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Original Article

Memo Accounts Repealed 7 Years Ago are Still Relevant in Italy

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Abstract *- Corporate economic and financial communication intended for the outside world appears to be an increasingly central topic in the judiciary's rulings of merit, i.e. the courts of appeal, and legitimacy, i.e. the Court of Cassation. In this article, we will analyse legislation by the Supreme Court and Manhattan in September 2022 that declares the existence of false corporate communications, i.e. penal invalidity of financial statements, due to omission and curiosity. Memo accounts, i.e. those memo accounts that some legislations still provided to enter into the balance sheet but outside the assets, liabilities and equity. Memo accounts are simply memory accounts, but their essential function is to provide information to those outside the company to understand the overall situation of the company. Although they do not affect the company's assets or income, the Supreme Court has held that the omission of these accounts constitutes a cause of an offence and has therefore declared the financial reporting at issue to be penally false.*

Keywords *- Memo accounts, Financial statement invalidity, False corporate communications of a penal nature*.

JEL Classification Codes *– M 10, M 14, M 40, M 41, M 42.*

1. Corporate Communication: Regulatory Evolution Vs Corporate Attitude[1]

Corporate communication is an issue that has been addressed for decades from a theoretical and operational point of view to understand how a company can disseminate information on its economic, asset and financial situation and, at present, also on its sustainability action without being detrimental to privacy and to a right that must necessarily recognise, i.e. the right to confidentiality.

Communication is, of course, not only a subject related to companies and businesses in general. The concept of communication varies according to the sciences analysing this issue. For example, for rhetoric, communication is the art of arguing; phenomenology defines communication as the experience of the diversity of dialogue or confrontation between several subjects, and psychology interprets it as a relationship and interaction between several issues. For semiotics, communication is a relationship between several topics that takes place through a signed instrument. This is not the place to address the concept of communication in the broad sense, as our interest lies in financial reporting. However, it is interesting to understand the idea of communication if we are to adequately understand corporate communication of an income, economic, equity and sustainability nature.

From an etymological point of view, the term communication derives from the Latin word communis, which means to put in common. Even the dissemination of mere information, understood in the strict sense of the term, sets in motion a process in which a piece of news is 'shared' with others. As already clarified in the previous pages, in this work, we will use the two terms (information and communication) in this 'broadened' perspective without dwelling on specialised elements that are not within our competence.

Information and communication identify situations where a plurality of subjects, physical or legal, create a series of interactive relationships.

To conclude this brief introduction, however, we feel it appropriate to express our disagreement with those who maintain that so-called communication in the narrow sense should be addressed exclusively to sets of persons and not to individual subjects. Sometimes, specific data, especially within the company, may be addressed to pre-established persons to induce typical subjective behaviour, whether overt or covert.

In light of these preliminary observations, we can state that, according to logic, albeit one that partially simplifies the semantic reality of the terms used, financial reporting is undoubtedly a critical communication/information tool.

However, the fact that we do not wish to write a treatise on communication but rather a text on tax interference in the context of civil financial reporting does

[1] To facilitate reading, I have decided not to include in the text, except in exceptional cases, the names of the scholars who have dealt with the subject under analysis since the bibliography is endless, I have opted not to indicate all the terms of the scholars in the text because this would have meant a continuous interruption of the reading of the complete sentence in which I express my thought.

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not exempt us from the obligation to go into some specific considerations which, although falling within the semiotics/science of communication/linguistics, we believe to be helpful or, rather, indispensable for understanding the particular object of interest of this work.

As already set out in the preceding pages and will be explored more analytically in the following pages, the economic-financial communication implemented through financial reporting can have two types of interlocutors: internal or external to the company. The remainder of this work will point out that, externally, financial reporting is undoubtedly the information tool par excellence. At the same time, this set of documents within the company identifies only a minimal part of the data/news/knowledge elements/information intended for managers. The analysis of the main characteristics of the communication will therefore make it possible to understand whether and to what extent the fact that it intends for inside or outside the company affects the process of disclosure of the information object of our analysis.

The starting point for any consideration of communication is expressed masterfully by Watzlawich, Beavin and Jackson (1971) when they state that 'first of all, there is a property of behaviour that could hardly be more fundamental and, precisely because it is too obvious, is often overlooked: behaviour has no opposite. In other words, there is no such thing as non-behaviour or, to put it even more simply, it is impossible not to have behaviour. Suppose one accepts that the whole behaviour in an interaction situation has the value of a message, i.e., communication. In that case, it follows that, however one tries, one can not communicate [...]. To sum up, one can postulate [therefore] a 'metacommunication' axiom of communication pragmatics: one can not communicate'.

This theory, formulated by Watzlavich, Beavin and Jackson in 1967 after an in-depth analysis of the subject in question, created a veritable scientific revolution in the Kuhnian sense of the term, caused a profound break with studies developed previously; the definitions of communication formalised in the 1940s and 1950s, although they revealed a remarkable evolutionary process, had never explicitly highlighted this particular aspect of human behaviour.

Watzlavich, Beavin and Jackson analysed the consequences of what one might call an individual's 'passive behaviour' and stated that every individual, regardless of whether or not they have the goal of sending messages to third parties, communicates with the outside world by simply adopting or not adopting a particular behaviour.

