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Incorporation of a limited liability company under Italian Law

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1. Introduction.

Under Italian corporate law, two¹ kinds of vehicles are available to incorporate a limited liability company: (i) a *società per azioni* (a joint stock company or *S.p.A*) and (ii) a *società a responsabilità limitata* (a limited liability company or *S.r.l*).

The joint stock company is governed by Articles 2325-2451 of Italian Civil Code (the “**Code**”) while the limited liability company is ruled by Articles 2462-2483 of the Code.

Foreigner investors may be interested in evaluating the main differences between the two vehicles in terms of corporate governance, responsibility, categories of shares, voting rights as well as the requirements for their establishment prior to decide terms, conditions and timeframe of their investment project.

In both the S.p.A. and the S.r.l. the liability of the stockholders is limited to the amount of their contribution to the company. S.p.A.s are often used for larger companies, where higher equity contributions and more flexibility with respect to transfer of shares is required. The corporate governance of the two types of companies may substantially differ. Corporate governance

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¹ Italian law also contemplates other vehicles with limited liability: (i) a limited partnerships (*società in accomandita semplice* or *S.a.S.*) with two kind of partners, limited and general and (ii) limited joint stock company (*società in accomandita per azioni* or *S.a.p.A.*) with two kind of shareholders, limited and general. Moreover the S.p.A can be listed and non-listed companies. For the purpose of this article we will refer only to the non-listed S.p.A.s

of S.p.A.s is usually more complex while S.r.l.s are very flexible in terms of corporate governance and internal organization.

1.1 Incorporation process.

1.1.1 In general

Both S.p.A.s and S.r.l.s must be incorporated by means of **notary deed**.

Both types of companies may be incorporated (and, successively, the relevant corporate capital may entirely be held) by a sole shareholder/quotaholder. In case of sole shareholder/quotaholder, to enjoy limited liability, the corporate capital must be fully paid-in and deposited in a bank account in Italy prior to the incorporation.

Prior to incorporation each shareholder/quotaholder, as well as each director, must obtain a taxpayer number in Italy. In case the shareholder/quotaholder is a legal entity, the taxpayer number must be obtained also for its legal representative. After the incorporation, a taxpayer number together with a VAT number will be attributed to the company.

The directors, who are appointed in the context of the incorporation must accept their appointment and file a declaration of acceptance with the Companies' register within 30 (thirty) days as of their appointment. The same rule applies also to the statutory auditors, if any.

Please note that the incorporation of a company before a notary public is insufficient to fully incorporate the company as a separate legal entity. The company does not officially exist until it has been registered with the Companies' register. Those who have acted on behalf of the company before the date of its registration (usually the directors) will be personally liable for all the transactions carried out up until that time by the company. Such liability is extended also (i) to the initial sole shareholder/quotaholder who, through the articles of incorporation or otherwise, has decided, authorized or allowed the carrying out of the transactions prior to registration of the company with the Companies' register; and (ii) to the company itself, in case the company, following registration, has approved such transaction/s with consequent discharge of all of the individuals/entities who have acted on behalf of the company.

1.1.2 Information and documents to be supplied

Article 2328 of the Code (for S.p.A.s) and Article 2463 (for S.r.l.s) list the information needed in order to incorporate a limited liability company in Italy and namely:

- (a) full details of each shareholder/quotaholder;
- (b) full address of the registered office;
- (c) company's corporate purpose (the activities carried out by the company must be identified in details);
- (d) company's name and corporate capital (which should amount to minimum Euro 120,000.00 for the S.p.A.s and Euro 10,000.00 for the S.r.l.s);
- (e) number of shares/quotas and relevant value;
- (f) date of the fiscal year end;
- (g) number of directors (a sole director or a board of directors can be alternatively appointed) and relevant personal details (full name, date and place of birth, citizenship, residence address abroad, and photocopy of their passports). Foreign directors must apply for a tax code number in Italy, if they have not yet received one); and
- (h) personal details (full name, date and place of birth, residence address) of the statutory auditors (three standing members and two alternate), if any². Only Italian citizens meeting specific requirements may be appointed.

In addition to the deed of incorporation containing the above information, the articles of association of the Company must be attached to the same deed of incorporation.

Moreover, please note that a power-of-attorney executed by the initial shareholder/quotaholder or an authorised representative thereof, would entitle an attorney in fact to accomplish all the actions necessary for the incorporation process, including, *inter alia*, the power to open a bank account for the deposit of the corporate capital. Such power-of-attorney

² See point 2.8 below on the hypothesis in which the establishment of the board of statutory auditors is mandatory also for an S.r.l.

must be signed before a notary public, and the signature, in certain cases, must be legalized or apostilled³.

2. Main differences between an S.p.A and an S.r.l.

The main features and differences between the S.p.A.s and the S.r.l.s are set out below.

