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LEGAL INFORMATION NEWSLETTER

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We are pleased to provide you with the new issue of our legal information newsletter.

Topical legal questions are discussed and those related to issues that you might encounter.

We hope that you will find it of interest. We would welcome any comment you might have.

Italian Corporate Law Reform: Brief Overview About Relevant Amendments to the Statutory Regulation on Corporate Reorganization, Merger, Consolidation and Split-up of Companies

L. 3.10.2001, n. 366 (so called Legge Delega)
D.Lgs. 17.1.2003 (enforcement date: Jan.1st 2004)
D. Lgs. 6.2.2004, n.37

Statutory amendments to domestic regulation have been enforced following the general goal of simplifying procedures. On the matter of heterogeneous reorganization, such amendments of law shall apply only to those corporate reorganization resulting into either the incorporation of a business entity or the reorganization of corporations and other limited liability business entities.
On the matter of merger, consolidation and split up Law n. 366/01 provides that specific rules are set for drawing up the first balance sheet subsequent to merger and split up operations. The first balance sheet subsequent to a merger or consolidation involving exchange of stock shares shall report the exchange ratio and values agreed upon for such share exchange, and not their market value. Vice-versa, when a deficit emerges from a consolidation without share-exchange, the business activities of the acquired company shall be adjusted, even if such adjustment is not consistent with the values adopted by the acquiring company for its own activities, and maintained after the consolidation process.

REORGANIZATION OF COMPANIES

The business entity reorganized preserves rights and obligations of the original business entity giving cause to the reorganization, and carries forward any of its activities and relationship, judicial also. Civil code, Article 2499 establishes that the reorganization may also occur pending insolvency proceedings, as long as the aim of the reorganization is compatible with such proceedings.

The reorganization shall formalized into a notarized deed, which shall be subject to conditions that the Law sets forth for the kind of business association chosen and to its relating statutory requirements of publicity, as well as to the statutory publicity for dissolution of the business entity, which undertook the reorganization.
The reorganization shall be in force upon compliance with the last of the previous mentioned publicity requirements of law. Once reorganization has been enforced, it is not possible to challenge the validity of the deed of reorganization. Anyhow, it is possible to claim compensation for any damage suffered.

REORGANIZATION OF PARTNERSHIPS

Save for different provision that the Bylaws or a shareholder agreement may set forth, the reorganization of a partnership into limited companies requires the favourable voting by the majority of the members, determined in accordance with the portion of profit attributed to each of them. The member, who did not concur to the action shall have appraisal rights. The stock capital resulting from reorganization shall be determined in accordance to the actual value of the items of the assets and liabilities and must result from an appraisal report drafted:

- in the event of a Corporation (Società per azioni - S.p.a.), by an expert appointed by the Tribunal in accordance with provision of Civil code, Article 2343
- in the event of a Limited Liability Company (Società a Responsabilità Limitata – S.r.l.), by an expert (either an auditor or an auditing company) in accordance with provision of Civil code, Article 2465

If some members provide services to the partnership, they are entitled to an allocation of stock:

- proportionate to the percentage of its holding that the partnership agreement set forth
- established by way of members' agreement
- set by the Judge on the basis of equity

In any such case, the stock assigned to other members shall be reduced proportionally.

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The reorganization process does not release members with unlimited liability from liability for company

obligations incurred prior to the fulfilments of the above mentioned publicity requirements. Such consent is presumed if the creditors, who have been given notice about the reorganization, do not deny expressly their consent within 60 days from receipt of such notice. Denial by the opposing creditor may be override by credit settlement.

REORGANIZATION OF LIMITED COMPANIES

Save for different Bylaws provision, the resolution for reorganization of limited companies into partnership is adopted with the quorum majorities provided for the amendments to the Bylaws, in accordance with the business association form. The stockholder gets always appraisal rights. The consent of stockholders assuming unlimited liability through the reorganization process, is required.

Directors shall draw up a report aimed at addressing the reasons for and the effects of the reorganization.

Copy of the report must remain deposited with the registered office during the thirty days preceding the meeting convened to resolve the organization. Upon reorganization, stockholders assume unlimited liability and are unlimited liable for corporate obligations arisen prior to the reorganization.

HETEROGENEOUS REORGANIZATIONS

They occur only when a limited company (1) undertake a reorganization; or (2) result from a reorganization process.

(1) Heterogeneous reorganization from limited companies – Such companies may reorganize themselves into syndicates, syndicates in company form, cooperative organizations, pool of companies, foundations and not-recognized associations. The relating resolution must be passed with the favourable voting of two thirds of the stockholders and with consent of those stockholders assuming unlimited liability.

