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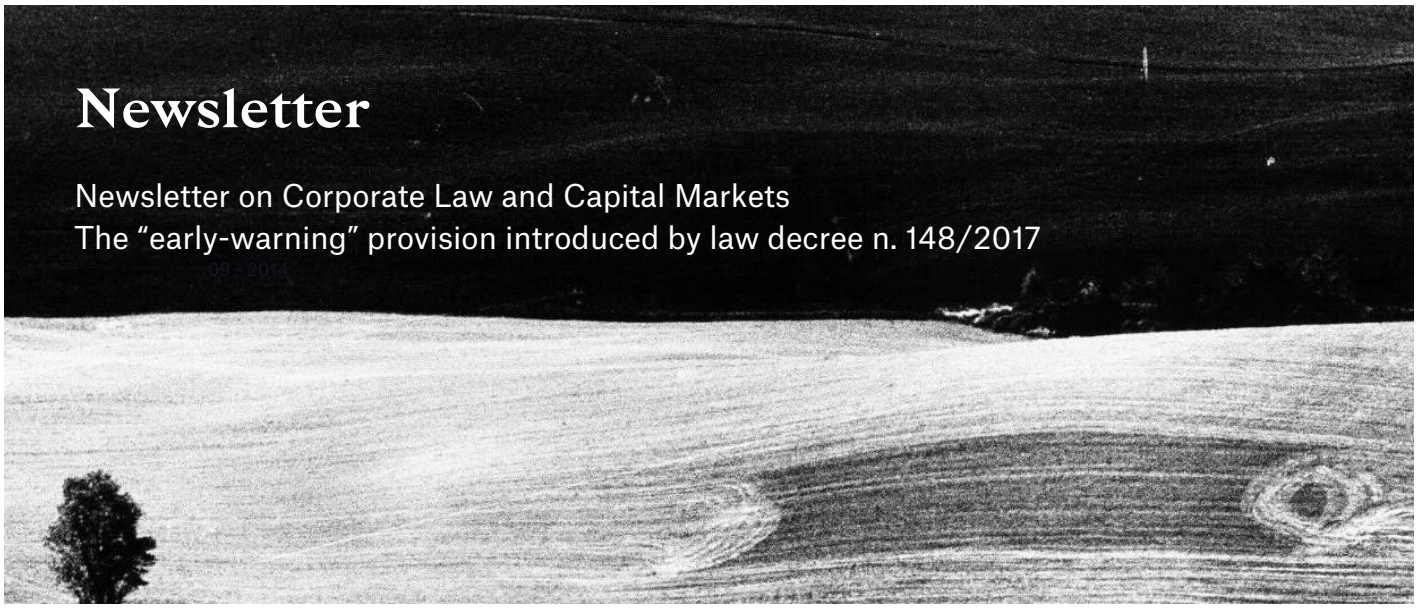

Newsletter

Newsletter on Corporate Law and Capital Markets
The "early-warning" provision introduced by law decree n. 148/2017

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Introduction

On 16 October 2017, law decree no. 148 setting forth "*urgent provisions on financial matters and for undeferrable matters*" (the "Tax Decree") has entered into force. Art. 13 of the Tax Decree has introduced a new paragraph 4-*bis* (so-called "early-warning provision") in art. 120 of the Italian Consolidated Financial Act, which requires the purchasers of highly material shareholdings in the voting share capital of Italian listed companies (*i.e.* above 10, 20 and 25%) to make a statement on the objectives pursued with the acquisition.

According to the intent of the legislator, the goal of the "early-warning" provision is to "*improve transparency and safeguard the proper functioning of the market, increasing the level of information of the stakeholders in corporate M&A transactions*" (*see* the Press release of the Italian Government (Council of Ministries) no. 50 of 13 October 2017).

The Tax Decree is currently under review by the competent legislative bodies, in the context of the process for its conversion into law.

