NEWSLETTER NR. 32 – Corporate Governance 2009

*Published in the The International Comparative Legal Guide To: Corporate Governance 2009, by Global Legal Group Ltd, London

1 SETTING THE SCENE – SOURCE AND OVERVIEW

1.1 What are the main corporate entities to be discussed?

The corporate entities covered in the answers below are official public limited companies whose shares are listed on the Italian regulated market, organised and managed by the Italian Stock Exchange, Borsa Italiana S.p.A. ("*società quotate*", hereinafter the "*Listed Companies*").

Notwithstanding the fact that companies which are not listed but whose shares are widely distributed among the public ("*società diffuse tra il pubblico in misura rilevante*")[1] are regulated by rules often coincident with or similar to the ones applicable to Listed Companies, they have not been considered in this paper due to their very limited number[2].
For the same reasons, companies which adopt two-tier or one-tier governance model, which are non standard in Italy, have not been included [3].

In fact, in Italy the more common system of corporate governance - indicated as «traditional» - is based on two corporate bodies appointed by the shareholders:

- the board of directors, having the function to manage the company; and

- the board of statutory auditors, having the function to supervise compliance with the law, the principles of proper management and, in particular, the adequacy of the organisational, administrative and reporting structure and its actual operation.

1. These are Italian issuers that contemporaneously (a) have shareholders, other than the controlling shareholders, that number more than 200 and own at least 5% of the paid-up share capital; (b) are not eligible to draw up simplified annual financial statements; and (c) are not listed in regulated market.

2. Currently there are in total 90 companies which are not listed but whose shares are widely distributed among the public (source: official website of Consob).

3. The one-tier and two-tier governance models have been introduced in our legislation in 2003.

1.2 What are the main legislative, regulatory and other corporate governance sources?

The primary corporate legislation covering all corporate entities is the *Italian Civil Code*.
In addition Listed Companies are subject to a specific set of rules set out in the Legislative Decree n. 58/1998 (the "*Consolidated Financial Act*") and its implementing regulations adopted by Consob[1] with resolution n. 11971/99 and its amendments (hereinafter the "*Regulation of Issuers"*).

Moreover, Listed Companies have to take into consideration recommendations and communications periodically published by Consob and they must adhere to *Borsa Italiana rules and instructions*.

Furthermore, Borsa Italiana in 2006 replaced the *Corporate Governance Code* adopted in 1999, which is currently under further revision. This Code contains principles and criteria on best corporate governance whose adoption and compliance are voluntary, but strongly recommended to Listed Companies. If the Issuers have not implemented, in whole or in part, one or more of such recommendations, they shall supply adequate information on their decision not to do so in their annual "*report on the corporate governance*".

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All companies have *articles of association*, which have to be compliant with mandatory rules and regulations for Listed Companies. Such documents are approved by the shareholders and they contain all the main provisions concerning the governance of the Company and its functioning (such as the shareholders and directors meetings, the powers of directors, etc).

Provisions contained in the shareholders' agreements of Listed Companies must have a relevant role in the corporate governance of the said companies, even though such agreements are concluded between shareholders and the companies themselves are not party to them. Consequently, extracts of any agreements whose object is the exercise of voting rights in companies with listed shares or companies that control them must be published, independently of the form in which such agreements are concluded.

1. Consob (Commissione Nazionale per le Società e la Borsa) is the public authority responsible in order to regulate the Italian securities market, and to survey and monitor the observance of these rules.

1.3 What are the current topical issues, developments and trends in corporate governance?

The Italian corporate governance framework of Listed Companies has been continuously and gradually adjusted and improved, also due to the harmonisation process implemented by EU regulations and due to the requirements imposed by the best international corporate governance practices.

