



**Company Law Reform in Italy:
An Overview Of Current Initiatives**

by

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**Company Law Reform in OECD Countries
A Comparative Outlook of Current Trends**

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Introduction

The Company Law reform process that Italy is currently carrying through began with Legislative Decree no.58 of 24 February 1998, known as the Consolidated Law on Financial Intermediation (hereinafter 'the T.u.F. '), which has laid the foundations for a model of corporate governance of listed companies in line with the legislation of countries with the most highly developed financial systems.

The enactment of the T.u.F. has also demonstrated the urgent need to revise Company Law as enshrined in the Italian Civil Code, something the business community has long been advocating. The T.u.F. has created a regulatory void for non-listed companies that depend on the financial markets, and are not subject to the same strict rules of disclosure, transparency and shareholder protection as listed companies under the T.u.F. On 26 May 2000, the government therefore approved a Bill (hereafter referred to as the 'Mirone Bill') to reform the regulations governing limited companies and pyramidal groups, revise criminal company law and civil procedural law regarding company lawsuits: it is currently before parliament.

Finally, because of its relevance to Company Law we should mention the Insolvency Reform Bill, approved by the government on 27 October 2000, and also currently before parliament.

These three pieces of legislation all share the same aim: to enhance the competitiveness of Italian companies and enhance their efficiency and their ability to grow in an increasingly competitive environment, working on the assumption that global competition not only involves a country's economic conditions, but also the legal system in which companies operate. For when investors decide how to allocate the resources they manage, they assess both the economic factors and the reliability and accountability of the legal system, as well as the management of individual companies.

In addition to increasing international capital mobility, other national factors have influenced the reform measures: the lower public deficit and inflation rate, which has made a huge amount of financial resources available that were previously invested in government securities, and privatisation, which has sharply raised the capital supply, giving the Stock Exchange an importance it had never had before.

Making Italy a more attractive environment for investors can be considered the idea lying behind the reform initiatives: this has meant revising securities, company and bankruptcy law. The judicial mechanism for enforcing shareholders' and creditors' rights also need to be improved.

On this point we might quote the research carried out in 1998 by La Porta, Lopez de Silanes, Shleifer and Vishny¹, in which they discussed a set of legal rules protecting shareholders and creditors and illustrated the prevalence of these rules in 49 countries around the world, including Italy. It also aggregated these rules into shareholder and creditor rights indices for each country, and considered the quality of various measures for their enforcement, such as the efficiency of the judicial system and the quality of accounting standards. The results of the research showed that Italy, which they included among the French civil law countries, provided a low level of protection for outside investors, whether shareholders or creditors.

The reform initiatives, notwithstanding the common underlying philosophy, have drawn a clear distinction between companies, whether listed or not, which depend on the capital markets, and private limited companies.

¹ La Porta, Lopez – De Silanes, Shleifer, Vishny, *Law and finance*, Journal of political economy, 1998, 106, 1113- 1155

With regard to the former, company law reform is very closely connected with the full liberalization of the financial markets on an international scale. One of the specific reasons behind the reform set out in the T.u.F. and envisaged in the Mirone Bill is the need to maximize the flow of external financing to Italian firms through the equity market.

On these grounds, company law reform focuses on corporate governance - considered crucial to promoting foreign and domestic investors' confidence and, consequently, to reducing the cost of capital to Italian firms – in order to make the Italian system compliant with international standards.

A model for corporate governance for listed companies has been drawn up in the T.u.F. and a similar one is envisaged in the Mirone Bill for non-listed companies with access to the finance market. In designing it, the government has taken account of the Italian corporate structure, whose traditional features – the high concentration of direct ownership, the small number of listed companies, the major role played by families, coalitions and the State, and the wide diffusion of pyramidal groups, reinforced by shareholders' agreements, cross-ownership and interlocking directorships – have resulted in very little separation between ownership and control. As has been argued elsewhere², in Italian corporations the fundamental agency problem, to be solved through a corporate governance system, is not the “Bearle and Means” conflict between outside investors and managers, but rather the conflict between outside investors and controlling shareholders that keep the managers tightly under control.

