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OPINION

1.- Request for amendment to the Articles of Association

The Chief Executive Officer of the Cassa Depositi e Prestiti ("CDP") and the Chief Operating Officer of Directorate 7, Finance and Privatizations of the Ministry of Economy and Finance ("Treasury") have sent a joint letter to the Chairman of Eni S.p.A ("Eni") in their capacity as representatives of the shareholders Treasury and CDP (which hold, respectively, stakes in Eni's capital of 4.3353% and 25.7604%). In this letter they ask Eni's Board of Directors, in accordance with art. 2367 of the Civil Code, that the shareholders' meeting called to approve the 2013 financial statements and to decide on the renewal of the company's board members whose terms are due to expire, also to be called in extraordinary session to adopt in the company's articles of association a clause regarding additional requirements of Board members and related reasons for ineligibility and loss of office ("Clause"), in accordance with the text contained in the explanatory Report ("Report") prepared by the shareholders, in compliance with art 125-*ter*, paragraph 3 of Legislative Decree No. 50 of 24 February 1998 ("TUF")[1].

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(1) The text of the clause proposed for inclusion in Eni's Articles of Association (which leaves to the Board of Directors the task of identifying its position within the articles of association and of adapting the group's policy to the principles expressed in the clause if it is approved) is the following: *"1. The criminal conviction, even not final, of a person for any of the offences contemplated by the following legislation without prejudice to the effects of discharge, constitutes cause for ineligibility for the functions of director or loss of said office for just cause without right to compensation for damages: (a) the legislation governing banking, financial, securities and insurance activities and the legislation concerning securities markets and financial instruments and payment instruments; (b) Chapter XI of volume V of the Civil Code and Royal Decree No. 267 of 16 March 1942; (c) the legislation that defines offences against the public administration, public trust, public wealth, public finances or in tax matters; (d) Article 51, paragraph 3 – bis, of the Code of Criminal Procedure and Art. 73 of Presidential Decree No. 309 of 9 October 1990. 2. The issuing of a decree of commitment for trial or summary commitment for trial for any of the offences mentioned at paragraph 1, letters a), b), c) and d) without the intervention of an acquittal verdict even not definitive or the issue of a definitive conviction that establishes the wilful commission of a loss to the State treasury also constitutes cause of ineligibility. 3. The directors who, during the term of their mandate, are notified with a decree of commitment for trial or summary commitment for trial for any of the offences mentioned at paragraph 1, letters a), b), c) and d) or of a final conviction that establishes the wilful commission of a loss to the State treasury must immediately communicate this*

In addition, the above-mentioned shareholders have asked the Board of Directors to draw up the agenda of the meeting called to approve the financial statements in such a way that the topic to be discussed in the above-mentioned extraordinary session "*is dealt with before that of the ordinary session concerning the renewal of the Board of Directors*" and point out that it is advisable that the proposal "*also be highlighted during the process of submitting the lists for the appointment of the new Board of Directors, in order to allow the shareholders to assess the consequences in terms of eligibility and loss of office arising from the possible approval of this clause of the articles of association.*"

The Report specifies that the request is formulated "*implementing the provisions of the Directive of the Ministry of Economy and Finance to the Treasury Department issued on 24 June 2013, concerning the adoption of criteria and procedures for the appointment of members of administrative bodies and of policies for the compensation of the senior officers of companies controlled directly or indirectly by the Ministry of Economy and Finance*" ("the Ministerial Directive") and that the clause that the shareholders CDP and Treasury

