

**CAPITAL
MARKETS**

New Corporate Governance Code

On 31 January 2020, the Corporate Governance Committee of the Italian Stock Exchange released the newly approved **Corporate Governance Code** (the "Code"), applicable from the first fiscal year beginning after 31 December 2020. The Code presents substantial changes to the previous with respect to the current version, based on the principles of sustainability, engagement, proportionality and simplification. Among other matters, the Code specifically focuses on (a) encouraging companies to adopt business strategies which are aimed at the sustainability of business activities as a whole; (b) increasing dialogue between companies and the market by adopting engagement policies with institutional investors and asset managers; (c) streamlining its structure, based on the "comply or explain" rule and on simplified recommendations and principles, the application of which will be clarified by the Committee through the release of Q&As which will be periodically updated; (d) the principles of flexibility and proportionality, given that certain recommendations apply solely to large companies (i.e. companies with capitalisation of more than 1 billion Euro for three consecutive calendar years) while specific simplifications are envisaged for companies with a concentrated shareholder base. Lastly, certain existing recommendations have been strengthened (such as the assessment of independence, the quality of information to directors and the role of the chairman) in accordance with global best practices, in order to align the domestic market with international standards.

New rules on gender quotas for listed companies

On 1 January 2020, Law No. 160/2019 of 27 December 2019 (the 2020 Budget Law) entered into force. The 2020 Budget Law amends Articles 147-ter and 148 of the Italian Financial Act to increase the percentage of representation of the least represented gender in the corporate bodies of listed companies. Specifically, the new provisions (applicable from the first renewal of the relevant issuer's corporate bodies after the legislation enters into force), provide that the least represented gender must make up at least 2/5 of the members of the management and control bodies of the companies listed on regulated markets. That rule is subject to an adjustment acknowledging it would be impossible to apply the new 2/5 quota to corporate bodies composed of three members. As a derogation to the current regime outlined by Article 144-undecies.1 of the Issuers' Regulation specific to such three-member corporate bodies, with **Notice No. 1/20 of 30 January 2020**, Consob proposed to apply rounding down so that bodies of three members will comply with the new quota regulations where the least represented gender holds only one seat, while the criterion of rounding up to the next highest digit, provided for in paragraph 3 of Art. 144-undecies.1 of the Issuers' Regulation, remains unchanged for corporate bodies consisting of more than three members. Consob has also initiated a further market consultation in the context of the amendments to be made to Issuers' Regulation in order to implement the new regime regarding gender quotas. This consultation is due to end on 16 March.

Amendments to the Crowdfunding Regulation

On 6 February 2020, Consob issued **Resolution No. 21259** which implements certain amendments to the Regulation on the raising of capital through online portals, adopted pursuant to **Resolution No. 18592/2013** (the "Crowdfunding Regulation"), in order for the Crowdfunding Regulation to comply with the amendments to Article 50-quinquies of the Financial Act introduced by **Legislative Decree No. 165 of 25 November 2019** (so-called "MiFID corrective"). The amendments are intended to waive one of the various capital requirements that portal managers must satisfy in order to be included in the relevant register kept by Consob, i.e. the obligation to provide an indemnity system to protect investors, while maintaining only the obligation of insurance coverage. Consob also clarified that the amendments provide that portal managers who are already authorised and adhere to an indemnity system will have to put their insurance policy in place by 1 July 2020.

New step towards implementation of Directive (EU) 2017/828

On 29 January 2020, the Government approved a draft **Legislative Decree (the "Draft")** in relation to the transposition of Directive (EU) 2017/828 on the long-term commitment of shareholders (the "Directive") in the Italian domestic framework. The Scheme is currently being discussed by several parliamentary commissions, with a view to it being passed into law by Parliament.

Assonime clarifies new rules on remuneration policies for listed companies

On 10 February 2020, Assonime (the association of Italian joint stock companies) clarified the current legislative and regulatory framework governing the drafting of the Remuneration Report for financial year 2019, as set forth by the TUF and the Issuers' Regulation. Please click [here](#) for further information.