Corporate governance has also been considered relevant to private limited companies, because it is increasingly affecting investment decisions by banks and other lenders, although the government has given priority to the demand from small and medium-sized firms. For it is aware of the important part they play in the Italian economy and the weakness due to their size when taking on international competition. The reform therefore hinges around deregulation as far as private limited companies are concerned, to give them greater flexibility and autonomy in choosing their own internal structure, and reduce the red tape and related costs they have to face, and provide a legal framework to encourage the growth of small and medium-sized enterprises.

Before analysing the T.u.F. and the Mirone Bill, it should be stressed that both attribute great importance to non-mandatory regulations, identifying binding rules only to protect investors' interests and preserve certainty in relations between the partners and with third parties. The government considers that corporate governance practices should be left to self-regulation as far as possible, because competition between alternative solutions emerging from the market could lead to greater flexibility and improve corporate governance relationships and investor protection. But in view of the Italian “manager - owner” corporate structure and the limited role still played by institutional investors, who typically have the skills to assess a company, legal protection for investors appeared necessary.

As for non-mandatory regulations, we might draw a distinction between opt-out and opt-in schemes: in the first case, statutory regulations apply to a company unless the company Articles provide otherwise; in the second case, the statutory regulations become effective only if the Articles actually adopt them. The first scheme should be used when a particular regulation is considered generally useful, but the company can see whether it is relevant to its own particular situation; the second one should be used when a certain legal provision is considered not to be appropriate or relevant for any particular company, but if the company decides to adopt it, a regulation is provided for it by law.

² La Porta, Lopez – De Silanes, Shleifer, Vishny, *Investors protection and corporate governance*, Journal of financial economics, 58 (2000), 3 - 27

With the opt-out scheme, it is sometimes possible to change the rules set out in the law in only one specific direction or within certain specified limits, mainly to raise the level of investor protection.

Finally, on October 1999 the Committee on Corporate Governance, appointed by the Italian Stock Exchange, approved a Code of Conduct, which it put to Italian listed companies to be used as a guide for self-regulation.

The listed company reform

The Consolidated Law on Financial Intermediation and the implementing regulations issued by the Bank of Italy and Consob³, laid down a comprehensive set of provisions governing financial intermediaries and investment services, the securities market and issuers.

All the parts of the T.u.F. are closely linked, and each one conditions the others, to accomplish its main purpose: to develop the Italian financial market, making it more efficient and accountable, and above all ensuring the transparency, disclosure and circulation of information, while at the same time making it easier for Italian firms to gain access to risk capital, thereby reducing their dependence on bank financing.

The provisions on issuers, which complete the regulation on the securities market with rules concerning public disclosure and the organisation of listed companies, form the model for the corporate governance of listed companies.

Taking specific national features into account it reflects the attempt to strike a balance between stability and competition for corporate control, management's interest in relying on stable powers and the interests of non-controlling shareholders to monitor the company's performance and to replace poorly performing management, and ensuring that the company is run efficiently.

This corporate governance model can be examined from different points of view: first of all, it is possible to see how this balance has affected the choices regarding the role and the functions of the companies' governing bodies. Secondly, the rules on the protection of minority shareholders can be analysed, as can the regulations on public purchase offer and cross/holdings, where the aim to make Italy a better environment for investors is quite evident.

When describing these issues, particular attention will be paid to highlighting the scope left for self-regulation.

a) Internal Organization

Board of Directors

Law no 52 of 6 February 1996, on the basis of which the T.u.F. was enacted, doesn't contain any provision regarding the board of directors. The Civil Code rules therefore apply to all limited companies. These provide that the board is not in itself essential, and companies can be managed by a single person. If a board is required by the company Articles, it has a unitary structure, without representatives of the minority shareholders or other stakeholders sitting on it. Independent directors are not compulsory, either.

A wide-ranging academic debate on the role and the structure of the board and on the advisability of introducing a dual structure into Italian company law, providing for a supervisory board comparable to the German *Aufsichtsrat*, has been underway in Italy for a long time, especially after Law no 474 of 30 July 1994 came into force.

