



The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Italy: Corporate Governance

This country-specific Q&A provides an overview to tax laws and regulations that may occur in Italy.

This Q&A is part of the global guide to Corporate Governance. For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/practice-areas/corporate-governance/>



Country Author: Orrick, Herrington & Sutcliffe LLP

The Legal 500



**Alessandro De Nicola,
Senior Partner of the Italian
Offices (M&A and Private
Equity)**

adenicola@orrick.com



**Marco Dell'Antonia, Partner
(M&A and Private Equity)**

mdellantonia@orrick.com



**Federico Urbani, Associate
(M&A and Private Equity)**

furbani@orrick.com

- 1. What is the typical organizational structure of a company and does the structure typically differ if the company is public or private?**

Leaving aside partnerships (*società semplice, società in nome collettivo and società in*

accomandita semplice) and partnerships limited by shares (*società in accomandita per azioni*), Italian companies are in most cases incorporated and operating as corporations, i.e. limited liability company (*società a responsabilità limitata*) or joint stock company (*società per azioni*).

On the one hand, private companies are usually incorporated as limited liability companies – small and medium-sized enterprises (SMEs) or closely-held – or joint stock companies. On the other hand, public companies, i.e. companies with shares admitted to trading on a regulated market, are typically incorporated as joint stock companies or cooperative companies limited by shares (as limited liability companies cannot be listed).

It is worth noting that, while limited liability companies issue “quotas” – which are not securities from a legal standpoint, therefore investors are called “quotaholders” – joint stock companies issue shares.

2. Who are the key corporate actors (e.g., the governing body, management, shareholders and other key constituencies) and what are their primary roles? How are responsibilities divided between the governing body and management?

The key corporate bodies of both limited liability companies and joint stock companies are the following:

- shareholders or quotaholders’ general meeting (*assemblea dei soci*) (see point 20 below);

- board of directors (*consiglio di amministrazione*) or sole director (*amministratore unico*);

- board of statutory auditors (*collegio sindacale*), a corporate body composed of professionals independent from the company and its management, which is entrusted

with internal control functions; limited liability companies shall appoint a board of statutory auditors or a sole statutory auditor only if certain thresholds are triggered (Art. 2477 ICC).

Joint stock companies may also opt-in - by means of an explicit by-laws provision - for implementing one-tier (*monistico*) or two-tier (*dualistico*) corporate governance systems. The one-tier system is characterized by the presence of a shareholders' meeting, a board of directors and a committee on management control, operating within the latter and composed of independent directors. The two-tier one is characterized by the presence of a shareholders' meeting, a supervisory board and a management board, whose members are appointed by the supervisory board.

Joint stock companies shall also appoint an accounting auditor, which shall act in compliance with Legislative Decree 39/2010, provided that the board of statutory auditors may act as accounting auditor, conditional to: (i) the company not being required to consolidate the accounts of other entities, (ii) the company not being a listed or supervised entity, (iii) all statutory auditors being enrolled with the Register of Accountants.

3. **What are the sources of corporate governance requirements?**

Corporate governance requirements are regulated, inter alia, under the Italian Civil Code and, as regard listed companies, the Consolidated Financial Act (*Testo Unico della Finanza* or CFA), as well as other relevant laws, regulations and best practice guidelines, such as the *Corporate Governance Code for listed companies* (the CG Code) issued by Borsa Italiana S.p.A. (the Italian stock exchange management company).

Corporate governance requirements of banks and financial institutions are regulated under the relevant supranational rules (e.g. EU ones), the CFA, the Consolidated Banking Act (*Testo Unico Bancario* or CBA), the Private Insurance Companies Act (*Codice delle Assicurazioni Private* or PICA) and the relevant implementing regulations.

Specific provisions apply to state-owned entities, non-profit and social entities and

companies, etc.

The above is without prejudice to supranational soft-law rules and guidelines (e.g. the G20/OECD *Principles of Corporate Governance* and the Basel Committee on Banking Supervision *Corporate governance principles for banks*).

4. **What is the purpose of a company?**

Pursuant to Art. 2247 ICC, companies are entities carrying out an economic activity with the purpose of distributing profits to the benefit of their shareholders. However, it is undisputed that companies can have non-profit or social purposes.