(2) Heterogeneous reorganization into limited companies – Syndicates, syndicates in company form, pool of companies, foundations and not-recognized associations may reorganize themselves into limited companies (cooperative organizations cannot). The resolution of reorganization must be taken in the:

- syndicates with the favourable vote of the absolute majority of members
- pool of companies with unanimous vote
- syndicates in company form and association with the majority required by Law or by the Articles of association for the early liquidation
- foundations with decision by either the governmental or the administrative authority

The reorganization of association in limited company may be excluded in the articles of association or, for specific categories of association, by law; the reorganization is not permitted in any case for associations which have received public contributions, grants and donations from the public. The capital of the company resulting from the reorganization is divided in equal parts among the members unless otherwise agreed among them.

In both cases (1) and (2), in derogation to the provision of Civil code, Article 2500, third paragraph, the heterogeneous reorganization is effective after sixty days from completion of the publicity requirements that the same article sets forth, unless there is consent of the creditors or the credit settlement of creditors who did not consent. Within the same term of sixty days, creditors may file an objection with the Tribunal.

MERGER OF COMPANIES

The new Law of corporations makes a distinction between merger and consolidation. A merger is effected when one or more companies become a part or merge with another company. The former company or companies cease to exist but the latter company continues to exist. By contrast, in consolidation two or more companies unite to form a new company and the original companies cease to exist. Those companies undergoing a winding up process, which have started distribution of the assets are not allowed to merge or consolidate; it is however permitted for those companies under insolvency proceedings. It is now possible to make limited amendments to the merger plan upon approval of the merger.

PROCEDURAL STEPS:

- Drawing up the merger plan
- Depositing the merger plan at the legal address of the companies participating to the merger
- Filing the merger plan with the Companies' Register for registration
- Drawing up financial statements of companies participating to the merger. Financial statements must be not older than 120 days from the date of filing of the merger plan
- Drawing up the report by the management board, commenting and justifying, from a legal and economic perspective, the merger plan and in particular, the exchange ratio of the shares or stock quotas
- Drawing up the expert reports for each company involved in the merger, on the adequacy of the exchange ratio of shares or stock quotas
- Depositing the following documents at the legal address of the companies participating to the merger. Such documents shall remain deposited during the thirty days preceding the meeting unless stockholders unanimously waive to such term, and until the merger have been resolved: (a) merger plan; (b) annual accounts of the last three fiscal years of participant companies, reports of directors and the Board of auditors along with the certification report; (c) balance sheets of the

companies participating to the merger drawn up pursuant to Civil code, Article 2501quater
- Calling the Shareholders' Meetings of the participant companies for passing the merger resolution and adopting the merger act, which shall be in the form of a public deed drafted by a notary
- Depositing and filing of the merger resolution with the Companies' Register
- Eventual opposition by creditors
- Drawing up and filing of the merger act with the Companies' Register

Publicity on the Official Gazette of an extract of the merger plan is not required anymore. Shareholders may now waive the term of on month between the date set for passing the merger resolution and the filing of the merger plan.

The expert, which must be either an auditor or an auditing company, shall draw up the report on the congruity of the share exchange ratio. If the company resulting from the merger or consolidation process is a corporation (S.p.a. or S.a.p.a.), then the expert shall be appointed by the Tribunal. If the Corporation is listed on the stock exchange, the expert must be an auditing company. In case of merger of partnership into a limited company, the expert shall draw up an appraisal report on the assets of the partnership in accordance to provision of Civil code, Article 2343. The merger shall be approved by each participant company through approval of the relating merger plan. If the Articles of association or the Bylaws do not provide otherwise, the merger decision shall be adopted:

- by partnerships through voting of its members. Each member shall have a vote proportionate to the percentage of its holding that the partnership agreement set forth
- by limited companies, in accordance to the rules that regulate amendments to the Articles of association or the Bylaws

Any shareholder who did not consent to the merger gets appraisal rights. Civil code, Article 2502bis provides that the merger resolution must be filed with the Companies' Register along with its relating documentation. The merger shall be enforced (by way of the act of merger) only after 60 days from the last of such filings, unless:

- there is a previous agreement with creditors to the filing of the merger plan
- there is a previous settlement of the all creditors, which did not express their consent; or
- the expert report has been filed for the all participant companies by a single auditing company, which must certify under its own responsibility, that the economical and financial situation of the participant companies makes it unnecessary to set up guarantees and securities for the creditors.; or
- the amount correspondent to the accounts payable to the creditors is deposited at a bank