The hypothesis of Watzlavich, Beavin, and Jackson derives the need for every individual to devise a real communication strategy since this is the only way in which subjects can plan and thus somehow keep under control the messages they voluntarily or involuntarily and continuously send to the outside world.

It is understandable how such statements, having considerable relevance in every field of human action, acquire particular importance in the corporate world, for whatever the company does or does not do, it communicates with the outside world. Therefore, even if a corporate image policy is not explicitly implemented, the company, with its attitude, assertive or omissive, communicates with the outside world by giving a positive or negative image of itself, depending on its behaviour.

Therefore, it is in the company's interest to plan its communication activities, as this is the only way to avoid the danger of sending unfavourable messages to third parties, perhaps unconsciously. As stated in the preceding pages, the main instrument of corporate communication to the outside world is the financial reporting of the year, concerning which all the general considerations that can express regarding a possible reticent and passive behaviour of the company not explicitly connected with economic-financial and asset communication apply.

Generally speaking, communication arises from a series of thoughts, evaluations, and insights experiences that transform into information. The latter, through mental representations, is an assertive or hostile act of behaviour, is transformed into communication and the latter into the news. Therefore, the information from which we start when we speak of financial reporting is not just thoughts and experiences. Still, these must supplement by a structured and consolidated cultural base in the accounting field. In corporate communication, it must add knowledge of the legal regulations of accounting principles and the subject matter concerning the drafting of the balance sheet, the income statement, the notes to the accounts, the management report and the integrated report to the birth of information. However, this information, through structures like the balance sheet, the combined statement, the sustainability report, or other documents, is transformed into communication disseminated outside the company. We have already had to repeatedly state how corporate communication has increased over time, both from a regulatory and accounting standards point of view and from a company attitude point of view. If one compares the situation at the beginning of the last century with the case today, one can see, in each country, a vast difference concerning the balance sheet, financial, earnings and sustainability-related communication that companies implement vis-à-vis the outside world. This is due to a considerable evolution in the legal regulations and accounting standards that financial reporting preparers refer to. Companies have also participated in developing the financial reporting culture. Compared to the beginning of the last century, many companies today are more favourable to disclosing the company situation fully. If, however, one analysis the legal regulations of the various countries and the accounting standards relating to financial reporting and the items that must include and the structures of the income statement and balance sheet that must apply and the content of integrated sustainability reports, one can say that there has been a remarkable evolution over the past decades, if you look closely at companies and talk to

managers in charge of corporate communication, you can see that while many companies are open-minded and have an inclusive communication culture, most small and medium-sized companies have not yet reached this level of awareness of the need for the company to provide the most comprehensive communication possible to third parties outside the company. If one then goes into the field of sustainability, the situation is even more striking. In the face of a regulatory evolution and standards issued by various national or international bodies concerning the integrated report and the sustainability report, there is a corporate behaviour that apparently and in words supports this evolution, but in fact, implements behaviour that is not precisely consistent with what is stated by national or international standards concerning sustainability (Avi 2022).

It is not the right place to delve further into the problem of corporate communication, which we take for granted. In this article, we intend to investigate how an abnormal situation can considerably influence today's corporate communication. The strange problem we are referring to is a judgement of the Court of Cassation, i.e. the last level of legitimacy in Italy, issued on 23 July 2022 (judgement no. 36012 of 9/23/2022), which analyses a 2010 financial reporting and, therefore, the judgement is based on the legislation in force in that year. Subsequent amend the legislation concerning financial reporting and the legislation regarding so-called false financial reporting or, as the code mentions, fraudulent corporate communications in the year considered by the Supreme Court. It could lead to the assertion that the ruling no longer has any reference to today's situation and is, therefore, of no current interest. Nothing could be more wrong. As we will see in the following paragraphs, the issue analysed by the Supreme Court, even if today's financial statements, could no longer be considered as the subject of the ruling or instead, one of the objects of the verdict has been eliminated from financial reporting by the reform in 2016 and is of current interest as it concerns, albeit indirectly, the concept of fairness in corporate reporting. From a reading of the ruling, which we will analyse in paragraph number 3, it is clear how, at a jurisprudential level, corporate communication is increasingly considered a fundamental element of a good relationship between the company and third parties outside the company. Therefore, what is of interest here is not so much the ruling itself as the message that the Supreme Court's interpretation spread through this decision. And, reading the judgment, one can understand how this interpretation is decidedly in favour of correct and broad dissemination of corporate communication that is not in the slightest harmed even by the lack of values that, in reality, belong neither to the assets nor to the liabilities nor the equity nor the costs nor the revenues of the company. The judgment refers to memo accounts, which, as we shall see on the following pages, no longer exist in various countries such as Italy, but which, even when they did exist by law, did not form part of the company's assets OR profit. Despite this, the Court of Cassation considered false financial reporting. It, therefore, combined the penalties for fraudulent corporate communications for the lack of such data, which by their essence belong neither to the company's assets nor to its income but are only additional information that, however, provide an overall picture of the company's global situation. Reading the Supreme Court's ruling, one can see how, although memo accounts belong neither to the company's assets or liabilities nor to equity or business income, they are endowed with their informational capacity, which, if absent, the company's communication. This means that for the Court of Cassation, with the ruling issued in 2022, even though it refers to legislation that is no longer in force and to accounts that are no longer used, it highlights how the notion of full disclosure that must disclose third parties firmly in the minds of the judges of the Supreme Court, which influence all other judges of the courts and courts of appeal, both civil and penal.

