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BRIEFING

Italian law on savings

Law 262 of 28 December 2005

Summary

Law 262 of 28 December 2005 (the Savings Law) introduces a number of changes to company and financial law aimed at protecting public savings and regulating financial markets. The Savings Law was approved at the end of 2005 and entered into force on 12 January 2006.

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Appointment and composition of board of directors of joint stock companies

The Savings Law introduces amendments to the financial law consolidated act (legislative decree 58 of 24 February 1998, FLCA) (and therefore to Italian publicly traded companies) on the appointment and requirements of directors and the composition and powers of the board of statutory auditors and other controlling bodies for monistic and dualistic models, the new corporate governance models introduced by the recent Italian company law reform.

By-laws must provide that board members be elected on the basis of lists, the threshold for the presentation of each list being 1/40 of the company's share capital. Elections must be by secret vote.

Apart from companies applying the monistic model at least one board member must be elected from the list representing the minority in terms of share capital and must not be directly or indirectly connected with the list that has won the majority of votes. If the board comprises more than seven members at least one must fulfil the independency requirements for statutory auditors stipulated in article 148 of the FLCA, as well as any requirements contained in the by-laws.

For companies applying the dualistic model whose boards comprise more than four members, at least one member must fulfil the independency requirements mentioned above.

Each director must fulfil (and if not will be dismissed from office) the honourability requirements for controlling bodies stipulated in a regulation to be issued by the ministry of justice under article 148, paragraph 4, of the FLCA.

Statutory auditors and similar controlling bodies of joint stock companies

The provision of the FLCA stating that the by-laws must provide for (i) criteria for, and methods of, appointment of the chairman of the board of statutory auditors and (ii) limits to the number of corporate offices held has been removed.

A regulation containing the criteria for the appointment of board members by minority shareholders is to be issued by the Commissione Nazionale per le Società e la Borsa (the Italian securities regulator, Consob). The chairman of the board is chosen and appointed by the shareholders' meeting from the auditors elected by the minority shareholders.

The independency requirement has been strengthened. Individuals with employment, economic or professional relationships with any director of the company or any member of his family cannot be appointed as statutory auditors of the company.

Consob is to issue a regulation setting forth the maximum number of management and control duties with which members of the controlling bodies of publicly traded companies may be entrusted. These individuals will be subject to communication requirements.

The Savings Law also amends provisions of the Italian civil code applying to non publicly traded companies: members of the managing and controlling bodies of these companies now have a duty to communicate to the shareholders' meeting the number of offices held in other companies before accepting office.

Action against directors of joint stock companies

The Savings Law amends article 2393 of the Italian civil code on company action against directors, entitling the controlling body to endorse such action by a resolution of at least two-thirds of members.

For publicly traded companies, action can now be exercised by shareholders representing at least 1/40 (and no more than 1/20) of the share capital or the minimum percentage provided for in the by-laws.

Protecting minority shareholders of joint stock companies

The Savings Law introduces provisions empowering Consob to facilitate proxy voting for high capitalisation companies or those with widespread shareholders.

The Savings Law also allows a qualified minority (shareholders representing at least 1/40 of the share capital) to request inclusion of items in meeting agendas.

Disclosure of off-shore companies

The ministry of justice, together with the ministry of economy and finance, will provide a list of countries that do not guarantee economic, financial and governance transparency based on criteria in article 6 of the Savings Law.

An Italian company controlling a company with a registered office in a country that does not guarantee economic, financial and governance transparency (Controlled Entity) must attach to its financial

statements those of the Controlled Entity drafted in accordance with the principles and rules applicable to Italian companies and according to internationally accepted accounting principles. The financial statement must be certified by the board of directors, the general manager and the director drafting the accounts of the Italian company and by the auditing firm of the Italian company. It must also be accompanied by a report of the board of directors indicating the relationship between the Italian company and the Controlled Entity and by a related statement by the controlling body. These rules also apply to the financial statements of Italian companies affiliated to any Controlled Entity or controlled by any Controlled Entity.

