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Developments and Critical Issues of Corporate Governance in Italy

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A summary of the most significant amendments to the Corporate Governance Code for Italian listed companies (the “Code”) approved on July 9, 2015 by the Corporate Governance Committee seated at the Italian Stock Exchange (the Committee)¹ is indicated here in.

¹ The Committee, with seat at Borsa Italiana S.p.A., Milan, Piazza Affari 6 (the Italian Stock Exchange), was set up, in its current composition, in June 2011 on the initiative of the main Italian associations representing corporations and institutional investors (ABI, ANIA, Assonime, Confindustria, Assogestioni) and Borsa Italiana S.p.A. and it is composed of representatives of the promoters above and Italian listed companies.

The Committee is in charge of promoting good corporate governance of Italian listed companies, pursued by a constant alignment of the Code with best practices and through initiatives which would enhance the credibility of the Code.

Adherence to the Code (or any other corporate governance code) by Italian listed companies is voluntary and based on the so-called “comply or explain” principle². For companies adhering to the Code, the changes (with the exclusion of changes regarding the statutory auditors, which

² As provided pursuant to Directive 2013/34/EU and Article 123-bis of the Consolidated Law on Finance (i.e., Legislative Decree No. 58 of 24 February 1998, as subsequently amended), each listed company is required to include a “corporate governance statement” in its annual management report, indicating “the corporate governance code which the undertaking may have voluntarily decided to apply”. In case a listed company decides to depart from any provision of the corporate governance code to which it voluntarily adhered, it should provide a clear and exhaustive explanation thereof. A listed company should also adequately explain its decision not to adhere to any corporate governance code (see Article 20 of EU Directive 2013/34/EU; see also the Commission Recommendation of April 9, 2014 “on the quality of corporate governance reporting (“comply or explain”)”.

listed companies are invited to apply since the first renewal of the Board of Statutory Auditors occurring after the fiscal year beginning in 2015) should be implemented by listed companies by the end of the fiscal year beginning in 2016, providing information about such implementation in the corporate governance report to be published in the following fiscal year.

Amendments

The main amendments of the Code are indicated for each topic here below.

Role of the Board of Directors

The Committee extends the role of the Board of Directors in relation to the sustainability of the business. In particular, the Board of Directors has to define the risk profile of the company consistently with the company’s strategic objectives, considering the risks that may be relevant for the sustainability of the company’s business activities in the medium-long term³.

The new provision expands the principle set out in Article 1 of the Code, whereby the Board of Directors has to pursue the overarching goal of “creating value for the shareholders over a medium-long term period”⁴.

On the other hand, the new provision includes, among the interests that the Board should take care of, the principle of sustainability, in compliance with the most recent European legislation⁵. This

³ Criterion 1.C.1, letter b), of the Code.

⁴ Principle 1.P2 of the Code.

⁵ Reference is especially made to Directive 2014/95/EU of 22 October 2014, providing new disclosure obligations for larger undertakings on “non-financial information” – and in particular on environmental, social and employee matters, respect of human rights, anti-corruption and bribery matters – and information on diversity policies.

new provision also seems to suggest that sustainability matters (such as environmental matters, social and employee-related matters, human rights concerns, anticorruption and bribery matters)⁶ may have a relevant impact on the business and should be considered in the definition of the risk profile and strategic objectives of a company.

Composition of the Board of Directors

The Committee recommends that the corporate governance report (to be prepared by listed companies’ directors jointly with the management report and the financial statement) should state the type and the organizational methods of any initiatives which occurred during the relevant fiscal year with regard to the induction sessions dedicated to directors and statutory auditors, which should be periodically organized by the chairman.

Independent Directors

The Committee expands and clarifies the recommendation according to which the independent directors meet at least once a year separately from the other directors (see Criterion 3.C.6. of the Code).

Establishment and Functioning of the Internal Committees of the Board of Directors

The Committee also adds two new recommendations within the general recommendations on the establishment, composition and functioning of the internal committees of the Board of Directors.

First, the recommendation that meetings

⁶ See Whereas 6 of Directive 2014/95/EU of 22 October 2014.

of committees be recorded with specific minutes has been integrated with the recommendation that the chairman should provide information to the board of directors regarding aforementioned recording at the first available meeting (see Criterion 4.C.1. of the Code).

The second and more relevant amendment concerns the recommendation that the Boards of Directors of companies listed on the FTSE MIB index⁷ evaluate the opportunity to establish a committee in charge of matters regarding the corporate social responsibility (see the Comment section of Article 4 of the Code).

The sustainability issues related to the business activities of the company and its interaction dynamics with all its stakeholders would be supervised by this committee. As an alternative to the creation of a dedicated committee, the Board of Directors may choose whether to group or to assign the tasks above to the other established committees, most significantly the Internal Control and Risk Committee.

This second recommendation is not subject to the “comply or explain” principle, as it is included in the Comment section of the Code⁸.

