Joint ventures in Italy: overview

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DOMESTIC COMPANY JOINT VENTURES (JVS)

Regulation

1. Are JVs expressly regulated?

JVs are not expressly regulated under Italian law. The parties are able to form contractual and corporate JVs under the principle of freedom to contract (Article 1322 and Article 2247 and so on, Italian Civil Code).

Types

2. Which types of JV are allowed?

Contractual and corporate JVs are allowed.

Contractual JVs

In the contractual JV the parties establish a contractual relationship, under which each party can operate independently, combining its resources with those of the other parties, to pursue a common interest and reach common goals set out in a cooperation agreement.

A contractual JV is generally used when the parties do not intend to go beyond a mere relationship between themselves, or where the activity that will be performed is on an occasional basis and limited in time.

Corporate JVs

The corporate JV consists of a company duly formed through the execution of a company agreement for the co-operation of two or more companies (co-ventures). Its aim is to unify the activities developed by each company within a new legal entity that pursues a defined and limited project.

Companies must be established by a deed of incorporation (Atto costitutivo). The new company must contain bye-laws (Statuto), which set out the company's governing rules.

Generally, the following types of company are used:
- The joint stock company (Società per azioni) (SpA).
- The limited liability company (Società a responsabilità limitata) (Srl).

The SpA is the most commonly used form. Its share capital must be a minimum of EUR120,000, and is divided into shares.

An Srl has a more streamlined corporate structure than the SpA. Its share capital is a minimum of EUR10,000, divided into quotas. The amount of the share capital is determined at the time the Srl is incorporated and must be subscribed in its entirety by the founding quotaholder(s).

For both SpAs and Srls, in the case of multiple founders, those paying the capital subscription in cash are not required to pay the entire amount of the shares up-front: they are entitled to deposit at least 25% initially and pay the remaining 75% at a subsequent date. Once the deed of incorporation (which must be drafted by a public notary) has been filed with the competent Companies' Register and the company has been duly incorporated, the company can issue shares/quotas representing its own share capital.

3. Are corporate JVs subject to the corporate law?

Corporate JVs are regulated by Italian corporate law and anti-trust law (see Question 7). The Italian Civil Code regulates several forms of companies, providing for the fundamental rules of Italian corporate law (Articles 2247 to 2642).

Other specific laws that apply to companies also apply, for example in relation to:
- Bankruptcy (Royal Decree No.267 of 1942).
- Restructuring (Legislative Decree No.270 of 1999).
- Banking (Legislative Decree No.385 of 1993).
- Financial intermediation, which provides laws applicable to listed companies (Legislative Decree No.58 of 1998).

Formation and registration

4. Is the use of foreign language in a JV's founding documents (both corporate and contractual) restricted?

Contractual JVs

No restriction on the use of foreign language is provided under Italian law. The parties can agree to draft and execute the agreement in the preferred language, and will be free to translate it into non-binding versions.

Corporate JVs

Ancillary/shareholders' agreements can be drafted and executed in the language agreed between the parties. The deed of incorporation and the bye-laws of the relevant company must be drafted and executed in the Italian language and registered at the Companies' Register at the local Chamber of Commerce. Without this registration, under certain circumstances, it could be deemed to be a less sophisticated form of company, without legal personality (società in nome collettivo).

Registration of a JV agreement

For the purposes of the registration of a JV agreement at the Italian Revenue Agency (Agenzia delle Entrate), documents written in a foreign language must be accompanied by a sworn translation into Italian performed with a court-registered expert (Article 11(5), Decree of the President of the Republic of Italy No.131 of 1986). Registration is required for both corporate and contractual JVs. In the case of a corporate JV, the deed of incorporation (without bye-laws) must be registered.
5. Are public officers (for example, public notaries) involved in a JV’s formation procedure?

A public notary is not required to be involved in the creation of a JV, except where:
- A corporate JV is incorporated (see Question 2, Corporate JVs).
- In the case of a contractual JV, the parties agree to transfer certain rights for which the involvement of a public notary is mandatory, such as for the transfer of real estate (where the deed of transfer must be in a written form, and its content and parties' signatures, or at least the parties' signatures, must be authenticated by a public notary).

Under Italian law, a public notary certifies that a document is consistent with the intention of the parties and complies with mandatory laws (that is, provisions of law that cannot be overridden by the choices of the parties). The public notary also guarantees the truthfulness and legality of documents drafted before him.

6. Are JVs registered with any local registries? Are public sector bodies’ authorisations required for a JV’s establishment?

Local registries
There are no specific JV registers. All JV agreements must be registered at the Italian Revenue Agency (Agenzia delle Entrate) (see Question 4, Registration of a JV agreement).

