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Client Alert Commentary

Latham & Watkins Capital Markets Practice

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New Measures Aim to Support Listing and Capitalization of Italian Companies

The Italian Government aims to support investments and incentivize listing and capitalization of companies, with significant implications for both listed and non-listed companies.

The new rules were introduced by law decree No. 91 of June 24, 2014, published on the Italian Official Gazette No. 144 of 24 June 2014, as subsequently converted into law No. 116 of 11 August 2014 (the Decree). This alert briefly describes the newly enacted provisions affecting corporate law, both with regard to private and public companies.

Private companies

Corporate capital requirements

In order to facilitate the incorporation of joint stock companies (SpAs), the Decree lowered the minimum corporate capital requirements applicable to SpAs from €120,000 to €50,000. This change not only affects entities yet to be incorporated but also affects existing distressed companies: companies with losses that require recapitalization may now recapitalize up to €50,000, instead of €120,000, thus favoring restructuring processes. Further, the minimum capital requirements are now automatically reduced for certain regulated entities (*e.g.* financial intermediaries incorporated pursuant to article 106 of the Italian Banking Act), which are required to be set up with a minimum corporate capital defined as a multiple of the minimum required corporate capital set for SpAs.

Reducing the minimum corporate capital required for SpAs would have then required that all limited liability partnerships (Srls) with corporate capital exceeding the required minimum corporate capital for SpAs would have had to appoint an auditing body or a single auditor. In order to avoid imposing extra costs on such entities, the Decree also cancelled the provision imposing this duty and specified that Srls with an auditing body or a single auditor may now revoke such corporate bodies, in consideration of the newly introduced amendments.[1]

Multiple votes shares

The Decree introduced new rules superseding the principle “one-share-one-vote” by allowing the by-laws of SpAs to introduce a new category of shares with multiple votes: the multiple vote also can be applied in relation to specific matters or can be conditional upon the occurrence of specified events. One single share can entitle the holder to no more than three votes. The opportunity to introduce multiple votes shares has been debated for years: on the one side, the newly introduced rules align Italian legislation with that of other countries thus filling a gap that, at times, lead investors as well as Italian groups to

prefer other jurisdictions as a place of incorporation, in order to be allowed more flexibility in defining their control structure. On the other hand, some commentators have emphasized that creating a category of shares with multiple votes could contribute securing the control of companies in the hands of shareholders who are not willing to make more significant investments, creating an excessive gap between control and risk.

As expressly specified by newly introduced article 127-sexies of the Italian Financial Act, listed companies cannot issue shares with multiples votes, but only shares with increased voting rights to the benefit of long term shareholders. However, multiple voting shares issued before the listing of a company maintain their features and rights after the IPO. Unless the bylaws provide otherwise, in order to maintain the proportions among different categories of shares, listed companies that have multiple voting shares, or entities resulting from the merger or demerger of such companies, may issue multiple vote shares with the same features and rights of those already issued, solely in cases of a) a free capital increase or a capital increase implemented by means of new contributions without excluding or limiting option rights, or b) merger or demerger. In such cases, however, the by-laws cannot allow further increases of the voting rights in favor of specific categories of shares or by virtue of increased votes pursuant to newly introduced article 127-ter of Legislative Decree of February 24, 1998, No. 58 (the Financial Act). Notably, multiple voting shares would maintain the extra votes, when transferred.

The existence of multiple voting shares in a listed company also impacts the determination of the ownership thresholds triggering mandatory takeovers and publicity requirements, as detailed below.

Acquisitions from shareholders, founders and directors

The Decree also introduces changes to simplify companies' purchases from shareholders, founders and directors, by applying the simplified procedure contemplated by article 2343-ter of the Italian Civil Code, initially set forth only to govern contributions in kind. Commentators have been soliciting such a change so as to align the rules governing such purchases and the contributions in kind, because the legislators had so far unreasonably treated these differently with respect to applying the simplified procedure. This provision allows a company to avoid appointing an independent expert to release an appraisal on the value of the purchased assets if: a) the purchased assets are listed securities and their value — calculated as the average price of the exchanges on regulated markets in the preceding six-month period — is not less than the purchase price paid; or b) the purchase price does not exceed the fair value of the purchased assets, as reported in the last audited financial statements; or c) the value of the purchase price does not exceed the value of the purchased assets, as reported in an appraisal released by no more than six months before the acquisition. Similar exemptions apply in case of transformation of an unlimited liability partnership into a company with limited liability.

