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# 6. CORPORATE - M&A

## Protection of investors

Two recent principles of the Council of Notaries in Milan **provide valuable input for investors**, **including foreign ones**, ensuring that they have real (statutory) protection, setting in By-Laws (and not only in shareholders' agreements) change of control and anti-dilution provisions.

**Change of control clause** The following clauses in the By-Laws are legitimate and enforceable: (i) the clauses that give the other shareholders of the company the right of redemption with regard to the shareholdings of the shareholder company, in the event of a change of control of Beta, (ii) the approval clauses, through which one of the corporate bodies of the company must express approval of the new controlling shareholder of one of the shareholders, (iii) the clauses that do not subject to the right of pre-emption the transfer of shareholders' participations to a subject controlled by or controlling the selling shareholder, but subjecting such transfer to a condition precedent in the event of the loss of control between the selling shareholder and the purchaser, and (iv) the clauses that do not subject to the right of pre-emption the transfer of company's shareholdings to a subject controlled by or controlling the selling shareholder, but imposing a retransfer obligation in the event of the loss of control between the selling shareholder and the purchaser.

**Anti-dilution clause** The By-Laws clauses of SPAs (**Joint-Stock companies**) or SRLs (**Limited Liability Companies**) establishing the obligation, in the event of future by cash capital increases, with or without subscription rights, to allocate a certain number of newly issued shares or quotas for free to the holders of a specific class of shares or quotas are legitimate where such capital increases are approved at a lower price than the amount set by that clause, with the purpose of avoiding any dilution in the value of the shares or the quotas in the protected class even in the event that the relevant holders do not participate in the new capital increases.

## Covid-19 Emergency: temporary corporate measures

A set of decrees have been enacted since the beginning of the pandemic in March 2020 to facilitate virtual meetings of corporate bodies, suspend certain corporate duties of recapitalisation because of extraordinary losses, support equity injections and grant strategic companies higher protection against predatory acquisitions. Such measures, originally intended to terminate by the end of 2020, have been extended as follows. They apply by derogating to the ordinary provisions of the Italian Civil Code and any different provisions of the relevant By-Laws.

| Provision of law | Expiry/relevant date |
|---|---|
| Full virtual meetings for all the attendees<br><br>Expression of vote by electronic devices or mail<br><br>For listed companies, right to vote in the shareholders meeting through the representative designated by the company (and faculty of the latter to opt that participation can take place exclusively through such representative)<br><br>*Art. 3 DL 183/2020 (to be converted into law)*<br><br>*Art. 106 DL 18/2020* | End of the emergency, by and not later than 31 March 2021 |
| Lower quorum for resolving share capital increase by new contributions, and delegating the board to resolve such increase<br><br>*Art. 44 DL 76/2020* | 30 June 30 2021 |
| Suspension of the duties of recapitalisation and liquidation of joint stock companies or limited liability companies incurring in losses exceeding one third of the share capital or reducing the capital below the minimum required at law, for those losses resulting in the ongoing financial year as of December 31, 2020<br><br>*Art. 1, par. 266 L 178/2020 - Art. 6 DL 23/2020* | Up to the shareholders meeting approving the financial statements as of the 5th year thereof |
| Enforcement of expanded "golden power" notification duties, concerning also EU investors and minorities, on investment in strategic assets and companies<br><br>*Art. 10 ter DL 137/2020 - Art. 4 bis, par. 3bis – 3quarter of DL 105/2019* | 30 June 2021 |

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# 7. BREXIT: THE APPLICABLE REGIME TO UK ENTITIES OPERATING IN THE FINANCIAL AND INSURANCE SECTORS

Pursuant to Article 22 of Law Decree No. 183 of 31 December 2020, from 1 January 2021 and in any case not later than 30 June 2021, the UK financial entities, operating in Italy, pending authorisation to carry out the activities as intermediaries of third countries may continue to operate in Italy, within the limits of the management of existing relationships and exclusively through the establishment of branches in Italy, in compliance with the provisions applicable to third country intermediaries pursuant to the Consolidated Law on Banking (TUB) and the Consolidated Law on Finance (TUF).