In any case, the by-laws shall set forth in detail the specific purpose of the company and the directors (or sole director) shall be entitled to carry out any action aimed at achieving the relevant purpose, in compliance with the applicable laws and the by-laws (Art. 2380-*bis* ICC).

5. **Is the typical governing body a single board or comprised of more than one board?**

The default corporate governance system is the so-called “traditional” one, which is the most commonly used (see point 2 above). As mentioned above, joint stock companies may also opt-in – by means of an explicit by-laws provisions – for implementing one-tier (*monistico*) or two-tier (*dualistico*) corporate governance systems (see point 2 above).

As mentioned, the governing body may be either a board of directors or a sole director.

Also, committees serving specific functions or tasks may be established within the board, either discretionally (non-listed and non-supervised entities) or mandatorily (listed companies, banks, financial institutions, etc.).

6. How are members of the governing body appointed and removed from service?

Pursuant to Art. 2383 ICC, the members of the board of directors shall be appointed by the ordinary shareholders' meeting, which is also exclusively competent in removing them. The removal may be discretionarily resolved upon by the meeting, provided that in the event that there is no just cause for removal, the removed directors shall have the right to sue a claim for damages. Ordinary quorums and majorities apply to appointment and removal of directors (see point 20 below).

The term in office shall be of maximum 3 financial years.

It is worth noting that, *inter alia*: (i) special classes of shares may be granted with certain rights in relation to the appointment of directors, such as veto rights or the right to appoint (autonomously) a certain number of directors, (ii) each holder of a participating financial instrument (*strumento finanziario partecipativo* or SFP) may be granted with the right to appoint an independent director under Art. 2346, par. 6, ICC, provided that the majority of the board shall be appointed by the ordinary shareholders' meeting.

Moreover, listed companies shall mandatorily apply list-voting mechanisms aimed at granting the appointment of at least 1 minority director.

7. Who typically serves on the governing body and are there requirements that govern board composition or impose qualifications for directors regarding independence, diversity or succession?

On the one hand, SMEs and closely-held companies are typically managed by the majority shareholder or a trusted representative of the latter, who usually acts as managing director (*amministratore delegato*) and/or chairperson.

On the other, large companies are typically managed by non-investor professionals, while majority and qualified-minority investors hold offices as non-executive chairperson or directors.

In any case, pursuant to Art. 2382 ICC, one cannot be appointed as director – and, if appointed, terminates from office automatically – if he/she is: (i) interdicted, (ii) incapable, (ii) declared bankrupt, (iv) prevented from carrying out public offices or executive directorates.

Further suitability requirements apply to those holding offices as directors of listed companies, banks and financial institution, provided that the by-laws may voluntarily set forth specific requirements (Art. 2387 ICC).

With reference to independence: (i) listed companies' board of directors shall include at least 1 or 2 independent directors, depending on whether the board is composed of up to or more than 7 members ("independence" is defined under Art. 147-ter and 148 CFA and the CG Code, (ii) banks' board of directors shall include 25% of independent members ("independence" is not defined by the applicable laws and regulations, therefore each entity's by-laws shall provide a definition).

Statutory diversity requirements are provided for: (a) listed companies, which shall reserve at least 1/3 of the board seats to the least represented gender, and (b) banks, which shall ensure the appointment of board members with an adequate degree of diversity of competences, background, age, gender, internationalization.

No mandatory provisions are set out as regard succession plans.

8. What is the common approach to the leadership of the governing body?

In the event that a board is appointed (i.e. not in the case of a sole director), pursuant to Art. 2381, par. 2-3, ICC, all or part of its powers may be attributed to: (a) one or more individual members, acting as managing director(s), and/or (ii) an executive

committee. In such case, the managing director(s) or the executive committee shall report to the board – at least on a semi-annual basis – on the general management of the company, the most significant transactions/events of the relevant period (with respect to the company and the subsidiaries) and the foreseeable evolution of the business.