This Law introduced a cumulative voting system for privatised companies whose Articles of Association set a cap on the amount of shares that can be held, in order to guarantee that at least one-fifth of the directors are appointed by the minority shareholders. According to section 4, only

³ See in particular Consob resolution 14 May 1999 n. 11971, as modified by resolution 6 April 2000, n.12475.

shareholders owning at least 1% of the capital, or retiring directors, are entitled to present election lists.

In the listed companies corporate governance model, if the unitary structure of the board has been maintained⁴, and does not include any representatives of the minority shareholders, a set of counterbalances has been devised to prevent conflicts of interest and to protect the minority shareholders' rights, as illustrated below.

It should be borne in mind, however, that the management of larger Italian companies is typically entrusted to a collective body on which executive and non-executive directors sit. On this point the Code of Conduct recommends a balanced composition of the board, which should be made up of executive and non-executive directors, and that the number and standing of the latter should be such that their views carry significant weight when taking board decisions. Moreover, an adequate number of non-executive directors, classifiable as independent of both the managing directors and the controlling shareholders, should guarantee that the necessary attention is paid to the performance of the company and to preventing conflicts of interest. It should also be emphasized that the Code does not prevent the controlling shareholders from appointing the independent directors.⁵

Board of Statutory Auditors

The T.u.F. has introduced major innovations concerning the board of statutory auditors of listed companies.

Firstly, in order to enhance the board of statutory auditors' independence, article 148 requires at least one member to be elected by the minority shareholders. Where the board comprises more than three members (the statutory minimum) the minority representatives may not be fewer than two.

Secondly, its functions have been thoroughly overhauled. Accounts of listed companies are now audited exclusively by external auditors (*società di revisione*), while the tasks presently entrusted to the board of statutory auditors relate to ensuring compliance with the law and the Articles of Association, sound management of the company, the adequacy of its internal organization and the internal control system, including the effectiveness of the accounting procedures.

Thirdly, the T.u.F. has reinforced the right to information and the duties of the board of statutory auditors: they can request information and updates from directors and from the external auditing firms; they are entitled to obtain reports from the internal controllers; they are under a duty to report on their work to the shareholders and can call general meetings for this purpose.

⁴ Compare the Mirone Bill on this point.

⁵ Other important principles from the Code are:

- nominations for election to the board of directors must be notified sufficiently in advance and be well motivated, and the appointment procedure should be transparent;
- the powers of the chairman and managing director should be well balanced, with a clear distinction of tasks and responsibilities, and if the two roles are not separated, the reasons should be adequately disclosed;
- all the directors should be kept fully informed;
- the Code recommends setting up a remuneration committee and an internal control committee. Companies could set up also an appointments committee
- communication with the shareholders should be effective and continuous;
- companies should appoint a person responsible for investor relations, and those with a broad shareholder base should introduce a dedicated corporate structure for this purpose, with adequate resources and professional skills.

General meeting

Provisions concerning general meetings are designed to encourage shareholders to attend them, either in person or by proxy.

Firstly, the T.u.F. has set new rules for collecting proxies, while the Civil Code strictly limited them. Restrictions on the number of proxies that may be collected no longer apply to listed companies, but a detailed discipline has been established to ensure transparency and correctness of appointments. In order to avoid the improper use of proxies, only shareholders representing at least 1% of capital, and who have held that stake for at least 6 months prior to the shareholders meeting are entitled to request proxies for the meeting. Shareholders' associations set up under section 142 may also collect proxies among their members. Moreover, shareholders cannot request proxies directly but only through an intermediary, such as a bank or an investment services company, or a mutual fund manager, or a proxy services company (unless the shareholder is eligible to act as an intermediary itself). These are responsible for making contact with the shareholders and guaranteeing that the information provided by the principal in the proxy documents is complete. Consob retains substantial powers to control the correctness and transparency of all operations relating to the exercise of voting rights.

Moreover, section 127 provides that the Articles of Association can make provision for a postal ballot, the regulations for which were set down in Consob resolution no.11971 of 14 May 1999, articles 139 to 143.

Conversely, the T.u.F makes no provision for electronic voting, while some companies' Articles provide the possibility for convening a meeting by e-mail or to hold meetings by video-conference.

