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"PARTICIPATING" SECURITIES (ART. 2346, ULT. CO., C.C.) AND REGULATION ON THE OWNERSHIP STRUCTURE OF BANKS

(ABSTRACT)

Coordinator: Chiar.mo Prof. Gustavo Visentini

Tutor: Chiar.mo Prof. Cosimo Sasso – Chiar.mo Prof. Antonio Blandini

Candidate: Gregorio Consoli

ABSTRACT

The political aim of the provisions introduced in the Italian civil code – in the context of the Italian companies' law reform – allowing companies to issue participating and non-participating hybrid securities (hereinafter, hybrid securities) was to enlarge the capacity of companies of raising funds for the purse of their corporate object. The immediate result of such provisions have been the mitigation of the distinction between equity and debt instruments provided for under the civil code and the granting of the companies with an autonomous power to issue, and determine, within certain limits, the content of, the hybrid securities.

The new hybrid securities may be granted with administrative and corporate rights which may, in principle, allow the relevant holders to exercise an influence on the management of the company. The rights to be granted to the securities need to be indicated in the by-laws of the company.

The dissertation is focused on the impact that the provisions mentioned above may have on the governance of banks and on the banking supervision provisions regulating the ownership structure of banks.

The dissertation contains a general part in the context of which the nature of the rights attachable to the hybrid securities and the quantitative and qualitative limits to the issuance of such securities have been analysed in detail and a special part relating to the analysis of the implication of the possibility to issue hybrid securities vested with administrative rights from a banking law perspective.

Indeed, the banking law was based on the assumption that all the voting and other administrative powers were vested in the shareholders and, therefore, the regulation was not focused on the quality of the other stakeholders of the bank companies. The possibility for the banks to issue hybrid securities in which voting or other administrative rights may be vested in required an amendment of

the banking law and will require further amendments to the relevant implementing regulation to which the primary law has delegated the power to rule on such issues.

The provisions of the Italian banking law relating to the ownership structure of the banks have been amended in order to take into account the possibility for the banks to issue participating securities vested with administrative rights. In particular, the legislative decrees (aimed at coordinating the banking law with the company law reform) have amended the previous provisions which were focused on the ownership of ordinary shares and have introduced new provisions focused on the concept of *influence on the banking company* as milestone of the entire regulation.

The coordinating decrees did non introduced in the banking law direct limitation to the issuance by banks of the hybrid securities. However, further to the analysis carried out, it is possible to identify two different indirect limits posed by the bank legislation to the issuance of hybrid securities by banks. Indeed, the banking law requires banks to submit the modification of their bylaws (which is necessary in order to issue the securities) to the prior approval of the Bank of Italy and, on a different perspective, grants the Bank of Italy with the power to determine the characteristics of securities issued by banks.

The tools granted to the Bank of Italy are aimed at ensuring the sound and prudent management of the banks in accordance with the general principle supervising the banking laws and regulations. In this respect the sound and prudent management assumes the double role of aim of the supervision activities and rules of conduct or criterion for the exercise the authorisation power by the competent authority.