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Italy Spices-up Its Recipe for Growth with New Measures Aimed at Reinvigorating Appetite for Equity Investments

BY [BRUNO COVA](#), [ANTONIO AZZARÀ](#) & SILVIO CAVALLO

Law decree No. 91 of 24 June 2014 (dubbed the "*competitiveness decree*", as converted into law,¹ with amendments, the "Decree") was published on the Italian Official Gazette (*Gazzetta Ufficiale*) on 20 August 2014, and became effective as of 21 August 2014.

The Decree, which is part of a broader reform package to promote growth and increase the competitiveness of the Italian economy, sets forth, *inter alia*, provisions specifically designed to encourage equity investments into listed and non-listed companies: a much-in-the-need commodity in a market traditionally over-reliant on bank debt financing.²

The most significant effects of the Decree may be summarized as follows:

- an Italian joint stock company (*società per azioni*) may now be incorporated with a share capital lowered to Euro 50,000;
- Italian joint-stock companies may now issue shares carrying multiple voting rights;
- differentiated mandatory tender offer regimes now apply to Italian listed companies, depending upon their size; and
- Italian listed companies may now issue shares carrying increased voting rights.

Certainly to be welcomed is the reduction in the minimum capital requirements for joint-stock companies, which brings Italy closer to European standards of company formation. By slashing start-up costs, the measure purports to render the joint stock company (which benefits from full separate legal personality and is designed to permit prompt and easy transfers of interests therein) the platform of choice for business and investments in Italy.

The introduction of shares carrying multiple votes (*azioni a voto plurimo*) provides shareholders with an additional tool for customizing governance arrangements to fit the specific needs of their organization. In particular, this measure may prove particularly attractive for owners of smaller, family-held businesses—many of whom have long been considering partnering with an equity investor, but have never made the move for fear of dilution—to open the capital base without relinquishing control. This may be good news for private equity investors too: a string of opportunities to invest into successful Italian companies looking for growth may materialize soon.

Regarding public companies, the Decree marks a departure from two traditional paradigms of financial regulation: "*one size fits all*" and "*one share, one vote*".

In particular, in a market dominated by medium/small enterprises, the introduction of an *ad hoc*, lighter-touch, tender offer regime and additional flexibility may encourage smaller companies to tap the capital markets and may be an incentive for institutional investors, often over-cautious for fear of high compliance costs and heavy-handed regulation, to invest in Italian listed companies.

Less clear-cut is the effect of the newly-introduced shares carrying increased voting rights (*azioni a voto maggiorato*). Institutional investors have traditionally been strong advocates of “shareholder democracy” and have been skeptical (if not overtly hostile) toward deviations from the “one share, one vote” principle.

However, in the Italian market, where pyramids and cross-ownership mechanisms are rife, increased voting rights shares may represent a more transparent way to secure control. In principle, the instrument also has the potential to encourage long-termism and may benefit institutional investors, which, since the start of the financial crisis, have been growing more active and aggressive.

This is not to say that increased-voting is immune from risk: it may be used to separate investment (and risk) from control and may permit the government (which is expected to launch a large-scale privatization campaign) to retain *de facto* golden shares after selling-off its stakes. A more in-depth judgment upon the instrument, however, would require reading provisions under the consolidated finance act³ (the “Finance Act”) in conjunction with second-level implementing regulations to be adopted by Italy’s stock market regulator, CONSOB.

The following is a summary of some of the most significant changes introduced to the Italian civil code (“Civil Code”) and the Finance Act, pursuant to provisions under the Decree.

Amendments to the Civil Code

Corporate Capital Requirement

As a result of the amendments set forth under the Decree,⁴ the minimum capital requirement for an Italian joint-stock company (*società per azioni*) is now Euro 50,000, a significant reduction from the previously applicable Euro 120,000 threshold.

Multiple-Voting Shares

The Decree⁵ allows Italian joint-stock companies to issue shares carrying multiple voting rights (*azioni con diritto di voto plurimo*), up to three votes per share.

Broad flexibility is permitted in designing the instrument: multiple voting rights, in fact, may be limited to certain matters and/or be subject to certain conditions, as specified in the by-laws.⁶

The resolution introducing *azioni con diritto di voto plurimo* may be adopted with favorable vote of shareholders representing two-thirds of the share capital present at the relevant shareholders’ meeting (irrespective as to whether convened at first or second call).⁷

Although not generally permissible for listed companies, a private company with *azioni a voto plurimo* shall be allowed to maintain multiple voting upon listing.⁸

Certain Extraordinary Transactions

The Decree increases flexibility and simplifies the formalities to effect certain extraordinary transactions, in particular with respect to:

- the acquisition of substantial non-cash assets from directors or shareholders in a joint-stock company;⁹

- the alteration of the status of an unincorporated entity (*società di persone*) to a body corporate (*società di capitali*);¹⁰
- pre-emption offers to existing shareholders in the event of the allotment of equity securities;¹¹ and
- the determination of the value of the shareholding upon withdrawal from a listed company.¹²

Amendments to the Finance Act¹³

Mandatory Tender Offer Regime

The Decree amends the Finance Act to distinguish between:

- small/medium enterprises (“SMEs”), *i.e.*, listed companies with a market capitalization lower than Euro 500 million or an annual turnover not exceeding Euro 300 million; and
- large companies (“LCs”), *i.e.*, listed companies other than SMEs.¹⁴

The creation of two separate classes of listed companies comes with the implementation of differentiated mandatory tender offer regimes.