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to the administrative body, with the obligation of confidentiality. The Board of Directors must verify, during the first meeting and, in any case, within ten days after becoming aware of the issue of the decisions referred to in the first sentence, whether one of the situations thereby indicated exists. If so, the director loses office for just cause, without the right to compensation for damages, unless the Board of Directors calls a meeting of the shareholders, within the time limit of ten days as indicated above, to be held within the following sixty days in order to submit to the shareholders' meeting a proposal to retain said director in office, justifying this proposal on the basis that the company has an overriding interest in retaining the director in office. If the Board of Directors carries out the check after the end of the financial year, the proposal is submitted to the shareholders' meeting called to approve the related financial statements, without prejudice to the observance of the terms provided by the legislation in effect. If the shareholders' meeting does not approve the proposal formulated by the Board of Directors, the director loses office with immediate effect, for just cause and without the right to compensation for damages. 4. Without prejudice to the provisions of the preceding paragraphs, a chief executive or managing director subject to: (a) a prison term or (b) preventive detention or house arrest, as a result of proceedings under Article 309 or Article 311, paragraph 2 of the Code of Criminal Procedure, or following the elapse of the relevant term for their institution, automatically loses the office of director for just cause, without the right to compensation for damages; at the same time the mandates delegated to him expire. A similar loss of office results where the chief executive or managing director is subjected to any another type of personal preventive measure, no longer subject to appeal, if the Board of Directors considers that this measure makes it impossible for the chief executive or managing director to carry out the duties and exercise the powers delegated to them. 5. For the purpose of this article, the imposition of a penalty in accordance with Art. 444 of the Code of Criminal Procedure is equivalent to a conviction, except in the case of extinguishment of the offence. 6. For the purpose of the application of this article, the Board of Directors establishes the existence of the situations hereby contemplated, with reference to cases governed, in whole or in part, by foreign legislation, on the basis of an assessment of substantial equivalence."

request to be incorporated aims at strengthening the integrity requirements for directors of publicly traded companies specified by the combined provisions of articles 147-*quinquies* and 148, paragraph 4, of the TUF, and of Art. 2 of the Decree of the Ministry of Justice No. 162 of 30 March 2000, ("*Regulations containing provisions for setting professionalism and integrity requirements for the members of the Board of Statutory Auditors of publicly traded companies to be issued in implementation of Art. 148 of the TUF*», "Decree No. 162 of 30 March 2000").

2.- Applicable legislation concerning integrity requirements for publicly traded companies

Art. 147-*quinquies* of TUF provides that: "*1. Persons fulfilling administrative and executive functions must possess the integrity requirements established for members of control bodies by the regulations issued by the Ministry of Justice in accordance with Article 148, paragraph 4. 2. Failure to meet the requirements results in loss of office.*"

Art. 148, paragraph 4, of TUF provides that: "*The regulations adopted, in accordance with Article 17, paragraph 3 of Law No. 400 of 23 August 1988, by the Ministry of Justice in agreement with the Ministry of Economy and Finance (following consultation with Consob [the National commission for companies and stock exchanges], the Bank of Italy and Isvap [Insurance oversight institute]) establish the integrity and professionalism requirements for members of the Board of Statutory Auditors, Supervisory Board and Management Oversight Committee. Failure to meet the requirements results in loss of office.*"

Decree No. 162 of 30 March 2000, Article 2, concerning the matters discussed here, provides that: "*1. Statutory auditors in companies indicated at Art. 1, paragraph 1 cannot: (a) have been subjected to preventive measures ordered by the courts in accordance with Law No. 1423 of 27 December 1956 or Law No. 575 of 31 May 1965 and later amendments and additions; (b) have been given a final judgment, without prejudice to the effects of discharge: 1) to imprisonment for one of the offences covered by the legislation regulating banking and insurance activities and by the legislation on financial markets and instruments, tax matters and payment instruments; 2) to imprisonment for one of the offences specified in*

Chapter XI of volume V of the Civil Code and in Royal Decree No. 267 of 16 March 1942; 3) to imprisonment for a term of not less than six months for an offence against the public administration, public trust, public wealth, public policy and public finances; 4) to imprisonment for a term of not less than one year for non-culpable offences. 2. The office of statutory auditor referred to in Article 1, paragraph 1 cannot be occupied by a person on whom one of the penalties provided by paragraph 1, letter b) has been imposed upon request of the parties, except where the offence has been extinguished" (emphasis added).