It is worth noting that the board shall have the right to recall the attributed powers at its sole discretion, provided that in the event that there is no just cause for recalling said powers, the relevant managing director(s) or executive committee shall have the right to sue a claim for damages.

Typically, the leadership is entrusted with a sole managing director.

It should be stressed that the chairperson – even if non-executive – is granted with significant rights and powers under Art. 2381 ICC, such as calling board meetings, defining the items on the agenda, ensuring that the directors receive all necessary information for the purposes of resolving on the matters to be addressed by the board.

9. What is the typical committee structure of the governing body?

Non-listed and non-supervised entities are not required to implement any committee structure, therefore it is to the by-laws or the board discretion to do so.

Notwithstanding the above, listed companies – pursuant to, respectively, Regulation no. 17221/2010 issued by CONSOB (the Italian securities and markets authority) and the above mentioned CG Code – and banks – pursuant to Circular no. 285/2013 issued by the Bank of Italy – shall appoint the following board committees: related party transactions, appointments, remunerations and risks (the latter in listed companies is called “control and risks”).

10. **How are members of the governing body compensated?**

Board members may be compensated in a variety of ways, ranging from a fixed annual remuneration, to stock option plans, from stock grants, to direct profit-sharing mechanisms.

It is worth noting that the compensation shall be resolved upon by the shareholders or quotaholders' meeting, even though the board itself may grant further compensation to the benefit of the directors holding particular offices (e.g. managing director, chairperson, committee members, etc.), provided that the shareholders or quotaholders' meeting shall in any case have the right to set out an aggregate maximum amount (Art. 2389 ICC).

11. **Are fiduciary duties owed by members of the governing body and to whom are they owed?**

Directors' duties and responsibilities are governed – as a general rule – under the ICC.

On the one hand, directors shall act in a loyal manner, as Art. 2390-2391 ICC sets forth that they shall not: (i) carry out any activity in competition with the company (unless so authorized by the shareholders' or quotaholders' meeting), (ii) use for their own advantage or the advantage of third parties any information (including information on business opportunities), of which they become aware as a consequence of their office and that might be exploited by the company.

On the other hand, pursuant to Art. 2392 ICC, directors are under a general duty to: (i) carry out the management of the company in accordance with the applicable laws and regulations, as well as the by-laws, (ii) act with the degree of care (*diligenza*) required in relation to their office, their professional skills and the particular features of the company.

Specific provisions apply to banks and financial institutions.

12. **Do members of the governing body have potential personal liability? If so, what are the key means for protecting against such potential liability?**

In case of breach of the mentioned duty of care and duty of loyalty (see point 11 above), directors shall be jointly liable towards the company for any damages caused by or deriving from their negligence, with the exclusion of the powers attributed, as the case may be, to the managing director(s) or the executive committee, if any.

However, non-executive directors are not totally exempt from liability. In case the relevant member: (a) negligently fails to obtain data or information from the managing director (s) or the executive committee, or (b) knew that a detrimental action was being carried out, but did not do his/her best to prevent or limit the consequences thereof, he/she shall be jointly liable with the managing director (s) or the members of the executive committee.

It should be noted that the so-called *business judgement rule* applies. Namely, directors shall not be held liable for any damages suffered by the company, provided that the latter are part of the range of choices that could be considered ex ante as potentially advantageous (or in any case harmless) for the company by a person having the standard of care and knowledge which could be expected from the director of a company operating in the same business sector. It is worthwhile noting that, even though the *business judgement rule* prevents the courts from plunging into the merits of managerial evaluations, courts are not prevented from evaluating whether the decisions of the directors have been taken with gross negligence or reckless disregard and/or with the actual awareness that said decisions would cause a prejudice to the company.

13. **How are managers typically compensated?**

Managers may be compensated in a variety of ways, ranging from a fixed annual remuneration plus bonus (if any), to stock option plans and stock grants.

Managers are employees (*dipendenti*) of the company, therefore the mandatory employment and social security laws and regulations should be carefully accounted for in determining their compensation.

With regard to variable remuneration, specific provisions apply to banks and financial institutions.

14. How are members of management typically evaluated?

Managers evaluation shall be discretionally defined and carried out by the board of directors, internal evaluation functions and senior management (e.g. CEO, COO, HR).

