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Selected Italian cases in the field of European Company Law

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BUSINESS LAW IN THE EUROPEAN UNION AND SUSTAINABLE ECONOMY

A general remark

Case Law: not just decisions, but also relevant practical cases

5 cases: a main course, and 4 side dishes, on different topics…

…but always with a reference to European Company Law

N.B.: It's not the proper and full mirror of current Italian judicial debate in the field of Company Law, but it's perhaps useful to understand how Italy is doing in the field of ECL

The cases

1. Online establishment of companies (State Council 2643/2021)
2. Purpose of a company (Court of Cassazione, 11.12.2000, n. 15599)
3. Starting up a business (Court of Milan, 3.1.2018)
4. Acting in concert (Court of Genoa, 17.9.2018)
5. A non-case: Commission v. Spain in case EUCJ (First Chamber) C-338/06

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Italian judicial system

Civil – and Criminal - Law

- First instance: Tribunale (the most relevant, for CL: Milan, Rome, Naples, Genoa – Specialised sections)
- Second instance: Corte d'Appello
- Last instance: Corte di Cassazione (just for formal issues in previous instances)

Administrative Law

- First instance (regional level): Tribunale amministrativo regionale – TAR
- Last instance (national level): Consiglio di Stato

1. Online establishment of companies

Hot topic: Directive (EU) 2019/1151

Not generally widespread in Italy: paper establishment is the usual way

Directive 1151 recently implemented by legislative decree November 8, 2021, n. 183, limited to s.r.l. (private company form)

So far, the only possibility for online establishment was for "innovative start-up companies"

- Decree in 2012, amended in 2015, with actual possibility for online establishment, according to a mandatory template, from February 2016 (ministerial decree)

Innovative start-ups

Companies with a specific focus on innovation, to be stated in the articles

If private companies, they are granted some features of public companies, too

- Categories of quotas (similar to shares)
- Equity crowdfunding
- Semi-listing online

As they are innovative, also their establishment should be innovative!

- Atto pubblico (public deed) – notarial involvement, or
- Online establishment by means of an online signature

Actually?

We have here a conflict of internal rules

1. General rule: companies must be established by public deed, which involves a notarial intervention (art. 2328, 2nd paragraph ICC)
2. Specific rule on innovative start-ups: art. 4, paragraph 10bis, Law decree 3/2015
   1. Public deed, or
   2. Private deed with electronic signature
3. Applicative rule in Ministerial decree 17.2.2016, art. 1: the deed of incorporation and the shall be drawn up *exclusively* via IT

So…

…. Just digitally, or also in paper?

That's one of the key questions. According to the hierarchy of the sources, the Law decree 3/2015 prevails always over the ministerial decree.

Cui prodest? Et cui non?

The point is that digital is good, but there are some conflicting interests. Namely, there was no notarial intervention in the digital establishment of the innovative start-ups, while they have always to be present in the public deed.

Actually there was a precedent, in early 2012, for simplified private companies, removed in 45 days…

Is this just an internal clash of powers?

Not at all. And we have a momentous role for European Company Law

Company? Well, not just company: creation of a new company with limited liability is a matter of administrative law, too

Why are Italian companies required to have a public deed to be established?

Because we have no (*recte*: no longer) a judicial or administrative procedure as of a company's constitution

In any case, once drawn up, the instrument of constitution is to be sent to the Trade Register, in order to have the company formally established

Legal basis? Art. 10 Codified Directive

In all Member States whose laws do not provide for preventive administrative or judicial control, at the time of formation of a company, the instrument of constitution, the company statutes and any amendments to those documents shall be drawn up and certified in due legal form.

For Italy, according to art. 2328 ICC, public deed is the *due legal form*

The point is: what does *due legal form mean*?

