CLOSE COMPANIES IN ITALY AND THE *SOCIETAS PRIVATA EUROPAEA* (*)

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CONTENTS: 1. Introduction. - 2. Company Limited by Shares. - 3. Limited Partnership by Shares. - 4. Limited Liability Company. - 5. Amendments to «common» Limited Liability Company in 2013. - 6. The «simplified» Limited Liability Company: new art. 2463 *bis* c.c. - 7. Reasons for the introduction of the European Private Company.

1. Introduction

In Italy there are three types of close companies. The discipline of these companies has been contained in the Italian Civil Code (c.c.) since 1942.

The first type that the code describes is the Company Limited by Shares (that we in Italy call *Società per azioni*, and you in Spain call *Sociedades anónimas*).

The second type is the Limited Partnership by Shares (*Società in accomandita per azioni - Sociedad comanditaria por acciones*).

(*) This document contains the text of the presentation given in Madrid, November 8th, 2013, to the Conference dedicated to the *Close corporation in Europe* and organized by the Universidad Rey Juan Carlos within the framework of the Research Project *El tratamiento de las sociedades de capital cerradas en la evolución legislativa de la Unión Europea y de las legislaciones nacionales de los Estados miembros* (Ref.: DER2010-21436).

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The third type is the Limited Liability Company (*Società a responsabilità limitata - Sociedad de responsabilidad limitada*).

According to the art. 2247 c.c. (*Contratto di società*) with the contract for the creation of the company «two or more persons contribute assets or service in order to jointly conduct an economic activity and pursue the purpose of sharing the profits thus gained».

Under the original text of the Italian Civil Code a company could be formed only by contract.

Currently the art. 2247 c.c. does not apply to each hypothesis of company.

Today the Limited Liability Company and the Company Limited by Shares may be set up by unilateral deed.

For the first type this has been true after the Legislative decree n. 88 of 1993.

For the second type this has been true since the General Reform of 2003 (Legislative decree n. 6 of 17 January 2003).

In general, a very long process of reform led to the today's situation.

One of the most important passages of this process was the General Reform of 2003 that I just cited.

Under the rules of 1942, capital companies were regulated by a rigid framework. This is no longer true.

In this presentation I would like to dedicate more attention to the Limited Liability Company because this type of company is the direct competitor of the European Private Company (*Societas Privata Europaea*: SPE) which the Research Project is dedicated, among other things.

2. Company Limited by Shares

In Italy usually we speak about three models of Company Limited by Shares that are:

(*a*) the Close Companies Limited by Shares; and

(*b*) the Open Companies Limited by Shares, that resort to the risk capital market and that are defined by the art. 2325 *bis* c.c. that covers two hypotheses:

(*b1*) Companies with shares widely distributed among the public (or companies with a substantially widespread share ownership);

(*b2*) Companies with shares listed on a regulated markets.

In this context we are interested only in the first model; this means the Close Companies Limited by Shares.

This model, in fact, is selected by firms that have a limited number of shareholders and is the most diffused model of Company Limited by Shares in Italy.

The most important characteristic of this model (*sub* category) are:

a) obviously the limited liability of the shareholders (art. 2325, § 1, c.c.): «[i]n a company limited by shares, any liability arising in relation to obligations contracted, may be satisfied solely with the company assets»;

b) the corporate participation is represented by shares (art. 2346, § 1, c.c.).

The first fact differentiates the Company Limited by Shares from the Limited Partnership by Shares in which – as we will see - the *accomandatari* (General Partners) are jointly and severally liable without limitation.

The second fact differentiates the Company Limited by Shares from the Limited Liability Company in which the quota holders' participation may not be represented by stock (this signifies that share certificates are not permitted), nor be offered to the public as financial products (art. 2468, § 1, c.c.).

A Company Limited by Shares must be established with corporate capital of not less than 120.000.= €.

One of the most important factors identifying this kind of company is that the corporate participation is represented by homogeneous and standardized shares.

In fact, shares shall be of equal value and confer equal rights to their holders (art. 2348, § 1, c.c.).

The limited liability of shareholders in this kind of company is counter balanced by an organization based on the necessary

presence of a Shareholders Meeting, a governing entity and a controlling entity.

Usually in tandem with the Shareholders Meeting, we find a Board of Directors and a Board of Statutory Auditors.

The shareholder has no power in the management of the company but has the right to select - with his vote in the shareholders meeting – the members of the Board of Directors and the members of Board of Statutory Auditors.

If this kind of organization is well done, and if well operated, it is able to guarantee an equilibrium between an efficient management of the company and the decision making process of the shareholders meeting.

