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Approval of the Capital Law ("*DDL Capitali*"): main changes for the Italian capital market

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INTRODUCTION

On 27th February 2024, the parliamentary process for the approval of the draft law containing provisions in support of the competitiveness of the Italian capital market and the delegation to the Italian Government for the organic reform of the provisions on capital markets provided for by Legislative Decree no. 58 of 24 February 1998 ("**TUF**"), and of the provisions on corporations ("*società di capitali*") contained in the Italian Civil Code also applicable to issuers was concluded (the "**Capital Law**").

The Capital Law provides for several and relevant amendments to the provisions governing the Italian capital market, mainly in the following macro-areas:

1. *issuance and subscription of bonds and debt securities;*
2. *changes to the rules of small and medium size enterprises;*
3. *corporate governance;*
4. *issuers of financial instruments that are widely held among the public;*
5. *amendments in relation to the door-to-door selling ("offerta fuori sede");*
6. *simplification of listing admission procedures;*
7. *prospectus approval and Lead Manager ("Responsabile del Collocamento");*
8. *collective asset management and cooperative banks;*
9. *supervision;*
10. *amendments to the provisions governing the so called "Patrimonio Destinato".*

Below is, for each of the above mentioned macro areas, a brief summary of the main changes.

1. ISSUANCE AND SUBSCRIPTION OF BONDS AND DEBT SECURITIES

The Capital Law provides for several measures for the purpose of promoting the issuance of bonds and debt securities by companies not listed on regulated markets and the relevant subscription by professional investors.

1.1. Amendments to the provisions relating to joint stock companies (società per azioni)

1.1.1. Assessment of the share capital in relation to the compliance of the quantitative limit on issuances

Article 7 paragraph (1)(a)(1) Capital Law firstly affects the moment of assessment of the issuer's share capital for the purpose of complying with the quantitative limit on bond issuances according to Article 2412, paragraph (1) of the Italian Civil Code (which provided that joint stock companies could issue bearer or registered bonds for an aggregate amount not exceeding more than twice of the share capital, legal reserve and available reserves as stated in the last approved financial statements and that the auditors must certify their compliance with the above limit).

The new wording of the same article now provides that the **share capital** must be, instead, the one resulting from the **last of the registrations provided for in Article 2444, paragraph 1**, of the Italian Civil Code, *i.e.*, from the registration at the relevant register of companies of the directors' certificate confirming that the capital increase regarding newly issued shares has been executed.

This amendment would facilitate a decrease in relation to the costs and timing associated with bond issuances for joint stock companies. For example, it would no longer be necessary the production of interim financial statements (nor to arrange all the activities related to them, such as

calling and conducting corporate meetings required for their approval) if capital increases need to be deliberated or executed after the closing of the last financial statements in order to comply with the above-mentioned limit of the issuance.

1.1.2. New exemption in relation to the issuance quantitative limit

Article 7, paragraph 1(a)(2), Capital Law, provides for a further exemption in relation to the quantitative limits on bond issuances – included in paragraph 5 of Article 2412 of the Italian Civil Code – which applies in the case of issuance of bonds intended to be **subscribed, even in case of resale, exclusively by professional investors**, provided that such provision is included in the terms of the issue.

Therefore, the legislative provision seems to be aimed at: (i) encouraging the subscription and subsequent resale of bonds by professional investors and (ii) reducing the burdens for issuers related to the issuance of bonds.

Indeed, this provision provides for:

- the removal of the requirement for a person subject to prudential supervision to ensure the issuer's solvency, if the subscription and subsequent trading of bonds are restricted to professional investors and if such provision is included in the terms of the issue; and
- a potential impact on bond listing applications, especially abroad (thus, reducing costs for issuers). This is because Article 2412, paragraph 5, of the Italian Civil Code, already included, prior to the Capital Law, the possibility to be in exemption from the compliance with the quantitative limits of issuance when bonds are listed.

Furthermore, in relation to the retail investors protection, there would be no amendments to the current regime, since in the case of trading of bonds issued above the limits imposed by such provision by this category of investors the requirement of the professional investor subject to prudential supervision to ensure the issuer's solvency would continue to apply.

1.2. Amendments to the provisions relating to the limited liability companies (società a responsabilità limitata)

Article 7 paragraph 1(b), Capital Law, provides for a new paragraph 3 to Article 2483, of the Italian Civil Code, which states that **professional investors** may **also** subscribe debt securities issued by limited liability companies, if such debt securities are intended to be traded only among this category of investors and this provision is included in the terms of the issue, without any option of amendment.

