



What about Italy?

Easy guide to your Italian business

1 *Start-up business - Incorporation of an Italian entity*

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In order to carry out a business activity in Italy is it necessary to incorporate a company or is it possible to act by means of a branch?

It is possible to start a business activity in Italy through (i) the incorporation of a company, or (ii) the opening of a branch.

Under the Italian Civil Code, a company is an independent entity with respect to the foreign company.

It may have limited liability or it may be a partnership. In the first case, the liability of the stockholders is limited to the amount of the participation subscribed by each of them while partnerships do not have a limited liability status and the partners are liable for all the debts and obligations of the company.

Under a legal and a statutory point of view, the incorporation and management of a limited liability company implies greater fulfilment and fixed costs than those imposed for a branch such as, for example, the approval and yearly registration of the statutory financial statements, the obligation to keep statutory books, the appointment of the statutory auditors in the event that certain thresholds are exceeded, etc.

In order to perform a business activity in Italy, foreign companies may establish a branch, according to the Italian Civil Code.

Under a legal point of view, a branch is not a separate legal entity with respect to the parent company and its establishment in Italy must be registered with the Register of Companies. A branch is subject to less statutory fulfilment with respect to a company's requirements.

From a tax point of view, a branch is deemed a permanent establishment of the foreign company and it is mainly treated as an independent entity for tax purposes. In general, a branch is subject to the same tax treatment of an Italian company as it is subject to corporate taxes for the profits produced in Italy (for this purpose, the branch must draw up yearly financial balance sheet). Furthermore, a branch is subject to the same tax fulfilment as Italian companies such as, for example, the keeping of official registers and the obligation to file corporate taxes returns as well as VAT returns.

What business activities may be carried out in Italy which are not subject to Italian taxation on income?

In general terms, a foreign company will not be deemed to have a “permanent establishment” in Italy, and therefore will not be subject to taxation in Italy, if it carries out solely a preparatory or auxiliary activity, even if this activity is carried out in a fixed place of business (premises and/or personnel).

In particular, a fixed place of business cannot be deemed to be a permanent establishment of a company resident abroad, if the following activities are carried out:

- i. the use of an installation solely for the purpose of storage, display or delivery of goods or merchandise belonging to the company;
- ii. the maintenance of a stock of goods or merchandise belonging to the company solely for the purpose of storage, display or delivery;
- iii. the maintenance of a stock of goods or merchandise belonging to the company solely for the purpose of processing by another company;
- iv. the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or collecting information for the company;
- v. the maintenance of a fixed place of business solely in order to carry out any other type of preparatory or auxiliary activity on behalf of the company;
- vi. the maintenance of a fixed place of business solely for any combination of the activities mentioned above provided that the overall activity resulting from this combination is of a preparatory or auxiliary character.

For further details on the above stated points, reference should be made to the Italian Income Tax Code (TUIR - Testo Unico delle Imposte sui Redditi, Presidential Decree No. 917 of December 22, 1986) with regards to the rules concerning the “permanent establishment”, introduced in 2004.

Non-resident companies may enter into a preliminary ruling procedure with the Italian Tax Authorities with the aim to ascertain whether the activities to be performed in Italy give rise to a permanent establishment.

Is there a definition of “permanent establishment” in the Italian Law?

The definition of “permanent establishment” is stated in art. 162 of the Italian Income Tax Code under two different descriptions:

- a. “fixed place of business” (at the disposal of the Principal) through which the business of the foreign entity is wholly or partly carried on in Italy – “material PE”;
- b. “dependent agent” that is acting on behalf of the foreign entity and has, and habitually exercises, in Italy an authority to conclude contracts in the name of the foreign entity “agency PE”.

In general, the “material PE” is described as a fixed place of business by means of which the non-resident company carries out all or part of its business activities within the territory of Italy”.

In particular, the “material PE” comprises:

- i. a place of management;
- ii. a branch;
- iii. an office;
- iv. a factory;
- v. a workshop;
- vi. a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;
- vii. a building site or construction or installation project constitutes a permanent establishment only if it exists for more than three months.

Instead, the so called “agency PE” is described as a “dependent agent”, in other words any party having a dependent status that concludes contracts other than contracts for the purchase of goods in the name of the non resident company.

For an agency PE, the following conditions must exist:

- the entity/person must be a “dependent agent”;
- the entity/person must habitually conclude contracts on behalf of the non-resident company;
- the contracts concluded must not be contracts for the purchase of goods.

It is worth pointing out that the definition of permanent establishment set in the tax treaties prevails over the domestic definition, in all such cases whereby a tax treaty applies.

Individuals have been transferred to Italy to set up the business; how are they considered for income tax and social security purposes?

For income tax purposes

Assuming that the presence and the activity of the transferred individual do not create any permanent establishment issue in Italy, the individual is liable to Italian income taxes on the basis of his/her “*tax residency status*” to be determined in accordance with Section 2 of the Italian Income Tax Code.

An individual is considered “*resident*” for tax purposes if, for the greater part of the fiscal year (i.e.: at least 183 days):

- is registered with the Registry of the Italian Resident Population (“Anagrafe”); or
- has his/her “domicile” in the territory of the Italian State, as defined by Section 43 of the Italian Civil Code (the place where the individual as his/her economic, social and family center of interests);
- has his/her “residence” in the territory of the Italian State, as defined by Section 43 of the Italian Civil Code (the place where the individual has declared their habitual abode).

Taxation of resident individuals:

Resident individuals are subject to the Italian personal (or national) income taxes on their income wherever produced (under the so called ‘worldwide principle’). Therefore, residents are also subject to taxation on income deriving from real estate owned outside of the Italian territory, foreign dividends and interests, foreign compensations and director’s fees and other types of foreign income.

In addition to the personal income tax, Italian legislation, as of fiscal year 2012, has introduced for individuals resident in Italy a ‘wealth tax’ on investments which are located outside of the Italian territory (called “IVAFE” for financial investments owned outside of Italy and “IVIE” for real estate investments).

Taxation of non-residents:

Individuals who are non-residents are subject to PIT (IRPEF) only on income arising from Italian sources (i.e. income earned in Italy).

Therefore, foreign income is not relevant for the purposes of taxation in Italy; this applies to both income and wealth tax.

For social security purposes

According to the Italian employment law a foreign individual working in the Italian territory (i.e.: even if the employer is located outside of Italy):

- is subject to the same rights and duties of an Italian worker also in terms of social security coverage;
- is liable to Italian social security contributions during the period of his/her work stay in Italy.

The Italian social security contributions are provided by both the employee and the employer, while the settlement can only be carried out by the latter.

An exception to the above rule may be provided by the Social Security Agreements between Italy and the Country of origin (see also § 1.6).

Has Italy signed any Treaties to avoid double taxation?

Italy has signed over 90 Treaties to avoid double taxation. The majority of the Treaties are based on the OECD model which has the following structure:

Article 1 - Persons covered

Article 2 - Taxes covered

Article 3 - General definitions

Article 4 - Resident

Article 5 - Permanent establishment

Article 6 - Income from immovable property

Article 7 - Business profits

Article 8 - Shipping, inland waterways transport and air transport

Article 9 - Associated enterprises

Article 10 - Dividends

Article 11 - Interest

Article 12 - Royalties

Article 13 - Capital gains

Article 14 - Independent personal services (this article has been deleted from the OECD model but is still present in different Double Tax Treaties)

Article 15 - Income from employment

Article 16 - Directors' fees

Article 17 - Artists and sportsmen

Article 18 - Pensions

Article 19 - Government service

Article 20 - Students

Article 21 - Other income

Article 22 - Taxation of capital

Article 23 - Methods for elimination of double taxation

Article 24 - Non-discrimination

Article 25 - Mutual agreement procedure

Article 26 - Exchange of information

Article 27 - Assistance in the collection of taxes

Article 28 - Members of diplomatic missions and consular posts

Article 29 - Territorial extension

Article 30 - Entry into force

Article 31 - Termination

Albania, Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Belgium, Brazil, Bulgaria, Byelorussia, Canada, China, Congo, Croatia, Cyprus, Czech and Slovak Republic, Denmark, Ecuador, Egypt, Estonia, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Hungary, Hong Kong, Iceland, India, Indonesia, Ireland, Israel, Ivory Coast, Japan, Jordan, Kazakhstan, Kenya*, Kuwait, Latvia, Lebanon, Lithuania, Luxembourg, Macedonia, Malaysia, Malta, Mauritius, Mexico, Moldavia, Morocco, Mozambique, New Zealand, Norway, Oman, Pakistan, Philippines, Poland, Portugal, Qatar, Romania, Russia, San Marino, Saudi Arabia, Senegal, Singapore, Slovenia, South Africa, South Korea, Soviet Union (applicable to Kirghizstan, Tajikistan e Turkmenistan), Spain, Sri Lanka, Sweden, Switzerland, Syria, Tanzania, Thailand, The Netherlands, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, United Arab Emirates, United Kingdom, United States of America, Uzbekistan, Venezuela, Vietnam, Yugoslavia (applicable also to Bosnia and Herzegovina, Serbia e Montenegro), Zambia.

* Kenya DTT has been signed but is not yet in force.

And what about Social Security Agreements?

Italy has signed over 20 bilateral Social Security Agreements, the EU Regulation and the European Convention.

Please find hereinafter the list of Countries which have signed a Social Security Agreement with Italy:

- Argentina
- Australia
- Bosnia and Herzegovina
- Brazil
- Canada and Quebec
- Cape Verde
- Israel
- Jersey - Channel Islands - Isle of Man
- Korea
- Macedonia
- Mexico
- Principality of Monaco
- San Marino
- Tunisia
- United States of America
- Uruguay
- Vatican
- Venezuela
- former Yugoslavia
- European Union (EU Regulation n. 883/2004 - applicable to all EU State members and to Switzerland, Iceland, Liechtenstein, Norway)
- Turkey (European Convention)

Companies and branches are also subject to the same tax compliance requirements (e.g.: both must keep accounting books and VAT registers, lodge their income tax return, VAT return, withholding tax return etc.).

Although prima facie the tax implications of having a branch or a corporation are very similar, there are some differences. For example, a tax advantage for a branch as opposed to a corporation is that profits may be transferred to the foreign company free of withholding tax, given that, from a commercial law perspective, the branch is not an independent entity with respect to the parent company and transferred profits are not considered dividends. On the contrary, the payment of dividends from the Italian subsidiary to the parent company may be subject to withholding tax. On the other hand, a branch structure may entail sometimes higher complexities in the allocation of profit to the branch. Moreover, the use of a branch could impact on the content of the transfer pricing documentation to be submitted by the branch (see also § 11.3).

Therefore, a careful examination is required, on a case by case basis, to understand if a branch structure may be preferable to a corporate structure, or vice versa.

1.8

Is it possible to move from a branch structure to a corporate structure? And vice versa?

In order to convert a branch structure in a corporate structure and vice versa, a specific transaction is required.

The conversion is in general a taxable event.

Different solutions may be put in place in order to move from a branch to a corporation and vice versa. Each change is to be evaluated on a case by case basis in order to maximize tax efficiency.

For example, if the conversion from a branch structure to a corporate structure and vice versa involves an Italian resident entity and an EU resident entity, the “Merger Directive” (Directive 2009/133/CE) might be applicable and, thus, make the transaction tax neutral.

1.7

Starting a commercial activity in Italy: what are the main tax consequences of operating through a corporation or a branch?

Limited liability companies and branches of foreign companies carrying out commercial activities in Italy are subject to the same taxes and fiscal commitments.

Both companies and branches of non-resident companies are subject to the following corporate taxes:

- Italian Corporate Income Tax (IRES - Imposta sul Reddito delle Società) set at a 27.5% rate (24% starting from January 1 2017);
- Italian Regional Tax on Production (IRAP - Imposta Regionale sulle Attività Produttive) set at a 3.9% ordinary rate (different rates can be set for by specific laws).

Which type of corporate entities can be set up in Italy?

The following corporate entities can be set up under Italian law:

- i. **Limited Liability Companies** (*Società a Responsabilità Limitata*, in brief “S.r.l.”), whose corporate capital is represented by quotas and must be, at least, equal to the amount of € 1;
- ii. **Joint Stock Companies** (*Società per azioni*, in brief “S.p.A.”), whose corporate capital is represented by shares and must be, at least, equal to the amount of € 50,000;
- iii. **Partnership Limited by Shares** (*Società in Accomandita per Azioni*, in brief “SAPA”), in respect of which the law provisions regarding S.p.A. shall generally apply.

In order to perform specific types of business (e.g.: investment and banking companies, saving management companies, etc.), the law requires specific amounts of corporate capital.

The most relevant and common aspects of the corporate entities are the following:

- they act by means of different bodies and resolutions are taken through the majority system;
- a perfect assets separation is provided (*i.e.: autonomia patrimoniale perfetta*); in this respect, the shareholders/quotaholders shall not fulfill the corporate obligations by means of their personal assets, and the contributions are exclusively owned by the company. They shall perform the agreed contributions without undertaking any other liability towards the company or its creditors;
- only the company, by means of its corporate capital, is liable for the corporate obligations (save for what provided with reference to the SAPA companies, as indicated below);
- the shareholders/quotaholders may perform some control systems;
- the corporate participations are, unless otherwise agreed, freely transferable;
- the company has legal status;
- in the event of insolvency, the company is subject to the law provisions concerning bankruptcy. In general, bankruptcy effects are not extended to the shareholders/quotaholders.

As far as concerns SAPA companies, there are two different kinds of stakeholders: those whose liability is joint and unlimited and who manage the company (*i.e.: unlimited partners*), and those whose liability is limited to the corporate capital they have subscribed (*i.e. limited partners*).

With reference to the different types of partnerships [*i.e.: Società Semplice (S.S.)*, *Società in Nome Collettivo (S.n.c.)* and *Società in Accomandita Semplice (SAS)*], the most relevant and common aspects to be considered are the following:

- a minimum set amount of corporate capital is not required;
- in case corporate assets are not sufficient to fulfill the company's obligations, creditors may be satisfied by means of the personal assets of the partners, as they are unlimitedly and jointly liable for corporate obligations, with exception to SAS companies in which there are limited partners;
- corporate participations may be transferred only if all other partners agree;
- partners per se (*i.e.: intuitus personae*), as well as the relationships between them, are particularly important;
- the bankruptcy of the company implies the automatic bankruptcy of all unlimited liable partners;
- the performance of commercial activities is forbidden by the Law for what concerns SS companies.

Foreign investors, according to their preferences and business necessities, are able to set up any of the companies described above.

1.10

Which are the obligations and procedures for the incorporation of a corporate entity?

A corporate entity may be incorporated by means of an agreement or a unilateral deed (in the event of a sole shareholder/quotaholder). The deed of incorporation shall be null and void if not executed by means of a public deed before a Notary Public.

The execution of the deed of incorporation may be implemented in two different ways:

- i. simultaneous or immediate execution in presence of the parties (or their proxy-holders);
- ii. subsequent execution or execution by means of public applications (only for S.p.A. and SAPA), which is concluded after a complex procedure in which the different applications are evaluated.

In both cases, there are specific requirements for the validity of the deed. In particular, pursuant to Section 2328 of the Italian Civil Code, the deed should indicate the corporate purpose, the corporate name (including the type of company), the registered office, the amount of corporate capital and the appointment of the first director/s.

S.p.A. and SAPA deeds of incorporation are represented by two different documents (i.e.: the deed of incorporation, including the parties' will to incorporate the company, and the by-laws, containing the provisions ruling the future operational functioning of the company). As far as concerns a S.r.l., the deed of incorporation and the by-laws may be included in one sole document.

The Notary Public, after receiving the deed of incorporation and verifying its compliance with the law provisions, shall file it within 20 days with the Companies' Register located in the same district of the company's registered office.

By means of such registration, the company obtains the legal status and therefore starts to operate.

Should any activity be performed in the name and on behalf of the company before its registration, those who have acted in the name and on behalf of the company (as well as those who authorized such activities) are unlimitedly liable vis-à-vis third parties for the activities performed before the registration.

May a company be set up by a sole shareholder/quotaholder?

S.p.A. and S.r.l. companies may be set up by means of a sole shareholder/quotaholder, which may be an individual, a company (even a foreign one) or a public entity.

The principle of the perfect separation of assets is applicable; therefore, in the event of insolvency, the sole shareholder/quotaholder shall not fulfill the company's obligations by means of this personal assets.

An exception to this rule is applicable in the event of activities performed before the registration of the incorporation deed with the Companies' Register, in which event the sole shareholder/quotaholder is unlimitedly liable.

Furthermore, it is provided that upon incorporation, and/or any capital increase, the sole shareholder/quotaholder shall pay all contributions in cash. The missed payment of such contributions entails, also, the unlimited liability of the sole shareholder/quotaholder.

The sole shareholder/quotaholder shall be indicated on the company documents and correspondence (but not in the corporate name), and registered in the Companies' Register. If this information is not provided the shareholder/quotaholder will be unlimitedly liable for the corporate obligations.

All the agreements between the company and the sole shareholder/quotaholder, as well as the transactions performed by the company in favour of the sole shareholder/quotaholder, may be enforceable vis-à-vis the creditors of the company if they have been listed in the Board of Directors' meetings minutes Book or if they have been drawn up by means of a written deed, having a fixed date prior to the possible distraint.

May specific assets be dedicated to financing a specific business?

S.p.A. and SAPA companies may:

- a. dedicate one or more assets to the exclusive implementation of a specific business (i.e.: patrimonio destinato). The value of the dedicated assets shall not exceed 10% of the company's net worth; or,
- b. enter into a financing agreement for a specific business, providing that all income of this business shall be destined to the reimbursement of such financing (i.e.: finanziamento destinato).

Dedicated Assets

In order to create an asset destined to a specific business, the managing body must adopt a resolution with the favourable vote of the absolute majority of its members. Pursuant to Section 2447-ter of the Italian Civil Code, the above-mentioned resolution shall include the following information:

- i. the business activity to which a pool of business assets is to be dedicated;
- ii. the rights and assets included in such pool of business assets;
- iii. an economic-financial plan demonstrating the suitability of the pool of business assets for the purpose of undertaking the business activity, the framework and rules for their exploitation, the objectives to be achieved and the guarantees offered to third parties, if any;
- iv. any possible contributions made by third parties, the framework for the control of the management and the allocation of profits and losses arising from the business activity;
- v. the possibility to issue financial instruments for investing in the specific business activity, specifying the rights attached to such instruments;
- vi. the appointment of a statutory auditor or of an audit firm entrusted with the accounting control of the performance of the specific business, in the event that the company is not already subject to statutory audit;
- vii. the reporting requirements applicable to the specific business activity.

The resolution shall be filed and registered in compliance with Section 2436 of the Italian Civil Code, which provides that the Notary Public shall carry out, within 30 days from its adoption, the registration in the Companies' Register.

Within 60 days from the registration date, the creditors of the company, which were creditors before the registration of such resolution, may apply to the Court in order to prevent the creation of the dedicated assets.

Notwithstanding any claim, the Court may order that the resolution is carried out, if the company provides adequate guarantees.

Unless otherwise provided in the resolution, the company is liable in relation to the specific business activity only within the limits of the pool of dedicated business assets.

However, all agreements entered into in relation to the specific business shall expressly refer to the destination; in the absence of such reference, the company is liable pursuant to such agreement to the extent of its other business assets.

Directors shall keep a separate set of registers and accounting records for each specific business and in the financial statements all the goods and rights included in any destined asset shall be separately indicated.

If the company has issued financial instruments in order to participate in a specific business, it is also necessary to keep a register which states all their main aspects. A specific shareholders' meeting and a common delegate is also provided for each class of the above financial instruments in order to protect their holders' rights.

The specific shareholders' meeting shall resolve on disputes, waivers, transactions and rights related to the abovementioned financial instruments and it shall also appoint and remove the aforementioned common delegate.

Should the specific business be performed or become impossible, the directors shall issue a final report, to be filed in the Company's Register.

Dedicated Financing

Dedicated financings are created by means of a loan agreement which should indicate the relevant terms of the financed business as well as any guarantees given in respect of the repayment of the agreement (see also § 19.5).

The key assets necessary to achieve the business object of the loan agreement should also be identified. Creditors of the company shall undertake only preventive measures on these assets.

Furthermore, the law provisions concerning the separation of the assets, applied to the dedicated assets, are also enforced with respect to the dedicated financings.

Are contributions in kind permitted?

Contributions in kind are usually allowed in all joint-stock companies, in compliance with the formalities and the terms established by the Law. In S.p.A. and SAPA companies contributions of an intangible nature and credits may be granted; on the contrary, the supply of labour and services is explicitly excluded. Furthermore, it is not possible to contribute indefinite goods, goods belonging to third parties, the periodical supply of goods and future goods. Contributions in kind and credits shall be entirely executed upon subscription.

With regard to S.p.A. and SAPA companies, contributions in kind or credit, either in the incorporation stage or in the event of a capital increase, shall be subject to a specific estimation procedure, pursuant to Section 2343 of the Italian Civil Code.

Entities who contribute in kind or credit shall submit a sworn appraisal of an expert designated by the Court where the company has elected its registered office (save for specific cases).

The report shall contain the description of the contributed goods and/or credits, the indication of the adopted criteria of evaluation, and the certification that their value is, at least, equal to the one assigned at the moment of determination of the corporate capital and of the premium, if any, and it shall be compliant with the by-laws. This value is subject to a further estimation within 180 days from the incorporation of the company. Within this term, directors shall verify the estimation included in the assessment and modify it, should the same be considered inadequate.

If the value of the goods contributed results to be lower by more than one fifth of the value for which the contribution was made, the company shall reduce its capital proportionately, voiding the shares whose value is shown not to be covered.

The contributing shareholders, however, may deposit the difference in cash or resign from the company receiving back, therefore, their contribution.

For what concerns a S.r.l. company, all items of the assets with an economic value may be contributed. The supply of labour and services is also included (i.e.: credits, work performances, supply of services, know-how, rights of property and alike, etc.).

The value of the goods should be estimated by an expert auditor, appointed by the company, who issues a report which is not subject to further estimations and/or verifications.

Is the full amount of corporate capital required to be paid in at the time of incorporation?

Unless otherwise provided for in the incorporation deed, contributions shall be made in cash.

At the time of incorporation at least 25% of the cash contribution shall be paid in.

As far as concerns S.r.l. companies, the contribution may be substituted by an insurance policy or a bank guarantee.

The payment of the full amount is required, on the contrary, in the event of incorporation by unilateral deed and in the event that the S.r.l. company's corporate capital is lower than € 10,000.

Is it possible for shareholders to provide accessory services (prestazioni accessorie) to the company?

In addition to the contribution, the deed of incorporation of S.p.A. and SAPA companies may impose on the shareholders (all or some of them) the duty to provide accessory services, different from cash, thereby specifying their nature, duration, formalities and the remuneration (e.g.: working for the company or performing periodical supplies).

Accessory services are aimed at allowing the company to achieve activities/services which cannot be granted as contributions in kind (as already mentioned in § 1.13, contributions in kind consisting in the supply of work and/or services are allowed in S.r.l. only).

The shares, to which the duty of such accessory services is related, shall be registered and they are not transferable without the consent of the directors. Such consent depends on the fact that the transfer of the shares also implies the transfer of the duty to fulfill the accessory services.

Unless otherwise provided for in the by-laws, the obligations related to the accessory services may be modified by means of the consent of all shareholders/quotaholders, only.

Is it possible to issue different kinds of shares?

S.p.A. companies may issue shares with par value or without par value, as well as shares that are not supported by certificates.

By-laws may also provide for special categories of shares such as:

- i. shares assigned not in proportion with the subscribed corporate capital;
- ii. shares which may discipline differently the holders' participation to losses or profits, save for the prohibition to wholly exclude the participation to losses or profits;
- iii. the extraordinary shareholders' meeting may also resolve on the assignment of the profits to employees, by issuing special categories of shares; other similar financing instruments (different from the shares) may be resolved upon by the shareholders' meeting, although the holders are not granted any voting rights;
- iv. shares conferring rights of vote limited to a certain business and/or a specific matter, or even excluding the right of vote.

Furthermore, in order to safeguard the rights related to different classes of shares, the resolutions of the meeting which affect the rights of one of them must also be approved by a special meeting of the shareholders belonging to the class in question.

According to Law no. 116/2014, S.p.A. companies not making recourse to the market of risk capital may now issue also shares with plural voting rights, up to a maximum of three votes, even limited to specific subjects or to the occurrence of specific conditions, as established by Section 2351, Paragraph 4 of the Italian Civil Code.

May quotas with different corporate rights be provided?

The deed of incorporation of an S.r.l. company may provide for quotas with a value not proportional with conferred contributions; therefore, quotas may entitle different corporate rights.

Furthermore, it may be provided that one quotaholder is entitled to specific corporate rights concerning the management of the company, as well as the distribution of the profits, or the provision of accessory services.

The consent of all the quotaholders is necessary in order to modify such rights.

Are there any differences, under a tax standpoint, between the various types of companies in Italy?

There are no differences, from a tax viewpoint, between the two main forms of limited liabilities companies, S.p.A. and S.r.l. Both types of companies are indeed subject to IRES and IRAP taxes and to the same tax obligations (keeping of registers, lodging of tax returns, etc.).

On the other hand, partnerships, including general partnerships (S.n.c.) and limited partnerships (SAS), are treated as transparent entities and are not subject to IRES tax but only to IRAP tax.

The taxable income of the partnerships is automatically attributed to the partners in proportion to their entitlement to the partnership's profits and, consequently, is taxed in the hands of the same partners.

At certain conditions, also limited liability companies may elect to be treated as transparent entities (see also § 3.19).

Which are the main taxes for the incorporation of a company in Italy?

In the event of the incorporation of a company, a registration tax applies with regards to contributions made by share / quotaholders in order to form the share capital.

In the event of the contribution of real estate properties, also mortgage and cadastral taxes apply.

The amount of registration tax varies according to the nature of the items contributed. More in detail, registration tax is:

- € 200 in the event of contribution of cash, movable goods, credits and other rights (regardless of the contributor);
- € 200 in the event of contribution of immovable properties carried out by a VAT person, (except in specific cases);
- an amount ranging between 2% and 9% of the market value of the item in the event of contribution of immovable properties carried out by a person not registered for VAT (12% for farm land contribution);
- € 200 in the event of contribution of a going concern.

Among non-fiscal costs, it is important to consider the fees applied by the Public Notary to draw up the incorporation deeds. These may vary depending on the value of the deed.



2 *Incentives and financial contributions to business start-ups*

- 2.1 May Italian companies take advantage of any incentives or contributions for the start-up of a business either having access to European or domestic funds? *p. 13*
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.....

May Italian companies take advantage of any incentives or contributions for the start-up of a business either having access to European or domestic funds?

Domestic financial aids to new businesses start-ups are provided for by several laws promoting new entrepreneurial activities. In particular, incentives are occasionally granted to enterprises by the Italian laws.

To this regard, for illustrative purposes only, we highlight the following:

- i. contribution for the purchase of property, plant and equipment;
- ii. incentives related to the economic increase in value of patents;
- iii. facilities of access to financial sources reserved to small and medium sized enterprises (hereinafter “SME”);
- iv. credit lines granted to innovative projects based on the use of industrial property rights;
- v. facilitated funding aimed at supporting the internationalization of SME.

Moreover, activities initiated by young entrepreneurs in Southern Italy or in other economically depressed areas, and/or activities initiated by female entrepreneurs may have access to financial aid schemes. Domestic funding programs concerning young entrepreneurs and/or specific Italian territories are analyzed more specifically in the following paragraphs (§ 2.2 - 2.3).

Generally, the EU offers European enterprises extra financial support, broadening the scope of local government action. It mainly consists of indirect assistance (channeled through various financial instruments and Structural Funds); companies, in fact, do not usually have direct access to EU structured financing programs. Funds are actually disbursed by EU to national governments and then through agencies and local authorities.

The EU also provides for direct assistance (another type of financial support).

In particular, EU financial aid programs can be summarized as follows:

- **Financial Instruments.** These are provided for under the Program for the Competitiveness of Enterprises and small and medium - sized enterprises (hereinafter, “COSME”) adopted on 11 December, 2013. Running from 2014 to 2020, COSME’s aim is to facilitate and improve access to finance for SME, in their start - up, growth and transfer phases, through two dedicated financial instruments which are managed by the European Investment Fund (hereinafter, “EIF”) on behalf of the Commission.

The program’s main instruments are:

- i. the Equity Facility for Growth (s.c. “EFG”) which provides venture capital and mezzanine finance, such as subordinated and participating loans, to expansion and growth - stage SMEs, in particular those operating across borders; and
 - ii. the Loan Guarantee Facility (s.c. “LGF”) facilitates access to debt financing, e.g.: loans and lease financing, and consists in guarantees for debt financing and counter - guarantees for financial intermediaries. The LGF also includes the securitization of SME debt finance portfolio.
- **Structural Funds.** The European Commission has adopted a “Partnership Agreement on European Structural and Investment Fund Investment for the 2014 - 2020 programming period” with Italy (hereinafter, “PA”) aimed to implement an optimal use of European Structural and Investment Funds.

By adopting the PA precondition for the agreement of the Operational Programs through which the strategy will be implemented will have been satisfied.

In particular, the EU investments of the PA should reduce unemployment and raise competitiveness and economic growth through support to innovation, training and education in urban centers.

The Structural Funds are used to finance regional policy between 2014 and 2020 in order to narrow the development disparities among Regions and Member States. Such funds provide an important source of business financing, especially for SMEs. Successful businesses will make a decisive contribution to the Fund’s goal of reducing development disparities between regions and promoting balanced economic and social development within the EU. The Structural Funds channels their financing through national and regional authorities and can be summarized as follows:

- i. the European Regional Development Fund (s.c. “ERDF”) and the European Social Fund (s.c. “ESF”), that support development and structural adjustment in regional economies by helping SMEs and promoting enterprises. The primary aim of these programs is to strengthen economic and social cohesion in the EU by correcting imbalances between its regions. In particular, the EU has approved an Operational Program aimed at supporting industries, artisan enterprises and businesses services in Southern Italy. This is the largest program to be backed by Structural Funds in the less-developed Italian regions to consolidate the productive structure in the South, in order to significantly reduce unemployment (especially youth unemployment);

- ii. the European Maritime and Fisheries Fund whose goal is to ensure that fishing and aquaculture are environmentally, economically and socially sustainable and that they provide a source of healthy nutrition for EU citizens; and
- iii. the European Agricultural Fund for Rural Development which contributes to increase the competitiveness of the agricultural and agro - industry sector, the sustainable use of natural resources, biodiversity and climate action as well as the balanced territorial development of rural communities and economies.

Moreover, the European Investment Fund has confirmed the second generation of the initiatives adopted during the 2007-2013 programming period to promote business on a regional bases, such as:

- a. “JEREMIE” (Joint European Resources for Micro-to-Medium Enterprises) initiative improving access to financing for SMEs in the EU’s least developed regions, encouraging the creation of new businesses particularly in innovative sectors. The initiative enabled European Member States and Regions to use part of their structural funds to obtain a set of financial instruments that were specifically designed to support micro, small and medium enterprises; and
- b. “JESSICA” (Joint European Support for Sustainable Investment in City Areas) which supports the sustainable urban development together with the urban regeneration by means of financial engineering mechanisms.

Enterprises can also obtain funding directly from the EU if they have specific goals in certain fields, such as research and innovation, environment and energy, education and training, health and safety. Should they meet the criteria for the program in question, businesses can apply for support directly to the European Commission’s department in charge.

2.2

Are there any incentives or contributions for young entrepreneurs?

In addition to EU contributions, analyzed in the previous paragraph, young entrepreneurs established in Italy may benefit from national funding to start-up, and/or further develop businesses. It is possible to briefly describe only what is provided for by the Ordinary laws generally applicable, because regulations for local funding programs may vary from region to region.

The Italian government implements measures mainly aimed at supporting the creation of businesses by young and/or female entrepreneurs. With specific reference to aids granted to young entrepreneurs, a special legislation package, providing for specific measures aimed at promoting the creation and the development of innovative start-up undertakings in Italy, has been recently implemented.

The new legislation applies to small enterprises enrolled in a specific section of the Business Register reserved for “innovative start - up companies” as well as to individuals willing to incorporate an innovative start - up company in Italy, including extra UE holders of a start-up VISA.

In particular, in order to benefit from the aforesaid provisions, a company shall meet, *inter alia*, the following requirements:

- i. it does/did not allocate profits;
- ii. it has to be a newly incorporated capital company or it must have been established for no longer
- iii. than sixty months;
- iv. its core business shall consist in the development, production and commercialization of
- v. innovative goods or services of significant technological value;
- vi. it shall reside in our country or be subject to Italian taxation; and
- vii. its turnover shall be lower than € 5,000,000.

With specific reference to point (ii) above, please note that new enterprises shall operate within the production of goods or supply of services satisfying the following characteristics:

- a. they shall be of significant technological and innovative contents; and/or
- b. they can be qualified as products, services and solution in the digital economy field; and/or
- c. they are based on the valorization of the results of public and private research (spin off from the research).

Financial aid for innovative start - up companies consist in zero interest loans covering:

- up to 80% of the investment programs amounting to the maximum amount provided for by Italian legislation. In such case, every partner/shareholder must be younger than 35 or, alternatively, women or, alternatively, at least a partnership quota shall be owned by a person who has a PhD or equivalent for no longer than 6 years and has conducted research or has taught abroad for at least 3 years; and in all the other cases;
- up to 70% of the maximum amount of eligible investment costs provided for by Italian legislation.

Moreover enterprises with registered office in Southern Italy, or in any other depressed area (in particular: Calabria, Sicily, Sardinia, Basilicata, Puglia, Campania and in some parts of Abruzzo) can receive partially refundable loans for which they are obliged to repay up to 80% of the amount granted.

Starting from February 2015, the presentation of requests for the above mentioned national contributions is valid.

Finally, it is worth pointing out that the innovative start-up undertakings may raise money through equity crowd funding online portals.

Are there any incentives and contributions granted with reference to specific territories?

In addition to what has been mentioned in the previous paragraph, in order to support the creation of new businesses in the Italian economically less-advantaged areas, further incentives have been implemented by law.

Beneficiaries must meet the following requisites:

- they must be resident, for at least 6 months prior to the presentation of the grant application, and the enterprise must have its registered office in Southern Italy or in another economically depressed area (in particular: Calabria, Sicily, Sardinia, Basilicata, Puglia, Campania, then Molise, Abruzzo and some municipalities of Northern and/or Central Italy);
- applicants must be unemployed at the time of application;
- businesses must operate in the field of commerce, production of goods and/or supply of services, with exception to some activities, such as the production, processing and marketing of agricultural products.

Beneficiaries must be, alternatively:

- self-employed. Sole proprietorships only can have access to benefits and the amount of investment cannot be more than € 25,800.00;
- micro-enterprise. General, informal and limited partnership can apply for benefits, and the amount of investment cannot be more than € 129,000.00;
- franchisee. Sole proprietorships or enterprises can have access to benefits.

Co-operatives and non-registered partnership cannot apply for grants.

The implementation of SMEs is encouraged through specific benefits, mainly financial, such as subsidized mortgage loans, non-refundable grants for investments or for the operating costs of the first year of activity and technical/management assistance.



3 Corporate Income Tax

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Which income taxes are applicable to corporate entities and what are the relevant rates?

Italian corporate entities are subject to Corporate Income Tax, IRES (Imposta sul Reddito delle Società) and to Regional Production Tax, IRAP (*Imposta regionale sulle attività produttive*). The rates are the following:

- i. IRES: 27.5%;
- ii. IRAP: 3.9%.

Starting from January 1, 2017 a reduced tax rate of 24% will be applicable for IRES.

IRAP is specifically dealt with in § 5.

Please also refer to § 18 for specific provisions concerning banks and financial companies.

Key principles applicable in the determination of the taxable income are reported below.

IRES is charged on the total net income reported in the Statutory Financial Statements, duly adjusted according to the specific tax rules. Positive and negative items of income are, respectively taxed and deducted on an accrual basis (*accrual principle*).

To be relevant for Corporate Income Tax purposes, costs and proceeds have to be certain (under a legal perspective) and objectively determined or determinable in their amount (*certainity and objective determination principle*). Those items accrued in the Statutory Financial Statements without meeting the above conditions are (temporarily) not taxable nor deductible. Deduction or taxation will be deferred to future tax periods when such conditions will be met.

Costs and expenses are generally deductible if related to proceeds concurring to the determination of the taxable income of the year (*inherence to business principle*) and are accrued in the relevant Profit and Loss Accounts (*imputation principle*).

How is tax base determined and what are the main principles governing the determination of taxable income?

The tax base of IRES is determined in accordance with the “world-wide taxation principle”: to the extent that the income is legally attributable to an Italian tax resident entity, that income must be taxed in Italy, regardless of the location (jurisdiction) where the income is yielded. Conversely, IRAP is determined on income earned in the Italian territory only.

As a consequence, income realised by a foreign permanent establishment of an Italian company is subject to IRES, but not to IRAP.

On the contrary, an Italian permanent establishment of a foreign corporation is subject to both IRES and IRAP for Italian source income.

An optional regime has been introduced which allows Italian companies to exempt from Italian taxation branch income and losses arising outside Italy, instead of the above standard regime.

Do participation exemption (PEX) rules exist in Italy?

For IRES purposes, capital gains (difference between sale consideration and tax basis of the shares) on sales of shares are 95% exempt, provided all the following conditions are met:

- i. the shareholding was held uninterruptedly for at least twelve months prior to the sale;
- ii. the investment was classified as a financial fixed asset in the Statutory Financial Statements relating to the first tax period ownership;
- iii. the majority of the subsidiary's income is not generated in a “tax haven country” or in a country with a privileged tax regime.
- iv. the subsidiary is currently carrying out a commercial activity (e.g.: investments in companies mainly operating in the management of their own Real Estate are not entitled to the PEX benefits);

Conditions sub (iii) and (iv) must be valid at the moment of the sale of the investment as well as for the last three years before the sale. If these conditions are not met, the capital gain realised by the company is ordinarily taxed (IRES only) (please refer to § 3.16 for further details on ordinary capital gain taxation).

Capital losses arising from the sale or the write-down of shareholdings meeting PEX conditions are not tax deductible. Likewise, the capital losses realized on sales of “non PEX” investments are deductible.

Specific rules are provided for those entities that adopted IFRS for Italian Statutory Financial Reporting purposes.

Specific anti-dividend washing rules provide that where capital losses arise from the disposal of shares and other assimilated financial securities that are not eligible for PEX, such losses are deductible only for the part exceeding the tax exempt amount of dividends (see § 3.4 below) received from the shares in question in the thirty-six months prior to the disposal.

3.4

Is dividend income taxable in Italy?

Dividends received by Italian resident companies from Italian companies or from foreign companies are generally excluded from IRES taxable base for 95% of their amount. Dividends paid by entities that are resident in countries with a privileged tax regime (please see § 3.20 for CFC) specific rules apply.

Specific rules are set for entities adopting IFRS for Italian Statutory Financial Reporting purposes: dividends yielded from investments in shares and other financial securities held for trading are fully taxable. Dividends are generally excluded from the IRAP taxable base.

3.5

Are there special tax rules for the evaluation of inventory?

The evaluation of inventory is based on the purchase price / manufacturing cost principle.

Italian companies are allowed to adopt, for tax purposes, any evaluation methods provided for by Italian GAAP or IFRS for Statutory Financial Statements purposes (LIFO, FIFO, average cost and variants of such methods). The choice of method for the purposes of the Statutory Financial Statements (stand-alone) is binding for income tax purposes as well.

The write-down (for tax purposes) of the value of the inventory is allowed up to the average market value of those goods recorded in the last month of the tax period. Write-downs not meeting the above conditions are temporarily nondeductible (see § 3.25 below).

Work-in-progress at the end of the tax period with an overall realization period of less than 12 months is valued based on the costs sustained in such tax period. Differently, work-in-progress with an overall realization period over 12 months is determined based on the overall agreed contractual consideration, apportioned to the percentage of realization achieved at the end of the tax period.

3.6

Are there special tax rules for the evaluation of shares, bonds and other financial instruments?

Securities should be grouped in homogeneous clusters by issuing entity and nature (e.g.: for shares: savings shares, ordinary shares, etc.; for bonds: maturity date, convertibility, etc.), the evaluation basically follows the same rules as those established for the evaluation of inventory.

The write-down of shares and other assimilated financial securities as well as the revaluation of the same assets are generally not relevant for tax purposes. Exceptions are specifically provided for Italian entities adopting IFRS for Statutory Financial Reporting purposes.

Any kind of equity injections (also including those aimed to cover losses) should be added to the cost of the shares and other assimilated financial securities.

3.7

Does Italian Law provide for rules concerning the debt / equity ratio of an Italian entity?

Alternative regimes have been introduced over time with different tax impacts. Please see below.

3.7.1 Are there thin capitalization rules?

There are not thin capitalization rules as such.

3.7.2 Are there incentive tax rules to encourage companies to be equity founded?

Starting from the 2011 fiscal year a notional interest deduction regime was introduced for IRES purposes; it mainly consists in a tax deduction corresponding to a notional interest cost computed on newly adjusted equity. This deduction is known as Allowance for Corporate Equity (ACE) or, in other words, Notional Interest Deduction (NID).

3.7.3 How does the Allowance for Corporate Equity work?

The ACE is a deduction from IRES taxable basis (after using any available NOLs) that corresponds to the net increase in the equity employed in the entity, multiplied by a rate yearly determined by the Italian Ministry of Finance. This rate is 4.5% for FY 2015 and 4.75% for FY 2016.

The relevant increases are determined by the equity contributions, the coverage of losses, and the retained earnings (with the exception of profits allocated to a non-disposable reserve). The shareholders credits' waiver are considered capital attributions and are therefore relevant for ACE purposes.

The relevant decreases are reductions of the net equity with assignment to shareholders, including, in particular, dividend distribution.

To calculate the equity increase, the equity disclosed in the Statutory Financial Statements for the fiscal year 2010 is used, net of the profits for the same year. Under no circumstances can the equity increase relevant for ACE exceed the net equity as resulting from the relative Statutory Financial Statements, without considering the reserves for the purchase of own shares.

For ACE purposes the capital contributions are relevant from the date of payment and retained earnings are relevant from the beginning of the year when the related reserves are appropriated. Decreases are relevant from the beginning of the year in which they occurred.

Anti-avoidance rules prevent that ACE deduction basis is multiplied through capital injections among companies belonging to the same group. In particular, the following transactions are considered as equity decreases relevant for ACE if performed among companies belonging to the same group:

- cash contributions to related entities;
- acquisition in controlled companies shares;

- acquisition of going business concerns from related entities;
- cash contributions from non-resident companies (controlled by resident companies) or from “black list” entities;
- increase of financing credits, compared to the value of the same as at FY 2010.

The ACE not used in one fiscal year can be:

- carried forward in future fiscal years;
- transferred to the fiscal unit if the company is part of a tax group in a taxable income position (please refer to § 3.18.5);
- transformed into tax credit to be offset against IRAP payments made in five installments of the same amount.

3.8

Are there specific limitations to the tax deduction of interests?

Generally, interest expenses are fully tax deductible up to the amount of interest proceeds. Interest expenses exceeding interest proceeds are tax deductible up to 30% of the gross operating margin (interest deduction capacity). The Law defines “gross operating margin” as earnings before interest, taxes, depreciation, amortization, and finance leasing fees. Starting from FY 2016, dividends received from foreign subsidiaries are included in the computation of the gross operating margin.

Net interest expenses in excess of the yearly limitation can be carried forward without any time limitation and can be deductible in any future tax period, as long as the net interest expenses in the tax year do not exceed 30% of the gross operating margin for the same period. In addition if the yearly interest deduction capacity (i.e.: 30% of the gross operating margin) exceeds the net interest deduction taken in that year, the excess of the interest deduction capacity may also be carried over to following periods to increase the future interest deduction capacity.

For companies electing for the domestic tax consolidation regime (please see § 3.18.4 below), certain mechanisms are in place providing for limitations to be applied on a consolidated level. As a consequence, if a company participating within a tax group has an interest deduction capacity excess, this excess may be used against the interest deduction deficit emerging from another company part of the same tax consolidation regime.

The above-mentioned rules are not applicable to financial institutions (e.g. banks and insurance companies) where the deductibility of the interest expenses is limited to 96% of the interest expenses.

A full deduction of interest expenses will be granted for financial institutions (except for insurance companies) starting from the FY 2017.

3.9 *How is depreciation of tangible and intangible assets treated for tax purposes?*

Fixed assets (both tangible and intangible) depreciation and amortization are allowed for tax deduction up to the amount determined by applying specific rates provided by a Ministerial Decree to the relevant acquisition cost. The above mentioned rates are fixed for homogenous classes of assets. In relation to the first year of use, the mentioned rate is reduced by half.

If accounting depreciation/amortization exceeds the maximum amount allowed for tax purposes, the difference is not deductible and a temporary tax difference is therefore generated.

Costs relative to real estate owned by a company are not deductible for the part related to the amortization cost of the land where the building is located.

Amortization of goodwill - deriving from the acquisition of a business part - and amortization of trademarks are deductible for an amount not exceeding 1/18 of the related costs.

Patents, know-how and other intellectual properties may be amortized over a two-year period.

Concession rights may be depreciated with reference to the utilization period as set by Law or by a specific agreement.

In principle corporate restructurings (such as mergers, demergers and contributions in kind) are tax neutral even if, for accounting purposes, the transaction results in the recognition of higher values of the assets or of goodwill. Companies may elect to obtain partial or full recognition for tax purposes of the step-up in the financial accounting values of assets or of the goodwill arising from the corporate restructurings, provided that a substitutive tax is paid.

The substitutive tax is calculated on the step-up in tax basis and is based on progressive rates of 12% to 16%. As a consequence, the depreciation of these assets (or goodwill) is calculated on the higher value arising from the operation. For further details, please refer to § 3.15.

A tax benefit is introduced as from October 15, 2015, to December 31, 2016, for investments in new tangible assets. The purchase cost is notionally increased of 40% for the determination of tax depreciation and lease fees (only for IRES purposes).

3.10 *How are financial leasing agreements treated for tax purposes?*

For what concerns the lessor, as well as the lessee adopting IFRS for Italian Statutory Financial reporting purposes, the cost of assets assigned under financial leasing agreements are tax deductible in accordance with the financial amortization plan applicable to the specific leased item. Rental fees are taxed on an accrual basis.

For lessees not adopting IFRS for Statutory Financial Statements Purposes, rental fees are tax deductible on an accrual basis, provided that the duration of the leasing agreement is not shorter than half (two third before 2014) of the ordinary tax amortization period provided by the Ministerial Decree mentioned in § 3.9 above for the same asset. If the duration is shorter, the exceeding portion of the rental fees is not deductible until the end of the agreement; after such time the taxed amounts will become deductible.

For immovable properties the minimum duration period is set at 12 years.

Interest expenses embedded in leasing agreement are subject to limitations provided for the deductibility of interest expenses (please refer to § 3.8).

3.11 *How are bad debt provisions treated for tax purposes?*

Bad debts provisions on receivables relating to the sale of goods and services are tax deductible up to 0,5% of the gross value of the receivables, with exception to receivables which are guaranteed e.g. by an insurance company.

No further deduction shall be permitted once the total amount of bad debts exceeds 5% of the above-mentioned gross value of the receivables as at the end of the fiscal year.

Losses on bad debts shall be deductible:

- if supported by precise and objective elements or,
- if the debtor is subject to bankruptcy proceedings (applicable even in foreign jurisdictions).

In any case the mentioned losses are deductible only for the part exceeding the bad debt provisions already deducted.

It is assumed that the loss on bad debt is certain:

- when the receivable is overdue by six months and the amount is minimal (up to €2,500, and up to €5,000 for larger corporations whose turnover exceeds €100 million);
- when the collection right is prescribed, regardless of the amount of the credit;
- in case of derecognition of receivables applied in compliance with the accounting standards (both ITA and IFRS GAAPs).

3.12

How are risk provisions treated for tax purposes?

Italian Tax Law generally provides that costs are allowed for tax deduction only when their actual occurrence is certain. The concept of certainty should primarily be regarded under a legal perspective, e.g. the occurrence of a legal obligation to pay a determined amount of money.

Based on the above, provisions for risks are, in line of principle, not allowed for tax deduction and give rise to timing differences between the Statutory Financial Statements results and the taxable income.

Provisions accounted for in previous Financial Statements become deductible in the fiscal year in which they are considered certain and objectively determinable.

3.13

How are staff severance pay provisions treated for tax purposes?

In line of principle staff severance pay provisions (e.g.: TFR) and provisions for Supplementary Customer Allowances are tax deductible on an accrual basis.

For what concerns provisions for Supplementary Customer Allowances, contradictory statements from both the tax authorities and the Courts opened a debate upon whether the deduction of the costs at hand should have been on a cash basis or on an accrual basis. It has been recently definitively clarified that these costs are deductible on an accrual basis.

3.14

Is the write-down/step-up of assets tax relevant?

The write-down of assets based on evaluation processes (e.g.: technological obsolescence) are not tax deductible. Conversely, write-downs due to damages (e.g.: incidents) or a deterioration process are allowed for tax deduction on condition that the loss can be objectively determined. In many such cases an appraisal drawn up by an independent expert may constitute valid proof of the occurring of those conditions.

Write-downs of financial securities (that are not shares and assimilated financial instruments) are allowed to the extent that the loss is objectively determined based on the official price settings (stock exchange securities) or on other similar objective parameters.

The write-up of assets (different from the recovery of previous write-downs) becomes relevant for tax purposes only if provided for by specific laws. Differently, any step-up is always tax irrelevant (as well as any tax depreciation calculated on the step-up value).

Are there any particular rules regarding operations with “tax haven” jurisdictions?

Expenses incurred for goods and services bought from entities resident in “tax haven” jurisdictions are now fully allowed for tax deduction.

Previously to FY 2016 an official list of “tax havens” was issued by the Italian Ministry of Finance (the so-called “black list”) and the transactions were subject to specific deducibility conditions and to disclosure in the tax return.

What are the other most common IRES adjustments?

Apart from expenses which are not inherent to the business activity and/or do not meet the timing accrual principle, the main IRES adjustments are the following.

Entertainment expenses

Expenses for gifts and entertainment are deductible on an accrual basis, provided they meet the qualitative and quantitative requirements set forth by a Ministerial Decree. For what concerns the quantitative requirement, a plafond is determined yearly by applying the following rates to the turnover split in brackets as follows:

- 1.5% of the turnover up to €10 million;
- 0.6% of the turnover exceeding €10 million, up to € 50 million;
- 0.4% of the turnover exceeding €50 million.

Entertainment expenses related to gifts with a value that does not exceed €50 are in any case entirely deductible.

Travel expenses

Meals and accommodation expenses incurred by employees outside the municipality where the company is located, which are correctly and thoroughly documented, are deductible up to a maximum daily amount of € 180.76 (increased to € 258.23 if incurred abroad). The deduction of other meals and accommodation expenses is limited to 75% of the amount incurred.

Car expenses

The deduction of costs incurred in relation to company cars is limited to the following percentages:

- 20% of the total amount of the costs incurred for cars that are not assigned to specific employees;
- 70% of the total amount of the costs incurred for cars assigned to employees, for both business and private purposes.

Car costs may be entirely deducted if: (i) they are related to cars that are essential for the company’s activity (e.g. vehicles owned by a car rental company); or (ii) for taxis.

Fines and penalties

These expenses are not considered “inherent” costs by Italian Tax Law, they are therefore not deductible for tax purposes.

IRAP

Even though IRAP is essentially not deductible from the IRES taxable base, a partial deduction of IRAP payments during the fiscal year is allowed proportionally to certain IRAP non-deductible items:

- labour costs (related to personnel not employed with open-ended contracts);
- interest expenses (exceeding the amount of interest income).

The deduction is carried out on a cash basis, thus it must consider the amount of IRAP effectively paid during the fiscal year, both as an advance payment and as a balance.

IRAP related to labour costs is analytically determined, while the deduction related to interest expenses is calculated with a flat rate of 10% applied to the amount of IRAP already paid.

Local taxes

Municipal tax on Real Estate (Imposta Municipale Unica, IMU) is essentially not deductible for IRES and IRAP purposes. From FY 2014 a deduction of 20% of IMU paid in the same fiscal year on capital assets is permitted.

Phone expenses

The expenses related to phone charges (i.e. both mobile phones and landline phones) are 80% deductible.

Capital gains on disposal of fixed assets

Deferred taxation is permitted for such capital gains and may be spread over a maximum of five fiscal years, if the assets sold have been owned for more than three years. Deferred taxation is also provided for capital gains on disposal of financial assets that do not qualify for PEX, though the ownership requirement is that the asset itself was stated as a fixed financial asset in the statutory financial statements for three tax periods prior to the sale itself.

3.17

May tax losses be carried forward and/or carried back?

Tax losses can be carried forward and can be used to offset the taxable income for IRES profits of following periods. The carry forward is unlimited in time, but is limited in the amount. Tax losses can be offset with taxable income for an amount not exceeding 80% of the taxable income. Thus, corporations are required to pay IRES on at least 20% of taxable income. Note that losses arising in the first three years of activity can be offset with 100% of taxable income.

No tax losses can be carried forward for IRAP purposes.

Specific (tax anti-avoidance) rules limit the carry forward of tax losses in the event of (i) change of control and (ii) an effective change of the main activity (performed by the company carrying forward the losses).

The limitation is applicable if the aforementioned changes occur together.

The change of the main activity is relevant for these purposes if it takes place in the tax period in which the change of control occurs or in the two subsequent or preceding periods.

In Italy, tax losses cannot be carried back.

Specific anti-abuse provisions are also applicable to net operating losses in cases of mergers or demergers.

Please also refer to § 14.6.1 and § 14.6.2.

Is tax consolidation available?

Provided that all the necessary conditions are met, companies belonging to the same group may opt for domestic or worldwide tax consolidation. Please note that the aforementioned regimes do not operate for IRAP purposes.

3.18.1 Which are the main requirements for tax consolidation?

The domestic tax consolidation scheme allows the determination of one single IRES taxable basis given by the algebraic sum of the taxable income/losses determined by each of the participating entities (thus achieving an immediate offset of losses realized by an entity with profits realized by another entity belonging to the tax group).

In the event that an overall tax loss position arises, the same can be brought forward and used against the future consolidated taxable income.

The taxable basis determined by each single company participating in the tax consolidation scheme is considered in its entire amount, i.e.: no apportionment in relation to the percentage of control.

The consolidating entity assumes the obligation of carrying out all payments due (both advance and settlement payments). In case of tax assessments on the taxable basis of the other participating companies each of them remain individually liable for the challenged taxes and related penalties arising from the tax assessments, nevertheless, the consolidating entity is jointly and severally liable for such higher taxes and penalties.

In order to be able to adopt the domestic tax consolidation regime, the following conditions must be met:

- the consolidating entity must be an Italian tax resident company and it must hold, directly or indirectly, more than 50% of the share capital of the consolidated entities (so called “legal control”); said percentage should be computed taking into consideration the de-multiplication effect due to a chain control. E.g. A company owns 80% of B, which in turn owns 70% of C; A ultimately controls 56% of C;
- the above control must be in place since the beginning of the tax period in which the tax consolidation is applied for;
- all the companies participating in the scheme must have the same financial year-end date.

The tax group election is irrevocable for three fiscal years. Starting from the tax year following the tax year in progress at 31 December, 2014 the election has to be exercised in the tax return submitted in the tax period for which the tax consolidation is applied for.

3.18.2 Is it possible to utilize prior years tax losses within a tax group?

Tax losses arising from tax years preceding the tax group election can be carried forward and used only by the company to which these losses belong.

Such carried forward tax losses are to be used before the consolidation. E.g.: a company has carried forward tax losses accrued before the beginning of the tax consolidation period which amount to € 1,000, while in the first year of tax consolidation its taxable profit amounts to € 600. The company will offset its taxable income against its carried forward tax losses and, therefore, no taxable income loss will be “transferred” to the tax group scheme.

3.18.3 Is it possible to utilize current year tax losses within a tax group?

The current year tax losses of a company which is part of a tax group can be offset against the profits of the other consolidated companies.

3.18.4 Is it possible to apply the transfer and carry-forward regime of interest expenses within a tax group?

The surplus of interest payable of each consolidated entity can be transferred to the tax unit in order to reduce the group’s taxable income if and to the extent that other consolidated entities transferred, in the same fiscal year, their gross operating margin surplus that has not been used to deduct interest payable at the level of the consolidated entity.

The same rule also applies for the surplus of interest payable carried forward, excluding the surplus accrued prior to the adoption of the tax consolidation regime.

3.18.5 Is it possible to apply the transfer and carry-forward regime of the ACE deduction within a tax group?

ACE deductions (please see § 3.7.3) accrued during the tax consolidation regime and exceeding the taxable income of each consolidated entity may be transferred to the group. When the ACE deduction exceeds also the group taxable income, then it is possible to carry it forward in subsequent years.

3.18.6 Is it possible for a branch of a non-Italian company to be part of an Italian tax group?

A non-Italian company can opt for the tax group as the controlling company (but not as a controlled company) if the same:

- i. is resident in a country in which a Double Tax Treaty is in force and
- ii. carries out business in Italy through a permanent establishment that assume the status of consolidating company, even if the entity to consolidate is not included in the branch’s equity.

3.18.7 Is it possible for “sister” companies to be part of an Italian tax group?

Starting from FY 2015 Italian “sister” companies or Italian PEs of EU/EEA companies, held by a common parent residing in any EU/EEA countries, can opt for the fiscal unity regime unless the parent has in Italy a PE.

Under the horizontal consolidation scheme the control requirements must be met in the non-resident parent company and all the rights or obligations of the consolidation regime (please see § 3.18.1.) are acquired by the Italian subsidiary, acting as consolidating entity.

It is required that the foreign entity and its legal representative have an Italian tax identification code (*i.e. codice fiscale*) to designate the Italian subsidiary as controlling entity of the fiscal unit.

There is a set of specific rules in case of tax consolidation interruption; as the Italian resident-sister company is not the controlling entity, the tax losses arising from tax years preceding the tax group interruption can be carried forward and used only by the controlled companies that produced these losses.

3.18.8 Are there adverse consequences in the event that a company leaves the tax group?

Italian tax law does not provide for any specific look back rules.

In order to interrupt the consolidated tax regime, the consolidating entity must file within 30 days from the occurrence of the interruption event a communication to the Italian Tax Authority.

3.18.9 Is it possible to include non-Italian companies in the tax group?

Italian Tax Law also provides for the worldwide tax consolidation group, in order to allow the consolidation of foreign subsidiaries.

In addition to the requirement set forth for the domestic tax group regime (see § 3.18.1), the following requirements must be met:

- i. the ultimate parent company must be either owned by individuals tax resident in Italy or listed on the Italian Stock Exchange, and
- ii. the option must be exercised including all the foreign companies (“all in, all out” principle).

The tax consolidated income is apportioned to the actual percentage of control exercised by the Italian ultimate parent company.

Additional specific requirements are set forth by the Italian Law in order to implement the scheme at hand (*inter alia*: the mandatory audit of the Statutory Financial Statements of all the foreign subsidiaries).

The adoption of the worldwide tax consolidation regime is irrevocable for five years.

3.19

Is consortium relief available for corporate tax purposes?

Italian joint-stock companies may elect for consortium relief for State Corporate Income Tax (IRES) purposes.

Under this election, the taxable income of the company is taxed in the hands of the shareholders of the company, each apportioned to its own participation. As such, the profits and losses of a company are transferred to its shareholders for tax purposes, regardless of whether profits are distributed, and can be used to offset the losses or profits of shareholders in the fiscal period in which the transparent company’s fiscal year ends.

The following requirements must be met:

- each shareholder should own not less than 10% and no more than 50% of the “transparent company”;

- the Italian shareholders are joint stock companies; while non-resident shareholders must be eligible for the full withholding tax exemption on dividends.

The option for consortium relief is binding for three fiscal years and must be elected for by the Company itself and by all the shareholders. Starting from the tax year following the year in progress at 31 December, 2014 the election has to be exercised in the tax return submitted in the tax period for which the consortium relief is applied for.

The dividends received by the elected transparent company are not included in the taxable base of the recipient company. As a result, the received dividends are 100% exempted from IRES (instead of 95% ordinary exemption: see § 3.4 above).

3.20

Is there a CFC Legislation?

The Italian tax law provides a set of specific rules to prevent the allocation of income to foreign subsidiaries resident in a country with a privileged tax regime.

As from FY 2016 a foreign jurisdiction or special tax regime is deemed to be a tax privileged one when the corporate taxation is less than 50 percent of the nominal statutory taxation in Italy.

Member states of the European Union and of the European Economic Area (i.e. which allow an effective exchange of information with Italy (i.e. Norway and Iceland) are explicitly excluded, apart from the case of ‘CFC white list’ (see below).

CFC rules provide that an Italian resident subject (either an individual or a company) controlling, either directly or indirectly, an entity resident in a tax privileged jurisdiction (“CFC country”), is required to consolidate in Italy the taxable income arising from the CFC proportionately to the participation held, irrespective of whether the profits have been distributed or not.

The taxable incomes from CFCs are taxed separately from the other taxable incomes of the business of the controlling company at the standard IRES rate (i.e. tax losses cannot be used to offset CFC taxable income). Foreign taxes paid by the CFCs are recoverable by way of a corresponding tax credit (please see also § 3.21).

Taxable incomes from CFCs are calculated taking into account the same rules

applicable to an Italian resident subject (e.g. rules for non-operating companies, see § 3.22) except for deferred taxation of capital gains (see § 3.16).

In the case of effective distribution of dividends, these are excluded from the taxable income of the recipient company up to the amount of the attributed income under the above CFC provision. The excess of dividends over the taxable income already included through the CFC regime is fully taxable by the same shareholder.

Exemption from the rules under discussion can be achieved by means of an advance ruling from the Italian Tax Authorities, whereby adequate evidence must demonstrate at least one of the following:

- i. the foreign subsidiary is ‘mainly and effectively’ engaged in sales or industrial activities in the ‘market’ of the foreign host state of territory. Banks, other financial intermediaries and insurance companies must demonstrate that most of the financial resources and related proceeds are, respectively, made in or the results of yields, from the market of the foreign host state or territory. However, this exemption cannot be availed where more than 50% of the income of the foreign subsidiary is derived from so called ‘passive income’ (e.g. dividends, royalties, interest income) or from intra-group services;
- ii. at least 75% of all the incomes of the CFC have been taxed in jurisdictions that are not tax privileged.

The advance ruling is optional, thus the taxpayer is allowed to prove the above also in the course of a tax audit, within 90 days from the request received from the Italian Tax Authorities.

In the absence of an advance ruling, the Italian parent company must disclose in the tax return the holding of shares in foreign companies which may be subject to CFCs rules.

The CFC rules are also extended to controlled companies that are not resident in a CFC country as defined above (so called ‘CFCs white list’), if the following conditions are met:

- i. the effective tax rate in the foreign jurisdiction is lower than 50% of the tax that would have been charged if the company had been resident in Italy (so called ‘tax rate test’);
- ii. more than 50% of revenue is derived from ‘passive income’ or from intra- group services.

A regulation of the Italian Tax Authorities is bound to define simplified criteria

to perform the ‘tax rate test’, specifying in particular the exclusion of temporary differences in the computation of the effective tax rate.

By means of an advance ruling, the Italian parent company can obtain an exemption from these rules provided that it is able to provide proper evidence that the settling abroad is not for tax avoidance purposes (unfair tax advantage).

The advance ruling is not mandatory also in the case of ‘CFCs white list’, but the absence of a positive ruling entails to reporting them in the tax return.

3.21

Is foreign tax credit allowed for recovery?

Withholding taxes suffered abroad do not reduce foreign-source income concurring to IRES taxable basis. However, in the event that foreign-source income is definitively taxed abroad, a tax credit can be claimed for use against IRES liability.

Basically, the amount of the tax credit that can be claimed is the lower amount between the foreign tax suffered abroad and the proportion of the IRES liability related to the foreign-source income. In the case of partially exempt income (e.g. dividends), the foreign tax credit is reduced in proportion to the part of the income taxable in Italy.

If a company receives foreign source income from more countries, the above limitation is applied separately for each country.

Foreign taxes definitively paid by the foreign permanent establishment of an Italian resident company can be offset against the overall consolidated tax liability (IRES). The same limitation described above shall apply.

Any excess of foreign tax credit over the maximum amount allowed for recovery in the same tax period, can be carried back or carried forward for eight years and recovered if specific conditions are met.

Foreign taxes on trading income sourced abroad in the absence of a local PE, generally cannot benefit from the foreign tax credit. In this case, foreign taxes suffered abroad may be deducted from the taxable base.

Are there any tax rules in Italy concerning “non-operating companies”?

Resident companies and Italian permanent establishments of non-resident companies can be qualified as non-operating companies if, one of the following requirements is met:

- the entity reports corporate tax losses for five fiscal years in a row, or for four years and in the fifth one, files a tax return with a taxable income lower than a minimum taxable income, determined by applying specific income ratios to the gross book value of specific assets (see below);
- the average revenues realized in the current fiscal year and the previous two years are lower than the amount of revenues resulting by applying specific income ratios to the average gross book values of specific asset in the current fiscal year and in the two previous years.

The main assets to be taken into consideration are shares and shareholdings, financial receivables, owned or leased real estate, and owned or leased tangible and intangible assets.

The above requirements must be met every year. Thus, it is possible for an entity to be ‘non-operative’ in one year and operative in the following year.

When qualifying as a non-operating entity, the company must report a minimum taxable income for both IRES and IRAP purposes.

For IRES purposes, the minimum taxable income that should be reported is the same as the requirement regarding revenue which is the sum of the values deriving from the application of specific income ratios to the gross book values of the above mentioned assets. Tax losses referring to previous tax periods can be used against the current taxable income only up to the minimum taxable income as above determined. Tax losses generated in a tax period in which the company qualified as being non-operative cannot be carried forward.

From 2012, a surtax of 10.5% is levied on the minimum taxable income determined for IRES purposes. For companies electing for group taxation, it is worth pointing out that the surtax cannot be included in the group tax burden, as it must be paid by each single company.

For IRAP purposes, labour costs related to personnel not employed with open-ended contracts and other IRAP non-deductible items have to be added back to the deemed minimum taxable income as outlined above.

These rules are not applicable in the first year of life of the company. Exemption from these rules can be achieved:

- by means of an advance ruling with the Italian Tax Authorities aimed at assessing the specific circumstances that caused the company to not earn the minimum amount of revenues; or
- availing of specific exemptions provided by the Italian Tax Law and the Italian Tax Authority which identify a number of objective situations in which an entity cannot be deemed as non-operating, irrespective of the result of the above requirement (e.g. companies directly or indirectly held by stock-listed companies; companies having a number of shareholders equal to, or higher than, 50; companies that, in the previous two years, has had at least 10 employees, etc.).

For what concerns VAT, non-operating entities are not allowed to recover the excess VAT credit suffered on purchases and importations of goods and services (see § 6.5).

3.23

Are there any special rules for bank and insurance companies?

Special provisions are set by the law in relation to specific items that are inherent to the banking and insurance business, such as the write-down of receivables and the obligatory technical reserve (please refer to § 18 and 20).

3.24

Is there a special tax regime for shipping companies?

The Italian Tax Law provides for the so-called “tonnage tax”, applicable to shipping companies. This scheme allows shipping companies to determine the IRES taxable income referable to those ships qualifying for this specific regime having reference exclusively to their tonnage rather than the actual profits and losses computed by the ordinary rules.

Companies electing for the tonnage tax regime are fully exempt from IRAP for all those incomes, which are deemed as being generated by ships qualifying for the regime at hand.

The regime can be adopted provided that an election is stated in the tax return filed in the first fiscal year of application of the ‘tonnage tax’ regime which has a mandatory validity of ten years and is renewable.

The following subjective requirements must be met in order to qualify for the Italian tonnage tax regime:

- i. the applying company is an Italian resident company;
- ii. the applying company must operate in Italy by means of a Permanent Establishment, provided that the place of effective management is in Italy (according to OECD model).

Only ships having a net tonnage of over 100 tons may qualify for the tonnage tax regime. The ships must be used for international goods and passenger transportation, salvage, towing and other services and must be registered in the so-called International Ship Register in Italy (Registro Navale Internazionale).

The election for the tonnage tax regime must be made for all the qualifying vessels belonging to a company or a group. Therefore the so called “cherry picking” method is not admitted.

Tonnage tax relevant income is determined on the basis of the ships’ net tonnage and the days of activity of the ships according to the following scheme:

up to 1,000 Net Tonnage	€ 0.0090 per Net Tonnage
from 1,001 to 10,000 Net Tonnage	€ 0.0070 per Net Tonnage
from 10,001 to 25,000 Net Tonnage	€ 0.0040 per Net Tonnage
over 25,000 Net Tonnage	€ 0.0020 per Net Tonnage

Days in which the ships are not in use due to maintenance operation or are temporarily out of commission are not to be taken into consideration.

No deduction is allowed from tonnage tax income. Indeed, income and expenses related to the following activities are deemed to be included in the tonnage tax relevant income: (i) transport of goods and passengers; (ii) salvage and towing; (iii) other services that need to be performed in high waters; (iv) charges related to the above mentioned activities (e.g. administrative and commercial expenses, insurances fees); (v) other operations performed in close connection with transportation operations (e.g. loading and unloading).

If the tax payer carries out activities other than those qualifying for the tonnage tax regime, the income due to non-tonnage tax activities is taxed according to the ordinary rules concerning corporate income tax.

Capital gains or losses due to the disposal of a ship qualifying for the tonnage tax regime from the date of its acquisition are always deemed to be included in the tonnage tax relevant income (no separate taxation). Differently, in the case of capital gains or losses arising from the disposal of a ship purchased before the election for the tonnage tax regime, the balance between the sale price and the net book value (cost - cumulated tax depreciation) as of the last tax period prior to join the tonnage tax system election, should be subject to ordinary taxation.

Transfer of ships between a “tonnage taxed” company and a company subject to ordinary taxation must be made in compliance with the market fair value.

3.25

Are there any special tax rules for companies operating in the oil, gas and energy sectors?

Specific rules are in place for companies operating in the oil & gas and energy sectors, in particular there is a Mandatory tax step-up of the value of the goods in stock.

For tax purposes only, those companies operating in the gas and oil refining sectors are required to adopt the average cost method or the FIFO (First in First out) method (see also § 3.5).

Italian Tax Authorities provided a 6.5% surtax to the standard IRES rate for the companies operating in the above industries. Starting from February 2015 the Italian Constitutional Court declared such surtax not compliant with Italian general principles also stating that no retroactive effects apply; in particular, no claims for refund will be possible for the past fiscal years.

What are the tax consequences in the event that a company transfers its tax residence outside of Italy?

Moving the tax residence of an Italian company out of Italy triggers immediate taxation (so called “Exit Tax”) for assets not attributed to a Permanent Establishment (“PE”) in Italy of the migrant company. The same holds true in the case of:

- i. indirect transfer of tax residence due to cross border mergers, de-mergers and business contributions when assets are not attributed to an Italian PE;
- ii. the outbound transfer of an Italian PE of a foreign entity;
- iii. the outbound transfer of a going concern owned by an Italian PE of a foreign entity

In the aforementioned events, if tax residence is moved to another State of the European Union (EU) or in a collaborative State of the European Economic Area (EEA), the Italian resident company or PE may elect to (i) defer the taxation of the capital gain; or to (ii) pay the exit tax in six equal yearly instalments.

Exit tax is calculated at IRES tax rate with reference to the overall capital gain, which is based on the arm’s length value of the transferred business, going concern or specific assets. Business value includes goodwill, as well as the value of any transferred functions and risks, determined in accordance with the arm’s length principle. The option for tax deferral or instalment payment must include all the assets of the migrant company or going concern (cherry picking is not permitted).

Tax deferral is available until the transferred assets are considered realized under the rules set forth by a ministerial decree: (i) for tangible and intangible assets in fiscal years in which the amortization accrues according to Italian Tax Law; (ii) for investments in participations, in fiscal years of distribution of dividends or capital reserves; (iii) generally, when the gain is deemed to be realized pursuant to Italian Tax Law (e.g. disposal of assets).

Tax losses carried forward shall be used to offset income produced during the year of transfer; any excess can offset exit tax.

The Exit Tax may no longer be deferred if the company:

- i. further transfers its tax residence outside the EU/EEA, also as effect of reorganizations, such as mergers or spin-offs, whereby the business is transferred abroad;
- ii. starts an insolvency or winding-up procedure.

Tax deferral and instalment payment is excluded for certain assets of the company which are subject to immediate taxation: (i) trade goods, inventory and working capital, (ii) untaxed reserves and (iii) other items that must be included in the taxable base of the last fiscal year in which the migrant company is tax resident in Italy.

In order to qualify either for the deferral or instalment payment, the taxpayer might be required by the Italian Tax Authority to provide guarantees.



4 Corporate governance

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Which are the models of corporate governance adoptable by an Italian stock company?

The models of corporate governance adoptable by an Italian company depend on the type of company in question. It is therefore appropriate to separately examine the rules applicable to joint-stock companies and those applicable to limited liability companies.

(i) Joint-stock companies (S.p.A.)

The Corporate Law “Reform”, undertaken by Law Decree January 17, 2003, No. 6 (the “Reform”), introduced in the Italian Civil Code two corporate governance models, namely, the Dualistic and the Monistic System, that can be chosen by an Italian joint-stock company in addition to the already existing so called Traditional System.

The following chart summarizes the main characteristics of these corporate governance models:

	Management	Management Control	Statutory Audit
Traditional System	Sole Director Board of Directors “Consiglio di Amministrazione”	Board of Statutory Auditors “Collegio Sindacale”	Registered Auditor or Auditing Firm By way of exception: Board of Statutory Auditors
Dualistic System	Managing Board “Consiglio di Gestione”	Monitoring Board “Consiglio di Sorveglianza”	Registered Auditor or Auditing Firm
Monistic System	Board of Directors “Consiglio di Amministrazione”	Management Control Committee “Comitato per il controllo sulla gestione”	Registered Auditor or Auditing Firm

- **Traditional System** (Sections 2380 and following, of the Italian Civil Code): the Shareholders’ Meeting appoints the managing body (Board of Directors or Sole Director) and the Board of Statutory Auditors is entrusted with the managing control. More precisely, according to Section 2403 of the Italian Civil Code, the Board of Statutory Auditors shall control the company’s compliance with the law and the by-laws, the respect of the good managing practices and, in particular,

the adequacy of the organizational, administrative and accounting systems adopted by the company and their effective functioning.

The statutory audit is entrusted to a Registered Auditor (an individual) or to an Auditing Firm, registered in the official auditors’ register as per Section 2409-bis, paragraph I, of the Italian Civil Code.

Notwithstanding the above, Section 2409-bis, paragraph II, of the Italian Civil Code provides an exception to the above mentioned rule. Indeed, the by-laws of those joint-stock companies that are not obliged to prepare the consolidated financial statements may provide that the Board of Statutory Auditors is also entrusted with the accounting control activities. In such case, each and all members of the mentioned board shall be registered in the official auditors’ register. The Board of Statutory Auditors cannot be entrusted with the accounting control activities (according to Section 16, paragraph 2, of the Legislative Decree 39/2010), in the case of public interest entities, companies controlled by/controlling public interest entities, or companies that have joint control with public interest entities.

- **Dualistic System** (Sections 2409-octies and following, of the Italian Civil Code): the Shareholders’ Meeting appoints the Supervisory Board which has, among others, the following main functions: the approval of the financial statements, the exercise of managing control, pursuant to Section 2403, paragraph 1, of the Italian Civil Code the above mentioned reporting to the Shareholders’ Meeting at least once a year on the controls performed on the management’s activities and, if provided by the by-laws, the approval of strategic transactions and on industrial and financial plans of the company drafted by the Managing Board.