Among others, the most relevant corporate governance topics which have been recently introduced are the followings:

i) the so-called "Savings protection Law" ("*Legge sulla tutela del risparmio*", Law no. 262/2005), which contains a set of rules whose main aim is to protect the interests of minority shareholders. The law, for instance, establishes that:
   - members of the Board of Directors and of the Board of Statutory Auditors have to be appointed solely on the basis of lists of candidates;
   - at least one of the members of the Board of Directors has to be elected from the minority slate;
   - the Chairman of the Board of Statutory Auditors has to be appointed among the auditors elected by the minority shareholders;
   - at least one member of the Board of Directors (or two if the Board is composed of more than seven members) has to satisfy the «independence requirements»; and
   - each Listed Company has to appoint a manager charged with preparing the company's financial reports (*see question 5.1 below*);

ii) the transposition of the European directive on takeover bids ("OPA" Directive 2004/25/EC);

iii) the transposition of the European market abuse directive (Directive 2003/6/EC);

iv) the transposition of the Directive on harmonisation of transparency requirements in relation to information about companies listed in regulated market ("Transparency" Directive, 2004/109/EC); and, finally,

v) the transposition of the "MIFID" Directive (2004/39/EC), which is mainly focused on the negotiation of financial instruments.

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2 SHAREHOLDERS

2.1 What rights and powers do shareholders have in the operation and management of the corporate entity/entities?

The recent Italian Corporate Law Reform (Legislative Decree No. 5/2003) granted separate scope of competences, respectively, to the shareholders and to the board of directors.

The company's management is reserved exclusively to the directors, whilst shareholders maintain the right and the power to appoint the corporate bodies and to decide the major issues of the company's life.

Shareholders in their *ordinary meetings* can decide about: approval of the company's financial statements; appointment and dismissal of directors, choice of statutory auditors and auditing firm; establishing the remuneration of such bodies (unless such remunerations have been set out in the articles of association); resolution on directors' and statutory auditors' liability; approval of the internal regulations of the shareholders' meetings.

Furthermore shareholders in their *extraordinary meetings* can decide about: amendments to the articles of association; appointment, replacement and powers of the liquidators; approval of the merger/de-merger projects 1; delisting of the Company and other matter specifically reserved to them by law or by the articles of association [*see also question 2.6 below*].

1. Articles of Association may grant to the directors the authority for the resolutions relating to the merger and de-merger of companies wholly owned or owned for the 90%.

2.2 Can shareholders be liable for acts or omissions of the corporate entity/entities?

According to Italian civil law shareholders cannot be liable for acts or omissions of Listed Companies since their obligations are limited to their contribution to the company's share capital. Consequently, company's creditors are entitled to satisfy their claims only on the assets of the company and not on the personal assets of its shareholders.

In fact, Italian law provides a complete segregation of the company's assets from the ones of its shareholders.

2.3 Can shareholders be disenfranchised?

Equity interests in the company are represented by shares which are homogeneous (all shares belonging to the same category carry equal rights and have equal value), standardised and freely transferable. However, articles of associations can provide categories of shares carrying different rights. The only shares which can be disenfranchised are named «ordinary shares», meaning shares not having a limited voting right.

Under Consolidated Financial Act, shareholders may be disfranchised only in very few cases:

a) shareholders which violated the disclosure duties set out by Consolidated Financial Act for shareholders' agreements (notification of the agreement to Consob and to Company Register Office and publication of its extract in daily press) can not exercise their voting rights during shareholders' meetings;

b) in the event of violations of obligations set out for mandatory public offers, the voting rights attached to the share capital held by the entities committing said violations shall not be exercisable; and

c) if shareholders omit to comply with the notification requirements for major holdings, voting rights attached to listed shares or financial instruments which have not been notified may not be exercised [*see also question 2.5 below*].

2.4 Can shareholders seek enforcement action against members of the management body?

Directors have the general duty to carry out the management of the company, in accordance with the law and the company's articles of association, with the care required by their office and by their professional skills. Consequently, if directors fail to use the degree of care required according to the above mentioned standards, causing an effective prejudice to the company, they may be considered jointly responsible towards shareholders. The company can bring liability actions towards directors through a shareholders' resolution to be taken in an ordinary meeting. Such actions can also be brought by the board of statutory auditors with a resolution taken with a 2/3 majority. Furthermore such kind of actions can be promoted by minority shareholders representing at least 1/40 of the share capital or the smaller percentage set out in the articles of association. The actions mentioned above have to be initiated within five years from the termination of the director's appointment.

Italian civil law provides that if an individual shareholder suffers damages caused directly by a negligent or fraudulent action of the directors, he has the right to compensatory damages, within five years of the act which damaged the shareholder.