Secondly, the T.u.F. introduced important innovations regarding extraordinary meetings: it provides that the quorum must be one-half of the share capital when first called to order, one-third when called the second time, and one-fifth at the third call, and that resolutions are carried if there is at least two-thirds of the capital represented at the meeting. In the prior regime, the favourable vote of shareholders representing at least half (first call), one-third (second call) and one-fifth (third call) of the capital was required.

It has been argued that this rule can operate in two different directions: if many minority shareholders attend meetings, it will be more difficult for the controlling shareholders adopt resolutions; on the other hand, if minority shareholders persist in being absent, it will now be easier than under the previous for the controlling shareholders to reach the required majority of votes.

It should be noted that the company Articles can modify this rule, but only to raise the quorum required to adopt resolutions.

b) Shareholder protection

The T.u.F. has provided a set of instruments for shareholder protection, that can be grouped into three categories: disclosure rules, economic rights, and rights of intervention.

Two different ideas regarding minority shareholders underlie them: individual investors who own too few shares to have any influence on corporate management, and more sophisticated institutional investors with the necessary technical skills to analyse management performance and able to establish closer interactions with directors.

For the former liquidity is essential, so a right of exit should be guaranteed them; the latter are specifically considered to be able to regulate monitoring rights that can be exercised by minority shareholders representing at least a given amount of the share capital.

The distinction drawn by the T.u.F. reflects the aim to encourage institutional investor activism, to foster the development of the financial market, giving them more extensive powers to monitor listed companies.

Disclosure rules

Under section 113, any company, whether listed or not, intending to issue securities on the financial market must disclose all the information that is necessary to make an informed assessment of the issuer's assets and liabilities, profits and losses, financial position and prospects, and the financial products and related rights.

Under section 130, each shareholder has the right to consult all the documents filed at a company's registered office, for a meeting already called.

The T.u.F. has set out new transparency rules about shareholders' agreements on the exercise of voting rights, or limiting the transferability of shares or other securities, or providing for their purchase, or concerning the exercise of a prevailing influence on the company (s.122). Those agreements must be notified to Consob, published in abstract in the daily press and filed with the Company Register. The duration of such agreements may be a maximum of three years or for an indefinite period. However, in this latter case, each contracting party may withdraw from the agreement at any time by giving at least six months' notice to the other parties. Moreover, to enhance the market for corporate control, it is always possible to withdraw from the agreement, in the case of compulsory public buy or swap bid (s.123).

Lastly, the T.u.F confirmed prior regulations about disclosure of holdings of more than 2% in a listed company, leaving it to a Consob regulation to define the relevant changes, as well as criteria for calculating holdings and the timing for disclosure. In particular, the Consob regulation provides that a declaration is required when the relevant holding crosses the thresholds of 2%, 5%, 7,5% and all the multiples of 5%; if the holding belongs to investors bound by a formal agreement, a specific disclosure rule is provided, starting from the 5% threshold; the timing for disclosure has been fixed as 5 working days, for both the initial declaration and for relevant changes. The definition of holding includes all EU directive criteria, giving relevance also to potential holdings, which can be obtained through options (both call and put), convertible instruments and warrants⁶.

Economic rights

The most important innovation concerns the T.u.F. regulation of compulsory public offer to buy. In fact a compulsory bid on 100% of the capital has to be launched by any person who has acquired a shareholding exceeding the threshold of 30% of ordinary shares. In this case the bid price cannot be lower than the arithmetic mean of the weighted average market price in the last twelve months and the highest price agreed in the same period by the bidder for the purchase of ordinary shares (s.106).

Provisions about non-voting savings shares can be also mentioned: it is commonly held that the previous savings shares scheme did not adequately compensate for the fact that savings shares do not carry voting rights.

⁶ See Consob resolution no. 11971/99, articles from 117 to 126.

The T.u.F. has accordingly given greater importance to the Articles to determine the preference dividend payable to savings shares and to specify other preferential rights, balancing the absence of voting rights, the conditions, the time and other limits for their exercise (s.145).

Finally, shareholders have a right of withdrawal from the company with redemption of their shares in the event of dissent from a resolution relating to mergers and demergers (s.131).