2. Memo accounts and their Relevance to External Corporate Communication

Memo accounts represent 'memory' entries that must record below total assets and the sum of liabilities and equity. Their primary characteristic is that they are recorded in the two sections of the balance sheet for equal amounts but do not affect the company's assets. These memorandum accounts were mandatory in Italy until the entry into force of Decree 139/2015, which repealed them. To understand the importance of the Supreme Court's ruling, which we will illustrate in the following paragraph, it is essential to understand these memo accounts even though, in Italy fully and some other countries, they are no longer required by the legislation governing financial statements.

In Italy, before 2015, Article 2424 Civil Code, paragraph 3, states that: "At the foot of the balance sheet, guarantees given directly or indirectly, distinguishing between sureties, endorsements, other personal guarantees and collateral, and indicating separately, for each type, guarantees given in favour of (rectius: on behalf of) subsidiaries and associated companies as well as parent companies and companies controlled by the latter; it must also disclose the other memorandum accounts '. As Principle No. 22 issued by the Organismo Italiano di Contabilità points out, 'memo accounts can be activated with the risk system are explicitly mentioned, but concluding requirement implies the obligation to indicate the other memorandum accounts, for identifying the necessary to follow the general principle enshrined in Article 2423 of the Italian Civil Code cited above. A clear presentation and a true and fair representation of the financial situation and the economic result achieved requires that the balance sheet always contain the memorandum accounts. Always contain memorandum accounts, obviously 'below the line', relating to risks commitments and third party assets."

Concerning valuation, the Civil Code did not dictate any rules. Principle OIC (Italian Organism of Accounting)

22, therefore, emphasised how the postulates of clarity and truthfulness/correctness must be observed, even for these accounts that are anomalous in that they do not affect the company's assets and income. Furthermore, OIC (Italian Organism of Accounting) 22 emphasised that "from the general principles mentioned above, it follows that it must determine the value associated with the administrative events to be recorded in the memo accounts prudently and reasonably. The first consequence of this principle was the need to avoid adopting symbolic values (e.g. 1 euro).

Not necessarily all commitments had to appear at the bottom of the balance sheet:

Those that could not quantify had to disclose in the notes to the accounts. Nominal values were also avoided as they were potentially misleading if not related to the risk or commitment undertaken by the company.

As can be seen, the Civil Code in the pre-2015 period did not address the issue of memorandum accounts in a particularly analytical manner. This situation entailed the inevitable application of what was stated in the national accounting standard OIC (Italian Organism of Accounting) number 22 since in that various standard issues were discussed in detail and illustrated in-depth manner:

- The definition of the characteristics and recognition methods of memorandum accounts
- The classification of memorandum accounts
- The valuation of such accounts.

In OIC (Italian Organism of Accounting) No. 22, the financial reporting preparer found all the necessary explanations to correctly identify and recognise memo accounts by assessing their value according to fairness and truthfulness.

Concerning the definition, characteristics, recognition and accounting presentation of memo accounts, accounting standard number 22 established precise rules, which can be summarised as follows:

Memo accounts are activated by supplementing the primary system of entries with minor or supplementary procedures whenever there is a need to highlight management events that, while not quantitatively affecting the assets and financial result at the time of their entry, may nevertheless produce effects at a later time.

From a strict accounting point of view, minor systems make it possible to maintain the formalism of double-entry bookkeeping and also to record those business events that cannot register in the primary method of entries; since they do not entail any changes in either the balance sheet or the profit and loss account these are risks, commitments and third-party assets at the company: their values are recorded in pairs of accounts that function in an 'antithetic' manner, in that one records the object (original aspect) and the other the subject (derived element). When the amount of risk, commitment or third-party assets is reduced, an opposite entry is made in the duplicate accounts. Thus, at the end of the financial year, the balance of each pair of accounts of each couple of memorandum accounts expresses the value of the risk, commitment or third-party assets still held by the company, to be shown 'under the line' in the balance sheet. In this regard, letter of civil law provision (Art. 2424(3)), the accounts as mentioned above are to be indicated in a single column at the foot of the balance sheet and separately, and the amounts expressed therein are not to be added to either the asset or liability totals. Although not expressly required by the rule, it is also deemed appropriate to implement the comparison with the previous year's values.

Finally, to avoid duplications detrimental to clarity, those events that have already been recognised (directly or indirectly) in the primary system should not be disclosed in the memo accounts since, in the hypothesis assumed, they are identified in the financial statements.

After having addressed the issue of the recognition and characteristics of memo accounts and after having given a precise definition so that companies would not incur interpretation errors, the first document or c 22, addressed the issue of the type of memo accounts that could record in financial reporting "under the line," i.e. outside the company's total assets and total sources. And in this regard, it is noted that, generally speaking of memo accounts, reference is made only to values present in the balance sheet. There was nothing to prevent memo accounts from being recorded in the profit and loss account, but this has never been common practice among companies. On a practical and theoretical level, therefore, when dealing with memo accounts, explicit reference is made to funds to be described outside the company's assets in the company's balance sheet.

