

# NATIONAL-LEVEL CORPORATE ANTI-ABUSE MEASURES RELEVANT TO THE EU COMPANY LAW PACKAGE

## *Expert Questionnaire*

Italy

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### 1) Anti-abuse mechanisms - do any of these exist in this country? If so, how do they work?

#### a. Disqualified Directors

##### i. Is there an official definition of “disqualified director”? If so, what are the grounds for disqualification? Where is this? (legal text and link)

Under Italian law, a disqualification can only be ordered by criminal courts as an additional penalty to selected criminal offences (e.g.: fraudulent trading). Additionally, a person who has become insolvent, in his or her personal capacity as entrepreneur, is also not allowed to be appointed as a company’s director. These rules on personal capacity to act as a director are only provided for public companies (*società per azioni*)<sup>1</sup>, yet it is widely held that they are to be also applied to private companies (*società a responsabilità limitata*). The only official list of currently disqualified directors is the official criminal record. For privacy reasons, third parties (including notaries), other than the person involved, are not allowed to have access to criminal records.

##### ii. Is there an official list of (current) disqualified directors? If so, where is it? (name and link)

The only official list of currently disqualified directors is the official criminal record.

##### iii. Who has access to this list?

For privacy reasons, third parties (including notaries), other than the person involved, are not allowed to have access to criminal records.

#### b. Beneficial Owners

##### i. Where is the database of beneficial owners and who maintains it (link)

The Directive (EU) 2018/843 was implemented in Italy through Legislative Decree 125/2009, amending the original Italian anti-money laundering act (Legislative Decree 231/2007).

According to article 21(5) of Legislative Decree 231/2007, a joint decree of the Ministry of Economics and the Ministry of Economic Development should implement the registry of

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<sup>1</sup> Art. 2382 Italian Civil Code.

beneficial owners. A draft decree has been presented in February 2020. This decree, however, has not been yet approved as of this writing.

**ii. Are there any checks on the authenticity of beneficial owners?**

n/a

**iii. Updating of lists/databases**

n/a

**iv. Access to databases?**

n/a

**c. Electronic identity (E-ID) scheme - name and eIDAS level of assurance**

In Italy, the EU Regulation on Electronic Identification, Authentication and trust Services was implemented through a “public system of digital identity” (*Sistema pubblico di identità digitale*, “SPID”). Digital identities are managed by identity providers, which are private firms authorised by the “Agency for Digital Italy”. Each identity provider should enable three assurance levels: (a) a low level, for services accessed just with userid and password; (b) an intermediate level, for services accessed with userid, password and OTP code received via SMS; (c) high level, when the access also requires a smartcard. Additionally, Italian citizens can request an electronic ID card, which enables to access digital services of many local councils or other public bodies; its level of assurance is high.

**2) Company registry – transparency, access, cost**

**a. Identity and location**

The Italian commercial register is accessible by way of a specific internet platform called ‘Telemaco’ (<http://www.registroimprese.it/area-utente>). This platform can be accessed by anyone either through own credentials received upon registration, or through personal digital identity (which is commonly used to access most public services).

**b. To what extent is it digitalized? Can company foundations/registrations and reporting be carried out fully online?**

Articles of association should be notarized in person. Any other activity aimed at forming a new entity can be implemented electronically (see paragraph 3(b) hereunder).

**c. Are bulk downloads of company lists possible?**

The Telemaco platform allows queries for companies or persons; bulk downloads are possible only within strict limitations.

**d. Search features (beyond the name of the company or person, i.e. by sector)**

- Tax identifier
- Legal form (eg: private company, public company, partnership, foundation etc.);
- Place (province, city, postal code);

- Type of activity (according to the Italian tax classification of economic sectors);
- Other criterions (such as legal capital, revenues, number of employees).

**e. Costs of access to information**

This service is not particularly expensive (for instance: personal records of directors or member of the supervisory board between 0,70€ and 1€; full historical records of a company 6€).

**f. Information on employment beyond what is contained in annual accounts**

In this context, the number of employees is normally available, but companies might decide not to reveal these figures to the commercial register.