Other minority shareholders' rights

In order to protect minority shareholders' interests the T.u.F. has set out specific rights reserved for the minority shareholders representing a given percentage of the share capital.

Under section 125 minority shareholders owning 10% of the share capital, or the lower percentage established by the Articles, may ask the directors to call a general meeting (the previous limit was 20%). The directors may, in the interests of the company, decide not to call the meeting unless shareholders representing at least one-fifth of the share capital request it. In all instances, however, the President of the Court of First Instance may, at the request of the shareholders, and after consulting the directors and the statutory auditors, order the meeting to be convened and appoint its chairman.

Minority shareholders are not entitled to add any items to the general meeting agenda as notified by the directors.

Any shareholder may complaint to the board of statutory auditors, which is only required to investigate the complaint if it is made by shareholders representing at least 2% of the share capital (the previous limit was 5%). To report irregularities to the court requires at least 5% of the share capital (previously 10%). But in all these cases, the Articles can establish a lower percentage than the one required by the law (s.128).

The T.u.F. introduced a type of lawsuit similar to the derivative action in the Anglo-American system: shareholders who have been registered for at least six months and represent at least 5% of the share capital (or the lower percentage established in the Articles) may sue, on behalf of the company, the directors, statutory auditors and general managers (s.129)⁷.

c) Take-over rules and cross-holdings

The intention to balance stability of control and shareholder protection emerges quite clearly in the regulation of the public share purchase and exchange offer (sections 102 to 112).

The new scheme introduces a specific regulation of three types of public bids: a compulsory bid on 100% of capital, which the buyer has to launch after acquiring 30% of a listed company; a preemptive bid on 60% of capital, which lifts the obligation to launch a bid on 100%; a residual bid, when the controlling shareholders bid for a residual free float, when the latter is too small.

If, as a result of a take over bid, the offeror receives possession of more than 98% of shares with voting rights, it is entitled to acquire the remaining share within four months after the close of the bid, provided he declared his intention to exercise this right in the offer document

⁷ See law no. 300 of 29 September 2000 reducing the percentage required to bring this action to 2.5%, but only for companies whose share capital is above 500,000,000 lire.

Earlier limits to counterbids have now been abolished, and Consob will have the power to require a public bid if it detects that a group of buyers are pooling their bids, each buying less than 30% of capital.

Italian companies, whose shares are the object of a bid, cannot take defensive measures unless authorised by the shareholders meeting (ordinary or extraordinary depending on the subject-matter). Such resolutions must be adopted with the support of at least 30% of the capital, whatever call the meeting is held.

The new rules limit the possibility of a change in the control of the companies without involving minority shareholders, and create more fertile ground for takeovers in a market where the control of listed company has traditionally rarely changed hands.

Cross-holding regulations can also be mentioned: it has been decided to keep to the previous regime, which differs considerably from both the Anglo-American legal system which considers cross-holdings to be an unfair practice, and from the French and German systems which limit cross-holdings, respectively, to 10% and 25% of the share capital. In fact, in consideration of national features, cross-holding are restricted to 2% of the share capital if both companies are listed, and 2% and 10%, respectively, if the cross-holding involves a listed company and a non-listed company. Any company which has exceeded these limits for second, cannot exercise the voting rights attached to exceeding shares and should sell them within twelve months. Ordinary meetings of both companies can authorise the threshold to be raised to 5% (s.121).

The limited companies reform

The reform introduced by the T.u.F. has been limited, as regards issuers, to listed companies and only covers issues considered relevant for the development of the Italian financial market.

In the meantime a wide-ranging study for the systematic revision of commercial law is currently being conducted by a Commission appointed by the Ministry of Justice (named Commission Rovelli from the name of its President), with particular reference to the regulation of forms of entrepreneurial activities, commercial contracts and court protection.

This study deals with all kinds of entrepreneurial activities, profit and non-profit alike, carried out individually or in an associated form, and any kind of companies, incorporated or unincorporated, limited or unlimited, as well as civil procedure law and commercial criminal law.

