

Corporate Governance and Directors' Duties: Italy

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A Q&A guide to corporate governance law in Italy.

The Q&A gives a high level overview of board composition, the comply or explain approach, management rules and authority, directors' duties and liabilities, transactions with directors and conflicts, company meetings, internal controls, accounts and audit, institutional investors and reform proposals.

To compare answers across multiple jurisdictions, visit the *Corporate Governance Country Q&A tool*.

The Q&A is part of the PLC multi-jurisdictional guide to corporate governance law. For a full list of jurisdictional Q&As visit www.practicallaw.com/corgov-mjg

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Corporate entities

1. What are the main forms of corporate entity used in your jurisdiction?

In Italy the most common forms of commercial entity are the:

- ▣ Joint stock company (*società per azioni*) (SpA). An SpA's corporate capital is divided into shares. This is the form of company used by listed companies. An SpA has a minimum corporate capital of EUR120,000.
- ▣ Limited liability company (*società a responsabilità limitata*) (Srl). An Srl's capital is divided into quotas (which represent a portion of the corporate capital). The Srl is mostly used for small and medium-sized businesses and for start-ups. An Srl has a minimum corporate capital of EUR10,000.

This article focuses on the SpA and the Srl.

Legal framework

2. What is the regulatory framework for corporate governance and directors' duties?

Non-listed companies

The regulatory framework is set out in the:

- ▣ Italian Civil Code.
- ▣ Company's articles of incorporation and bye-laws.

Listed companies

The regulatory framework is set out in the:

- ▣ Italian Civil Code.
- ▣ Legislative Decree 58/1998 (*Testo Unico della Finanza*) (TUF).
- ▣ Rulings (*Regolamenti*) issued by the National Commission for Companies and the Stock Exchange (*Commissione Nazionale per le Società e la Borsa*) (CONSOB). These are available on CONSOB's

website (www.consob.it/main/index.html).

- Code of Self Regulation, a non-mandatory code issued by Borsa Italiana SpA (the company that manages the Italian stock exchange), available on its website (www.borsaitaliana.it/borsaitaliana/regolamenti/corporategovernance/corporategovernance.en.htm), which listed companies may voluntarily adopt (see Question 3).

3. Has your jurisdiction adopted a corporate governance code?

Italian listed companies can voluntarily adopt the Code of Self Regulation, the latest version of which was issued on December 2011 (see Question 2). This code mainly regulates the following:

- Corporate governance.
- Composition of the board of directors.
- Composition of the panel of the statutory auditors and external auditors.
- Related-party transactions.
- Internal committees.
- Relationship with the shareholders.

If a listed company adopts the Code of Self Regulation, that company will be bound to comply with its provisions. The Code of Self Regulation is based on the principle of "comply or explain". The directors must declare in the directors' report attached to the financial statements what activities have been carried out to comply with the Code of Self Regulation and statutory auditors must verify compliance.

No penalties are provided for non-compliance with the Code of Self Regulation.

Many listed companies have adopted the Code of Self Regulation. Non-listed companies do not usually adopt the Code. Where they do, they must communicate the adoption of the Code of Self Regulation (or other relevant code of conduct).

Board composition and remuneration of directors

4. What is the management/board structure of a company?

Structure

SpA. An SpA's management body can be structured in one of the following ways:

- **Traditional system (*sistema tradizionale*).** The shareholders' meeting will appoint:

- a management body (sole director or board of directors);
- a panel of statutory auditors, which is responsible for ensuring that the company is managed in compliance with the law, company bye-laws and standards of proper management (*see Question 30*).

If certain conditions are met, the panel of statutory auditors may also be required to carry out accounting control activities. Otherwise, the shareholders' meeting must also appoint an external auditing body (*Article 2409-bis, Italian Civil Code*).

- **Dualistic system (*sistema dualistico*)**. This is a two-tier structure ruled by Articles 2409-*octies* and following of the Italian Civil Code. The shareholders' meeting appoints a supervisory board (*consiglio di sorveglianza*), which is responsible for ensuring that the company is managed in compliance with the law, company bye-laws and standards of proper management. The supervisory body must appoint the management board (*Consiglio di Gestione*), which is responsible for the company's day-by-day management (*Article 2409-terdecies, Italian Civil Code*). The shareholders' meeting must also appoint an external auditing body.
- **Monistic system (*sistema monistico*)**. This is a one-tier structure ruled by Articles 2409-*sexiesdecies* and following of the Italian Civil Code. The shareholders' meeting appoints a board of directors (*Consiglio di Amministrazione*), which will manage the company. The board of directors will appoint a controlling body (*Comitato per il Controllo sulla Gestione*) from among its members. The shareholders' meeting must also appoint an external auditing body.

If the company's bye-laws do not specify the system, the traditional system applies.

Srl. An Srl's management body can be structured in one of the following ways:

- Sole director.
- Two or more directors acting jointly or severally to manage the company, but not forming a board of directors.
- A board of directors.

