

**NEWS FROM THE FIRM**

**The firm strengthens its Administrative and Regulatory Law practice in Rome with Elenia Cerchi and Elisabetta Pistis**

[Elenia Cerchi](#) and [Elisabetta Pistis](#) (formerly partners of a leading Italian administrative law firm) have joined the firm as partners. The arrival of Elenia and Elisabetta has significantly strengthened the firm's Administrative and Regulatory Law [practice](#) and its Rome office.

**Legal500 ranking released**

The specialist publisher Legal500 lists the firm under **Data Privacy and Data Protection**, **Luxury goods**, **TMT**, **Intellectual Property**, **Commercial**, **Corporate and M&A**, **Dispute Resolution**, **Banking & Finance**: borrower side and **Employment** categories in the Legal500 EMEA 2020. Partners [Domenico Colella](#) (TMT), [Matteo Orsinger](#) (Intellectual Property) and [Mario Ortu](#) (Commercial, corporate and M&A) enter the **Hall of Fame**, while [Nicola Barra Caracciolo](#) (Commercial, corporate and M&A), Marco Consolani (TMT: Information Technology), [Alessandro De Palma](#) (Employment), [Pierfrancesco Giustini](#) (Luxury Good; Commercial, corporate and M&A), [Fabrizio Sanna](#) (Data Privacy and Data Protection; Luxury Good; Intellectual Property) are among the leading names in their categories.

**The firm advises Unicredit in relation to the financing of a real estate project in Turin**

A team led by [Manfredi Leanza](#) and including [Federica Paniz](#), [Mariachiara Crea](#) and [Riccardo Valgò](#) assisted Unicredit bank in relation to the financing of a real estate project in Turin.

**The firm in the renegotiation of the financial indebtedness of the real estate fund "Geo Ponente"**

A team led by [Manfredi Leanza](#) and including [Federica Paniz](#) and [Mariachiara Crea](#) assisted Banca Imi and Intesa Sanpaolo in relation to the financing of the Geo Ponente fund.

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**COVID-19 SPECIAL**

**The firm contributed to the book on "Covid-19 Governmental Financial Supporting Programmes for Business (Europe/US/Russia)".**

**CAPITAL MARKETS**

**ESMA public statement "COVID-19: reminder of firms' MiFID2 conduct of business obligations"**

On 6 May 2020, ESMA issued a [public statement](#) highlighting the risks for retail clients when trading under the current highly uncertain and unprecedented market circumstances caused by the spread of COVID-19. In such a context, ESMA reminds firms of their obligation to act honestly, fairly and professionally in accordance with the best interests of their clients when providing investment or ancillary services and to comply with all relevant MiFID 2 conduct of business and related organisational requirements, especially when providing services to investors with limited investment knowledge or experience, who decide to invest during these times of intensified market volatility.

**MEDIA**

**AGCOM on the suspension of terms**

In the context of the current Coronavirus emergency, [Law Decree no. 18 of 17 March 2020](#) (the so-called "Cura Italia" Decree) provided for the suspension of all terms relating to administrative proceedings while simultaneously providing for public administrations to adopt "any appropriate administrative measure to ensure, in any event, the reasonable duration and to expedite the conclusion of proceedings" (Article 103 of the Cura Italia Decree). Pursuant to such provision, on 18 March 2020 the Italian Communications Authority ("AGCOM") issued [Resolution no. 130/20/CONS](#) in order to clearly identify all proceedings that shall not be subject to the term suspension provided under Article 103(1) of the Cura Italia Decree. These include, in particular: (a) *ex parte* proceedings carried out with the presence of only one party, (b) urgent interim proceedings involving copyright matters, (c) proceedings for the adoption of urgent measures in light of the COVID-19 emergency and (d) conciliation hearings for the resolution of user-operator disputes on AGCOM'S online platform "Conciliaweb" (used to facilitate simple and interactive communication aimed at resolving disputes between users and operators of electronic communication services, Internet and Pay TV).

**E-COMMERCE**

**AGCOM on the adoption of measures aimed at encouraging the use of lockers**

On 29 April 2020, the Italian Communications Authority ("AGCOM") started a preliminary [investigation](#) aimed at defining measures that may encourage the use of automatic lockers for the delivery and collection of packages during the current health emergency caused by COVID-19. According to AGCOM, the greater flexibility of delivery through automatic lockers could also better adapt to the lifestyles of consumers, avoiding cases of non-delivery and also resulting in increased efficiency from an environmental perspective, since "the concentration of deliveries in a single collection point would help to decongest part of city traffic with the consequent reduction in pollution levels".