The management of the company is entrusted to the Managing Board, whose members are appointed by the Supervisory Board.

The accounting control is always attributed to a Registered Auditor or to an Auditing Firm.

Within the Dualistic System, inspired by the German legal tradition as well as by the statute for a European Company introduced by Council Regulation (EC) No. 2157/2001, some of the main prerogatives of the Shareholders’ Meeting in the Traditional Systems (among which the appointment of the managing body and the approval of the yearly financial statements) are entrusted to a body constituted by professionals (i.e.: the Supervisory Board). Therefore, the Dualistic System is aimed at achieving dissociation between the property of the company, which belongs to the shareholders and the managerial power.

- **Monistic System:** (Sections 2409-sexiesdecies and following, Italian Civil Code): the Shareholders' Meeting appoints the Board of Directors, entrusted with the management of the company, which in turn designates a Management Control Committee among its members, that shall perform the management control as well as any other duty attributed to it by the Board of Directors with specific reference to the relationship with the body entrusted with the accounting control. The accounting control shall be carried out by a Registered Auditor or by an Auditing Firm.

The Monistic System, inspired by the Anglo-Saxon legal tradition as well as by the Statute for a European Company, is the most simple and flexible model of corporate governance, which is intended to promote the circulation of information between the managers and the body that performs the managing control.

In any case, unless otherwise provided within the by-laws, the corporate governance is enacted according to the Traditional System; in other terms, the shareholders shall expressly choose and adopt the Dualistic or Monistic System.

(ii) Limited liability companies (S.r.l.)

The Reform provided some significant changes in the rules concerning limited liability companies, whose corporate structure, prior to 2003, was governed by means of several references to the provisions applicable to the joint-stock companies.

In particular, while the joint-stock companies are still focused on the “capital”, the Reform had the benefit to increase within the limited liability companies the value of the “quotaholders” and the importance of the contractual relationships existing between them.

Such choice had an impact on the corporate governance structure of the limited liability companies that, as a matter of fact, is left to the agreement reached by the quotaholders, save for some compulsory provisions that, anyway, are limited in respect of those applicable to the joint-stock companies.

In particular, unless otherwise agreed upon within the deed of incorporation, the company's management may be entrusted to one or more quotaholders elected by all others.

When the management of the limited liability company is entrusted to more than one person, they represent the Board of Directors.

The deed of incorporation may also provide that the management power is granted either jointly and/or severally among the Directors. The members of the board shall in any case jointly draft the financial statements and the plan of corporate mergers and split-ups as well as resolve on the increase of the corporate capital, if authorized by the deed of incorporation.

If a Board of Directors is established and if provided in the deed of incorporation, the relevant decisions may be adopted by means of written consultation or on the basis of consent expressed in writing (this being the case, the object of the resolution and the vote expressed by each member has to be clearly stated in the documents signed by the Directors).

In limited liability companies the managing control is performed by the quotaholders that are not part of the company's Management. To this regard, they are allowed to exercise the right to ask the Directors any information concerning the development of the corporate affairs and to examine the corporate books and the related management documentation (also by means of trusted experts).

At the same time, according to Section 2477 of the Italian Civil Code, the deed of incorporation may provide for the appointment either of a Supervisory Body (in the meaning of “organo di controllo”) or an Auditor, determining the relevant powers and competences (including the accounting control): should no provision be stated in the deed of incorporation, the Supervisory Body is formed by a sole individual.

However, the appointment of the Supervisory Body/Auditor is compulsory, when the company has exceeded for two subsequent accounting years two of the limits provided by Section 2435-bis of the Italian Civil Code:

- total value of the assets: € 4,400,000;
- sale profits: € 8,800,000;
- average number of employees during the accounting year of reference: 50.

In the above mentioned situation, the principles governing joint-stock companies apply; should the deed of incorporation not provide otherwise, the accounting control shall be performed by the Supervisory Body/Auditor.

Moreover, the appointment of a Supervisory Body/Auditor is also required when a limited liability company: (a) is obliged to the drafting of the consolidated financial statements; (b) controls a company whose accounts are subject to audit.

Which are the powers, duties and rights of the shareholders/quotaholders?

With regard to the powers, duties and rights of the shareholders/quotaholders it is necessary to distinguish the position of each shareholder/quotaholder with respect to the position that these may assume within the relevant Shareholders/Quotaholders' Meetings.

Shareholders' Meeting

First, as for joint-stock companies, it is necessary to examine both the ordinary and the extraordinary Shareholders' Meetings.

The ordinary meeting of the joint-stock companies that do not adopt a Dualistic System (and, therefore, without the Supervisory Board) is entrusted with the power to:

- approve the yearly financial statements;
- appoint and revoke the Directors; appoint the members and the chairman of the Board of Statutory Auditors and the Registered Auditor or the Auditing Firm should they be required;
- establish the remuneration of the Directors and of the members of the Board of Statutory Auditors, unless already established in the by-laws;
- resolve on the liability of the Directors and the members of the Board of Statutory Auditors;
- resolve on other matters attributed by law to the Shareholders' Meeting as well as on the authorizations which might be required by the by-laws concerning the actions of the Directors, being it understood that, in any case, the liability for such actions will be on the Directors;
- approve the rules, if any, for the Meetings.

On the other hand, in joint-stock companies where a Monitoring Board is appointed, the ordinary meeting has the power to:

- appoint and revoke the members of the Supervisory Board and establish their remuneration, unless already established in the by-laws;
- resolve on the liability of the members of the Supervisory Board;
- resolve on the distribution of profits;
- appoint the Registered Auditor or the Auditing Firm.

Furthermore, the extraordinary meeting shall resolve on the amendments to the by-laws, the appointment, the replacement and the powers of the liquidators and upon any other matter expressly attributed by the law to its competence.

Shareholders

The shareholders are granted with both patrimonial and administrative rights: each stock of shares ensure to its owner not only the right to obtain a proportional part of the net profits as resulting from the yearly financial statements approved by the Shareholders' Meeting (and, where applicable, of the net assets resulting from the company's liquidation), but also the right to vote in the Shareholders' Meeting.

Notwithstanding the above, the by-laws may authorize the issuing of shares without voting rights, with voting rights limited to specific matters, with voting right subordinated to the occurrence of certain conditions not merely dependent on the exercise of individual rights (to this regard, see § 1.16 -1.17 above).

Furthermore, as for the administrative rights, those shareholders representing at least 1/10 of the corporate capital, or the lower percentage provided in the by-laws, have the power to ask the Directors (or the members of the Managing Board in the Dualistic System) the calling of the meeting, indicating the relevant agenda. This request is not admitted for matters in relation to which the meeting resolves upon the proposal of the Directors or on the basis of a project or a report prepared by them.

In addition, each shareholder has the right to withdraw from the company (see § 4.2.5 below).

The shareholders are also granted with some informative rights. In particular, they are entitled to inspect the Shareholders' book and the Shareholders' Meeting minute book and to obtain excerpts at their own expense. Furthermore, the shareholders may examine the copy of the yearly financial statements of the company together with full copies of the yearly financial statements of the controlled companies and a schedule summarizing the essential data of the last yearly financial statements of affiliated companies. These documents shall remain deposited at the registered office of the company, together with the reports of the Directors, the Statutory Auditors and the subject entrusted with the accounting control, during the 15 days preceding the meeting that shall approve the yearly financial statements and until its approval.

As for the duties, the main obligation in charge of the shareholders is to pay the relevant capital contribution or to perform their due contribution in kind. In addition to the contributions, the deed of incorporation can provide for the duty of the shareholders to perform some ancillary obligations, other than in cash, specifying their relevant content, their duration, the related formalities and remuneration, providing sanctions in case of non-performance.

Quotaholders decision and Quotaholders' Meeting

As per Section 2479 of the Italian Civil Code, the quotaholders have the power to resolve on the matters reserved to them by the deed of incorporation as well as on the matters which one or more Directors, or quotaholders representing at least 1/3 of the corporate capital, submit to their approval.

In any case, the quotaholders shall decide upon:

- i. the approval of the yearly financial statements and the distribution of the profits;
- ii. the appointment, if provided in the deed of incorporation, of the Directors;
- iii. the appointment of the members and the chairman of the Supervisory Body or the Auditor;
- iv. the amendments to the deed of incorporation;
- v. the decision to enter into transactions which cause a substantial change to the corporate object as determined in the deed of incorporation or a significant change to the rights of the quotaholders.

The deed of incorporation can contemplate that the decisions of the quotaholders may be adopted through consultation in writing or on the basis of the consent expressed in writing. In such case the documents signed by the quotaholders must clearly outline the object of the resolution and the approval of the same.

However, the decision of the quotaholders shall be adopted by means of a resolution of the Quotaholders' Meeting (see § 4.2.1 and 4.2.2 below) and not through written consultation or written consent in the following cases:

- a. if the deed of incorporation does not state this provision;
- b. with reference to the matters indicated in the above-mentioned points (iv) and (v), as well as in Section 2482-bis, paragraph IV of the Italian Civil Code (concerning the reductions of corporate capital in the event of capital loss);
- c. if one or more Directors or a number of quotaholders representing at least 1/3 of the corporate capital request so.

Quotaholders

The quotaholders are also granted with both patrimonial and administrative rights. The social rights belong to the quotaholders in proportion to the participation held by each of them. Unless specifically provided within the deed of incorporation, the participation of each quotaholder is determined in proportion to their respective contribution. However, the deed of incorporation may provide for the granting of special rights to single members relating to the management of the company or the distribution of profits (see § 1.16 above).

As already mentioned in § 4.1 (ii) above, the quotaholders that are not entrusted with the management of the company shall perform the managing control.

Furthermore, non-director quotaholders have some informative rights: in particular they may exercise the right to ask to the board members any information on the development of the corporate affairs and to examine the corporate books and the related management documentation (also by means of trusted experts).

Each quotaholder is also entitled to withdraw from the company (see § 4.2.5 below).

As for duties, the main obligation of the quotaholders also for limited liability companies is to provide the company with the capital contribution or the contribution in kind related to their respective quota.

4.2.1 Does the law require a specific quorum for certain resolutions of the Shareholders' Meeting/Quotaholders' Meeting?

Shareholders' Meeting

The Italian Civil Code acknowledges the ordinary and the extraordinary meetings. As for the *quorum* of these meetings it is necessary to distinguish between the so called "opened" and "closed" joint-stock companies.

In particular, opened joint stock companies are those that make recourse to the market of risk capital (i.e.: listed companies or companies with shares highly distributed among the public); all the remaining joint-stock companies are closed.

This being said, at first call (Section 2368 of the Italian Civil Code):

- the *ordinary meeting* of opened and closed companies is legally established with the participation of a number of shareholders representing, at least, half of the corporate capital. Its resolutions are taken by absolute majority, unless the by-laws require a higher quorum;
- the *extraordinary meeting* of closed companies validly resolves with the absolute majority of the corporate capital. The by-laws may require higher majorities. For special resolutions concerning the modification of the corporate scope and type, anticipated winding up, prorogation of the duration of the company, revocation of the liquidation procedure, transfer abroad of the company's registered office, issuance of privileged shares, the voting quorum must be over 1/3 of the corporate capital;

- the *extraordinary meeting* of opened companies is legally established with the participation of a number of shareholders representing, at least, half of the corporate capital, or the higher percentage set forth in the by-laws. Its resolutions are taken with the favorable vote of at least the 2/3 of the corporate capital represented in the meeting.

At the second call (Section 2369 of the Italian Civil Code):

- the *ordinary meeting* of opened and closed companies is legally established regardless of the amount of the corporate capital represented thereto and validly resolves with the absolute majority. The by-laws may require higher majorities except for resolutions concerning the approval of the yearly financial statements and the appointment and revocation of the Directors;
- the *extraordinary meeting* of closed companies is legally established with the attendance of shareholders representing more than 1/3 of the corporate capital and resolves with the favorable vote of at least 2/3 of the corporate capital represented in the meeting. The by-laws may require higher majorities. For special resolutions concerning the modification of the corporate scope and type, anticipated winding up, prorogation of the duration of the company, revocation of the liquidation procedure, transfer abroad of the company's registered office, issuance of privileged shares, the voting quorum must be over 1/3 of the corporate capital;
- the *extraordinary meeting* of opened companies is legally established with the attendance of shareholders representing more than 1/3 of the corporate capital and resolves with the favorable vote of at least 2/3 of the corporate capital represented in the meeting. However, the by-laws may require higher majorities.

In calls subsequent to the second one:

- the ordinary and extraordinary meeting of closed companies is ruled according to the provisions set forth for the second call;
- the ordinary meeting of opened companies is ruled according to the provisions set forth for the second call;
- the extraordinary meeting of opened companies is legally established with the attendance of shareholders representing at least 1/5 of the corporate capital, save for the higher percentage required by the by-laws and resolves with the favorable vote of at least 2/3 of the corporate capital represented in the meeting.
- As a general note, unless otherwise provided for by law, the shares for which the voting right cannot be exercised are computed for purposes of the attendance quorum of the meeting. Said shares as well as the shares for which the voting right has not been exercised due to the decision of the shareholder to abstain from it, being in conflict of interest, are not computed for purposes of the voting quorum.

Quotaholders' Meeting

It is necessary to distinguish between the quorum requested to validly adopt a quotaholders' decision in writing and the quorum relating to the Quotaholders' Meeting.

As for the quotaholders' decision, unless otherwise provided in the deed of incorporation, the decisions of the quotaholders are adopted with the favorable vote of the shareholders that represent the majority of the corporate capital.

As for the Quotaholders' Meeting, the "Reform" no longer provides for the extraordinary meeting in limited liability companies (see § 4.2.2 below); attendance and voting quorum are provided on the basis of the meeting agenda. In particular, unless differently regulated in the deed of incorporation, the meeting is legally convened with the attendance of shareholders representing at least one-half of the corporate capital. Its resolutions are taken by absolute majority of the corporate capital represented in the meeting, unless the agenda of the meeting concerns the modification of the by-laws, the decision to enter into a transaction which causes a substantial change to the corporate purpose or of the rights of the quotaholders, the appointment and revocation of the liquidators as well as the revocation of the winding-up. In such cases, the favorable vote of at least one-half of the corporate capital is required.

Considering that the Italian Civil Code does not provide any specific quorum for the second or subsequent calling of the meeting, the provisions concerning the first call shall apply.

4.2.2 In the Italian Legal System are there any particular law provisions concerning the calling of the Shareholders'/Quotaholders' Meetings?

Shareholders' Meeting

According to Section 2364, paragraph II, of the Italian Civil Code, the ordinary meeting must be called at least once a year within the term indicated in the company's by-laws and, in any case, within 120 days from the closing of the financial year. The by-laws may also provide a longer term, not exceeding 180 days, if the company is obliged to draft the consolidated financial statements, or if it is requested for specific reasons related to the corporate business or the company's structure. The reason for such postponement shall be indicated by the Directors in the relevant report on the management.

The Shareholders' Meeting shall be called by the Directors (or by the Managing Board in the Dualistic System) by means of a notice specifying the day, the hour, and the place where the meeting is convened and the relevant agenda.

This notice shall be published, at least 15 days prior to the day of the meeting, in the Official Italian Gazette or on a daily newspaper indicated in the by-laws; if the daily newspapers have ceased to be published, the notice must be published in the Official Italian Gazette.

Furthermore, the by-laws of closed companies (see § 4.2.1 above) can also derogate to the above-mentioned provisions, allowing the calling of the meeting by means of notices delivered to the shareholders at least 8 days prior to the meeting.

Such notice shall guarantee evidence of the relevant receipt.

Moreover, in absence of the aforementioned formalities, the meeting is deemed regularly convened when the entire corporate capital is represented and the majority of the members of the administrative or the control bodies attends the meeting.

However, in such case, each participant is allowed to oppose to the discussion of matters on which he/she deems not to have been adequately informed.

Prompt notice of the resolution adopted by the Shareholders' Meeting must be provided to the members of the management and control bodies who did not attend the meeting.

Finally, the Italian Civil Code also provides that the Directors (or the Managing Board in the Dualistic System) should call a meeting without delay, when requested by as many members representing at least 1/20 of the company's corporate capital in companies that make recourse to the market of risk capital, and when requested by as many members representing at least 1/10 of the company's corporate capital, or the lower percentage provided for in the by-laws in closed joint-stock companies (see § 4.2.1 above). If the Directors (or the Managing Board in the Dualistic System) or, in their place, the members of the Board of Statutory Auditors (or the Monitoring Board and the Management Control Committee respectively in the Dualistic and Monistic System), fail to proceed, the calling of the meeting can be made through a decree of the President of the Court.

Quotaholders' Meeting

According to Section 2479-bis of the Italian Civil Code, the deed of incorporation determines the modalities to convene the Quotaholders' Meeting, which shall in any case assure the prompt information of the relevant agenda. If no provision is contained in the deed of incorporation, the calling is made by registered letter sent to the quotaholders at least 8 days prior to the date of the meeting at the domicile stated in the companies' register (since the Quotaholders' book has been abolished as of March 30, 2009).

In any case, the resolution is validly adopted when the entire corporate capital is represented and all the Directors as well as the members of the Board of Statutory Auditors, if any, attend the meeting or are informed of the meeting and no one opposes to the treatment of the items of the agenda.

4.2.3 *How does the existence of a shareholders' agreement impact on the company's management?*

Joint-stock companies

The rules governing the agreement by means of which the shareholders integrate and, in some cases, bypass the provisions of the by-laws through private contracts signed between themselves (patti parasociali), were introduced in the Italian Civil Code by the Reform.

As a matter of fact, Section 2341-bis of the Italian Civil Code regulates the content, purposes, duration and formalities of the shareholders agreement.

In particular, for what concerns the content, the Italian Civil Code provides for three types of agreement: (a) those having as object the exercise of the voting right within joint-stock companies or companies controlling joint-stock companies; (b) those limiting the transfer of the shares of joint-stock companies or of the participations in companies controlling joint-stock companies; (c) those having as object or as a consequence the exercise, also jointly, of a predominant influence on such companies.

One of the aims of these agreements is to regulate the relationships among the shareholders or the management of the company.

The duration of the shareholders' agreements shall not exceed 5 years. Should the parties agree upon a longer term, this is automatically reduced to 5 years.

However, the agreements are renewable upon their expiration. Should they be executed without a determined term of duration, each of the parties may withdraw with a notice of at least 180 days prior to the expiration of the same.

As for the formalities, all the agreements howsoever executed shall fall within the application of Section 2341-bis of the Italian Civil Code.

Within opened companies (see § 4.2.1 above), the shareholders' agreements must be previously communicated to the company and disclosed at the opening of the Shareholders' Meetings; in the absence of such formalities, the representatives bound by the shareholders' agreements shall refrain from exercising their voting rights, and the resolution adopted with their relevant vote may be claimed according to the procedure described in § 4.2.4 below.

Lastly, specific provisions are set forth by the Financial Code, which expressly renders the examined Section of the Italian Civil Code not applicable to companies falling under its application. In particular, according to Section 122 of the Financial Code, the shareholders agreements in whatsoever form concluded, whose object is the exercise of voting rights in companies with listed shares or companies that control them, shall be notified to "Consob", the National Commission for Listed Companies and the Stock Exchange, (*Commissione Nazionale per le Società e la Borsa*) published in abridged form in the daily press, filed with the Register of Companies of the jurisdiction where the company has its registered office and notified to companies with listed shares, within 5 days from the date of their conclusion. The non-compliance with the aforementioned requirements shall cause the agreements to be null and void. Voting rights attached to listed shares for which the above mentioned requirements have not been met may not be exercised.

The duration of the shareholders agreements regulated in the Financial Code shall not exceed 3 years and shall be automatically reduced to such duration if the parties have agreed for a longer term; agreements shall be renewable upon expiration. Agreements may also be concluded for an indefinite period of time; this being the case, each party may withdraw by giving 6-months' notice.

Limited liability companies

The provisions concerning the shareholders' agreements in joint-stock companies also apply to limited liability companies when controlling joint-stock companies.

In other cases, the mentioned provisions are not applicable to limited liability companies, whose quotaholders appear therefore to be entitled to undertake commitments amongst themselves without respecting the limits provided by the Italian Civil Code.

Notwithstanding the above, the increase of the autonomy of the quotaholders provided by the "Reform" entitles the mentioned subject to tailor the company to their needs by inserting directly in the by-laws or the deed of incorporation specific provisions which shall regulate their corporate relationships.

4.2.4 Is it possible to claim against a shareholders'/quotaholders' resolution?

Joint-stock companies

Resolutions not adopted in compliance with the law or the by-laws might be challenged by the absent or the dissenting shareholders as well as by those who did not vote.

This right is also attributed to the Directors, the Board of Statutory Auditors and the Supervisory Board, on the basis of the system of corporate governance adopted by the company.

More specifically, the challenge may be filed by shareholders owning shares provided with the voting rights representing, also jointly, at least the 1/1000 of the corporate capital in opened companies and 1/5 of the corporate capital in closed companies (see § 4.2.1). The by-laws may reduce or exclude such requirement.

Those shareholders, who are not entitled to challenge the resolutions, can only assert the right of compensation for the damages caused to them by the noncompliance with the law or the by-laws of the resolution.

The challenge or the request of compensation of damages has to be filed, by means of a summon before the local Court where the company's registered office is located, within 90 days from the date of the resolution, or from the date of deposit of the same in the Register of Companies, should the resolution be subject to the aforementioned fulfilments.

By filing a specific recourse jointly with the summon, the appealing party may also request the suspension of the execution of the resolution.

The invalidation shall not take place if the resolution is replaced by another resolution adopted in compliance with the law and the by-laws.

A resolution that modifies the corporate purpose in order to carry out impossible or illegal activities can be challenged without any time limit.

Furthermore, the resolution approved with the determining vote of shareholders having, on their own or on behalf of third parties, a conflict of interest with the company may be challenged should the company suffer prejudice.

The invalidation of the resolution is effective towards all the shareholders and obliges the Directors, the Supervisory Board and the Managing Board to adopt the consequent resolutions under their responsibility. All rights acquired by third parties in good faith on the basis of acts implemented pursuant to the execution of the invalidated resolution are safeguarded.

Lastly, the Italian Civil Code provides to annul the Shareholders' Meeting in the case of failure to convene the meeting, if the minutes are not taken or if the agenda of the meeting is illegal or unrealizable. In the latter cases, the resolution can be challenged by any interested party within the general term of 3 years.

Limited liability companies

Resolutions adopted in violation of the law or the deed of incorporation may be challenged by the dissenting quotaholders, by each Director and also by the Board of Statutory Auditors, if appointed, within 90 days from the relevant registration in the quotaholders' minute ledger.

Upon request of the company or the challenging party, the Court may provide the company with a period of a maximum of 180 days in order for the same to adopt a new decision which will replace the previous invalid resolution.

Deliberations which have an unlawful or an impossible object, as well as those which are taken without any kind of information, can be challenged by any interested party within 3 years from the relevant registration in the quotaholders' minute ledger. The resolution that modifies the corporate purpose, providing for an unlawful or impossible scope may be challenged without any time limitation.

Moreover, any resolution which may damage the company and which is adopted with the determining vote of the quotaholders in conflict of interest can also be challenged.

Lastly, Section 2479, paragraph IV of the Italian Civil Code, states a number of dispositions in order to claim against the Shareholders' resolution.

4.2.5 In which cases does a shareholder/quotaholder have the right to withdraw from the corporate relationship?

Shareholders' withdrawal right

The Italian legal system provides several cases in which a shareholder is allowed to assert his right to withdraw from the corporate relationship.

According to Section 2437, paragraph I of the Italian Civil Code, shareholders are entitled to withdraw all or a part of their shares, if they do not contribute to the deliberations concerning:

- the modification of the corporate purpose clause, if it leads to a significant change in the company's business;
- the company transformation;
- the transfer abroad of the registered office;
- the revocation of the liquidation status;
- the elimination of one or more of the following withdrawal causes provided by the law or by the by-laws: (i) extension of the life of the company, (ii) introduction or removal of restrictions on the circulation of share certificates;
- the modification of the criteria for determining the shares' value in case of withdrawal;
- the variations of the by-laws concerning the voting or the participation rights.

Every agreement concluded in order to exclude or limit the right to withdraw in the above mentioned circumstances is null and void.

Unless otherwise provided in the by-laws, the shareholders who did not concur to the approval concerning the (i) extension of the life of the company, (ii) introduction or removal of restrictions on the circulation of share certificates, are entitled to withdraw.

Moreover, if the company is established without an ending term and its shares are not negotiated on the Stock Exchange, the shareholders may withdraw with a 180-day notice (unless a different term is provided in the by-laws, but in no case shall it exceed one year).

The by-laws of the closed companies (see § 4.2.1 above) may also provide for further withdrawal causes.

In order to exercise the withdrawal right, the shareholder shall send a registered letter within 15 days from the filing of the resolution within the Register of Companies, stating his/her personal data, his/her domicile, the number and the kind of shares the withdrawal is exercised for. If the circumstance which justifies the withdrawal is not a resolution, the withdrawal has to be exercised within 30 days from the date on which the shareholder had become aware of it.

The shares for which the withdrawal is exercised shall not be transferred and must be deposited at the registered office of the company. Lastly, the right to withdraw cannot be exercised, and, if exercised, is not effective if the company resolves its dissolution or revokes the resolution that might justify the withdrawal.

Quotaholders' withdrawal right

The events in which a quotaholder can assert his right to withdraw may be defined in the deed of incorporation.

However, the withdrawal right is valid to all the quotaholders that did not agree on:

- the change of the corporate purpose or the kind of company;
- the merge of the company or its split;
- the revocation of the liquidation procedure;
- the transfer abroad of the registered office;
- the elimination of one or more of the withdrawal causes set forth in the deed of incorporation;
- the realization of operations that determine a substantial modification of the corporate purpose provided in the deed of incorporation or a considerable modification of particular patrimonial and administrative rights assigned to the quotaholders.

Furthermore, if the company is established without an ending term, each quotaholder may withdraw with a 180-day notice (save if a different term is provided in the deed of incorporation, which cannot however exceed one year).

The quotaholders who decide to withdraw from the company have the right to obtain the refunding of their quota; the reimbursement must be executed within 180 days following the communication of withdrawal. Lastly, the right to withdraw cannot be exercised, and if exercised is not effective, if the company resolves its dissolution or revokes the resolution that might justify the withdrawal.

In any case, the withdrawal cannot be asserted, and if asserted will not be effective, should the company revoke the resolution legitimating the withdrawal, or resolve upon its winding-up.

Are there any specific requirements and/or limitations in order to be appointed as Director?

Directors of joint-stock companies

According to Section 2382 of the Italian Civil Code, whoever is banned, prohibited, in bankruptcy, condemned to a punishment entailing the interdiction, also temporarily, from public offices or the incapacity to exercise managerial offices shall not be appointed as Director, and if appointed he/she shall be revoked.

Furthermore, unless otherwise specified by specific law provisions concerning the exercise of particular activities, the by-laws may require certain requisites of honorableness, professionalism and independence.

In addition, unless specifically authorized by the shareholders' meeting, the Director shall not acquire the status of partner with an unlimited liability in competing companies nor perform, on his behalf or on behalf of third parties, any activity in competition with the company, nor be appointed as Director or general manager. Should the Director fail to fulfil the aforementioned obligation, he shall be revoked from his office and deemed liable for any damage.

Following specific law provisions, certain limitations are provided for the appointment as Directors of individuals covering particular professions, such as: state officers, notaries, lawyers, members of the Parliament, members of the Magistrates Superior Council, the President and the Commissioners of the *Consob*, etc.

Directors of limited liability companies

Unless specifically set forth in the by-laws, the management of a limited liability company may be entrusted solely to the quotaholders.

Considering that the Italian Civil Code does not provide any specific provision concerning the requirements for being appointed as a Director in a limited liability company, according to the prevailing legal doctrine, the above mentioned provisions concerning the Directors of joint-stock companies can also be applied to those of the limited liability companies.

4.3.1 Do Directors have to have Italian nationality?

The Italian legal system does not provide for any specific restrictions for citizens of the European Union to be appointed as Director of an Italian company.

As for non-EU citizens, pursuant to Section 16 of the preliminary general provisions of the Italian Civil Code *“the foreign citizen is admitted to the same civil rights assigned to an Italian citizen under condition of reciprocity, unless otherwise provided in special laws. This disposition shall also apply to foreign entities”*.

4.3.2 Can a company be appointed as Director of another company?

Sections 2380-bis and 2475 of the Italian Civil Code, introduced by the Reform, do not clearly state for the possibility to appoint a company or a legal entity as Director.

However, in 2006, the Chamber of Commerce of Milan permitted the registration in the Register of Companies of a limited liability company's deed of incorporation in which it was provided for the possibility to have another limited liability company as a sole Director.

Subsequently, on May 18, 2007, the Commission of the Public Notaries Council of Milan (*Commissione del Consiglio Notarile di Milano*) published the rule no. 100, concerning the possibility for companies to appoint as director one or more corporate entities or other legal entities different from individuals, notwithstanding the limits deriving from specific provisions of law with regard to given types of companies.

One of the main aspects outlined in this principle is the lack of any distinction between joint-stock companies and limited liability companies: therefore, the divergence of opinions between the legal doctrine which permits the appointment of legal entities as Director for limited liability companies only and the doctrine that, on the other hand, considered this possible for all kinds of companies, could be replaced.

During the drafting of the above mentioned principle, the Commission of the Public Notaries Council of Milan decided to apply Section 47.1 of Regulation (EC) No. 2157/2001 concerning the European Company, and Section 5 of the Legislative Decree 240/1991, regarding the European Economic Interest Grouping.

On the basis of these provisions, the Commission set forth several general principles which can be considered also for legal entities appointed as Directors of companies (and of partnerships), and in particular:

- any legal entity appointed as Director must appoint a representative belonging to its organization, who will exercise the functions of Director. However, such representative may not necessarily be the legal representative of the legal entity covering the office of Director. Furthermore, it is necessary that he/she is part of the legal entity in which they are appointed as Director, and the appointment may only concern one person.
- the representative is subject, together with the legal entity acting as Director, to the same duties and responsibilities provided by the law towards the individual appointed as Director. The main purpose of this provision is to prevent that the appointment of a legal entity as Director of a company can be used to elude the duties and responsibilities of the Directors;
- both the appointment of the legal entity acting as director and the appointment of the representative have to be filed in the Register of Companies;
- the appointment of a legal entity as Director cannot be made by certain types of companies for which special legal provisions or regulations are in force. For example, for listed companies or for companies operating in fields subject to particular regulations and supervisory standards, which are provided with specific regulations concerning the managing and controlling bodies.

Considered the lack of specific legal provisions in the Italian legal system, these principles could be useful in order to interpret and understand the subject concerning the appointment of corporate bodies. It is important to underline that these leave some open points, concerning, for example, the necessity or lack of a specific clause in the by-laws providing for the possibility of appointing a legal entity as Director, and the actual need, or lack of, for the legal entity appointed as Director, to designate a representative.

4.3.3 What duties and powers do the Directors have?

Directors of joint-stock companies

According to Section 2381, paragraph VI of the Italian Civil Code, Directors of joint stock companies have the duty to ensure that they are duly informed whilst performing their task. Therefore, each Director may ask the Managing Directors to provide him/her with information regarding the development of the company's business.

In other words, a continuous flow of information between the members of the Board of Directors that have the right/duty to acquire all the data and information necessary in order to gain a vast knowledge on how the company is managed is required.

In addition, Section 2392, paragraph I of the Italian Civil Code requires that the Directors fulfil the duties provided by law and by the deed of incorporation with the diligence required by the nature of their task and by their specific expertise.

The Directors are jointly and severally liable towards the company for the damages caused to the latter, unless the relevant acts and activities were performed by the Executive Committee, if appointed, or by one or more Managing Directors.

In addition, the Directors are jointly and severally liable towards the company should they have not prevented the damages and/or their cause, although they were aware of existing prejudices.

To this regard, please note that the previous wording of such Section of the Italian Civil Code did instead refer to the diligence of the mandatory (i.e.: of a good pater familias). Therefore, it is possible to affirm that the "Reform" has increased the level of diligence of the Directors. In any case, notwithstanding the above, the liability for acts or omissions of Directors is not extended to the Director, who, being without fault, has had his/her dissent reported without delay in the minute ledger of the Shareholders' Meeting and has immediately provided written notice to the chairman of the Board of Statutory Auditors.

The Reform, therefore, has also substantially confirmed the duty for the non-Managing Directors to pay particular attention to the acts and activities performed by the other members of the Board of Directors in order to avoid any possible damage or prejudice to the company.

As for the powers, in order to achieve the corporate purpose, the Board of Directors and the Managing Board are allowed to perform all the acts necessary to achieve corporate objectives and, in particular, actions connected both to the ordinary, as well as to the extraordinary administration.

Moreover, according to Section 2384 of the Italian Civil Code, the power to represent the company, granted to the Directors by the by-laws or by the resolution that has appointed the same, is general. Possible limitations of the representative powers set forth by the by-laws or by the component bodies, even if duly stated, cannot be opposed to third parties, unless it is proved that the latter acted intentionally to harm the company.

Furthermore, the by-laws may attribute a number of responsibilities to the administrative body (or the Supervisory Board or the Managing Board in the Dualistic System), such as resolutions concerning the merger of wholly owned companies or companies which are at least 90% owned, the creation or suppression of secondary offices, the appointment of those directors that have the power to represent the company, the reduction of the corporate capital in the event of a shareholder's withdrawal, any adjustment of the by-laws to the law provisions, the transfer of the registered office of the company within the national territory.

In addition, the by-laws may attribute the authority to the Directors to issue one or more convertible bonds up to a specified amount and for a maximum period of 5 years from the date of registration of the company in the Register of Companies. In such case, the delegation of such authority shall also include the corresponding increase of capital. Moreover, such authority may also be attributed through an amendment to the by-laws, for a maximum period of 5 years from the date of the resolution.

Furthermore, the by-laws may provide the Directors the power to increase the corporate capital one or more times up to a specified amount and for the maximum period of 5 years from the date of registration of the company in the Register of Companies.

Finally, the by-laws may not provide the Directors the power to issue bonds and allocate assets to a specific business.

Directors of limited liability companies

The Directors, unless otherwise stated in the company's by-laws or in the deed of incorporation, have the power to manage the company, performing ordinary and extraordinary administration. They also have the power to represent the company towards third parties and in Court.

Furthermore, only the Directors have the competence to draft the yearly financial statements, the management's report, in accordance with the law provisions, and merger and split-up plans.

The deed of incorporation may grant the Directors the power to increase the corporate capital through payment, specifying the relevant limits and procedures.

Although the Italian Civil Code does not provide for an explicit duty of professional diligence towards the Directors of a limited liability company, the same principles set forth for joint-stock companies are applicable.

4.3.4 Is there any provision ruling the conflict of interest of Directors?

Directors of joint-stock companies

According to Section 2391 of the Italian Civil Code, each and every Director shall give notice to the other directors and to the Board of Statutory Auditors - or the Supervisory Board or the Management Control Committee, if the Dualistic or Monistic Systems has been adopted - of the existence of any direct or indirect interest in any particular corporate transaction, specifying the nature, terms and origin of such interest.

Should the conflict refer to a managing Director, the latter shall refrain from performing the transaction, simultaneously empowering the other directors of the Board for its accomplishment.

In such case the board's resolution shall adequately state the reasons of and the company's interest in the transaction: when the resolution is taken in breach of the aforementioned rules and a damage has been caused to the company, the Directors and the members of the Board of Statutory Auditors may appeal such resolution within 90 days from the date in which it was taken.

In any case, any rights acquired in bona fide by third parties are safeguarded, even if acquired as a consequence of resolutions which go against the company's interests.

The Director is liable for any damage caused to the company consequent to his/her action or omission. In addition, the Director is liable for any damage to the company deriving from the use, at his/ her own or third parties' benefit, of data, information or business opportunities discovered during the performance of his/her task.

Directors of limited liability companies

The company may claim the deletion of all those agreements, which have been executed in the name and on behalf of the company by a Director having directly or indirectly a conflict of interest with the company, if the conflict was known or even knowable by the third party.

Furthermore, any resolution taken by the board with the decisive vote of a Director in conflict of interest with the company may be appealed by the other Directors within 90 days, should the company have suffered consequent economic damage.

Any rights acquired in bona fide by third parties are safeguarded, even if acquired as consequence of a resolution which goes against the company's interests.

4.3.5 What are the Directors' liabilities? Are there any limitations?

Directors of joint-stock companies

As previously mentioned in § 4.3.3 above, the Directors are jointly and severally liable towards the company should they have not prevented the damages and/or their causes, although they were aware of the existing prejudices.

Subject to the above, the liability for acts or omissions of Directors is not extended to the Director, who, being without fault, has had his/her dissent entered without delay on the minute ledger of the Shareholders' Meeting and has immediately given written notice to the chairman of the Board of Statutory Auditors.

Furthermore, the Directors are jointly liable towards the company, unless their duties were provided to the Executive Committee or to one or more specifically identified Directors.

The Italian Civil Code acknowledges three possible actions that could be filed against the Directors:

- **Liability towards the company**

Action concerning the liability of Directors may be brought against the same following a specific resolution of the Shareholders' Meeting, even if the company has entered into liquidation.

Such resolution may also be adopted during the Shareholders' Meeting when convened for the examination of the yearly financial statements, even if it is not specifically stated in the agenda of such meeting, when the liabilities in question refer to actions performed by the Director/s during the relevant corporate year.

To this regard, the approval of the balance sheet by the shareholders does not release the Directors from the liabilities incurred whilst managing the company. Action for such liabilities may be exercised within 5 years following the expiration of the director's office.

When a resolution to bring an action against a Director is made, the Director in question must be removed from office, provided that the resolution is taken with the favorable vote of shareholders representing at least 1/5 of the corporate capital of the company. In such event the replacement of the Director will be provided for during the same meeting. Such action may be waived or approved by the company, provided that (i) such waiver and compromise are approved by an express resolution of the meeting (ii) there is no opposing vote of a minority of members, that represent at least 1/5 of the corporate capital, or at least 1/20 of the corporate capital or any different percentage set forth by the by-laws in companies that make recourse to the market of risk capital.

A liability action against Directors may also be exercised by shareholders representing at least 1/5 of the corporate capital or a different percentage set forth in the by-laws, but in any case not higher than 1/3.

- **Liability towards company creditors**

Directors are also liable towards company creditors for the non-observance of their duties concerning the preservation of the corporate capital.

Action can be brought by the creditors when the assets of the company are proven to be insufficient for the satisfaction of their claims.

Even if the company decides to waive the action brought against a Director, the company's creditors may still proceed to exercise the same. Such waiver may be challenged by the creditors through an action for revocation should specific conditions be met.

- **Liability towards individual members or third parties**

The provisions concerning the liability of the Directors towards the company and its creditors do not prejudice the right of a single stakeholder or a third party - who were directly damaged as a result of fraud or negligence of the Directors - to seek for compensation for damages. The action may be exercised within 5 years from the execution of the act that has caused a prejudice to the single stakeholder or third party.

Directors of limited liability companies

The members of the Board of Directors are jointly liable towards the company for all those damages consequent to any non-fulfilment of corporate duties, provided by law or by the memorandum of association. Nevertheless, the liability shall not be extended to those members of the board, who give evidence that they cannot be blamed for negligence or who have expressed their disagreement.

The joint liability is also extended to those quotaholders, who have deliberately resolved or authorized to perform acts and/or activities causing damages to the company and/or the quotaholders and/or third parties.

The approval of the yearly financial statements by the quotaholders does not release the Directors from liabilities incurred during the management of the company.

The liability claims against Directors may be raised by each quotaholder, whichever is the amount of his participation to the corporate capital, who may also request, in the event of serious irregularities in the management of the company, that a precautionary order of revocation of the Directors is adopted.

In such case the Court may subordinate the order to the posting of an adequate bond. Unless otherwise provided in the deed of incorporation, such claims may be waived or settled by the company, provided that (i) quotaholders, representing at least 2/3 of the corporate capital, agree so and (ii) quotaholders, representing at least 1/10 of the corporate capital, do not oppose it.

Notwithstanding the above, the right to compensation for damages of each of the quotaholders or third parties who has been directly damaged as a result of fraud or negligence of the Directors is not effected.

4.3.6 Under which terms may a claim be brought forward against a Board of Directors' resolution?

Joint-stock companies

According to Section 2388 of the Italian Civil Code, the Board of Statutory Auditors, the Supervisory Board, the Management Control Committee and also the absent and dissenting Directors are allowed to challenge the Board resolutions that are not in compliance with the law or the by-laws.

The shareholders are entitled to challenge the resolutions which are harmful for their own prerogatives.

The applicable procedure to the said challenges is the same examined under § 4.2.4 above for the challenging of the Shareholders' Meeting resolution.

In any case, the rights acquired in good faith by third parties on the basis of acts done in execution of the challenged resolution are saved.

Limited liability companies

The Italian Civil Code does not provide specific causes that allow the challenge of the Board of Directors' resolution for limited liability companies, aside from the case of conflict of interest of the Directors, already examined in § 4.3.4 (ii) above.

However, the prevailing legal doctrine acknowledges that, if the managing power is assigned to the Board of Directors, specific causes of invalidity of the relevant resolutions may be provided in the deed of incorporation and, with regard to the terms, the above-mentioned Section 2388 of the Italian Civil Code, concerning the joint-stock companies, should find application..

4.3.7 May a Director be substituted or revoked before the end of his/her office?

Directors of joint-stock companies

The ordinary shareholders' meeting (the Supervisory Board if the company adopted the Dualistic System) is entitled to revoke the Directors at any time, even if they were appointed in the deed of incorporation.

However, Directors who have been revoked have the right to obtain the restoration of the damages suffered, if the revocation was performed in the absence of a true and just cause.

As for the quantification of the damages, the Court shall not only consider the amount that the Director would have earned during the period between the revocation and the natural end of his office, but it shall also increase the mentioned amount taking into consideration the period of time reasonably needed to allow him to establish a professional relationship having analogous authority and profitability.

Generally, the resolution of revocation is immediately effective, which means that the meeting shall also resolve on the Directors' replacement.

Directors of limited liability companies

No specific provisions concerning the revocation of Directors of a limited liability company is provided in the Italian Civil Code.

According to the prevailing legal doctrine and similarly to joint-stock companies, the Directors may be revoked, even if they are appointed in the deed of the incorporation, at any time, but they have the right to obtain the restoration of the damages if the revocation was performed in the absence of a reasonable cause.

Which Bodies are in charge of the company's management control and auditing activities?

Joint-stock companies

With regard to joint-stock companies, as previously mentioned in § 4.1 above, it is necessary to distinguish between the different models of corporate governance.

- **Traditional System**

The Board of Statutory Auditors has the duty to perform the management control.

This Board consists of 3 to 5 effective members and 2 alternate members.

At least one effective member and one alternate member shall be enrolled in the official auditors' register; the remaining members shall be chosen among those individuals enrolled in professional registers, as identified by the Ministry of Justice, or among university professors in economic or juridical matters.

The members stay in charge for 3 corporate years and their term of office expires at the date of the meeting convened for the approval of the last yearly financial statements. As for the accounting control, the Reform transferred the function of accounting control either to a Registered Auditor (an individual) or to an Auditing Firm, enrolled in the official auditors' register. In any case, companies operating within the securities market shall appoint an Auditing Firm.

According to Section 2409-bis, paragraph II of the Italian Civil Code, which provides for an exception to the above-mentioned rule, the by-laws of those joint-stock companies not bound to the drafting of consolidated financial statements may provide that the Board of Statutory Auditors is entrusted with the accounting control activities. In such case, each and all members of the board shall be enrolled in the official auditors' register.

- **Dualistic System**

The Supervisory Board, which is composed of at least 3 members, appointed by the Shareholders' Meeting, oversees the management control. At least one of them has to be chosen among the members of the above-mentioned official auditors' register and they stay in charge for three years.

A Registered Auditor or an Auditing Firm exercises the accounting control.

- **Monistic System**

The Management Control Committee appointed by the Board of Directors oversees the management control; the decision on the number of the members is determined by the Board of Directors. At least one of the members of the Management Control Committee shall be enrolled in the official auditors' register.

The Management Control Committee of companies that make recourse to the market of risk capital has to be composed of at least 3 members.

The accounting control must always be assigned to a Registered Auditor or to an Auditing Firm.

Limited liability companies

As already mentioned in § 4.1 (ii) above, the managing control is performed by those quotaholders who do not participate in any management activities.

As for the accounting control, the memorandum of association may establish the appointment of a Supervisory Body or an Auditor, determining the relevant powers and competences.

The appointment of the Supervisory Body or an Auditor is compulsory when the company has exceeded for two subsequent accounting years two of the following limits:

- total value of assets: € 4,400,000;
 - sale profits: € 8,800,000;
 - average number of employees during the accounting year of reference: 50.
- In the above-mentioned situation, the principles governing joint-stock companies should find application; should the deed of incorporation not provide the contrary, the accounting control shall be performed by the Supervisory Body.

According to joint-stock company rules, only members enrolled in the official auditors' register, if compulsory and entrusted of the accounting control, shall constitute the Supervisory Body.

As already indicated in paragraph 4.1 (ii) above, in addition to the above mentioned hypothesis, the appointment of a Supervisory Body/Auditor is also required when a limited liability company: (a) is bound to the drafting of the consolidated financial statements; (b) controls a company which accounts are subject to audit.

4.4.1 Are there any specific requirements and/or limitations in order to be appointed as a member of the Board of Statutory Auditors/Supervisory Body?

Joint-stock companies

At least one effective member and one alternate member shall be enrolled in the official auditors' register; the remaining members shall be chosen among those individuals enrolled in professional registers, as determined by the Ministry of Justice, or among university professors in economic or juridical matters (Section 2397, paragraph II of the Italian Civil Code).

Should the Board of Statutory Auditors also exercise the accounting control (see § 4.4 above), it shall be composed by Registered Auditors enrolled in the official auditors' register as established by the Ministry of Justice.

Furthermore, the following people may not be elected as members of the Board of Statutory Auditors and, if elected, shall be revoked from office: (i) those who are stated in Section 2382 of the Italian Civil Code (see § 4.3 above), (ii) the spouse, the relatives and the relatives-in-law within the fourth degree of the Directors of the company, of the controlled companies, or of the companies which control it as well as those of the companies under common control, (iii) those who are linked to the company or to the companies controlled by it or to companies which control it as well as to companies under common control by an employment relationship or by a regular consultancy contract or by other economic relationships which may prejudice their independence.

Moreover, the deletion or the suspension from the register of auditors and the loss of the requirements provided in Section 2397 of the Italian Civil Code (see above), entail the revocation of the member of the Board of Statutory Auditors. Finally, the by-laws may contemplate other causes of ineligibility or revocation as well as causes of incompatibility and limits and criteria for the plurality of appointments.

Limited liability companies

The legal requirements described in the previous paragraph must also be applied to the members of the Supervisory Body of a limited liability company if deemed necessary by law.

4.4.2 May a member of the Board of Statutory Auditors/Supervisory Body be substituted or revoked before the end of his office?

Joint-stock companies

Members of the Board of Statutory Auditors may be revoked by the Shareholders' Meeting only on the basis of a true and just cause. The resolution shall be approved by means of a court judgment following the hearing of the interested party.

As for the substitution in the event of death, resignation or withdrawal of a member of the Board of Statutory Auditors, one of the alternate members, specifically the eldest one, takes over such position, and the new member will stay in office until the following Shareholders' Meeting, which has the duty to appoint the necessary number of effective and alternate members in order to integrate the Board of Statutory Auditors.

If it is necessary to replace the Board's chairman, the position will be covered by the eldest member of the Board of Statutory Auditors.

Limited liability companies

The legal requirements described in the previous paragraph also apply to the members of the Supervisory Body of a limited liability company, if appointed.

4.4.3 Which are the powers, duties and liabilities of the Board of Statutory Auditors/Supervisory Body?

Joint-stock companies

For what concerns their powers, the members of the Board of Statutory Auditors may implement, at any time, also individually, acts of inspection and control, requesting information from the Directors regarding the company's business, or the business of its controlled companies, in order to ascertain compliance with the law and the by-laws.

Furthermore, during such controls the members of the Board of Statutory Auditors may avail themselves of employees and collaborators, under their responsibility.

All controls performed must be reported in the Board of Statutory Auditors books. The members of the Board of Statutory Auditors shall attend the meetings of the Board of Directors, of the Executive Committee, if appointed, and of the Shareholders.

Furthermore, the Board of Statutory Auditors shall meet at least every 90 days and, if provided by the by-laws, also through means of telecommunication. A member of the Board of Statutory Auditors who, without a justifiable reason, fails to attend two or more meetings during a financial year is to be revoked from his/her office.

As for their duties, the Board of Statutory Auditors shall verify the company's compliance with the law and the by-laws, the respect of the good managing practices and, in particular, the adequacy of the organizational, administrative and accounting systems adopted by the company and their effective functioning.

As for their liabilities, the members of the Board of Statutory Auditors shall fulfil their duties with the due diligence requested by the nature of their task. They are also responsible for the truth of their declarations and obliged to keep secrecy on all the documents that they examine.

They are also responsible, jointly with the Directors, for their facts and omissions, if the damages would have not occurred if they had done their job correctly.

Limited liability companies

The provisions stated in the previous paragraph are also applicable to the members of the Supervisory Body of a limited liability company.

4.5

In case of suspected irregularities in the company's management, what actions may be taken against the Directors?

Joint-stock companies

According to Section 2409 of the Italian Civil Code, in the case of grounded suspect that the Directors, violating their duties, have committed serious irregularities in the management of the company that could be harmful to the latter (or towards one or more of its controlled companies), the shareholders representing at least 1/10 of the corporate capital (or 1/20 if the company makes recourse to the market of risk capital), the Board of Statutory Auditors, the Supervisory Board or the Management Control Committee (and in the companies that make recourse to the market of risk capital, the public prosecutor), are allowed to report such facts to the Court.

The Court, after hearing the Directors and the members of the Board of Statutory Auditors, may request an inspection of the Administration of the company and attribute the relative costs to the shareholders.

However, these measures shall not be adopted and the trial in court shall be suspended, if the Shareholders Meeting substitutes the Directors and the members of the Board of Statutory Auditors in question with professionals that have the necessary skills and the same will immediately proceed to verify the abovementioned violations and, if necessary rectify the violations, reporting the situation to the Court.

In addition, if the reported irregularity do exist, or if the controls and activities performed in accordance with the previous provisions are inadequate for their removal, the Court may take the appropriate precautionary measures and call the Shareholders' Meeting for consequent resolutions.

However, in more serious cases, the Court may discharge the Directors and the members of the Board of Statutory Auditors, and appoint a judicial Director. The same court will specify the powers and the term of office of such figure.

Moreover, upon the expiration of his term of office, the judicial Director shall report to the Court through which he was appointed and shall convene and preside over the meeting for the appointment of new shareholders and members of the Board of Statutory Auditors, or shall propose, if necessary, the liquidation of the company or its admission to an insolvency procedure.

Limited liability companies

No specific provision in the Italian Civil Code rules the actions that may be taken in case of suspected irregularities in the management of a limited liability company. To this regard, on one side, some Authors consider that recourse to the above mentioned procedure can only be carried out if explicitly provided for in the company's deed of incorporation; on the other side, other authors do not consider Section 2409 of the Italian Civil Code to be applicable to limited liability companies, considering the specific nature of this kind of company and the fact that the action aimed to ascertain the Director's liability can be promoted by each quotaholder.

With decision dated December 14/29, 2005, No. 481, the Italian Constitutional Court accepted the latter interpretation, stating, therefore, the non-application, to limited liability companies, of Section 2409 of the Italian Civil Code. Moreover, it is worth noting that the Supreme Court of Cassation also adopted the same interpretation in the decision dated January 13, 2010, No. 403.

When is the appointment of an auditing company required by law?

Joint-stock companies

- Traditional System: the appointment of a Registered Auditor or of an Auditing Firm is always required. By way of exception, in some cases, the accounting control can be entrusted to the Board of Statutory Auditors (see § 4.4 above);
- Dualistic System: the appointment of a Registered Auditor or of an Auditing Firm is always required;
- Monistic System: the appointment of a Registered Auditor or of an Auditing Firm is always required.

Limited liability companies

In limited liability companies the appointment of a body entrusted with the auditing activity is not required, unless the company falls under the cases described in § 4.1 (ii) above.

What are the liabilities of the parent company towards its subsidiaries?

The Reform provides for the regulation of corporate groups, introducing the concept of companies or bodies that perform activities of "direction and co-ordination" (hereinafter, referred to as the "parent company") towards another company (hereinafter, referred to as "subsidiary company"), without providing an express definition to such concept, which can therefore be subject to several interpretations.

In any case, according to Section 2497-sexies of the Italian Civil Code, unless evidence to the contrary is provided, it is assumed that the activities of direction and co-ordination are performed:

- by the company or body responsible for the drafting of the consolidated financial statements;
- by the 'controlling' company as per Section 2359 of the Italian Civil Code (i.e.: *"The following are considered controlled companies: 1) companies in which another company has a majority of the votes exercisable at a regular meeting; 2) companies in which other companies have sufficient votes to exercise a dominant influence at a regular meeting; 3) companies which are under the dominant influence of another company by virtue of particular contractual bonds with it. For the purpose of the*

application of numbers 1) and 2) of the first paragraph the votes pertaining to controlled companies, to fiduciary companies and to an interposed person are also included in the computation; the votes available on behalf of third persons are not included in the computation (...)”).

Furthermore, according to Section 2497-septies of the Italian Civil Code, the provisions relating to corporate groups shall in any case apply to a company that, outside of the hypothesis provided by the above stated Section 2497-sexies, performs activities of direction and co-ordination according to specific agreements executed with another company or by means of specific clauses inserted in the relevant by-laws.

As for the liabilities of the parent company, the following main principles have been introduced: the parent company - acting in violation of the good managing rules - becomes liable (i) towards the shareholders, for damages caused to company's profitability and to the value of the participations, and (ii) towards all corporate creditors, for the loss of integrity of the company's assets.

The joint liability is also extended to those who have participated in and consciously taken advantage of the prejudicial act, within the limit of the occurred benefit.

No liability is imputable when the occurred damages have been entirely cancelled, even by means of specific transactions having this purpose or when such damages are compensated in consideration of the overall effect of the direction and co-ordination activities carried out by the parent company.

The shareholders and the corporate creditors may act against the parent company only if they are not satisfied by the subsidiary company.

4.7.1 What are the Directors' duties with regards to the direction and co-ordination activity

The Reform has introduced several provisions concerning the direction and co-ordination activity, which provide for new duties to be performed by the Directors. Among others, the main rules are summarised as follows:

- any subsidiary company shall indicate in its own documents and correspondences the company or entity responsible for the direction and coordination of such subsidiary. Similarly, the Directors of the subsidiary company shall provide supporting documents of such situation and register the same in a specific Register of Companies;

- Should the Directors fail to comply with the above regulations or should the registration with the specific section of the Register of Companies also be kept when the company is no longer subject to the activities of direction and coordination, the Directors will be held responsible for damages suffered by the shareholders/quotaholders or by any other third party, who have not been informed of the company's subjection to the activities of direction and co-ordination;
- the subsidiary company's financial statements shall include a special section containing a résumé of the essential data of the financial statements of the company or entity exercising the direction and co-ordination activities;
- the Directors shall report in the managing report attached to the financial statements the relationship with the entity exercising the direction and co-ordination activities, as well as with other companies subject to such direction and co-ordination activities and state the effects and consequences of such activities on the corporate activities and results;
- resolutions taken by the subsidiary company, when influenced by the decisions of the parent company, shall be adequately motivated and shall include a specific report of the reasons and interests which have led to the resolution itself.

4.8

May a company be held liable from a criminal point of view?

The legislative Decree No. 231 of June 8, 2001, (hereinafter referred to as “Decree 231/2001”), introduced a specific liability for companies and entities, which derives from crimes committed, in their interest or benefit, by:

- i. individuals representing or managing, directly or indirectly, the company or entity (so called “Apical Subjects”);
- ii. individuals subject to the direction or supervision of one of the Apical Subjects (so called “Subordinated Subjects”).

In particular, Decree 231/2001 provides for economic sanctions and determines specific forms of incapacity (which may be temporary or definitive) as a consequence of the commission by Apical and/or Subordinated Subjects of certain crimes provided for by Sections 24 and ff. of such Decree (i.e.: fraud, undue receipt of public facilities, computer crimes against the State or public bodies; data processing crimes and unlawful data treatment, extortion, corruption also between private parties; coinage of counterfeited money, government securities and revenue stamps; corporate crimes; crimes with terrorist or subversive purpose; crimes

against the individual personality; market abuse; crimes against the discipline of health and safety at work; money laundering and dealing in stolen goods; copyright crimes, misrepresentation in court; environmental crimes; immigration crimes; transnational crimes).

The Decree was approved within a framework of international regulations aimed at preventing corruption and bribery. Among others, the following can be mentioned:

- Convention on the Protection of the European Communities' Financial Interests (Brussels, July 26, 1995) and additional first Protocol Dublin, September 27, 1996);
- Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (Brussels, May 26, 1997);
- OCDE Convention on combating bribery of foreign public officials in international business transactions (Paris, December 17, 1997).

Within the international framework, it is worth noting that other Countries adopted specific provisions ruling the criminal/administrative liability of juridical persons in respect to crimes committed (in their interest or to their benefit) by natural persons. Among others, the regulations listed below contain provisions similar to those set forth by the Italian Decree:

- the Foreign Corrupt Practices Act, enforced by the Government of the United States of America on December 19, 1977 (as amended in 1988 by the International Anti-Bribery Act);
- Chilean regulations on legal entities' criminal liability, set forth by Law no. 20393, dated December 2, 2009 ("responsabilidad penal de las personas jurídicas en los delitos de lavado de activos, financiamiento del terrorismo y delitos de cohecho que indica");
- the Bribery Act 2010, enforced by the United Kingdom Government on April 8, 2010;
- the Spanish Ley Organica no. 5/2010, dated June 22, 2010;
- the 2010 Federal Sentencing Guidelines Manual & Supplement, released by the United States Sentencing Commission on November 1, 2010.

The Decree provides for the following penalties in the event the entity is held liable:

- administrative fines (ranging up to Euro 1,549,000);
- disqualification measures (the measures shall consist in: (i) prohibition to the company to carry on its activity; (ii) revocation or withdrawal of authorizations, licenses or concessions issued by the Public Administration which are functional to the crime; (iii) prohibition to contract with the Public Administration; (iv) exclusion from public facilities, loans, contributions or benefits and possible revocation of the ones already granted; (v) prohibition to advertise goods or services);
- confiscation of the proceeds and profits of the offence;
- publication of the decision.

However, it is worth noting that Decree 231/2001 expressly states that the company or the entity is not liable:

■ for crimes committed by **Apical Subjects** if:

- the Board of Directors adopted and effectively followed, prior to the occurrence of the crime, an organizational and operational model (hereinafter, the "Model"), which is appropriate to prevent the taking place of crimes similar to the one occurred;
- the duty to supervise on the adequacy and respect of the Model and to its update is assigned to an independent and autonomous subject (the "Supervisory Body");
- the individual who committed the crime violated fraudulently the provisions set forth in the Model;
- the Supervisory Body did supervise adequately;

■ for crimes committed by **Subordinated Subjects** if:

- the company or the entity adopted, prior to the occurrence of the crime, the Model, which was adequate to prevent the performance of crimes similar to the one occurred.

It is, therefore, clear that the adoption of the Model constitutes a fundamental step in helping to discharge a company's liability as stated by Decree 231/2001. In this respect it is worth noting that, according to certain case law decisions (among others, Court of Milan, no. 1774/2008) the directors of a company may be held liable for not having adopted a Model when it would have been appropriate to do so. In addition, it is worth mentioning that the Institute of Research of Chartered Accountants ("Irdcec"), by means of Circular no. 26/2011, recently affirmed that the adoption of the Model should not be considered optional.

It must be specified that, according to Decree 231/2001, the Model shall consist of the following main items:

- i. details of the areas of the company where there is a high probability of crimes being committed;
- ii. the outcome of the internal processes review of the company or entity;
- iii. a provision of special procedures which aim to regulate how the administrative bodies take decisions and how the same are implemented;
- iv. an adequate reporting system towards the Supervisory Body;
- v. management procedures of the financial resources which are aimed at
- vi. preventing crimes being committed;
- vii. Ethical Code;
- viii. disciplinary measures.

The Supervisory Body, carries out the following activities:

- supervision of the adequateness of the measures adopted in the Model;
- verification of the compliance with the rules set forth in the Model;
- suggestions concerning possible amendments and/or integrations to the Model and further verification of the adjustment activities performed.

The most relevant requirements of the Supervisory Body are the following:

- i. self-government and independence: this entity must be exempt from any influence exercised by the representatives of the company. The members of this body shall not be granted any power by the company and shall not be involved in economic and financial processes or decisions;
- ii. professional competence: the Supervisory Body should be composed by members of mixed skills. In any case, the Supervisory Body shall have a good knowledge of the company's business and its past;
- iii. continuity of action: in order to perform the task, such body should perform auditing activities full time.

In which circumstances may a company enter into a voluntary winding up procedure?

The winding-up stage (also referred to as liquidation stage) is the process by which a company is brought to an end and the assets and properties of the same are transferred, dismissed, liquidated or redistributed, also in order to pay potential creditors of the company.

Although, as a general principle, the company is usually free to decide when to close down its business activity, the Italian Civil Code provides for specific reasons, upon occurrence of which the company must be liquidated.

In particular and if no corrective action is taken, the following events will cause the dissolution of a company:

- the elapse of the term for which the company was formed;
- the achievement of the corporate purpose, or the impossibility to achieve the same;
- the inability of the company to continue its business or its continuous inactivity;
- the reduction of the corporate capital below the minimum required by law, save for the provisions contained in Sections 2447 and 2482-ter of the Italian Civil Code, according to which the shareholders' meeting can resolve upon the reduction and the contemporary increase of the share capital above the minimum, or the transformation of the company;
- the resolution of the shareholders' meeting to liquidate the company as a consequence of the withdrawal of one or more shareholders;
- the resolution of the shareholders' meeting to liquidate the company due to the impossibility to reimburse the value of the shares to the withdrawing
- shareholder/s without reducing the corporate capital, or due to the objections raised by the creditors of the company to such reduction of the corporate capital;
- the adoption by the shareholders of a decision to liquidate the company before the achievement of the corporate purpose determined in the deed of incorporation;
- the occurrence of an event or a circumstance considered as a liquidation cause according to the deed of incorporation and the by-laws of the company;
- the judgment stating the nullity of the company.

Should one of the above-listed dissolution event occur, the Directors of the company must, without delay, (a) ascertain the occurrence of the dissolution event and (b) file with the Register of Companies either the shareholders' decision resolving upon the liquidation of the company or a statement of the Directors acknowledging the existence of a dissolution event.

In the event of delay or omission in performing such activity, the occurrence of an event of liquidation is ascertained by the Court (i.e.: *Tribunale*) upon request of one or more shareholders, the Directors, or the statutory auditors (as appropriate), being it understood that the Directors shall be personally and jointly liable for any damage incurred to the company, the shareholders, the creditors of the company and to third persons by their failure or delay to comply with such obligations.

Once the filing with the Register of Companies has been completed, the company's name shall be integrated by inserting the wording "in liquidation".

Upon occurrence of an event of dissolution and until the appointment of the liquidators (and the subsequent filing of their appointment with the Register of Companies), the powers of the directors are limited to the maintenance of the integrity and the value of the corporate assets. Should the Directors exceed such limits, they are responsible towards the company, the shareholders, the creditors of the company and third party for any damage the company may have suffered.

In addition to the above, the Directors shall promptly convene a shareholders' meeting to resolve upon (with the majority required for the amendment of the deed of incorporation and the by-laws): (i) the appointment of one or more liquidators; (ii) the granting of the necessary powers to carry out the liquidation activities; and (iii) the establishment of the rules and criteria according to which the liquidation activities shall be implemented and performed, with specific regard to the transfer of the business (or part of it), or to the sale of one or more assets and rights.

Upon filing of the appointment of the liquidator/s with the Register of Companies, the Directors cease from their office and shall hand over to the liquidators the corporate books, a statement of assets and liabilities updated as at the date of liquidation, as well as a report on their management related to the period following the last approved financial statements.

Once appointed and unless differently provided upon their appointment, the liquidators shall have the power to carry out any and all acts that are useful and necessary for the liquidation of the company. The liquidator(s) may not assign or distribute any assets to the shareholders, unless it is shown that such assignment/distribution does not prejudice the right of the creditors to be fully and promptly paid, or unless the necessary sums to pay them have been set aside.

If the winding up procedure lasts more than 1 year, the liquidator/s, at the end of each year, shall prepare a liquidation balance sheet and submit it to the shareholders' meeting for approval.

Moreover, once the corporate assets are liquidated, the liquidator/s must draw up the final liquidation balance sheet and submit the same to each single shareholder for its approval and afterwards, in case of approval, ask for the cancellation of the company from the Register of Companies.

Once the liquidation is completed, the corporate books shall remain deposited and kept at the Register of Companies for the following 10 years.

Notwithstanding the liquidation of the company and its cancellation from the Register of Companies, creditors whose claims have not been satisfied in full can claim their rights:

- towards the shareholders, proportionally to the sum attributed to them by the final liquidation statements;
- towards the liquidators if the lack of payment depends on their fault.



5 *Local income taxes on corporate entities*

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How is the taxable base calculated and what are the main principles to consider when determining the income taxable basis for IRAP purposes?

There are different computation methods of the IRAP taxable basis, depending on the nature of the business carried out by the taxpayer.

For commercial and manufacturing companies, IRAP taxable base is broadly represented by the gross margin resulting from the Company's Statutory Financial Statement. Accruals, interest income and expenses, provisions for bad debts and extraordinary items are not part of the IRAP taxable base.

Deduction for labour costs have been historically limited for IRAP. However, the 2015 law Bill introduces the deductibility of labour costs relating to employees working under an open-ended contract, effective from the Fiscal Year following the fiscal year in progress as at December 31, 2014. Considering that other labour related costs, such as mandatory insurance expenses against work-related accidents, and others mentioned in § 5.3, were already deductible, currently most labour costs are deductible for IRAP.

Since 2008 proceeds and expenses relevant for IRAP strictly derive from those reported under the Statutory Financial Statements prepared in compliance with Italian GAAP standards, with some limited exceptions (e.g. non-deductible goodwill, Municipal Property Tax, account receivable losses).

At what rate is Regional Tax levied?

IRAP is generally levied at a basic 3.9% rate on the gross margin attributable to the activities carried out in Italy. Tax is levied on a regional basis. Regions are permitted to increase or decrease the tax rate up to 0.92%.

Companies with facilities in different Countries and in different Italian regions must allocate the overall taxable basis to Italy and to the different regions on the basis of labour costs of people working in the respective sites. Facilities become relevant if they have been running for at least three months.

Is there any relevant tax benefit for IRAP purposes?

Prior to the 2015 Law Bill, i.e. up to the Fiscal Year in progress at December 31, 2014, labour costs were not deductible for IRAP, however, it was possible to deduct an amount equal to € 7,500, on an annual basis, for every employee working under an open-ended contract, increased to € 13,500 for women and employees under 35 years old.

Such deductions were increased respectively to € 15,000 and € 21,000 for employees working in certain regions, i.e. Abruzzo, Basilicata, Calabria, Campania, Molise, Puglia, Sardinia and Sicily.

Moreover, companies were allowed to deduct, for their total amount, the social security and welfare contributions related to employees with open-ended contracts. Both tax benefits were calculated taking into account the duration of the open-ended employment agreement (including part-time) and cannot be used by companies operating in the following sectors under concession regimes: infrastructure, electricity, water, transport, postal services and telecommunications, the collection and purification of wastewater, and the collection and disposal of waste.

Costs relating to employees involved in research and development activities (proportionally to the amount of time effectively involved in such activity) are allowed to be deducted for IRAP purposes.

However, the law does not permit the combination of these different tax benefits.

According to the current interpretation, the tax payer can indeed choose, in relation to each single employee, whether to use the deduction of € 7,500/13,500/15,000/21,000 a year, or rather (if higher) the deduction of the cost of employees working in the research and development activity (pro rata temporis).

As previously mentioned, starting from the 2015 Fiscal Year, labour costs related to open ended contracts are deductible for IRAP.

Are there any special rules for banks and insurance companies?

Banks and other financial and insurance entities determine IRAP taxable base following some specific rules, aimed at taking into account the specific activities carried out by such entities.

Starting from FY 2008 IRAP taxable base for banks and financial entities is broadly represented by the gross operating margin resulting from the statutory financial statements of the company.

The taxable base is generally determined as a sum of the following profit and loss account's items:

- i. intermediation margin reduced by 50% of dividends (for banks and financing companies) or commission margin (for SIMs and SGRs);
- ii. amortizations of functional tangible and intangible assets, in an amount of 90%;
- iii. other administrative expenses, in an amount of 90%;
- iv. receivables write-downs net of revaluations concerning receivables from customers duly booked in the balance sheet, in an amount equal to one fifth of the net write-downs recorded in the P/L of a certain fiscal year (only for banks and financing companies). For further details please refer to § 18.

IRAP taxable base of insurance companies is made up of the economic results of the technical account for life insurance and of the technical account for damages insurance, provided the following negative adjustments: (i) 90% of the amortization costs and other administrative expenses, and (ii) 50% of the dividends received. For further details, please refer to § 20.

6 VAT

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What are the Italian VAT rates?

The Italian VAT rates are either standard (22%) or reduced (4%, 5% or 10%).

When a special provision in terms of reduced VAT rate is not provided, the standard rate applies.

The 4% VAT rate is applicable to the following products and services (the list is not exhaustive):

- listed food and drinks;
- listed agricultural products;
- listed publishing products and related listed supplies of services;
- corporate canteens;
- listed supplies of immovable property;
- books, newspapers, magazines, simple news issued by agencies and periodicals identified by code ISBN (International Standard Book Number) or ISSN (International Standard Serial Number which identifies publications) supplied on paper or electronically;
- rental rate for listed radio and television broadcasting.

The recent 5% VAT rate is applicable to some listed social health and welfare services carried out by social cooperatives companies or by their consortiums to elderly and disabled adults, drug addicts and AIDS patients, psychophysically handicapped, minors involved in maladjustment and deviance situations, immigrants, without permanent residence, asylum seekers, detained persons, women victim of sex and labor trafficking.

The 10% VAT rate is applicable to the following products and services (the list is not exhaustive):

- poultry, horses, donkeys, sheep, goats and other listed animals;
- other listed food and drinks;
- other listed agricultural products;
- electric power for listed uses;
- listed fuel oils;
- methane gas supplies for household use;
- listed supplies of immovable property;
- listed drugs;
- supplies of food and drinks also through automatic dispensers;
- passenger transport other than those exempted.

What operations are not subject to VAT (exempt with right to deduction)?

The exemption is foreseen for transactions that, in the view of their international nature, are deemed to be consumed outside Italy.

They do not trigger any consequences in terms of deduction of VAT and they are subject to all the VAT fulfilments (with exception to VAT payments).

Upon certain conditions, these supplies are exempt from VAT:

- intra-community supplies of goods, exportations, importations of goods
- transported in the framework of trading with other Member States;
- certain transactions related to international transports (e.g.: fuelling of vessels used for the navigation on the high sea);
- transactions related to international trade (VAT warehouses);
- transactions with San Marino and the Vatican City;
- transactions treated as deemed exports (e.g.: diplomatic and consular arrangements and international bodies).

What operations are outside the scope of VAT?

Italian VAT shall apply to the supplies of goods and services carried out in Italy by entrepreneurs, professionals or artists and on importations carried out by anyone. Intra-community acquisitions are also subject to taxation upon certain conditions.

Transactions relevant for VAT purposes must:

- regard supplies of goods or services;
- be carried out by an entrepreneur, an artist or professional, in the exercise of their activity;
- be carried out in Italy.

These three pillars are defined in the Italian VAT Law. In the event that one of them is missing (e.g.: the supply of goods is carried out by a private person), the transaction is not subject to VAT and remains outside the Italian VAT scope. This entails, firstly, that the supply is not subject to VAT, but, also, that it is not subject to any of the VAT fulfilments set by the Italian VAT Law. Starting from 2013, VAT taxable persons established in Italy are in any case required to invoice the supply of goods and services which does not take place in Italy according to the rules on the territoriality with a specific wording provided by the Law.

These are the general rules; in addition, according to the Italian Law, there are specific cases where the exclusion from VAT is provided on a case by case basis (e.g.: transfer of money, transfer of going concern).

Generally, out of scope supplies trigger VAT undeductibility; however, there are exceptions to this rule.

6.4

What operations are exempt from VAT (with restriction on VAT credit)?

Supplies of goods and services, which are exempt from VAT with no right to deduction, are set out in article 10 of the Presidential Decree no. 633/1972. Exemptions can be divided into two groups:

- i. exemptions applied to certain supplies carried out in the public interest (the list is not exhaustive):
 - universal public postal services and the supplies of ancillary services thereto where the term of the transaction has not been individually negotiated;
 - health care services of diagnosis, treatment and rehabilitation provided in the exercise of health professions and health trade;
 - supplies of human organs, blood and milk;
 - welfare and social security benefits to employees;
 - certain educational services;
 - transport services for sick or injured persons carried out by authorised entities or non-profit organizations;
- ii. exemptions applied to other transactions (the list is not exhaustive):
 - insurance and reinsurance services;
 - some financial services;
 - betting, lotteries and other forms of gambling;
 - supplies, leasing or letting of particular immovable property.

In general, input VAT which is directly linked to transactions exempt with no right to deduction is not recoverable.

Companies carrying out supplies exempt from VAT with no right to deduction have to deal with full or partial (so called “pro rata”) restriction on the recoverable input VAT incurred on purchase of goods and services. This is the main difference with respect to the operations in § 6.2.

What are the general rules governing the deduction of input VAT?

A taxable person has the right to deduct from the tax for which he is liable in respect of his supplies, the amount of VAT incurred on purchases of goods or services, or (intra-community) acquired or imported by him.

The right to deduct VAT is restricted to goods and services pertaining to the business activity and used to perform VAT taxable output supplies.

For goods and services acquired and used for output supplies which are not subject to VAT, generally, VAT is not deductible. This rule suffers from important exceptions: VAT is deductible even if there are not any connected taxable supplies, for instance, when purchases are used for exports, intra-community and similar supplies.

If VAT is applied with reference to both activities which give right to deduction and to activities with no right to deduction, deduction is granted proportionally to the part attributable to the activities with right to deduction.

The right to deduction arises when the tax becomes chargeable (i.e.: when the invoice is issued) and it can be exercised at the latest with the yearly VAT return related to the second year following the one in which the right to deduct arose.

In order to benefit from the VAT deduction, purchase invoices must have been duly accounted in the input VAT ledger.

Adjustments of the original deduction are made in case goods or services are used:

- for operations giving right to deduction in a different measure than the one originally applied;
- in case the taxation regime of output supplies changes;
- in case of changes in the pro rata (see § 6.6).

Some important exceptions to the above-mentioned rule are provided for non-operating companies (as defined by the Italian VAT Law).

Non-operating companies are not allowed:

- to recover the input VAT resulting from the Annual VAT Declaration;
- to transfer the input VAT;
- to offset the input VAT with other taxes and contributions.

In addition to this, it is foreseen that non-operative companies cannot carry forward the input VAT (resulting from the Annual VAT declaration), if:

- the company is a non-operative for three sequential years;
- during each of the above-mentioned three sequential years, the company has not performed supplies of goods and services relevant for VAT purposes which exceed the amount of proceeds determined applying specific rates to the book value of the different assets as provided by the Law (see § 3.22 second subparagraph for further details).

