

Dossier on the Company Law Reform

SUPPLEMENT TO INTERALIA N.2/2004 (JUNE 2004)

On 1 January 2004, the Company Law Reform (Legislative Decree 6/2003) came into effect. As a result, certain changes must or may be made to the articles of association and the by-laws of already existing companies.

We have prepared two memos highlighting the main changes that can or must be made to clauses in the articles of association and the bylaws of joint-stock companies (*Società per Azioni*, p. 1) and limited liability companies (*Società a Responsabilità Limitata*, p. 6).

JOINT STOCK COMPANIES: CHANGES UNDER THE NEW LAW

1) Changes that had to be made by 1 January 2004

1. any **arbitration clauses** (only possible for joint stock companies that do not seek funding from the risk capital market) that do not give a person “outside” the Company the power in any case to appoint all of the arbitrators shall be deemed null and void if retained after 1 January 2004 (Art. 34, para. 2, D.Lgs. 5/2003);
2. Companies with a **sole shareholder** must be noted in the Register of Enterprises as prescribed by Art. 2362 for the purposes of publication (this had to be performed no later than 30 January 2004);
3. if the Company is subject to other’s **activity of direction and coordination** (Art. 2497-*bis*), such circumstance must be indicated in the acts and correspondence of the Company, as well as recorded at the Register of Enterprises. It is assumed that Companies or entities required to consolidate their accounts or which in any case control them in accordance with Art. 2359 (Art. 2497-*sexies*) exercise “management and coordination activity”.

2) Changes that will have to be made by 30 September 2004

I. Required additions to the articles of association.

Pursuant to Art. 2328, additional information must be provided on several items reported in the articles of association by 30 September 2004, including:

1. specify the date and place of formation of any **shareholders that are legal entities**, in order to identify the applicable law pursuant to Art. 25 of Law no. 218 of 31 May 1995 (containing the reform of the Italian system of private international law);
2. define the activity that forms the **Company’s object**: formulations of the corporate object that are too generic or heterogeneous must be adjusted since now the specific “activity” must be stated;
3. define the characteristics of the **shares** (any “categories”) and the manner in which they are issued (any dematerialization or non-representation of a share);
4. identify all the benefits that may be provided to **promoting or founding shareholders** (therefore, not just their particular regime of participation in the profits);
5. specify the **system of governance** adopted (traditional, monistic or dualistic model);

6. provide, for Companies that have an indeterminate or extremely protracted duration in time (and that intend to maintain such), an indication of the time periods, in any event not to exceed one year, after which the member may exercise his **right of withdrawal**.

II. Required changes to the bylaws.

It is then necessary to make certain changes to the bylaws, if they contain clauses that are incompatible with current law. In particular:

1. clauses that provide that in the event that a **shareholder fails to pay the quota due from him**, the Directors, if they do not consider it useful to start an action for the enforcement of the contribution against the delinquent shareholder, may sell the shares directly after fifteen days have elapsed from the publication of the warning in the Official Gazette, without having first offered them to the other shareholders, must be changed (Art. 2344, para. 1);
2. clauses that provide **terms for submission of the accounts** corresponding to those contained in the previous Art. 2364, para. 2, that do not conform to those now imposed must be changed: the accounts must be submitted to the shareholders within at most **120 days** (and no longer 4 months) from the closing of the fiscal year; the articles of association may set a longer term (maximum of **180 days**) only *i)* for Companies required to consolidate their accounts and *ii)* when special needs related to the corporate structure or object so require.
3. It is important to pay special attention to the clauses that govern **shareholders' meetings**. Especially:
 - 3a* clauses that provide that the shareholders' meeting has competence regarding the **management of the company** must be removed; of special note are clauses that provide that the Directors have free power to submit decisions concerning any management matter to the meeting, since the bylaws must provide which specific authorizations the meeting can issue, subject in any case the liability of the directors for their acts (Art. 2364, para. 1, no. 5);
 - 3b* clauses that give the managing body the power to approve any **rules for the shareholders' meeting** must be removed (Art. 2364, para. 1, no. 6);
 - 3c* clauses that provide that, in absence of the formalities for the calling of meeting, the meeting is deemed to have been regularly convened only when (in addition to the presence of the entire share capital) all the members of the management and control bodies are present, must be changed; the law, for the purposes of so-called **complete meetings**, now requires the attendance of a simple majority of the latter (Art. 2366, para. 4);
 - 3d* clauses that provide that shareholders who represent a percentage of at least one-tenth of the share capital may request that a meeting be **called** must be changed since the bylaws may only provide for a percentage lower than one-tenth (Art. 2367, para. 1);
 - 3e* clauses that establish that extraordinary meetings on second call may adopt resolutions with a percentage of less than two-thirds of the share capital in attendance must be changed since more than one-third of the share capital must be present (Art. 2369, para. 3);
 - 3f* clauses that provide for higher majorities than those required by law for resolutions **approving the balance sheet or the appointment or revocation of officers** adopted by the shareholders' meeting on second call must be removed (Art. 2369, para. 4)¹;