2.5 Are there any limitations on, and disclosures required, in relation to interests in securities by shareholders?

Under Italian Law overtaking certain relevant thresholds could have significant impacts on takeover rules (which are beyond the scope of this paper), but there are no limitations on the number of securities which can be held by any shareholders.

However, shareholders who exceed or fall below thresholds of 2%, 5%, 7,5%, 10% - and subsequent multiples of 5% - of the voting share capital must notify it to the Company and to Consob within five days from the time at which they overtook or fell below a threshold.

Similar disclosure duties apply when a Listed Company holds more than 10% of the capital of an unlisted company or a limited liability company.

Limitations also exist for cross-holdings exceeding the threshold of 2% of the capital of a Listed Company or 10% of the capital of an unlisted company or of a limited liability company. The company that was the last to exceed the applicable threshold may not exercise the voting rights attached to the shares in excess of the threshold and must dispose of them within twelve months (from the date on which it exceeded the threshold), otherwise the suspension of voting rights shall apply to their entire shareholding.

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2.6 What shareholder meetings are commonly held and what rights do shareholders have as regards them?

Shareholders' meetings are commonly held in the place where the company has its registered office, unless otherwise stated in the articles of association. Depending on the matters to be discussed, Italian Law provides different classes of shareholders' meetings:

- *ordinary meeting:* it is convened, at least once a year for the approval of the annual financial statements. Furthermore, it decides, among other things, (i) on the appointment and dismissal of directors; (i) on the appointment of statutory auditors and their chairman and on their remuneration, and (iii) on the statutory auditors' liability in case of a legal action pursued by the company. The first time a meeting is convened, it is duly constituted with the presence of shareholders representing at least 50% of the company's outstanding capital. Shareholders adopt resolutions by means of absolute majority, unless a larger majority is required by the company's articles of association. The second time, the meeting is duly constituted regardless of which share of the capital is represented by the shareholders in attendance, and resolutions are adopted by means of simple majority;

- *extraordinary meeting:* it is convened, among other things, to decide on amendments to the articles of association; on appointment, replacement and powers of the liquidators, in case of liquidation of the Company; on capital increases, dissolution, mergers and de-mergers operations. The first time the meeting is convened, shareholders adopt resolutions with a favourable vote of shareholders representing more than the 50% of the outstanding capital, unless a larger majority is required by the company's article of association. The second time, the meeting is regularly constituted with the presence of more than 1/3 of outstanding voting share capital, and adopts resolutions with the favourable vote of at least 2/3 of the voting capital represented.

Italian Law provides also special shareholders' meetings for different classes of shares or financial instruments, i.e. privileged or preference shares and bonds.

Formalities to convene shareholders meetings are provided by Corporate Governance rules and by articles of associations. Usually they are convened by the Chairman of the Board of Directors through a public notification, specifying when and where the meeting shall be held and the agenda containing the list of issues to be dealt with. Shareholders who represent at least 1/10 of the company's share capital may request the directors to call a meeting. Shareholders representing at least 1/5 of outstanding capital, have also the right to request additions to the agenda, within five days of the publication of the above mentioned notification *[see also question 2.1 above]*.

3 MANAGEMENT BODY AND MANAGEMENT

3.1 Who manages the corporate entity/entities and how?

The management body of the company is the Board of Directors, which is composed by the number of members set out in articles of associations; the members are appointed by shareholders. The Board of Directors is entrusted with the general and exclusive duty to manage the Company. Italian Law provides that at least one member has to be elected from the slate presented by minority shareholders which obtained the largest number of votes. Moreover, at least one of the members of the Board (or two, if the Board is composed of more than seven members), should satisfy independence requirements. All members of the Board must satisfy the integrity requirements established for members of the board of internal auditors in the regulations issued by Minister of Justice. Further requirements can be established in articles of associations (i.e. possession of special integrity, professionalism and independence characteristics).

If a Chairman is not appointed by shareholders' meetings, the Board of Directors selects it from among its members. The Chairman is usually the legal representative of the company, without any executive proxy. If so provided in the articles of association, the Board can also delegate its functions to an executive committee composed of certain of its members (Executive Committee), or to one or more of its members (so called executive director/s).