If required by the company's bye-laws or if the company meets the following specific requirements, the shareholders' meeting must also appoint a controlling body (*see Question 30*):

- The corporate capital of the Srl is at least equal to the minimum corporate capital required for an SpA (*see Question 1*).
- The Srl must draft and approve consolidated financial statements.
- The Srl controls a company, which must appoint a controlling body.
- The Srl has gone beyond two of the economic requirements provided by Article 2435-*bis* of the Italian

Civil Code for two consecutive years.

Listed companies. Listed companies must be managed by a board of directors. Listed companies can choose between the traditional, dualistic or monistic system (*see above*). Directors are appointed by the shareholders' meeting based on the voting list mechanism (a system under which shareholders representing a certain percentage of the shares of the company are entitled to file a list of directors to be appointed). Listed companies must maintain a gender balance on the board (*see Question 5, Gender*).

Management

Directors of an Srl and an SpA have the duty of managing the company and are responsible for it.

In an SpA, the company's bye-laws can provide that the shareholders' meeting must authorise certain management decisions (*Article 2364, Italian Civil Code*).

In an Srl, one or more directors can request that the quotaholders' meeting resolve specific issues that are usually resolved by the management body (*Article 2479, Italian Civil Code*).

In both companies, managing powers can be granted to individuals who are not directors of the company (*direttori generali*).

Board members

For all companies, the board of directors can be composed of individuals or legal entities. The company's shareholders or quotaholders can also be directors of the company.

Employees' representation

Generally speaking, employees are not entitled to board representation. An SpA's bye-laws can provide that the company can issue shares to employees that can give them a right to appoint a member of the board of directors (*Article 2349, Italian Civil Code*).

Number of directors or members

SpA. The number of directors can vary, depending on the management structure adopted by the company:

- **Traditional system.** The shareholders' meeting can freely determine the number of directors, if the number is not provided in the company's bye-laws.
- **Dualistic system.** There must be at least two members of the management board. However, the shareholders' meeting can freely determine the maximum number of directors. The supervisory board must be composed of at least three members.
- **Monistic system.** The number of members of the board of directors is not fixed and it can be freely determined by the shareholders' meeting. The supervisory board of publicly traded companies must be composed of at least three members.

For appointment of the panel of statutory auditors, see *Question 30*.

Srl. The quotaholders' meeting can freely determine the number of directors, if the number is not provided in the company's bye-laws.

Listed companies. The same rules as for the SpA apply. In addition, specific rules also apply concerning the appointment of independent directors and the directors appointed by the minority shareholders (see *Question 6, Board composition*).

5. Are there any general restrictions or requirements on the identity of directors?

Age

Directors must be 18 years old, unless the company's bye-laws provide otherwise.

Nationality

There are no nationality restrictions or requirements that directors must meet. However, foreign persons can only be appointed as directors provided that Italian citizens are allowed to act as directors (or similar offices) in the country of those foreign persons, under the principle of reciprocity (*Article 16, preliminary provisions, Italian Civil Code*).

Gender

Listed companies must maintain a gender balance on the board: the less represented gender must be represented by at least one-third of the directors (*Article 147-ter, TUF*).

6. Are non-executive, supervisory or independent directors recognised or required?

Recognition

Italian law recognises non-executive and independent directors.

Board composition

Non-listed companies are not required to maintain independent directors.

The rules applying to listed companies depend on the system adopted:

- **Traditional system.** A board of directors must include at least one director appointed from a list submitted by the minority shareholders (*Article 147-ter, TUF*). If the board of directors is up to seven members, at least one must be independent (from the company, from the majority shareholder and from other directors) and meet the same independence requirements required for statutory auditors (see *Question 31*). If the board of directors is composed of eight or more members, at least two directors must be independent.

- **Monistic system.** The directors must include at least one director appointed from a list submitted by the minority shareholders (*Article 147-ter, TUF*). These directors must be independent and meet the same independence requirements required for statutory auditors.
- **Two-tier dualistic system.** If the board of directors is composed by five or more members, at least one must be independent and meet the same independence requirements required for statutory auditors (*Article 147-quater, TUF*).

Independence

An SpA's bye-laws can require that a director comply with specific requirements of integrity, professionalism and independence (*Article 2387, Italian Civil Code*). Similar requirements may exist under self regulatory codes issued by professional associations, or by the companies who manage regulated markets.

Generally, for all companies, directors, like statutory auditors, are considered independent if they are not:

- Declared bankrupt or disqualified from public offices or from the direction of enterprises (even temporarily).
- They are parents or relatives (up to the fourth degree of kinship) of the directors of the company, or the companies controlled by, controlling or under common control with the company (associated companies).
- They are part of an employment agreement or have other relationships of an economic or professional nature that limit their independence with the relevant company or associated companies.

For listed companies that have adopted the Self Regulation Code, a director is independent if he or she is not:

- Directly or indirectly:
 - in control over the issuer;
 - able to exercise a dominant influence over the issuer; or
 - party to a shareholders' agreement through which one or more persons can exercise control or considerable influence over the issuer.
- Currently (or in the preceding three fiscal years) a representative of:
 - the issuer;
 - a subsidiary of the issuer with strategic relevance;
 - a company under common control with, controlling or exercising a considerable influence over the issuer (including jointly with others through a shareholders' agreement).