COPYRIGHT

EU Advocate General on copyright protection of a folding bicycle

On 6 February 2020, the EU Advocate General M. Campos Sánchez-Bordona delivered his opinion on the copyright protection of the Brompton folding bicycle, in the context of a request for a preliminary ruling of the EU Court of Justice made by the Tribunal de l'entreprise de Liège of Belgium (in **case C-833/18** *Sl, Brompton Bicycle Ltd. v Chedech v Get2Get*). The issue raised was whether products, the shape of which is primarily dictated by their technical function, are eligible for copyright protection. In his opinion, the EU Advocate General proposed that the Court of Justice reply to the Tribunal of Belgium pointing out that Articles 2 to 5 of **Directive (EC) No. 2001/29 of 22 May 2001** (on the harmonisation of certain aspects of copyright and related rights in the information society) do not provide for copyright protection of products with an industrial application in cases where the shape of the relevant product is exclusively dictated by technical function. In this context, in order to determine whether the specific features of the shape of a product are exclusively dictated by its technical function, the Court must take into account all the relevant objective factors in each case, including the existence of an earlier patent or design right in the same product, the effectiveness of the shape in achieving the technical result and the intention to achieve that result. Where the technical function is the only factor which determines the appearance of the product, the fact that other alternative shapes exist is not relevant while, on the other hand, the fact that the shape chosen incorporates important non-functional elements which were freely chosen by its creator may be relevant.

Italian Supreme Court on the requirements for granting criminal protection to sui generis databases

On 12 February 2019, the Italian Supreme Court issued its judgment in **case No. 52140/17** on the requirements for the criminal protection of sui generis databases, pursuant to **Article 171-bis of the Italian Copyright Law**. In its decision, the Court of Cassation clarified that the Italian Copyright Law grants protection (a) to the author of a database that may qualify as a creative work (pursuant to **Articles 64-quinquies and 64-sexies of the Italian Copyright Law**), and (b) to the compiler of a database which, although not original or qualifiable as a creative work, required significant investment for its creation (in terms of financial and material resources and/or expenditure of time) sustained by the [maker] [compiler] of the database (the so-called sui generis rights granted by **Articles 102-bis and 102-ter of the Italian Copyright Law**). The Court of Cassation further clarified that creativity is the key requirement for granting criminal protection to all works subject to copyright, including databases. Based on this construction, only authors of creative databases, and consequently [non - makers of non-creative sui generis databases, may benefit from protection from criminal liability provided for under Article 171-bis para. 2 of the Italian Copyright Law.

FINANCE

Italian Supreme Court on the criteria for the assessment of insolvency status

On 20 January 2020, the Italian Supreme Court issued its decision (**No. 1069/2020**) on the criteria for the assessment of the insolvent status of a company. Specifically, the criteria taken into account by the Court of Appeal of Milan (and confirmed by the Supreme Court), to indicate a company's inability to fulfil its payment obligations, and, as a result, its insolvency status included (a) the company's lack of liquidity and significant debts, both as detailed in the financial statements, (b) the company's delay in making payments, and (c) the existence of enforcement proceedings over the Company's assets. The Supreme Court also clarified that a company's insolvency status is indicated by the relevant criteria, including where the company owns significant real estate assets, given that those assets may not guarantee future repayment to its creditors and should not be considered relevant for the immediate fulfilment of the company's payment obligations.

PATENTS

The EPO's Board of Appeal confirms the "all applicants" approach

On 16 January 2020, the Board of Appeal of the European Patent Office (the "BoA") issued a **decision** which confirmed the so-called "all applicants" approach to ascertain a valid priority entitlement.

The Supreme Court on novelty assessment

On 19 December 2019, the Italian Supreme Court issued a **decision** which held that the novelty requirement for patentability is to be assessed in cases where the validity of a patent is disputed with regard to both the "extrinsic" novelty and the "intrinsic" novelty (i.e. the inventive step).

The European Patent Office publishes new guidelines on national law relating to the European Patent Convention

On October 2019, the European Patent Office published the 20th edition of its "**National law relating to the EPC**", which provides a concise guide to the most important provisions and requirements of the relevant national law in the European Patent Convention contracting states, extension states and validation states.