3.- Ministerial Directive

The Ministerial Directive referred to by the shareholders CDP and Treasury provides that "*with regard to eligibility requirements and loss of office, the Treasury Department must ensure that, when directly controlled companies renew their governing bodies, they amend their articles of association by including the clause contained in the attachment to this directive (…). With regard to publicly traded companies controlled by the State, the Treasury department must, when the administrative bodies are renewed, promote the formulation of a proposal of amendment to the articles of association in the terms indicated and ask to conform groups' policies to the same principles" (page 2).*

The clause proposed by the Ministerial Directive reads as follows:

"*1. The pronunciation of a conviction, even not final against a person for any of the offences contemplated by the following legislation constitutes cause of ineligibility for the functions of director or loss of said office for just cause without the right to compensation for damages:*

(a) the legislation that governs banking, financial, securities and insurance activities and by the legislation concerning securities markets and instruments and payment instruments;

(b) Chapter XI of volume V of the Civil Code and by Royal Decree No.267 of 16 March 1942;

(c) the legislation that defines offences against the public administration, public trust public wealth, public policy, public finances or in tax matters;

(d) Article 51, paragraph 3 bis of the Code of Criminal Procedure and Art. 73 of Presidential Decree No. 309 of 9 October.

2. The issue of a decree of commitment for trial or summary commitment for trial for any of the offences mentioned at paragraph 1, letters a), b), c) and d) or a definitive conviction that establishes the wilful commission of a loss to the State treasury also constitutes cause of ineligibility.

3. The directors who, during the term of their mandate, are served with a decree of commitment for trial or summary commitment for trial for any of the offences mentioned at paragraph 1, letters a), b), c) and d) or a definitive conviction that establishes the wilful commission of a loss to the State treasury must immediately communicate this to the administrative body, with the obligation of confidentiality. The Board of Directors must verify, during the first meeting and, in any case, within ten days after becoming aware of the issuing of the dispositions mentioned in the first sentence, whether one of the situations thereby indicated exists; it must then call the shareholders meeting, within 15 days, to decide whether the director should remain in office; in this regard, the Board must formulate a proposal supported by reasons, that takes into account the overriding interest of the company in the director staying in office. If the shareholders' meeting does not decide that the director remains in office, the latter automatically loses his office for just cause without the right to compensation for damages.

4. Without prejudice to the provisions of the preceding paragraphs, the situation of being submitted to a personal remand order constitutes cause of ineligibility or of automatic loss of the office of a director with delegated management functions for just cause without the right to compensation for damages when the nature of this situation makes it impossible to fulfil the delegated mandates as a result of the order referred to in Article 309 or Article 311, paragraph 2 of the Code of Criminal Procedure or after the related terms for implementation have elapsed.

5. For the purpose of this provision, the imposition of ae penalty pursuant to Art. 444 of the Code of Criminal Procedure is equivalent to a conviction.

4.- Legislative and regulatory framework regarding integrity requirements

Both the Ministerial Directive and the amendment to the articles of association proposed by the shareholders Treasury and CDP contain more rigorous rules regarding integrity requirements relative to the provisions applicable to directors and statutory auditors of publicly traded companies and also relative to the specific provisions for bank officers (Decree No. 161 of 18 March 1998, "*Regulation containing provisions to define integrity and*

professionalism requirements for company officers of banks and causes for suspension in accordance with Art. 26 TUB"), and for persons that fulfil administration, executive and control functions at SIM [Securities brokerage companies], savings institutions and SICAV [Variable capital investment companies] (Decree No. 468 of 11 November 1998, "*Regulation containing provisions to define integrity and professionalism requirements for persons that fulfil administration, executive and control functions at SIM, savings institutions and SICAV in accordance with Art. 26 of TUB*") – ("Regulations")[2]

Both regulations, in defining the integrity requirements (the lack of which causes automatic loss of the office in accordance with Article 26 TUB and 13 TUB respectively), link, with regard to specific offences, the loss of office only to cases in which there has been a final judgement[3], as do (as already discussed) also the provisions for publicly traded companies (Decree No. 162 of 30 March 2000, applicable, under Art. 147-*quinquies* TUF, also to the directors of publicly traded companies). It is clear that the choice to restrict the situations causing the loss of office to the existence of a "final" judgement (meaning a judgment that can no longer be appealed) was considered to respond to a basic principle of judicial fairness enshrined in the Constitution in the form of the presumption of innocence[4].