- Currently (or in the preceding fiscal year) directly or indirectly in a significant commercial, financial or professional relationship:
 - with the issuer, one of its subsidiaries, or any of its significant representatives;
 - with a subject who, jointly with others through a shareholders' agreement, controls the issuer; or
 - in the case of a company or entity, with the relevant significant representatives.

This also applies if the director is, or has been within the preceding three fiscal years, an employee of one or more of the above.

- Receiving (or has received in the preceding three fiscal years) from the issuer, or a subsidiary or holding company of the issuer, significant additional remuneration compared to the basic remuneration of non-executive directors of the issuer. This can include participation in incentive plans linked to the company's performance and share option plans.
- A director of the issuer for more than nine years in the last 12 years.
- An executive director in another company in which an executive director of the issuer holds the office of director.
- A shareholder, quotaholder or director of a legal entity belonging to the same group as the company appointed for the accounting audit of the issuer.
- A close relative of a person who is in any of the positions listed in the above bullet points.

Duties and liabilities

Independent and non-executive directors are subject to same duties and liabilities as the executive directors (see *Question 16*).

7. Are the roles of individual board members restricted?

There are no legal restrictions on the number of roles that an individual board member can hold.

Under the Code of Self Regulation, if the chairman of the board of directors is also the chief executive officer (CEO), it is recommended that a lead independent director be appointed as a counterbalance.

8. How are directors appointed and removed? Is shareholder approval required?

Appointment of directors

SnA The first director or the first members of the board of directors or management body (depending on the

SpA. The first director or the first members of the board of directors or management body (depending on the type of system chosen) are appointed by the shareholders in the incorporation deed. Any subsequent directors are appointed as follow:

- **Traditional system.** An ordinary shareholders' meeting appoints the sole director or the members of the board of directors.
- **Dualistic system.** The supervisory body appoints the members of the management board.
- **Monistic system.** An ordinary shareholders' meeting appoints the members of the board of directors.

In case of death, resignation or termination due to ineligibility of the director, the other directors will appoint a new director until the next shareholders' meeting, provided that the majority of the directors remain in office. This appointment must be approved by the panel of statutory auditors (*section 2386, Italian Civil Code*).

Srl. The directors are appointed by the:

- Quotaholders at the execution of the incorporation deed.
- For subsequent appointments, at the quotaholders' meeting.

Listed companies. Certain directors must meet independence requirements, and be appointed from a list submitted by the minority shareholders, depending on the system chosen (*see Question 6, Board composition*). The same rules apply to the appointment of other directors as for SpAs (*see above*).

Removal of directors

For both the SpA and Srl, the directors can be dismissed by a resolution of the ordinary shareholders' meeting at any time (or by resolution of the supervisory body in the dualistic system). However, a dismissed director is entitled to claim damages if the shareholders' meeting or supervisory body has dismissed him without just cause (*giusta causa*).

9. Are there any restrictions on a director's term of appointment?

SpA

The directors can be appointed for a maximum term of three years. Their term of office will expire on the date of the shareholders' meeting that resolves whether to approve the financial statements relating to the last fiscal year of their office. Directors can also be re-appointed at this date.

Srl

The directors can be appointed for an indefinite period of time until they are dismissed or they resign.

Listed companies

CONSOB provides regulations setting out specific restrictions on terms of appointment for particular officers of directors.

10. Do directors have to be employees of the company? Can shareholders inspect directors' service contracts?

Directors employed by the company

Directors can be, but do not have to be, employees of the company.

Shareholders' inspection

SpA. Shareholders have the right to inspect corporate books and make copies at their own expense (*Article 2422, Italian Civil Code*).

Srl. Quotaholders who do not manage the company have the right to (*Article 2476, Italian Civil Code*):

- Receive information on the company's business.
- Consult, through their own experts, the company's books and documents relating to the company's management.

11. Are directors allowed or required to own shares in the company?

Directors are not required, but are permitted, to own shares in the company. The remuneration to directors can consist, wholly or partially, of:

- Participations in company profits.
- The attribution of the right to subscribe, at a pre-determined price, shares that the company will issue in the future. For this to occur:
 - the company bye-laws must expressly provide for this possibility;
 - the shares must be allocated to the directors through a special shareholders' resolution at a shareholders' meeting.

Directors of listed companies must notify CONSOB and the public with the details of their transactions in the shares of the relevant issuer and other financial instruments linked to those shares (*Article 114, TUF*). This rule extends to the director's close relatives, including the director's:

- Spouse, if not legally separated.
- Dependent children.

- Dependent children of the spouse.
- Any of the spouse's relatives who live with the director.

12. How is directors' remuneration determined? Is its disclosure necessary? Is shareholder approval required?

Determination of directors' remuneration

SpA and Srl. Generally, the shareholders' meeting determines the remuneration of directors, either through the same resolution under which they are appointed, or through a separate resolution.

The board of directors determines the remuneration of directors that have special offices under the company's bye-laws, subject to the opinion of the panel of statutory auditors.

The bye-laws can provide that the shareholders' meeting can determine the aggregate compensation for the remuneration of all company directors, including those vested with special offices.

