



NEWSLETTER No. 43 - MERGERS AND DE-MERGERS IN ITALY: THE WEB HELPS TO SIMPLIFY THE DISCLOSURE OBLIGATIONS

► Legislative Decree No. 123 of 22 June 2012

On 18 August 2012, Legislative Decree No. 123 of 22 June 2012, which streamlines disclosure obligations in the context of corporate mergers and de-mergers in Italy, entered into force (the “Decree”). The Decree, implementing Directive 2009/109/CE (which amends Directives 77/91/CEE, 78/855/CEE, 82/891/CEE and 2005/56/CE), was approved by the Council of Ministers on 7 June 2012 and then published in the Italian Official Gazette No. 180 of 3 August 2012. Primarily, the Decree dealt with the following issues:

- (i) Streamlining the disclosure of the merger and de-merger plan and related documents;
- (ii) Right to waive the preparation of the statements of assets and liabilities, directors’ report and the report on the fairness of the exchange ratio;
- (iii) Right to use the interim biannual report instead of the statement of assets and liabilities for listed companies; and
- (iv) No obligations to prepare certain merger documents in the case of merger by absorption of a ninety percent controlled company and in the case of proportional de-merger.

► Merger Plan and Merger Documents on the Company Website

The Decree allows a company to publish the merger plan on its website, as an alternative to filing it with the Companies’ Register.

Article 2501-ter, third paragraph, of the Italian Civil Code requires the merger plan to be filed with the Companies’ Registers located where the companies involved in the merger have their registered offices. In addition, Article 2501-ter, fourth paragraph, provides that the shareholders’ resolution related to the merger can only be approved after a period of 30 days from the date of the filing of the merger plan with the Companies’ Registers, unless all the shareholders of the companies involved in the merger waive the benefit of the 30-day period.

New Article 2501-ter of the Italian Civil Code now provides an alternative for the companies involved in the merger, allowing them to publish the merger plan on their websites instead of filing it with the Companies’ Registers. Such website publication must ensure “*the security of the website itself, the authenticity of the documents, and the certainty of the publication date.*” As before, if the merger plan is published on the company website, no resolutions on the merger can be adopted until 30 days have passed from the publication of the plan on the websites, except where all the shareholders of the companies involved in the merger waive this term.

Similarly, pursuant to Article 2501-septies of the Italian Civil Code, companies involved in the merger have to file (i) the merger plan, (ii) the directors’ report, (iii) the experts’ report on the exchange ratio, (iv) financial statements for the past three fiscal years, and (v) the statement of assets and liabilities for each company involved in the merger (collectively, the “**Merger Documents**”) with their own registered



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offices at least 30 days before the resolution on the merger.

The Decree permits a company to publish the Merger Documents on its website as an alternative to filing them with its registered offices, amending the Article 2501-*septies* of the Italian Civil Code. However, the Decree does not set forth that such publication must ensure the security of the website itself, the authenticity of the documents, and the certainty of the publication date, as provided for the merger plan.

► Waiver of Statement of Assets and Liabilities and Directors' Report

The Decree allows the companies involved in the merger to waive, subject to unanimous consent of the shareholders, the preparation of the statement of assets and liabilities as well as the directors' report.

Firstly, pursuant to Article 2501-*quater* of the Italian Civil Code, each board of directors of the companies involved in the merger must prepare the statement of assets and liabilities as of a date not more than 120 days before the date on which the merger plan is filed at the registered offices of the company. Alternatively, such statement of assets and liabilities can be replaced by the financial statements if such financial statements cover a period ending less than six months prior to the date the merger plan is filed with the registered offices of the company.

The introduction of the Decree has made the preparation of such statement of assets and liabilities optional and now, therefore, shareholders and holders of other financial

instruments with voting rights can waive it with unanimous consent. The Decree also indicates that if a company decides to publish the Merger Documents on its website, the 120-day period that applies to the statement of assets and liabilities, as well as the six month period that applies to the annual financial statements, will be calculated as from the publication date on the company website rather than the filing date with the registered offices.

Secondly, pursuant to Article 2501-*quinquies* of the Italian Civil Code, each board of directors of the companies involved in the merger must prepare a report that sets forth and explains the merger plan from both a legal and financial point of view, as well as the exchange ratio of shares or quotas.

