CBA

HIGHLIGHTS **2021**

It's a new year and we are in it to win it! We miss welcoming clients and colleagues into our offices, but, you don't say... we are keeping busy.

The Highlights here below have been drafted to offer some news and selling points on what is going on in Italy. We hope they can be interesting for you and your clients.

Remember, from 2020, *it's a marathon, not a sprint*. It still is. We're still here, and we're still in this.

Your teams, our teams are incredible. We are here for you, and glad to answer any question you might have.
From the bottom of our hearts, we hope you are all safe and in good health.

CBA team

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1. TAX

Withholding tax exemption on dividends and capital gains for EU/EEA investment funds

The 2021 Budget Law introduced a revolutionary change in law. In brief, Article 1, paragraphs 631-633, of Law No. 178/2020, provides for a tax exemption in the hands of EU/EEA investment funds which will be effective from 1 January 2021 with regards to capital gains on substantial shareholdings and dividends deriving from their direct investment into Italian resident companies. This new exemption has been designed with the purpose of eliminating the tax discrimination suffered by EU/EEA funds vis-à-vis Italian funds – contrary to EU law. It should have the effect of increasing inbound investments made by EU/EEA investments funds. In brief, the new tax provision repeals the 26% flat tax provided for capital gains on substantial shareholdings and dividend distributions deriving from direct investments into Italian tax resident companies by qualified foreign investments funds. In particular, this tax exemption applies to undertakings for collective investment set up either in compliance with Directive 2009/65/EC (UCITS IV Directive) or in an EU Member State or EEA Member State exchanging adequate information for tax purposes, and managed by an AIFM subject to regulatory supervision in the country where it is established in accordance with Directive 2011/61/EU (AIFM Directive). According to our view the exclusion of retroactive effects and the lack of foreign investment funds established in third countries (e.g., the UK from January 2021 and the US) from the subjective scope of the new tax exemption could still constitute a breach of EU law.

First application of the Digital Services Tax (DST)

In 2021 the first application of the Digital Services Tax (**DST**) will take place, with respect to 2020 fiscal year.

The DST was enacted on the basis of the guidelines issued by the European Commission in the proposed digital services tax Directive set out in COM (2018)148. More precisely, the DST applies to persons, resident and non-resident in Italy for tax purposes, carrying out a business activity and meeting, individually or at group level, both of the following requirements during a fiscal year:

(i) a total amount of worldwide revenues not lower than EUR 750 million; and

(ii) a total amount of revenues arising from digital services realised in Italy not lower than EUR 5.5 million.

In principle, the DST applies to revenues arising from "digital services":

a) digital interface advertising;
b) intermediation services (the making available to users of a multi-sided digital interface which allows users to find other users and to interact with them, and which may also facilitate the provision of underlying supplies of goods or services directly between users); and
c) transmission of data collected about users and generated from users' activities on digital interfaces.

Indeed, certain exemptions apply, including revenues arising from services supplied to associated companies.

The DST applies both to business-to-business and business-to-consumer transactions.

For the purposes of the DST, revenues are taxable if users of digital services are located in Italy. In this respect, the DST is calculated by applying a 3 % rate to the taxable revenues realised in Italy on an annual basis.

For 2020 fiscal year, taxable persons are required to pay the DST by 16 February 2021 (deadline to be extended to 16 March 2021[1] based on a Law Decree dated 14 January 2021, pending publication on the Italian Official Gazette) and to file a DST return with the Italian tax authorities by 31 March 2021.

First application of mandatory disclosure under DAC 6

In 2021 intermediaries and taxpayers will have to notify reportable cross-border arrangements to the Italian tax authorities. This is a consequence of Legislative Decree No. 100/2020 (and the following Ministerial Decree of 17 November 2020), implementing the provisions set forth by Directive 2018/822/EU (**DAC 6**), which provides the mandatory automatic exchange of information between tax administrations of Member States in the field of taxation in relation to certain cross-border arrangements, whose hallmarks indicate a potential tax avoidance.

More precisely, the following deadlines to report cross-border arrangements for intermediaries and relevant taxpayers are prescribed:

(i) any reportable cross-border arrangements where the first step was implemented between 1 July 2020 and 31 December 2020 must be reported by 31 January 2021;
(ii) any reportable cross-border arrangements where the first step was implemented between 25 June 2018 and 30 June 2020 must be reported by 28 February 2021;
(iii) starting from 1 January2021, any reportable cross-border arrangements must be reported within a 30-day period.

The reporting obligations at issue should affect the approach on international tax planning adopted by the multinational groups and related intermediaries involved.