The Board sets the content, limits and procedures for the exercise of delegated powers. It may also instruct the delegate bodies on specific decisions and advocate to itself any delegated decisions. Some functions and operations cannot be delegated by the Board, specifically pertaining to: (i) the power to issue debentures convertible into shares, (ii) preparation and approval of draft financial statements, (iii) increase of corporate capital, (iv) reduction of corporate capital for losses, (v) reduction of corporate capital below the legal minimum, (vi) mergers and (vii) de-mergers. Moreover, the Corporate Governance Code recommends the appointment of internal committees with proposing and consultative functions, on the subject of internal dealing, remuneration and appointment of directors. Such Code recommends that these committees shall be composed of at least three members, with a majority of independent directors [*see also question 1.3 above*].

3.2 How are members of the management body appointed and removed?

According to the Consolidated Financial Act, rules for the appointment of directors are set out in the articles of association. Members of the Board of Directors are appointed by the ordinary shareholders' meeting on the basis of a list of candidates. The Corporate Governance Code provides that, along with such lists, a curriculum vitae of each candidate to the board shall be deposited at least 15 days before the shareholders' meeting. The directors cannot be appointed for a period exceeding three financial years, but they can be re-elected unless otherwise provided by the articles of associations. Their mandate terminates on the date of the meeting called to approve the annual financial statements.

The Italian Civil Code provides that the directors can be removed at any time by the shareholders' meeting [*see above, question 2.6 and 3.1*].

3.3 What are the main legislative, regulatory and other sources impacting on contracts and remuneration of members of the management body?

Remuneration for members of the Board of Directors is decided upon by the ordinary shareholders' meeting. The remunerations of directors provided with special powers (usually managing directors and the Chairman of the Board) are determined directly by the Board of Directors, after having consulted the Board of Statutory Auditors. Equity based remunerations plans (i.e. stock option plans and stock grant plans) have to be previously approved by shareholders' meeting.

The amount of Directors' fees and compensation are disclosed in the annual financial statements and in the corporate governance report.

3.4 What are the limitations on, and what disclosure is required in relation to, interests in securities held by members of the management body?

Under Italian Law Directors are allowed to own shares in their Listed Companies without any limitation. However, they are subject to a set of informational duties towards the company and the market.

In fact, they must inform Consob and the market on any transactions they make on the share capital exceeding the

amount of euro 5,000.00.

Moreover, transactions in securities held by directors are considered “related parties transactions” and – if relevant - they are generally subject to the prior consent of the Board of Directors, pursuant to the internal procedures adopted by it. Under Italian Law, Listed Companies must adopt regulations ensuring substantial and procedural transparency and correctness of such transactions and make them known in the management report.

The company’s statutory auditors monitor the adherence to such regulations.

3.5 What is the process for meetings of members of the management body?

Under Italian Law, unless otherwise stated in the articles of association, meetings of the Board of Directors are convened by its Chairman, who sets the agenda, coordinates the work and makes sure that adequate information about the matters contained in the agenda is provided to all members of the board. After notification to the Chairman of the Board of Directors, meetings of the Board of Directors may also be called by the Board of Statutory Auditors. Italian Law doesn’t establish a minimum number of annual meetings. In this regard, the Corporate Governance Code recommends to the Board of Directors to organise its meetings at regular intervals and to adopt an organisation and a modus operandi which enable it to perform its functions in an efficient manner. The Code also recommends to independent directors to have at least one meeting each year without the presence of the executive directors. The number of meetings of the Board of Directors (including the ones participated exclusively by the independents) is disclosed in the annual report on the corporate governance.

For the validity of Board resolutions, the attendance of a majority of the directors in office, as well as the vote of the absolute majority of those presents, are necessary. Further rules on the functioning of the Board of Directors are set out in the articles of association of each company (i.e.: how and where meetings are to be convened and through which modalities).

3.6 What are the principal general legal duties and liabilities of members of the management body?

Directors are entrusted with the general power to represent the company and they must act within their powers. They are subject to the general and exclusive duty to manage the company with the care and the loyalty required by their office and by their professional skills and to take all the actions required to carry out the corporate scope in accordance with the law and the company’s articles of association, avoiding conflicts of interests. Directors are subject to the general duties to avoid competing with the company (they can not be appointed director or general manager of competing company, unless expressly authorised by the shareholders’ meeting), and maintain confidential information acquired due to their position [*see above, question 2.4*].

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body?

