

# Shares with multiple votes and increased vote

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The recent Italian law Decree no. 91/2014 (the so-called “*Decreto Competitivà*”) converted into law in August 2014 has repealed the prohibition to issue shares carrying multiple votes previously set forth under art. 2351 of the Italian Civil Code (“**ICC**”). Under the new rules, both listed and not listed companies will have the possibility to issue shares carrying more than one vote within the limits provided for under the new legislation.

The 2004 reform of Corporate Law (under the Legislative Decree no. 6 of January 17, 2003) had already introduced certain exceptions to the principle of strict proportionality between the number of shares and the voting rights, but had maintained firm, as the backbone of a “financial democracy”, the prohibition to issue shares carrying multiple votes, which was instead permitted in many European and non-European jurisdictions.

The possibility - now contemplated - to issue shares carrying more than one vote will affect the *quora* and the majorities and, thus, will have a significant impact on the rules regarding the governance and the control of companies in Italy. As better outlined below, there is one set of rules applying to non-listed companies, while a different set of provisions will apply with respect to listed companies.

The objective of the legislator, with the enactment of the above provisions, is to boost the equity investments in the capital market through new legal instruments that would allow equity injections into a company without a significant dilution of the controlling shareholder, and to encourage listing's processes, allowing the controlling group to maintain the position of majority shareholder. Shares carrying multiple votes might also be interestingly used for the definition of the governance rules within corporate joint ventures (for example, in the investments of private equity funds and, more in general, in any type of equity investment).

## 1. Shares with increased votes in non-listed companies

Before the enactment of the *Decreto Competitività*, Italian law permitted the issuance of shares with limited voting rights or without voting rights (non-voting shares) within the limit of 50% of the corporate capital, but excluded the possibility to increase the number of voting rights for any share.

With the novel art. 2351 ICC, third paragraph, as amended by the *Decreto Competitività*, it is now possible for non-listed companies to issue shares carrying more than one vote (but, in any case, not more than three votes) in any shareholders' meeting, or in shareholders meetings resolving upon specific matters; the right to express multiple votes may also be subject to the occurrence of conditions precedents which shall not be merely discretionary.

Through the issuance of shares carrying multiple votes, it will thus be possible to further affect the proportionality between capital investments and governance rights, and to entrust the control of a company with a minority.

The introduction of shares with multiple votes will require, for the existing companies, a change to the by-laws to be approved with the majority provided for the extraordinary shareholders' meeting. However, it should be noted that, as a derogation to the ordinary *quora* provided in artt. 2368 and 2369 ICC, art. 212 of the implementing provisions of the ICC provides that, for the companies already enrolled in the Register of Companies as of August 31, 2014, the shareholders' resolution for the creation of shares with multiple votes shall be adopted, also on first call, with the favorable votes of at least 2/3 of the corporate capital represented in the shareholders meeting.

The issuance of shares with multiple votes will trigger the withdrawal right for the shareholders who have not consented to the adoption of the relevant resolution, on the basis of art. 2437, first paragraph, letter g) ICC, which provides, in general, the withdrawal right in case of decisions entailing "*amendments of the by-laws concerning the voting and participations rights*".

## 2. Shares with increased votes in listed companies: amendments to the Italian Financial Act (TUF)

Pursuant to art.127-*quinquies* TUF, as recently introduced by the *Decreto Competitività*, listed companies are now allowed to set forth in their by-laws the granting of increased voting rights - up to a maximum of two voting rights - for any share which has been owned by the same shareholder uninterruptedly for at least 24 months from the date of entry in a special register (to be regulated by an *ad hoc* regulation by Consob, *i.e.*, the Italian market regulator). The by-laws of listed companies may increase (but not decrease) the above-said 24 months period and may provide for the modalities for the shareholders to waive, in whole or in part, the increased voting rights.

Unless the by-laws provides otherwise, the increased voting rights are also calculated for the determination of the attendance and majority *quora* which refer to the percentage of the share capital. The increased voting rights have no relevance on the rights, other than the voting right, granted to those holding a certain percentage of the share capital.

Increased voting rights cease to be effective in case of transfer of the shares, regardless of whether the transfer is carried out against consideration or on a free basis (including, in case of transfer, directly or indirectly, of a controlling stake in companies or entities holding increased voting shares representing at least 2% or 5% in case of Small and Medium-sized Enterprises – so called PMI). Unless the by-laws provides otherwise, instead, the right to increased voting rights (a) is preserved in case of *mortis causa* transfer, as well as in the case of merger and demerger of the shareholder; and (b) will be attached also to the newly issued shares in case of free capital increase pursuant to art. 2442 ICC (*i.e.*, capital increase through the allocation of reserves to share capital).

Since the increased voting shares do not constitute a class of shares (unlike the shares carrying multiple votes), no right of withdrawal arises in favor of the shareholders who have not consented to the amendment of the by-laws relating to the increase of the voting rights.

As a temporary rule, it has been provided, though, that the resolutions amending the by-laws, with the introduction of the increase of the voting rights, shall be adopted, even on the first call, with the favorable vote of the majority of the share capital represented at the shareholders' meeting, if such resolutions are taken not later than January 31, 2015.

Some specific rules coordinate the above new regulation with the rules applicable to public tender offers, providing that: (i) the obligation to launch a mandatory tender offer is triggered not only in case the relevant threshold is exceeded as a result of the purchase of shares, but also in case of increase of the voting rights and (ii) the by-laws may provide the "neutralization" of the multiple voting rights with respect to the shareholders' meetings convened to resolve on defensive measures in the case of hostile tender offer.

The rationale of the introduction of increased voting shares in the listed companies' regulation is to stimulate medium-long term share investments (so to stabilize the management of the company) and, therefore, the presence of "long-lasting" and stable shareholders, not driven exclusively by a short term speculative logic and, moreover, provided with a significant power of control over the management.

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### 3. Listed companies and shares with multiple votes

In principle, companies whose shares are already admitted to trading on the regulated markets are not allowed to issue shares carrying multiple votes (referred to under paragraph 1 above). Nonetheless, companies that have issued shares with multiple votes prior to the admission to trading on a regulated market are entitled to keep such class of shares also after the listing; in this case, the company may not provide for other measures to increase the voting rights. Unless the by-laws provides otherwise, in order to maintain the ratio between the different classes of shares, companies which have issued shares with multiple votes, as well as companies resulting from the merger or demerger of such companies, may issue shares with multiple votes with the same features of those already issued, in two cases: (a) capital increase pursuant to art. 2442 ICC (*i.e.*, capital increase through the allocation of reserves to share capital) or through new contributions of capital without exclusion or limitation of the pre-emption rights and (b) merger or demerger.

Finally, it is worth mentioning that, with the enactment of the new provisions of law, also companies which “makes recourse to risk capital market” (*ricorso al mercato del capitale di rischio*), e.g. listed companies, are now entitled to issue shares with limited voting rights up to a certain threshold or with staggered voting rights, in relation to the number of the shares owned by the same person.

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