



Italian law on savings:

Legislative decree co-ordinates the consolidated law on banking and credit and consolidated law on financial intermediation with savings law

Legislative decree 303 of 29 December 2006

A number of changes to Italy's banking and financial law will enter into force on 25 January 2007. The changes are introduced by legislative decree 303 of 29 December 2006 (the Decree), which implements the enabling act contained in article 43 of law 262 of 28 December 2005 (Savings Law). The changes are intended to co-ordinate the provisions of the banking law consolidated act (legislative decree 385 of 1 September 1993, BLCA) and of the financial law consolidated act (legislative decree 58 of 24 February 1998, FLCA) with the provisions introduced by the Savings Law.

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Appointment and composition of the board of directors

The Decree abrogates the provision allowing a secret vote for the election of the members of the board of directors, contained in article 147-ter, second paragraph, FLCA and introduced by the Savings Law, in that it clearly breaches the rules on the transparency of relevant holdings, the rules on the disclosure of shareholders' agreements and the provision contained in article 2375, first paragraph, Italian civil code, on recording shareholders' resolutions.

To make list-based voting effective, the Savings Law had provided that the articles of association could determine the minimum participation quota at no more than one-fortieth (1/40) of the corporate capital; now the Decree has also introduced the possibility for the articles of association to determine such quota on the basis of the different amount provided by regulations from financial regulator Consob (to be issued by 31 March 2007) on the basis of such parameters as capitalisation, the free float and the shareholding structure. The Decree also provides

that the lists must specify which directors meet the independence requirements and that the articles of association must specify the minimum percentage of votes each list must obtain. There must be at least one independent director on any board of directors with seven members or fewer and at least two on any board with more than seven members. Finally, the Decree provides that an independent director will cease to hold office if he no longer meets the requirements.

Board of internal auditors

The Decree aims to strengthen the provision introduced by the Savings Law that Consob will issue regulations establishing the procedure for ensuring minority shareholders may appoint at least one internal auditor. It provides that the election of the members of the board of internal auditors by minority shareholders will take place on the basis of lists and that those members 'will not be, even indirectly, connected to the shareholders who submitted or voted for the list that obtained the highest number of votes'.

Protecting minority shareholders

The Decree removes one of the requirements provided by article 139 FLCA on the solicitation of voting proxies. It is no longer necessary to be registered in the shareholders' ledger for at least six months for the solicitation of voting proxies.

Conflicts of interest between banks and companies

The Decree amends the requirements and limits applicable to banks undertaking high-risk activity vis-à-

vis persons who are in a position to exercise influence over the management of the bank, the banking group or affiliated entities. In particular, it provides that the Bank of Italy has to identify such requirements and limits on the basis of resolutions adopted by the inter-ministerial credit and savings committee. It extends the Bank of Italy's regulatory power regarding conflicts of interest to include all types of relationships of an economic nature other than those giving rise to high-risk activity (for example, consultancy).

To bring article 136 BLCA into line with both the civil code provisions on directors' interests and the provisions of the Savings Law, the Decree amends, among others, the rules on the obligations of banking representatives by providing:

- for compliance with the procedures in cases when there is some connection between the parties (article 2391-*bis* civil code); and
- that the rules in question do not apply to relationships within groups and relationships between banks for transactions effected on the inter-banking market.

Structure of the Bank of Italy and co-ordination with the Italian antitrust authority

The Decree amends article 20 of law 287 of 10 October 1990 (Antitrust Law) and confirms that the acquisition of holdings in banks that could restrict freedom of competition comes within the scope of application of the Antitrust Law. It also provides, as it does in the current article 20, paragraph 5 with regard to the Bank of Italy, that the Italian antitrust authority has the power to authorise agreements that derogate from the Antitrust Law. This power also applies to concentrative transactions. Derogations have to be agreed on in compliance with the principle of proportionality and the Decree specifies the scope. Paragraphs 12, 13 and 14 of article 19 of the Savings Law have been abrogated. They provided, among other things, for a double endorsement of bank acquisitions (by the Italian antitrust authority and the Bank of Italy) issued in a joint resolution.

The issue of securities

The Decree eliminates the Bank of Italy's powers to authorise the issue of securities under article 129 BLCA, as such powers are no longer consistent with the division of roles among the supervisory authorities introduced by the Savings Law, or with the fact that Consob has all the

powers relative to the protection of investors and the transparency of financial instruments.

The Bank of Italy may still ask issuers for final information (periodical reports, data, etc) to enable it to supervise the development of products and financial markets. Special provisions will have to be issued for such purposes. As a consequence, article 143 BLCA, which provided for sanctions in the event of any failure to comply with the provisions of article 129 BLCA, has been abrogated and article 144 BLCA supplemented.

Circulation of financial instruments

The Savings Law has brought financial products from all sectors (banking, financial and insurance) within the scope of the FLCA in the interests of transparency.

By amending the scope of application of the rules on public offerings and supplementing the definition of 'financial product', the Decree clarifies that the latter does not include bank or postal deposits, unless they are represented by financial instruments. The placement of financial products through authorised intermediaries now comes under the concept of 'public offerings' and a new concept of 'financial products issued by insurance companies' has been introduced as a result of the amendments the Savings Law has made to the FLCA.

The Savings Law introduced to article 25-*bis* FLCA the rules on 'financial products issued by banks and insurance companies'. The Decree extends the rules set forth by the FLCA on the provision of investment services to these products and specifies that the BLCA's rules on the transparency of contractual terms and conditions do not apply to financial products issued by banks or the banking components of financial products (so-called mixed products). This exemption does not apply to consumer credit transactions, to which the rules of the BLCA will continue to apply.