Term for the exercise of pre-emption rights

The Decree also reduced the minimum duration of the term, from 30 days to 15 days, for the exercise of the pre-emption right in the case of capital increases of SpAs whose shares are not listed on regulated markets, in line with the term set forth for listed companies.

This reduced term will also allow non-listed distressed companies under restructuring to more rapidly complete the required recapitalization procedures.

Public companies

The Italian legislators a) amended the framework applicable to mandatory takeover bids, b) introduced a simplified regime applicable to small and medium enterprises (SMEs) listed or to be listed on regulated

markets, by amending the Financial Act and c) introduced the possibility for listed companies to introduce increased voting rights for mid-term investors.

Simplified regime for SMEs

SMEs are defined as issuers of shares listed on Italian or EU regulated markets, which have, as evidenced by the financial statements relating to the last fiscal year, also before admission to trading of their shares, revenues up to Euro 300 million, or an average market capitalization in the last calendar year of less than 500 million Euro. In case the revenue and capitalization requirements are exceeded for three consecutive years, the issuer no longer qualifies as SME, and is thus subject to the ordinary regime applicable to listed companies.

In order to encourage the listing of SMEs with a restricted shareholding, mainly composed by family members, the Decree introduces the possibility for SMEs to amend their by-laws and set a different threshold triggering the mandatory takeover bid, ranging from 25 percent to 40 percent. So as to protect minorities from change to the by-laws which could negatively affect their exit right upon a takeover, the Decree provides the right to those shareholders — who were absent, abstained or did not vote in favor of the introduction of the amended threshold in the extraordinary shareholders' meeting called to resolve upon such change — to withdraw from the company, if the amendment takes place when the SME is already listed.

The Decree also favors SMEs by changing certain mandatory takeover rules applicable to those shareholders which already own more than 30 percent but less than 50 percent, in case they acquire more than five percent in a 12-month period (the so-called incremental mandatory takeover bid). This incremental mandatory takeover rule is aimed at granting minority shareholders an exit right in case the controlling shareholder further strengthens its influence on the issuer. In particular, the Decree introduces the option for SMEs to set forth in their by-laws that, for five years from the IPO, such incremental mandatory takeover rules do not apply. This allows controlling shareholders to launch an IPO, placing more than 50 percent of the capital on the market, thus increasing the liquidity of their shares and, on the other hand, keeping the possibility of repurchasing shares up to 50 percent of the voting share capital in the five years following the IPO, without an obligation to launch an incremental mandatory takeover bid.

Increased voting rights (*maggiorazione del voto*)

The Financial Act has been amended to allow companies, listed or in the process of being listed, to issue new shares or provide existing shares with increased voting rights to the benefit of long term shareholders. The risk of losing control of the issuer, once listed, as a result of share capital increases or other transactions which entail issuance of new shares — such as in mergers, the issue of convertible bonds, etc. — is one of the main factors preventing family-run companies from going public. The ability to grant increased voting rights may allow companies to increase the free float in an IPO and therefore the liquidity of shares, without diluting controlling shareholders.

In particular, companies which are listed or in the process of being listed may contemplate in their by-laws the granting of up to two votes per share held by the same shareholder for a consecutive term specified in the by-laws. That term may not be less than 24 months from enrolment in a special register, to be held pursuant to the requirements set forth in the by-laws.

The by-laws must also specify how the requirements for granting the increased voting rights will be met. Consob shall implement regulatory provisions to ensure transparency of shareholding and compliance with takeover bid rules. In particular, the provisions will require the issuer to periodically publish the total number of votes that can be exercised, also considering the increased voting rights.

Shares with increased voting rights are not a special category of shares and the resolution passed by the extraordinary shareholders' meeting to change the by-laws providing for such increased voting rights does not entitle shareholders who were absent, or abstained or did not vote in favor of such change to exercise the withdrawal right.