Listed companies. Any remuneration based on financial instruments whose details are not yet published must be (*Article 114-bis, TUF*):

- Approved by the shareholders' meeting.
- Made available to the public:
 - at the company's registered office;
 - on the company's website.
- Filed with CONSOB.

The board of directors of listed companies can appoint an internal committee for the remuneration of the directors.

Disclosure

SpA and Srl. The directors' remuneration must be included in the company's financial statements.

Listed company. The company must publish an annual report on the company's policy regarding directors' remuneration (*Article 123-ter, TUF*).

Shareholder approval

See above, *Determination of directors' remuneration*.

Management rules and authority

13. How is a company's internal management regulated? For example, what is the length of notice and quorum for board meetings, and the voting requirements to pass resolutions at them?

The chairman of the board of directors is entitled to call the board of directors' meeting, unless the company's bye-laws state otherwise.

In order for the meeting to be duly held, the majority of the members of the board of directors or management body must attend the meeting. Board resolutions require a simple majority of the directors attending the meeting.

The company's bye-laws can set out:

- Different quorum requirements.
- A possibility of attending board meetings by teleconference.
- Other rules and notice requirements for the calling of board meetings.

14. Can directors exercise all the powers of the company or are some powers reserved to the supervisory board (if any) or a general meeting? Can the powers of directors be restricted and are such restrictions enforceable against third parties?

Directors' powers

SpA. In the traditional system, the sole director or the board of directors can exercise all the powers of management of the company. The board of directors can delegate specific functions and grant the relevant powers to a managing body or to a particular director.

However, the board of directors cannot delegate certain specific functions, such as:

- The approval of the annual financial statements.
- An increase in corporate capital.
- The drafting of a merger plan.

In relation to representing the company in relation to third parties, the company's bye-laws or resolution of appointment can provide that a director has the general power to act in the name and on behalf of the company (*section 2384, Italian Civil Code*). This representation power is usually granted to the chairman of the board of directors or the managing director(s).

In the dualistic system, the management body exercises all the powers of management of the company. However, the supervisory body must approve:

- The annual financial statements.
- The strategic and industrial plan or operations prepared for the management body.

Srl. Similar rules to the traditional system in SpA apply (*see above*).

All the directors may act in the name and on behalf of the company (*section 2475, Italian Civil Code*).

Restrictions

For all companies, the powers of the directors can be restricted by the bye-laws or by a proper resolution of the relevant body. However, those restrictions are not enforceable against third parties, unless those parties have intentionally caused damage to the company.

15. Can the board delegate responsibility for specific issues to individual directors or a committee of directors? Is the board required to delegate some responsibilities, for example for audit, appointment or directors' remuneration?

For all companies, the bye-laws or shareholders' meeting can expressly permit the board of directors to delegate its functions to an executive committee formed by some of its members, or to one or more of its members (*Article 2381, Italian Civil Code*).

However, the board of directors cannot delegate the following issues, among others:

- The issuance of convertible bonds.
- The drafting of financial statements.
- Resolutions to increase or decrease the company's corporate capital.
- Drafting of merger plans.

The board of directors is always entitled to cease delegating responsibility for functions, if necessary.

Duties and liabilities of directors

16. What is the scope of a director's duties and personal liability to the company, shareholders and third parties?

General duties

Directors must act in the best interest of the managed company and in compliance with the obligations set out by applicable law and the company's bye-laws.

The Civil Code sets out certain specific obligations (for example, to draft the annual financial statements, to enter into transactions, to regularly keep the corporate books, and so on). In addition, there are general

duties binding on each director, such as the (*Italian Civil Code*):

- Duty of care.
- Duty to inform the other directors.
- Duty to act advisedly (for example, with the appropriate skill and professionalism).
- Duty to monitor the other directors.

The extent of these duties and responsibilities and the standard of care required for each director depend on the director's office and specific expertise.

Directors may have civil liability towards:

- The company, if they have caused damage to that company due to the breach of the law, the company bye-laws, or the general duties.
- The company's creditors, if the directors have breached the specific rules regarding the preservation of the corporate assets, and those assets are insufficient to pay the creditors off.
- Each shareholder and each third party, if the third party has suffered direct damage from an act performed with fraud or gross negligence by the directors.

In relation to criminal liability, in addition to the general rules applying to everybody, specific rules of criminal corporate law apply to the directors. These rules mainly concern the:

- Accounting documents.
- Shareholders' contribution.
- Distribution of profits and reserves.
- Corporate assets.

Generally, criminal liability arises only if the fraudulent act is performed with the intention of gaining a profit and if it causes actual damage to the company.

Theft and fraud

In addition to the general criminal laws regarding theft and fraud that are applicable to all, the directors are subject to certain specific provisions concerning crimes committed when performing their office.

These crimes are similar to theft and fraud as they refer to entering into a deception to gain a monetary profit and to cause damages to the company's property. They can be committed by the company's directors, main officers, auditors and receivers (in the case of a winding-up).