6.6

Is VAT deductible if a company performs activities outside the scope of VAT or exempt from VAT?

A part from specific cases, VAT incurred on purchase or importation of goods and services linked to VAT exempt supplies or which are outside the scope of VAT (apart from the cases included in the VAT law), is not deductible.

As a general rule, in the event that a taxable person carries out only exempt supplies, VAT is not deductible and is a cost for the company (exceptions are foreseen, see § 6.5).

In the event that VAT is incurred with reference to both output supplies giving right to deduction and to supplies with no right to deduction, deduction is granted proportionally to the part giving right to deduction.

In the case that both exempt activities (see § 6.4) and taxable activities are performed, the deduction is granted partially according to the so-called pro rata. This is the typical situation of hospitals, financial and insurance institutions.

The pro rata is a percentage given by the ratio between the taxable turnover (and other supplies for which the right to deduction is granted) and the total turnover of a taxable person (including exempt turnover). Certain exempt activities are not included in the calculation (article 19bis (2), Presidential Decree no. 633/1972). The result is rounded up or down to the nearest whole number.

The ratio has to be applied to VAT incurred on purchases (except for VAT which is expressly not deductible see § 6.7) to determine the percentage of VAT incurred which is ideally used for taxable supplies; the result is the deductible VAT.

Alternatively to the pro rata, taxable persons performing several businesses or several activities within the scope of the same company, or several trades or professions, have the right to opt for the separate application of VAT in relation to some of the activities carried out.

According to the above scheme, the taxpayer maintains the same VAT number, but has to keep the activities separated from the point of view of VAT accountings and VAT invoicing.

6.7

For which goods and services is the deduction of VAT not allowed?

The deduction is restricted for the VAT charged on certain types of goods and services, such as (the list is not exhaustive):

- entertainment expenses: generally not deductible;
- passenger transports: (air, sea, taxi, train ticket, etc.): generally not deductible;
- diesel, petrol, car repair, car rental and other related expenses including motorway tolls: the deduction of VAT is equal to 40% if related to vehicles that are not used entirely for the purposes of the business.

The latter disposition is not applicable in the case that the vehicles are used by trade agents or vehicles constituting the scope of the activity.

6.8

When are payments due?

The VAT payments are due by the 16th day of the month following the one to which the settlement relates to. In the event that specific conditions (related to the dimension of the business) are met, also quarterly periodical VAT payments are provided for (due within the 16th day of the second month subsequent to the one which the settlement relates to, except for the fourth quarter for which the due date is the 16th March of the following year) and a 1% interest is due, except for special cases (e.g.: telecommunications companies).

An advance payment for the last monthly/quarterly VAT payment must be made by the December 27 of each calendar year; the advance payment on account is generally equal to 88% of the last periodical VAT payment (monthly/quarterly) in the preceding calendar year. Alternatively, a provisional calculation is possible. Special rules are stated for particular categories of taxable persons, e.g.: telecommunications companies.

Finally, in the case that VAT is due from the annual VAT return in excess to the periodical payments, it has to be paid by the March 16 of the following year.

6.9

Which registers are required by the Law?

Transactions within the scope of Italian VAT have to be reported in registers which state the information requested by the Italian VAT Law.

The VAT registers are the following:

- registers of output invoices in which the number and date of the invoice, the taxable amount, VAT split on the basis of the VAT rates (in case of an exemption, the relevant provision in the Italian or European law must be indicated) and some details of the customer have to be registered (in the case of self-accounted invoices, the name of the supplier has to be indicated);
- register of the consideration (in the case of a business activity for which the issuing of the invoice is not compulsory rules on cash till compliance are also applicable) on which the taxable basis, VAT split on the basis of the VAT rates, has to be accounted on a daily basis. In some cases, also exempt transactions need to be registered;
- purchase register where the taxable person shall register the number attributed to the invoice, the date of the invoice, the taxable amount, VAT split on the basis of the VAT rates (in the case of an exemption, the relevant provision in the Italian or European law must be indicated) and the details of the supplier (in the case of imports, the relevant customs office and customs bill has to be mentioned).

With reference to the Intra-community acquisitions and supplies, they have to be accounted separately from the other transactions.

Entities that, according to the Italian Civil Law, must keep the general ledger (e.g.: the Italian companies) may not be obliged to keep the above-mentioned separate VAT registers provided that:

- the accountings relevant for VAT purposes are carried out on the general ledger within the time limit provided by the Italian VAT Law;
- upon request of the Italian Tax Authorities, all the information that should have been recorded in the VAT books is systematically provided.

6.10

What are the mandatory requirements for invoices?

According to the Italian VAT law, the requirements of an invoice are the following:

- date of issue of the invoice;
- sequential number which uniquely identifies the invoice;
- full name of the supplier;
- full address of the supplier;
- the VAT identification number of the supplier;
- full name and function of the tax representative (if any) of the supplier;
- full address of the tax representative (if any) of the supplier;
- full name of the customer;
- full address of the customer;
- the VAT identification number of the customer. In the case of a non-taxable person the fiscal code;
- full name and function of the tax representative (if any) of the customer;
- full address of the tax representative (if any) of the customer;
- nature, quantity, quality of the goods and services supplied;
- price per unit (excluding VAT) expressed in any currency;
- any discounts or rebates, not included in the unit price, expressed in any currency. Moreover, in the case of discount in kind, the arm's length value of the goods given in specific cases as a discount, premium or rebate, has to be mentioned;
- taxable amount, VAT rate and amount of VAT in euro;
- in the case of supplies of goods or services with different VAT rates, the following items have to be indicated separately on the basis of the applicable rate:
 - nature, quantity, quality of the goods and services supplied;
 - price per unit (excluding VAT);

- any discounts or rebates, not included in the unit price expressed in any currency. Moreover, in case of discount in kind, the arm's length value of the goods given in specific cases as a discount, premium or rebate, has to be mentioned;
- taxable amount, VAT rate and amount of VAT in euro;
- in case of intra-EU supply of new means of transport, the date of the first vehicle matriculation or registration in the public registries and number of kilometres travelled, hours sailed or flown must be mentioned on the invoice;
- if any, annotation that the invoice is drafted by the customer or, by a third party in the name and on behalf of the supplier;
- where an exemption is involved or where the customer is liable to pay the tax, the exemption must be stated with reference to the corresponding national or communitarian provision:
 - supplies of goods in transit or stored within places monitored by customs, not subject to VAT according to art. 7-bis paragraph 1 - *“operazione non soggetta”*;
 - VAT exempt supplies according to artt. 8, 8-bis, 9 and 38-quarter - *“operazione non imponibile”*;
 - exempt supplies according to art. 10 (with some exceptions) - *“operazione esente”*;
 - supplies subject to special regimes (e.g. second hand goods) - *“regime del margine - beni usati”*, *“regime del margine - oggetti d'arte”* or *“regime del margine oggetti di antiquariato o da collezione”*;
 - supplies performed by travel agents under art. 74-ter - *“regime del margine - agenzie di viaggio”*;
 - supplies of goods or services towards taxable persons that are liable to pay VAT in another EU country according to artt. 7 - 7 septies (with some exceptions) - *“inversione contabile”*;
 - supplies of goods or services that are considered carried out outside the EU - *“operazione non soggetta”*;
 - supplies of goods or services that are carried out towards the Public Bodies and for which the VAT charged is paid directly by the latter according to art. 17-ter (so called “split payment” mechanism) - *“Scissione dei pagamenti ai sensi dell'art. 17-ter del D.P.R. n. 633/1972”*;
 - self invoices issued by the customers in accordance with the Italian Law - *“autofatturazione”*;
- in case of transactions or taxable persons subject to particular provisions, the invoice has to refer to such applicable provision and/or state further additional information (e.g. companies registered in the Italian chamber of commerce register must also show on the invoice issued (i) the commercial register of enrolling (ii) the registration number attributed by the register (iii) the share capital - in the case of public companies (iv) the sole shareholder in the case of certain limited companies (v) the status of the company - in the event that the

company is in liquidation).

It is possible to issue a single invoice instead of a number of invoices if, during the same day, a supplier carries out more than one transaction towards the same customer.

Moreover, for the supply of goods entailing transport documentation or other suitable documents to identify the persons between whom the transaction is made and having the characteristics determined by Presidential Decree N° 472/1996, as well as for the provision of services identifiable through suitable documentation, performed in the same month towards the same person, a single invoice may be issued that details the transactions, by the 15th day of the month subsequent to that of the execution of the same.

Simplified invoice

It is possible to issue a simplified invoice for transactions of a total maximum amount of € 100.

Furthermore, a Ministerial Decree can extend the mentioned limit to € 400; it can also provide for the issuance of the simplified invoice without limits on the amount, for certain sectors or categories. In general, in the case of simplified invoices, the VAT registration number or the tax code or the EU VAT registration number of the customer can be stated in place of the complete data identifying the customer. Moreover, the taxable basis is no longer a mandatory element to be stated on simplified invoices (it is sufficient to report the total consideration and the VAT in euro there included or the information necessary to calculate the VAT).

According to the Italian VAT law, the requirements for a simplified invoice are the following:

- the date of issue;
- progressive number that identifies it univocally;
- company's name or corporate name, name and surname, residence or domicile of the seller or supplier, the tax representative as well as the location of the permanent establishment for non-resident persons;
- VAT number of the seller or supplier;
- company's name or corporate name, name and surname, residence or domicile of the buyer or customer, the tax representative as well as the location of the permanent establishment for non-resident persons; alternatively, in case of persons established in the territory of the State, the tax code or the VAT number only may be indicated or, in case of taxable persons established in another Member State of the European Union, simply the VAT identification number attributed by the Member State of establishment;

- description of the goods or services supplied;
- amount of the overall consideration and the incorporated tax or the information to calculate the same;
- for the invoices issued under art. 26 [credit/debit notes], reference to the adjusted invoice and the specific indications amended.

The simplified invoice may not be issued for the following types of transactions:

- intra-community sales under art. 41 of law decree no. 331/1993;
- transactions under art. 21, paragraph 6-bis, letter a), Presidential Decree no. 633/1972 (sale of goods and provisions of services other than those under Article 10, numbers from 1) to 4) and 9), carried out towards a taxable person who is debtor of the tax in another Member State of the European Union).

6.11

Is self-billing allowed in Italy?

The self-billing procedure is allowed in Italy.

Even if not expressly stated by the Law, in the case of outsourced invoices, according to the interpretation of the Italian Ministry of Finance, a prior agreement between the supplier and the customer is required. The parties have also to provide for the related procedures.

In the event that the customer using the self-billing procedure is part of the EU or is a non-EU resident subject established in a Country with which legal instruments exist relating to mutual assistance, it is not necessary to have other prior fulfilments in place.

On the other hand, if the customer is a non-EU resident subject established in a Country with which no legal instruments exist relating to mutual assistance, the self-billing procedure is also allowed but the following fulfilment have to be carried out:

- it is necessary to send a prior notification to the Italian Tax Authorities;
- the Italian supplier must have carried out his business for at least five years;
- during the above-mentioned period the supplier must not have received any tax payment demand or notice of material breach in respect of VAT.

Each self-billed invoice should state that it has been “issued on behalf of the supplier by the client (or a third party)”, according to art 21, para. 2, letter n) Presidential Decree no. 633/1972.

Is electronic invoicing/archiving allowed in Italy?

The electronic invoicing/archiving is allowed in Italy.

An electronic invoice is an invoice which is issued and received in any electronic format.

The use of electronic invoicing is subject to acceptance by the recipient.

Both the taxable persons (issuer and recipient) should guarantee the “AIL (i.e. the Authenticity of the origin, the Integrity of the content and the Legibility of e-invoices)” requirements from the issuance up to the deadline for their e-archiving.

In the case the recipient does not accept the electronic format, the issuer is not prevented from e-invoicing and e-archiving provided that the “AIL” requirements (i.e. the authenticity of the origin, integrity of the content and the readability of the e-invoices) are met from the issuance to the end of the e-archiving period.

The “AIL” requirements could be alternatively granted through:

- business control systems which ensure a reliable connection between the invoice and the transaction to which it relates;
- a qualified electronic signature (i.e. an advanced electronic signature based on a qualified certificate and generated through a secure signature creation device) or a digital signature (i.e. a qualified electronic signature based on a qualified certificate and a cryptographic keys system, which allows respectively the signatory to disclose and the recipient to verify the authenticity of the origin and the integrity of the content);
- an EDI system; or
- other technologies able to guarantee the authenticity of origin and integrity of data (these are left to the taxable person’s discretion).

E-invoices can be transmitted (the issuance of an invoice and/or its transmission can be outsourced to third parties, provided that a specific agreement between the supplier and the third party is in place) one by one or in batches to the same recipient, by the same supplier. If invoices are sent in batches it is possible to indicate common data only once, upon condition that all data can be accessible for each invoice.

In the case of electronic invoicing, the invoice date is the date of the transmission to the recipient.

Electronic invoices transmitted or received by electronic means have to be archived electronically.

Electronic invoices issued to public bodies have to be mandatorily issued in .xml format and transmitted by electronic means following particular procedures.

According to the Legislative Decree no. 127/2015, new rules related to business-to-business e-invoicing and e-submission of considerations of certain transactions to Italian tax authorities will be introduced. There will be several benefits to taxpayers who will adopt e-submission of the invoices issued and received and, where applicable, e-submission and e-recording of the daily considerations.

E-archiving

The electronic storage of documents is allowed in Italy and is mandatory in specific cases (e.g. in the case of electronic invoices).

Registers can be kept in paper form or electronically.

IT documents relevant for tax purposes (i.e. invoices, accountings and tax registers) are created, issued, transmitted, reproduced and e-archived within certain time limits and by following specific technical regulations and other provisions, according to which the use of specific formats, procedures and documents that identify new specific roles in the e-archiving process are established. They have to also comply with the Italian Civil Code, the digital administration code and other relevant tax provisions regarding accounting duties.

E-invoices have to be e-archived within specific time limits and can be stored in servers that are located in another State, provided that the same legal instrument exists relating to mutual assistance and in accordance with the Italian legislative provisions. The taxable person shall grant an automated access to the e-archive and guarantee that the document (e.g. invoices and documentation attesting the authenticity of the origin and integrity of the content) can be printed and transferred to another IT support upon request.

The taxable person can outsource the e-archiving to third parties according to the conditions set out by the above mentioned rules and provided that a specific agreement between the taxable person and the outsourcer is in place.

Moreover, even where the e-archiving is outsourced, the taxpayer will continue to be solely responsible towards the tax authorities for violations related to the e-archiving process while the outsourcer is responsible for the protection of personal information/data.

Public and private subjects, and outsourcers can ask to obtain the recognition of the highest requirements in terms of quality and safety at “Aid” (The Agency for digital Italy) and public bodies only delegate the e-archiving process to subjects who are recognised by “Aid”.

In which cases is a non-Italian resident obliged to register for VAT in Italy?

Direct registration or the appointment of a tax representative is only mandatory in the case of:

- intra-Community purchases;
- intra-Community supplies;
- exports supplies; or
- supplies to private individuals or to non-residents without a permanent establishment in Italy.

Special rules are provided for with reference to certain telecommunication, television, radio broadcasting and electronically supplied services.

A permanent establishment in Italy as defined for VAT purposes (see § 6.17) also triggers a VAT registration of the fixed establishment itself.

Moreover, the VAT registration could become due in the event of intra-EU movement of goods for the purposes of the undertakings of an EU business.

Furthermore, in the event that an entity cannot take advantage of the refund procedure (e.g.: a US company), it is required to register for VAT purposes in order to recover Italian VAT, unless it has a branch in Italy.

Finally, if a fixed establishment is already registered in Italy, the head office cannot directly register or appoint a fiscal representative for VAT purposes in Italy.

6.14

What are the procedures in place to obtain a VAT registration?

Taxable persons, established in an EU Member State other than Italy, can register in Italy for VAT purposes (where mandatory or advisable) by either:

- appointing a VAT representative (i.e.: “indirect VAT registration”); or
- directly registering (i.e.: “direct VAT registration”).

Taxable persons, established in non-EU Member States, can register in Italy for VAT purposes (where mandatory or advisable) by appointing a tax representative, since the direct registration option is available for EU businesses only.

Is direct VAT registration allowed for non-EU residents?

For non-EU countries, “legal instruments” in the field of cooperation must exist with Italy in the field of indirect taxation in order to apply for direct VAT registration.

For the time being, no such instruments are in place with non-EU countries.

Does a VAT registration or the appointment of a VAT representative imply a permanent establishment in Italy?

VAT registration does not trigger in itself any permanent establishment issue.

Is there a definition of permanent establishment for VAT purposes?

The definition of a VAT fixed establishment (hereinafter “VAT FE” or “fixed establishment”) has been introduced to European law by article 11 of the Regulation No. 282/2011/EC.

Such article states that a VAT FE is any organization other than the place of business, characterized by a sufficient degree of permanence and an appropriate structure in terms of human and technical means to enable it to:

- receive and use the services that are provided for the personal needs of such an organization, or
- provide services in case of:
 - generic services provided to non-taxable persons;
 - long term rental of pleasure boats to non-taxable persons;
 - provision of services and supply of goods in Italy where the VAT FE “intervenes”.

The concept described in Regulation No. 282/2011 (hereinafter the “Regulation”) substantially coincides with the concept often stated by the European Court of Justice (“ECJ”), but it is divided into two parts: on the one hand there is the concept of VAT FE as a recipient of services, on the other there is the VAT FE as a provider of services and goods.

This concept is only partly in line with the interpretation provided by the Italian Supreme Court, which stated that the concept of VAT FE can be inferred from article 5 of the OECD model convention with respect to taxes on income and on capital and its commentary, integrated with the relevant provisions of the VAT directive as interpreted by the ECJ.

According to the Italian Supreme Court, the concept of permanent establishment for corporate tax purposes can be relevant in order to state whether a fixed establishment exists only in the event that the following circumstances are met:

- the concept of permanent establishment does not affect the correct applicability of the directives;
- the concept of permanent establishment is not at odds with the European Court of Justice decisions.

In light of the above, it is clear that the Regulation makes a distinction when the fixed establishment is deemed to be the recipient of services and when the fixed establishment is deemed to intervene in a supply of services and goods.

In short a fixed establishment (different from the one where the supplier has established its business) is considered only if the following conditions are valid:

- It is of a set minimum size;
- both its human and technical resources are permanently present;
- its business transactions can be performed on an independent basis by the VAT FE.

In addition to the above, the ECJ states that another place of establishment may be considered if reference to the place where the supplier has established his business does not fall into the scope of VAT purposes or creates conflict with another Member State.

Are operations between a branch and its head office relevant for Italian VAT purposes?

The Intra-community supply of goods between a branch and its head office is relevant for Italian VAT purposes and is subject to the normal rules.

The supply of services between a branch and its head office, in principle, is out of the scope of Italian VAT because the services are supplied within the same legal entity and therefore a real “service” cannot be said to take place.

Following the ECJ’s decision in the Skandia Case (C-7/13), the supply of services from a head office in a third country to its branch in a Member State constitutes a taxable transaction when the branch belongs to a group of persons whom it is possible to consider as a single taxable person for VAT purposes (reference is to the VAT group regime according to article 11 of the EU VAT law).

It is important to properly interpret the EU VAT law in the light of the ECJ decision above.

The Italian VAT law has not implemented the VAT group regime as provided by article 11 of the EU VAT law.

The implementation of the VAT group regime, as provided by article 11 of the EU VAT law, was included in the tax reform started in year 2014. However, the term for the completion of the tax reform expired in June 2015 and the VAT group regime was not implemented.

6.19

What are the bookkeeping obligations in the case of direct VAT registration?

Is it possible to keep the VAT books and records outside Italy?

In the case of direct registration, the non-resident person has to perform all the obligations provided by the Italian VAT Law.

The bookkeeping obligations are the same as those for a resident taxable person.

The following VAT books are required to be kept: register of output invoices, register of consideration (if it is the case on the basis of the activity carried out) and the purchase register. For a detailed description please refer to the previous § 6.9. The Italian VAT Act, in the case of direct VAT registration, provides for the possibility to keep the VAT accounting records abroad, without any restriction. In such case, the VAT books and the other relevant documents (i.e.: invoices and transport documents) have to be submitted upon request of the Tax Authorities. In principle, the notice for such request should be at least 15 days.

6.20

What are the bookkeeping obligations in the event that an Italian VAT representative is appointed?

Is it possible to keep the VAT books and records outside Italy?

If an Italian VAT representative is appointed, all the obligations provided by the Italian VAT law must be performed.

The bookkeeping obligations are the same as those provided for a resident taxable person, i.e.: it is compulsory to keep the register of output invoices, the register of consideration (if it is the case on the basis of the activity carried out) and the purchase register. For a detailed description please refer to the previous § 6.9.

Registers and documents must be kept by the taxable person or by the keeper of its accounts reported to the competent Tax Agency.

According to the wording of the Italian VAT Law, at present it is not possible to keep abroad paper invoices and other documents relevant for tax purposes that are paper archived (accounting registers included).

On the contrary, provided that further particular conditions are met (please refer to the previous § 6.12. for further details), e-invoices and other documents relevant for tax purposes that are e-archived can be stored in a State other than Italy, provided that the same legal instrument exists regarding mutual assistance.

A company with a structural VAT credit position: what can be done to reduce this credit?

A VAT credit can be carried forward and used to offset a VAT debit position pertaining to future periods. Alternatively, different options are applicable in the event that the taxable person ends up in a VAT credit situation and wishes to minimize exposure in terms of receivables towards the Italian Government (please note that tax refunds in Italy can currently take even years to be carried out). However, each of these possibilities has to be evaluated on a case by case basis:

- set-off using the F24 form: a VAT credit can be offset with other taxes upon certain conditions. It must result from the yearly VAT declaration or from the VAT quarterly settlements related to the first three quarters of the year (in these cases, requirements for quarterly VAT credit refund requests have to be met and a special form has to be submitted to the Tax Authorities). The maximum threshold for the offsetting is € 700,000.00, per year (the amount requested to be refunded with the accelerated procedure is also relevant when computing the above limit). Moreover, the setting-off of the annual VAT credit or of the VAT credit related to a period shorter than a year, for an amount exceeding €10,000 euro, can be carried out starting from the 16th day of the month following the month in which the Annual VAT Return or the request for refund (from which the credit arises) is submitted. Furthermore, for the compensation of the VAT credits for an amount exceeding €15,000, it is necessary to obtain, from the authorized subjects, the “conformity mark” or the Annual VAT Return signature by the subject in charge of the accounting control.
- Infra-group compensation of VAT credits: please, see § 6.23 and § 6.24 below, with reference to the VAT grouping scheme;
- VAT refund: upon certain conditions, the yearly or quarterly VAT credit refund can be requested. A VAT refund form (which is different for yearly credit and quarterly credit) has to be submitted, as a general rule, together with a fidejussory warranty or a caution money in government securities (unless the amount requested for refund is less than €15,000), to:
 - tax collection agent, for yearly credits up to the amount of €700,000;
 - local Tax Agency, for quarterly credits and for the part of yearly credits exceeding the €700,000.00 threshold.

It is possible to avoid the provision of the bank guarantee if the taxpayer obtains the “conformity mark” on the annual or quarterly claim.

A particular procedure is provided for non-resident, unregistered subjects (please refer to the following paragraph for details);

- transfer of VAT credit: a VAT credit requested for refund on a yearly basis can be transferred to a third party. In such deed, the VAT refund will be granted to the transferee. The transfer has to result from a public act and has to be notified to the competent Tax Authorities.

6.22

How can non-Italian residents claim for the refund of VAT paid in Italy?

Entrepreneurs resident in any of the EU Member States may apply for refund of VAT charged on purchases or imports of movable goods and services carried out in Italy. Entrepreneurs from non-EU countries may also apply for refund upon the condition that there is a reciprocal agreement in force with the entrepreneur’s home country. (In both cases, the following conditions must be satisfied:

- the company is liable for tax in its home country (in this respect, with reference to the procedure for taxable entities that are not established in the EU, a declaration issued by the competent local tax authorities certifying that the company is VAT liable in its State must be provided);
- the company is not established for VAT purposes in Italy;
- the company has not carried out the supply of goods and services in Italy in the period the claim refers to with exception to those supplies for which the customer is liable to pay VAT and any exempt transports and ancillary service supplies.

Alternatively, the non-resident person who is registered for VAT in Italy either directly (where possible, see § 6.15.) or through the appointment of a VAT representative can request the refund of Italian VAT in accordance with the procedure described above (see § 6.21.).

As a general rule, the appointment of a VAT representative must be made before the transaction is carried out for VAT purposes in order to be able to recover VAT.

When the above-mentioned conditions for the VAT refund claim for non-resident persons are not applicable (e.g.: the non-resident is a US resident), VAT registration is the only means to recover Italian VAT, unless the foreign taxable entity has a branch in Italy.

Is a VAT group provided for in Italy?

In Italy, VAT grouping is possible, but its notion is quite limited. Companies belonging to a VAT group should meet certain requirements in terms of legal status, the amount of time they have been part of the group, and the ownership of the capital share for more than a half of the capital.

The companies of the group maintain their full independency as single taxable persons, each company has its own VAT number and the inter-company transactions are subject to the ordinary VAT rules.

According to the VAT grouping facility, the VAT returns of the controlled companies can be filed together with the VAT return of the parent company and the VAT credits and debits of the companies belonging to the group can be offset.

Special fulfilments in terms of communications and accomplishments have to be carried out. Moreover, in principle, a bank guarantee has to be provided with reference to the VAT credits offset.

Is it possible to include in a VAT Group a non-Italian resident company, registered for VAT in Italy?

The Italian Tax Authorities have clarified that European Union companies can be included into a VAT group. In order to apply for the procedure, the non-Italian resident company must satisfy the following requirements:

- it must have the equivalent legal corporate features required for Italian companies in order to be part of a VAT group;
- it must be registered for VAT purposes in Italy (through a permanent establishment, a fiscal representative or direct registration).



7 *Customs and excise duties*

7.1	What are the customs duties for the importation of goods into Italy?	<i>p. 68</i>	7.7	Does a disclosure procedure for customs operations exist?	<i>p. 69</i>
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What are the customs duties for the importation of goods into Italy?

The amount of customs duty to pay depends on the value, origin and nature of the goods imported. In particular, for each kind of goods originating from non-EU Member states, the Common Customs Tariff provides a customs duty rate to be applied to the value of the goods imported.

Further to the payment of customs duties, the importation of goods from a non-EU Member state into the Italian territory may require the payment of the following main taxes:

- VAT;
- Excise duties;
- Consumption taxes.

The payment of the above taxes depends on the nature of the goods imported.

Is it possible to obtain a reduction of customs duties?

Yes. For example, a reduced customs duty rate can be applied when the goods imported have a preferential origin. The preferential origin depends on the existence of commercial agreements between the European Union and other non-EU Member states or by benefits provided by the European Union to non-EU Member states unilaterally.

The application of a reduced customs duty rate can even depend on the existence of preferential tariff treatment or the adoption of special customs procedures.

For customs operations, can the importer act directly or is the presence of a customs broker necessary?

Any person may appoint a representative to deal with the Customs Authority in order to perform the activities and formalities laid down by customs rules.

Such representation may be direct, in which case the representative will act in the name and on behalf of another person, or indirect, in which case the representative will act in his own name but on behalf of another person.

In the case of direct representation, a forwarding agent, holder of a particular license, must be appointed.

The representative must be established within the European Union.

Does a facilitated regime exist for the importation of goods into Italy?

Yes. The customs legislation provides for many facilitated regimes. The most important ones are the following:

Customs warehouse: this regime allows the storage in a customs warehouse of:

- non-EU goods, such goods are not subject to import duties or commercial policy measures;
- EU goods may be placed under the customs warehousing procedure in accordance with EU legislation governing specific fields, or in order to benefit from a decision granting repayment or remission of import duty.

Inward processing: this regime allows non-EU goods to be used in the customs territory of the Union in one or more processing operations without such goods being subject to import duties or commercial policy measures.

Temporary importation: this procedure provides, upon certain conditions, for the use of non-EU goods in the customs territory of the EU, with total or partial relief from import duties and without them being subject to commercial policy measures when intended for re-export without having undergone any change except normal depreciation due to the use made of them.

Outward processing: under this procedure, EU goods may be temporarily exported from the customs territory of the Union in order to undergo processing operations. The processed products resulting from those goods may be released for free circulation with total or partial relief from import duty.

7.5

For companies that usually perform import/export operations does any facilitation exist with regards to the Customs Authority?

Yes. The customs legislation provides the status of Authorized Economic Operator (AEO).

An Authorized Economic Operator can be defined as an economic operator who is reliable throughout the EU in the context of his customs related operations, and, therefore, is entitled to enjoy benefits throughout the EU.

In particular, the Customs Authority may grant the AEO status to any economic operator established in the customs territory of the EU and the status is recognized by the Customs Authorities in all EU Member states.

An Authorized Economic Operator benefits from facilitations with regard to customs controls concerning security and/or from simplifications provided for under the customs rules.

The main criteria for granting the status of Authorized Economic Operator include:

- the absence of any serious infringement or repeated infringements of customs legislation and taxation rules;
- the demonstration by the applicant of a high level of control of his or her operations and of the flow of goods;
- financial solvency;
- practical standards of competence or professional qualifications directly related to the activity carried out;
- appropriate security and safety standards.

Does any facilitation exist with regards to the payment of customs duties?

Yes. Upon the request of an operator performing customs operations on a regular basis, Customs Authorities provide for an aggregate payment of customs duties attributable to import operations performed within a certain period of time, but not exceeding 30 days. The payment must be made by the end of an agreed period. In order to obtain this facilitation, the operator must submit a guarantee.

Furthermore, upon request of the operator, Customs Authorities can allow that the payment of customs duties, related to a single customs operation, is deferred for a period up to 30 days. Also for this facilitation the operator must present a guarantee.

7.7

Does a disclosure procedure for customs operations exist?

Yes. The customs legislation provides for a procedure which provides for a review of the customs declarations submitted to the Customs Authorities.

The procedure can be started upon the request of the operator that submitted the declaration to be amended. The request for a review of the customs declarations must be submitted within 3 years from the date upon which the declarations became definitive.

Review of the customs declarations upon request of the operator prevents the application of administrative penalties.

Which goods are subject to excise duties?

The following goods are subject to excise duties:

- energetic products (petrol, gas oil, natural gas, coal, etc...);
- alcohol and alcoholic drinks (wine, beer, ethyl alcohol, etc...)
- processed tobaccos (cigars, cigarettes, tobacco, etc...);
- electric power.

The excise duty to be paid on a product depends on its customs combined nomenclature code.

The main rules applicable in Italy, in this respect, are provided by the Italian Decree No. 504/1995.

When are the excise duties due?

As general rule, tax liability arises at the moment of the importation or production of excise goods. Excise duties must be paid at the moment in which such goods are released for consumption in Italy.

The following events are considered as release for consumption (the list is not exhaustive):

- within a suspensive regime, a shortage of goods which exceed the quantities accepted by law;
- the release of goods from a suspensive regime (even when illegally);
- the production or importation of goods out of a suspensive regime (even when illegally).

As general rule, with reference to excise goods released for consumption, the payment of the relative excise duties must be made within the 16th day of the month following such release.

With reference to excise goods imported, the customs rules apply to the procedure and terms of payment.

Who is obliged to pay the excise duties?

As general rule, the holder of the fiscal warehouse from which the release of goods for consumption in Italy takes place must pay the relevant excise duties. With reference to imported products, the importer of records (according to customs rules) is obliged to pay the excise duties.

Upon the authorization of the Customs Authority, a professional operator (so-called “registered consignee”), even if not managing a fiscal warehouse, can receive goods under the excise duty suspension regime. In such a case, excise duties are due at the time of shipment by the latter.

What kind of authorization is required to manage goods subject to excise duties?

The production, processing and holding of “excise goods”, within a suspensive regime, are performed through a fiscal warehouse. In order to manage a fiscal warehouse it is necessary to obtain a license issued by the Italian Customs Authority.

The owner of a fiscal warehouse must:

- provide for a particular guarantee, equal to 10% of the excise duties payable with reference to the products stored within the warehouse;
- keep a particular accounting system for the goods stored;
- be subject to controls performed by Italian Customs Authority, where requested.

What kind of fulfilments are required for the circulation of goods subject to excise duties?

The circulation of “excise goods” in a suspensive regime is usually performed through a fiscal warehouse. The owner of the fiscal warehouse from which the goods are shipped has to provide for a guarantee for the payment of the excise duties due for the transported goods.

For the circulation of excise goods in a suspensive regime, a particular document, named e-AD (Electronic Accompany Document), must be used. The e-AD is transmitted in the electronic form through the EMCS (Excise Movement and Control System) made available by the Customs Authority.

7.13

Does any exemption exist for goods subject to excise duties?

Yes. The Italian legislation provides for many exemptions with regards to the use of “excise goods”. For example, with reference to energetic products, the use of such products as fuel in air navigation or in training air navigation is exempted from excise duties. With regard to products containing alcohol, the use of such products in order to produce medicaments or their use for scientific purposes is exempted from excise duties.

The excise duty exemption is also provided, as a general rule, when the excised goods are destined to be used by international organizations or with regard to international relationships.

Furthermore, a tax refund is granted to the operator who releases the products for consumption, if, following their release, they are not consumed in Italy. In particular, the excise duties are refunded when goods are exported from the EU or moved to another EU member State. A refund is also granted when an assortment of excise products is authorized and the resulting item is subject to excise duties with a lower tax-rate than the one applicable for each component. The refund claim may be made within two-years from the date of the operation.



8 Real estate

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Which are the grounds for the acquisition of real estate ownership in Italy?

In accordance with the Italian Civil Code ownership may be acquired in two different ways:

- a. original acquisition
 - accession:
the accession operates in the case of incorporation of goods (generally, the inclusion of a secondary property into a main property), owned by different owners, due to human activity or natural events. As a general principle, the landowner acquires the ownership of any work or structure performed under or upon his land;
 - adverse possession:
the ownership of a property - together with the other real rights of enjoyment regarding the property - is acquired through the continuous possession without interruption for
 - i. twenty years (ordinary term);
 - ii. ten years from the date of the transcription of an instrument which transfers the real estate ownership in the event that the relevant acquisition is achieved in good faith from a person who is not the real owner of the transferred property.
- b. derivative acquisition
 - agreement:
the acquisition of real estate ownership determines the transfer of the same rights of the previous owner;
 - mortis causa inheritance:
 - mortis causa inheritance is ruled by the legal provisions relating to individuals at the time of death;
 - expropriation for public interest;
 - compulsory sale of the debtor's property, which may occur at the end of judicial proceedings filed by creditors.

Is it possible to structure a real estate investment through an Italian company?

The company law reform implemented by the Legislative Decrees No. 5 and 6 dated January 17, 2003, as amended by the Legislative Decree No. 37 dated February 6, 2004, and the Legislative Decree No. 310, dated December 28, 2004, (hereinafter the "Reform") has introduced the opportunity for foreign investors to benefit from greater flexibility and protection in relation to the possibility to structure and implement real estate investments through Italian companies.

In particular, the Reform has simplified the incorporation and contribution procedures to be performed in order to set-up a joint-stock company (S.p.A.) or a limited liability company (S.r.l.) it is therefore now extremely easy to create a special purpose vehicle in order to perform a real estate investment in Italy.

To this regard, it is worth mentioning that the formalities to set up a legal entity in Italy do not require a lot of time. Generally, even though the Italian Civil Code does not provide for an official time frame, the minimum length of time for setting up a S.p.A. or S.r.l. is 15 days.

As for the requirements in terms of equity, it is worth considering that a S.p.A. must have a minimum corporate share capital equal of € 50,000 and a S.r.l. a minimum of € 10,000.

The corporate capital is represented by shares (S.p.A.) or quotas (S.r.l.) which, at the time of incorporation, may be subscribed by means of a payment of the relevant value or by means of contribution in kind of goods and credits.

At the moment of incorporation of a S.p.A. or S.r.l., at least 25% of the contributions in cash shall be deposited in a bank with regard to a joint-stock company, and, with regard to a limited liability company paid to the Administrative Body appointed in the by-laws, with the exception of companies with sole ownership which requires the deposit of the entire corporate capital. Exclusively for the S.r.l., the deposit may be replaced by drawing up an insurance policy or a bank guarantee of an amount corresponding to the contribution's value.

In a joint-stock company and in a limited liability company, only the company is liable for its assets and the company's obligations. However, in the event of insolvency of the company, for those obligations incurred when the shares/quotas were held by a sole shareholder/quotaholder, such shareholder/quotaholder is unlimitedly liable when the contributions in kind have not been made pursuant to the law provisions or until the fulfilments required by law to declare that the

corporate capital is held by a sole shareholder/quotaholder are not performed (i.e.: the Directors of the company have to deposit a declaration with the Register of Companies stating the details of the sole shareholder/quotaholder).

The main benefit deriving from the incorporation of a special purpose vehicle is the possibility to isolate the risks strictly connected to real estate investments (in particular, those connected to environmental issues or, should the property be an asset of a business or a branch of business acquired through the investment, the risks relating to the business itself).

8.3

Is it possible to provide for a contribution in kind of a real estate property in order to subscribe, fully or partially, the corporate capital?

According to the provisions of the Italian Civil Code, the contributions to be performed at the time of setting up an Italian company (S.p.A. or S.r.l.) must be made in cash unless differently provided for by the deed of incorporation.

Should the contributions in kind be allowed, a real estate property may be used for this purpose according to a specific procedure, which is slightly different depending whether the entity involved is a S.p.A. or a S.r.l.

Starting from the general rules applicable to both kinds of companies, it is worth mentioning that the shares or the quotas issued against the contribution in kind must be entirely released at the time of their subscription. This means that the value of the shares or of the quotas must not be lower than the value of the contribution in kind (i.e.: the value of the real estate property in the case of its contribution).

In order to verify this circumstance, the Italian law provisions expressly provide for the obligation of the shareholder or quotaholder who performs the contribution in kind to deposit a sworn appraisal containing a description of the goods or claims contributed, the indication of the evaluation criteria applied, as well as the confirmation that their value is at least equal to those attributed for quantifying the corporate capital and the share/quota premium, if any. The appraisal must be attached to the deed of incorporation.

The difference between the procedure applicable to S.p.A. and S.r.l. companies, is strictly connected to the person entitled to issue the sworn appraisal considering that the Italian Civil Code compulsorily requires the following conditions:

- S.p.A.: the appraisal must be issued by an expert appointed by the President of the Court of the place where the company has its registered office;
- S.r.l.: the appraisal must be issued by an expert or by an auditing company enrolled in the registry of the accounting auditors or by an auditing company registered in the special register kept by the National Commission for Listed Companies and the Stock Exchange (*Consob*).

In both cases, the expert is liable for damages caused to the company, to the shareholders and to third parties.

A further difference between S.p.A. and S.r.l. companies, is connected to the review process of the sworn appraisal, which is required only for joint-stock companies. To this regard, the Italian Civil Code requests that the company's directors verify the evaluations stated in the sworn appraisal and, should grounded reasons occur, these must be corrected. This process must be performed within 180 days from the registration of the company and, in the meanwhile, the shares corresponding to the value of the contribution in kind cannot be sold and must remain deposited with the company. If it appears that the value of the property or of the claims contributed is lower by more than one fifth of the value for which the contribution was made, the company shall reduce its capital proportionately, voiding the shares whose value is shown not to be covered. The contributing shareholder, however, may deposit the difference in money or resign from the company; the resigning shareholder is entitled to receive back the contribution in kind, to the greatest possible extent, in whole or in part. The articles of association may state that, as a consequence of the annulment of the shares, their distribution among shareholders may be different.

The contribution in kind of a real estate property is possible not only at the time of the company's incorporation, but also if an increase of the corporate capital is resolved; this would be subject to the performance of the same evaluation procedure mentioned above.

May a non-resident private individual/company purchase real estate property in Italy?

In principle, a non-resident private individual/company has the possibility to purchase a real estate property in Italy. Usually, non-residents perform real estate investments not directly, but through a special purpose vehicle, mainly for tax purposes. In any case, the Italian Civil Code states a general legal provision concerning the “treatment of non-residents”, pursuant to which “Non-residents benefit from the civil rights attributed to citizens on condition of reciprocity and subject to the provisions contained in special statutes. This provision also applies to a non-resident legal person”.

As per the above, the “reciprocity principle” is considered to be the discriminating element in force which determines whether a foreign subject (private individual/company) may, or may not, purchase a real estate property in Italy. At present, only a few countries do not satisfy the reciprocity condition with Italy (by way of example and without limitation: Afghanistan, Bahamas, Congo, Liberia, Iraq, Madagascar and Myanmar).

Useful information to check if the “reciprocity principle” is met or not may be found on the website of the Italian Ministry of Foreign Affairs where a country list is posted:

(http://www.esteri.it/MAE/IT/Ministero/Servizi/Stranieri/Elenco_Paesi.htm). Please consider that the information is available only in Italian.

Are there any income tax consequences to owning real estate in Italy?

In principle, real estate property is deemed to produce taxable income, even if not used by the owner or even if not leased to third parties. This income is generally subject to income tax to be paid by the owner of the real estate, in property or by virtue of another real right (e.g.: usufruct, use, habitation, emphyteusis, etc.).

The taxation of property varies according to the tax “category” in which real estate income is classified, depending also upon nature and tax status of the owner, characteristics and use of the real estate property.

8.5.1 Do income taxes have to be paid for real estate that is neither leased nor directly used for business?

In general, income deriving from real estate properties qualifies as “income from land and buildings” (*reddito fondiario*). This category of income can be divided in two different sub-categories:

- a. “income from land” (*reddito dei terreni*), which is generally formed by the following two components:
 - a-1. “income from ownership of land” (*reddito dominicale*);
 - a-2. “income from agricultural activities” (*reddito agrario*), if performed;
- b. “income from buildings” (*reddito dei fabbricati*).

Nevertheless, given the “force of attraction” of “business income” (*reddito di impresa*), the same income earned in connection to a business activity carried out is attracted to “business income”. This is the case, for example, of resident entrepreneurs, resident partnerships and companies; with regards to foreign subjects, reference is made to the business activity carried out within the Italian territory through a permanent establishment or a fixed place of business located therein.

For income tax purposes, the “income from land and buildings”, concerning real estate properties registered (or that should be registered) in the Cadastral Registry, is generally determined according to cadastral criteria (unless the real estate property is leased to third parties).

Conversely, real estate income attracted to “business income” is normally determined on the basis of related actual proceeds and costs (in certain specific circumstances, however, such income forms part of the taxable “business income” according to cadastral criteria).

8.5.2 How do resident individuals pay income tax for the real estate owned?

Resident individuals are subject to the Individual Income Tax IRPEF (*Imposta sul Reddito delle Persone Fisiche*) with regards to their total income, from whatever source it derives (worldwide taxation principle). The Individual Income Tax is calculated on the basis of rates increasing by brackets of income, presently ranging from 23% up to 43%, with the highest rate applicable to the amount of aggregate taxable income which exceeds €75,000 (these rates do not consider local surcharges and also the 3% solidarity contribution for income exceeding €300,000 presently applicable until 2016).

Taxable income deriving from the ownership of real estate properties, not leased to third parties and not used for a business activity, is generally calculated on the basis of the cadastral income, corresponding to the “ordinary”/“average” income deemed to derive from the properties, determined by the Cadastral Office in consideration of their characteristics. The cadastral income is adjusted in relation to the owning period during the relevant tax period (which for individuals corresponds to the calendar year).

An exception to this rule is provided for residential buildings which are the owner’s main residence (i.e.: used as the usual residence by the owner or by his relatives), which is not subject to income tax in the hands of the owner.

In addition, from 2012, real estate properties not leased that are subject to IMU (see § 8.6.1) are exempt from IRPEF, except for residential buildings other than the one representing the main residence and sited in the same municipality, whose 50% of the income is subject to IRPEF (in this case cadastral income is further increased by one-third).

In the case of buildings leased to third parties, the taxable income generally corresponds to the highest amount between: (a) the cadastral income and (b) 95% of the rentals earned in the relevant tax period (even if not actually collected, with some exceptions). In fact, for leased buildings the law provides for a 5% flat reduction of rentals (higher flat reduction is provided in some specific cases), in consideration of eventual managing and maintenance costs incurred by the owner. As a result, related expenses actually incurred are not relevant for tax purposes.

8.5.3 How do non-resident individuals pay income tax for the real estate owned in Italy?

Non-resident individuals are subject to tax in Italy (IRPEF, at same rates provided for Italian individuals) in respect of income deemed to derive from the Italian territory. As far as real estate is concerned, this rule refers to income derived from real estate properties located in Italy.

The same tax rules provided for resident individuals also apply to non-resident individuals (see § 8.5.2), with the exception to tax relief related to the residential building where the owner’s main residence is located (apart the case of Italian expatriates).

8.5.4 How is real estate income determined when owned by entities other than individuals?

From an income tax perspective, entities other than individuals have to be divided into the following categories, which generally apply different income tax regimes:

- resident partnerships (also including other resident associations without legal personality and assimilated entities);
- resident companies;
- resident commercial entities (different from companies) and trusts (that both carry out business activities as the sole or prevalent purpose);
- resident non-commercial entities (different from companies) and trusts (that both do not carry out business activities as the sole or prevalent purpose) and resident undertakings for collective investment of savings (i.e.: Italian OICRs, such as: UCITS funds, Alternative Investment Funds and Real Estate Investment Funds);
- foreign companies and entities of any kind (with or without legal personality) with permanent establishment in the Italian territory;
- foreign companies and entities of any kind without permanent establishment in the Italian territory.

In the following cases, real estate income collected qualifies as “business income”, thus determined according to “business income” tax rules (in general, analytical determination based on actual proceeds and costs, with exception to certain specific circumstances where the cadastral criteria is applicable):

- resident partnerships (also including other resident associations without legal personality and assimilated entities);
- resident companies;
- resident commercial entities;
- resident non-commercial entities (for real estate income collected in relation to any business activities performed);
- Italian permanent establishments of foreign companies and entities.

Conversely, in the following cases (unless in the context of a special tax regime, such as the case of Italian OICRs) real estate income collected qualifies as “income from land and buildings”, thus determined and taxed according to the cadastral criteria:

- resident non-commercial entities (for real estate income not pertaining to any business activities performed);
- foreign companies and entities without permanent establishment in the Italian territory.

8.5.5 How do resident companies (and corporate bodies subject to the tax rules of “business income”) pay income tax for the real estate owned?

Income collected by resident companies (and by Italian permanent establishments of foreign entities) qualifies as “business income” and is subject to IRES (the Corporate Income Tax) and IRAP (the Regional Tax on Production).

Income from land and “instrumental” buildings (i.e.: buildings directly used in the business activity and those whose destination, due to their characteristics, cannot be changed without a complete transformation - e.g.: commercial or industrial buildings, offices, etc. - even if not directly used) is determined according to the tax rules applicable to “business income” (i.e.: in general, related revenues less pertaining costs).

Typical revenues are collected rentals. Examples of related costs are the following:

- depreciation (annual ordinary rate for instrumental buildings: 3%, reduced to 1.5% for the first year);
- ordinary and extraordinary maintenance costs (where not capitalized on the asset);
- interest expenses;
- administration expenses;
- registration tax paid in respect of real estate lease contracts.

With particular reference to depreciation, as a general rule, land may not be depreciated. Since 2006 land amortisation, even if part of the building general depreciation (this may be the case of land on which instrumental buildings are located or adjacent land), is non-deductible. This implies that, in determining the tax deductible depreciation, the cost of instrumental buildings has to be considered net of the cost of the area (land).

The cost of such area, if not autonomously purchased, is quantified as the highest amount between: (a) the balance sheet value of the year of purchase (if any), and (b) 20% of the total buildings’ cost, increased to 30% for industrial buildings, defined as those used for the production and transformation of goods.

This non deductibility regime also applies to instrumental buildings owned under financial leasing contracts, with regard to the amount of the periodical rentals corresponding to the value of the land.

Income deriving from “non-instrumental” buildings (i.e.: residential buildings not directly used for the purpose of the business activity carried out and not representing available stock) is determined according to the cadastral criteria, thus corresponding to:

- the cadastral income, adjusted in consideration of the period of ownership in the tax period, increased by 1/3 (one-third), for buildings not leased to third parties;
- the highest amount between: (a) the cadastral income and (b) the rental income earned in the relevant tax period according to the lease agreements, reduced of a maximum of 15% of the rentals for maintenance expenses actually incurred (other related expenses exceeding such percentage of rentals are not deductible from income tax purposes), for buildings leased to third parties.

One must consider that, for IRAP purposes, only proceeds actually collected (e.g.: rentals) are subject to this tax. As a consequence, the cadastral income concerning “non-instrumental” buildings not leased to third parties, being a “theoretical” income not booked in the financial statements, does not have to be included in the IRAP taxable base.

Real estate companies have to take in due consideration, *inter alia*, the two following tax rules, which may have a significant impact in determining their taxable bases:

- “non-operating companies” rules (see § 3.22);
- “*Studi di Settore*”, i.e.: “industries surveys” which are aimed at evaluating “adequacy”, “coherence” and “normality” of declared proceeds with reference to general indicators established by the tax authorities, on the basis of taxpayers’ economic and non-economic parameters, for tax assessment purposes (see § 13.2).

8.5.6 How do non-resident companies pay income tax for real estate owned in Italy?

Non-resident entities without permanent establishment within the Italian territory are subject to IRES (the Corporate Income Tax) only in respect of income deemed to originate in the Italian territory. With regards to real estate, this circumstance refers to income derived from real estate properties located in Italy.

They are not liable to IRAP.

Real estate income taxable in Italy qualifies as “income from land and buildings” and is taxed according to cadastral criteria (see § 8.5.2.).

Are there property taxes for real estate owned in Italy or abroad?

There are two types of property taxes, depending on where the asset is located and on the tax status and residence of the owner. In this regard, assets located in Italy are subject to IUC, independently from the tax residence of the owner, while assets located abroad are subject to IVIE if the owner is an individual tax resident in Italy.

8.6.1 What is IUC?

Effective since January 1, 2014, the main municipal taxes related to real estate properties have been encased under the single definition of IUC (*Imposta Unica Comunale*), the Unified Municipal Tax. This tax is composed by the three following components:

- IMU, the Municipal Property Tax;
- TASI, the Municipal Tax for Indivisible Services;
- TARI, the Municipal Waste Tax.

IMU (*Imposta Municipale Unica*) is the local tax on real estate properties (i.e.: buildings, building-areas and agricultural lands).

The taxable person, regardless of the residence, is:

- the owner of the property right;
- the owner of a real estate right allowing the availability and the utilisation of the property (i.e.: usufruct, use, habitation, perpetual lease, right of common on the building);
- the lessee, in the case of financial leasing contract (*locazione finanziaria*).

The ordinary rate is fixed by Law and is equal to 0.76%. However, Municipalities can increase or reduce such standard rate by 0.3%.

The tax payable is calculated by multiplying the municipality's tax rate (established by the competent Municipality) by the "cadastral value", determined on the basis of the cadastral income multiplied by specific coefficients (for real estate properties that have not been attributed a cadastral income, different computation rules apply). The tax so determined shall be adjusted in consideration of the months of the calendar year in which the property, or the other real estate right, was held.

Tax exemptions/reductions are provided for residential buildings used by individuals as their main residence - i.e.: the property where one usually lives - (with some exceptions for luxury houses), for agricultural lands (under certain conditions), for unfit-for-use buildings and other limited circumstances.

IMU is generally paid in two instalments: a first advance instalment, equal to 50% of the tax due, which must be paid by June 16 of the relevant year, and the final balance due which must be paid by the following December 16. It is possible, however, to make a sole payment in June.

IMU has to be paid directly in favour of each competent Municipality, for all the real estates located in its territory, except for buildings belonging to cadastral group D (i.e.: industrial buildings), which is paid to the State (in this case, only the increase established by the Municipality is paid to the latter).

TASI is the new local tax introduced to finance certain general services provided by the Municipality (e.g. lighting, road maintenance, etc.). The tax is due by the owner of real estate properties. However, in case of lease contracts, TASI is partially due by the tenant, in the range from 10% to 30%, according to the competent Municipality's resolution.

TASI is not due in respect of non-luxury properties used by individuals as their main residence; under the same condition, this exemption applies to tenants. TASI is not due in respect to agricultural lands. Tax reduction is provided for building constructors with respect to properties to be sold. TASI has the same taxable base of IMU.

The TASI ordinary rate is 0.1%, but the competent Municipality can increase the rate up to 0.25%. For years 2014, 2015 and 2016, as provided by the respective Finance Laws, the TASI rate can be increased up to 0.33%.

The aggregate rate of IMU and TASI, however, cannot exceed the maximum IMU rate stated by law which is currently 1.06%. Only for years 2014, 2015 and 2016, this cap can be increased up to 1.14%.

As IMU, TASI is generally paid in two instalments: the account (50% of the total tax due) to be paid by June 16 of the relevant year; the balance (remaining 50%) to be paid by December 16 of the same year.

TARI, the Municipal Waste Tax (as renamed in the context of IUC), is due entirely by the user of a real estate property (owner or, in case of lease contract, tenant). It is calculated directly by the competent Municipality on the basis of tariffs established by the same (which depend on several parameters, such as for example: the floor area of the building, the business activity carried out, etc.). TARI is generally not due for areas and buildings not able to produce wastes (i.e.: appurtenant/accessory open areas). Further exclusions, such as the case of unfit-for-use properties, can be provided by each Municipality).

The relevant payment forms are sent to the taxpayer directly by the competent Municipality. The payments are due in several instalments during the year.

8.6.2 What is IVIE?

IVIE (*Imposta sul Valore degli Immobili situati all'Estero*) is a property tax applicable to real estate properties (i.e.: buildings, building-areas and agricultural lands) located abroad.

The taxable person is an individual tax resident in Italy:

- who owns the property right;
- who owns the real estate right allowing the availability and the utilisation of the property (i.e.: usufruct, use, habitation, perpetual lease, right of common on the building);
- who is the lessee of a real estate, in the case of financial leasing contract (*locazione finanziaria*).

The ordinary tax rate is 0.76%, whereas it is reduced to 0.4% for buildings used as main residence by Italian residents working abroad for the Italian State, for one of its political or administrative or local bodies or for international organisations to whom Italy adheres.

The tax basis is represented, in case of real estate located in European Union countries or States belonging to the European Economic Area, by the cadastral value as determined and revaluated by the tax law of the foreign Country where the property is located.

For other States the tax base is represented by the acquisition cost of the real estate showed in the purchase deed. If this value is not available, the tax basis is the market value of the real estate at the end of the year or, in case of sale, its market value at the end of the holding period.

The tax is proportioned to the percentage of ownership of real rights on the property (i.e.: percentage of ownership) and to the months of ownership in the year (a month in which the ownership lasts at least 15 days is computed in its entirety). IVIE is generally paid by June 16 or, with a surcharge of 0.40% in case of payment by July 16 (i.e.: the same deadline for the payment of the personal income tax).

Do indirect taxes apply to disposal or lease of real estate?

The transfer of the ownership of a real estate is subject to real estate transfer taxes. The most relevant indirect taxes, because generally applicable proportionally with respect to the property value (apart from when the application of fixed amounts is provided), are the following: registration tax (*"imposta di registro"*), mortgage tax (*"imposta ipotecaria"*) and cadastral tax (*"imposta catastale"*). Other minor duties may apply (e.g., stamp tax, *"imposta di bollo"*), but, in such case, they are payable in a fixed nominal amount.

Moreover, disposals made by VAT registered subjects fall in the scope of VAT; therefore, also the application of VAT has to be taken into consideration.

Real estate lease contracts are generally subject to registration tax. In addition, if the landlord is a VAT registered subject, the lease contract falls in the scope of VAT.

8.7.1 What transfer taxes apply to disposal of lands and buildings?

In case of transfer of lands or buildings, registration, mortgage and cadastral taxes are due by the parties which, regardless of the contractual arrangements (such taxes are generally borne by the buyer), are jointly and severally liable vis-à-vis the tax administration.

(i) Registration tax

Registration tax, applicable in the event of transfer of lands or building, may be:

- an amount proportional to the market value of the lands and buildings, with ordinary rate of 9%, reduced to 2% for residential properties to be used by the owners as their main house (apart from some exceptions) and increased to 15% (12% till the end 2015) for agricultural lands purchased by subjects which do not perform agricultural activity; the applicable amount shall not be lower than € 1,000;
- fixed, for an amount of € 200, in principle for transfers subject to VAT.

(ii) Mortgage Tax

The transcription formalities, inscription, renewal, cancellation and annotation carried out in the public registrars of immovable property, as a consequence of a property transfer or of other indefeasible right's transfer, are subject to mortgage tax.

The taxable base of mortgage tax is, in principle, the same used for registration tax purposes. Nevertheless, in the case of contribution of immovable property and liabilities, mortgage tax is calculated on the gross value of lands or buildings: liabilities contributed with the lands and buildings are not relevant in order to determine taxable basis.

Mortgage Tax is due in an amount proportional to the market value of lands or buildings, in principle at a 2% rate or at a 3% rate in case of transfer of instrumental real estates by nature (reductions are applied in certain cases) or in a fixed amount, depending on the circumstances. As a general rule, the fixed amount is € 200, and a fixed amount of € 50 is applicable for transfers subject to proportional registration tax.

(iii) Cadastral Tax

Any cadastral registration change, as a consequence of transfers or other indefeasible rights referring to immovable property, is subject to cadastral tax.

The taxable base on which cadastral tax is calculated is the same used for mortgage tax purposes.

Cadastral tax is due at a 1% rate or in a fixed amount, depending on the circumstances. As a general rule, the fixed amount is € 200, and a fixed amount of € 50 is applicable for transfers subject to proportional registration tax¹.

8.7.2 Is VAT applicable to disposal of real estate?

As a general rule, the transfer of a real estate property represents ‘transfer of goods’ for VAT purposes. If made by a VAT registered subject it falls in the scope of VAT, generally as a “VAT exempt” operation (i.e., operation subject to VAT obligations, but with “zero” VAT in invoice), which generally reduces the capacity to recover VAT input.

Anyhow, the Italian VAT system provides the following exceptions (for which proportional VAT applies):

- transfer executed, within five years from the end of construction or refurbishment works, by builders or subjects that have performed building refurbishment works;
- upon seller’s option to apply VAT (for residential buildings - other than those related to social housing programs - only builders can make the option);
- transfer of buildable lands (conversely, the transfers of agricultural lands are always out of the scope of VAT).

In case of seller’s option, VAT is applied by the buyer (if he qualifies as a VAT subject) according to the reverse charge mechanism.

For real estate transfers subject to VAT, the tax generally applies with the following rates:

- the 22% ordinary rate;

- the 4% and 10% soft rates, applicable in particular cases (e.g. residential buildings having certain requirements; buildings subject to certain restructuring works, etc.).

For purchases of residential buildings with stated requirements from the builders, executed during year 2016, individuals can deduct 50% of the VAT paid from their income tax, in equal instalments over a ten-year period.

In these circumstances, RETTs (i.e. registration, mortgage and cadastral taxes) are due in a fixed amount (€ 200 each), except for instrumental buildings which are normally subject to proportional mortgage and cadastral taxes.

Conversely, for real estate transfers which are VAT exempt, RETTs apply as follow:

- for residential buildings, registration tax is due at the rates of 9% or 2% (as the case may be), while mortgage and cadastral taxes are due in a fixed amount (€ 50 each);
- for instrumental buildings, registration tax is due in a fixed amount (€ 200), while mortgage and cadastral taxes are due with rates, respectively, of 3% and 1%.

The transfer of agricultural lands, as previously mentioned, is out of the scope of VAT and is consequently subject to registration tax at the rate of 15% (12% till the end 2015), while cadastral tax and mortgage tax are due in a fixed amount of € 50 each.

8.7.3 Is the lease of lands and buildings subject to indirect taxes?

The lease of lands and buildings is subject to registration tax which applies with rate ranging from 0.5% to 2% or in a fixed amount (€ 200).

Stamp duty applies as well, but the amount is not considerable.

The different framework of taxation (fix or proportional) varies depending on:

- the kind of building (commercial or residential property);
- the nature of lessor and lessee.

The taxable base is equal to the total amount of the rents referred to the whole lease period. The corresponding tax may be paid in one settlement when the lease agreement is registered, or once a year.

In case of the financial lease of buildings, registration tax is due in fix amount of € 200 (it is subject to VAT). If the contract is drawn-up in the form of a private deed (i.e., without the involvement of a Notary public) the fixed registration tax is due only in case of “caso d’uso” (i.e. voluntary utilisation of the contract in administrative or judicial proceedings).

Can the tenant secure the purchase in the future of the real estate used?

Law Decree no. 133 dated 12 September 2014 (i.e., the so-called Sblocca-Italia Decree) introduced the “rent to buy” agreement in the Italian legislation which is a new type of contract related to real estate properties.

The rent to buy main features are:

- lease of the real estate property to the tenant;
- purchase option on the real estate property granted to the tenant (only), to be exercised within a specified date;
- as per contractual arrangement, part of the rental income paid to the landlord is deemed as advanced payment for the (eventual) real estate purchase.

From a juridical perspective, the rent to buy contract can be split into two different agreements:

- a current lease agreement;
- a future sale and purchase agreement, whose effects are conditioned to the exercise of the purchase option by the tenant.

With regard to the tax regime of the rental payments, they are treated consistently with their contractual qualification:

- the portion which remunerate the property lease is subject to the tax treatment generally applied to rentals;
- the portion concerning to purchase right option is subject to the tax regime of account payments.

In case the tenant exercises the purchase option, the final purchase price is decreased by the part of rentals deemed as an advanced payment, as set out in the rent to buy agreement.

Conversely, if the option is not exercised, the whole or part (as set out in the rent to buy agreement) of the advanced payments incorporated in the rentals are reimbursed to the tenant (except in case of tenant’s breach of other contractual obligations).

Is it possible to verify if the seller is the owner of the real estate and if there are real estate rights on the property?

The necessary investigation activities aimed to verify if the seller is the owner of the real estate or if there are third parties’ rights or guarantees registered on the property are, generally, performed by the Notary Public who requests and obtains a Report from the Land Registry which states (i) the ownership history of the property in the last twenty years and (ii) any existing encumbrances on the property, if any.

The Notary Public verifies the Land Registrar files and extracts the relevant information that is then included in the Report and certified as truthful by the same Notary Public. The request of an updated certificate from the Land Registry is made directly by the Notary Public.

In addition, the Notary Public obtains the following documentation from the Cadastral Office: (i) historical cadastral situation and Cadastral Certificate; (ii) Cadastral maps of the premises and of the land.

Furthermore, it is worth noting that the Notary Public verifies the powers of the signing parties. In particular, the Notary carries out surveys in the Register of Companies in order to check the official information regarding the selling and purchasing companies. Should a resolution of the Administrative Body or the Shareholders’ meeting for authorizing the real estate investment according to the By-Laws of the selling or purchasing company be required, an extract of these minutes, certified by a Notary Public, must be attached to the deed of transfer.

8.10

What issues concerning the real estate property may determine a prejudice to the purchaser?

On the basis of the assumption that the fundamental principle of ownership is acknowledged and granted by Section 42, paragraph 2, of the Italian Constitution, the Italian legal system imposes two relevant categories of restrictions to real estate private ownership:

- limitation for public interest (e.g.: expropriation, requisition, pool, reclamation);
- limitation for private interest (e.g.: relationship with neighbouring owners, distance between structures, third parties’ rights).

For what concerns the first category, which is the most significant, the Italian State has at its disposal instruments of authority for the attainment of ownership.

Section 42, paragraph 3, of the Italian Constitution states that real estate private ownership may - in specific cases expressly provided by law and upon payment of an indemnity to the owner - be expropriated should reasons of general interest occur.

In any case, the expropriation is grounded on two relevant principles provided by the Italian Constitution and by the Italian Civil Code: the basic principle of legality and the provision of a satisfactory indemnity.

With reference to the limitation of private interest, the Italian Civil Code, under Section 832, confirms substantially the constitutional provisions regarding the content of the real estate private ownership stating that the owner has the right to enjoy and dispose of the goods fully and exclusively, within the limits and with observance of the duties set forth by the Italian law provisions. In particular, the above-mentioned Section expressly sets forth that “no one can be deprived in whole or in part of the property that he owns, except in the public interest, legally declared, and on payment of a just indemnity”.

To this regard, the Italian Civil Code sets forth specific provisions ruling the relationships with the neighbourhood and, in particular (i) the emissions of smoke, heat, fumes, noise and vibrations; (ii) the distances between structures, land, walls; (iii) light and views and (iv) the drainage of water from roofs.

In addition, Italian law provisions provide the possibility for the owner of a property to voluntarily grant to third parties specific enjoyment rights connected to the property itself, which in principle remain in force up to the expiry of the relevant validity term notwithstanding any possible change in the ownership.

To this regard, the Italian Civil Code expressly provides for the following real estate enjoyment rights:

- right of common;
- right of emphyteusis;
- usufruct, use and habitation;
- servitude.

The right of common (*diritto di superficie*) consists of the right to build and maintain a construction on the land in favour of others, who acquire the ownership of it. In addition, the owner has the faculty to transfer the ownership of an existing building, separately from the ownership of the land.

If the right of common is constituted for a fixed period of time, at the expiration of the term, such right is extinguished and the owner of the land becomes the owner of the building.

To this regard, please note that the extinguishment of the right of common determines the consequential extinguishment of the real estate rights imposed by the tenant.

The right of emphyteusis (*diritto di enfiteusi*) assigns to the person, in favour of whom it is constituted (the tenant), the same enjoyment right as the owner of the property, save the obligation to improve the land and to pay a periodic rent to the owner. Among the several enjoyments rights set forth by law, the right of emphyteusis is the one less used.

The term of the emphyteusis may be permanent (differently from the usufruct, use and habitation that always have a fixed term) or temporary (in this case, the term cannot be shorter than 20 years).

The tenant has the right to become the owner of the property by means of paying an amount equal to 15 times the annual rent.

In addition, if there are several tenants, the redemption can be carried out by only one of them, but for the entire property. In this case, the redeeming tenant succeeds to the owner's right against the other tenants, subject to a proportional reduction of the rent due by them.

On the other hand, the owner has the faculty to request the reversion of the emphyteutic property if the tenant (i) damages the property or does not perform the obligation to improve it; (ii) is in default of the payment obligation of the rent for two years.

Finally, the emphyteusis is extinguished in the event that the land is entirely destroyed.

The right of usufruct (*diritto di usufrutto*) grants the usufructuary the right to enjoy the property but he must respect its economic destination of use. The usufructuary has the faculty to draw from any utility deriving from the property, within the limits set forth by law, and also has the right to obtain possession of the property, to dispose of it and to even derive profit from the same (*fructus naturales and civiles*).

The term of the right of usufruct must be set and temporary and, in any case, it cannot exceed the usufructuary's life. Should the usufruct be constituted in favour of a legal person, the term cannot exceed a period of 30 years.

The right of use (diritto d'uso) consists of making use of the property and, if such property is productive, of collecting the relevant profit to the extent necessary for the holder of the right and his family's needs.

With regards to the right of habitation (diritto di abitazione), the Italian Civil Code states that the relevant holder has the faculty to inhabit a house within the limits of their own and their family's needs.

Easement (diritto di servitù) consists of a limitation imposed on land for the utility of other land belonging to a different owner. The utility may also be represented by the greater convenience of the dominant land. Easement mainly arises when there is a type of service relation between two lands in force of which the dominant land receives benefit from the limitation of the other land.

Easement may be created on a compulsory basis (obligation to permit the passage of water, crossing streams or roads, compulsory right of way, right of way for electric lines, etc.) or on a voluntary basis (by means of an agreement or by will).

Finally, easement is extinguished when the ownership of the dominant and servant lands is acquired by a sole individual. In addition, easement is also extinguished by prescription if it is not used for a period of 20 years.

8.11

Which are the rights of lien that may be registered on a real estate property?

A typical right of lien is a mortgage, which may be applied on a real estate property or on a minor real estate enjoyment right.

The mortgage gives the creditor the right to expropriate the property used for securing his claim, even against a third person transferee, as well as a right to be preferred in respect of other unsecured creditors at the time of the distribution of the proceeds deriving from the sale of the property.

As long as the mortgage is not enforced, the owner remains the person who has the faculty to enjoy the property. A mortgage is created by means of its registration in the land property register of the place where the property itself is located.

A mortgage may be created following:

- a provision of law ("legal mortgage");
- a judgment ("judicial mortgage");
- a unilateral declaration ("voluntary mortgage").

A mortgage is effective for a period of twenty years from its inscription date. The effects of the inscription cease unless the mortgage is renewed before the expiration of the mentioned time limit.

On the basis of the above, before executing any legal documents, agreements and deeds of transfers involving Italian real estate property, it is strongly recommended to check (also through the help of a Notary Public) the relevant public registers in order to ascertain the absence of mortgages on the property.

In accordance with the Italian Civil Code, the causes of extinguishment of mortgages are:

- deletion of the inscription;
- failure to renew the inscription within the time limit of 20 years;
- extinguishment of the obligation guaranteed by the mortgage;
- destruction of the mortgaged property, within the limits expressly provided by law;
- creditors' waiver of the relevant right;
- expiration of the term within which the mortgage was limited or in the case of occurrence of the condition subsequent;
- decree which transfers the expropriated right to the buyer upon completion of a forced sale and the same orders the deletion of the mortgage.

In addition, as a general rule, it is worth noting that, apart from the mortgage which is the typical right of lien, a real estate property may be subject to further prejudicial inscriptions (i.e.: seizure or attachment of property). Considering that the inscriptions are recorded in the Land Registry, it is advisable to consult this Registry prior to the execution of any agreement relating to the property and, in particular, the deed of transfer.

Which are the main obligations of the seller of a real estate deed of transfer?

The seller's main obligations are:

- i. to provide the property to the buyer;
- ii. to ensure that the buyer acquires the ownership of, or any other right on, the property, if the mentioned acquisition is not finalized immediately when the agreement is signed;
- iii. to guarantee the buyer against eviction and defects of the property.

Which are the most relevant documents relating to a real estate property that should be requested at the time of the investment?

The most relevant documents concerning a real estate property may be classified into two main categories:

- construction and planning permits;
- safety certificate.

In both cases, contents and release conditions of the two certificates are expressly set forth by the Presidential Decree No. 380 issued on June 6, 2001, concerning the law provisions and regulations related to constructions (known as Testo Unico Edilizio).

The construction and planning permits should be obtained from the General Constructions Office ("Sportello Unico") of the Municipality as established by the Testo Unico Edilizio, where the property is located, in accordance with specific provisions stated in the regulations of each Municipality, District or Region. In particular, such permits are expressly requested, not only in the case of a new building construction, but also in the event of changes to be carried out in order to improve an existing property (by way of example: restorations, change of destination of the property, demolition of old property in order to build a new construction, etc.).

As for the safety certificate, the Municipality of the place where the property is located will issue a document which certifies the safeness of the property. In particular, the safety certificate is issued by an expert, after having carried out adequate inspection activities, and it certifies the existence of the conditions listed below, which are necessary to use and inhabit the real estate property:

- safety;
- hygiene;
- healthiness;
- energy saving of the buildings and installed equipment.

The safety certificate has to be requested from the competent Municipality, not only in the case of a new building construction, but also in the event of re-construction of a real estate property. In order to obtain this certificate, it is necessary to file, among others, the following documents:

- application of land and buildings registration of the real estate property;
- written declaration issued by the installing company of the property's equipment attesting their compliance with the applicable law provisions to be provided together with the certificate attesting the performance of the relevant tests.

From a general point of view, it is worth noting that it is advisable to request the delivery of these documents before the completion of a real estate investment in order to check if the property meets the requirements and the expectations of the investing company. To this regard, please note that the Italian Civil Code expressly provides for the seller's obligation to deliver all the documents and certificates pertaining to the ownership and use of the real estate property at the time of the execution of the deed of transfer. Moreover, please note that, in the event of failure to submit the request for such safety certificate to the competent Municipality, the requesting party shall be subject to an administrative sanction ranging from € 77 to € 464.

Furthermore, should the real estate investment operation include the acquisition of a business activity carried out within the purchased property, the buyer should ask the seller to deliver all the documents and information which give evidence of the compliance and fulfilment of any environmental obligation set forth by the Italian law provisions in connection with the relevant business activity.

Among the environmental issues to be checked, specific relevance concerns the non-existence of adverse conditions which may determine a prejudice to the land, air, groundwater or surface water surrounding the property and to human health or the environment in general.

Therefore, prior to the execution of a real estate investment, it is generally advisable to perform an environmental due diligence in relation to the property and to the business activity, if relevant.

This due diligence process should provide the purchaser with a detailed assessment of the historic, current and potential future environmental risks which may arise, by way of example and without limitation, from existing contamination caused by past operations, planned operations, or third party claims for environmental damages.

Basically, the scope of the environmental due diligence is aimed to identify any adverse issue relating to the property or to the business activity in relation to which the buyer should ask for adequate warranties and indemnity obligations, within the deed of transfer or the sale and purchase agreement, in order to be covered against any potential economic prejudice that may be suffered after the completion of the deal.

8.14

Which are the formal requirements in order to obtain the validity of a real estate sale and purchase agreement?

Registration of the deed at the Registration Office

The Notary Public files, exclusively on-line, the deed of transfer and the transcription note with the Registration Office of the place where the real estate property is located.

The main function of the Registration Office is to grant the registration of the deeds and to collect the relevant taxes. The certified date (“data certa”) of the deed of transfer is granted on the date resulting from the notarial deed.

Registration of the deed at the Land Registry and at the Cadastral Office

The Notary Public files the deed of transfer and the transcription note with the Land Registry which delivers a receipt attesting the inscription notice with the registration number usually between 4 and 15 days from the filing date. Please note that, it is mandatory for the Notary Public to file the documents within 30 days from the execution of the deed of transfer and the lack of compliance to such obligation is sanctioned with a fine.

To this regard, it is worth noting that the registration of the deed of transfer at the Land Registry has the purpose of rendering such deed enforceable towards all third parties.

Until a deed has not been registered in the Land Registry, it is only enforceable between the parties thereto. The Italian Land Registry system is based on the principle of continuity of the registrations. This means that the last individual or entity that has registered the deed of transfer in the Land Registry will be considered owner of the property. Should it result from the Land Registry that a third party has registered a claim or a deed in connection with a specific property, the relevant owner will not be able to validly sell the property until said claim or deed is cancelled, being them considered as “prejudicial”.

Registration at the Cadastral Office takes place automatically after registering the deed at the Land Registry. The Notary Public takes care directly of this fulfilment.

8.15

How is the sale and purchase agreement drawn-up?

The definitive deed of transfer (“rogito”) must be drawn up in writing and it must be signed before a Notary Public. Such deed is the legal instrument which determines the actual transfer of the property from the seller to the purchaser.

During the execution of the definitive deed of transfer, the Notary Public usually reads and explains to the parties the relevant sections, providing the buyer and the seller with impartial advice as to all legal aspects arising from the transaction.

The payment due by the buyer typically includes the purchase price, as agreed between the parties, the Notary Public’s fees (calculated as a percentage of the cadastral value of the property as declared in the “rogito”) and taxes arising from the transaction. Pursuant to Law no. 147 issued on December 27, 2013, the buyer shall deposit such amounts in a specific bank account opened by the Notary Public. After the duly execution and registration of the definitive deed of sale and purchase, the Notary Public will transfer the relevant amounts to the seller.

The formalities for registering the change of ownership of the property at the Land Registry are performed by the Notary within 30 days from the date of execution of the definitive deed of transfer.