1. Pending publication, the deadline for filing the relevant DST tax return remains to be confirmed.

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2. TAX LITIGATION

New provisions related to APAs

The 2021 Budget Law has provided for relevant modifications to the Italian procedure applicable to Advance Pricing Agreements (**APAs**) in order to grant to taxpayers, the faculty of applying retroactively the effect of the agreement reached with the Italian tax authority ("rollback") in both unilateral and bilateral/multilateral APAs.

Art. 31 - ter of Presidential Decree No. 600/1973 now grants to taxpayers the faculty to extend the effects of unilateral, bilateral or multilateral APAs up to the fiscal year that is still open to assessment by the Italian tax authorities according to the relevant statute of limitations. In any case, the rollback applies provided that (i) the circumstances under which the agreement has been reached also occurred in the previous fiscal years; and (ii) no tax investigations have been formally started by Italian tax authorities in respect to the same fiscal years. Moreover, for bilateral or multilateral APAs the rollback is conditional upon the formal agreement of the foreign competent tax authority. In case of application of the rollback, the taxpayer is entitled to amend previous tax returns, and pay any additional income tax due, without any administrative penalty.

Moreover, in order to share the administrative costs necessary to implement bilateral or multilateral APAs, the Budget Law provides for that the filing of a ruling request for this kind of APAs is conditional upon the payment of an administrative fee equal to:

(i) EUR 10,000 where the overall turnover of the group is lower than EUR 100,000,000;

(ii) EUR 30,000, where the overall turnover of the group is higher than EUR 100,000,000 and lower that EUR 750,000,000;

(iii) EUR 50,000, where the overall turnover of the group is higher than EUR750,000,000.

New Mutual Agreement Procedure (MAP)

Legislative Decree No. 49/2020 has implemented Council Directive (EU) 2017/1852 regarding tax dispute resolution mechanisms in Italy. The Legislative Decree provides for a binding and mandatory procedure for the resolution of disputes between Italian and other European Union (EU) tax authorities arising from the interpretation and application of tax treaties, including the elimination of double taxation in connection with the adjustment of profits of related or associated enterprises. It also introduces the faculty

for Italian taxpayers to start an arbitration process if no agreement is reached by the tax authorities, by requesting that an Advisory Commission is instituted.

The new rules apply to MAPs filed as of 1 July 2019 with reference to fiscal years starting from 1 January 2018 onwards.

Italian Supreme Court decision after ECJ "Danish" cases

After crucial decisions by the Court of Justice of the European Union (Case No. 115/16, N. Luxemburg; 118/16, X Denmark; 119/16, C. Denmark; 299/16, Z Denmark of 26 February 2019 – better known as "Danish" cases) on the meaning of "beneficial owner" for the purposes of applying the exemption on withholding taxes pursuant to Directive 2003/49, year 2020 registered an important sentence by the Italian Supreme Court.

Given the substantial interpretation of the meaning of "beneficial owner" adopted by the EU Court, even the fact that the recipient of the interest does not meet the legal requirements is not decisive for the purposes of excluding exemption from withholding tax. On the contrary, the interest might be exempt if the recipient Company transfers the amount to a beneficial owner established in the European Union who also satisfies all the conditions provided by Directive 2003/49 for the purposes of exemption.

In its judgment No. 14756 of 10 July 2020, the Italian Supreme Court agreed with the said substantial interpretation of "beneficial owner", establishing that this can be identified in the parent Company, and not in the Companies at the top of the chain of control, despite the fact that it had transferred the interests back because of its role as a holding Company and as a manager of financial flows within the Group. This is because (i) no legal obligation to transfer to third parties was found and ii) the role played by the sub-holding within the Group was assessed.

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3. REAL ESTATE/ENERGY

2021 will certainly be a year of deep improvement for real estate in Italy, considering new legislative provisions set forth by Law Decree No. 34/2020 ("Decreto Rilancio"), as part of the real estate renovation strategy defined by the Legislator. In this regard, the most innovative and interesting aspects that have been recently introduced (in addition to the expansion of tax reliefs related to renovations, energy efficiency works, anti-seismic measures, etc.) concern both the possibility for professional operators to benefit of such incentives in relation to their assets and the possibility of transferring, without limitations, such tax credits to third parties (even including financial intermediaries): this way, a market for these credits has been developed, which have therefore become securitizable assets.

With reference to the securitization market, amendments to Law No. 130/1999 have implemented real estate securitization transactions (not only related to non-performing exposures), allowing the structuring of particularly efficient investment models also with reference to tax aspects, making it possible for certain foreign investors to implement RE business in Italy without being levied by any taxation (in the form of direct taxation or withholding taxes).