It is possible to have:

a) a Two-tier System (*dualistico*); a system based on a management board and on a supervisory board (art. 2409 *octies* c.c.); the appointment of the members of the management board is entrusted to the supervisory board;

b) a One-tier System (*monistico*); a system based on the Board of Directors and on a Committee formed within the Board of Directors (art. 2409 *sexiesdecies* c.c.); the determination of the number and the appointment of the members of the Management Control Committee is under responsibility of the Board of Directors (art. 2409 *octiesdecies* c.c.).

3. Limited Partnership by Shares

Unlike a Limited Partnership, in this company the capital is split into shares: «[t]he parts of holdings of the members are represented by shares» (art. 2452 c.c.).

There are two types of shareholders.

a) The *accomandatari* (General Partners) that «are jointly and severally liable without limitation for the partnership's obligations» (art. 2452 c.c.), but according to articles 2461, § 1, c.c. and 2304 c.c. «[t]he social creditor can request payments from the singular partner only after the corporate capital has been examined, even if the company has gone in liquidation».

Each General Partner is a director by right and is subject to the same duties as those of the directors of a Company Limited by Shares (art. 2455, § 2, c.c.).

b) The *accomandanti* (Special Partners or Limited Partners) that are liable within the limits of the part of the subscribed capital.

This type of company is not often used in Italy. And it is used principally as a holding company.

This is because, in this case, the risk is less significant and the stability in controlling is important.

4. Limited Liability Company

Prior to the General Reform of 2003 this type of company was considered a kind of «little Company Limited by Shares without shares».

This was because a lot of the rules governing a Company Limited by Shares also applied to the Limited Liability Company.

Since the General Reform of 2003 this kind of company has been governed by an autonomous set of rules.

Now, in this company there are few obligatory rules and a lot of rules which may be modified by the members.

The general model of this company has now became a business association combining the characteristics of a Company Limited by Shares (*limited liability of members*) with those of a Partnership (*flexibility of structure*).

In the Limited Liability Company only the company with its corporate capital is liable for the corporate obligations (art. 2462, § 1, c.c.).

The company must be established with corporate capital of not lower than 10.000.= €.

The company can issue debts instruments (if contemplated by the articles of association: art. 2483, § 1, c.c.).

Quota holders' quota may not be represented by shares, nor be offered to the public as financial products (art. 2468, § 1, c.c.).

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Like a Company Limited by Shares, the value of contributions cannot be lower in aggregate than the overall amount of the quota capital (art. 2464, § 1, c.c.).

Unlike a Company Limited by Shares in this company (same as in a Partnership) all assets which have an economic evaluation may be contributed (art. 2464, § 2, c.c.).

In other words, the members are allowed to contribute not only by cash or in kind, but also in the form of work and services.

Only «[i]f the articles of association do not differently provide, the contribution must be made in cash» (art. 2464, § 3, c.c.).

This flexibility can be seen also through the organization of the company.

This is because, first, in this company the decisions of shareholders can be adopted through a Quota Holders Meeting: the meeting is validly held with the presence of at least of as many quota holders to represent at least the half of the corporate capital, and resolves with the absolute majority (art. 2479 *bis*, § 6, c.c.).

But the articles of association can provide for the decisions of quota holders to be adopted:

a) though written consultation; or

b) on the basis of consent expressed in writing (art. 2479, § 3, c.c.).

In these last cases the procedure is faster because, obviously, the Quota Holders Meeting, and its convocation, is not necessary.

As I said, the flexibility can also be seen through the organization of the company.

This is because, second, in this company the management is entrusted to one or more directors; when the management of the company is granted to several persons, those form the Board of Directors.

If the Board of Directors is set up, the Articles of Association can foresee that the decisions are taken:

a) though written consultation; or

b) on the basis of the consent expressed in writing (art. 2475, § 4, c.c.).

And it is possible to adopt the same management system used in the partnerships.

The quota holders have very ample right of control.

In fact, the quota holders that do not participate to the management of the company have the right:

a) to be informed by the directors on the performance of the company's activities; and

b) to consult, including with entrusted professionals, the company's registers and documents related to the management.

5. Amendments to «common» Limited Liability Company in 2013

According to the new art. 2463, § 4 and 5, c.c. the minimum capital requirement for «common» S.r.l. can be under 10,000 € (but at least 1 €).

In this case:

a) the contributions are only cash and fully paid by shareholders to directors at the company's constitution;

b) at least one fifth of annual company's net profits shall be held by the company in its «legal reserve» as far as the amount of such a reserve, added to actual legal capital, will be at least par to 10,000 €.

This reserve can be used only for capital increases and to cover company losses, and if decreased must be replenished;

c) there is no limitation to natural persons in the moment of the company's constitution, nor the need to use model articles.