- In general, the law and just the law (not ministerial decrees, e.g.) may establish how a company comes to existence, but…
- The Italian translation of the art. 11 (since 1968, First Directive…) mention the requirement of "atto pubblico"

The case

- The plaintiff/complainant is the only party that has an actual interest in having the public deed always available, i.e., Italian Notaries' National Council
- The defendant is the Ministry of Economic Development, for the maintenance of the ministerial decree enabling the online establishment via e-signature
- The case is an *administrative* case, dealt with by the Regional Administrative Court of Rome, in the first instance, and by the Council of State for the appeal

The key points of the plaintiff

1. The ministerial decree would have allowed an exception to the law, excluding the public deed establishment, without a due power in the hierarchy of the legal sources

2. The ministerial decree would not be a valid legal source

3. As there is not a public deed, therefore the Italian rule would be against art. 11 CodDir, as the Trade Register should perform a check exceeding its own peculiar role

The first instance decision (2.10.2017)

1. No derogation to the law: the public deed is always available, even if it is not mentioned by the ministerial decree
2. The ministerial decree is a valid legal source (no *numerus clausus* for secondary regulation)
3. The template for the establishment of the innovative start-up is to be seen as a *preventive administrative* assessment, and guarantees substantive lawfulness

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So far, thus…

… almost everything is deemed to be ok: basically, the provisions of the decree are valid, and there is no damage for the public interest in the fact that there is no need for a public deed

But the judges do not motivate well by which way the public deed would in any case be available as a form of constitution of the company

This is basically the ground for the appeal

The appeal decision (4.3.2021)

1. The ministerial decree goes beyond its possibilities: it was intended just to establish the technical details for the online establishment, and not to change the legal provisions
2. The Trade Register is entitled to perform just a formal assessment (cf. DPR 581/1995, art. 11), therefore all the additional checks required by the ministerial decree would not be legally grounded, in particular those dealing with the assessment of the social object as lawful and the fact that the legal requirements for the innovative star-ups have been met, as these assessments are not just formal

For these reasons…

… the Council of State decided that the relevant parts of the ministerial decree had to be withdrawn

I.e.: the innovative start-ups have no longer the possibility to be established online via e-signature

In addition, one of the grounds for the appeal judges was, again, art. 10 CodDir, as the formal check by the Trade Register was not to be held as sufficient for not requiring the public deed

A couple of remarks

The decision is basically an award for the notaries; it's an issue of check and balances

Does it make sense such kind of a decision while the Directive 1151/2019 on online constitution was already about to be implemented in Italy?

Are we sure that the decision is completely correct?

Wasn't it enough to remove the "exclusively"?

In particular…

Does art. 10 CodDir actually:

- Require a public deed?
- Require *minimum standards* for preventive administrative and judicial control?

IMHO, for both of the questions, the answer is NO.

- Public deed: it is not in the power of the EU to decide the domestic legal form due for the constitution of a company
- And it is not in its power to require *minimum standards*. There are many cases: UK's Companies House (while the UK was in the EU, naturally); but also France and Portugal in early Years 2000.

2. Purpose of a company

The key question: what is a company for?

The most relevant provision in Italian Law is art. 2247 ICC, regarding all companies and partnerships (and cooperatives):

"By means of the contract of *società* two or more parties contribute goods or services in order to perform jointly an economic activity **with a view to distribute the profits**"

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Profit purpose

To be divided in

- Objective profit
  - The money that the partnership or company makes
- Subjective profit
  - The objective profit distributed to the members

Objective profit is for sure always needed in a *società*; according to the wording of art. 2247, also subjective profit should be, but...

There are a couple of questions…

Maximise, or not maximise, this is the question

Twofold question:

- Profit maximisation in carrying out the activity
  - Issue to be dealt with looking at directors' duties, and to the most recent proposal of the EU Commission, *inter alia*
- Subjective profit maximisation in the distribution of objective profits
  - That's properly the case of Cassazione 25599/2000

The case

In 1991 (yes…)

Merger by incorporation

Bank 1 merges by incorporation in Bank 2

Bank 2 has a clause, in its articles, establishing that *a part* of the annual profit is to be devoted to "catholic charities and cultural, recreational and social associations"

A few minority shareholders of Bank 1 (plaintiffs) claim (among other issues) that this clause is not lawful, as it would be against the (subjective) profit purpose

Before the Cassazione…

There had been two more instances

All were consistent in the solution

- Court of Perugia, 26. 4.1993
- Court of Appeal of Perugia, 12.12.1997

But they face mainly procedural and legitimacy issues (e.g.: is the extraordinary meeting entitled to take this decision of merger with a majority decision, and not unanimously? – The answer is yes: the dissenting shareholder is granted the right of appraisal)

Cassazione 15599/2000, instead...