I. The new provisions on corporate transparency and consequent amendments to the Italian Consolidated Financial Act

I.I. Introduction. The notice requirements pursuant to art. 120 of the Italian Consolidated Financial Act

Art. 13 of the Tax Decree has directly amended the Italian Consolidated Financial Act ("TUF") by revising the provisions on mandatory disclosure and communication of material shareholdings set forth in art. 120 TUF.
Such latter provision – which, as known, is included in Section I ("Ownership Structures"), of Chapter II ("Listed companies") of Title III ("Issuers") of Part IV of the TUF – sets forth, in paragraph 2, that any person holding a stake in "*a listed issuer having Italy as home Member State*" which exceeds 3% (or 5% for a SME) – or the other thresholds set forth by the Italian Stock Market Supervisory Authority (Consob) (please see below) – shall communicate such shareholding both to the relevant issuer and Consob.

The relevant implementing provisions issued by Consob, and set forth in articles 117 and following of the Issuers' Regulation, indicate, in addition to the other thresholds of material shareholdings for the purposes of the afore-mentioned disclosure notice (5%, 10%, 15%, 20%, 25%, 30%, 50%, 66.6% e 90%), also the criteria for the calculation of such holdings as well as the terms and conditions of the notice.

As known, with the notice provided under art. 120 TUF, the market acquires knowledge of the size the shareholding acquired, of the direct owner of such shareholding and of the ultimate beneficial owner of the shareholding itself.

I.II. The new paragraph 4-*bis* of art. 120 of the Italian Consolidated Financial Act

Article 13 of the Tax Decree has introduced in art. 120 TUF a new paragraph 4-*bis*, which requires that, upon acquisition of a shareholding in a listed company equal or exceeding 10%, 20% and 25% of its share capital, the person giving the notice under art. 120 TUF represents and states (also) the goals that the same intends to pursue in the next six months.

For companies other than SME, the provisions of the new paragraph 4-*bis* are, in any case, without prejudice to art. 106, paragraph 1-*bis,* TUF, pursuant to which – in the event that, after a purchase, the 25% threshold is exceeded and there is no other shareholder with a higher stake – the relevant purchaser is required to launch a mandatory tender offer, with the consequent disclosure and fulfillment duties.

The statement provided under the new paragraph 4-*bis* - which must be delivered to the issuer whose shares are being acquired as well as to Consob within ten days from the date of the acquisition – shall indicate, under the declarant's own responsibility:

a) the terms of financing of the acquisition;
b) whether the purchaser is acting alone or in concert;
c) whether the same intends to desist from other purchases or to carry on with additional purchases, as well as if the purchaser intends to acquire control of the issuer or, in any

case, exercise an influence on the management of the company and, in such cases, the strategy that the same intends to follow and the terms for its implementation;

d) the intentions regarding any shareholders' agreements and arrangements to which the purchaser is a party;

e) whether the purchaser intends to propose the amendment or revocation of the management or supervisory bodies of the issuer.

Without prejudice to the above, in the event that, within six months from the delivery of the notice, there is a change in the intentions of the declarant "*on the basis of supervening objective circumstances",* the declarant shall deliver, without delay, a new reasoned notice to the issuer and Consob, from which the above-mentioned six month-term shall run again.

All the above is without prejudice to the provisions on market manipulation under art. 185 TUF, which punishes with criminal sanctions anyone who disseminates false information or sets up sham transactions or employs other devices likely to produce a significant alteration in the price of financial instruments.

Both the initial statement and its subsequent amendment, if any, shall be communicated to the market according to the terms and conditions which shall be set forth by Consob through its own regulation.

Consob shall also set forth, through its own regulation, the relevant implementing provisions on:

(i) the content of the different items of the statement;

(ii) the cases in which the notice shall be given by the holders of the financial instruments provided with the rights set forth by art. 2351, paragraph 5, of the Italian Civil Code, taking into consideration, as appropriate, the size of the stake and the declarant's characteristics; and

(iii) the provisions relating to the controls to be carried out by Consob itself on the content of the statements and the relevant terms.

