Doing Business in Italy

2022 edition

Hogan Lovells

Contents

Introduction

This booklet has been written specifically for business individuals and whilst it may be of interest to their local advisers, such as lawyers or accountants, the information is intended for a wider audience.

We cover topics which are relevant for businesses of any size seeking to establish business activities in Italy, but would like to stress that the note is only a summary and should not be relied on, or used, as a substitute for legal advice with respect to any particular transaction or specific set of circumstances.

Should you require more information, please contact the most convenient office listed in the contents page, or call one of the partners with whom you normally deal.

Scope of booklet

The booklet outlines the laws and taxes which apply to a foreign corporation establishing a business operation in Italy, as well as the administrative requirements which need to be observed once the business has been established.

The three methods of establishing a business we cover are:

(a) the incorporation of a subsidiary company;

(b) the establishment of a 'branch' office, either of the foreign corporation itself or of a subsidiary; and

(c) the establishment of a representative office.

There are special requirements which apply to specific types of company (for instance investment, insurance, and banking companies and companies whose shares are traded on a recognised stock exchange). These are not covered in this booklet, but we are happy to deal directly with any specific queries relating to banking and finance.

This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

Establishing a subsidiary company

Legal formalities

Types of company

The two most common types of limited liability corporate vehicles in Italy are the "*Società per azioni*" (the "**SPA**") - a joint stock company or company limited by shares; and the "*Società a responsabilità limitata*" (the "**SRL**") - a limited liability company. The rules governing SPAs and SRLs are quite similar from the standpoint of company law; the main principle being that the liability of a member of an SPA or an SRL is limited to the amount paid up as capital. Both company types are treated identically under the applicable corporate tax regulations. Appendix 1 lists the main differences between an SPA and an SRL.

The rules governing SPAs and SRLs are contained in the Italian Civil Code.

In principle, unless specific circumstances require the setting up of an SPA (eg the possible listing of the company, or activity in regulated fields such as banking or insurance, the possible need to create a pledge on shares, or the issuance of securities), we recommend the use of an SRL for a business start-up in Italy, since this allows for a greater degree of flexibility from the perspective of corporate governance and control over the company's management and accounts. Should circumstances change, the SRL may, at any time, be converted into an SPA.

The minimum capital required for an SPA is €50,000** and €1.00* for an SRL. The capital of an SPA must be divided into shares, which may or may not have a par value (if they have a par value this must be the same for all shares), and are represented by share certificates which are negotiable instruments and which must be recorded in the register of shareholders.

In contrast, the capital of an SRL is divided into quotas which are not represented by certificates, but are merely recorded as an entry in the Companies Register and can have different values. In this booklet, the term "**quota holders**" is used to refer to the members of an SRL. Shares and quotas afford their holders a number of economic and administrative rights and powers. Different classes of shares, to which special rights can be attached, can be provided for by the Articles of Association. Any special right may be attached to a share (or class of shares) but no special rights personal to any particular shareholder are permitted. By contrast, special rights of any kind may be conferred on SRL quota holders, who may also be identified by name.

There is another type of limited liability company called a "*Società in accomandita per azioni*" which allows for two categories of shareholders (one having limited liability and the other having unlimited liability). However, since it is not commonly used, it is not covered in this booklet.

* *Law Decree No. 70, 2013 as amended and ratified by Law No. 99 of 9 August 2013.*

** *Law Decree No. 91, 2014 as amended and ratified by Law No. 116 of August 2014.*

General principles of incorporation

Deed of incorporation

Any company, whatever its form, must be incorporated by way of public deed ("**Deed of incorporation**") before a public notary.

The founding members may appear before the notary either in person (or, if the founding member is a company, by way of its duly authorised representative), or grant authority to an attorney (by means of a notarised power of attorney accompanied by a sworn translation) to appear and to execute on their or its behalf the documents necessary for the incorporation of the company.

An SRL with its registered office in Italy and with a corporate capital paid by means of cash contributions - to be executed by means of bank transfers to a dedicated bank account - may be set up by a Notary Public by means of an electronic public deed with the participation by videoconference of the requesting parties or even only some of them.

For detailed information and the documents required to incorporate a company, please refer to Appendix 2.

Articles of Association

At the time of entering into the Deed of incorporation, a company must also adopt Articles of Association which must be attached to the Deed and can only be amended after incorporation by way of an "extraordinary" resolution passed at a meeting of quota holders or shareholders (see below).

The Articles detail the rules for the internal management of the company and cover matters such as the methods for the issue or transfer of shares; the convening of, and voting at, general meetings; the appointment and removal of directors and their powers and duties; and the rules governing proceedings at both the meetings of the Board of Directors ("**BoD**") and of the shareholders/quota holders.

Shareholders (SPA) and Quotaholders (SRL)

The founders may be either individuals or legal persons and can be Italian or foreign. Both an SRL and an SPA may be incorporated by a sole quota holder or shareholder. A sole member enjoys limited liability provided that the corporate capital has been fully paid up and the company's directors (or the same sole member) notify the Companies Register that the company is controlled by a sole quota holder/ shareholder. Upon incorporation, the existence of a sole shareholder/quota holder is specifically indicated by the notary when filing the Deed of Incorporation with the Companies Register.

Amount of share capital

In order to be validly incorporated, the capital must be subscribed in full, and at least 25% of the subscriptions must be paid in cash by the founders at the time of the incorporation, except where the company has a sole shareholder, in which case the entire subscription amount must be paid up at the time of incorporation.

For an SPA, the subscription cash must be deposited in a special account with a bank in Italy prior to the date of incorporation and only be handed over to the company after completion of the registration formalities.

For an SRL, the subscription cash must be deposited with the managing body* at the date of incorporation.

Where an SRL has capital lower than €10,000, 100% of the subscriptions must be paid in cash by the founders and deposited with the managing body at the time of the incorporation.

Any outstanding subscription payments (ie up to 75% of the subscription price) may be called up by the Directors, whenever they deem it appropriate.

Subscribed capital may be paid in cash or in kind. However, where paid in kind, an appraisal is required from an expert chosen by the contributor (for an SRL) or – except in certain cases mentioned in Appendix 1 – appointed by a competent Court (for an SPA) to value the assets or the receivables contributed. The shares and the quotas corresponding to such contribution are considered fully paid up upon the relevant subscription.

* *Law Decree No. 70, 2013 as amended and ratified by Law No. 99 of 9 August 2013.*

Filing of documents with the Companies Register held by the competent Chamber of Commerce

Within 20 days of the date of incorporation, the notary must register the company in the competent Companies Register held by the local Chamber of Commerce under whose jurisdiction the company's registered office falls.

A company acquires legal personality and thus full corporate status, only upon its registration/entry in the Companies Register. The directors, however, can act in the name of the company prior to such date (but not prior to the date of the Deed of Incorporation). However, in these circumstances, they risk unlimited personal liability for such actions.

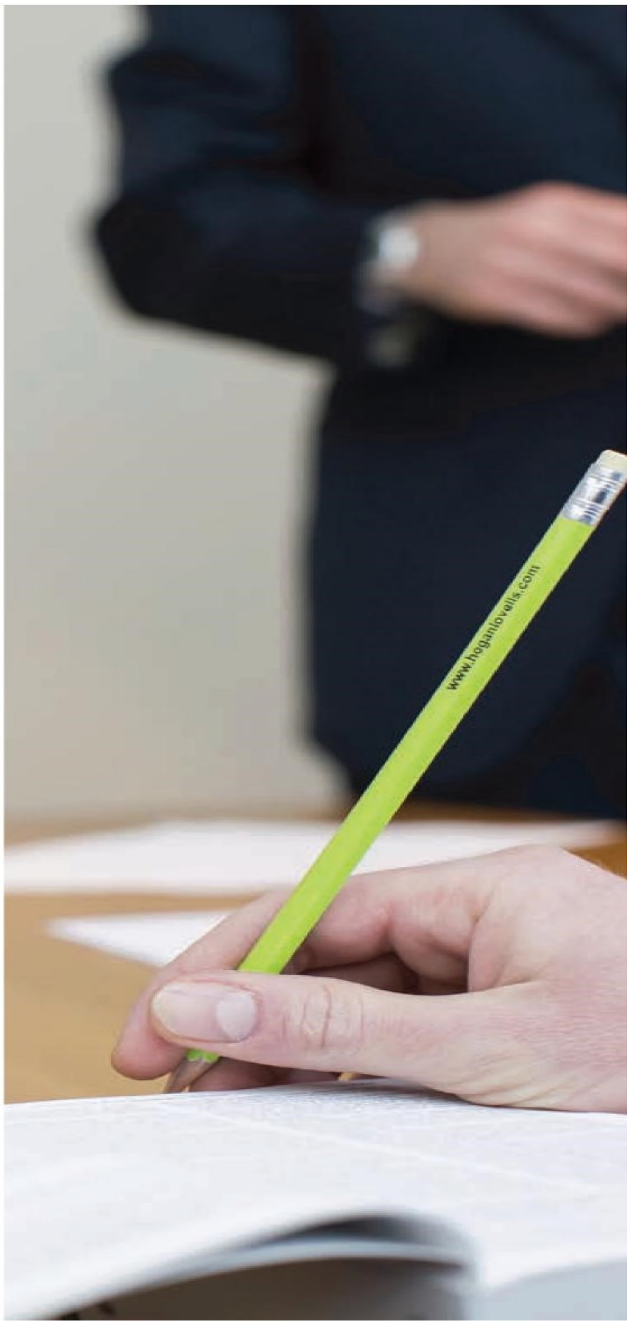
Time required for incorporation and incorporation expenses

The entire incorporation process (preparation of documents, notarial deed of incorporation, filings at the Companies Register etc.) takes approximately a couple of weeks but may vary depending on the workload of the local Companies Register under whose jurisdiction the company's registered office falls.

Notarial fees, court fees, registration tax and other expenses incidental to the incorporation of an SPA or an SRL vary depending on factors such as the level of capital raised.

First meeting of directors

The first director or directors named in the forms filed on incorporation are deemed to be appointed upon incorporation of the company. It is usual for a company to have the first meeting of the BoD shortly after its incorporation and the Board will normally deal with such matters as the delegation of powers, the appointment of a chairman (where he is not appointed in the Deed of Incorporation) and the opening and operation of the company's bank account etc.



Basic rules for the operation of the company

Meetings of Shareholders (SPAs) and Quoteholders (SRLs)

At least one meeting of shareholders or quota holders must be held each year in order to approve the company's annual financial statements, which must take place no later than 120 days from the closing of each financial year (or 180 days if so provided by the Articles in cases where the company is required to approve consolidated financial statements or where exceptional circumstances related to the structure and purpose of the company apply).

Meetings of shareholders/quota holders should, in principle, be held in the place where the company has its registered office. It is usual to provide, in the Articles, that such meetings may be held elsewhere, which represents a more practical approach, especially for extraordinary meetings (resolutions on an increase or a reduction of capital; amendments to the Articles or the winding-up of the company etc.; for details see below), where the presence of a notary public is required.

The Articles may provide for attendance at the meetings by way of remote communication technology, as well as, under certain conditions, for postal voting. Vote by proxy is allowed, but certain limitations apply (for example, directors, members of the internal control body and employees of the company cannot act as proxy holders).

With respect to an SRL, the Articles may further provide that certain resolutions be adopted by the quota holders in writing (ie without an actual meeting, but by written resolution).

The members of the management and internal control bodies must be invited to attend such meetings, but have no right to vote and their presence is not taken into account in calculating quorums.

Types of resolution

There are two types of shareholders' resolution which may, in different circumstances, be required:

(a) an ordinary resolution: (i) for an SRL or an SPA with a traditional or "monistic" governance system (see below) in order to approve the financial statements; to appoint and/or remove the directors and statutory auditors and determine their compensation for office; to appoint the external auditors; to resolve upon the directors' liability; and to approve all other matters reserved in the Articles for decision by ordinary restriction; and (ii) in the case of a company which adopts a "dualistic" system (see below) in order to appoint the members of the supervisory committee and determine their compensation and to resolve on members' liability; and

(b) an "extraordinary" resolution for both SPAs and SRLs (i.e. where the presence of a notary public is required), in order to amend the Articles, to increase or decrease the share capital or to appoint liquidators for the winding up of the company.

With regard to voting rights, the votes exercisable at a quota holders' meeting of an SRL are distributed among the members in proportion to their respective quotas, while for an SPA each share carries one vote; although it is possible to create various classes of shares carrying different rights, including shares having limited or no voting rights at all or shares having multiple voting rights (up to three votes per share). An ordinary resolution requires the affirmative vote of the majority of votes represented at the meeting, although the Articles may provide for a higher threshold. The so-called extraordinary resolutions (such wording is typical for an SPA) require the favorable vote of shareholders representing the majority of the share capital unless the Articles provide for a higher quorum. Where a meeting has been reconvened, the quorum required may vary but is generally lower.

Governance of an SRL

Governance of an SRL is not heavily regulated by Italian law and the company's Articles may allow a fair degree of latitude.

Basically, the company can be managed by one or more quota holders, a sole director or a BoD or, alternatively, by more directors acting jointly or severally but not forming a BoD. The directors of an SRL can be persons other than quota holders if expressly so provided in the Articles. In any case (ie also if a BoD is not established), the functions that cannot be delegated and must be resolved upon collectively by the Directors regard: (i) the increase of the capital, pursuant to Article 2481 of the Italian civil code; (ii) the drafting of the annual accounts, and (iii) the drafting of merger and de-merger plans.

The Articles may make further provision for: (i) requirements, powers and duties of the directors (to which some rules set forth for SPA's directors may apply, if compatible); and (ii) that resolutions be adopted in writing (ie without a physical meeting).

An internal supervisory board, or, as an alternative, a sole auditor (external or internal), is not mandatory, unless certain thresholds (eg regarding number of employees, turnover or assets) are exceeded. If mandatory, or so provided for in the Articles, supervision can be exercised by an internal auditor, (or if expressly so allowed in the Articles, by a Board of Statutory Auditors ("**BoSA**")) or, alternatively, by an external auditor, in accordance with the provisions of the Articles.

Governance of an SPA

An SPA can be managed under the traditional system or under one of the two alternative systems available as a result of the reform of Italian company law in 2003 – the "dualistic" system and the "monistic" system. Please refer to Appendix 3 with respect to the powers, duties and liabilities of directors of SPAs, which are also applicable, where compatible, to members of the managing committee described below.

The 'traditional system'

Under the 'traditional system', the management of the company is carried out by either a sole director (*Amministratore Unico*) or a BoD (*Consiglio di Amministrazione*) appointed at the shareholders' meeting.

The directors' term of office cannot exceed three financial years, but the director may be re-appointed on expiry of the term. Revocation without a just cause, prior to the expiry of the term, is effective but unlawful and the revoked director may be entitled to be compensated for any damages suffered.

Supervision over the management of the company is undertaken by a BoSA (*Collegio Sindacale*, "**BoSA**"), comprising three or five members, appointed at the shareholders' meeting. The term of office for the statutory auditors cannot exceed three financial years.

If the company is not required to prepare consolidated financial statements, the BoSA may undertake both the supervision of the management of the company and the auditing of the company's accounts. In such cases, all members of the BoSA must be accountants registered with the register established by the Ministry of Justice. Where the company is obliged to prepare consolidated financial statements, an independent auditor (either a registered accountant or an auditing firm) must be appointed to audit the accounts.

The main duty of the BoSA is to supervise the directors' actions, in order to ensure that the company is managed in accordance with Italian law and the provisions of the Articles of Association. Members of BoSA are individually liable for their activities, and infringements can result in criminal prosecution.