The most common crimes of this kind include:

- False or omitted information concerning the economic and financial situation of the company in the financial statements, the reports and other accounting documents (*false comunicazioni sociali*).
- Fraudulent reduction of the corporate capital and fraudulent merger or spin-off in breach of the provisions protecting the company's creditors (*operazioni in pregiudizio dei creditori*).
- Donation or sale of the company's assets causing economic damage to the company (*infedeltà patrimoniale*).
- Performance or omission of an act in breach of the obligations concerning their office against a personal profit (*infedeltà a seguito di dazione o promessa di utilità*).

Securities law

Directors are bound by several duties concerning the issue and sale of securities of public listed companies in stock exchange markets (*Articles 172, 173, 184 and 185, TUF*). The breach of those duties may trigger criminal liability and resulting criminal sanctions.

The most common crimes triggering directors' liability in securities law are:

- Unlawful purchase of shares of the company or of the controlled companies in breach of the rules set out for this kind of purchase.
- Failure to sell shares in the case of:
 - a mandatory public offer;
 - interests mutually owned.
- Disclosure of false information in the prospectus required for the public offer.
- Abuse of privileged information regarding securities.

Insolvency law

The general duties also apply where an insolvency proceeding is opened (*Italian Civil Code*) (*see above, General duties*).

Directors have criminal liability if they commit offences during either (*Bankruptcy Law (Royal Decree 267/1942, as amended)*):

- An insolvency proceeding.

- The period before a company is declared insolvent, under certain specific circumstances.

The main insolvency crimes include:

- Bankruptcy (*bancarotta semplice*).
- Fraudulent bankruptcy (*bancarotta fraudolenta*).
- Illegal applications for loans (*ricorso abusivo al credito*).
- Declaration of non-existing creditors (*denuncia di creditori inesistenti*).

Health and safety

Among other obligations, the director as employer must guarantee compliance with rules concerning health and safety in the workplace to assure that the employees have the best working conditions in relation to health and safety (*Health and Safety Code (Legislative Decree 81/2008 and relevant amendments)*).

These obligations bind all directors, when the members of the board of directors have the same powers and a director is not specifically appointed with the role of employer.

Breach of the provisions concerning health and safety in the workplace trigger criminal liability for the directors as employer.

Environment

The Italian Environment Law (*Legislative Decree 152/2006 and relevant amendments*) sets out the rules Italian companies must comply with to protect the environment against potential damage.

Where directors do not comply with the required formalities and rules, administrative monetary fines can apply and the directors may be deemed liable for the economic damages suffered by the company.

Further, the breach of provisions concerning the environment can trigger criminal liability for the directors under certain specific circumstances.

Anti-trust

The Italian Anti-trust Law (*Law 287/1990 and relevant amendments*) sets out the rules Italian companies must comply with when entering into transactions that may have a negative impact on fair competition, such as acquisitions, joint ventures, and so on, including:

- Prohibitions of certain transactions.
- Requirements for communications with the Competition Authority (*Autorità Garante della Concorrenza e del Mercato*).

- Other requirements to be carried out by companies that enter into certain transactions under certain conditions.

Where the company does not comply with the rules or the Competition Authority's decisions, administrative monetary fines may apply and the directors may be deemed liable for the economic damage that the company suffers.

Cyber-crime

There are criminal sanctions that apply to anyone committing cyber-crimes, including (*Italian Criminal Code*):

- Illegal access to a computer or internet system.
- Illegal possession and circulation of access codes to computer or internet systems.
- Illegal tapping, blocking and interruption of computer or internet communications.
- Damage to computer information, data and programs.
- Damage to computer or internet systems.

Where company directors commit crimes, in addition to the criminal liability of the directors, the company has an administrative liability to pay a monetary fine (*Legislative Decree 231/2001*).

Other

Not applicable.

17. Can a director's liability be restricted or limited? Is it possible for the company to indemnify a director against liabilities?

Generally, the directors' civil liability cannot be restricted or limited. All directors are jointly liable if they have not done their best to prevent the performance of a damaging action or to eliminate or mitigate the damaging consequences of such an action.

However, directors can avoid civil liability if they have both:

- Acted without negligence.
- Noted in the relevant corporate document their disagreement concerning a damaging action, while informing the chairman of the panel of statutory auditors about their dissent.

Whether directors can be indemnified by the company depends on the kind of civil liability incurred. For example, the company can indemnify the directors against civil liability towards third parties on condition that the directors have not acted with fraud or gross negligence. However, the company cannot indemnify the directors from liabilities incurred concerning the company itself.

Criminal liability cannot be restricted or limited for any reason under Italian law.

18. Can a director obtain insurance against personal liability? If so, can the company pay the insurance premium?

The directors can obtain insurance against their civil liability, except for liability deriving from acts carried out with fraud or gross negligence.

It is quite common that the company takes out the insurance policy in favour of its directors and pays the relevant price.

The insurance policy cannot cover the directors' criminal liability under Italian law.

19. Can a third party (such as a parent company or controlling shareholder) be liable as a de facto director (even though such person has not been formally appointed as a director)?

Under Italian law, a de facto director is a person who has not been appointed as director by the competent corporate body, but performs management acts in the name and on behalf of the company. This may happen, for example, when the controlling shareholder exceeds his role within the shareholders' meeting and acts as a director.