The competent authorities exercise the powers attributed to them by law, including those regarding prevention, resolution and management of crises, towards non-EU intermediaries.

In case of denial of the authorisation, these intermediaries cease the activity carried out in Italy, without prejudice to the orderly closure of existing relationships, and return the cash and cash equivalents, assets and their financial instruments, according to the instructions received, in the shortest time possible, and in any case not later than the maximum term of three months from the date of communication of such denial, in compliance with the notice periods for the termination of contracts.

For loans, the termination of the activity, even if resulting from the denial of the authorisation, does not entail a change in the times and methods of payment of interest and repayment of capital by the customer, without prejudice to the customer's right for early repayment.

The UK insurance companies operating in Italy are cancelled from the List of EU companies and they shall inform, by 15 January, counterparties of the operating regime applicable to them.

They continue their activities within the limits of the management of contracts and coverages in progress without taking on new contracts or renewing existing ones, until their expiry or other term indicated by the company in the specific plan to be submitted to the National Institute for the Supervision of Insurance (IVASS) by the end of March, containing the measures that allow for the quick and correct execution of contracts and coverages in progress, including payments for claims to be updated annually.

From 1 January 2021, the contracting party can withdraw without additional charges from contracts that have a duration of more than one year, by giving written notice to the UK company, or exercise other forms of termination of the contractual obligation; the tacit renewal clauses lose their validity. The withdrawal has effect from the expiry of the first year following the date of exercise of the withdrawal itself.

Pending the period of temporary continuation, all provisions relating to insurance continue to be applicable.

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# 8. LABOUR

In 2021 the Italian Government will implement massive tools in order to tackle the economic crisis due to the COVID-19 outbreak. The Budget Law (No. 178/2020) renewed some of the most relevant employment measures already used during 2020, as follows:

- **Wage Guarantee Fund** ("Cassa Integrazione Guadagni"): employers who suspend or reduce work activity due to the COVID-19 epidemiological emergency can apply for a concession from the Wage Guarantee Fund for a maximum duration of 12 weeks, to be placed between 1 January 2021 and 31 March 2021;

- **Prohibition of dismissal for objective reasons**: until 31 March 2021 employers cannot proceed with either collective or individual dismissals for objective reasons, except for some cases (i.e., definitive cessation of the company activity; bankruptcy; collective company agreements with trade unions);

- **Fixed-term contracts**: until 31 March 2021 fixed-term employment contracts can be extended or renewed only once for a maximum duration of 12 months, without the indication of any reason (without prejudice to the maximum overall duration of 24 months);

- **Social security contributions exemption**: by 31 March 2021 employers can benefit from a 8-week social security contributions exemption (INAIL contributions excluded), within the limits of the hours of salary integration used in May and June 2020. Moreover, employers can benefit from a 100 % contributions exemption in case of new hiring of under-35-year-old employees during 2021 and 2022. The exemption lasts maximum 36 months within the limit of EUR 6,000.00.

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# 9. LITIGATION

In November 2020, the entry into force of the reform of **the Italian class action has been postponed to 19 May 2021.** This postponement will allow the Italian Minister of Justice to implement the IT system necessary for the purpose of publicity of the procedure with telematic methods.

In particular, the new class action:

- will be **governed by the Italian Code of Civil Procedure**, and not by the Italian Consumer Code;
- will aim to ascertain any **harmful conduct** and relating **responsibilities** as well as to receive **compensation for damages**;
- **will unfold in three phases**: the first and second phases relating, respectively, to ascertain the assumptions of the action and the decision on the merits by the Specialised Commercial Division of the Italian Civil Court, and the third phase, relating to the assignment of the sums to the members of the class by a delegated judge.

Among the assumptions of the class action, the Court will ascertain the **homogeneity of the rights of the consumers**. Further, any individual consumer will be entitled to "**opt-in**" the class action procedure either in the first phase, right after the Court's order ascertainment ascertaining the admissibility of the claims, or once the Court issues its final judgement.

Finally, the **enforcement procedure** for recovering the amount recognised by the Court as compensation for damages at the end of the class action can be also commenced collectively.