¹ It should be specified that even under the pre-existing regime, the case law held null and void clauses in the bylaws that provided a *quorum* for the purposes of convening the meeting or adopting a resolution for the second assembly of regular meetings.

- 3g* clauses that establish a resolving *quorum* for the shareholders' meetings on **second call** of more than one-half of the share capital for resolutions concerning changes in the corporate object, the reorganization of the Company, its early dissolution, the transfer of the legal address abroad and the issuance of preference shares must be removed; such resolutions (in addition to the extension of the Company and the revocation of the liquidation) require the favourable vote of shareholders representing more than one-third of the share capital (Art. 2369, para. 5);
- 3h* clauses that grant the right to **attend the meeting** to holders of shares without voting rights or of shares with limited voting rights with regard to decisions on which they have no right to vote must be removed (Art. 2370, para. 1);
- 3i* clauses that assign the **chairman** of the meeting lesser powers than those provided for by Art. 2371 must be removed;
- 3j* clauses that provide for **taking minutes** of the meeting in a "concise" manner or in a way that does not conform with the new Art. 2375, especially as to the identification of the participants and of the capital represented by each, must be removed.
4. Special attention must be paid to clauses governing the **management and control** of the Company. In particular:
- 4a* clauses that establish that the managing body is competent to decide on the assumption of participations in other enterprises in the event that such assumption carries unlimited liability for the obligations of such other companies (Art. 2361) must be removed;
- 4b* clauses that accord the Chairman of the Board of Directors fewer powers than those contained in the new Art. 2381, para. 1 must be changed;
- 4c* clauses that allow the Directors to delegate **functions that cannot be delegated**, such as projects of merger or de-merger must be removed (art. 2381, co. 4);
- 4d* if there are special time periods set for **sending information** from the delegated bodies to the Board of Directors, such period must be made to conform with Art. 2381, para. 5, which states that such period cannot exceed 180 days;
- 4e* clauses that allow the Company to set up against third persons in bad faith for transactions performed by its legal representatives that **do not fall within the corporate object** (as the previous Art. 2384-*bis* provided) must be removed;
- 4f* clauses that, with regard to Companies required to have consolidated accounts, provide for the exercise of **accounting control** by the board of auditors, must be removed since accounting control must be exercised by auditing firms registered in the register created by the Ministry of Justice (Art. 2409-*bis* para. 3);
- 4g* clauses that provide a **date of termination of appointment** of Directors (Art. 2383, para. 2), Auditors (Art. 2400, para. 1), Management Board (Art. 2409-*undecies*) and Supervisory Board (Art. 2409-*duodecies*) on a date other than that of the meeting convened for the approval of the balance sheet relating to the last fiscal year of their appointment must be changed.
5. With regard to clauses on the new rules governing **shares** and their circulation, the following should be noted:
- 5a* clauses that provide, the case of **indivisibility of shares**, the appointment of a joint representative of the shareholders in a manner other than those provided by Arts. 1105 and 1106 (Art. 2347) must be changed;
- 5b* clauses that, conditioning the transfer of the shares to the **mere agreement** of the social bodies, provide rules for the **calculation of the price** (in the case of the purchase of the shares by the Company or another shareholder, following refusal of consent) that do not conform to those provided by Art. 2437-*ter* (Art. 2355-*bis* para. 2) or that do not contain provisions for the required **designation of an alternate acceptable purchaser** or the right of withdrawal of the seller must be changed;
- 5c* clauses that provide that shareholders who transfer **shares not fully paid** are jointly and severally liable with the purchaser for a period of less than three years from the transfer must be changed; the three years now start to run as of the date of notation of the transfer in the shareholders' book (Art. 2356).

