

NEWS FROM THE FIRM

The firm strengthens its litigation practice with the arrival of Paolo Pototschnig, Valeria Mazzeoletti and their team

Valeria Mazzeoletti and Paolo Pototschnig (formerly partners of a leading Italian firm) have joined the firm as partners with a team of seven colleagues composed of Elisa Cazzani, Riccardo Gioielli, Andrea Palvarini, Samuele Giuliani, Francesca Riccio, Stefania Trevisan and Annachiara Ferrarini.

The arrival of Valeria and Paolo has significantly strengthened the firm's litigation/ADR and restructuring practice.

RECENT PUBLICATIONS

PAOLO POTOTSCHNIG, [Scissione e responsabilità per le obbligazioni nel concordato preventivo \(e negli accordi di ristrutturazione\)](#), [2020] Le Società 8-9, 963

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- [Special Newsletter: COVID-19 e HR \(2\)](#)
- [Liquidity Decree](#)
- [New disclosure obligations on holding thresholds and on shareholders "investment intentions" declarations for listed companies](#)
- [COVID-19 forward looking statements](#)
- [Contracts at the time of the Coronavirus](#)
- [COVID-19 and HR](#)
- [COVID-19 and Impact of Coronavirus on certain Corporate Issues](#)
- [COVID-19 and Suspension of Contractual Obligations](#)

COPYRIGHT

New Decree for the determination of private copying levies in force

On 5 August 2020, the new [Decree](#) for the determination of private copying levies was published in the Official Gazette of the Italian Republic. Attached to this Decree is the Technical Annex, which contains the list of device categories for which private copying levies are due as well as the specific private levies for each category (the "Technical Annex"). The Technical Annex has undergone certain changes vis-à-vis the previous version of the Law. Specifically, for the device categories, the New Technical Annex reduces to 17 the number of device categories for which private copying levies (as compared to 24 under the previous Law. As for private copying levies, the new Technical Annex extends the storage capacities for certain categories of devices and adjusts the private copying levies accordingly. In certain instances (e.g. smartphones), this creates an increase in private copying levies for devices with higher storage capacities. Nevertheless, in most cases the maximum levy set per device category in the new Technical Annex would seem to be in line with/lower than that set in the previous Law.

DATA PROTECTION

The EDPB issues draft guidelines on the concepts of controller and processor in the GDPR and Guidelines on the targeting of social media users

On 4 September 2020, the European Data Protection Board adopted [guidelines](#) on the concepts of controller and processor in the GDPR and on the [targeting of social media](#) users. These guidelines will be subject to public consultation.

The Italian DPA on bodies accredited to issue data protection certification

On 29 July 2020, the Italian Data Protection Authority issued [guidelines](#) (the "Guidelines") on the "additional" requirements for bodies accredited to issue data protection certification in accordance with Article 43.1(b) and 43.3 of the GDPR [ADD LINK]. The GDPR provides that the issuance of data protection certification shall be carried out by bodies accredited to perform such tasks and in Italy this role has been entrusted to Accredia. Accreditation must take place on the basis of the requirements contained in the international technical standard EN-ISO/IEC 17065:2012 and other "additional" requirements established by national regulators. The Guidelines contain these additional requirements and establish that Accredia shall verify that the certification bodies meet the criteria set out in the Annex thereto and, notably, integrity, independence and impartiality, certifying the absence of conflicts of interest with those who wish to be certified. Moreover, the certification bodies shall be equipped with qualified and constantly updated personnel, adopt adequate processes for handling any complaints and implement periodic surveillance procedures on certified products, processes, and services.

TRADEMARK

Registered trademark as keyword in search engines

On 17 August 2020, the Tribunal of Milan issued its decision in the urgency proceedings brought by Flexform S.p.A. against Eurooo S.r.l. for certain unauthorised uses of the "Flexform" distinctive sign including, in particular, its use as a keyword in a search engine. According to established case-law, a trademark's owner has the right to prohibit a competitor from using a distinctive sign as a keyword in search engines if such use affects (or could affect) the essential trademark's function of ensuring the origin of the trademarked product for the consumer or ultimate user. In the case at issue the Tribunal of Milan assessed that the use of the "Flexform" trademark as keyword advertising or a sponsored link was such as to suggest the existence of a commercial relationship between Eurooo S.r.l. and Flexform S.p.A., thus drawing unfair advantage from the notoriety of the latter's trademark.

