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Power delegation in limited liability companies (“SRL”) and in stock companies (“SPA”) in Italy

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The structure of the delegation of powers within the board of directors as well as to external proxy holders represents a topic of significant impact on the day to day operation of Italian companies.

1) A look into business practice

Our professional focus is mainly on Italian companies which are part of multinational groups of companies and therefore we have experience of commonly used business internal authorization policies of medium/large size companies.

Their goal usually is to reduce the use of single signatures to a minimum and extend joint signatures as much as possible.

This approach has obviously more than one advantage: firstly, it allows strict control on the operations and secondly it strengthens the position of the company from the point of view of Legislative Decree 231/2001 (i.e. Italian law on corporate administrative liability).

However, under Italian law certain basic principles of corporate law must necessarily always be borne in mind: the purpose of this short memo is to underline them.

2) Italian law on SRL's and SPA's legal representation powers

The basic principles are broadly the same for both types of company.

Where there is a board of directors:

(a) The members of the board of directors have statutory general powers to represent the company, subject to any limitations resulting from its articles of association and/or from their appointment. Usually company By-laws limit representation powers, granting general representation powers only to the Chairman of the board and the powers to represent the company of the other directors are limited to specifically delegated powers;

(b) The board of directors may delegate powers (with single and/or joint signature) amongst its members (as regards SRLs, provided this is expressly authorized by the By-laws);

(c) The board of directors may also delegate powers to execute certain pre-determined types of contracts/acts/deeds (with single and/or joint signature) to non-directors (again, as regards SRLs, provided this is expressly authorized by the By-laws).

The same principles also apply *mutatis mutandis* to the other types of management bodies provided under Italian law (sole director and – in the case of SRLs – joint or several management by two or more directors).

However, the following fundamental two rules must always be borne in mind:

(d) The management of the company must always remain the exclusive responsibility of the managing body.

In fact, the shareholders (or quotaholders in an SRL) alone are by law entitled to choose who is in charge of the management of the company: should the management of the company *de facto* not be performed by the managing body, this would result in a breach of the trust of the shareholders /quotaholders;

(e) As a consequence of the above, although the managing body may appoint external proxy holders for certain contracts/acts/deeds or categories thereof, this has a precise limitation: delegation shall never be so broad as to become a de facto abdication of its own powers.

3) Common misunderstandings on power delegation in Italian companies: a case study

Very often an Italian subsidiary (SRL or SPA) of multinational group of companies is managed by a board of directors composed of members residing abroad and with only one “local” member, who is appointed as managing director.

Usually, the company, in compliance with the applicable group policies, is not willing to grant to the managing director single signature powers (or at least not for the most important contracts/acts/deeds).

In the above framework a delegation structure often implemented is the following:

(i) the board of directors appoints one “local” managing director with few single signature powers (for less sensitive areas);

(ii) the board of directors grants more extended powers to the same managing director and to two or more non-directors as attorneys in fact of the company (usually executive employees of the same) to be exercised with the joint signature of any two of the three.

At a first look , this structure achieves the purpose of having a double signature system and the company may rely on an efficient signature system, with many individuals easily physically available in place and authorized to sign so as to allow swift and easy running of the company business.

But this kind of structures presents several critical points.

Looking closer: what are the actual corollaries of the above structure?

- ✓ Extended areas of the company business in respect of which the managing director cannot decide autonomously but needs the approval of an individual (an attorney in fact) who is not a member of the board. This may result in a de facto abdication by the management body (i.e. the board of directors) to its role and function divesting itself of extended areas of powers;

- ✓ There are attorneys in fact who are de facto put on the same level as the managing director (their signature being alternative to that of the latter). This means that these individuals may be considered "*de facto directors*" with all consequent implications and liabilities.

  In this connection, for example, it is worth noting that hat many multinational groups rely on ad hoc insurance policies which cover the risk of a member of a management body incurring a liability in good faith. If a *de facto* director incurs in the same liabilities of the members of the management body, it is possible that the group's insurance policy might not cover the person in question as he/she was not formally appointed as member of the board.

4) Conclusions: solutions in compliance within the Italian legal framework

As mentioned, any solution implemented within the Italian legal framework must necessarily comply with the basic principles indicated under paragraph 2.

As a consequence thereof, in a corporate law perspective the most correct way to achieve a double signatures system is to have at least two managing directors granted with joint powers.

A possible alternative could be:

(i) to maintain a single managing director with extended single signature powers, allowing the same to sub delegate only limited powers to one or more attorneys in fact (and only within their respective skills and competences), who would in any case act under the directions and instructions of the managing director;

and

(ii) adopt internal approval procedures which all of the signatories must always comply with and observe in the exercise of their powers. These internal approval procedures would not, however, have an impact on the external validity of the acts and deeds entered into (in other words, a breach of the approval procedures by a signatory could lead to internal sanctions against the latter but would not affect the validity of the act or deed that was signed without complying with the internal approval procedures)

A review of the delegation of powers structures and the use of internal approval procedures may also provide a good chance to redraft/revisit/test the effectiveness of the company's 231 organization and control model.

The synergies between the two areas are manifold and a coordinated review of corporate delegation structures and corporate governance models should always be duly considered.