6. It is also possible that some clauses in the bylaws may be in conflict with the new rules governing the **right of withdrawal**, such as:
 - 6a* clauses that limit withdrawal to only the specific cases formerly provided (change in the corporate object or the kind of Company and transfer of the legal address abroad) and that do not allow withdrawal also for all the other **mandatory cases provided** by law (Art. 2437: change in the corporate object when the change allows a significant change in the activities of the Company; transformation of the Company; transfer abroad of the Company's legal address; revocation of the liquidation; elimination of one or more reasons for withdrawal; changes to the criteria for the determination of the value of the shares in the vent of withdrawal; amendment to the bylaws concerning the voting or participation rights; Art. 2469, para. 2: introduction of the clause of non-transferability of the participations or of unconditional or unlimited approval; Art. 2497-*quarter*: withdrawal in Companies subject to the activity of direction and coordination) must be changed;
 - 6b* clauses that require withdrawal as to all shares owned (it is possible to have a "partial" withdrawal, limited to a portion of the shares held) must be changed;
 - 6c* clauses that allow only dissenting shareholders and not absent or abstaining shareholders to withdraw must be changed;
 - 6d* clauses that provide terms and modalities of the exercise of the right of withdrawal that are more restrictive than those contained in Art. 2437-*bis* must be removed.
7. Clauses that prescribe rules on the **dissolution and liquidation** of the Company that do not comply with new Arts. 2484 et seq must be modified. In particular, where a clause provides for circumstances other than those provided for by law, it must indicate who has the power to ascertain their existence and to give them publicity (Art. 2484, para. 4).

Some changes apply solely to **Companies issuing shares listed on regulated markets or highly distributed among the public**. The bylaws of these Companies must conform with various provisions of the new rules, such as the following:

1. clauses that introduce mechanisms on the basis of which voting rights related to the quantity of shares owned by one subject are limited to a maximum amount or provide for lots (so-called **staggered vote** or **maximum vote**) (Art. 2351, para. 3) must be removed;
2. clauses that, for the purposes of participation in a shareholders' meetings, require the **deposit of the shares** or of the relevant certificates more than two days prior to the meeting (Art. 2370, para. 2) must be changed;
3. clauses that submit to **arbitration** disputes arising between shareholders or between shareholders and the Company concerning transferable powers with regard to corporate dealings must be removed (Art. 34, para. 1, D.Lgs. 5/2003);
4. clauses that provide ratios different from those required for the **protection of the minority shareholders**, such as, for example, those that provide, for the purposes of complaint to the board of auditors, percentage greater than 1/50 of the share capital (Art. 2408, para. 2) or a percentage greater than 1/20 of the share capital for the purposes of the report to the Tribunal (Art. 2409, para. 1) must be corrected;
5. clauses that provide that **accounting control** be exercised by the board of auditors must be removed since now accounting control must be exercised by an auditing firm registered in the register for auditors (Art. 2409-*bis* para. 2).

3) Optional changes to the bylaws

It is possible (but not required) to make further changes to the bylaws aimed at taking advantage of opportunities offered by the Reform or at limiting the application of the new institutions using the exception rights accorded by the new rules on autonomy of bylaws. In particular, from among all the options that it is possible to implement in the articles of association and the bylaws of registered Companies, we highlight the following:

1. the **governance rules** and the new systems of management and control, consisting of the “monistic system” (with a Board of Directors and a Committee for the Control of Management established within it) and the “dualistic system” (where the management body is represented by Management Board and the control body is the Supervisory Board);
2. the **financial structure** of Joint stock companies (for instance: shares without par value, different categories of shares, financial instruments of participation, allocated assets, bonds);
3. identification of the **legal address**: it is now possible to give only the municipality where it is located. In case of any change of address within the same municipality, it will not be necessary to modify the articles of association;
4. as to **representation in a shareholders’ meeting**, the same person can represent up to twenty shareholders (while for Companies issuing shares listed on regulated markets or highly distributed among the public the previous limits remain unchanged);
5. special clauses can be introduced that affect the composition and arrangement of the **managing body** or to broaden their powers, such as, for example:
 - 5a clause that sets the **number** of Directors, when the managing body consists of more than one member (Art. 2380-bis, para. 3);
 - 5b clauses that state a **rule** for dealings between the Board of Directors and the bodies to which functions are delegated (Art. 2381);
 - 5c clauses that prescribe, in addition to those legally required, further **requirements** of honorableness, professionalism and independence for Directors (Art. 2387);
 - 5d clauses that state the Directors are competent to issue **convertibles** (Art. 2420-ter), setting the maximum amount and time period, not to exceed five years from the date of the resolution, in order to exercise the power. Said attribution of power concerning the issuance of convertibles also involves the granting of the power to provide for the corresponding capital increase;
6. by 30 June 2004, the Company may pass a resolution to: *l)* extend the life of the Company, and/or *ii)* introduce or remove liens on the circulation of share certificates, without having to grant the **right of withdrawal** to absent or dissenting shareholders with regard to such resolutions (Art. 2437, para. 1, let. e), and para. 2);
7. clauses that keep, in Companies either not listed or not required to maintain consolidated accounts, responsibility for **accounting control** in the hands of the Board of Auditors. In this case, the corresponding modification must be adopted by the date of approval of the balance sheet up through 31 December 2003.