Concerning the type of accounts, the OIC (Italian Organism of Accounting) document number 22, after pointing out that there was, in fact, no legal articulation of memo accounts, all scholars and practitioners referred to three broad categories of memo accounts expressly concerning

a) The risks assumed by the company
b) The enterprise undertakes commitments
c) Finally, third-party assets are deposited with the company.

Concerning the risks assumed by the undertaking, the document or c no. 22 pointed out that it was an obligation - expressly provided for in the third paragraph of Article 2424 of the Civil Code - to disclose at the foot of the balance sheet the guarantees given directly or indirectly. The securities mentioned above had to be distinguished between sureties, endorsements, other personal guarantees and collateral, with separate indications - for each type - of those given in the interest of subsidiaries, affiliates, parent companies and companies controlled by the latter, as well as those falling under the same management and coordination activities 3.

Regarding “indirectly” granted guarantees, a specific reference offer by the credit mandate which B undertakes vis-à-vis A (the originator) to give credit to C, in its name and for its account. In that case, the OIC (Italian Organism of Accounting) provides that since A is liable as a guarantor for future debt, the amount of the risk had to be entered in the memorandum accounts.

In the case of a surety given by the company in favour of the principal debtor’s guarantor, although the risk borne by the guarantor company was generally remote, as it only became liable if the principal debtor and all of its guarantors were insolvent or discharged as incapacitated, the amount of the surety given was also disclosed at the foot of the balance sheet, with an appropriate commentary in the notes to the accounts.

In the notes to the accounts, in the case of a surety given by the company and other guarantors (co-guarantee), the total amount of the guarantee given was to be disclosed in the memo accounts. In contrast, if less, the total amount of the guaranteed debt at the balance sheet date was to be revealed in the notes to the financial statements. If a beneficial division was agreed upon, the pro-rata amount of the guarantee given was to be disclosed in the memo accounts, while the notes to the financial statements were to tell the total amount of the debt existing at the balance sheet date and the pro rata amount guaranteed. It was also deemed appropriate for the notes to the accounts to specify whether or not the beneficium excursions had been agreed upon since the intensity of the risk borne by the company was different in the two cases.

If the company had granted an “omnibus” surety, the outstanding amount of the guaranteed receivables at the financial reporting date had to be recorded in the memo accounts. The maximum amount guaranteed had to be stated in the notes to the financial statements.

Assignments of receivables with recourse create a risk situation for the assignor, who, as a recourse obligor, could be called upon to pay in the event of the assigned debtor’s insolvency. For the sake of clarity and provided that the claim was not retained as an asset, these risks had to be disclosed separately from those arising from the “guarantees given”. Where, in assignments without recourse, the assignor had provided security (e.g. an “upstream” deductible), the relevant risk had to be disclosed in the memo accounts.

Other guarantees are given (as provided for in Art. 2424 of the Civil Code) included “strong” (or binding) comfort letters, which therefore had to be recorded in the memorandum accounts. On the other hand, ‘weak’ (or simple) letters of comfort did not require any entry in the memorandum accounts. The latter contained tenuous and generic reassurances (or ‘comfort’) to the ‘creditor’ as to the successful outcome of the transaction so that there was no risk of future disbursement lay in store for the patronnant.

Instead, the declaration of continued solvency and the declaration of assumption of the risk of loss constituted “strong” patronage and, therefore, had to be disclosed at the foot of the balance sheet.

The presence of memo accounts relating to risks for all guarantees given required that when preparing the balance sheet, if it was probable 6 that the guarantor would call the security, the recourse claim was compared with the guarantee obligation. If the (nominal) value of the latter was deemed to exceed the realisable value of the former, the difference was set aside “above the line” in the balance sheet in an appropriate risk provision.

The obligation to enter personal and real guarantees in the memo accounts was inherent in those granted in favour of creditors for the debts of others. In the case of fundamental guarantees relating to one’s debts, the pledged or mortgaged asset was subject to the risk of expropriation. This circumstance did not constitute grounds for entry in the memorandum accounts, as the asset remained entered at its value on the assets side. At the same time, the debt was joined on the liabilities side and was also reported in the notes to the accounts 7. In the latter document, it was considered appropriate to adequate disclosure of the asset item to which the asset - pledged or mortgaged - belonged.

These considerations, by analogy, were also applicable to the case in which the company, having constituted one or more earmarked assets according to Article 2447-bis et seq. of the Civil Code, had granted guarantees to third parties for obligations incurred by the earmarked assets.

Indication in the memo accounts of personal or collateral guarantees issued by third parties in favour of the reporting company was deemed unnecessary, as these strengthened the prospects of realisation of the receivables to which they relate and would be appropriately disclosed in the notes to the financial statements.

Personal and collateral guarantees issued by third parties for debts of the reporting company were likewise not disclosed at the foot of the balance sheet but in the notes to the financial statements, as such disclosure helped assess the company’s financial position.

