

The Process of Company Incorporation in Italy

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Italian legislation describes three (3) types of limited liability companies, namely S.p.A. (“società per azioni,” equivalent to public limited company (PLC)), S.R.L. (“società a responsabilità limitata,” which corresponds with private limited company (LTD)), and S.a.p.a. (“società in accomandita per azioni,” partnership limited by shares). A general reform of Italian corporate law was enacted in 2003, which aimed, among other things:

- To harmonize Italian corporate law with European Union standards,
- To simplify the legislation, and
- To provide entrepreneurs with more flexible and tailored instruments to run their business.

The need for a general revision of the regulation stemmed from the fact that the entire set of rules concerning corporations revolved around PLCs, allowing shareholders to modify and adapt them to their needs only to a limited extent. As a result, the new regulations of PLCs and LTDs differ substantially, better meeting the diverse needs of stakeholders and entrepreneurs.

Incorporation of a Public Limited Company (Società per Azioni or S.p.A.)

Public limited companies are the most sophisticated organizing and funding models ever created to establish a business entity. Together with private limited companies, PLCs are the most common legal model adopted to run a business in Italy.

The most salient features of a PLC are the limited liability of shareholders and the wide range of funding instruments it can issue.

As per Article 2328 of the Italian Civil Code (“ICC”), a PLC can be established either by one or more persons. Until 2003, setting up a PLC with a single shareholder was prohibited. Currently, the creation of a single member company is expressly provided for by ICC Article 2328. This amendment is the result of the new perspective adopted by the corporate law reform of 2003, which puts the enterprise at the heart of the legislation, and considers the legal forms in which businesses can be run or owned simply models of organization.

Another, but by far less common, method of incorporating a PLC is through a public offer.

The incorporation process of a public limited company in Italy consists of two (2) steps: first, the filing of the “constitutional” documents of the company (“atto costitutivo” and “statuto,” respectively the memorandum of association and the articles of association²); second, the registration of the company at the Registrar of Companies. The registration of the company is a fundamental step, since only afterwards will the company acquire legal status and its shareholders have limited liability. For any operations carried out on behalf of the company prior to its registration, as per ICC Article 2331, the persons who performed the operation, along with those shareholders who ordered or authorized it, shall be held jointly and unlimitedly liable.

The law prescribes that the memorandum of association be filed as a notarial act in public form. This provision sets an essential condition for the validity of the memorandum of association (forma ad substantiam) without which the act is deemed to be void and the company null.

¹ As per ICC Article 2328, in case of conflict between the provisions of the memorandum and the articles of association the latter should prevail.

Pursuant to ICC Article 2328, the memorandum of association shall contain: the personal details of the shareholders and number of shares attributed to each of them, name of the company (the legal ending of which shall indicate at least the abbreviation "S.p.A."), location of its registered office, objective of the company, amount of the share capital and amount paid up, number and features of the shares, aggregate value of the contributions in kind, and rules governing the payment of dividends; as well as the corporate governance system of the company, number and powers of the directors, number of auditors, name of the appointed directors and auditors, duration of the company, if any, and rules applying to shareholder withdrawal.

Upon the filing of the memorandum of association, three (3) conditions must be met:

- a) The total amount of the nominal capital must have been subscribed; in Italy, PLCs must have a minimum issued capital of EUR 120,000;
- b) Twenty-five percent (25%) of cash contributions must be deposited in a bank account; in the case of a single member company, the total amount (100%) of cash contributions must be deposited in a bank account;
- c) Any other authorizations, where necessary, must have been obtained.

If the share capital is paid by contribution in kind, providing an independent auditor's report determining the value of the contribution is legally required. The auditor shall be appointed by the competent court of first instance (this is not required for LTDs).

Within twenty (20) days, the memorandum of association shall be delivered to the Registrar of Companies with an application for the registration of the company and the other documents required for registration. This procedure is carried out by the civil law notary who drafted the documents of incorporation. If the documents satisfy the legal requirements, the company will be successfully incorporated. The procedure is quite fast, since the application for registration, which is processed through an electronic system called "ComUnica," also satisfies the registration requirements laid down by workers' compensation laws, social security laws and fiscal laws.

Once registered, the company becomes a legal person and its shareholders enjoy limited liability. Following the incorporation, the directors may request at any time that the shareholders pay up the remaining part of the subscribed shares.