In the traditional system, the shareholders' meeting appoints the directors and the statutory auditors (and the independent auditor, as the case may be), and approves the financial statements as well as any amendments to the articles of association (including capital increases) or major extraordinary transactions such as mergers and/or demergers.

The dualistic system

Under the dualistic system a managing committee is in charge of the management of the company (*Consiglio di gestione*). Members are appointed by the supervising committee (*Consiglio di Sorveglianza*).

The supervising committee (*Consiglio di Sorveglianza*) (the "**Surveillance Board**"), composed of at least three members, is appointed by the shareholders' meeting and:

(a) appoints the members of the managing committee;

(b) approves the company's financial statements;

(c) authorises actions against members of the managing committee in cases of breach of their duties;

(d) has a supervisory role over the company's activity to assure compliance with the law and with the Articles of Association;

(e) reports to the shareholders' meeting, at least once a year, on the results of its supervisory activities; and

(f) when provided for in the Articles of Association, approves major strategic decisions and/or business plans proposed by the management committee. With respect to appointment, term of office and revocation, the above mentioned rules for directors and statutory auditors of the traditional system apply to the members of: (i) the managing committee (ie *Consiglio di gestione*); and (ii) the supervisory committee (ie *Consiglio di Sorveglianza*).

The shareholders' meeting appoints the members of the Surveillance Board, approves any amendment of the Articles of Association (including capital increases) and/or major extraordinary transactions such as mergers and/or demergers.

The monistic system

Under the monistic system the BoD (*Consiglio di Amministrazione*) is in charge of the management of the company, while a committee ("**Committee for Internal Control**" or "*Comitato per il Controllo della Gestione*") formed of members of the *Consiglio di Amministrazione*, is in charge of the supervision of the management.

At least one-third of the members of the BoD shall satisfy the same requirements as those established by the Italian Civil Code (the "**Code**") for members of the *Collegio Sindacale*.

The Committee for Internal Control, appointed from among the independent members of the BoD, supervises the suitability of the organisational structure of the company and its system for internal control, administration and accounting.

With respect to appointment, term of office and revocation, the above-mentioned rules for directors and statutory auditors of the traditional system apply to the members of: (i) the managing body (ie *Consiglio di Amministrazione*); and (ii) the supervision committee (ie *Comitato per il Controllo della Gestione*).

The shareholders' meeting has the same powers and duties as in the traditional system.

Common requirements for the members of the management and control bodies of an SPA

The members of the board of directors, of the managing committee and of the supervising committee may be persons other than shareholders. The first members of the managing body are appointed in the Deed of Incorporation. Meetings of the management bodies must be attended personally by no less than the majority of the directors and resolutions are passed by a majority on a show of hands. No vote by proxy is permitted nor may a director appoint an alternate to attend or vote in his place, even temporarily. The Articles may provide for meetings to be held by videoconference or teleconference.

No vote by proxy is permitted nor may a director appoint an alternate to attend or vote in his place, even temporarily. The Articles may provide for meetings to be held by videoconference or teleconference.

Foreign individuals as members of management and control bodies (SPAs and SRLs)

For both an SPA and an SRL, the sole director or the members of the management and control bodies (if any) may be of any nationality. If they are not Italians, they must apply for a tax code in Italy, but are not required to be resident in Italy. The obtaining of an Italian tax code does not per se trigger any tax consequence since the tax code merely represents an identification number to be used in several deeds to be executed in Italy

If a member of the management or control body is not an EU citizen, no visa will be required in connection with his appointment, provided that the director performs his activities predominantly abroad.

As a result of international bilateral treaties between Italy and certain foreign countries (not being members of the EU) foreign individuals resident in such countries may be required to be resident in Italy in order to be appointed as a director of an Italian SPA or SRL. An up-to-date list of these countries is available at the Italian Ministry of Foreign Affairs.

Italian rules on mandatory reduction of capital to cover losses

Identical rules govern the reduction of capital for losses for both an SPA and an SRL. In general, capital maintenance rules prevent the distribution of dividends where the company's net assets are less than the level of the nominal share capital, until appropriate steps are taken as a result of a resolution of the shareholders.

Losses are quantified in accordance with the accounting principles used for the preparation of the company's financial statements. When comparing the value of net assets with the company's nominal capital, losses are set off against undistributed profits accrued in past accounting periods, and available reserves. Interim profits cannot be set off to cover the losses. If the capital is reduced as a result of losses of more than one-third (but does not fall below the legal minimum), then the directors or the management committee, or failing both of these, the board of auditors or the supervisory board shall promptly call a shareholders' meeting in order to determine and take appropriate actions. A report on the financial condition of the company together with the remarks of the board of auditors or the control committee must be presented to the meeting. A copy of the report and the relevant remarks must be filed at the company's registered office for eight days preceding the meeting to allow for examination by shareholders. During the course of the meeting, the directors must report on any relevant material facts which have occurred after the drafting of the report.

If the loss is not reduced to less than one-third within the subsequent financial year, the meeting or the supervisory board approving the annual accounts of such period shall reduce the share capital in proportion to the reported losses. Failing this, the directors and the auditors or the supervisory board shall ask the court to provide for a reduction of the share capital by the amount of the losses reported in the annual accounts. The court shall, after hearing the public prosecutor, issue a decree which may be appealed. The directors are responsible for filing the decree with the Companies' Register.

In the event that losses of more than one-third of the capital cause the capital to be lower than the minimum amount required by law (ie Euro 50,000** for an SPA and Euro 1.00* for an SRL), the directors or the management board, and failing them, the supervisory board (if any), shall promptly call a shareholder's meeting in order to resolve upon one of the following actions:

(a) a reduction in nominal value and simultaneous increase of the capital (at least up to the statutory minimum);

(b) the conversion of the company into a different corporate form (eg from an SPA to an SRL) having lower capitalisation requirements; or

(c) the winding up of the company.

For an SPA, the reduction is often achieved by a reduction of the nominal value of the shares in issue (eg from 200,000 shares of Euro 10 each to 200,000 shares of Euro 5 each). Alternatively, the company may replace the existing shares with newly issued shares bearing a lower nominal value, or reduce the number of issued shares through the cancellation of a number of shares in proportion to the losses incurred.

Recent judicial precedents allow an increase of capital subsequent to the total write-off of the share capital to be approved by an ordinary majority rather than a unanimous vote of the shareholders. Where losses exceed the value of the issued share capital, the courts often require that the increase of capital also cover any excess losses, at least in proportions sufficient to bring the value of net assets in line with the statutory minimum share capital. Some courts have excluded the option for the shareholders' meeting to limit or exclude the shareholders' statutory option to subscribe the increase of capital.

The shareholders can resolve in all cases to cover the losses incurred by using their own financial resources (eg through capital contributions or through a waiver of receivables due from shareholder loans).

* *Law Decree No. 70, 2013 as amended and ratified by Law No. 99 of 9 August 2013.*

** *Law Decree No. 91, 2014 as amended and ratified by Law No. 116 of August 2014.*

Directors' liability in the event of a reduction in corporate capital for losses incurred

As soon as they learn of the reduction of the net assets below the statutory minimum, the directors must not enter into any "new business" and assume unlimited personal liability for any new transaction resolved by the company at this stage.

The directors' liability arises as a result of their being aware of the situation, rather than the mere occurrence of the losses. Therefore, the directors may avoid liability to the extent that they can show that they did not know about the losses, provided that such ignorance was not caused by negligence. However, they may not invoke their ignorance of the financial situation after the preparation of the draft annual financial statements for presentation for shareholders' approval. The resolution of the BoD ascertaining the reduction in value of the company's net assets must be filed with the local Companies Register.

"New business" includes new transactions that go beyond the ordinary management of the company, or are independently directed at the realisation of a profit or benefit for the company. It does not include activities that are necessary to complete pending activities. For example, the Courts have held that the purchase of packaging materials for the storage of a company's seasonal production does not amount to a new transaction. However, the performance of contracts awarded prior to the losses being ascertained has been deemed as a new transaction, because it is for the purpose of realising new profits, rather than the mere completion of a necessary activity.

As explained below, upon the reduction of the net assets below the statutory minimum share capital, the company is deemed to be in liquidation, and its corporate objects should be amended accordingly.

Thus, the notion of "new business" includes all activities that are inconsistent with the purpose of liquidating the company.

When entering into new business, the directors are liable to:

(a) the company, for damages arising from the new business. In the event of the subsequent bankruptcy of the company, a corresponding action can be pursued by the trustee or judicial administrator;

(b) the company's creditors, for the diminution of the company's assets resulting from the new business; and

(c) third parties with which they have negotiated the new business, for the performance of the company's obligations arising from the new business.

According to Court decisions, the company is also liable vis-à-vis third parties in relation to any new business, at least until the filing of the Board resolution quantifying the diminution of the net assets with the competent Companies Register.

Corporate "administrative" liability for entities (including companies) arising from criminal offences

Following the introduction of Legislative Decree No. 231 of 8 June 2001 ("**Decree 231**"), criminal sanctions are now also applicable to companies and not only individuals. Companies, whether resident or non-resident, which carry out business in Italy, may suffer not only severe monetary sanctions but, even more seriously, injunction measures which can lead to the forced suspension of their business activities.

This risk arises when certain specific criminal offences (see catalogue below) are committed by an individual in the interests of the company: examples of the most recurring risky areas include the dealings with public authorities, breaches of the health and safety at workplace or the mismanagement of funds.

Currently the main types of crimes under the Decree 231 can be summarised as follows:

(a) Public Administration crimes (bribery, fraud against the public administrations, fraud aimed at obtaining public financings, etc);

(b) Violations of workers' health and safety regulations, causing a culpable homicide or negligent personal injury;

(c) Corporate offences (misrepresentation of company communications and accounts; insider trading and market abuse; forgery of a prospectus; falseness in communications to the auditors, etc);

(d) Financial crimes (money-laundering and self-money-laundering; forgery of coinages, banknotes and duty stamps);

(e) Association crimes (such as the Mafia-related crimes, or the crimes committed with purposes of terrorism and disruption of democracy, or transnational conspiracies);

(f) Crimes against industry and trade (including also crimes against infringements of copyright; counterfeiting of trademarks and patents and the use and marketing of counterfeit goods);

(g) Computer and data processing crimes;

(h) Environmental crimes;

(i) Tax crimes (e.g. filing fraudulent tax returns, issuing invoices for non-existent operations, concealment or destruction of mandatory accounting books or tax avoidance, as well as certain tax crimes affecting the financial interests of the European Union).

In fact, the number of criminal offences potentially leading to company liability is continuously expanded by Parliament.

Applicable sanctions are fines (up to €1.5 million) and, in certain cases, also "restraining sanctions" such as: (i) prohibition of the carrying on of the business; (ii) suspension or revocation of authorisations, concessions and licences; (iii) prohibition in contracting with the Public Administration; (iv) exclusion from financing and contributions or possible revocation of those already granted; and (vi) prohibition of advertising goods or services.

Companies will not be considered liable pursuant to Decree 231, inter alia if the following conditions exist:

(a) the individual(s) who committed the crime acted in their own exclusive interest or in the interest of third parties not related to the company; or

(b) the managing body of the company has adopted and implemented a compliance programme apt to prevent the misconducts sanctioned by Decree 231 (the "**Model**"); and

(c) an ad hoc internal body has been appointed by the management, to oversee the implementation and updating of the Model (the "**Supervisory Board**").

According to best practices, the Model must include at least:

(a) a risk assessment (ie the identification of the areas of activity of the company where the probability of committing the relevant crimes is higher);

(b) the identification of policies and procedures regulating the decision-making process in risky areas and evaluation of their concrete suitability and efficiency to prevent the crimes set out in Decree 231 (so called gap analysis);

(c) the establishment of an (independent) organisation of the company that ensures the implementation, compliance and functioning of the Model, verifies its efficiency and adequacy and takes care of updating it from time to time as required;

(d) the implementation of a disciplinary system sanctioning violations of the procedures provided by the Model, as well as violation of the ethical rules provided in the ethical code where adopted; and

(e) a dissemination and adaptation programme of the Model, that must be a "live" document, adherent to the (changing) structure and business of the company.

Although the adoption of Model 231 (as well as the consequent appointment of the "supervisory body") is not mandatory, it is nonetheless necessary in order to avoid the possible implications and liability of a company if crimes are committed by the management in the interests, or for the benefit, of the company itself. Therefore, failure to adopt Model 231 by the Group Companies precludes the limitation of liability under Decree 231.

Establishing a branch office

Legal formalities

The Italian branch of a foreign company is an entity that has no separate legal identity from that of the company of which it is a branch. However, it carries on the business activity of the company itself on an autonomous basis and in a different location, and has a separate tax and accounting identity and autonomy from its foreign head office.

In order to establish a branch in Italy, an approved resolution by the competent corporate body of the foreign company must be filed with the local Companies Register, together with authenticated copies of its Deed of Incorporation, Articles and an updated Certificate of Good Standing, and of the name and powers vested in the person who has been authorised by the company to represent the branch (the so-called *institore*). The filing of the necessary documentation (accompanied by a sworn translation) with the Companies Register must be made through an Italian notary. Further, the Italian branch must be registered with the VAT and Income Tax authorities and must maintain certain registers and accounting records in accordance with applicable VAT and tax regulations.

The *institore* is the legal representative of the branch and is responsible for its management, within the limits of the powers granted by the relevant special power of attorney. If the legal representative and his powers are not registered with the local Companies Register, any individual acting on behalf of the company risks personal and joint liability, without limitation, for obligations incurred by the company.

Registration of the branch in the Companies Register can usually be achieved in 20-30 days, dependent on the workload at the Companies Register.

Tax issues

Tax advantages of operating as a subsidiary/branch

Italian subsidiaries and branches of foreign companies are basically subject to the same obligations regarding administrative, accounting and tax filing requirements.

For example, they are both subject to Italian corporation tax (“**IRES**”) and Regional Tax on Productive Activities (“**IRAP**”). They must be registered for VAT in Italy and fulfil the related VAT obligations, apply withholding taxes on wages and salaries paid to employees and comply with certain tax return filing duties (See “Tax treatment of subsidiaries and branches” below which provides further details on the tax treatment of subsidiaries and branches).

There are, however, certain differences in the tax treatment of the two entities which, depending on the circumstances, may influence the choice of which entity to use.

The tax advantages of establishing a branch rather than a subsidiary are:

(a) a foreign company may be able to write-off any initial losses it expects the branch to incur against its “foreign” income, thereby reducing its tax burden in its home country. This would not be possible for losses of a subsidiary (unless the tax laws of the State in which the foreign company resides permit it); and

(b) any after-tax income of a branch can be transferred to the foreign company without any further taxation in Italy (it is not classified as a dividend). On the other hand, dividends of a subsidiary distributed to its parent company are subject to Italian withholding tax, unless the parent company resides in an EU member State and certain criteria are met (see “Taxation of outbound dividends” below).

There are some significant disadvantages in establishing a branch:

(a) Italian tax returns must refer to the branch’s financial statements based on accounting records kept in strict compliance with Italian accounting principles. If this approach is not observed, the Italian tax authorities may assess Italian-sourced income on a presumptive basis, and attribute to the Italian branch a share of the overall income of the parent company shown in the parent company’s balance sheet. This gives rise to a substantial tax risk and can result in considerable expenditure and effort in contesting potentially random Italian tax assessments;

(b) Branches are not covered by double tax treaties.

Therefore, when the branch enters into commercial relations with entities located in other States, it is often difficult to identify the relevant tax treaty. This could lead to the application of withholding tax at the wrong rate, exposing the branch to penalties and sanctions.