In the presence of assets earmarked for a specific business, if the resolution of allocation provided for unlimited liability of the company for the obligations incurred (i.e. not limited to the assets and rights constituting the earmarked assets), it had to appear among its memo accounts with a specific denomination (e.g., “Unlimited liability assumed in connection with the constitution of the earmarked assets XY”). The amount, which had to be indicated because it was expressly required by law, even though it was a guarantee for debts about the same legal entity set up by the company, had to be equal to the maximum risk incurred (i.e. the total of the obligations assumed, recorded under the liabilities of the

earmarked assets); account also had to be taken of the obligations and potential liabilities identified and recorded among the memo accounts in the financial reporting of the earmarked holdings according to the provisions governing this case, unless they had already required recording "above the line" in specific risk provisions.

If the companies' liability was limited in quantum, the maximum risk had to be limited to that amount. A similar entry, where it appeared that proceedings were in progress, was to be made for obligations arising from torts contracted in the performance of the 'business' for which the company was liable without limit. It should be noted that considering the different characteristics of the obligations and guarantees assumed by the company concerning the earmarked assets. It seemed appropriate to identify two distinct sub-items: the first distinct sub-items: the first related to the liabilities in the financial reporting of the earmarked assets, and the second to what the assets themselves had indicated in their memo accounts under commitments and risks.

In the presence of numerous memorandum accounts, the subdivision of the guarantees concerning the different categories of companies within the same group was preferable - for the sake of clarity - to be implemented with a specific table in the notes to the financial statements so that the total of the guarantees as mentioned above was shown at the foot of the balance sheet. The document was thus easier to read and understand."

Concerning the commitments undertaken by the Company, the OIC (Italian Organism of Accounting) document no. 22 established that "the stipulation of synallagmatic contracts - that were not with real effects - which, as long as they remained unfulfilled by both parties, did not influence either the composition of the assets or the entity of the economic result, did not give rise to recognition within the 'main system', but to recognition in memo accounts of the committee system. These accounts, although related to obligatory concrete relationships between the company and third parties, were to be entered 'below the line at the bottom of the balance sheet. They generally recorded values resulting from contracts with deferred performance entered into the financial year the balance sheet refers to. Such agreements gave rise to obligations assumed by the company towards third parties and the latter towards the former from their conclusion. These obligations had to be disclosed until the financial year when it ascertained the financial and economic changes inherent in the contracts' execution phase; however, not all obligations arising from contracts with a deferred performance by both parties were represented by memo accounts at the foot of the balance sheet.

In particular, the following were not to be reported in the memorandum accounts:

a) Standard orders received and to be carried out in the course of a manufacturing business and, in general, those commitments entered into on an ongoing basis by the enterprise;
b) Employment contracts, consultancy contracts of several years' duration and the like.

If, at the foot of the balance sheet, there were commitments for which an unbalanced contingency to the detriment of the reporting enterprise, an appropriate provision for risks is entered in B3 of the balance sheet liabilities. On the other hand, no account of the principle of prudence was to be taken off the inverse hypothesis. The memo accounts also included commitments associated with the conclusion of derivative contracts, the value of which depended on (or was derived from) the price of a given underlying financial asset or the level of a given reference parameter, such as a stock exchange index or an interest or exchange rate. These were contracts - the types of which are numerous and constantly evolving - of a financial risk hedging or speculative nature, from which derived rights and obligations related to the transfer, between the contracting parties, of financial risks inherent in the underlying primary element (contract), or the reference index".

Finally, the OIC (Italian Organism of Accounting) document number 22 addressed the issue of third-party assets held by the company. In this regard, the accounting standard pointed out that 'it was deemed necessary, even in the absence of an explicit reference in Article 2424 of the Civil Code, to indicate in the memo accounts the nature and value of third party assets grouped by nature that, temporarily, were held by the company as a deposit, pledge, security, processing, gratuitous loan (in the case, only if of significant value) and so on. These, while not affecting the size of the assets and results of the depositary enterprise, always entailed safekeeping with associated charges. At the same time, they could generate additional costs for damages in the event of asset loss and custodial liability.

The company could receive a security deposit in money, a fungible 'asset' par excellence, which became the company's property. In this hypothesis, the use of memo accounts was incorrect since the body of the financial reporting (on the liabilities side) indicated the liability for the deposit received.

It was not considered necessary to record in the memo accounts the company's assets 'with third parties on deposit, pledge or loan. Instead, it commented on such situations in the memo accounts. In the case of promises for third-party debts, the fact was highlighted at the foot of the balance sheet as 'risk'.

If the company paid cash bailments, the bailment receivable was shown on the assets side of the balance sheet and not in the memorandum accounts."