Public sector bodies
To establish a JV in Italy, public sector bodies' authorisations are not expressly required. In the case of the corporate JV, if the specific purpose of the new company requires an authorisation (for example, in the chemical or pharmaceutical industries), the new company must comply with any European, national or local regulation, by obtaining any relevant required permit or authorisation.

In relation to anti-trust clearances, see Question 7.

7. What other formal requirements must be complied with to validly constitute a JV?

There are no formal requirements to comply with to validly constitute a JV, other than those described in Questions 2 to 6. However, anti-trust law may apply in cases where the parties to the JV establish a full function corporate JV, which would require notification (see Question 18).

Permitted markets
8. Can the JV instrument be used in every market? Are there any restrictions to be considered and carefully assessed before investing?

In Italy the JV instrument can be used in every field of the economy and no particular restrictions are to be considered and carefully assessed before investing. However, certain markets (such as the insurance, banking, and telecommunications markets) are subject to specific regulatory restrictions and/or approvals.

9. Can a JV be established with any purpose?

A corporate or contractual JV can be established with any commercial purpose, as long as it is not unlawful or otherwise non-permissible.

Share capital and participation
10. What possible forms of participation are there in a JV’s share capital? How can a JV member contribute and are there statutory limits on the possibility to make contributions in kind?

Forms of participation
Unless a company's deed of incorporation provides otherwise, contributions to the share capital of a corporate JV must be granted in cash (Article 2342 and 2464, Italian Civil Code). A deed of incorporation can provide that contributions can be made in kind through goods, assets or receivables, but they must be fully paid-up on execution of the deed of incorporation.

There is a special regime for the appraisal of goods, assets and receivables under Article 2343 and so on of the Italian Civil Code. This appraisal must be carried out by an expert appointed by the competent Civil Court (that is, of the place where the corporate JV has its registered office).

Contributions
A member can contribute into the JV by cash, or through contributions-in-kind if this is permitted in a deed of incorporation (see above, Forms of participation). In the case of a limited liability company (Srl) it is possible to replace the contribution with an insurance policy, or a bank guarantee which is equivalent to the amount of contribution due.

11. Can a corporate JV’s share capital be indicated by making reference to a foreign currency?

A corporate JV's share capital cannot be indicated by making reference to a foreign currency. A joint stock company (SpA) must be constituted with share capital amounting to at least EUR120,000 and a limited liability company (Srl) with a share capital amounting to at least EUR10,000.

Duration and limits on membership
12. Are there statutory limits on a JV’s duration?

Italian law does not provide any statutory limits as to the duration of a JV, which can exist for an undefined term.

13. Are there statutory limits on the number of members participating in a JV?

Italian law does not provide any limits as to the number of members participating in a JV.
Although unusual, in Italy it is possible for a public sector body to enter into a JV agreement (either contractual or corporate). The main legal framework according to which the participation of a public sector body can legally occur is set out in:

- The principles laid down in Royal Decree No. 2440 of 1923 and its following legislation.

In addition, public-private partnership laws and regulations (provided for in several sections of the Legislative Decree) may also apply.

Non-competition and anti-trust clauses

15. Are there statutory constraints on the use of non-competition or anti-trust clauses in a JV agreement?

During period of effectiveness

Under Italian law, parties are allowed to provide for non-competition clauses in their agreements. However, non-competition clauses must be (Article 2596, Italian Civil Code):

- In writing.
- Defined in terms of time, territory and duration (no more than five years).

Following termination

The provisions of Article 2596 of the Italian Civil Code apply (see above, During period of effectiveness).

Since the JV agreement is based on a trust relationship between/among the parties to the JV, for the purposes of realising common interest, it is advisable that each party is able to withdraw from the JV. In those circumstances, it may be deemed reasonable to insert non-competition clauses in the agreement, providing for the obligation for a JV party to refrain from any activity that may conflict or may be in competition with the company's activities, during the period of effectiveness of the JV agreement and following its termination.

De facto company/partnership

16. Must the contractual JV satisfy any conditions to avoid falling within the definition of de facto company/partnership?

Italian laws and regulations do not provide for express definitions of de facto company/partnership. According to case law, however, the following three elements in a contractual JV relationship may trigger the finding of a de factor company/partnership:

- A common fund managed by the parties (by means of a contribution of goods and services).
- The sharing of the risk between or among the parties.
- The partners’ common intention to bind themselves and cooperate for an economic activity.

