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Client Alert Commentary

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Italy's Simplification Decree Introduces Measures to Facilitate Company Recapitalization

The provisions aim to help Italian companies overcome a lack of liquidity caused by the COVID-19 pandemic.

Facilitation of capital increases

Law Decree no. 76 of 16 July 2020 (the Simplification Decree), converted with amendments by Law no. 120 of 11 September 2020 (entered into force on 15 September 2020), has introduced provisions on corporate matters to facilitate capital increases by Italian companies. In particular, article 44 of the Simplification Decree, as amended by Law 120/2020, has modified the rules applicable to capital increases of Italian companies, providing for emergency measures of a temporary nature, and permanent measures. These provisions are part of a broader set of measures under the Simplification Decree focused on promoting simplification and digital innovation.

The Simplification Decree aims to put into effect the Italian government's previous efforts to help Italian companies execute recapitalization transactions with greater speed and ease. Such an approach is necessary in order for many companies to help overcome their lack of liquidity and financial challenges resulting from the COVID-19 pandemic.

Temporary measures

Lowered quorums for the approval of capital increase resolutions

The Simplification Decree provides[1] that certain shareholders' meeting resolutions adopted until 30 June 2021 by joint-stock companies and limited liability companies may be passed with the favorable vote of the majority of the share capital represented at the shareholders' meeting (instead of the higher two-thirds majority of the share capital required by applicable law or any higher majority required by the bylaws), provided that at least half of the share capital is represented.[2] The resolutions concern:

- Capital increases made in cash or through in-kind contributions or receivables[3]
- Bylaws amendments delegating to the board of directors the power to resolve capital increases until 30 June 2021[4]

Notably, these quorums aimed at facilitating capital increases are alternatives to those provided by law (which, depending on the circumstances, could be more convenient) — a fact that should be considered in order to assess the actual scope and usefulness of the quorums introduced by the Simplification Decree in relation to joint stock companies. In particular, shareholders' meetings of listed companies are normally held in a single call (unless otherwise provided for in the bylaws), and are therefore duly constituted when at least one fifth of the share capital is represented and resolve with the favorable vote of at least two thirds of the capital represented at the shareholders' meeting. For shareholders' meeting of listed companies held in a single call, therefore, it seems reasonable to conclude that if up to 49.9% of the share capital is represented at the shareholders' meeting, it would be convenient to apply the quorum provided by law (equal to two thirds of the represented share capital). However, if 50% of the share capital is represented, it would be convenient to apply the quorum provided by the Simplification Decree, equal to the simple majority of the represented share capital.

With reference to the shareholders' meetings of limited liability companies, to which the quorums provided for by article 44 have been extended when the Simplification Decree has been converted into law, the facilitation becomes clear when compared to both the quorum required by law and the statutory quorums. The quorum required by law is higher (at least half of the share capital) for the approval of capital increase resolutions, while the statutory quorums are often strengthened in order to reflect the "closed" shareholding structure of limited liability companies.

Regarding the possibility to authorize the administrative body to increase the share capital with lowered quorums by 30 June 2021, the Simplification Decree clarifies that the board of directors shall exercise such power within the same term. From a timing perspective, 30 June 2021 does not represent a limit for the execution of the share capital increase but only for the adoption of the relevant resolution, so that the capital increase may also be concluded at a later date if approved by 30 June 2021 by the shareholders' meeting or the administrative body.

Exclusion of the option rights up to 20%

The Simplification Decree also allows companies with shares listed on regulated markets and/or traded on multilateral trading facilities to resolve to increase the share capital with the exclusion of option rights within the limits of 20% of the pre-existing share capita — again, until 30 June 2021.[5] This temporary measure is an exception to the ordinary regime, which provides for a threshold of 10% and even in the absence of an express provision in the bylaws in this regard, which is also provided for by the ordinary regime.[6]

From a procedural perspective, a resolution to increase the share capital or amend the bylaws to delegate the administrative body within the highest limit of 20%, may be passed at the extraordinary shareholders' meeting with the lowered quorums provided for by the Simplification Decree — so long as the delegation is exercised by 30 June 2021. If the bylaws already provide a delegation of up to 10%, the administrative body would presumably not be able to exercise it by increasing the share capital up to the highest temporary limit of 20% because the necessary approval at the shareholders' meeting — which is a prerequisite for the attribution of the delegation to the management body — would be lacking.

