
LEGAL INFORMATION NEWSLETTER

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We are pleased to provide you with the new issue of our legal information newsletter.

Topical legal matters are discussed and those related to issues that you might encounter.

We hope that you will find it of interest.

We would welcome any comment you might have.

**THE LEGISLATIVE DECREE 22.1.2010
ON AUDITING OF ACCOUNTS IN
COMPLIANCE WITH THE DIRECTIVE
2006/43/EC CONCERNING STATUTORY
AUDITS OF ANNUAL ACCOUNTS AND
CONSOLIDATED ACCOUNTS**

Legislative sources:

Legislative Decree. 22.1.2010
EU Directive 2006/43/EC
EU Directive 78/660/EEC
EU Directive 84/253/EEC

INTRODUCTION – On 22 January 2010 the Council of Ministers definitively approved the legislative Decree 2006/43 on statutory audits of annual accounts and consolidated accounts in compliance with the Directive 43/2006/EC.

The new provisions aim at ensuring a more rigorous audit of the accounts in accordance with the European Union accounting regulations.

Appointing a statutory auditing committee is mandatory for those Limited liability companies (1) having a stock capital of at least 120,000 Euros, (2) subject to consolidated balance-sheet drawing up, (3) exercising control over a Company which accounts are subject to auditing, or (4) whenever they exceed, for two financial years in a row, two of the thresholds established by the first paragraph of article 2435-bis which allow the drafting of an abbreviated balance-sheet.

As far as the appointment of an auditor for the control of the accounts is concerned, the new rules provide, for listed and unlisted Companies, that the Shareholders Meeting has the authority to designate an auditor for the control of the accounts upon justified proposal by the board of statutory auditors.

If no auditor for the control of the accounts is designated, then the Tribunal will provide for it upon request by anyone interested.

In case of listed Companies the control over the auditor for the control of the accounts is effected by the board of statutory auditors or by the Supervisory Board.

DEFINITIONS -

Statutory Auditors Committee

It is constituted of 3 members, one Chairman and 2 standing auditors, plus 2 alternate auditors. Its function is that of legal control over governance and administration. When the control of the accounts is not entrusted with an auditing Company or an auditor of the accounts, it will be effected by the Statutory Auditors Committee.

Auditing Company

Whenever the control of the accounts is entrusted with an auditing Company, the auditing Company carries out this function separately from the Statutory Auditors Committee. Auditing Companies have to be registered with Consob (securities commission).

Auditor for the control of the accounts

The audit of the accounts may also be entrusted with an external auditor. The external auditor must be a member of the Registry of the auditors of accounts.

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INTERNAL AUDIT COMMITTEE AND AUDITING FOR PUBLIC BODIES –

Article 19 of the Legislative Decree establishes the obligation for public bodies listed at article 16, such as banks, insurance companies, estate broker companies and investment management companies, to appoint a committee for internal audit which will have to accomplish a series of tasks relating to:

- a) financial information process;
- b) internal audit and risk management systems;
- c) as well as statutory audits of accounts.

In order to take into account the possible systems of *governance*, the directive 2006/43/EC establishes that the members of the Committee can be non-executive members of the Board of Directors and/or members of the auditing body and/or members designated by the Shareholders Meeting.

However, to implement the said provision, article 19 entrusts the above mentioned auditing tasks to the sole Companies' auditing body, infringing – in our opinion – the content of the said directive.

THE AUDITING STRUCTURE IN LIMITED LIABILITY COMPANIES –

An important piece of news is introduced by article 34, paragraph 26 of the Legislative Decree, which produces considerable changes to the content of article 2477 Civil Code about statutory audits of accounts in limited liability Companies, providing for the appointment of the board of statutory auditors also if:

- a) the Company has to draw up the consolidated balance-sheet;
- b) the Company has a control over Companies obliged to legal audit of accounts.

Not only the cases in which the appointment of the board of statutory auditors is compulsory are extended, but also, according to the current wording of article 2477, it seems that anybody interested can ask the Tribunal for the appointment of the board of statutory auditors if the Shareholders Meeting does not provide for it.

Only an interpretation by the jurisprudence can make this aspect clear.

BEGINNING OF THE AUDITING ACTIVITY –

The subjects entitled to carry out the legal audit of accounts comply with the principles of ethics and professional conduct, confidentiality and professional secrecy established by associations and professional categories and approved by the Ministry of Economy and Finance, jointly with the Ministry of Justice and upon Consob's advice, or issued by the Ministry of Economy and Finance, jointly with the Ministry of Justice and upon Consob's advice.