In those cases, the general duties and rules concerning directors' liability apply to the de facto director (*see Questions 15 to 17*).

In relation to a parent company, the Italian Civil Code sets out specific rules and liabilities applying to legal entities that exercise direction and co-ordination (*direzione e coordinamento*) towards other companies. In particular, those legal entities are liable when they act in their own interest (or in the interest of other third parties) in breach of the principles of a fair management of the companies subject to their direction and co-ordination. Specifically, those entities are liable towards:

- The shareholders of the controlled companies, for the damages caused to the value of their shares.
- Creditors, for the damages caused to the controlled companies' assets.

Therefore, all the resolutions passed by the controlled companies must specify the reasons and the interests that had an impact on the decision. However, no liability arises when:

- There is no damage, taking into account the overall outcome of the activity of direction and co-ordination.
- The damage has been completely eliminated by a specific action carried out for this purpose.

CONSOB sets out specific regulations concerning related-party transactions.

Transactions with directors and conflicts

20. Are there general rules relating to conflicts of interest between a director and the company?

Directors are bound by fiduciary duties towards the company, as they act in its name and on its behalf. Therefore, directors must act in the best interest of the company.

The Italian Civil Code sets out some rules about directors' conflicts of interest. Under those rules, directors with a potential interest in a company's transaction, on their own behalf or on behalf of a third party, must:

- Disclose this interest to the other directors and the auditors.
- Specify the nature, terms, source and value of this interest.

A potential conflict of interest does not prevent the director with this interest from voting in favour of the transaction, but it does require the entire board of directors to specify the reasons for the transaction and the opportunity that entering the transaction will grant the company.

If the director with the conflict of interest is a managing director, that director must not carry out the transaction and must involve the whole board of directors in the decision.

Directors with a conflict that act in breach of these rules are liable towards the company for the damages:

- Deriving from their action or omission.
- Arising from the use of company information or business opportunities on their behalf or on behalf of third parties.

21. Are there restrictions on particular transactions between a company and its directors?

The main restrictions on transactions between a company and its directors concern transactions that give rise to conflicts of interest, and which require the directors to comply with specific disclosure requirements (see *Question 20*).

There are specific restrictions on the purchase by the company of goods and credits from, among others, the directors, where the (*Italian Civil Code*):

- Consideration for the purchase is equal to or higher than 10% of the company's corporate capital.
- The purchase occurs during the first two years starting from the registration of the company at the register of enterprises.

This purchase must be authorised by the shareholders' meeting and needs a sworn report from a court-appointed expert.

Where these rules are breached, the directors are liable for damages caused to the company, shareholders and third parties.

CONSOB sets out specific regulations concerning related-party transactions. Directors of listed companies are deemed to be related parties.

22. Are there restrictions on the purchase or sale by a director of the shares and other securities of the company he is a director of?

Unlisted companies

There are no restrictions on the purchase or sale by directors of shares and other securities of unlisted companies. In practice, it is common for a company to provide share option plans for its directors.

Listed companies

Criminal liability may arise for directors who have purchased or sold securities while in possession of certain unpublished, confidential and sensitive information.

Share option plans for listed companies must be approved by a shareholders' meeting and disclosed to the public (*Article 114-bis, TUF*).

Disclosure of information

23. Do directors have to disclose information about the company to shareholders, the public or regulatory bodies?

For both the SpA and Srl, the directors are subject to several disclosure duties, which also depend on the business carried out by the company (for example, the competent register of enterprises, tax authority, municipality(ies), anti-trust authority, and so on).

Article 114 of TUF provides a list of all information concerning listed companies that must be filed with the public and with CONSOB. Among others, the directors of listed companies must disclose to CONSOB their transactions in the company's shares or related financial instruments.

Company meetings

24. Does a company have to hold an annual shareholders' meeting? If so, when? What issues must be discussed and approved?

The same requirements apply to both the SpA and Srl, and are set out in Article 2364 and 2478-*bis* of the Italian Civil Code, respectively. Generally, the shareholders' meeting must be called at least once a year, within the date fixed by the bye-laws, if any, or within 120 days from the end of the financial year.

The annual shareholders' meeting must resolve on the following issues:

- Approval of the financial statements.

- Allocation of profit and loss.

The bye-laws can provide for a longer time limit, which must not exceed 180 days from the end of the financial year, where:

- The company must draft the financial statements in a consolidated form.
- There are special needs related to the structure and to the corporate purpose of the company.

25. Can shareholders call a meeting or propose a specific resolution for a meeting? If so, what level of shareholding is required to do this?

SpA

The SpA's directors or the management board must call a shareholders' meeting without delay when requested by 10% of the company's corporate capital or a lower percentage set out in the company's bye-laws (*Article 2367, Italian Civil Code*).

Calling a meeting on a shareholder's request is not permitted on issues that must be:

- Proposed by the directors.
- Dealt with on the basis of a project or a report drafted by the directors.

Srl

At the request of one-third or more of the company's corporate capital, resolutions must be put before a quotaholders' meeting.