It is worth noting that, usually, the parties enter into a preliminary agreement, prior to the execution of the definitive deed of transfer before the Notary Public.

The preliminary agreement is a binding contract whereby the parties agree in writing to enter into a future final real estate property deed of transfer. In general, by means of entering into a preliminary agreement, both parties mutually agree to buy and sell a specified property, reserving the faculty to further negotiate the exact terms and conditions of the sale.

According to the provisions of the Italian Civil Code, the preliminary agreement must be drawn up in the same form required by law as the definitive one and therefore it should be executed by a notary deed or a certified private deed. Subject to the above, it is common practice to sign a preliminary agreement without the involvement of the Notary Public in order to identify the main terms and conditions of the sale, agreeing to have only the definitive deed executed in compliance with the law provisions.

Pursuant to Section 2645-bis, paragraph 1, of the Italian Civil Code, should the preliminary agreement be executed through a notarial deed or certified private deed, such agreement must be registered. In addition to the above, the Presidential Decree no. 131 issued on April 26, 1986, as amended by Law Decree No. 296 issued on December 27, 2006, known as the “2007 Financial Bill”, expressly requires the registration of the preliminary agreements entered into starting from July 1, 2007 through an uncertified private deed and executed through a real estate agent. In such case, the real estate agent is considered liable, jointly with the parties, to register the preliminary agreement and pay the relevant tax.

In any case, the registration of the preliminary agreement is recommended since it represents a “booking” of the real estate property as well as a guarantee towards third parties (i.e.: in the case of sale of the same real estate property to different parties, the subject who registers the preliminary agreement in advance is guaranteed).

However, according to Section 2645-bis, paragraph 3, of the Italian Civil Code “the effects of the transcription of the preliminary contract are interrupted and are considered as never occurred if within one year from the date agreed between the parties for the entering into of the definitive contract, and in any case within three years from said transcription, the transcription of the definitive contract or of any other act representing in any case compliance with the preliminary contract is not made”.

What information must be stated in a sale and purchase agreement?

Following the 2007 Financial Bill, when real estate ownership is transferred, the parties involved must provide the Notary Public with the following documents and information:

- terms and conditions of payment of the agreed consideration for the sale and purchase of the real estate;
- mediation (if applicable) of a real estate agent (mentioning the relevant data of the individual or entity involved) and the amount of commission paid;
- energy certification (where requested by Regional Laws or Regulations).

With reference to energy certification, Legislative Decree no. 192 issued on August 19, 2005, as modified by Law Decree no. 63 issued on June 4, 2013, passed, with amendments, into Law no. 90 dated August 3, 2013, concerning the energy efficiency of real estate properties.

Pursuant to such regulation, in the sale and purchase agreement regarding the transfer of real estate properties and in the lease agreements, the parties shall insert a provision according to which they acknowledge the receipt of the energy performance certification (so called “APE” - i.e. “Attestato di prestazione energetica”);

furthermore, the parties shall attach a copy of such certification to the agreement. Should the parties omit to insert and/or attach such acknowledgement, they will be jointly liable and subject to a possible administrative sanction ranging from € 3,000.00 to € 18,000.00. The payment of such sanction does not free the parties from the obligation to deliver or attach the relevant certificate within a maximum of 45 days.

The energy performance certification states the energy performance of the immovable property and provides recommendations for the improvement of its energy efficiency.

The minimum content of the energy performance certification has been identified by the Ministerial Decree dated June 26, 2015 which is entered into force on October 1, 2015.

Such certification is issued by qualified and independent experts under the:

- builder’s responsibility with regard to newly built properties, both in the case of sale and lease. Such certification must be issued prior to the obtainment of the safety certificate [see also § 8.13];
- owner’s responsibility in the event of previously built properties, both in the case of sale and lease.

As for the information relating to the real estate agent, upon the signing of the deed of transfer before the Notary Public, the parties must declare:

- the intervention of a real estate agent, if any, and, this being the case, their identification details;
- the VAT number and tax payer's code of the real estate agent;
- the number of enrolment in the relevant real estate agents' register ;
- the amount of the commission paid to the real estate agent.

Should the real estate agent be not enrolled in the relevant register, the Notary Public shall inform the competent Tax Authority.

In case of omitted, incomplete or false declaration by the parties concerning the information listed above, a penalty - which ranges from € 500 up to € 10,000 - is applicable and the value of the property (declared by the parties within the deed of transfer and according to which the registration duty is calculated) is subject to an assessment by the Tax Authority.

8.17

Which are the legal actions in order to protect real estate ownership in Italy?

In order to protect and enforce the right of ownership, the owner has the faculty to exercise one of the following actions expressly provided by the Italian Civil Code.

- **Replevin Action:** the owner may claim the property from whoever is in possession or holds the same and may continue the action even if that person, following such lawsuit, ceases, autonomously, to possess or hold the property. In such case, the defendant is obliged to recover it for the plaintiff at his own expense or, if not possible, to pay the relevant value and to compensate the damage. If the owner recovers the property directly from the new possessor or holder he is required to return the amount received in place of it to the previous possessor or holder. The Replevin Action is not subject to a time limitation, with exception to the effects of the acquisition of ownership by others due to adverse possession.

- **Actio Negatoria:** the owner can start legal action to obtain the statement of the non-existence of the rights claimed by others concerning the property , when he has good reason to fear prejudice from them. If disturbances or nuisance also occur, the owner can request their discontinuance, as well as compensation for damages.
- **Action for the settlement of boundaries:** when the boundary between two different properties is uncertain, both owners have the right to claim its establishment through a decision provided by a court judgement. In this case, any kind of evidence is allowed. In the absence of other elements, the competent court shall comply with the boundary defined by the cadastral maps.
- **Action for the placement of boundary markers:** if boundary markers between contiguous lands are missing or have become unrecognizable, the owners have the right to request that they be put in place or replaced at common expense.

8.18

Are there special or regulated investment vehicles to invest in real estate?

Alternatives to the direct acquisition of Italian real estate properties and to the acquisition of interest in real estate companies owning such properties, may be the investment in Italian regulated vehicles operating professionally in the Italian real estate industry. For this purpose, the following three main alternative investments can be evaluated:

- investment into units of an Italian Real Estate Investment Fund (*Fondo Comune di Investimento Immobiliare*);
- investment into shares of an Italian Investment Company with fixed capital (*SICAF - Società di Investimento a Capitale Fisso*);
- investment into shares of an Italian Listed Real Estate Investments Company (*SIIQ - Società di Investimento Immobiliare Quotata*).

8.18.1 What is the Real Estate Investment Fund (REIF)?

The Italian REIF is a closed-end investment fund, established in contractual form and managed by an Italian asset management company (the SGR), in compliance with the fund's regulations and the other applicable laws. The SGR is a regulated Italian joint-stock company which, under authorisation by the Bank of Italy (i.e.: the Italian regulatory authority), can manage one or more investment funds. As contractual fund, the REIF does not have legal personality.

Further to the implementation of the Alternative Investment Fund Managers Directive (Directive no. 2011/61/UE, enforced in Italy by Legislative Decree no. 44 dated March 4, 2014 as integrated by Decree of Ministry of Economy and Finance no. 30 dated 5 March, 2015), the “investment fund” is defined as an “OICR” (i.e.: undertaking for the collective investment of savings) representing an autonomous pool of assets, divided into units, set up and managed by an authorised professional manager. In its turn, the OICR is defined as “*an undertaking established to provide the financial service of investment and management of savings on a collective basis, whose assets are raised among a plurality of investors by means of issuing or offer of shares and units, managed on a collective basis in the interests of the investors and autonomously from the same, and invested in financial instruments, receivables, interest and other transferable and immovable assets, in accordance with a predetermined investment strategy*”. The investment fund’s assets are separated from those of the SGR, of the other funds managed by the same and of each unitholder. In addition, the investment fund is solely liable, with its own assets, for the obligations incurred on its behalf by the SGR.

The REIF, in particular, is an investment fund that invests at least 2/3 (two-thirds) of its assets (reduced to 51% under certain conditions) in real estate properties, real estate rights and participations in real estate companies.

The REIF is not subject to corporate income taxes (IRES and IRAP). Conversely, the REIF profit is taxed upon distribution, with the application of a 26% withholding tax (reductions and exemption are provided in certain circumstances). It does not have access to EU Directives. However, because defined as “liable” to income tax (expressly, since 2012), it should benefit from the application of treaties against double taxation.

According to the current legal and tax framework (enforced by Law Decree no. 78 dated May 31, 2010, converted by Law no. 122 dated July 30, 2010, as amended by Law Decree no. 70 dated May 13, 2011, converted by Law no. 106 dated July 12, 2011), two categories of REIFs are provided, with different tax regimes applicable to investors:

- “institutional” REIFs;
- “non-institutional” REIFs.

Institutional REIFs are those entirely owned by any (or a combination) of the following subjects (defined as “institutional” investors): a) States or public entities/bodies; b) Undertakings for collective investment of savings (i.e.: Italian OICR, “*Organismi d’Investimento Collettivo del Risparmio*”); c) Pension funds and compulsory and complementary pension schemes; d) Insurance companies (only regarding investments made to cover “technical reserves”); e) Banks and financial intermediaries subject to “prudential supervision”; f) Entities indicated in letters a) to e), established in Countries included in the Italian “White List” (i.e.: list of countries which have with Italy an agreement for the exchange of tax information which allows the identification of the beneficial owner of income), subject to “prudential supervision”, where provided; g) Italian non-profits/charities; h) Corporate and contractual SPVs owned for more than 50% by any of the entities listed under the previous letters a) to g) and established in Italy or in Countries included in the White List.

With regard to SPVs under letter h), the institutional investors’ control may be also indirect (in this case, the percentage of interest must be properly adjusted - e.g. an indirect control on 60% of a Lux SPV through 90% of a UK entity, equates to 54% actual control on the Lux SPV).

Non-institutional REIFs are those also owned by other kinds of subjects.

For institutional REIFs, profits (also those included in liquidation/redemption proceeds) are taxed upon distribution, by way of a 26% withholding tax at source. The withholding tax does not apply in case of distributions to Italian pension funds and Italian OICRs (which include investment funds, such as: UCITSs and AIFs). Such withholding tax is an advanced payment in case the units relate to a business activity performed by the owner (e.g.: corporate investor), since distributions are subject to ordinary business income taxation.

In case of REIF profits distributed to foreign investors, which are resident in countries with a treaty against double taxation with Italy, the more favourable tax regime set out in the treaty may apply (for this purpose, reference is made to provisions concerning “interest”, unless the relevant treaty expressly regulates the income from real estate funds). For this purpose, subjective, objective and documentary requirements have to be fulfilled (e.g., “beneficial owner” status, tax certificate issued by the tax authority of the country of residence of the beneficial owner, valid until March 31 of the following year).

Furthermore, exemption from withholding tax applies if REIF profits are distributed to the following subjects:

- Foreign pension funds and foreign OICRs (e.g.: investment funds), established in countries included in the White List;
- International bodies established on the basis of International treaties that are valid in Italy (e.g. CECA, EURATOM, etc.);
- Central banks or entities that manage the State's official reserves (e.g. sovereign funds).

The exemption does not apply in case of indirect investment, unless the entitled foreign subject invests through a 100% owned SPV (for pension and investment funds, similarly to the latter, the SPV – in general a company or partnership - has to be resident in a White List country).

For “non-institutional” REIFs, investors are divided into the following three categories: a) institutional investors, regardless of their interest in the REIF; b) other investors, holding no more than 5% of the REIF units; c) “qualified” investors, holding more than 5% of the REIF units (for this purpose, REIF units are computed at the end of the REIF's FY and also units owned indirectly, by means of controlled companies/bodies/subjects, are taken into account).

For institutional investors and other investors, REIF profits are taxed upon distribution or are tax exempt, according to the same rules applicable to institutional REIFs (see above).

For “qualified” investors, the following rules apply:

- For resident investors, the profit accrued by the REIF in its annual report is attributed to the investor (according to the ownership percentage), regardless of its actual distribution, and must be included in the annual taxable income which is subject to tax according to their tax regime/status. The distribution of the REIF profit already attributed to the investors (and taxed in their hands) is consequently not subject to withholding tax. REIF's accrued income (loss) attributed to the investors increases (decreases) the REIF units' tax cost; REIF profit distribution decreases such tax cost.
- For non-resident investors, instead, REIF profit remains taxable upon distribution by way of withholding tax, according to the same rules applicable to “institutional” REIFs (treaty relieves are applicable as well).

With regard to taxation of capital gains from disposal of REIF units, a special provision is stated for qualified unit-holding in non-institutional REIFs held by non-institutional investors. In particular, this unit-holding is treated as relevant interest in resident partnerships, taxable according to the tax regime/status of the investor (PEX or favourable treaty regimes may apply). In the other circumstances, capital gains are taxable according to the rules ordinarily stated for units of OICRs (which are generally assimilated to bonds and similar securities).

As far as VAT is concerned, transactions carried out by the REIF generally follow the same rules applicable to other VAT subjects. The VAT obligations related to the REIF's transactions are administered by the SGR which, according to the law, is the ‘taxable person’ for goods (assets) and services that are acquired/provided on behalf of the REIFs managed (albeit separately from the SGR's own VAT obligations).

Acquisitions of real estate properties, carried out by the SGR on behalf of the REIF, as well as maintenance expenses on such properties, entitle the SGR to deduct the input-VAT incurred, if any. This implies that the SGR could be in a large VAT credit position. With specific reference to real estate acquisitions/maintenance expenses performed on behalf of the REIF, the law provides a special refund procedure, generally faster than the ordinary one.

A particular VAT regime is provided for contributions in kind to the REIF of a plurality of buildings, leased for their majority: they are treated as ongoing business concern contributions, so falling out of the scope of VAT, and transfer taxes are due in a fixed nominal amount.

With regard to instrumental building transfers, the 4% aggregated mortgage-cadastral tax is reduced to 2% for transactions involving REIFs (either as purchasers, or as sellers).

Capital gains realised upon contribution to the REIF of real estate properties and real estate rights may be subject to a 20% substitute tax in the hands of the contributing entity.

Some further benefits with regard to indirect taxes are provided for the REIF. In addition, in certain circumstances the liquidation of the REIF can benefit from favourable tax regimes.

8.18.2 What is the SICAF and is it relevant for real estate investments?

The SICAF (*Società di Investimento a Capitale Fisso*) is a new regulated investment vehicle introduced in 2014, by Legislative Decree no. 44 dated March 4, 2014, with the implementation of the AIFMD.

From a legal-regulatory perspective, the SICAF is a closed-end OICR (i.e.: undertaking for collective investment of savings), set up in the form of company limited by shares with fixed equity and with registered office and head office in Italy. In nutshell, it is a closed-end corporate fund.

The SICAF has as a sole objective the collective investment of the savings raised through the issuing of its shares (and other similar financial instruments) and as such, similarly to the REIF, the savings invested have to be collected from a plurality of investors, managed in the interest, but independently, from such investors and in compliance with stated and pre-defined investment policies.

The setting-up of a SICAF requires the prior authorisation of the Bank of Italy. The SICAF is subject to the regulation and supervision of the same; as a result, the SICAF is obliged to fulfil several requirements (e.g. minimum amount of equity, compliance with the “regulatory capital”, professional requirements in the hands of the management) and the respect of regulatory provisions aimed, *inter alia*, to limit and diversify investment risks.

The SICAF may have an internal management or, alternatively, the asset management function may be entrusted to an external professional manager (e.g. SGR or another AIFM). However, as the SICAF is a share company, the investors may influence the management of the OICR, more than investors in the REIF do, by way of exercising the typical administrative shareholder’s rights (e.g. appointment of the directors and other internal bodies).

As closed-end OICR, the SICAF can invest in real estate. It qualifies as real estate SICAF if it invests at least 2/3 of its total value/assets (reduced to 51% under certain conditions) in real estate properties, real estate property rights, shareholdings in real estate companies, Italian or foreign REIFs. In such a case, the favourable tax regime applicable to the Italian REIF (in terms of direct taxes exemption, indirect taxes discounts and tax exemption or reduction for certain foreign investors - see the relative section above) applies also to the SICAF, with the sole exception that the SICAF is liable to IRAP (the Regional Tax on Production). For this purpose, the taxable base is substantially determined by the difference between commission revenues and commission expenses (other increasing/decreasing adjustments are provided by law), while the real estate proceeds are in any case not subject to IRAP.

8.18.3 Have REITs been introduced in Italy?

The Italian SIIQ (*Società di Investimento Immobiliare Quotata*) is the Italian version of the better known REIT in force in other Countries. The SIIQ is not a new type of entity, but rather an optional special civil and tax regime; in practice, an ordinary stock corporation, which mainly carries out real estate rental activity, may make an irrevocable election to be governed by such SIIQ civil and tax law regime.

The SIIQ regime was introduced, with effects from June 30, 2007, by Law No. 296, dated December 27, 2006, and was subsequently amended several times, most recently by Law Decree No. 133, dated 12th September 2014 (converted into Law No. 164, dated November 11, 2014).

The SIIQ regime is applicable to companies limited by shares (“S.p.A.s”), which are Italian resident for tax purposes, provided that the following conditions are met:

- the shares of the company - whose “prevalent” business is real estate lease activity - shall be listed on the regulated stock exchanges of the European Union or the European Economic Area Member States, included in the so-called Italian White List;
- no shareholder shall hold, directly or indirectly, more than 60% of the voting rights in the general meeting, and no shareholder shall participate to more than 60% in the company’s profits;
- at least 25% of the shares in the SIIQ shall be held as free float, this meaning that at least 25% of the SIIQ shares have to be owned, at the time of the option for the SIIQ status, by those shareholders that do not hold, directly or indirectly, more than 2% of the voting rights in the general meeting and no more than 2% of participation in the company’s profits.

To this end, the lease business is deemed “prevalent” if “asset test” and “profit test” are satisfied, as in the following:

- “asset test”: at least 80% of the assets are real estate properties addressed to the rental activity (held in property or pursuant to other real estate rights), shareholdings in other SIIQs, SIINQs (i.e.: non-listed SIIQs - see below) and (pursuant to Law Decree No. 133/2014) units into certain REIFs booked as fixed assets (with particular reference to interests into REIFs, they are relevant only if the REIF is invested for at least 80% in real estate properties and rights for the rental activity, interest in real estate companies and other REIFs carrying on the rental activity, SIIQs and SIINQs).
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- “profit test”: at least 80% of the SIIQ’s annual revenues derive from the aforementioned assets. For the purpose of this test, SIIQ and SIINQ profits that are paid out as dividends from the exempt business (thus deriving from the real estate rental activities) and qualified REIF profit distributions are included. According to Law Decree No. 133/2014, also capital gains derived from disposal of real estate properties and real estate rights related to the exempt rental business can be taken into account for the purpose of the profit test.

From a tax point of view, income deriving from the lease business and from the investments in related SIIQs is exempt from the corporate income taxes in the hands of the SIIQ. Conversely, dividends distributed to shareholders out from the exempt profit are subject to a 26% withholding tax at source (for non-Italian investors, resident in Countries which have entered into a Treaty against the double taxation with Italy, the withholding tax rate may be reduced under the terms and conditions of the relevant Treaty). Withholding tax is not applied to distributions to: SIIQs, Italian pension funds, Italian OICRs (i.e.: undertakings for collective investment of savings: e.g, UCITSs, REIFs, SICAVs), private wealth management subject to substitute tax regime.

SIIQs are required to annually distribute at least 70% of the net profit derived from the exempt business available for distribution. In practice, the distribution requirement applies to the net profit derived from: profits from the real estate rental business, profits from shareholdings in related SIIQs and SIINQs and (following Law Decree No. 133/2014) profits distributed by qualified REIFs. Pursuant to Law Decree No. 133/2014, also capital gains, net of related losses, earned from disposal of the previously mentioned assets related to the exempt business and generating exempt profits are subject to compulsory distribution for at least 50% of their amount, over the two years following their earning.

SIIQ status may also be extended to Italian resident non-listed companies performing the lease business as their “prevalent” business (i.e.: SIINQs), provided that at least 95% of the voting rights and participation in profits are held by a SIIQ, or jointly with other SIIQs.

The SIIQ regime is applicable upon irrevocable option, which has to be exercised before the beginning of the tax period from which the SIIQ status is intended to be applied.

From 2010 this regime can also be applied by Italian permanent establishments (PE) of companies resident in the countries of the European Union or of the European Economic Area included in the Italian White List, to the extent that such PEs carry out real estate lease activity as their prevalent business. In this case, the PE is subject to a 26% substitute tax (the rate was originally stated in 20%; however, since this substitute tax replaces the dividend withholding tax, which does not apply to repatriations by the permanent establishment to its foreign head office, starting from July 1, 2014 the applicable rate should increase from 20% to 26%, as per dividend distributions to SIIQ shareholders).

The option for the special regime implies the realisation, at fair market value, of real estate properties owned and used for the lease business activity. The net capital gain may be subject to a 20% substitute tax - payable up to 5 years -, rather than to the ordinary corporate income taxes.

Capital gains realised upon contribution to the SIIQ of real estate properties may be subject to a 20% substitute tax in the hands of the contributing entity, provided that the assets are addressed to the lease business and held by the SIIQ for at least three years.

Some further benefits with regard to indirect taxes are provided for the SIIQ and, pursuant to Law Decree No. 133/2014, to facilitate the transfer to SIIQs of the real estate properties held by REIFs in liquidation.



9 *Other taxes*

9.1	Are there any other taxes levied by the Central Tax Authorities?	<i>p. 93</i>
.....		
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Are there any other taxes levied by the Central Tax Authorities?

There are other minor taxes to take into account for the establishment of a business in Italy. Among these, the most relevant for incorporation/reorganization or financing purposes are registration tax and substitute tax applied to medium/long term loans.

9.1.1 What is the scope of application of registration tax?

Registration tax applies to deeds mandatorily subject to registration as well as deeds voluntarily submitted for registration. It is generally, therefore, applied on written deeds and on a number of verbal deeds.

9.1.2 Are there any taxes applicable to medium/long term loans?

Yes, medium/long term loans can elect the application of a substitute tax equal to 0.25% of the total amount of the loan requested, instead of the levying of stamp duty, government license tax and registration, mortgage and cadastral taxes. The exercising of the option shall be written in the financial agreement. The lender entity is liable to pay this tax, even if generally it is charged to the borrower, and withheld by the lender at the time the loan is granted.

If a loan is granted in order to buy house, a substitute tax of 2% is applied. A substitute tax equal to 0.25% of the loan requested to purchase, to build and renovate houses applies, instead of the 2% tax rate, if a declaration stating that the immovable property is the main house of residence of the owner, is presented.

9.1.3 Other minor taxes?

The main minor taxes follow.

Government license tax

Government license tax is connected to the issuing of deeds or measures stated by law. In fact such deeds or measures only become effective following the payment of government license tax. Examples of other documents subject to government license tax are accounting registers, licenses, documents referring to coinage metals.

Stamp duty tax

Stamp duty tax applies on deeds or documents included in the list attached to the Presidential Decree No. 642/72 (e.g.: cheques, bills of exchange, statements of account, petitions, appeals, certificates, books of accounts, deeds of transfer of quotas, etc.). According to the kind of deed, Stamp duty tax is due at the moment the deed is written-up or when the deed is used.

The stamp duty tax rate may be:

- a fixed amount (up to € 300);
- an amount proportional to the value of the deed or document (up to 12%).

The stamp duty tax is paid by intermediaries or, if certain circumstances are met, through the direct payment of the taxpayer for all the documents subject to stamp duty and issued each year.

Entertainment tax

Activities subjected to entertainment tax are:

- musical events (with the exception of vocal concerts and dance entertainment, also in discos and in dance halls if the live music played has a duration of less than 50% of the total opening hours of the business to the public);
- utilization of any kind of token-operated machine, with coins or cards for entertainment purposes;
- amusement arcades, card rooms, bookmakers' shops and other places in which gambling activity is carried out.

The taxable base is the total amount of the entrance tickets sold to the public to assist the entertainment.

The entity entitled to assess and levy entertainment tax in Italy is the Italian Society of Authors and Editors (*SIAE- Società Italiana Autori ed Editori*).

9.2

Are there any taxes levied by local Authorities?

Yes, there are other taxes levied by local Authorities, such as:

- IUC Service Tax (composed of IMU, TASI and TARI taxes), for further details please see §.8.6.1;
- Tax on advertising;
- Tax on the occupation of public spaces and areas.



10 *Withholding taxes on cross-border payments of dividends, interest and royalties*

10.1 What are the applicable withholding taxes on cross-border payments? *p. 95*

10.2 Is there any anti-abuse or conduit rule applicable to cross-border payments? *p. 97*

10.3 What procedural requirements are in force in order to apply reduced withholding tax rates or other special regimes? *p. 97*

What are the applicable withholding taxes on cross-border payments?

There is no uniform withholding tax applying to cross-border payments in general, but different withholding taxes apply to different payments.

10.1.1 What are the withholding tax rates applicable to dividends?

Ordinary dividends paid by Italian entities to foreign persons are generally subject to a 26% withholding tax rate with the following main exceptions.

- i. **Partial refund.** Under certain circumstances (mainly: taxation of the dividend in the foreign country), a portion of the 26% withholding tax may be claimed back (up to 11/26 of the amount, effectively reducing the taxation to 15%).
- ii. **Income tax treaties.** Applicable income tax treaties may reduce the withholding tax rates. Most treaties provide for a dividend withholding tax ranging between 5% and 15%.
- iii. **Payments to EU corporate entities.** Dividends paid to corporations resident in the EU (plus Norway and Iceland) are subject to WHT at a 1.375% rate (i.e. the 27.5% corporate income tax rate over 5% of the dividend). As the corporate income tax rate from 2017 on will be lowered from 27.5% to 24%, this dividend WHT rate will be correspondingly lowered from 1.375% to 1.2%.
- iv. **EU Parent-Subsidiary directive.** Under the Parent-Subsidiary EU directive, dividend payments may be fully exempt from withholding tax if all of the following conditions are met:
 - a. the parent company takes one of the forms listed in the directive;
 - b. the parent company is resident of an EU country for tax purposes and, under the terms of an income tax treaty concluded with a third state, is not considered to be resident for tax purposes outside the EU;
 - c. the parent company is subject to one of the taxes listed in the directive without the possibility of an option or of being exempt;
 - d. the parent company has a 12-month holding period of, at least, a 10% direct interest in the capital of the subsidiary.

If any distributions were to be made before the holding period elapses, the dividends may be subject to the applicable withholding tax. In this instance, a refund claim may be filed by the foreign parent company after the 12-month period elapses; however, the refund procedure is very time consuming and it may exceed 4-5 years.

A similar regime is available for dividends paid to Swiss parent companies (a 25% minimum holding for a 2-year minimum period is required).

10.1.2 What are the withholding tax rates applicable to interest payments?

Interest on regular loans paid by Italian entities to foreign lenders is generally subject to a 26% rate.

There is a domestic withholding tax exemption for interest on “medium-long term” loans paid by Italian enterprises to certain foreign lenders. Foreign lenders qualifying for the exemption are: (i) banks established in an EU member State; (ii) entities listed under article 2, paragraph 5, numbers 4 to 23, of the EU directive 2013/36/UE; (iii) insurance companies established in an EU member State and therein authorized to carry out their activities; (iv) supervised institutional investors established in a “white list” State. The exemption is granted upon condition that the loan does not breach regulatory requirements. So far, no guidelines have been issued by the Italian tax authorities in this respect.

Finally, Italian tax law provides for a general exemption for interest paid by an Italian bank (or an Italian permanent establishment of a foreign bank) to a foreign bank (or a foreign permanent establishment of an Italian bank).

Applicable income tax treaties may reduce the withholding tax rates. Most treaties provide for a withholding tax on interest payments of 10% (e.g.: the Netherlands, Luxembourg or the U.S. income tax treaties). Very few treaties provide for no withholding tax on interest payments (e.g.: Hungary).

Interest paid to certain European companies will not be subject to withholding tax based on the Interest-Royalty EU Directive, if the following conditions are met:

- i. the Italian resident company paying the interest (or the company whose Italian permanent establishment pays the interest) takes one of the forms listed in the directive and is subject to Italian corporate income tax (with reference to the Italian permanent establishment in the case of foreign companies) without the possibility of an option or of being exempt;
- ii. the foreign company receiving the interest (or the company whose permanent establishment, located in a EU country, receives the interest) is resident of a EU country for tax purposes and, under the terms of an income tax treaty concluded with a third state, is not considered to be resident for tax purposes outside the EU;

- iii. the foreign company receiving the interest (or the company whose permanent establishment, located in a EU country, receives the interest) takes one of the forms listed in the directive and is subject to one of the taxes listed in the directive or to a tax which is identical or substantially similar and which is imposed after the date of the entry into force of the directive in addition to, or in place of, the listed taxes, without the possibility of an option or of being exempt;
- iv. the company or the permanent establishment receiving the interest beneficially owns the interest received;
- v. the interest is subject to one of the taxes listed in the directive;
- vi. a 12-month holding period of a minimum of 25% of voting rights direct interest is met.

The following circumstances are covered:

- the company paying the interest (or the permanent establishment of a EU company, located in a EU country, which pays the interest) holds for a 12-month period a minimum of 25% voting rights direct interest in the company receiving the interest (or in the EU company whose permanent establishment, located in a EU country, receives the interest);
- the company receiving the interest (or the permanent establishment of a EU company, located in a EU country, which receives the interest) holds for a 12-month period a minimum of 25% voting rights direct interest in the company paying the interest (or in the EU company whose permanent establishment, located in a EU country, pays the interest);
- a company, eligible for the application of the directive under the above conditions, holds for a 12-month period a minimum of 25% voting rights direct interest in both the company paying the interest (or in the EU company whose permanent establishment, located in a EU country, pays the interest) and the company receiving the interest (or in the EU company whose permanent establishment, located in a EU country, receives the interest).

A similar regime is available for interest paid to Swiss companies (a 25% minimum holding for a 2-year minimum period is required).

In a number of circumstances, mainly dependent on the nature of the instrument and the profile of the investor, interest may be exempt from withholding tax under domestic provisions. Exemption may be available for Government bonds and bonds issued by, *inter alia*, listed corporations, banks or notes issued by securitization vehicles if certain conditions are met, including the residence of the recipient in a white listed jurisdiction and the beneficial ownership of the interest.

Additional exemptions apply to interest paid to foreign companies on deposit accounts and current accounts with banks and post offices. Interest on deposit and current accounts, other than deposit accounts and current accounts with banks and post offices, is exempt for investors residing in white list Countries, while non-white list investors are subject to a 26% withholding tax.

For bond interest, not qualifying for specific exemptions, the applicable withholding tax rate is 26%. A reduced 12.5% withholding tax rate applies to interest deriving from Italian Government bonds.

10.1.3 What are the withholding tax rates applicable to royalty payments?

In most circumstances, royalties paid by Italian companies or individuals to non-resident beneficiaries are subject to a withholding tax rate of 22.5% (i.e.: 30% of 75% of gross royalties). Applicable income tax treaties may reduce this domestic rate (however, the treaty withholding tax would apply on the full gross amount).

When applicable, the Interest-Royalty EU Directive reduces the withholding tax to zero. As noted above, certain conditions will need to be met, including a 25% direct voting interest (meaning, direct sisters or parent-subsidiary relationship). A similar regime is available for royalties paid to Swiss companies (a 25% minimum holding for a 2-year minimum period is required).

10.1.4 Are there any other types of withholding tax?

Other Italian sourced income may be subject to Italian withholding tax, depending on specific circumstances.

For instance, salaries and wages are generally subject to withholding tax at rates varying in accordance with the amount of income earned.

Income from professions and other independent work is subject to a withholding tax rate of 30% although an exemption is generally provided by treaties when the individual receiving such payments has no fixed base regularly available to him in Italy. For resident individuals, such kind of income is subject to 20% withholding tax.

Income from most swaps and payments under certain security lending arrangements are exempt when paid to a resident in a white listed country; otherwise a 26% (or 12.5% in limited cases) withholding tax applies, possibly reduced by applicable income tax treaties. Income and other proceeds from derivative contracts concluded on a regulated stock exchange are exempt for non-residents.

Note that branch profits are freely redeployed to their head office without taxation.

Is there any anti-abuse or conduit rule applicable to cross-border payments?

The Italian tax authorities may try to challenge a transaction or the role of an intermediary on the basis of a number of domestic provisions, including a general anti-abuse provision, specific anti-abuse provisions under the Parent-Subsidiary EU Directive and Interest-Royalty EU Directive or anti-conduit provisions. Additionally, the Italian Supreme Court developed an even wider “abuse of law” doctrine, which was recently codified in a legislative provision. The determination of whether a transaction may be seen as abusive under any of these provisions depends on the particular facts of each specific case. If any of these rules were to be applied to cross-border payments, full domestic withholding tax rates would be applied, with additional application of penalties and interest where appropriate.

What procedural requirements are in force in order to apply reduced withholding tax rates or other special regimes?

Domestic exemption or withholding tax reductions generally require specific procedures to be followed. Generally, specific forms or statements need to be submitted to the withholding agent or financial intermediary. In most cases, a certificate of tax residency abroad needs to be provided.



11 *Transfer Pricing*

11.1	What are the rules governing transfer pricing in Italy?	<i>p. 99</i>	11.7	Is a pan-European benchmark analysis acceptable by Italian Tax Authorities or are local comparables required?	<i>p. 101</i>
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11.6	Are there specific transfer pricing penalties?	<i>p. 100</i>			

What are the rules governing transfer pricing in Italy?

Statutory rules on transfer pricing are set out in Article 9 and Article 110 of the Italian Income Tax Code (Testo Unico delle Imposte sui Redditi, TUIR).

Article 110, paragraph 7, states that components of the income statement of an enterprise derived from operations with non-resident corporations that have direct or indirect control, that are subsidiaries or are fellow affiliates should be valued on the basis of normal value. Possible reductions in taxable income as a result of the normal value rule are allowed only on the basis of mutual agreement procedures or the European Union Arbitration Convention.

Article 9, paragraph 3, states that “normal value” means the average price or consideration paid for goods and services of the same or similar type, carried out at market conditions and at the same level of business and at the same time and place. Reference should be made where possible to the price list of the provider of goods or services or in its absence to the price lists issued by the Chamber of Commerce and to professional tariffs, taking into account usual discounts.

Transfer pricing documentation rules were established by law in 2010 and provide a penalty protection regime for companies which comply with specific requirements concerning Italian documentation, so they can escape the normal Italian regime of tax geared penalties insofar as any tax adjustment relates to a transfer pricing matter.

Does the Italian Tax Authority approach follow OECD Guidelines?

Italian transfer pricing legislation generally complies with the 2010 OECD Guidelines, which are referred to in the Italian Transfer Pricing Documentation law and regulations.

What are the transfer pricing documentation requirements?

Documentation required by the Regulation dated 29 September 2010 for penalty protection purposes is based on the EU Code of Conduct on Transfer Pricing Documentation Requirements and uses the concept of master file and local file. This Regulation explicitly refers to the 2010 OECD Guidelines. As at March 2016 no changes have been made to reflect the report issued in October 2016 on Action 13 of the OECD's project on Base Erosion and Profit Shifting (BEPS) and the recommendations contained there on the master file and local file.

In order to obtain penalty protection relief certain requirements must be met (e.g., documentation must be prepared in the Italian language, the specific form provided by the Regulation has to be used, etc.). This means that transfer pricing documentation similarly based on the master file and local file concept may not be eligible for penalty protection purposes if it does not follow all the Regulation requirements.

Italian-based groups with non-Italian subsidiaries must produce both a master file and a local file; Italian subsidiaries need to produce only a local file. A sub-group master file is required for Italian sub-holding companies and for Italian branches of foreign holding and sub-holding companies. Documentation needs to be signed on each page by the company's legal representative.

The 2016 Finance Act, included provisions introducing country-by-country (CbC) reporting for Italian-parented multinational enterprises with consolidated annualized group revenue of EUR 750 million or more in line with Action 13 of the BEPS project. In certain circumstances Italian subsidiaries also may be required to file a CbC report. This will be the case if the subsidiary's foreign parent meets the consolidated accounts threshold but is resident in a country that has not introduced CbC reporting or if the country in question either does not have an agreement at the competent authority level with Italy for the exchange of CbC reports or effectively fails to exchange such information. The CbC report must be filed annually and must include specific financial data covering gross profit, taxes paid and accrued, and other key indicators of effective economic activities by territory. Failure to provide the report or providing an incorrect or incomplete report will give rise to penalties ranging from EUR 10,000 to EUR 50,000.

Further details covering the effective date, specific content, filing requirements and methods, and other procedural terms and conditions to be followed in relation to CbC report were still awaited at March 2016.

11.3.1 Is there any specific deadline for filing the transfer pricing documentation?

Documentation is not obligatory but, if prepared in the required form, it allows taxpayers to claim penalty protection in the event of a transfer pricing adjustment. Taxpayers have to declare in the annual tax return that they possess such documentation in order to benefit from the penalty protection regime. The deadline for filing the tax return is the end of the ninth month following year-end.

The documentation must be produced within 10 days of a tax auditor request. Taxpayers have a further seven days to produce additional supplementary information if requested. If the taxpayer is unable to meet these deadlines, penalty protection is lost.

11.3.2 Is there any specific transfer pricing information requested in the Tax Return?

Taxpayers have to declare in the tax return that they possess transfer pricing documentation in order to benefit from the penalty protection regime. Total values for income and for costs deriving from intercompany transactions must also be stated. Furthermore, it is necessary to specify if:

- the taxpayer is controlled, directly or indirectly, by a foreign company;
- the taxpayer controls directly or indirectly a foreign company;
- the taxpayer and a foreign company are both controlled (directly or indirectly) by the same company.

11.3.3 Does the documentation need to be in Italian?

Transfer pricing documentation (local file and master file) must be prepared in Italian, although the annexes may be in English. In certain cases Italian sub-holding companies may prepare the master file in English.

11.3.4 How often is it necessary to prepare the documentation?

Transfer pricing documentation must be prepared each year and on a company-by-company basis, although large companies may produce divisional files. Small and medium companies (defined as those with a turnover of less than EUR 50 million) need only update the benchmark analysis every three years, provided there has been no significant change in the business and that the economic analysis is based on publicly available databases. All the other sections of the report have to be updated each year even for small and medium enterprises.

What are the transfer pricing methodologies commonly accepted by the Italian Tax Authorities?

The OECD methods are acceptable. These include Comparable Uncontrolled Price, Resale Price Method, Cost Plus Method, Transactional Net Margin Method, Transactional Profit Split Method. In 2014, an exception was introduced for companies operating in online advertising and related ancillary services, which cannot use cost-based methods unless an advance pricing agreement (APA) has been concluded with the Italian tax authorities on this.

Are profit methods acceptable in Italy?

Profit methods are acceptable. The Regulation dated 29 September 2010 favours traditional transaction based methods by specifically requiring a justification for the use of profit based methods in the event that traditional methods, particularly CUP, are potentially available. In practice the TNMM tends to be the most frequently used method.

Are there specific transfer pricing penalties?

There are no specific transfer pricing penalties, and therefore ordinary administrative penalties apply in the case of a transfer pricing adjustment, unless compliant transfer pricing documentation has been prepared. Rates range from 90% to 180% of the amount of tax underpaid. Special rules apply where similar violations occur over a number of fiscal years. Penalties may be reduced below these levels in the event of spontaneous disclosure or early settlement. Once a taxpayer loses an appeal in court, the penalties are applied in full. For regional tax purposes (IRAP) only penalties do not apply for adjustments relating to fiscal years from 2008 to 2012.

Is a pan-European benchmark analysis acceptable by Italian Tax Authorities or are local comparables required?

The Italian tax authorities pay close attention to benchmarks during tax audits and tend to look for specific comparable companies located in and operating on the market where the tested party operates.

Although the EU Code of Conduct advises Member States to evaluate domestic or non-domestic comparables with respect to the specific facts and circumstances of the case, in practice benchmark analyses with no or few Italian companies are often challenged, and recent OECD statements add support to the Italian tax authority position. Hence, it is advisable to perform either a local comparable search or, at least, to prepare a pan-European search which includes Italian comparable companies. While the tax authorities tend to accept pan regional benchmark analyses as sufficient for penalty protection purposes, they may use their existence as a justification for performing a completely new search of their own.

11.8

Are Advanced Pricing Agreements (APA) available in Italy?

The “International Ruling” was introduced by Article 8 of Law Decree No. 269 of 30 September 2003 and, with the approval of the Legislative Decree No. 147 of 13 September 2015, have been formalized in article 31-ter of Presidential Decree No. 600 of 29 September 1973 titled “Accordi preventivi per le imprese con attività internazionale”. This advance ruling procedure is unilateral, although since 2010 it has also been possible to obtain bilateral or multilateral APAs where there is a double taxation agreement between Italy and the counterparty state or states with provisions based on Article 25, paragraph 3 of the OECD Model Tax Convention.

The procedure is available for companies engaged in “international activity” and can cover transfer pricing issues, allocation of profit to permanent establishments, dividends, the existence or otherwise of an Italian permanent establishment, royalties and interest. In 2015 the scope of the APA has been extended to cover also the entry and exit values of assets and liabilities on change of corporate tax residence.

11.8.1 What is the timeframe provided in an APA procedure?

The Revenue Authority has thirty days in which to accept or reject an application. However, in the event the application is not complete, the taxpayer will be given a period of not less than thirty days to provide any missing elements. Once the application has been accepted, the relevant Ruling Office will invite the taxpayer to a meeting in order to verify the accuracy of the information provided, to request further information and agree on the next steps for subsequent meetings and negotiations. The full procedure should be completed within 180 days from the filing of the request, but this term is not mandatory.

Based on the statistics issued by the Italian Tax Authorities on 23 March 2013 covering the period 2004 to 2012, the average time to conclude an APA appeared to be approximately 16 months. However, the practice of splitting one APA application into a number of separate APAs which can be agreed consecutively may have the effect of shortening the overall recorded time scale.

The agreement remains in force for five years (increased in 2015 from three years) starting from the tax period in which it is concluded and can then subsequently be renewed. From 2015 rollback provisions are available making it possible to extend the agreement to cover the period between filing the application and signature of the agreement or as agreed by the competent authorities for bilateral or multilateral APAs.

A taxpayer wishing to renew an APA must make an application at least 90 days prior to the expiry of the existing agreement. The Revenue Agency must approve or decline such a request at least 15 days before the existing APA expires.

11.8.2 What are the effects of an APA?

For transfer pricing purposes the procedure concludes with an agreement in which the criteria and methods of calculation of the “normal value” of transactions are defined.

During the time the APA is in force the Ruling Office will conduct audits to verify there have been no changes with regard to the underlying facts and circumstances, and that the terms of the APA have been respected. The local audit teams cannot examine or assess the company in respect of matters covered by the APA. If the facts and circumstances change, the APA may need to be amended, and will cease to have effect if an agreement cannot be reached.

Does local law accept corresponding adjustments?

In the context of the EU Arbitration Convention tax refunds are possible and are regulated by the Italian law ratifying the Arbitration Convention.

There is some uncertainty about the position of tax refunds for corresponding adjustments resulting from the mutual agreement procedure (“MAP”) under a bilateral tax treaty. This is due to the lack of specific legal provisions and the reservation made by Italy regarding paragraph 2 of Art. 25 of the Model Tax Convention. Together with certain other countries, Italy considers that the implementation of reliefs and refunds under MAP ought to be limited by the time limits prescribed by domestic law.

Are patent box regimes available in Italy?

The 2015 Finance Act, effective 1 January 2015, introduced a Patent Box regime, which allows taxpayers to partially exempt income derived from qualifying intangible assets. The general exemption is 50%, but the percentage is limited to 30% for 2015 and 40% for 2016. Qualifying intangible assets include software protected by copyright, patents, know-how such as processes, formulas, industrial, commercial, or scientific information, trademarks, designs and models that are potentially capable of legal protection. Although the rules are based on the OECD BEPS nexus approach, the range of assets for which the exemption has been made available is greater than those in the report issued in October 2015 of the BEPS project and is likely to be restricted in the future. The income that can benefit from the tax exemption is in proportion to the ratio of qualifying expenditure to total expenditure incurred to develop the assets.

How are Permanent Establishments taxed?

Legislative Decree No. 147 of 14 September 2015 enacted significant changes with regard to the taxation of permanent establishments.

The Decree aligns the Italian tax rules for profit attribution to permanent establishments (PEs) with the Authorized OECD Approach (AOA) – set out in the “2010 Report on the attribution of profits to Permanent Establishments”. The rules have now been formalized in a revised Article 152 of the Italian Income Tax Code, and a PE should be treated as a functionally separate and independent entity for the purpose of determining its business profits. The revised Article 152 also requires “free capital” (“fondo di dotazione”) to be attributed to the PE based on OECD principles.

Furthermore, a PE is now required to prepare financial statements according to the accounting principles that would have been adopted by Italian resident entities carrying out a similar business.

A new optional branch exemption regime has been introduced, allowing Italian entities to exempt from Italian taxation branch income and losses arising outside Italy, instead of applying the worldwide taxation principle. This option must be exercised at the time the branch is incorporated with effect from that fiscal year. Existing branches may also exercise this option. Restrictions are in place for PEs with pre-existing losses.



12 Accounting and tax compliance obligations

12.1 What are the accounting obligations of an Italian corporation or an Italian branch? *p. 104*

12.2 For how many years is it necessary to keep accounting records archived? *p. 104*

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12.11 May tax liabilities be offset against tax credits? *p. 108*

What are the accounting obligations of an Italian corporation or an Italian branch?

According to Italian Law (both the Civil Code and Tax Law), all Italian companies and Italian branches of foreign enterprises are required to keep the following accounting books:

- i. journal book;
- ii. inventory book (whereby the breakdown of the annual balance sheets date have to be reported);
- iii. VAT registers (please see § 6.9 for further details);
- iv. general ledger book;
- v. register of fixed assets;
- vi. goods-in-stock book.

Books from (i) to (iii) and (v) and (vi) have to be progressively numbered with reference to the tax period in which they are initialized.

The goods-in-stock book is mandatory for those companies/branches which, for two consecutive tax periods, have accrued revenues exceeding € 5,164,568 and represented final stock values exceeding € 1,032,914. The obligation to set up and maintain the goods-in-stock book starts from the second tax period following the above two periods: e.g. if both thresholds are exceeded in 2013 and 2014, the obligation starts in 2016.

The above books and records must be timely updated. The deadline is 60 days from the moment in which facts and circumstances generating the accounting entries take place.

Companies are also required to maintain copies of all the business related documents sent and received.

For how many years is it necessary to keep accounting records archived?

Pursuant to the Italian Civil Code, the accounting books and related documents must be kept for ten years. For tax purposes, the same documentation must be kept until the expiry of the tax assessment terms (please see § 13.1) or (if longer) the moment in which pending tax assessments are definitively settled.

Is it possible to have the accounting function outsourced outside Italy?

It is possible to have the accounting function outsourced outside Italy. All the accounting records, must, in any case, be kept in compliance with Italian Law.

Moreover, in order to guarantee the availability of information in case of request, the electronic accountings records should be available and auditable in Italy by means of an on-line computer access to the mainframe accounting system located abroad.

Is it possible to archive accounting records outside Italy?

Although it is possible to have accountancy processed abroad (e.g.: a service center outside Italy), hard copies of accounting records must be kept in Italy.

As a result of the above, it is advisable to have:

- the annual print-outs of the accounting books kept in Italy;
- the documents (e.g.: invoices) shipped to Italy on a periodical basis.

In the case of accounting records archived in electronic format (please see § 12.5) it is possible to have the place of storage outside of Italy, but the Country of storage must have in place legal instruments related to mutual assistance with the Italian Republic.

Also in this case it is a requirement that the accountings records archived electronically should be available and auditable in Italy by means of an on-line computer access.

Is it possible to archive accounting records in an electronic format?

The accounting records can be temporarily kept in electronic format. Complete printouts are mandatory within the end of the third month following the due date of the filing of the income tax return relevant to the tax period which they refer to. Still, in the event of a Tax Audit, the company must be able to promptly provide the Tax Authorities with the printout of those books and records.

The Italian Law also provides for the faculty of setting up a completely electronic archive (i.e.: no printouts required, no hardcopies of the business related documents sent and received). Specific conditions and fulfilments are required to validly elect such archiving method (please see also § 6.12), i.e. communication of the implementation of the e-archiving process by filling of the specific box of the Corporate Income Tax (IRES) Return.

12.6

Are Italian companies required to draw up annual Statutory Financial Statements?

Italian Companies are required to draw up annual Statutory Financial Statements (both stand-alone and consolidated accounts). The rules disciplining the mentioned financial statements are set forth in the Italian Civil Code (compliant with 2013/34/UE Directive) and in the set of Italian GAAP's.

Pursuant to the Law, the Statutory Financial Statements (both stand-alone and consolidated accounts) are made up of (i) the Profit & Loss account, (ii) the Assets and Liabilities account, (iii) the Cash Flow Statement and (iv) Explanatory Notes. The sub (iii) is mandatory for the Statutory Financial Statements related to the financial year starting from January 1, 2016.

The law provides for the mandatory format of the documents sub (i) and (ii) and the minimal content of the Cash Flow Statement sub (iii) and Explanatory Notes sub (iv).

Effective from the financial year as at December 31, 2014, the stand-alone Statutory Financial Statements drawn up in Italian GAAP must be filed in XBRL (eXtensible Business Reporting Language) format.

As for consolidated Statutory Financial Statements, XBRL format is required only with reference to the Profit & Loss account and Assets and Liabilities schemes.

As for stand-alone Statutory Financial Statements drawn up in IFRS, XBRL format is not required.

The Board of Directors must also draw up a Management Report which accompanies the Financial Statements. The law provides for the minimal content of this report.

Smaller Companies are allowed to draw up Statutory Financial Statements (sub (iii) the Cash Flow Statement is not required) adopting a simplified format.

Smaller companies are those meeting the following parameters:

(i) total book value of the assets does not exceed € 4,400,000 (ii) total turnover does not exceed € 8,800,000 and (iii) average number of employees does not exceed 50. The simplified format is not applicable when, for the first period or, then, for more than two consecutive tax periods, two of the above thresholds are exceeded.

Micro Companies are allowed to draw up Statutory Financial Statements adopting a simplified format set forth for the Smaller Companies. Micro companies are those meeting the following parameters:

(i) total book value of the assets does not exceed € 175,000; (ii) total turnover does not exceed € 350,000 and (iii) average number of employees does not exceed 5.

The simplified format is not applicable when, for the first period or, then, for more than two consecutive tax periods, two of the above thresholds are exceeded.

Pursuant to the Law, Statutory Financial Statements for Micro Companies are applicable to the financial year starting from January 1, 2016.

As for Consolidated Financial Statements, the law provides for some exceptions. Italian Holding companies are exempted from the obligation of drawing up Consolidated Financial Statements when, for two consecutive tax periods, at least two of the following parameters are not exceeded: (i) the total aggregated book value of the assets does not exceed € 17,500,000; (ii) total turnover does not exceed € 35,000,000 and (iii) average number of employees does not exceed 250. The parameters sub (i) and sub (ii) are respectively increased to € 20,000,000 and € 40,000,000 related to the financial year starting from January 1, 2016.

Such exemption is not applicable for Italian Holding company or one of the subsidiaries issued listed securities. For financial year starting from January 1, 2016, the exemption is not applicable to the Italian Holding company or one of the subsidiaries meets the definition the public-interest entity as set forth by article 16 of the Legislative Decree n. 39/2010.

Italian Holding companies are not obliged to draw-up Consolidated Financial Statements if they hold only companies which individually and globally are not relevant to the fair representation of the Group results.

From the financial year starting from January 1, 2016, the draw-up of Consolidated Financial Statements is not required in case the Italian Holding companies hold exclusively companies of which consolidation can be avoided as set forth by the article 28 of Legislative Decree no. 127/1991:

- the effective exercise of the rights of the Italian Holding company is subject to substantial and long-term restrictions;
- in exceptional cases, the Italian Holding company cannot get timely, or without undue expenses, the necessary information;
- shares or quota are held exclusively for the subsequent sale.

Italian Sub-holding companies are exempted from the obligation of drawing up Consolidated Financial Statements if the following conditions are met:

- Italian Sub-holding companies are directly or indirectly held by E.U. companies;
- E.U. companies drawing up Consolidated Financial Statements. This last must be audited;
- the Italian Sub-Holding companies did not issue listed securities negotiated on Italian or European regulated market trading;
- the drawing up of Consolidated Financial Statements is not required at least six months before the end of the financial year by the shareholders of Italian Sub-holding companies representing at least five per cent of the capital;

This last condition is not relevant if the EU companies hold over ninety-five per cent of the shares or quotas of the Italian Sub-holding companies.

With reference to the Italian branches, the drawn of (i) the Profit & Loss account and (ii) the Assets and Liabilities account, is mandatory for tax purposes as set forth in the Italian Tax Code. Such obligation is applicable to the following tax period in progress as at October 7, 2015.

Can Italian companies adopt IFRS accounting?

IFRS have entered into force in Italy. Stock listed companies, companies issuing listed securities and financial institutions (banks and other financial intermediaries) are required to adopt IFRS, in place of the Italian GAAP and the Civil Code rules for both their stand-alone and consolidated Financial Statements.

With exception to Smaller and Micro Companies (see above § 12.6 for the definition of Smaller and Micro Companies), other companies are allowed (on a voluntary basis) to adopt IFRS.

What is the deadline for drawing up Statutory Financial Statements?

Italian Companies are required to approve the Statutory Financial Statements within 120 days after the closing year end. The approval pertains to the Shareholders' meeting. The by-laws of the company may set a longer term, albeit it cannot exceed 180 days from the closing year end. The longer term can be elected upon occurrence of specific circumstances specifically set forth in the by-laws itself or in the case of the obligation to draw up the consolidated statutory financial statements.

Within 30 days from the actual approval by the Shareholders' meeting, the Statutory Financial Statements, as well as the Consolidated Financial Statements, must be filed with the Register of Companies. Documents filed with the Register of Companies are publicly available.

Which tax returns must be filed by taxpayers and which are the relevant deadlines?

The following are the main tax returns that must be filed annually by Italian companies and branches of foreign enterprises:

- i. Corporate Income Tax (IRES) Return;
- ii. Regional Production Tax (IRAP) Return;
- iii. VAT Return;
- iv. List of transactions for VAT purposes (“Spesometro”);
- v. Certification of Taxable Income (Certificazione Unica - CU);
- vi. Withholding Tax Agent Returns;
- vii. Consolidated Corporate Income Tax Return (CNM);
- viii. Country-by-country (CbC) reporting.

Companies having their tax period coinciding with the calendar year file the returns sub (i), (ii) and (iii) with the Tax Authority by means of a single form, the so-called Modello Unico (Unified Tax Return) within September 30 of the following year.

Companies not having their tax period coinciding with the calendar year file the returns sub (i) and (ii) within 9 months from the end of the fiscal year whilst the VAT Return is filed separately September 30 of the following year.

From FY 2017, the VAT return has to be filed separately within the end of February of the following year end.

The Consolidated Corporate Income Tax Return is filed by the holding companies that elected for tax consolidation with their Italian Subsidiaries (please refer to § 3.18). The said yearly return must be filed within the same deadline provided for the Modello Unico (within 9 months from the end of the tax period year).

The list of transaction for VAT purposes (“Spesometro”) has to be filed by Companies within April 10 (taxpayers with monthly VAT payments) or April 20 (taxpayers with quarterly VAT payments) of the following year end.

Country-by-country (CbC) reporting has to be filed annually. For further detail please refer to § 11.3.

Companies acting as Withholding Tax Agent have to file the Certification of Income (CU) attesting employees’ income, self-employees’ income and other incomes within March 7 of the following year end.

Similarly information of CU return are included in two different Withholding Tax Agent Returns: the so called “770 Semplificato” form aimed at declaring the employees, self-employed and sales agents related withholdings (for both tax and social security purposes), and the so called “770 Ordinario” form for all the other kinds of withholdings (on dividends, interest, etc.).

The deadline for filing the 770 *Semplificato* and 770 *Ordinario* forms is July 31 of the following year end.

Further fulfilments (i.e. income, expenses, other positive/negative items of income related to transactions with tax haven countries, Intrastat returns) may be required to Companies on the basis of the type of operation performed.

All the above returns must be electronically filed with the Tax Authorities. The electronic filing can be performed either by the taxpayer itself or by means of a qualified intermediary (Tax firms).

12.10

When are corporate taxes and withholding taxes due for payment?

For Corporate Income Tax and Regional Production Tax purposes, the law provides for both advance payments and settlement payments.

The Income Tax advance payments (both IRES and IRAP) are equal to the net tax payables for the previous tax period and are due for payment during the same tax period which they refer to (so called “historical method”). Advance payment is split in two instalments: (i) the first instalment is equal to 40% of the overall advance payment due and is due for payment within the 16th day of the sixth month following the previous tax period closing date; (ii) the second instalment is equal to 60% of the overall advance payment due and is due for payment within the end of the 11th month following the previous tax period closing date.

Settlement payments are due within the 16th day of the sixth month following the tax period closing date which they refer to.

Settlement payments and first instalment of advance payments can be performed in monthly instalments (not exceeding 6 months). Interests are applicable (presently 0.4% per month).

Taxpayers are allowed to reduce the advance payments, when they expect the overall amount of income tax due for the tax period (which the advance instalments refer to) will be lower than the one computed according to the “historical method” illustrated above. The self-reduction faculty at hand, should, however be carefully evaluated as any underpayment (in the event that actual taxes due are higher than the forecasted ones) might result in the application of penalties for late payment.

Withholding taxes must be paid monthly within the 16th day of the month following the one in which the withholdings were withheld.

12.11

May tax liabilities be offset against tax credits?

Tax credits and tax liabilities regarding the same tax may be offset without the F24 form.

The offsetting of payables and receivables resulting from a tax return and regarding different taxes is accepted in the respect of specific rules:

- the offsetting is allowed in the F24 form only;
- the filing of the F24 form must be carried out electronically by using the Entratel service in specific cases;
- if the total amount of the tax credit to be offset during the fiscal year, exceeds € 5,000.00 a filing of tax return is required before offsetting (rule applicable for VAT credit only). Such tax credit can be used in offsetting from the sixteen day following the month in which the tax return is filed;
- if the total amount of the tax credit to be offset during the fiscal year, exceeds € 15,000.00 the tax return related to the fiscal year requires the issuance of the conformity mark;
- the total amount of tax credits offset during the fiscal year cannot exceed the threshold of € 700,000.00;
- at the time in which the tax credit is offset, there should not be outstanding tax bills for an amount exceeding €1,500.00.

The tax receivable that is requested as a refund cannot be used for off-setting tax payables.

Companies belonging to the same group are also allowed to perform a intragroup transfer of Corporate Income tax receivables. If the transfer exceeds the threshold of €15,000.00 a conformity mark must be applied to both tax returns of transferring and receiving companies.



13 Tax audit, tax assessment and tax penalties regime

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What is the Statute of limitations in Italy?

Statute of Limitation applicable starting from the tax period in progress at December 31, 2016

Tax Assessment (for both Income Taxes and VAT purpose) can be notified within December 31 of the fifth year following the one in which the relevant Tax return is filed. E.g.: tax year 2016; filing of the tax return in 2017; Tax Assessment expiry term on December 31, 2022.

The Statute of limitation can be extended by two years in the case of omitted filing of the return

In the case of the filing of an amended tax return pursuant to the self-curing procedure (see § 13.11 below), the aforesaid expiry terms shall run from the date of the amendment itself (E.g.: tax year 2016; filing of the tax return in 2017; filing of the amended tax return in 2018; Tax assessment expiry term on December 31, 2023).

Statute of limitation applicable for previous tax periods

Tax Assessment (for both Income Taxes and VAT purpose) can be notified within December 31 of the fourth year following the one in which the relevant Tax return is filed. E.g.: tax year 2015; filing of the tax return in 2016; Tax Assessment expiry term on December 31, 2020. The Statute of limitation can be extended as follows:

- i. in the case of omitted filing of the return, the above term is extended by one year;
- ii. in the case of tax fraud, reported within the ordinary Statute of limitations above, the term is doubled (E.g.: tax year 2015; filing of the tax return in 2016; Tax assessment expiry term on December 31, 2024).

In the case of the filing of an amended tax return pursuant to the self-curing procedure (see § 13.11 below), the aforesaid expiry terms shall run from the date of the amendment itself (E.g.: tax year 2015; filing of the tax return in 2016; filing of the amended tax return in 2017; Tax assessment expiry term on December 31, 2021).

Are there specific rules regulating the frequency of tax audits?

The Italian Law provides general guidelines regarding the frequency of the tax audit. In principle, the so called “big taxpayers” (i.e., taxpayers whose annual turnover exceed € 100 million) should be tax audited within the year following the one in which the tax return has been filed.

The Tax authorities usually select the taxpayers to be audited on the basis of their risk profile.

Similar selection guidelines are provided for those companies whose annual turnover ranges between € 5.16 million and € 100 million.

The Operative Guidelines on Tax audits for 2014 - Circular letter no. 25/E issued by the Tax Authority on August 6, 2014 - identify some tax risk areas; e.g.: (i) aggressive tax planning schemes (ii) deduction of costs incurred with suppliers resident in black-list countries (iii) existence of CFC (iv) situations whereby taxpayers claim for refund.

The Italian Tax Law also provides for special Tax control procedures for those enterprises whose total turnover does not exceed € 7.5 million (so-called “*Studi di Settore*”).

These last procedures are based on standardized (on a statistical basis) economic models of the different business fields and are aimed at assessing whether or not a specific subject’s taxable income is in line with its own standard model.

The procedure is computer based. The software is provided and regularly updated by the Tax Authority and operates on data which refer to the economic situation of the Taxpayer (location of the business, number of employees, etc.).

When a Taxpayer’s taxable income results are not in line with the standard model, the Taxpayer is more likely to be subject to a Tax Audit.

How are Tax Audits carried out?

13.3.1 Automatic tax controls

The Italian law provides for two kinds of automatic controls:

- automatic tax controls (so-called “*Liquidazioni automatiche*” ex art. 36-bis Presidential Decree no. 600/1973 for direct taxes and ex art. 54-bis of Presidential Decree no. 633/1972 for VAT).
The controls in question aim at verifying the exactness of the figures declared in the tax returns, without entering into the merits. The Tax Authority implements automatic tax settlement for all the tax returns filed by the taxpayers / withholding agents, by the beginning of the year following the one in which the tax return is filed and by means of specific and automatic procedures.

The Tax Authority, after having implemented the “*Liquidazioni automatiche*” from which the reported data results to be different from those resulting from the control (e.g. calculation mistakes; deductions higher than those due), provides the taxpayer with a notification (so called “*avviso bonario*”).

- formal tax controls (so-called “*Controlli formali*” ex art. 36-ter Presidential Decree no. 600/1973).
These controls focus on checking specific data indicated in the tax return. The Tax Authority implements formal tax controls on taxpayers selected on the basis of the risk analysis, by December 31 of the second year following the one in which the tax return is filed.

In this case before providing the Taxpayer with a formal notification, the Tax Authority will request to be provided with clarifications or specific documents by the Taxpayer in question. In the event that the “*Controllo formale*” finds discrepancies (e.g. declared deductions not owed to the taxpayer), the Tax Authority will proceed to issue the “*avviso bonario*”.

13.3.2 Tax audit

Tax Audits can be carried out either by a special branch of the Finance Police (*Guardia di Finanza*) or by inspectors of the Tax Authority (*Agenzia delle Entrate*).

A Tax Audit can take place at the Taxpayer’s premises as well as by the Tax Authority.

In the course of the audit performed at the Taxpayer’s business premises, Tax Auditors will deal directly with the Management of the company (in particular with the legal representative and the proxyholders appointed by the legal representative) and they can request to have access to any relevant information and documentation (books, records, invoices, letters, etc.).

When the audit is carried out by the Tax Authority, books, records and any other documentation deemed necessary by the Tax Auditors to complete the audit have to be submitted by the Tax Auditors’ Office.

13.4

What powers do the Tax Authorities have during a Tax Audit?

In the course of a Tax Audit, Tax Auditors can:

- enter and search the Taxpayer’s premises. Some documents (e.g., the ones locked in drawers or cabinets) can be accessed only upon the Taxpayer’s consent. In the event that the Taxpayer does not consent, the search can be continued by the Tax Inspectors only on the basis of a written authorization by the Public prosecutor.

A Public prosecutor’s order is also necessary in the event that the search is carried out in personal residences;

- convene Taxpayers or their legal representative in order to gather the relevant information related to the assessment;
- ask Taxpayers to produce or submit any such documentation which is deemed relevant for the purposes of the Audit. Tax Inspectors are entitled to hold such documentation in their original form in their Office for a maximum period of 60 days from the day of receipt. With reference to Transfer Pricing documentation, for penalty protection application, the taxpayer must provide the Tax Auditors with such documentation within 10 days from the request;
- send Taxpayers questionnaires in order to gather information. The Taxpayers are required to return the questionnaires to the Tax Authority completed and duly signed;
- request copies or extracts of documentation filed with the Public Notary or any other functionary.

It is worth pointing out that if the Taxpayer refuses to produce the requested

documentation or an explicit statement that the documentation does not exist and/or cannot be retrieved by the Taxpayer, this implies that those same documents cannot be used for the benefit of the Taxpayer's defense in the event of a litigation before the Tax Court.

13.5

How long may Tax Audits last?

The Italian law provides that Tax Auditors can stay at the Taxpayer's premises for no longer than 60 working days (30 days of ordinary term + 30 days extension).

At the end of the tax audit, a tax audit report is issued whereby the challenges that the tax auditors believe should be brought against the taxpayer are illustrated. Tax Auditors must take note of the observations and requests made by the Taxpayer during the same tax audit.

13.6

What kind of deed is issued following:

- **Tax Audits?**

At the end of their audit, the Tax Auditors must draw up the final Tax Audit Report for the Local Tax Office, whereby the outcome of the audit activity must be detailed and the findings (if any) must be illustrated and motivated. A copy of the Report has to be filed with both the Tax Office and the Taxpayer.

It is worth pointing out that the final Tax Audit Report is not an executive act against the Taxpayer and it does not state any request for payment of higher taxes and/or penalties. It is indeed the Tax Assessment notice which brings forth such requests to the Taxpayer.

The Office receiving the final Tax Audit Report examines the findings reported by the Tax Auditors and starts the assessment procedure (see § 13.8 below) which may lead to a Tax Assessment Notice being issued.

- **Automatic tax controls?**

Following both the automatic tax settlement and the formal tax controls (see § 13.3.1) the Tax Authority may issue the "*avviso bonario*".

In the case of automatic tax settlement, the "*avviso bonario*" shows *inter alia* formal mistakes, deductions/tax credit owed to the Taxpayer in an amount which is lesser than the declared one, and delayed tax payments, etc..

The "*avviso bonario*" issued following formal tax controls claims withholding taxes/deductions/detractions and tax credits declared by the Taxpayer but not due.

13.7

Is there any defensive action that the taxpayer can put in place following a:

- **Final Tax Audit report?**

The Tax Assessment Notice can be issued and notified to the Taxpayer only after the expiry of a 60-day term running from the notification of the final Tax Audit Report. The term is in favour of the Taxpayer in order for him to file his comments and observations for the final Tax Audit Report with the Tax Authority. The Tax Authority is in fact required to take the Taxpayers' observations into consideration before issuing the Tax Assessment Notice.

The Taxpayer can opt for the self-curing procedure also after having received the Tax Audit report (see § 13.11 below). Under this procedure, the penalties may be reduced down to 1/5.

- **"Avviso bonario"?**

When the Taxpayer receives an "*avviso bonario*" following automatic tax controls, he can:

- pay the requested amounts within 30 days, benefiting from a reduction of penalties;
- provide the Tax Authority with clarifications within 30 days following the date of receipt, if there is incorrect information declared by the Tax Authority;
- the taxpayer may also ask for the cancellation of the "*avviso bonario*", by means of a particular form (so-called "*istanza di autotutela*", see § 13.9.4 below), in which the Taxpayer clarifies why the *avviso bonario* is unfounded in the merits. In the event of formal mistakes, the Taxpayer may ask for the correction of the tax return.

If the *istanza di autotutela* is accepted by the Tax Authority, the Taxpayer will avoid the issuance of the notice of payment by the Collector Agent. If the *istanza di autotutela* is not accepted by the Tax Authority, the Taxpayer: (i) can raise the case before the Tax Court against the denial of the *istanza di autotutela* by the Tax Authority and (ii) will receive the notice of payment.

13.8

What are the main consequence and features of Tax Assessment Notices

Tax assessment notices (for both Income taxes and VAT) are executive deeds, by which the Tax Authority formally notifies the tax claim to the taxpayer as a result of a tax audit.

To be valid, the Tax Assessment Notice must always be motivated and must indicate:

- the assessed taxable income and the relevant tax rates;
- the excess amount of the taxes requested;
- the office where the information is obtained as well as the tax officer in charge of the procedure;
- the terms and deadline for the payment;
- the court to which the Taxpayer may appeal.

13.9

What can a company do after being provided with a Tax Assessment Notice?

Is it possible to achieve a settlement with the Tax Authorities?

After being provided with a Tax Assessment Notice, a company can:

- i. file an appeal before the Tax Court of First Instance (Commissione Tributaria Provinciale). The appeal must be filed within 60 days from receiving the Notice of Assessment. If a settlement procedure is requested (see point ii below) the term of 60 days to appeal is extended of 90-days;
- ii. apply for a settlement with the Tax Authority (so-called “Accertamento con adesione”; see § 13.9.2);

- iii. pay all the required amounts (tax acquiescence; see § 13.9.1);
- iv. pay the penalties and file an appeal only for the excess amount of the taxes requested (penalty acquiescence; see § 13.9.3).

13.9.1 How does Tax acquiescence work?

The Taxpayer can opt for the Tax acquiescence if:

- he does not propose a tax settlement;
- he does not raise the case before the Tax Court;
- he pays the required amounts within the deadline for raising the case before the Tax Court (i.e. within 60 days from the notification of the Tax Assessment).

In the case of Tax acquiescence, penalties are reduced to 1/3 of their amount.

13.9.2 How does Tax settlement procedure work?

Tax settlement can be applied for Income taxes, VAT and other indirect taxes and allows the Taxpayer to reach the settlement of the dispute in the prejudicial stage (as for judicial settlement see § 28.10).

The advantage of such procedure is the possibility to reduce the excess amount of the taxes requested and to reduce penalties down to 1/3 of the minimum amount.

The tax settlement procedure may be requested by the Tax Authorities or by the Taxpayer, either during the tax audit, or after receiving the tax assessment notice.

Within fifteen days from receiving the above instance, the Tax Authorities should convene the Company. The procedure may lead to (a) the achievement of a tax

settlement (leading to a reduction of the taxes due and of the penalties; see below); or (b) the rejection of the settlement proposal by the Tax Authorities or by the Taxpayer.

Penalties applied in the event of a positive Tax Settlement are reduced down to 1/3 of the minimum amount applicable. The tax settlement is only effective upon the payment of the amounts due pursuant to the tax settlement deed.

The whole Tax Settlement procedure cannot last more than 90 days. The expiry of this term with no agreement between the Taxpayer and the Tax Authorities corresponds to a rejection of the tax settlement proposal.

The Taxpayer can, at any time, leave aside the settlement procedure and appeal directly before the Court.

13.9.3 How does Penalties acquiescence work?

If the Taxpayer opts for Penalties acquiescence:

- he has to pay the required penalties - reduced to 1/3 - within the deadline for raising the case before the Tax Court (i.e. within 60 days from the notification of the Tax Assessment);
- he raises the case before the Tax Court, challenging only the higher taxes emerging from the Tax assessment.

13.9.4 Tax authority's self-protection

In general the Italian tax law provides for the power and the duty of the Tax Authority to cancel - upon the request of the Taxpayer or ex officio - tax claims emerging from unlawful or unfounded deeds (so-called "*autotutela*").

In the event that a Taxpayer receives a Tax deed - unlawful or unfounded in the merits - he can request for its amendment/cancellation, by providing the Tax Authority with a specific form (so-called "*istanza di autotutela*").

The Tax Authority can either accept the request and cancel the tax claim or reject the request, expressly or by silent agreement.

It is worth pointing out that, as Italian law does not provide for any deadline for the request of cancellation of the tax claims by means of "*autotutela*", the latter can be invoked also in the case that the term for raising the case before the Tax Court has expired (i.e. after 60 days from the date of receipt of the Tax Assessment Notice).

13.10

What are the penalties for:

13.10.1 Failure to file a Tax return?

Failure to file a Tax return entails a penalty ranging from 120% to 240% of the taxes due. Minimum penalties (ranging from €250 to €1,000) are applicable if no tax liability is due.

If the omitted Tax return is filed by the deadline for the filing of following FY Tax return and, in any case, before any tax assessment procedure, penalties range from 60% to 120% of the taxes due. Minimum penalties (ranging from €150 to €500) are applicable if no tax liability is due.

The penalties applicable in case no tax liability is due, may be doubled for taxpayers required to keep accounting records.

13.10.2 False Tax return?

False Tax Return (being in the form of a tax return showing either a taxable income lower than the one assessed or a tax credit higher than that owed to the Taxpayer) entails a penalty ranging from 90% to 180% of the higher taxes ultimately due.

13.10.3 Failure to issue or register an invoice?

Failure to issue or register an invoice entails the following penalties:

- if the transaction is subject to VAT, a penalty ranging from 90% to 180% of the relevant VAT;
- if the transaction is not subject to, or exempt from, VAT, a penalty ranging from 5% to 10% of the payment received. Yet, if such transaction is not relevant for income tax purposes, only a penalty ranging from € 250 to € 2,000 is applicable.

13.10.4 Failure to make a payment within the prescribed deadline?

Omitted and/or late payments of taxes of whatever kind and nature entail a penalty equal to 30% of the unpaid / late paid tax. Interests are applicable at the legal yearly rate. Where the payment is performed within 14 days from the ordinary deadline, the applicable penalty is equal to 1%, to be calculated on each day of delay (e.g., payment performed 7 days after the ordinary deadline, applicable penalty equal to 7%). Should the payment be performed within 90 days from the ordinary deadline, the applicable penalty is equal to 15%.

The taxpayer should benefit from penalty reduction according to the self-curing procedure (see § 13.11 below).

13.10.5 Non-compliance with book-keeping obligations?

In this case a penalty ranging from € 1,000 to € 8,000 is applied.

The above mentioned penalty can be reduced by 50% if the irregularity is not relevant for tax assessment purposes, or double in the case of tax evasion exceeding € 50,000.

Still, it is worth pointing out that in the event of serious non-compliances that were proved to obstruct the tax audit (e.g.: impossibility of determining the turnover of the Taxpayer under examination), the Tax Authorities may fully disregard the entire accountancy held by the Taxpayer and assess the taxable income on the basis of economic indicators and presumptions.

13.11

Is it possible to reduce penalties by way of the self-curing procedure?

The self-curing procedure provides for a reduction of any administrative penalty in the case in which the Taxpayer cures any unpaid tax and/or other previously omitted fulfilments, together with the applicable penalties and interests.

