

New Italian Legislation Allows Enhanced Voting Rights Capital Structures

In a break from the “one share one vote” principle, issuers of Italian-listed stocks now have more flexibility in their capital structures.

Legal framework

Law Decree No. 91 of 24 June 2014, as converted with amendments into law No. 116 of 11 August 2014 (the Competitiveness Decree), introduced significant changes to Italian corporate and securities laws set out in the Italian Financial Act (Legislative Decree no. 58 of February 24, 1998) with the aim of boosting long term equity investments and promoting access to Italian equity capital markets. On December 23, 2014, the Italian Securities Regulator, CONSOB, adopted resolution No. 19084 (the Resolution) amending the Issuers Regulation no. 11971 of May 14, 1999 (the Issuers Regulation) in order to enact the regulatory provisions necessary to complete and implement the general rules which the Competitiveness Decree introduced. The Resolution came into force January 1, 2015 and the new legal framework, as resulting from the Competitiveness Decree and the Resolution, is now fully applicable.

With the Competitiveness Decree, Italian legislators have superseded the principle “one share one vote” — allowing Italian joint stock companies which are listed (or in the process of being listed) on Italian-regulated markets to introduce enhanced voting rights attached to the issuers’ shares. These enhanced voting rights would relate to shares having voting rights on the appointment or dismissal of the members of a company’s administrative body as a result of a certain holding period, similarly to the loyalty shares regimes in the French and Dutch systems.

The Competitiveness Decree’s¹ main enhanced voting rights requirements include:

- Granting of enhanced voting rights does not create a special category of shares; therefore all shares meeting the requirements set forth by law and by the issuers’ by-laws shall benefit from the increase.
- The increase can be up to two votes per share. The majority of comments by authors and market participants released so far agrees that the increase can also be for a fraction (e.g.: 1.5 votes per share).
- The disposal of shares for a consideration or free of charge, or the direct or indirect sale of the controlling stake in a company or entity holding shares with enhanced voting rights exceeding two percent of the voting capital of a listed issuer automatically terminates the enhanced voting right. Unless otherwise laid down in the by-laws, the enhanced voting right:

- a) Is maintained in the case of succession due to an individual shareholder's death, as well as in the case of a merger or spin-off
- b) Applies to the newly issued shares in the case of a free capital increase

- Unless the by-laws provide otherwise, the vote increase is calculated to determine the majority necessary to validly hold the shareholders' meeting and resolve the relevant matters. The increase does not affect corporate rights, other than voting rights, which can be exercised upon the possession of certain capital thresholds (e.g. capital thresholds required to present slates for the appointment of directors, to require postponement of shareholders' meetings or to propose any liability action).
- The increase is applicable only to those shares which the same shareholder holds for at least two consecutive years without interruption, starting from the date registered in the issuer's special register or for a longer period which the issuer can stipulate in the by-laws.
- Companies in the process of being listed can include in their by-laws provisions stating that the shareholding period preceding the enrolment in the special register mentioned above can be counted to trigger the increased voting rights.

How enhanced voting rights capital structures are implemented

The enhanced voting rights attached to the shares having voting rights on the appointment or dismissal of the members of a company's administrative body need to be expressly provided for and regulated in detail in the by-laws of any issuers which intend to use such a mechanism. According to the general Italian corporate law provisions, the relevant amendments to the by-laws need to be resolved by the extraordinary shareholders' meeting. The issuer's extraordinary shareholders' meeting can resolve the introduction of enhanced voting rights with the majority required to resolve on an amendment to the by-laws.

When will the effects be visible and who will benefit from the enhanced voting rights

Based on the Competitiveness Decree's purpose and the overview of the new legal framework, the impact of the enhanced voting rights likely will be tangible, effective:

- Immediately, for current long-term shareholders of an Italian joint stock company in the process of being listed that could opt to introduce enhanced voting rights
- Two years from the date the issuer opts in for the enhanced voting rights (or a longer period which may be set forth by issuers' by-laws) for shareholders aiming at investing in shares that are already listed

A capital structure with enhanced voting rights can encourage entrepreneurs and sponsors to go public while retaining control over the company's management. This allows the issuer to access a significant source of financing — through an IPO — while retaining a greater percentage of the corporate capital, thus guaranteeing continuity and long term management strategy. On the other hand, the market and institutional investors can perceive such a capital structure as allowing a controlling shareholder to reduce equity investments without losing control over the issuer, thus separating risk and control, and as a mean to prevent possible takeovers of the issuer.