Listed companies

Shareholders of listed companies that represent at least one-fortieth of the corporate capital can ask for an item to be included in the agenda of the shareholders' meeting (*Article No. 126-bis, TUF*). In addition, before the shareholders' meeting the shareholders can ask for clarifications on an agenda item.

Minority shareholder action

26. What action, if any, can a minority shareholder take if it believes the company is being mismanaged and what level of shareholding is required to do this?

SpA

Minority shareholders representing at least 20% of the corporate capital (or a different percentage set out in the company's bye-laws), but not higher than one-third of the corporate capital, can bring an action on behalf of the company against the director(s) (*section 2393-bis, Italian Civil Code*). Any damages that the court awards will be paid to the company and not to the shareholders that have brought the action.

In addition, where there are grounds for suspicion of serious irregularities from the directors in managing the company that can cause damage to the company or its controlled company, shareholders representing at least 10% of the corporate capital can report this irregularity to the court (*section 2409, Italian Civil Code*). The court has discretion to take several actions to resolve those irregularities, including:

- Dismissing the director.
- Appointing an interim director to temporarily manage the company.

Each shareholder, regardless of shareholding, can also:

- Claim damages against the director(s), where that shareholder has been directly damaged by the directors' negligence or wilful conduct.
- Report any irregularities in the management of the company to the panel of statutory auditors. The panel of statutory auditors must then immediately investigate these irregularities and report the outcomes of the investigation and possible solution to the shareholders' meeting.

In the case of listed companies, shareholders must hold at least 5% of the corporate capital to bring an action under *section 2393-bis*.

Srl

Where damage has been caused to the company, each quotaholder can (*section 2476, Italian Civil Code*):

- Bring an action against the director(s).
- In case of serious events of mismanagement of the company, claim before the court that the relevant director(s) be dismissed.

Internal controls, accounts and audit

27. Are there any formal requirements or guidelines relating to the internal control of business risks?

The statutory auditors have the role of monitoring the directors' activity and ensuring that the:

- Management of the company is carried out in compliance with the applicable law, bye-laws and standards of good management.

- Company's structure, governance and accounting are adequate to comply with the law.

In performing these duties, the statutory auditors are entitled to:

- Request information from the directors concerning the management of the company.
- Call a general meeting to discuss items on which a resolution is urgently necessary.
- Report to the local courts any suspicion of unlawful operations carried out by the directors in the management of the company.

28. What are the responsibilities and potential liabilities of directors in relation to the company's accounts?

The company's directors must draft the yearly financial statements with clarity in order to represent, in a true and correct manner, the company's assets, liabilities, and financial and economic situation.

Where the directors breach these duties, they may be held liable in relation to the company, the share or quotaholders, and third parties. If the yearly financial statements are inaccurate, the directors may also face criminal liability.

29. Do a company's accounts have to be audited?

SpA

The financial statements may be subject to accounting control by an auditor or by an auditing company registered in the register created by the Ministry of Justice.

A corporation controlling other enterprises must draft consolidated financial statements if (taking into account also the controlled enterprises) the following thresholds are exceeded for two consecutive fiscal years (*Legislative Decree no. 127 of 9 April 1991*):

- Total assets equal to EUR17.5 million.
- Business proceeds equal to EUR35 million.
- Average personnel employed equal to 250 individuals.

However, where the SpA is not required to draft consolidated financial statements, the bye-laws may provide that the accounting control is carried out by the panel of the statutory auditors. In that case, the panel of the statutory auditors must consist of auditors enrolled in the proper register kept by the Ministry of Justice.

Srl

The appointment of a sole auditor is mandatory (unless the company's bye-laws opt for a panel of statutory auditors) where:

auditors) where:

- The company's corporate capital is at least EUR120,000 (the minimum corporate capital required for SpAs (see *Question 1*)).
- For two consecutive fiscal years the company has exceeded two of the three limits in Article 2435-*bis* of the Italian Civil Code:
 - business proceeds equal to EUR8.8 million;
 - total assets equal to EUR4.4 million;
 - average number of employees during each fiscal year equal to 50 individuals.
- The company must file consolidated financial statements, or controls a company that is subject to an external auditing requirement.

30. How are the company's auditors appointed? Is there a limit on the length of their appointment?

SpA

The company's internal and external auditors are appointed by the shareholders' general meeting. The panel of statutory auditors consists either of three or five regular members. Two alternate auditors, who can replace an auditor who ceases to hold office, must also be appointed.

At least one of the regular and one of the alternate auditors must be chosen from external auditors listed in the register of external auditors kept by the Ministry of Justice. The other auditors, if not listed in the register of external auditors, must be elected from the auditors listed in the registers of professional orders authorised by the Ministry of Justice, such as the accountants' professional order, or from legal and economic professors (such as a University academic).

Srl

The company's internal and external auditors are appointed by the quotaholders' general meeting.

Currently, a sole auditor can be appointed, and an alternate auditor is not necessary. The same rules concerning the identity of the auditor apply as for SpAs (see *above, SpA*).

Listed company

The rules depend on the system adopted by the listed company:

- **Traditional system.** At least one-third of the members of the panel of statutory auditors must be appointed from a list of auditors provided by the minority shareholders (*Article 148, TUF*). The chairman of the panel of the statutory auditors must be chosen from those auditors appointed by the minority

shareholders. Auditors must be independent (see *Question 6*).