I.III. Consequences in the event of failure to file the statement

Pursuant to paragraph 5 of art. 120 TUF, as amended by art. 13 of the Tax Decree, in case of failure to file the statement required by the aforementioned paragraph 4-*bis*, the voting rights attached to the listed shares or (when applicable) the other financial instruments cannot be exercised. In the event of failure to comply with the above, art. 14, paragraph 5, of the TUF shall apply and the resolution or act adopted with the decisive vote or intervention of such securities can be challenged also by Consob pursuant to paragraphs 6 and 7 of the same art. 14.

Moreover, pursuant to art. 193, paragraph 2, of the TUF – as amended by art. 13 of the Tax Decree – and save that the fact constitutes a crime, in the event of failure to file the statement required by paragraph 4-*bis* of the art. 120 TUF the following administrative measures and sanctions shall apply:

a) a public statement indicating the responsible of the breach and the nature of the same;

b) an order to remove the alleged breach, which may indicate the measures to adopt and the term for their implementation, as well as to refrain from any repetition of such conduct, when the same is deemed scarcely offensive and dangerousness;

c) a monetary administrative sanction from Euro ten thousand up to Euro ten million, or, if higher, up to five percent of the aggregate annual revenues.

II. The United States and French experiences

"Early-warning" provisions comparable to those introduced by the Tax Decree have since long been adopted in other foreign countries' corporate legislations, and in particular in the United States and in France.

II.I. The United States

The eldest experience of the so called "early warning" system dates back to the United States' late sixties.

To date, the relevant provisions are set forth in Section 13(d) of the Securities Exchange Act, pursuant to which any person, after acquiring, directly or indirectly, equity securities of a listed company (also through a security-based swap) comes to hold, directly or indirectly, more than 5 per centum of the relevant class, shall file with the Securities and Exchange Commission (the "SEC"), within ten days from the acquisition (or the shorter term which may be set forth by the SEC), a statement containing, *inter alia*, the following information:

- the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, if the person filing such statement so requests, the name of the bank shall not be made available to the public;
- if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;
- information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer.

Similarly to Italian law, the Securities Exchange Act requires that if any material change occurs in the facts set forth in the statement filed with the SEC, an amendment shall be filed with the SEC.

II.II. France

Even more similar to the newly-introduced Italian "early-warning" legislation are the provisions adopted and implemented, since 1998, in the French legal system. To date, the relevant regulation is set forth in art. L233-7 of the *Code de Commerce*, which – similarly to art. 120 TUF – governs the transparency of the ownership structure of listed companies.

In particular, paragraph 7 of the above article provides that the persons required to file the statement on "material shareholdings" pursuant to the previous paragraphs of the same art. L233-7 are also required to disclose and represent, upon exceeding the thresholds of 10%, 15%, 20% and 25% of the share capital or voting rights, the goals that the same intend to pursue in the following six months.

Such statement, which must be filed with the issuer and the *Autorité des Marchés Financiers* ("AMF") within the end of the fifth open-market day after the relevant threshold has been exceeded (deadline set forth by the relevant implementing regulation and provided in the Statement Form prepared by the AMF), must include, amongst others, the following information:

- the sources and funds used for the acquisition, indicating in particular – as required in the Statement Form prepared by the AMF – (i) whether the acquisition has been funded through own funds or debt, specifying, in such latter case, the main terms of the relevant financing and the relevant securities, if any; as well as (ii) any quota acquired through securities lending transactions;
- whether the purchaser is acting alone or in concert;
- whether the same intends to desist from other purchases or to carry on with additional purchases, as well as if the same intends to acquire control of the issuer;
- the strategy that the purchaser intends to follow in respect to the issuer and the terms for its implementation and in particular – as requested in the Statement Form prepared by the AMF – all the plans regarding (i) merger, reorganization, winding-up or transfer of material assets of the issuer or its subsidiaries; (ii) amendments to the business and/or the by-laws of the issuer; (iii) issuance of new securities of the issuer or delisting of issued securities; as well as (iv) any other action or activity which may have an impact on the strategies of the issuer;
- its intentions regarding the "*dénouement*" of any agreement or instrument (such as options/derivatives), to which it is a party;
- any agreement of temporary transfer regarding the shares and the voting rights;
- whether the same intends to become or propose candidates to the office as director, member of the *directoire* or of the *conseil de surveillance*.

