



Italy's New Rules for Listed Small and Mid Caps and Other Changes Relevant to Listed Issuers

The Italian Council of Ministers enacted Law Decree No. 91 of June 24, 2014 (the "Law Decree"), which introduced new measures aimed at ensuring the country's future sustainability and growth. As part of such new measures, the Law Decree introduced significant changes to certain corporate and capital market rules applicable to both listed and private companies. The Law Decree was converted into law and confirmed by the Italian Parliament on August 11, 2014, with limited changes.¹ This *Commentary* will focus on the set of changes regarding companies listed on the Italian stock exchange.

- A special regime applies to small and mid cap listed companies.
- The bylaws of listed companies may now provide that, subject to a minimum holding period, shares grant multiple voting rights.
- Listed companies may choose additional criteria to determine the price to be paid to withdrawing shareholders (beside the arithmetic mean of the closing prices in the preceding six months).

The following paragraphs will describe more in detail each of the four categories of amendments.

New Rules for Listed Companies—General Overview

The main changes introduced by the Law Decree that apply to listed companies can be summarized as follows:

- The mandatory tender offer threshold has generally been reduced from 30 percent to 25 percent, except under certain circumstances.

New Tender Offer Threshold

As a general rule, before conversion into law of the Law Decree, Italian provisions regarding mandatory tender offers required whomever acquired a stake in excess of 30 percent of the outstanding voting shares in an Italian listed company to launch a tender offer for all the remaining shares of that company at an equitable price to be determined in accordance with Italian law.

1. The Law Decree was published in the *Italian Official Gazette* No. 144 of June 24, 2014, and has been in force since the day following its publication (i.e., June 25, 2014). The conversion law was published in the *Italian Official Gazette* No. 192 of August 20, 2014, and entered into force the day following its publication. In consequence of the above, any reference in this document to the Law Decree shall mean to refer to the Law Decree as converted into law with amendments by the conversion law.

The Law Decree (as amended by the conversion law) reduced from 30 percent to 25 percent the mandatory tender offer threshold for all listed issuers, subject to two exceptions. In light of the new rule, whoever acquires a stake in excess of 25 percent of the outstanding voting shares in an Italian listed company will be required to launch a tender offer for all the remaining shares of the company, provided that: (i) there is no other shareholder holding a stake higher than 25 percent in the target company (otherwise, the 30 percent threshold would still apply); and (ii) special rules apply to small and mid cap companies (see “New Regime Applicable to Small and Mid Cap Listed Companies,” below).

New Regime Applicable to Small and Mid Cap Listed Companies

New Definition of Small and Mid Cap Listed Companies

The Law Decree has introduced a new definition of “small and mid cap companies listed on the Italian stock exchange” (“SMC”) in the Italian Financial Market Statute (i.e., Legislative Decree No. 58 of February 24, 1998) (“IFMS”). This definition is relevant because a special regime applies to SMCs.

Pursuant to the Law Decree, a listed company falls within the scope of the definition of “SMC” if (i) based on the most recently approved annual financial statements, its revenues do not exceed €300 million or, alternatively, (ii) its average market capitalization during the last calendar year is lower than €500 million.

Any listed issuer that, for three consecutive fiscal years or calendar years, exceeds both of these limits cannot be regarded as an SMC any longer.

New Tender Offer Thresholds for SMCs

With the aim of boosting listings of SMCs, the Law Decree affords SMCs the flexibility to amend their bylaws so as to set forth a mandatory tender offer threshold different from the general statutory one (30 percent for those SMCs that do not amend their bylaws as allowed by the Law Decree). The SMC bylaws may set their mandatory tender offer threshold within a range comprised between 25 percent and 40 percent.

The resolution to amend the SMC bylaws to introduce a customized mandatory tender offer threshold requires approval by a qualified majority of the shareholders. To protect the minorities, the Law Decree provides an exit right for those shareholders who do not vote in favor of the resolution, in the form of a right to withdraw from the issuer (see “Withdrawal Right,” below).

The Law Decree also introduced a special regime for SMCs with regard to the so-called incremental tender offer, which is a type of mandatory tender offer that is triggered whenever someone holding a stake in an Italian listed company that is more than the applicable mandatory tender offer threshold and less than 50 percent acquires (or obtains multiple voting rights that account for) more than 5 percent of the voting shares of such company within any given 12-month period.