Independently to the legal capital amount, the art. 2464 c.c., was recently modified as well, by stating that all contributions (both cash and in-kind) shall be paid to directors.

6. The "simplified" Limited Liability Company: new art. 2463 *bis* c.c.

This *sub*-type was created in January 2012.

a) Is a company «without by laws» (*memorandum*; containing the rules for the functioning of the company);

b) only the model of Articles of Association issued by Italian Ministry of Justice can be used (art. 2463 *bis*, § 3, c.c. «the provisions of the standard model are binding»);

c) the floor of the capital is 1 €; the cap to 9,999.99 €;

d) the shareholders must be natural persons (art. 2463 *bis* c.c.);

e) the contributions must be done only in cash and must be fully paid by shareholders directly to company's directors [art. 2463 *bis*, § 2, n. 3), c.c.];

f) there are no notary public's fees; there is only a small tax benefits at constitution (~ 200 € *una tantum*);

g) if not otherwise stated by art. 2463 *bis* c.c., common Limited Liability Company rules do apply «as far as compatible».

7. Reasons for the introduction of the European Private Company

Referring to the Italian System we can say that the law is very complete as a result of the last ten years of reforms.

This is true for all the capital company types but in particular for the Italian Limited Liability Company because – as I said – the discipline is very flexible.

The reasons why we must insist on the introduction in the European System of the European Private Company maybe are not so numerous, but they are important.

The first one is a practical reason: we must continue to overcome the hesitation of the business operators towards new types of companies that they are not familiar with.

This means that must look to the future after the introduction of the European Company (*Societas Europaea*, SE) and the European Cooperative Society (SCE), even if currently these two types are not diffused.

The second one, and more important, is that we need an easy vehicle for trans-border business for small and medium-sized enterprises.

One of the principal innovations of the Proposal on the 25 June 2008 is the fact that the European Private Company is not obliged to have (from the moment of formation) relationships with at least two member states. This is the case for the European Economic Interest Grouping (EEIG), the European Company, and the European Cooperative Society.

The Proposal is limited to requiring that «[a]n SPE shall have its registered office and its central administration or a principal place of business in the Community» and that «[a]n SPE shall not be under any obligation to have its central administration or principal place of business in the Member State in which it has its registered office» (art. 7).

On 10 March 2009, the Parliament proposed the insertion of a cross-border vocation as a prerequisite for the creation of the company itself.

In the opinion of the Parliament, the cross-border component is demonstrated by one of the following: «a cross-border business intention or corporate object; an objective to be significantly active in more than one Member State; establishments in different Member States; or a parent company registered in another Member State» [new point: (*ea*)].

The Parliament states that the cross-border component should not be an obstacle for the founding of a European Private Company.

In this context, the Parliament proposes that the Commission and Member States should, within two years of registration, conduct *ex post* monitoring in order to examine whether the SPE has the required cross-border component. However, this is without prejudice to the requirements of registration.

There is a contrasting idea which states that, for the success of the SPE, it would be useful if this proposal of the Parliament was not accepted. The reason is because, for example, if the proposal was rejected, the new SPE form could be used by companies which have operated in only one Member State for many years.

The ultimate goal of the SPE Proposal is to create an organizational vehicle that conducts its business beyond national borders. However, in its Proposal of 25 June 2008, the European Commission decided not to subject the creation of a SPE to a prior cross-border requirement.

This is because this cross-border requirement could discourage the adoption of the vehicle and narrow the expected scope of the instrument.

In short, a cross-border vocation as a prerequisite for the creation of the company conflicts with the original spirit of the Proposal.

The real value for Italy of the introduction of the European Private Company is not only its specific discipline.

The flexibility of the national law regarding the Limited Liability Company, after the most recent reforms, is able – in theory – to resolve any problems regarding the organization of small and medium-sized enterprises.

The real value of the new European legal form - as you can read in the Explanatory Memorandum, related to the Proposal - is to enhance the ability of small and medium-sized enterprises to compete, by facilitating their establishment and operation in the European Single Market.

For this goal, the creation of a new company type for small and medium-sized enterprises, is useful to reduce compliance costs for the creation and operation of business.

And it is useful to have a company type that everyone in Europe can comprehend.

If the Proposal of 25 June 2008 is withdrawal – as is possible -, a new proposal with the same objective will be necessary or at least opportune.

At the end, it is possible to say that in Italy there is now only one European Company.

This may be because, among other things, the rules require the cross–border component; so we must be sure that the new form of the European Private Company does not automatically require this component.

In general we can affirm that a fundamental element will be the communication of the characteristics of the new type,

because the operators may take advantage of the new company structures.

It would be useful for the operators if the single member states provide for a model of the association contract to reduce transaction costs.

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