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Law Working Paper presented on the Italian – German seminar
on the two-tier system: minority shareholders' representation
within the Italian supervisory board

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In its 2003 company law reform (legislative decree 2003/6), our lawmaker has profoundly modified, among many other legal institutions, the corporate governance of *società per azioni*, known as joint-stock companies.

Accordingly, Article 2380 of the Italian civil code provides that the by-laws may apply, apart from the one-tier system and in substitution of the traditional system, the two-tier system, a model of corporate governance that reproduces for the most part the German dualistic system. Furthermore, and with exclusive regard to the two-tier system, Article 2409-*octies* states that “the by-laws may provide that the management and the control (of a joint-stock company) can be exercised by a management board and by a supervisory board [...]”.

Focusing on the Italian supervisory board, we firstly notice that its structure, and this is one of the major differences to the German two-tier system, does not consider the so-called “co-determination”, i.e. the presence of a certain number of employee-chosen members, with their number varying in relation to the total number of employees as already shown by my German colleague. This is firstly due to historical-cultural reasons, and secondly to the provision of Article 2409-*duodecies*, paragraph ten, which lists causes of ineligibility and disqualifications, including the following (subparagraph c): “those who are linked to the company or to the companies controlled by it or under common control of them by a labor relationship [...]”. The same provision also applies to listed companies as stated in Article 148, paragraph 3 (recalled by paragraph 4-*bis*) of the Financial Markets Consolidated Act 1998 (also known as “Draghi Law” after its Drafting Committee’s Chairman) which provides “that persons who are linked to the company or to the companies controlled by it, the companies it is controlled by and those subject to common control, or to directors of the company or persons referred to in subparagraph b) by self-employment or employee relationships [...]” may not be elected as members of the supervisory board.

Nonetheless, supervisory boards, packed with employees’ representatives, have been quite ineffective in monitoring management and dominant shareholders

on behalf of outside investors, as the work of my German colleague on this regard has already pointed out.

The Italian lawmaker has preferred to strengthen the “voice” of minority shareholders and their representation within the supervisory board, although only with regard to listed companies. Let us now follow a logical order, and firstly focus on non-listed companies, as regulated by the Italian civil code in Article 2409-*duodecies* and Article 2409-*terdecies*.

1) *Non-listed companies:*

First of all, it has to be noticed that the Italian lawmaker does not guarantee any kind of minority shareholder’s representation within the supervisory board. Indeed, Article 2409-*duodecies*, paragraph 1 only states that “unless the by-laws require a greater number, the supervisory board is formed by at least three members, which may also be non-members”, and does not include any other provision about potential members elected by minority shareholders. The only requirements set out by Article 2409-*duodecies* are that at least one regular member of the supervisory board must be selected among those registered in the registry of chartered accountants held at the Ministry of Justice; in addition, the by-laws, without prejudice for the provisions of special laws as to the exercise of specific activities, may subordinate the appointment to specific requirements of honorableness, professionalism and independence.

These methods of appointment of the supervisory board, without any participation of members elected by minority shareholders, except a different provision made by the by-laws, may well prejudice the efficiency of the way internal controlling duties are exercised in non-listed companies, especially after the 2003 reform.

In fact, with the adoption of the two-tier system significant competences and powers, which in the traditional system were reserved to the meeting (see Article

2364 c.c.), have been transferred to the supervisory board; i.e. the supervisory board, apart from exercising typical internal control and supervisory functions (see therefore Article 2409-*terdecies*, paragraph 1, subparagraph c), e) f)), appoints and revokes the members of the management board, approves the balance sheet and, if drafted, the consolidated accounts, and promotes liability actions against the members of the management board (Article 2409-*terdecies*, paragraph 1, subparagraph a), b), d)). Furthermore, the supervisory board, “only if so empowered by the by-laws, resolves on strategic transactions and on industrial and financial plans of the company drafted by the management board [...]” (Article 2409-*terdecies*, paragraph 1, subparagraph f-bis), as amended by Legislative Decree 2004/310). This is another important difference to the German dualistic system, whose Article 111, par. IV,2 *AktG* (as amended in 2002 by the *TransPuG*) imposes a statutory regulation on this regard (so called “*Katalog von bestimmten Arten von Geschäften*”).

Considering all this additional functions – additional meaning on top of the typical auditing duties generally delegated to a internal control body – many authors (GHEZZI, MONTALENTI, SHIUMA; against BONELLI), in particular referring to the latest provision (Article 2409-*terdecies*, paragraph 1, subparagraph f-bis), consider the supervisory board **a hybrid body with both control and *lato sensu* managing functions** (so called “*funzioni di alta amministrazione*”).

In conclusion, we can therefore say that the supervisory board has a fundamental role in the dynamic of the two-tier model, especially when it is assigned *funzioni di alta amministrazione* by the by-laws.

For this reason, it might have been opportune, although only with regard to open (non-listed) companies, to require the appointment of one member of the supervisory board by the minority shareholders (PROVIDENTI), on the assumption that some of them exist within the shareholder group. This would contribute to a more equilibrate, impartial and independent (i.e., from eventual dominant

shareholders) exercise of the significant competences and powers the supervisory board is entitled to.