...also considers the profit distribution profile, and goes more in depth than the motives in Court of Appeal's decision

"The profit purpose *must* be present. This, however, does not mean that the entire objective profit must always be distributed to the shareholders or retained in the reserve. [...] Therefore, such a clause [...] is to be deemed as lawful, and in line of principle it is not suitable to damage the profit purpose. The conclusion cannot be different on the basis that the clause did not specify the actual part of the objective profit to be given for charitable purposes, as [...] such a competence is devoted to the shareholders' meeting, and the shareholders meeting also shall decide the part to be given to charities.

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Cassazione 15599/2000, instead...

If the shareholders decide to devote a so relevant part of the objective profits to charities that the profit purpose would be substantively damaged, therefore this would be unlawful. But this does not deal with the clause itself, but with the shareholders' decision (abuse of the majority). If, on the contrary, only a relatively little part of the profits is devoted to charities, this would be perfectly consistent with the profit purpose, for instance with a view to a company's activity of self promotion".

Relevant with a view to ECL because, already in 1973, Italian literature (Santini) argued that no-profit organisations might be companies, as the European rules on the nullity of company (former 1st Directive, now art. 11 CodDir) do not include the lack of profit purpose among the possible grounds.

Ok, but it's a year 2000 decision…

In the meanwhile, *inter alia*, we had a major company law reform in 2003/04…

But this decision is still extremely relevant from the profit purpose point of view!

In addition, since 2016 we have in Italy Benefit companies, with a mixed "profit+common benefit purpose"

The criteria followed by Cassazione 15599 are very relevant – besides the creation itself of benefit companies, also - to understand that in this case there is not a minimum requirement for common benefit purpose by benefit companies, too, as this might be functional to reputational-self promotion purposes

3. Starting up a business (Court of Milan, 3.1.2018)

K.R. Energy case, Court of Milan, 3.1.2018

The case deals with pre-emptive subscription rights (art. 2441 ICC) and above all assessment of in-kind contributions (arts 2343 ss. ICC)

The key issue is a capital increase in a listed Italian company, by means of the contribution of shares representing the capital of another company

Key legal provisions

In-kind contribution, with specific reference to European Company Law rules (2nd Directive and now arts 49 ss. CodDir)

General rules (art. 2343 ICC) imply a sworn report to be issued by an independent expert appointed by the Court, that assesses that the good to be contributed is worth *at least* inasmuch the par value of the shares (+ share premium, if any) to be given to the contributor

After 2006, a simplified procedure with no need of a sworn report is possible, *inter alia*, when the contributed goods are securities or money market instruments that had already been somehow evaluated recently (e.g.: weighted average market price, or value resulting from recent balance sheets) – IT: 6-12 months

EU provision

Arts 50 and 51 CodDir

It is possible to decide to use either the traditional or the simplified procedure; that's up to the directors.

In any case, even if the simplified procedure is used, according to the European rule:

"However, where that price has been affected by exceptional circumstances that would significantly change the value of the asset at the effective date of its contribution, including situations where the market for such transferable securities or money-market instruments has become illiquid, a revaluation shall be carried out on the initiative and under the responsibility of the administrative or management body."

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The case

K.R. Energy must increase its capital by means of new contributions, due to severe losses that affected the capital.