After indicating the type of memo accounts that could or, instead, should be entered 'under the line' in the balance sheet, the OIC (Italian Organism of Accounting) standard 22 addressed the issue of the valuation of such items. Concerning this issue, and bearing in mind the postulates of financial reporting, the accounting standard

concerning memo accounts emphasised that it was forbidden to adopt symbolic or nominal values when these could be misleading. The OIC (Italian Organism of Accounting) document No. 22 emphasised that the valuation of risks for guarantees granted, both personal and real, connected to the debts of others had to be carried out by indicating in the memo accounts for an amount equal to the amount of the guarantee given. The accounting standard stipulated that the memo accounts should disclose the amount of the guaranteed debt if it were lower at the date of the financial reporting. Concerning guarantees, the accounting standard referred to what has already been stated in the section on commitments to third parties. In the case of assurances given by the company in favour of third parties in respect of debts denominated in foreign currencies, the accounting standard pointed out that it was necessary to convert the amounts into euros to assess the risk based on the exchange rate prevailing at the balance sheet date. If material, the foreign currency amounts of the guaranteed debt had to be disclosed analytically in the notes to the financial statements. If gages of various degrees were written on the company's assets, the total value of all mortgages had to be indicated in the memo accounts.

Commitments disclosed in memo accounts were to be stated at the nominal value provided, as noted above, this was not misleading for forward commodity contracts, currencies, and securities to be received or delivered; the document emphasised that the valuation of the commitment was to be made at the predetermined forward price. The amount in foreign currency was to be disclosed in the notes to the financial statements if this value was, in proportional terms, relevant. The OIC (Italian Organism of Accounting) document c 22 pointed out that if the commitment was to be defined not in monetary terms but in terms of physical units, the market value of the assets at the end of the financial year was taken as the parameter.
Concerning third-party assets, the valuation of such assets was to be carried out at nominal value in the case of unlisted fixed-income securities, at current market value if available, in the case of assets, shares or fixed-income securities if listed, at the value taken from existing documentation in all other cases.

The OIC (Italian Organism of Accounting) document 22 concluded that the notes to the financial statements should provide certain specific information regarding memo accounts; in particular, it recalled how the messages to the financial statements should show:

a) Commitments not disclosed at the foot of the balance sheet;
b) Information on the composition and nature of such commitments and memo accounts, knowledge of which helps assess the company's balance sheet and financial position, specifying those relating to subsidiaries, associates, parent companies and companies subject to the control of the latter, as well as, if different, those falling under the same management and coordination activity
c) The sureties were given to other guarantors, with appropriate details on these, the principal debtor and the creditor;
d) The total and pro-rata amount of the debt guaranteed, as at the balance sheet date, by co-guarantee with beneficial divisions, with appropriate details on the other guarantors, the debtor and the creditor
e) In the case of joint and several co-guarantees, the total amount of the guaranteed debt outstanding at the balance sheet date, with appropriate details of the other guarantors, the debtor and the creditor
f) The weak letters of comfort for the most significant commitments;
g) The basis used to assess the risk arising from the existence of earmarked assets;
h) Any other information required by the preceding paragraphs.

The notes to the financial statements also provide, separately for each item, the number of receivables and payables relating to transactions involving an obligation for the purchaser to repurchase the assets on a forward basis."

As we have previously noted with the financial reporting reform implemented by Legislative Decree 139/ 2015, memo accounts have been repealed.

However, the information in the memo accounts has not been abolished. In fact, with the 2015 reform, the notes to the financial statements must disclose the following:

The total amount of commitments, guarantees and contingent liabilities not disclosed in the balance sheet, with an indication of the nature of the collateral provided; existing commitments in respect of pensions and similar obligations, as well as commitments made to subsidiaries, associates, as well as parent companies and companies controlled by the latter, are separately disclosed.

It should be emphasised that the new legislation introduced in 2015 does not only deal with guarantees but also with contingent liabilities not disclosed in the balance sheet or the context of commitments; the OIC (Italian Organism of Accounting) standard 31 explicitly states that in the event of contingent liabilities that are considered probable but whose amount cannot be determined except on a random and arbitrary basis, an indication must be given in the notes to the financial statements of the contingent liability considered probable. This information must show the uncertainty over the material that would give rise to a loss, the estimated amount and an indication that it cannot determine the amount. The notes to the financial statements must also show other possible effects if not apparent and express the opinion of the company's management, its legal advisors and other experts available.

The information previously given in the memorandum accounts is now represented in the notes to the financial statements, which is the third constituent document of financial reporting, together with the balance sheet, income statement and cash flow statement. The big difference

between the pre-2015 and the post-2015 situation is that before the reform, the information given through the memo accounts probably paid less attention to operatives and those who prepared the financial reporting than to preparing the notes to the financial statements.

The information we have discussed so far, to be disclosed in the memo accounts before 2015 and in the notes to the financial statements after 2015, identifies information that, although not part of assets or income, represents valuable information to third parties outside the company. However, before 2015, there was a widespread practice of underestimating the importance of memo accounts. Often, there was an apparent omission of information by those preparing the financial statements. Since they did not consider accounts that did not affect assets and income to be relevant, such memo accounts were often not recognised in the balance sheet. Therefore it did not disclose the information to third parties. This situation was widespread, especially in small and medium-sized companies, where importance was given to balance sheet and income accounts gave less importance was given to accounts which, despite having potentially relevant information content, had no impact whatsoever on either assets or liabilities or equity, let alone costs or revenues.

