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Chronique

Recent developments in financial law in Italy (2014)

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Summary

A number of major reforms took place in Italian financial law in 2014. In addition to the amendments to company law affecting voting rights, the transposition of the AIFM directive in particular left its mark, as did the new provisions on the liquidation of real-estate funds.

Résumé

L'année 2014 a marqué le droit financier italien de plusieurs réformes importantes. Outre les amendements du droit des sociétés, s'agissant du droit de vote, c'est surtout la transposition de la directive AIFM qui a marqué les esprits, de même que les nouvelles dispositions pour la liquidation des fonds immobiliers.

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Introduction

1. The major developments in Italian financial law of interest for the Review occurred in 2014 relate to: (i) reforms on company law enabling the issuance of multiple voting and double voting shares and amending the existing provisions on takeovers; (ii) the (late) implementation of Directive 2011/61/EU on AIFM and (iii) new special provisions on the liquidation of real estate funds and on SiiQs.

1. New rules on company law and on takeovers

2. Article 20 of Law Decree 24 June 2014 No 91 as converted (with amendments) into Law 11 August 2014 No 166 put forward a step change in Italian company law, enabling private joint stock companies to issue multiple voting shares carrying up to three votes. This reform removed a long lasting prohibition of multiple voting shares and, in so doing, further increased the number of cases where, under Italian law, deviations from the proportionality (one share one vote) principle are permitted. Although the introduction of multiple voting shares is still prohibited for listed companies (once they are already listed) and it is thus *apparently* tailored as a simple enhancement of free bargaining for private non listed companies (i.e. as an additional tool made available to shareholders of closed corporations to engineer as they deem fit the better allocation of primary governance rights), the reform is in fact directed at promoting – at least in the lawmakers' declared intentions – the listing of public companies. It intends to respond indeed to market developments mostly occurred in recent years in the US where major technological companies like Google, Facebook, Linkedin, Groupon and Zynga made wide use of dual share structures at the time of their initial listings. It also responds to the reincorporation of the

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Italian car manufacturer FIAT in the Netherlands following the Fiat Chrysler merger with adoption of a dual share structure governed by Dutch law. Also Italian listed companies are thus deeply affected by this reform. The new provisions grandfather indeed for listed companies multiple voting shares that were issued before listing (new Article 127-sexies of the Italian Consolidated Act on Financial Law – Legislative Decree No 58 of 24 February 1998) and enable listed companies to issue further multiple voting shares in subsequent capital increases or in mergers or divisions. Contrary to US experience, however, Italian law does not require that multiple voting shares feature sunset clauses: the entrenchment of control via multiple voting shares can be achieved therefore permanently, whereas in most of the US cases mentioned above is was intended to last as long as the founder of the company was personally engaged in its management.

3. The same law, mirroring French double voting shares (recently amended by the so called loi Florange – loi 2014-384 of 29 March 2014), introduced a new Article 127-quinquies in the Italian Consolidated Act on Financial Law enabling the by-laws of listed companies to allocate "up to a maximum of two votes" to "tenure" or "loyalty" shares, i.e. shares continuously held by a shareholders for a period of at least 24 months. Differently from the current French system, however, double voting is not the default regime and must be opted-in by the articles of association. The Italian securities and markets authority (CONSOB) shall implement such provision through a regulation that is expected by the end of the year. It should be noted that double voting via loyalty shares and multiple voting shares cannot coexist in the same company.

4. This reform was complemented by new rules on takeovers, setting out that the mandatory takeover bid is triggered also by the achievement of the threshold via increase of the voting rights pertaining to loyalty shares and this applies also to those held by parties considered to be acting in concert. This provision commands some caution from the side of the fund industry in managing substantial stakes in Italian listed companies in the near future, because, unbundling the acquisition of voting rights from the acquisition of shares, it sets a deviation from the previously general rule that Italian mandatory offer could be triggered only by the acquisition of shares and sets the ground for the imposition of a mandatory bid also where the acquisition of voting rights is passive and automatic, without any underlying market transaction. This risk could be further enhanced by the fact that if the by-laws opt for the adoption of the conferral of additional voting power to loyalty shares, they can, *but are not obliged to*, permit eligible shareholders to waive such additional voting rights. In theory this makes it possible that crossing of the mandatory offer threshold due to the simple conferral of additional voting power to existing holdings might trigger a unintended and costly mandatory offer, unless the (vigilant) investor timely sells a proportion of its shares. It should be finally noted that both multiple voting shares and loyalty shares are expressly made subject to the Italian break through rule under Article 104-bis of the Consolidated Act on Financial Law.

5. The same law, following the model of 2012 US JOBS Act and of several current European initiatives, set special provisions for listed SMEs. In particular, it amended the thresholds whose crossing triggers the mandatory takeover bid, providing that the by-laws of listed SMEs – to be understood as those companies having an annual turnover not exceeding 300 million or a median market capitalisation not exceeding 500 million in the last three fiscal years – can adopt a different threshold from that set for other listed companies ranging from 25% to 40% of voting rights.