This is done by limiting (lawfully) the pre-emptive rights of the shareholders, as the capital increase takes place by means of a in-kind contribution (art. 2441 ICC allows this, if directors explain the ground for that in a specific report); in any case, the shareholders authorise such an operation in the general meeting, with reinforced majority. The extraordinary shareholders meeting approves such an operation on May 25, 2017, *unanimously*

V.C., who is already a shareholder of K.R. Energy, contributes his shares of another company, S.I. s.p.a. (100%). This makes the sworn report not needed, as the directors opted for the (cheaper) simplified procedure

The case

According to the Italian rules in this field, the operation is to be seen as a "related party operation" (V.C. had a specific interest, as he was the sole owner of S.I. s.p.a.); this means that the shareholders meeting should decide according a even more reinforced majority. As the decision was unanimous, however, this is not relevant in this case

However two shareholders of K.R. Energy (C.G.C. and G.B.), after the shareholder meeting, asked a new evaluation of S.I.'s shares, as they were doubtful regarding their actual value. The directors refused, alleging they had no legitimacy for that, as they voted in favour of the decision, in the meeting

The decision

According to the Court, C.G.C and G.B. (the shareholders asking for a new evaluation) have the right to ask that, *even if they voted in favour of the decision*.

In fact, some facts or information might appear only after the shareholders meeting. In any case, the maximum term for such a petition is 30 days from the filing of the capital increase's notice in the Trade Register. After that moment, the directors file a statement describing the goods that have been contributed, and their actual evaluation. After the filing of such a statement in the Register, the capital increase is completed

Unfortunately, C.G.C and G.B. opened their claim after that 30 days term, whose purpose is precisely to make it possible to assess any doubts regarding the evaluation

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The decision

Therefore, in this very case, the plaintiffs lose due to the time expiration

This decision has however already been followed by several other decisions of major Italian courts, and the principle that the fact that a shareholder voted in favour of a capital increase is not an hindrance for having him/her as a claimant for a new regular assessment is currently widely recognised

4. Acting in concert (Court of Genoa, 17.9.2018)

Banca Carige's controversial case

The point here is the right of minorities to join in order to perform their rights in a company

Specific rules for banks and insurances, regarding the *acquisition* of a certain number of shares

Key legal provisions

Everyone who intends to purchase a controlling, influential or more than 10% stake in a bank must obtain a prior authorization of either the European Central Bank or Bank of Italy (art. 19, Italian Banking Act). This also when there are more individuals involved, "on the basis of any form of agreement, want to exercise jointly their rights" (art. 22)

A secondary regulation by the Interministerial Committee for Credit and Savings (Decree 675/2011, art. 5) sets down a further rule stating that the purchases made in the 12 months before the agreement are relevant

Key legal provisions

ECB or BoI assess whether the buyer guarantees a sound and prudent management of the bank

If the buyer does not ask the authorization, or does not obtain it, voting rights attached to the non-authorized acquired shares cannot be exercised, and the Bank of Italy may challenge the meeting's decision, in case the voting rights have been exercised and were needed to have the decision passed (art. 24, Italian Banking Act)

In the ECL…

We know acting in concert because of the Takeover Bids Directive (Directive 2004/25/EC, art. 2)

'persons acting in concert' shall mean natural or legal persons who cooperate with the offeror or the offeree company on the basis of an agreement, either express or tacit, either oral or written, aimed either at acquiring control of the offeree company or at frustrating the successful outcome of a bid;

In the ECL…

And, in addition, Directive 2007/44/EC – now Directive 2014/65/EU, art. 11

"1. Member States shall require any natural or legal person or such persons acting in concert (the 'proposed acquirer'), who have taken a decision either to acquire, directly or indirectly, a qualifying holding in an investment firm or to further increase, directly or indirectly, such a qualifying holding in an investment firm as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20 %, 30 % or 50 % or so that the investment firm would become its subsidiary (the 'proposed acquisition'), first to notify in writing the competent authorities of the investment firm in which they are seeking to acquire or increase a qualifying holding, indicating the size of the intended holding and relevant information, as referred to in Article 13(4)."

The point is: just acquisition/purchase, or also holding or reinforcing the control of a company?

The Italian Banking Act does not include the holding/reinforcing; the Italian Securities Act – implementing the Takeover Bids Directive, does. And so the Interministerial Decree, de facto

The case

The case is rather simple. Three companies, shareholders of the Italian Bank Carige, having 9%, 5.5% and 0.5% (overall: around 15%) of the bank's shares, enter into an agreement under which each company undertakes the obligation to vote in favour of the candidates directors submitted by one of these three companies

The controlling shareholder, before the shareholder meeting, proposes a list of candidates as well, and acts as a plaintiff in a legal action against the three shareholders with the second list of candidates

The decision

The point is that the agreement between the three shareholders had not been approved by the ECB. As they together have more than 10% (relevant influence threshold) the rights linked to the shares exceeding 9.99% should be sterilised.