These tax hazards have discouraged many foreign companies from establishing operating branches in Italy. The tax advantages/disadvantages referred to in this note should be evaluated together with corporate aspects and business needs before determining which entity is most appropriate in light of the particular circumstances.

Tax treatment of subsidiaries and branches

Meaning of "Permanent Establishment"

Article 162 of the Italian Tax Code ("**ITC**") contains a definition of a "permanent establishment" ("**PE**") derived from double tax treaties and the OECD Model tax convention; such definition has been amended by Italian 2018 Budget Law, in line with BEPS Action 7 ("**Preventing the artificial avoidance of Permanent Establishment Status**").

In principle, a PE is defined as a fixed place of business through which a non-resident company carries on a business, whether wholly or partly. The term "PE" includes: a place of management, a branch, an office, a factory or a workshop. Accordingly, in order for a company to have a PE status, the following criteria must be met:

(a) the existence of a "place of business" (*sede d'affari*) which includes any place, equipment or plant used to carry on a commercial activity, even if they are not utilised exclusively for that purpose. It is not necessary that the place, equipment or plant be owned by the foreign company; they can also be borrowed or leased;

(b) the place of business must be "fixed", ie it must have a specific location and be permanent (in order for the office to be considered permanent, the period of occupation of the place of business may vary, depending on the purpose for which the office has been established); and the company must carry on (all or part of) its business activity through the place of business. It is not necessary that this activity is profitable (ie income producing), nor that it is continuous (ie carried out without interruption); it must, however, be carried on regularly.

(c) Furthermore, a PE is deemed to exist also in case the foreign company has a significant and continuative economic presence in Italy structured so as to avoid the establishment of a physical presence in Italy.

No PE exists, however, where, among other things, a fixed place of business is used solely for the purposes of carrying on advertising activities, gathering information, or carrying on scientific research or similar activities, under the condition that such activities have a preparatory or auxiliary nature.

Finally, a PE is deemed to exist if the enterprise, or a closely related enterprise, carries on business activities at the same place or at another place in the same Contracting State, and that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise; or the overall activity resulting from the combination of the activities is not of a preparatory or auxiliary character, provided that such activities constitute complementary functions that are part of a cohesive business operation.

Paragraph 6 of Article 162, furthermore, contains the definition of a "personal" PE which arises through an agent who habitually concludes contracts in Italy in the name, and on behalf, of the foreign company, or participates in the conclusion of contracts by the foreign principal and the foreign principal routinely simply approves the terms proposed to the clients without material modifications.

Accordingly, as a general rule, a representative office which does not carry on the core business activity of the company but merely engages in public relations, market research and collecting information from or for potential customers, and does not act as an agent or intermediary of the company, cannot be deemed to constitute a PE in Italy. If, however, a representative office does not limit itself to this activity, it risks being regarded as a PE.

Corporate tax

Corporate tax ("**IRES**") applies to both resident and non-resident companies.

For taxation purposes, a company is deemed to be "resident" if it has: (i) its registered office; (ii) its administrative office; or (iii) the main purpose of its business, in Italy for the majority of the tax year (ie at least 183 days).

Companies resident in Italy for tax purposes are subject to IRES with respect to any income received, wherever produced. Companies not resident in Italy for tax purposes are subject to IRES only on income produced in Italy. Business income earned from activities carried out in Italy through a permanent establishment or branch is deemed to be produced in Italy and is taxed accordingly. Therefore, as a general rule, business income produced by foreign companies and not attributable to an Italian permanent establishment or branch is not taxable in Italy. However, if the business income of the foreign company comprises income which is deemed to be produced in Italy pursuant to Italian law (for example dividends, interest and royalties paid by an Italian subject or rentals from leased property located in Italy), the foreign company could be subject to IRES on such income.

The taxable income of a subsidiary or branch is calculated on the basis of net profits earned during the financial year as reported in its financial statements (drawn up in compliance with the accounting principles to be adopted by Italian companies carrying out similar activities). Accordingly, in principle, all profits and losses reported in the financial statements are relevant for tax purposes. However, differences between the net profit or loss shown in financial statements may occur as compared to the taxable income or loss as calculated under the ITC provisions.

As a result of Legislative Decree No. 38 of 28 February 2005, International Accounting Standards are now applicable in Italy, although only a limited number of companies are obliged to adopt such accounting standards (eg listed companies and banks).

For IRES purposes, tax losses may be carried forward without a time limit but can only be used in each year as to 80% of the taxable income. Tax losses incurred in the first three years of the existence of a company can be used in full (ie not limited to the above mentioned 80% of the taxable income limit) without time limit.

Tax losses cannot be carried back.

Commencing 2017, the general IRES rate has been reduced from 27.5% to 24%. However, an additional 3.5% (which will effectively reinstate the previous 27.5% IRES rate) applies to Italian companies and branches operating in the financial sector.

As a general rule, corporate taxes paid abroad by an Italian commercial entity, in relation to income subject to taxation in Italy, can be recovered as a foreign tax credit, provided that certain criteria are met.

In addition to the IRES payment, an Italian company or branch has a duty to file an annual income tax return, in which all the relevant tax information on the company or branch activity in Italy is included in order to determine the tax due for the tax period of reference. The tax year is the same as the financial year. This return must be filed with the Italian Tax Authorities, within eleven months of the end of the tax year, through authorised persons, such as accountants for electronic data transmission.

These authorised persons, in turn, forward the return (by electronic means) to the secure Web site of the Ministry of Finance.

Regional Tax on Productive Activity ("IRAP")

The Regional Tax on Productive Activities ("**IRAP**") was introduced in Italy effective 1 January 1998, pursuant to Article 36 of Legislative Decree No. 446 of 15 December 1997, as subsequently amended (the "**IRAP Decree**").

IRAP applies both to Italian companies and to branches of foreign companies based in Italy.

Pursuant to Article 16 of the IRAP Decree, the normal rate applicable to companies is 3.9%, although the competent Region may increase or decrease the rate by up to 0.92%. Companies which operate in certain industries are subject to a higher tax rate.

For instance, banks are subject to IRAP at a rate of 4.65% and insurance companies at 5.90%. As a general principle, IRAP applies on the value of the "net production" deriving from the business activities carried out within Italy. According to Article 5, paragraph 1, of the IRAP Decree, the taxable income must be calculated on the basis of the financial accounts, and is the difference between the sum of the items which represent the value of the production and the sum of the costs of the production (excepting for labour costs not related to open-ended employment relationships and losses on receivables). This means that neither financial and extraordinary costs nor financial and extraordinary profits are taken into account for IRAP purposes.

Capital gains and capital losses arising from the transfer of going concerns are not included in the IRAP taxable income. Special rules apply to companies operating in the financial and insurance sectors.

However, if the taxpayer incurs interest expenses, a deduction equal to 10% of IRAP paid from IRES taxable income is available. Such deduction is considered as a lump sum deduction available irrespective of the level of the interest expenses incurred.

Conversely, pursuant to Article 2, paragraph 1, of Law Decree No. 201 of 2011, effective from the 2012 fiscal year, the portion of IRAP referred to as non-deductible labour costs is fully deductible from the IRES taxable base (ie the calculation of the deduction is based on the exact labour costs incurred by the company but not deducted for IRAP purposes). A separate annual tax return must be filed for IRAP purposes ("IRAP Tax Return").

Tax on "inbound dividends"

The Italian tax regime provides that dividends distributed to an Italian company or branch as a result of its shareholding in another Italian or foreign company are, in principle, exempt from tax as to 95% of their aggregate amount, resulting in only 5% of the amount of any such dividend being subject to IRES.

However, dividends distributed to an Italian company or branch by a foreign company residing in a Tax Haven Country (i.e. a non-EU or non-EEA Country with which Italy has not signed an Exchange of Information Agreement and whose tax legislation provides a nominal corporate income tax rate lower than 50% of the nominal income tax rate applicable in Italy) are fully taxable, unless it can be proven (also by filing a ruling with the Italian tax authorities) that the foreign company effectively carries out an industrial or commercial activity, as its main activity in the State of residence or that the participation in the foreign company did not have the effect of relocating the income in a Tax Haven Country.

Deductibility of interest

As a general rule, a proportion of interest payments made by an Italian company or branch is deductible, representing that percentage which the amount of the revenue and other earnings subject to taxation represents of the total amount of revenues and other earnings received by the company. Therefore, if all of the company's revenues are included in the taxable income, interest payments made by it will, in principle, be fully deductible.

Interest expenses are always deductible in an amount equal to the interest income received by the an Italian company or branch in the same FY, increased of any carried forward interest income (i.e. interest income accrued in previous FYs but not entirely used to offset previous years interest expenses can be carried forward without any time limit). Any excess balance of net interest expenses is deductible only up to 30% of the company's EBITDA of the relevant FY determined according to the applicable corporate income tax rules (i.e. reflecting the tax adjustments applied to the EBITDA determined according to accounting rules).

Any excess of the 30% EBITDA not used in a given FY (i.e. whenever the relevant FY interest expenses are lower than such FY 30% EBITDA) can be carried out for 5 years and used to increase the amount of subsequent FYs EBITDA available to offset net interest expenses. In such a case, the offset must follow the first in, first out (FIFO) approach so that net interest expense must be offset (i) first against 30% EBITDA of the current FY and, only thereafter, (ii) any excess interest expense may be offset against any excess 30% EBITDA carried forward from previous FY.

Interest expenses not deductible in any FY as a result of exceeding the above thresholds can be deducted in subsequent years without any time limit, provided that in those years the relevant interest expenses (net of interest income) are less than 30% of the EBITDA (carried forward interest expenses being then deductible within such limit).

As a result, if interest expenses exceed 30% of the current FY EBITDA, a tax asset may be accounted for without resulting in a negative impact on net profits, whenever management forecasts anticipate that the EBITDA will improve in subsequent years so that 30% EBITDA will: (i) exceed current financial costs; and (ii) allow the recovery of interest expenses not deducted in previous FYs.

For companies opting for the domestic tax consolidation regime (see below), interest expenses, generated after such option and not deductible by a group company, may be deducted for tax purposes by other consolidated group companies whose interest expenses do not exceed 30% of EBITDA. Accordingly, interest expenses are subject to a tax treatment similar to that applicable to tax losses.

This new regime also applies to holding companies which invest in entities other than those carrying on credit, financial or insurance activities. It does not, however, apply to credit, financial and insurance companies, which are subject to dedicated rules.

Tax on capital gains

Any capital gain arising from the sale of a shareholding is partially exempt from corporate tax. Consequently, whilst 95% of the capital gain realised is exempt, only 5% of the same will be subject to the ordinary IRES tax rate at 24% (such partial taxation, indeed, means the application of a 1.2% rate on the full capital gain). This (partial) exemption is available provided that:

(a) the shareholding has been held for at least 12 months;

(b) the shareholding has been reported as a financial asset in the seller’s first balance sheet subsequent to its acquisition;

(c) the participated company does not reside in a Tax Haven Country (i.e. a non-EU or non-EEA Country with which Italy has not signed an Exchange of Information Agreement and whose tax legislation provides a nominal corporate income tax rate lower than 50% of the nominal income tax rate applicable in Italy)[1]; and

(d) the company carries on a real commercial activity.

The criterion set out by letter (c) above must be met from the first FY in which the relevant participation is held; however, if the participation is held for more than 5 FYs and the sale of the participation is performed with counterparties not belonging to the same group, it is only required to be met in the 5 FYs prior to the sale without any interruption. The criterion set out by letter (d) above must be met for at least the 3 FYs ahead of the sale.

If the requirements for this "participation exemption" regime are not met, capital gains arising in favour of an Italian company or branch resulting from the sale of its shareholding (whether in an Italian or foreign company) will be included in its taxable income and be subject to ordinary income tax.

Capital losses realised from the sale of shares which meet the requirements of the "participation exemption" regime, are not deductible for tax purposes.

Conversely, capital losses from the sale of shares which do not meet the requirements of the "participation exemption" regime are deductible, subject to certain limits such as capital losses not being tax-deductible up to the amount of the tax-exempt dividends (or advanced dividends) received in the 36 months preceding the sale and realisation of the capital loss.

Tax consolidation

The tax consolidation regime is available for both domestic and international groups.

Domestic tax consolidation

Italian companies belonging to the same group (including Italian branches of a foreign company) can opt for tax consolidation. Such option is irrevocable for at least three years, unless the "control requirement" ceases to exist.

According to the Ministerial Decree of 1 March 2018, foreign companies that move their residence to Italy can opt for the domestic tax consolidation regime. Furthermore, according to the legislation currently in force, the foreign parent company can opt for the application of the tax consolidation regime for Italian companies and for Italian permanent establishments of non-Italian companies belonging to its group ("*consolidato tra sorelle*").

This option allows the determination, at the controlling company's level (or at the level of the Italian entity designated to act as consolidating entity in the "*consolidato tra sorelle*"), of a "consolidated" taxable income equal to the sum of all the Italian taxable income of the companies included in the tax consolidation.

Whether a "group" exists will depend on whether the "control requirement" is satisfied. Broadly, "control" exists where (under Article 2359 of the Italian Civil Code) a company owns at least the majority of the voting rights exercisable in the ordinary general meetings of its subsidiary, or where (under Article 120 of the ITC) a company owns (directly or indirectly) more than 50% of the share capital or profits of its subsidiary, taking into account (pro rata) indirect control. Such control must have existed since the beginning of each financial year in relation to which the controlling company or the subsidiary has opted for the consolidation regime.

In determining the global taxable income, regardless of the level of interest held in the subsidiaries, the parent company must aggregate the total net income of each subsidiary which has opted for the group tax consolidation. Tax losses incurred before the exercise of the option for the group tax

[1] Or, otherwise, it is proved (also by filing a ruling with the Italian tax authorities) that, as a result of the shareholding, no income is relocated to a Tax Heaven Country.

consolidation can only be used by the company that incurred those losses.

The distribution of dividends among companies included in the group tax consolidation is subject to the ordinary regime (ie 95% tax exempt if the requirements for the participation exemption are met), while the compensation granted to those companies which grant to the tax group tax benefits (eg losses, deductible interest expenses etc) is fully tax exempt.

International tax consolidation

Italian holding companies have the option of including in their taxable income, for a minimum period of five years, income and losses realised by their foreign controlled companies, even if not distributed, on the basis of the proportion of the percentage of capital owned in the foreign company. The option must be exercised with respect to all of the foreign controlled companies. As to the "control requirements", the rule mentioned above for the domestic tax consolidation applies.

The amount of tax payable is determined by deducting from the taxes due (calculated by applying the corporate income tax rate to the group's taxable income) the amount of the foreign tax credits relating to taxes paid abroad by the foreign subsidiaries.

The transfer pricing rules (ie the arm's length principle) continue to apply to inter-group transactions between Italian and non-Italian resident companies (see "Transfer pricing regulation" below).

Transfer pricing regulation

Business income of a company resident in Italy arising from transactions entered into with a non-Italian company belonging to the same group (ie which directly or indirectly controls, or is controlled by, the Italian resident company, or which is under a common control with the Italian resident company) is determined on the basis of the arm's length value of the goods transferred, services rendered, or goods and services received, as opposed to the value actually agreed by the parties, if an increase in the taxable income would arise from so doing (in the case of a reduction in the taxable income, the provision only applies on the basis of the mutual agreement procedures set out in applicable tax treaties).