In the previous regime, debt securities issued by limited liability companies could only be subscribed by professional investors subject to prudential supervision, and in case of later trading, the person who would transfer them would be liable for the issuer's solvency towards purchasers who were not professional investors or shareholders of the issuer. Providing for the subscription and mandatory trading of debt securities only among professional investors (without the possibility of amendment), also results in the termination of the liability of the person subject to prudential supervision to ensure the issuer's solvency (as specified in the provision and in line with what is provided for joint stock companies).

Therefore, the legislative provision seems to be aimed at (i) expanding the pool of subjects who will be able to subscribe debt securities issued by limited liability companies and (ii) reducing any potential costs for the issuer (considering, *inter alia*, that the guarantee for the issuer's solvency provided by professional investors subject to prudential supervision is usually fee-based and presents a higher cost for obtaining financing).

Furthermore, in relation to the retail investors protection – in line with what is provided for joint-stock companies – there would be no amendments to the current regime, since in the

case of debt securities traded by this category of investors the requirement of the professional investor subject to prudential supervision to ensure the issuer's solvency would continue to apply.

2. CHANGES TO THE RULES OF SMALL AND MEDIUM SIZE ENTERPRISES

2.1. Changes to the definition of small and medium size enterprises ("SME") in the TUF

Article 2, Capital Law amended letter w-*quater* of Article 1, paragraph 1 of the TUF by replacing Euro 500 million with Euro 1,000 million of market capitalization in the definition of listed "SME".

This amendment makes it possible to broaden the range of companies that will be able to be considered "SME" and, consequently, benefit from the simplifications provided for these companies in the TUF and its implementing legislation.

2.2. Dematerialization of the shares of "SME"

Article 3, Capital Law amended Article 26 of Decree-Law No. 179 of October 18, 2012 by inserting, after paragraph 2, paragraphs 2-*bis*, 2-*ter*, 2-*quater*.

It is, therefore, provided that the quotas of "SME" established in the form of limited liability companies (*società a responsabilità limitata – S.r.l.*) can be dematerialized pursuant to Article 83-bis of the TUF (as for listed companies).

The joint stock companies (*società per azioni – S.p.A.*), not listed on stock exchanges, could already make use of this regime on a voluntary basis, while the Capital Law has also extended this possibility to "SME" incorporated as S.r.l.

This law facilitates the circulation of S.r.l. quotas, with a reduction also in the costs associated with the transaction of buying and selling quotaholdings (where the traditional process involving notaries or accountants can be overcome).

The digitization of quotas will, therefore, make investment in start-ups and "SME" more attractive, increasing liquidity for the entire "SME" sector, and also facilitating access to the capital market, especially through equity crowdfunding platforms.

The new paragraph 2-*quater* provides that it will be mandatory for companies which will have dematerialized quotas to keep the quotaholders' register in accordance with the law set forth by the TUF for listed companies.

3. CORPORATE GOVERNANCE

Article 5, Capital Law allows companies with shares traded on multilateral trading facilities to prepare consolidated financial statements in accordance with IFRS standards regardless of their size.

Art. 10, Capital Law deleted paragraph 7 of Article 114 of the TUF, eliminating internal dealing obligations on the shareholders, *i.e.* the obligation of disclosure to Consob (Italian market authority) and the public, incumbent on shareholders (and also on persons closely related to them) who hold shares amounting to at least 10 percent of the share capital, of transactions, involving shares issued by the company or other financial instruments linked to them, carried out by them, including through intermediaries.

Therefore, this obligation, in line with EU regulations, would remain limited to persons performing administrative, control or management functions within the company (as well as persons closely related to them).

Article 11, Capital Law allows, where provided for in the by-laws, that the holding of shareholders' meetings of listed companies (this option has also been extended to companies whose shares are traded on multilateral trading facilities) may take place exclusively through the representative designated pursuant to Article 135-*undecies* of the TUF.

In such a case, the submission of resolution proposals directly during the shareholders' meeting would then not be permitted, but those with voting rights may submit individually resolution proposals on the items on the agenda or proposals whose submission is permitted by law by the fifteenth day prior to the date of the first or single call of the shareholders' meeting. Resolution proposals must be made available to the public on the company's website within two days after the deadline. The right to ask questions pursuant to Article 127-*ter* of the TUF, in this circumstance, may also be exercised only prior to the meeting, and the company will be required to provide, at least three days prior to the meeting, answers to the questions received.