In particular, under the formerly applicable regime, the obligation to launch a mandatory tender offer for the entire share capital of a listed company was triggered where a person held a shareholding in excess of 30%.¹⁵ Regarding LCs, the Decree introduces a new 25% shareholding or voting rights threshold, which applies other than where another shareholder in the company owns a higher shareholding.¹⁶ The standard 30% threshold continues to apply in all cases where the lower 25% threshold does not operate.¹⁷

SMEs, on the other hand, are given the option—as an alternative to the standard 30% threshold, which would apply if no choice is made—to determine the threshold triggering the obligation to launch a mandatory tender offer, within a scale ranging from 25% to 40%.¹⁸

In addition to the foregoing, SMEs may, by inserting *ad hoc* provisions in the by-laws, opt-out of the “consolidating” tender offer (*opa da consolidamento*) regime, whereby any acquisition of additional shares or voting rights in excess of 5% completed, in a period of 12 months, by any person holding certain qualified shareholding, triggers the obligation to launch a mandatory tender offer for the entire share capital of the company.¹⁹

Shares Carrying Increased Voting Rights

As a result of the Decree, listed companies (both, LCs and SMEs) shall be allowed to issue shares carrying increased voting rights (*azioni a voto maggiorato*), up to two votes per share, if maintained in the portfolio for a “loyalty period” of at least 24 months.²⁰ The increased voting rights attached to the shares are automatically forfeited in the event of any transfer of the shares²¹ or a transfer of the controlling shareholding in any vehicle holding such shares with increased voting rights.²²

A favorable regime has been introduced to encourage and facilitate the issue of shares with increased voting rights. In particular:

- the adoption of a resolution introducing the *voto maggiorato* will not allow dissenting shareholders to withdraw from the company;²³ and

- until December 31, 2015, the favorable vote of shareholders representing the majority of the share capital present at the meeting (irrespective of whether at the first or any subsequent call thereof) shall constitute a quorum for the adoption of a resolution introducing *azioni a voto maggiorato*.²⁴

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Milan lawyers:

Antonio Azzarà
39.02.30414.214

antonioazzara@paulhastings.com

Bruno Cova
39.02.30414.212

brunocova@paulhastings.com

Silvio Cavallo
39.02.30414.216

silviocavallo@paulhastings.com

¹ Law No. 116 of 11 August 2014.

² In fact, the Decree also contains measures facilitating the issue of bonds by non-listed companies and opening the loan market to non-bank providers, as discussed in details in our client alert "*Italy introduces measures to facilitate alternative funding*" of 7 July 2014 and available at: <http://www.paulhastings.com/publications-items/details/?id=b185e169-2334-6428-811c-ff00004cbded>.

³ Legislative decree No. 58 of 24 February 1998.

⁴ Section 20, paragraph 7 of the Decree, setting forth amendments to section 2327, Civil Code.

⁵ Section 20, paragraph 8-*bis* of the Decree, amending section 2351, paragraph 2, Civil Code.

⁶ Section 20, paragraph 8-*bis* of the Decree, amending section 2351, paragraph 2, Civil Code.

⁷ Section 20, paragraph 8-*ter* of the Decree, amending section 212 of the transitional and implementing provisions of the Civil Code.

⁸ Section 20, paragraph 1, subparagraph aa)-*bis* of the Decree, amending section 127-*sexies* of the Finance Act.

⁹ Section 20, paragraph 4 of the Decree, amending section 2343-*bis*, paragraphs 2 and 3, Civil Code.

¹⁰ Section 20, paragraph 5 of the Decree, amending section 2500-*ter*, paragraph 2, Civil Code.

¹¹ Section 20, paragraph 6 of the Decree, amending section 2441, paragraph 2, Civil Code.

¹² Section 20, paragraph 3 of the Decree, amending section 2437-*ter*, paragraph 3, Civil Code.

¹³ Please note that some of the provisions under the Finance Act, as amended by the Decree, may require the adoption by CONSOB, the Italian stock market regulator, of certain implementing regulation before fully coming into force.

¹⁴ Section 20, paragraph 1, subparagraph a) of the Decree, introducing a new subparagraph w-*quater*.1 under section 1, paragraph 1, Finance Act.

¹⁵ Section 106, Finance Act, as applicable prior to the enactment of the Decree.

¹⁶ Section 20, paragraph 1, subparagraph e) of the Decree, introducing a new paragraph 1-*bis* under section 106, Finance Act.

¹⁷ Section 20, paragraph 1, subparagraph d) of the Decree, amending section 106, paragraph 1, Finance Act.

¹⁸ Section 20, paragraph 1, subparagraph e) of the Decree, introducing a new paragraph 1-*ter* under section 106, Finance Act.

¹⁹ Section 20, paragraph 1, subparagraph 1) of the Decree, introducing a new paragraph 3-*quater* under section 106, Finance Act. Please note that opting-out of the "consolidating" mandatory tender offer regime is permitted for a period up to the fifth anniversary of the first shareholders' meeting held, after completion of the listing, for the approval of the financial statements of the company.

²⁰ In particular, see section 20, paragraph 1, subparagraph aa) of the Decree, introducing a new section 127-*quinquies* under the Finance Act.

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²¹ Pursuant to section 127-*quinquies*, paragraph 3, Finance Act, irrespective of whether for a consideration or not and other than where certain limited exceptions apply, in particular, with respect to (a) a *mortis causa* conveyance of the shares, and (b) a merger/de-merger of the entity holding the shares.

²² Section 127-*quinquies*, paragraph 3, Finance Act.

²³ In particular, section 127-*quinquies*, paragraph 6, Finance Act.

²⁴ Section 20, paragraph 1-*bis* of the Decree.