The auditor for the control of the accounts or the auditing Company have to contact the subject previously entitled to carry out the audit in order to obtain any useful information – for carrying out the audit – about the Company being audited.

The subject previously entitled to carry out the audit will give access to such information.

INDEPENDENCE & OBJECTIVENESS –

The auditor for the control of the accounts or the auditing Company which carry out the legal audit of the accounts of a Company must be independent from it and do not have to be involved in its decisions.

The auditor for the control of the accounts and the auditing Company cannot carry out the legal audit of the accounts of a Company if between the said Company and the auditor or the auditing Company or their network there are financial, business, working or other kinds of relationships, direct or indirect, including those coming from the supply of services other than auditing, from which a third Party – informed, objective and rational – would draw the conclusion that the independence of the auditor or the auditing Company is compromised.

If the independence of the auditor for the control of the accounts or the auditing Company risks being compromised – as in case of self-re-examination, personal interest, legal Court assistance, familiarity, extreme confidence or intimidation – the auditor or the auditing Company have to take measures to reduce such risks.

If the said risks are so considerable as to compromise the independence of the auditor for the control of the accounts or the auditing

Company, the auditing will not be carried out by them.

The subjects entitled to carry out the legal audit of the accounts follow suitable procedures to prevent and detect in due time the situations which can compromise their independence.

The institution and functioning of such procedures are documented so that they can be subject to quality control systems.

The auditor for the control of the accounts or the auditing Company state in their records all the significant risks to their independence as well as the measures taken to reduce such risks.

The Shareholders and the members of the Board of Directors of the auditing Company or a subsidiary cannot get involved in the carrying out of the audit if they compromise the independence and objectiveness of the person in charge of the audit.

Remuneration for auditing cannot be subject to any condition, nor be established depending on the audit's results, nor depend on the supply of services other than auditing to the Company being audited, to its controlled or controlling Companies, by the auditor for the control of the accounts or the auditing Company or their network.

Remuneration for auditing is determined so that the quality and reliability of the job are ensured. For this purpose the subjects entrusted with the auditing of accounts establish the professional resources and the time needed for the accomplishment of that task in consideration of:

- a) the proportion, composition and riskiness of the most significant capital, economic and financial ratios of the balance-sheet of the Company being audited, as well as the risks connected to the consolidation process of the data related to the Companies of the group;
- b) the technical preparation and experience needed to carry out the audit;
- c) the need to ensure – besides the material execution of the audit – a suitable activity of supervision and the line to be followed.

In any case, the remuneration of the employees of the auditing Companies which carry out the auditing cannot depend on the audits' results.

The subjects entitled to carry out the audit of accounts comply with the principles of independence and objectiveness established by associations and professional categories and approved by the Ministry of Economy and Finance upon Consob's advice, or issued by the Ministry of Economy and Finance upon Consob's advice.

BEGINNING AND END OF THE WORKING RELATIONSHIP – Article 13 provides that the auditor for the control of the accounts should be appointed by the Shareholders Meeting, upon justified proposal by the controlling body.

Appointment lasts for three financial years and expires at the date of the Shareholders Meeting convened to approve the balance-sheet related to the third financial year of the appointment.

The Shareholders Meeting, after having conferred with the controlling body, can remove the auditor for the control of the accounts from his position for just cause. Then the auditing of the accounts will be entrusted with another auditor or auditing Company.

A disagreement over an accounting treatment or audit procedures cannot be considered a just cause for dismissal.

The auditor for the control of the accounts or the auditing Company entrusted with the audit can resign from their position, as long as they pay compensation for damages, in the cases and with the procedures established by the regulation issued by the Ministry of Economy and Finance upon Consob's advice.

In any case, the resignation must be given in within a certain time and upon certain conditions so that the Company can arrange the replacement of the auditor for the control of the accounts, except for serious and proven impediment by the auditor or the auditing Company.

In case of resignation or resolution of the contract by mutual consent, the task of legal

audit continues to be performed by the same auditor for the control of the accounts or auditing Company until the resolution concerning the appointment of a new auditor becomes effective, and, in any case, not over six months from the date of resignation or resolution of the contract.