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(2) Legal scholars raised doubts concerning the consistency of the regulatory legislation with constitutional principles: MAZZINI, *Requisiti di professionalità e di onorabilità degli esponenti aziendali [Professionalism and integrity requirements of company officers]*, in *Testo Unico delle leggi in materia bancaria e creditizia [Consolidated text of laws regarding banking and lending matters]* edited by Belli, Contento, Patroni Griffi, Porzio, Santoro, Bologna, vol. 1, 2003, p. 394 and following, ibidem p. 397; ZANOTTI – BELLI, *Profili penalistici in tema di requisiti di onorabilità per esponenti e partecipanti al capitale di banche e sim [Criminal law considerations regarding integrity requirements for officers and shareholders of banks and SIM]*, in, *Banca Borsa tit. cred.*, 1999, I, p. 448 and following, ibidem pages 452-453, see below, note 9.

(3) *Art. 5.* (Decree No. 161 of 18 March 1998) *Integrity requirements – 1. The offices, however they may be called, of director, statutory auditor and chief operating officer in banks cannot be occupied by persons who: (…) c) have been convicted with definitive judgement … . Art. 3. (Decree No. 468 of 11 November 1998) Integrity requirements – 1. The offices, however they may be called, of director, statutory auditor and chief operating officer in SIM, SGR and SICAV cannot be occupied by persons who: (…) c) have been convicted with definitive judgement … .*

(4) In this direction, CAVALLI, *Art. 148*, in *Testo Unico della Finanza {Consolidated text of finance]*, Commentary directed by Gian Franco Campobasso, Torino, **, 2002, p. 1208 and following, ibidem p. 1230.

The regulations in question have introduced, for the first time in corporate governance, the institution of "suspension" from office[5] identifying, among the causes of suspension from the office of director, statutory auditor and chief operating officer, also the case of "*conviction with non final judgement …*" to specific offences (Art. 6, Decree No. 161 of 18 March 1998; Art. 4, Decree No. 468 of 11 November 1998).

It has been pointed out that the suspension has the character of a prophylactic measure because it is intended to affect persons "*still protected by the constitutional presumption of innocence*"[6]. The suspension mechanism allows the company to verify whether leaving the person in office is in the company's best interest. In fact, the conviction with a non final judgement does not lead to the automatic loss of office; rather, when it occurs, the company is required to decide whether or not to remove from office the person who is the subject of the non-final judgement[7].

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(5) GIANNELLI, *Autonomia statutaria e sospensione degli amministratori di società per azioni [Autonomy of articles of incorporation and suspension of directors of publicly traded companies],* in *Riv. soc.*, 1997, p. 1186 and following; PORTALE, "*Sospensione delle funzioni" di amministratore di società bancaria e disciplina societaria ["Suspension from functions" of director of banking company and company regulations,* in *Banca, borsa, tit. cred.*, 1994, I, p. 377 and following, FERRO LUZZI, *Sulla "sospensione" di amministratori e sindaci [On the "suspension" of directors and statutory auditors],* in *Riv. soc.*, 1993, p. 1225 and following; SALAFIA, *Sospensione dalla carica di amministratore, sindaco, direttore generale di Banche e SIM [Suspension from the office of director, statutory auditor and chief operating officer of banks, and SIM],* in *Società*, 1998, p. 752 and following; CABRAS, *Sospensione ed autosospensione di amministratori e sindaci nelle società esercenti il credito [Suspension and self-suspension of directors and statutory auditors in lending companies],* in *Banca, borsa, tit. cred.*, 1995, I, p. 685 and following; WEIGMANN, *Commento all'art. 9 legge 5 luglio 1991, n. 197 [Comment on Art. 9 of Law No. 197 of 5 July 1991],* in *Nuove leggi civili*, 1993, p. 1078 and following.

(6) MAZZINI, *op. cit.*, p. 412; DE LILLO, *Requisiti di professionalità, onorabilità e indipendenza degli esponenti aziendali [Professionalism, integrity and independence requirements for company officers],* in *Commentario al Testo Unico delle Leggi in materia bancaria e creditizia [Commentary to the Consolidated Text of the laws regarding banking and lending],* directed by F. Capriglione, Padova, 2012[3], volume I, p. 309 and following, ibidem p. 319.