3. False Corporate Communications as a Consequence of Non-Disclosure of Memorandum Accounts: The Current Position of the Court of Cassation

Memo accounts have always been the subject of a blatant underestimation of their relevance, both by doctrine and practice. It can be seen from the tiny space in books and articles generally devoted to this issue and the fact that, in many companies, it did not recognise memo accounts even in situations that would have made them mandatory. It believed that the accounts that mattered were the accounts that had to be recognised in assets, liabilities, equity, total expenses and total income. Since memo accounts were identified 'below the line', i.e. under total assets and total company sources in the balance sheet, little theoretical and operational relevance was attached to such memo entries because, in essence, memo accounts represent precisely memo accounts. Such a position is erroneous from a legal point of view because, in the pre-2015 period, the Civil Code explicitly provided for recording such memo accounts at the bottom of the balance sheet. The absence of the values required by the code was a deficiency and rendered the balance sheet invalid. It is well known that incorrect financial reporting can fall into the civil or criminal sphere. In the civil sphere, one falls when the three postulates of correctness, clarity and truthfulness are not observed due to error, lack of knowledge of the rules, or incompetence. In the civil sphere, therefore, there is no question of unjust profit or misleading third parties, but simply not applying the rules or misapplying the regulations without the aim of gaining economic or other advantages or of blatantly dishonest third-parties as to the company's assets, income and financial situation.

When incorrect transactions are made in financial reporting to obtain an unfair personal gain or with the aim of misleading third parties, one enters the realm of criminal offences as accounting operations that lead to the determination of incorrect and untrue values represent a criminal offence. In Italy, in addition to false financial reporting of a quantitative nature, there is also false financial reporting of a qualitative nature, i.e. linked to the clarity of financial statements. This is not the place to address the issue of qualitative misrepresentation. Still, it is necessary to understand how false corporate communications, and thus the criminal offence of preparing an invalid financial report, is linked not only to the substance of the values but also to the form and, thus, to the formal structure laid down by civil law.

The judgment of the Court of Cassation penal of 23 September 2022, number 36012, section five, dealt with an interesting case that concerns the memorandum accounts among the various issues addressed in the judgment.

First, we consider it essential to refer to Article 2621 of the Civil Code, which regulates the criminal offence of false corporate communications. This article was amended, concerning what was previously provided for, by Law No. 262 of 28 December 2005, Article 30, and was subsequently further amended by Article 11 of Law No. 69 of 27 May 2015.

Article 2621 of the Civil Code in force at the time of the facts on which the Court of Cassation was to rule was introduced by Law No. 262 of 28 December 2005.

Based on this article, the Court of Cassation had to take a position on financial reporting in which the memo accounts were incorrect. The Supreme Court ruled as follows: "Without prejudice to the provisions of Article 2622, directors, general managers, managers in charge of drafting accounting documents corporate accounting documents, auditors and liquidators, who, to deceive shareholders or the public and to obtain for themselves or others an unjust profit in financial statements, reports or other corporate communications provided for by law, addressed to the shareholders or the public, state material facts untrue material facts, even if subject to evaluation, or omit information whose disclosure is required by law on the economic, asset or financial situation of the company or the group to which it belongs in such a way as to mislead the addressees on the problem, as mentioned above, shall be punished with imprisonment of up to two years.

The punishment extended to cases where the information relates to assets owned or administered by the company on behalf of third parties.

Punishment is excluded if the falsehood or omission does not significantly alter the palpable representation of the company's economic, asset, financial, or financial situation or the group to which it belongs. The punishability is, however, excluded if the false statements

or omissions lead to a change in the financial result for the financial year before taxes not exceeding 5 per cent or a change in net assets not exceeding 1%.

In any event, the act is not punishable if it is the consequence of estimates estimated valuations which, individually considered, differ by no more than more than 10 per cent from the correct one.

In the cases provided for in paragraphs three and four, the persons referred to in paragraph one section shall be subject to an administrative sanction of ten to one hundred shares and disqualification from the executive offices of legal persons and companies from six months to three years, from exercising the office of director, auditor, liquidator, general manager and manager in charge of drawing up the corporate accounting documents, as well as from any other office with other offices with the power of representation of the legal person or of the company. With this ruling, the Court of Cassation practically sanctioned the chairman and vice-chairman of the board of directors of a joint-stock company for false corporate communications, including for the omission made in the memo accounts. In practice, the two directors avoided providing information on the value of the shareholdings held in their subsidiaries, thus significantly affecting the representation of the company to third parties outside the company. In this trial, the prosecution had emphasised the circumstance that in the memo accounts relating to the financial statements at issue in the criminal case, the directors had failed to disclose the value of the sureties and letters of patronage granted to secure the debts of the investee companies' banks over 13 million. The Court of Cassation punished this because the Supreme Court pointed out that memo accounts represent memo entries. Still, they constitute essential information for understanding the parent company's financial commitments to its subsidiaries. Even if memo accounts do not, therefore, affect the quantitative thresholds provided in Article 2621 cited above, they identify accounts of primary importance in the context of communication intended for external use and therefore omit such indications and not indicating the exact amount of intra-group financial commitments does affect as the Court of Cassation affirms, on the primary interest of transparency. It contributes to creating a false social communication about the company's actual asset, income and financial situation, a false representation, the Court of Cassation points out, which, regardless of whether or not it affects the quantitative thresholds, in any case, assumes criminal relevance. In this judgment, therefore, it is noted that the concept of misrepresentation, i.e., the invalidity of financial reporting, does not depend only on exceeding certain quantitative thresholds provided for in Article 2621 but also on the general information provided to third parties through the financial statements. And memo accounts in this context identify values that affect the representation that the entire information tool called financial reporting offers to third parties outside the company.

