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To all
clients

Circular No. 44/2023

Bolzano, 20 November 2023

Subject: Supervisory body in limited liability companies – appointment now probably required

The statutory rules are well known: pursuant to Art. 2477 of the Italian Civil Code, a limited liability company is obliged to appoint a supervisory body in the following cases:

a) The company is required to draw up consolidated financial statements.

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

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

- balance sheet total of 4 million Euro,
- sales revenues of 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 rules now in force have clearly overshot the mark, 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 date, however, this

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has not happened, and consequently it will be necessary in many cases to designate a supervisory body. For limited liability companies which exceeded at least one threshold in the years 2021 and 2022 there are now 3 options:

1. appointment of a board of statutory auditors (or of a sole auditor) solely for the review of legal compliance, and in addition of an external auditor (or an audit firm);
2. appointment of a board of statutory auditors (or of a sole auditor) which also assumes the task of the statutory audit, or
3. appointment of an external auditor (or an audit firm) who is responsible only for the statutory audit.

The most cost-effective solution is certainly the appointment of “only” an external auditor, because his duties are more limited, being confined to the accounting records and the annual financial statements, whereas a sole auditor or a board of statutory auditors must also monitor the management conduct of the directors, the adequacy of the organisational structure and compliance with the articles of association and with the law. Which option is chosen will ultimately depend on the size and the risk profile of the individual undertaking.

Pursuant to Art. 2477 para. 1 of the Italian Civil Code, in limited liability companies the board of statutory auditors consists in principle of only one person (sole auditor), unless the articles of association provide otherwise. In this connection the question also arises whether it is necessary to amend the articles of association if these may still refer to a three-member supervisory body. The National Council of Notaries takes a very moderate view here: if the provision contained in the articles of association merely repeats or refers to the earlier wording of Art. 2477 of the Italian Civil Code, this is not to be regarded as a choice or an intention on the part of the shareholders to appoint a board of statutory auditors consisting of three persons. Accordingly, in most cases the appointment of a single person should also be possible without amending older articles of association.

A few further notes on the calculation of the thresholds referred to above for the years 2021 and 2022:

- the balance sheet total results from the sum of the assets shown in the balance sheet, i.e. net of accumulated depreciation and other value adjustments;
- the sales revenues result from item A.1 of the profit and loss account (it is therefore not a question of total output);
- the average number of employees is to be determined by reference to full-time equivalents (FTE). Employees with fixed-term employment contracts and part-time employees are also to be taken into account on a pro rata basis and, on a prudent

interpretation, so too are freelance collaborators as well as those shareholders who receive remuneration for their activity.

Incidentally: if the shareholders remain inactive, in extreme cases the appointment is made by the court, at the request of any interested party. This will generally occur following a report by the registrar of the Companies Register. For the directors this results in an administrative offence on account of the failure to convene the shareholders' meeting.
Press reports of recent days, according to which the Chambers of Commerce of the "Triveneto" region were already preparing to send reminder letters to companies in default, have at least been denied by the Companies Register in Bolzano. Nevertheless, it cannot be ruled out that, as a matter of courtesy, the companies concerned will shortly be reminded of the obligation to make the appointment, before the Companies Register actually files a petition with the court, as provided for in Art. 2477 para. 5 of the Italian Civil Code.

<u>From today's perspective it must be assumed that – contrary to earlier expectations – the statutory framework is unlikely to change any time soon, and there is currently no reason to hope for a further extension of the deadline either. Accordingly, we can only recommend that you initiate the appointment of a supervisory body without delay where the conditions set out above are met.</u>

We remain at your disposal for any further information.

Yours sincerely

Josef Vieider