Special rules apply to single member companies. In order to protect the interests of third parties, the law stipulates that a sole shareholder may enjoy limited liability only if:

- The total amount of capital contributions has been fully paid prior the filing of the memorandum of association; and
- A formal statement about the unipersonality of the company and providing the personal details of the sole partner has been delivered and registered to the Registrar of Companies.

Failure to meet one of the abovementioned conditions, and in case of the company's insolvency, closing or receivership, the sole shareholder will be held responsible for the debts and obligations of the company arising during the period in which the conditions set out above were not fulfilled.

Since the 2003 corporate law reform, PLCs may use any of three (3) different board structures.

1. The most common system adopted by Italian PLCs is the "traditional" system, based on the presence of an administrative body ("consiglio di amministrazione," board of directors or single director), monitored by a board of statutory auditors ("collegio sindacale") or an independent external auditor. In the corporate governance framework created by the reform, this system automatically applies if the founders or shareholders do not specify a different choice in the articles of association.

2. The "dual" system consists of a management board ("consiglio di gestione," ICC Article 2409-nonies) and a supervisory board ("consiglio di sorveglianza," ICC Article 2409-duodecies) which is appointed by the shareholder meeting. Unlike the traditional model, in this case the monitoring body, and not the general body of the shareholders, appoints the management body. The most notable feature of the "dual" model is the limited powers of the shareholders, whose main role is to appoint and remove members of the monitoring board, to promote directors' liability procedures, and to decide on the allocation of dividends.

3. Finally, the "unitary" system is based on the traditional model but with two (2) main differences: first, the management function cannot be vested in a single director; second, the supervisory board ("comitato per il consiglio sulla gestione," ICC Article 2409-octiesdecies) is appointed by and from among the members of the board of directors, which thus

has both the management and supervisory powers. As a counterbalance to this concentration of powers, it is required that at least one-third (1/3) of the representatives of the board are “independent” members.

Incorporation of a Private Limited Company (Società a Responsabilità Limitata or S.R.L.)

The incorporation process of a private limited company in Italy is almost identical to the PLC incorporation process. Some notable differences must be highlighted, though. These result from the 2003 reform, which aimed to empower the shareholders of LTDs and make the structure of LTDs more flexible. This flexibility was intended to encourage partnerships to switch to the LTD structure, as this would trigger the growth of Italian small and medium-sized companies and renew the country’s stagnant entrepreneurial situation.

Consequently, new LTDs are between a partnership and a corporation, allowing shareholders to choose the applicable set of rules at their discretion at the time of incorporation. Moreover, unless the articles of association provide for a different rule, as per ICC Article 2475, the power to manage the company is vested in one or more partners. By contrast, Article 2380-bis explicitly prescribes that, in the case of a PLC, directors shall have the exclusive prerogative to manage the company.

The minimum share capital required to establish a LTD is EUR 10,000. Prior to filing the memorandum of association, a percentage (25%) of capital contributions must be deposited in a bank account. Unlike PLCs, however, in this case the deposit of twenty-five percent (25%) of capital contributions may be substituted by a bank guarantee or an insurance policy of the same amount.

Another notable difference concerns contributions. Along with contributions in cash and in kind, the 2003 reform has introduced the possibility for shareholders to make contributions in the form of labor and services, against an insurance policy, a bank guarantee or a deposit. As per ICC Article 2464, contributions may in fact consist of any kind of asset, as long as its worth can be determined. This is consistent with the new approach adopted by the reform, which has placed shareholders’ persona at the heart of the LTD regulation.

Incorporation of a Partnership Limited by Shares (Società in Accomandita per Azioni or S.a.p.a)

The third and last model of corporation described in Italian law is derived from the S.p.A. model, but differs from it inasmuch as it comprises two (2) categories of shareholders. In fact, an S.a.p.a. must have at least one (1) unlimited liability partner, called the “socio accomandatario,” as opposed to a “socio accomandante,” whose liability is limited to the amount invested in the company.

The unlimited liability partner is by law also the director of the company. Due to the correlation of unlimited liability with the power to run the business, it is prescribed that in case of withdrawal or resignation from the directorship, unlimited shareholders acquire the status of limited shareholders.

The formation of this company is governed by the rules applicable to Italian PLCs, with two (2) main differences:

1. The memorandum of association shall specify the unlimited shareholders (ICC Article 2455);
2. The name of the company will consist of at least one (1) unlimited shareholder’s name and specify the legal nature of the company (“S.a.p.a.”) (ICC Article 2453).