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MERGER AND ACQUISITION

Recommendation No. 180/2019 of the Milan Notarial Council concerning mergers and demergers

With regard to the exemption from the drafting of the updated balance sheet, in addition to the cases provided for by law, the Milan Notarial Council highlights other cases of such exemption.

The Milan Notarial Council (recommendation no. 180/2019) states that, in some cases of mergers and demergers, an exemption from the drafting of the updated balance sheet could apply.

In particular, the Italian law provides that the directors of the companies involved in the merger (or demerger) must draft an updated balance sheet, if the last approved financial statements refer to a date longer than six months from the filing of the merger plan. Such updated balance sheet is not mandatory if all shareholders and holders of financial instruments with voting rights waive it. The law establishes that in the following cases the updated balance sheet shall not be required even without the prior consent of the shareholders and holders of voting rights:

- a. Incorporation of one or more companies into a company that holds more than 90% of the shares. Although, in this case, the minority shareholders of the merged company have the right to transfer their shares at a price determined on the basis of the criteria for withdrawal;
- b. Demerger that is carried out through the establishment of one or more new companies when the shares are allotted proportionally.

The Milan Notarial Council has deemed that the exemption from the drafting of the updated balance sheet also applies to other operations not expressly provided for by law, but in accordance with the purpose of the law. In particular, it highlighted the following cases:

- a. Incorporation of a wholly-owned company;
- b. Mergers and demergers involving companies in which the same corporate structure is replicated (i.e. the same shareholders with the same proportions and same rights).

INTELLECTUAL PROPERTY

Judgment No. 22984/2019 concerning the European and Italian patent

The Italian Supreme Court stated that the validity of the Italian patent must be assessed by referring to the internal laws.

The Italian Supreme Court, with the judgment No. 22984/2019, deals with the case of a European patent revoked for lack of patentability requirements.

The Italian Supreme Court states that even if the opposition to the European patent is accepted, the Italian patent does not automatically lose its effectiveness.

In this respect, the Court argues that the Italian patent is a title other than the European patent. The validity of the Italian patent must be assessed by referring to the internal laws. Indeed, the validity/invalidity of the Italian patent does not depend on the validity/invalidity of the European patent.

TAX

New provisions concerning the patent box regime introduced by the Growth Decree

The ruling procedure is no longer mandatory and the taxpayer can determine the tax benefit autonomously. In this case, penalties shall not be applied if the document certifying the determination of the tax benefit is drafted.

The Growth Decree has introduced some new provisions in relation to the so called “patent box” preferential regime.

The Patent box is an optional tax regime for income arising from the use of intangible assets. In some cases, in order to access to the tax benefit, Italian law provides for the submission of a ruling procedure (the ruling is mandatory in the case of direct use of the intangible asset and optional in the case of indirect use in intra-group transactions). This ruling establishes the methods and criteria for determination the tax benefit. This ruling procedure has in some cases involved long and complex discussions with the Italian tax authorities.

The Growth Decree authorized taxpayers to determine the tax benefit themselves, even in cases where the ruling was previously mandatory. If the taxpayer decides not to submit the ruling and, therefore, to determine the benefit autonomously, the amount of the tax benefit must be distributed into three fiscal years.

However, in order to benefit from the penalty protection (i.e. non-application of penalties in case of adjustment of the determination of the tax benefit by Italian tax authorities) the taxpayer shall have to draft a document certifying the methods and criteria for determination the tax benefit and other information regarding the structure and activities of the company. The penalties will be applied instead if the taxpayer has not drafted such document. On July 30, 2019, the Italian tax authorities issued some guidelines concerning the information needed to properly draft such document.

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