Article 12, Capital Law, regarding the lists for the appointment of the board of directors of listed companies, introduced Article 147-*ter*.1 of the TUF, under which the by-laws may provide that the outgoing board of directors may submit a list of candidates for the election of the new directors. The law provides for certain specific rules to be followed in the event that the board intends to propose its own list, including the need for the list to be voted on by the outgoing board with the favorable vote of two-thirds of its members, and to contain a number of members equal to the number of directors to be elected plus one-third. In addition, special rules are made for the voting at the shareholders' meeting of the list submitted by the outgoing board (such as the provision of a voting system based on an initial vote of the list and a subsequent individual vote of the candidates) and for the allocation of seats on the board where the board list is the one with the highest number of votes.

Article 13, Capital Law amended Article 2351, paragraph 4, of the Italian Civil Code on multiple voting, providing that the maximum number of votes in multiple voting shares is 10 and no longer 3.

Art. 14, Capital Law amended Art. 127-*quinquies* by providing new rules on increased voting in listed companies. Specifically, in addition to the current increase of up to two votes for each share held for a continuous period of not less than twenty-four months, it is now provided that the by-laws may provide for the granting of an additional vote at the end of each twelve-month period, up to a maximum of ten votes per share. This additional increase gives the right of withdrawal to shareholders who have not approved this provision at the shareholders' meeting pursuant to Article 2437 of the Italian Civil Code.

The aim is to avoid that companies may want to move to more permissive jurisdictions.

In addition, Article 14 provides that the takeover bid obligation does not exist as a result of the increase in votes resulting from a merger, cross-border conversion or proportional demerger carried out pursuant to Legislative Decree No. 19 of March 2, 2023, where this does not entail a change in the control relationship over the company resulting from the transaction.

4. ISSUERS OF FINANCIAL INSTRUMENTS THAT ARE WIDELY HELD AMONG THE PUBLIC

Article 4, Capital Law provides for a reorganization of the rules on issuers of financial instruments that are widely held among the public.

Among the various changes made to these regulations, it is worth noting (i) the introduction of a definition of issuers of financial instruments that are widely held among the public in the new Article 2325-ter of the Italian Civil Code (a definition basically transplanted from Article 2-*bis* of CONSOB Regulation 11971/199, with the exception that it does not incorporate the conditions set forth in paragraph 2 of the aforementioned Article); and (ii) the deletion of certain obligations that lumped companies with widely held securities among the public together with companies whose securities are listed on regulated markets (*e.g.* among other things, the regulations on the limits to the accumulation of offices of the members of the supervisory body under Article 148-*bis* of the TUF, that on transactions with related parties under Article

2391-*bis* of the Italian Civil Code in relation to issuers with widely held securities, as well as letter a) of Article 19-bis of Legislative Decree 39/2010, which included issuers with widely held securities among the entities subject to the so-called "*intermediate regime*" with the related consequences on the subject of statutory audit, are deleted).

The scope of application of Article 2341-*ter* of the Italian Civil Code, with reference to the disclosure of shareholders' agreements, has been also extended to companies whose shares are traded on multilateral trading facilities. Consequently, companies whose shares are traded on Euronext Growth Milan will also be required to disclose shareholder agreements to the company, which must also be declared at the opening of the shareholders' meeting.

5. AMENDMENTS IN RELATION TO THE DOOR-TO-DOOR SELLING ("*OFFERTA FUORI SEDE*")

Article 1, Capital Law, **expands the cases of exemption from the door-to-door selling (*offerta fuori sede*) regulation set forth in Article 30 TUF**, providing that the sale or subscription offer of own shares or other financial instruments of its own issuance that allow the acquisition or subscription of such shares (*e.g.*, convertible bonds or participative financial instruments) shall not constitute a door-to-door selling, provided that such instruments: (i) are issued by issuers (other than SICAV and SICAF) with shares traded on Italian or other Member States regulated markets or multilateral trading facilities; (ii) are offered by the issuer through its directors or its management employees; and (iii) are offered for a minimum subscription or purchase amount equal to or greater than Euro 250,000.

This exemption seems to have a limited application in the debt capital market both because it concerns only debt financial instruments that allow the acquisition or subscription of such shares and because of the minimum subscription and purchase amount that appears high especially for SME (for example, considering that under Article 4, of Regulation (EU) 2017/1129, the so-called Prospectus Regulation, it is enough for securities to have a nominal amount per unit of at least 100.000 EUR in order to proceed with offers that are exempt from the obligation to publish a prospectus).

Even on the equity capital market, the amount appears to be excessively high, especially for SME with shares traded on multilateral trading facilities.

