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To all
clients

Circular No. 13/2024

Bolzano, 24 February 2024

Subject: Supervisory body in Srls – appointment likely required

We have already pointed out the statutory rules on several occasions: pursuant to Art. 2477 of the Italian Civil Code, a limited liability company is required to appoint a supervisory body in the following cases:

a) The company is required to prepare consolidated annual financial statements.

b) The company controls a company which is itself subject to a statutory audit.

c) In two consecutive financial years, the company exceeds at least one of the following thresholds in each of those years:

- balance sheet total 4 million Euro,
- revenues 4 million Euro,
- 20 employees on average.

As is known, the thresholds under letter c) have been amended several times in recent years, and it has frequently been observed in the specialist press that the solution adopted probably overshoots the mark considerably, in particular with the requirement that a supervisory body must be appointed as soon as a single threshold is exceeded in two consecutive years. Then, however, came the coronavirus crisis, and the deadlines for the appointment were suspended until 2023. There were high hopes that the provisions would be relaxed in the meantime. To

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date, however, this has not been the case!

And that is not all: the thresholds set out above are also based on the definition of SMEs at EU level, and last December, by EU Directive No. 2023/2775, the EU Parliament raised the thresholds for the definition of small undertakings from the previous 4 million Euro to 5 million Euro in the case of the balance sheet total and from the previous 8 million Euro to 10 million Euro in the case of revenues. The increase was justified by reference to average inflation in the EU since 1 January 2013, when the previous thresholds entered into force. The Member States have until the end of 2024 to adapt their legislation, where applicable with retroactive effect from 1 January 2023.

It therefore seems likely that, in the course of transposing the aforementioned EU Directive, Italy will finally also take a clear position on how the thresholds for supervisory bodies are to be defined.

To date, however, nothing has been heard in this respect. Accordingly, it must be assumed that limited liability companies which exceeded at least one of the 3 thresholds in the years 2021 and 2022 must appoint a supervisory body without delay.

In Milan, the Companies Register has already written to defaulting companies in recent weeks, requiring them to appoint a supervisory body within 60 days. Upon enquiry, the Companies Register in Bolzano confirmed that a similar initiative is planned for the near future. If the request to make the appointment is complied with within the deadline stated in the letter, administrative penalties are in our view unlikely to be imposed.

Conversely, however – at least under the law as it currently stands – this does not remedy the company's own default in appointing the supervisory body. In this context, the question is in particular whether the annual financial statements for 2023 still have to be audited or not. The prevailing doctrine (see Assonime Circular No. 1/2020) assumes that a board of statutory auditors appointed at the beginning of 2024 will only be responsible for auditing the annual financial statements for 2024. The question therefore arises: what happens to the annual financial statements for 2023 if they are not audited although the company should have appointed a supervisory body?

Here too, doctrine and case law predominantly assume that such annual financial statements are valid but could, where applicable, be challenged. There is, however, also a judgment (Court of Milan No. 11595/2015) which holds that the annual financial statements are void in such a case.

In conclusion, our recommendations: particularly in strained situations, a supervisory body should be appointed immediately, and it should, where possible, also audit the

annual financial statements for 2023.

Finally, once again as a reminder, the three options for designating a supervisory body:
1. Appointment of a board of statutory auditors (or of a sole statutory auditor) solely for the review of legal compliance, together with an external auditor (or an audit firm);
2. Appointment of a board of statutory auditors (or of a sole statutory auditor) which also assumes the task of auditing the annual financial statements, or
3. Appointment of an external auditor (or of an audit firm) responsible solely for the statutory audit.

We remain at your disposal for any further information.

Yours sincerely

Josef Vieider