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## **EXTENSION OF THE OBLIGATION TO APPOINT THE CONTROLLING BODY OR THE EXTERNAL AUDITOR IN THE ITALIAN LIMITED LIABILITY COMPANIES**

On 10 January 2019, the Council of Ministers finally approved legislative decree No. 14/2019 which, in implementation of Law 19 October 2017, No. 155, introduces the new **Code of Crisis and Insolvency** (the “**Code**”).

Most of the provisions of the Code will come into force eighteen months after the publication in the Official Journal of the legislative decree, which took place in 14 February.

In this newsletter, we will examine the innovations introduced by the Code, with reference to the obligation to appoint, for the Italian limited liability companies (“**S.r.l.**”), a controlling body or an external auditor.

### **1. Amendments to the Civil Code**

Among the innovations introduced by the Code there are some modifications to the Civil Code, came into force on the thirtieth day after its publication in the Official Journal, namely on 16 March 2019.

These amendments concern **the extension of the obligation to appoint the controlling body or the external auditor** to S.r.l. that fall within the range of the "small enterprises".

In particular, the first paragraph of Article 379 of the Code amends the third and fourth paragraphs of Article 2477 of the Italian Civil Code as follows:

*"The appointment of the controlling body or of the external auditor is mandatory if the company:*

*a) is obliged to draw up the consolidated financial statements;*

*b) controls a company which is subject to the obligation to audit its accounts;*

*c) has exceeded at least **one** of the following thresholds for two consecutive financial years: 1) total assets: **Euro 2,000,000**; 2) income from sales and services: **Euro 2,000,000**; 3) average number of employees during the financial year: **10**.*

*The obligation to appoint the controlling body or the external auditor in the case referred to in point (c) of the third paragraph does not apply anymore if none of the limits referred to above has been exceeded for **three** consecutive financial years."*

Therefore, the new Article 2477 no longer refers to Article 2435-*bis* of the Italian Civil Code, with a consequent reduction of the parameters used to trigger the obligation to appoint a controlling body or an external auditor<sup>1</sup>. It is also important to underline that in Article 2477 of the pre-reform regulation it was necessary to exceed two of the three thresholds referred to in Article 2435-*bis* in order to make companies subject to the aforesaid obligation. With the new Code, on the other hand, it is sufficient to exceed only one threshold referred to in Article 2477, with regard to the financial statements for the years 2017 and 2018.

## **2. Content of the obligation referred to in Article 2477 of the Italian Civil Code**

If the conditions set out in the new Article 2477 of the Italian Civil Code are met, the companies will have the obligation to appoint a controlling body or an external auditor.

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<sup>1</sup> Article 2435-*bis* of the Italian Civil Code provides for the following thresholds as parameters for the financial statements in short-form:

- 1) total assets: 4,400,000 Euros;
- 2) income from sales and services: 8,800,000 Euros
- 3) average number of employees during the financial year: 50.

The **Controlling Body** is a corporate body with the purpose of internal control. It must control that the management body carries out its activities in compliance with the law, the by-laws and the principles of proper management.

The Controlling Body consists, alternatively, of a Sole Statutory Auditor or of a Board of Statutory Auditors. The Controlling Body is composed by professionals (mainly chartered accountants or lawyers) who must be independent from the company although they are appointed by the quotaholders. In case of appointment of a Board of Statutory Auditors, it is composed of 5 members, three of them (including the Chairman) effective, while two alternate. At least one of the effective Statutory Auditors and one of the alternate Statutory Auditors must be registered with the external auditors' registry.

Generally, the legal audit of the accounts ("*revisione legale dei conti*") is delegated to an **External Auditor**, which can be an independent professional or an auditing firm registered with the specific registry. The legal audit of the accounts mainly entails the duties to verify, on a quarterly basis, the keeping of accounts and the correct recording in the accounting records of operations, and the verification of the annual financial statements and consolidated ones (if any). The legal audit of the accounts also includes the assessments of the correspondence of these documents to the accounting records.

Please note that the by-laws of companies that are not obligated to draft the consolidate financial statements and which are not operating within the security market can delegate also the legal audit of the accounts to the Controlling Body. In such a case the Sole Statutory Auditor or all members of the Board of the Statutory Auditor must be registered in the external auditors' registry.

The Company can therefore appoint, alternatively:

- a) an External Auditor;
- b) an External Auditor and a Controlling Body;
- c) a Controlling Body with, amongst others, a function of control over the accounting.

### 3. Companies' fulfilments

In light of a preliminary interpretation of the text, a distinction should be made between companies that don't have to adapt their articles of association and those that have to.

The by-laws which, for example, in providing for the appointment of the controlling body or the external auditor, make a general reference to the legal obligations or provide that the appointment is mandatory if the thresholds provided for in Article 2477 of the Italian Civil Code are exceeded, comply with the new provisions.

Otherwise, the by-laws which, for example, provide for the appointment of the controlling body or of the external auditor in the event of exceeding the parameters set out in Article 2435-bis of the Italian Civil Code, do not comply with Article 2477 of the Italian Civil Code.

The companies that don't have to change the by-laws have, for the appointment of the controlling body or the external auditor, a term of 30 days from the quotaholders' meeting which approves the second financial statements in which one of the limits set forth in the amended art. 2477 of the Italian Civil Code is exceeded.

The companies that have to make an amendment to the by-laws, on the other hand, will have until nine months from the 16 March (entry into force of art. 379) to amend the by-laws and, subsequently, 30 days from the quotaholders' meeting which approves the 2019 financial statements for the appointment of the controlling body or the external auditor.

Finally, it should be noted that there are proposals for amendments to raise the thresholds for the obligation to appoint the Controlling Body or the External Auditor. These amendments provide for that the obligation applies if two of the following thresholds are exceeded: 1) total assets: 6,000,000 euros; 2) income from sales and services: 12,000,000 euros; 3) average number of employees during the financial year: 50 persons. The aim of this proposal is to reduce costs for small companies.

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