In this regard, the members of the board of directors, the general manager and the auditing firm of the Italian company are subject to the civil, criminal and administrative liability rules applicable to financial statements drafted by Italian companies.

Voting rights of banking foundations

From 1 January 2006, banking foundations (*fondazioni bancarie*) cannot exercise voting rights in the ordinary and extraordinary shareholders' meeting of participant banks for shareholdings exceeding 30 per cent of the voting share capital.

Conflicts of interest between banks and companies

The Savings Law amends the banking law consolidated act (legislative decree 385 of 1 September 1993, the Banking Law), introducing a new regime for the granting of credit by banks to their own shareholders and the obligations of banking representatives. In particular, banks must observe the conditions set forth by the central bank of Italy on high-risk activity regarding (i) persons holding a significant or controlling interest in the bank or in the holding company, (ii) persons permitted to appoint members of the managing or controlling body of the bank or holding company, (iii) persons with management or control duties in the bank or holding company, and (iv) companies controlled by persons under (i), (ii) and (iii) above or at which these persons have management or control duties.

Provisions introducing a quantitative limit on debt exposure for banks, or persons holding interest in such banks, have been removed.

Conflicts of interest in the management of investment funds

The government will issue within six months from the coming into force of the Savings Law one or more decrees introducing a regime to prevent conflicts of interest in the management of investment funds, insurance products and related social security products and in the management of individual portfolios on behalf of third parties observing criteria set forth by article 9 of the Savings Law.

Conflicts of interest in offering investment services

The FLCA is amended to prevent conflicts of interest in the offering of investment services by financial intermediaries. The central bank of Italy, in agreement with Consob, will determine cases in which it would be advisable for services to be offered by a separate entity. Administrative sanctions will apply to persons with management or control duties in a financial intermediary who do not comply with these rules.

Offers to the public of financial instruments addressed to professional investors

The Savings Law amends article 2412 of the Italian civil code, providing that in calculating the limit set forth in paragraph 1 (see below), the amounts relating to guarantees granted by the company for bonds issued by other companies (including non-Italian companies) must be considered. (Company law reform set higher thresholds up to which companies can issue bonds. Article 2412 of the Italian civil code sets limits of twice the company's capital stock and reserves, which can be exceeded by publicly traded companies.)

The Savings Law amends the FLCA in removing the exemption for bank products from the door-to-door selling regime.

The Savings Law changes the rules on the circulation in Italy of financial instruments placed with institutional

investors and the related duty of communication in cases of transfers to parties other than institutional investors.

In particular, it provides that in a transfer of financial products (including those issued abroad) originally addressed only to institutional investors to non-institutional investors, the institutional investor selling the product must guarantee the solvency of the issuer for a year from the date of issue, unless the intermediary has delivered to the buyer a document containing the information required by Consob.

Exemptions from the obligation to publish a prospectus in favour of banks and insurance companies offering financial products (article 100(f) of the FLCA) have been removed.

Prospectus Directive (Directive 2003/71/EC)

The Italian government must issue within 18 months of the coming into force of the Savings Law a legislative decree implementing the Prospectus Directive and amending the FLCA accordingly. Consob is acknowledged as the competent authority on this matter.

The Savings Law lays down criteria for this decree. For example, it provides for offers to which the duty of publishing a prospectus does not apply and for financial instruments that do not involve public offers or admission to listing or require the publishing of a prospectus, and outlines the conditions for placement by intermediaries or the resale of financial instruments. It provides for the passporting of a prospectus approved by an EU member state. The Savings Law also considers a right of revocation of the subscription in favour of the investor in certain cases. It is expected that criteria will be laid down specifying who is a qualified investor. There is also provision for a rule on civil responsibility regarding the information contained in the prospectus.

Protection of investors, financial sales representatives and regulated markets, and duty to provide information

The Savings Law amends the FLCA on the issues of investor protection, financial sales representatives and regulated markets, and the duty to provide information. Consob is to issue a regulation under which financial

intermediaries have the duty to classify the level of risk of financial products and management of investment portfolios, taking into account the profile of each client (its economic situation, experience and investment targets).