A trademark registered without any real intention to use it is invalid

On 14 September 2020, the Cancellation Division of the European Union Intellectual Property Office declared invalid, on the grounds of bad faith, a trademark consisting of one of Banksy's most famous artworks (a piece of street graffiti named the Flower Thrower). According to the Office, grounds for a holding of bad faith may be present where it is apparent that the proprietor of a trademark filed the relevant application without any intention of using the trademark, and without the intent of engaging fairly in competition but with the intention of undermining the interests of third parties, in a manner inconsistent with honest practice, or with the intention to obtain an exclusive right for purposes other than those related to the trademark's functions (and in particular its function as an indicator of origin). On that basis, the Office considered that the trademark in question was filed in order to grant Banksy exclusive legal rights over the sign, as he could not rely on copyright and, as a result, with no real intention to use it in relation to the relevant registered goods and services.

CAPITAL MARKETS

Brexit: Consob provides operational instructions to UK investment firms in Italy

On 23 July 2020, Consob issued [Communication No. 8/2020](#), providing operational instructions for UK investment firms that intend to continue operating in Italy following the end of the so-called "transition period" (on 31 December 2020). In particular, Consob recommends that (a) British investment firms which intend to continue operating in Italy submit their application for authorisation promptly, also taking into consideration that the duration of the authorisation procedures may be subject to suspension and interruption; (b) British investment firms intending to continue operating in Italy by transferring their activities to an EU investment firm should complete such transfers by the end of the transition period and, where necessary, the procedures for passport notification into Italy; (c) UK investment firms intending or required to cease operation by the end of the transition period should terminate their relationships with clients in ways that prevent them from being prejudiced and in compliance with the notice deadlines for contract termination.

EBA and ESMA launch consultation to revise joint guidelines for assessing the suitability of members of the management body and key function holders

On 31 July 2020, the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) launched a [public consultation](#) (concluding on 31 October 2020) on their revised joint Guidelines. The review reflects the amendments introduced by the fifth Capital Requirements Directive (CRD V) and the Investment Firms Directive (IFD) in relation to the assessment of the suitability of members of the management body. The new draft joint Guidelines clarify that: (a) knowledge, experience and skill requirements are important aspects in the fit and proper assessment of members of the management body and key function holders as they contribute to identifying, managing and mitigating money laundering and terrorist financing; (b) being a member of affiliated companies or affiliated entities does not in itself represent an obstacle for a member of the management body to act with independence of mind; (c) a gender-balanced composition of the management body is of particular importance. The draft joint Guidelines also consider the recovery and resolution framework introduced by the Bank Recovery and Resolution Directive (BRRD), providing further guidance in this regard.

CORPORATE

"Decreto Semplificazioni": temporary derogation from share capital increase regulations

Article 44 of [Italian Decree-Law no. 76 of 16 July 2020](#) (so-called *Decreto Semplificazioni* "Simplification Decree") introduced certain changes to share capital increase regulations, amending Article 2441 of the Italian Civil Code [ADD LINK]. Until 30 April 2021, the 2/3 majority rule will not apply to the following resolutions: (a) increases in share capital with new contributions; (b) the introduction in the by-laws of the clause allowing the exclusion of pre-emption rights; and (c) the attribution to the directors of the power to increase the share capital, which may be adopted with the favourable vote of the majority (provided that at least half of the share capital is represented), even where the by-laws provide for higher majorities. Furthermore, until 30 April 2021, listed companies will be able to decide on a capital increase with new contributions, excluding pre-emption rights (a) even if this is not expressly provided by the by-laws; (b) within the limit of 20% of the pre-existing share capital (instead of the previous 10%) or, if the par value is not indicated, the number of pre-existing shares, provided that the issue price corresponds to the market value of the shares; (c) with a reduction by half of the time limit for calling the shareholders' meeting on this matter. In addition to the above temporary derogations, Article 44 definitively modifies the regulation of the option right: (a) reducing the minimum period for the exercise of such right from 15 to 14 days; (b) removing the obligation for companies with listed shares to offer unexercised option rights on the market, thus providing the possibility for the company to require the exercise of the pre-emption right directly when exercising the option right; (c) extending the possibility of deciding on a capital increase with the exclusion of pre-emptive rights to companies with shares traded in a multilateral trading facility; (d) requiring listed companies to indicate the reasons for the exclusion or limitation of pre-emptive rights in a specific directors' report to be filed at the registered office and published on the company's website within the expiration of the deadline for the convocation of the shareholders' meeting.

FINANCE

Measures implemented to strengthen the capital of medium-sized companies

On 10 August 2020, the Italian Ministry of the Economy and Finance issued a [Decree](#) on the implementation of the provisions setting out measures to strengthen the capital of medium-sized companies contained in the so called [Decreto rilancio](#) ("Relaunch Decree"), following the publication in the Italian Official Gazette of [Law no. 77 of 17 July 2020](#) (promulgating the conversion into law of the Relaunch Decree, [Decree-Law no. 34 of 19 May 2020](#)) and the approval of the Relaunch Decree by the European Commission (decision [SA_57289 \(2020/N\)](#)) on 31 July 2020 based on the [Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak](#). Notably, companies with annual revenues in a range between €5 million and €50 million, which have suffered revenue losses of at least 33% as a result of Covid-19, may access tax credits for their shareholders participating in their capital increase, no later than 31 December 2020. The maximum investment of the cash contribution on which the tax credit is calculated may not exceed €2 million. Moreover, the SME Equity Fund is now in place, aimed at subscribing, by 31 December 2020, up to a maximum of €4 billion, bonds or debt securities issued by companies with annual revenues ranging between €10 and €50 billion. The decree of the Italian Ministry of the Economy and Finance defines the features, conditions and methods of financing and financial instruments. For further information on the measures introduced by the Recovery Decree, please refer to [Our Echo - May 2020](#).

