Legal Framework of Doing Business in Italy

Legislation

In the past the only source of legislation was the national Parliament. Now, in many areas, regions may pass legislation which applies to their respective territory.

This tendency is increasing and Parliament is making space for regional legislation. There is a large number of Statutes and *D.L.* and *D.Lgs* (Executive Orders). This is mainly due to creating legislation in areas where simple regulations could suffice. Due to their quantity, it is not always easy to identify the applicable Statute or provisions.

The latter are occasionally placed in a Statute which has a quite different heading.

Courts of Justice

Precedents are not binding in this country. While Courts are quite independent, their backlog is very high and the duration of proceedings is long. In order to reduce this inconvenience, applications for interlocutory injunctions are frequent.

Disputes with Governments and Local Authorities

Whenever a citizen has a claim against the Government or a local authority through which he does not assert a right, but complains for a negative effect of a breach by the public body of provisions which have been set out to govern its conduct in the public interest, the dispute is within the jurisdiction of Administrative Courts and not of Ordinary Courts of Justice.

Regional Administrative Tribunals hear these disputes in the first instance and their decision may be challenged before the Council of State.

Several independent authorities have been formed, such as the Antitrust Authority and the Security Exchange Commission (CONSOB).

Bureaucracy's Attitude

Public servants tend to apply the statutes and regulations according to the book and are generally not fast. Each public servant, within certain limits, may handle matters according to his/her individual interpretation. Written answers to queries are generally not obtained except from Ministries but this may take a long time.

National General Characteristics

Because of a strong individualism, behaviours are not standardized and imagination is frequently used. The general approach tends to be neither formalistic nor oppressive.

Corporate Law

The legal entities mainly used to form a company are the *S.p.A.* (company limited by shares with a minimum capital of 100,000) which may be listed on the stock exchange and the *S.r.l.* (a company with limited liability with a minimum capital of 10,000) which is subject to less stringent formalities, issues no shares (its parts being called *quote*), and which is particularly suitable when they are few quotaholders. Apart from these two, there are *società di persone* i.e. various types of partnerships, which are not legal entities, the most used of which is the *società in nome collettivo*, whose partners are fully liable.

In a particular form of partenership, called *società in accomandita semplice*, some partners do not have to be fully liable.

> Directors who are in breach of their responsibilities are liable to the firm. to the creditors and to shareholders if they suffer direct damage

The traditional structure of the above legal entities consists of a minimum of two shareholders, a Board of Directors, (more rarely a sole director) and statutory auditors. The statutory auditors are required only in case of S.p.A and S.r.l., if the capital is not lower than 103.291,38.

A sole shareholder is fully liable for corporate liabilities incurred where there are no other shareholders. The balance sheet has to be approved by a Shareholders Meeting. Directors who are in breach of their responsibilities are liable to the company, to the creditors (and to individual shareholders if they cause a direct damage to them). Shareholders agreements are not rare. Their validity has been debated for a long time. Under the prevailing view they are valid if not in conflict with any

mandatory provision. Resolutions by majority and duration are still being discussed.

At shareholders meetings a different majority is required for ordinary and extraordinary resolutions (the latter including increases or decreases of capital and any other amendments to the By-Laws). If not stated otherwise in the By-Laws, 51% of the voting shares assures control of the company.

If the *quorum* for the validity of meetings is raised by the By-Laws from 51%, (e.g. to 67%), a majority shareholder holding 51% of voting shares is unable to pass resolutions at shareholders meetings in first call.

However in second call a mandatory provision allows the meeting to be held irrespective of the number of shares which are in attendance. One viewpoint is that this provision forbids also a majority in excess of 51% in order to pass the resolution. If so in second call the minority shareholder would be unable to prevent approval by a shareholder holding just 51%.

A large number of controls have been imposed on companies which are listed in the stock exchange, such as the offering of shares to their own employees.

As for the *S.r.l.* it has become possible that they now be formed by a sole shareholder. A sole shareholder is fully liable for corporate liabilities if it is a legal entity or the sole shareholder of another legal entity.

European Directives are implemented even if not immediately.

By Statute October 3 no 33 [2001] Parliament has authorised the Government to reform corporate law. A Draft Executive Order has been approved and the Corporate Law Reform, which should become effective in 2004, will vastly amend what has been an entrenched corporate structure.

Under the Reform, even an S.p.A may be formed legally by a sole shareholder.

The *governing body* may now be:

- either – as before – a Board of Directors whose management is controlled by the statutory auditors while other auditors control the accounts;
- or a *consiglio di gestione* (similar to the previous Board of Directors) and a *consiglio di sorveglianza* (supervisionary body) entrusted with the control over the management of the company, the approval of the balance sheet, and the appointment and removal of directors;
- or a Board of Directors, within which a Committee (consisting of directors without operational tasks) is formed, to be in charge of the control of executive management.

Groups of companies are for the first time regulated. The Reform's guidelines are to provide for transparent principles and to balance the interest of the group, the interest of the controlled companies and of their minority shareholders. The list of all the members of a group must be public and corporate resolutions, which deal with the interest of the group, have to be reasoned. Eventually protection of minority shareholders at the time they become and cease to be shareholders is provided.

Italy's corporate taxation system is based on the worldwide principle: that is, a resident entity is taxed on all the income generated

The *allocation of assets to a specific business*, is to be reported separately in the balance sheet and reports.