If the above circumstances does not occur, and there is objection by creditors within 60 days, the Tribunal may enforce the merger anyway upon posting of a bail. The bondholders may object to the merger, unless consent to the merger was previously given by the bondholder assembly. With reference to convertible bonds, there is a requirement of publicity on the Official Gazette ninety days at least prior to the filing of the merger plan, which is aimed at allowing bondholders to exercise their right to conversion of the bonds within one month from the date that the above mentioned publicity was made. The company resulting from the merger or the acquiring company takes on rights and liabilities of the other participants. The merger shall be recorded into a public deed (Civil code, Article 2504). The act of merger must remain deposited for filing with the Companies' Register within thirty days. The filing referred to the acquiring company or the company resulting from the merger cannot be done prior to the filings referred to the other participant companies. According to Civil code, Article 2504, the merger takes effect when the last of the required filings has been made. Such date may be postponed in case of mergers. Setting an earlier date is admissible with reference to dividend distribution and to the date they are charged to the accounts of the company. The first balance sheet subsequent to the merger shall report the assets and liabilities at the values resulting from the accounting records at the date of effectiveness of the consolidation or merger. If from the consolidation or merger emerges a loss, such a loss must be imputed, to the extent possible, to the items of the assets and liabilities of the companies participating to the consolidation or merger and, for the difference and in compliance with the conditions that Civil code, Article 2426, n.6 sets forth. In case of companies which make recourse to the market of risk capital, accounting reports indicating the values attributed to the assets and liabilities of the companies which have participated to the consolidation or merger together with the expert report must be attached. The merger cannot be challenged under a claim of invalidity, after filing of the act of merger with the Companies' Register,. Compensation for eventual damages may be claimed instead.

LEVERAGED BUY-OUT & MANAGEMENT BUY-OUT

Specific rules have been enforced with reference to those takeovers and subsequent mergers carried out using borrowed funds, when either the stock asset or the asset of the target company represent the guarantee or the source of repayment of such debt undertaken. The specific rules are that:

- the merger plan must detail the financial resources of the company resulting from the merger, budgeted for debt repayment
- the directors' report must specify the reasons that justify the operation and provide for a comprehensive economical and financial plan detailing sources for financial commitments and description of the goals

- the expert report must certify the reasonableness of the information reported in the merger plan

The report of the auditing company of either the targeted or the acquiring company must be attached to the plan. It is not possible to apply for short-form merger (either wholly owned or 90 % owned companies).

WHOLLY OWNED COMPANIES – In case of merger with a company entirely owned, the merger plan may not make mention of information relating to the exchange-share ratio, the procedure for assignment of the shares, and the accounting date for the operations. Directors' report and expert report are not required as mandatory.
If there is compliance with statutory provisions relating to the merger plan, and with reference to the acquiring company also with those provisions relating to the filing of documents, the Articles of association may provide that the resolution of merger with a fully owned subsidiary is passed by each Board of Directors by way of public deed.
Upon request by 5% of shareholders of the acquiring company, the standard procedure that Civil Code, Article 2502 sets forth shall be adopted. The relating request shall be filed within 8 days from the date of filing of the merger plan.

90% OWNED COMPANIES – In this case the experts' report is not required, if the minority shareholders of the 90% owned company are given the right that their shares are to be purchased by the acquiring company at a price determined with the same criteria established for exercising appraisal rights by the withdrawing shareholder. Moreover, either the Articles of incorporation or the Bylaws may provide that the decision about the merger may be taken by the management Body. In this latter case the overall merger process is subject to those conditions and to the same procedures that the law sets forth in case of merger with fully owned subsidiaries, and to the additional condition that the filing of the merger plan of the acquiring company must be done at least one month prior to the date fixed for the resolution of merger by the target company.

MERGER WITH COMPANIES WITHOUT STOCK CAPITAL REPRESENTED BY SHARES
Civil code, Article 2505quater provides for a simplified procedure in order to ease the merger process among these companies. In particular, the following statutory requirements are not mandatory:

- prohibition of merger for winding up companies, which have initiated distribution of the assets
- price adjustment over 10% of the par value of the shares

Requirements of Civil code, Article 2501sexies relating to the expert report may be waived with the unanimous consent by all of the stockholders of the participant companies. In addition, the following terms are halved:

- one month between the date fixed for passing the merger resolution and the filing of the merger plan
- one month for the documents that must be deposited at the company before decision is taken
- two months for objection by the creditors.