Permanent measures

The Simplification Decree, as amended by conversion Law n. 120/2020,[7] also introduced a number of general and permanent changes to the rules governing capital increases of joint stock companies.[8] In particular, the Simplification Decree has:

- Amended the rules on the offer of option rights by:

  - Reducing the term for exercising the option right from 15 to 14 days, in line with the minimum term imposed by Directive (EU) 2017/1132[9]

  - Removing the pre-emption right mechanism introduced in the original text of the Simplification Decree, also in view of the technical difficulties of its prompt implementation on Monte Titoli's centralized management system[10]

  - Restoring the ordinary mechanism of the offer of option rights remaining unoptioned at the end of the offer period — a provision that has been extended to companies with shares traded on multilateral trading facilities[11]

  - Reducing the minimum number of mandatory trading sessions during which companies with shares listed on a regulated market and companies with shares traded on a multilateral trading facility must offer the option rights remaining unoptioned to the market, from five to two days

- Extended the provision permitting the implementation of capital increases (with the exclusion of option rights for up to 10% of the outstanding share capital) to companies with shares traded on multilateral trading facilities[12] by introducing the relevant provision in the bylaws

- Introduced the obligation for directors of companies with shares listed on regulated markets or traded on multilateral trading facilities to publish, within the deadline for calling the shareholders' meeting, a report explaining the rationale for excluding or limiting shareholders' option rights with respect to the specific transaction and the criteria for determining the issue price; for companies with shares listed on regulated markets, this report may coincide with the explanatory report provided for in the Issuers' Regulation, which is not prejudiced by the Simplification Decree

Other corporate law innovations

Simplification of the criteria for the qualification of listed SMEs

The Simplification Decree has facilitated the qualification of small medium enterprises (SMEs) issuing listed shares by modifying the qualification criteria[13] — again, with the broader aim of achieving an overall simplification of the regime applicable to listed companies. In particular, article 44-*bis* (introduced at the time of conversion by Law 120/2020) removed the requirement that companies must have revenues of less than €300 million, even at a time prior to the admission to trading of the shares.

Therefore, the sole requirement for the qualification of a company as an SME issuing listed shares is the maintenance of a market capitalization less than €500 million. The qualification will be lost in case a company exceeds this threshold for three consecutive years.

On a transitional basis, however, the Simplification Decree provides that issuers assuming the status of SME as of 15 September 2020 on the basis of revenues only will continue to maintain this status for fiscal years 2021 and 2022.

Cancellation from the Companies' Register and liquidation procedure

The Simplification Decree has amended the procedure for canceling companies from the Companies' Register,[14] introducing new cases of ex officio cancellation in case of:

- Failure to file financial statements for five consecutive years

- Failure by the competent corporate bodies to perform the actions considered necessary for the good management of the company

However, such cases of omission and inactivity constitute grounds for dissolution (without liquidation) of companies only if they occur together with either:

- The continued registration in the Companies' Register of the share capital of the company expressed in Italian lira

- The failure, by limited liability companies and limited liability consortium companies only, to submit to the Office of the Companies' Register the appropriate updating statement based on the provisions of the relevant shareholders' ledger

Finally, intervening on dissolution procedures for companies, the Simplification Decree has also provided the following requirements:

- In the event that a complaint is filed with the court by shareholders in relation to the final liquidation statements (*bilancio finale di liquidazione*), the court clerk shall electronically inform the competent Companies' Register within the next five days for the purposes of the relevant annotation (in the same way, the final decision on the complaint shall also be sent to the Companies' Register).

- The competent Registrar of the Companies' Register will be required to register the cancellation of the company concerned within five days following the expiry of the 90 days following the registration of the liquidation statements granted to each shareholder to file a complaint,[15] and in the absence of complaints from shareholders.

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Endnotes

1 Article 44, paragraphs 1 and 2.

2 In cases in which the extraordinary shareholders' meeting has been convened in order to resolve, during the same meeting, also on matters other than those indicated in the Simplification Decree, as converted by Law no. 120/2020, the resolution shall be passed, in relation to these matters, according to the ordinary quorums provided for case by case by the applicable law.

3 Articles 2439, 2440, and 2441, and 2480, 2481-bis, and 2482 of the Italian Civil Code.

4 Article 2443 of the Italian Civil Code.

5 Article 44, paragraph 3.

[6] Article 2441, paragraph 4, part 2 of the Italian Civil Code

[7] Article 44, paragraph 4.

[8] Article 2441 of the Italian Civil Code.

[9] Article 2441, paragraph 2 of the Italian Civil Code.

[10] Article 2441, paragraph 3 of the Italian Civil Code.

[11] Article 2441, paragraph 3 of the Italian Civil Code.

[12] Article 2441, paragraph 3 of the Italian Civil Code.

[13] Article 1, paragraph 1, letter w-*quater*.1) of Legislative Decree 24 February 1998, no. 58.

[14] Article 40.

[15] Term provided for in article 2492, paragraph 3 of the Italian Civil Code.