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# 10. GOLDEN POWER EU CHINA - CAI

## Foreign direct investments – Golden power

The Italian Golden Power legislation (Law Decree No. 21/2012) – which under certain circumstances grants the Italian Government the right to veto or imposes conditions on relevant transactions – applies to investments and agreements in the defence & national security sector and networks, in plants, assets and relationships deemed strategic for the national interest in the fields of energy, transportation and communications, in services, assets and infrastructures related to 5G technologies; also, said technologies have recently included those strategic assets provided for in art. 4, par. 1 of Reg. (EU) 452/2019 (to be identified in a specific implementing decree).

In December 2020 two new implementing decrees have been approved, which shall enter into force on 14 January 2021. The first decree identifies the assets and infrastructures of the Reg. (EU) 452/2019 and considers strategic those pertaining to: energy sector, water sector, health sector, sensitive data and information, electoral infrastructures, financial sector (including banking and insurance) and financial market infrastructures, AI, robotic, semiconductors, cybersecurity, nanotechnologies, biotechnologies, non-military aerospace infrastructures and technologies, essential supplies including those in the steel and food sector, dual use products, freedom and pluralism of the media.

The second decree updates the existing implementing regulation of energy, transport and communications by including the essential real estate properties needed to use the related energy and gas strategic assets, and by adding to the list also national spaceports, roads and highways of national interest, and inter-ports of national relevance.

Clear understanding and correct application of these new rules are of the utmost urgency and relevance for structuring and executing Foreign Direct Investments (FDIs), considering also the fact that the temporary expanded notification duties, enacted in April 2020 to provide higher protection against predatory acquisitions and concerning also EU investors and minorities, will apply until 30 June 2021 (as recently postponed).

## EU China – Comprehensive Agreement on Investment

On 30 December 2020, the European Union and China finally reached a common understanding on the Comprehensive Agreement on Investment (CAI). The CAI will need to be defined and ratified by both sides to take effect; according to European officials the EU side is aiming for the deal to enter into force in early 2022. It will ensure:

a) that EU investors achieve better access to a fast growing 1.4 billion consumer market

Market access commitments by China include opening to foreign investors of certain manufacturing sectors (such as cars, production of transport and health equipment, and chemicals production) and services sectors (such as financial, international maritime, environmental, construction and computer, auxiliary air transport, cloud, and private health services).

b) that EU investors can compete on a better level playing field in China and sets rules on SOEs and transparency in subsidies

China committed to SOEs (State-Owned Enterprises) conduct based on commercial considerations and no discrimination, and to share information and consult if the behaviour of SOEs affects EU investors. The CAI lays very clear rules against the forced technology transfer, and the protection of confidential business information collected by administrative bodies from unauthorised disclosure; it will also enhance transparency, predictability and fairness in authorisations, as well as legal certainty and predictability.

c) that the parties pursue a sustainable development in their investment relationship

China will support the uptake of corporate social responsibility by its companies, the effective implementation of the Paris Agreement on climate, and the ratification of the outstanding ILO (International Labour Office) fundamental Conventions and particularly the two ILO fundamental Conventions on forced labour.

The CAI will contemplate an enforcement mechanism (state-to-state dispute settlement), coupled with a monitoring mechanism at pre-litigation phase established at political level (including via an urgency procedure).

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# 11. GENERAL DATA PROTECTION REGULATION (GDPR)

"Schrems II Judgement": The Court of Justice of the European Union (CJEU) ruled on 16 July 2020 (the so-called "Schrems II Judgement") on the data transfer regime between the EU and the US, invalidating the Privacy Shield adequacy decision. As a result, data controllers transferring data to the US found themselves without guarantees of lawfulness. In the same judgment, the CJEU also held valid Decision 2010/87 on Standard Contractual Clauses (SCCs) for the transfer of personal data to processors established in third countries, even if more requirements to make extra-EU transfers valid and lawful have been introduced.