Furthermore:

- In case of transfer of increased voting rights shares to third parties, the benefit of the double vote automatically expires.
- The change in control of entities holding shares with increased voting rights exceeding two percent (or five percent, in case of SMEs) of the voting rights, causes automatic termination of the increased voting rights.
- Unless otherwise provided for in the by-laws, the increased voting rights remain in force in case of transfer of the shares mortis causa or in case of merger or demerger of the owner of the shares.
- In case of free corporate capital increase, the newly issued shares are granted increased voting rights.

Until January 31, 2015, the resolution to introduce shares with increased voting rights also can be passed on first call with the favorable vote of the majority of the corporate capital attending the meeting.

Unless otherwise provided for by the bylaws, for the purposes of calculating the attendance and resolution quora making reference to a percentage of the corporate capital, increased voting rights are also taken into account. The increased voting rights are not taken into account for the exercise of minority rights granted to shareholders reaching a minimum percentage (including call of the shareholders' meeting upon request by the shareholders, right to submit claims to the board of auditors or to the court; right to request integration of the items of the agenda to be discussed in a shareholders' meeting).

Significant participation rules and mandatory takeover rules have also been amended to ensure that increased voting rights are taken into consideration for the calculation of the relevant thresholds.

Mandatory takeover bids

Pursuant to article 106 of the Financial Act, shareholders acquiring shares with voting rights in shareholders meetings called to resolve the appointment or revocation of director (a Participation) in excess of 30 percent must launch a mandatory takeover bid. The Decree amended this provision so as to include the obligation for such shareholders to launch a takeover bid when, as a consequence of increases of the voting rights, those shareholders become entitled to exercise voting rights in excess of 30 percent.

A Consob-issued regulation shall specify in detail the method of calculating the Participation, also in case the issuer has shares with increased voting rights. Whether or not the regulation shall possibly confirm if multiple voting rights attached to shares must be considered, remains unclear.

The Decree introduces another lower threshold triggering mandatory takeover bids for companies other than SMEs: a mandatory takeover bid has now to be launched by who, as a consequence of purchases, holds a Participation exceeding 25 percent, in the event there are no other shareholders holding a higher percentage. Notably, under article 49 of the Consob regulation currently in force, an exemption from the obligation to launch a takeover bid applies to issuers, in cases of purchases resulting in the availability of

a participation exceeding 30 percent, when another shareholder (or more shareholders acting jointly) holds the majority of the voting rights in the ordinary shareholders meeting. Consob regulation will likely clarify if this principle will still apply to cases where the 30 percent threshold applies or if the newly introduced exemption applies to cases where the 25 percent thresholds is exceeded (other shareholders holding a higher percentage) will remain the sole exemption applicable to all cases.

Further, Consob regulation could also specify if multiple voting rights relating to the appointment or revocation of the board of directors should be considered, when calculating the 25 percent threshold.

In case of takeover bids, article 104-bis of the Financial Act now provides for the possibility to include in the by-laws a freeze of increased voting rights and multiple votes in excess of one per share, in shareholders' meetings called to resolved upon defensive measures to contrast a takeover bid or in shareholders' meetings held to appoint the board of directors after the acquisition of at least 75 percent of the corporate capital by the bidder.

Publicity requirements

In order to incentivize investments in SMEs by professional investors, Article 120, paragraph 4 of the Financial Act now requires that shareholding in SMEs in excess of five percent, instead of two percent, as the ordinary regime requires, must be notified to Consob and the issuer. Further, the Decree clarified that multiple voting rights and increased voting rights are considered when calculating the relevant thresholds, both for SMEs and non-SMEs.

Cross holdings and withdrawal

Aiming to avoid possible management abuses and double counting, Article 121 of the Financial Act and Article 2359-bis c.c., paragraph 1) of the Italian Civil Code set forth limitations to cross holdings. In order to encourage strategic alliances of SMEs, also listed, cross holding is now allowed up to five percent and in case of approval by the relevant companies' shareholders' meetings, this permitted cross holding can increase up to 10 percent.

The Decree also amended the criteria applicable in determining the share value in case of withdrawal from a listed company. Article. 2437-ter, paragraph 3 of the Italian Civil Code, allows more flexibility for the issuer's by-laws to provide parameters which are alternative to the average of the prices at close of market in the preceding six-month period, provided that such parameters are more favorable to the withdrawing shareholder, thus encouraging investors.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult.

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Endnotes

[1] Second paragraph of article 2477 of the Italian Civil Code was deleted.