Report from Italy

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1. Legislation

Securities legislation

1.1 The Italian Parliament implemented in April 2005 the EC Directive 6/2003 on "Market Abuse".[1] The reform replaced the former Articles 180 to 187 of Law Decree 58/1998, *Testo Unico dell'intermediazione finaziaria* (hereinafter, the TUF) with more than twenty new Articles (from 180 to 180- *quinquiesdecies* TUF), also amending some relevant rules on the information to be made public by listed companies (Article 114 TUF). Without portraying the rules on insider trading and market manipulation which simply reflect the harmonized regime brought about by the Directive, it may be worth briefly pointing out herebelow the more relevant innovations put forward by the new law:

a) Insider trading and market manipulation are now punished in Italy with both a criminal (Articles 184-185 TUF) and an administrative sanction (Articles 187-*bis*-187-*ter*, TUF), the latter inflicted by CO.N.SO.B., the Italian supervisory authority. The factual circumstances to which the sanctions refer are partially overlapping; hence there could be cases in which both sanctions may become applicable. In order to avoid a double punishment, however, Article 187-*terdecies* TUF, on one hand, put a cap on criminal pecuniary sanctions which may be inflicted on a person who has already been sanctioned with an administrative fine for the same fact and, on the other hand, sets out that from the amount of the criminal sanction is to be deducted the amount of the administrative sanction.

b) "Secondary insider" (i.e. the case where whoever obtains inside information is not an "insider" himself and passes on the information, or suggests an investment relying upon this information) is subject only to an administrative sanction (Article 187-*bis*, paragraph 4, TUF; under the previous regime this case was not punished at all).

c) Provided that under the term "market manipulation" is to be understood any diffusion of information, which is likely to influence the price of financial instruments, and every transaction or order to trade which can achieve the same goal (Articles 185 and 187-*ter* TUF), fictitious operations are now subject only to a criminal sanction (Article 185 TUF) whereas "real" – but misleading – operations and orders to trade, as well as any other form of deceptions or contrivance, which can influence the market price of financial instruments, are punished by both an administrative and a criminal sanction (Article 187-*ter*, paragraph 3, TUF).

d) The reform has significantly broadened the powers of the supervisory authority, according to Article 12 of the Directive (Article 187-*octies* TUF). Accordingly, CO.N.SO.B. can now have access to any document, require telephone and data traffic records, order the seizure of assets and have access to the data of *Centrale dei Rischi* of the Bank of Italy.

e) As anticipated, the transparency regime on inside information was changed (Article 114 TUF). According to the previous law, listed companies had to inform the public of any relevant *fact* which could influence the market price. According to the new Article 114, first paragraph, TUF, listed companies must now only inform the public of any relevant *confidential information*, as defined in Article 181 TUF; therefore, the application of the Directive seems to have restricted the area of information subject to the transparency requirement.

Accounting standards

1.2 A second relevant innovation of Italian corporate law is the new Act on International Accounting Standards (IAS)[2] which applies EC Regulation 1606/2002.[3] According to Article 5 of the Regulation, Member States can permit or require listed companies to also prepare annual accounts (*i.e.*, not only the consolidated account, as provided for in Article 4 of the Regulation), or other companies to prepare both the annual and/or the consolidated account, in compliance with IAS principles. Italy has resolved to subject to IAS principles also the annual accounts of listed companies, of companies not listed but whose shares are disseminated with the public as well as of banking and financial companies starting from 2006. The same companies can however opt for the application of IAS principles already with regard to the annual accounts closed on 31 December 2005.