6. SIMPLIFICATION OF LISTING ADMISSION PROCEDURES

Article 8 Capital Law – amending Articles 66-*bis* and 66-*ter* TUF – provides for **several simplifications of the listing admission procedures** for financial instruments, including the elimination of the 5-day suspension period for listing admission decisions (and of exclusion from trading) made by the regulated market operator.

7. PROSPECTUS APPROVAL AND LEAD MANAGER ("*RESPONSABILE DEL COLLOCAMENTO*")

7.1. Running of time for prospectus approval

Article 9 paragraph 1(a), Capital Law provides for a new period in paragraph 3 of Article 94, TUF, regarding public offerings of securities, where it is clarified that the terms for the approval of the prospectus run from **the date of submission of the prospectus draft** (in line with the provisions of the Prospectus Regulation) and not from the moment at which the CONSOB deems the application complete.

7.2. Lead manager ("Responsabile del Collocamento")

Article paragraph 9(1)(b), Capital Law **repeals** paragraph 7 of Article 94 TUF, which concern the **liability of the lead manager** for misleading information or omissions in the prospectus suitable to influence the decisions of a reasonable investor.

The removal of this provision (which seems to represent a gold plating rule not required by the common rules and not included in other European Union jurisdictions) appears reasonable considering, *inter alia*, that investor's protection would already be ensured by the liability regime applicable to the other parties involved in the drafting and distribution of the prospectus (in particular, the issuer).

8. COLLECTIVE ASSET MANAGEMENT AND COOPERATIVE BANKS

8.1. Simplification of the supervisory regime for externally managed SICAVs and SICAFs

Article 16, Capital Law, introduces a significant simplification of the regime applicable to **externally managed Italian Sicavs and Sicafs** by aligning it to that applicable to mutual investment funds.

In particular:

- for the set-up of externally managed reserved Italian Sicavs and Sicafs, **no authorization procedure** will be necessary before the Bank of Italy, rather it will be sufficient to only submit the Sicav/Sicaf's bylaws to the Bank of Italy (*i.e.*, no need to obtain the Authority's approval). Conversely, the start of operations of non-reserved externally managed Sicavs/Sicafs is subject to Bank of Italy's approval of the bylaws;
- the corporate officers and relevant shareholders of the Sicavs/Sicafs **no longer need to meet the integrity, professionalism and independence requirements** under Art. 38 of the TUF (only those applicable to joint stock companies under the Italian Civil Code would apply to the Sicav/Sicaf's corporate officers);
- in case of termination of the external management agreement (to be entered into by and between the AIFM and the Sicav/Sicaf) or liquidation of the AIFM, the Shareholders' Meeting **shall immediately be convened by the Sicav/Sicaf's BoD** to resolve upon the replacement of the external manager. In case of failure to resolve the replacement within 2 months of the termination of the agreement/liquidation of the AIFM, the Sicav/Sicaf shall be put into liquidation.

With reference to **multi-compartment Sicavs/Sicafs**:

- the mechanism for allocation of expenses/losses among the different compartments of a Sicaf is better addressed, in compliance with the segregation principle pursuant to which each compartment constitutes a UCI and is entirely distinct and independent from the other compartments;
- the application of the procedure according to which - if the assets of the fund or sub-fund do not allow the fund's or sub-fund's obligations to be satisfied and there is no reasonable prospect that such a situation may be overcome - one or more creditors or the AIFM may apply to the court of the place where the AIFM has its registered office for the liquidation of the fund, is extended to externally-managed Sicafs (or their compartments).

Furthermore, as Article 16, Capital Law, carves out from the "Sicav" and "Sicaf" definition reference to externally managed Sicavs/Sicafs, the following should be noted in relation to externally managed reserved Sicavs/Sicafs:

- certain AML fulfillments (in terms of, e.g., AML function and exponent) would no longer apply;
- no authorization procedure would be required for Sicavs/Sicafs as a result of merger and demerger transactions;
- the set-up of new compartments would only require an *ex-post* notification to the Authority for information/reporting purposes;
- no authorization procedure would be required for the purchase of qualified stakes in the Sicav/Sicaf;
- no authorization procedure would be required for the conversion of existing companies into externally managed

reserved Sicavs/Sicafs (without prejudice to the tax aspects linked to such a conversion).

Notwithstanding the above, it is in any case understood that Article 16, Capital Law, shall be analyzed and considered in light of the relevant implementing provisions as they may be adopted at the secondary legislation and regulatory level.

8.2. Simplification of representation arrangements for exercising voting rights at the shareholders' meeting

The version to date in force of Article 24 of the TUF provides for that the portfolio management service provider could be given power of attorney to exercise the voting rights concerning the financial instruments under management, provided that such power of attorney was given in writing and for one sole meeting.