At the moment only the part regarding the limited companies has been put into a Bill: on 26 May 2000 the government approved the so-called Mirone Bill (from the name of the President of the Commission that wrote it), which is now lying before parliament. The reform of limited companies law has become very urgent since the enactment of the T.u.F., which has created a regulatory void regarding listed companies, subject to the strict rules of disclosure, transparency and shareholders' protection, established by the T.u.F., and unlisted joint stock companies that have access to the capital markets. This void, which burdens listed companies with more costs than other joint stock companies, while relying on external finance, might discourage companies from seeking a Stock Exchange listing.

There is another argument that makes the reform of limited companies so urgent: despite the prominent role in the Italian economy played by small and medium firms, the Civil Code does not provide for a legal scheme designed to meet their specific needs. It is the case that the regulation for limited companies is based on the joint-stock public company - *società per azioni (S.p.A.)* - which was designed in the Civil Code as the form to be used for large or medium-large firms. The Civil Code provides for a type of private limited liability company called *società a responsabilità limitata (S.r.l.)*, designed for small and medium firms. But this has been modelled on the *S.p.A.* regulation and has turned out to be excessively rigid and burdensome for companies that do not have a broad shareholder base. As a result, 80% of Italian firms have adopted the *S.p.A.* type, while the *S.r.l.* has become marginal.

The Mirone Bill therefore focuses on revising the legal forms of corporations, to make them more suitable for present economic needs and cut down on red tape, with the basic aim of creating a regulatory framework that is more favourable to setting-up new firms, and to fostering their growth and efficiency in an increasingly competitive environment.

Another Bill, no. C6751, laid before parliament by a group of deputies, also deals with the same issue as the Mirone Bill. The two Bills are very similar in their purpose and substance, so they are being debated together. It is significant that both Bills constitute enabling legislation - *legge delega*: this means that the Act will only set out the main thrusts and principles of the new system, to be used by the government to adopt a Legislative Decree - *decreto legislativo* - which will introduce the specific rules. This is a legislative technique that is often used in Italy to set out specialized regulations.

Both Bills retain the main distinction between *S.r.l.* and *S.p.A.* companies: the former is the form for companies owned by a small number of persons, while the latter is for companies with a broader shareholder base, at least potentially. This distinction corresponds to the well-known distinction between open and closed companies, although within each of the two primary types, a range of

subtypes is set out, in order to link them together and avoid too rigid a division between *S.p.A.* and *S.r.l.* companies. In other words, the law should offer each company a statutory scheme that is consistent with the different stages of its growth and development.

With regard to the *S.r.l.*, the discipline from both Mirone Bill and draft no C6751 is based on giving wide autonomy over the internal structure, the procedures for adopting company resolutions, measures to protect the partners' interests, the transferability of the partnership and withdrawal from the company. Moreover, the reform aims at simplifying the procedures for starting a new businesses and reducing their administrative burdens⁸.

The result is that the *S.r.l.* will best meet the business needs of small and medium-sized firms whose shareholders are directly involved in the management of the company. Measures to protect investors are therefore unnecessary, and such a wide autonomy in determining the organization of the company should be limited only by the need to protect creditors and third party interests.

Mandatory rules are therefore only envisaged to the guaranteeing function of capital: a minimum legal capital will be required and specific rules will be provided to ensure that the capital is actually paid in, and its integrity. Finally, the draft requires the future *decreto legislativo* to decide when an external accounting control is necessary.

If a *S.r.l.* decides to issue bonds, as it will be allowed to do under the new regime (above all to reduce the dependence of small and medium firms on short-term bank financing), even though these companies cannot appeal directly to public savings, a need to protect external investors arises. Consequently, the *decreto legislativo* should provide adequate measures, in addition to accounting control.

In other words, according to these Bills, the greater the need to resort to external financing (both debt and equity), the larger becomes the role of these mandatory rules. This feature is quite evident in the regulations provided for an *S.p.A.*

The Mirone Bill and the concurrent Bill no. C6751, despite some differences, set out a general set of rules for the *S.p.A.* as a potentially broadly-owned corporation characterized by the central importance of its shares and their circulation, while establishing specific provisions for those which have real access to public savings.