LIMITED LIABILITY COMPANIES: CHANGES UNDER THE NEW L AW

1) Changes that had to be made by 1 January 2004

1. any **arbitration clauses** that do not give a person “outside” the Company the power in any case to appoint all of the arbitrators shall be deemed null and void if retained after 1 January 2004 (Art. 34, para. 2, D.Lgs. 5/2003);
2. Companies with a **sole member** must be noted in the Register of Enterprises as prescribed by Art. 2470 for the purposes of publication (this must be performed no later than 30 January 2004);
3. if the Company is subject to other’s **activity of direction and coordination** (Art. 2497-*bis*), such circumstance must be indicated in the acts and correspondence of the Company, as well as recorded at the Register of Enterprises. It is assumed that Companies or entities required to consolidate their accounts or which in any case control them in accordance with Art. 2359 (Art. 2497-*sexies*) exercise “management and coordination activity”.

2) Changes that had to be made by 30 September 2004

I. Required additions to the articles of association.²

Pursuant to Art. 2463, additional information must be provided on several items reported in the articles of association by 30 September 2004, including:

1. specify the date and place of formation of any **members that are legal entities**, in order to identify that applicable law pursuant to Art. 25 of Law no. 218 of 31 May 1995 (containing the reform of the Italian system of private international law);
2. define the activity that forms the **Company’s object**; formulations of the corporate object that are too generic or heterogeneous must be changed because now the specific “activity” must be stated;
3. provide the **participation quota** of each member, in a way that is distinct (and possibly that does not correspond to) their contribution quotas;
4. provide the **rules concerning the functioning of the Company**, indicating those relating to the management and the powers to represent the company (in the past, these rules were only contained in the bylaws);
5. provide, for Companies that have an indeterminate or extremely protracted duration in time (and that intend to maintain such), an indication of the time periods, in any event not to exceed one year, after which the member may exercise his **right of withdrawal**.

II. Required changes to the bylaws.

Certain changes must be made to the bylaws if they contain clauses that are incompatible with

² The new rules in the Civil Code, even as concerns the functioning of the Company, always refer to the articles of association of the limited liability company. However, nothing appears to prohibit the retention of separate articles of association and bylaws (see Art. 223-*bis* impl. prov. C.C., which refers to changes to be made without distinction to both documents).

current law (The changes must also be made to the articles of association if the incompatible clauses are included therein). In particular:

1. as regards the **quotas**:
 - 1a* clauses that create different categories of quotas recognizing special rights or responsibilities that derive from the actual personal identification of their respective holders and are intended to circulate and to be transferred to subsequent purchasers must be changed. Special rights regarding the management of the Company or the distribution of the profits can be retained only if they are attributed to “**individual members**”, because of the actual importance of their person (Art. 2468, para. 3);
 - 1b* clauses that provide, in the case of co-ownership of a participation, the appointment of a **common representative** of the co-owners in accordance with Arts. 1105 and 1106 (Art. 2468, para. 5) must be changed.
2. It is possible that some clauses may conflict with the new legal framework governing the **right of withdrawal**; and therefore:
 - 2a* clauses that limit withdrawal to only the specific cases formerly provided (change in the corporate object or the kind of Company and transfer of the legal address abroad) and that do not allow withdrawal also for all the other **mandatory cases provided** by law (Art. 2473, para. 1: merger or de-merger of the Company; revocation of the status of liquidation; cancellation of one or more causes for resignation provided in the articles of association; completion of transactions which cause a substantial change in the object of the Company determined in the articles of association or in a relevant change of the rights attributed to the members in accordance with Art. 2468, para. 4; Art. 2469, para. 2: introduction of the clause of non-transferability of the quotas or of unconditional or unlimited approval; Art. 2473, para. 2: Company without termination; Art. 2481-bis, para. 1: withdrawal in case of increase of capital through offer of quotas of new issue to third persons; Art. 2497-*quarter*; withdrawal in Companies subject to the activity of direction and coordination) must be changed;
 - 2b* clauses that allow only dissenting, absent or abstaining members to withdraw must be changed;
 - 2c* clauses that provide for the manner in which or a time by which the right of withdrawal must be exercised that are more restrictive than those contained in Art. 2473 must be changed;
 - 2d* clauses that contemplate criteria for calculation of the value of the quota to be liquidated to the resigning member that do not conform to those established by law (Art. 2473, para. 3) must be changed.
3. Clauses that provide **terms for submission of the accounts to the members** corresponding to those contained in the previous Art. 2364, para. 2, that do not conform to those now imposed must be changed (Art. 2478-*bis*): the accounts must be submitted to the members within at most 120 days (and no longer 4 months) from the closing of the fiscal year; the articles of association may set a longer term (maximum of 180 days) only *i*) for Companies required to consolidate their accounts and *ii*) when special needs related to the corporate structure or object so require;
4. clauses that assign the managing body competence concerning the performance of **every act of management**, including decisions to enter into transactions which cause a substantial change to the corporate object as determined in the articles of association or a relevant change to the rights of the members which are powers reserved to the resolution of members’ meetings (Art. 2479, para. 2, no. 5) must be changed;
5. clauses that provide that, in the absence of the formalities for convening, the members’ meeting can be deemed duly constituted only if (in addition to the presence of the entire share capital) all the Directors and, if appointed, the Auditors are present must be changed; the law, for the purposes of the so-called **complete meeting**, as an

alternative to the presence of the latter, provides for the possibility that they simply be informed of the meeting (Art. 2479-*bis* para. 5);

6. clauses that grant **legitimization to challenge decisions of the members** that do not comply with law or with the articles of association to the Managing Body only as a entire body, rather than to each Director individually, must be changed (Art. 2479-*ter*; para. 1);
7. clauses that prescribe rules on the **dissolution and liquidation** of the Company that do not comply with new Arts. 2484 et seq. must be changed. In particular, where a clause provides for circumstances other than those provided for by law, it must indicate who has the power to ascertain their existence and to give them publicity (Art. 2484, para. 4).

3) Optional changes

It is possible (but not required) to make further changes to the bylaws (or to the articles of association) aimed, every time, at taking advantage of opportunities offered by the Reform; adding some new features of the new doctrine; or, finally, aimed at limiting the application of the new institutions using the exception rights accorded by the new rules on autonomy of bylaws. In particular, from among all the options that it is possible to implement, we highlight the following:

1. it is now possible to state only the municipality where the **legal address** is located; in case of any change of address within the same municipality, it will not be necessary to modify the articles of association;
2. new appraisals on the **financial structure of the Company** related, in particular, to the new rules on contributions (Art. 2464) and any issues of debt securities (Art. 2483), can be introduced;
3. clauses that subject the authorization of the Company to purchase, for a price equal to or higher than one tenth of the capital, the assets or receivables of the founding members, of the members and of the Directors, within two years from the registration of the Company in the register of enterprises (so-called “**dangerous purchases**”) to the decision of the members may be introduced (Art. 2465, para. 2);
4. special **rights to individual members** can be granted concerning the management of the Company or the distribution of profits (Art. 2468, para. 3);
5. the structure of the Company can be modelled on the basis of the **new governance rules**, dividing, based upon the actual needs of the Company, the decision-making powers between the members and the Directors (if the articles of association do not reserve additional matters to their competence, the members decide only: *i*) on the approval of the accounts and the distribution of the profits; *ii*) on the appointment, if provided in the articles of association, of the Directors, the Statutory Auditors or the accounting auditors; *iii*) on the amendments to the articles of association; *iv*) on transactions which cause a substantial change to the corporate object as determined in the articles of association or a relevant change to the rights of the members (Art. 2479);
6. finally, it should be noted that, in the case of management entrusted to several persons – rather than providing for a Board of Directors – the articles of association can provide that management be entrusted to several persons on a joint or several basis, with the consequent applicability of the rules on *società di persone* (partnerships) - except for the preparation of the drafts of the accounts and of the projects for merger or de-merger, as well as resolutions for capital increase in accordance with Art. 2481; see Art. 2475).