Data Protection issues in the COVID-19 era: The COVID-19 outbreak has given rise to new scenarios from the perspective of personal data protection: massive processing of health data at global level; many States have introduced tracking apps to be downloaded on a voluntary basis and – at European level – -often introducing data intercommunication services between EU States; smart working has been introduced and implemented in many new sectors. Inevitably, in 2021 these scenarios will be more regulated.

Brexit. The "bridging clause": In the agreement reached on 31 December 2020, the EU and the UK introduced the "bridging clause" which extends the application of the existing data protection regime during the transition period (continuity of data flows between the EU and the UK) for a further six months. Thereafter, the UK will qualify as a third country under the GDPR and data transfers to and from Europe will require the application of one of the safeguards set out in chapter V of the GDPR. It is hoped that during these months the European Commission will adopt the adequacy decision under the GDPR.

EDPB Guidelines: In 2020, the European Data Protection Board (EDPB) introduced a number of guidelines, recommendations and best practices on topics of particular relevance from a technology development perspective which will lead to new actions by data controllers and data processors.

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# 12. INTELLECTUAL PROPERTY

In particular due to the COVID-19 pandemic Italy registered in 2020 a boosting move and a strong acceleration towards digitisation processes in various sectors of industry and services. Through systems governed by technologies in the ICT field such as Artificial Intelligence, Machine Learning, IoT-Big Data, cloud computing, augmented reality and robotics, the tendency of the companies is to focus increasingly on automating business management, on creating new sharing-and-sales channels, on collecting, processing and synchronising data to ensure a more strategic and predictive management of purchase, manufacturing and supply cycles as well as of post-sale assistance.

To fill the gap in the digitalisation process in the near future, an opportunity for Italian companies is represented by the "5G technology": more complex than the previous mobile generations with new requirements for new different use cases, 5G will be able to act as a catalyst and a new opportunity to use intellectual property as a key tool for promoting innovation of products, services and business processes (using wireless networks in "connected cars", Industry 4.0, agriculture, medicine, etc.).Industry 4.0 will continue to be a driver in 2021, also thanks to the tax incentives and support tools granted for the next years, such as the increase of the incentives introduced by 2021 Budget Law (Law No. 178/2020): all the companies which make investments in intangible assets covered by the law (such as software, platforms and applications for the development of production systems) from now until 2022 will benefit from a tax credit equal to 20% of investments up to EUR 1 million (previously, 15% up to an investment of 700k).

In line with the international context, the process of transformation and innovation has involved services not only to businesses but also to citizens: new methods of homeworking, digital payment and signature, platforms for meetings and assemblies, telemedicine services have been implemented. In such digitalisation process, a key role is played by a proper management of intellectual property rights, both in terms of legal protection and in terms of their governance within the companies in order to protect trade secrets, as well as in the related contracts such as licences, SaaS, and software development agreements, where the identification of the background and foreground intellectual property rights of each party, the cross-licensing of the results of the collaboration and non-compete undertakings are of essence.

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# 13. ESG – SUSTAINABLE FINANCE

The Sustainable Finance Disclosure Regulation (EU) 2019/2088 (SFDR) with respect to their environmental, social and corporate governance (ESG) policies will apply in the European Union from 10 March 2021.

The SFDR applies to all "financial market participants" (FMPs), which include alternative investment fund managers (AIFMs) and management companies of undertakings for collective investment in transferable securities (including self-managed UCITs) (UCITS ManCos) (together Management Companies) and investment firms which provide portfolio management services (MiFID firms). The SFDR also applies to "financial advisers" which include, among others, credit institutions, Management Companies and MiFID firms providing investment advice. The requirements which apply to all managers regardless of the products they market are ESG basis.

The FMPs shall have to comply with the SFDR requirements: integrating the assessment of ESG risks in their investment process, disclosing their ESG policies on websites and incorporating their ESG policies in the pre-contractual disclosures.

The extraterritorial application of the SFDR to non-EU investment managers is currently unclear, but the broad drafting of the SFDR and certain guidance provided by the European Commission suggest the possibility that FMPs and "financial products" could also include non-EU managers, such as when marketing a non-EU fund under a national private placement regime in the EU.

CBA

HIGHLIGHTS 2021

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