**ADMINISTRATIVE LAW**

**The Regional Administrative Court of Lazio on limits to subcontracting**

On 24 April 2020, the Regional Administrative Court (TAR) of Lazio issued its judgment in [case no. 4183/2020](#) (RTI P.R.S. *Planning Ricerche e Studi S.r.l.-HSP S.p.A./Camera dei Deputati*), ruling that the recent judgment of the EU Court of Justice (ECJ) in [case C-63/18](#) (*Vitali S.p.A./Autostrade per l'Italia S.p.A.*) of 26 September 2019 did not preclude the Italian State from establishing in the abstract a limit to subcontracting. In TAR's opinion, the ECJ only acknowledged the illegality of the limit of 30% of the works originally provided for in Article 105 of [Legislative Decree no. 50/2016](#), without however excluding the compatibility with European law's principles of upper limits. Consequently, the First Chamber of the TAR ruled that the upper limit of 40% of the works provided for in Article 1.18 of [Law no. 55/2019](#), according to which subcontracting is indicated by contracting authorities in the call for tender and may not exceed 40% of the total amount of the works contract, cannot be considered in breach of European law.

**CAPITAL MARKETS**

**Amendments to the Issuers Regulation concerning gender quotas**

On 13 May 2020, Consob, with its [Resolution no. 21359](#) (the "Resolution"), approved some amendments to the Issuers Regulation in order to align it with the provisions introduced by Law no. 160/2019 (i.e., the 2020 Budget Law) on gender balance in the corporate bodies of listed companies. Specifically, according to the new provisions, the criterion to be adopted for calculating the number of seats to be reserved for the least represented gender in the corporate bodies of listed companies is - as a general rule - consistent with the previous regulations, i.e. that of rounding up. On the other hand, the criterion of rounding down will apply only to corporate bodies made up of three members, due to the arithmetical impossibility of ensuring gender balance on the basis of rounding up criteria. At the same time, Consob made it clear that the strengthening of the safety measures set forth in the 2020 Budget Law in order to protect the least represented gender will have to be applied for six consecutive mandates, starting from the first renewal of the corporate bodies after the entry into force of the 2020 Budget Law, i.e. from 1 January 2020. The Resolution confirmed Consob's position (as already explained with [Notice no. 1/2020 of 30 January 2020](#)) concerning clarifications on the application of the amendments to the provisions of Articles 147-ter and 148 of the Italian Consolidated Financial Act on gender balance in the bodies of listed companies made by the 2020 Budget Law (see [Our Echo - February 2020](#)).

**ESMA consultation on the functioning of the current European SME Growth Markets regime**

On 6 May 2020, the European Securities and Markets Authority ("ESMA") published a [consultation document](#) to gather the view of all stakeholders (national market authorities, issuers and institutional and retail investors) on the functioning of the current European SME Growth Markets regime. The consultation is aimed at allowing ESMA to submit a technical report to the Commission on the functioning of the current regulatory framework as set out by MiFID 2, in light of possible future initiatives aimed at improving the attractiveness of the regulation and promoting access to capital markets for small and medium-sized enterprises (SMEs) as well as investors. Additionally, ESMA is presenting a draft of Regulatory Technical Standards on Liquidity Contracts and a draft of implementing Technical Standards on Insider Lists. Stakeholders' views on both, the current state of play of the SME GMs regime and on ESMA's proposed technical standards should be submitted to ESMA by 15 July 2020.

**MiFID2: Consob recommendation on transparency of costs**

As a result of the public [consultation](#) launched on 21 February 2020, on 7 May 2020 Consob issued a [Recommendation](#) on the reporting methods ex post of the costs and charges associated with the provision of investment and accessory services". Consob's recommendation is part of the MiFID2 regulatory framework, which requires higher levels of transparency on all costs and charges however related to the provision by intermediaries of investment and ancillary services, with the aim of enabling investors to make informed assessments and evaluations on their own investments.

**Consob's clarifications on increased voting rules**

On 8 May 2020, Consob issued [Communication no. 5/2020](#), clarifying an applicative aspect of the increased voting rules provided for by Article 127-quinquies of the Italian Consolidated Finance Act. In particular, for the purposes of calculating the continuous 24-month vesting period (required by Paragraph 1 of Article 127-quinquies for the increased voting to be applicable), Consob clarified that (a) the holding period prior to the listing must also be counted and (b) any form of participation, whether represented by shares or quotas, must be deemed as relevant. Consequently, with particular reference to companies which are going to be listed, any period of holding of quotas prior to the listing can be considered for the purpose of calculating the vesting period, provided that there is continuity between the share package in relation to which the increased voting right is granted and the package held - also in the form of quotas - during the entire period required for the vesting of increased voting rights.