The amount of penalties due depends on the amount of time the Taxpayer takes to perform the self-curing procedure. Specifically:

- if the self-curing procedure is performed within 15 days from the ordinary deadline, the penalty due is equal to 0.1% of the minimum amount due, to be calculated on each day of delay (e.g., omitted payment of € 1,000; self-curing procedure performed on the second day following the deadline; applicable penalty of 0.4% equal to € 40). Such self-curing procedure is applicable on omitted payments only;
- if the self-curing procedure is performed within 30 days from the ordinary deadline, the penalty is reduced to 1/10 of the minimum amount due (e.g., for payments performed within 14 days from the ordinary deadline, the penalty due is equal to 0.1%, to be calculated on each day of delay);
- if the self-curing procedure is performed within 90 days from the ordinary deadline, the penalty is reduced to 1/9 of the minimum amount due;
- if the self-curing procedure is performed within the deadline for the filing of the tax return related to the fiscal year in which the infringement has been committed (or within one year from the violation if no periodic tax return is provided for the same violation), the penalty is reduced to 1/8 of the minimum amount due;
- if the self-curing procedure is performed within the deadline for the filing of the tax return related to the fiscal year following the one in which the infringement has been committed (or within two years from the violation if no periodic tax return is provided for the same violation), the penalty is reduced to 1/7 of the minimum amount due;

- if the self-curing procedure is performed after the above mentioned term, the penalty is reduced to 1/6 of the minimum amount due;
- if the self-curing procedure is performed after the Tax Audit Report is issued, the penalty is reduced to 1/5 of the minimum amount due. Note that the Taxpayer is not obliged to self-cure all of the challenges raised by the Tax Auditors. Some exclusions may apply.

In the event of omission to file the tax return, if the taxpayer files the relevant tax return within ninety days from the deadline provided for the filing of the same tax return, the related penalties are reduced to 1/10.

The self-curing procedure cannot be called for if the infringement has been already assessed by the Tax Authorities by means of a Tax Assessment Notice or by a Notice of payment.

13.12

Are criminal penalties applicable?

The main criminal penalties are summarized below:

Fraudulent Tax return. The Taxpayer who, in order to evade corporate taxes or VAT, reports false costs in the Tax return (i.e.: inexistent costs) on false invoices, is punished by imprisonment from one year and six months up to six years.

The Taxpayer who, in order to evade corporate taxes or VAT, - by carrying out simulated operations objectively or subjectively or by means of false documents or other fraudulent means likely to mislead the Tax authority - reports false costs in the Tax return (i.e.: inexistent costs) from fraudulent means as well as false invoices, false tax credits and false withholding taxes, is punished by imprisonment from one year and six months up to six years, if, both,

- the evaded tax amount is over € 30,000, and
- the total income that was not subject to tax (even through the statement of false expenses) is over 5% of the total amount of income reported in the Tax return (or, in any case, higher than € 1.5 million), or the overall amount of the false tax credits or withholding taxes - which reduce the taxes due - is higher than 5% of the same taxes (or, in any case, higher than € 30,000).

False Tax return. Imprisonment from one year up to three years is inflicted on the Taxpayer who reports revenues lower than the actual revenues or fictitious items or expenses in the Tax return if (i) the tax evaded was over € 150,000, and, jointly, (ii) the total income that was not subject to tax was higher than 10% of the overall amount of income items indicated in the Tax return or, in any case, higher than € 3 million.

In this respect, the following violations do not trigger the application of criminal penalties:

- classification/evaluation of costs actually incurred, whose criteria have been properly disclosed in the Statutory Financial Statements (or any other similar document);
- differences between taxpayers' evaluation of costs and Tax authority's one less than 10% of the same costs.

The criminal penalty at stake is not applicable if:

1. the Taxpayer pays the tax liabilities and the related penalties and interests:
 - i. by means of self-curing or
 - ii. by means of the filing of the non-filed tax return within the deadline for filing the tax return of the following tax period and
2. provided that the self-curing or the filing sub (ii) intervened before the Taxpayer has had formal knowledge of access, inspections, tax audits or the opening of any administrative assessment or criminal proceedings.

Failure to file the Tax return. Failure to file corporate income taxes, VAT and withholding taxes returns is punished by imprisonment from one year and six months up to four years, provided that the tax/withholding tax evaded is over € 50,000.

The criminal penalty at stake is not applicable if:

1. the Taxpayer pays the tax liabilities and the related penalties and interests:
 - i. by means of self-curing or
 - ii. by means of the filing of the non-filed tax return within the deadline for filing the tax return of the following tax period and
2. provided that the self-curing or the filing sub (ii) intervened before the Taxpayer has had formal knowledge of access, inspections, tax audits or the opening of any administrative assessment or criminal proceedings.

Issuing of false invoices (i.e.: for services and goods which were not actually rendered and sold). The Taxpayer issuing false invoices is punished with imprisonment from one year and six months up to six years.

Concealment or destruction of accounting documents. The Taxpayer, who conceals or destroys accounting documents in order to obstruct the Assessment activity by the Tax Authorities, is punished by imprisonment from one year and six months up to six years.

Failure to pay withholding taxes. Failure to pay withholding taxes may result in imprisonment from six months up to two years if (i) the amount of taxes, that were withheld and not paid within the deadline of the filing of the relevant withholding tax return, is higher than € 150,000 (ii) the same withholding taxes were officially reported to the beneficiary of the payment (therefore allowing the latter to recover the withholding taxes in his annual income Tax return).

The criminal penalty at stake is not applicable if, before the opening of the first tier hearing, the Taxpayer pays the tax liabilities and the related administrative penalties and interests.

Failure to pay VAT. Failure to pay VAT resulting from the annual VAT return may result in imprisonment from six months up to two years if (i) the unpaid amount exceeds € 250,000 (ii) the failure extends over the established deadline for the advance payment due in relation to the following period (e.g.: VAT due for the 2016 fiscal year has to be paid by December 27, 2016).

The criminal penalty at stake is not applicable if, before the opening of the first tier hearing, the Taxpayer pays the tax liabilities and the related administrative penalties and interests.

Undue off-set. The above-mentioned penalty is applicable also to the Taxpayers who use non-existing or undue tax credits for off-setting the taxes due, for an amount exceeding € 50,000.

The criminal penalty at stake is not applicable if, before the opening of the first tier hearing, the Taxpayer pays the tax liabilities and the related administrative penalties and interests.

Fraudulent actions to avoid tax payments. Imprisonment from six months up to four years is inflicted on the Taxpayer who, to avoid tax payments purposes for an amount exceeding € 50,000, falsely sells his own assets (or assets held by other persons) or carries out different actions with the aim to render the tax payment procedure ineffective.

In the case of avoidance of tax payments exceeding € 200,000, the period of imprisonment ranges from one to six years.

Please note that, in case of challenging of tax abuse, effective from tax assessments served by October 1, 2015, criminal penalties are not applicable.



14 *Acquisitions, mergers, business combinations and reorganizations*

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Can a foreign company merge with an Italian company? How is this process ruled under Italian law?

The rules and regulations concerning cross-border mergers depend on the laws of the country in which the merging companies are located: in particular, in the case of a cross-border merger between an Italian company and a company incorporated under the laws of any EU member states, the regulation set forth by the European Directive No. 2005/56/CE shall apply; on the other hand, in the case of a cross-border merger involving an Italian company and an entity not located in the EU, reference is to be made to the principles set forth by the Italian Statute on Private International Law (Law no. 218/1995).

The European Directive No. 2005/56/CE on cross-border mergers was issued on October 26, 2005 and implemented in Italy by virtue of the Legislative Decree No. 108 of May 30, 2008 (“Legislative Decree No. 108/2008”).

The afore-mentioned legislative decree introduced a specific set of rules to be applied in the case of a merger of a foreign company with an Italian company. In particular, the Legislative Decree No. 108/2008 regulates cross-border mergers between Italian companies and companies of EU member states.

In addition, cross-border mergers between companies located in EU member states are permitted, provided that the following conditions are met (Article 4 of the European Directive No. 2005/56/EC):

- i. cross-border mergers shall only be possible between types of companies which may merge under the national law of the relevant member states, and
- ii. a company taking part in a cross-border merger shall comply with the provisions and formalities of the national law to which it is subject to.

Such conditions have also been included in the Legislative Decree No. 108/2008 under Sections 3 and 4 respectively where it is stated that the “national rules and regulations” concerning mergers shall also apply to cross-border mergers. Consequently, in the case of a cross-border merger, Legislative Decree No. 108/2008 provides for the following steps to be adopted by the Italian company involved:

- i. preparation of common draft terms for the cross-border merger: this document shall be prepared by the management body of the Italian company and shall include, among other information, the following:
 - the form, name and registered office of the merging companies, as well as details of the company which will be formed from the cross-border merger;
 - conditions relating to the right to participate to profits;
 - the potential repercussion of the cross-border merger on the work force;
 - details of the merging companies’ accounts or financial statements which will be used to establish the terms of the cross-border merger;

- ii. filing with the Italian Register of Companies of the common draft terms of cross-border merger: such documents may, otherwise, be published on the companies’ websites. At least 30 days shall elapse between such filing (or the publication on the website) and the shareholders’ meeting resolving upon the merger, unless the shareholders unanimously waive such terms (this step is provided for by Section 2501-ter, paragraphs 3 and 4 of the Italian Civil Code, which is expressly referred to by Legislative Decree No. 108/2008);
- iii. publication on the Italian Official Gazette of the following information: (a) the type, name, registered office and laws of incorporation of each merging company; (b) the number of enrolment and the register of companies in which the merging companies are enrolled with; (c) the arrangements made for the exercise by the creditors and minority shareholders of their respective rights and the address at which complete information on those arrangements may be obtained free of charge;
- iv. drafting of the report from the managing body: the managing body shall prepare a report (Section 2501-quinquies, Italian Civil Code), which shall contain the economical and juridical reasons underlying the merger plan and, in particular the share/quota exchange ratio (“*rapporto di cambio*”). In addition, as provided for by Section 8 of the Legislative Decree No. 108/2008, such a report shall also illustrate the consequences of the cross-border merger with regard to shareholders, creditors and employees;
- v. preparation of the report of independent experts: preparation of the experts’ report regarding the fairness of the share/quota exchange ratio (“*rapporto di cambio*”) (Section 2501-sexies, Italian Civil Code). This report shall be drafted by an external auditor or an audit company and, if the company resulting from the cross-border merger is a joint stock company (“*Società per Azioni*”) or a partnership limited by shares (“*Società in Accomandita per Azioni*”) or an equivalent company of another member state, the experts shall be appointed by the Court of the place in which the Italian company participating in the cross-border merger has its registered office;
- vi. decision on the cross border merger: the shareholders’ meeting of each of the merging companies shall approve the common draft terms of the cross-border merger. The effects of the decision on the cross-border merger may be subject to the condition of prior approval, by a subsequent shareholders’ meeting resolution, of the arrangements decided on with respect to the participation of employees in the company resulting from the cross-border merger;

- vii. request for the issuance of the preliminary certificate for the cross-border merger: pursuant to Section 11 of the Legislative Decree No. 108/2008, the Italian company participating in the cross-border merger shall request to a Notary Public the issuance of a certificate attesting that all formalities required by law for the implementation of the merger have been duly fulfilled. In particular, the certificate shall attest, among others, the correct registration with the Register of Companies of the resolution concerning the cross-border merger and the expiration of the term granted to creditors to oppose the merger;
- viii. execution of the cross-border merger deed: if the company resulting from the cross-border merger is an Italian company, the Notary Public shall draft the cross-border merger deed after having controlled the legality of the cross-border merger;
- ix. issuance of the final merger certificate: if the company resulting from the cross-border merger is an Italian company, the Notary Public shall issue the final merger certificate, once the following checks have been made: (i) companies participating in the cross-border merger have approved the same common draft terms of the cross-border merger; (ii) preliminary certificates of each company involved in the merger procedure have been collected and (iii) if appropriate, that the participation of the employees concerned has been established;
- x. filing with the Register of Companies of the merger deed.

It is worth mentioning that Legislative Decree No. 108/2008 expressly states that if the company resulting from the cross-border merger is located in another EU member state, shareholders of the Italian merging company shall have the right to withdraw from such entity.

Once the cross-border merger procedure has been duly implemented, if the company resulting from the merger is an Italian company, the effectiveness of the merger begins once the cross-border merger deed has been filed with the Register of Companies.

On the other hand, if the company resulting from the cross-border company is a company located in another EU member state, the date of the entry into force of the merger will be provided by the law of that member state.

Regarding the consequences of the cross-border merger, it is to be underlined that:

- i. pursuant to Section 16 of Legislative Decree No. 108/2008 and Section 2504-bis of the Italian Civil Code, by virtue of the merger there is universal succession in all the rights, obligations and relationships (lawsuits included) of the merging entities;
- ii. once the cross-border merger has entered into force, its invalidity cannot be
- iii. declared.

Furthermore, Legislative Decree No. 108/2008 sets forth a simplified procedure for the merger by absorption of a company owned by at least 90% of the corporate capital, and for mergers between wholly-owned companies.

Legislative Decree No. 108/2008 provides, in addition, a specific rule for the participation of employees in the implementation of the cross-border merger. With regard to a cross-border merger between an Italian entity and an entity not pertaining to one of the EU member states, the feasibility of such transaction is confirmed by Italian authors and case law, in light of the principles provided by Italian Law No. 218/95, Section 25, which states that *“The transfer of both the legal address of a company to another State and the mergers of entities which have their legal address in different States are valid only if implemented in compliance with the laws of the States concerned.”*

On the basis of the above-mentioned Law No. 218/95, a cross-border merger between companies not pertaining to the EU can be implemented only if such merger is in conformity with all the relevant *leges societatis* of the states concerned.

To this regard, according to leading Italian authors, the following information must be checked before the merger is carried out: (i) if the set of rules pertaining to each company involved in the merger regulates, by means of specific provisions, the merger itself and (ii) once ascertained that such set of rules provides for merger regulations, it must be verified whether such provisions can also be implemented to regulate a merger between the Non EU company and the Italian company; (iii) once the two mentioned issues are positively solved, it is necessary to verify if the provisions of the principle *leges societatis* (i.e.: of the Italian company and the foreign company) are compatible.

Moreover, it is worth mentioning that, according to Council Regulation No. 2157/2001, Section 17, it is now possible to merge or consolidate two companies of different countries by means of the so-called *Societas Europaea* (“SE”). More precisely, such Council Regulation provides for cross border mergers aimed at incorporating a SE, in compliance with the limits and formalities required by the above-mentioned Regulation.

Can a foreign company purchase an Italian company? How is this ruled under Italian law?

According to the Italian legal system, there are no specific restrictions or prohibitions preventing a foreign company from purchasing holdings in an Italian company, provided however that the so-called “conditions of reciprocity” exist (i.e.: the same rights must be granted to an Italian investor willing to invest in the country of the concerned foreign investor). The need to check the existence of such “conditions of reciprocity” in advance is not required, *inter alia*, if the foreign investor is an entity pertaining to a Member State of the EU or the EEA or an entity of a country that has entered into a specific international agreement / bilateral treaty with Italy.

For the sake of clarity, please note that restrictions on the transfer of shares/quotas may be provided by the by-laws of the company, such as lock-up period, rights of first refusal, prior approval, etc. (though in most cases these restrictions do not concern the nationality of the potential buyer).

That said, the regulations are slightly different depending on whether the foreign entity is considering the acquisition of an Italian joint stock company (*Società per Azioni*), or an Italian limited liability company (*Società a Responsabilità Limitata*).

In the former case, the following steps are usually required:

- the execution of a share purchase agreement (not necessarily in the Italian language, nor to be made before a Notary Public), which is valid and enforceable only between the parties involved in the sale and purchase of the shares. It is quite standard that the share purchase agreement, in addition to the general terms and conditions of the transfer, such as the purchase price, terms and means of payments, does provide for specific and extensive representations and warranties on several specific matters (corporate, contractual, employment and social security, tax, litigation, IP, environmental, etc., depending also on the type and size of the business of the acquired target company) as well as other provisions that are standard in M&A transactions, including non-compete undertakings, adequate mechanisms to secure the buyer’s relevant indemnification rights (such as, either a first demand bank guarantee or part of the purchase price to be deposited in an escrow account), additional undertakings and covenants of the parties, confidentiality obligations, arbitration clause, etc.. Escrow agreements and first demand bank guarantees are usually adopted also in order to secure the payment obligations of the buyer (in the event that, for instance, the terms of the agreement provide for a deferred payment or for part of the consideration to be conditional upon the

future performance of the target company). Similarly, if the sale and transfer refers to either a majority or minority holding of the target company, it is also standard to include in the share and purchase agreement provisions concerning the corporate governance, as well as the rights and duties of the parties in their role as shareholders (which shall then be reflected - to the extent possible - in a specific shareholders’ agreement);

- the endorsement of the shares to be made before a Notary Public (if the relevant certificate has been issued) and the registration of the new shareholders in the shareholders book in order to guarantee the enforceability of the transfer vis-à-vis the target company (i.e.: the company whose shares are being sold) and third parties, as well as the right of the new shareholders to exercise the relevant rights.

In the case of a transfer of quota of an Italian limited liability company (*Società a Responsabilità Limitata*), the following steps are usually required:

- the execution of a quota purchase agreement between the parties (not necessarily in the Italian language, nor to be made before a Notary Public), which is valid and enforceable only between the parties involved in the sale and purchase of the quota of the target companies. The content of a quota purchase agreement is substantially the same as a share purchase agreement. Also in the case of quota deals, it is standard practice to include detailed and extensive representations and warranties provisions, indemnification obligations and mechanisms to secure both payment obligations and indemnity and hold-harmless obligations;
- In order to be enforceable vis-à-vis the target company and third parties, the main terms and conditions of the afore-mentioned quota purchase agreement (parties, subject of the transfer, price and payment terms) must then also be used - for execution purposes only and without having a novate effect - in a separate agreement, that shall have the form of either a public deed or a private deed duly notarized (and consequently to be prepared in the Italian language). This agreement shall then be filed by the Notary Public with the competent Register of Companies.

It should also be noted that further restrictions may be imposed in the event of the purchase of a considerable stake regarding specific types of companies, such as banks and insurance companies or listed companies. In these cases, the acquisition must be previously approved by the competent independent authority.

Is it possible to purchase or lease the business (or part thereof) of an Italian company?

Under Italian law, a “business” is defined as “[...] the aggregate of assets organized by the entrepreneur to conduct a business activity” (Section 2555, Italian Civil Code).

On the other hand, “part of a business” can be defined as a functional independent division of an organized economic activity, as established by the transferor and the transferee at the time of the transfer.

Generally speaking, in the case of a foreign entity willing to either acquire or lease the business (or part of the business) of an Italian company, the restrictions (if any) are the same applicable in the case of the sale and purchase of shares/quota.

In general, the agreement for the transfer of a business (or part thereof), must be made in the form of a public deed, or a private deed authenticated before the Notary Public and then filed with the competent Register of Companies.

Below are a number of factors to consider when dealing with the transfer of a business (or part thereof):

- i. as a general rule, all the agreements related to the business (and existing at the time of the transfer) are automatically transferred / assigned together with the transferred business. However, the transferred contracting party is entitled to terminate any such agreements for a “justified reason” within 3 months as of the transfer of the business. This being the case, the buyer of the business may seek compensation for damages from the seller;
- ii. the automatic-transfer rule does not find application with respect to those agreements for which the parties have expressly excluded their transferability, as well as for those agreements characterized by the so-called “*intuitu personae*” (that is to say all those agreements where the person of one of the contracting parties is an essential term of the contract);
- iii. the credits/receivables related to the business are generally transferred to the purchaser, unless the parties have decided to transfer only part of them or to exclude them all from the transaction;
- iv. as far as debts/payables are concerned, the general rule is set forth by Section 2560 of the Italian Civil Code, according to which the transferring party is not released from those debts related to the business (and accrued prior to the transfer), unless it is shown that the creditors have consented to such a release. In any case, the transferee of a business is jointly and severally liable for those debts resulting from the mandatory accounting books;

- v. the seller shall not, for a period of five years following the execution of the agreement, start a new business activity that is capable of enticing away customers from the business transferred;
- vi. from a labour law perspective, the main regulation is set forth by Section 2112 of the Italian Civil Code and can be summarized as follows: (a) the automatic transfer from the transferor to the transferee of the employees related to the business; (b) the joint liability of the transferee for all credits of the employees towards the former employer and accrued prior to the transfer; (c) generally speaking, the transfer of a business cannot be a cause for dismissal or staff redundancies.

The above mentioned points concerning the transfer of the business (or part of the business), shall apply *mutatis mutandis* also with regard to the lease by a foreign company of a business (or part thereof) owned by an Italian company.

14.4

Business networks agreement (BNA)

14.4.1 Which others legal forms of business combination may a foreign company employ to increase its business in the Italian market?

Art. 3 of Law Decree No. 5 dated February 10, 2009, (converted into Law No. 33 on April 9, 2009) introduced a new form of business cooperation between companies in the Italian legal system: the business networks agreement (BNA).

More in detail, the BNA constitutes a legal instrument through which two or more businesses (both companies and individuals) agree to cooperate in order to increase their:

- i. innovative ability;
- ii. competitiveness on the market.

In particular, on the basis of a common network’s plan established by the parties, the networked companies undertake to pursue specific strategic objectives (whose achievement must be periodically measured) by:

- a. cooperating in predefined forms and fields pertaining to their respective business’ activities; or

- b. exchanging industrial, commercial, technical or technological information or services; or
- c. performing jointly one or more activities which fall within the respective business purposes.

The BNA, therefore, represents an alternative and flexible means for all those foreign companies interested in expanding their own business through the implementation of a ductile form of cooperation with other legal entities that are well-established in the Italian territory.

For the sake of clarity, a simple example of what may be the core content of a BNA between an Italian company and a foreign company, may be the cooperation in the R&D field for the realization of a new product of common interest.

From a legal perspective, a BNA may be structured in different ways, on the basis of the specific requirements or necessities of the parties; it may assume a “light” structure, if it is established as a simple agreement or, if the parties intend to implement a more advanced collaboration, it may have a more complex structure (including a specific fund relating to the BNA, an administrative body and a special form of limited liability); BNAs may also be structured as special legal entities, as an autonomous holder of rights and obligations, different from the same networked companies.

The implementation of a BNA requires the form of a public deed, a certified private deed or a digitally signed deed.

14.4.2 Can a foreign company subscribe or join a business network agreement?

The Italian law does not exclude the participation of foreign companies in a BNA; however the Italian Authorities have still not issued official guidelines on such aspect. Therefore, according to the prevailing opinions of Authors and to the practice adopted by the Italian Chambers of Commerce, it seems that a foreign company may participate in a BNA, subject to the compliance with the following substantial and formal requirements:

- a. substantial requirement: the foreign entity must be qualified as an enterprise (therefore, a foreign legal entity which cannot be considered as running a business cannot participate in a BNA);
- b. formal requirement: an Italian permanent establishment of the foreign company (e.g. branch, local unit, secondary division) must be registered at the Italian Registrar of the Companies.

In the event of the acquisition of an Italian target... (tax implications of asset deals vs. share deals)

14.5.1 How can the acquisition be financed?

Two different financing options can basically be considered:

1. Debt
2. Equity

From an Italian tax point of view (i.e. at the level of Italian AcquiCo.), this decision leads to the possibility to deduct interest expenses (in case of debt) or to benefit from a notional interest deduction (“NID” or “ACE”, in case of equity).

A case-by-case analysis – based on, *inter alia*, the business plan of the potential investment, the funds flow, the entities and the jurisdictions involved – should be performed to define the optimal financial structure of the envisaged investment and to assess the related tax implications.

Debt financing: main tax implications

IRES (corporate income tax, generally levied at 27.5% tax rate, 24% starting from 2017)

Net interest expenses (interest expenses that exceed interest income) shall be deductible for IRES purposes at the level of the borrower on an accrual basis, for an amount capped to 30% of the gross operating margin (roughly the EBITDA). A carry-forward mechanism applies.

Exceptions to the aforesaid rule are laid down to, *inter alia*:

- companies joining a tax group;
- financial institutions and pure holding companies;
- companies in the real estate business.

For further details about the tax deduction of interest expenses, please see § 3.8.

Please note that extraordinary transactions, such as acquisition, resulting in artificial leverage at the level of the Italian target (e.g. debt push-down in case of an intra-group reorganization) are usually scrutinized by Italian tax authorities which might try to challenge the interest deductibility.

IRAP (Regional Tax, generally levied at 3.9-4.97% tax rate)

No interest costs deduction is available for IRAP purposes to industrial and commercial companies. On the other hand, for financial institutions and pure holding companies (holding companies whose exclusive or main business activity is the mere holding shares in other companies), interest expenses shall be deductible for an amount up to 96% (starting from January 1, 2017, for financial institutions only, interest costs will be fully deductible).

Withholding taxes

Under the relevant domestic tax rules, outbound interest payments are in principle subject to withholding tax in Italy at 26%.

The applicable withholding tax rate could be reduced should a tax treaty be applicable. Full exemption from withholding might be sought, under the EU Interest-Royalties Directive, in the event of interest payments towards eligible EU parent or sister companies. In this respect, please note that the Italian Tax Authorities regularly scrutinize with a very strict approach the beneficial ownership and the substance requirements for the purposes of the application of the EU Interest- Royalties Directive.

For further details about withholding taxes (and available exemptions) on cross-border interest payments, please see § 10.1.2.

Finally, note that Italian Transfer Pricing regulation applies also to inter- company financing.

Equity: main tax implications

IRES

Italian companies and Italian permanent establishments of foreign entities can benefit from an Allowance for Capital Equity (“ACE” or “NID”): a notional interest deduction for IRES purposes only (not available for IRAP purposes) equal to the notional return - currently fixed at 4,75% - applied on any equity increase accrued from December 31, 2010 onwards.

Specific anti-avoidance limitations (e.g. cash injections directly or indirectly received by black list entities, ...) are provided for in order to neutralise the tax relief if, by mean of a sole capital injection, a multiplication of the deduction could potentially be obtained. In such a case, the taxpayer may submit an advanced ruling to the Tax Authorities aimed at obtaining confirmation about the applicability of NID benefits.

For further details about ACE, please see § 3.7.3.

Withholding taxes

Under the domestic tax rules, outbound dividend payments are in principle subject to withholding tax in Italy at 26% rate.

The applicable withholding tax rate could be reduced should a tax treaty be applicable. Full exemption from withholding tax might be sought, under the EU Parent-Subsidiary Directive, in the case of dividend payments towards eligible EU parent companies.

Under specific circumstances, the withholding tax is applied at 1.375% (1.2% from 2017 onwards) rate upon dividend payments towards EU entities which cannot benefit from the EU Parent-Subsidiary Directive.

Please note that Italian Tax Authorities regularly scrutinize with a very strict approach the beneficial ownership and the substance requirements for withholding reduction/exemption purposes.

For further details about withholding taxes (and available exemptions) on cross-border dividend payments, please see § 10.1.1.

14.5.2 What are the main tax consequences of a share deal versus an asset deal?

14.5.2.1 Share deal

Direct taxes

Seller

The Italian law provides for a number of tax regimes for capital gains realized upon the disposal of quotas or shares. The applicable tax regime depends on whether the seller is a company or an individual (resident/non-resident) and whether the seller is an entrepreneur or not.

In the case of a resident corporate seller (or Italian permanent establishment of a foreign entity), a specific participation exemption regime (PEX) could be applicable. Under this regime, capital gains realised by Italian companies upon sales of shareholdings are 95% exempt from IRES (applicable effective tax rate equal to 1.375%, 1.20% from 2017).

Capital gains/losses are generally excluded from IRAP taxable basis.

Please see § 3.3, for further details about PEX rules.

Purchaser

No special issues arise to the purchaser upon acquisition of shares or quotas of a company. The acquisition price is considered as the tax basis in case of a future disposals of the shares or quotas. The classification of the participation in the purchaser's balance sheet may have an impact on the tax treatment of the subsequent sale of the participation (i.e. applicability of PEX regime).

Indirect taxes

VAT

Transfers of shares, quotas, bonds and other securities are VAT exempt transactions.

Registration tax

Purchases of shares/quotas are subject to a fixed registration tax of € 200.

Tobin Tax (Financial Transaction Tax or “FTT”)

The transfer of Italian shares in Joint Stock Companies (*Società per Azioni* or *S.p.A.*) is subject to the so- called Financial Transaction Tax at 0.2% tax rate to be applied on the value of the transaction (i.e. sale price of the shares). No Financial Transaction Tax is due upon the transfer of Italian quotas in Limited Liability Companies (*Società a Responsabilità Limitata* or *S.r.l.*).

The tax is payable by the persons to whom the ownership of shares is transferred, regardless of their place of residence or the place where the contract is concluded. The FTT shall also be applied on the variable part of the price, deriving from earn-out clauses (if any), which is an integration of the closing price. The tax is due on the date on which the payment of the price integration is contractually due. In the case of downward price revision, the taxpayer is entitled to be refunded the overpaid tax.

Specific exclusions from taxation are provided for the transfer of shares between companies belonging to the same group (i.e. transaction performed between controlled companies - as defined by the Italian Civil Code - or which are controlled by the same company) or in the context of a group reorganization (as defined by art.4, EU Directive no.2008/7/CE). On the basis of the clarifications provided by the Italian Tax Authorities the control, by the only controlling company, over the companies between which the transfer takes place, can be both direct and indirect.

Under the applicable Italian rules, the Italian Notary Public involved in the transactions (namely in the drafting/authentication of the acts or in receiving foreign acts which must be filed in Italy) is required to pay the Tobin Tax on behalf of the taxpayer, unless the latter certifies that:

- the tax has already been applied, or
- the transaction falls under one of the cases of exclusion/exemption.

14.5.2.2 Asset deal (Sale of a business as a going concern)

Direct taxes

Seller

Capital gains arising upon the disposal (i.e. asset deal in exchange for cash) of a going concern by an Italian company are subject to IRES. However, if the business was owned by the seller for at least 3 financial years prior to the transfer, the capital gain may be subject, upon election of the seller, to IRES in equal instalments over a period of 5 years.

Capital losses must be taken into account in the computation of the business income.

Capital gains/losses realised upon disposal of going concerns are not relevant for IRAP purposes.

Purchaser

Regarding the Italian purchasing company, the purchase price is recognized as the new tax basis (for IRES and IRAP purposes) of each asset/liability included in the acquisition perimeter.

As far as the assets are concerned, the allocated purchase price may be recovered through:

- tax depreciation, with respect to fixed assets and/or goodwill;
- the reduction of the taxable profit derived from the future sale of the goods, with respect to the inventory assets.

For IRES, the maximum depreciation rates allowed for fixed tangible assets are set forth in a Ministerial Decree. Such depreciation rates are different, depending on the economic sector in which the company operates. In the event that accounting depreciation exceeds the maximum amount allowed for tax purposes, temporary differences arise. Tax depreciation of fixed tangible assets is allowed starting from the tax period in which the asset is firstly used. In the first tax depreciation period (after the acquisition of the going concern), the depreciation rate cannot exceed half of the normal rates.

For IRAP, the amount of tax deductible depreciation is equal to the one booked in the accounts of the Italian company (i.e. the tax rule related to the maximum depreciation rate does not apply).

No accounting and tax depreciation is allowed with regards to lands, while goodwill is tax deductible over a minimum 18-year period (both for IRES and IRAP purposes).

Differently from the contribution of a going concern, the parties are not obliged to request an asset evaluation from an expert (however, please note that an acquisition of assets by a company from its shareholders or directors taking place within 2 years from the incorporation must be approved by the shareholders' meeting and the assets must be evaluated by an appraiser appointed by the Court - Section 2343-bis of the Italian Civil Code).

Indirect taxes

VAT

Transfers of going concern transactions are out of scope of VAT.

Registration tax and other indirect taxes

Transfer of going concerns located in Italy are in principle subject to:

- registration tax;
- mortgage and cadastral taxes (only if the transferred going concern includes real estate);
- stamp duties.

Registration tax applies on a proportional basis on the net value of the going concern (i.e. fair market value "FMV"). Namely, registration tax applies on the economic value of the transferred assets, including goodwill if any, reduced by the amount of the transferred liabilities.

The applicable rates differ depending on the categories of assets, as per the following list (limited to the main asset categories):

- real property assets (land and building): 9%;
- receivables: 0.5%;
- other assets (e.g., inventories and goodwill): 3%.

For the purposes of assessing the liability for registration tax:

- each of the above rates shall apply on the economic value of the respective category of assets transferred (if separately reported in the purchase deed agreement, otherwise the highest rate shall apply on the entire value of the going concern);
- the amount of any liability included in the acquisition perimeter (reducing the taxable basis for registration tax) shall be apportioned among the various asset categories (subject to different rates) proportionally to the economic value of each category to the total value.

As discussed above, the basis for the computation of the registration tax is the net economic value of the transferred assets, which should be declared by the parties (usually declared as equal to the agreed purchase price) when the purchase deed is registered with the Italian tax office.

Finally, as far as the transfer of real estate assets is concerned, mortgage and cadastral taxes are also levied, for a fixed amount of €50 each.

Stamp duties are also due for a negligible amount.

14.5.3 Is goodwill tax deductible?

Any goodwill arising upon an asset deal transaction (as a difference between the purchase price and the net book value of the assets/liabilities transferred) is available for tax deduction, for both IRES and IRAP purposes, over a minimum 18-year period. The tax deduction is available also to companies adopting IAS/IFRS (for which the goodwill is not amortized from an accounting point of view, but rather subject to impairment test).

Conversely, in a share deal transaction, the goodwill element implicit in the price paid for the shares is not deductible, unless subsequent reorganization steps are undertaken.

14.5.4 What are the tax liabilities for the purchaser?

In the event of a transfer of going concern (sale/purchase or contribution of a business) the buyer shall enter into joint liability with the seller for both actual or potential Italian tax obligations (also including penalties and interest) of the seller related to or challenged over the fiscal year when the transfer occurs or in the two preceding fiscal years.

Such liability is limited to the value of the transferred going concern and may be further limited by applying to the Italian Revenue for a certificate stating the pending actual or potential Italian tax liabilities of the seller.

If the certificate does not report any pending actual or potential liability, the buyer shall not incur any joint liability at all. If any liability is shown in the certificate, the liability of the buyer shall be limited to the lowest between:

- i. the amount of the liabilities shown in the certificate; and
- ii. the value of the transferred going concern.

The limitation under the certificate applies with sole reference to tax related liabilities (not with regards to commercial/social security liabilities) and may not be valid if it was claimed that the transaction was executed for fraudulent purposes vis-à-vis the Italian Revenue.

An exception to the aforesaid rule applies where the transfer of going concern occurs within an insolvency/bankruptcy procedures. In such a circumstance, the buyer shall not enter into any liability for prior Italian tax obligations of the purchased business.

Finally, in a share sale/purchase transaction, the buyer has no possibility to limit any tax liabilities pertaining to the acquired company towards the Tax Authorities.

What are the main tax consequences in the event of...

14.6.1 Merger of two Italian companies?

Direct taxes

As a general rule, a merger between companies, either through the incorporation of a new company or through the absorption of one or more companies into another existing company, is a tax neutral transaction.

In particular, a merger shall constitute neither the realization nor the distribution of the capital gains/losses on the assets of the merged/incorporated company, including those related to inventory and goodwill. In calculating the income of the incorporating/surviving company, no account shall be made of the surplus or deficit recorded in the Financial Statements as a result of the share exchange of the merged company owned by others.

Any negative merger difference arising upon the transaction (either allocated amongst the assets of the company resulting from the merger or to goodwill) is basically tax neutral, unless an optional step up is undertaken (see also § 14.6.4).

Special attention should be made to any equity reserve under a tax suspension regime existing in the merged company, since any amount not attributed to a reserve under a tax suspension regime in the merging company may concur to the taxable income of the latter.

Several specific provisions set forth some limitations in using tax attributes of the companies involved in a merger (e.g. carried forward tax losses, non-deductible interest expenses) which should be taken into account when evaluating the effects of the merger.

As far as shareholders of the merging companies are concerned, the transaction gives rise to a substitution of the participation in the merged company with a participation in the surviving company. No capital gains are deemed to be realized because of this exchange of shares. However, balance cash payment to the shareholders could give rise to taxable income.

Indirect taxes

VAT

Any transfer of assets upon a merger transaction is not subject to VAT.

Registration tax and other indirect taxes

Mergers are subject to a fixed registration tax of € 200.

Should a merger involve real estate assets, the deed of merger is also subject to mortgage and cadastral taxes at the fixed amount of € 200 each.

14.6.2 De-merger (division)?

Direct taxes

As a general rule, a division is a tax neutral transaction since it gives rise to neither a realization nor a distribution of capital gains or losses on the assets of the dividing company, including inventory and goodwill.

The tax values of the assets transferred remain unchanged in the balance sheets of the receiving companies (see also § 14.6.4). Consequently, the difference between the market value of the assets transferred and their value for tax purposes does not give rise to taxable income or deductible losses.

Positive or negative accounting merger differences may arise as a result of the transaction. The fiscal treatment of these differences is the same as for mergers, and generally speaking they are not relevant for tax purposes. These differences are collectively referred to as division surplus or deficit.

As far as tax attributes and liabilities are concerned (including tax losses), the general principle is that they are transferred to the receiving company/ies in proportion to the value of the net equity transferred to each company (or maintained by the surviving dividing company, in case of a partial division), unless these tax attributes are strictly connected to certain assets or categories of assets transferred.

Several specific provisions set forth some limitations in using tax attributes of the companies involved in a division (e.g. carried forward tax losses, non-deductible interest expenses) which should be taken into account when evaluating the effects of the division.

As far as shareholders of the dividing company are concerned, the division gives rise to a substitution of their participation in the dividing company with a participation in the company or companies receiving the assets and liabilities. No capital gains are deemed to be realized because of this exchange of shares. However, balance cash payment to the shareholders of the dividing company could give rise to taxable income.

Indirect taxes

VAT

Transfers of assets upon a division transaction are not subject to VAT.

Registration tax and other indirect taxes

Divisions are subject to a fixed registration tax of € 200.

Should a division involve real estate assets, the deed of division is also subject to mortgage and cadastral taxes at the fixed amount of € 200 each.

14.6.3 Contribution of business or shares?

Contribution of business

Direct taxes

Contribution of going concern qualifies as a tax neutral transaction. As a consequence, no taxable capital gain (or deductible capital loss) shall arise either to the contributing or to the receiving company.

The tax neutrality regime implies that:

- the tax basis of the participation received by the contributing entity shall correspond to the net tax basis of the contributed assets and liabilities;
- the receiving company receives the assets/liabilities with the same tax basis as resulting in the hands of the contributing company.

From an accounting perspective, contributions may be executed at either a book or fair market value.

Whilst, subject to economic appraisal, the value of the contributed assets may be stepped-up for accounting purposes in the accounting books of the receiving company and/or a goodwill may be recorded, the incremental value attributed to the assets and/or the recorded goodwill amount shall not be recognised for the purposes of corporate taxes (i.e. the aforesaid amounts shall not be available in the hands of the receiving company for tax deduction, e.g. by way of tax depreciation), unless an optional step up is undertaken (see also § 14.6.4).

For PEX purposes, the holding period of the business contributed is transferred to the shares received by the contributing company.

Indirect taxes

The contribution of going concern is not subject to VAT, (while the sale of single assets by a VAT taxpayer is subject to VAT - the ordinary rate is 22%), while a registration tax at a fixed amount of € 200 is applicable.

Should the contribution involve real estate assets, the transaction is also subject to mortgage and cadastral taxes at the fixed amount of € 200 each.

Contribution of shares

Share per share contributions qualifying for the control or the connection (pursuant to Section 2359, Italian Civil Code), are considered a tax relevant transaction.

However, the consideration for tax purposes is deemed equal to the value attributed by the contributing company to the shares received in exchange, or, if higher, to the value of the shares contributed as booked in the accounting records of the company receiving the contribution. In other words, the taxable income is determined by the accounting approach taken and not by the fair market value of the shares involved.

The aforementioned regulation does not apply and the relevant consideration is determined according to the fair market value if:

- the contributed shareholdings, qualifying for the control or the connection, is not eligible for the Participation Exemption Regime, and
- the participations received qualify instead for the Participation Exemption (with exception to the holding period requirement).

14.6.4 Substitutive tax on reorganisations (merger, demergers, contributions)?

Corporate restructurings, such as mergers, demergers and contributions, are, in principle, tax neutral even if, for financial accounting purposes, the transaction results in the recognition of higher values of the assets or of goodwill.

Companies may elect to obtain partial or full recognition for tax purposes of the step-up in the financial accounting values of assets or of the goodwill arising from the corporate restructurings, provided they pay a substitutive tax.

The substitutive tax is calculated on the step-up in tax basis and is based on progressive rates of 12% to 16%. The substitutive tax is not deductible for the purposes of IRES or IRAP.

In addition, stepped-up values of goodwill and trademarks may be depreciated for tax purposes over five tax years (instead of the 18 years normally provided) by paying a substitutive tax of 16%. The higher tax depreciation arising from this election is effective from the tax period subsequent to the one in which the substitutive tax is paid. For example, if a merger transaction occurred in year one and the substitutive tax was paid in year two, the increased tax depreciation would begin in year three.

Are cross border mergers, de-mergers and contributions possible under Italian Tax Law?

Directive 90/434/EEC (EU Merger Directive) introduces common rules applicable to business restructuring. The objectives of the EU Merger Directive are that taxation of the income, profits and capital gains from business reorganization should be deferred and obstacles to the functioning of the internal market, such as double taxation, should be eliminated.

EU Merger Directive, applicable to the extraordinary transactions concerning companies of different countries of the European Union, was implemented in Italy through the Law no. 544/92 and subsequently transfused in the ITC.

Sections 178 and 179 ITC extend the application of the principles provided by the Directive to mergers involving companies and persons resident in Italy or another Member State.

Finally, Directive 2005/19/EEC has introduced new provisions regarding European mergers which have been implemented in the Italian legislation.

Is there any tax anti-avoidance rule in connection with the above transactions?

Beside the specific limitations in using tax attributes of the companies involved in extraordinary transactions (e.g. carried forward tax losses, non-deductible interest expenses), under the new general anti-avoidance rule (in force starting October 1, 2015) the Tax Authorities may disallow the undeserved/illegitimate tax advantages obtained through transactions that, notwithstanding being formally lawful, lack of a sound economic rationale (i.e. transactions which determine no significant effects, except for the associated tax savings).

The anti-avoidance rule does not apply where the taxpayer demonstrate that the transaction was grounded on non-negligible non-tax driven reasons (e.g. organizational or management efficiency).

By means of an advance ruling from the Italian tax authorities, taxpayers may obtain confirmation whether the anti-avoidance rule applies to a specific and real transaction.

Is a tax ruling possible in order to obtain advance clearance from Tax Authorities?

Taxpayers may apply to the Tax Authorities for a clearance on the transaction potentially falling within the scope of the anti-avoidance legislation mentioned in the preceding paragraph by means of submitting a proper ruling request.

What are the tax consequences in the case of liquidation of an Italian company?

In principle, liquidation is a taxable event. Section 182, ITC, provides the regulation concerning the ordinary liquidation of an Italian company. In particular it states that the business income referred to the period between the opening of the FY and the beginning of the liquidation is determined according to a specific Profit & Loss Account.

With particular emphasis on the tax aspects of the matter in question, it must be noted that separate taxation may apply in place of ordinary taxation for the income related to the portion of the FY following the beginning of the liquidation and for the subsequent intermediate FYs , provided that certain conditions are met.



15 *Antitrust and competition*

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When shall the antitrust impact on business be considered?

The Italian rules governing the protection of the competition and the market are set forth in Law No. 287 of October 10, 1990 named “Competition and Fair Trading Act” and are in line with the European Community Laws. All the provisions therein contained shall be construed on the basis of the principles of the European Community.

As a general note, the rules provided for by Law No. 287/1990 apply to: (i) agreements restricting freedom of competition; (ii) abuses of dominant position; and (iii) concentrations that are not comprised within the scope of Sections 65 and/or 66 of the Treaty establishing the European Coal and Steel Community, or of Sections 101 and/or 102 of the Treaty on the Functioning of the European Union, or of the EEC Regulations and of the community acts having an equivalent prescriptive efficacy. Should the Italian Antitrust Authority ascertain that the case brought to its attention does not pertain to its competence, it shall promptly inform the Commission of the European Community and send to the latter any relevant information to this regard.

Given the above, also within the Italian legal system, before planning specific agreements with other companies or a concentration by means of a merger or an acquisition, it should be checked upfront whether the proposed transaction is relevant from an antitrust perspective.

As a matter of fact, agreements restricting freedom of competition (defined by Section 2, Law No. 287/1990 as “*accords and/or concerted practices between undertakings, and any decision, even if adopted pursuant to their articles of association, taken by consortia, association of undertakings or other similar entities*” and that have as their object or effect “*appreciable prevention, restriction or distortion of competition [...] including those that (a) directly or indirectly fix purchase or selling price or other contractual conditions; (b) limit or restrict production, market outlets or market access, investment, technical development or technological progress; (c) shares market or sources of supply; (d) apply to other trading partner objectively dissimilar conditions for equivalent transactions [...] (e) make the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by the nature or according to commercial usage, have no connections with the subject of such contracts*”) are void.

According to Section 5, Law No. 287/1990, the concentrations are deemed to arise when, *inter alia*, “(a) two or more undertakings merge; (b) one or more persons controlling at least one undertaking or one or more undertakings, acquire the direct or indirect control of the whole or parts of one or more undertakings, whether through the acquisition of shares or assets, or by contract or any other means; (c) two or more undertakings create a joint venture by setting up a new company”.

The Italian Antitrust Authority has to ascertain whether concentrations create or strengthen a dominant position on the domestic market with the effect of eliminating or restricting the competition appreciably and on a lasting basis.

To this end, Law No. 287/1990, requires the prior notification to the Italian Antitrust Authority of those mergers and acquisitions involving undertakings whose combined aggregate turnover in the Italian territory exceeds € 495,000,000 and when the aggregate domestic turnover of the undertaking to be acquired exceeds € 50,000,000 (the said thresholds are adjusted every year). If both such thresholds were exceeded, then it would be necessary to proceed with the prior notification of the transaction.

For the purposes of calculating the “aggregate turnover”, the Italian Antitrust Authority provides some guidelines. In particular, the “aggregate turnover” achieved in the Italian territory means the turnover from the sale of products and services during the previous financial year on the Italian market after deducting returned products and discounts, as well as taxes directly relating to the sale of products and the provision of services.

The Italian Antitrust Authority provides certain guidelines also for the computation of the turnover “of the undertaking to be acquired” in the hypothesis of merger and establishment of a joint venture, which can be summarized as follows:

- i. merger: (a) in case of “merger by means of incorporation”, the turnover of the undertaking incorporated shall be computed; (b) in case of “proper merger”, the turnover attributable to the contributions made by the merging undertakings shall be considered; and
- ii. creation of a joint venture by setting up a new company: the turnover of possible contributions made in favor of such new company by the undertakings that acquire the common control of the same shall be considered. This being the case, the amount contributed shall not be considered for purposes of calculating the turnover of the contributing undertakings.

Which is the competent Authority for antitrust issues in Italy?

The competent authority for antitrust matters in Italy is the *Autorità Garante della Concorrenza e del Mercato* (“AGCM”), which was established by Law No. 287/1990.

AGCM is an administrative independent authority and, therefore, all its resolutions and decisions are taken independently from the Government or from any other public agency. The head-office of AGCM is located in Rome, Piazza G. Verdi 6/A.

AGCM is responsible for the correct application of Law No. 287/1990 and, in particular, for controlling (i) the agreements restricting freedom of competition, (ii) the abuses of dominant position and (iii) the concentrations, also with reference to the banking sector.

Furthermore, AGCM has other duties and, in particular, is responsible for:

- enforcing the law in case of unfair commercial practice, misleading and comparative advertisements;
- ruling on conflicts of interests involving holders of government offices, in order to secure that such subjects are acting exclusively in the public interest.

- acquisition of control: the notification is deemed timely filed when the effectiveness of the agreement establishing the acquisition of control is subject to the condition precedent of AGCM’s prior approval;
- set up of a new joint venture: the operation must be notified prior to the filing of the memorandum of incorporation with the Register of Companies.

Documents to be submitted to AGCM upon notification include, *inter alia*:

- a copy of the documents related to the concentration;
- in case of public takeover bid, a copy of the document of the offer;
- a copy of the annual records and financial statements of the last 3 financial years of each of the undertakings involved in the concentration.

As to the form according to which the notification shall be made, the AGCM provides for two different forms, and precisely:

Full-form notification

According to the indications provided by AGCM, full-form notification is required when:

- two or more parties to the concentration operate in the same affected market and the concentration will lead to a combined market share of 25% or more; and/or
- one of the parties of the concentration will have, after the concentration, a market share of 40% or more, provided that at least one other party operates in an upstream or downstream market.

Full-form notification is not necessary should the market share of the undertaking to be acquired or merged be less than 1%.

Full-form notification is required only in relation to the concerned market in respect of which at least one of the above-mentioned conditions is met, as well as in relation to the relevant upstream and downstream market in case the condition under (ii) above occurs.

Short-form notification

Short-form notification is admitted for all concentrations for which full-form notification is not requested.

AGCM has in any case the right to request the information required under full-form notification when it considers the short-form notification not sufficient in order to adequately assess the prospected operation. In this latter case, the 30-day time period within which AGCM is required to provide its response shall not begin to elapse until the receipt of full-form notification.

How shall concentrations be communicated to the Italian Antitrust Authority?

AGCM has adopted a specific template containing the indication of all relevant data, information and documents that shall be provided in order to notify a concentration.

As to the timing, the notification of a concentration shall be sent to AGCM before its execution. As a general rule, a concentration is deemed to have taken place with the acquisition of the ability to substantially influence the target undertaking’s economic behavior. In order to permit AGCM to fully ascertain and appraise the proposed operation, the concentration must be notified as soon as the parties have reached an agreement on the fundamental aspects of the transaction and, hence, prior to its implementation. More specifically, AGCM provides the following rules:

- merger: the operation shall be notified before the deed is drafted;

After the notification has been filed with AGCM, the following circumstances may occur:

- i. whenever AGCM deems that the information stated in the notification (including the relevant documents and annexes) is incomplete, it shall notify the undertakings concerned requesting to integrate the information. In particular, according to AGCM indications a notification shall be considered incomplete in the event of, unjustified failure to submit the information required, or in the event of incorrect or misleading information. Dealing with a short-form notification, this latter is deemed incomplete when AGCM considers that the proposed operation should have been notified by means of full-form notification;
- ii. should the facts set out in the notification be subject to substantial changes after the filing, the notifying parties must promptly inform AGCM.

15.4

Which are the agreements between undertakings that may be prohibited under the Italian Antitrust Law perspective?

Pursuant to Section 2 of Law No. 287/1990, the following shall be regarded as agreements: accords and/or concerted practices between undertakings, and any decisions, even if adopted pursuant to their by-laws, taken by consortia, associations of undertakings and other similar entities.

Agreements between undertakings are prohibited (and therefore null and void) when they have as object (or produce as effect) appreciable prevention, restriction or distortion of competition within the national market or within a substantial part of the same, including those that:

- i. directly or indirectly fix purchase or selling prices or other contractual conditions;
- ii. limit or restrict production, market outlets or market access, investment, technical development or technological progress;
- iii. share markets or sources of supply;
- iv. apply to other trading partners objectively dissimilar conditions for equivalent transactions, thereby placing them at an unjustifiable competitive disadvantage;
- v. make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The Italian Antitrust Authority may authorize - for a limited period of time - agreements (or categories of agreements) prohibited under the aforementioned Section 2 which have the effect of improving the conditions of supply in the market, leading to substantial benefits for consumers.

Such improvements shall be identified taking also into account the need to guarantee the undertakings the necessary level of international competitiveness and shall be related, in particular, with increases of production, improvements in the quality of production or distribution, or with technical and technological progress. The exemption may not permit restrictions that are not strictly necessary for the purposes of achieving the results mentioned above, nor it may permit competition to be eliminated in a substantial part of the market.

The Italian Antitrust may subsequently revoke the exemption in any and all cases in which the party concerned abuses it, or when any of the conditions on which the exemption was based no longer exists.

The AGCM shall conduct an investigation to ascertain any infringements of the prohibitions of agreements restricting freedom of competition. Notification to the AGCM may be made also by the relevant undertakings for any agreement they conclude in order to assess a possible infringement to the Italian Antitrust Law.

Should the AGCM acknowledge an alleged infringement of prohibitions of agreements restricting freedom of competition, it shall notify the undertakings and entities concerned that an investigation is being opened.

In any urgent case where a risk of serious and irreparable damage to competition is feasible, the AGCM may decide “ex officio” that precautionary measures must be adopted. A sanction up to 3% of the turnover of the concerned company may be applied in case of failure by such company to comply with the precautionary measure imposed by the AGCM.

Upon conclusion of the investigation procedure by the AGCM, if an infringement of the prohibition of agreements restricting freedom of competition is revealed, the AGCM shall set a deadline within which the undertakings and entities concerned are obliged to remedy the infringements.

Depending on the seriousness and the duration of the infringement, a penalty up to 10% of the turnover of each undertaking or entity may be applied.

In case of failure by the relevant undertakings to comply with the deadline set forth by the AGCM for remedying the infringements, the following sanctions shall be applied:

- i. a penalty up to 10% of the turnover of the concerned entities, or
- ii. double the penalty already imposed as per above due to the seriousness of the infringement, with a cap equal to 10% of the turnover.

In cases of reiterated non-compliance by the relevant undertakings, the AGCM may also dispose the suspension of the activities of such entities for a period up to 30 days.

However, companies that have participated to an infringement of the competition rule have the opportunity to avoid or reduce the fine. More precisely, pursuant to Section 15, paragraph 2-bis, of the Law No. 287/1990, if companies under investigation provide assistance in ascertaining infringements of competition rules, the fine may either not be levied or may be reduced. On the basis of such rule, AGCM has adopted a leniency program.

15.5

Is it necessary to pay any tax to the Antitrust Authority?

Prior to the conversion of Law Decree No. 1/2012 into Law No. 27/2012, in order to file a notification of a concentration with the AGCM, the requesting party was required to pay a fee aimed at covering the costs sustained by such authority for the performance of its duties.

Nowadays and following the entry into force of Law No. 27/2012, a new system for covering costs and financing the AGCM has been adopted and is now ruled by the newly-introduced paragraphs 7-ter and 7-quarter of Section 10 of the Law No. 287/1990.

In particular and pursuant to such new discipline, companies whose overall revenues are higher than € 50 million have to pay an annual contribution to the AGCM, equal to the 0,08 per thousand of the turnover resulting from the last approved yearly financial statement it being understood that the maximum threshold of contribution imposed to each of the concerned companies cannot be higher than one hundred times the minimum sum to be paid (i.e.: € 400,000).

As to terms of payment, for the year 2014 and subsequent years, the aforementioned contribution shall be paid directly to the AGCM within 31 July of each year.

Variations regarding the amount to be paid can be adopted by the AGCM by virtue of specific resolutions: such variations cannot exceed the maximum limit of the 0.5 per thousand of the turnover resulting from the last yearly financial statement approved before the adoption of such resolution (being it understood that the maximum threshold of contribution cannot be higher than one hundred times the minimal sum to be paid).

15.5.1 Who has to pay the contribution?

Payment of the contribution to the operating expenses of the AGCM is only requested to those Italian companies (registered with the Italian Register of Companies) whose overall revenues are higher than € 50 million. The AGCM further specifies that foreign companies shall pay the contribution only to the extent that they have secondary offices with permanent representation (i.e.: sedi secondarie con una rappresentanza stabile) that are required to be registered with the Italian Register of Companies.

In such event, the amount to be considered for the calculation of the contribution shall be determined taking into account the revenues deriving from the sale of goods and the provision of services as indicated in the financial statements of the secondary office, if prepared, or in the relevant section concerning the secondary office of the foreign company's financial statements.

In addition, the AGCM clarifies that the contribution shall be paid:

- i. not only by joint stock companies and limited liability companies but also by cooperative companies;
- ii. by the companies part of a consortium and not by the consortium itself;
- iii. by the entity that acquires rights and duties of the relevant company in cases of merger;
- iv. by companies admitted to a composition plan with creditors (i.e.: concordato preventivo), a winding-up procedure or to the extraordinary administration procedure (i.e.: *procedura di amministrazione straordinaria*).

In case of a group of companies, the calculation of the contribution shall be made by adding the single contributions due by each of the companies pertaining to such group that, individually considered, exceeds the threshold of € 50 million of revenues.

If the threshold of € 50 million of revenues is exceeded only taking into account the overall revenue of the group, no contribution shall be paid.

On such regard, the maximum threshold of contribution imposed to companies pertaining to a group cannot be higher than one hundred times the minimal sum to be paid, as provided for by Section 10, paragraph 7-ter of the Law No. 287/1990 [to this purpose, “companies pertaining to a group” refers to “controlled companies” under the meaning set out in Section 2359 of the Italian Civil Code (i.e.: companies for which another company holds: (i) the majority of the voting rights exercisable in the ordinary shareholders’ meeting; (ii) sufficient voting rights in order to exercise a leading influence in the ordinary shareholders’ meeting; (iii) a dominant influence as a consequence of specific contractual provisions)]. This being the case, the contribution can be paid by the holding company only, but in such event each payment order shall make a specific reference to the single company of the group to which the payment refers to.

15.6

Are there any specific time limits concerning the non-competition agreements in the Italian legal system?

As a general principle and according to Section 41 of the Italian Constitution, private economic enterprise is free. Notwithstanding the above, the Italian legal system allows the parties to be bound by non-competition agreements as long as specific limitations with reference to their length and content are met.

In particular, it is possible to identify four different kinds of non-competition agreements:

i. Non-competition agreements among entrepreneurs

Notwithstanding the antitrust rules, according to Section 2596, Italian Civil Code, *“an agreement limiting the competition shall be evidenced in writing. It is valid if restricted to a specific territory or a specific activity and cannot exceed the duration of 5 years. If the duration of the agreement is not specified or it is established for a period longer than 5 years, the agreement is valid for a period of 5 years only”*.

The scope of this provision is to safeguard those parties that voluntarily decide to be bound by a non-competition agreement excluding an excessive limitation to their right of economic enterprise.

ii. Non-competition agreement in case of transfer of the business

Pursuant to Section 2557, Italian Civil Code, *“whoever transfers a business shall refrain, for a period of 5 years from the transfer, from starting a new enterprise which, by reason of its object, location or other circumstances, is likely to divert the customers of the business that was transferred. An agreement to refrain from competition to a greater extent than that set forth in the previous paragraph is valid, provided that it does not prevent the transferring party from engaging in any business activity. It cannot last more than 5 years from the date of the transfer. If a longer term is indicated in the agreement, or if the term is not specified, the not to compete clause is effective for a period of 5 years from the transfer”*.

For the sake of clarity, the not-to-compete clause provided for by Section 2557, Italian Civil Code, is limited to the starting of a new business only, whilst, on the contrary, no denials are provided for business activities already existing prior to the transfer.

iii. Non-competition undertaking for the time subsequent to the termination of the employment relationship

According to Section 2125, Italian Civil Code, *“any agreement intended to restrict the activities of an employee for the time following the termination of the contract is void unless evidenced in writing, if no consideration is agreed upon in favor of the employee and unless the restriction is confined within specified limits as to purpose, time and location. The duration of the restriction cannot be in excess of 5 years in case of managerial staff and 3 years in the other cases. If a longer duration is agreed upon, it is reduced to the length indicated above”*.

All compensation payable to the employee following a not-to-compete agreement shall be determined taking into consideration his wage as employee, the extent of the non-compete undertaking with reference to the purpose and location and the professional expertise of the employee. In other words, the amount due cannot be purely symbolic or clearly disproportionate in prejudice of the employee.

iv. Non-competition agreement referring to the period following the termination of an agency relationship

Pursuant to Section 1751-bis, Italian Civil Code, *“an agreement to limit the competition by the agent after the termination of the contract shall be made in writing. It shall refer to the same area, customers and kind of goods and services for which the agency agreement has been entered into and its duration may not exceed the 2 year period following the termination of the agency agreement”*.

Should the non-competition agreement be accepted, upon termination, by the agent, an indemnity shall be paid to the latter. More precisely, such indemnity shall not be calculated on a percentage basis, but, on the contrary, the indemnity shall be determined taking into account the duration, the nature of the agency contract and the end of service allowance due to the agent upon termination of the agency relationship.



16 Industrial and intellectual property rights

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Is it possible to protect industrial properties in Italy? Which rights are protected under Italian Law?

The protection of industrial properties in Italy is possible.

Legislative Decree No. 30 of February 10, 2005 (the so-called “Industrial Property Code”) groups together and reorganizes provisions already provided in various pre-existing legislative sources, namely into R.D. No. 1127/1939 (invention patents and confidential information), R.D. No. 1411/1940 (utility models, designs and models), Presidential Decree No. 974/1975 (new species of vegetables), Law No. 70/1989 (topographies of semiconductor products), R.D. No. 929/1942 (trademarks), Legislative Decree No. 198/1996 (geographical indications).

More specifically, Section 1 of the Industrial Property Code provides that “industrial property” includes the following elements:

- trademarks and other distinctive elements;
- geographical indications;
- denominations of origin;
- industrial designs and models;
- inventions;
- utility models;
- topographies of semiconductor products;
- confidential information having an economic value;
- certain species of vegetables.

Industrial property rights are acquired through patents, registration or through any other way provided for by the Industrial Property Code. In particular, whereas inventions, utility models and new species of vegetables need to be patented, trademarks, designs and models, topographies of semiconductor products are subject to registration. Other signs, confidential information, geographical indications and denominations of origin are only limitedly protected.

The Industrial Property Code establishes that the registered trademark owner has the exclusive right to the use of the trademark. The owner may prevent any third party who does not obtain his/her consent from using: (i) any sign which is identical with the trademark in relation to goods or services which are identical to those for which the trademark is registered; (ii) any sign where, because of its identity with, or similarity to, the trademark and the identity or similarity of the goods or services, there is the probability of confusion by the general public, which includes the likelihood of association between the sign and the trademark; (iii) any sign which is identical to, or similar to, the trademark in relation to goods or services which are not similar to those for which the trademark is registered, where the latter enjoys a certain reputation in

Italy and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the reputation of the trademark.

The rights deriving from the issue of patents for inventions having an industrial application which allow their owner to realize the invention, as well as to draw any pertaining economic right in Italy, within the limits and conditions set out in the Industrial Property Code. Specifically, the patent grants the following exclusive rights: a) should the patent cover a certain good, the right to prevent any third party from producing, using, commercializing the relevant good, unless specific permit is granted by the owner of the patent; b) should the patent cover a certain proceeding, the right to prevent any third party from using it, or from selling products obtained by means of the proceeding, save for the patent owner’s consent.

Industrial designs and models, on the other hand, are protected in accordance with Section 41 of the Industrial Property Code. Also in this specific case, the owner of a registered design or model has the exclusive right to use it and to prevent others from using it without his/her consent. More in detail, this confers the owner the exclusive right to manufacture, distribute, import, export, and use any goods possibly connected with the industrial design or model.

Rights on topographies of semiconductor products consist in the reproduction and economic use (either through sale, lease, or any other method of commercial distribution) of the topographies.

The owner’s consent is also required with reference to the rights granted for the invention of new species of vegetables, namely for their production or reproduction, commercialization, export or import.

Protection lasts for a time varying in accordance with the right protected.

Trademarks enjoy a potentially unlimited protection, although registration generally lasts 10 years, it can be renewed for an unlimited number of times.

Exclusive rights of patents, on the contrary and as a general rule, are granted for a limited time:

- as far as inventions are concerned, the relevant right lasts 20 years from the filing of the application;
- rights related to utility models last 10 years from the day the application is filed;
- rights of designs and models last 5 years, renewable for 5 more years up to a maximum of 25 years.

The general rule, as provided for by Section 3 of the Industrial Property Code, states that citizens of each and all countries that are members of the Paris Convention for the Protection of Industrial Property, or of the World Trade Organization, as well as citizens from other countries who are domiciled or established within the territory of a country

included in the Paris Convention, enjoy - for the scope of the subject matters disciplined by the Industrial Property Code - the same treatment reserved to Italian citizens.

Citizens of countries which are not part of the Paris Convention, or of the World Trade Organization, are granted the same treatment enjoyed by Italian citizens, under reciprocal conditions.

The owner of an industrial property right may file a claim against any third party that harms in any way his/her right.

Delays in legal proceedings and the gravity of damages caused by such delays, which are often difficult to quantify in their exact amount, have led the legislator to provide for specific precautionary measures, such as:

- description;
- attachment;
- injunction to cease the harmful activity.

The granting of a precautionary measure by the judge may be subject to the issuing of an adequate guarantee by the plaintiff.

The judicial decision confirming the infringement of an industrial property right may entail a substantial number of sanctions. All sanctions - except a sanction for damages, which can only be provided in the event of fraud or negligence (ex Section 2043 of the Italian Civil Code), where both are presumed - require a strict assessment of the harmful activity, without taking into account further elements involving liability and material consequences.

The most meaningful penalty is the so-called *inibitoria* that is an injunction to cease the harmful activity, or to not start it again.

As for penalties within the scope of criminal law, the Industrial Property Code sets out the following fines:

- up to € 516,46 for the falsification of documents proving the patent or the valid registration;
- up to € 2,065.83 for the illegitimate use of trademarks declared null.

The Italian Criminal Code punishes the perpetrator of the activities listed below:

- falsification and alteration of trademarks and use of such trademarks;
- trade of products showing forged trademarks;
- trade of products identified by misleading trademarks concerning origin and quality;
- revelation and use of confidential industrial information.

Rules set forth by the Industrial Property Code with reference to ordinary legal proceedings, as well as to the precautionary measures and the penalties for the counterfeiting or the infringement of rights are substantially the same for all the industrial property rights, although there are specific rules which are applicable only for inventions and trademarks. The same legal proceedings rules applicable to the Italian patent remain valid as far as the European patent is concerned (limitedly to the Italian portion of this patent), since the Convention of Munich makes reference to domestic legislation for the regulation of the proceedings as well as the penalties.

The jurisdiction is normally set where the respondent is domiciled or has taken up residence. Yet, as far as counterfeiting and harm of industrial property rights are concerned, the plaintiff may appoint the competence of the court of the place where the prejudicial event occurred.

16.2

What requirements must be met in order to receive protection?

Trademarks

In theory, the event producing the right to the trademark may either consist in the registration or in the use of the sign.

Registration is regulated by Section 2569 of the Italian Civil Code, as well as by Section 15 of the Industrial Property Code. The same discipline is provided for with reference to the communitarian trademark.

In certain events, also rights granted by a non-registered trademark may be protected, within the limits of the previous use its owner has made of it (i.e.: *preuso del marchio*, as provided for in Section 2571 of the Italian Civil Code), as well as within well-defined geographical limits (Section 12/1 b, Industrial Property Code).

Whether the trademark was registered or not, in order to receive protection, it must have the following features:

- lawfulness: the trademark must not be contrary to the law, public order, or public decency;
- truth: it must not deceive the customers;
- originality: it must make the product recognizable by the customers;
- novelty: it must not be already used by other manufacturers.

With reference to the validation of a trademark that was registered after a previous, non-registered trademark, it must be pointed out that - as provided for in Section

28 of the Industrial Property Code - the former is validated if the owner of the non-registered trademark tolerates its use for 5 years from the day he/she discovers its existence, except if the trademark was registered *in mala fide*.

Also, a trademark lacking in originality may be validated when, by virtue of the use the owner has made of it, the trademark became recognizable for the customers before the filing of the claim by the owner of the conflicting right. This hypothesis is represented by the occurrence of the so-called “secondary meaning”.

As far as the remaining signs are concerned, requirements to receive protection by the law are represented - in respect to the company’s name - by truth and novelty, whereas protection of shop names derives from truth and originality.

Patents

Generally speaking, an invention may be patented, and thus the inventor may enjoy its pertaining rights, when the invention is sufficiently described and it shows the following features:

- lawfulness;
- novelty;
- inventive activity;
- potential industrial application.

With specific reference to inventions, limited relevance is granted to the previous use the owner has made of such inventions during the 12-month period prior to the filing of the application made by others in order to obtain the patent (*i.e.: preuso del brevetto*).

Models, Designs and Utility Models

A new shape, novel and that shows an individual character, can be protected as a design and model under a patent. Registered designs lack any functional value and thus have a purely aesthetical relevance.

Models which improve the effectiveness of the application or of the use of machines or of parts of machines, instruments, or in general goods, can be patented as utility models when they prove to have the requirements of novelty and originality. The fundamental difference between utility models and inventions has always been ascribed to either a “quantitative” criteria (considering the utility model as a “minor invention”) or a “qualitative” criteria. In more recent times, the latter tends to prevail. In accordance with this interpretation, the utility model, unlike the invention, is not a new solution to a technical problem and the innovation refers only to limited and merely executive aspects of something which is already known.

What are the procedures required in order to register patents and trademarks with the competent patent and trademark office?

A. Patents

The Italian system

The exclusive right to register an invention depends on the issuing of a specific patent by the *Ufficio Italiano Brevetti e Marchi*.

To this aim, the inventor has to file an application directly to said office, or, alternatively, to a Chamber of Commerce. The application may be filed directly by the inventor, although this part of the procedure is often left to the competence of a professional advisor with expertise in intellectual properties issues.

Although the date of the filing serves as a rule to settle disputes which may arise between inventors, and although the 20-year term starts to run from the same day, the patent takes effect only after the application is publicly disclosed (*i.e.: usually eighteen months after the application is filed with the Ufficio Italiano Brevetti e Marchi*).

Only one invention may be filed through a single application; such application must also provide details of the invention, define its title (above all for classification purposes), set out the relevant claims, and provide a description of the invention.

As for patent applications filed prior to July 1, 2008, the Italian system did not require an examination with regard to the validity of the patent requested (save for certain formal and prima facie investigations of the application). In particular, until such date, the *Ufficio Italiano Brevetti e Marchi* was required to perform only minor, essential controls, for example, if the invention was able to be protected by a patent (pursuant to Section 45 of the Industrial Property Code), and that the application related to one invention only. Until July 1, 2008, the Italian system did not provide for an assessment relating to the elements of novelty and originality.

On the contrary, since July 1, 2008, all applications filed with the *Ufficio Italiano Brevetti e Marchi* undergo a further, more thorough, examination aimed at assessing whether a priority for the patent does exist or not. More in particular, pursuant to the provisions of a Ministerial Decree dated October 3, 2007 (issued in force of Section 170, paragraph 1 of the Industrial Property Code), this control will be carried out by the European Patent Office.

During the procedure, the application may be duly modified or integrated (Section 172, paragraph 2 of the Industrial Property Code), although the patent’s subject cannot be extended further to the contents of the first application.

Finally, the *Ufficio Italiano Brevetti e Marchi* decides whether or not the application for the patent may be accepted.

Should the application be accepted, the patent is issued in original and in two copies (one to be enclosed to the application file, and one to be handed to the inventor).

In the event that the application is rejected, the inventor may - within 30 days - appeal to the *Commissione dei Ricorsi*.

The procedure of the European Patent Office

The application for the European patent may be filed to the European Patent Office in Munich, as well as to its Department in The Hague, or before a Patent Office located in any one of the countries part of the European Patent Convention.

The application has to be filed in French, English or German, although a citizen of a country participating in the Convention may file the application in his/her native language, together with a translation of the documentation in one of the three official languages mentioned above.

The application shall state in which country or countries, among those which are part of the Convention, the inventor is requesting to obtain protection.

Usually, the application is publicly disclosed eighteen months after it has been filed.

The European Patent Office performs both a formal and a substantial examination. The first step is carried out by the Filing division, thus the application (deemed formally acceptable) goes through a Research division, in charge of finding possible priorities. From the day this report is filed, the inventor may request the start of the substantial examination within 6 months. The substantial examination procedure is carried out through cross-examination methodologies, in an informal context. Such decisions are potentially subject to recourse, which may be filed by whoever may have an interest in the same, and who may therefore take part in the procedure.

International Patent Applications

Italy is one of the contracting States of the Patent Cooperation Treaty (PCT) that allows to seek patent protection in a wide number of countries by means of a single application.

The *Ufficio Italiano Brevetti e Marchi* acts as “receiving office” under the PCT for international patent applications filed by individuals and legal entities who are resident in one of the contracting States of the PCT or old one of the nationalities.

B. Trademarks

Domestic registration

In order to obtain the registration of a trademark, it is necessary to file an application with the *Ufficio Italiano Brevetti e Marchi*. Section 147 of the Industrial Property Code, provides that the application may also be filed with a Chamber of Commerce.

The application shall state:

- the identification of the applicant (and of the proxy, if any);
- any possible claims for priority;
- the reproduction of the trademark;
- the list of goods and/or services the trademark is going to represent, in accordance with the “International (Nice) Classification of Goods and Services for the Purposes of the Registration of Marks”.

One single application corresponds to one single trademark. Once the application is filed, the *Ufficio Italiano Brevetti e Marchi* carries out a formal examination, aimed at assessing the formal validity of the application. If the latter is confirmed, the *Ufficio Italiano Brevetti e Marchi* performs an in-depth examination aimed at identifying potential “absolute impediments”, mostly represented by causes of absolute invalidity of the trademark.

Subsequently, the *Ufficio Italiano Brevetti e Marchi* publishes the application in the Trademarks’ Official Bulletin, as regulated by Section 187 of the Industrial Property Code. If any absolute, or even relative, impediments are found that impair the application, the applicant may appeal to the *Commissione dei Ricorsi*.

Registration of the community trademark

Community trademarks may be registered by either natural persons or legal entities enjoying the citizenship of a European Community member State, or in a country member of the Paris Convention or the Agreement constituting the World Trade Organization. Community trademarks may also be registered by natural and legal persons domiciled or established within the Community’s territory or in a country taking part to the Paris Convention.

The application may be filed either with the O.H.I.M. (Office for Harmonization in the Internal Market) in Alicante, or with the local office of a member State, which shall procure to forward it to O.H.I.M.

Further to a formal examination, the O.H.I.M. shall carry out an assessment aimed at locating possible impediments to registration, as well as possible community priorities. Thus, O.H.I.M. forwards a copy of the applications received to the national offices that provided their consent to perform a search on their own domestic Trademark Registrars (this applies for all member States, save for Italy, France and Germany). Within three months, the national offices submit the outcome of their search to the O.H.I.M. and, in turn, the Office of Alicante submits the complete report to the applicant.

Subsequently, the application is publicly disclosed and the O.H.I.M. procures to make possible owners of previous community trademarks or previous applicants aware of such publication.

Within three months from the publication, the owners of previously registered trademarks may file a claim against the trademark's registration.

Following the application's public disclosure, legitimated third parties may submit written observations to the O.H.I.M., indicating what absolute impediments would obstacle the registration of the trademark.

The following degrees of jurisdiction are allowed, granting a wide possibility of recourse:

- Judicial Panel;
- Community Court of first instance;
- European Court of Justice.

Registration of an international trademark

The owner of a registered trademark in Italy may request the *Ufficio Italiano Brevetti e Marchi* to file the trademark with the International Office for the protection of industrial property located in Geneva. The latter shall proceed to register the trademark which, thereafter, will be protected in all the designated States which are part of the Madrid Arrangement of 1891 (implemented in Italy by means of Law No. 424 of April 28, 1976), as if the trademark was registered separately in each of those countries.

In any case, the international trademark may be rejected in a member State only if it failed to meet the requirements necessary for the registration in that specific country.

How is intellectual property protected in Italy?

The foundations of the Italian Copyright Law may be traced back to Law No. 633 of April 22, 1941 (hereinafter "Law No. 633/41"), which has been continuously amended throughout the years.

Section 1 of Law No. 633/41 - basically reproducing Section 2575 of the Italian Civil Code - protects original works of a creative nature, in the fields of literature, music, figurative arts, architecture, theatre and cinema, whatever the means through which they find expression. In addition, pursuant to the Bern Convention (ratified and made effective in Italy through Law No. 399 of June 20, 1978), protection is also granted to computer software and to databases representing original creations of the author. To this regard, it must be underlined that "creativity" is a fundamental requirement of any original work, which has to be evaluated on a case-by-case basis.