- **One-tier monistic system.** At least one-third of the members of the panel of the statutory auditors must be appointed from the minority shareholders' list (see *above*). The chairman of the panel of the statutory auditors must be chosen from those auditors appointed by the minority shareholders (*Article 147-ter, TUF*). Auditors must be independent.
- **Two-tier dualistic system.** There are no rules regarding appointment of auditors from the minority shareholders. Auditors must be independent.

31. Are there restrictions on who can be the company's auditors?

The following persons cannot be appointed as auditors:

- Those prohibited from acting, bankrupt persons and those who have been sentenced to a penalty involving a prohibition (even a temporary prohibition) from public office or from exercising managerial functions.
- Parents and relatives of directors of the company or of controlling companies, companies subject to the company's control or under common control (associated companies).
- Individuals who are related to the company or associated companies by an:
 - employment relationship;
 - consultancy relationship on a regular basis;
 - other economic relationship that could prejudice their independence.

For other rules regarding appointment of auditors, see *Question 30*.

32. Are there restrictions on non-audit work that auditors can do for the company that they audit accounts for?

To maintain independence, auditors cannot provide consultancy services on a permanent basis to the company, its subsidiaries or to a parent company.

33. What is the potential liability of auditors to the company, its shareholders and third parties if the audited accounts are inaccurate? Can their liability be limited or excluded?

Statutory auditors must comply with the professionalism and diligence required by the nature of their office and are responsible for the accuracy and truth of their statements. In particular, if the panel of statutory auditors is required to monitor the company's accounting, it must verify the adequacy of the resources the company has made available for accounting and observe the rules for external auditors. Failure to act in

compliance with this principle may result in the auditors incurring civil or criminal liability.

Statutory auditors are jointly and severally liable for their responsibilities to the directors of the company and each other, and personally liable in their responsibilities to the company and to creditors.

Auditors' liability cannot be limited or excluded.

Corporate social responsibility

34. Is it common for companies to report on social, environmental and ethical issues? Please highlight, where relevant, any legal requirements or non-binding guidance/best practice on corporate social responsibility.

Italian companies can draft a "social financial statement", to be included with the annual financial statement. The social financial statement reports on the company's compliance with ethical issues.

It is not common for Italian companies to include this statement.

Company secretary

35. What is the role of the company secretary in corporate governance?

Italian law does not provide for the role of a company secretary.

Institutional investors and shareholder groups

36. How influential are institutional investors and other shareholder groups in monitoring and enforcing good corporate governance? Please list any such groups with significant influence in this area.

Investors can implement specific corporate governance rules into the bye-laws or through shareholders' agreement.

Reform

37. Please summarise any proposals for reform and state whether they are likely to come into force and, if so, when.

In the last nine months two new forms of commercial entity have been introduced:

- The simplified limited liability company (Srls.).
- The limited liability company with reduced capital (Srlc.r.).

Both companies are subject to the same rules that apply to the Srl, with some differences, the most important

or which are:

- Quotaholders must be individuals and, in the case of Srls., under 35 years of age, unless the quotaholder founded the company when under 35 and has kept his quota on reaching 35.
- The minimum corporate capital required by law ranges between EUR1 and EUR10,000.

Recently, a Decree for development (*d.l. n. 179/2012*) to simplify the incorporation process of companies that qualify as "innovative start-ups" under the Decree.

The regulatory authorities

National Commission for Companies and the Stock Exchange (*Commissione Nazionale per le Società e la Borsa*) (CONSOB)

Main activities. CONSOB is the public authority responsible for regulating the Italian securities market.

W www.consob.it/mainen/index.html?mode=gfx

Italian Competition Authority

Main activities. The Italian Competition Authority, also known as the Anti-trust Authority, has responsibility for enforcing competition and anti-trust law in Italy.

W www.agcm.it/en

Online resources

Official Gazette (*Gazzetta Ufficiale*)

W www.gazzettaufficiale.it

Description. Official website in the Italian language providing copies of legislative acts issued by the Italian state.

Italian Government (*Governo Italiano*)

W www.governo.it

Description. Official website of the Italian government, which provides Italian copies of governmental acts.

Altalex

W www.altalex.com

Description. Unofficial website with up-to-date legislation in the Italian language, which includes an up-to-date version of the Italian Civil Code. No English version is available.

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Recent transactions

All client information must be kept confidential under section 17 of the Italian Ethical Rules. Against the background of that rule, non-confidential information concerning the recent transactions with which the authors were involved includes:

- Assisting UL LLC, a premier global independent safety science company, in the acquisition of ICQ Global, a leading consumer product testing provider based in Italy, with presence in Africa, Asia and the United States. This deal is public.
- Assisting a Japanese medical devices producer in an investment in an Italian company, manufacturing an innovative colonoscopy device. The structure of the deal was unusual because it was aimed at ensuring that the Italian company purchased a patent from a South Korean university before the investment was completed.
- Assisting a venture capitalist in its investment in a hosting provider platform.