All this is even more true if we consider that the members of the supervisory board may be revoked by the meeting at any time with a resolution adopted with the majority of 20 per cent of the share capital, except for the right to restoration of damages if the displacement has been without cause (Article 2409-duodecies, paragraph 5). This is another difference to the German two-tier model, which allows the revocation of the board members only for cause (Article 103 *AktG*). It is quite evident that, even if in this way supporting contestability of corporate control, majority shareholders influence the destiny and the effectiveness of the supervisory board and indirectly also of the management board at their discretion; **this contradicts the purpose of the 2003 corporate law reform whose aim was to separate the ownership and the management of a company.**

Kommentar: spiegare per quale ragione

Eventual concerns about possible conflicts between members elected by majority shareholders and those elected by minority shareholders are easily dispelled, as the interests of the majority shareholders are conflicting with those of the minority shareholders only at the moment of appointment of the company's organs, while afterwards every board member has to act aiming exclusively to create corporate value (see therefore also the recommendations adopted by the Italian Code of Conduct, the so called "*codice (di autodisciplina) Preda*" – March 2006).

Kommentar: un po' ingenuo

2) *Listed companies:*

The Italian lawmaker has interpreted the way minority shareholders shall be represented in listed companies in a different manner, probably due to the fact that wider interests, such as investor protection and the efficiency, transparency and attractiveness of financial market, are affected by listed companies.

In fact, Article 148, paragraph 4-*bis* of the Draghi Law (as amended by Law 2005/262 – “*Provisions for the protection of savings and the regulation of financial markets*”, and ultimately as amended by Legislative Decree 2006/303), states that the “Italian Security and Exchange Commission (CONSOB) shall regulate the procedures for the election, on the basis of slates, of a member of the board of auditors (*rectius*: supervisory board) by the minority shareholders, who are not **related**, even indirectly, to the shareholders that have presented or voted the slate that ranked first by number of votes”. At the present date no definitive regulation has been adopted by the CONSOB, but a (second) draft regulation dated 6th April 2007 has been worked out, which defines the methods that apply in electing a board member – at least one – that represents minority shareholders. The provisions adopted in the CONSOB regulation have to be applied to all shareholder’s meetings called after 1st July 2007.

Kommentar: non è vero; vedi delibera del 4 maggio

Summarizing the points of major interest, it has to be underlined that, pursuant to the draft regulation, every shareholder may present a slate of candidates (two or more, in order to guarantee replacement) to be elected as members of the supervisory board, although the by-laws may require a minimum participation needed to present a slate of candidates, which shall not be more than one fortieth of the total share capital, but can exceptionally be reduced by half in the case only one slate or only slates related to dominant shareholders have been presented. In any case, the by-laws may not require the slates to achieve a certain percentage of share capital or a minimum of votes (see the different provision of Art. 147-*ter*, par. 1 Draghi Law).

Kommentar: ??

In accordance to Article 148, subparagraph 2 of the Draghi Law, the draft document introduces cases (non mandatory) of related party relationships between minority shareholders and dominant shareholders (*i.e.* those who have presented or voted the slate that ranked first by number of votes), in particularly referring to some of the provisions laid down in IAS 24 (“*Related Party Disclosure*”) and eliminating every reference contained in the first draft regulation to Article 2391-

bis, in full harmony with the recommendations laid down in the “*Report of the High Level Group of Company Law Experts*”. Thus, a minority shareholder is related to a dominant shareholder pursuant to Article 148, paragraph 2 Draghi Law – with possible consequences of annulment of the resolution of appointment if the vote was a casting – if the latter has the ability to control or to exercise significant influence or joint control over the former by making financial and operational decisions, because of (i) relationships by blood, (ii) being an associate of the same group of companies, (iii) having an interest in the entity that gives significant influence (i.e. voting power) over the group of companies in the way provided by Article 2359, paragraph 3 of the Italian Civil Code, (iv) being a member of the key management personnel of the group of companies, (v) accessing to a shareholder’s agreement pursuant to Article 122 of the Draghi Law, whose object are shares of the issuer or of entities the issuer controls or is controlled by.

The slates of candidates have to be deposited at the place of business at least 15 days before shareholder’s meeting, and have to indicate, amongst information concerning the identity of the shareholders who have presented the slates of candidates, the percentage of share capital held supported by a certification proving their ownership, and be supplied with a statement made by the shareholders different from those who have, even jointly, a controlling or majority stake, attesting the non-existence of a related party relationship with the latter in the way seen above.

As already mentioned, at the present stage some of the most important companies, especially in the banking sector, have opted for the two-tier system, such as Intesa Sanpaolo S.p.A., Management & Capitali S.p.A., S.S. Lazio S.p.A., Monti Ascensori S.p.A., Banche Popolari Unite S.c.p.A., Banco Popolare Soc. Coop.; Mediobanca S.p.A. is about to adopt the two-tier system as well.

All of their by-laws, even if they do not match with all of the provisions set out in the draft regulation (for example some of them require a minimum participation higher than one fortieth of the share capital to be allowed to present a

slate of candidates, or provide different remedies in the case only one and/or only party-related slates have been presented, or fix a minimum percentage or number of votes a slate of candidates has to achieve), call for the appointment, in accordance to Article 148, paragraph 2, of at least one member of the supervisory board by the minority shareholders. In relation to the methods of election of the above mentioned, the by-laws of the companies considered apply the voting system based on slates – as recommended by the Italian code of best practices – but do not comply with Article 148, paragraph 2 and the draft regulation (except for Intesa San Paolo S.p.A., Banche Popolari Unite S.c.p.A. and Banco Popolare Soc. Coop., which intelligently recall operative laws and regulations) when they state that the minority slate shall not be related with the slate that ranked first by number of votes.

Kommentar: un po' pochino

The companies will therefore be obliged to conform their by-laws to those provisions of the Draghi Law, as amended by Legislative Decree 2005/262 and Law 2006/303, until 30th June 2007, and furthermore adopt measures to guarantee the compliance with the in-force-coming CONSOB regulation.

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