Regulation of Controlled Foreign Companies

Controlled Foreign Companies ("CFC") are governed by article 167 of the ITC. Profits realised by a foreign company:

a) directly or indirectly controlled (as defined in Article 2359 of the Italian Civil Code) by an Italian company or Italian resident individual or by an Italian permanent establishment of a foreign company; or

b) whose share capital is held, directly or indirectly, for more than 50%, by an Italian company, Italian resident individual or Italian permanent establishment of a foreign company are deemed, for tax purposes, as profits of the Italian controlling company, individual or permanent establishment, proportionally to the shareholding held.

Such rule applies if both the following criteria are met:

(a) the non-resident entity is subject to an effective tax rate lower than 50% of the effective tax rate applicable in Italy; and

(b) more than 1/3 of the non-resident entity's income arises from: (i) interest or any other income generated by financial assets; (ii) royalties or any other income generated from intellectual property; (iii) dividends and income from the transfer of shares; (iv) income from financial leasing, insurance, banking and other financial activities; and (v) proceeds from trading goods with and supplying services to associated enterprises, adding no or little economic value.

CFC rules do not apply if the foreign entity carries on substantive economic activity supported by staff, equipment, assets and premises. The taxpayer may request an advance ruling from the Italian tax authorities to prove the above circumstance.

Non-operating companies (*società di comodo*)

Specific rules are set out in Law No. 724 of 1994, as amended by Law No. 662 of 23 December 1996, for "non-operating" companies (*società di comodo*). A company is deemed to be non-operating when the total amount of: (i) its revenues; (ii) the increase in the value of its inventory; and (iii) proceeds other than revenues (excluding extraordinary revenue items) reported in the financial statements are lower than the aggregate of:

(a) 2% of the value of the shares, bonds and other securities held by the company and receivables arising from loans made by the company;

(b) 6% of the value of the real estate assets; and

(c) 15% of the value of the other assets (eg intangible assets).

Effective from 2012, Italian legislation introduced a further premise which, provided certain criteria are met, classifies a company as a 'non-operating company'. According to Law Decree No. 138 of 2011, article 2, paragraph 36-decies and 36-undecies, companies realising tax losses for five consecutive fiscal years and companies that, over a period of five consecutive fiscal years, realise a tax loss in four years and income lower than the minimum taxable income (calculated by applying percentages to certain balance sheet items, as described above) in the remaining year, may be deemed to be non-operating. If a company is assessed as non-operating and it can successfully demonstrate, provided certain criteria are met, that the "non-operating" company regime should not be applicable, it can request a tax ruling from the Italian Tax Authorities.

Tax ruling no. 23681 of 14 February 2008 and the tax ruling issued on 11 June 2012 set out further conditions that, if fulfilled, provide for the automatic (ie without the necessity of filing for a tax ruling) non-applicability in full or in part of the rules for "non-operating" companies (eg should the company be subject to specific liquidation or insolvency proceedings, lease of assets to public entities etc). As mentioned above, when a company is deemed to be "non-operating", it will be assessed as having a minimum taxable income subject to IRES and IRAP equal to the sum of:

(a) 1.50% of the value of the shares, bonds, other securities and financial receivables;

(b) 4.75% of the value of the real estate assets (however, for buildings used as offices – cadastral class A/10 – such percentage is reduced to 4%. This percentage is further reduced to 0.9% where the property is located in a town with less than 1,000 inhabitants); and

(c) 12% of the value of the other assets.

If a company is classified as a non-operating company:

(a) the tax losses accrued by the company during the period in which it is classified as such cannot be carried forward;

(b) the company can only utilise tax losses declared in the fiscal years preceding the application of the non-operating company regime in order to set off income which exceeds the minimum amount required by the law;

(c) the company cannot request refunds of VAT credits nor offset or transfer such credits;

(d) the company is subject to a higher rate of corporate income tax (ie a 34,5% IRES tax rate instead of the ordinary 24%); and

(e) the non-operating company regime does not apply to companies which: (i) due to their business activity must be incorporated as a stock company; (ii) are in their first fiscal year; (iii) are carrying on their activity in an irregular manner; (iv) are companies listed, or holding companies of companies listed, on a regulated stock market; (v) provide public transportation services; (vi) have more than 50 shareholders; (vii) during the two preceding years had 10 or more employees; (viii) are subject to bankruptcy or other similar insolvency proceedings; (ix) have productive value higher than the total value of the balance sheet activities; (x) are at least 20% owned by public entities; and (xi) meet the so-called "Studi di settore" (Sector study) requirements.

Withholding tax

An Italian company or branch must levy withholding tax on the following payments:

(a) salaries and wages paid to employees;

(b) remuneration paid to individuals for professional services or other activities of an independent nature; and

(c) returns on capital paid to individuals or foreign companies not having a branch in Italy (subject to certain exceptions).

Accordingly, a Withholding Tax Agent Return must be filed annually, showing the various types of payments and the related withholding tax levied for the previous year. The filing procedure for the Withholding Tax Agent Return is the same procedure as for the filing of the Corporation Tax Return (described above).

If the financial year of the company or branch ends on 31 December, the Withholding Tax Agent Return (770 Form) must be submitted by 31 October of the following year.

Tax on "outbound dividends"

EU holding companies

Dividend distributions by an Italian subsidiary made to an EU member state resident holding company are not subject to Italian withholding tax, provided that:

(a) the EU parent company directly held at least 10% of the capital of the Italian subsidiary for an uninterrupted period of one year;

(b) the Italian subsidiary is incorporated as one of the legal forms listed in EU Directive no. 96 of 2011 and is subject to corporation tax in full in its country of residence; and

(c) the requirements set out by EU Directive no. 96 of 2011 are met and the EU holding company provides the Italian subsidiary with the relevant forms issued by the foreign tax authorities certifying the existence of conditions (a) and (b) above.

Notwithstanding the above, Italian withholding tax applies (at the rates set out below) to dividends distributed by Italian companies to EU companies when the latter are, either directly or indirectly, controlled by one or more entities not resident in an EU Country. In such a case, however, the withholding tax exemption is granted if the beneficiary of the dividends proves that it has not been incorporated in an EU Country for the sole or main purpose of benefiting from the withholding tax exemption regime. Italian withholding tax also applies to dividends distributed to EU holding companies which do not meet the requirements from (a) to (c) above. The withholding tax rate applicable to dividends distributed to EU holding companies (other than those benefitting from the exemption provided for in Directive No. 96 of 2011) or to holding companies resident in a Country which is a signatory of the European Economic Area Agreement and is included in the white list is set at 1.2%.

Non-EU parent companies

Subject to special rules for EU companies receiving dividends from Italian companies, dividends paid to non-Italian shareholders are subject to a withholding tax at a 26% rate.

However, dividends paid to holding companies resident in a Country which is a member of the European Economic Area and is included in the white list are subject to a reduced withholding tax rate of 1.2% as indicated above.

Moreover, Switzerland has executed a special agreement with the European Union for the reduction of the withholding tax applicable on dividend distributions to Swiss-resident holding companies.

Reduced tax rates are also applicable in accordance with double taxation treaties, if any.

The OCSE model tax treaty, for example, provides that dividends paid by a company which is a resident of a Contracting State, to the resident of another Contracting State, may be taxed in that other State. However, such dividends may also be taxed in the Contracting State where the company paying the dividends is resident according to the laws of that State. However, if the beneficial owner of the dividend is a resident of the other Contracting State, the tax so charged shall not exceed:

(a) 5% of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which directly holds at least 25% of the capital of the company paying the dividends; and

(b) 15% of the gross amount of the dividends in all other cases.

The effective taxation applicable to outbound dividends, however, must always be checked by reviewing any tax treaty entered into between Italy and the State of residence of the recipient.

Tax on interest

An Italian company paying interest to a company not resident in Italy must deduct withholding tax, the basic rate of which is 26%.

However, if the recipient of the interest is resident in a State with which Italy has entered into a tax treaty, then the lower rate provided in the Treaty applies. Article 11 of the OECD Model tax treaty specifies, for example, that interest arising in a Contracting State and paid to a resident of another Contracting State may also be taxed in the Contracting State in which it arises, although the tax so charged shall not exceed 10% of the gross interest if the beneficial owner of the interest is a resident of the other Contracting State.

Moreover, under Directive 2003/49/EC of 3 June 2003, (implemented in Italy by Legislative Decree No. 143 of 30 May 2005) interest payments made by an Italian company or branch are exempt from any tax in Italy provided that the following criteria are met:

(a) the beneficial owner of the interest is a company of another EU member State or a branch of a company of another EU member State situated in another EU member State. According to Directive 2003/49/EC, the term “company of an EU member State” means any company which: (i) is set up using one of the models listed in the Directive; (ii) is considered to be resident for tax purposes in an EU member State in accordance with the tax law of that State; and (iii) is subject to taxation in full in its State of residence; and

(b) the company paying the interest, or the company whose branch is the payer of the interest, is an "associated company" of the company which is the beneficial owner of the interest payments. Directive 2003/49/EC states that a company is an "associated company" of another company if, at least:

(i) the first company has a direct minimum holding of 25% of the voting rights in the second company; or

(ii) the second company has a direct minimum holding of 25% of the voting rights in the first; or

(iii) a third company has a direct minimum holding of 25% in the capital of both the first and the second company.

Withholding tax exemptions apply in relation to interest paid to qualified entities (eg banks, insurance companies, etc.) resident in the EU and resulting from long term loans.

VAT

Italian companies and branches must register for VAT in Italy and comply with all the related VAT obligations set out in Italian law.

As from 1 January 2019, Italian VAT rules introduced mandatory e-invoicing for private businesses, in relation to B2B and B2C sales of goods/provisions of services, performed between subjects resident in Italy or having a permanent establishment therein (with some minor exemption, e.g. for taxpayers falling within the special regime for small enterprises).

Accordingly, the company/ branch is exempt from the requirement to register the electronic invoices issued in the relevant VAT books.

Furthermore, the taxpayer is required to:

(a) within 16 days of the end of the relevant month, pay the difference, if any, between the amount of output VAT and input VAT; and

(b) in the period from 1st February to 30th April of each year, file the annual VAT Return and, if the latter shows VAT due, make the appropriate payment.

Opening a representative office

Advantages and disadvantages of operating through a Representative Office

Operating through a representative office can help to minimise the administrative costs connected with the opening of a separate business structure in Italy, and may attract favourable tax treatment. However, a representative office is not a legal entity from either a corporate or a tax perspective. It is deemed as a "centre of expenses" whose responsible officer has no power to take decisions or bind the foreign company vis-à-vis third parties. For these reasons, operating through a representative office is only advisable if no productive business activity is intended to be carried out in Italy.

In summary, the main advantages of operating through a representative office are:

(a) no corporate income tax or local income taxes are due by the representative office after its registration, since it does not constitute a permanent establishment;

(b) the establishment of an Italian representative office has no VAT impact since it is not subject to VAT and is not required to register for VAT;

(c) a representative office is not required to keep accounting books and records nor to produce financial statements; and

(d) a representative office is not required to file annual financial statements.

However, there are disadvantages associated with a representative office:

(a) the activities which can be conducted by a representative office are limited to public relations, market research and the provision of information relevant to the foreign company. Therefore, only preparatory or auxiliary activities may be carried out. Given its function as a "contact" office, the labour and Social Security issues involved would not be significant since the number of people employed should be no greater than two or three at most (all employed by the foreign company);

(b) the person responsible for the representative office must not have authority to enter into contracts in the name of the foreign company (should this happen, a permanent establishment would be deemed to exist and the tax treatment would be to the same as for a branch); and

(c) in order to recover Italian VAT on purchases made within Italy, the foreign company will need to appoint an Italian VAT representative (this would represent an additional administrative burden and cost), or, alternatively, deal with this directly itself and will need to register for VAT purposes.

How to open a Representative Office

From a corporate perspective, the establishment of a representative office is straightforward and relatively quick (20-30 days at most), as it only requires: (i) a resolution by the Board (or other competent body) of the foreign company authorising the opening of the office and appointing an individual responsible for managing the office; and (ii) an up-to-date Certificate of Good Standing.

A representative office is not required to be registered with the Companies' Register nor to file the deed of incorporation and the Articles of the foreign company. Its establishment must be merely notified to the local companies' register in the R.E.A. (the Economic Administrative Inventory) within 30 days of the effective date of the start of its activities. Specific forms are required to be filed for this.

Tax issues for the establishment of a representative office

A representative office is not required to file income tax returns since neither corporate income taxes (IRES) nor local income taxes (IRAP) are payable.

However, the Italian Ministry of Finance recently issued instructions that a representative office should act as a withholding tax agent in respect of Italian personnel hired by the representative office. Consequently, when paying salaries and wages to Italian personnel, a representative office must apply the relevant withholding taxes and furnish its employees with documentary evidence of the withholding taxes levied. The representative office, therefore, must also file a Withholding Tax Agent's Return. All documentation relating to withholding taxes levied must be held locally.

Italian Labour Law

Framework of Italian Labour law

In Italy, employment relationships are regulated in considerable detail by: (i) Italian law (in compliance with the principles set out in the Italian Constitution); (ii) the relevant National Collective Agreement ("CCNL"), where applicable; and (iii) individual employment contracts. Most of the provisions in the CCNL and Italian law are mandatory and cannot be contractually modified, unless the modifications create rights more favourable to the employee than those granted by law or by the CCNL.

Labour Law

Italian law regulates most of the terms and conditions of the employment relationship (such as hiring and dismissal, minimum salary, health and safety at work, and race, sex and disability discrimination). The most important law governing employment relationships is Law no. 300 of 20 May 1970 ("Worker's Bill of Rights", as amended), which also contains specific provisions regarding trade union activities, and the 2015 reform of the Italian Labour market, the so called "Jobs Act".

CCNLs

CCNLs are private agreements negotiated at a national level by representatives of employers' associations and trade unions. Generally, CCNLs are only legally binding upon employers and employees belonging to the management and labour organisations which have signed the agreements or have chosen to adopt them. Further, each employer may decide to regulate the employment relationship with its own employees by executing an in-house bargaining agreement ("CCA") with local representatives of employers' associations and trade unions. In principle, the CCA cannot provide for a treatment less favourable than that provided for on a national basis by the law or by the CCNL. The Jobs Act has, however, significantly increased the areas where a CCA can deviate from the general rules of law.

Individual employment agreement

The employment relationship is also regulated by the individual employment contract entered into between the employer and the employee which may either simply make reference to the provision of the applicable CCNL or provide for specific contractual conditions governing the individual employment relationship (ie salary, benefits, trial period, non-competition and non-solicitation clause, confidentiality clause etc.) which, in any case, cannot be less favourable to the employee than those provided for under the law and the applicable CCNL.

EU legislation

In addition, EU legislation is significant within the promulgation of labour law as a result of the power granted to the EU authorities to issue provisions binding on Member States, without any need for intervention by the national legislator.

General Law principles governing the individual employment relationship

Under Italian law, an individual may work either as an employee in a position of "subordination" or as an independent contractor (ie "self-employed") under the terms of a service agreement.

In this booklet, only the general principles governing the employment relationship with employees will be described. Nevertheless, employers should be aware that it is very common for self-employed individuals holding a service agreement with a company, to claim that they are employees of that company and to succeed in such claims with relative ease. Consequently, the employer could be ordered to pay the Social Security contributions due at that time calculated from the beginning of the relationship (ie from the execution of the service agreement), over and above any administrative sanctions. The employer could also be ordered to make an accrual severance payment, known as a TFR (see below) with effect from the beginning of the subordination (employment) relationship.

Under the Italian civil code, the employee and the employer are subject to the following duties during an employment relationship.

Duties of the Employee:

(a) to perform his/her activity with care and diligence and to follow the employer's commands and directives;

(b) not to work for a competitor of the employer during his/her employment; and

(c) to keep information related to the company's organisation and production methods confidential.