Article 17, Capital Law, in order to encourage a **greater exercise of rights by shareholders**, introduces the possibility, as an exception to Article 2372, paragraph 2 of the Civil Code, of issuing a **power of attorney to a portfolio manager for multiple meetings**, thus allowing investors to take an **active role** in the governance of participated entities.

This article at hand, which derives from the process of implementation into Italian law of the Shareholder Rights Directive II (SRD II), aims at encouraging the exercise of the rights (including voting rights) of shareholders as a fundamental tool for assuming the active role that asset managers and institutional investors are called upon to play in the governance of participated companies.

8.3. Provisions on asset limitation of cooperative banks

Article 18, Capital Law, by amending Article 29, Paragraph 2-bis, of Legislative Decree No. 385 of September 1, 1993 (the so-called Consolidated Law on Banking and Credit), raises the asset limit of popular banks **from 8 billion euros to 16 billion euros**, in order to allow the **maintenance of the form of a limited liability joint-stock cooperative company**, and the related regime, **even for larger popular banks**.

9. SUPERVISION

9.1. Free float provisions

Article 6 Capital Law removed from Article 112 TUF the possibility for Consob to raise for individual companies the percentage provided for in Article 108 of the TUF (the squeeze-out provision).

9.2. Provisions on institutions under Legislative Decree No. 509 of June 30, 1994, and Legislative Decree No. 1 of February 10, 1996

Article 15, Capital Law, amends the TUF (in particular, Article 6, paragraph 2-quater (d)) **by extending the status of qualified counterparties for the purposes of the provision of investment services and activities to private and privatized Social Security Institutions.**

The inclusion of these Social Security Institutions among the qualified counterparties will avoid the need for these entities, and the counterparties with which they interact, to have to go through the procedures (and thus to bear the related costs) to be implemented to be recognized as “professional clients upon request” and to which no actual benefits in terms of protection and safeguards correspond, thus finally recognizing the knowledge and market experience that distinguishes them.

9.3. Discipline of national Supervisory Authorities

Articles 20 to 24, Capital Law, **address the discipline of the national Supervisory Authorities.** Specifically, Art. 20 intervenes on compensation for damages for failure of the Authorities to supervise; Art. 21 on the incompatibility of offices; Art. 22 deals with the new powers ascribed to Consob in the area of contrast to advertising activities of investment services and activities provided by unlicensed

persons; Art. 23 intervenes on Consob's sanctioning powers; and, finally, Art. 24 deals with the authentic interpretation rules concerning the performance of investment advisory activities.

10. AMENDMENTS TO THE PROVISIONS GOVERNING THE SO CALLED "PATRIMONIO DESTINATO"

Article 26, Capital Law, expands the operation of the so called "*Patrimonio Destinato*" established by Decree Law No. 34 of May 19, 2020 (converted, with amendments, by Law No. 77 of July 17, 2020) ("*Decreto Rilancio*"), supplementing what was already provided for in Article 27 of the same Decree.

In particular:

- in order to benefit from the interventions at market conditions of the so called "*Patrimonio Rilancio"* in the form of primary market operations, through participation in capital increases and subscription of convertible bonds, and to allow access to FNS (*Fondo Nazionale strategico*) interventions also to companies resulting from recent extraordinary operations, **companies resulting from mergers or demergers may also use one or more pro forma financial statements, certified by an auditor**. Precisely, through the *pro forma* financial statements, assumptions regarding the future course of management are translated into accounting quantities.

- limitedly to operations at market conditions, **access to the interventions of the so called "*Patrimonio Destinato*" is also allowed to companies under investigation for crimes giving rise to an administrative liability of the entity**, pursuant to Legislative Decree No. 231/2001, without prejudice to the prohibition of access to such interventions for entities against which a sentence of conviction or application of the sanction upon request has been issued, even if not final.

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Lastly, Article 19, Capital Law, introduces a **delegation of powers to the Government**, which is required to adopt, **within 12 months** after the entry into force of the Capital Law, one or more legislative decrees for an **organic reform** of the TUF and the provisions on joint stock companies contained in the Civil Code that are also applicable to issuers.

Article 19, setting out the guiding principles and criteria to be followed by the Government in the exercise of the delegation, requires the Government, *inter alia*, to **facilitate access of small and medium enterprises to alternative forms of financing**.

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The latest available version of the Capital Law may be consulted at the following link.

For further information or clarification, please feel free to contact us.

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