**g. Information on European company forms and EU reorganizations (CBM) - is a search possible for companies with the SE legal form or CBMs**

Eventually, also pieces of information regarding European Companies registered in Italy, foreign companies having branches or activities on the domestic territory and cross-border reorganizations (including cross-border mergers) are available.

**3) Firm foundations**

**a. What authority or organization is responsible for registering new companies (with link)?**

Italian companies are incorporated by way of their registration in the commercial register (*registro delle imprese*)<sup>2</sup>, which is held by the local chamber of commerce<sup>3</sup>. Chambers of commerce are business associations, which are also entrusted with public functions and are statutorily qualified as public entities. New companies, in particular, should be registered with the branch of the commercial register of the province in which their registered office is situated<sup>4</sup>. The commercial register is supervised by a local court, which plays the role of appellate tribunal against chamber of commerce's decisions<sup>5</sup>.

**b. What are the steps needed to found and register a new company? To what extent can these happen digitally?**

These are the steps that lead to a new company's registration:

1. The article of association is received by a notary and drafted in the form of a public deed<sup>6</sup>.
2. Within 20 days, the notary should deposit the articles of association at the branch of the commercial register situated in the province of the company's seat (in practice, this activity is conducted electronically)<sup>7</sup>;

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<sup>2</sup> Art. 2331 Civil Code.

<sup>3</sup> Art. 2188 Civil Code; this article was fully implemented only in 1993 (Art. 8, l. 580/1993 and Decree 581/1995, as amended).

<sup>4</sup> Art. 2330(1) Civil Code.

<sup>5</sup> Art. 2188(2) Civil Code.

<sup>6</sup> Art. 2328(2) Civil Code.

<sup>7</sup> Art. 2330(1) Civil Code.

3. Together with the articles of association, the notary should also deposit the documents showing that all legal requirements for registration were fulfilled, as indicated by article 2329 Civil Code, namely:
  - a. that the company's legal capital has been fully subscribed;
  - b. that all provisions related to contributions are respected (such as rules on the evaluation of contributions in kinds);
  - c. that any authorization required has been given (eg for banks).
4. The notary should also file for registration of the new entity<sup>8</sup>;
5. After a regularity check, the commercial register registers the new entity<sup>9</sup>.

In this context, it is to be mentioned that Companies whose object is 'development, production and marketing of highly-technological products or services' ('innovative start-up companies')<sup>10</sup> can be incorporated by reference to model articles<sup>11</sup> that do not require being notarized, provided that they are signed by way of digital signature<sup>12</sup>. As a consequence, these companies can be formed without any assessment as to their compliance with legal requirements, except the compliance check conducted by the chamber of commerce.

In this proceeding, digital tools are already largely used for incorporating Italian companies. Companies, in particular, can be registered online by using specific internet platforms managed by the Chambers of commerce, provided that users access these services by way of their electronic signature.

**c. What checks (if any) are done on the authenticity of documents, identity of founders, record of founders (e.g. disqualification as directors) and beneficial owners**

**i. By registration authority**

The local chamber of commerce should check whether the documents presented by the notary to support a filing for registration are regular<sup>13</sup>. Therefore, the registration authority can not check whether the material prerequisites of registration are missing.

This power has been further relaxed in 2014 for all companies, with the exception of public companies (s.p.a.), with the aim of facilitating the incorporation of legal entities<sup>14</sup>. The chamber of commerce, in particular, has a duty to register these companies immediately, without any check of regularity (not even the limited checks indicated above); legality checks are to be conducted after the registration, so that companies are to be struck-off the register should the chamber of commerce assess that legal requirements were lacking.

**ii. By notaries**

Notaries, like any other professionals, are required to undertake an intense scrutiny about beneficial ownership, under current anti-money laundering provisions<sup>15</sup>. Any professional, in particular, should identify his or her client and ask them to provide for documents supporting

<sup>8</sup> Art. 2330(3) first sentence Civil Code

<sup>9</sup> Art. 2330(3) second sentence Civil Code.

<sup>10</sup> Art. 25 d.l. 179/2012.