As far as the non-compete obligation referred to in (b) is concerned: (i) any agreement intended to restrict the activities of an employee following termination of the contract ("non-compete covenants") must be in writing; (ii) remuneration of employees must be agreed; and (iii) the nature of activity covered by the covenant, as well as its duration and the territory to which it applies, must be specified.

Duties of the Employer:

(a) to provide safe conditions of work by adopting all measures necessary to protect the physical and mental health of the employee;

(b) to comply with the Workers' Bill of Rights, as amended by the Jobs Act, which, among other things, sets out the limits and conditions under which an employer may use private security investigations; or use audio-visual equipment or other machinery for the remote surveillance of employees; and requires medical checking of physical fitness or illness of employees by the relevant state Social Security institutions; and

(c) in general, to prevent discrimination (eg discrimination based on age, sex, race, religion etc) between employees.

General CCNL principles governing the individual employment relationship

Most CCNLs provide for a rigid division of employees into four categories:

(a) blue collar employees (operai);

(b) white collar employees (impiegati);

(c) middle managers (quadri); and

(d) executives and white collar managers (dirigenti).

Most of the economic and regulatory aspects of the employment relationship are governed by the applicable CCNL, which determines: (i) the minimum wage (in principle a CCA may improve, but not reduce, these standards through further provisions on rates, productivity bonuses etc); (ii) the notice period in cases of termination of the employment relationship which can vary according to the seniority and the level of the employee; (iii) the number of paid days of vacation per year; (iv) the maximum length of any probation period; and (v) the duration of an employee's right to keep his/ her job during any period of illness.

Other principles governing the individual employment relationship provided by Italian Labour Law

Italian law does not permit women to work during their maternity leave (five months) and gives them the right (also available to male parents) to take parental leave (up to 10 months following the mandatory five months of maternity leave). An employee cannot be dismissed for any reason during pregnancy and up until the child is one year old.

An employer with 15 or more employees must hire a certain number of disabled persons, having regard to the percentages determined by the relevant law.

Unions' rights

Employees enjoy constitutional rights to organise trade unions and to strike. Trade unions are usually formed on an industry or trade-wide basis, with the various local unions forming a national body.

If a company has more than 15 employees, the employees are entitled to establish a Works Council which has the right to be informed and consulted regarding collective dismissals, business transfers, and on any proposals to install work surveillance devices or to introduce personal surveillance procedures which directly involve an employee, as well as on any other matter provided for by the applicable CCNL.

Pursuant to Legislative Decree no. 74 of 2 April 2002, Italy implemented EU Directive 94/45 aimed at establishing European Works Councils ("EWC") standard procedures in: (i) Community-scale undertakings (ie companies that employ at least 1,000 employees across the Member States and 150 or more employees in at least two Member States); and (ii) Community-scale group undertakings (ie a group that employs at least 1,000 employees across the Member States and not less than two companies of the group, employing at least 150 employees each, located in two or more different Member States) to inform and to consult employees, in particular, on transactions (mergers, acquisitions etc.) that may have an impact on employment levels or on employment conditions.

The individual employment agreements

The different types of employment contracts have been reduced and simplified by the Jobs Act (specifically, Legislative Decree no. 81 of 15 June 2015), with the aim of making it easier to employ individuals and decreasing the level of litigation which currently surrounds the employment relationship. Individual employment contracts are divided into the following types:

(a) an employment agreement for an indefinite period;

(b) a fixed term employment contract. The only limitations on entering into a fixed term contract are: (i) it has a maximum duration (36 months, this limitation also governs a series of contracts); and (ii) the open-ended/fixed term contract ratio, which is a maximum of 20% of the fixed term (save for different percentages in the CCNL/CCA);

(c) a part-time contract;

(d) a Job on Call agreement. Under this type of agreement, the employee makes himself/herself available to the employer, who may use his/her services on an occasional basis (within specific limits set out under the law and the CCNL/CCA);

(e) a contract for the supply of personnel by an authorised agency, which can be open-ended/fixed term; and

(f) an apprenticeship agreement: a special contract whereby an employer undertakes to train an apprentice as a skilled worker and the apprentice agrees to work under the employer's direction.

An employment agreement for an indefinite period does not need to be in writing, although it is advisable to prepare at least a short form agreement setting out the principal points, particularly where there is some deviation from the relevant CCNL or CCA. In fact, the law requires that:

(a) certain provisions, such as the probation period and the non-competition covenant, must be agreed in writing in order to be enforceable; and

(b) all other employment agreements that have certain peculiarities referring to the duration of employment(fixed-term employment), or to the working time (part-time employment), or to the manner in which the employment relationship is carried out (apprenticeship agreement, and job on call) must be reduced to writing. In the absence of a written agreement, the employment relationship is considered to be a subordinate relationship for an indefinite period without any special provisions.

Recent Updates

Under Covid-19 emergency the Italian Legislator has introduced several measures involving Labour Law, in particular:

(a) Ban on collective and individual dismissals for justified objective reasons since March 2020 until – at least – March 2021;

(b) Exceptional and simplified furlough programs (so called “cassa integrazione guadagni ordinaria”, “assegno ordinario” and “cassa integrazione guadagni in deroga”) - paid by the National Social Security Institute (“INPS”) or by the competent Region - for employers who suffered a reduction or suspension of their business/working activity due to Covid-19 emergency;

(c) Temporary exemption from the payment of social security contributions only under certain condition and as an alternative to the social programs under letter b) above;

(d) Exceptional health and safety (H&S) provisions on workplace. In particular the employer is required to mandatory respect Protocols on Health and Safety at the workplace providing specific measures in order to avoid Covid-19 contagion and spread, such as, for example:

– respect of social distancing and reorganization of workplace/working activity;

– providing employees with all the required DPI (hand sanitizer, face masks, etc.);

– sanitization of workplace;

– exceptional health surveillance by the Company Doctor, especially for fragile employees;

(e) Temporary provisions on fixed term contracts or contracts for the supply of services which derogates their ordinary discipline. Law Decree no. 25 of 2017 introduced important changes to the rules on joint liability in the case of contracts for the supply of services.

Flexible work to allow work-life balance

The Italian law includes several provisions aimed at combining personal life with working life, including part-time, the so-called remote work (or "smart work"), teleworking or work from home. Special rules regulate H&S for agile workers and their right to disconnect.

Under the Covid-19 emergency, smart working has been required and strongly implemented by the Italian Legislator – also through simplified administrative procedures - in order to avoid, where possible, having employees at work.

Secondment

Secondment involves an employer (“Home Company”) which, in its own interests, temporarily makes available one or more of its employees to another company (“Host Company”) to carry out certain activities. The Home Company remains in charge of the employee’s salary and must comply with the statutory employment requirements.

In Italy, secondment is lawful where:

(a) the Home Company has a significant interest in the employee performing his/her duties for the Host Company; and

(b) it is temporary (for a period during which the interest of the Home

Company referred to in (a) above must last, regardless of the duration of the secondment).

If the secondment is unlawful, the employee will be considered as an employee of the Host Company.

The consent of the employee to the secondment is only needed if his/her employment duties are changed or if it involves the transfer of the employee to a place of work which is more than 50 km from his/her original place of work.

International secondment

"Transnational Secondments" - that occur when an employee who ordinarily works abroad is temporarily posted to work in Italy – are regulated by Legislative Decree no. 136 of 2016 as amended by Legislative Decree no. 122 of 2020 (by way of implementation of the EU Directive 2018/957). For secondments starting from September 30, 2020, the amended Decree provides: (i) a detailed list of those elements that have to be taken into account in order to establish if the secondment is lawful; (ii) an implemented list of the employment terms and conditions to be mandatorily granted to seconded employees, depending also on the duration of secondment; and (iii) administrative obligations of the posting company (any breach of which can result in an administrative fine), for example, communicating the start of a secondment to the Italian Ministry of Welfare no later than 24 hours before the secondment commences, keeping copies (in the Italian language) of all documents regarding the secondment and the designation of a contact person in Italy. The aforementioned discipline applies also to secondment executed by staff agencies posting employees to companies with subsidiaries in Italy.

Termination of the employment relationship

Notice

As a general rule, notice must be given in writing to terminate an employment relationship with an indefinite term. The notice period is stipulated in the CCNL or, if no CCNL applies, in the employment contract and varies in accordance with the employee's seniority and category. Either party can elect to terminate the contract without prior notice but, in this circumstance, the terminating party must pay to the other an amount equivalent to the salary otherwise payable during the notice period ("payment in lieu of notice").

Severance payment

On any termination of employment (including resignation, dismissal for just cause, or death), the employer must pay a severance lump sum (a "TFR", the acronym for trattamento di fine rapporto), which is calculated on the basis of the employee's wages, taking into account not only his/her basic wage, but also any other remuneration periodically paid to him/her, eg thirteenth and fourteenth month's salary (if any), regular bonus, or the value of any company car.

An employer must make a specific reserve in its annual accounts for TFR in respect of all of its employees, even though payment is only due on termination of employment and, in the past, this reserve has effectively amounted to a type of self-financing for employers. However, the recent reform of the complementary pension system introduced significant changes in this practice (see below under "The complementary pension system.

Individual dismissal

Individual dismissals are regulated by Laws no. 604 of 15 July 1966 and no. 108 of 11 May 1990, the Workers' Bill of Rights and the Jobs Act, which mostly refer to blue collar and white collar workers only, and not to executives. The following types of dismissal are recognized as lawful:

(a) Dismissal for just cause (giusta causa): if the dismissal is due to the misconduct of the employee, making a continuation of the employment relationship untenable (for instance theft, riot and insubordination). Case law on this point illustrates sharply contrasting precedents which make it extremely difficult in practice for an employer to act with speed and certainty. If just cause exists, an employee may (following a disciplinary procedure which takes about seven days unless otherwise provided for by the CCNL) be dismissed without notice or any payment in lieu of notice.

(b) Dismissal for a justified reason (giustificato motivo): this includes a serious breach of the contract by the employee ("justified subjective reason", eg lack of productivity or continuous uncooperative attitude, in which case a dismissal can be notified only after the disciplinary procedure mentioned under (a) has been completed), or "any reason concerning the productivity, the organisation of the work or the operation of the company" ("justified objective reason", eg the removal of the position). In such cases, the employee must nevertheless be given either notice of dismissal or receive payment in lieu of notice. In the case of dismissal grounded on a justified objective reason served by an employer employing more than 15 employees within the same municipality and, in any case, more than 60 in aggregate, a mandatory preventive settlement procedure before the competent territorial Labour Office must be initiated if the employee was hired prior to 7 March 2015. No dismissal can be served until this latter procedure is concluded.

Executives are subject to different rules. In particular, the dismissal of executives is lawful if based on "just cause" or if the dismissal is fair and reasonable (ie if it is "justified"). If the dismissal of the executive is not justified and the employment relationship is regulated by a CCNL, the executive is entitled to receive compensation ("Supplementary Compensation") as set out in the applicable CCNL (such payment, generally, varies according to the age of the manager and his/her seniority).

Italian law prohibits dismissal for all categories of employees in specific cases, including:

(a) in the case of female workers, during the period from the announcement of her marriage until one year after its celebration;

(b) from the beginning of a pregnancy until one year after the birth in the case of female workers and, for those who take paternity leave, from the duration of the leave until one year after the birth;

(c) in the case of illness and accidents at work, for the period of time set out in the applicable CCNL;

(d) in the case of dismissals of managers appointed to the works council, for the period from the date of their appointment to such office until one year has elapsed from vacation of the office; and

(e) for discriminatory reasons (eg determined by political ideologies, religion, racism, language, sex and for belonging to a trade union).

Collective dismissal

A collective dismissal occurs when an employer with more than 15 employees dismisses at least five employees (including executives) within 120 days as a consequence of the reduction or reorganisation of the business' activities, or of the closing down of the business.

In cases of collective dismissals, the employer is required to follow a consultation procedure with the Trade Unions/Works Council and to meet certain criteria in selecting the employees to be dismissed.

Unfair dismissal

If an employee is dismissed without just cause or justified reason, he/she may (within 60 days of the receipt of the letter of dismissal) challenge the dismissal in writing. The employee can initiate a claim before the Court for unfair dismissal within a 180-day period from challenging the dismissal.

The burden of proof regarding the lawfulness of the dismissal always lies with the employer.

Should the Court declare the dismissal unlawful, the consequences for the employer depend on the employee's hiring date, on the number of individuals employed, and on the type of dismissal.

Specifically: Employees hired before 7 March 2015.

(a) Regardless of the number of employees: In the case of an Invalid Dismissal (eg oral dismissal, dismissal after a wedding announcement or dismissal of an employee during maternity leave): the employer must reinstate the employee in his/her job position and pay him/her all salaries due from the date of dismissal to the date of reinstatement (or in any case not less than five months' salary after deducting any amount earned by the employee after the dismissal) plus Social Security contributions. The employee can refuse to be reinstated and ask for the payment in lieu of reinstatement equal to 15 months' salary; however, the employer can never refuse to reinstate the employee to his/her job position if the employee chooses to be reinstated.

(b) If the employer has more than 15 employees in a single productive unit (or in the aggregate of all productive units located in the same municipality) or more than 60 in aggregate (the "**Threshold**"):

   (i) Unfair Disciplinary dismissal (ie the dismissal is not grounded on a justified subjective reason or on the basis of 'just cause'):

      (1) if the dismissal is not grounded on any valid reason or the applicable CCNL provides a different sanction for the specific breach committed by the employee, the employer must reinstate the employee to his/her job position, paying compensation of up to a maximum of 12 months' salary, less any amount earned by the employee after the dismissal as well as any other amount the employee could have earned if he/she had searched for other working opportunities, plus Social Security contributions. Alternatively, the employee may ask for the payment of a sum in lieu of reinstatement equal to 15 months' salary. The employer cannot refuse to reinstate the employee to his/her job position if the employee chooses to be reinstated; and

      (2) in all other cases (save for contraventions of disciplinary procedures, see 4. below): the employer must pay to the employee compensation ranging from a minimum of 12 up to a maximum of 24 months' salary;

   (ii) Unfair Economic dismissal (ie the dismissal is not grounded on any justified objective reason): the employer must pay to the employee compensation ranging from a minimum of 12 up to a maximum of 24 months' salary. However, if the Judge rules that the dismissal is not grounded on sound factual reasons, the Court may order reinstatement of the employee as well as the payment of a sum up to a maximum of 12 months' salary;

(iii) For procedural breaches (ie the employer gives notice of the dismissal without setting forth the reasons for the dismissal or does not follow disciplinary procedures or the preventive settlement procedures), the employer must pay to the employee compensation ranging from a minimum of six to a maximum of 12 months' salary.

(iv) If the employer is below the Threshold, the employer must pay the employee an amount ranging, in principle, from two and a half to six months' salary, depending on the number of employees, the size of the company, the length of the employment period and the parties' overall behaviour in the course of the employment and in the course of the Court proceedings.

Employees hired from 7 March 2015 onwards, including: i) apprentices and fixed-term employees already in force on that date whose relationship is converted into a permanent contract thereafter; and ii) individuals already employed by companies who meet the Threshold after that date.

The reinstatement remedy can be ordered only:

(a) regardless of the number of employees: in the case of an Invalid Unlawful Dismissal;

(b) for employers above the Threshold: in the case of a disciplinary dismissal based on facts not substantiated in Court, together with a payment of maximum 12 months' salary.

In any other case of unlawful termination, employees are entitled to the payment of compensation, equal to:

(a) two months' salary for each year of service, subject to a minimum of 4 and a maximum of 24 months, if the employer is above the Threshold;

(b) one month's salary for each year of service, with a minimum of two and a maximum of six months' salary, if the employer is above the Threshold.