2. Case law

2.1 In 2005 CO.N.SO.B. took an important decision on mandatory takeover bids and the concept of "persons acting in concert". The decision was (obviously) related to the Abn-Amro offer for the shares of

1 Directive 6/2003, 28 January 2003, in *OJCE* 12 April 2003, L 96/16.
2 Law-decree 28 February 2005, no. 38, in *GU* 21 March 2005, no. 66.
3 Regulation 1606/2002, 19 July 2002, in *OJEC* 19 September 2002, L 243/1.

the Italian bank Antonveneta.[4] CO.N.SO.B. noted that BPI financed third parties in order to allow them to purchase shares of Antonveneta; these shares were then sold on the market to BPI itself some time later, when BPI acquired a substantial stake in Antonveneta it needed to vote in the general meeting of Antonveneta of 30 April 2005 on the appointment of a new board fully supported by BPI. This circumstance was held as evidence of the agreement between BPI and the third parties, who therefore were considered as having acted in concert for the purpose of obtaining the majority of the shares of Antonveneta.

2.2 Again with regard to takeover bids, the Milan Tribunal, in turn, issued a very important decision on civil liability in the case SAI/Fondiaria.[5] The question at issue was whether one or more persons acting in concert who omitted to launch a mandatory bid according to Articles 105 ff. TUF were liable in respect of minority shareholders for the damages suffered by the same for the loss of the opportunity to sell their shares at the price which the omitted mandatory offer should have offered. The point was indeed that, with a previous decision, CO.N.SO.B. denied that, if the omission to launch the mandatory offer is detected after the lapse of the time period set by the law to mandatorily make the offer, the persons having acquired control cannot subsequently be ordered to launch the bid although the voting rights are suspended and an administrative fine can be applied.[6] The Tribunal of Milan granted the damages on the grounds that the mandatory bid vests a personal right in the minority shareholders of the "target" company.

2.3 Although dating back to 2004, it is also worth mentioning a decision of the Italian Supreme Court on companies' freedom of establishment.[7] The decision is significant because it referred to the case of an Italian company which transferred its registered office to another Member State in order to avoid the application of Italian insolvency law. The Italian Supreme Court decided that the company should be considered as being wound-up in Italy at the moment it transferred the registered office abroad, because according to the legislation of the country of "arrival" (Luxemburg) the transfer of the registered office implies a nationality and company law change. In other words, according to the Cassazione, both Italian rules of conflict and corporate law do not allow an Italian company to change the company law applicable to it through the "simple" transfer of the registered office. If this happens, according to the Italian Supreme Court, the company should be considered in liquidation under Italian law.

3. Developments on corporate governance

3.1 After the large scandals of Cirio and Parmalat in 2003 the Italian Parliament is debating a bill setting out new rules on corporate governance of listed companies, financial markets and supervision, with the aim to foster investor protection. For this purpose the bill endeavours to increase the powers and the role of minority shareholders. Accordingly, it provides that the board of listed companies should have at least one member elected by the minority and that the chairman of the supervisory or audit corporate body should be elected by minority shareholders; that the *quorum* in the shareholders' meeting for the approval of a derivative suit should be lowered; and that minority shareholders should be entitled to adjust the agenda of a general meeting.

3.2 Although the matter is highly controversial and many proposals have been debated up to now, it seems likely that the reform will be eventually enacted either in the next months (before the forthcoming closure of the current legislature) or immediately at the beginning of the next legislature.[8]

4 CO.N.SO.B., 10 May 2005, no. 15029, www.consob.it. *See* Malaguti – Onado, *Mercato concorrenza regole*, 2005, 331 ff.
5 Tribunal of Milan, 26 May 2005, in *Società*, 2005, 1137, www.lesocieta.it.
6 CO.N.SO.B. 27 December 2002, no. 2083933, www.consob.it.
7 Cassazione, 23 January 2004, no. 1244, *Rivista di diritto italiano e processuale*, 2005, 1381, for a comment and critics *see* Mucciarelli, *ECFR*, 2005, 512.
8 The bill was indeed approved by the *Camera dei Deputati* on 3 March 2005 (with the number AC 2436-A), but was then modified by the *Senato* on 11 October 2005 (AS 3328) http://www.senato.it/leg/14/BGT/Schede/Ddliter/22640.htm and it is now due for the final discussion at the Camera in the next weeks or so.