SPLIT-UP OF COMPANIES

There are several express references to the statutory regulation of mergers. Civil code, Article2506 provides that with a split up a company transfers:

- all of its assets and liability to more than one company, pre-existing or newly established, or
- part of its assets and liabilities, in such case also to a single company, and the relevant shares or quotas to its stockholders

An adjustment in cash is permitted provided that it is not higher than 10% of the par value of the shares or the quotas allocated. It is also permitted, with the unanimous consent, that shares of one of the companies benefiting of the split are not given to certain members, but rather shares of the split company. The split company may, with the split, either terminate its activities without liquidation or may continue its activities. Companies in liquidation, which have started distribution of their assets are not allowed to split. Splitting up is however permitted to those companies undergoing insolvency proceedings.

PROCEDURAL STEPS
With reference to the split-up plan, Civil code, Article 2506bis provides that:

- The management body of the participant companies shall draw up a plan, which must include all the information that Article 2501ter requires as well as an accurate description of the asset and liability items to be transferred to each of the beneficiary companies along with a description of the cash adjustment, if any.
- Upon transfer of all of the assets and liabilities of the split-up company, if the destination of an asset item cannot be inferred from the plan, the same item is apportioned among the beneficiary companies in proportion to the share of the net assets transferred to each of them, as evaluated for purposes of determination of the share exchange ratio
- If the transfer of the net assets of the company is only partial, the item remains attributed to the transferor company
- For the liability items whose destination cannot be inferred from the plan, there is joint and several liability (1) among beneficiary companies in case of transfer of all of the assets and liabilities to more than one company, (2) among the transferor company

and the beneficiary companies in case of partial transfer of assets and liabilities of a company. The joint and several liability is limited to the actual value of the net assets attributed to each of the beneficiary companies.

- The split-up plan must provide for criteria of distribution of the shares or quotas of the beneficiary companies. If the plan provide for an allocation of the holdings to members of the split up company, which is not proportional to their original percentage of holdings, the plan itself must set forth appraisal rights to those members who did not approve the split at a price determined in accordance with the criteria provided for the withdrawal.

The split up plan shall be filed for registration with the Companies' Register. The management bodies of the participant companies must draw up the balance sheet and the their report in accordance with rules that Articles 2501quater and 2501quinques set forth in case of merger. The balance sheet shall be at a date not earlier than 120 days prior to the date on which the split-up plan is deposited at the company's legal address.

The management report shall justify, from a legal and economical perspective, the split-up plan and the share (or quotas) exchange ratio, as well as criteria and any eventual difficulty for its assessment. In addition, the management report must also provide information about the criteria of distribution of the shares or quotas and shall indicate the actual value of the net assets transferred to the beneficiary company and of those, if any, which are retained by the split-up company. The experts' report is governed by the rules set forth in case of merger; such report is not required when the split-up occurs through the formation of one or more new companies and no criteria for the assignment of the shares or quotas are provided other than a proportional criterion. With the unanimous consent of the members and of the eventual holders of other financial instruments, the company may be exempted from drawing-up the above mentioned reports. The split-up takes effect as from the date of the last registration of the filings to be made with the Companies' Register where the beneficiary companies are registered. A subsequent date may be established, except in case of split-up into newly established companies. Each company remains jointly and severally liable to the extent and limitation of the actual value of the net assets transferred to it or retained, for the debts of the split-up company that are not satisfied by the companies to which they are charged. Any beneficiary company may carry out the mandatory requirements of publicity relating to the split-up company. The first balance sheet subsequent to the split-up shall report assets and liabilities at their actual value on the date that the split-up took effect. In case of companies with outstanding shares held by public investors, information on the values attributed to assets and liabilities of the participant companies as well as the experts' reports must be attached to the integrative report by the Board of Directors.

Enforcement & Deadlines
January 1st, 2004 • Corporate Law Reform enforcement date • Since this date on Certificate of incorporation and Bylaws shall comply with new rules (newly incorporated companies)
June 30th, 2004 • Ministerial Decree about the institution of the Registry of "Cooperative" • Deadline for limitations to exercise appraisal rights (art. 2437 lettera e).
September 30th, 2004 • Deadline for amending Bylaws in order to comply with new rules • Anticipated compliance makes amendments enforceable since January 1st, 2004. • Enforcement of new rules for drafting annual financial reports.
December 31st, 2004 • Deadline for amending Bylaws of "Cooperative".
December 31st, 2009 • End of automatic renewal of voting agreements entered before January 1st, 2004.
• Raising stated capital to the new legal threshold of € 120,000.00 for companies operating on January 1st, 2004 is not mandatory until expiration of the life term of the company