Also the French provision governs the event of possible changes in the statements filed; however, the current provision of the *Code de Commerce* appears broader than the correspondent provisions of the Italian and U.S. legal systems, as it provides that, in case of changes in the intentions within six months, the declarant must file a new statement to the issuer and the AMF, from which the six-month term starts running again. In the original text of art. L233-7 – which was in force until January 2009 and, in such part, more similar to the provision of the new paragraph 4-*bis* of art. 120 TUF – a change in the intentions was allowed only in the event of "*modifications importantes dans l'environnement, la situation ou l'actionnariat des personnes concernées*".

III. First remarks and considerations on the application of the new provisions

The decision to introduce also in our legal system a set of provisions on "early warning" has the main goal of increasing the transparency of the so-called takeovers "below Mandatory Tender Offer threshold", to protect and safeguard the proper functioning of the market and the equal treatment of all stakeholders.

Unlike the golden powers provisions– which are also supplemented and partially strengthen by the Tax Decree – the provisions on "early warning" protect the interests of the entire market and the related stakeholders and not (only) those of specific sectors deemed of strategic and national interest.

Without prejudice to the above, a first remark concerns the scope of the new paragraph 4-*bis* of art. 120 TUF. As anticipated above, such provision expressly refers to the acquisition of securities in *"listed companies"*. A first question that arises regards therefore what type of listed companies the provision intends to refer to. Considering the systematic inclusion of the new provision within the text of art. 120 TUF and, more in general, within the Chapter on "*Listed companies*", it seems reasonable to conclude that, although not expressly specified, reference is to be made to the acquisition of securities in "*listed companies having Italy as home Member State*", just as provided by paragraph 2 of the same art. 120. Such conclusion seems further supported by the circumstance that paragraph 4-*bis* is included in a system of notices and statements already provided by art. 120, further requiring that the person who files the statement required by the said paragraph 2, when the conditions and requisites set forth under paragraph 4-*bis* are met, must *also* disclose and state its goals. The statement required by paragraph 4-*bis* is therefore an additional statement that supplements the statements already required by the other paragraphs of art. 120 TUF (it is not a chance that, in the French system, the same form of the notice on the holding of material shareholdings – the same form which, in Italy, is enclosed under Annex 4 to the Issuers' Regulation – includes also the section on the reasons and goals of the acquisition).

A second aspect of particular interest, given that the Tax Decree has been enacted quite recently, concerns the practical enforceability of the "early-warning" provisions pending the adoption of the relevant implementing regulations by Consob. Pending any possible clarifications on this subject which may come from the competent Authorities (clarifications which may come also during the process for the conversion of the Tax Decree into law), based on the literal wording of the new provisions it seems reasonable to conclude for a "staggered" effectiveness of the same.
Indeed, the implementing provisions to be adopted by Consob concern (i) the terms and conditions for the disclosure to the *market* and (ii) the precise elements and content of the statement as well as the cases where the same must be filed by the holders of financial instruments bearing the rights provided by art. 2351, last paragraph, of the Italian Civil Code and the terms and conditions of the controls to be carried out by the same Consob.
To the contrary, the primary rules already set forth the provisions (which are therefore not delegated to Consob) on the deadline by which the statement must be filed (ten days) and the terms for the giving of the relevant notice to the issuer and Consob.
In light of the above, considering the urgency nature of the legislative instrument enacting such new provisions (*i.e.* a law decree), a conservative a prudent approach leads to conclude that, notwithstanding the adoption by Consob of the relevant implementing regulation is still pending, the stakeholders in the position described by paragraph 4-*bis* are nonetheless immediately subject to the obligation to file the further information required by paragraph 4-*bis* with the issuer and Consob, within the relevant ten day-term.

As for the content of such statement, pending the adoption by Consob of the relevant implementing regulation, reference must be made to the list provided under paragraph 4-*bis*, which – despite the doubts that may arise in its interpretation (for example as regards the notions of "*concert*" and "*influence on the management*") – appears, in any case, sufficiently "self-explanatory".