2.1 Corporate Capital

S.p.A

The minimum amount of the share capital provided for an S.p.A is Euro 120.000,00.

If the S.p.A. is established by more than one shareholder, 25% of minimum capital must be immediately paid in; if the S.p.A. is established by a sole shareholder the entire amount of minimum capital must be immediately paid in.

The corporate capital is represented by shares which, unless excluded by the by-laws, are embodied in stock certificates, and are transferable according to the provisions set out for the negotiable instruments (*“titoli di credito”*).

The corporate capital can be increased by issuance of new ordinary shares which are subject to a pre-emption rights to be exercised by the existing shareholders. However, in case of capital increase, limitations of subscription rights are allowed in the following cases by virtue of a resolution of the general meeting (*assemblea dei soci*) resolved by the shareholders' representing at least half of the corporate capital:

- manifest corporate interest and favourable vote of shareholders representing more than 50% of the entire share capital;
- issuance of shares in consequence of a contribution in kind; and

³ Convention of 5 October 1961 *Abolishing the Requirement of Legalisation for Foreign Public Documents*, available at www.hcch.net.

- issuance of shares to be offered to the company's employees.

S.r.l.

The minimum amount of the share capital provided for an S.r.l. is Euro 10.000,00.

If the S.r.l. is established by more than one quotaholder, 25% of minimum capital must be immediately paid in; if the S.r.l. is established by sole quotaholder the entire amount of minimum capital must be immediately paid in.

The corporate capital is divided into "quotas", which are not embodied in certificates but only recorded in the "quotaholders' ledger" (to be kept on a voluntary basis).

The quotas cannot be represented by shares nor can they be the object of an offer to the public.

In case of capital increase limitation of subscription rights is always allowed if the by-laws so provide. Quotaholders who have voted against the relevant resolution have a right of withdrawal from the company.

2.2 *Equity contributions*

S.p.A

In the S.p.A the equity contribution can be made in cash as well as in kind. However, contribution in kind is subject to the evaluation of an expert appointed by the relevant Court and reviewed by the company's directors. Moreover the contribution in kind must be immediately and fully paid in.

The performance of work or services cannot be the subject of a capital contribution.

S.r.l.

In the S.r.l. the equity contribution can be made in cash as well as in kind. However, contribution in kind is subject to evaluation of an expert

appointed by the contributing shareholder. Moreover the contribution in kind must be immediately and fully paid in.

The performance of work or services can be the subject of a capital contribution.

2.3 Voting rights and special rights

S.p.A

In the S.p.A. the voting rights might not be proportional to the percentage of corporate capital subscribed by the shareholders. The by-laws may provide the issuance of non-voting shares, shares with voting rights limited to certain matters or subject the occurrence of certain conditions, however the overall amount of such shares shall not exceed 50% of the corporate capital. Shares with multiple votes are prohibited.

Categories of shares are also allowed.

The general rule is that all shares must have the same rights, however if provided for by the by-laws, special classes of shares can be issued such as:

- shares with limited or non-voting rights;
- shares with privilege with respect to dividends distribution or liquidation;
- shares in favour of employees;
- redeemable shares; and
- tracking shares.

S.r.l.

In the S.r.l. the voting rights are proportional to the percentage of corporate capital subscribed by the quotaholders.

No different categories of quotas are allowed. The by-laws may reserve to one or some of the quotaholders some special rights (e.g. with respect to dividends, right to appoint directors/auditors, etc.).

2.4 *Transferability of shares/quotas*

S.p.A

The shares of an S.p.A. are freely transferable unless restrictions are provided in the by-laws.

Possible restrictions are the following:

- other shareholders' pre-emption rights;
- corporate bodies' or other shareholders' prior right of approval (if discretionary, the by-laws must grant the selling shareholder either a put option against the other shareholders or a right of withdrawal from the company);
- lock up for up to five years.

The shares are transferred by endorsement of the relevant certificates (when issued).

S.r.l.

The quotas of an S.r.l. are freely transferable unless restrictions are provided in the by-laws.

Possible restrictions are the following:

- other quotaholders' pre-emption rights;
- corporate bodies' or other shareholders' prior right of approval (if discretionary, the by-laws must grant the selling shareholder a right of withdrawal from the company, which can be excluded for a period not longer than two years from the incorporation of the company or the subscription of the quota);
- lock up for up to two years from the incorporation of the company or the subscription of the quota (afterwards quotaholders are granted a right of withdrawal from the company)

The quotas are transferred by execution of a notary deed and record of the transfer into the quotaholders ledger kept on a voluntary basis.