Transfer of an undertaking

A business transfer occurs when, as a result of a transaction of any kind (except a mere sale of shares) the ownership of an organised economic entity or of an autonomous part of it, whether profit-making or not, which produces or exchanges goods or services, is transferred to another business entity. Usufruct, lease of business, mergers and demergers are also deemed to be a transfer of a business.

When a transfer of an undertaking occurs:

(a) the employment contracts of the transferor's employees assigned to that business are automatically transferred to the transferee, who assumes all rights and obligations under those contracts;

(b) the transferee must apply the CCNL and/or the CCA applied by the transferor to the transferred employees until their expiration date, unless they are replaced with collective agreements of the same level applied by the transferee to its employees;

(c) the transferor and the transferee are jointly liable for all sums owing to the relevant employees at the moment of the transfer, whether or not any provision or reserve for such sums has been made;

(d) in the transferor's accounts. The transferee is liable for all future matters.

Where the transferor employs, in the aggregate, more than 15 individuals regardless of the number of employees that will actually be transferred, the transferor and the transferee must follow a consultation procedure with the Trade Unions/Works Council.

Usually, this does not apply in the context of the sale of shares, even if this results in a change in control of a company. There may, however, be some sectors where, even in the case of a sale of shares, the employer must consult with the trade unions, in accordance with the applicable CCNL.

Setting up a subsidiary, branch or representative office: employment issues

The employment relationship of personnel employed in Italy at an Italian subsidiary, branch or representative office of a foreign company may be governed either by Italian law or by the applicable foreign law, depending on the parties' agreement.

Should the parties decide to have their employment relationship governed by a foreign law:

(a) the treatment afforded by such law cannot be less favourable than that enjoyed under Italian law in the same circumstances. For example, employees cannot be paid a salary lower than the base salary provided for by the CCNL as applied by Italian companies operating in the same sector (regardless of whether the subsidiary, branch or representative office is party to any CCNL); and

(b) there can be no derogation from the mandatory provisions of Italian law since the employment relationship is carried out within Italian territory. Therefore, the following provisions will apply regardless of the applicable foreign law: (i) the employer is obliged to allow its employees to enjoy at least two weeks' holiday during the year in which the holidays are accrued and a further two weeks within the following 18 months; and (ii) the duration of the working week cannot exceed 40 hours a week within a reference period of four months.

As regards Social Security, even if the employment relationship is regulated by a foreign law, the Italian subsidiary, branch or representative office must comply with Italian legislation on Social Security and pay the applicable compulsory contributions, including: insurance for retirement, unemployment fund, National Health Service and insurance for accidents at work.

Exceptions to this rule apply only in particular circumstances such as secondments, when a foreign employee is seconded to work in Italy for a limited period and he/she is duly insured abroad. In this event, during the working period in Italy, the employee remains under foreign insurance and, therefore, the employer is not required to pay any Social Security contribution in Italy.

Since an Italian representative office is not an Italian legal entity (ie it has no separate legal status in Italy), an individual should be appointed as the legal representative of the office in dealings with any relevant insurance and Social Security authority for the payment of Social Security contributions, insurance awards, and for the performance of various obligations related to the hiring of employees in Italy.

The national insurance system

The fundamental principle of public Social Security is set forth in Article 38 of the Italian Constitution, which provides that all citizens who are unable to work have a right to social assistance. Article 38 further requires that the Government implement a compulsory Social

Security system. The public Social Security system in Italy is extremely complex, with a number of entities and funds involved. Social Security is provided to all employees working within the territory of the Italian State, irrespective of their nationality, as well as to Italian citizens working abroad, save as provided for in EU Regulations and any special Social Security treaty.

The principal entities which administer Social Security are: (i) INPS (*Istituto Nazionale per la Previdenza Sociale*) ie the Italian National Social Security Authority that provides for Social Security for all *operai, impiegati and quadri* and, among others, for executives of Commercial and Industrial Companies; and (ii) INAIL (*Istituto Nazionale per l'Assicurazione contro gli Infortuni sul Lavoro or INAIL*) ie the National Institute for Insurance against Industrial Accidents that compensates employees (including executives) for work-related accidents or injuries. Accidents covered by INAIL include all accidents which relate to, or arise from, the work performed, even if they do not result in a diminution of capacity to work. These entities are financed by contributions from employers and employees. Any agreement to avoid payment of these Social Security contributions is null and void and may result in administrative and/or criminal sanctions.

National Insurance scheme

Social Security contributions are paid, in differing percentages, by both the employee and the employer based on the taxable salary of the employee.

The Italian pension system

Retirement pensions currently originate from two sources:

(a) the State pension system, applying to both types of State pensions, namely, the old-age pension and the early-retirement pension (see below under "Pensionable age"); and

(b) the complementary pension system.

The State pension system

Until 1992, the mandatory State pension system adopted the final salary approach (under which the pension of a worker was calculated by reference to: (i) the average salary received by the employee during the last 10 years of his/her working life; and (ii) the number of years during which Social Security contributions were paid). Since 1992, due to the serious economic and financial problems experienced in the funding of Social Security, laws have been enacted with the aim of: (i) reforming the State pension system by replacing the final salary approach with the contribution approach (under which the pension is calculated taking into account the amount of the Social Security contributions paid to INPS during a person's working life); and (ii) harmonising the various Social Security funds managed by INPS providing for homogeneous rules as to the access to pensions and the criteria for their calculation.

Recent reforms have further amended the pension system with the objective, among other things, of increasing the retirement age.

Pensionable age

In order to qualify for a pension, an employee must cease his/her employment and have reached a certain age, which gradually increases over time as set out in the chart below:

Years of age		
From	Men	Women
1 January 2020	67	67

An employee may also retire earlier than the ages set out above and receive a reduced pension, provided that he/she has been in work and paid the relevant social charges contribution for the following number of years:

Years of accrued social charges contribution		
Up to	Men	Women

31 December 2020	41 and ten months*	42 and ten months*

* to be adjusted according to future life expectancy.

Foreign nationals

EU citizens

If the employee being hired in, or seconded to, Italy is an EU citizen (or a non-EU citizen but registered with the Social Security system of an EU member State), the payment of the Social Security contributions is governed by EU regulation 1408/71, which provides that the Social Security contributions will be governed by the Social Security legislation of the country in which the employee carries out his/her work activity, unless the secondment exception is applicable. If the secondment exception is applicable, the seconded employee may continue to be subject to the Social Security legislation of his/her home country.

Non-EU citizens

Italy has entered into Social Security treaties with a number of foreign countries in order to regulate the payment of Social Security contributions for non- EU citizens working in Italy or Italian nationals working outside the EU. If the employee being hired in, or seconded to, Italy is a non-EU citizen (and not registered with the Social Security system of an EU member state), payment of Social Security contributions will be governed by the Social Security Treaty entered into by Italy with the country of origin of the employee, if any.

If Italy has no Social Security Treaty with the employee's country of origin, the employer must pay Social Security contributions, due under Italian law in respect of the employee, to the Italian Social Security Authority in addition to the Social Security contributions due (if any) in the employee's country, unless the exemption based on reciprocity applies with the employee's country of origin. In such cases, a formal request for exemption must be addressed to the Italian Ministry of Welfare.

The complementary pension system

Besides the traditional compulsory Social Security system, Italy has, since 1993, introduced complementary forms of pension.

Legislative Decree no. 124 of 21 April 1993 (the "**Pension Funds Act**"), as subsequently amended, has created the following three forms of complementary pensions:

(a) "closed" pension funds, established by national collective agreements between representatives of the employers and of the trade unions for specific industry sectors. Such funds are only open to employees working in the specific sector for which the agreement has been signed;

(b) "open" pension funds, established by investment firms ("SIM"), asset management companies ("SGR") and insurance companies. They are open to employees in firms or companies not eligible to participate in closed pension funds due to no provision being made for a "closed" pension scheme in the relevant sector; and

(c) individual pension plans provided under life assurance contracts ("PIP"). PIPs are open to all persons whether or not employed. The plans are structured as a "true" insurance product, usually under the form of unit-linked products.

These three types of funds have basically the same modus operandi: during the first phase (the "accumulation" stage) the subscriber pays a contribution (or a premium, in the case of insurance products) until he/she reaches a particular retirement age or "seniority".

At that point, upon request, he/she ceases to make contributions and the total amount accrued is converted into an annuity for his/her lifetime (the "annuity" stage).

Since 1 January, 2007, employees can elect to assign their TFR amounts to these funds, instead of leaving them with the employer. This election may be made by the employee: (i) with an explicit declaration to this effect, within the first six months of employment (if the employee decides to keep his/her TFR with the employer, he can revoke the decision at a later stage); or (ii) where an employee does not make any positive indication in the first six months of their employment, the employer must transfer the TFR to:

(a) the existing closed pension fund for employees in that sector (unless an agreement between the employer and its employees provides for different complementary pension schemes to which the transfer must be made); or

(b) the pension scheme which counts the greater number of employees/participants (where the employer has more than one complementary pension scheme of reference); or

(c) the INPS complementary pension scheme, when there is no complementary pension scheme of reference.

As a result, from 2007, employers must fund the TFR, as opposed to merely accruing for it in their accounts.

Occupational pension plans operated by single employers do not exist in the Italian pension landscape since complementary pension benefits can only be paid by legal entities other than the relevant employers.

Main features

Requirements

A participant in a complementary pension scheme qualifies for a supplementary pension (a life annuity) provided that: (i) he/she has reached the minimum prescribed age for retirement in the mandatory pension system (usually referred to as the "first pillar"); and (ii) he/she has participated in a supplementary pension scheme for not less than five years.

Distributions during participation

A participant may request a lump sum in advance from the pension fund or insurer where he/she needs to meet expenses for: (i) the purchase or repair of his/ her residence; or (ii) for medical treatment, provided, in each case, that eight years have passed from the commencement date of the pension scheme.

The participant may return the advance and thus restore his/her position within the scheme.

Payment of the benefit in cash

When the participant qualifies for receipt of the pension benefit, he/she may request that up to 50% of the overall amount accrued be paid in cash, but the remainder must be paid as a life annuity.

Transfer

Another important feature of the private pension schemes is that the participant may transfer his/her individual position to another scheme. Under the law, there is a time limit (two years after commencement of a scheme) before a participant may request a transfer, unless his/her entitlement to participate in a closed pension fund arises from a change to a new job (in which case there are no time limits).

Immigration Law

EU citizens

As a result of the freedom of movement enjoyed by EU citizens within the EU territory, an EU citizen being hired, or seconded to work, in Italy, is not required to obtain a work permit.

Following Legislative Decree no. 30 of 6 February 2007, an EU worker is no longer required to obtain the so called "Leave to remain Card", in order to stay in Italy, but if he/she does possess a valid card, no proof of the employment relationship is needed in order to be allowed to stay in Italy.

EU citizens have the right to stay in Italy for a period of no longer than three months or longer if they are: (i) students; (ii) workers; or (iii) relatives of persons of one of the mentioned categories. Workers intending to stay for more than three months will have to register at the appropriate municipal office (Anagrafe), presenting documentary proof of the employment relationship.

The employment relationship will be entirely regulated by the Italian law.

Non-EU citizens

According to the Italian law on immigration (Law no. 189 of 30 July 2002) and the implementing regulation issued on 10 February 2005 (Law no. 286 of 25 July 1998, as amended), the hiring of a non-EU citizen to work in Italy for an Italian or foreign employer is subject to a special authorisation called a work permit (the so called "Non-objection work notice" or nulla osta al lavoro) which is issued by the Sportello Unico per l'Immigrazione ("SUI"), the Italian public body in charge of processing the entire immigration scheme for non-EU workers.

Recent updates

Pursuant to Law no. 232 of 11 December 2016, Non-EU Citizens who intend to make an investment or a large donation in strategic sectors for economic and social development of Italy can now apply – through the platform investorvisa.mise.gov.it - for a new type of visa that will be valid for two years. Compared to the ordinary way of requesting and obtaining entry visas for Italy, the platform offers numerous advantages. In particular such procedure is fully dematerialised (ie it takes place entirely online) and faster (the visa can be released within 30 days from the submission of the application).

Work permit for employment

The entire immigration process must be managed by the Italian employer in Italy prior to the employee's arrival in Italy and is initiated by filing an application form with the SUI for the Province of the place where the non-EU employee is to carry out his/her employment (the "Form").

Among other things, the Form includes, special sections (for completion) where the employer is required to: (i) offer a proposal of Contratto di Soggiorno, ie a proposal of a contract for the non-EU employee evidencing the work conditions, applicable work hours, economic benefits, the CCNL applicable in the business unit where the non-EU employee will work, and the classification and duties of the non-EU employee under the relevant CCNL; (ii) declare that the non-EU employee will have accommodation in Italy; (iii) undertake the payment of the repatriation expenses of the non-EU employee; (iv) inform the relevant authorities of any changes in the work conditions of the non-EU employee; and (v) declare that no collective dismissal procedures have been started by the employer in the last 12 months.

On receipt of the Form, SUI forwards the employer's work permit request to the Questura (local police office) and the local labour office (Direzione Territoriale del Lavoro) for their respective approvals. They verify whether: (i) an Italian or an EU worker could be a candidate for the work position described by the employer; and (ii) the quota threshold (ie number of work permits issued each year by the Labour Office) has been reached.

Once SUI receives the approvals from the Questura and the Labour Office, SUI will: (i) apply for the granting of a temporary tax code number to the non-EU employee from the Italian Ministry of Finance; and (ii) call the employer for signature of the Contratto di Soggiorno based on the proposal of the employment contract included in the Form and will deliver the nulla osta al lavoro (ie the work permit) within 60 days of the filing date of the Form.

SUI will then forward the work permit application documentation to the Italian Consulate of the place where the non-EU employee then resides. The non-EU employee must appear personally at the Consulate to apply for the issue of the work visa and the Consulate will accordingly issue him with the work visa within 30 days of the application date.

Within eight days from of his/her arrival in Italy, the non-EU employee must appear personally in front of SUI to: (i) sign the Contratto di Soggiorno; and (ii) apply for the Permesso di Soggiorno (ie a residence permit). The Questura, finally, will contact the non-EU employee (by telephone or mail), for delivery/collection of the Permesso di Soggiorno.

Work permit for a secondment

The secondment of a non-EU worker is allowed for the exchange, intra-group, of services or where the relevant companies have entered into a contract for the supply of services. If the entry into Italy is considered to be "for specific reasons" (Ingresso per lavoro in casi particolari), it is subject to the following special immigration provisions.

As a general principle, there is no limit to the number of such work permits ("quota") that the SUI can issue each year.

The hosting company starts the process by submitting the Form to SUI following the same process as that described above for a Work Permit for employment. The process for the issue of the work permit for a secondment is the same, save that SUI does not need to verify whether an Italian or an EU worker could be considered for the relevant work position nor whether the quota for employees of that nationality has been reached since the secondment concerns key employees who are not subject to quotas.

The duration of the secondment, including any extension/renewal, must not exceed a total of five years.