The Supreme Court on the assignment of receivables by way of security

On 28 May 2020, the Italian Supreme Court issued its [judgment](#) (No. 10092/2020) confirming the court's case law in the field of assignment of receivables by way of security, according to which the assignee (including banks) is entitled to act either against the assigned debtor or the assignor in order to satisfy its claims against the assignor without having to prove the prior unsuccessful enforcement of the assigned debtor, in the latter case.

PATENT

The CJEU on the conditions for granting SPCs in connection with new therapeutic applications of a known active ingredient

On 9 July 2020, the EU Court of Justice (ECJ) issued its judgment in [case C-673/18](#) (*Santen SAS v. Directeur général de l'Institut national de la propriété industrielle*) clarifying the conditions for granting a Supplementary Protection Certificate for medicinal products ("SPC"; please refer to [Our Echo No. 32 of June 2018](#)) set forth in [Regulation \(EC\) No. 469/2009](#) ("SPC Regulation"). Specifically, the CJEU ruled that Article 3(d) of the SPC Regulation must be interpreted as meaning that a marketing authorisation ("MA") cannot be considered to be the first MA where it covers a new therapeutic application of an active ingredient, or a combination of active ingredients, and that active ingredient or combination has already been the subject of a MA for a different therapeutic application.

INDUSTRIES

MEDIA

The ECJ on Italian antitrust telco legislation (Integrated Communications System, "SIC")

On 3 September 2020, the ECJ issued its judgment in [case C-719/18](#) (*Vivendi SA v Autorità per le Garanzie nelle Comunicazioni*) in response to a request for a preliminary ruling made by the regional administrative court of Lazio on the provisions of the Italian Consolidated Audiovisual Media Code (*Testo Unico dei servizi di media audiovisivi e radiofonici*, Italian Legislative Decree no. 177/2005) that (a) defines the relevant sub-markets for the application of antitrust provisions in the media field (jointly composing the so-called *Sistema Integrato delle Comunicazioni* (Integrated Communications System, or "SIC") and (b) stipulates that no company may control more than 10% of the SIC if such company controls a share equal to 40% in one of any relevant sub-markets composing the SIC. The ECJ held that this latter rule is contrary to the principle of freedom of establishment enshrined in Article 49 of the TFEU as (a) it fails to protect the general interest of pluralism of information and media pluralism and, consequently, cannot restrict freedom of establishment; (b) it is too restrictive in its definition of the electronic communications sector, excluding services linked to the Internet and satellite broadcasting, thus limiting a company's opportunity to establish itself in the media sector in Italy; (c) it treats 'subsidiary companies' in the same way as 'affiliated companies' when calculating the revenue of an undertaking in the electronic communications sector or SIC and (d) it sets thresholds which are not related to the risk to media pluralism, since those thresholds do not make it possible to determine whether and to what extent an undertaking is actually in a position to influence the content of the media.

FINANCIAL INSTITUTIONS

Bank of Italy's recommendation on the distribution of dividends and variable remuneration policies

On 28 July 2020, in line with the provisions of the [European Systemic Risk Board \(ESRB\) Recommendation](#) dated 27 May 2020 and the European Central Bank Recommendation dated 27 July 2020, the Bank of Italy recommended, *inter alia*, until 1 January 2021 that: (a) "less significant" banks should not pay dividends relating to financial years 2019 and 2020 (including distribution of reserves) or make any irrevocable commitment to pay dividends relating to the same financial years or repurchase shares with the aim of remunerating shareholders; (b) SIMs subject to the rules of the CRR/CRD IV package should not pay dividends relating to the current year (including distribution of reserves) or make any irrevocable commitment to pay dividends relating to the current year or repurchase shares with the aim of remunerating shareholders. The restriction on dividend payments applies only to cash payments that have the effect of reducing the level and quality of the "Common Equity Tier 1". Furthermore, the Bank of Italy encouraged the abovementioned intermediaries to reduce the variable component of remuneration to the extent necessary to preserve or restore a solid capital base. Should this option not be considered feasible, the Bank of Italy proposed an increase in the percentages and deferral periods of the variable component as well as an increase in the use of financial instruments instead of cash.

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