Shareholders agreements also have been regulated, acknowledging their role which consists in dealing with voting rights, sales of shares and the joint control of the company. Such agreements are valid for up to 5 years (and are renewable) and must be notified to the company when the latter is listed in the Stock Exchange.

Mergers and Acquisitions

Mergers and acquisitions are subject to control by the Italian Antitrust Authority as well as, if they affect the European common market, by the EU Commission. Public bids for shares are subject to a very detailed regulation and control by the Security Exchange Commission (*CONSOB).*

Mergers and acquisitions too, as well as any split up and transformation of companies, have been affected by the corporate law reform.

Corporate Tax Law

The Italian tax system for corporations is based on a worldwide taxation principle. That means that in Italy the taxation of a resident legal entity, in compliance with OECD principles, is taxed on all the income produced, both in Italy and abroad. For income produced outside of Italy the double taxation is generally avoided by the use of a foreign tax credit, that sum being deductible from the taxes due in Italy.

Non resident legal entities in Italy are subject to taxation only for the taxable income produced in Italy.

Withholding taxes, in general, are applied to interest, royalties and dividends paid to non resident entities.

As a member of the European Union, Italy applies the EU "parent subsidiary" Directive on dividends. Thus, dividends paid to an EU resident corporation are, under certain conditions, exempt from any withholding tax.

On the other hand, dividends received from EU resident entities and from entities resident in selected countries, shown in a "white list", are subject, under certain conditions, to a limited taxation in Italy (i.e.: the taxable base is equal only to 5% of the actual dividend received).

The corporate income tax (IRPEG) is currently calculated at 34%. A local tax is also applicable (regular tax rate: 4,25%).

Note that the Italian tax legislation for income tax purposes allows the full depreciation on intangible assets (goodwill and trademarks included) related to the business.

Italy has a CFC legislation and special provisions are applicable in case of transactions with entities resident in countries defined as tax heavens (i.e. higher withholding taxes or limitation in the deduction of the costs charged). These countries are defined in a "black list", issued by the Tax Authorities.

Note also that an important tax reform is taking place in the country.

This reform will introduce, *inter alia*, a reduction of the income tax rate, the abolition of the local tax (IRAP), and an important participation exemption rule, thus offering opportunities for setting up holding companies in Italy. On the other hand, the introduction of a "thin capitalization" rule will also be part of the mentioned tax reform.

Industrial Property Law

As for the three-dimensional trademarks, the European Directives have been implemented.

Design is now protected by copyright provisions. Legislation has been introduced according to which special Divisions specialised in industrial property will hear cases in High Courts and Courts of Appeal.

Labour Law

Labour law consists of various applicable Statutes plus many national collective agreements which have been entered into by the Employers Union and by the Trade Union. Many businesses which are not members of the Employers Union accept that their labour relationships be governed by such agreements and frequently the courts look to them for inspiration even when they are not mandatory. Over 200 national collective agreements have been entered into; the main ones being those concerning trade, metal mechanical businesses, chemical industry and textiles.

The labour relationships of public servants are governed by separate legislation.

Very high social contributions are to be paid by the employer in addition to the salary. One has consequently to be aware of the business' total cost (including social contributions, additional months of salary, fringe benefits).

At the end of the labour relationship, the employee is entitled to be paid a termination indemnity which is based on one month salary per each year of seniority (based on the yearly salary of the respective year).

Very high social contributions have to be paid by the employer. You must be fully aware of all the costs that result for the business

Such indemnity accrues every year and is payable at the end of the relationship whatever be the reason for the termination of that relationship.

The old prohibition of mediation for labour relationships still exists, with the exception of *lavoro interinale* (temporary allocation of staff who remain on the payroll of the labour service provider). Large and middle size businesses had to hire staff by requesting a number of workers or employees from the *Ufficio di Collocamento* (governmental agency) which chose them. This body still exists but is no longer compulsory.

Businesses with more than 15 employees/workers are not under the obligation to rehire the employee/worker if his/her termination is found by the Court to be without justified cause. However, if they terminate the labour relationship without a justified reason, they are obliged to pay damages to the employee, which correspond to many months' salary.

Just reasons for termination may be subjective (serious breaches of the duty of care, refusal to follow instructions related to the organisation of work and to discipline) or objective (if the employee becomes totally incapable of accomplishing his/her, for which he/she has been hired, or if the job position itself is cancelled due to various reasons such as reorganisation of the business).

The legal system sees labour laws as a protection for the weaker party and it is not easy for the employer to override this approach.

As for *dirigenti* (executives) the national collective agreement provides for a very favourable treatment upon their termination.

Professional Advisors

Professional advice is provided by several professions each dealing with a specific area of the law:

- for litigation, legal advice and assistance in negotiations by *avvocati* (legal profession);
- for tax and accounting law, by *dottori commercialisti* (tax advisors and chartered accountants);
- as to patents and trademarks by *uffici brevetti* (patents offices which consist of lawyers and of engineers);
- succession and conveyancing by *notai* (notary publics);
- salaries and social contributions by *consulenti del lavoro* (labour consultants but for legal issues the labour bar is to be instructed).

Due to the above described individualism, these professions tend to remain separate.

Cooperation amongst them is generally preferred to forming a large army which is heterogeneous and not always disciplined. Generally top lawyers have their own practice. ■

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