The registration of financial marketers is entrusted to a new body supervised by Consob.

Articles 114 and 115 of the FLCA are amended in accordance with article 9 of law 62/2005 implementing the Market Abuse Directive (Directive 2003/6/EC). In particular, the duty of communicating conflicts of interest regarding financial instruments under article 180(a) of the FLCA does not apply to rating agencies.

Transactions concerning the merger of a non publicly traded company and a publicly traded company are subject to the publication of a prospectus under article 113 of the FLCA and to a regulation to be issued by Consob.

Publicly traded companies have a duty to report annually, according to the terms and criteria laid down by Consob, on the adoption of codes of conduct promoted by the Italian stock exchange or any associations.

By-laws of publicly traded companies must provide for the appointment of a manager entrusted with drafting the company's accounts. Provisions concerning the civil and criminal liability of directors will apply to these managers.

Stock option plans

The Savings Law introduces new provisions on the duty to provide information for publicly traded companies that adopt stock option plans in favour of employees. The stock option plan must be approved by the shareholders' meeting and information must be communicated to Consob and to the public. These provisions aim to prevent conduct detrimental to the interests of the company.

Auditing activity

The Savings Law amends provisions of the consolidated financial act on the auditing of accounts of publicly traded companies.

An auditing assignment may not last for more than six financial years, with only one renewal, and can be renewed at the earliest three years after the preceding assignment, with the person responsible for the auditing to be replaced. The person responsible for the auditing cannot remain in office for more than six financial years (even if employed by different auditing companies). Incompatibility requirements applicable to auditors have also been strengthened.

Non publicly traded companies controlling publicly traded companies are subject to the same auditing duties.

Central bank of Italy's structure and powers and co-operation among different authorities

The Savings Law introduces new rules on the structure and powers of the central bank of Italy. In particular, the office of the governor may not be permanent and is renewable only once. The antitrust authority is given power and competence over antitrust issues regarding banks with the exception of bank acquisitions, for which approval of the central bank of Italy is still required.

Co-operation among the authorities controlling the financial market (central bank of Italy; Consob; Isvap, the insurance regulator; Covip, the pension funds supervision commission; and Uic, the Italian foreign exchange office) is to be strengthened. Provision is made for establishing co-ordinating committees.

Protective measures for investors

The Italian government will introduce within 18 months from the coming into force of the Savings Law (i) conciliation and arbitration procedures and (ii) an indemnity system and a guarantee fund for savers related to any dispute against banks or other financial intermediaries, insurance companies and pension funds for misconduct.

Corporate crime and sanctions

The Savings Law amends articles of the Italian civil code concerning corporate crime eg miscommunication of corporate information (*False comunicazioni sociali*) or miscommunication that damages the company, its

shareholders or its creditors (*False comunicazioni sociali in danno delle società, dei soci o dei creditori*). New provisions have been introduced for false prospectuses, miscommunication to the auditing company and miscommunication on the application of code of conduct rules concerning publicly traded companies. The crime of non-communication of conflicts of interest is introduced.

The Savings Law doubles the criminal sanctions provided for in the banking law, the FLCA, law 576/1982 (reform of supervisory activity for insurance companies) and legislative decree 124/1993 (complementary pension forms) and the Italian civil code; increases the administrative sanctions in the same laws fourfold; and doubles the administrative sanctions for individuals under legislative decree 231/2001 (the law on administrative liability of corporate entities).

The government is to adopt, within six months of the coming into force of the Savings Law, decrees introducing ancillary sanctions for infringements under title XI, book V, of the Italian civil code on corporate crime; the consolidated banking act and the FLCA; law 576/1982; and legislative decree 124/1993.

Transitional provisions

The entering into force of (i) the obligation to publish a prospectus for banks and insurance companies offering their financial products and (ii) rules on the transfer of financial products originally addressed only to institutional investors to non-institutional investors has been delayed by 60 days from publication in the official gazette of law decree 13 January 2006.

Among the transitory provisions, it is also worth mentioning that all companies registered in the companies register when the Savings Law comes into force must amend their by-laws in compliance with the new provisions within 12 months.

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