 11, 2020, p. 1195.

⁶³ For a more in-depth review see ZANICHELLI-MULAZZI, *Assetti organizzativi: profili di attinenza tra il modello 231 ed il nuovo codice della crisi e dell'insolvenza*, in *Rivista*, 231, 4, 2019, p. 179 ss.; the Authors, in fact, contemplate that on an operational level the structure envisaged by the reform will have to translate into the adoption of a manual, possibly accompanied by a Code of Ethics, which describes in detail the individual items in which the new system is expressed.

⁶⁴ This judgment is divided into a double evaluation: the first concerns the suitability of the OMM, understood as the ability of the organizational and management structure to prevent crimes, the second, on the other hand, concerns the effective implementation, understood as the concrete implementation as provided in the abstract by the OMM 231, which also translates into the central role played by the SB.

⁶⁵ Refer to DE SENSI, *Adeguati assetti organizzativi e continuità aziendale: profili di responsabilità gestoria*, in *Riv. soc.*, 2-3, 2017, p. 348 ss.; the Author believes that the adaptation requires continuous checks and analyses, especially since the system must be adequate – what the entrepreneur has the duty to prepare is functional to the timely detection of the crisis and its management. Crisis detection and management activities are, by nature, internal to the administration and control functions, therefore a source of constant attention by the management and control bodies.

and, in this sense, information flows are of central importance as they should avoid “*the sudden onset of a crisis*”, since they are able to support the management bodies in adopting a conscious and timely conduct.

In the system outlined by the 2001 Decree, the engine of the overall structure of the framework is the Supervisory Board, which is entrusted with the function of adequacy control, albeit over different corporate aspects.

It should be noted that in order to exercise its duties, the Supervisory Board is “forced” to constantly interact with the supervisory and inspection bodies and the various corporate functions responsible for internal control, especially internal auditing⁶⁶.

The Rule 5.5 redefines the relationship between the Board of Statutory Auditors and the Supervisory Board. In particular, after establishing that “*For the purpose of carrying out the supervisory activity delegated to it by art. 2403-bis of the Italian Civil Code, the Board of Statutory Auditors acquires information from the supervisory board regarding the function assigned to it by law in order to monitor the adequacy, functioning and compliance with the model adopted pursuant to Legislative Decree no. 231/2001*”, the Standard requires the Board of Statutory Auditors to verify “*that the model provides terms and conditions favouring the exchange of information from the supervisory board to the administrative body as well as to the Board of Statutory Auditors*”.

The positive intent behind this recommendation is to strengthen the exchange of information between the corporate bodies and the Supervisory Board in order to ensure the effectiveness of the prevention activities carried out.

Therefore, in exercising its oversight duties and in compliance with the independence necessarily granted to the SB, The Board of Statutory Auditors⁶⁷ can establish the terms and procedures with the SB for the exchange of relevant information, agreeing, if necessary, on a setting up a program of meetings during the pe-

⁶⁶ This is a company function whose task is to carry out continuous and systematic checks, in implementation of the Audit Plan, agreed with the company board and in execution of the operational mandate issued to him. In particular, the internal audit must ensure that the main risks are managed correctly, taking into account the degree of risk appetite of the company determined by management, and the so-called acceptable risk, and that the risk management and internal control systems operate efficiently, therefore that any implementations are in line with the reference frameworks adopted by the company.

⁶⁷ It is recalled that the same supervisory body function can be attributed to the Board of Statutory Auditors (pursuant to art. 6, paragraph 4-bis, Legislative Decree no. 231/2001). The legislator therefore believes that the coincidence of the two functions in a single body is synonymous with the efficiency and effectiveness of the SB. However, the two functions remain distinct, albeit coordinated with each other, and separate documentary evidence must be provided for the activities carried out in carrying out them, therefore it is necessary to be aware of the activity carried out pursuant to Legislative Decree n. 231/2001 in minutes and in separate working papers with respect to the book of meetings and resolutions of the Board of Statutory Auditors and the related supporting documents.

riod aimed at verifying the existence of the conditions provided for by art. 6, paragraph 1, letter d), of Legislative Decree 231/2001.

The Board of Statutory Auditors must, therefore, activate specific information flows, in the sense of full reciprocity of information and data sharing aimed at guaranteeing periodic information on the activity carried out by the SB, especially with reference to the activity of adequacy checks of Model 231, how effectively it is being implemented and updated, with particular reference to the inclusion of the new predicate offenses which must be taken into consideration and the illustration of the procedures aimed at monitoring the related risk areas.

8. Concluding remarks

The issue of the Code of Conduct of the Board of Statutory Auditors of unlisted companies is part of a constantly moving legislative framework which over time has deeply reshaped the role of the Board of Statutory Auditors, directly and indirectly redefining the information profiles (both active and passive) at times even its contents, at other times only in the direction of the information flows. Therefore, the need was felt, as requested by several parties, for a rationalization of controls, which does not mean merely strengthening the “procedural apparatus”, but rather paying attention to the operational and concrete (and efficient) application of the regulatory data.

In this context, one of the main reasons behind the new standards was the institutionalization of a system of interorganic and intraorganic information flows with desirable and much-needed virtuous consequences not only within the company, but also on the market, for the benefit of all stakeholders.

Indeed, the effectiveness and efficiency of a company are strongly conditioned by the sharing of information on which the decision-making process in its various articulations is based. Moreover, the concept of “control” undeniably rotates in a central and decisive way around the circulation/acquisition of information relating to the functions subject to supervision as well as the activities and/or the acts and operations performed by monitoring the exercise of certain functions and the consequent carrying out of certain activities and/or the carrying out of certain acts and operations.