It is worth noting that listed companies, insurance companies and banks' board of directors shall conduct auto-evaluations on a periodic basis, respectively, under the CG Code and Circular no. 285/2013 issued by the Bank of Italy.

15. Do members of management typically serve on the governing body?

Members of the management do not typically serve as members of the board of directors. It might however occur that the CFO or the general manager (*direttore generale*) serve on the board, especially in the case of SMEs.

16. What are the required corporate disclosures, and how are they communicated?

Non-listed and non-supervised entities are not required to disclose business information to the public, other than the required corporate disclosures to the Register of Companies, such as: (a) corporate seat and purpose, (b) number and characteristics of the issued shares or quotas, (c) names and data of (i) shareholders or quotaholders,

(ii) members of the corporate bodies (directors and statutory auditors, with indication of those holding managing director or chair functions, as well as their date of appointment and term in office), (iii) accounting auditor, (iv) entity carrying out management and coordination activity (*direzione e coordinamento*) over the company, (d) etc.

With regard to listed companies, inter alia: (a) pursuant to Art. 120 CFA, investors holding more than 3% of the corporate capital of the company (5% if the company is a SME under the CFA) shall notify such holding to the company, CONSOB and the market, (b) pursuant to Art. 122 CFA, where investors holding more than the mentioned thresholds enter into a shareholders' agreement (*patto parasociale*), such investors shall inform of the agreement the company, CONSOB and the market, (c) pursuant to Art. 123-bis, par. 2, CFA, on a yearly basis, the company shall inform the market of the compliance to the CG Code provisions (comply-or-explain).

Moreover, while listed companies shall comply with the disclosure duties under Regulation (EU) no. 596/2014 on market abuse (Market Abuse Regulation or MAR), certain large undertakings and groups (even though non-listed) shall comply with those under Directive 2014/95/EU as regards disclosure of non-financial and diversity information, as well as the relevant national implementing laws and regulations.

Specific provisions apply to banks and financial institutions.

17. How do the governing body and the equity holders of the company communicate or otherwise engage with one another?

On the one hand – with the aim of preserving corporate secrets and the exclusive governance competence vested into the directors – shareholders of joint stock companies are not granted with the right to engage with the board of directors for the purposes of being informed of the business activity of the company.

On the other hand, quotaholders of limited liability companies are granted with the individual right to ask the board of directors for any information on the business

activity of the company (Art. 2476, par. 2, ICC).

18. Are dual or multi-class capital structures permitted and how common are they?

As mentioned (see point 6 above), the by-laws may provide for the existence and issuance of special classes of shares, granted with certain rights or obligations, e.g. (i) multiple-voting rights (up to no more than 3 votes per share) or limitations/conditions to the exercise of voting rights, (ii) specific rights regarding the distribution of profits or the apportionment of losses, (iii) rights or obligations relating to the transferability of the shares (lock-up, pre-emption, right of first offer, drag and tag-along, etc.), (iv) prior approval or veto rights on specific matters to be resolved upon by the general shareholders' meeting, (v) etc.

Multi-class capital structures are commonly used in private equity and other tailor-made investment schemes, with the aim of protecting the position and the investment of specific shareholders.

19. What percentage of public equity is held by institutional investors versus retail investors?

According to the latest publicly-available data (Report on corporate governance of Italian listed companies, issued by CONSOB in December 2017): *'Ownership of Italian listed companies is still highly concentrated. In line with medium-term evidence, almost 9 out of 10 firms remain controlled either by a single shareholder or by a shareholders' agreement [...]. At the end of 2016 institutional investors resulted to be major shareholders in 61 listed firms, representing slightly more than 26% of the market [...]. At the end of 2016, the average share of capital held by major institutional investors is equal to 7.5%, slightly lower than its former levels'*.

20. **What matters are subject to approval by the shareholders and what are the typical quorum requirements and approval standards? How do shareholders approve matters (e.g., voted at a meeting, written consent)?**

Shareholders or quotaholders' general meetings are "ordinary" or "extraordinary" depending on the items to be addressed and meet at first and second calling (*prima* and *seconda convocazione*).