Finally, moving on to the real estate energy sector, in the light of the experiences of recent years and the current situation, sensitive to climate change, a renewed interest in such a sector is being met, with particular reference to wind and photovoltaic energy production, due to new investment processes and the development of the so-called grid parity, together with new models of tax efficiency: in this regard, real estate alternative investment funds to be structured in order to benefit from the aforementioned tax efficiencies and contemplate efficiency improvements in terms of governance will be the most suitable investment vehicles.

Hydrogen and the European decarbonisation process

A "Climate Neutral Europe" is the main objective of the European Green Deal, the strategy presented by the European Commission at the end of 2019 that aims to reach net-zero greenhouse gas emissions by 2050 in the European Union. To this purpose, hydrogen is considered as having a key role in the European and in the Member States' national energy strategies.

Currently, hydrogen is commonly obtained through a process called "reforming", which consists in the conversion of fossil fuels (for instance, coal and natural gas) into hydrogen (**grey hydrogen**). The downfall of the production of grey hydrogen is the elevate level of polluting emissions emitted during the reforming of the fossil fuels. To miti-

gate these negative effects, the thermochemical process of reforming can be paired with Carbon Capture and Storage (**CCS**) technologies, allowing for the production of hydrogen with a reduced environmental impact (**blue hydrogen**). Finally, hydrogen obtained by breaking down water molecules through electrolysis processes (**green hydrogen**) is the real key to the whole hydrogen-based strategy. Indeed, if the electrolysis process is powered by energy obtained through renewable sources, the production of hydrogen is completely sustainable and clean.

Hydrogen, paired with other kind of clean energies, is the key to drastically reduce greenhouse gas emissions. Inside an integrated energy system, hydrogen could support the decarbonisation of heavy industry, transport, power generation and buildings across Europe. This gas has a double use: indeed, it can be employed as a feedstock for energy processes and as an energy vector. Hydrogen can be produced from renewable energy sources, transported, stored and employed for several uses like a gas and its versatility and its functionality could represent a solution for the decarbonisation of the so-called "Hard-to-Abate" sectors.

The role of Italy as the European hydrogen hub

Italy needs to promptly boost its decarbonisation efforts in order to achieve the objectives set in the European Green Deal by 2050. Hydrogen could represent an instrument to fully exploit the resources and the potential of the Italian renewable energy system, allowing also to create around it a manufacturing industry of a significant volume.

If correctly developed and integrated with the existing renewable energy production systems, hydrogen could play a key role in the Italian green transition, but not only. It could also represent an important driver in boosting the role of Italy in a future hydrogen-integrated economy.

Italy's strategic position

Italy and the development of a hydrogen-integrated economy are tightly interlinked. Indeed, the geographical position and the environmental characteristics of the Italian peninsula, especially of its southern regions, make it more efficient and more cost-effective to produce green hydrogen using electricity produced by PV and wind plants than compared to the rest of Europe. Given these peculiar features and the rapid reduction of the production costs of renewable energy, it is estimated that, in Italy, the production of green hydrogen could outcompete the production of grey hydrogen more rapidly than in any other European member State.

Italy also benefits of a strategic position between the European continent and North Africa. The volume of the hydrogen production from renewable energy sources in North Africa could be scaled up significantly over the next few years, and Italy features one of the most advanced gas transmission grids in Europe, connecting continental Europe

and North Africa. Therefore, it could become the first major hydrogen hub in the European Union, functioning as a gateway between these two regions. Indeed, hydrogen could be channelled through the existing pipelines, at first blended with natural gas and subsequently, after the modernisation of the entire grid, on its own. Snam, one of the most prominent companies active in the energy and infrastructure sectors in Europe, is strongly supporting the role of Italy in the hydrogen transition, promoting its role as a future green hydrogen hub.

The Italian hydrogen supply chain

Finally, at the moment, Italy and Germany feature promising national hydrogen supply chains. Indeed, besides Snam, several Italian companies are significantly investing in R&D and are already producing innovative solutions for the production, transport and storage of green and blue hydrogen, as well as new technologies and hardware for its final utilisations. For instance, Industrie de Nora manufactures highly advanced electrolysers and fuel cells for the production and storage of green hydrogen.

Building up the production capacity of hydrogen-related technologies will naturally drive down the cost of green hydrogen production and will allow to reach sooner the technological maturity along the entire supply chain.

Given these premises, the next years will be crucial for a significant growth of an Italian hydrogen supply chain: becoming a landmark in the development and mass-scale production of hydrogen-related technologies will naturally pair Italy's potential role as the European main hydrogen hub. It has been estimated that the potential value of the hydrogen supply chain in Italy will grow significantly over the next thirty years, amounting to EUR 21 billion in 2050.