The Decree also clarifies that the rules set forth by the FLCA, and not the provisions of legislative decree 209 of 7 September 2005 (private insurance code), apply to the subscription and placement of financial products issued by insurance companies.

The Savings Law excluded bank products from the exemption from the rules on door-to-door selling (article 30 FLCA). The Decree has also excluded insurance products, solely in relation to eligible entities, in line with

the extension of the application of the FLCA rules to the distribution of insurance products. Article 30 FLCA applies to financial products issued by insurance firms, starting from 1 July 2007.

The Decree introduces various amendments to article 100-*bis* FLCA on the circulation of financial products, which was introduced by the Savings Law and has presented several problems of interpretation. Among other things:

- the Decree specifies that the subsequent resale of financial products that were the object of a public offering exempted from the obligation to publish a prospectus constitutes a separate, autonomous public offering if it meets the requirements set forth in the definition of public offering contained in article 1, paragraph 1, letter (t) FLCA;
- it eliminates the obligation on professional investors that transfer financial products to guarantee the solvency of the issuer;
- it introduces the presumption of public offering if within 12 months of a placement aimed exclusively at professional investors, the financial instruments are systematically resold to the public (provided that the exemption limits set forth under article 100 FLCA are exceeded); and
- it provides that an agreement is null and void if financial products are systematically resold without a prospectus to persons other than professional investors and that the eligible entities on whose premises the resale took place are liable for the damage inflicted.

The presumption in the third bullet above does not apply to bonds issued by states belonging to the Organisation for Economic Co-operation and Development with investment grade rating (ie low-risk financial instruments).

Codes of conduct

On the subject of corporate governance, the Decree eliminates Consob's power to check the accuracy of the information contained in codes of conduct and its power to impose sanctions (article 124-*ter* FLCA).

Manager in charge of preparing the company financial reports

The Decree amends some provisions regarding the manager in charge of preparing the company financial

reports. It specifies that the articles of association must provide for experience requirements that must be met by the manager. The written declaration by the director general and by the manager that must be attached to the annual accounts is no longer required to attest their accuracy but the accounts must correspond 'to the ledgers and the accounting records'. The attestation that the administrative and accounting procedures have been adequately and effectively applied to notices of a financial nature must also be attached to the six-monthly report (article 154-*bis* FLCA). Paragraph 2 of article 154-*bis* of the FLCA also specifies that the acts and disclosures released to the market that have to be accompanied by a written statement by the director general and manager charged with preparing the company's financial reports are those relating to the approval of the periodical, even infra-annual, accounting data.

Stock option plans

The Decree introduces corrective provisions on information relating to stock option plans (under article 114-*bis* FLCA) in which it sets out in more detail the time limits in which the information has to be disclosed to the public and the contents of same. It also reduces the powers attributed to Consob by the Savings Law.

Auditing activity

The rules regulating the task of auditing firms (article 159 FLCA) are amended to strengthen the role of the minority shareholders and comply with the principles set forth in Directive 2006/43/CE on statutory audits of annual accounts and consolidated accounts (the so-called eighth company law directive).

The Decree provides that:

- the auditing firm is appointed or revoked by the shareholders' meeting upon grounded proposal by the supervisory body; and
- the duration is nine financial years, not renewable.

Regarding the situations of incompatibility provided for by article 160 FLCA, the Decree clarifies that legal advice is one of the services that cannot be provided by auditors. It also removes some doubts raised by the current wording of article 160-*quater*, paragraph 1, FLCA on the maximum duration of the appointment. There is an express provision that the same person (whether natural or legal) may be reappointed only once three years have

lapsed since the end of the previous appointment. In article 160-quinquies FLCA, the Decree introduces new cases of incompatibility and provides for the case in which the entities have supervisory and directive duties. Finally, Consob's powers are amended as follows:

- its assessment of the conformity of the appointment with regard to the grounds for incompatibility has been eliminated;
- the scope of its supervisory powers has been extended to include the organisation of auditing firms;
- its duty to verify periodically the independence and technical adequacy of such firms has been removed; and
- a periodical quality control (every three years) by the auditing firm has been introduced (article 162 FLCA).

Banking foundations

The Decree abrogates article 7 of the Savings Law, which provides that banking foundations cannot exercise the right to vote in ordinary and extraordinary shareholders' meetings of the companies referred to in article 25, paragraphs 1 and 2, of legislative decree 153 of 17 May 1999 for shares exceeding 30 per cent of the capital represented by shares with voting rights.

Organisation and operation of the market

The Decree lists the cases in which the aggravated procedure referred to in paragraph 1-*bis* of article 64 FLCA, which provides for a suspension of five days for the implementation of decisions of admission and exclusion of financial instruments or intermediaries adopted by the market operator, does not apply.

Protective measures for investors

The Decree amends article 128-*bis* BLCA and extends access to extrajudicial dispute resolution, previously applicable exclusively to consumers, to all clients, including companies.

Corporate offences and sanctions

Following amendments to the rules on corporate offences and sanctions made by the Savings Law, it has been necessary to co-ordinate some of the pre-existing provisions with the new provisions.

In particular, the Decree introduces an administrative

sanction to article 193 FLCA, both for breaches of the provisions on keeping lists of persons with access to insider information, referred to in article 115-*bis* FLCA (introduced by the legislation on market abuse), and for breaches of article 114-*bis* FLCA on stock option plan information.

Amendment of articles of association to bring these into line with the Savings Law and the Decree

The Decree has postponed the deadline for the amendment of articles of association from 12 January 2007 (provided by the Savings Law) to 30 June 2007.

It provides for smaller quorums for resolutions required to bring the deed of incorporation and the articles of association into line with the provisions of the Savings Law and of the Decree.

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