The meeting is entitled to resolve upon the matters granted to its competence by the applicable laws and regulations, which most significantly include: (i) appointment of directors and statutory auditors, (ii) filing of corporate suits against directors and statutory auditors, (iii) approval of financial statements and distribution of profits, (iv) share buyback programs, (v) amendments to the by-laws, (vi) mergers and demergers, conversions, (vii) etc.

Shareholders' meetings are prevented from resolving upon any management matter, which is reserved to the directors' competence.

Meetings operate based on the majority principle, provided that the by-laws may provide for the existence and issuance of special classes of shares, granted with certain rights or obligations (see point 18 above). The applicable quorums and majorities are to be determined based on: (a) type of company (listed or non-listed), (b) type of meeting ("ordinary" or "extraordinary"), (c) calling (first or second), (d) super-quorums and/or majorities set forth under the by-laws, if any.

Only limited liability companies' by-laws may provide for non-at-meeting voting methods, i.e. written consent or circular resolution (joint stock companies shareholders' resolutions shall always be taken with at-meeting voting methods).

21. **Are shareholder proposals permitted and what requirements**

must be met for shareholders to make a proposal?

Pursuant to and subject to the limitations under Art. 2367 ICC, shareholders holding at least 10% of the corporate capital (or 5% in case the company is listed) shall have the right to request the directors to call a meeting, for the purposes of resolving on specific items.

The same rule applies to quotaholders holding at least 1/3 of the corporate capital.

As regard listed companies, Art. 126-bis CFA grants the shareholders representing at least 2.5% of the corporate capital with the right to request the directors to supplement the agenda of an already-called meeting.

22. May shareholders call special meetings or act by written consent?

Other than as specified under point 21 above, shareholders cannot call special meetings or act by written consent.

23. Is shareholder activism common and what are the recent trends?

Italian financial markets experienced a significant growth in shareholder activism and engagement in the past years.

According to the latest publicly-available data (Report on corporate governance of Italian listed companies, issued by CONSOB in December 2017): *'In 2017 the attendance by institutional investors has marked its highest rate over the last six years by hitting 19.4% of the share capital. This results from the stable increase in the participation of foreign institutional investors, equalling on average 18.3% of the share capital (eight percentage points higher than its 2012 value), whereas over the time*

span under consideration attendance of Italian institutional investors has remained substantially unchanged'.

In 2018, activism and engagement have grown even stronger, a trend which will reasonably be confirmed in the upcoming months, also considering that the national legal framework is going to be supplemented with the relevant implementing measures of the provisions under Directive (EU) 2017/828 as regards the encouragement of long-term shareholder engagement (Shareholder Rights Directive 2 or SRD 2).

24. **What is the role of shareholders in electing the governing body?**

See point 6 above.

25. **Are shareholder meetings required to be held annually or otherwise, and what information needs to be presented?**

Pursuant to Art. 2364, par. 2, ICC, the board of directors shall call the shareholders or quotaholders' meeting at least on a yearly basis, no later than 120 days from the date of expiration of the financial year (usually set by the by-laws at 31 December) - or 180 days from such date if the company is required to consolidate the accounts of other entities or such term extension is grounded on reasons relating to the corporate purpose or structure - for the purposes of resolving upon the financial statements, which shall be made freely accessible to the shareholders (at the corporate seat) at least 15 days prior to the meeting.

With sole reference to listed companies, Art. 125-ter CFA sets forth that, together with the calling notice, the shareholders shall be provided with written reports on each of the items on the agenda, prepared by the board of directors.

It is worth noting that, pursuant to Art. 2374 ICC, shareholders holding at least 1/3 of the corporate capital shall have the right to request a postponement of the meeting, should they assert not to have enough information on the item to be addressed. The

new meeting shall convene no later than 5 days from the original date.

26. **Do any organizations advise or counsel shareholders on whether to approve matters?**

Proxy advisors often play a fundamental role in determining the voting outcome in listed companies shareholders' meetings, especially with reference to compensation resolutions (so-called say-on-pay).

It is worth noting that SRD 2 provides a first set of rules applicable to proxy advisors.