The Italian renewable energy market

The Italian secondary renewable energy market has been growing and consolidating over the last years, reflecting the extent to which the sector has become financialised, marketised and privatised. Many international players such as private equity firms, infrastructure funds, pension funds and insurance companies have been significantly interested in buying and selling already functioning PV and wind plants over the last few years.

However, in parallel to the consolidation of the secondary market, Italy has witnessed a significant increase in the volume of its primary renewable energy market, namely the production and development of technologies and infrastructures for the production and storage of clean energy. This has to do mainly with the achievement of the grid parity between the production of energy from renewable energy sources and fossil fuels, which stimulated a renewed interest in the development, construction and management of this kind of assets.

This trend depends mainly on the rapid advancement of the technologies employed to build and manage power plants employing renewable energy sources: indeed, over the last few years, the production of clean energy has become a more interesting and less risky business to invest in. The competition in the market has also greatly increased, given the large volume of MW photovoltaic grid connected power plants and wind plants installed in the last few years.

The boost in the installation and investments in energy plants powered by renewable sources has been mainly urged by the issuance of the European Green Deal and by the Integrated National Energy and Climate Plan (**PNIEC**), which have set ambitious goals for the reduction of carbon emissions in Italy. Namely, the PNIEC provides that Italy will have to achieve an amount of energy produced from renewable sources representing the 30% of the total gross energy consumption in Italy by 2030. To reach this goal, the PNIEC aims to add 32 GW of solar and 9 GW of wind capacity until that date.

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4. RESTRUCTURING AND INSOLVENCY

2021 should be a turning point for business crisis regulation.

As a matter of fact, further to the COVID-19 emergency, the entry into force of the "Code of the business crisis and insolvency" introduced by Legislative Decree No 14/2019 (hereinafter, the "Code"), originally set for 15 August 2020, has been postponed to 1 September 2021.

The Code has also undergone certain relevant amendments brought by Legislative Decree No. 147/2020 concerning the crisis management procedures, which will become effective together with the Code itself, save for certain innovations relating to the identification of the entities competent in relation to the establishment of the corporate organisational structures and to the establishment of the Register of the Business Crisis Managers ("Albo dei gestori della crisi"), which have been effective since November 2020.

As of 1 September 2021, the Code will replace both the Italian Bankruptcy Law (Royal Decree No. 267/1942) and the Law on Over-Indebtedness (Law No. 3/2012), which have also been subject to amendments within the framework of the pandemic emergency legislation.

As to the Italian Bankruptcy Law, Law Decree No. 125/2020 (converted into Law No. 159/2020) has introduced significant innovations in relation, in particular, to the role played within the arrangement with creditors procedure by the financial administration and the entities responsible for the management of mandatory assistance and social security. Further derogation provisions to the benefit of businesses are provided by Law Decree No. 23/20 (converted into Law No. 40/2020).

As to the Law on Over-Indebtedness, Law Decree No. 137/2020 (converted into Law No. 176/2020) provided, *inter alia*, for the extension to shareholders with unlimited liability of the effects of the crisis composition agreement, the introduction of so-called family over-indebtedness procedures, and the inclusion of members of partnerships within the definition of "consumers".

Considering that the emergency legislation paralysed bankruptcy filing processes only until 30 June 2020, we will soon have the chance to test the new crisis management instruments.

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5. REGULATORY RECOGNITION FOR RESTRUCTURING FUNDS

In 2020, although from a mere accounting point of view, a first authoritative recognition occurred – from the Italian regulatory authorities (Consob/Banca d'Italia/IVASS) – of the so called "Fondi di Ristrutturazione" – "Restructuring Funds", a specific and peculiar kind of Alternative Investment Fund (**AIF**). This is an innovative tool/strategy to address the general, wider and multifaceted NPL (non-performing loans) issue from a banking perspective, focusing in particular on UTPs (unlikely-to-pay loans); a half-way strategy between a traditional "hold/forbearance" approach and a traditional "portfolio reduction" approach, producing a change in the type of exposure. Such a new, complementary, tool is aimed at overcomings market inefficiencies of other available "traditional" approaches/tools and, at the same time, at helping to effectively reduce the legacy assets at bearable levels. Nevertheless, this is a "debtor-level" approach aimed at concentrating and coordinating all the exposures of the banking system vis-à-vis the same debtor, as a precondition for a successful restructuring process of corporate borrowers in distress. Such a tool could hopefully gain greater, specific recognition and discipline in the regulatory framework in the coming years. This could boost the use of this model, following certain pioneering, successful experiences already present on the market.