The Board of directors has the right to delegate its powers to managing directors (certain specific transactions, such as drafting of merger/de-merger projects can not be delegated), setting the content, the limits and procedures for the exercise of the delegated powers. In such cases, however, the Board of Directors may always decide on transactions falling within the delegation.

In addition to general duties already examined, directors shall comply with the following specific duties:

- execute and duly perform all shareholders’ resolutions;

- on an on going basis, keep the company’s accounts properly; draft the yearly financial statements;

- call the shareholders' meeting at least once per year in order to approve the company's financial statements;

- properly keep the mandatory corporate books (e.g. the shareholders ledger, the book of the resolutions of the Board of Directors etc.);

- evaluate and approve related parties transactions; and

- define internal control guidelines.

Directors shall accomplish the formalities required by law in connection with the companies' listing and make all required communications to Consob, providing accurate and fair information to the public; disclosing any price sensitive information pursuant to the law and publishing the information documents required.

They have the duty to report on the status of the company's management within three months from the end of the first semester of each fiscal year.

The Corporate Governance Code provides for specific duties for the Board of Directors, considered as a whole and, in particular, it shall: a) examine and approve company's strategic, operational and financial plans and the corporate structure of the group it heads, if any; b) evaluate the adequacy of the organisational, administrative and accounting structure of the company; c) delegate powers to the managing directors and to the executive committee and revoke them; d) determine, after examining the proposal of the special committee and consulting the Board of Statutory Auditors, the remuneration of the managing directors and of those directors which are appointed to particular positions within the company and, if the shareholders' meeting has not already done so, determine the total sum to which the member of the board and of the executive committee are entitled; e) evaluate the general performance of the company, comparing the results achieved with those planned; f) examine and approve in advance transaction carried out by the issuer (and its subsidiaries) having a significant impact on the company's profitability; and g) evaluate, at least once a year, composition and performance of the Board of Directors and its committees [*see above, question 3.6*].

3.8 What public disclosures concerning management body practices are required?

Under Italian Law, Listed Companies shall annually publish a report on their compliance with the Corporate Governance Code, and whether they fulfilled its provisions. As referred above, companies are not obliged to comply with such provisions, but they are required to explain to the market the reasons why they did not do so. The company shall publish such report within 15 days prior to the shareholders' meeting convened for the approval of the annual financial statements. The report specifically provides information on internal functions, including on the internal committee and internal dealing systems, and on directors' remuneration and their independence [*see above, question 1.2, 3.3, 3.5*].

3.9 Are indemnities, or insurance, permitted in relation to members of the management body and others?

Companies typically stipulate insurance policies, to be covered from any damages caused by their managers. The directors are allowed to stipulate insurance on their own

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4 CORPORATE SOCIAL RESPONSABILITY

4.1 What, if any, is the law, regulation and practice concerning corporate social responsibility?

Legislative Decree No. 231/2001 (the "Decree") introduced in Italy the regulatory framework of administrative liability of legal entities. Under the Decree, companies may be held liable for certain specific listed offences committed (or attempted) in their interest and/or for their benefit by: (i) individuals at the highest level of corporate representation, administration and management or, (ii) individuals subject to the management or oversight of one of the persons indicated under (i) above. In the case where one of the offences specifically indicated by the Decree is committed, the criminal liability of the individual who materially carried out the offence, also entails the 'administrative' liability of the company.

In order to benefit from specific exemption of administrative liability, companies shall: (i) adopt and implement the appropriate organisational, management and control models, which allow to prevent offences, and (ii) entrust an internal body with the power of supervising the functioning and effective compliance of the company with the model.

The Code of Ethics represents the operational measure adopted by Listed Companies in order to comply with the requirement set out under (i) above, as part of the organisational model. It defines values that Listed Companies recognise and adopt in the exercise of their business activities.

4.2 What, if any, is the role of employees in corporate governance?

According to Italian Corporate Governance rules, employees do not have any specific and active role. The companies have the duty to advise the labour organisations in case of relevant transactions, such as mergers, de-mergers and tender offers, on which the employees have rights of consultation and information.