27. **What role do other stakeholders, including debt holders, employees, suppliers and customers and the government, typically play in the corporate governance of a company?**

Unless so provided for on a voluntary basis, stakeholders do not typically play a role in the company's corporate governance.

It should be noted that, among others: (a) employees may be granted with corporate rights by means of granting them with financial instruments or stock options, (b) pursuant to Art. 2394 ICC, creditors shall have the right to sue the directors for breach of their duties (see point 12 above), (c) pursuant to Art. 2418 ICC, the noteholders' representative shall have the right to attend the shareholders' meeting.

28. **What consideration is given to environmental and social issues, including climate change, sustainability and product safety issues, and are there any legal disclosure obligations regarding the same?**

The mentioned issues are experiencing a significant growth in awareness by companies and stakeholders.

From a legal standpoint, legal disclosure obligations are those set forth under Directive 2014/95/EU as regards disclosure of non-financial and diversity information, as well as the relevant national implementing laws and regulations (see point 16 above).

29. **How are the interests of shareholders and other stakeholders factored into decisions of the governing body?**

Management matters are reserved to the exclusive competence of the board of directors (Art. 2380-*bis*, par. 1, ICC, even though certain exclusions apply to limited liability companies under Art. 2479 ICC), which is not required – from a strictly legal standpoint – to factor into its decisions shareholders or stakeholders’ interests, unless on a voluntary basis.

30. **Do public companies typically provide earnings guidance on either a quarterly or annual basis?**

With sole reference to listed companies, pursuant to Art. 123-ter CFA, no later than 21 days prior to the date of the shareholders’ meeting called to resolve upon the yearly financial statements, the board of directors shall make available to the market a “report on remuneration”, setting out, with regard to (among others) board members and general managers (*direttori generali*), *inter alia*: (i) the general remuneration policy, (ii) a suitable depiction of each of the items composing the relevant remunerations, (iii) an analytical depiction of the remunerations paid during the latest financial year.

Specific provisions apply to banks and financial institutions.

31. May public companies engage in share buybacks and under what circumstances?

Share buybacks are governed – as a general rule – under the ICC.

Pursuant to Art. 2357 ICC, share buybacks shall be resolved upon by the shareholders' meeting (see point 20 above), which must determine, *inter alia*: (i) the maximum number of shares to be bought-back, (ii) the program term, which cannot exceed 18 months, (iii) the price range for the purposes of the share purchases, (iv) shares disposal rules and limits, to be complied with by the board of directors in managing the treasury shares.

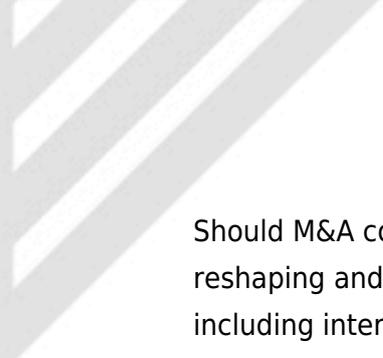
Treasury shares are deprived of any voting rights. Pre-emption rights (*diritti d'opzione*) and rights regarding the distribution of profits are sterilized and apportioned proportionally to the other outstanding shares.

With sole reference to listed companies, the aggregate par value of the shares to be brought-back (adding the aggregate par value of the shares held by controlled entities) cannot exceed an amount equal to 20% of the corporate capital. Certain exemptions to said quantitative limit apply, under Art. 2357-bis ICC.

Under no circumstances the company may subscribe its own shares.

32. What do you believe will be the three most significant issues influencing corporate governance trends over the next two years?

Italian financial markets experienced a significant growth in shareholder activism and engagement in the past years. We expect that the upcoming national implementation of Shareholder Rights Directive 2 will encourage even greater activism and engagement of institutional investors.



Should M&A continue to be as strong as in the past months, corporate governance reshaping and restructuring within newly formed groups will be of pivotal importance, including internal control systems and regulatory/compliance schemes.

Finally, many companies – especially listed and/or supervised – have implemented or are assessing whether to opt-in for the one-tier system, in search for a stronger and more efficient corporate governance. We expect this trend to continue.