Limiting member liability

17. Can a JV agreement provide that a JV member can participate without incurring any risk, loss or reward?

Under certain circumstances a party to a contractual JV cannot incur any risk or losses (for example, by means of guarantees through which it may be indemnified and/or held harmless following third parties' claims). In the case of a corporate JV, Article 2265 of the Italian Civil Code (as interpreted by the current Italian case law) excludes this possibility of participating without risk, loss or reward. This means that participation on that base cannot be made in relation to the company deed of incorporation and bye-laws, and, with some distinguishing opinions, shareholders' agreements (see, among others, the decision of the Court of Milan, section VIII, dated 30 December 2011).

Anti-trust

18. Do any anti-trust rules, guidelines or policies apply to a JV agreement?

Anti-trust rules apply.

Merger control

A full function corporate JV is a corporate joint venture which performs on a lasting basis all the functions of an autonomous economic entity. Parties to a JV that create a full function JV may be subject to merger control, if the JV agreement is aimed at creating a new concentrative JV, as provided by Article 5(1)(c) of Law No. 287 of 1990, which is not of a co-operative nature. In making the assessment as to whether the JV operates as an autonomous economic entity, the Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato) will generally apply the criteria established by Commission notice on the distinction between concentrative and cooperative joint ventures under Regulation (EEC) on the control of concentrations between undertakings (OJ 1994 C/385/01), as replaced by Notice on the concept of full-function joint ventures under Regulation (EEC) 4064/89 on the control of concentrations between undertakings (OJ 1998 C66/01), Operations which have as their main object or effect the co-ordination of the actions of independent undertakings do not constitute concentrations (Article 5(3), Law No. 287 of 1990).

Parties establishing a full function JV may need to file a prior notice with the AGCM (or the European Commission, where the new concentration falls under EU jurisdiction). The parties establishing the JV must file a prior notice with the AGCM where (Article 16(1), Law No. 287 of 1990):

- The aggregate turnover of the parties in Italy exceeds EUR468 million.
- The aggregate turnover in Italy of a undertaking to be established exceeds EUR47 million.

The AGCM will verify whether the full function corporate JV complies with the Italian anti-trust laws.

Anti-competitive agreements

JVs that are considered to be co-operative agreements may be prohibited as an anti-competitive agreement under Article 2 of Law No. 287 of 1990, if their object or effect is to restrict freedom of competition. If the JV is deemed to have a European scope, Article 101 of the Treaty on the Functioning of the European Union (TFEU) along with the European Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, and the Guidelines on vertical restraints may also be applicable.

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There are exemptions for research and development agreements under Regulation (EU) 1217/2010 on the application of Article 101(3) of the TFEU to certain categories of research and development agreements, to the extent that those agreements contain restrictions on competition falling within the scope of Article 101.

**Governance and limits on directors**

19. **Can the parties to a JV freely regulate the JV or are they subject to certain restrictions?**

Members of corporate JVs frequently enter into a shareholders’ agreement (patti parasociali) to regulate their relationship, and/or the respective relationships between each of them and the corporate JV (if applicable).

The shareholders’ agreement includes the main elements of the internal structure of the JV, such as the:

- Ways to transfer the shares.
- Appointment of members of the corporate JV’s governing bodies.
- Modifications to the incorporation deed or bye-laws.

Shareholders’ agreements are regulated by:

- Article 2341 bis of the Italian Civil Code, which regulates shareholders’ agreements in joint stock companies (SpAs) and its affiliates.
- Article 2341 ter of the Italian Civil Code, which regulates shareholders’ agreements in SpAs whose share capital is listed on regulated capital markets (or whose share capital is widespread in the public, see Article 116, Legislative Decree No.58 of 1998).
- Articles 122 and 123 of the Legislative Decree No. 58 of 1998, which regulates shareholders’ agreements in listed companies.

SpA shareholders’ agreements may not be for longer than five years, unless such agreements are instrumental to co-operation agreements for the production or exchange of goods or services (which is generally the main purpose for constituting a corporate JV) (Article 2341 bis, Italian Civil Code). In that case, the duration of a shareholders’ agreement can last more than five years.

No limits apply related to the nationality of a member of the board of directors.

**Statutory auditors**

At least one standing statutory auditor and one substitute statutory auditor must be selected from a specific register of auditors (Article 2397, Italian Civil Code). The other members, if not registered in that register, must be selected among those registered in the professional registers identified by a decree issued by the Minister of Justice or among permanent university professors of economics or law.

The following are ineligible from being appointed as statutory auditors or, where appointed, forfeit their office (Article 2399, Italian Civil Code):

- Individuals covered by Article 2382 of the Italian Civil Code (see above, Directors).
- The spouse, relatives and those who are related (within the fourth degree) to the directors of the company:
  - controlled by the company;
  - which control the company; or
  - under common control with the company.
- Those who are related to the company or related companies by an employment relationship or by a regular consultancy contract or by other economic relationships which may prejudice this independence.