5 TRASPARENCY

5.1 Who is responsible for disclosure and transparency?

The ultimate responsible for disclosure and transparency duties is the Board of Directors. However, pursuant to the Consolidated Financial Act, Listed Companies shall appoint a manager charged with preparing the financial reports, subject to the mandatory opinion of the internal control body. Such manager shall attest, through a written declaration, the conformity of the company's financial accounts and of the communications disclosed to the market, verifying their compliance against relevant documents, books and accounts records.

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5.2 What corporate governance related disclosures are required?

Listed Companies shall maintain a continuous disclosure of information concerning material events and circumstances and of inside information which might have an impact on the price of their securities. In addition, they are subject to disclosure of relevant participations, shareholders agreements, equity based remuneration plans.

Periodical disclosure is required for financial statements (annual, first semester and first and third quarter). Companies have also to provide the reports containing information related to the exercise of votes in shareholders' meetings, as well as information on compliance with the Corporate Governance Code.

5.3 What is the role of audit and auditors in such disclosures?

Under Italian Law, Listed Companies which adopted the traditional corporate governance system must appoint a Board of Statutory Auditors, having the function to supervise:

- compliance with the law and the articles of association;

- observance of the principles of proper management;

- the adequacy of the Company's organisational structure for matters within the scope of the board's authority, the adequacy of the internal control system and the administrative and accounting system and the reliability of the latter in correctly representing the Company's transactions;

- the arrangements for implementing the corporate governance rules provided for in the code of conducts drawn up by management companies of regulated markets or by trade associations that the company, by means of public disclosure, declares it complies with; and

- the adequacy of the instructions imparted by the company to its subsidiaries.

The Board of Statutory Auditors shall notify to Consob any irregularities found in the performance of its oversight activity and shall provide an annual report on the Company's financials before their approval by the Shareholders' meeting.

Furthermore, Listed Companies must appoint an external independent auditing firm, which shall verify: a) during the financial year, that company accounts are kept properly and that transactions are reported correctly in accounting records; and b) that the company annual accounts and consolidated accounts correspond to the results of the accounting records and of tests performed by the auditor, and that the annual accounts comply with the relevant statutory and regulatory provisions.

Auditing firms shall render an opinion on the company annual accounts and consolidated accounts in special reports. They also shall inform Consob and the Board of Statutory Auditors without delay of any facts deemed to be censurable.

5.4 What corporate governance information should be published on websites?

Pursuant to the Regulation of Issuers, Listed Companies must publish on their websites information on material events and circumstances, disclosing corporate governance report, press releases related to corporate governance issues (i.e. internal dealing disclosures), assignment of financial instruments to corporate officers, employees and collaborators and publication of the proposals for the appointments of the board of directors and the board of statutory auditors, procedures provided for the participation and the exercise of the voting right in the shareholders' meetings, as well as the documentation relating to items on the agenda of the shareholders' meetings. Usually such information is contained in a specific section of the Companies' website named «investor relations», where the relevant corporate governance documents, such as the Articles of Association, the Ethic Code, at the Committees' Regulations are also published.

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LAW FIRM PROFILE & AUTHOR DETAILS

Santa Maria law firm was established in 1970 by Alberto Santa Maria, who is tenured professor of international law and international economic law at the University of Milan and is widely regarded as one of Italy's pre-eminent attorneys. Based in the centre of Milan, the firm offers one of the most sophisticated international practices among Italy-based law firms. Santa Maria law firm has consistently advised the Italian government and a wide range of important clients in connection with all aspects of European Community law, including antitrust, state aids, international trade law, as well as very complex corporate transactions, privatisations, mergers and acquisitions, joint ventures, restructurings and financings.
Moreover, Santa Maria law firm has been a pioneer in representing Italian companies in the United States market, having offered for a long time integrated Italian and U.S. legal services. The firm has currently developed an alliance with Greenberg Traurig LLP, a U.S.-based law firm with nearly 1,750 lawyers and over 30 offices in all major cities in the United States and worldwide.

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ACKNOWLEDGMENT

The authors would like to acknowledge the assistance of their colleague Marco Vigilante in the preparation of the chapter

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Marco Vigilante joined the firm after his graduation in 2008. His professional areas of interest include Commercial, Corporate matters and Litigation.

His practice is focused with particular attention on collaborating on the drafting of businesses and share purchase agreements, shareholder agreements, joint ventures, lease of businesses, as well as on collaborating on the structuring of domestic and foreign transactions and on general corporate assistance.

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