<sup>11</sup> Decree of the Ministry of economic development 17 February 2016

(<https://www.mise.gov.it/index.php/it/normativa/decreti-ministeriali/2034206-decreto-17-febbraio-2016-modalita-di-redazione-degli-atti-constitutivi-di-societa-a-responsabilita-limitata-startup-innovative>).

<sup>12</sup> Art. 4(10-bis) d.l. 3/2005 as approved by l. 33/2005.

<sup>13</sup> Art. 2330(3) Civil Code.

<sup>14</sup> Law Decree 94/2014, art. 20

<sup>15</sup> Legislative Decree n. 231/2007, as amended.

their identity, including whether they act on behalf of someone else. Should a professional doubt about a client's statement, further inquiries are requested.

Articles of association are received by a notary and drafted in the form of public deeds<sup>16</sup>. Until two decades ago, the tribunal situated in the place of a company's seat was in charge of checking whether legal conditions for incorporation were fulfilled and authorising companies' registration. Such validation of the articles of association was abolished in 2000<sup>17</sup>. As a consequence, the legality check is conducted by the notary while drafting the articles of association and filing for registration. Hence, the question arises as to what checks notaries should conduct regarding the authenticity of documents, identity of founders, record of founders (e.g. disqualification as directors) and beneficial owners.

Authenticity checks and identification of founders are intense, as public deeds are always to be signed in person *vis-à-vis* the notary<sup>18</sup>. This is also the case regarding 'electronic public deeds', where parties use their electronic signatures<sup>19</sup>, with the exception of 'innovative start-up companies', which will be addressed hereunder.

The answer is different regarding checks about founders' and directors' capacity. To answer this question, we should first address the scope of notaries' duties. Before applying for registration, notaries should assess that (a) the legal capital has been entirely subscribed, (b) the rules on contributions have been respected and (c) authorizations that are statutorily required (e.g. for banks) have been issued. Additionally, as a general principle, notaries are not allowed to receive deeds that are expressly prohibited by a statutory provision or that are manifestly against public policy or morality<sup>20</sup>. The Notary Law, eventually, maintains that notaries are punished with a fine when the legal pre-conditions for registration are *manifestly* lacking<sup>21</sup>. Regarding companies' foundation, some authorities maintain that notaries should apply for registration when the company's articles of association are valid and its organization complies with legal requirements. On the other hand, other authorities, including the most recent decisions of the Italian Supreme Court, indicate that notaries should only assess whether articles of association are *manifestly* null and void, while uncertain cases are not included in the scope of their assessment (that is to say, they are not liable for accepting a deed that entails a provision whose validity is still debated)<sup>22</sup>. In any event, it is clear that notaries only assess whether the articles of association are valid and the legal requirements for registration indicated in article 2329 Civil Code are fulfilled; as a consequence, notaries do not have to check whether the persons indicated in the articles of association as first directors lack personal capacity to act as directors. It is, however, a common practice that notaries request first directors who are also shareholders to sign a declaration – under own responsibility – that they do not lack personal capacity to act as directors.

### iii. By “facilitator” companies (foundation agents)

To my knowledge, facilitator companies are not active in Italy.

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<sup>16</sup> Art. 2328(2) Civil Code.

<sup>17</sup> Art. 32(2) l. 340/2000.

<sup>18</sup> Art. 2699 Civil Code.

<sup>19</sup> Art. 52-bis Notary Law.

<sup>20</sup> Art. 28 Notary Law.

<sup>21</sup> Art. 138-bis Notary Law.

<sup>22</sup> Corte di Cassazione 20 July 2011, n. 15892, *Vita Notarile* (2012) 359.

#### 4) Cross-border Mergers (CBMs)

##### a. Please briefly describe the process for CBMs

According to Italian provisions implementing the cross-border merger directive<sup>23</sup>, these transactions should respect the following steps, which largely mirror those entailed in the directive.