(7) The following are also indicated among the causes for suspension, in addition to a conviction with non-definitive judgement:*"b) the imposition, upon request by the parties of one of the penalties provided for by Art. 3 paragraph 2* [in Decree No. 161 of 18 March 1998, the reference is to Art. 5 paragraph 2], *with non-definitive judgement;*
c) the temporary application of one of the measures provided by Art. 10, paragraph 3 of Law No. 55 of 19 March 1990, and later amendments and additions; d) the application of a preventive measure of the personal type."

Both regulations specify that: "*the Board of Directors includes the possible revocation of the persons that it has suspended among the agenda items to be dealt with at the first shareholders meeting following the occurrence of one of the causes for suspension….*"

Therefore, the suspension forms the prelude to a revocation where the shareholders' meeting does not deem that the continued stay in office of the person is in the company's best interest. When a suspension occurs, the Board must include the matter in the agenda of the first shareholders' meeting that follows the occurrence of the cause of suspension.

Even the most recent legislation concerning ineligibility (to elected and government offices) and impediments to the conferment of positions in the public administration provides only for cases in which a conviction has been pronounced.

Italian Legislative Decree No. 235 of 31 December 2012, containing "*Provisions regarding ineligibility and prohibition from occupying elective and government positions following definitive convictions for non-culpable offences*"[8] includes, as a cause of ineligibility, "*final conviction*" for specific offences (Art. 1), or, as cause for suspension, "*non-final conviction*" (Articles 8 and 11).

Italian Legislative Decree No. 39 of 8 April 2013, containing "*Provisions regarding the prohibition on conferment and incompatibility of offices in the public administration and in government-controlled private entities*" includes, among the causes for impediment, the issue of a conviction «*including one with non-final judgement*» (Art. 3, paragraph 1).

5.- Invalidity of the clause due to conflict with binding legislation at the constitutional and European Union level

The text of the clause intended for inclusion in the articles of association can be considered invalid for a number of reasons.

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(8) Legislative Decree issued in accordance with Art. 1, paragraph 63, of Law No. 190 of 6 November 2012 containing "*Provisions for the prevention and repression of corruption and illegality in the public administration.*"

First of all, it is appropriate to state in advance that the Civil Code recognizes as one of the autonomous prerogatives of the articles of incorporation the right to "*make the appointment to the office of director subject to the meeting of specific integrity, professional and independence requirements*" (Art. 2387, paragraph 1 of the Civil Code) in addition to those provided by the legislator in Art. 2382 of the Civil Code.

The issue, considering the punitive nature of the regulations on ineligibility and loss of office whose introduction is proposed, is that of the possible constraints to the freedom of the articles of association[9]: in fact the articles of association are subject to the constraints provided by the Civil Code for private transactions, especially to the constraints arising from binding regulations and public policy.

The shareholders can introduce additional criteria for eligibility to company offices "*with the sole constraint of the conflict with public policy and legislation at the constitutional level*[10]." In fact, the articles of association "*can identify independent criteria in this regard, within the limits of public policy legislation*[11]."

Constitutional principles constitute binding legislation[12] or, in any case, are relevant to define the notion of public policy[13].

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(9) On a similar topic, the legal theory doubted the legality of delegating to the regulatory authority the identification of the professionalism and integrity requirements for bank officers. This choice "*completely devolves to ministerial regulation a matter that affects the powers and right to self-determination of individuals.*" MAZZINI, *op. cit.*, p. 396. Also, referring specifically to the integrity requirements, it has been stressed that "*linking integrity to the existence of specific causes, of an indisputably criminal nature, that exclude it reopens the issue (and does not settle it) of whether we are facing a criminal matter, which is certainly covered by absolute reserve*" finally observing that "*even a superficial glance at the existing regulatory legislation makes it immediately clear that we face automatic consequences of judgements of the criminal courts, under the guise of estoppels which limit considerably and in many directions the activities of the convicted person*" ZANOTTI – BELLI, *op. cit.*, pages 452-453.

(10) LANDINI, *Commento sub art. 2387 [Commentary on Art. 2387]*, in *Il nuovo diritto delle società* edited by Maffei Alberti, I, Padova, 2005, p. 715 and following, ibidem p. 718.