With Article 11 of Law No. 69 of 27 May 2015, Article 2621 of the Civil Code (which, with this and other articles, regulates criminal offences) governing false corporate communications was amended, and the new wording of the article is as follows:

Except for the cases provided for in Article 2622 of the Civil Code, directors, general managers, managers in charge of drafting corporate accounting documents, statutory auditors and liquidators, who, to obtain an unjust profit for themselves or others, in financial statements, reports or other corporate communications addressed to shareholders or the public, provided for by law knowingly present material facts that do not correspond to the truth, or omit material facts whose disclosure is required by law on the economic, asset or financial situation of the company or of the group to which it belongs, in a manner concretely likely to mislead others, shall be punished with imprisonment from one to five years.

The same penalty also applies if the falsehoods or omissions concern assets owned or administered by the company on behalf of third parties.

If the Court of Cassation were to address the issue of information that was required to be written in memo accounts today, in the current situation, there would be no interpretation problems since such data was included, as already been pointed out, in the notes to the accounts. Therefore the absence of information and notes to the accounts would constitute the prerequisite for the preparation of an invalid memo account, and should the criminal conditions for such invalidity exist, the existence of false corporate communications could be decreed.

The exciting circumstance is the judgement that is the subject of our article and that the Court of Cassation considered criminally relevant, in the presence of unfair profit and the will to deceive third parties, even the J absence of specific information that should instead have been contained in the memo accounts, i.e. in accounts that do not affect the company's assets and income. It demonstrates how, from a jurisprudential point of view, external corporate communication represents a well-established right of third parties to be protected against any company attempting to disclose relevant information or detect non-existent assets. The ruling of the Court of Cassation, which is the subject of our study, is therefore fundamental in so far as we can understand how the judiciary has fully understood what the doctrine has been spreading for years concerning the company's economic and financial communication to third parties external to the company. For decades a point of non-return has been reached. Still, now, with the ruling of the Court of Cassation mentioned above, we can stop the concept of the right to information that recognises by third parties external to the companies has become an extensive right and very well protected at a jurisprudential level. It is recalled at this. In some judgments, it also affirmed that drafting the management report, i.e. a document that is not

part of the financial statements, identifies an element to be considered when talking about the validity or invalidity of the financial reporting itself. Some judgments found financial reporting to be invalid where the balance sheet, income statement and notes to the financial statements were perfect (at the date of those judgments, the cash flow statement was not yet part of the financial statements). Still, it had drafted the management report in an approximate, deficient and superficial manner. The magistrates judged the financial reporting invalid because they signed that the complex information structure intended for the outside world also included the management report. Drafting the management report characterised by gaps, superficiality, omissions or erroneous indications compromised the overall corporate communication intended for the outside world, rendering the financial reporting itself invalid even though the management report was not part of it.

The judgment of the Court of Cassation, Criminal Court of 23 September 2022, number 36012, section five, has therefore added a further fundamental piece to the issue of corporate disclosure intended for the outside world. This ruling is, therefore, significant in the context of the problem of corporate disclosure to third parties outside the company, even if the verdict also deals, among other issues addressed, with memorandum accounts, which, we have already pointed out several times, are no longer provided for by the Italian legislation currently in force. The Court of Cassation's ruling is of fundamental importance in that it highlights a trend that it can no longer alter, namely the recognition of an ever-increasing right to information for third parties outside the company, at least in terms of assets, finances and income. on the subject of sustainability, there are still no rulings to affirm the trend of the judiciary in this field. OIC (Italian Organism of Accounting), while the EU sustainability directive was definitively approved in mid-October, this will have an impact on the annual report; we will see in the future what the attitude of the judiciary will be about the information on sustainability in a general sense and the various issues involved.

4. Conclusion

At the end of this short article, we can stop how the judgment of the Court of Cassation, section five, dated 23 September 2022, number 36012, even if issues a decision on memo accounts, among other issues, dealt with in the same judgment, which currently, at least in Italy, is no longer expected to be recorded "below the line" in the balance sheet, represents fundamental judgment in the field of corporate communication intended for external parties. Even though these memo accounts are only ones that do not affect the company's assets or income, they have been considered by the Supreme Court as fundamental elements of information intended for third parties outside the company. It means recognising the right to information of third parties external to the company appears to have been increasingly strengthened with time by both judiciaries of legitimacy, i.e. by Supreme Court, and of merit, i.e. by courts and appeal courts. This right to information appears more and more solid and increasingly recognised by judges who consider it the obligation of companies to provide complete, correct, truthful and precise information to third parties outside the company on the company's equity, income and financial situation. It should note that the lacunose or absent memo accounts were considered relevant in penal justice as the Court of Cassation, with previous judgement, decided on the subject of false corporate communications, i.e. the invalidity of financial reporting of a criminal nature. It means that the right to information of third parties is increasingly recognised and protected by the judiciary of merit and legitimacy.

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