Work permit for self-employed persons

This procedure depends on the type of activity carried out by the self-employed person:

(a) if the foreign worker wishes to work in Italy, on a self-employed basis, to perform services which are

(b) subject to licences, authorisations or registration with special registers (such as an agency relationship), he/she must ask the relevant authorities for a statement confirming that there are no reasons preventing the issue of the licence, authorisation or registration with the register for the exercise of the self-employment relationship of the non-EU worker (the "**Declaration**");

(c) if the foreign worker intends to carry out self-employed activity that is not subject to licences, authorisations or registration with special registers (eg a consulting relationship), he/she must apply for a statement from the Italian company register of the place where the work activity is to be performed stating that the economic resources criteria prescribed for the exercise of the work activity are met by the non-EU applicant (the "**Statement**");

(d) the Declaration or the Statement, together with a copy of the application filed with the relevant authorities and the supporting documents must be enclosed with the application filed by the foreign worker with the *Questura* in order to obtain interim approval for entry into Italy (the so-called *Nulla Osta Provvisorio*). The *Questura* issues the *Nulla Osta Provvisorio* within 20 days of date of application; and

(e) since the entry of self-employed persons is also subject to quota limits, the *Nulla Osta Provvisorio* by the *Questura* will be granted only if the quota reserved for self-employed persons has not already been reached. Once the *Nulla Osta Provvisorio* has been granted, the foreign worker must file this, together with the Statement or the Declaration, with the Italian Consulate of his/her place of residence abroad, which will then issue the relevant work visa for self-employment within 120 days of date of application.

Appendix 1 - Main differences between an SRL and an SPA

	SRL	**SPA**
Minimum corporate capital Incorporation	Euro 1.00[2] Incorporation by way of public subscription is not provided for in the law Online incorporation allowed by means of an electronic notarial deed	Euro 50,000[3] Incorporation by way of public subscription is allowed
Quota/Shares	Ordinary quotas Management quotas Privileged quotas	Ordinary shares Multiple voting shares – up to 3 votes per share Tracking Shares Privileged shares Limited/conditional voting shares
Quotaholders'/Shareholders' rights	The Articles may provide for the granting of special rights relating to the management of the company or the distribution of profits to individual quotaholders. The Articles may provide for the granting to individual quotaholders of additional special rights to grant special prerogatives or safeguards to some quotaholders as well as some methods for protecting minority quotaholders, such as: (i) right of first refusal on the sale of a quota by other quotaholders; (ii) put options, call options and tag along rights (to guarantee an exit from the nvestment);	The Article may provide for the issue (creation) of shares without voting rights or with voting rights limited to specific matters or with voting rights subordinated to the occurrence of specific conditions or with multiple voting rights.

2 Law Decree No. 70, 2013 as amended and ratified by Law No. 99 of August 9, 2013.
3 Law Decree No. 91, 2014 as amended and ratified by Law No. 116 of August 2014.

	(iii) voting list mechanisms; and (iv) veto rights supermajorities.	
Share certificates	None, the corporate capital is divided into quotas which are not in certificate form. The quotaholders are recorded in the companies' register kept by the Chamber of Commerce.	Yes, the corporate capital is divided into shares which are incorporated in certificates and are recorded in the shareholders' register. The Articles may exclude the issue of the certificates which incorporate the shares or may contemplate the use of a different form of legitimation and circulation.
Capital Contributions	Any element having an economic value may be contributed to the company as capital. Any non-cash contribution (including receivables) must be appraised but the appraiser is freely chosen by the contributor.	The performance of work and services cannot be contributed to the company as capital. Any non-cash contribution (including receivables) must be appraised by an appraiser appointed by the President of the local Court. Under certain conditions: (i) a non-cash contribution (including receivables) can be appraised by an appraiser freely chosen by the contributor; (ii) a non-cash contribution (including receivables) can be made at the fair value of the contributed assets, as recorded in the audited financial statements of the contributor; and a contribution of securities negotiable in a regulated market is permitted without appraisal.
Ancillary performances	The Articles may impose a duty of ancillary performance other than a	The Articles may impose (in addition to the duty to contribute) on the shareholders

	contribution in in money without any limitation in connection with the transfer of the quota.	a duty of ancillary performance other than a contribution in money. The shares with which the duty of such ancillary performance is connected are not transferable without the prior consent of the directors.
Dedicated assets to a specified business activity	The creation of dedicated assets to a specified business activity is not expressly provided for in the law.	The company may create one or more pools of business assets, each of which is allocated in priority and exclusively to a specific business activity.
Transfer of shares/quotas	The Articles may prohibit the transfer of quotas for an indefinite period but the right of withdrawal is granted to quota holders Pre-emption rights are allowed. Transfers are transparent. If quotaholders are natural persons and they are married, the joint marital property regime applies.	Limitations on the transfer of shares may not last more than 5 years. Pre-emption rights are allowed. Limited confidentiality of the transfer.
Ability to issue Bonds	Yes, but only to professional investors	Yes
Quotaholders'/Shareholders' meeting	Written resolutions are allowed. Resolution of the quotaholders' meeting is required in order to amend the Articles, the corporate purpose or significantly the rights of the quota holders' rights 8 days' written notice is required for a quotaholders' meeting, unless the Articles provide for a different notice period.	No written resolutions 15 days' minimum written notice is required for a shareholders' meeting. No written notice is required if holders of the entire share capital are present together with the majority of the management and supervisory bodies.

	No written notice of the meeting is required if holders of the entire corporate capital are present and management and supervisory bodies declare they have been informed as to the agenda, even if they are not physically in attendance.	
Management and supervision	Written resolutions are allowed. Quota holders may be appointed as directors. Directors may be appointed indefinitely. A sole director is allowed Management by one or more quotaholders (also not forming a board of directors) unless a board is appointed. Directors may act jointly or severally; if jointly, board meetings or written resolutions are required depending on the matter to be resolved. An internal supervisory board is not mandatory, unless certain thresholds, eg: regarding number of employees, turnover or assets, are exceeded. If mandatory or provided for in the Articles, internal supervision can be exercised by an internal (sole) auditor or by a board of statutory auditors or, alternatively, by an external auditor or auditing company enrolled in a special register.	No written resolutions. Directors appointed for a maximum period of 3 years. Re-appointment is allowed. A sole Director is allowed. There are three possible types of corporate governance structure: Traditional system: board of directors (management) and board of statutory auditors (supervisory) appointed by shareholders. An internal supervisory board is mandatory. Accounting control is mandatory and is exercised by an external auditor or auditing company enrolled in a special register. Dualistic system: management committee (management) and supervisory committee. The supervisory committee, appointed by the shareholders' meeting, appoints the management committee. Monistic system: board of directors (management), including a supervisory committee appointed from among its members. The board

	The accounting control is mandatory only if certain conditions are met and is exercised by an external auditor or auditing company enrolled in a special register.	is appointed by resolution at the shareholders' meeting.
Conflict of interests	Directors There is a duty to declare to the other directors and to the board of statutory auditors/sole auditor, if any, his/her own personal interest in company matters or transactions by indicating the nature of the transaction, the terms, conditions and origin of the same and the related duty to abstain from carrying out the specific transaction and submit it to the BoD is not expressly provided for in the law, but: (i) contracts entered into with the company by directors who have the power to represent the company and have conflicts of interests to/for their own benefit or for the benefit of a third party can be annulled (annullati) at the request of the company itself, if the conflict was known or detected by a third person; and (ii) the resolutions adopted by the BoD that would not have been approved without the favorable vote of the conflicted director if damage to the company may result, can be challenged	Directors Each director has the duty to declare to the other directors and to the board of statutory auditors any personal interest in company matters or transactions (ie when he/she is acting not only as director, but also as a direct or indirect counterparty of the action to be resolved upon) by indicating the nature of the transaction, the terms, conditions and origin of the same. Where the relevant director is the Managing Director he/she must abstain from carrying out the specific transaction and submit it to the BoD. In the above circumstances, the BoD resolution must clearly indicate the reasons and the appropriateness for the company to approve the relevant transaction. The resolutions adopted by the BoD failing the above requirements or that would not have been approved without the favorable vote of the director who declared an interest, if capable of causing damage to the company, may be challenged by the directors or by the board of statutory auditors (or similar body), within 90 days, but the resolutions remain effective

	(impugnate) by the directors or by the board of statutory auditors (or similar body), within 90 days, but they remain effective vis-à-vis third parties who act in good faith. Quotaholders Not expressly provided for in the law[4]	vis-à-vis third parties who act in good faith. The director is liable for any damages to the company as a result of the action or omission. The director is also obliged not to use for his own benefit or for the benefit of a third party data, information or opportunities of the business of which he becomes aware during his office. Shareholders The resolution approved with the determining vote of members having a direct conflict of interest or on behalf third persons with that of the company may be challenged, if the company is prejudiced, by: (i) the shareholders not present; (ii) the dissenting shareholders; or (iii) those who did not express a vote; (iv) the directors; (v) the supervisory board; (vi) the board of auditors; or (vii) the shareholders if they own sufficient shares with voting rights with reference to specific resolution which represent in aggregate at least 5% of the corporate capital.
Duty of non-compete	The duty of non-compete is not expressly provided for in the law[5]	Directors cannot acquire the status of shareholder with unlimited liability in competing companies nor carry out competitive activities for their own interest or for the interest of third persons, nor be appointed directors or general managers in competing companies unless expressly

4 According to some scholars the discipline of Spa also applies to Srl.
5 According to some scholars the duty of non-compete also applies to Srl.

		authorised by a shareholders' meeting.
	SRL	**SPA**
	Financing	
Financial assistance	Financial assistance is not allowed[6]	Financial assistance is allowed if certain conditions are met
Financing of quotaholders – Right of reimbursement/ subordination	The reimbursement of financing of the quotaholders in favour of the company is subordinated to the payment of other creditors and, if made in the year preceding the bankruptcy of the company, must be repaid.	Subordination applies only to the financings made in favour of the company by those who exercised the activity of direction and coordination towards the company or by other subjects under its control[7]
Financing allocated to a specific business activity	Financing allocated to a specific business activity is not expressly provided for in the law.	Any agreement relating to the financing of a specific business activity may provide that all or part of the cash flows generated from that specified business activity shall be exclusively used to the repayment of all or any part of such financing.

6 According to a recent Italian law (D.L. 179/2012 "Misure urgenti per la crescita del Paese") this rule does not apply to a Srl qualified as "Start-up innovativa" if certain conditions are met.

7 According to only one recent case law and some scholars this rule applies to a Spa regardless of the activity of direction and coordination.

Appendix 2 - Summary of the information and documents required to incorporate an Italian subsidiary

Notarised power of attorney for the execution of the incorporation deed and the fulfilment of the related formalities in cases where the founding members do not appear in person before the notary on the incorporation of the subsidiary.

General information regarding the company to be incorporated (the "**Newco**"):

(a) name of the Newco;

(b) address of the Newco's registered office;

(c) corporate form (SRL or SPA);

(d) detailed description of the corporate purpose (ie of the business activities that will be carried out by the Newco);

(e) duration of the Company (if any); and

(f) fiscal year end*.

** usually the first fiscal year is shorter than the following fiscal years.*

Capitalisation

(a) Share capital amount divided into shares in case of SPA or divided into quotas, which number depends on the number of quota holders and quotas may have different par values.

(b) Corporate capital to be paid in at incorporation. In the case of an SRL, at least: €1.00*.

In the case of an SPA, at least €12,500**, if incorporated by two or more shareholders and €50,000 if incorporated by a sole shareholder.

(a) Bank account at an Italian bank for deposit of the above amounts.

** Law Decree No. 70, 2013 as amended and ratified by Law No. 99 of 9 August, 2013.*

*** Law Decree No. 91, 2014 as amended and ratified by Law No. 116 of August 2014.*

Shareholders/quota holders

(a) Name, address, citizenship, Italian tax code*.

** Hogan Lovells may apply for the issue of an Italian tax code if not already available upon submission of any necessary documents duly signed by the individual shareholder/quota holder or by the legal representative of the same in the case of a corporate entity within two working days of the receipt of the above documents.*

(b) Place and date of birth plus a copy of identity document (for individuals).

(c) Details of the authorised representative plus a copy of his identity document. (for corporate entities).

(d) Number of shares or amount of the quota subscribed by each shareholder/quota holder.

Management

(a) Number of directors (to be inserted in the Articles as a range; eg from 3 to 5, save in the case of the appointment of a Sole director).

(b) Number of directors to be appointed in the Deed of Incorporation.

(c) Term of appointment (if any – normally a three financial year term is indicated).

(d) Full name, place and date of birth, citizenship, residence address and Italian tax code number for each director *.

(e) Copy of identity document of each director.

** the issue of a tax code for directors – Italian or foreign, Italian resident or non-resident – requires two working days from receipt of all necessary instruments and documents duly signed by the directors.*

Supervision

(a) For of an SRL:

full name; place and date of birth; citizenship; residential address; Italian tax code; copy of identity document of the company's accountant (if any) or of the internal auditor or of the members of the BoSA (if any) *

* *for SRLs, the Articles may provide for the appointment of an accountant or internal auditor or a BoSA of three or five members, and their powers and duties. The appointment of an internal auditor or of a BoSA at incorporation is not mandatory unless certain thresholds (eg regarding number of employees, turnover or assets) are exceeded.*

(b) For an SPA with the traditional management system:

full name; place and date of birth; citizenship; residential address; Italian tax code; copy of identification documents of the members of the BoSA (three or five members) *

* *at least one of the effective statutory (ie sindaco effettivo) auditors must be enrolled in the register of accountants kept by the Ministry of Justice, while the others, if not so enrolled with the same register, must be registered in the special professional lists compiled by the same Ministry or be university professors in economics or law. If the BoSA implements the accounting control over the company in addition to the management control, all the members of the BoSA must be registered with the register established by the Ministry of Justice.*

Appendix 3 - Powers, duties and liabilities of directors of an SPA

1. General requirements, appointment and duration

1.1 Under Italian law, the directors of an SPA are appointed by an ordinary shareholders' meeting for a maximum period ("the mandate") of three financial years, unless a shorter period is provided for in the Articles, and may be reappointed for the same maximum period.

1.2 Individuals who have had their civil rights removed or declared by a judge to be disabled or bankrupt cannot be appointed as a director of a company, while in certain cases the office of director is incompatible with other offices or activities (such as the statutory auditors of the same company, public employees, stock exchange agents, members of parliament and of other Italian public bodies and independent authorities; university professors and lawyers cannot be appointed as a sole director or as a managing director but only as a normal director without any delegated managing powers).

1.3 A director may or may not be an employee of the company, or may have some other contractual relationship with the company (such as a consultancy or service relationship) for a purpose other than the office of a director.

1.4 Foreign individuals may be appointed as directors of an Italian company provided that they have applied for an Italian fiscal code (this code is not mandatory for the purpose of a valid appointment of the director upon incorporation or through a resolution of the shareholders' meeting, but it is necessary in order to exercise the office and is aimed at identifying the director vis-à-vis any tax and public authority). There are, however, no tax consequences for a foreign individual in acting as a director of an Italian company but it is essential that he is not physically in Italy for more than 182 days per year, otherwise he would be considered Italian resident and his income, wherever arising, may be subject to taxation in Italy.

1.5 1A director vacates his office on: (i) expiry of his mandate (in this case, the director remains in charge of the ordinary management activity until the newly appointed director accepts his appointment); (ii) resignation; and (iii) revocation by the ordinary shareholders' meeting for whatever reason (if no justified reason exists the director may claim damages against the company).

2. Directors' function and powers

2.1 The general task of the BoD of an SPA as outlined by article 2380-bis of ICC is to implement the company's corporate purpose and to ensure that this is achieved in compliance with the law, by managing and supervising the conduct of the company's business. Therefore, both the ordinary and the extraordinary management of the company are exclusively entrusted to the BoD which is entitled to carry out any transaction aimed either directly or indirectly at implementing the corporate purpose of the company, within the limits set out by the law, by the company's Articles, or by the corporate bodies (ie the shareholders' meeting which appointed the directors or the BoD itself where there has been a delegation of powers to certain directors).