**ESMA statement on promoting transparency in half-yearly financial reports related to COVID-19 outbreak**

On 20 May 2020, the European Securities and Markets Authority (ESMA) issued a [statement](#) aimed at promoting transparency and consistent application of EU requirements (including MAR) in the context of half-yearly financial reports under the current circumstances related to the COVID-19 outbreak. ESMA emphasizes the need for issuers to provide updated information which assists investors in assessing the current and/or expected impacts of the COVID-19 pandemic on the issuers' financial position, performance, transactions, cash flows and highlights, as well as the importance of providing information on the identification of the principal risks and uncertainties to which issuers are exposed. The guidelines provided by ESMA mainly concern application of the IAS accounting principle 24, disclosures relating to significant uncertainties, going concern and risks linked to COVID-19, impairment of non-financial assets and presentation of COVID-19 related items in the statement of profit or loss.

**PATENTS**

**The Court of Appeal of Milan clarifies the patent owner's burden of proof to claim the counterfeiting of patents of process**

On 14 April 2020, the Court of Appeal of Milan issued its [judgment](#) on the case *Toshiba Europe GmbH v. S.I.S.V.E.L. S.p.A. and Brau Verwaltungsgesellschaft MBH*. In its ruling, the Court of Appeal upheld the understanding of the Court of first instance in connection with the burden of proof set forth in Article 67 of the Italian Intellectual Property Code, which establishes that, under specific conditions, a product identical to that obtained through the patented process is presumed to be obtained by way of that process unless demonstrated otherwise by the counterparty. Specifically, the Court of Appeal clarified that in order to benefit from the above-mentioned presumption, where the patent owner has not succeeded - through a reasonable effort - in determining the process actually carried out, the patent owner is in any case required to demonstrate at least a substantial probability that the identical product was manufactured through the patented process.

**The ECJ clarifies the requirements for Supplementary Protection Certificates**

On 30 April 2020, the EU Court of Justice ("ECJ") issued its judgment in [Case C-650/17](#) (*Royalty Pharma Collection Trust v Deutsches Patent- und Markenamt*), clarifying the interpretation of Article 3(a) of [Regulation \(EU\) no. 469/2009](#) of 6 May 2009 ("Regulation") on Supplementary Protection Certificates ("SPC") (see [Our Echo no. 41 of May 2019](#) and [no. 32 of May 2018](#)) which establishes that an SPC shall be granted if, at the date of its application, the product to which the SPC refers is protected by a basic patent in force. Notably, the ECJ clarified that a product is nevertheless protected by a basic patent in force when it falls within a general functional definition used by the basic patent's claims, even where it is not derivable from the patent as a specific embodiment in individualised form, provided that it is specifically identifiable by a person skilled in the art, based on their general knowledge in the respective field at the filing date or priority date of the patent and in consideration of the prior art at this point in time and all information disclosed in the patent. Conversely, a product is not protected by a basic patent in force when, although falling within the functional definition provided in the patent's claims, the product has been developed only after the filing date of the basic patent application, as the result of an independent inventive activity.

**TRADEMARKS**

**The special Italian registry for "historical trademarks of national interest"**

As from 16 April 2020, it is possible to request entry in the special register of the Italian Trademark and Patent Office reserved for historical trademarks of national interest, by following the procedure set forth in the [Decree of 27 February 2020](#) (which complements the previous [Decree of the Ministry of Economic Development of 10 January 2020](#)). The entry can be made by the trademark owner (or its exclusive licensee) by telematic means only. The conditions that must be met by the relevant trademark, in line with Article 11-ter of the Italian Intellectual Property Code, are the following (a) to be registered for at least 50 uninterrupted years or, in the case of unregistered trademarks, to be used effectively and continuously for at least 50 years; and (b) to be used for the marketing of products or services made in a national manufacturing company of excellence, historically connected to the national territory. The registration, which has unlimited duration without the need for renewals, gives the right to use the "Historical trademark of national interest" logo for commercial and promotional purposes.