The Decree amends the above rule, allowing the shareholders and holders of other financial instruments with voting rights of the companies involved in the merger to waive, with unanimous consent, the preparation of the directors' report.

► Listed Companies: Interim Biannual Report as Substitute for Statement of Assets and Liabilities

The Decree, amending the first paragraph of Article 2501-*quater* of the Italian Civil Code, provides that companies listed on regulated markets can substitute the interim biannual report for the statement of assets and liabilities, provided that the interim biannual report covers a period ended not more than six months from the filing date with the Companies' Register or publication on the company website of the Merger Documents.



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► **Report on the Fairness of the Exchange Ratio**

With respect to the report on the fairness of the exchange ratio of shares or quotas, the Decree, under Article 2501-*sexies*, third paragraph, of the Italian Civil Code, clarifies that whenever a company listed on regulated markets is involved in the merger, the expert responsible for such report must be selected from among the companies regulated by CONSOB (*i.e.* National Commission for Companies and Stock Exchange), rather than from among the companies listed in the relevant register.

In addition, shareholders and holders of other financial instruments with voting rights of all the companies involved in the merger can waive the right to the report on the fairness of the exchange ratio with their unanimous consent.

The above provision is also applicable to cross-border mergers.

► **More Information for the Shareholders**

Irrespective of the fact that the board of directors has prepared the report pursuant to Article 2501-*quinquies* of the Italian Civil Code, the Decree states that the board of directors has an obligation to inform its shareholders and the board of directors of the other companies involved in the merger of any material change in the company's assets and liabilities that has occurred between the filing or publication of the merger plan and the date of the shareholders' meeting to approve such merger plan.

The companies involved in the merger have to provide a copy of the Merger Documents (free of charge) to any requesting shareholder. However, the Decree exempts companies which have chosen to publish the Merger Documents on their websites from the obligation to provide copies of the Merger Documents to requesting shareholders, as long as the Merger Documents published on the website can be downloaded or printed out. In addition, for companies filing the Merger Documents with their registered offices, the Decree allows the companies to provide copies of the Merger Documents via e-mail and free of charge to any shareholder, upon request.

► **Merger by Absorption of Fully Controlled Companies**

With respect to merger by absorption of fully controlled companies, regulated by Article 2505 of the Italian Civil Code, the Decree sets forth two requirements pursuant to which the resolution upon the merger can be adopted by the board of directors rather than by a shareholders' meeting.

First, all the companies involved in the merger must comply with the disclosure obligations of the merger plan provided by Article 2505-*ter*, third and fourth paragraph, of the Italian Civil Code.

Second, the shareholders of the absorbing company must be allowed to examine and receive a copy of the financial statements - and the related reports from the last three fiscal years - and the statement of assets and liabilities of all the companies involved, in addition to the merger plan.



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► **Merger by Absorption of Ninety Percent Controlled Companies**

In the event of merger by absorption of a company controlled at least at ninety percent by the absorbing company or in the event of proportional de-mergers, the Decree provides for further simplifications in addition to those already set forth by Article 2505-*bis*, first paragraph of the Italian Civil Code, including an exemption from (i) the experts' report on the fairness of the exchange ratio (Article 2501-*sexies* of the Italian Civil Code), (ii) the statement of assets and liabilities (Article 2501-*quater* of the Italian Civil Code), (iii) the directors' report (Article 2501-*quinquies* of the Italian Civil Code), (iv) the obligation to file or publish the Merger Documents (Article 2501-*septies* of the Italian Civil Code), provided that the minority shareholders of the absorbed company are granted the right to sell their shares or quotas to the absorbing company at a price to be determined as if such shareholders were exercising their right of withdrawal.

► **Procedural Simplifications for De-mergers**

All the above amendments introduced by the Decree with respect to mergers are also applicable to de-mergers, by virtue of the references contained in Articles 2506 and ff. of the Italian Civil Code, regulating corporate de-mergers.

In addition, the Decree includes a specific provision on de-mergers under Article 2506-*ter*, third paragraph, of the Italian Civil Code. Such rule exempts the companies involved in the de-merger from the obligation to prepare the statement of

assets and liabilities and the report of the board of directors (in addition to the exemption relating to the experts' report), where the de-merger is implemented by incorporation of one or more new companies and the shares are attributed and calculated proportionally.

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