According to both Bills there are three different subtypes of *S.p.A.*: the basic model, that is of companies which at the moment are closed to risk capital; unlisted companies with access to the capital markets, and listed companies.

While the regulation of the first ones is characterized by broad degree of autonomy, when an *S.p.A.* has access to capital markets, it will be subject to some mandatory rules: in particular, the government Bill requires mandatory rules separating accounting audits from internal audits; to entitle minority shareholders to sue the company directors, the statutory auditors, and the general managers; to amend the rules for adopting resolutions at extraordinary general meetings in order to improve shareholders protection; to entitle auditors to report irregularities committed by directors to the courts. These provisions are very similar to those laid down in the T.u.F., which continues to apply to listed companies.

⁸ While waiting for parliament to enact the Bill another law (n.340/2000) has abolished judicial control over the Memorandum and Articles of Association and amendments to them. So a new limited company must be entered in the Companies Register, once the Registrar has ensured that both documents conform with formal requirements.

It is interesting to note that both Bills devote particular attention to the structure of the board of directors. According to the Mirone Bill an *S.p.A.* will be able to choose between the present system and a system with a management board and a supervisory board elected by the shareholders' meeting, while the other Bill adds another model to these, envisaging a unitary structure made up of independent executive and non-executive directors.

In any case, the procedures for incorporating and running an *S.p.A.* are simplified, and broader scope is left for self regulation. The possibilities of raising capital in various forms are widened and simplified.

The Mirone Bill deals with other important issues and lays down principles and guidelines, to be taken up in the future *decreto legislativo*, concerning the reform of the financial statements, co-operatives and the revision of criminal company law.

With reference to corporate governance, two other issues deserve mention: the new principles governing pyramidal groups, and the revision of current civil procedure law for the settlement of business and trade disputes.

Addressing pyramidal groups, the Mirone Bill recognizes the group as a whole, and considers as lawful, in principle, the powers of management and coordination exercised by a holding company over its subsidiaries. This being so, the Bill vests the government with enabling powers to identify the boundaries within which interference from the holding company is permitted, taking adequately into account the interests of the group together with the interests of the subsidiaries and the interests of the minority shareholders of the latter. The *decreto legislativo* will also ensure that the company's stake in a group is adequately disclosed and provide measures in favour of the minority shareholders, including the right of withdrawal, in the events that the company decides to enter or to leave a group and a take-over bid is not required by law.

As has been argued elsewhere, the inefficiency of the judicial system to ensure the enforcement of shareholders' and creditors' rights, can be highly detrimental to the competitiveness of a legal system, and make a country unattractive to investors as an economic barrier. In other words, the globalisation of the financial markets gives a new priority to the efficiency of the administration of justice and to its ability to ensure fast and predictable decisions.

To achieve these goals, the Mirone Bill takes two different approaches: firstly, it provides that commercial cases, combining legal with economic and financial aspects, are to be settled by judges with specific skills for this purpose; and secondly, it envisages a revision of the rules of civil procedure so that a decision is reached in a short time, consistent with the needs of the financial markets, in order to make court enforcement effective.

The Insolvency Act reform

As has been already emphasised, Insolvency Law, including criminal bankruptcy law, can also affect investment decisions.

Italy, like the other European countries which have reformed insolvency procedure in recent years, has also carried out a radical revision of the Insolvency Act in response to a demand dating back years. After the decisive impetus given by the adoption of *decreto legislativo* no. 270 of 8 July 1999 which has thoroughly innovated the insolvency procedure for large companies (*procedura di amministrazione straordinaria delle grandi imprese in crisi*) on 27 October 2000 the government approved a Bill which is now being examined by parliament.

The current regime has been criticized both on the grounds of the result which the procedures are designed to achieve, and its procedural aspects.

On one hand, the main purpose of the current law is provide direct protection for creditors, through the liquidation of the company's assets, and a number of provisions are designed to prevent creditors from losing this security. Insolvency therefore has to be declared as soon as possible and the board of directors (or the sole proprietor) cannot continue managing the company and has to be replaced by a court-appointed administrator, called a *Curatore fallimentare*.