> Actually, the plaintiff tried also to demonstrate that the 9.99 threshold would be enough to deem the presence of a notable influence as well, with the duty to sell the shares. The court rejected this argument

The court, thus, decided to have the rights exceeding the 9.99% sterilised

5. A non-case: Commission v. Spain in case EUCJ (First Chamber) C-338/06

European Court – not Italian

Against Spain – not Italy

Therefore… why?

Because this is a very clear example of the slowness of the ECL

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Many points, but...

...what's important to our extent is this.

According to the 2nd Directive, now art. 72 CodDir, in case of increase in capital by consideration in cash, the new shares "shall be offered on a pre-emptive basis to shareholders in proportion to the capital represented by their shares". In addition: "Paragraphs 1 to 5 shall apply to the issue of all securities which are convertible into shares or which carry the right to subscribe for shares, but not to the conversion of such securities, nor to the exercise of the right to subscribe".

Pre-emptive right, again.

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Many points, but…

Spanish legislation, however, admitted that not just the shareholders, but also the convertible bondholders should be granted a pre-emptive right *on the new shares*, on the basis of their exchange ratio.

"Where the capital is increased by means of the issue of new ordinary or preference shares, the shareholders and holders of convertible bonds may … exercise their right to subscribe for a number of shares proportionate to the nominal value of the shares which they already hold or, in the case of holders of convertible bonds, which they would hold if, at that time, they exercised their right to conversion"

According to the European Commission, plaintiff, such a provision is against the abovementioned European rule, as it only deals with shareholders: "the directive requires new shares and convertible bonds to be offered on a pre-emptive basis to shareholders alone"

The decision

38 It is indeed the case, as the Kingdom of Spain submits, that Article 29(1) and (6) of the Second Directive *[now art. 72 CodDir]* does not provide that both the new shares and the bonds convertible into shares are to be offered exclusively to the shareholders and that they can thus also be offered to holders of earlier issues of convertible bonds.

39 It must be held, however, that it is apparent from the very wording of that article that the offer must not be made to both of them simultaneously, but 'on a pre-emptive basis' to the shareholders.

The decision

40 Thus, only in so far as the shareholders have not exercised their right of pre-emption can those shares and bonds be offered to other purchasers, including, in particular, the holders of convertible bonds.

41 Furthermore, if the legislature had wished to extend the right of pre-emption at issue to the latter, it would have done so expressly, in the same way as, in Article 29(6) of the Second Directive, it extended the right of pre-emption to other securities which are convertible into shares or which carry the right to subscribe for shares.

[…]

46 It follows that, by granting a pre-emption right in respect of shares in the event of a capital increase by consideration in cash, not only to shareholders, but also to holders of bonds convertible into shares, and a pre-emption right in respect of bonds convertible into shares not only to shareholders, but also to the holders of bonds convertible into shares pertaining to earlier issues, the Kingdom of Spain has failed to fulfil its obligations under Article 29(1) and (6) of the Second Directive *[now art. 72 CodDir]*.

Everything is clear

Spain had to change its law, by repealing the provision allowing a pre-emptive right for convertible bondholders, but…

See art. 2441 ICC

"Newly issued shares and convertible bonds shall be offered in pre-emptive basis to the shareholders in proportion to the number of shares they hold. If convertible bonds are present, pre-emption right is given to the holders of such bonds, on the basis of the exchange ratio"

So?

Spanish and Italian provisions are the same…

…but while the Spanish one was repealed, the Italian one is still completely in force…

The same can be seen with a view to the cross-border transfer of seat, before Directive 2121/2019, when many MS asked for a preventive winding up of the company for having its seat transferred from one MS to another (See, e.g., Polbud).

Thank you very much for you attention

Questions?

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