**Termination**

21. **What legal regime applies to a JV’s termination? Can a JV be terminated for just cause on request of one party?**

The contractual JV usually has a limited duration or is connected to the achievement of a particular purpose, so that the termination is automatic on the occurrence of the term or the achievement the purpose. Generally, an agreement can be terminated in various ways. If one of the parties wishes to terminate early, the agreement can only be terminated for a cause permitted by the law (Article 1372, Italian Civil Code).

This can be provided in the agreement itself, for example, where the agreement contains conditions subsequent, and in the case of long-term contracts which provide a right of withdrawal, and other methods of termination such as revocation and renunciation. Apart from this, there are three situations in which termination of the agreement can arise from a cause different from carrying out due performance:

- Non-performance (Article 1453 and so on, Italian Civil Code).
- Supervening impossibility (Article 1463 and so on, Italian Civil Code).
- Excessive onerousness (Article 1467 and so on, Italian Civil Code).

The corporate JV’s termination is typically more complex because it is also necessary to liquidate the corporate vehicle. For this reason the partners may often decide to keep the company incorporated by giving the company’s control to one of the partners, who will purchase the shares of the other shareholder(s). The causes of termination include (Article 2484 and so on, Italian Civil Code):

- The expiry of the term.
- The attainment of the corporate purpose.

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The impossibility of operating, or the continued inactivity of the shareholders' meetings.

22. Is the termination of a JV agreement subject to any public sector body's approval?

The termination of a contractual JV is not subject to any public procedure or approval. For the termination of a corporate JV, the liquidation procedure to be followed is laid down by Article 2484 and so on of the Italian Civil Code.

Choice of law and jurisdiction

23. Are there constraints on the choice of the law and the jurisdiction applicable to a JV?

There are no constraints to the choice of law and jurisdiction applicable to a contractual JV. In contrast, the bye-laws and the deed of incorporation of the corporate JV are subject to the application of the Italian law and jurisdiction. It is possible, however, for shareholders' agreements to be governed by a foreign law.

JVS WITH FOREIGN MEMBERS

Validity and authorisation

24. What are the rules relating to validity and authorisation of JVs with foreign parties?

Validity
JVs with foreign parties are allowed in Italy.

Limits
There is no minimum/maximum number of parties that must be local.

Authorisation
There are no specific authorisations required for JVs with foreign parties.

Effect of foreign membership

25. Are any of the rules relating to domestic company JVs (see Questions 1 to 23) different for JVs with members incorporated under, or governed by, the laws of a foreign country?

None of the rules relating to domestic company JVs are different for JVs with members incorporated under, or governed by, the laws of a foreign party. It is possible that certain rules of the relevant foreign jurisdiction may apply (for example, a foreign company forming a corporate JV in Italy may need to file a merger control notification in its own country), if this is required by that country's laws (see Question 18).

Economic or financial incentives

26. Are there economic or financial incentives for foreign direct investments in a JV?

There are no material incentives directed exclusively to foreign companies.

Minimum investments/contributions

27. Are there mandatory minimum equity investments or contributions-in-kind thresholds for a foreign JV member?

There are no mandatory minimum equity investments or contributions-in-kind thresholds for a foreign JV member.

THE REGULATORY AUTHORITIES

Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato) (AGCM)

Main activities. The AGCM enforces rules against anti-competitive agreements among undertakings, abuses of dominant position as well as concentrations (for example, mergers and acquisitions, joint ventures) which may create or strengthen dominant positions detrimental to competition.

W www.agcm.it/en/

Italian Securities and Exchange Commission (Commissione Nazionale per le Società e la Borsa) (Consob)

Main activities. The Consob is the public authority responsible for regulating the Italian financial markets.


ONLINE RESOURCES

Normativa

W www.normativa.it/

Description. The Normativa project was launched in March 2010 to store and classify state and regional provisions in force, and to enable citizens to freely search and consult these provisions, and provide instruments for legislative review. Normativa is the responsibility of the Prime Minister's Office, the Senate of the Republic and the Chamber of Deputies.
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Publications
• “Il Crowdfunding”, dirittobancario.it, August 2013.
• “Novità in tema di start-up innovative”, costozero.it, July 2013.
• “Dalla S.r.l semplificata alla S.r.l a capitale ridotto”, costozero.it, May 2013 and June 2013.
• Financing dedicated to a specified business activity and leveraged financing, in “European Forum News, International Bar Association Legal Practice Division”.

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