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to be taken into consideration (such as, for example, regulatory limitations for the banks to carry-on equity interests in non-banking entities), but this brief *excursus* should suffice to illustrate that the market for acquisitions from distressed entities does offer several alternatives to structure investments.

To conclude, opportunities are available in the Italian market for acquisitions from distressed companies. Italy's legal environment is mature enough to grant protection from unmanaged risks, and legal models (we have illustrated only two of the many available[6]) are sufficiently flexible and heavily tested to provide a potential purchaser the right level of protection.

Notes

1 Annex A of the CE Regulation lists the following procedures as *insolvency procedures* (i) *fallimento* (bankruptcy), (ii) *concordato preventivo* (pre-bankruptcy administration under Court supervision), (iii) *liquidazione coatta amministrativa* (forced administrative winding-up), (iv) *amministrazione straordinaria* (extra-ordinary administration), and (v) *amministrazione controllata* (controlled administration).

2 See Article 182-*bis* Bankruptcy Law.

3 See Article 67-*bis* Bankruptcy Law.

4 See Article 79 Bankruptcy Law.

5 An interesting article, in Italian, presenting this model can be Paolo Carriere, *Dal Merger Leveraged buy out al (De-Merger) De-leveraged Sell Out: la conversione dei crediti nelle operazioni di ristrutturazione*, Le Società, 3/2012, pages 278 – 293.

6 Additional legal structures, among the many available, which we have not illustrated given the limited scope of this article, are, for example (i) the straight-forward purchase of assets or companies from insolvency procedures (so called *vendita in blocco*), regulated by Article 105 of Bankruptcy Law, or (ii) the acquisition of the entire procedure of *concordato preventivo* as an *assuntore*, it being the entity which will carry-out all obligations provided by the plan of *concordato*, and which will ultimately retain the assets and liabilities remaining un-assigned further to the execution of the *concordato* (see Article 160, first paragraph, letter b) of Bankruptcy Law.

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Corporate capital in Italy after recent developments of corporate law: real life or just fantasy?

Two new sub-types of Srl (limited liability company) have recently appeared in the Italian legal framework: *Srl semplificata* (simplified Srl); and *Srl a capitale ridotto* (Srl with a corporate capital below the general threshold of legal capital of €10,000).

Srl semplificata

Article 2463 *bis* of the Italian Civil Code (*Società semplificata a responsabilità limitata*) was introduced at the beginning of this year by Law Decree No 1 of 24 January 2012 ('Urgent measures for competition, development of infrastructures and competitiveness'), with the aim to help and support young entrepreneurs at the moment of starting up their business.

The company may be incorporated only by natural persons who are not older than 35 years at the date of incorporation. Its legal capital shall not be lower than €1 and higher than €10,000: in other words, the capital may not exceed the minimum legal capital generally provided for a 'classic' Srl

The aim of helping young entrepreneurs was strengthened by further provisions which make the process of incorporation quite quick and simple (eg, the articles of association could be in the form of a private agreement among the parties). Nevertheless, in March, upon the enactment of the decree (Law No 27 of 24 March 2012), some of these provisions were amended and, now, the articles of association must be drafted as a public deed (ie, before a public notary, with certain – although reduced – costs for the shareholders). Furthermore, the Minister

of Justice, together with the Ministers of Treasury and of Economic Development, shall prepare a standard model of articles of association to be used in each and any case of incorporation of a *Srl semplificata*. As of today (four months after the enactment of the decree), there is no news from the relevant Ministers.

In March 2012 another important specification was introduced in Article 2463 *bis*: only shareholders may be appointed as directors of the company.

For matters not expressly regulated by Art. 2463 *bis*, the ordinary rules for Srl shall apply.

2. Srl a capitale ridotto

Another sub-type of S.r.l. has been introduced by Article 44 of the so called 'Development Decree' (*decreto sviluppo* - Law Decree No 83/2012), enacted by the Italian Government on 22 June 2012.

Until mid-June, the various drafts of the Development Decree which have followed one another were focussed on a material and deep review of the recently created *Srl semplificata*; in particular, the threshold of 35 years for the shareholders was projected to be eliminated, so that the simplification in terms of minimum capital requirements would be extended to each and any natural person who intends to incorporate a company.

Then, suddenly, in one of the last drafts of the Development Decree, the *Srl semplificata* was not considered anymore as a target for amendments, while the *Srl a capitale ridotto* showed up in the Italian corporate law scene.

Main characteristics of this new sub-type of Srl are:

- they may be incorporated exclusively by natural persons who are older than 35 years at the date of incorporation;
- their legal capital shall not be lower than €1 and higher than €10,000;
- the articles of association must be drafted as a public deed. In any case, no standard model of articles of association shall be provided for;
- also natural persons other than shareholders may be appointed as directors of the company;
- for matters not expressly regulated by Article 2463 *bis*, the ordinary rules for Srl shall apply.

In a nutshell, the *Srl a capitale ridotto* mirrors the rules of the *Srl semplificata*, with the difference as to the age of the relevant shareholders (no more than 35 years for the first; exclusively more than 35 years for the second).