2. The AIFMD and its Italian implementation

6. According to its Article 66, Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 (hereinafter, the "AIFMD"), together with its level 2 implementing provisions[2] – directly applicable in all Member States – and ESMA *Guidelines on key concepts of the AIFMD* of 13 August 2013 (ESMA/2013/611)[3] should have been implemented *"by 22 July 2013"*. Italian implementation was partially made with a Consob and Bank of Italy joint regulation in July 2013 and was finally completed on 25 March 2014 through Legislative Decree No 44 of 4 March 2014 amending the Italian Consolidated Act on Financial Law. The implementation required a quite substantial revision of the provisions of the Consolidated Act on management companies and namely:

1) The revision of Part II (Regulation of intermediaries), Title III (Collective portfolio management), in particular of the regulation of variable capital investment company (SICAV) and of the new *fixed capital investment company* (SICAF): both were

2. Delegated Regulation (EU) No 231/2013 of 19 December 2012 regarding exemptions, general operating conditions, depositaries, leverage, transparency and supervision; Implementing Regulation (EU) No 447/2013 of 15 May 2013 establishing the procedure for AIFMs which choose to opt in under Directive 2011/61/EU; Commission Implementing Regulation (EU) No 448/2013 of 15 May 2013 establishing a procedure for determining the Member State of reference of a non-EU AIFM and Delegated Regulation (EU) No 694/2014 supplementing Directive 2011/61/EU that determines whether an AIFM is an AIFM of open-ended AIFs and/or closed-ended AIFs.
3. http://www.esma.europa.eu/system/files/2013-611_guidelines_on_key_concepts_of_the_aifmd_-_en.pdf.

linked to that of asset management companies (SGR);

2) The introduction of a new Article 4-*quinquies*, identifying special rules applicable to particular types of AIFMs under Regulations (EU) No 345/2013 and No 346/2013.

7. Under the new regime collective asset management is reserved, in addition to the already known asset management companies and SICAVs and EU management companies managing Italian UCITS, *to newly introduced (in Italy) SICAFs* and to EU and non-EU AIFMs managing an Italian AIF and is now aligned, with the relevant EU provisions. In particular, it is now possible for EU AIFMs: (i) to market EU AIFs in Italy to professional investors and certain other classes of sophisticated investors (to be identified through a Decree of the Ministry of Treasury) benefiting of the AIFMD passport under Article 32 of the Directive; (ii) to market EU AIFs in Italy to retail investors, subject to the AIFMD passport *and an ad hoc authorization to be granted by Consob*. It is also worth noting that the amendments to the Consolidated Act introduced a definition of "marketing of AIFs" consistent with the one adopted by the Directive, that "holding companies" (as defined in the AIFMD) were exempted from the Act; and new disclosure obligations were introduced, imposing that AIFs asset management companies inform Consob when their AIFs cross the thresholds of 10%, 20%, 30%, 50% and 75% of the voting rights in a non-listed company; the communication must be made within ten working days of the date of the transaction. Moreover, when they acquire control, they must report the acquisition also to the company. Further to the implementation of the Directive, although the AIFMD does not harmonize funds, the Italian Ministry of Economy and Finance launched a public consultation[4] for the recast of the Italian regulation of AIFs (currently regulated by Ministerial Decree No 228/1999)[5]. In turn, in June 2014, Bank of Italy and Consob jointly started a consultation[6] on the amendments needed to their implementing regulations[7] currently in force in the wake of the AIFMD implementation.

3. Reforms on real estates funds and real estate listed companies

8. Article 22 of Law Decree 24 June 2014 No 91 as converted (with amendments) into Law 11 August 2014 no. 166, responding to the deepening of the real estate crisis in Italy, set out special provisions for an extraordinary postponement of the duration of (listed) real estate funds "for a maximum period not exceeding two years to the sole purpose of completing the liquidation of their assets", upon approval of the unit holders. The same provision sets out detailed terms and conditions applicable to the funds admitted to this special regime in such grace period.

9. In turn, with Law Decree 12 September 2014 No 133, a series of measures were adopted in an attempt to revitalize the real estate sector and to assist Italian SiiQs (real estate investment companies listed) that are primarily engaged in real estates professional renting. The new regime (i) rose from 51 to 60 percent the eligible maximum percentage of voting rights in the ordinary shareholders' meeting that can be held (directly or indirectly) by a single shareholder; (ii) reduced from 35 to 25 percent the floating shares, i.e. shares held by shareholders not exceeding 2 per cent of the voting rights in the ordinary shareholders' meeting, unless the company is already listed (in such a case, no requirement applies); (iii) made also shares in real-estate funds, and their related income, eligible for the achievement of the requirement of 80 per cent of own assets; (iv) reduced from 85 to 70 per cent percentage of net profit required to be distributed to shareholders (payout). It is also worth noting that a specific provision was introduced to facilitate the transfer of properties between SiiQ and real estate funds. Indeed, a special fiscal exemption was granted when real estate funds undertake a total or partial liquidation by assignment opting for the SiiQ regime. In the same vein, in an attempt to support real estate funds and SiiQ Article 18 of the Decree liberalized large non-residential leases with a new provision stipulating that non-residential lease agreements at an annual rent of more than 150 thousand euro are not bound by the mandatory provisions of Article 79 of Law 392/1978 and can therefore be freely determined by the parties as they deem fit.

4. http://www.dt.tesoro.it/export/sites/sitodt/modules/documenti_it/regolamentazione_bancaria_finanziaria/consultazioni_pubbliche/Scheda_di_presentazione_regolamento.pdf.
5. http://www.dt.tesoro.it/export/sites/sitodt/modules/documenti_it/regolamentazione_bancaria_finanziaria/compendio_tuif/11_-_2007.pdf.
6. See http://www.consob.it/main/documenti/Regolamentazione/lavori_preparatori/consultazione_consob_bancaditalia_20140626.htm?symblink=/main/regolamentazione/consultazioni/ln_consultazioni.html or https://www.bancaditalia.it/vigilanza/cons-pubblica/proc_concluse/cons-concluse-no-norm/gest_coll_risp.
7. (i) Banca d'Italia – Consob Joint Regulation on the organisation and control of intermediaries supplying collective investment and management services; (ii) Consob Regulations on issuers and on intermediaries; (iii) Banca d'Italia Regulation on collective portfolio management.