(11) SANDULLI, *Commento sub art. 2387 [Commentary on Art. 2387]*, in *La riforma delle società*, Commentary edited by Sandulli e Santoro, Torino, 2003, I, p. 435 and following, ibidem p. 437.

(12) For the binding nature of the provisions contained in the articles of the Constitution, see SACCO, in *Trattato di diritto privato [Treatise of private law]*, Vol. X, *Obbligazioni e Contratti [Obligations and contracts]*, II, edited by Rescigno, Torino, 2002. DE NOVA, «*The law which*

This interpretation also found support in some decisions of the Court of Cassation, which, criticizing the contested sentence that had not "declared the invalidity of the clause of the articles of association" decided that autonomous private entities cannot establish a rule in conflict with the binding provisions in the Constitution[14].

In this perspective, the clause appears to violate some constitutional principles: specifically, the regulation in question is in conflict with the **principle of presumption of innocence (*more correctly* of non culpability) set forth by Art. 27, paragraph 2, of the Constitution**, – if not where it assigns relevance to a "non-final" judgement – certainly with reference to the mechanism that makes the issue of the decree to remand to trial (ordinary and summary) a cause of ineligibility and of loss of office, **without, therefore, establishing responsibility** (paragraphs 2 and 3 of the Clause).

The decisions of the Constitutional Court are very relevant to this question. In fact, the Court declared illegal, by virtue of the combined provisions of Articles 2, 27, and 51 of the Constitution, the "*non eligibility in the regional, provincial, municipal and district elections of the persons who (...) have been committed to trial*" provided by Art. 15, paragraph 1, letter e) of Law 55/1990 and, in this regard, highlighted that the "*provision for ineligibility and ensuing invalidity of the election is a measure that restricts in an essential way the possibility of participating in the democratic process, which the constitution*

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governs this agreement is the law of the Italian Republic»: il contratto alieno [the foreign contract], in *Dir. comm. Intern.*, 2007, p. 3 and following: "*Sacco drew up a broad range of constitutional provisions that protect the autonomy of contracts and of protected values. **And the ordinary case law has had the opportunity to give direct relevance to the constitutional provisions regarding contracts, also through the concept of public policy**, which, already in 1966, Rescigno indicated as the means by which fundamental rights in private relations could be made effective. I am thinking of the decision in which the invalidity of the sale of the machine tool lacking an accident prevention device was pronounced because of conflict with public policy principles "among which must be identified the requirement to protect the health of citizens (Art. 32 of the Constitution) and labour (Art. 35 of the Constitution)" or to the decision in which the invalidity of the clause of the "maximum level of education" was pronounced due to violation of Art. 34, paragraph 3 of the Constitution" (emphasis added).*

(13) RESCIGNO, *In pari causa turpitudinis*, in *Riv. dir. civ.*, 1966, I, p. 1 and following, ibidem p. 33.

(14) In the case in point the matter concerned Art. 36 of the Constitution: see Court of Civil Cassation, labour section, 02.09.1995, No. 9290; in the same direction, Court of Civil Cassation, labour section, 21.11.2012, No 20418.

gives to the citizen. Persons subject to criminal proceedings, while benefiting from the presumption of innocence in accordance with Art. 27 paragraph 2 of the Constitution, are, in the meantime, excluded from the elections: an irreversible effect that in this case can be justified only by a definitive conviction." In view of this, "***the prescribed ineligibility assumes the character of a preventive penalty, in the absence of a definitive conviction and, in the case of simple commitment to trial, even before the prosecution's claims are tested by a trial.***" The Court goes on to say that, therefore, "*the inconsistency and disproportionate nature of an irreversible measure such as non eligibility are evident, on the strength of the conditions that the law attributes physiologically (where they apply) to the effects of just the suspension*[15]."

If one applies the principle affirmed by the Constitutional Court to the case under examination, it is easy to see that the rules provided for in the clause limit, in conflict with the constitutional guarantees, the ability and freedom that the Constitution guarantees to the individual: as in the case in point examined by the Constitutional Court, the rules contained in paragraphs 2 and 3 of the proposed amendment provide that the irreversible punitive effect arises from the mere decree to commit to trial (or by the decree ordering summary proceedings), and therefore in the absence of any established criminal liability. Therefore, the conflict with the presumption of innocence principle makes **the clause invalid**, due to the conflict with binding (constitutional) legislation or with public policy.
In addition to being in conflict with constitutional principles, the clause also appears to be in contrast with the **European Convention on Human Rights (ECHR)**.