On the other hand, these procedures are considered excessively lengthy and costly, especially when compared with the degree to which the creditors' demands are met. Moreover, the role of the creditors in the procedure is undervalued, while court control is regarded as excessive.

The government Bill takes a completely different approach, aiming to keep the company going, perhaps by a change of ownership, and the liquidation of the assets is to be allowed only if there is no chance to restructure the company.

To achieve this, the Bill reduces the four procedures provided by the 1942 Law to only two: one, named *procedura di crisi*, (crisis procedure) is designed to prevent a company from becoming insolvent, while the other, named *procedura di insolvenza*, (insolvency procedure) deals with insolvent companies.

When a company is facing difficulties of an economic or financial nature, or in relation to its assets and liabilities, that threaten insolvency, it may request the *procedura di crisi* and submit a recovery plan. The board of directors (or the sole proprietor) may, however, continue to manage the business. The plan may provide that creditors waive a share of the debt due to them, even if guaranteed by collateral. All the creditors, grouped into different classes according to the nature of the debts, are required to appraise the plan and then approve it. The *decreto legislativo* will establish the majority required to approve the plan within each single creditor class and the weight of each in determining the final decision. After the plan is approved by the creditors, a court decision on the plan is required. In the case of a positive settlement, the plan should be implemented within two years; otherwise, the *procedura di insolvenza* can be opened if a state of insolvency is detected. If the *procedura di insolvenza* follows the *procedura di crisi*, the Bill sets out a number of principles to be developed by the future *decreto legislativo*, regulating the linkage between the two procedures. Basically, they should prevent creditors supporting the recovery plan from being penalized in the *procedura di insolvenza*.

The court must declare a state of insolvency at the company's request or that of a creditor, public prosecutor or on a decision of the court itself. The *procedura di insolvenza* is in two stages: during the first stage, a *Curatore fallimentare* is appointed by the court to assess the state of the company

and to see whether or not it can recover from the state of insolvency. If it can, the *Curatore*, and also the debtor or some creditors, are to submit a recovery plan which could include reducing the debts or selling-off some of the company assets. However, the debtor continues to manage the company. The creditors have to approve the plan, following the rules governing the *procedura di crisi* mentioned earlier, and the court must ratify it. The debtor then has a two-year period to implement the plan.

If the *curatore* thinks that the company cannot recover, or the creditors or the court refuse to give their approval, or the plan is not implemented (and if the company has already taken advantage of the *procedura di crisi*), it has to be wound up and the proceeds divided among the creditors. The Bill also provides that, where possible, the company should be sold as a whole so that it can become a going concern in the hands of another entrepreneur.

Moreover, the Bill abolishes many of the personal consequences for the bankrupt entrepreneur existing in the current legislation, which views bankruptcy as something shameful, and not as an event that is possible, albeit undesirable, in the life of a company in a market economy.

The proposed reform will provide the basis for regulating insolvency, but the special procedures for large companies, banks, insurance companies and other financial intermediaries have not been abolished, but they have been made consistent with the reform. Small firms are not subject to the effects of the new law.

A revision of criminal bankruptcy law is also provided to simplify the various criminal provisions concerning bankruptcy and place them in a consistent framework.

A faster, more efficient and more predictable administration of justice is to be achieved through a revision of the current civil procedure law for the settlement of cases concerning procedures, to be decided by specialized courts, as already envisaged in the Mirone Bill on limited companies.

Various criticisms have been levelled at the proposed reform of the Insolvency Act by the business community and academics. According to them, notwithstanding the noteworthy attempt to radically reform the law currently in force, the result is not so innovative. In particular, they claim that the procedures are still too intricate and the administrative formalities, timing and costs are still excessive. Moreover, the role of the court is still too prominent, especially when creditors have already approved the recovery plan. They maintain that the Bill fails to recognise the validity of agreements reached between debtors and creditors (usually banks) without the intervention of the courts, designed to prevent the company from being declared insolvent. Finally, on the subject of criminal bankruptcy law, the Bill is too closely influenced by the idea of insolvency as being culpable: the criminal clauses in particular are considered to be too numerous, while the penalties are deemed excessive, especially in comparison with the similar provisions used in other European countries.