Given these arguments, the way the market and institutional investors react to the introduction of enhanced voting rights likely will depend on several factors, including:

- The majority shareholders' ability to convey to institutional investors the advantages of the enhanced voting rights
- The introduction in the issuer's by-laws of provisions aimed at mitigating the risks for institutional investors considering the typical features and goals of their long-term investment and stewardship (see paragraph *Possibility to tailor enhanced voting right structures in the by-laws*, below)
- How issuers avoid areas of uncertainty in calculating majorities required for the shareholders' meetings resolutions, as well as thresholds triggering mandatory takeover bids and disclosure obligations of relevant shareholdings

Other than the limits and requirements illustrated above, the issuer has a wide range of options available to tailor and detail the enhanced voting rights capital structure. Only after introduction of the relevant rules in the issuers' by-laws, the market will be able to evaluate how the new legislation has been implemented and will react accordingly. Intuitively, enhanced voting rights likely will be used to benefit majority shareholders. However, the possibility to tailor the content of the enhanced voting rights, and to include a possible waiver thereof in the by-laws, could make enhanced voting rights a valuable incentive for loyal investors as well.

Possibility to tailor enhanced voting right structures in the by-laws

According to the new provisions,² an issuer's by-laws set forth terms and conditions for granting enhanced voting rights, as well as for verifying the relevant requirements. Shareholders opting for enhanced voting rights must be registered in a special register held by the issuer.

Save for the minimum requirements which CONSOB set forth in the revised Issuers Regulation, the issuer can specify and limit, in its by-laws, the framework applicable to the enhanced voting rights.

In particular, the issuer's by-laws may grant enhanced voting rights on a limited number of crucial matters to be resolved, so as to avoid discouraging potential investors, who could decide not to take the risk of being irrelevant in the shareholders' meetings.

Further, the Competitiveness Decree specifies that the issuers' by-laws may grant the right to waive, in whole or in part, enhanced voting rights. The by-laws should detail the procedure and timing to irrevocably waive enhanced voting rights.

The definition of "transfer" will be a particularly significant matter which the by-laws will need to clarify. As mentioned above, transferring shares automatically terminates the enhanced voting rights. In order to avoid uncertainty as to whether a transaction could be treated as a transfer, the by-laws must provide for the overall amount of voting rights to be considered when calculating majorities and thresholds that trigger mandatory takeover bids or disclosure obligations. We refer in particular to all transactions that, although not strictly involving a sale, result in the disposal of the voting rights, such as pledge, right of use, transfer of option rights, seizure, securities lending, etc.. With reference to any such transactions the by-laws can clarify whether or not the enhanced voting right terminates, thus reducing uncertainty that would discourage investors from acquiring or subscribing to the issuer's equity.

Also, the by-laws may provide for a duration of uninterrupted ownership that extends beyond two years, if the issuer aims at attracting loyal investors for longer term strategies.

Eventually, the by-laws could also specify that once the minimum ownership term requirement is met, the enhanced voting right applies automatically to the shares for which shareholders requested enrolment in the special register. The enhanced voting right could apply without prejudice to the right to waive such enhanced voting rights, or could require a specific confirmation from the relevant shareholder.

The Competitiveness Decree allows a wide range of possibilities for tailoring the enhanced voting rights — a welcome tool to address different issuers' needs.

Such flexibility should be used as a tool to guarantee that institutional investors are adequately protected against possible abuses: if the issuer's by-laws would clearly specify and detail that the regime applies on an equal basis to enhanced voting rights, the by-laws could limit — to the maximum extent possible — areas of risk and uncertainty that the market would otherwise perceive and punish.

CONSOB regulation detailing the applicable regulatory framework

As mentioned above, CONSOB's Resolution enacted the regulatory provisions implementing the rules which the Competitiveness Decree introduced.

The new provisions set forth in the Issuers Regulation govern: (i) the minimum requirements of the special register to enrol the shareholders willing to benefit from the enhanced voting rights; (ii) the shareholders' transparency requirements applicable to enhanced voting rights and (iii) the impact of the enhanced voting rights on mandatory takeover bids.

The special register

The Issuers Regulation³ specifies that the special register must include at least:

- The data identifying the shareholders which requested to be enrolled, the number of shares in relation to which enrolment was requested, the transfer and the liens relating to such shares and the date of enrolment
- The data identifying the shareholders which actually benefit from the increase of their voting rights, the number of shares with enhanced voting rights, the transfer and the liens relating to such shares and the effective date of the increase

Pursuant to the Issuers Regulation, the issuer also must update the special register based on the information provided by the banks and financial intermediaries holding the shareholders' accounts where book-entry shares are credited.

The issuer must make available:

- To all shareholders; the information contained in the register, also in electronic format
- To the public; by means of publication, on the corporate web site, of the data identifying the shareholders that have requested enrolment in the special register, their respective participation exceeding two percent (or five percent in case the issuer is a SME⁴) and the registration date

Shareholding transparency requirements

Pursuant to the Issuers Regulation's new provisions, the issuer must update the information on enhanced voting rights — published according to the provisions above — when exceeding the relevant thresholds⁵ set out for the disclosure of relevant shareholdings held in Italian-listed issuers. The updates must occur

within (i) the fifth trading day after the end of the calendar month during which an increase or a decrease of the voting rights has occurred, and (ii) the day after the record date of any shareholders meetings.

