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# Streamlining the reports and documents needed for mergers and de-mergers

On 7 June 2012, the Council of Ministers approved legislative decree No. 123 of 22 June 2012 (the "**Decree**"), which streamlines the reporting obligations in the context of corporate mergers and de-mergers, implementing Directive 2009/109/CE that amends Directives 77/91/CEE, 78/855/CEE, 82/891/CEE and 2005/56/CE. The Decree was published in the Italian Official Gazette No. 180 of 3 August 2012 and entered into force on 18 August 2012, i.e., fifteen days after publication.

## Key issues

- Simpler to publish merger and de-merger project and related documents
- Possible to waive preparation of the ad-hoc statements of assets and liabilities and of the report of the management body
- Interim six-month report can be used by listed company instead of ad-hoc statements of assets and liabilities
- No obligation to prepare ad-hoc statements of assets and liabilities and report of the management body in certain circumstances

The Decree allows (i) a company to publish the merger or de-merger project on its website, as an alternative to depositing it with the register of companies; (ii) a company to publish the documents relating to the merger or de-merger on its website as an alternative to depositing them at its registered office; (iii) a company, subject to unanimous approval of the shareholders, to waive preparation of the ad-hoc statements of assets and liabilities of the companies involved in the merger and of the reports of the respective management bodies; (iv) a company listed on a regulated market to use its interim six-month report, rather than the ad-hoc statements of assets and liabilities; and (v) for a merger by absorption of a company owned for at least 90% or for proportional de-mergers, an exemption from the obligation to prepare the ad-hoc statements of assets and liabilities and the report of the management body.

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## Publication of the merger project

As currently worded, Art. 2501-*ter*, third paragraph, of the Civil Code requires filing of the merger project with the registers of companies with jurisdiction over the respective registered offices of all companies involved in the merger. The fourth paragraph of Art. 2501-*ter* further provides that a decision in relation to the merger can be made only after 30 days following the date the merger project is filed with the registers of companies, unless all the shareholders of all companies involved in the merger waive the benefit of the 30-day term.

The Decree amends Art. 2501-*ter*, third paragraph, of the Civil Code, and provides for an alternative, whereby the companies involved in the merger can choose instead to publish the merger project on their respective websites rather than filing it with the registers of companies. This publication on the website shall be at terms and conditions that are such as to ensure "*the security of the website, the authenticity of the documents, and the exact date on which the documents were published*."

Similarly to when the merger project is filed with the register of companies, no decision on the merger can be made until at least 30 days after publication of the project on the websites, except where all shareholders of the companies involved waive this right.

## Publication of the documents relating to the merger

In its current wording, Art. 2501-*septies* of the Civil Code requires that the following documents be deposited at the respective registered offices of all companies involved in the merger, within the 30 days before the decision on the merger is made: the merger project, report of the management body, experts' report, and the financial statements for the past three financial years, for each company involved in the merger (the "**Merger Documents**"). Moreover, the companies involved in the merger are also required to provide, free of charge, the Merger Documents to any shareholder that so requests.

The Decree amends Art. 2501-*septies* of the Civil Code and provides that, in the alternative, the Merger Documents can be published on the respective websites of the companies involved in the merger, rather than deposited at the companies' registered offices.

Companies who choose to publish the Merger Documents on the website will be exempt from the obligation of having to provide the Merger Documents to the shareholders free of charge, as long as the Merger Documents published on the website can be downloaded or printed. Companies that opt to deposit the Merger Documents at the registered office will continue to be required to provide the Merger Documents free of charge to the shareholders, but may comply with this obligation by sending the Merger Documents via e-mail, if a shareholder so requests.

## Ad-hoc statement of assets and liabilities

Pursuant to Art. 2501-*quater* of the Civil Code, the respective management bodies of the companies involved in the merger must prepare an ad-hoc statement of assets and liabilities for the company as of a date that is not more than 120 days before the date when the merger project is deposited at the registered office of the company, except where the most recent approved financial statements of the company refer to a period that ended less than six months before the date the merger project is deposited at the registered office of the company.

The Decree changes this provision materially with two amendments, one applicable to all companies and one applicable only to listed companies. Pursuant to these amendments, the preparation of the ad-hoc statement of assets and liabilities is optional, and therefore shareholders and holders of other financial instruments with voting rights can waive preparation thereof.

The Decree also provides that companies listed on regulated markets can substitute the ad-hoc statement of assets and liabilities with the interim six-month report, provided that the reference period for the report ended not more than six months before the date of the deposit or of the publication of the Merger Documents.

Finally, the Decree explains that if a company opts to publish the Merger Documents on its website, then these "validity" periods for the ad-hoc statement of assets and liabilities (120 days), and for the annual financial statements and six-month report (six months) will begin as from the date on which the Merger Documents are published, rather than as from the date the Merger Documents are deposited at the registered office.

## Report of the management body

Pursuant to Art. 2501-*quinquies* of the Civil Code, the respective management bodies of the companies involved in the merger are required to prepare a report that sets forth and explains the legal and financial reasons underlying the merger project, as well as the exchange ratio.

With the Decree, this provision is now amended to allow shareholders and holders of other financial instruments with voting rights of the companies involved in the merger to waive preparation of this report, provided the vote is unanimous.

The Decree, on the other hand, also requires the management body to inform the shareholders' meeting, and the management bodies of the other companies involved in the merger of any material changes in the company's assets and liabilities that have occurred from the date when the merger project was deposited at the registered office of the company, or published on the website, and the date on which the merger project is voted.

## Merger by absorption of companies held for at least ninety per cent

The Decree also simplifies Art. 2505-*bis*, first paragraph of the Civil Code, which governs mergers by absorption of companies owned at least for 90% by the absorbing company, and exempts these mergers from the requirement of preparing the experts' report under Art. 2501-*sexies* of the Civil Code, provided that the minority shareholders of the absorbed company are granted the right to sell their shares to the absorbing company at a price to be determined on the basis of the criteria to be used for circumstances allowing withdrawal of shareholders.

Without prejudice to the above, the Decree provides that this type of mergers, and subject to the same restrictions, will also be exempt from the obligation to prepare the ad-hoc statement of assets and liabilities under Art. 2501-*quater* of the Civil Code, the report of the management body under Art. 2501-*quinquies* of the Civil Code, and to deposit or publish under Art. 2501-*septies* of the Civil Code.

## Provisions applicable to de-mergers

The amendments on mergers described above will also apply to de-mergers, because of the cross-references in Articles 2506 et seq. of the Civil Code that govern corporate de-mergers. In addition, the Decree includes specific provisions and amendments governing de-mergers.

Art. 2506-*ter*, third paragraph, of the Civil Code, is amended so as to exempt companies involved in the de-merger from the obligation to prepare the ad-hoc statement of assets and liabilities and the report of the management body (retaining the previous exemption relating to the experts' report), where the de-merger is implemented by creating a new company and ownership thereof is calculated exclusively on the basis of proportionality.



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