- 1) Italian merging companies should draw-up a draft term of the merger and make it public on the Italian public register<sup>24</sup>.
- 2) The essential elements of the transaction are published in the Italian official gazette (*Gazzetta Ufficiale*)<sup>25</sup>.
- 3) Business and financial reports are to be draw-up by the board and an independent advisor<sup>26</sup>.
- 4) At least 30 days after the draft was published in the public register and in the official gazette, the shareholders' meeting should approve the envisaged transaction. This decision, like any amendment to the articles of association, mergers and demergers, should be notarized and eventually registered in the commercial register following the general rules set forth in the Italian Civil Code.
- 5) When the resulting company is a foreign entity, absent and dissenting shareholders can withdraw from the company, by obtaining an adequate amount of money in return<sup>27</sup>. This provision is already in line with new shareholders' protection requirements set forth by the Company Law Package<sup>28</sup>.
- 6) Creditors can oppose the transaction within 60 days from the latest registration in the commercial register. A court should then assess whether the envisaged cross-border merger will harm creditors. Courts should also accept cross-border mergers despite creditors' objections when an independent advisor has declared that no risk arises or when the merging companies provides for a security.
- 7) With regard to Italian merging companies, a notary should issue the 'pre-merger certificate' of compliance with legal requirements<sup>29</sup>.
- 8) When the resulting company is an Italian entity, a notary is in charge to receive preliminary certificates of each merging company and to assess that all certificates have been issued, that all companies have approved an identical deed and that labour protection provisions have been respected<sup>30</sup>.
- 9) Eventually, the deed of merger is published in the commercial register of the resulting company.

##### b. Which authority is responsible for the pre-merger certificate (outbound CBMs), which authority is responsible for approving the merger (inbound CBMs)? (name and link)

With regard to Italian companies involved in a cross-border merger, notaries are the national authority in charge to check whether all substantive and procedural rules have been respected. Therefore, a notary should issue the 'pre-merger certificate' of compliance with legal requirements regarding Italian merging companies<sup>31</sup>.

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<sup>23</sup> Legislative Decree 30 May 2008, n. 108.

<sup>24</sup> Art. 6 Legislative Decree n. 108/2005

<sup>25</sup> Art. 7 Legislative Decree n. 108/2005.

<sup>26</sup> Art. 8 Legislative Decree n. 108/2005

<sup>27</sup> Art. 5 Legislative Decree n. 108/2005.

<sup>28</sup> Article 126a Directive 2017/1132.

<sup>29</sup> Art. 11(2) Legislative Decree n. 108/2008. See art. 127 Directive 2017/1132.

<sup>30</sup> Art. 13 Legislative Decree n. 108/2005

<sup>31</sup> Art. 11(2) Legislative Decree n. 108/2008. See art. 127 Directive 2017/1132.

When the resulting company is an Italian entity, a notary is in charge to receive preliminary certificates of each merging company and to assess that all certificates have been issued, that all companies have approved an identical deed and that labour protection provisions have been respected<sup>32</sup>.

Eventually, the deed of merger is published in the commercial register of the resulting company. When the resulting company is an Italian entity, the local chamber of commerce should assess whether all documents have been filed.

**c. What personnel capacity/qualifications does the authority/ies listed above (organization(s) granting the pre-merger certificate + approving merger) have?**

The question arises of whether the number of notaries at national level is adequate to their task. The number of notaries is established by the Italian Ministry of Justice, having regard to the goal of granting this public service in any corner of the country. As of October 2019 (latest data available), there were 6222 notary seats, but only 5115 of these seats were occupied.

**d. What (if any) anti-abuse checks are made?**

The new Directive on cross-border transaction provides for anti-abuse provisions. National authorities, in particular, must not issue the pre-merger certificate where it is determined in compliance with national law that a cross-border merger is set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law, or for criminal purposes.

Under current Italian legislation, such anti-abuse checks are lacking. In particular, the notary does not have to check neither what is the real purpose of a given reorganization, nor what directors' background is; they should only check whether worker arrangements have been signed and respected.

**i. Purpose of reorganization**

n/a

**ii. Background check on directors**

n/a

**iii. Identity of beneficial owners**

n/a

**iv. Worker I/C/P arrangements**

Yes, notaries check for this.

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<sup>32</sup> Art. 13 Legislative Decree n. 108/2005