Section 180 of Law No. 633/41 disciplines the Italian public entity named S.I.A.E. (*Società Italiana degli Autori ed Editori*). The S.I.A.E. carries out the functions of an authority with regard to the artistic representation, execution, recitation, broadcasting and cinematographic representation of a protected creative work.

Moreover, the S.I.A.E. may perform other tasks for the protection of creative works, in compliance with its own by-laws. The S.I.A.E. is also entitled to determine and collect any relevant tax, levy and right on behalf of the Italian Government as well as of other public and private entities.

As far as European sources are concerned, it must be noted that the European Community has always shown a particular interest for the protection of original works and copyright, often intervening to harmonize the domestic legislations of member-States.

Both economic and moral rights derive from an original work. Usually, the former are protected for 70 years following the death of the author, or after the first publication if the work is anonymous or pseudonymous. On the other hand, moral rights are inextinguishable.

As for rights of an economic nature, the following are particularly significant:

- exclusive right of reproduction through any means;
- right of transcription of oral work;
- right of execution, representation or recitation in public of the work;
- right of communication;
- right of distribution;
- right of elaboration, translation and publication into an organized body of the work;
- right to rent out and or lease the work.

It is possible to transfer rights an economic nature which derive from an original work. Furthermore, any original work gives way to moral rights in favour of the author, namely:

- the right to be recognized as the author;
- the right to reveal him/herself as author of the anonymous or pseudonymous work;
- the right to make available for publication previously unpublished works;
- the right to preserve the work in its integrity;
- the right to withdraw the work from the market for serious moral reasons.

As a rule, moral rights cannot, in any event, be alienated.

Once the copyright is extinguished, the work becomes of public domain and it made be used freely by anyone, even for economic purposes, as long as the moral right and the authorship are respected. Protection of the right derives directly from the author's "creative deed". Therefore, unlike what is provided for with reference to patents, utility models and drawings, there is no need to file, register or publish the work in order to obtain protection through a claim against copyright infringement.

It may be useful to point out that the European Directive No. 91/250/EC expressly included the software programs within the scope of the protection granted by Law No. 633/41, so that such protection is now established in Sections 64-*bis* ff. of domestic regulations.

Prevention and repression of copyright violations have been, for a long time, fundamental means to protect the economic exploitation of creative works. As a matter of fact, artistic piracy was already widespread in the '60s'. The TRIPS Agreement, signed within the framework of the World Trade Organization, represents the foundations of the international harmonization process in respect of protective measures against the violation of intellectual property. When Italy undertook to tighten up the sanctions relating to copyright violations, with regard to both criminal and administrative law, the TRIPS Agreement played an important role. Such embitterment, as well as strengthening the relevant contrast measures, came into effect through the adoption, within the text of Law No. 633/41, of the provisions stated in Law No. 248 dated August 18, 2000. Even more recently, the so-called "Decreto Urbani" was converted into Law No. 128 of May 22, 2004, which addresses the unlawful distribution of creative works through the "peer-to-peer" system.

In conclusion, it is apparent that the field of the intellectual property is undergoing continuous changes.

Who is the owner of the industrial and intellectual property rights developed by employees?

Which are the rights recognized to the employees in consideration of any patent or original work created during the employment relationship?

A. Industrial property rights: inventions

The Industrial Property Code (Section 64) provides for three different kinds of inventions which may be developed by employees:

- "*invenzione di servizio*" (service invention), when the invention is the object of the employees' offices and therefore of the employment agreement;
- "*invenzione aziendale*" (business invention), when the invention is the result of an employee's performance, even if it has not been provided in the employment agreement as part of the employees' office;
- "*invenzione occasionale*" (occasional invention), when the employee invents something which has no connection with the employment relationship.

The rules and regulations differ significantly in accordance to the kind of invention above described:

- in the case of an "*invenzione di servizio*", the employee has the right to be recognized as the owner of the invention, whilst the employer is directly granted with all the economic rights arising there from;
- in the case of an "*invenzione aziendale*", the employee has the right to be recognized as the owner of the invention whilst the employer is directly granted with all the economic rights arising there from. Considering that the invention is not included in the employment agreement, the employee must be subsequently properly compensated;
- in the case of an "*invenzione occasionale*", the employee is granted with the right to be recognized as the owner of the invention and is granted all the economic rights; the employer is only granted with the pre-emption right for the use of the invention or for the purchase of the possible patent.

On January 28, 2016, the Italian Council of Ministers issued the bill for the protection of self-employment. In particular, the bill in hand aims to complete the Reform of Contracts, started by Legislative Decree. No. 81/15 and provides the protections of intellectual property for the original contributions and inventions belonging to the self-employees (Section 4 of the Bill).

The mentioned bill shall be probably approved on May 2016.

B. Intellectual property rights

The Italian Copyright Law does not provide any general rule concerning the ownership of intellectual work which may be developed by employees.

Notwithstanding the above, the general principles provided by the Industrial Property Code with reference to the service invention are deemed to find application also for art works created by employees during the employment relationship. Therefore, the employer shall be considered to be the owner of the right to use the art works created by the employees only if the creation of works is the object of the employment agreement.

In any case, some specific rules, that confirm the general interpretation above mentioned, are provided for particular art works i.e.: among others, software, industrial designs and photography.

To this regard, Sections 12 bis, 12 ter and 88, paragraph 2 of the Italian Copyright Law, provide that the employer has the exclusive ownership of the right of use of the intellectual work created by employees during the employment relationship, save if differently agreed by the parties.

16.6

Is it possible to transfer and/or license industrial or intellectual property rights?

A. Industrial property rights

Patents

Patents may be freely transferred or licensed. The transfer of a license may also be compulsory in the following cases:

- the original user fails to implement the invention or the use of the patent is deemed unsatisfactory;
- in all cases of derived invention, the owner of such right is granted with a license on the upstream patent.

Trademarks

In accordance with Section 2573 of the Italian Civil Code, and Section 23 of the Industrial Property Code, trademarks may be freely transferred (also partially). The use of a trademark may even be granted on a license, that is to say it may be enjoyed by third parties, although the original owner maintains its legal ownership. The license may be either exclusive or non-exclusive, therefore more than one license may be granted with the right. Should the trademark be registered for more than one product, it can either be transferred for a number of the products or in their entirety.

Other industrial property rights

The rules and regulations governing the transfer of rights relating to industrial designs and models, as well as to utility models is substantially similar and it is based on the issuance of licenses by the owner of the relevant right.

B. Intellectual property rights

As for intellectual property rights, the author can transfer the economic rights deriving from his creative work. It must be pointed out, though, that on the basis of Italian legislation, a full transfer of the right cannot be performed, since the author - even once the economic rights have been transferred - is still entitled to withdraw his work from circulation for serious moral issues.

In addition to the right to draw an economic revenue from a creative work, the author benefits from the granting of several rights of a “moral” nature:

- the right to be identified as author;
- the right to reveal or not his/her own identity;
- the right to publish previously unpublished works;
- the right to preserve the work in its original form;
- the right to withdraw their work from circulation for serious moral issues.

Moral rights cannot be transferred by the author.



17 Bankruptcy and reorganization/ debt restructuring procedures

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When is a company subject to a bankruptcy procedure?

The rules governing the insolvency status of an entrepreneur are essentially set forth in the Royal Decree No. 267, of March 16, 1942 (hereinafter “Bankruptcy Decree”), which has been amended over the years by several sets of rules, the most recent and significant of which in the period 2012-2013.

The debtor may enter into a bankruptcy procedure when:

- he/she is considered an entrepreneur (either a company or an individual), whose main activity consists in the production or trade of goods and/or services. Agricultural entrepreneurs and public bodies are exempted.
- In order to be excluded from the bankruptcy procedure, the entrepreneur shall demonstrate that, in the last 3 financial years prior to the request of bankruptcy (or from the start of his/her business activity if this dates back to a period shorter than 3 years), the yearly assets did not exceed € 300,000 and that, in the same period, the yearly gross income did not exceed € 200,000, and that the current amount of debts, considering also those not yet expired, does not exceed € 500,000;
- he/she becomes insolvent. According to Section 5 of the Bankruptcy Decree, the debtor is insolvent when the same is unable to regularly pay his/her debts by ordinary means.

The burden of proof concerning the simultaneous existence of all the above mentioned requisites lies with the entrepreneur, who wants to avoid his/her involvement in the bankruptcy procedure.

The declaration of bankruptcy (in the meaning of “*fallimento*”) can be requested, alternatively, by the debtor, by one or more creditors or by the Public Prosecutor and will be stated by an order of the Court which has jurisdiction over the debtor’s main place of business. The prerogatives vested upon the Court are, *inter alia*:

- the appointment of the Bankruptcy Judge (i.e.: *Giudice Delegato*), who will have the responsibility to supervise the bankruptcy procedure;
- the appointment of the Official Receiver (i.e.: *Curatore Fallimentare*), who shall be responsible for managing the bankruptcy procedure and the debtor’s assets, including liquidation of the same ; the Official Receiver is subject to the supervision of both the Bankruptcy Judge and the Creditors’ Committee (i.e.: *Comitato dei Creditori*). This committee, composed of 3 or 5 members, has the duty to supervise the activity carried out by the Official Receiver as well as to authorize several actions and/or express its opinion when required by law or otherwise requested by the Court or the Bankruptcy Judge;

- the indication of the term within which the creditors must file their claims and the date, place and time of the creditors’ meeting during which the Bankruptcy Judge will examine the creditors’ claims and the eligibility of the debtor’s assets and liabilities.

Notwithstanding the above, the filing of a claim is considered the responsibility of each creditor. In general, creditors may claim for the restitution of a monetary credit as well as of goods, which are temporarily in use by the debtor.

Each claim shall, *inter alia*, indicate the name and the address of the creditor, the amount due by the debtor and/or the goods which are temporary in his/her use. All documents, which may support the creditor’s claims, shall be filed.

17.2

What is the impact of bankruptcy on the creditors and on the debtors?

Bankruptcy produces several effects both on the debtor and on the creditors: the former is sanctioned with limitations on his/her civil rights and on his/her freedom to manage and dispose of assets. For example, the bankrupt entrepreneur shall notify the Official Receiver of any change in his/her residence or domicile. Similarly, all correspondence addressed to the bankrupt entrepreneur and related to matters part of the bankruptcy procedure shall be delivered to the Official Receiver.

As far as the impact on the debtor’s assets is concerned, it must be underlined that upon the declaration of bankruptcy the debtor loses his right to freely manage or dispose his assets (although they are still under the ownership of the bankrupt debtor). Similarly, all payments made or received by the bankrupt entrepreneur following the declaration of bankruptcy shall not produce any effect. In any case, the debtor can still dispose of personal commodities such as alimonies, wages and pensions, and any bankrupt income within the limit of what is necessary for his/her own maintenance and for the maintenance of his/her family, and for those assets that according to law may not be seized.

As a general rule, the bankrupt entrepreneur shall be substituted by the Official Receiver in all pending proceedings related to the patrimonial rights involved in the bankruptcy procedure. The bankrupt entrepreneur can intervene in the legal proceedings in which he/she is involved only where provided for by law or if the lawsuit may lead to a judgment of straight or fraudulent bankruptcy (i.e.: *bancarotta*).

After issuing the bankruptcy declaration and pursuant to the general principle of the so-called *par condicio creditorum* (all creditors have to be treated in the same manner), creditors are not allowed, throughout the entire procedure, to obtain satisfaction of their outstanding credits by means of private individual enforcement procedures.

Creditors can be mainly divided into 2 different classes:

- i. those secured by pledge, mortgage or privilege and allowed to claim repayment of principal, interest and costs with priority right on the distribution of the profits obtained after the sale of the secured assets, and
- ii. ordinary creditors. Unlike secured creditors, ordinary creditors may only make claims on the sale/liquidation of the remaining assets, it being understood that if secured creditors are not satisfied in full, their residual claims may rank with unsecured creditors on the bankruptcy assets for the difference.

17.3

What impact does bankruptcy have on contracts?

The declaration of bankruptcy may affect existing contracts executed by the bankrupt debtor in different ways.

As a general rule, the performance of any agreement, not yet carried out as a whole or in part by any of the parties, shall be deemed suspended up to the date on which the Official Receiver, upon authorization of the Creditors' Committee declares either to continue such agreement in lieu of the bankrupt debtor, or to terminate the same.

Several exceptions to this general rule are expressly provided for by law, distinguishing basically:

- i. contracts which automatically terminate after the declaration of bankruptcy, and
- ii. contracts that, unless otherwise agreed upon, continue to be in force. In this case the Official Receiver will perform the contracts on behalf of the bankrupt debtor.

Contracts that automatically terminate upon the declaration of bankruptcy include any current account agreement (including bank accounts), commissionaire agreements, joint venture agreements and mandates in the event of the bankruptcy of the representative agent, whilst, in case of bankruptcy of the principal, the decision as to whether such agreement shall continue or terminate is vested upon the Official Receiver.

As far as the bid agreements are concerned, they are automatically terminated in the event of bankruptcy of one of the parties, unless the Official Receiver (previously authorized by the Creditors' Committee) declares, within 60 days following the declaration of bankruptcy, to succeed in the contractual relationship and provide the other party with proper guarantees. Notwithstanding the above, in the case of bankruptcy of the contractor, the principal may also object to such take over by the Official Receiver if his/her choice of that particular contractor was an essential reason for entering into the relevant bid agreement (i.e.: the so-called agreement characterized by *intuitus personae*).

Contracts that, unless otherwise agreed upon, continue to be in force having the Official Receiver to perform them, include, *inter alia*: (a) tenancy agreements, save for the right of the Official to terminate such agreements in advance providing the non-terminating party with a fair indemnification; (b) lease of business agreements, save for the right of the parties to terminate in advance such agreements providing the non-terminating party with a fair indemnification; (c) insurance agreements against damages, save for the right of the insurer to terminate them in advance if the bankruptcy of the insured party is likely to cause the deterioration of the risk in question.

17.4

Is there any risk of revocation actions?

Typically, a certain period of time passes between the moment in which the insolvency of the debtor is manifested and the date of its declaration by the competent Court. During this period it is possible that the entrepreneur, in order to cope with or hide the financial crisis, disposes of his/her assets and, consequently, puts at risk the integrity of his/her properties and possessions.

In light of this potential scenario, creditors of the bankrupt entrepreneur may benefit from both the ordinary action of revocation and the bankruptcy action of revocation.

With the ordinary action of revocation, the creditors, through the Official Receiver (i.e.: *Curatore Fallimentare*) may demand that those actions, by which the debtor disposed of his/her assets to the prejudice of such creditors' rights be declared ineffective towards the claiming creditors when the following conditions are met:

- the debtor was aware of the prejudice that the disposal would have caused to the rights of the creditors or, if such action was prior to the existence of the credit, that the disposal was fraudulently designed for the purpose of prejudicing the satisfaction of the claim;

- that, in the event of a non-gratuitous act, the third party involved was aware of said prejudice and, if the disposal was prior to the existence of the credit, that the third party participated in the fraudulent design.

Moreover, upon the declaration of bankruptcy, creditors may contemporarily seek for bankruptcy revocation action.

The logic behind the bankruptcy action of revocation is that all actions of disposal, with some exceptions, made by the insolvent entrepreneur are deemed to be capable of impairing the so-called *par condicio creditorum* and prejudicing the creditors.

Assumptions of the bankruptcy action are the insolvency status of the entrepreneur and the knowledge of the same by the third parties involved.

Based on such principle, those actions of disposal without consideration (except for gifts for use or acts executed in fulfilment of a moral duty), that have been made in the last 2 years prior to the declaration of bankruptcy, as well as the payments of debts which expire on or after the date of declaration of bankruptcy and that were made within 2 years prior to such declaration, shall not produce effects against the creditors.

Secondarily, other actions of disposal by the bankrupt entrepreneur are subject to revocation by the Official Receiver on behalf of the creditors and may be distinguished in those for which the state of insolvency of the entrepreneur is presumed and those for which the burden of proof of the same lies upon the Official Receiver.

The first category includes, if made in the last year prior to the date of the bankruptcy declaration, *inter alia*:

- those actions of disposal characterized by a 25% unbalance against the entrepreneur;
- payments of expired debts made with abnormal forms of payment;
- pledges and voluntary mortgages for non-outstanding debts; and
- if occurred in the last 6 months, pledges and voluntary mortgages for outstanding debts.

On the contrary, acts of disposal of the second category shall include:

- payments of claimable debts;
- pledges, mortgages for debts contextually contracted; and
- any other acts against payment,

if made in the last 6 months prior to the date of the bankruptcy declaration.

Without prejudice to the above, there are some specific acts and deeds that, according to specific law provisions in force, are not subject to revocation, among which:

- payment of goods and services performed within the exercise of the corporate business and within due terms of use;
- actions, payments and guarantees performed during the execution of any bankruptcy and/or debt restructuring procedure (such as the adjustment with creditors and the debt restructuring procedure) and during the execution of a specific plan aimed at recovering the company's debts and duly certified by an expert according to Section 67, paragraph 3 letter d) of the Bankruptcy Decree.

17.5

Which are the main conditions required in order to proceed with the adjustment of creditors' claims?

The proposal for the adjustment of creditors' claims (in the meaning of *concordato fallimentare*) regulated under Section 124 and following of the Bankruptcy Decree, is an agreement between the bankrupt entrepreneur and the creditors, which is not only aimed at bringing the bankruptcy procedure to a close, but it is also intended to reorganize and recover the undertaking, without the need to initiate the liquidation of the existing assets. It will also attempt to respect the general principle of "*par condicio creditorum*", in force, which provides that all creditors have to be treated in the same manner.

In other words, the procedure under analysis tends to limit the time and cost inconveniences for the creditors with respect to the bankruptcy procedure and to favour the entrepreneur, who can demonstrate its reliability and diligence, relieving the same from a part of its liabilities and leaving him/her with the availability of their assets.

The above-mentioned proposal can be filed before the Bankruptcy Judge (i.e.: Giudice Delegato) by:

- the bankrupt entrepreneur (and/or by companies in which they own a participation or that are subject to joint control), but not before 12 months from the declaration of bankruptcy and on the condition that a two-year period has not elapsed since the statement of liabilities has been enforced; and by

- one or several creditors or by third parties.

As a matter of fact, the creditors are divided into different classes and their claims' satisfaction can take place by any means, including the transfer of assets, the assumption of liabilities and the use of financial instruments, such as the allocation to creditors of shares, quotas or bonds, even convertible.

Full payment of the secured creditors is not required. On the contrary, such creditors can be partially paid provided that, by means of the plan of reimbursement, they can be satisfied in the same way they would have been had the secured assets been sold.

Without prejudice to the abovementioned, the proposal shall grant the unsecured creditors the payment of at least 20 % of the amount of their credit. Such provision does not apply to the so-called "adjustment of creditors' claims on a going concern basis" (i.e.: Concordato in continuità aziendale).

The proposal for adjustment shall be filed with the Bankruptcy Judge (i.e.: Giudice Delegato), who shall preventively request the opinion of the Official Receiver (i.e.: Curatore Fallimentare) and that of the Creditors' Committee (i.e.: Comitato dei Creditori). With regards to the latter, the proposal for adjustment must be accepted/ approved by those creditors representing the majority of the credits admitted to vote or, in case there are different classes of creditors, by the majority of the credits admitted to vote in the classes themselves.

Once the plan has been voted and approved by the creditors, the Bankruptcy Judge orders its communication to whom filed the proposal, to the bankrupt entrepreneur and to those creditors who did not agree to the plan itself. Such communication also establishes the term within the claims can be filed. If no claims are filed, the competent Court approves the adjustment of the creditors' claims.

To this regard, it is important to notice that (similarly to the adjustment before bankruptcy) the Court may approve the adjustment even if the majority of creditors in one or more classes has not agreed to the plan, in the event that the majority of classes has provided its approval and the Court believes that those classes, which have not approved the proposal, cannot be satisfied in a better way.

The adjustment, once approved, will be binding upon the bankrupt entrepreneur and upon all those creditors present prior to the starting of the bankruptcy procedure, including those who did not file any judicial petition against the bankrupt entrepreneur.

Which are the main conditions to be met in order to proceed with adjustment before bankruptcy?

The entrepreneur facing the crisis (also if already insolvent) may ask the creditors to enter into an adjustment before bankruptcy based on an arrangement with creditors (in the meaning of "*concordato preventivo*"), regulated by Section 161 and following of the Bankruptcy Decree, which provides that the entrepreneur may restructure the existing debts. Such arrangement with creditors may provide for:

- debt restructuring and satisfaction of creditors' claims by any means, also through the transfer of assets, assumption of liabilities, or other transactions, including the allocation to creditors or to companies controlled by creditors of the shares, quotas or debentures (even convertible into shares) issued by that company, or other financial instruments;
- the transfer of some or all of the activities of the company involved in the proposal of adjustment before bankruptcy to a contractor;
- the division of the creditors into classes based on their homogenous legal status and economic interests;
- different repayment schemes for creditors belonging to different classes.

The entrepreneur willing to enter into the arrangement with creditors is required to file a motion with the competent Court (where the company has its main place of business). The Court, after verifying the documentation filed, including, *inter alia*, a list of the company's assets and creditors and an up-dated report on the financial and economic position of the company, shall delegate a Judge for the management of the said procedure, appoint a specific Commissioner (so-called *Commissario Giudiziale*) and, moreover, shall call a meeting of creditors to be held within the following 30 days, so as to vote for the restructuring proposal and to set a term within which the entrepreneur shall file before the competent Court the amount that is deemed sufficient for the whole procedure.

Further to the amendments introduced by Law no. 132/2015, the Bankruptcy Decree provides, under certain conditions, for the possibility of one or more creditors representing the 10% of the credits' total amount to present a concurrent proposal of adjustments of creditors' claim in addition to the debtor's proposal. Should more than one proposal of arrangement be presented, the successful proposal will be the one approved by the majority of creditors admitted to vote.

Moreover, further to the abovementioned amendments, if the adjustment plan provides for the transfer of Company, of a business unit or assets, the Court shall promote a competitive proceedings in order to identify other interested parties. Should more offers, better than the debtor's one, be presented by the interested parties, the Court shall promote a tender procedure among such parties. At the end of the tender, the debtor shall amend his proposal and the adjustment plan according to its outcomes.

The arrangement with creditors must be approved by those creditors representing the majority, in terms of value, of the claims admitted to vote. Should the creditors be divided in more than one class, each single class shall vote separately and the arrangement shall be approved, when such majority, in terms of value, is reached in the most relevant number of classes.

The arrangement must also be certified by an expert (such as lawyers or chartered accountants) with regard to its feasibility and to the correctness of the data and information stated in the same.

In any case, the Court may still approve the arrangement proposal even if the majority of creditors in one or more classes have not agreed to the arrangement, provided that:

- the majority of the classes has approved the above-mentioned arrangement with creditors; and
- the Court believes that those classes, which have voted against the proposal, cannot be satisfied in a better way.

Should the arrangement with creditors be approved by the Court, it will become binding on all creditors, regardless of their acceptance or not. On the contrary, should the arrangement proposal be rejected, the Court shall declare the bankruptcy of the entrepreneur (if he/she is insolvent), who will, consequently, undergo ordinary bankruptcy dissolution proceedings.

Further to the amendments of the Bankruptcy Decree implemented in the period 2012 - 2013, it is now possible for the debtor to file a so-called "blank" petition for adjustment before bankruptcy together with other minor documents (mainly consisting of the company's financial statements of the last 3 years and a list of the creditors with indication of the relevant credits) and reserve the right to file the adjustment plan and proposal together with the additional documents required, within a specific term determined by the Court from 60 up to 120 days (that may be postponed for justified reasons for a further 60 days only).

Should a bankruptcy request be filed against the entrepreneur, the above term may not be longer than 60 days. In addition, a so-called "blank" petition cannot be filed by an entrepreneur who has already filed for such procedure within the last 2 years.

Within the term above mentioned, the debtor may file the following main requests:

- an adjustment plan / proposal providing for the liquidation of the company's assets;
- an adjustment plan / proposal providing for the continuity of the business either by the debtor or by a third party acquiring the company's business or quota within the adjustment procedure;
- a debt restructuring agreement (as better described under paragraph 17.7 below).

During the adjustment before bankruptcy procedure (it including the period between a so-called "blank" petition and the filing of the final adjustment proposal and plan) the enterprise is managed by the debtor under the supervision of the Commissioner. However, any action or activity exceeding the ordinary administration, in order to be valid and effective shall be performed upon specific authorization of the Bankruptcy Judge.

Revocation actions are not applicable during the course of the adjustment before bankruptcy, or during the subsequent bankruptcy of the debtor with respect to those acts and deeds performed to implement or in function of this procedure. Moreover, starting from the date the adjustment before bankruptcy is filed (a so-called "blank" petition), the creditors shall not initiate or continue any enforcement action against the debtors' assets.

Which are the main conditions to be met in order to proceed with a debt restructuring agreement procedure?

The entrepreneur facing the crisis (also if already insolvent) may ask to the Court the homologation of a debt restructuring agreement (in the meaning of “**accordo di ristrutturazione dei debiti**”) regulated under Section 182-bis of the Bankruptcy Decree, executed with creditors representing at least 60% of the credits.

The agreement may have a variable content and may also be different with respect to different creditors. Upon execution of the agreement/s by creditors representing at least 60% of the credits, any creditors that have not signed the same shall be paid in full by the debtor within:

- 120 days from the date of homologation for debts already expired prior to homologation;
- 120 days from expiry date for debts not yet expired at homologation.

The agreement / agreements must also be certified by an expert (such as lawyers or chartered accountants) with regard to its/their feasibility and to the correctness of the data and information stated therein. In particular, the expert's certification shall include the verification of the appropriateness of the agreement/s to ensure the payment of those creditors that have not executed a debt restructuring agreement within the above mentioned terms.

Together with the agreement and the expert's certification, the debtor shall file with the Court the same documentation required for the adjustment before bankruptcy procedure (i.e. financial statements of the last 3 years, list of creditors with specification of relevant credit, etc.).

The debt restructuring agreement shall be filed with the competent Register of Companies and shall be effective starting from the date of its registration.

Starting from such date and up to the following 60 days, the creditors shall not begin or continue any enforcement action against the debtors' assets.

Any act or deed carried out in execution of a debt restructuring agreement homologated by the Court is not subject to revocation.

Which are the main conditions to be met in order to proceed with the debts' recovery pursuant to Section 67, paragraph 3, letter d) of the Bankruptcy Decree?

The entrepreneur facing the crisis may draft a specific plan which should ensure the recovery of the company's debts as well as the balance of its financial situation, according to provisions included under Section 67, paragraph 3, letter d) of the Bankruptcy Decree.

On the basis of such plan, an agreement is usually reached together with major creditors though, according to law, the same may also be drafted unilaterally by the debtor.

This kind of plan / agreement does not imply the involvement of the Court but shall in any case be certified by an expert (such as lawyers or chartered accountants) with regard to its feasibility and to the correctness of the data and information thereto contained.

In addition, any action or deed carried out in execution of the mentioned plan and/or connected agreement is not subject to revocation.

Which are the main conditions to be met in order to obtain extraordinary administration procedures for major enterprises?

Extraordinary Administration of major enterprises *(“amministrazione straordinaria grandi imprese”)*

This procedure, regulated by Legislative Decree No. 270, of July 8, 1999, is only available to major enterprises, which are temporarily insolvent and it is aimed to preserve the wealth of their business by means of continuation, reactivation and reorganization of the industrial activities.

The admission to such procedure requires the following conditions to be met by the entrepreneur:

- there must be at least 200 employees, as of at least one year prior to the procedure;
- the amount of debts must not be lower than 2/3 of the value of the assets and the income of the earnings deriving from sales and services provided in the past year;

- the company is an entity subject to bankruptcy procedures;
- the company is insolvent;
- the company must be in a position to be able to recover its business.

The bodies who manage the procedure are:

- the Court, which declared the insolvency;
- the Bankruptcy Judge (i.e.: Giudice Delegato), appointed by the Court;
- one or three Extraordinary Commissioners (i.e.: Commissario Straordinario).

Within 30 days from the declaration of insolvency, the Commissioner shall draft a report stating the reasons of the insolvency and if the company is in a position to be rescued and shall present the same to the Ministry of Economic Development.

The entrepreneur usually continues to manage the company under the supervision of the Commissioner, unless otherwise stated by the Court.

Recovery of the company may be obtained either by means of an economic and financial plan (having a maximum duration of 2 years) or through a maximum 1 year plan providing for the transfer of the assets.

Should the Court consider that the extraordinary administration cannot be effectively carried out due to the impossibility, within the given term, to pay off the creditors regularly or to sell the assets of the company, the same will convert the extraordinary administration into a bankruptcy procedure. Similarly, such procedure can also be concluded if no claims for credits are filed within the term provided for by the declaration of insolvency or if the entrepreneur recovers his/her capacity to regularly pay off their obligations.

Restructuring of major enterprises (“Ristrutturazione grandi imprese”)

This procedure, regulated by Law Decree No. 347, of December 23, 2003, is only available to those enterprises which are larger than those indicated under the extraordinary administration procedure.

More precisely, the admission to this procedure requires the following conditions to be met by the entrepreneur:

- there are a minimum of 500 employees as of at least one year preceding the procedure (taking into account the sole company requesting the procedure or the entire group of the same);
- the amount of debts must amount to at least €300 million;
- the company is an entity subject to bankruptcy procedures;
- the company is insolvent;
- the company must be in a position to be able to recover its business.

Despite differences in the procedural aspects to be followed, the reorganization of major enterprises is, in general, very similar to the extraordinary administration of major enterprises.

The aim of this procedure is, also, the recovery of the company that may be obtained either by means of an economic and financial plan (having a maximum duration of 2 years) or through a maximum 1 year plan providing for the transfer of assets.



18 Banks and financial companies

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How can foreign banks and financial companies carry out business in Italy?

Banking businesses and other financial activities may be carried out through cross border operations or by means of a physical presence in Italy (branch or subsidiary). The choice between the three main options:

- i. cross border operations;
- ii. Italian branch;
- iii. Italian subsidiary;

has a profound impact on the applicable legal, regulatory and tax framework.

Is there any authorization to be requested by non resident companies in order to carry out banking and financial services in Italy?

As a starting point, it is worth mentioning that for both banking and financial activities the applicable regulatory framework depends significantly on the country where the foreign entity planning to operate in Italy is established.

To this extent, the framework provided by the applicable EU directives, which establishes that an EU player may carry out business activities in another EU country and benefit from a simplified regulatory access to the Italian financial and banking market.

Banks

EU banks may carry out their activity in Italy through cross border operations or a branch, benefiting from the authorization received to perform such activity in the country where the bank is established. In this respect, it is only required that the Italian regulator (Bank of Italy) is given prior notice by the competent Authority of the country where the EU bank is established.

On the other hand, non-EU banks may carry out their activity in Italy through cross border operations or a branch only if licensed by the Bank of Italy (in the case of a branch, as a result of an authorization process similar to the one applicable to the set-up of Italian banks).

If a foreign bank (EU or non EU) intends to establish a subsidiary in Italy, the authorization of the European Central Bank is mandatory. In order to obtain the authorization, there are several substantial requirements to be satisfied, including, among others:

- specific requirements for the management of the bank and qualified shareholding (e.g.: experience, integrity and independence);
- minimum capital requirements;
- specific legal form (*Società per azioni* or *Società cooperativa per azioni a responsabilità limitata*);
- presentation of a program of the activities to be carried out, including a business plan.

After receiving the authorization of the European Central Bank, there are also a number of formal fulfilments to satisfy (such as the registration in the Italian Register of Companies and all the subsequent communications). Moreover, the European Central Bank, with the support of the Bank of Italy, which is required to regularly send data and information to the supervisory authority.

Financial entities

EU investment services companies (“SIMs”) may carry on investment services and activities in Italy (through cross border operations or a branch) under rules similar to those applicable to banks. These rules, based on the two principles of mutual recognition and home country control, apply also for EU asset management companies (Italian “SGRs”) and other financial entities (e.g.: leasing or factoring players). However, certain areas where legal uncertainty still exists on the services admitted and a case by case analysis is generally advisable.

As to non-EU financial companies, it is required that the Italian regulator authorizes them to provide investment services through the establishment of a branch. In order to receive the authorization, a non-EU company must satisfy the following conditions:

- i. specific requirements regarding capital, management and others;
- ii. authorization in the foreign country to perform investment services which the company intends to perform in Italy;
- iii. existence in the foreign country of provisions concerning authorizations, organizational arrangements and supervision equivalent to those applying to Italian investment firms;
- iv. existence of cooperation agreements between the Bank of Italy, Consob and the competent authorities of the foreign country;
- v. fulfilment of conditions of reciprocity between Italy and the foreign country within the limits permitted by international agreements;
- vi. presentation in Italy of a program of the activities to be performed locally.

If a foreign financial entities (EU or non EU) intend to establish a subsidiary in Italy, the authorization of the Italian Regulators is mandatory (*Consob* or Bank of Italy). In order to obtain the authorization, there are several substantial requirements to be satisfied, including, among others:

- specific requirements for the management of the company and qualified shareholding (e.g.: experience, integrity and independence);
- minimum capital requirements;
- specific legal form (*Società per azioni* or *Società in accomandita per Azioni* or *Società cooperativa* or *Società a responsabilità limitata*).

After receiving the authorization, there are also several formal fulfilments to comply with.

18.3

Are there specific accounting rules for banking and financial entities balance sheet purposes?

Banks

From FY 2006, Italian Banks are required to prepare their statutory financial statements in accordance with the International Accounting Standards (IAS/IFRS).

The Legislative source is Decree No. 38 dated February 28, 2005 which has modified the local legislation according to the new IAS/IFRS accounting framework. In particular, the Decree establishes the entities to which IAS/IFRS accounting framework is applicable (either on a compulsory or voluntary basis) as well as the relative timing of the application.

The Decree also aims to coordinate the principles provided for under domestic legislation and IAS/IFRS principles. In particular:

- if the IAS/IFRS principles are incompatible with the correct representation of the financial position of the company, there is the option to not apply them;
- in principle, income and reserves generated from the application of the “fair value” method cannot be distributed;

Financial entities

IAS/IFRS principles generally apply to financial entities other than banks (e.g.: Italian investment services company - SIM, Italian asset management companies - SGR, and financial companies included in the Register of financial companies pursuant to Section 106 IBC).

In particular, Legislative Decree No. 136/2015 modified the accounting framework applicable to financial entities different from banks. Starting from fiscal year 2016 (for companies with calendar year):

- financial entities allowed to provide loans enrolled in Register pursuant to Section 106IBC are required to adopt IAS/IFR accounting principles;
- minor financial entities (pursuant to Section 111 and 112 IBC) should adopt the specific accounting principles provided by Legislative Decree No. 136/2015;
- other financial entities different from the above listed, should adopt the ordinary rules set forth by Italian Civil Code and Legislative Decree No. 127/1991.

Italian permanent establishments of foreign banks and financial entities

According to the amendments provided by Legislative Decree No. 147/2015, starting from fiscal year 2016, Italian PEs are required to prepare the income statement and the financial sheet according to the accounting principles that would have been adopted by Italian resident entities carrying out a similar business (e.g. PE carrying out banking and financial activity shall adopt IAS/IFRS standards).

18.4

What are the corporate taxes paid by banks and financial companies in Italy?

Italian resident banks and financial companies are subject to Italian corporate income tax (IRES), levied at the rate of 27.5% and to Local tax on productive activities (IRAP), levied at a standard rate of 4.65% which is usually increased by financial and banking entities at 5.57%.

The 2016 Financial Bill (i.e. Law No. 208 of December 28, 2015) introduced a new rule, according to which starting from fiscal year 2017, the basic IRES rate for all Italian companies will be reduced to 24%. At the same time an additional 3.5% IRES rate will be applied to resident banks and financial companies.

How is the corporate taxable income of banks and financial companies determined?

As a general rule, the taxable basis is determined starting from the profit and loss result of the year, adjusted as required by the tax law, irrespective of the accounting framework (Italian GAAP or IAS/IFRS) adopted by the company.

Starting from FY2008, the “Reinforced Derivation Principle” (*“Principio della Derivazione Rafforzata”*) is applicable to IAS/IFRS adopters.

By applying the Reinforced Derivation Principle, the timing accrual principle and the qualification and classification criteria provided by the IAS/IFRS are fully relevant for the calculation of the taxable base. Such provisions have not been extended to the evaluation and quantification criteria stated by the IAS/IFRS.

The Ministerial Decree No. 48 of April 1, 2009 (the so-called “IAS Decree”), which implements the 2008 Financial Bill, introduces relevant tax provisions addressed to IAS/IFRS adopters. The main provisions included in the IAS Decree are:

- confirmation of the relevance of the accounting approach for tax purposes: an exception to such general rule was introduced in relation to equity instruments, where the legal classification prevails over the accounting classification (debt vs equity classification);
- introduction of a general rule in order to avoid the duplication of taxable/deductible items for IAS/IFRS adopters;
- the tax treatment of the transactions between IAS/IFRS adopters and non-IAS/IFRS adopters, stating that, in relation to operations concluded between an IAS/IFRS adopter and a non-IAS/IFRS adopter, the tax regime applicable is based on the accounting principle adopted by each company.

Among the specific rules applicable to IAS/IFRS taxpayers, it is worth mentioning:

- at certain conditions, unrealized profits and losses recognized in the profit and loss account are, respectively, taxable and deductible (e.g.: fair value on securities other than participations);
- depreciations are permitted within the rates provided for by the Tax Authority, for the amount booked. For goodwill and trademarks the deduction of depreciations is allowed independently from the amount booked (ordinary, for an amount not exceeding one eighteenth of the original value). Therefore, the substitution of the depreciation of the goodwill (admitted under the Italian GAAP) with the goodwill’s review for impairment purposes (provided under IAS/IFRS), does not affect the maximum deduction per year of the goodwill admitted for tax purposes;

- dividends arising from shares held for trading purposes are fully taxable for IRES and partially (50%) for IRAP purpose;
- profits and losses arising from the evaluation of trading securities (shares and bonds) and derivatives are tax relevant.

(i) Are there some restrictions for the deduction of receivable write-downs and write-offs?

The Italian Tax Law provides for a specific rule regarding the deduction of receivables write-downs and write-offs for banks and financial entities, recently amended by Art. 1, paragraph 160 of the Financial Bill 2014 (i.e. Law No. 147, of December 27, 2013) effective from fiscal year 2013, and further amended by Law Decree No. 83 of June 27, 2015 (Art. 16).

Until fiscal year 2012, receivables write-downs booked in the financial statement were deductible each year, for the portions not covered by insurance contracts, up to an amount not exceeding 0.3% of the value of the receivables from customers booked in the balance sheet, being the excess deductible in equal instalments over the following eighteen years. Receivables write-offs were fully deductible if supported by certain and precise elements (this aspect was matter of a large conflict between banks and Italian tax authorities).

Following the amendments provided by 2014 Financial Bill, for FYs 2013 and 2014, receivables write-downs and write-off of credits granted to clients, assumed net of revaluations performed on such receivables and different from those realized through sale for a consideration, were deductible, for IRES and IRAP purposes, in equal instalments in the fiscal year in which they were recorded in the P&L and over the subsequent 4 fiscal years. If the aggregate amount of receivable revaluations was higher than write-downs, the exceeding revaluations became fully taxable in the fiscal year in which it was recorded in the P/L. Under this regime losses on receivables from customers realized through sale for a consideration, were fully deductible in the fiscal year in which they were recorded in the balance sheet.

Starting from FY 2015, Law Decree No. 83/2015, has further modified the tax treatment applicable to receivables from customers write-downs for banks and other financial institutions, both for IRES and IRAP purposes. In particular, according to the new rule, receivables write-downs are fully deductible in the fiscal year in which they are booked in the P/L.

Such Decree provided for a transitional regime for the first year of application (i.e., FY 2015), according to which net write-downs deduction should be limited to the

75% of their overall amount booked in the P/L. Write-downs reversals not deducted at December 31, 2014 (based on the rules previously in force) and the 25% of write-downs whose deduction is not allowed in the first year of application will be deductible in the next 10 years with increasing percentage of deductibility (starting from 5% to 12%).

(ii) Are there specific rules regarding the deduction of the costs related to derivative contracts?

As a general rule, gains and losses deriving from the evaluation of derivatives are relevant for corporate income tax purposes. In particular, gains and losses on derivatives booked in the P/L on the basis of the correct application of the IAS/IFRS are relevant also for tax purposes.

According to the Italian Tax Law, it is possible to identify two different tax regimes for derivative contracts, depending on whether the contract is concluded for trading or hedging purposes.

In the case of trading derivatives contracts, gains and losses resulting from the evaluation or negotiation of such contracts are, in general, recognized for tax purposes and included in the computation of the taxable profit of banks and financial entities.

With regards to hedging derivatives contracts, the tax treatment differs between fair value hedge contracts and cash flow hedge contracts.

As to fair value hedge contracts, the so-called “principle of symmetry” applies, based on which any gains and losses, resulting from the valuation or realization of the contract, are subject to the same tax regime applicable to gains and losses deriving from the valuation or realization of the hedged assets and liabilities.

As to cash flow hedge contracts, should the derivatives contract be concluded with the purpose of hedging the risks of interest cash flow deriving from assets and liabilities, any gains and losses resulting from the derivative contracts shall be included in the computation of taxable base, in accordance with the accrual principle established for the recognition of interest (payable or receivable).

In order to prove, for tax purposes, the hedging nature of such contracts, it is required that the hedge relationship results from a deed with a “fixed date” precedent or contextual to their negotiation, in order to qualify such contracts as “hedging derivatives”.

(iii) Are there specific rules regarding the deduction of interest expenses?

The Italian Tax Law provides a specific rule regarding the deduction of interest expenses suffered by Italian banks and financial companies, introduced by Law Decree No. 112 of June 25, 2008 for IRES and IRAP purposes.

Such provisions aimed to limit the deduction of the interest expenses suffered by banks and financial companies to 96% of the amount of passive interest booked in the income statement of the mentioned entities.

Law Decree No. 112/2008 also provided a specific mechanism for the deduction of passive interest in the case of application of the “Domestic tax consolidation - DTC” regime. In particular, in such case, the total amount of passive interest due by the entities of the DTC regime in favour of other entities of the DTC regime (i.e. “intra-group passive interest”) are deductible up to the amount of passive interest due by the entities of the DTC regime in favour of third parties not included in the Group and in the DTC regime area.

The described rules concerning the deduction of interest expenses has been amended by the 2016 Financial Bill, (i.e. Law No. 208 of December 28, 2015). In particular, starting from the FY17, interest expenses suffered by Italian banks and financial companies will be fully deductible from the IRES and IRAP taxable basis.

(iv) Is it possible to convert certain deferred tax asset (DTA) into tax credits?

According to Italian Tax Law, certain DTAs booked in the balance sheet may be converted into tax credit under certain conditions. As a general rule, the conversion is possible if the company realizes an accounting loss or a tax loss (or a negative tax base for IRAP purposes).

As a matter of fact, the provision was originally introduced only for IRES purposes by Law Decree No. 225, of December 29, 2010 subsequently amended by Law Decree No. 201 of December 6, 2011, extended to IRAP by the 2014 Financial Bill (i.e. Law No. 147, of December 27, 2013) and further entirely amended by Law Decree No. 83 of June 27, 2015

The deferred tax assets (DTAs) which may be converted into tax credits under the previously mentioned rules are the following:

- i. DTAs booked in respect of the difference between the accounting value and the tax value of intangible assets and goodwill (only in relation to the part of DTAs booked before FY 2015);
- ii. DTAs arising from the deferred deductibility of receivables write-downs and write-off (as previously reported).

In the event of an accounting loss, the conversion is effective from the financial statements approval date and operates in a measure equal to the ratio between the accounting loss and net equity. Starting from the fiscal year in which the financial statement is approved, the negative items correspondent to the converted DTAs (such as reversal of write downs or goodwill and intangibles amortization) can no longer be deducted from the taxable income.

In the case of a tax loss (or negative IRAP tax base), DTAs are convertible into tax credit only for the part of the loss generated by the reversal of receivables write-downs, and the depreciation of goodwill and other intangible assets. In this case, the conversion starts from the date in which the relevant tax return is filed (within the last day of the ninth month subsequent to the end of the fiscal year) in the limits of the tax loss generated by the aforementioned reversals.

For IRES purposes, the tax losses to be carried forward in the following fiscal years will be reduced by the amount of such reversals related to the converted DTAs.

The resulting tax credit can either be off-set against tax liabilities (without limitation in the off-settable amount) or may be disposed to other companies belonging to the group at face value pursuant to Section 43 of the Presidential Decree No. 602/1973. In this case, the transferee may off-set the credit against its tax liabilities within the limit of € 700,000. The residual amount of such credit not off-set can be claimed for refund by the company.

The credit can also be transferred to the companies part of the domestic tax consolidation regime. In this case, the Italian Tax Authority confirms that the credit can be transferred in the limits of i) the IRES correspondent to the taxable income resulting from the tax return filed by the consolidated company and ii) the IRES due by the fiscal unit.

In this regard, Law Decree No. 83/2015 has introduced significant amendments to the provisions relating to the conversion into tax credits of DTA booked on goodwill and other intangibles. In particular, the DTA regarding such assets booked starting from FY 2015 cannot be converted into tax credit.

The new provisions introduced by Law Decree No. 83/2015 do not affect the conversion into tax credit of the DTA booked on receivable write-downs not deducted as of December 31, 2014. Moreover, according to the explanatory memorandum to the Decree, also the DTA booked on the 25% of write-downs whose deduction is not allowed in the first year of application could be potentially converted into tax credit.

Is the income of the Italian branch of a foreign bank or financial company fully or partially taxed?

For IRES and IRAP purposes, the computation of the taxable basis of the branch (this being generally a permanent establishment in Italy of the foreign bank/financial company) is generally determined on the basis of the same rules applicable to Italian corporate entities.

In this respect Section 152 of the Italian Income tax Code expressly states, for IRES purposes, that to calculate the taxable income of Italian branches of non-resident companies, the same provisions provided for Italian resident companies are applicable.

Nevertheless, differently from corporate entities, the Italian branch has no obligations to file the statutory financial accounts (the local subledger, however must be kept according to domestic ordinary rules).

Until the amendments provided by Art. 7 of Legislative Decree No. 147/2015 (effective starting from January 1, 2016) the Italian law did not provide clear guidance on the accounting framework to be adopted by the Italian branches of banks and financial entities, being unclear whether Italian GAAP, IFRS or the local GAAP of the head-office were applicable.

This being said, Legislative Decree No. 147/2015 clarified the accounting framework applicable to Italian permanent establishment, through amendments of Art. 152 of ITC. In particular, a PE will now be required to prepare the income statement and the financial sheet according to the accounting principles that would have been adopted by Italian resident entities carrying out a similar business (e.g. PE carrying out banking activity shall adopt IAS/IFRS standards).

As to the applicable tax rules, please refer to the above described information concerning Italian banks and financial entities, in relation to the computation of IRES and IRAP taxable basis.

Funding of the branch

Specific considerations should be made in relation to the tax regime applicable to notional interest or interest borne by Italian permanent establishments in respect of loans attributed to them by other entities of the same group. Generally, Italian transfer pricing provisions also apply to internal dealings between the Italian permanent establishments and the head office and to transactions between the latter and other related entities, which are attributable to the permanent establishment. Generally speaking, from an Italian perspective, intra-company dealings should be recognized as long as they are aligned with the arm's length principle.

As to the funding of the branch, in recent years the Italian Tax Authority made reference to the guidance issued at the OECD level for the purposes of calculating the so-called “free” capital to be allocated to banking branches. In this respect, several Italian permanent establishments of foreign banks have undergone audits resulting in significant tax adjustments based on the challenge that local branches are thinly capitalized from a tax perspective. The Tax Authority based their assessments on the guidance issued by the OECD in the “Report on the Attribution of Profits to Permanent Establishment”, issued in their final version in 2010.

In particular, assessments based on the consideration that, as no EU specific regulation provides for a mandatory minimum capital for the purpose of deducting passive interest in the hand of an Italian branch, it seems appropriate to make reference to the minimum capital requirements set by the Bank of Italy. Therefore, even if, from a legal/regulatory perspective, no obligation exists in respect of the requirement of a free capital, from a tax perspective, a figurative free capital having an amount in line with the regulation set forth by the Bank of Italy is required.

Accordingly, where a PE is considered under-capitalized in respect of the Bank of Italy’s requirements, a portion of the funding provided by the relevant head office may be re-assessed as figurative free capital, and, consequently, passive interests arising from such re-determined part of the funding are not deductible from the calculation of the taxable income.

A 2013 Sentence of the Regional Tax Court specified that, in order to determine the amount of free capital, the methodology to adopt should take into consideration principles shared at an international level. Therefore, according to the OECD Report, the methodologies to be used to calculate the operations carried out with the head office are i) the capital allocation approach, ii) the thin capitalization approach or iii) the quasi-thin capitalization approach (considered as a safe harbour approach).

This approach has been recently confirmed by Legislative Decree No. 147/2015 which, modifying Art. 152 of ITC, establishes that the branch free capital should be attributed to the Italian permanent establishment based on OECD principles.

In this regard, appropriate regulation will be issued by the Director of Italian Tax Authorities identifying the methods to be applied for allocation of free capital in various industries.

18.7

Is there any tax incentive granted in respect of capital increase made in Italian companies (i.e. ACE deduction)?

Banks and Financial Institutions can take advantage of the Allowance for Capital Equity which provides for the deduction of a notional interest from the corporate income tax base computed as a percentage of new capital injections made from FY 2011 onwards.

For further details, see § 3.7.3.

18.8

Is it possible to carry forward tax losses incurred by the company in previous fiscal years?

Tax losses realized by Italian companies as well as by Italian permanent establishments of foreign entities may be carried forward indefinitely for IRES purposes. For further details, please see 3.17

No tax loss carried forward is admitted for IRAP purposes.

No specific rules are applicable to banks or financial companies.

18.9

How is the IRAP taxable base for bank and financial companies determined?

Italian resident companies and PEs of non-resident companies are subject to Local Tax on productive activities (i.e. IRAP), generally levied at a rate of 4.65%. Regional Authorities may decrease or increase IRAP rates by up to 0.92%.

Basically, the IRAP taxable base is broadly represented by the gross operating margin resulting from the statutory financial statements of the company.

As far as banks are concerned, the taxable base is determined as a sum of the following profit and loss account’s items:

- i. intermediation margin reduced by 50% of dividends;
- ii. amortizations of functional tangible and intangible assets, in an amount of 90%;
- iii. other administrative expenses, in an amount of 90%;
- iv. 100% of receivables write-downs recorded in the P/L (starting from FY2016).

Point sub (iv) relative to the tax treatment applicable to receivables from customers write-downs for banks and other financial institutions has been introduced by Law Decree No. 83/2015.

Starting from FY 2015, according to the provision set forth by Law Decree No. 83/2015, receivables write-downs are fully deductible in the fiscal year in which they are booked in the P/L.

Law Decree No. 83/2015 provided for a transitional regime for the first year of application, according to which net write-downs deduction should be limited to the 75% of their overall amount booked in the P/L. Write-downs reversals not deducted at December 31, 2014 and the 25% of write-downs whose deduction is not allowed in the first year of application will be deductible in the next 10 years with increasing percentage of deductibility (starting from 5% to 12%).

According to Italian Tax Law, the deduction for IRAP purposes of the interest expenses suffered by Italian banks is limited to the 96% of the amount of passive interest booked in the income statement of the mentioned entities. The 2016 Financial Bill repealed such rule providing that starting from FY 2017 interest expenses will be fully deductible from IRAP taxable basis.

As a general rule, until 2015, labour cost were out of the IRAP taxable base. Starting from 2015, labour cost related to permanent employees is deductible from the IRAP taxable base within the limit of the amount reported in the P/L.

Investment companies (i.e. SIMs) and other entities qualified for carrying out investment services, determine the taxable base as the difference between (i) the sum of interests and assimilated revenues concerning spot against forward transactions and active commissions referred to services carried out by the intermediary and (ii) the sum of interests and assimilated costs concerning spot against forward transactions and passive commissions referred to services carried out by the intermediary.

With regard to Asset management companies (i.e. SGRs), the taxable base is calculated as the difference between active and passive commissions.

With regard to Open-end investment companies (SICAVs), the taxable base is calculated as the difference between underwriting commissions and passive commissions due to the investments dealer.

With reference to the above-mentioned financial entities (SIM, SGR and SICAV), amortizations and other administrative expenses are deductible in an amount of 90% permanently. Starting from fiscal year 2017, interest expenses will be fully deductible from IRAP taxable basis (in the previous fiscal periods interest expenses are deductible in an amount of 96%).



19 Corporate lending and access to the financial market

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How can a company finance itself in order to make investments in Italy?

A company willing to invest in Italy may finance itself by either entering into financial agreements or the Italian capital market.

In the latter case, the foreign company could issue financial instruments (such as bonds, shares, etc.) in favour of third parties or get listed on the Italian stock market.

Which are the most popular financial/banking agreements expressly ruled by the Italian Law?

- (i) **Loan (*Mutuo*)**: regulated by Sections 1813 et seq. of the Italian Civil Code which defines it as that “*agreement with which one party gives to another party a determined sum of money or other exchangeable goods, while the second party undertakes the obligation to provide in return an equal amount of goods of the same kind and quality*”.

Specifically, the “bank loan” is a monetary loan, granted by a financial institution with a returning policy based on a delayed plan in accordance to which the company, after receiving the loaned sum (usually all at once), undertakes the obligation to return it through periodical refunds (usually on a month, quarter and six-month basis), together with the related interest accrued.

A particular type of loan is the “purposed loan” (such as the real estate credit, the public works credit or other atypical kinds of loans) by means of which the company, that grants the loan, uses it in order to achieve a determined purpose.

- (ii) **Bank overdraft facility (*Apertura di credito*)**: it is a credit option governed by Sections 1842 - 1845 of the Italian Civil Code that consists in a credit agreement with a financial institution according to which the latter grants the account holder the right to use or withdraw a certain sum of money made available for a determined or undetermined period.

If not otherwise agreed, in accordance with the banking practice, the borrower can resort to the available amount in different moments providing to restock it with further remittances.

Unless provided for the contrary by the agreement, the financial institution cannot terminate the contract before its expiration date, except for just cause (*recesso per giusta causa*). The bank’s withdrawal determines the immediate termination of the client’s right to use the credit; however, a minimum period of 15 days shall be granted in order to allow the client to repay the amount used, as well as any other due amount. In case of an open - ended credit, each party may withdraw by giving either at least 15 days prior notice.

- (iii) **Bank advance (*Anticipazione bancaria*)**: the bank advance is a subtype of bank overdraft facility: while the latter does not need to be guaranteed by any particular security, Section 1846 of the Italian Civil Code establishes that the bank advance requires the borrower to provide a collateral (such as a pledge on securities, goods or documents representing goods) in order to guarantee its obligation, which needs to be proportioned to the guarantees value. Therefore, by means of this agreement, the company that grants securities, valuables or goods, has the possibility to obtain a loan, while still maintaining the right to take advantage of possible favourable changes in the market, by selling the assets given as guarantees afterward.

- (iv) **Bank discount (*Sconto bancario*)**: ruled by Section 1858 of the Italian Civil Code, it consists in an agreement by which the bank, after having deducted the corresponding interest, provide the client with an advance payment relating to unmatured claims. This operation allows a company, during its ordinary course of business, to benefit immediately of the amounts related to unmatured claims through payments granted in advance by the bank.

Which are the main features of atypical financial agreements?

The company that intends to obtain a loan may sign agreements not explicitly ruled by the Italian Law, in accordance with the principle that “*the parties can freely discipline the content of the agreement that they undertake, save for the respect of the boundaries established by the law and by the corporative rules*” (Section 1322, paragraph 1 of the Italian Civil Code). It is understood that such agreements must be direct to rule lawful interests tolerated by the Italian jurisdiction.

Therefore, in compliance with the aforementioned principle, the parties may sign any kind of agreement to finance a legitimate operation governed by the conditions agreed by the Parties.

Which are the main additional guarantees related to financial agreements?

When granting a loan, lenders may ask borrowers or third parties to provide guarantees.

The main kinds of guarantees expressed by the Italian law are: (i) personal guarantees, in reason of which the credit is granted if a third party personally guarantees to pay the amount due in the event that the principal debtor does not fulfil his obligation; (ii) real guarantees (such as the pledge, the mortgage and a special lien, disciplined by Section 46 of the Banking Code), in reason of which the credit is guaranteed by the creation of a juridical tie, in favour of the creditor, on a movable, immovable good and/or a financial instrument.

Which type of loans are explicitly ruled by the Law in order to finance specific operations?

Section 2447-*decies* of the Italian Civil Code, establishes the “financial agreement dedicated to a specific business”. This agreement can provide that all or part of the earnings gained through a certain specific operation, for which specific assets of the company are segregated, shall be used to repay all or part the loan granted (see also § 1.12).

More precisely, if specific formal and substantial requirements are met, the earnings gained by means of a certain specific operation that entails the segregation of dedicate assets, shall be acquired in a pool that shall not be attacked by the company’s creditors.

The financing agreement shall have, *inter alia*, the following main requirements: (i) a description of the specific purpose of the operation, the modalities and the timings required for the realization of the operation, the budgeted costs and earnings, (ii) the financial plan concerning the transaction, (iii) the assets needed to realize the operation, (iv) the amount of earnings which will be destined to the reimbursement of the loan and the modalities that may be used in order to determine them.

How can a foreign company access the Italian financial markets?

By issuing shares, bonds or other financial instruments, companies can request to be admitted to the official listings of Borsa Italiana S.p.A., provided that the issuer meets certain requirements, which vary according to the kind of issuer and the financial instrument to be issued.

Such requirements are set out by the Rules and Instructions of the markets (Rules) organized and managed by *Borsa Italiana S.p.A.*, which establish: (i) the conditions and procedures for the admission to trading of financial instruments and their exclusion or suspension, (ii) the conditions and procedures for the admission to trading of intermediaries and their exclusion or suspension, (iii) trading and the operation of support services, (iv) the obligations of intermediaries and issuers with specific regards to operating in the markets, (v) the procedures for the acquisition, publication and disclosure of prices and information.

As to the general conditions for admission to listing, the issuing companies must be regularly established and their articles of incorporation and by-laws must comply with the applicable laws and regulations. In addition, financial instruments must be:

- issued in compliance with the laws, regulations and any other provision that apply;
- in compliance with the laws and regulations to which they are subject;
- freely transferable;
- suitable for settlement using the settlement service referred to in Section 69 of the Financial Code or, where established by the provisions applicable to individual market segments, via comparable foreign services subject to the supervision of the competent home country authorities;
- suitable for trading in a fair, orderly and efficient manner.

Furthermore, Section 2.1.4. of the Rules sets out additional conditions for foreign issuers. In particular, issuers established under a foreign law must demonstrate that (i) there are no impediments to their substantial compliance with the provisions stated in the Rules and the Instructions or in laws or other regulations that apply to them, concerning information to be made available to the public, *Consob* or *Borsa Italiana S.p.A.*; (ii) there are no impediments of any kind to the exercise of all the rights related to their financial instruments admitted to stock exchange listing.

For the admission of financial instruments issued by companies or entities subject to the national legislation of an EU member state and existing in the form of paper certificates, the certificates must be in compliance with the provisions in force in such member state. In the event that certificates do not comply with the provisions in force in Italy, this fact must be disclosed to the public.

Borsa Italiana S.p.A. shall verify that, in the case of financial instruments issued by companies or entities subject to the national legislation of non- EU countries, the paper certificates representing such instruments offer sufficient guarantees for the protection of investors.

Where financial instruments issued by a company or an entity subject to the national legislation of a non - EU country are not listed in the home country or the country in which they are most widely distributed, they may be admitted only after it has been ascertained that the absence of listing in the home country or the country in which they are most widely distributed is not due to the need to protect investors.

Together with the above specific rules issuers intending to conduct business in the Italian financial markets must comply with other provisions contained in the Financial Code with reference to Market Abuse and Public Offerings, and the provisions set out in the *Consob* Regulations for Issuers (*Regolamento Consob No. 11971*), Intermediaries (*Regolamento Consob No.16190*) and Markets (*Regolamento Consob No. 16191*). Such provisions are intended to protect both the integrity of markets and investors.

It has to be noted that Section 113 of the Financial Code states that before the date set for the listing of European financial instruments on a regulated market, the issuer or the person applying for admission to public trading must publish the prospectus provided by Section 94 of the Financial Code for public offerings.

19.7

What is the correct conduct of an issuer in the event of public offerings?

Title II of Part IV of the Financial Code, provides for specific rules with regard to public offerings, implemented by *Consob* Regulation for Issuers. In particular, it is provided that persons who intend to make a public offering must publish a prospectus in advance. To this extent, for offerings of European financial instruments in which Italy is the member state of origin and for offers of financial products other than European financial instruments, *Consob* must be informed in advance by receiving the prospectus destined for publication. The prospectus cannot be published until it has been approved by *Consob*. The prospectus must contain, in an easily analysable and comprehensible form, all the information that, depending on the characteristics of the issuer and the financial product offered, is necessary for investors to make an informed assessment of the issuer's assets and liabilities,

profits and losses, financial position and prospects and of any guarantors, as well as the financial products and related rights. The prospectus shall also contain a summary of the risks and essential characteristics of the offer.

The prospectus for the offer of European financial instruments is prepared in accordance to the schedules laid down by the European Regulations governing this matter. The issuer or the offeror can prepare the prospectus as a single document or in separate documents. In the prospectus prepared using separate documents, the information required is split into a registration document, a note explaining the instruments and the products offered and a summary. If it appears necessary to protect further potential investors, *Consob* may require the issuer or the offeror to include supplementary information in the prospectus.

If the offer is for financial products other than European financial instruments, *Consob* establishes, upon request of the issuer or the offeror, the contents of the prospectus.

The issuer, the offeror and any guarantor, depending on the case, is liable, together with the person responsible for the information stated in the prospectus for damages endured by the investor who reasonably relied on the truthful and complete nature of the information contained in the prospectus, unless they are able to present proof that they took every precaution to ensure that the information was in compliance with the facts and there were no omissions able to alter any term.

For the purposes of approval, *Consob* shall (i) check the completeness of the prospectus as well as the validity and comprehensibility of the information provided and (ii) approve the prospectus within the terms established with regulations complying with European provisions. Failure by *Consob* to reach a decision within a set term shall not be considered as approval of the prospectus.

For the purposes of monitoring the accuracy of the information provided to the public, issuers could also be subject to disclose further information requirements by *Consob*.

Which financial services can be performed in Italy by a foreign company?

19.8.1 Financial services under the Banking Code

The Banking Code provides that EU banks may establish branches in Italy. The first branch establishment shall be preceded by a notice to the Bank of Italy from the competent authorities of the home member state. The Bank of Italy and *Consob* within the scope of their respective authority shall, where appropriate, notify the competent authorities of the member state and the bank of the conditions to which the activities of the branch shall be subject before it may start to operate.

Non-EU banks that have already established a branch in Italy may establish other branches subject to authorization by the Bank of Italy.

With reference to the possibility of providing banking services without establishing branches in Italy, the Banking Code provides that EU banks may perform the activities subject to mutual recognition in another EU member state without establishing branches under the freedom to provide services legal framework.

The activities subject to mutual recognition are (i) acceptance of deposits and other repayable funds from the public; (ii) lending (including, *inter alia*, consumer credit, mortgage credit, factoring with or without recourse, and financing of commercial transactions including forfeiting); (iii) financial leasing; (iv) money transmission services; (v) issuing and administering means of payment (credit cards, travellers' cheques and bankers' drafts); (vi) guarantees; (vii) trading on own or on account of customers in the money market instruments (cheques, bills, CDs, etc.), foreign exchange, financial instruments and options, exchange and interest rate instruments, securities; (viii) participation in securities issued and services relating to such issues; (ix) advice on capital structure, industrial strategy and related questions, and advice and services relating to mergers and purchase of undertakings; (x) money broking; (xi) portfolio management and advice; (xii) safekeeping and administration of securities; (xiii) credit reference services; (xiv) safe custody services; (xv) all other activities that by virtue of adaptive measures adopted by EU authorities are added to the list annexed to the Second Banking Directive of the Council of the European Communities (89/646/EEC of 15 December 1989).

EU banks may carry out the above activities in Italy without establishing branches only after the Bank of Italy has been informed by the competent authorities of the home country.

Non-EU Banks may operate in Italy without establishing branches only if a specific authorization has been provided by the Bank of Italy, after consulting *Consob* in the case of securities intermediation activity is intended to be provided by the bank in Italy.

The possibility to establish a branch in Italy also apply to (i) financial companies having their registered office in Italy and subject to forms of prudential supervision where the controlling interest is held by one or more Italian banks and the conditions established by the Bank of Italy are met, (ii) financial companies having their registered office in a EU member state where the controlling interest is held by one or more banks whose registered offices are in the same EU member state.

19.8.2 Financial Code

For the purpose of providing investment services subject to mutual recognition, EU investment companies may establish branches in Italy. The establishment of the first branch shall be subject to prior notification to *Consob* by the competent authority of the home country. EU investment companies may provide services subject to mutual recognition in Italy without establishing branches provided that *Consob* has been informed by the competent authority of the home country. The services subject to mutual recognition are the following:

A - Investment services and activities

(i) dealing on own account; (ii) execution of orders for clients; (iii) subscription and/or placement with firm commitment underwriting or standby commitments to issuers; (iv) placement without firm or standby commitment to issuers; (v) portfolio management; (vi) reception and transmission of orders; (vii) investment consultancy, (viii) management of multilateral trading systems.

B - Accessory services

(ix) safety deposit box rental and the administration of financial instruments on behalf of customers, including custody and related services such as cash/security guarantees, (x) allocation of credit or loans to investors in order to perform a transaction relating to one or more financial instruments, involving the company granting the credit or loan, (xi) business consultancy on capital structuring, industrial strategy and related matters, together with consultancy and services in relation to business mergers and takeovers, (xii) exchange service where such service is linked to the provision of investment services, (xiii) investment research and financial analysis or other forms of general recommendation regarding transactions on financial instruments, (xiv) related services with firm commitment, (xv) investment services and activities, together with accessory services of type indicated before, linked to derivatives as per points (5), (6), (7) and (10), section C of the annex to the Financial Code, if linked to the provision of investment or accessory services.

Non-EU investment companies can establish their first branch in Italy only upon the authorisation of *Consob* after consulting the Bank of Italy, provided: a) the fulfilment by the branch of certain corporate requirements; b) authorisation and actual provision in the home country of the investment services and activities and non-core services which the non-EU investment company intends to provide in Italy; c) the existence in the home country of provisions concerning authorisation, organisational arrangements and supervision equivalent to those applying to Italian investment companies in Italy; d) the existence of cooperation agreements between the Bank of Italy and *Consob* and the competent authorities of the home country; e) the fulfilment of conditions of reciprocity in the home country within the limits permitted by international agreements.

19.8.3

UCITS

The Financial Code provides that with reference to marketing activities performed in Italy of units of EU investment funds falling within the scope of the Directives on Collective Investment Undertakings (“UCITS”, Directive 2009/65/EC), these may take place after the issuer receives the notification by the authority of the home country of the submission to *Consob* of the intention to offer units in Italy.

AIFMD

According to the Directive on “Alternative Investment Funds” (“AIF, Directive 2011/61/EU”) AIF are collective investment undertakings, including investment compartments thereof, which: (i) raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and (ii) do not require authorisation pursuant to Article 5 of UCITS Directive.

The Financial Code establishes different provisions for the offer of units or shares of AIFs to professional and retail investors.

1. Professional investors.

It must be preceded by a notification to *Consob* the intention to distribute in Italy units or shares of:

- a. Italian reserved AIF, participation in which is reserved to professional investors and the investor categories;
- b. EU alternative investment funds;
- c. non-EU alternative investment funds managed by an asset management company or by a non-EU alternative investment manager authorised in Italy;

In addition, it must be preceded by a notification to *Consob* the intention to distribute such instruments in an EU state other than Italy of:

- a. units and shares of Italian AIF;
- b. non-EU alternative investment funds managed by an asset management company or by a non-EU alternative investment fund manager authorised in Italy.



Consob immediately transmits to the Bank of Italy the information stated in the notification and the documents attached therein.

2. Retail investors

- a. The Financial Code establishes that the marketing in Italy of units or shares of Italian non-reserved AIF to retail investors, is preceded by a notification forwarded by the to *Consob* for each AIF marketed.
- b. *Consob* informs the manager that it can begin marketing to retail investors the AIFs indicated in the notification within 10 working days after receiving it. The manager cannot begin marketing to retail investors before receiving the communication.

For what concerns the operation of AIFs managers, managers of EU and non-EU AIFs which market in the home state to retail investors and that intend to market such AIFs in Italy to retail investors, shall apply to *Consob* for authorization.

20 Insurance companies

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How may foreign insurance companies carry out business in Italy?

Foreign insurance companies with their head office in a European Union (EU) member State or in a Country which is member of the European Economic Area (EEA) may carry out business in Italy under the Freedom of Establishment (FE) or under the Freedom to Provide Services (FOS) regime. Non EU insurance companies may deal with the Italian insurance market only under the FE regime, through an Italian Branch duly authorised by the Italian Supervisory Authority (*Istituto per la Vigilanza sulle Assicurazioni, IVASS*).

Are there authorisations to be requested by non resident companies to carry out insurance or reinsurance business in Italy?

From a regulatory perspective:

- EU insurance companies still remain subject to the supervisory activity of the local Regulator (home Country control principle, introduced by Directive No. 92/49/CEE of 18 June, 1992 and Directive No. 2002/83/CE of 5 November, 2002). In such a case, the Italian Regulator must be previously notified;
- Non-EU insurance companies may deal with the Italian insurance market only through an Italian authorised Branch. IVASS may not grant the authorisation when the home State does not respect the principle of equality of treatment or reciprocity vis-a-vis the Italian companies which intend to establish a branch in that State. It is forbidden to underwrite policies with non-EU insurance companies not having a permanent establishment in Italy and not authorised by the Italian Regulator.

Reinsurance companies having their head office in another EU member State or in a third Country and which intend to carry out business in Italy under FE regime are subject to rules similar to those outlined above. IVASS authorisation is not required where a company intends to carry out business under the FOS regime, even if it has its head office in a third Country.

What are the “minimum requirements” set forth by the Italian Regulator to carry out insurance business in Italy?

20.3.1 Through an Italian resident company?

From a regulatory perspective, IVASS shall grant the required authorization provided that the following main conditions are met: a) the company has adopted a form of joint stock company, co-operative company, mutual insurance company or European Company (Council Regulation - EC no 2157/2001 of 8 October 2001); b) the company has its general direction and administrative offices in Italy; c) the capital or initial fund, fully paid up, may be not less than the minimum amount established by IVASS regulation; d) the company submitted to IVASS a scheme of transactions and a memorandum of association describing its activity and the relevant structure; e) reputation and independence requirements are met at the holding and management level; f) other additional administrative requirements are duly met.

20.3.2 Under Freedom to Provide Services Regime?

A foreign insurance company with its head office located in another EU member State and carrying out business in Italy under the FOS regime is required to inform the Italian Regulator (through the home Country regulator). The company may begin its activity in Italy as soon as IVASS acknowledges receipt of the notification by the Regulator of the home member State.

If the company intends to cover risks relating to compulsory insurance against motor civil liability, the notification shall include the indication of the name and address of the representative for the handling of claims and a declaration that the company has become a member of the national bureau and of the National guarantee fund. Any changes to the conditions governing the business shown in the first communication must be notified to IVASS.

20.3.3 Under Freedom of Establishment Regime?

A foreign insurance company with its head office located in another EU member State and carrying out business in Italy under the FE regime is required to notify the Italian Regulator (through the home Country Regulator). If the company intends to cover risks relating to compulsory insurance against motor civil liability, the notification shall include the indication of the name and address of the representative for the handling of claims and a declaration that the company has become a member of the National Bureau and of the National Guarantee Fund.

The company must appoint the general branch representative, having its domicile and address at the branch premises. The branch representative has to be empowered to represent the branch before the Italian Authorities and to conclude the contracts and any other act related to the Italian business. The company may set up its Italian branch and start business in the Italian territory as soon as it receives the notification by IVASS from the Regulator of the home member State or, if no notification is received, upon expiration of 30 days. Any changes to the conditions governing the business shown in the first communication must be immediately notified to IVASS.

As to insurance companies with their head office in a third Country, IVASS's authorization is required in order to conduct business in Italy. The authorization can be granted, *inter alia*, provided that the home Country complies with the principle of equality treatment and reciprocity vis-a-vis the Italian insurance companies that want to set up a secondary office in the third Country. Further, the insurer has to prove that it is authorised to conduct business in the home Country in the same line of business for which an authorization is sought in Italy.

20.4

Are there specific rules for “captive” insurance companies?

At present there is no specific legislation regarding captive insurance companies.

20.5

Are there specific rules for the distribution of policies?

Only insurance intermediaries registered in the Single Register of Insurance and Reinsurance Intermediaries (*Registro Unico degli Intermediari assicurativi e riassicurativi - RUI*) are authorised to carry out activity with regards to Italian products. The Register is kept by IVASS and any intermediation contains the data of whoever acts as insurance and reinsurance intermediary within the Italian territory. The Register is divided into 5 sections: A (agents), B (brokers), C (direct canvassers of insurance undertakings), D (banks, financial intermediaries as per article 107 of the Consolidated Banking Law, stock brokerage companies and *Poste Italiane - Divisione servizi di bancoposta*) and E (collaborators of the intermediaries registered under sections A, B and D conducting business outside the premises of

said intermediaries). The same intermediary may not be recorded in more than one section of the Register, with the exception of those intermediaries recorded under sections A and E for the sole distribution tasks pertaining to the motor vehicle liability insurance.

20.5.1 Is a foreign intermediary permitted to distribute insurance policies in Italy (on behalf of an Italian or a foreign company)?

Insurance and reinsurance intermediaries having their residence or head office in the territory of another EU member State may start business, under the FE or under the FOS regime within the territory of the Italian Republic, thirty days after the date in which IVASS receives the notification by the home member State. IVASS shall, by its own regulation, lay down rules on the disclosure of the notifications received by the home supervisory authorities concerning the activity pursued by the intermediaries from these States within the territory of the Italian Republic by means of a note to the list attached to the RUI. In any case, intermediaries can only distribute products of insurers authorized in Italy.

20.6

Are there specific accounting rules for insurance balance sheet purposes?

Italian insurance companies must draw up the balance sheet according to the accounting principles set out in the Italian Civil Code, in the special insurance legislation (Legislative Decree No. 209 of 7 September, 2005) and in the specific regulations issued by IVASS (Regulation No. 22 of 4 April, 2009).

Italian insurance and reinsurance companies which issue financial instruments permitted to trade on regulated markets of any EU member State and do not draw up consolidated accounts shall draw up their financial statements in compliance with the international accounting standards.

Are there specific rules for covering technical liabilities?

There are specific rules issued by the Italian Supervisory Body to cover technical reserves to reduce the credit and liquidity risks linked to the assets held by companies.

The company may cover technical reserves with its own assets (including derivative financial instruments) within the terms and under conditions adopted by IVASS with a specific regulation. In exceptional circumstances and under the company's request, IVASS may, temporarily, allow the investment in categories of assets as cover for technical provisions other than those foreseen by the general rule. For contracts included in the Italian portfolio, the company may localize assets representing technical reserves in one or more member States. Should insurance company intend to localize assets covering technical reserves in a third State, authorization must necessarily be granted by IVASS.

Are there specific rules for the solvency margin?