The cases of ineligibility and loss of office under examination can be considered similar to criminal penalties based on the criteria established by the European Court of Human Rights[16], both because they are highly

(15) Constitutional Court, 6 May 1996, No. 141.
(16) The European court of Human Rights has identified three criteria to establish whether a penalty is of criminal nature: *(i)* the classification of the offence in the internal legislation of the member state, *(ii)* the nature of the offence, *(iii)* the severity of the penalty (judgement of 9 June 1976, *Engel and other vs. The Netherlands*, paragraphs 82 and 83). The first criterion is non cumulative relative to the others; therefore, a penalty can be considered as being of a criminal law nature even if it is not classified as such by the internal legislation (*ex pluribus*,

punitive measures that involve loss of social standing and raise doubts about the integrity of the persons affected and because they concern the consequences of decisions by the criminal courts that significantly affect the possibilities and freedom of the individual. Therefore, the violation of the principle of presumption of innocence, which is also guaranteed by Art. 6 of the ECHR[17], also becomes relevant.

Another case of conflict with the requirements of the Constitution (specifically with Articles 3 and 24 of the Constitution) can be identified in the part in which the clause of the articles of incorporation provides for the effectiveness of the cause of ineligibility and loss of office also as a result of sentences of imposition of the penalty upon request by the parties issued before the introduction of the clause (paragraph 5).

In fact, the Constitutional Court declared unconstitutional, because it violated Articles 3 and 24 of the Constitution, a temporary provision which, providing for the retroactive implementation of the new legislation, "*radically changed the legislation that the accused faced when weighing up the advisability of plea bargaining,*" on the grounds that "*the element of negotiation characteristic of the plea bargaining instrument (...), requires certainty and stability of the legislative framework that provides the background of the choice made by the accused and prevents later changes to the law that could change for the worse important effects of the agreement concluded with the plea-bargained judgement*[18]." The Constitutional Court stressed the essential negotiating

judgement of 9 October 2003, *Ezeh and Connors vs. United Kingdom*, paragraphs 82-86). On the basis of the criterion of the nature of the offence, legislation considered of "criminal law nature" is that which, addressing a variety of subjects, is characterized by an essentially repressive content and/or by an essentially punitive dimension (judgement of 25 August 1987, *Lutz vs. Germany*, par. 54). Regarding the severity of the penalty, it is necessary to consider the magnitude of the penalty imposed in practice and its repercussions on the subject on whom it is imposed (Judgement of 24 September 1997 *Garyfallou Aebe vs. Greece*, paragraphs 33 and 34).

(17) The presumption of innocence requires that "*the members of the judging body do not start from the preconceived idea that the accused (has) committed the offence for which he is being prosecuted*" (ex multis, judgement of 6 December 1988, *Barberà, Messegué and Jabardo vs. Spain*, par. 77). This presumption is violated each time that the judicial decision concerning an accused reflects the "feeling" that he is guilty, while his guilt has not been legally established in advance.

(18) Constitutional Court, 25 July 2002, No. 394.

aspect of the so-called "plea-bargaining:" the unilateral change for the worse of the framework underlying the agreement and the retroactive application of inhibitory measures that the accused was unable to take into account when waiving his right to a defence would not be consistent with the constitutional principles of Articles 3 and 24 of the Constitution.

Therefore, private autonomy also runs into this insurmountable obstacle when introducing additional integrity requirements for directors. On the other hand, a different solution would also be in conflict with the principles of legality and non-retroactivity provided for under Article 7 of the ECHR ("*nulla poena sine lege*" [no penalty without a pre-existing law]).

6.- Invalidity of the clause (paragraph 3) due to conflict with the binding rules of the company legal structure

There is also another aspect of invalidity with reference to paragraph 3, because of conflict with the binding rules of the company's legal structure.