Further, in case such shareholdings (counted on the overall voting rights in case the by-laws provide for the enhanced voting rights) fall below — or exceed — the relevant thresholds as a result of an increase of voting rights — or of the waiver of enhanced voting rights — the relevant shareholder shall disclose such events to the issuer and CONSOB with no delay and in any case within five trading days preceding the periodic publication of the overall voting rights due by the issuer.

Mandatory takeover bids

Pursuant to the Italian Financial Act, as amended by the Competitiveness Decree⁶, if a shareholder, as a result of purchase(s) or enhanced voting rights, becomes the owner of more than 30 percent of shares (issued by an Italian company listed on an Italian-regulated market,) which grant rights to vote on appointment or removal of directors, or if a shareholder becomes the holder of more than 30 percent of such voting rights, that shareholder shall promote a takeover bid on all the securities granting voting rights in the ordinary and extraordinary shareholders' meeting which are admitted for trading on an Italian-regulated market.

The Competitiveness Decree has added another threshold: in companies other than SMEs, a mandatory takeover bid must be launched by whoever, as a result of purchases, becomes the owner of a stake exceeding 25 percent, if no other shareholder holds a higher stake.

In order to support SMEs and promote their access to the Italian equity capital market, SMEs' by-laws may set a different threshold, ranging between 25 and 40 percent, provided that in case the amendment to the by-laws to set this threshold is resolved upon after the IPO, shareholders who have not resolved such an amendment are entitled to withdraw.

Notably, the obligation to launch a takeover bid is not triggered if the relevant thresholds described above are crossed as a result of the enhanced voting rights — provided that the relevant shareholder undertakes to transfer to unrelated third parties the shares which are in excess of the threshold, or reduce the voting rights in excess of the relevant threshold within 12 months. In the meantime, such a shareholder must abstain from exercising the relevant voting rights. Such undertakings shall be disclosed to the public and if the shareholder does not transfer or reduce the exceeding stake within 12 months he/she shall launch the mandatory takeover bid.

The so-called “passive” variation of thresholds

Changing the overall number of voting rights may significantly affect all shareholders, as enhanced voting rights are considered when calculating the thresholds that trigger disclosure obligations or mandatory takeover bids. In particular, the regulator has evaluated circumstances (such as the waiver by some shareholders of their enhanced voting rights or termination of the enhanced voting rights due to the transfer of the relevant shares) in which other shareholders suddenly and involuntarily exceed the thresholds described above.

The regulator has properly addressed the above-mentioned circumstances that could generate concerns among investors; exempting shareholders from some disclosure obligations and mandatory takeover bid rules in all circumstances where a shareholder's voting rights increase as a consequence of facts or circumstances that are not under the shareholder's control (such as if the total voting rights are reduced) results in crossing the relevant thresholds. The exemption from the mandatory takeover bid, however,

does not apply if the shareholder acquires a stake that exceeds the relevant voting shares, regardless of whether the voting rights remain below such thresholds.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

[Maria Cristina Storchi](#)

mariacristina.storchi@lw.com

+39.02.3046.2044

Milan

[Isabella Porchia](#)

isabella.porchia@lw.com

+39.02.3406.2078

Milan

[Simona Bormida](#)

simona.bormida@lw.com

+39.02.3046.2048

Milan

You Might Also Be Interested In

New Measures Aim to Support Listing and Capitalization of Italian Companies

Modifiche recenti alla disciplina fallimentare

Recent Developments in Italian Insolvency Law

Italian Government Enacts Innovative Measures to Support Access to Finance

Client Alert is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the lawyer with whom you normally consult. The invitation to contact is not a solicitation for legal work under the laws of any jurisdiction in which Latham lawyers are not authorized to practice. A complete list of Latham's *Client Alerts* can be found at www.lw.com. If you wish to update your contact details or customize the information you receive from Latham & Watkins, visit <http://events.lw.com/reaction/subscriptionpage.html> to subscribe to the firm's global client mailings program.

Endnotes

¹ Article 127 – *quinquies* of the Italian Financial Act.

² Article 127 – *quinquies* of the Italian Financial Act.

³ Article 143-*quater* of the Issuers Regulation.

-
- ⁴ "SME": listed small and medium enterprises, which, on the basis of the approved financial statements for the last financial year, also prior to the admission of their own shares for trading, have turnover of up to Euro 300 million, or average market capitalization in the last calendar year of less than Euro 500 million.
- ⁵ Pursuant to article 117 of the Issuers Regulation the relevant thresholds applicable to holding of actual shares are: 2% (for entities other than SMEs), 5%, 10%, 15%, 20%, 25%, 30%, 50%, 66.6%, 90% and 95%.
- ⁶ Article 106 of the Italian Financial Act.