**DATA
PROTECTION**

Major fine imposed by the Data Protection Authority

On 11 December 2019, the Italian Data Protection Authority imposed two fines on Eni Gas and Luce ("EGL") for a total of EUR 11.5 million as a result of the illicit processing of personal data in the context of promotional activities. The fines were determined according to the parameters set out in the GDPR, taking into account the wide range of stakeholders involved, the duration of the infringement and the economic conditions of EGL. The **first fine** of EUR 8.5 million was imposed for unlawful processing of data in connection with telemarketing and tele-sales activities. The violations included advertising calls made without the consent of the person contacted or despite their refusal to receive promotional calls; holding customer data beyond permitted data retention periods; the acquisition of data on prospective customers from entities (list providers) which did not obtain any consent for the disclosure of such data. The **second fine** of EUR 3 million was imposed for the conclusion of unsolicited contracts.

INDUSTRIES

MEDIA

The Court of Milan on online infringement of theatrical works about to be released

On 24 December 2019, the Court of Milan issued an order (No. 2718/2019) to prevent the online copyright infringement of a cinematographic work which was about to be released in cinemas, of which the imminent (simultaneous) illegal broadcasting on several "pirate websites" had been announced during the weeks preceding the theatrical distribution of the film. As a result, the producer and the owner of the relevant distribution rights began interim proceedings before the Court of Milan, requesting that the Internet Service Providers operating as mere conduits (i.e. the Italian telephone network operators) prevent their customers from accessing the relevant websites under their current domain name and in association with any other future domain names allowing access to the same illegal content (the so-called "alias websites"). In its decision, the Court upheld the request of the rights-holders on the basis of a summary judgment, stating that (a) the intention to illegally broadcast the content of the cinematographic work once it was distributed in cinemas was evident; (b) there was an actual risk that the rights of the producer and distributor may be irreversibly prejudiced during the time necessary to obtain a final judgment, given the fundamental importance that the first release of a film in cinemas has in the subsequent commercial distribution of the same cinematographic work, also in terms of the first reaction of the public and critics. Therefore, the Court ordered the Internet Service Providers (operating as mere conduits) to immediately adopt the most appropriate technical measures to effectively prevent viewers from accessing the relevant "pirate websites", and to continue to act promptly in this way, upon notification of the rights-holders.

TELECOMMUNICATIONS

AGCOM fines Vodafone, Tim and Wind TRE over the novation of prepaid contracts

On 12 January 2020, the Italian Telecommunications Regulator ("AGCOM") imposed a fine of EUR 696,000.00 on each of TIM S.p.A., Vodafone Italia S.p.A. and Wind Tre S.p.A. (the "Operators") for breach of Article 70.4 of the **Code of Electronic Communications** and of AGCOM **Resolutions No. 326/10/CONS** and **No. 519/15/CONS**. The Operators unilaterally amended prepaid contracts so that, in the case that consumers run out of credit and do not "top-up" upon renewal of the monthly service, the Operators would no longer block outgoing traffic but make it available against payment. The AGCOM ruled that such arrangements (a) do not constitute an exercise of the mere right of amendment which, pursuant to Article 70 of the Code of Electronic Communications, does not require consumers' consent; (b) breached Article 2 of AGCOM Resolution no. 326/10/CONS in so far as the Operators activate the continuation of phone and data traffic without the consumers' explicit consent when credit runs out; and (c) were communicated to consumers through confusing SMS texts.

TECHNOLOGY

Bank of Italy and Consob launch a common strategy for cybersecurity in the financial sector

On 16 January 2020, the Bank of Italy and Consob – the supervisory authority of the Italian financial market – announced a **common strategy** for cybersecurity in the financial sector. The common strategy aims at strengthening the cybersecurity of the Italian financial sector through specific measures relating to payment systems, central counterparties, central securities depositories and trading venues. The supervision of cyber risks by the Bank of Italy and Consob will employ the Cyber Resilience Oversight Expectations for Financial Market Infrastructure (CROE) tool, which has already been adopted by the Eurosystem. In addition, the Bank of Italy and Consob will develop TIBER-IT, a testing model based on the European Threat Intelligence-Based Ethical Red Teaming (TIBER-EU) framework.

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