To the contrary, as regards the communication to the market, it will be necessary to await for the enactment of the Consob regulation, since the terms and conditions of such communication must be decided by Consob.

Further areas of attention, which will need specific analysis and that may be partially clarified in the process of conversion of the Tax Decree into law, refer, as an example, to the calculation criteria of the significant holdings and the conditions that legitimate a change in the intentions of the purchaser, as already communicated.

As for the first aspect, that is the holdings calculation criteria, it appears reasonable to apply, in general, the criteria under art. 118 and following of the Issuers' Regulation implementing the other paragraphs of art. 120 TUF, pursuant to which the following must be computed in the relevant calculation: (i) the shares owned by a party, even if the relevant voting rights belong or are granted to third parties or are suspended; (ii) the shares in relation to which a party has or is granted the relevant voting rights under one of the circumstances set forth by paragraph 1 of the mentioned art. 118 of the Issuers' Regulation; as well as (iii) the shares owned by nominees, trustees or subsidiaries and the shares in relation to which the above persons have or exercise the voting rights.
Other than as provided under paragraph 3-*bis* of art. 118 of the Issuer's Regulation in relation to the other disclosures provided by art. 120 TUF, pursuant to paragraph 4-*bis* it should not be considered relevant the so called "passive exceeding" of the thresholds, as it may occur in the presence of multiple votes shares. The purpose of the "early warning" provision, as noted, is to increase the transparency of information "*upon acquisition*" of shareholdings exceeding specific qualified thresholds. So, where the exceeding of such thresholds is independent from a voluntary act of the shareholder, paragraph 4-*bis* should not apply. Such conclusion seems to be confirmed also by the circumstance that paragraph 4-*bis,* for the purpose of defining the object of the disclosure, identifies elements which refer to an intentional increase of the shareholding held.

As regards the second aspect, a first question arises as to whether there is any limit, and - if so - which ones, to the possibility to change the intentions already disclosed before the expiry of the six month-term. As reminded above, the provision indeed sets forth that "*without prejudice to what provided under art. 185, if, within the next six months from the delivery of the statement, there is a change in the intentions on the basis of supervening objective circumstances*" a new statement must be filed, from which the above-mentioned six month-term shall run again. The possibility to change the intentions already communicated would seem therefore limited by, and subject to, the occurrence of supervening objective circumstances that justify the change. The purpose of such limitation should probably be brought back to the intention to avoid that the information transparency and the disclosure value descending from the first statement may be "nullified" *ad nutum* by the shareholder.

Other considerations refer to the set of sanctions, broadly intended.
First of all, we note that the provisions of paragraph 4-*bis* on the change in the declarant's intentions expressly refer and save the application of the provisions of (the sole) art. 185 TUF which sanctions the offense of market manipulation. To the contrary, no reference is made to the other provisions of the TUF on the subject of market abuses (articles 181 and following), which, to date, punish with both criminal and administrative sanctions the cases of insider trading and market manipulation, nor to the new European directive on market abuse. In this regard, we believe that the above provisions, even if not expressly referred to, must be in any case taken into account.
As specifically regards the sanctions introduced by art. 13 of the Tax Decree by way of amendment to art. 193 TUF, please note how the reference to paragraph 4-*bis* has been introduced only in paragraph 2 of such art. 193, which imposes sanctions over companies, entities and associations for the case of failure to make the required communication. To the contrary, art. 13 of the Tax Decree does not expressly mention the following paragraphs 2.1

and 2.2 of the same art 193 TUF, which regulate the different hypothesis where the sanctions are respectively imposed on individuals or persons holding managerial, direction or control positions, or on the personnel of legal entities, whether and when the behavior of such persons has contributed to cause the breach committed by the latter. It is also not mentioned paragraph 2.3, which sanctions the different specific case of delay in the communications provided under art. 120, paragraphs 2, 2-*bis* and 4; indeed, differently from paragraph 2, such provision does not include any reference to the new paragraph 4-*bis*.

Rome – Milan, October 2017

For any clarification or further queries, please refer to your usual contact in Chiomenti.