RESPONSIBILITY OF THE AUDITING COMPANY – The legislative Decree repeals article 2409 *sexies* Civil Code about the responsibility of the subjects entrusted with the audit and establishes that they take the responsibility jointly and severally among them and with the directors – within the limits of their actual contribution to the damage caused – towards the Company and its Shareholders and third Parties.

The person in charge of the audit of accounts and the employees who co-operate in the activity of auditing of accounts are responsible jointly and severally among them and with the auditing Company towards the Company and the third Parties which have been damaged, within the limits of their actual contribution to the damage caused. This is the principle of proportional responsibility.

In this connection it should be pointed out that the responsibility of the auditors for the absence of supervision has been cancelled.

The same regulation establishes the cases and conditions in which the contract relating to legal audit can be resolved by mutual consent or for just cause.

HYPOTHESIS OF CRIME – The rules being examined introduce various hypothesis of crime related to the activity of auditing.

Article 27 introduces the crime of falsity in the reports or in the accounts made by the subjects responsible for the auditing.

Pursuant to the said rule, the subjects responsible for the legal audit who – aiming at obtaining unjust advantages for them or for other people, acknowledging their falsity and with the intention of deceiving the receivers of their reports – make false declarations or suppress information concerning the economic or financial situation of the Company, body or subject being audited in their reports or in other accounts – to mislead the receivers of

the reports on the above situation – are punished with the arrest up to one year if they have not caused property damage.

If their behaviour causes property damage to the receivers of the reports they risk from one to four years' imprisonment.

If this kind of crime is committed by the subject responsible for the legal audit of a public body the punishment is from one to five years' imprisonment.

If the crime is committed by the subject responsible for the legal audit of a public body for money or a different benefit given or promised, or with the complicity of the directors, the chief executive officers or the auditors of the Company being audited the punishment is increased up to one half.

In any event, the punishment applies to the subjects who give or promise benefits as well as to the chief executive officers and the members of the board of directors and of the board of auditors of the public body being audited who participate in the crime.

Another hypothesis of crime has been introduced by article 28 in case of corruption of the auditors entrusted with the audit by the Company.

The subjects responsible for the legal audit who – as a consequence of the promise or giving of a benefit – commit or omit activities infringing their obligations related to their position – causing damage to the Company – are punished with up to three years' imprisonment. The same punishment applies to the subjects who give or promise the benefit.

The subject responsible for the legal audit and the members of the board of directors, the Shareholders and the auditing Company's employees who – during the legal auditing of the accounts of public bodies or Companies under their control, except for the cases provided for by article 30 examined herein below – commit or omit activities infringing their obligations related to their position for money or a different benefit given or promised, are punished with one to five years' imprisonment. The same punishment applies to the subjects who give or promise the

benefit.

Also obstruction to audit is punished as a crime.

The members of the board of directors who – by concealing documents or by using other suitable tricks – prevent or obstruct the due course of legal auditing are punished with a fine up to € 75,000.

If the unlawful behaviour causes damage to the Shareholders or third Parties the punishment applied is a fine up to € 75,000 and a maximum of 18 months' imprisonment.

In case of legal audit of public bodies the punishments are doubled.

Article 30 condemns the practice of unlawful remunerations and provides that the subject responsible for the legal audit and the members of the board of directors, the Shareholders and the auditing Company's employees who receive, directly or indirectly, remunerations in money or in different ways from the Company being audited other than those legitimately agreed, are punished with one to three years' imprisonment and with a fine from € 1,000 to € 100,000.

The same punishment applies to the members of the board of directors, the chief executive officers and the liquidators of the Company being audited who offered the undue remuneration.

With reference to the hypothesis of unlawful business relationships with the Company being audited, pursuant to article 30 the directors, the subjects responsible for the legal audit and the auditing Company's employees who get loans, in any form either directly or indirectly, from the Company being audited or its controlling or controlled Company, or they ask those Companies to give them guarantees for their own debts, are punished with one to three years' imprisonment and with a fine from € 206 to € 2,065.

It should also be noticed that the Ministry of Economy and Finance and Consob will be informed about any criminal judgement pronounced against the subjects responsible for the legal audit, the members of the board of directors, the Shareholders and the auditing

Company's employees for the crimes committed during the legal auditing of the accounts.

In conclusion, some provisions of the Civil Code have been consequently repealed or amended.

In particular article 2624 about falsity in the reports drawn up by the auditing Company has been repealed, while all the references to the auditing Company and the subjects responsible for the audit provided for by articles 2625 and 2635 have been cancelled.

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