2.5 Governance

S.p.A

An S.p.A can be governed by one of the following three alternative governance models:

- *traditional system*

whereby the management of the company is assigned to a board of directors, which has broad powers to govern the business of the company. A board of statutory auditors controls that the activities and the business of the company are conducted in compliance with the law, the article of association, and the proper rules of business administration. An external independent auditor – either an individual or an auditing firm – must audit the company's financial statements, except when such duty is delegated by the company's articles of association to the board of statutory auditors;

If no system is chosen by the deed of incorporation, the traditional system applies.

- *one tier system*

whereby: (i) the management is assigned to the board of directors; (ii) the control pertains to an internal audit committee; and (iii) there is no board of statutory auditors.

- *two tier system*

whereby (i) the control pertains to a supervisory board; (ii) the management pertains to a management board; and (iii) there is no board of statutory auditors. The supervisory board carries out internal control functions similar to those exercised by the board of statutory auditors in the traditional system. In addition, certain powers that in the traditional and in the one-tier systems pertain to the general shareholders' meeting are reserved to the supervisory board, such as the powers to (i) appoint the management board, (ii) take legal actions against members of the

management board, and (iii) approve the financial statements. An external independent auditor, either an individual or an auditing company, must audit the company's financial statements.

Directors:

in a S.p.A a director's office can not be longer than 3 fiscal years, but may be re-elected if the by-laws does not provide otherwise.

Board of Statutory Auditors:

the Board of statutory auditors is compulsory only for the traditional corporate governance system. The board of statutory auditors is appointed by the shareholders' general meeting for a period of three years. The statutory auditors cannot be revoked by the shareholders' meeting, except for cause and with the approval of a court. Only persons with certain personal characteristics in terms of moral integrity, professional skills and independence may be appointed to the board of statutory auditors.

S.r.l.

For an S.r.l. only traditional governance model is available but the board of statutory auditors is compulsory only when (i) the corporate capital equals or exceeds Euro 120,000.00 or (ii) other financial, profit or number of employees thresholds are met⁴.

Director:

The duration of a director in an S.r.l. can be open ended.

⁴ In particular, according to Articles 2477 and 2435-bis of the Code, a S.r.l. is mandatorily required to appoint the board of statutory auditors in the event that (a) the company is required by law to prepare consolidated financial statements; (b) the company controls another company with is subject to mandatory audit; or (c) at least two of the following criteria are met by the company in two consecutive years:

- (i) the aggregate amount of the assets of the company exceeds a value of Euro 4,400,000.00;
- (ii) the revenues exceed Euro 8,800,000.00;
- (iii) the average number of employees during a fiscal year exceeds 50 employees.

2.6 *Withdrawal rights*

S.p.A

The right to withdrawal from an S.p.A belongs to shareholders who did not consent to:

- change the company's corporate purpose when the change allows a significant change to the activities of the company;
- transform the company form;
- transfer the registered office outside the national territory;
- revoke the winding up;
- remove one or more causes of withdrawal provided for in Article 2437 or in the by-laws;
- change the criteria to determine the value of the share upon withdrawal;
- amend the by-laws affecting the shareholder's voting or participation rights
- if the by-laws provide for share transfer restrictions making the transfer subject to the discretion (*mero gradimento*) of the company's bodies, shareholders or third parties;
- if the by-laws provide for transfer restrictions that prevent a transfer in the event that a shareholder dies
- if not provided otherwise by the by-laws, also if resolved for the extension of the duration term of the company; and introduction or elimination of share transfer's restrictions

The by-laws of the companies that do not recourse to the market of risk capital may provide for additional circumstances of withdrawal.

If the company is established for an unlimited time, the shareholder can withdraw from the company by giving 180 (one hundred and eighty) days prior written notice. The by-laws may allow a longer terms of not more than one year.

S.r.l.

The right to withdrawal from an S.r.l belongs in any case to shareholders who did not consent to:

- change the company's corporate purpose;
- transform the company form;
- merge or de-merge;
- revoke the winding up;
- transfer the registered office outside the national territory;
- remove one or more causes of withdrawal provided for in the by-laws;
- accomplishment of transaction which cause a substantial change in the corporate purpose;
- in case the article of association provides that the capital increase may take place also through the offer of new issued quotas to third party. In such a case, the shareholder who did not consent to the decision is entitled to withdraw;
- if the by-laws provide that the quotas in the company are not transferable; that the transfer of the quotas is subject to the prior and absolutely discretionary approval of the corporate bodies, of the other shareholders or of third parties; or that the transfer to the quotaholder's heirs is subject to such conditions or limits that de facto do not allow the transfer of the quota;

The by-laws of the companies may provide for additional circumstances of withdrawal.

If the company is established for an unlimited time and the shares are not listed on a regulated market, the shareholder can withdraw from the company by giving 180 (one hundred and eighty) days prior written notice. The by-laws may allow a longer term of not more than one year.

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