As of January 2016, Solvency II rules on the solvency capital requirement will apply in Italy.

What are the Corporate income taxes to be paid by insurance companies in Italy?

Italian insurance companies and Italian branches of foreign insurance companies are liable to IRES (at a 27.5% ordinary rate) and IRAP (ordinary rate of 5.9%). Some Regional Laws may establish an increase of the IRAP tax rate (up to 0.92%) applicable to insurance companies.

Finance law for 2016 has reduced IRES ordinary rate to 24% with effect starting from 2017.

For further details about corporate income taxes, please see § 3.

How is corporate taxable income for insurance companies calculated?

Corporate income taxes (IRES and IRAP) are quantified on the basis of the result of the P&L account; some tax adjustments need to be made in accordance with Italian Tax Law.

20.10.1 Are there some restrictions for the deduction of technical reserves?

Compulsory technical reserves concur to determine taxable income (for IRES and IRAP purposes) of insurance companies (i.e. are deductible) on an accrual basis, up to the maximum set by the Italian regulatory law.

Specific restrictions are applicable to the variation of claims reserves for non-life insurance companies and only for IRES purposes. In particular, the provision for claims reserves relating to the long period component (i.e. 75% of the relevant amount) is deductible in equal installments over a five year period. The provision for claims reserve relating to the short period component (i.e. 25% of the relevant amount) remains deductible for the whole amount in the accounting year.

Mathematical reserves concerning life business (other than unit and index-linked policies) concur to determine the taxable income for an amount equal to the ratio between the taxable income and the overall amount of income, including exempt or excluded income. In any case such ratio is tax relevant for an amount higher than 95% and lower than 98.5%.

20.10.2 Are there some restrictions for the deduction of bad debts?

Starting from 2013 fiscal year and until 2014, the write-downs and losses on the receivables towards policyholders (different from those realised through sale for consideration) are deductible (for IRES and IRAP purposes) in equal installments over a five year period; the write-downs and losses are considered net of the appreciation to receivables (if any) accounted for in the financial statement. Losses on receivables towards policyholders realised through the transfer of the receivables for consideration are fully deductible in the relevant accounting year. Law Decree 27 June 2015, no. 83 has significantly modified the tax treatment applicable to the write-downs and losses on the receivables towards policyholders for IRES and IRAP purposes with effect from 2015. According to the new rules, write-downs and losses are fully deductible in the fiscal year in which they are booked in the P&L. Law Decree n. 83/2015 provided for a transitional regime for 2015 only, according to which the deduction of write-downs and losses (different from those realised through sale for consideration) is limited to 75% of the overall amount booked in the P&L.

Write-downs and losses not deducted up to 31 December 2014 and 25% of write-downs not deducted in 2015 will be deductible over the next 10 years with percentages of deductibility (5%-12%).

20.10.3 Are there specific rules for the deduction of deferred acquisition costs (DAC)?

Acquisition costs related to yearly policies are deductible in the year in which they are accounted in the P&L. Acquisition costs, related to policies lasting more than one year, are deductible alternatively in equal installments during that tax period and in the two following tax periods or for the full amount in the year in which the policy has been stipulated. Such costs, if included among the assets covering the technical reserves, are deductible up to the amount of the corresponding charges for premiums and for a period which does not exceed the duration of each contract, and in any event which does not exceed ten years.

20.10.4 Are there specific rules for the taxation of investment income related to unit-linked and index-linked policies?

Financial income and losses arising from assets underlying unit-linked and index-linked policies are relevant for IRES purposes. In particular, dividends, capital gains/losses on shares qualifying for the participation exemption regime and unrealized capital gains losses on shares referred to investments the risk of which is sustained by the insured party (unit-linked and index-linked policies) concur to form the IRES taxable basis.

20.10.5 Are there specific rules for the deduction of Interest payable?

Starting from the 2008 fiscal year interest payable concurs to determine taxable income (for IRES and IRAP purposes) of insurance companies for an amount equal to 96%. For insurance companies opting for the tax domestic consolidation regime, interest payable due to other companies participating in the tax consolidation regime concur to group taxable basis within the limits of the amount of the payable interest due to companies outside the tax group perimeter.

20.11

How is the income of the Italian branch of an insurance company quantified for corporate income tax purposes?

Italian branch taxable income is calculated following the same rules governing corporate business income, comparing the costs and proceeds attributable to the branch as shown in the Financial Statement. Premiums relating to the insurance contracts issued within the Italian territory represent positive items of branch income, against negative items and other costs (including technical reserves) sustained in carrying out the insurance activity in Italy. The Financial Statement must be prepared according to Italian accounting principles applicable to Italian insurance companies.

The Italian branch of an insurance company is treated as a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, risks assumed and assets used. Internal deals between the Italian Branch and the Head Office must be at arm's length. The Italian branch must be supplied with an adequate endowment fund to be determined based on the specific rules set out in a decree in line with the OECD principles.

For further details about the rules applicable to the Italian branch, please see § 12.6.

20.12

Is the foreign branch income fully or partially taxed?

Foreign branch income is fully taxable in Italy. A foreign tax credit for taxes paid abroad is allowed, under certain conditions. Foreign branch income is not subject to IRAP.

A branch exemption regime may be opted under certain conditions.

20.13

Is it possible to carry forward tax losses incurred by the company in previous fiscal years?

Incurred losses can be carried forward for corporate tax (IRES) purposes only. No tax loss carry forward is admitted for IRAP purposes.

For further details, please see § 3.17.

How is the IRAP taxable base for insurance companies calculated?

Italian resident insurance companies and the permanent establishments of non-resident insurance companies are subject to Local Tax on Productive Activities (IRAP) which is generally levied at 5.9% rate.

IRAP rates may be increased by Regional Authorities up to 0.92%.

IRAP is applicable on the added-value produced in Italy. Non-resident companies are taxed only on the added-value produced in Italy through a permanent establishment.

For insurance undertakings, IRAP taxable basis is computed based on the sum of the results reported in the technical accounts referred to Non-Life (item 29) and Life (item 80) business as shown in the Profit and Loss account.

The main following adjustments have to be made:

- Depreciation costs referred to capital goods and other administrative expenses (item 24 and 70 of P&L) are deductible within the limit of 90% of their amount;
- Dividends related to life business (item 33 of the Life Account) are subject to taxation within the limit of 50% of their amount.
- Interest for leasing transactions, local property tax, depreciation, write-downs and losses of receivables different from those towards policyholders and certain other costs are not relevant for IRAP purposes. Interest on loans are deductible within the limit of 96% of the amount booked in the P&L.

Write-downs, losses and revaluation of receivables towards policyholders are relevant for IRAP purposes. As concerns the tax regime applicable up to 2014 and the transitional regime for 2015, please see § 20.10.2.

Amortization costs referred to trademarks and goodwill are deductible within the limit of 1/18 of the relevant cost. On the other hand, appreciations and depreciations costs of non-auxiliary real estate goods, not classified as “trade assets” are relevant for IRAP purposes.

Payable interest from reinsurance deposits concerning life business are partially deductible for IRAP purposes (see § 20.10.5). Payable interest from reinsurance deposits concerning non-life business and interest on loan are generally not deductible since they are not included into the technical result.

Up to 2014 fiscal year, labour costs were not deductible for IRAP purposes, however it was possible to deduct specific tax benefits related to employee expenses (please see § 5.3). According to Law 24 December 2014, no. 190, starting from 2015 fiscal year labour costs relating to employees working under an open-ended contract are deductible for an amount not exceeding the amount of IRAP tax benefits above mentioned.

What is the substitutive tax on mathematical reserves?

Life-insurance companies carrying out insurance business in Italy must pay a 0.45% tax on mathematical reserves, with the exception of those regarding death risk contracts, permanent invalidity or non-self-sufficiency contracts, pension funds and social security insurance policies.

Substitute tax is treated as a tax credit to be used to offset any withholding tax or substitute tax due on capital income arising from insurance policies. If the total amount of withholding and substitutive taxes due for each year is lower than the tax paid for the fifth prior year, the difference may be used, wholly or partly, to offset taxes and contributions due or transferred to other group companies.

If the residual tax credit (increased by the amount of tax on mathematical reserves due for the relevant fiscal year) exceeds a determinate threshold of the mathematical reserves amount related to life insurance policies as shown in the financial statement, the tax to be paid is reduced accordingly. In particular, with specific reference to the fiscal year 2013, the above-mentioned threshold has been set as 2.50% of the mathematical reserves; for each of the following years, the above mentioned percentage (2.50%) is reduced by 0.1% up to 2024, and will be equal to 1.25% starting from 2025.

20.15.1 Are foreign companies carrying out life insurance business in Italy liable to the substitutive tax on mathematical reserves?

Foreign companies carrying out insurance activities in Italy under the FE regime are liable to substitutive tax on mathematical reserves. EU insurance companies carrying out business in Italy under the FOS regime which act (on a voluntary basis) as a withholding agent with reference to capital income arising from insurance policies are liable to substitutive tax on mathematical reserves; this tax is quantified only on the basis of mathematical reserves related to the Italian portfolio at year end (i.e. the reserve stock), as shown in the company's Financial Statement.

EU insurance companies operating under the FOS regime and not acting as a withholding agent are not subject to substitutive tax on mathematical reserves.

Is Insurance Premium Tax (IPT) due on non-life insurance policies?

IPT is due in Italy when the insured risk is deemed to be located in Italy under certain relevant territorial conditions, which vary depending on the class of insurance.

IPT is due irrespectively whether the insurance company is resident or not in Italy. IPT due on non-life insurance is levied in proportion to the full amount of premium paid to insurers (including all sums paid to the insurer as extra-premiums and other amounts paid to the insurer) at a rate varying from 2.50% to 21.25%, depending on the class of the insured risk. Additional surcharges may be applied (up to 1%) depending on the class of business.

Insurance companies (including also foreign companies acting in Italy under the FOS regime), must make a payment on account of 40% of the IPT settled in the prior FY, with the exception of premium tax referred to third-party motor-vehicle insurance. The IPT payment on account made in each year will be deductible from the IPT to be paid starting from the month of February of the following year.

20.17

Is Insurance Premium Tax (IPT) due on life insurance policies?

No, IPT is not due on life insurance policies executed after December 31, 2000; IPT of 2.50% was applicable on life insurance policies executed prior to the above date.

20.18

Are foreign insurance companies required to appoint a Fiscal Representative for IPT purposes, with reference to the Italian portfolio?

Foreign insurance companies carrying out life and non-life insurance business in Italy under the FOS regime are required to appoint a Fiscal Representative for IPT purposes. If no Fiscal Representative is appointed, the Italian policyholder is tax liable with the insurance company and is obliged to fulfil all IPT obligations as provided for by the Italian Law (i.e. to pay and to declare the IPT due and to comply with registration duties). A special exemption is applicable to EU insurance companies and EEA insurance companies in order to permit an efficient exchange of information with Italy.

The IPT representative shall be resident in the territory of the State and his/her appointment shall be notified to the competent tax office (Agenzia delle Entrate of Rome) and to IVASS.

20.19

Are premiums paid by individuals for life insurance policies tax deductible?

For life insurance policies executed prior to December 31, 2000, 19% of the premium paid may be deducted from income taxes due by the individual. For life insurance policies executed from January 1, 2001, the above-mentioned deduction is limited to the portion of premiums related to the death risk.

Starting from 2014, the aforementioned premium paid must be considered for the computation of the deduction for an amount not exceeding € 530, increased to € 1,291.14 only for premiums related to insurance policies covering the risk of disability in the performance of activities of daily living (net of premiums related to the death risk).

20.20

What is the tax system applied to capital gains arising from a life insurance policy in the event of a partial or total surrender?

In the event of a total surrender, capital income arising from the insurance policy is taxed at an amount corresponding to the difference between the amount received and premiums paid by the policyholder. In the case of a partial surrender, proper adjustments have to be made to quantify the capital income subject to taxation (based on the ratio between the surrender amount and the economic value of the policy at the date of the surrender).

Capital income arising from the surrender of the policy shall be subject to substitute tax levied, on a cash basis, at the following tax rates: (i) 12.5% on capital income accrued up to December 31, 2011; (ii) 20% on capital income accrued from January 1, 2012 up to June 30, 2014; (iii) 26% of capital income accrued thereafter.

For capital income accrued after January 1, 2012, the difference between the encashment amount and the gross amount of premiums paid by the policyholder shall be calculated net of 37.50% (51.92% starting from July 1, 2014) of the proceeds, if any, arising from Italian Government Bonds and assimilated securities (as per Section 31 of DPR no. 601/29/73) and from Government bonds and assimilated securities issued by White List Countries (as per Section 168-bis co. 1 of the Italian Income Tax Consolidated Text).

20.21

In the event of death, are the proceeds arising from life insurance policies taxable or exempt?

Starting from January 1, 2015, insurance death payments are exempted from taxation within the limit of payments referred to the “demographic risk” of the policy; payments referred to the financial component of the policy shall be subject to taxation according to the above mentioned rules (see § 20.20).

20.22

Is capital tax due on insurance policies (Ordinary Stamp duty)?

Stamp Duty Tax (“Ordinary Stamp Duty”) is due on statements sent to the customers and related to life insurance policies, qualified as “financial instruments” according to Italian Legislation (e.g. unit-linked and index linked policies and capitalization products). Ordinary Stamp Duty is applied to life policies at a 0.2% rate.

This tax is also due by EEA Life insurance companies who have opted - on a voluntary basis - (i) to act as the withholding agent with regard to their Italian portfolio and (ii) to apply the Stamp Duty Tax on a “virtual basis”, according to a special procedure provided for by Italian Law. In such case, no IVAFE (special tax on financial assets held abroad) is due on these products.

Stamp Duty on insurance policies is applied at the date of surrender and/or maturity of the policy and in the case of death. In practice, the insurance company must (i) accrue (on a yearly basis), the Stamp Duty (based on the value of the policy at year-end) and (ii) charge the tax to the Client at the date of surrender (total or partial) and/or maturity of the policy (including the case of death) based on the value of the policy under a pro rata temporis basis.

Policies underwritten with repatriated sums and still benefiting from the confidentiality regime provided for by the so-called “tax shield” rules are subject to a Special Stamp Duty Tax (“Bollo Speciale”). This tax is applied on the surrender value of the policy at year-end or at the date of surrender or renunciation of the confidentiality regime (on pro rata basis), at 0.4% rate.

20.23

Is inheritance tax due on insurance benefits?

In 2006, in Italy, inheritance tax was reintroduced by the Italian Government with a 4%, 6%, and 8% rate, depending on parental degree. However, based on the law currently in force, in the event of death, sums paid by the insurance company to the policy’s beneficiary do not concur to the inheritance taxable basis and they are not subject to inheritance tax.



21 *Agreements*

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Does Italian law provide general principles that may be applied to all types of agreements?

Sections 1321 to 1469-bis of the Italian Civil Code, regulate agreements in general. The Civil Code specifically regulates certain contractual schemes (sale, lease, mandate etc.). The rules governing these agreements are stated, mostly, within the fourth book (“Obligations”) of the Italian Civil Code (Sections 1470-1986), following the agreements’ general regulation. Yet, other agreements are regulated elsewhere in the Italian Civil Code: some of them, such as, donations, can be found within the second book (“Succession”); others, such as labour and/or shareholders’ agreements, are regulated within the fifth book of the Italian Civil Code, named “Labour”.

The general rules briefly outlined below are applicable to any agreement, as established by Section 1323 of the Italian Civil Code.

According to Section 1321 of the Italian Civil Code, the parties may set up, regulate, or extinguish a contractual relationship of an economical nature. This aspect emphasizes the importance of the parties’ will, which is the basis of the so-called “autonomia contrattuale” (Section 1322 of the Italian Civil Code), allowing the parties to provide for the rules governing a contractual relationship autonomously.

Basically, the notion of “autonomia contrattuale” entails that:

- i. nobody can be deprived of his/her property, or bound to carry out any services or undertakings in favour of another party against or, however, independently from his/her own will (negative value of the “autonomia contrattuale”);
- ii. anyone is able to make his own disposition by will and to freely undertake the performance of a service (positive value of the “autonomia contrattuale”).

Section 1325 of the Italian Civil Code, lists the “requirements” of the agreement:

- the agreement of the parties is generally reached when the parties’ will, as expressed in their statements, correspond. The agreement may be concluded tacitly, also;
- the “*causa*”, which may be defined as the agreement’s grounding, thus its economic and social function. The agreement’s “*causa*” is unlawful when it does not comply with mandatory rules, public order, or morality;
- the object, which is the good or the right transferred by the agreement, or the service that one of the parties undertakes to perform in favour of the other;
- the form, when prescribed by law (for example, written form is required in agreements concerning the transfer of the ownership of certain rights relating to real estates).

In relation to each of these requirements, the Italian Civil Code defines some general fundamental principles.

Invalidity affects an agreement when the latter is not compliant with a mandatory rule established by law. Invalidity may either mean the agreement is voidable (Sections 1425, ff., Italian Civil Code) or directly null and void (Sections 1418, ff., Italian Civil Code) upon request of any of the interested parties (even a third party). Only the latter hypothesis has a general scope of application: the breach of any mandatory rule is enough to consider the agreement as void and null. On the contrary, the agreement may be considered void only when such outcome is envisaged by the law as an effect of the breach of a certain mandatory rule.

The invalidity of an agreement must be distinguished from its ineffectiveness. An invalid agreement is necessarily also ineffective. Nevertheless, in certain circumstances, a valid agreement may also be ineffective, that is to say it does not have juridical validity. There are various reasons that may determine this situation, as there are many different forms of ineffectiveness. An agreement may be temporarily ineffective (or effective) when subject to a term or a condition; also, full ineffectiveness must be distinguished from relative ineffectiveness: whereas the former concerns the parties of the ineffective agreement, as well as any possible third party, the latter makes the agreement fully enforceable between the parties, although it does not have any validity for third parties.

21.2

Are there any mandatory provisions that can not be renounced by the parties?

According to Section 1322 of the Italian Civil Code, the parties are free to establish the contents of the agreement to which they subscribe; Italian law states that they shall comply with the limits set forth by law. In this respect, certain general limits (applicable to any kind of agreement) exist, as well as certain specific rules enforceable only with reference to certain agreements.

The Italian legal framework (set out by the Italian Civil Code, as well as by other regulations) contains several mandatory provisions, which, in most cases, have been introduced in order to safeguard interests of the weakest party, or to prevent the parties agreeing upon provisions against the law. In these cases, the clauses of a contract, in breach of mandatory provisions, will be deemed as null and void and, if necessary, the relevant legislative mandatory regulation will be applicable

in their place. In this respect, it is important to point out that the Italian Civil Code (Section 1419, paragraph 2) provides for a severability rule, in force of which the *“nullity of individual clauses does not lead to the nullity of the entire agreement when, by operation of law, mandatory rules are substituted for the voided clauses”*.

Among the provisions which are considered as mandatory according to the domestic regulations, the following are particularly significant (the list is not exhaustive), as provided in the Italian Civil Code and in the Legislative Decree No. 206/2005 (hereinafter the “Consumers’ Code”: see also § 22):

- limitations to certain rights enjoyed by the agent in agency agreements;
- limitations of liability in the event of fraud or gross negligence;
- interest rates exceeding the amounts allowed by law;
- producer’s liability;
- term in shareholders’ agreements.

Furthermore, it is important to focus on the so-called “standard” contracts, with “standard” conditions unilaterally set out by a company or requiring the subscription to forms or formularies prepared in a uniformed manner: the Italian legislator has provided certain measures aimed at safeguarding the other party who is willing to enter into a standard agreement. As a matter of fact, the Italian Civil Code provides that:

- provisions contained in the standard conditions of a contract or in forms or formularies prepared by one of the parties shall be interpreted, in case of doubt, in favour of the other party (Section 1370);
- unless specifically approved in writing, the conditions providing, in favour of the party who has prepared them in advance, limitations of liability, the power of withdrawing from the contract or of suspending its performance, or which impose time limits involving forfeitures on the other party, limitation on the power to raise defences, restrictions on contractual freedom in relations with third parties, tacit extension or renewal of the contract, arbitration clauses or derogation from the competence of courts, are not effective (Section 1341, paragraph 2).

Are there specific regulations for certain agreements?

The Italian Civil Code provides for the regulation of a number of contractual schemes, which are mostly regulated by the fourth book (“Obligations”) of the Italian Civil Code (Sections 1470 - 1986). This regulation sets forth specific sets of rules which may be either mandatory or not. In the latter case, they will be applicable only if the parties do not agree upon different terms and conditions.

In particular, the following Sections of the Italian Civil Code are worth mention:

- the sale or purchase of movable and immovable property (Sections 1470 - 1547): agreements having as object the transfer of a property right, as well as a right of any other nature on a good;
- the supply of services (Sections 1559 - 1570): this is an agreement by means of which one of the parties undertakes to perform, periodically or continuously, a supply of services in favour of the other party that, in turn, pays a certain price;
- the lease of a property (Sections 1571 - 1654): by means of a lease agreement, one of the parties undertakes to authorise the other party, upon payment of a set amount, to enjoy a property for a determined time;
- contract (Sections 1655 - 1677): one of the parties undertakes to perform a specific work or to render a specific service, providing autonomously for all necessary means and operating at its own risk, in return for a certain consideration;
- mandate (Sections 1703 - 1741): one of the parties undertakes to perform one or more actions of juridical relevance in favour of the other party;
- agency (Sections 1742 - 1753): through an agency agreement, one of the parties undertakes to promote the conclusion of commercial agreements in a certain area in the interest and on behalf of the other party, which in turn undertakes to pay the agent;
- custody (Sections 1766 - 1797): one of the parties receives from the other party a movable property, with the obligation to preserve it and, later, to return the good to the latter party;
- “comodato” (Sections 1803 - 1812): one of the parties provides the other party with the good, who will use the same for a pre-determined time or purpose and undertakes to return it to its owner; the “comodato” is essentially free from any payment obligation;
- “mutuo” (Sections 1813 - 1822): this agreement has one of the parties giving a sum of money, or of any other fungible good, to the other party which, in turn, undertakes to return the sum or good, in the same amount and quality in which it was received, plus interests (save if the parties expressly agree upon a contrary clause);

- banking agreements (Sections 1834 - 1860): this kind of agreement provides the regulation of bank deposits, the banking service concerning safe deposit boxes, the opening of bank credit, bank loans, banking transactions relating to the bank accounts, bank discounts;
- insurance (Sections 1882 - 1932): that is to say the agreement by means of which the insurer receiving a premium undertakes to keep the insured subject safe upon occurrence of any harmful event.

Apart from the contractual forms regulated by the Italian Civil Code, several different laws and/or regulations set out the rules applicable either to the above listed agreements or to other kinds of agreements which are not governed by the Italian Civil Code, among which, the following may be mentioned as an example: franchising agreements, agricultural lease agreements, “e-commerce”, subcontract agreements, part-time labour agreements, transfer of receivables, etc...

21.4

Must the parties respect certain conduct during the negotiation?

Section 1337 of the Italian Civil Code expressly establishes that the parties must act in good faith, during both the negotiation of the contract and in the formation of the same.

The stage of contractual negotiation entails a relationship of trust between the parties, the parties are therefore required to observe the customary standard of care.

The parties have to act with fairness and loyalty and have the duty to fulfil certain obligations such as:

- to inform the other party of any events or information that may have an influence on the party's will to enter into the agreement. The party has to be informed correctly;
- to observe the confidentiality obligations, requiring secrecy with reference to facts and circumstances relating to the personal or economical life of the other party;
- furthermore, Section 1338 of the Italian Civil Code establishes that the party who knows or is supposed to know any reason of invalidity of the agreement has to inform the other party.

The infringement of these obligations is the origin of a pre-contractual liability for the defaulting party and damages should be recoverable against the party whose blameworthy conduct during the negotiations was ascertained. For example, pre-contractual liability may occur:

- when one of the parties enters into negotiations without having any intention to regulate their own interests through an agreement, yet creating a reasonable expectation in the other party that an agreement is going to be underwritten, so that the other party incurs substantial pre-contractual expenses.
- If the negotiation is at an advanced stage and one of the parties abruptly interrupts the same in an arbitrary and unfair manner.
- Pre-contractual liability entails the recovery of any losses and expenses the suffering party may have incurred during the negotiations, more in detail.
- Expenses incurred in order to conclude the future agreement. For example: travel, expert consultancy, etc.
- Losses caused by not being able to take advantage of favourable opportunities deriving from the agreement.

21.5

Which remedies are provided for by law in the event of breach by one of the parties to perform their obligations as established by the agreement?

Section 1453 of the Italian Civil Code provides for two possible remedies in case of default by one of the parties.

In fact, should one of the parties not fulfil its obligations, the other party may choose to:

- continue the request for due performance of the agreement;
- request the termination of the agreement.

It must be pointed out that, whilst in the first scenario the fulfilment is still possible despite the delay, in the second case, once the non-defaulting party has requested the termination, this remedy remains the only solution left for the party (*electa una via non datur recursus ad alteram*). Conversely, once a party has requested the termination of the agreement, the party in breach may no longer fulfil their obligations.

The amount of the sum due by the party in breach varies accordingly with the remedy adopted.

The termination of the agreement may be stated only by the Judge and it does not occur automatically. However, the law provides for certain situations in which the termination may occur autonomously with no need for a decision by the Judge but upon simple request of the interested party. Such situations are as follows:

- express termination clause (Section 1456, Italian Civil Code): the parties agree upon a specific fulfilment as a condition for the automatic termination of the agreement;
- notice to fulfil (Section 1454, paragraph 1, Italian Civil Code): a written declaration (warning) which establishes a term for the fulfilment. If the term is not respected, the termination occurs by right;
- essential term (Section 1454, paragraph 3, Italian Civil Code): the fulfilment becomes useless and the agreement is automatically terminated once such term has expired.

Also in these cases there is often an intervention by the Judge, but only in order to assess the actual occurrence of the conditions which legitimate termination of the agreement.

In both events, the party not in breach is entitled to receive an indemnification for any harm they may have suffered as a consequence of the non-fulfilment. For certain kinds of agreement (e.g.: sale and purchase agreements where a reduction of price may be requested) Italian Law provides for specific remedies.

21.6

Is it possible to enter into an agreement for an indefinite term?

As a general rule, commercial agreements may have an indefinite duration. In these cases, any one of the parties may freely withdraw from the agreement with no need to provide a justification. In these events, an adequate prior notice has to be given to the other party. The term of the notice is linked to the specific situation ruled by the agreement and it shall be assessed on a case by case basis.

Notwithstanding the above, Italian law provides for time limits with reference to certain kinds of agreements. Among these, it is worth mentioning lease agreements, which may not last longer than 30 years. The so-called “comodato”, too, may constitute an example of an agreement which necessarily lasts for a well-defined period of time.

21.7

Which kind of restrictions, if any, are enforceable when dealing with the Public Administration?

In principle, the Public Administration may enter into an agreement in the same way as any other natural and legal person.

In cases such as independent agreements or labour agreements, the Public Administration shall be bound to follow specific rules with reference to the awarding, as well as to the implementation and the termination of the agreement. Although the public nature of one of the parties is rather conditioning, the agreement's nature remains essentially based on private law.

21.8

Is it possible to provide for penalties within agreements?

Section 1382 of the Italian Civil Code establishes that the parties have the possibility to agree upon a clause that provides for the payment of a certain amount as a penalty in the event one of the parties is in default, regardless of proof of damages.

The penalty clause may occur in two different situations:

- non-fulfilment of the agreement;
- delay in the fulfilment of the agreement.

In the former case, once the non-defaulting party requests the payment of the penalty clause, the same may no longer request the fulfilment of the agreement. In the latter case, the party claiming the delay may request both the penalty and the fulfilment. Usually, the penalty clause is a sum of money contractually agreed upon by the parties. However, the penalty clause may also consist in an undertaking of a different nature.

The agreed penalty may be exhaustive or not exhaustive. In fact, the penalty generally limits the amount of the indemnification to the sum contractually agreed upon by the parties. Nevertheless, the parties may expressly agree in the text of the agreement that, should the creditor prove that the damage suffered is higher than the penalty, such outstanding amount may be requested by the creditor.

If the amount of the penalty clause is excessive, or if the debtor has already paid part of the sum, the judge may decrease the penalty on an equity basis. On the other hand, if the amount of the clause is deemed disproportionately low, such clause is null.



22 *Consumers' rights*

22.1 Are there any law provisions for the protection of consumers' rights? *p. 180*

22.2 Is there a specific action in force in Italy by which a group of consumers may proceed to take action against a company to obtain the recognition of their rights? *p. 183*

Are there any law provisions for the protection of consumers' rights?

The protection of consumers' and users' rights under the Italian legal system is currently regulated by Legislative Decree No. 206 of September 6, 2005, also known as the "Consumers' Code".

With the specific aim to safeguard consumers' and users' rights in many sectors (including labelling, general product safety, misleading advertisings and unfair clauses, door to door selling, distance selling, tourism contracts and time-sharing, guarantees for purchased goods and injunctions), the Consumers' Code recognizes the following as the fundamental rights of consumers and users:

- health protection;
- the safety and quality of products and services;
- adequate information and correct advertising;
- consumer education;
- fairness, transparency and equity in contractual relations;
- the promotion and development of free, voluntary and democratic associations between consumers and users;
- the supply of public services according to standards of quality and efficiency.

According to such Code, the "consumer" or "user" can be identified as "...the natural person who is acting for purposes which are outside their trade, business or profession".

Furthermore, the "consumer" or "user" are also intended as "...any natural person to whom the commercial information is directed".

The main aspects ruled by the Consumers' Code are the following:

(i) Advertising

The Consumer's Code charges the "professional" and the "producer" (qualified, respectively, as "any natural or legal person who is acting for purposes related to his trade, business or profession, or his intermediary" and "the manufacturer of the goods or the supplier of the services or his intermediary (...) as well as the importer into the territory of the European Union or any natural or legal person purporting to be a producer by placing his name, trade mark or other distinguishing mark on the goods or services") with several advertising and contractual constraints.

First of all, the advertising shall be evident and therefore clearly recognizable, truthful and correct. On the contrary, the other competitors, the consumers and their associations and organizations shall be allowed to ask the competent Italian Authority (*Autorità Garante della Concorrenza e del Mercato*) to inhibit every kind of deceptive or unlawful comparative advertising.

If the Italian Authority considers the advertisement misleading or the comparative advertising not to be permitted, it shall prohibit any advertising that has not yet been made public or order the cancellation of advertising that has already commenced in addition to the imposition of a fine.

Furthermore, on September 21, 2007, Legislative Decree No. 146/2007 (the "Decree") - implementing the European Directive 2005/29/CE - came into force and modified Sections 18 to 27 of the Consumers' Code by introducing new provisions concerning the so-called "unfair commercial practices".

In particular, "unfair commercial practices" are those practices that are "contrary to the requirement of professional diligence" and that "materially distort or are likely to materially distort the economic behaviour with regard to the product of the average consumer whom they reach or to whom they are addressed, or of the average member of the group when the commercial practices are directed to a particular group of consumers".

Furthermore, according to the Decree, "unfair commercial practices" can either be "misleading" or "aggressive".

The former include those commercial practices that contain false information (and are, therefore, untruthful) or, even if the information is factually correct, do deceive or are likely to deceive the average consumer in relation to one or more elements such as the existence or nature of the product, its main characteristic (including its availability, benefits, risks, composition, after-sale customer assistance, handling of the claims, method and date of manufacture, fitness for purpose, etc.), the price or the manner in which the same is calculated, the consumers' rights, etc., and in any case cause or are likely to cause the consumer to take a transactional decision that the consumer would not otherwise have taken.

Similarly, an "unfair commercial practice" is deemed "misleading" when "in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer requires, in such context, to make an informed transactional decision and thereby causes or is likely to cause the average consumer to make a transactional decision that he/she would not otherwise have taken".

An "unfair commercial practice" shall be regarded as "aggressive" when, "in its factual context, taking into account all of its features and circumstances, by harassment coercion, including the use of physical force or undue influence, it significantly impairs the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he/she would have not otherwise taken".

In addition to the above, the Decree also describes particular kinds of practices (both “*misleading*” and “*aggressive*”) which are in all circumstances considered unfair.

The former include those “*misleading commercial practices*” that are enacted by means of, *inter alia*, (i) displaying a trade mark, quality mark or equivalent without having obtained the necessary authorization; (ii) falsely stating that a product will only be available for a very limited period of time in order to solicit an immediate decision by the consumer; (iii) stating or otherwise creating the impression that a product can be legally sold when it cannot; (iv) falsely claiming that a product is able to cure illnesses, dysfunctions / disorders, etc.

Likewise, “*aggressive commercial practices*” are always considered “unfair” when enacted with the aim of creating the impression that the consumer cannot leave the premises until a contract is finalized, when performed by means of conducting personal visits to the consumer’s home and ignoring this latter’s request to leave or not to return or by means of making persistent or unwanted solicitations by phone, fax, e-mail, etc.

As previously mentioned, the Italian Antitrust Authority is entitled, either *ex officio* or upon request of any interested party, to take legal proceedings against such unfair practices, order the cessation of the same together with the elimination of their effects, request the traders in question to publish a corrective statement, etc.

(ii) Information

The Consumers’ Code strengthens the protection granted to the consumers establishing a duty of minimal information about the content of products on sale within the Italian territory.

The most important indications that the product shall bear on its packaging are:

- the legal name or classified name of the product;
- the name or the corporate name, the brand and the indication of the producer’s registered office, or the registered office of an importer established in the European Union territory;
- the country of origin, if located outside the European Union territory;
- the mention of any material or any substance added to the product that may be harmful to humans, animals or the environment;
- the material used and the production methods where these are significant for the quality or characteristics of the product.

All of the above information shall be written in the Italian language and must be clearly visible and in a legible manner.

The violation of the abovementioned provisions shall entail the prohibition of selling such product in the entire Italian territory and, will moreover, lead to pecuniary penalties.

(iii) Consumer’s Contract

The Consumers’ Code also provides for consumers’ protection under the contractual point of view.

The written clauses included in the agreement have to be drafted in a clear and comprehensible manner for the consumer and, in case of doubt on their meaning, the interpretation in favour of the consumer shall prevail.

In addition, all the provisions that lead to a significant imbalance between consumers’ contractual duties and rights (the so-called “vexatory clauses”) are valid only if they were specifically negotiated between the producer and the consumer.

For contracts concluded by signing a pre-formulated form or standard contract designed to regulate certain contractual relations in an uniform manner, the professional shall bear the burden of proving that the terms or aspect of the terms have been individually negotiated with the consumer, even though they have been prepared unilaterally by the professional. However, specific vexatory clauses are always null even if negotiated between the parts: in this case, the remainder of the contract shall remain in force but such clauses shall be considered void.

In particular, the clauses shall be null, even if they have been individually negotiated, where they have the purpose or effect of:

- excluding or exempting the liability of the professional in the event of the death of the consumer or personal injury to the latter resulting from an act or omission of that professional;
- excluding or exempting the action of the consumer towards the professional or another party in the event of total or partial non-performance or inadequate performance by the professional;
- providing for an extension of the consumer’s acceptance to terms with which he had no real opportunity of becoming acquainted to prior to the execution of the contract.

(iv) Distance Contracts

Legislative Decree No. 21 of 21 February 2014, implementing Directive 2011/83/EU, introduced significant changes to the regulation applicable to Distance Contracts. The above mentioned decree applies to those contracts executed after 13 June, 2014.

First of all, the decree imposes the duty of the trader to provide the consumer with certain information “in a clear and comprehensible manner” prior to the execution of the contract. In particular, this information, in addition to the one provided for by Section 49 of the Consumers’ Code which applies to contracts other than distance ones, relates to the withdrawal right and its exercise terms and conditions, wherever existing pursuant to Section 59. This information shall form “an integral part” of the agreement “and shall not be altered unless the contracting parties expressly agree otherwise”.

The decree also introduces specific formal requirements by which such information shall be provided. In particular it shall be made available to the consumer “in a way appropriate to the means of distance communication used in plain and intelligible language”. In addition the decree provides that “*The trader shall ensure that the consumer, when placing his order, explicitly acknowledges that the order implies an obligation to pay. If placing an order entails activating a button or a similar function, the button or similar function shall be labelled in an easily legible manner only with the words «order with obligation to pay» or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the trader. If the trader has not complied with this subparagraph, the consumer shall not be bound by the contract or order*”.

Pursuant to Section 52 of the decree “*the consumer shall have a period of 14 days (instead of the previous 10 day-period, ndr) to withdraw from a distance contract, without giving any reason*” and the withdrawal term shall expire after 14 days from specific and different timing depending on whether they are service contracts, sales contracts, contracts for the supply of water, gas or electricity, of district heating or of digital content.

The non-fulfilment of the trader to provide the consumer with the information on the right of withdrawal shall have the effect to extend the withdrawal term, which shall expire, in such a case, 12 months from the end of the initial withdrawal term.

As far as terms and conditions to exercise the withdrawal right are concerned, it is provided that the trader shall reimburse the consumer of “*all payments received (...), including, if applicable, the costs of delivery without undue delay and in any event no later than 14 days from the day on which the trader is informed of the consumer’s decision to withdraw from the contract*”. On the other hand, Section 57 provides that the consumer shall send back the goods or return them to the trader, unless the latter offers to collect them, “*without undue delay and in any event no later than 14 days from the day on which the consumer communicated his decision to withdraw to the trader*”. It is understood that such deadline shall be met if the goods are sent back before the expiration of a 14-day period.

The consumer shall be liable “*for any diminished value of the goods resulting from the handling of the goods other than what is necessary to establish the nature, characteristics and functioning of the goods. The consumer shall in any event not be liable for diminished value of the goods where the trader has failed to provide notice of the right of withdrawal*”.

Section 61 provides that unless the parties have agreed otherwise, “*the trader shall deliver the goods to the consumer without undue delay and at the latest within 30 days from the date the contract was signed. The delivery obligation shall be deemed fulfilled upon the transfer of the physical possession or control of the goods to the consumer*”. Moreover, where the trader has failed to fulfil his obligation to deliver the goods at the time agreed upon with the consumer or within the above mentioned time limit, the consumer shall call upon him to make the delivery within an additional and appropriate period of time, depending on the circumstances. If the trader fails to deliver the goods within that additional period of time, the consumer shall be entitled to terminate the contract, without prejudice to further right for damages.

With reference to the passing of risk, Section 63 states that in contracts where the trader dispatches the goods to the consumer, the risk of loss or damage to the goods not caused by the seller shall pass onto the consumer only when he or a third party indicated by the consumer, other than the carrier, has acquired the physical possession of the goods.

However, the risk shall pass onto the consumer upon delivery to the carrier should the latter be mandated by the consumer to carry the goods and that choice was not offered by the trader, without prejudice to the rights of the consumer against the carrier.

(v) Producer’s Liability

The producer is obliged to put on sale in the national market safe products only, which means, on the basis of a case by case evaluation, products not risky for people’s health and safety.

Moreover, the producer is personally responsible for any damage caused by defects of his product; more precisely, a product is deemed to be considered defective when it does not provide the safety that should be reasonably expected from the same.

This last evaluation must be made with reference to several circumstances such as, for example:

- how the product was placed on the market, its presentation, its evident features, the instructions and warnings provided;

- the use to which the product could reasonably be directed and the conduct that could reasonably be followed in relation to the same;
- the period when the product was put on the market.

However, the injured person shall be required to prove the flaw, the damage and the causal relationship occurring between them.

At the same time, the producer must prove the facts that may exclude his liability: in particular, the producer must prove that, taking all the circumstances into account, the defect did not exist when the product was put into circulation.

Furthermore, liability shall also be excluded if:

- the producer did not put the product into circulation;
- the flaw which caused the damage did not exist at the time that the product was put into circulation;
- the producer did not manufacture the product for sale nor was it intended for any form of distribution for economic purpose, nor was the product manufactured or distributed by the producer during his professional activity;
- the flaw is due to the compliance of the product with mandatory regulation issued by the public authorities;
- the state of technical and scientific knowledge at the time when the producer put the product into circulation was not such as to enable the existence of the flaw to be discovered;
- in the case of a manufacturer or supplier of a component, that the flaw is attributable to the design of the product in which the component has been fitted or to the instruction given by the manufacturer of the product.

In any case, any agreement that a priori excludes or exempts the producer from liability to any injured party shall be null.

(vi) ADR Procedures

Legislative Decree No. 130 of 6 August 2015, implementing Directive 2013/11/EU, on alternative dispute resolution (ADR) for disputes between consumers and traders, introduced a new Title of the Consumers' Code (Part V, Title II-bis, sections from 141 to 141-decies).

The purpose of the above mentioned amendment is to ensure that consumers can voluntarily resolve, even electronically, their disputes, domestic and cross-border, concerning contractual obligations stemming from sales or service contracts between a trader and a consumer respectively established and resident in the EU through the intervention of an ADR entity which proposes or imposes a solution or brings parties together with the aim of facilitating an amicable solution.

The main points are the following:

- the ADR procedure is free of charge or available at a nominal fee for consumers;
- the outcome of the ADR procedure is made available within a period of 90 calendar days from the date on which the ADR entity has received the complete complaint file. In case of highly complex disputes, the ADR entity in charge may, at its own discretion, extend the 90-calendar-day term. Parties shall be informed of any extension of that period and of the expected length of time that will be needed for conclusion of the dispute;
- ADR entities may introduce procedural rules that allow them to refuse to deal with certain types of disputes, such as – among others – the case in which (i) the consumer did not attempt to contact the trader concerned in order to discuss his complaint and seek, as a first step, to resolve the matter directly with the trader, (ii) the dispute is frivolous or vexatious, (iii) the value of the claim falls below or above a pre-specified monetary threshold;
- parties, before agreeing or following a proposed solution, are informed that (i) they have the choice as to whether or not to agree to or follow the proposed solution, (ii) participation in the procedure does not preclude the possibility of seeking redress through Court proceedings and (iii) the proposed solution may be different from an outcome determined by a Court applying legal rules.

22.2

Is there a specific action in force in Italy by which a group of consumers may proceed to take action against a company to obtain the recognition of their rights?

Law No. 244 of December 24, 2007 (Financial Bill for year 2008) introduced a new Section of the Consumers' Code (Legislative Decree No. 206 of September 6, 2005), called "class action" (Section 140-bis of the Consumers' Code).

The effectiveness and regulation of the class action have been defined by section 49 of Law No. 99 of July 23, 2009. The class action is a legal instrument aimed to guarantee the protection of consumers who suffered the consequences of improper conducts committed by the company with which they have signed an agreement; it may also be aimed to realize the collective management of an action for damages based on individual interests.

Pursuant to Section 140-bis of the Consumers' Code, the subjects entitled to proceed are:

- single consumers or users;
- associations/committee of consumers and users, upon mandate granted by the members of the class.

The class action may be undertaken for damages suffered by the consumers caused by different kinds of improper conducts, such as the ones committed within the agreements provided for by Section 1342 of the Italian Civil Code (i.e.: contracts made by means of pre-formulated forms or standard contracts), non-contractual unlawful acts, illegal commercial practices and non-competitive conduct.

The Court competent to resolve the disputes is the Court located where the defendant has its registered office.

All consumers willing to join the collective action have to expressly state their intention to join the class action ("opt-in") within 120 days from the date set by the Court to prepare the adhesions' call through appropriate advertising. After the opt-in term has expired, no further class actions may be brought against the same subject and based on the same facts.

The consumers may subscribe to the class action, without a defence attorney, until the hearing in which the parties specify their reciprocal conclusions in the trial before the Court of Appeal. The adhesion to a class action entails for the consumer the automatic waiver to any individual action against the same subject and based on the same grounds. Vice versa, the consumer who has not adhered to the class action can proceed individually before the same Court in order to obtain the recognition of their rights.

When the class action is considered well-founded, the judge alternatively (i) determines the total sums to be granted in favour of each class member or, if that is not permitted, (ii) provides only the criteria upon which the damages shall be liquidated in favour of each consumer. In the latter case, the judge sets a term for the parties, of a maximum of 90 days, to reach an agreement upon the amounts to be liquidated. The minutes of the agreement, as subscribed by the parties and the judge, has the value of execution of judgment. Should the parties fail to reach an agreement within the set term, on the request of at least one of the parties the judge liquidates the sums due to each consumer.

The judgment becomes executive on the 180th day following its publication.

A class action under Italian law cannot be brought against facts occurred prior to 15 August, 2009.

Please, also note that the Italian Legislative Decree No. 198 of 20 December, 2009 introduced an analogous class action for the protection of users' interests towards the Public Administration.

Users may start a class action against the PA as long as their own interests suffered an actual and direct damage as a consequence of a delay in the administrative procedure or the non-issuance of general measures.

The public class action may be made by either a group of users/consumers or by those associations/committees representing the same.

For what concerns the counterparty, Authorities (e.g. Antitrust Authority), Judges, the Chamber of Deputies, the Senate and other Constitutional Bodies, as well as Chairmen of the Council of Ministers may not be sued.

The Court competent to resolve the disputes is the Regional Administrative Tribunal on an exclusive basis.

Should the judge find that an illicit action has been committed, the PA will be sentenced to remedy such action within a fixed term.

Unlike the private class action, no damages may be requested through a public class action, in such action individual actions must be pursued individually for damages.



23 Labour law and key employment related issues

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Does the Italian system provide for particular Labour Law sources?

The Italian Labour Law is very detailed and strictly compulsory. It provides a hierarchy of sources:

- i. at the top of the hierarchy is the Italian Constitution which establishes the most important principles to be respected (e.g.: the right to strike, the freedom of Trade Union activities, the criteria for remuneration, etc.);
- ii. The European Union rules (e.g.: the principle of freedom of employees' settlement in the European Area, etc.);
- iii. The Italian National Law:
 - the Civil Code;
 - Law No. 300/70 (hereinafter also the "Employee's Statute" or "Statuto dei Lavoratori") and following amendments;
 - Law No. 604/66 and Law No. 108/90 on individual dismissal (hereinafter also "Licenziamento Individuale");
 - Law No. 223/91 regarding the collective dismissal procedure and the public welfare support regulation;
 - Law No. 146/90 and Law No. 83/00 on the regulation strikes in the public services;
 - Legislative Decree No. 231/01 that introduced for the first time into the Italian legal system the direct liability of companies and other legal entities for crimes committed by directors, executives, their subordinates and other subjects acting on behalf of the legal entity. The aforesaid liability applies when the unlawful conduct has been carried out in the interest of the company;
 - Legislative Decree No. 368/01 and following amendments, on fixed term employment contracts;
 - Law No. 276/03 and following amendments (hereinafter also "The Biagi Reform" or "Riforma Biagi");
 - Legislative Decree No. 81/08 and No. 106/09 regarding health and safety at the workplace;
 - Law No. 148/11 attributes to certain second level collective bargaining agreements ruling particular matters the same power as the National collective agreements and laws;
 - Law No. 92/12 and following amendments (hereinafter also "The Fornero Reform" or "Riforma Fornero");
 - Legislative Decree No. 167/11 on apprenticeship contracts;
 - Law Decree No. 34/14 (converted into Law No. 78/14) eg. "The Jobs Act.1";
 - Law No. 161/14 on specific disposition for the executives Enabling Law no. 183/14;
 - Legislative Decree No. 22/15, regulating the unemployment benefits (so called "NASPI");

- Legislative Decree No. 23/15 on the new discipline of the "dismissal" based on the gradually increasing protection;
 - Legislative Decree No. 80/15 on work and family care balance;
 - Legislative Decree No. 81/15 on the general reorganization of the major contracts (as well as free lances, fixed term, part-time, job on call, spot job, temporary work and apprenticeship);
 - Legislative Decree No. 148/15, regarding the temporary lay-offs benefits scheme;
 - Legislative Decree No. 149/15 on the service inspection;
 - Legislative Decree No. 150/15 on the employment services and the institution of the new public agency "ANPAL";
 - Legislative Decree No. 151/15 concerning the disabled people placing services, remote worker check;
 - Law No. 208/15 ("Legge di Stabilità 2016");
- iv. the collective bargaining agreements;
 - v. the individual employment contract.

23.2

Are there particular rules regarding collective agreements which need to be followed?

The Italian collective bargaining system follows hierarchical criteria and provides:

- i. "interconfederal level" (if any) (e.g.: the last agreement was signed on January 10, 2014);
- ii. national level for different sectors: National Collective Labour Agreements ("NCLA") (sector intended as the field of the firm's activity, e.g.: metalworking, chemistry, public administration);
- iii. territorial level (if any);
- iv. company level: collective internal bargaining ("CIA").

Various levels of collective bargaining rule mainly the normative and economic aspects of the individual employment relationships.

The collective agreement in Italy is considered a private agreement and follows the rules established by the Italian Civil Code on the matter.

A collective agreement is binding only for those employees who are enrolled in the Trade Union signing the collective agreement (at a "interconfederal", national sector or Company level) and the employer signing the collective agreement.

In particular, the “interconfederal agreement” under lett. (i) above and Law No. 148/11 in the previous paragraph (23.1/iii) represent an opportunity from which an employer may benefit in order to establish different terms and conditions of the working relationship towards the generality of the workforce.

23.3

Is it compulsory to apply a National Collective Labour Agreement (NCLA)?

Generally speaking, the enforcement of a collective agreement is only compulsory for the parties who sign it (employees and employers members of the respective trade unions/associations signatories).

In any case, the employer, who does not sign the collective agreement, can “adopt” and apply it to employment relationships.

Should the employer not apply any collective agreement, in the event of any possible employees’ claims, the Judge refers to its provisions as a sort of “minimum standards” of the normative and economical treatments, to be applied to each employee.

23.4

Can an employer apply further internal agreements signed with the trade unions regarding particular matters, even if they provide worse conditions for the employees?

As previously mentioned, Law No. 148/11 has modified the regulation regarding the power and effectiveness of specific second level bargaining agreements. As a consequence, it is now possible to introduce treatments worse than the ones previously granted - at certain conditions also worse than the NCLA’s provisions - regarding the following specific areas: (i) audio-visual equipment and employer surveillance; (ii) duties and job classification; (iii) flexible contracts (i.e. part-time contract, fixed-term contract, temporary work, etc.); as well as (iv) working time regulation.

Such kind of agreements shall be executed by the most representative Trade Unions together with the workers representatives. It has to be specified that several Trade Unions do not agree, as a principle, with such agreements, as they firmly believe that the minimum terms and conditions of the NCLA should not be jeopardized.

23.5

How many types of contracts can a company apply?

The standard agreement applicable to employees is the open-term contract (contratto a tempo indeterminato). It constitutes the regular type of agreement. In order to grant a certain degree of “flexibility”, the Italian Labour Law provides different kinds of possibilities such as:

- i. fixed-term employment contracts (as amended by Law No. 92/12, as well as by Law No. 78/14 and Legislative Decree No. 81/15);
- ii. part-time contracts (as amended by Legislative Decree No. 81/15);
- iii. coordinate and continuative collaborations (as amended by Legislative Decree No. 81/15);
- iv. staff leasing for a fixed-term contract (as amended by Legislative Decree No. 81/15);
- v. job on call, self-employment contract (for consultant), agency collaboration contracts, introduction agreement contract, internship contract;
- vi. apprenticeship contract (as amended by Legislative Decree No. 81/15).

23.6

Are there limits to respect for all kinds of contract?

The Italian Labour Law system as recently amended by Legislative Decree No. 81/15 provides specific limits for several contracts, regarding:

- i. the nature of the contract (e.g.: the fixed-term contract);
- ii. the percentage of specific contracts in respect of the entire work-force (e.g.: fixed-term contract; supply contract);
- iii. the possibility to extend a fixed-term contract till No. 5 times, within a maximum duration of No. 36 months, by performing the tasks of the same contractual and legal category;
- iv. the distribution of the working hours (e.g.: part-time contract).

Are there limits concerning how many individuals can be employed with a fixed term contract and how many individuals can work part-time?

According to Legislative Decree No. 81/15, which abrogated almost completely Legislative Decree No. 368/01:

- i. the fixed-term employment contracts can be signed up to 20% the company's open-term workforce, which is in force at the beginning of the year;
- ii. in case of the company with up to No. 5 employees, only No. 1 fixed-term contract can be signed.

On this regard, special provisions are often provided by the collective bargaining agreements. Moreover, according to the mentioned recent disposition, no quantitative limits have been provided for signing fixed-term employment agreements in a few cases (e.g.: start-up, workforce temporary substitution, periodicity needs, trainee contracts, employees over 50 years old).

With reference to part-time employees, the Italian Labour Law system (as recently amended by Legislative Decree No. 81/15) permits the employer to hire such employees with a fixed-term contract, without any quantitative restrictions.

These restrictions are usually established by the NCLA, which often sets limits for this kind of contract.

However, the internal regulation of part-time workers (e.g.: concerning the management of working hours) is strictly provided by law and the collective bargaining agreement.

Legislative Decree No. 81/15 extended the possibility to change employment relationship from full-time to part-time also for: (i) employees with serious chronic degenerative diseases; (ii) employees looking after spouse, children and parents suffering from serious chronic diseases degenerative.

Do employment contracts have to be prepared according to specific and compulsory provisions?

In general, the employment contract does not have to be prepared according to specific and compulsory provisions.

Nevertheless, some specific information or clauses need to be prepared in written form. Written form is sometimes required in order to: (i) prove the employment relationship; (ii) implement the validity of the provisions (e.g.: fixed-term clause; part-time clause).

In any case, the employees must be informed of the essential conditions of the employment relationship such as: (i) work place; (ii) the tasks or activities assigned; economical treatment; (iii) working hours; (iv) destination of the severance indemnity ("TFR"); (v) privacy data processing according to the provisions of Legislative Decree No. 196/03. On this regard, Legislative Decree No. 151/15 amended Section 4, Law No. 300/70, confirming that general privacy protection regulation have to be applied, as well as, stating expressly that preliminary information must be provided to the employees about any use of their personal data.

Are there particular rules regulating the economic treatment in contracts (minimum pay, holidays, bonuses, benefits, overtime and other items which should be included)?

According to Section 36 of the Italian Constitution, any employee is entitled to a retribution proportioned to the quantity and quality of his/her job. In any case, the wage has to be sufficient to guarantee him/her and his/her family a "free and dignified life".

The basic economic treatment is usually established in the individual agreement with reference to the applicable NCLA, which establishes the minimum wage applicable. If it is not established, it will be quantified by the judges, according to the best practice principle (labour judges will refer to the NCLA applicable to the same job area).

Nevertheless, individual agreements can provide for further bonuses, beyond the minimum wage whether absorbable or not, etc.

According to Law No. 66/03, employees have the right to at least No. 4 weeks of holiday leave every year. In particular, they have the right to at least No. 2 weeks of holiday during the working year in which they have been accrued, and another No. 2 weeks within the following No. 18 months.

According to Law No. 66/03, there are limits related to working hours. In particular, the ordinary working time of any employee is set at No. 40 hours in a week, with the possibility for the collective bargaining agreement to provide a lower number of hours. Moreover, it is forbidden to work over an average of No. 48 hours per week, with reference to a period of minimum No. 4 months, which can be extended by the NCLA (e.g. No. 6 or No. 12 months).

In any case, it is forbidden to work overtime for more than No. 250 hours per year. Bonuses and benefits are established by individual agreements according to the quality and quantity of each employee. In any case, they are included in the final wage in order to calculate a number of indemnities such as severance indemnity (“TFR”), the notice period, etc.

23.10

Are there particular rules regulating the economic treatment of the income of researchers and academic figures?

Special Tax Regime, so called “*Rientro dei Cervelli*”, is applicable to the income of researchers and academic professors that are in possession of a University Degree or an equivalent study title that have carried out research or academic activity outside Italy prior to their return/employment in Italy.

The mentioned figures must satisfy the criteria provided by Italian Law, specifically introduced for the first time with Law Decree 185/2008 and subsequently amended and updated over the years.

The Financial Law 2016 “*Legge di Stabilità 2016*” has extended the special tax regime until the tax period ending on December 31, 2017.

The Tax Regime consists in the taxation of only a portion of the income earned, and specifically the taxation of only 20% for women and 30% for men of the total income earned.

23.11

TFR: deferred compensation or termination indemnity?

TFR is a mandatory termination indemnity due to employees according to Section 2120 of the Italian Civil Code.

The TFR can be estimated as 7.4% of the employee’s annual gross compensation, and it is accrued on an annual basis.

23.12

Are there particular rules regarding termination indemnity accruals?

As of 2007, companies with more than 50 employees shall transfer the termination indemnity (TFR) accruals either to an integrative pension fund chosen by the employees, or to a special fund held by the National Pension Scheme (INPS).

The integrative pension fund will allow employees to benefit from of an additional pension profit upon retirement; the eligibility to participate in a determined integrative pension fund as well as the amount of the pension benefit is determined according to the rules of the same pension fund.

The TFR transferred to the special fund held by INPS is payable to employees upon termination of the employment relationship for any reason; the payment is carried out by the employer, who then recovers the amount paid from INPS.

23.13

Anticipation of the TFR in the monthly payslip?

For employees of the private sector only(except domestic workers and those working in the agricultural sector) , with an employment contract in place for at least six months, the Italian tax law has provided for the opportunity to request an anticipation of the TFR , in relation to the pay periods from 1 March 2015 to 30 June 2018.

The above-mentioned supplementary portion of salary (Quota Integrativa della Retribuzione “ Qu.I.R.”)will be considered as an integral part of the ordinary salary and is therefore subject to ordinary tax rates (less favourable than the separate taxation recognised for the TFR payable upon termination of the employment relationship) and is not subject to taxation for social security purposes.

As ordinary income, such Qu.I.R quote will be added to the normal employment income reported in the Italian Wage Statement named “Certificazione Unica” - CU form.

23.14

Is it mandatory to pay social security contributions in Italy even if covered by the home country scheme?

In Italy, the social security contributions’ obligation is governed by the so-called “principle of territoriality”; in any case, when the employment services are rendered in Italy, Italian social contributions are due.

The only exemption to the above-mentioned principle can be found in the social security agreements between Italy and countries (bi-lateral or multilateral agreements as listed in previous § 23.2).

According to said agreements, employees on temporary assignment to Italy can remain covered by their home country social security schemes up to the maximum period provided for by the applicable social security agreement.

In this case, the assigned employees may benefit from the total exemption from payment of social contributions in Italy, or from partial exemption if the applicable Social Security Agreement does not provide for the totality of Italian social security contributions.

23.15

What is a Social Security Representative and who can be appointed as one?

Companies with no legal presence in Italy, which employ individuals to work in this country and to which none of the social security exemption rules apply, are obliged to register their employees with the Italian compulsory social security scheme.

The employer’s obligation derives from the so-called “principle of territoriality” which governs such obligation (i.e.: social security contributions should be paid in the country where employment services are rendered).

In order to comply with the above obligation, the foreign employer should appoint their representative in Italy for social security contributions’ purposes.

The local Social Security Representative should be an individual and is usually a payroll consultant, who acts in the name and on behalf of the foreign entity, pursuant to a special power of attorney granted to him/her by the board of the foreign employer.

The Social Security Representative should comply with all obligations the Italian Law and Social Security Regulations impose upon employers, and is jointly responsible with the foreign employer towards the local authorities for the compliance with said obligations.

23.16

What is the social security contribution “totalization”?

The social security “totalization” is a procedure foreseen in the Social Security Agreements according to which the period/s of social contribution to the social security scheme/s of a “totalized” country/ies is taken into consideration by one of these pension schemes in order to reach the minimum period required to be entitled to a pension benefit.

23.17

What are the most common benefits granted to Italian employees?

The most common benefits granted to Italian employees are: company car, company mobile phone, discount on employer’s manufactures, scholarship for employees and/or their family members, company provided housing, loans for particular needs, lunch coupons or substitutive payments, transportation services to/from the work location, share awards, stock options, etc.

Are there specific rules regulating the attribution of stock options, benefits and bonuses?

The attribution of incentive compensation, such as stock options, benefits and bonuses is generally regulated by the company's internal policies and there are no particular rules or restrictions in force.

It shall be noted, however, that the attribution of share benefits (i.e.: stock awards, stock options, stock purchase plans) is considered as a public offering of securities and is consequently subject to the regulations of the Italian Commission for Companies and Securities Markets (*Consob*). In some cases of share offering, the employers will be subject to filing obligations with *Consob* while in others, the filing may not be an essential requirement. In all cases, however, the rules provided by *Consob* shall be respected or the stock plan may be blocked.

How are stock options, benefits and bonuses taxed?

Taxation of incentive compensation generally falls under the employment income taxation and, as such, is subject to progressive Italian tax rates. Notwithstanding this, a favourable tax treatment may still apply to certain forms of benefits while bonuses are always treated as salary and are fully taxable. With reference to benefits and to certain stock schemes, favourable taxation can be provided through the reduction of the taxable value of a benefit or through taxation of the notional value as provided for by the Italian Tax Code.

Is a split payroll tax efficient in Italy?

The split payroll is not considered a tax efficient way to provide compensation to an Italian employee or to a foreign employee working in Italy.

The above is due to different obligations arising to the Italian employers and individuals' income tax filing obligations that are briefly described below.

Italian employees - Italian employers are deemed responsible to apply monthly wage withholdings on any compensation paid directly to their employees and on any compensation paid by third parties, such as foreign subsidiaries, in relation to the working activity carried by the employees of such Italian employers. This obligation leads to the consequent taxation of the entire compensation (paid directly or indirectly) via monthly payroll withholdings.

Only in the cases in which the Italian employee is treated as a non-tax resident of Italy and performs his/her activities abroad, the Italian employer is not obliged to apply any income tax withholding, nor with reference to the compensation paid directly nor with reference to the compensation paid by third parties.

Employees of foreign companies working in Italy - This category of employees is subject to Italian taxation with reference to the income produced in the Italian territory. If such income is delivered via split payroll (i.e.: portion is paid by an Italian company and another portion is paid by their foreign employer), the Italian company is obliged to apply the income tax withholdings on any compensation or benefit provided to the individual directly. An additional portion of income, paid by the foreign employer, shall be reported in the individual's tax return in addition to compensation already taxed through the Italian payroll. This obligation leads to full taxation of compensation received in relation to the individual's Italian activities.

Are there particular rules to be considered in order to avoid discriminatory conduct?

The Italian Labour System prohibits all kinds of discrimination (gender, sexual orientation, political ideas, trade union activities, religious beliefs).

In fact, many sources refer to the matter in hand, such as (i) the Italian Constitution; (ii) the Employees' Statute and in several other provisions such as Law No. 604/66, Law No. 108/90, and also Law No. 92/12, which considers null and void dismissal for discriminatory reasons; (iii) Law No. 151/00 which prohibits the dismissal of a pregnant employee; (iv) Legislative Decree No. 216/03 (which implements the EU Directive No. 2000/78); and (v) Legislative Decree No. 198/06, which is the so-called "Equal Opportunities Code".

It might be convenient for a company to provide for an Internal Code which sets policy rules against discriminatory conduct.

Are there specific provisions for foreign employees?

The Italian Labour System grants foreign employees the same standards of rights provided to Italian employees.

The only difference in regulations between EU and extra-EU employees, regards the freedom of entrance and establishment in Italy.

Legislative Decree No. 286/98 regulates the general entry procedures and the right of residence of extra-UE employees.

The provisions ruling the secondment of foreign employees in Italy are also applied to companies which are not established in European countries.

The breach of the rules concerning the entrance and establishment of EU and non EU employees may result in criminal measures.

- iv. the bargaining agreements can provide other cases regarding the possibility to assign the employees to tasks belonging to the lower level of contractual classification but to the same legal category;
- v. it is also possible to assign employees to higher professional positions, but after No. 6 months in such position they are entitled to maintain the newly assigned contractual level and the relative increase in compensation, with exception to the assignment of a higher professional position due to temporary replacements (e.g. for maternity leave).

With regard to Welfare Contributions, the main rules provide that:

- i. the employer and the employee contribute to social security and the employer is responsible for the payment of the employee's quotas as well;
- ii. in the event that the employer does not pay the social contributions, the employee is still entitled to receive his/her welfare benefits, if the law does not provide differently; in this case, the employer will be responsible for any damages occurred.

With regard to breaks, Section 7 of Legislative Decree No. 66/03 provides that employees have the right to enjoy a total of No. 11 hours of break every No. 24 working hours (so called "daily rest period").

Moreover, according to Section 9 of the mentioned Legislative Decree, employee is entitled to enjoy a rest period of least No. 24 consecutive hours every No. 7 days (so called "weekly rest period"), usually coinciding with Sunday, to be combined with the hours of daily rest as provided by Section 7. The weekly rest period is calculated as average on a period not exceeding No. 14 days.

Furthermore, every employee is entitled to enjoy brief intervals of break when the working hours are more than No. 6 hours a day. Particular rules are established for dangerous offices.

With regard to sick leave, Section 2110 of the Italian Civil Code provides that, during such period:

- i. the wage will be provided fully;
- ii. the exceeding of the so-called "periodo di comporta" (it is usually equal to No. 180 days per year, but different provisions can be provided by NCLA), during which the job is guaranteed to the employee, despite his/her absence from work, allows the employee's dismissal.

Are there particular rules concerning the employment relationships, with regards to working hours; professional positions; holidays; welfare; contribution; sick leave; permissions; breaks; maternity leave, etc.?

With regard to holidays and working hours, please refer to § 23.9.

With reference to professional positions, an important rule is stated in Section 2103 of the Italian Civil Code (which is recently amended by Legislative Decree No. 81/15), by which:

- i. an employee must be assigned to the category and level corresponding to the duties effectively carried out as established in the individual employment contract and in the applicable NCLA;
- ii. the employees' basic salary and all other benefits/bonuses are determined by their assigned level;
- iii. in case of changing of the organizational business which may have affects on the position of the employee, it is possible to assign this latter to tasks belonging to the lower level of contractual classification but to the same legal category;

With regard to maternity leave, the above-mentioned Section 2110 of the Italian Civil Code and further provisions guarantee to those employees who are pregnant or who have children the right to temporarily interrupt their professional duties with maintenance of the job and the economical treatment.

In particular, the law guarantees: (i) a compulsory period equal to No. 2 months prior to the expected birth and No. 3 months following the birth and (ii) facultative leave equal to 6 months following the compulsory period.

Other paid leave is guaranteed until the employee's children are 12 years old, as established experimentally till December 31, 2015 by Legislative Decree No. 80/15, and extended later also for the following years by Legislative Decree No. 148/2015.

23.24

Is there an obligation to hire disabled people?

According to Law No. 68/99, employers are obliged to hire disabled individuals in the following events:

- i. 7% of the entire work-force, in case of company with more than No. 50 employees;
- ii. No. 2 individuals, if No. 36-50 employees are in force within the company;
- iii. No. 1 individual, if No. 15 – 35 employees are in force within the company.

23.25

Does a particular disciplinary code need to be adopted?

An internal disciplinary code has to be adopted by the employer according to Section 7 of Law No. 300/70.

Its implementation is required in order to guarantee the validity of the adoption of disciplinary measures, employee dismissal included.

The disciplinary code has to be posted in the company's public area, accessible to all employees. Illicit conduct, considered as a disciplinary infraction and the consequent applicable penalties should be specifically stated.

23.26

Are there particular rules to be followed in order to adopt a disciplinary measure against an employee?

Section 2106 of the Italian Civil Code and Section 7 of Law No. 300/70 establish specific rules to be applied in order to take disciplinary measures against employees. The employer has to adopt a code of disciplinary infractions, which contains all measures that can be imposed.

Usually these measures correspond to those provided by the applicable NCLA.

The employer can adopt a disciplinary measure only after having respected the following procedures. In particular, the employer has to:

- i. object to the infraction (in writing for the most serious cases) to the employee;
- ii. make a timely and specific objection, the content of which cannot be modified once sent to the employee.

The employee can justify himself/herself within No. 5 days from receipt of the objection, while the consequent disciplinary measure can be adopted only after these No. 5 days have passed (or, according to the cases law, within these No. 5 days, if the employee provides justification for his/her actions).

23.27

Can an employer adopt particular internal policies concerning different matters (internet, ethic code, etc.)?

The employer can, and sometimes is obliged to, establish rules on specific matters (e.g.: Internet or e-mail use), unilaterally or sometimes after having consulted the relevant Trade Union.

The matter in hand has been recently amended by Legislative Decree No. 151/15.

May strikes be addressed and, if so, are there particular rules to follow?

The strike is not only possible but, according to the Italian Labour System, it is a right guaranteed by Section 40 of the Italian Constitution.

The strike is regulated by case law and is set by law just for particular fields (e.g.: in matter of Public Services as ruled by Law No. 146/90, modified by the Law No. 83/00).

When, and for what reasons, can an employee be dismissed?

An employee can be dismissed when:

- i. he/she commits such seriously illicit conduct that the employment relationship
- ii. is definitely and immediately affected. It is the so-called “just cause” dismissal, as provided by Section 2119 of the Italian Civil Code, allows the employer to dismiss the employee immediately without having to respect the usual notice period;
- iii. he/she commits illicit conduct which is not so serious to allow the employer not to respect the notice period, which therefore has to be guaranteed or alternatively paid. It is the so-called “subjective justified reason” dismissal. The dismissal for “Subjective justified reasons” may also be imposed in case of private situations, and not necessarily in connection with illicit conduct (e.g.: if the so-called “periodo di comporta”, is exceeded or rather, the annual period during which the employment relationship can be suspended - e.g.: due to long-term illness - with the conservation of the economical treatment);
- iv. there are justified reasons connected to the employer’s activity, labour organization and its regular operation. It is the so-called “objective justified reason” dismissal;
- v. the interested employee is involved in a “collective dismissal” procedure, according to the provisions set forth by Law No. 223/91.

In case of dismissal for a “just cause”, the respect of the notice period is not required and, consequently, the relevant substitutive indemnity. The notice is regularly due in the event of dismissal for the so-called “subjective justified reason”.

Which are the consequences of an unlawful dismissal?

The reform of the Italian Labour System (namely, Law No. 92/12 or *Riforma Fornero*) introduced several changes to Section 18 of Law No. 300/70. In particular, the reform has divided the previous regulation by introducing different consequences in the event of unlawful/null dismissal performed by the employer. The consequences can be summarized as follows.

The dismissal shall be considered null if imposed: (i) for discriminatory reasons; (ii) for marriage; (iii) in breach of the rules regarding the safeguarding of motherhood and fatherhood; (iv) for null/illicit/criminal reasons provided by law; (v) through an oral and not written communication.

The consequence of a null dismissal, for all companies regardless of the number of employees in force, is:

- a. the reinstatement of the employee in addition to
- b. the compensation allowance (not less than No. 5 monthly salaries), that shall be calculated on the basis of the last monthly salary, from the date of dismissal until the effective reintegration, and
- c. the payment of social security contributions, deducted the amount received by the employee during the unemployment, for the performance of other work activities.

In alternative to the reinstatement and without prejudice to the recognition of the compensation allowance as above described, the employee may choose the payment, as compensation, of No. 15 monthly salaries (which is exempted from social security contributions). The payment of the compensation in lieu of the reinstatement determines the resolution of the employment relationship.

Company with more than No. 15 employees: unlawful dismissal is due to defects or vices related to the lack or absence of a “just cause”, or a “justified subjective reason” or a “justified objective reason”. The consequence of these kind of unlawful dismissals is:

- a. the reinstatement of the employee in addition to
- b. the compensation allowance (not exceeding No. 12 monthly instalments) on the basis of the last salary for the period included from the date of dismissal up to the date of effective reintegration and
- c. the payment of social security contributions (any amount received by the employee during the period of unemployment, for the performance of other work activities will also be deducted from such amount).

As an alternative to the reinstatement, and without prejudice to the recognition of the compensation allowance, the employee may choose the payment of compensation equal to No. 15 monthly salaries (which is exempted from social security contributions).

For all the other cases of unlawful dismissal for a just cause or a justified subjective reason, the Judge can sentence the employer to the payment of an allowance ranging from No. 12 to No. 24 monthly salaries based on the last monthly salary (exempt from social contributions). The payment of the indemnity in lieu determines the resolution of the employment relationship.

Company with less than No. 15 employees: in the event of unlawful dismissal due to defects or vices related to the lack or absence of a “just cause” or a “justified subjective reason” or a “justified objective reason”, the employer can choose between the reinstatement of the employee or the payments of an allowance ranging from 2.5 to 6 monthly salaries (also up to No. 14 monthly installments in specific cases), based on the last monthly salary received prior to the dismissal (exempted from the social contributions).

On March 7, 2015, Legislative Decree No. 23 has entered into force in the Italian Labour System. Such regulation is applied to the dismissals of the employees, qualified as blue-collars, white-collars and upper-white-collars, hired with an open-term contract by a company from March 7, 2015 (consider that the new regulation is applicable also in case of conversion of the fixed-term or apprenticeship contract into an open-term contract, occurred after the same date).

The regulation established by the recent Legislative Decree does not delete the other rules stated by the *Riforma Fornero*, which remain applicable to the employees hired with open-term contracts before March 7, 2015.

The rules regarding the discriminatory, null and oral dismissals have not been changed in respect to the *Riforma Fornero*.

On the other hand, the Legislative Decree No. 23/15 has stated that the penalties provided for such dismissals are applied also in case of unjustified dismissal based on a reason referring to physical or psychic disability of the employee.

With reference to the executives’ dismissal, the rules of *Riforma Fornero* remain applicable. The main innovation introduced by the mentioned Legislative Decree regards the dismissal for justified reasons or for just cause.

In particular, for an employer with more than 15 employees:

- a. when the Court states that the justified reasons or the just cause of the dismissal do not exist, it declares the termination of the employment relationship from the date of the dismissal and sentences the employer to pay an indemnity, not subject to the contribution, equal to No. 2 monthly salaries of the last retribution used to calculate the severance indemnity, for each service year, with a

- minimum of No. 4 and a maximum of No. 24 monthly salaries;
- b. only in the event of dismissal for justified subjective reasons or for just cause, if, during the trial the material fact/conduct contested to the employee is demonstrated as not existent, the Court annuls the dismissal and sentences the employer to reinstate the employee. The employer must also pay an indemnity proportional to the last retribution used to calculate the severance indemnity, for the period from the date of the dismissal to the actual reinstatement, deducted the amounts paid to the employee for performing any working activities and the amount that he could have earned, by accepting a reasonable alternative job.

The amount of this indemnity cannot exceed No. 12 monthly salaries. The employer, moreover, shall pay the social security contribution from the date of the dismissal to the date of the actual reinstatement, without any penalties in case of related missing payment.

For an employer with less than No. 15 employees, the rules as per point (b) above are not applicable. On the other hand, the regulation under point (a) above is applicable, but the indemnity values shall be divided by half and, in any case, cannot exceed No. 6 monthly salaries.

Legislative Decree No. 23/15, entered into from March 7, 2015, is not applicable to the executives, but only to the blue-collars, white-collars and upper-white collars, hired with an open-term contract from March 7, 2015, as above mentioned.

23.31

Are there particular rules for executives?

Apart from the case of a null dismissal due to discriminatory reason (which implies always the reinstatement of the employee, even if it concerns an executive), in the event of the unlawful dismissal of an executive, his/her reinstatement is not mandatory; therefore, even if the dismissal is unlawful, the executive’s dismissal implies the termination of the agreement.

The executive is nevertheless entitled to get a supplementary indemnity, as provided for by the applicable NCLA.

Are there other ways to terminate an employment relationship, besides through dismissal?

An employment relationship can be terminated because of: (i) the failure of the trial period; (ii) the so-called “sudden impossibility/force majeure”; (iii) resignation which has to be performed on line from March 12, 2016, as provided by Legislative Decree No. 151/15 ; (iv) the expiration of the terms of the contract; (v) the employee’s retirement/ death; (vi) mutual agreement which as to be performed on line from March 12, 2016, as provided by Legislative Decree No. 151/15; (vii) “collective” dismissal; (viii) “individual” dismissal (on this regard, consider that different kinds of individual dismissal are provided by Italian Law and the Italian legal system provided a specific dismissal procedures according to the size of the Company).