The clause that the shareholders Treasury and CDP intend to introduce (and which diverges from this point of view from the clause formulated in the Ministerial Directive) provides that directors who receive notification of a decree of commitment to trial during their term of office [19] must immediately communicate this to the Board of Directors, which is charged with verifying whether the decree exists; in addition, the clause provides that "*if so, the director loses office for just cause, without the right to compensation for damages, unless the Board of Directors calls a meeting of the shareholders, within the time limit of ten days as indicated above, to be held within the following sixty days in order to submit to the shareholders' meeting a proposal to retain the director in office, justifying this proposal on the basis that the company has an overriding interest in retaining the director in office.*"

On the other hand, the proposal contained in the Ministerial Directive (see above, section 3), following the integrity requirement regulations for banks

(19) The clause also indicates the case of receiving notification of a decree that "*summarily commits for trial for any of the offences in paragraph 1, letter a), b), c) and d), or of a definitive conviction that establishes the wilful commission of a loss to the state treasury.*"

and SIM officers, requires the Board of Directors, after having received communication that the required event has occurred and having established its existence, to call an *ad hoc* meeting of the shareholders in order to have the shareholders' meeting itself assess whether the company has an overriding interest in retaining the director in office. The director "loses office" only as a result of the negative decision of the shareholders' meeting; more precisely, it should be said that his office is "revoked," because the loss of office is an automatic effect of the occurrence of a situation not subject to assessment at the discretion of the shareholders' meeting[20].

In fact, it must be said that this situation is to be considered, more correctly, equivalent to a case of "suspension," not one of automatic loss of office, which can then lead to a revocation, because it provides that the shareholders' meeting can express itself against the loss of office if there is an overriding company interest in the person affected by the event remaining in office. Therefore, this is not a situation in which the loss of office is an automatic effect of the occurrence of a specific event. On the other hand, as it has already been said, the loss of office does not raise any issue regarding the possibility of compensation for damages for the terminated director; this issue only relates to the case of revocation without just cause.

As already discussed, the text proposed by the shareholders Treasury and CDP leaves it to the Board of Directors to decide whether to refer the question to the shareholders' meeting in order to allow the director to remain in office. Therefore, it would be possible for the Board of Directors to decide not to call the shareholders' meeting, thus causing the automatic loss of office of the director.

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(20) *"The Board of Directors must verify, during the first meeting and, in any case, within ten days after becoming aware of the issue of the orders mentioned in the first sentence, whether one of the situations thereby indicated exists; it must then call the shareholders' meeting, within 15 days, to decide whether the director should remain in office; in this regard, the Board must formulate a proposal supported by reasons, that takes into account the overriding interest of the company in the director staying in office. If the shareholders' meeting does not decide that the director remains in office, the latter automatically loses his office for just cause without right to compensation for damages."*

However, this would clearly subvert the principle of the exclusive competence of the shareholders' meeting on the appointment and termination of the directors. Therefore, even from this point of view, the provision must be considered invalid, because the legislation that regulates the authority of the shareholders' meeting must be considered "*binding because it concerns public policy, as it impacts on a domain of general interest for the society as a whole*[21]."

7.- Conclusions

The clause contains several indisputable characteristics that may render it invalid that have been examined above.

Other criticisms could be added (for example the absolutely typical nature of the legal structures of publicly traded companies and the extravagant reference to the concept of damage to the State treasury); I have preferred to ignore these in order not to burden the discussion unnecessarily.

Milan, 28 March 2014

(Guido Rossi)

(21) GIANNELLI, *op. cit.*, p. 1190, regarding suspension from office. In the same direction, SIRONI, *Requisiti di onorabilità, professionalità e indipendenza [Integrity, professionalism and independence requirements],* in *Commentario alla riforma delle società [Commentary on the reform of companies]* edited by P. Marchetti, L.A. Bianchi, F. Ghezzi, M. Notari, *sub* art. 2387, p. 277 and following, ibidem p. 295, ove: "*the legality of the clause that attributes to the Board of Directors the authority to suspend the director can be certainly excluded.*"

The English text is a translation of the Italian "Parere richiesto da Eni sulla clausola statutaria su requisiti di onorabilità proposta da azionisti MEF e CDP Spa". For any conflict or discrepancies between the two texts the Italian text shall prevail.