Under the new rules, the bylaws of the SMCs may opt out of the incremental tender offer requirement for the first five years following the IPO. By means of this exemption, the controlling shareholders of an SMC that is undergoing its IPO may get diluted to well below 50 percent as a result, while still retaining the possibility to build back their stakes by buying shares of the issuer on the secondary market even in excess of the general 5 percent per year limit during the five years following the IPO, without being required to launch an incremental tender offer for all the remaining shares.

New Threshold for Equity Disclosure Requirements in SMCs

Before the Law Decree, Article 120 of the IFMS provided that any person who either (i) holds more than 2 percent (or other greater thresholds) of the outstanding voting shares of any Italian listed issuer, or (ii) reduces the stake below such threshold must notify the issuer and CONSOB (the Italian market regulator).

With regard to SMCs, the Law Decree raised the 2 percent equity disclosure threshold to 5 percent.

The aim of this change is to encourage financial investors (especially foreign investors) to acquire larger stakes in SMCs without having to immediately disclose their investment strategy, provided that their overall stake remains below 5 percent.

Higher Thresholds for Cross-Holdings

The Law Decree has also raised the maximum thresholds for cross-holdings between SMCs, which have been increased from 2 percent to 5 percent in the base case and from 5 percent to 10 percent in case of prior approval by the shareholders' meetings of both of the concerned SMCs.

Shares with Multiple Voting Rights

The Law Decree introduced a new provision in the IFMS (Article 127-*quinquies*) pursuant to which listed companies may amend their bylaws so as to allow that, under certain conditions, the shares of the issuer grant more than one voting right to their holders.

This new rule completely overrides the principle "one share one vote," which has always been one of the pillars of Italian corporate law. Such change in law is in accordance with the recommendations included in the *Action Plan for the Modernization of Company Law and the Consolidation of Corporate Governance of 2012*, pursuant to which the European Commission invited the Member States to evaluate the opportunity to facilitate long-term investments in European companies, also by using instruments such as shares bearing multiple voting rights.

Since 2010, Italian listed issuers have been allowed to amend their bylaws to provide that those shares that are held in excess of a minimum holding period of not less than 12 months grant their holders (other than controlling shareholders) a dividend greater, by up to 10 percent, than that of the other common shares.

Now, pursuant to the Law Decree, listed issuers may amend their bylaws to provide that shares that are held in excess of a minimum holding period of not less than 24 months grant their holders multiple voting rights not to exceed two votes per share as a sort of "loyalty premium." Such multiple voting rights are designed to be a temporary feature of the shares to which they apply. In the case of transfer to a third party, the multiple voting rights lapse, and the shares transferred to the third party revert to regular, single-vote shares. Consequently, multiple voting right shares do not form a special class of shares. Also, as an exception to the multiple

voting right prerogative, in those shareholders meetings held (pursuant Article 104 of the IFMS) to resolve upon the adoption of shark repellents or other defensive measures against a tender offer, each multiple voting right share counts for only one vote.

Subject to certain exceptions, multiple voting rights are taken into account to determine whether the applicable mandatory tender offer threshold or incremental tender offer threshold or equity holding disclosure threshold is exceeded.

The provisions regarding multiple voting rights are not immediately applicable, since CONSOB is required to implement the general principles set forth by the Law Decree by adopting a specific regulation by December 31, 2014.

Conversely, unlike in the case of private companies, Italian listed companies (subject to limited exceptions) may not issue new classes of shares that permanently grant their holders multiple voting rights.

Withdrawal Right

Before the entering into force of the Law Decree, the price to be paid to a shareholder who exercised the withdrawal right from a listed issuer in those circumstances that trigger it under applicable law (e.g., resolutions resulting in the delisting of a listed issuer, the move of the registered office abroad, changes in the shareholders' voting rights or economic rights or in the criteria for determining the consideration for withdrawing shareholders, etc.) could be determined only according to the criterion of the arithmetic mean of the closing prices of the relevant class of shares during the previous six-month period.

As a result of the changes introduced by the Law Decree, Article 2437-*ter* of the Italian Civil Code has been amended such that the this six-month arithmetic mean has become a floor to determine the price to be paid to withdrawing shareholders, provided that the bylaws of listed issuers may now provide for other criteria for its determination (subject to such floor), including criteria that take into account the equity of the company and its income prospects.

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