Are there particular rules concerning retirement?

The right to retire and to obtain a national pension is guaranteed by article 38 of the Italian Constitution. Special legislative rules establish conditions concerning retirement age, according to specific insurance and welfare requisites.

The main rules are provided for by the recent retirement reform set forth by Law Decree No. 201/11 (“Decreto Salva Italia”), which redefined the new requirements to obtain the related treatment (i.e. minimum contribution to the National Social Security Fund, minimum required age for retirement, the difference between men and women and between specific sector of business).

Is there flexibility for recruitment and labour contracts?

Flexibility is only partially guaranteed and the Italian system still requires the respect of many employees’ guarantees and internal/external limits with reference to some types of contracts. In any case, the recent reform set by Legislative Decree No. 81/15 has modified Legislative Decree No. 368/01 and Law. No. 74/14, as well as other important disposition as follow:

- i. with specific regard to the fixed-term employment contracts:
 - it is possible to sign fixed-term employment agreements, without specifying reasons at the basis of the contract (which were mandatory before);

- the employer can renew the employment contract up to 5 No. times, within No. 36 months;
 - the total number of fixed-term employment contracts cannot be higher than 20% of the total workforce with open-term contracts (in case of the company with up to No. 5 employees, only No. 1 fixed-term contract can be signed). In any case, different limits may be provided for by the applicable NCLA;
- ii. similar provisions and limits are provided for temporary staff leasing relationships, which have been made easier to be executed owing notably to the possibility of not providing the productive and organizational motivations at the basis of the contract (which was previously mandatory);
 - iii. the adoption of a part-time contract may be limited by the NCLA with reference to the number of the entire work force. Moreover, some rules are established in order to limit the employer’s right to change the agreed working hours. In this regard, Legislative Decree No. 276/03 provided the possibility to include in the NCLA the so-called (i) “elastic clauses”, which allow the employer to increase the agreed working hours and (ii) “flexible clauses”, which allow to change the employees placing over the week. The above clause require written communication.
The Legislative Decree no. 81/15 has deleted the distinction between elastic clauses and flexible clauses, referring only to elastic clauses, by which the parties can change the timing of work and the increase of the duration of work. On this regard, the NCLA may provide:
 - compensation measures;
 - limits to the possible supplementary working time or overtime.
 The employee has to be informed about any above mentioned change at least 5 days in advance. Legislative Decree No. 81/15 has stated that, lacking provisions in the NCLA, the employer may require the supplementary working to the employee in no more than 25% of weekly hours agreed;
 - iv. the adoption of the so-called “coordinated and continuative collaboration”, constitutes a particular kind of employment relationship (half autonomous and half subordinate). According to Legislative Decree N. 81/15, starting from June 25, 2015:
 - a. the “project” collaborations can not be signed anymore as the discipline has been deleted (except for the contracts entered into before the reform, as they can last till their natural expiration);
 - b. the coordinate and continuative collaborations can be signed according to the typical definition based on (1) continuity, (2) coordination, (3) personality of the activity, (4) absence of subordination;
 - c. the subordination’s presumption shall be introduced in case of irregular collaborations, starting from January 1, 2016;

- v. the adoption of the so-called “job sharing” contract, implies that two hired employees are both responsible for the same obligation;
- vi. the adoption of the so-called “job on call” for some activities;
- vii. the adoption of “apprenticeship” and “internship” contracts provide the payment of lower social contribution because of their formative aim. These contracts are permitted when certain conditions, related to age and to personal situations, are met.

All flexible contracts require a written form in order to prove their existence; otherwise, the employment relationship may be qualified as a normal, subordinate and open term relationship.

Further relevant flexible provisions take place within the Enabling Law No. 183/14 (also known as “Jobs Act”) and the connected Legislative Decrees. For additional information please refer in particular to § 23.30 and § 23.53.

23.35

Are there other types of collaboration besides the employment relationship?

As previously mentioned in the paragraph above, the Italian Labour System provides for other types of employment relationships, such as the so-called “continuative and coordinative collaborations” (half autonomous and half subordinate). On this regard, according to Legislative Decree N. 81/15, starting from June 25, 2015:

- a. the collaboration based on the project can not be signed anymore, as the discipline has been deleted (except for the contracts entered into before the reform, as they last till their natural expiration);
- b. the coordinate and continuative collaborations can be signed according to the typical definition based on (1) continuity, (2) coordination, (3) personality of the activity, (4) absence of subordination;
- c. the subordination’s presumption shall be introduced in case of irregular collaborations, starting from January 1, 2016;
- d. starting from January 1, 2016, an irregular collaboration contract can be validated by a competent Commission, by hiring the employee with an open-term contract.

It is also possible to stipulate the so-called “accessorial services” contract when the working relationship does not last more than No. 30 days per year with the same principal and when the annual wage is lower than € 7,000.

In this situation the rules provided for the so-called “continuative and coordinative collaborations” are not applied.

In any case, the employer may stipulate consultancy contracts as these contracts provide for autonomous employment relationships.

Legislative Decree No. 81/15 deleted the possibility to sign occasional collaboration contracts starting from June 25, 2015.

23.36

Do collaboration contracts have to be drafted according to specific and compulsory provisions?

The regulations of collaboration contracts have been amended by Legislative Decree No. 81/15, as well as by Law No. 92/12 which amended various articles of Legislative Decree No. 276/03. The latter, in its latest version, states that the so-called “continuative and coordinative collaborations” requires written form in order to prove the existence of the following elements: (i) the term; (ii) the compensation; (iii) the eventual adoption of health and safety measures; (iv) the organisational system with the employer.

According to the Legislative Decree No. 81/15, starting from June 25, 2015, a collaboration contract can be signed without a project. Under the provisions of Legislative Decree No. 276/03, all collaboration contracts must be prepared on a fixed-term basis, with exception of the collaboration:

- i. with a so-called “occasional worker” (meaning the individual working with the employer for no more than No. 30 days a year and earning no more than € 7,000 annually);
- ii. with intellectual professionals who must be enrolled in specific register in order to carry out their profession;
- iii. with a member of the board of the company and with its directors or managing directors.

Are there specific rules as to safety and health measures at work?

The Italian Labour System provides specific rules concerning safety and security at workplaces, according to the Legislative Decrees No. 81/08 and No. 106/09. Pursuant to such laws, the most important rules state:

- i. the adoption of a very detailed monitoring system of the risks and the duty of the employer to prepare the so-called Risks Evaluation Document (“DVR”); companies with up to 50 employees may adopt a simplified risks evaluation procedure;
- ii. the duty to elaborate an ad hoc Risks Evaluation Document (“DUVRI”) when more companies and consequently more employees of different employers are involved in the performance of the working activity and there is a risk that their activities might interfere under a safety and security point of view;
- iii. the employer’s faculty to transfer his spending and decisional powers and consequently the responsibility in matters concerning safety and health at work to somebody expert by means of a written proxy;
- iv. timely support in the event of danger;
- v. a specific duty to guarantee the employees’ individual and collective protection means;
- vi. a very strict and detailed information procedure, in order to guarantee a thorough and continuous control, up-dating and training on these issues.

Are there any social security burdens?

The Italian Labour System provides for the employer’s duty to pay insurance burdens to the Public Insurance Authority (“INAIL”) which are calculated on the basis of the actual existing risks.

Do social security burdens include insurance?

INAIL insurance is strictly compulsory in order to cover all employees’ accidents at workplace. In any case, the employer can provide further individual insurance covers.

This usually applies to individuals holding managerial positions.

Are Company Trade Union Representatives (RSA) or Unitary Trade Union Representatives (RSU) permitted?

The Italian Labour system permits Company Trade Union Representative (hereinafter also “RSA”) within a company with at least No. 15 employees and, commencing from 1993, the Unitary Trade Union Representative (hereinafter also “RSU”).

What can conduct against a trade union interest imply?

When the employer keeps a behavior against a Trade Union’s interest, according to Section 28 of the Employees’ Statute (Law No. 300/70), the Trade Union is entitled to sue the employer before the Court in order to stop the illicit conduct.

The procedure implies the adoption of an injunction which is immediately effective and which can be objected within a very short term (No. 15 days).

Are there particular rules, concerning trade union procedures, that need to be respected during mergers and acquisition?

According to Law No. 428/90, during mergers and acquisitions, the employer in question has to respect a particular procedure involving Trade Unions. The employer has to inform the employees of the merger and acquisition at least No. 25 days before signing the definitive contract.

The Trade Unions can request a meeting, within the following No. 7 days, in order to discuss the modalities of the operation. The consultation is considered final after No. 10 days even if an agreement is not reached.

A breach of the above-mentioned rules is considered as illicit conduct against the Trade Unions' interest and therefore it may lead to a claim.

23.43

Are there particular rules, related to the trade union procedures, that need to be respected during bankruptcy and reorganization operations?

According to Section 2119 of the Italian Civil Code, bankruptcy and similar events do not imply a so-called “just cause” which may provide for the termination of the employment contract.

Usually, in the event of an economic crisis, it is possible to request the intervention of particular public welfare institutions, i.e.: (i) “CIGO” (ordinary fund), for transitory and difficult economic situations, not depending on the employer or the employees but caused by temporary market difficulties and (ii) “CIGS” (extraordinary fund), for internal business reorganization or restructuring, bankruptcy procedures (when the activity ceases) and internal business economic crisis.

In both cases, the employer has to inform the Trade Unions which may request a joint examination within a certain number of days which vary depending on the situations in hand.

Sometimes, after a period of CIGS, the situation does not improve and, therefore, it becomes necessary to dismiss employees. In similar circumstances, according to Section 4 of Law No. 223/91, the employer must inform preliminary the Trade Unions on the number of the employees involved and motivations behind possible future dismissals. Within the following No. 7 days, the Trade Unions may request for a joint examination in order to reach an agreement. If a joint examination is required, the procedure is, in any case, considered concluded after No. 45 days, even if an agreement is not reached.

After this first and compulsory step, a further “administrative phase” (lasting a maximum of No. 30 days) is required in order to resolve the matter before the competent Labour Authorities.

Only at the end of the whole procedure, the employer is entitled to communicate in writing the dismissal to the interested employees, observing the relevant notice period.

Regardless of a formal declaration of bankruptcy, if economic difficulties occur, a “collective dismissals” procedure has to be started when an employer intends to dismiss at least No. 5 employees within No. 120 days, as well as in case of reduction of the entire work force, the reorganization or the transformation of the activity and the closing down of the company.

The procedure stated in Section 4 of the aforementioned Law No. 223/91 must be complied with.

On this regard, Law No. 161/14 has included also the executives within the collective dismissal procedure, starting from November 25, 2014.

Legislative Decree No. 148/15 has recently stated new important provision in matter of CIGO and CIGS. In detail:

- i. the maximum duration of CIG and CIGS has been reduced to No. 24 months (within five year), increased to No. 36 months by solidarity contract;
- ii. the CIGO and CIGS discipline can be applied also to the professional apprenticeship;
- iii. the company is not required to declare the criteria selection of the employee to be suspended and the arrangements governing the rotation;
- iv. the CIGO request has to be filed within No. 15 days from the stopping of the activity; the CIGS request has to be submitted in No. 7 days following the termination of the Union procedure or signing off of the union agreement;
- v. in case of final closing down of the company, CIGS is not available anymore;
- vi. the company is required to pay an ordinary contribution, as well as an additional contribution only in case of actual use of CIGO/CIGS;
- vii. the solidarity contract becomes one of causes of CIGS, on which the company shall be required to pay also the additional contribution as above mentioned;
- viii. the old solidarity contract's type “B” (which is applied to little companies or if the CIGS is not available) shall be deleted starting from June 30, 2016.

Does a social mobility or ordinary/extraordinary redundancy fund system exist?

Law No. 223/91 provides two kinds of redundancy funds:

- i. CIGO (“ordinary fund”), for transitory and difficult internal events, not depending on the employer or the employees;
- ii. CIGS (“extraordinary fund”), for internal business reorganization or restructuring, bankruptcy procedures, internal business economic crisis. After this intervention, if the Company’s economic situation does not improve, the interested employees (with exception of the executives) may be dismissed and they have the right to social mobility indemnity for a certain period of time as established by Law.

Particular provisions have been set by specific Laws (e.g. Law Decree No. 185/08 turned into Law No. 2/09) so as to allow the enforcement of the redundancy funds also in favour of categories of employees originally excluded.

The mobility redundancy allowance (*indennità di mobilità*) will be cancelled and totally replaced by a monthly unemployment indemnity, known as “New social insurance for employment” - “NASpI”, starting from December 31, 2016. For further information, please refer to § 23.53.

Is it necessary to follow a specific procedure when the employer intends to use social mobility or ordinary/extraordinary redundancy funds?

If an employer intends to use social mobility funds, he must present an application request to the National Social Security Fund (CIGO) or to the Labour Ministry (CIGS).

With reference to the procedure, please see previous § 23.43.

Are there particular rules that need to be considered in the event of the transfer of a business?

According to Section 2112 of the Italian Civil Code and Section 47 of Law No. 428/90, the main principle applicable in the case of transfer of business (which include also M&A operations implying asset deal) is that the employees’ rights have to be maintained. Therefore the employment relationship continues with the new employer and the transferor and the transferee are jointly responsible for the employees’ credits existing at the time the transfer occurs.

In general, if the transferee does not apply the NCLA, it is required to refer to both the economic and normative treatments set out in the NCLA applied by the transferor.

If the transferee applies a different NCLA from the one applied by the transferor, the transferee’s NCLA shall be enforced, even if pejorative.

The transfer does not imply a reason justifying a dismissal. Nevertheless, the employees, whose conditions suffered a significant change, can give their resignations within the following No. 3 months, without giving any notice period.

In the event of the transfer of business the employers involved must follow a mandatory procedure in order to inform the Trade Unions. In this regard, please refer to § 23.42.

Are there credits regarding wages and salaries considered secured credits?

According to the Italian Labour System wages and salaries are considered particularly secure.

Few priorities are guaranteed:

- i. a general privilege over a debtor’s movables is recognized for wages, salaries, severance indemnities, compensation for damages following an illicit dismissal or to a contributory failure (Section 2751-bis Italian Civil Code);
- ii. employees’ credits are placed immediately after legal expenses and they are privileged with regard to all other special priorities established by special provisions (Section 2777 of the Italian Civil Code);

- iii. in the case of a failed realization on the debtor's movable properties, the employees' credits are placed subsidiary on the price of the real estate, before the unsecured creditors (Section 2776 of the Italian Civil Code). In particular, severance indemnities and the notice period substitutive indemnities are placed before all other privileged credits and deferred only to the mortgage credits (Law No. 297/82).

Moreover all credits are considered (i) un-distrainable (they cannot be distrained for more than 1/5 or for the amount established by the judge in the case of family maintenance credits in compliance with Section 545 of the Italian Civil Procedure Code); (ii) in the same measure partially subject to seizure according to Section 671 and (iii) submitted to compensation (Section 1246 of the Italian Civil Code). A special Fund has been set up (Legislative Decree No. 80/92) in the event of bankruptcy, should few conditions occur. Such fund will pay the credits that are not paid by the employer.

23.48

Do particular labour authorities exist?

The Italian Labour system provides three main authorities for labour and welfare matters:

- i. the Italian authority which manages compulsory insurance against accidents and diseases due to work activity is INAIL;
- ii. the National Social Insurance Institute which provides pension payments and other various services (e.g.: sickness) is called INPS;
- iii. local Labour Governments, ("DTL").

23.49

Is it possible to second employees?

According to Article 30 of the Law No. 276/03, it is possible to second one or more employees.

Are there limits regarding the possibility of secondment of employees?

According to Article 30 of the Law No. 276/03, an employer, for the benefit of all parties, can temporary transfer one or more employees to another entity in order to perform a specific activity. Nevertheless the employer remains economically and legally responsible of seconded employee.

The employee's consent is required when the secondment implies the change of the workplace.

When the secondment implies the transfer of an employee from a production unit to another unit, which is located over 50 km from the original work place, the transfer can only take place for technical, productive, organizational and substitutive reasons.

23.51

Can an employer lease employees?

According to the Legislative Decree No. 276/03, an employer can lease employees.

According to the Italian system, the so-called "Work Supply Contract" is regulated by article 20 of the Legislative Decree No. 276/03 (so called "Riforma Biagi"), which provides for that this kind of contract can be signed between an employer and special agencies, specifically authorized to perform "Work Supply Contracts", in accordance with articles 4 and 5 of the same Legislative Decree No. 276/03 and following amendments.

The parties (the employer and the agency) can sign an open-term contract (so-called "Staff leasing") or fixed term contract (so-called "Temporary Work"). The Staff leasing contract can be signed only in specific and limited cases provided by law (e.g. transport of people, goods and equipment handling, consulting and assistance in the IT sector).

Are there limits concerning the Work Supply Contract?

Pursuant to the recent Legislative Decree No. 34/14, as well to Legislative Decree no. 81/15, the Work Supply Contract may be signed also in the absence of technical, productive, organizational and substitutive reasons.

The Temporary Work period can last for a maximum of No. 36 months, as provided for by the applicable National Collective Labour Agreement.

Moreover, National Labour Agency's collective Labour Agreement provides the possibility to renew the Employment contract with the same worker up to No. 6 times, within a period of No. 36 months.

If only No. 2 renewals are made within the first No. 24 months, the limit of No. 36 months can be extended up to No. 42 months.

The limit of the utilization of the Work Supply Contract is established by the National Collective Labour Agreement.

However, an analogic application of the provision regarding the fixed-term employment contract is not excluded in case of the Work Supply Contract (20% of the staff hired with an open-term contract in force as of January 1 of the hiring year).

Are there specific reform projects under discussion which concern the Italian Labour law?

On December 15, 2014, the Legislator approved a labour reform, Enabling Law No. 183/14 (also known as "Jobs Act"), aimed at changing and evolving the Labour market and its main rules, as well as ensuring a flexible security system.

The Jobs Act concerns and involves specific labour areas, mainly:

- i. reorganization of labour contracts;
- ii. introduction of relevant tax reductions;
- iii. reorganisation of the unemployment benefits and insurance;
- iv. rationalisation of the services for labour and active policy;
- v. simplification of processes and payments;
- vi. new maternity rules.

On March 7, 2015, Legislative Decrees No. 22/15 and No. 23/15 entered in force, providing significant changes concerning the dismissal regulation scheme and social security system.

In particular, the Legislative Decree No. 23/15 has mainly introduced the open-ended employment agreements with "gradual social protection" to be applied for employees qualified as blue-collars, white-collars and upper-white-collars (not including executives) hired as from the date of entry into force of the Legislative Decree. According to mentioned Legislative Decree, dismissing newly-hired employees is easier for companies and the reinstatement set forth by Article 18 of Law No. 300/70 is qualified as *extrema ratio*, exclusively limited to certain cases of unlawful disciplinary dismissals.

On the other hand, no reinstatement is expected for unlawful dismissal for economic reasons and for large part of unlawful disciplinary dismissals that is compensated by an economic indemnity calculated on the workers' seniority. For further information, please also refer to § 23.30.

In the context of the above, aimed at improving a more flexible scheme, the Legislator by Law No. 190/14 has provided for employees hired starting from 2015 lower social security payments (up to € 8,060.00) per year for three years, as well as IRAP tax reduction for open-term employees.

Otherwise, the Legislative Decree No. 22/15 has considerably reformed the social insurance system, mainly introducing new unemployment indemnities and extending the relevant measures also to workers employed with coordinated and continuous collaboration contracts. In particular, the mentioned Legislative Decree has introduced a monthly unemployment indemnity, namely "New social insurance for employment" ("NASpI"), as income support for employees who have involuntary lost their former job position. NASpI has replaced the previous indemnities known as "ASpI" and "mini-ASpI", as introduced by Law No. 92/12.

On this regard, Legislative Decree No. 148 (i) has extended NASpI till No. 24 months, also for the year 2017; (ii) has confirmed a further unemployment allowance defined as "ASDI", to be acknowledged to employees that have been granted the NASpI indemnity for its entire duration without finding further work position. Such allowance lasts for a maximum period of No. 6 months and it is equal to 75% of the last NASpI treatment.

Moreover, specific treatment for workers employed with coordinated and continuous collaboration contracts, known as "DIS-COLL". The indemnity duration is no longer than No. 6 months. The Legislative Decree expressly provides specific terms and condition in order to be entitled to receive DIS-COLL, mainly connected to an involuntary unemployment position (at the application date) or to certain monthly contributions. The DIS-COLL request can be filed within December 31, 2016, according to Law No. 208/15, Section 1 ("Legge di Stabilità 2016").

The Italian Law on public sector is under discussion.



24 *Data protection*

24.1 Are personal data protected by the Italian law?	<i>p. 205</i>	24.4 Are there particular rules which need to be followed in order to guarantee the safe treatment of employees' data?	<i>p. 206</i>
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Are personal data protected by the Italian law?

Yes, they are. In Italy, the processing of personal data is currently regulated by Legislative Decree No. 196 of June 30, 2003 (the “Privacy Code”). Shortly, the Privacy Code will be repealed by the new EU General Protection Regulation (please see § 24.5).

The Privacy Code came into force on January 1, 2004, and brings together all the laws, codes and regulations relating to data protection.

For the sake of clarity, under the Privacy Code ‘personal data’ means any information relating to natural persons (“Data Subject”) that are or can be identified, even indirectly, by reference to any other information including a personal identification number. In other words, legal persons information may be freely processed, save for any confidentiality and secrecy obligation.

However, according to Section 24 of the Privacy Code, consent is not required if the processing:

- is necessary to comply with an obligation imposed by local law, regulations or European legislation;
- is necessary for the performance of obligations resulting from a contract in which the Data Subject is a party;
- concerns data contained in public registers, lists, documents or records that are publicly available;
- concerns data relating to economic activities;
- is necessary to safeguard life or bodily integrity of a third party;
- is necessary for carrying out the investigations by the defence counsel or to start a legal claim;
- is necessary for pursuing a legitimate interest of either the Data Controller or a third party in the cases expressly specified by the Data Protection Authority.

Data Controllers are required in any case to ensure a minimum level of personal data protection, adopting the minimum security measures provided for by the Privacy Code. Specific safeguards apply to sensitive data (i.e., personal data allowing the disclosure of racial or ethnic origin, religious, philosophical or other beliefs, political opinions, membership of parties, trade unions, associations or organizations of a religious, philosophical, political or trade-unionist character, as well as personal data disclosing health and sex life), judicial, genetic, biometric data, or other information disclosing geographic location of individuals, profiling the data subject and/or his/her personality, analysing consumption patterns and/or choices.

It being understood the above obligations on Data Controller(s), it is worth noting that “save for some specific cases” it is prohibited to transfer personal data to countries outside the European Union, temporarily or not and in any form and by any means whatsoever, if the laws of the country of destination or transit of the data do not ensure an adequate level of protection of individuals.

For the sake of completeness, with reference to data transfers to the U.S.A., on October 22, 2015, the Italian Data Protection Authority – following the Court of Justice of the European Union judgment – ruled that the authorization it had issued to enable such transfers on the basis of the so-called “Safe Harbour” Agreement is invalid. Accordingly, the Italian Data Protection Authority recognizes that alternative transfer measures, such as Standard Contractual Clauses or the Binding Corporate Rules, remain valid until specific decisions are taken at European level.

Which are the fulfilments required by the Italian law to process personal data?

Generally speaking, before collecting the personal data the Data Controller - meaning for that any natural or legal person, that is competent to determine purposes and methods of the processing of personal data and the relevant means, including security matters - shall inform, the Data Subject, of:

- i. the purposes and modalities of the processing;
- ii. the obligatory or voluntary nature of providing the requested data;
- iii. the consequences if the data subject fails to reply;
- iv. the entities or categories of entities to whom or which the data may be communicated and, if necessary, the scope of use of such data;
- v. the right to access, update, correct, cancel and transform in an anonymous form the data processed;
- vi. the identification data concerning the Data Controller.

In addition, once the Data Controller, has provided the Data Subject with the mentioned information, before starting the processing, the same Controller obtain the consent of the latter to proceed with the relevant processing.

How shall the company manage the processing of personal data?

The company, as for the Data Controller, shall deal with the processing of personal data taking into account all the obligations above described, i.e.: provision of certain information to the Data Subjects (clients, employees, directors, etc.), acquisition of the Data Subject's consent, and implementation of specific security measures.

Given the actual flow of data from the Data Subject to the Data Controller, the nature of the data processed and the level of complexity of the processing, a specific privacy structure shall be created and adopted.

In particular, internal and/or external Data Processors (who processes personal data on the data controller's behalf) and person(s) in charge of the processing (who has been authorized by the data controller or by the data processor to carry out processing operations) shall be appointed, specifying their role and duties in the process and internal procedures/privacy policies shall be implemented.

It should be noted that if a website is in place, enterprises must comply with additional obligations.

Are there particular rules which need to be followed in order to guarantee the safe treatment of employees' data?

The Data Protection Authority, by means of Resolution No. 53 of December 23, 2006, issued the "Guidelines on the processing of private employees' personal data" (hereinafter the "Guidelines") establishing specific measures that the Data Controller must comply with.

The Guidelines aim to collect, coordinate and clarify the provisions stated in the Privacy Code and in the decisions rendered by the Data Protection Authority at different stages of the process. The These Guidelines are divided into 8 chapters.

(i) Compliance with personal data protection rules

The personal data processed by the employer shall concern and not exceed the business' needs and their processing, it shall only and solely aim to fulfil the obligations related to individual labour contracts and, in some cases, to collective labour agreements.

(ii) Data Controller

In order to identify a Data Controller for the employees', it is necessary to take into particular consideration the effective location of the working relationship, regardless if the employer is part of a group of companies and is subject to the direction and coordination of another company.

However, the controlled companies may delegate, at a central level, the fulfilment of the obligations related to labour, welfare and social assistance to the holding company with regards to the employees of the companies pertaining to the group, including, in this case, the personal data processing.

(iii) Biometric data

Generally speaking, the use of biometric data may only be justified in specific cases by taking into account the relevant purposes and the context in which the data are to be processed.

Specifically, for the access to "sensitive areas" - e.g. where dangerous production processes are controlled or carried out, or areas intended for the storage and preservation of secret, or reserved and confidential, goods, documents, or valuables - or used in order to facilitate the entrance to public or private locations (i.e., libraries, private airport areas, etc.).

(iv) Personal data communication and dissemination

Also for employees' data, the rule according to which: "third parties' knowledge of personal data related to an employee is admitted if the interested party grants his authorization" is confirmed.

The employee's authorization is also required for the publication of information pertaining to the Data Subject on the company's intranet website.

In this regard, it is specified that the identification badges (considered a data dissemination instrument) shall only state a code, the name and surname and the employee, and his professional position.

(v) Data which discloses an employee's health condition

Specific cautions shall be observed with regards to employees' sensitive data processing, and in particular to data that could disclose the health conditions of the employee, that the employer collects pursuant to his duty of communication to third parties (among others, the notification to the insurance company of accidents and occupational diseases).

In such circumstances, the employer shall only communicate the health data related to the notified pathology and not additional data possibly connected to other absences during the professional work relationship.

Finally, it is established that even the number of days of sick leave, even if not integrated with the diagnosis, shall be considered health data.

(vi) Information to Data Subject

Before processing personal data, the employer should provide the employee with an individual informative document, stating all the elements described in § 24.2 above.

(vii) Safety measures

The employer shall guarantee both physical and organizational safety measures regards the employees' personal data, in any way processed within the job relationship, and shall appoint in writing the people authorized to carry out the activities related to the data processing.

(viii) Data Subjects' rights

In the event that the employee exercises their rights concerning the updating, correction, cancellation and transformation in an anonymous form of the data processed, the Data Controller shall answer within 15 days from the date in which the interested party's request is received, or within 30 days, should the necessary operations be particularly complex.

For the sake of completeness, as for the acquisition and use of personal data from workplace surveillance systems, it is worth noting that Section 4, Law No. 300 of May 20, 1970 (the "Workers Statute"), as well as Section 171, Privacy Code, have been recently amended by Legislative Decree No. 151 of September 2015, providing for requirements allowing employees monitoring practices, it being understood the Guidelines applying to the use of e-mails and the Internet in the employment context, issued by the Italian Data Protection Authority on March 1, 2007.

Such amendments are part of a broader reform and deal, in particular, with the updating of a set of rules in the light of the technological innovations that have recently occurred in working and productive environments, business models and privacy legislation.

The upcoming reform of EU data protection rules

The adoption process of the new EU General Data Protection Regulation ("GDPR") has come to its final stage. As a matter of fact, on December 15, 2015, the European Commission, European Parliament and the Council of the European Union agreed the wording of the GDPR after a series of meetings known as trilogue negotiations.

On April 14, 2016, the GDPR was adopted by the European Parliament. The text will shortly be published in the Official Journal of the European Union in all official languages.

The GDPR - directly applicable to all EU Member States - introduces substantial changes to data protection law. Specifically, further to a 2 years transposition window, it will repeal and supersede, on a European level, the current Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data and, on a national level, the Privacy Code.

The Regulation will significantly affect businesses in all industry sectors. The main key points it is worth highlighting are:

1. The territorial scope of EU data protection legislation will be increased to include controllers or processors outside of the EU. In other words, any entity that targets the EU to supply goods and services will be brought within the scope of the GDPR if they capture or use EU personal data, regardless of where they are physically located. Entities that are based in the EU are automatically captured;
2. The increased compliance requirements are backed by heavy financial penalties (up to 4% of annual worldwide turnover for groups of companies);
3. In certain situations, the designation of a data protection officer ("DPO") will be compulsory; otherwise, a DPO may be appointed by the controller or processor on a voluntary basis. The DPO will be supposed to be responsible for creating access controls, reducing risk, ensuring compliance, responding to requests, reporting breaches and even creating a good data security policy;
4. Introduction of more obligations on data processors. The processing of personal data by a processor must be governed by a contract between the processor and the controller. Furthermore, the processor will directly be liable for the security of personal data during its processing activities;

5. In the event of a data breach, controllers must notify the competent Data Protection Authority without delay and, where feasible, no later than 72 hours after being aware of the breach, unless the breach is unlikely to result in risk to individuals' rights and freedoms. Where the breach likely involves high risks to individuals' rights and freedoms, controllers also must communicate the breach to the individual without undue delay;
6. The right to data portability. It will allow a data subject to request a copy of all personal data that a controller processes electronically and which must then be provided in a commonly used format, in order to allow the data subject further use of the data;
7. Controllers will be required to perform a data Privacy Impact Assessment ("PIA") where the processing of personal data likely involves high risk to the rights and freedoms of individuals. Upon the outcome of the PIA, controllers could be required to notify the competent Data Protection Authority before processing the relevant personal data;
8. Right to be forgotten. A consumer or data subject can request to erase the data held by companies at any time and, if it has been passed on to any third parties (or third party websites), they would have to erase it as well;
9. Overall increased focus on operational adequacy and accountability.



25 *Immigrating to Italy*

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Arriving in Italy: Is a visa required to enter in Italy?

EU citizens

EU citizens do not require any visa to enter and work in Italy. A valid identity document issued by their Country of origin (valid for expatriation) is sufficient to allow for regular entry into Italy.

EU Citizens are allowed to stay in Italy for up to three months without any formalities. After three months they are obliged to register with the Municipal Registry of Residency (so-called *Anagrafe*).

Non-EU citizens

The general rule is that non-EU citizens require the entry visa to enter into Italy, that shall be requested to the Italian Consulate of their country of citizenship or residency. The various types of visa that can be requested to enter into Italy follow:

- Adoption;
- Business;
- Medical care;
- Diplomatic;
- Dependants;
- Sport Competition;
- Invitation;
- Employment;
- Self-employment;
- Mission;
- Religious Reason;
- Re-entry;
- Elective Residency;
- Family reunion;
- Study;
- Airport transit;
- Transit;
- Transport;
- Tourism;
- Work-holidays.

Tourism and business visas allow non-EU citizens to enter and stay in Italy for a period/s not exceeding 90 days within a six months period.

Notwithstanding the above, although the general rule provides for the visa obligation to non-EU citizens, citizens of the following countries do not require an entry visa to enter into Italy for tourism reasons, missions, business and invitations to take part in sports events:

Andorra, Antigua and Barbuda, Argentina, Australia, Bahamas, Barbados, Brazil, Brunei, Canada, Chile, Costa Rica, Croatia, El Salvador, former Republic of Macedonia, Guatemala, Honduras, Hong Kong, Israel, Japan, Malaysia, Macao, Mauritius, Mexico, Monaco, Montenegro, New Zealand, Nicaragua, Panama, Paraguay, Sain Kitss and Nevis, Serbia, Seychelles, South Korea, Singapore, United States, Uruguay, Venezuela.

Upon entry into Italy, non-EU citizens (both visa and non-visa holders), whose intended stay in Italy shall not exceed three months, have to inform the Italian immigration authorities of his/her presence in Italy in one of the following ways:

- i. in the case of entry into Italy directly from a non-EU Country (i.e.: airport): the individual's passport must be stamped by the Italian Border Police;
- ii. in the case of entry into Italy through another country of Schengen area: the non-EU citizen is obliged to inform the local Police Office (so-called "Questura") of his/her presence in the Italian territory through a formal communication (so-called "Comunicazione di presenza") within 8 days from his/her arrival in Italy; some exceptions to this rule are applicable if the non-EU citizen resides in a place where a check in/out is mandatory (e.g.: Hotel).

Please note that non-EU citizens:

- without a stamp in their passport; or
- without a receipt of "Comunicazione di presenza"; or
- holders of the required stamp or the receipt but whose stay in Italy has exceeded the maximum period allowed for a regular stay in Italy may be expelled from the Italian territory.

Finally, non-EU citizens, whose stay in Italy shall exceed 90 days (i.e.: visa holders) are obliged to apply for a residence permit within 8 working days from their entry into Italy.

25.2

And to work in Italy?

Work visa allows non-EU citizen to work in Italy and can be obtained in the following ways:

- i. through the "Quotas" allowing for employment of non-EU citizens and issued annually by the Italian Labour authorities (work permit applications are made pursuant to Section 3 of the Legislative Decree No. 286 of 25 July 1998).
- ii. through the "extra-Quotas" reserved for the following specific cases (work permit applications are made pursuant to Section 27 of the above mentioned Legislative Decree):
 - a. executives or highly specialized personnel employed by companies with headquarters of branch offices in Italy, or by the representative offices of foreign companies whose main site of activity falls within the territory of one of the member nations of the World Trade Organization, or executives

- of a major Italian office of an Italian company or a company from another member state of the European Union;
- b. university lecturers in exchange or mother-tongue programs;
- c. university professors or researchers who intend to hold an academic position or carry out research activity for compensation at a university or an educational or research institute operating in Italy; in any case they must hold the same position abroad;
- d. translators and interpreters;
- e. domestic employees who have worked full-time abroad and for at least one year for Italian citizens or for citizens of the European Union, in cases where the employers decide to move to Italy, and exclusively for the purpose of continuing the relationship of domestic employment;
- f. individuals who, having been authorized to reside in the country for the purpose of professional training, perform temporary periods of education at the Italian employer's facilities, eventually carrying out activities which fall under the category of salaried work;
- g. workers who are employed by organizations or enterprises operating in the Italian territory, and who have temporarily been permitted, at the request of the employer, to perform specific functions or tasks for limited or set period of time, with the obligation to leave Italy once these tasks or functions have been completed;
- h. maritime workers employed to the degree, and under the procedures, stipulated in the regulations of implementation;
- i. salaried employees who are regularly paid by employers, either individuals or organizations, which reside or are headquartered abroad, and from whom they received their retribution directly, in cases where the employee is temporarily transferred from foreign countries to work with individuals or organizations, be they Italian or foreign, residing in Italy, for the purpose of performing in the Italian territory specific services stipulated under a contract executed between the aforementioned individuals or organizations residing or headquartered in Italy and other individuals and organizations residing abroad, in accordance with the provisions of Section 1655 of the Italian Civil Code and with Law No. 1369 of October 23, 1960, as well as International norms and those of the European Community;
- j. workers employed with circuses or shows that travel abroad;
- k. artistic or technical personnel for opera, theatrical, concert or ballet performing groups;
- l. dancers, artists and musicians employed at entertainment establishments;
- m. artists employed by theatrical or cinematographic enterprises, or by radio or television broadcasters, be they public or private, or by public organizations, as part of cultural or folklore initiatives;

- n. foreigners intended to perform any type of professional sports activity with Italian sports enterprises, under the provisions of Law No. 91 of March 23, 1981;
- o. news correspondents officially accredited in Italy and regularly compensated by bodies of the daily or periodic press, or by foreign radio or television broadcasters;
- p. individuals who, based on the norms of international agreements in force in Italy, perform in Italy research activities or occasional work under programs of young people's exchange or young people's mobility, or as individuals employed on an "au pair" basis.

iii. through the European Blue Card - Extra quota system

In the event that the foreign company is based in an EU country, the immigration process listed in letter i) of article 27 is simplified.

25.3

Which are the main steps to be followed?

In "Quota" case

The Italian company has to file an application via internet for the request of "Quota" through the completion of a specific form which shall state the information of the employer, the non-EU citizen and the employment proposal.

Once the Quota has been attributed (i.e.: the work permit has been issued), the non-EU citizen will be able to apply for the Work Visa to the competent Italian Consulate in the country of his/her citizenship or residency.

Upon the receipt of the work visa, the non-EU citizen is allowed to enter into Italy for work-related reasons. Within 8 days from his/her arrival in Italy, he/she is required to sign a "Sojourn contract" (i.e.: *Contratto di soggiorno*) with the Italian employer who makes his/her entry and employment official.

As a final step, the non-EU citizen must apply for the residence permit for work-related reasons.

In "extra-Quota" case

In extra-Quota cases, the Italian sponsor applies online for the Work Permit (Nulla Osta) with the Italian Immigration office (*Sportello Unico / Prefettura*) of the Province in which the Italian company has its legal office or where the non-EU citizen will work.

If the Italian Company has arranged a specific agreement protocol with the Ministry of the Interior and with the Ministry of Labour through which it declares to be compliant with the dispositions of the National collective labour contract (so called CCNL).

Once the Work Permit has been issued, the non-EU citizen will be able to apply for the work visa to the competent Italian consulate in the country of his/her citizenship or residency.

Upon receipt of the work visa, the non-EU citizen is allowed to enter into Italy for reasons of work. Within 8 days from his/her arrival in Italy, he/she is required to sign a “Sojourn contract” (i.e.: *Contratto di soggiorno*) with the Italian employer which makes his/her entry official.

As a final step, the non-EU citizen must apply for the residence permit for work-related reasons.

“Extra Quota - European Blue Card” cases

Italy has finally recognised the directive 2009/50/CE, publishing in the Official Gazette on August 8, 2012, Legislative Decree 108/2012 regarding the conditions of entry and residence in Italy for work reasons in favour of Non-EU nationals who intend to perform skilled work.

The Decree states that non-EU workers can enter Italy and perform highly qualified professional activities outside the system of “quotas”. This means that they may be employed by Italian employers all year round, provided that all the requirements provided by the Decree are met.

The Decree States that:

1. the scope of application is limited only to employment, and is not applicable to the self-employed and to positions in assignment;
2. Non-EU workers are considered “skilled” if they have completed in their country of origin a higher education course of studies lasting at least three years. The educational institution must necessarily be recognized as a member of the Institute of higher education in their country. It will be necessary to provide the authority with the “Declaration of value” issued by the competent Italian Consulate;
3. the title of Bachelor studies provides the worker with a qualification included in the categories 1, 2, 3 of the ISTAT classification of professions, namely business managers, engineers, computer specialists and workers belonging to the technical professions. (the complete list of activities is available on www.istat.it);
4. the employer shall provide a binding contract with a minimum duration of one year and with a minimum wage of at least € 25,500 gross per year.

The Decree also establishes the categories of non-EU citizens who can aspire to be hired in Italy, specifically the foreign citizens that can take advantage of the European blue card are the ones who fall within the above categories whether they reside abroad or in Italy, and those who are in possession of a European blue card issued by another EU Member State.

Foreigners with an Italian residence permit provided in conformity with Section 27 of the Italian Immigration Law cannot request the European blue card.

The operating procedure provides that an employer may send a hiring request electronically to the Sportello Unico for immigration, presenting all the required documentation, including the title of studies translated and legalized by the competent Italian Consulate.

The Sportello Unico for immigration must issue the authorisation for employment within 90 days following the request. In possession of the work authorisation the foreign worker can apply for an entry visa to the Italian Consulate and then enter into Italy. Once in Italy, the worker must be accompanied by the employer to the Prefecture to sign the residence contract and apply for a residence permit.

The Questura will issue a residence permit for two years if the employment contract is for an indefinite period or for the duration of the work contract plus three months in the other cases.

The European blue card holder may, for the first two years, apply exclusively to work in accordance with the conditions of admission on Italian territory; change of employer during the first two years will have to be endorsed by the positive opinion of the competent Territorial Directorates Labour Authority.

Since the procedure is of recent introduction, it is not possible to provide a complete and comprehensive list of documents necessary for the obtainment of authorization; in any case it is established that the principal document for this purpose is the title of studies obtained in the country of origin. It is also required to provide Immigration Authority with the documentation concerning the Italian employer company.

In addition the Non-EU workers are allowed to bring their family member with them, regardless of the duration of their blue card.



26 Taxation of individuals

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Who is liable to pay taxes in Italy?

The individual is liable to Italian income taxes on the basis of his/her “*tax residency status*” to be determined in accordance with Section 2 of the Italian Income Tax Code.

An individual is considered “resident” for tax purposes if, for the greater part of the fiscal year he/she (i.e.: 183 days):

- is registered with the Registry of the Italian Resident Population (called “*Anagrafe*”); or
- has his/her “*domicile*” in the territory of the Italian State, as defined by Section 43 of the Italian Civil Code (the place where the individual as his/her economic, social and family centre of interests);
- has his/her “*residence*” in the territory of the Italian State, as defined by Section 43 of the Italian Civil Code (the place where the individual has the habitual abode).

Tax resident individuals:

Tax resident individuals are liable to the Italian personal (or national) income taxes on their income wherever produced (under the so-called ‘worldwide principle’). Therefore, tax residents are also subject to taxation on income deriving from real estates owned outside of Italy, foreign dividends and interests, foreign compensations and Director’s fees, and other foreign income.

In addition to the personal income tax, the Italian legislature, as of the fiscal year 2012, has introduced for Italian tax residents a ‘wealth tax’ on investments (financial and not) owned outside of Italy (called “*IVAFE*” on financial investments owned outside of Italy and “*IVIE*” on real estates).

Non-tax resident individuals:

Non-tax resident individuals are subject to PIT (IRPEF) only on ‘income produced’ in Italy (i.e. employment income related to the work activity performed in Italy). Therefore, foreign income is not relevant to the purposes of taxation in Italy of both income and wealth tax.

Which are the main categories of incomes taxable in Italy?

Pursuant to the provisions stated in Section 6 of the Italian Income Tax Code (ITC), income is grouped into the following six categories: (i) income from real estates; (ii) investment income; (iii) employment income; (iv) self-employment income; (v) business income; (vi) miscellaneous income.

How is gross taxable income calculated?

Gross taxable income is calculated as the aggregate of various income categories where a separate rule is applied to determine the taxable amount of each category of income. The total taxable amount is generally subject to progressive tax rates. Certain categories of income, and upon certain conditions, may qualify for separate taxation.

How can gross taxable income be reduced?

Are there any deductions from gross income or tax credits?

The Italian Tax Law allows for certain expenses to be used as deductions from the taxpayer’s gross income, while tax credits can be used to offset the taxpayer’s gross liability.

Provided that the conditions required by the law are met, the main deductions from the taxable basis are related to the following expenses: i) alimony payments to a former spouse as provided by judicial separation; (ii) mandatory social security contributions paid; (iii) contributions paid (up a limited amount) to the specific complementary pension funds; (iv) some charitable contributions; (v) social security contributions paid for domestic employees.

Tax credits, instead, are allowed for the following items / expenses: family dependants, employment income, medical expenses, life insurance costs, mortgage interests for purchase of the first residency in Italy, education fees, renovation costs for real estate owned in Italy, etc.

Is there a specific tax treatment for non-resident taxpayers?

As stated in previous § 26.1, an individual qualifying as non-tax resident of Italy is subject to pay taxes only on income produced in Italy. Section 23 of ITC states specific rules according to which an income is deemed to be produced / taxable in Italy.

In particular, according to the aforementioned provision, employment income is considered as produced in Italy if it is related to the work activity performed in Italy. With reference to the taxation of non-tax resident individuals, few deductions and tax credits are allowed by law. For example, medical expenses or insurance costs are not recognized as tax credits to non-tax resident individuals.

Domestic residency rules and Double Tax Treaty rules: how do they work together?

As previously mentioned in § 26.1, on the basis of the Italian Tax Law, an individual is considered an Italian resident for fiscal purposes if, for the greater part of the fiscal year (i.e.: for more than 183 days):

- the individual is registered in the records of the Italian resident population (so-called *Anagrafe*) or
- the individual has his/her “domicile” in Italy (intended as the centre of the relevant economic and social interests), or
- the individual has his/her “residence” in Italy (intended as the place of habitual abode).

It is sufficient that any of the above conditions are met for an individual to be considered as tax resident according to Italian Law.

However, it may happen in some cases that an individual is considered tax resident in two countries (Italy and a foreign country), in relation to the same fiscal year. In such a case, it is necessary to investigate if the involved countries have signed a Double Tax Treaty which states the necessary rules to avoid the double taxation of income as well provisions according to which an individual can be considered tax resident only in one Contracting State.

In general, Double Tax Treaties provide for specific rules to be utilized in the case in which an individual qualifies as tax resident in two Contracting States (so-called “tie breaker rules”). These rules, generally included in Section 4 of the Double Tax Treaties, provide a list of elements that shall be examined in order to determine the individual’s tax residency on the basis of: (i) permanent home; (ii) centre of economic and social interests; (iii) habitual abode; (iv) nationality. Ultimately, if the above elements are not sufficient to determine the individual’s country of residence, the competent authorities of the Contracting States shall settle the matter by mutual agreement.

26.7

When and to what kind of income do progressive rates and flat rates apply?

In the case of an Italian resident taxpayer, progressive tax rates apply to all incomes, with the exception of investment incomes (i.e.: dividends, interest and capital gains, Italian rental income under some specific conditions) and other incomes listed in Section 17 of the Italian Tax Code.

The above-mentioned incomes are subject to the so-called “separate taxation”; they are not included in the taxpayer’s aggregate taxable income, and the applicable tax rate can be a fixed rate applicable to all taxpayers or it can be calculated on the taxpayer’s prior years’ taxable incomes.

As from 2011, taxpayers may choose an alternative tax regime (separate taxation) named “Cedolare Secca” on rental income earned from real estate properties that are located in Italy and rented out for residential purposes only.

26.8

Is it mandatory to apply separate taxation?

The taxpayer can often elect to include incomes, subject to separate taxation, in the aggregate taxable income subject to progressive tax rates. This usually happens if the taxpayer carries forward tax overpayments related to previous tax years or when the applicable progressive tax rate is still lower than the flat tax rate.

It shall be noted, however, that certain types of incomes (i.e.: non-qualified dividends, non-qualified capital gains, etc.) imply the flat tax rate application and no choice can be exercised by the taxpayer.

26.9

How is tax liability paid?

Italian income taxes can be settled by withholding at source or, in absence of compulsory withholding obligations by Italian withholding agents, the individual is liable to report his taxable income in the Italian tax return (“Form Unico or Form 730”) and to settle the related liability within the provided deadlines (i.e.: self-assessment method). It is worth mentioning, however, that in some cases the withholdings applied at source may not be sufficient to exempt an income from the tax reporting obligation and one of these cases is given by two or more incomes taxed at source but still subject to progressive taxation. In this case, the tax return shall be filed to declare the aggregate amount of taxable incomes, the aggregate amount of withholdings paid and to determine the income tax difference to be settled by the taxpayer.

The income tax liability deriving from the Italian income tax return (*Form Unico*) is payable by filing a proper tax payment form named “F24 model”.

Differently, the income tax liability deriving from Form 730 will be directly offset from the taxpayer's salary or the taxpayer's pension and will be paid to the Tax Office via Employer or by the national pension institute (see following paragraphs for Unico) is payable by filing a proper tax payment form named "F24 model".

Differently, the income tax liability deriving from Form 730 will be directly offset from the taxpayer's salary or the taxpayer's pension and will be paid to the Tax Office via Employer or by the national pension institute (see following paragraphs for further information).

26.10

And when?

The income tax liability deriving from the Italian income tax return (Form Unico) shall be settled by June 16 of the year subsequent to the tax year. In addition to this deadline, the taxpayers are also allowed to carry out the tax payments within the second deadline of July 16, increased by an additional amount 0,40% of the related liability.

In addition to the tax settlement for the tax year for which the tax return is being filed, the taxpayer shall pay two tax advances for the current tax year. The aggregate of the tax advances equals 100% of the previous year's tax liability.

The payment of advances should be made in two instalments: 40% by June/July deadline and 60% shall be settled by November 30 of the same year.

26.11

Which are the consequences if the taxpayer does not pay Italian taxes?

If the taxpayer forgets to pay the Italian tax liability resulting from his/her income tax return within the prescribed deadlines, the Italian Tax Law contains provisions and terms according to which he/she is allowed to settle such delayed payments.

The terms and conditions applicable to the late payment of the liability deriving from the Italian income tax return (Form Unico) may vary depending on:

- the number of days that pass following the prescribed deadline before the payment is carried out. Basically the earlier you pay, the lower the penalties and interests.

- As from the 2016 tax year the penalties have been considerably decreased, starting from 0.1% up to 3.75% if the payment is carried out after 90 days following the prescribed deadline but within the deadline for the presentation of the following year's income tax return.
- The daily interests, from the 0.5% annual legal rate for the 2015 tax year have been decreased to 0.2% as from 2016 tax year, which clearly are required to be paid in addition to the delayed tax liability and penalties.

Any delayed tax payment including the interest and the penalties, can be settled by filing the F24 form, electronically via home-banking or at the postal office (under certain conditions).

26.12

What is the difference between the 730 and UNICO tax forms?

Form 730 is a simplified tax return reserved to employees and pensioners and it offers different advantages and simplifications to these categories of taxpayers, in comparison to the ordinary tax form called "Form Unico". The main features of Form 730 are:

- it is simple to fill-in by the taxpayer;
- it does not require any calculation of taxes, as the calculation should be performed by the authorized intermediary or Tax Assistance Centre "CAF" which is often appointed by the employer;
- it provides for almost immediate reimbursement of tax credits resulting from such tax return; these are refunded through the employee's / pensioner's payroll or rather from the Italian Tax office;
- in the event of a tax liability, the payroll withholdings applied by the Employer or rather by the National Pension Institute are used for the payment of the resulting taxes;
- joint filing with a spouse is permitted.

It shall be noted, however, that in addition to the limitation to the category of taxpayers (employees / pensioners), this form can be used to declare limited types of incomes such as: employment income and similar, pensions, incomes from real estates, income from capital (subject to ordinary taxation), income from independent activities (with exclusion of incomes subject to VAT) and some incomes subject to separate taxation.

The Form Unico, instead, can be used to declare all categories of incomes and can be filed by both, tax and non-tax resident individuals. Such Form does not permit joint filing and the taxes deriving from it must be settled by the taxpayer directly. Furthermore, refunds can be carried forward to the next tax year return to be used against other taxes or claimed as a refund to the Tax Authorities. It shall be noted that differently from the Form 730, the refunds deriving from the Form Unico are processed after some time, following the e-filing of the return and taxpayers are often subject to waiting long periods of time for their refunds.

26.13

How and when must the Form UNICO be submitted?

All Italian taxpayers (with exception to exempt individuals and those filing the Form 730) are subject to the electronic filing of the Form Unico. Such electronic filing must be carried out through an accredited intermediary or via direct internet filing with the Tax Office. This filing can be avoided by very few categories of tax-payers who are still allowed to paper file with Postal offices, Banks, at the branches of the Italian Tax Authorities (Agenzia delle Entrate) or with Authorized intermediaries.

The Italian tax return must be filed during the year subsequent to the tax year and the Form Unico can be filed:

- from May 2 up to June 30 for paper filing;
- until September 30 if the submission is made electronically (save for specific annual exceptions);
- late filing of the return is allowed if done within 90 days after the September 30 ordinary deadline (approx. within December 28). A penalty of Euro 25 is due for such late filing, to be meant additionally to the penalties/interest due on the liability deriving from the tax return.

26.14

Is there any possibility to amend a tax return?

Italian taxpayers are given the possibility to amend their tax returns for one year after the tax return is submitted and however not later than the deadline for e-filing the following year tax return. During such period, the changes in favour of the taxpayer can be enclosed or omissions giving raise to additional taxes can be corrected. In case of additional liability arising from such amended tax return, the taxpayer will be subject to lower penalties as described in §26.11.

Specific rules and payment conditions have to be verified and taken into consideration, in the event that the Annual Tax Return also includes the RW section as stated in §26.15

Furthermore, the tax returns can also be amended after the ordinary one year period, and it is generally allowed for an additional period of 4 years. It shall be noted that, in this latter case, the liabilities resulting from such amended tax returns will be subject to much higher penalties.

26.15

What is considered as a foreign investment? The RW section of the Italian Tax Return.

Individuals, who qualify as tax residents of Italy, have a disclosure obligation in Italy in relation to all investments owned outside of the Italian territory. This obligation is fulfilled through the Italian tax return, in the section named RW.

Foreign investments for Italian tax filing purposes are considered all those investments / assets held outside the Italian territory and which are potentially productive of income. Some examples of foreign investments are real estate properties, bank accounts, stocks, investment funds, life insurance, voluntary pension funds, exercisable stock options, etc.

With reference to filing obligations deriving from possession of such foreign investments, it shall be mentioned that only individuals that shall qualify as tax resident individuals of Italy are subject to the compulsory filing of the RW Section.

The RW Section is an integrative part of Form Unico and shall be filed within same deadlines provided for the tax return.

Penalties related to false/omitted filing of the RW Section, have considerably increased over time.

Are there any taxes to be paid on investments reported in the RW section?

Italian tax residents must pay the “wealth tax” that is applied on the value of financial activities/assets held abroad, as stated in the above paragraph.

1. The wealth tax on the value of real estate properties located abroad equals 0.76% of purchase price (alternatively market value can also be used); however, in the event that the property is already subject to wealth tax in the foreign country, a tax credit may be recognized that equals the amount of any wealth tax paid in the State where the property is located.
2. The wealth tax on foreign bank accounts exceeding the annual monthly average of € 5,000, amounts to the fixed tax of € 34,20 per year.
3. The wealth tax on foreign financial investments (life insurances, trust, shares, stocks or other type of foreign asset or investment etc.) amounts to 0.20% of the market value as from 2014.



27 *Inheritance and gift tax*

27.1 Is there an inheritance tax or gift tax in Italy?

p. 220

27.2 Taxpayers and tax exemptions?

p. 220

Is there an inheritance tax or gift tax in Italy?

Yes, inheritance and gift taxes are in place.

The inheritance and gift taxes are imposed to non-resident taxpayers only on estates located within Italian territory, while Italian resident taxpayers are subject to taxation on inheritances and gifts received on a world-wide basis.

Gift tax

The applicable tax rates are the same provided for heirs. Furthermore, it is worth mentioning that gift tax is not applicable to acts concerning the transfer or establishment of real estate rights or to the transfer of companies, if the act provides for the application of the registry tax in a proportional measure or for the application of VAT, cases that allow the avoidance of the so-called indirect gift issues.

Taxpayers and tax exemptions?

Inheritance tax

All movable and non-movable assets of the deceased person (net of related debts) are subject to taxation. Specific assets are expressly excluded from taxation.

Both resident and non-resident estate owners are subject to Italian inheritance tax and the related tax rates vary on the basis of the heirs' relationship to the deceased: in case of a spouse or relatives in direct line (ascendants and descendants), inheritance tax will be imposed at 4% on the value of the assets exceeding the tax-free threshold of one-million euros for each heir. The tax-free threshold will not apply to other relatives and the tax rate will vary on the basis of their relationship with deceased: 6% will apply to relatives up to the 4th line and 8% to other heirs.

Section 1, paragraph 77 of Law No. 296/2006 included in the category of individuals taxed at 6% brothers and sisters and handicapped individuals extending to those individuals the tax-free threshold of € 100,000 and € 1,500,000 respectively.

In practice, the tax is aimed at large real estate properties (those exceeding one million euros) and makes small estates inherited by direct relatives immune from such taxation.

Further obligation that should be considered relates to the compulsory filing of the inheritance return within 12 months from the date in which the inheritance was opened (that matches with the date of the decease).



28 Tax and civil litigation

28.1 Which are the authorities entitled to exercise the civil jurisdiction in first instance?	p. 222	28.8 How is the Tax Courts jurisdiction structured?	p. 226
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As provided for by Section 24 of the Constitution of the Italian Republic, anyone may bring cases before a court in order to protect their rights under civil and tax law.

Defence is an inviolable right at every stage and instance of tax and legal proceedings.

Consequently, each person or company, Italian or foreign, may start a tax or a civil dispute in Italy against one or more counterparts or against Tax Authorities. Italian Tax and Civil laws set forth several instruments aimed to protect rights before a court.

In alternative, the legislator offers some “out of court” measures. This chapter provides the general aspects of both these solutions for both the civil environment and tax environment.

28.1

Civil Litigation section

Which are the authorities entitled to exercise the civil jurisdiction in first instance?

The authorities entitled to exercise the civil jurisdiction in first instance are:

- (i) *Giudice di Pace*
- (ii) *Tribunale*

The jurisdiction of the *Giudice di Pace*

As provided for by Section 7 of the Italian Civil Procedure Code (i.c.p.c.), *Giudice di Pace* is the venue for actions concerning real estate having a value equal to or less than € 5,000.00, unless where pursuant to applicable law provisions these actions shall fall within the venue of a different judge.

Giudice di Pace is also the proper venue for actions regarding compensation for damages caused by car, boat and airplane accidents, provided that these actions do not exceed the overall value of € 20,000.00.

Further, the same *Giudice di Pace* has jurisdiction over the following actions, irrespective of their value:

- actions for settlement of boundaries and compliance with the distance between real estates established by applicable law provisions, regulations or customs concerning hedges and the planting of trees;

- actions on the limits to, and modalities of use of, the services of condominiums;
- actions between landlords and tenants concerning the introduction of smoke and heat, sound, noise, vibrations and other similar nuisances exceeding the limits of the normal tolerability;
- actions concerning the interests or accessories for late payment of social security or welfare services.

The jurisdiction of the *Tribunale*

Pursuant to Section 9 i.c.p.c., *Tribunale* shall be the proper venue for all the actions which do not fall under the venue of a different judge.

Tribunale shall also be the exclusive venue over actions concerning excise taxes and fees, status and legal capacity of individuals, actions concerning honour rights, forgery claims, execution actions and, in general, any other action of undeterminable value.

28.1.1 Which is the general criteria to determine the jurisdiction?

The general criteria to determine the jurisdiction is:

Firstly

- (i) the value of the action
- (ii) the subject matter of the claim

secondly

- (iii) the territory

Value and subject matter are the criteria aimed to determine the jurisdiction between two authorities of the same degree (*Giudice di Pace* or *Tribunale*). As provided for by Section 10 i.c.p.c., the value of an action shall be calculated on the basis of the claim thereto connected (should it be impossible to assess the value of the claim, the action is to be considered of “undeterminable value”).

Once the proper venue is determined according to this criteria, it is necessary to select the right forum (in the meaning of the specific court-office where to start the legal proceedings), using the territory criterion.

Which are the main kinds of civil proceedings, provided for by the Italian Civil Procedure Code?

The main kinds of civil proceedings are:

- i. ordinary proceedings (*“Procedimento di cognizione”*), aimed to obtain an order by the Judge stating upon a particular case;
- ii. enforcing proceedings (*“Procedimento esecutivo”*), aimed to obtain the execution of an order;
- iii. precautionary proceedings (*“Procedimento cautelare”*), aimed to protect a specific “as is” situation in view of future ordinary or enforcing proceedings.

28.2.1 Are there different ways to start ordinary proceedings?

There are two ways to start ordinary proceedings, depending on the subject matter of the specific litigation.

Common litigations are started by means of a specific pleading, the so-called “Atto di citazione”, that must be served by an official bailiff (*“Ufficiale Giudiziario”*) to the defendant and then filed before the competent court for its examination and relevant decision.

Specific litigations (eg. concerning family, employment and renting matters) are started by means of recourse (*“Ricorso”*) that shall be filed before the competent court and, once approved, served to the counterparty jointly with the provision of the Judge scheduling the date of the first hearing.

28.2.2 Are there different kinds of enforcing proceedings?

There are three different kinds of enforcing proceedings:

- i. forced expropriation;
- ii. execution of “delivery or release” obligation;
- iii. execution of “to do or not to do something” obligation.

Forced expropriation is aimed to collect a credit. There are three kinds of forced expropriation:

- the expropriation of movables at the debtor’s place;
- the expropriation at the third party’s place;
- the expropriation of immovable property.

Execution of “delivery or release” obligation is aimed to force a party to deliver or release a specific good.

Execution of “to do or not to do something” is aimed to obtain the execution of a sentence following the breach of an obligation to do or not to do a specific action.

28.2.3 Are there different kinds of precautionary proceedings?

There are four different kinds of precautionary proceedings:

- i. judicial seizure;
- ii. proceedings to report new work and possible damages;
- iii. temporary admission of evidence;
- iv. emergency measures (ruled under Section 700 i.c.p.c.).

Precautionary proceedings are regulated by means of a specific discipline, which are largely the same in all cases.

Conditions for the issuance of a precautionary provision by the Judge are:

- the risk of injury which the claimant might suffer if he promotes ordinary proceedings instead of precautionary proceedings, due to the longer duration of the former (the so-called *“Periculum in mora”*);
- the approximate and reasonable probability that the right actually exists (the so-called *“Fumus boni iuris”*).

28.3

Does Italian law provide any proceedings specifically aimed at collecting credit?

Injunction proceedings (*“Procedimento d’ingiunzione”*) is a summary proceeding specifically aimed at collecting credit.

As provided for by Section 633 i.c.p.c., upon motion by the party who is a creditor of a specific amount of money or of a specific amount of fungibles, or upon motion by the party who is entitled to receive a specific movable property, the competent judge issues - *inaudita altera parte* - an injunction for the payment or the delivery, if the right claimed is proven by written evidence.

The judge competent over the motion for injunction is either the *Giudice di Pace* or the *Tribunale* (sitting as a sole judge), who would be competent over the same motion if filed in ordinary proceedings.

Pursuant to Section 634 i.c.p.c. the following documents are considered “written evidence”:

- insurance contracts, unilateral promises made through private writing, telegrams, even if the conditions under the Italian Civil Code are not complied with;
- in addition, if the credit concerns goods or money or the supply or services made by entrepreneurs exercising a business activity;
- certified abstracts of the bookkeeping entries under Section 2214 and followings of the Italian Civil Code, provided they are stamped and authenticated and kept pursuant to the applicable law provisions;
- certified abstracts of the bookkeeping entries prescribed by the applicable tax law provisions, provided they are kept pursuant to the provisions provided for these bookkeeping entries.

The injunction can be challenged by means of a claim before the judicial office of the judge who issued the provision, within the term of 40 days after it being served to the alleged debtor.

28.4

Is there a specialized Court called to resolve upon specific corporate matters?

Tribunale delle Imprese has been established to ascertain that certain particular issues are examined by judges adequately skilled in the relevant subject matter; this is the proper venue for civil actions concerning:

- corporate relationships;
- transfer of equity participations;
- shareholders’ agreements / quotaholders’ agreements;
- liability actions, upon motion by creditors of the subsidiary company against the parent company;
- relationships concerning (i) controlled companies [under Section 2359, paragraph 1, number 3), Italian Civil Code], (ii) companies exercising direction and coordination [under Section 2497- septies Italian Civil Code] and (iii) cooperative societies [under Section 2545-septies Italian Civil Code];
- disputes concerning agreements, abuse of dominant position and concentrations [under Section 33, paragraph 2, Law n.287 dated October 10, 1990];
- disputes concerning violations of the EU antitrust regulations.

In addition, as provided for by Legislative Decree No. 30 dated February 10, 2005 (Italian Trade Mark and Patent Law), the *Tribunale delle imprese* is the proper venue for actions concerning industrial property rights and, in particular for:

- proceedings concerning industrial property and unfair competition (with the sole exception of cases which do not interfere, even indirectly, with the exercise of industrial property rights) as well as cases related to violations concerning the exercise of industrial property rights under Law No. 287, dated October 10, 1990 and Sections 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and, in general, in subject matters connected with those under the jurisdiction of these specialized judges;
- disputes concerning matters regulated by Section 64 (with regard to the inventions of employees), Section 65 (concerning the inventions of university and public institutes researchers) and Sections 98 and 99 (regarding confidential information) of Italian Trade Mark and Patent Law;
- disputes concerning compensation for expropriation of industrial property rights;
- disputes regarding decisions taken by the Council of the Bar of Intellectual Property Advisors (i.e.: Ordine dei Consulenti in proprietà Industriale) provided for by Chapter VI of the Italian Trade Mark and Patent Law; this Bar includes those advisors who are entitled to represent a party before the *Ufficio italiano brevetti e marchi* (Italian Patents and Trade Mark Office) and the Commissione dei ricorsi (Commission for petitions regarding decisions taken by the *Ufficio italiano brevetti e marchi*).

The *Tribunale delle Imprese* is also the proper venue for disputes concerning copyright (“diritto d’autore”).

28.5

Which are the means to challenge judgements provided by the Italian Code of Civil Procedure?

The means to challenge judgements are:

- i. the appeal;
- ii. the motion filed before the Supreme Court (“*Corte di Cassazione*”);
- iii. the motion for a new trial (“*Revocazione*”);
- iv. the third party’s challenge (“*Opposizione di terzo*”);
- v. the motion for the assessment of venue (“*Regolamento di competenza*”).

28.5.1 Which are the authorities entitled to examine an appeal regarding a first instance judgement issued in ordinary proceedings?

It depends on the authority that issued the judgement. More precisely:

- the appeal against judgements issued by the *Giudice di Pace* shall be filed before the *Tribunale*;
- the appeal against judgements issued by the *Tribunale* shall be filed before the *Corte d'Appello* (Court of Appeal).

In both cases, the appeal shall be filed in the same district of the judge who issued the judgement to appeal from, by means of a claim containing a brief description of the facts and the specific issues on which the challenge is grounded.

The trial before the *Corte d'Appello* takes place in front of a panel of judges; before the *Tribunale*, the appeal is decided by a single judge.

In the appeal proceedings, neither new claims nor new objections can be filed (excluding those that could be raised by the judge *sua sponte*) and if filed, shall be declared inadmissible by the judge. In addition, new evidence and new documents shall not be offered (unless where the panel of judges deems such evidence essential for the decision of the case, or if the party demonstrates that he could not offer that evidence or exhibit those documents in the first instance proceedings for reasons not attributable to the same).

In the appeal proceedings before the *Corte d'Appello* or before the *Tribunale*, the general provisions of the Italian Civil Procedure Code concerning the first instance proceedings shall apply, to the extent they are not in contrast with the specific provisions regarding the appeal.

28.6

Which is the authority entitled to examine a challenge regarding a second instance judgement?

As provided for by Section 360 i.c.p.c. judgements issued in the appeal proceeding may be challenged by motion before the Supreme Court (*Corte di Cassazione*) for the following reasons:

- for matters concerning jurisdiction;
- for breach of the applicable law provisions on venue where the motion for the assessment of venue is not provided by the applicable law provisions;

- for breach or false application of law provisions and of the contracts or the collective labour agreements;
- for nullity of the judgement or the proceeding;
- for lack of, or insufficient or contradictory reasoning on an issue of a fact, which was disputed and decisive for the proceeding.

28.7

Does Italian law provide any “out of court” measure to resolve a dispute?

The alternative “out of court” measures provided for by Italian law to resolve a dispute are:

- i. the arbitration
- ii. the mediation
- iii. the assisted negotiation.

The arbitration

As provided for by Sections 806 and following, i.c.p.c., parties may decide to have disputes settled by arbitrators, except for those disputes that due to their particular nature cannot be the subject of an arbitration.

The rules of arbitration are usually decided by the parties. In the absence of these rules, the arbitrators have the power to rule the arbitration proceeding in the way they deem most appropriate.

Under the penalty of nullity, the arbitration agreement shall be made in writing and shall specifically mention the object of the dispute which is submitted to the arbitrators.

In addition to the rules of arbitrations, parties are also free to decide the venue of the arbitration, as well as the language that the arbitration proceeding will be held in, as well as the time limit for issuing the award.

Unless otherwise agreed in writing by the parties, the arbitration award must be rendered within 240 days as from the date of acceptance of the appointment by the arbitrator (or the arbitration panel).

The award (substantially non-appealable in the merits), may be subject to recourse only in very limited circumstances and, precisely: nullity, revocation and third party opposition.

The mediation

Mediation is an activity performed by a neutral and independent third party (the mediator) aimed to assist two or more parties to reach a mutual satisfactory agreement with regard to a specific dispute concerning disposable rights.

Once a party has submitted a mediation request, the person responsible of the competent body appoints a mediator and schedules a preliminary meeting with the parties no later than 30 days following such appointment, in order to verify the possibility to proceed with the mediation procedure.

Following such meeting, the parties are free to either interrupt or to continue the mediation proceedings.

If the parties reach an agreement, the mediator drafts the minutes of the relevant meeting to which such agreement is attached; once duly signed also by the lawyers involved in the mediation proceedings, such document represents a title empowering execution.

The assisted negotiation

The parties are allowed to resolve the dispute in an extrajudicial way by means of the assistance of lawyers (so-called “Assisted negotiation”) providing that it does not concern non-disposable rights or labour matters.

There are two main kinds of assisted negotiation:

- i. the voluntary assisted negotiation (which may also include matters such as consensual separation, wedding dissolution or termination of its civil effects and changes in the separation or divorce conditions);
- ii. the mandatory assisted negotiation (see § 28.7.1).

The maximum duration of the mediation procedure is decided upon by the parties.

The final agreement, undersigned by the parties and their respective lawyers, constitute an instrument entitling execution.

28.7.1 Are there cases in which such measures are mandatory?

The mediation and the assisted negotiation are mandatory in specific cases:

The mediation

The (even tentative) mediation procedure is a pre-condition to accessing Italian courts when the dispute regards the following subject matters:

- joint ownership;
- property rights;
- division of goods;
- inheritance;
- family-owned business;
- lease;
- bailment;
- lease of business;
- damages arising from medical and sanitary liability and defamation by the press or by other means of advertising;
- insurance, banking and financial agreements.

The assisted negotiation

Law Decree No.132/2014 provides that actions in compensation for damages caused by vehicle and boat circulation and - except cases in which mediation is mandatory - all judicial claims for payments up to € 50,000.00, are barred until a party sends a request to enter into an assisted negotiation agreement.

28.8

Tax Litigation section

How is the Tax Courts jurisdiction structured?

In Italy tax jurisdiction is exercised by (i) the Tax Court of First Instance (i.e. Provincial Tax Court), which judges in the first degree of judgment and (ii) the Tax Court of Second Instance (i.e. Regional Tax Court) to which the Taxpayer and/or the Tax Authority are entitled to appeal against the adverse sentence of the Tax Court of First Instance.

The third and last degree of judgment is represented by the Supreme Court of Cassation. Appeals before the Supreme Court are allowed only for legitimacy issues related to the Courts proceedings and to the Tax Assessment procedure.

What is the deadline to appeal before the first tier Tax Court?

The deadline to appeal before the Tax Court of First Instance is 60 days from the date of notification of the Tax Assessment Notice. If a settlement procedure is applied for (see above) the term of 60 days to appeal was suspended of a 90-day term.

As for tax disputes relating to deeds whose value does not exceed € 20,000, it is necessary to file a claim (so-called “*Reclamo*”) with the same Tax Office/Collector Agent which issued the deed with the aim to achieve a mediation. The procedure takes 90 days. At the expiry of this term, if no agreement between the taxpayer and Tax Authorities is reached, the Company must file the claim with the First Tier Court within 30 days from such expiry term.

Is it possible to achieve a settlement pending the tax litigation?

Articles 48 and 48-bis of Law Decree No. 546/1992 set forth the possibility to achieve a settlement both before the Tax Court of First Instance and before the Tax Court of Second Instance, (so-called “*conciliazione giudiziale*”).

The “*conciliazione*”:

- can be submitted by both the Taxpayer and the Tax Authority;
- can be also proposed by the Tax Court during the hearing;
- can be submitted for every kind of tax;
- allows the reduction of the agreed penalties down to 40% (50% when the settlement is reached before the Second Tier Court);
- is resolved by means of subscription of the settlement.

When are higher taxes and penalties due pending a tax litigation?

The Taxpayer that appeals to the First Tier Court has to pay 1/3 of the higher taxes and interests, within the deadline of the filing of the appeal. The Taxpayer may ask the Court to suspend the payment at hand. The Tax Court may rule the suspension subordinated to an adequate guarantee by the Taxpayer (e.g.: bank guarantee).

During tax litigation, the payment of the higher taxes, interest and penalties depends on the sentences of the First and Second Tier Courts.

In particular:

- favorable first tier ruling:** if the Tax Court of First Instance upholds the appeal, the amount paid by the Taxpayer (if any) after receiving the Notice of Assessment should be refunded to this latter within 90 days from the notification of the sentence to the Tax Authorities by the Taxpayer. If the Tax Authorities are not compliant, the Taxpayer is entitled to file an appeal with the First Tier Court in order to request its execution;
- unfavorable first tier ruling:** the higher taxes, interests and penalties are due up to 2/3 of the same overall amounts. Along with the appeal to the Second Tier Tax Court, it's possible to request the suspension of such a payment;
- favorable second tier ruling:** if the Tax Court of second Instance upholds the appeal, the amount paid by the Taxpayer (if any) should be refunded to this latter within 90 days from the notification of the sentence to the Tax Authorities by the Taxpayer. If the Tax Authorities are not compliant, the Taxpayer is entitled to file an appeal with the Second Tier Court in order to request its execution;
- unfavorable second tier ruling:** the residual amounts (tax, interest and penalties) are due. Pending the appeal before the Supreme Court of Cassation, the Taxpayer may ask the Second Tier Court to suspend the payment at hand.

How long does it take to achieve the first tier ruling?

The first tier court ruling takes on average 1 year. That period is shortened if a suspension of the relative Tax Assessment Notice is granted. If this is the case, the first tier court schedules the suspension hearing within 180 days and the merit hearing within an additional 90 days from the suspension hearing.

In case of unfavourable ruling, what is the term to appeal?

The deadline to appeal against the unfavourable ruling is 6 months from the filing date of the ruling, or, alternatively, if the ruling is served to one of the parties, 60 days from the day of notification.

How long does it take to achieve a definitive ruling?

Considering that the second tier court ruling also takes on average 1 year, while the ruling of the Supreme Court of Cassation takes on average four years, a definitive ruling can be achieved within not less than 8 years.

In the case of favourable ruling, can the taxpayer claim for the reimbursement of the sums paid pending the litigation?

In the case of favorable ruling, the taxpayer is entitled to a refund of the amount paid (if any). Effective from June 1, 2016, if the Tax Authorities are not compliant, the Taxpayer is entitled to file an appeal with the Court that issued the ruling in order to enforce its execution.

Until June 1, 2016, the Taxpayer is entitled to enforce the execution of a favorable ruling, only if the same ruling is final and definitive.



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