The reason for the introduction of the *Srl a capitale ridotto* has been explained by the Italian government as reflecting the need to have a better position in the Doing Business rankings (prepared by the World Bank) as to the Starting Business criterion. Italy now ranks 77; through the introduction of the new sub-type of company, the government expects to gain six positions.

Legal capital under Italian perspective

The introduction of *Srl semplificata* and *Srl a capitale ridotto* represents the Italian answer to the so called 'light vehicle competition', which has characterised the EU market after the well-known *Centros* case (CG 9 March 1999, C-212/97). The right (granted to each and any EU company) to establish a branch in any of the EU Member States, notwithstanding the incorporation under the laws of another Member State, has entailed a high level of competition between national corporate laws, which have proposed increasingly 'light' legal entities in terms of incorporation requirements and in particular as to the legal capital requirements.

Several countries have recently introduced a type of company which requires a capital of €1: Germany in 2008 (Unternehmergesellschaft), and Belgium in 2010 (*société privée à responabilité limitée starter*). In France, starting in 2003, the limited liability companies no longer have a minimum capital requirement; in 2008, such a requirement was cancelled also with reference to the *sociétés par actions simplifiées*. The corporate capital, even when not eliminated formally, is reduced to a minimum level which *de facto* deprives it to any importance.

From an Italian perspective, the ability to incorporate a company with a capital of €1 represents a real revolution. For sure, the indication of the corporate capital is still a requirement of the articles of association of each and any company incorporated in Italy. For sure, the discipline of *Srl semplificata* and *Srl a capitale ridotto* does not represent a general regulation, but only a derogation to general principles (they apply only to companies which are incorporated by natural persons).

Nevertheless, it is clear that the reduction of the minimum capital to €1 hits one of the key elements of the Italian legal framework. Traditionally, Italian corporate law is based

upon the legal capital system. Pages and pages of scholars have been dedicated to the functions which may be identified in the corporate capital: a general guarantee for the company's creditors; a 'productive' function (the capital would represent the mass of goods/money which is destined to remain in the company for carrying on its business and which shall not be distributed to the shareholders); a system to inform the creditors of the wealth of the company etc.

Today, after the recent developments in Italian corporate law, most of the above functions should be rethought: the guarantee and the productive function are no more effective. The low level of capital would neither provide any guarantee for the claim of creditors, nor be comprised of money sufficient to conduct the business (shareholders' or third parties' loans shall be essential).

The capital would still provide information to the creditors (they would easily see that the company has only €1 as capital), but it would not represent a significant advantage for them (for example, they would not receive any information as to the level of venture capital or the indebtedness of the company).

In other words, the legal capital has lost its centrality in Italian corporate law.

The problems with the new regulations

The Italian legislator has introduced a very concise regulation for the new sub-types of Srl, which leaves jurists in a state of uncertainty.

Generally speaking, the corporate capital serves as an 'alarm bell' with respect to the entity of the losses of the company: should losses exceed one third of the capital, the management board shall immediately call a shareholders meeting to adopt the opportune resolutions and, in case the loss is not reduced to less than one third within the following fiscal year, then the capital shall be automatically decreased (Article 2482 *bis* of the Italian Civil Code). In case the above losses bring the capital below the minimum threshold, then the shareholders meeting shall be obliged to decide to either immediately recapitalise or liquidate the company (Article 2482 *ter* of the Italian Civil Code).

Well, the alarm-bell principle is still applicable to any Italian company, including *Srl semplificata* and *Srl a capitale ridotto*. Many issues would probably arise in practice: the first invoice issued to the company would bring the company to undercapitalisation, and the directors should be obliged to adopt the abovementioned procedure to recapitalise the company, maybe one day after the incorporation of the company.

Another important issue: shareholders' loans. According to Italian law, if a shareholder provides financial means to the company in a situation of undercapitalisation, their loan would be treated as a subordinated loan, which may be repaid only after the reimbursement of the other creditors.

This principle is not derogated with reference to the *Srl semplificata* and *Srl a capitale ridotto*. In such companies – which are by definition undercapitalised – the shareholders' loans are discouraged: they would be treated as equity, when the main reason to incorporate such a type of company is not to provide equity to the company.

In order to avoid this paradoxical situation, the company should be able to raise funds from third parties. Nevertheless, given the current situation of the market, it appears unlikely that banks would grant loans to companies without a sound equity basis.

Conclusions

The *Srl semplificata* and the *Srl a capitale ridotto* have introduced significant novelties in Italian corporate scene: they represent two new kind of light vehicles; they require a very low corporate capital, which may be close to zero.

The capital, hence, has lost its primary role in the Italian corporate law: it risks to remain only a 'fantasy', in particular when it is considered in its guarantee or productive function.

Taking in exam the new rules, in any case, it must be noted that their drafting gives rise to great margin of doubts, which may – *de facto* – prevent the use of these sub-types. Actually, *Srl semplificata* and *Srl a capitale ridotto* are less attractive than they might seem *prima facie*. Unless the Italian legislator makes some amendments to the applicable regulation, *Srl semplificata* and *Srl a capitale ridotto* risk to remain only companies "on paper".