2.2 The conduct of the BoD is coordinated by a chairman (appointed in a shareholders' meeting or selected by the BoD among its members) who usually has the power to call and conduct meetings, unless the company's Articles provide otherwise.

2.3 For the purposes of the daily management of the company, the Articles may entrust the BoD with the power to delegate most of its functions to an executive committee (composed of certain BoD members) or to one or more directors (who are described as “Managing Directors”). In the absence of such delegation of powers, the latter rest with the BoD as a whole and joint signatures are required for any action, whatever its importance or value.

2.4 The scope and limitations of any delegation of powers can be freely tailored by the BoD in lightof the specific operational needs of the company. The functions that cannot be delegated and must be resolved upon collectively are: (i) the issue of convertible bonds; (ii) an increase in share capital upon delegation of the extraordinary shareholders’ meeting; (iii) the drafting and approval of the annual accounts; (iv) resolutions to be taken when the share capital falls below certain thresholds; and (v) the drafting and approval of merger and spin-off plans.

2.5 Usually, a single Managing Director is empowered to carry out the ordinary business and is vested with substantial autonomy within his delegated functions. The appointment of a Managing Director is obviously coupled with the power to represent the company and thus validly undertake obligations on its behalf vis-à-vis third parties. Also the BoD’s Chairman is usually vested with the representation of the company by either the Articles or the resolution of the competent body. Pursuant to article 2384 of ICC, the representative power granted by the Articles or by the competent body to one or more directors is presumed to be a general representative power which involves all rights and obligations of the company vis-à-vis third parties. Any limitation to such representative power cannot be opposed by third parties even if indicated in the company’s Articles or in the resolution of the competent body, unless evidence is given that the third party acted fraudulently against the company.

2.6 Any delegation of powers may be revoked at any time by the BoD, subject to the right of the revoked director to seek indemnification by the company where the delegation was linked to a special remuneration. In any case, the BoD is entitled to reinstate its jurisdiction over specific transactions falling within the delegated powers on a temporary basis as well as to give binding instructions to the delegated director(s) on an occasional basis.

2.7 On the other hand, since the establishment of an “executive” office as a Managing Director creates a segregation of roles within the BoD, non-executive directors are tasked with a specific supervisory duty over the Managing Director’s conduct. In particular, on the basis of the information received from the “executive” directors, non-executive directors must verify the adequacy of the overall organization of the company from an accounting and administrative standpoint and must also verify the financial and strategic plans as well as the general management of the company as reported by the “executive” directors.

2.8 This supervisory role has been strengthened by the Reform which has codified the duty of each director to act on an informed basis. Accordingly, the company must be organised in such a way as to ensure an adequate flow of information among the various members of the BoD. For this purpose, the “executive directors” must ensure that the organisational, management and accounting structure of the company is suitable for its nature and size and must provide the BoD and the BoSA (at least every six months) with information relating to the general outlook of the company, its development and the main transactions carried out by the company or by its subsidiaries.

3. General duties of directors

3.1 The ICC states that all directors must diligently fulfil the duties imposed upon them by the law and by the Company's Articles.

3.2 Each director must therefore comply with the specific duties set out by law in relation to the ordinary and extraordinary management of the company such as, among others: (i) to keep the mandatory corporate books; (ii) to draft and sign the financial statements and directors' report; (iii) to convene the shareholders' meetings when required by law; (iv) to bring any legal action against the shareholders in cases of breach of their obligations; (v) to allow the BoSA to perform its supervision over the company; and (vi) to file application for bankruptcy in the case of the default of the company.

3.3 As far as general duties are concerned, directors are primarily bound by the following:

(a) the duty of care/diligence. All directors must diligently fulfil the duties imposed upon them by law and by the Articles with the standard of diligence required by the nature of their office and taking into account the specific competence of the director;

(b) the duty of loyalty and duty to act at arm's length. Such duties pertain, in particular, to the assets of the company and, therefore, directors must not misappropriate the assets of the company or use these for purposes other than the company's corporate objects;

(c) the duty to declare to the other directors and to the BoSA any personal interest in company matters or transactions (ie when he is acting not only as director, but also as a direct or indirect counterparty of the transaction to be resolved upon) by indicating the nature of the interest in the transaction, and its terms, conditions and origins. Where the relevant director is the Managing Director, he must also abstain from carrying out the specific transaction and submit it to the BoD. In the above circumstances, the BoD resolution shall clearly indicate the reasons and the opportunity for the company to approve the relevant transaction.Resolutions adopted by the BoD which do not observe the above requirements or which have been approved with the vote of the interested director may, if they are able to cause damages to the company, be challenged by the directors or by the BoSA, but they are effective vis-à-vis third parties who act in good faith. A director is also obliged not to use for his own benefit or for the benefit of a third party data, information or opportunities of the business of which he becomes aware during his office.

(d) the duty to carry out business in the best interests of the company and all respects the duty of loyalty, disregarding any other interfering interest, including those of other group or affiliated companies, notwithstanding possible "direction and coordination" policies affecting the free decision-making process of the company;

(e) the duty to act on an informed basis. For this purpose, each director is entitled (and indeed should regard himself as required) to ask the Managing Director or any other executive director/body constantly to provide the BoD with all information related to the management of the company; and the duty not to compete with the company. Unless previously authorised by the shareholders' meeting or by the company's Articles, a director of an SPA cannot be a partner with unlimited liability in a competitor of the company, nor a director or a general manager of a competitor of the company, nor carry out any activity which may be considered as being in competition with the company's activity for his own interest or on behalf of a third party. In cases of breach of such duty, the director may be revoked by the BoD and shall be liable for any damages suffered by the company.

3.4 A Managing Director is subject to the same duties and, in addition, as mentioned in paragraph 2.8 above, is under a duty to organise the structure of the company and periodically report to the BoD.

4. Directors' potential liabilities

Liabilities under civil law

4.1 A director may be liable under civil law towards the company, the company's creditors and/or each shareholder individually and third parties as follows:

Liability vis-à-vis the company

4.2 In general terms, a director may be held liable towards the company (jointly with all the other directors in respect of the activities of the BoD, or alone in respect of the delegated activities) for actions, which, according to common standards of diligence and prudent practice, may not be considered proper management actions/reactions in given circumstances. In particular, a director may be held liable for failing to fulfil his duties at law and under the Articles using the standards of diligence and duty of care required of any mandate holder, thus causing the company actual damage. Please note that both the breach of a duty and the actual damage directly produced by such breach are the two necessary elements in order to consider a director liable under civil law vis-à-vis the company.

4.3 Moreover, failure to supervise over the respective mandates or awareness by any director of circumstances that may damage the company entails a specific cause of liability. Therefore any negligent action/omission by a Managing Director that may harm the company, even within the functions delegated to the Managing Director, may also trigger liability for the non-executive directors if the latter: (i) were informed by the Managing Director himself of the relevant conduct and failed to supervise properly; or (ii) were not informed by the Managing Director of the general management but nonetheless became aware of the adverse circumstance and failed to take any necessary measure to prevent or limit the damage; or (iii) were not informed by the Managing Director of the general management of the company nor were aware of the adverse circumstance but failed to ask for information reasonably needed to take informed (and proper) management decisions.

4.4 A discharge of such liability can be obtained by a diligent director who promptly asks the BoD to indicate, in the book of the minutes of BoD meetings, his disagreement with the resolution adopted by the BoD and communicates in writing such disagreement to the chairman of the BoSA.

4.5 Pursuant to articles 2393 and 2393-bis of the ICC, an action may be brought against the director by the company (based on a resolution of the shareholders' meeting) or by shareholders owning a minority stake of the company representing one-fifth of the company's share capital (or such different proportion as may be set out by the company's Articles but in any event not higher than one-third) within five years of the termination of that director's mandate.

4.6 The shareholders' meeting may resolve upon the waiver of such an action or upon a stipulation of a settlement agreement with the directors, provided that this is not opposed by members representing at least one-fifth of the company's share capital.

4.7 Even if the action against a director/s is brought by the shareholders holding a minority stake of the company, any damages awarded by the judge must be paid by the liable director to the company.

Liability vis-à-vis the company's creditors

4.8 All directors may be held liable to the company's creditors for failure to fulfil their duties related to the preservation of the integrity of the company's assets and if, because of their mismanagement, the creditors are unable to satisfy their claims.

Liability in tort vis-à-vis each shareholder individually and third parties

4.9 A director will be liable for any fraudulent or negligent behaviour that directly damages a single shareholder or a third party. This is an ordinary action for damages ("liability at tort"). The claim is subject to a five-year time bar, starting from the day in which the act was committed and subject to proof of the "chain of causation" (*nesso causale*) between the unlawful act/omission and the damage suffered by the shareholder/third party. The claim may be brought against the directors who are still in office, as well as those who are no longer in office. Third parties (for instance, former shareholders) can waive their right to start legal action against the directors of a company.

Report to the Court

4.10 Pursuant to article 2409 of the ICC, shareholders holding a minority stake in the company, which represents one-tenth of the company's share capital (unless the company's Articles provide a lower figure) are allowed to apply to petition the Court where there are grounds for suspicion that one or more directors, in violation of their duties, has acted with serious irregularity in the management of the company and such irregularities are able to cause damages to the company or to one or more of its subsidiaries. The Court is entitled to order inspections at the company's offices 4 and can adopt suitable measures in order to remedy the irregularities. In the most serious circumstances the Court may remove all the directors and statutory auditors from office and appoint a judicial director which is entitled to bring a legal action against the directors responsible.

Criminal and administrative liability

4.11 Directors are liable also under criminal and administrative laws. The breach of some of the duties imposed on directors may be subject to criminal penalties. Therefore, should a breach of these duties occur, directors are liable both under civil and criminal laws. Such criminal liabilities include inter alia:

(a) forgery of corporate communications and financial prospectus;

(b) unlawful reimbursement of shareholders' contributions;

(c) unlawful distribution or profits which were not earned by the company or reserves which cannot be distributed;

(d) illicit transactions in the company's shares or in the shares of the company's subsidiary which cause damage to the share capital;

(e) transactions which cause damage to the company's creditors (including reduction of the share capital, merger or de-merger);

(f) fictitious increase in the company's capital and overestimation of the capital contributions;

(g) fraud with respect to the company's assets;

(h) Market manipulation (*aggiotaggio*);

(i) obstruction of supervision over the company by the statutory auditors, the shareholders or other corporate bodies;

(j) fraudulent obstruction of the supervisory activity of public regulators (Consob and Bank of Italy in this case) whether by positive actions or omissions;

(k) crimes provided for by accounting, safety and health and insolvency laws;

(l) omission to provide material information or use of false information for the purpose of granting or increasing a financing (*mendacio bancario*);

(m) bankruptcy of the company as a result of fraudulent actions of its director/s (by destroying or hiding the company's assets or the corporate and accounting books; or by declaring non-existent liabilities in order to jeopardise creditors and to gain an unjustified profit) (*bancarotta fraudolenta*);

(n) bankruptcy of the company as a result of the following actions carried out by a company's director: personal expenses in excess of the company's assets; incautious transactions which significantly reduce the company's assets; negligent actions aimed at illegitimately delaying a bankruptcy procedure; serious increase of the company's default without applying for bankruptcy; and breach of the obligations assumed in accordance with a previous arrangement with creditors (bancarotta semplice);

(o) illegal request for credit facilities (by hiding the company's distress); and

(p) declaration of non-existent creditors or failure to disclose the existence of other assets of the company;

4.12 A criminal penalty is provided for in cases of violation of the prohibition against the directors of a bank undertaking obligations of whatever nature (or entering into a sale and purchase agreement directly or indirectly with the bank) unless the prior unanimous approval of the BoD and of the BoSA is obtained. The same prohibition applies in relation to financing agreements entered into by the company with a company of the same banking group. In such a case, the prior approval of the transaction by the contracting party and by the holding company is required.

4.13 Moreover, administrative fines are provided for a number of omissions (including failure to file documents and the annual financial statements with the register of enterprises; failure to call the shareholders' meeting when required by the law or by the By-laws; and failure to comply with certain provisions of the Consolidated Banking Act) or irregularities (including tax violations and violations of money-laundering regulations).

Further information

If you would like further information on any aspect of this publication, please contact a person mentioned below or the person with whom you usually deal.

Antirust and Competition

Sabrina Borocci

Partner, Milan
T +39 02 7202 52384
sabrina.borocci@hoganlovells.com

Banking & Finance

Carlo Massini

Partner, Milan
T +39 02 7202 52394
carlo.massini@hoganlovells.com

Business Restructuring and Insolvency

Pierantonio Musso

Counsel, Milan
T +39 02 7202 52315
pierantonio.musso@hoganlovells.com

Capital Markets

Federico Del Monte

Partner, Milan
T +39 02 7202 52309
federico.delmonte@hoganlovells.com

Corrado Fiscale

Partner, Milan
T +39 02 7202 52329
corrado.fiscale@hoganlovells.com

Corporate

Luca Picone

Country Managing Partner, Rome
T +39 02 7202 52336
luca.picone@hoganlovells.com

Marco Rota Candiani

Partner, Milan
T +39 02 7202 52380
marco.rotacandiani@hoganlovells.com

Francesco Stella

Partner, Milan
T +39 02 7202 52379
francesco.stella@hoganlovells.com

Employment

Vittorio Moresco

Partner, Milan
T +39 02 7202 52333
vittorio.moresco@hoganlovells.com

Financial Institutions

Jeffrey Greenbaum

Partner, Rome
T +39 06 6758 2328
jeffrey.greenbaum@hoganlovells.com

Government Regulatory

Francesca Angeloni

Partner, Rome
T +39 06 6758 2346
francesca.angeloni@hoganlovells.com

Intellectual Property

Giovanni Ghirardi

Partner, Milan
T +39 02 7202 52392
giovanni.ghirardi@hoganlovells.com

Luigi Mansani

Partner, Milan
T +39 02 7202 52347
luigi.mansani@hoganlovells.com

Tax

Serena Pietrosanti

Counsel, Rome
T +39 06 6758 2306
serena.pietrosanti@hoganlovells.com

Litigation and Arbitration

Andrea Atteritano

Partner, Rome
T +39 06 6758 2336
andrea.atteritano@hoganlovells.com

Christian Di Mauro

Partner, Milan
T +39 02 7202 52328
christian.dimauro@hoganlovells.com

Francesca Rolla

Partner, Milan
T +39 02 7202 52349
francesca.rolla@hoganlovells.com

Strategic Operations, Agreements and Regulation

Marco Berliri

Partner, Rome
T +39 06 6758 2329
marco.berliri@hoganlovells.com

Massimiliano Masnada

Partner, Rome
T +39 06 6758 2342
massimiliano.masnada@hoganlovells.com

Alicante
Amsterdam
Baltimore
Beijing
Birmingham
Boston
Brussels
Budapest*
Colorado Springs
Denver
Dubai
Dublin
Dusseldorf
Frankfurt
Hamburg
Hanoi
Ho Chi Minh City
Hong Kong
Houston
Jakarta*
Johannesburg
London
Los Angeles
Louisville
Luxembourg
Madrid
Mexico City
Miami
Milan
Minneapolis
Monterrey
Munich
New York
Northern Virginia
Paris
Perth
Philadelphia
Riyadh*
Rome
San Francisco
São Paulo
Shanghai
Shanghai FTZ*
Silicon Valley
Singapore
Sydney
Tokyo
Ulaanbaatar*
Warsaw
Washington, D.C.

Legal Services Center: Berlin

*Our associated offices

www.hoganlovells.com