Appointment of Directors

Under Italian law the Board of Directors of Italian listed companies governed by the so-called “traditional” governance mechanism is appointed by the shareholders,

⁷ The FTSE-MIB is the primary benchmark index for the Italian equity markets, comprising 40 shares listed on the Italian Stock Exchange and capturing approximately 80% of the domestic market capitalization. The Index is comprised of highly liquid, leading companies in Italy.

⁸ However, since the sustainability matters should be included in the definition of the risk profile of each company pursuant to the new Criterion 1.C.1, letter b), of the Code, the Board of each company should reasonably supervise such sustainability matters (if appropriate, with the support of the Control and Risk Committee).

pursuant to a voting-list mechanism, which is intended to grant to the minority shareholders the right to designate their representatives on the Board. The voting-list mechanism, including the right to present a list of candidates, is regulated by each company’s by-laws.

Normally, the lists of candidates are presented by the shareholders. However, Comment to Article 5 of the Code provides that the Committee highlights the importance of an engagement of the nomination committee (appointed internally to the Board and composed in majority of independent directors) “in case the Board itself, as far as it is consistent with applicable law, submits a slate for the renewal of the Board”⁹.

Furthermore, the Committee also recommends that, if the listed company has adopted a plan for the executive directors’ succession, the plan’s procedure should clearly outline the plan’s scope, instruments and timeline.

Internal Control and Risk Management System

The Committee also passed changes regarding the system of internal control and risk management, which significantly strengthen the effectiveness of internal controls.

In particular, the revised Article 7 of the Code now explains that an effective system of internal controls and risk management contributes to the reliability of the information provided to the corporate bodies and not only of the publicly

⁹ Consider that under Italian law do not exist specific provisions on the subjects entitled to the formation of the lists of candidates to be voted by the shareholders and that, according to some scholars, the Board of Directors in office may decide to present such a list of candidates. The Code seems to support this interpretative position.

disclosed financial information¹⁰. Particularly, this provision includes the reliability of the internal flow of information among the core tasks of an effective system of internal control and risk management.

In this regards, in the Comment to Article 1, the Code provides the following: “under relevant circumstances, the Board of Directors acquires any necessary information and adopt any suitable measure to protect the company and the information to the market”.

The Control and Risk Committee¹¹ appointed within the Board may assist the Board in this respect. In fact, the Control and Risk Committee “supports, with adequate preliminary activities, the Board of Directors’ assessments and resolutions on the management of risks arising from detrimental facts that the Board may have been become aware of”¹².

The aforementioned amendment represents an important development as, pursuant to the Code, the Control and Risk Committee is composed by a majority, or exclusively, of independent directors¹³.

According to the provisions of the Code, each company should provide for the coordination of the corporate bodies and functions with specific tasks in the context

¹⁰ Principle 7.P.2 of the Code.

¹¹ According to Principle 7.P.3, letter (ii) of the Code, the Board of Directors shall identify within the Board “a control and risk committee [...] to be charged with the task of supporting, on the basis of an adequate control process, the evaluations and decisions to be made by the Board of Directors in relation to the internal control and risk management system, as well as to the approval of the periodical financial reports”.

¹² Criterion 1.C.2, letter g) of the Code.

¹³ Pursuant to principle 7.P.4 of the Code, “The Control and Risk Committee is made up of independent directors. Alternatively, the committee can be composed of non-executive directors, the majority of which being independent; in this latter case, the chairman of the committee is selected among the independent directors. If an issuer is controlled by another listed company or is subject to the direction and coordination activity of another company, the committee shall be made up exclusively of independent directors”.

of the system of internal control and risk management “in order to enhance the efficiency of the internal control and risk management system and reduce activities overlapping”.

In order to reinforce this provision, the Code now requires each company to describe in its annual Corporate Governance Report the instruments adopted to ensure the coordination among the corporate bodies and functions responsible for the system of internal control and risk management¹⁴.

In the Comment to Article 7, the Code provides that an adequate internal control and risk management system – at least in the most significant companies (i.e., companies included in the FTSE-MIB index) – should include a so-called “whistleblowing” system, consistently with domestic and international best practices and ensuring “a specific and confidential communication channel as well as the anonymity of the reporting person”.

Statutory Auditors

The last amendments to the Code approved by the Committee concern the recommendations applicable to statutory auditors.

Pursuant to the “traditional” governance structure of Italian joint stock corporations, the shareholders appoint a Board of Statutory Auditors, vested with wide monitoring responsibilities within the supervisory system of a company.

According to the amendments passed by the Committee, the results of the verification of the independence requirements of the statutory auditors, to be performed after their appointment and subsequently on an annual basis, shall be submitted to the Board of Directors. The

¹⁴ Criterion 7.C.1, letter d) of the Code.

Board will then disclose such results through a press release to the market relating to the first verification conducted after the first appointment and in the relevant corporate governance report with reference to the annual verification (Criterion 8.C.1. of the Code).

compensation of the member of the Board of Statutory Auditors was not proportionate to their wide spectrum of responsibilities and potential liabilities (Criterion 8.C.3. of the Code).

Moreover, the Code now provides a new remuneration criteria, since the



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