**INDUSTRIES**

**E-COMMERCE**

**To be unlawful, a commercial practice can be just "unfair"**

On 16 April 2020, the Council of State issued its [Judgment no. 2414 in the case brought by the Italian Competition Authority against Ticket One S.p.A.](#) By this judgment, the Council of State clarified that if a commercial practice is neither misleading nor aggressive, it can still be unfair if the requirements under Article 20(2) of the Italian Consumer Protection Code are met, i.e. (a) it is contrary to the requirements of professional diligence and (b) it materially distorts or is likely to materially distort the average consumer's economic behaviour. The category of "unfair commercial practice", although applying on a residual basis, qualifies as an autonomous offence.

**MEDIA**

**AGCOM on the use in press releases of articles including the "All rights reserved" clause**

On 5 May 2020, the Italian Communications Authority ("AGCOM") adopted its ["Decision No. 169/2020 against the company Eco della Stampa S.p.A. \(confirmed by the Administrative Court of Latium on 18 May 2020\)"](#), specialised in the field of press releases. According to such measure, the company has been ordered to remove from its service any article taken from the "Il Sole 24 Ore" newspaper, including the "All rights reserved" clause (the "Clause") and to stop the reproduction of such articles. According to AGCOM, the company qualifies as an "active" hosting provider that is directly involved in, and therefore liable for, the processing of editorial content. As clarified by AGCOM, the use made by the company of the articles concerned, since this was carried out despite the inclusion of the Clause, cannot enjoy the exception on the freedom of reproduction of news articles under Article 65 of the Italian Copyright Law but it rather amounts to an infringement of the editor's rights of reproduction and communication to the public (pursuant to Articles 13 and 16, respectively, of the Italian Copyright Law).

**DATA PROTECTION**

**The EDPB on consent under the GDPR**

On 4 May 2020, the European Data Protection Board ("EDPB") adopted [Guidelines 5/2020](#) on consent under the GDPR (the "Guidelines"), updating the guidelines previously adopted by the Article 29 Working Party on 10 April 2018. In particular, after recalling that the conditions for obtaining valid consent set out in the GDPR also apply in situations falling within the scope of the e-Privacy Directive, the Guidelines address the validity of consent provided by data subjects when interacting with so-called "cookie walls". Where data subjects are faced with cookie walls impeding consent from being visible, except for a request to accept cookies and other cookie-related information, their consent cannot be "freely given". In such cases, data subjects are not presented with a genuine choice on the service they want to access. In addition, the Guidelines clearly provide that consent obtained by scrolling or swiping through a webpage cannot be deemed "unambiguous" since such mechanisms do not qualify as affirmative actions from the data subject expressing a clear indication of wishes.

**FINANCE**

**Italian special economic measures in relation to pandemic Covid-19**

In April and May 2020, the Official Gazette published two law decrees providing, inter alia, urgent economic measures to counter the Covid-19 emergency period (i.e. [Law Decree 8 April 2020, n. 23](#) (the [Liquidity Decree](#)) and [Law Decree 19 May 2020, n. 34](#) (the [Relaunch Decree](#)). For the special measures introduced by the Liquidity Decree, please refer to [Our Echo published on our website on 14 April 2020](#). The Relaunch Decree now also includes the following measures: (A) businesses, self-employed workers and agricultural workers generating annual revenues of less than Euro 5 million, who provide proof of having lost (as a consequence of Covid-19) at least two-thirds (2/3) of their income as compared with their income in April 2019, may request a non-refundable contribution from the Revenue Agency, which varies in amount in proportion to the scale of the relevant business; (B) an SME Equity Fund has been established for the subscription, in the period until 31 December 2020, of bonds or debt securities to be issued by businesses with annual revenues between Euro 10 million and Euro 50 million which have suffered losses in their revenues of at least 33% as a result of Covid-19, in addition to the raising of capital increases of at least Euro 250,000. The issue will be for a maximum amount equal to the lesser of (i) three times the amount of the capital increase and (ii) 12.5% of the amount of the revenues. The maximum repayment term of the bonds is six years and, inter alia, the relevant businesses will undertake not to resolve, prior to full repayment of the bond, distributions of reserves and/or purchases of treasury shares and not to repay any shareholder loan; and (C) specific, dedicated assets of *Cassa Depositi e Prestiti* will be established in order to support the capital requirements of businesses, including those listed on regulated markets and those established as cooperatives, which (i) have their registered office in Italy, (ii) do not operate in the banking, financial or insurance sectors, and (iii) have an annual turnover of at least Euro 50 million. Additional requirements and procedures will be defined in a subsequent decree of the Ministry of the Economic Development.

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