

Italian Proposed Tax Reform on Certain Extraordinary Transactions

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1. Foreword

With Law no. 111 of 9 August 2023, the Italian Parliament has delegated the Italian Government to issue a series of Legislative Decrees aimed at amending several aspects and rules of the Italian domestic tax law.

In carrying out the activities the Parliament has delegated, the Italian Government has issued, among the others, a draft of a [Legislative Decree](#) amending certain provisions of Italian tax law related to extraordinary transactions.

Below there is a summary of the features of the envisaged modifications. The draft is expected to be approved by the end of 2024.

2. Cross-border mergers

2.1 Scope of the provision

One of the main provisions is related to cross-border [mergers](#) that meet certain requirements.

In particular, the new provision will apply with respect to mergers occurring between:

- a company resident in the European Union or in the European Economic Area with which Italy has concluded an agreement for the exchange of tax information; and
- a company with tax residence in Italy,

to the extent that the company resulting from the merger is to be considered tax resident in Italy.

2.2 Effects of the new provision

In connection with transactions falling in the scope reported above, the new provisions will allow the company resulting from the merger to use losses registered by the EU or EEA company before the merger to off-set them against future (Italian) income.

However, in order to do so, the previous losses need:

- to be redetermined according to Italian tax law; and
- to be final, *i.e.* such losses should not be available for use in any other Country.

In addition, for the new rule to apply, both during the fiscal year(s) in which the foreign company has registered the final losses and the one in which the merger occurs:

- one of the companies involved in the merger needs to control the other; or
- both the companies need to be controlled by the same third entity.

Finally, the rule does not say anything about the determination of the value (for tax purposes) of the assets “entering” the Italian jurisdiction. Accordingly, even in these kinds of transactions, the provisions of Art. 166-*bis* of the [TUIR](#) should apply (the basic rule there provided is the fair market value).

3. Contribution in kind of partici- pation

3.1 Current regime

Currently, Italian tax laws provide that [contributions of participation](#) into a company may benefit, where certain conditions are met, from a sort of tax exemption (*rectius*, a capital gain is not deemed to exist when such contributions occur) when either:

- the company making the contribution acquires a controlling stake in the company receiving the contribution (or increments such stake pursuant to a legal or statutory obligation); or
- the contribution refers to [non-portfolio participations](#).

Pursuant to a consolidate interpretative position of the [Italian Tax Authorities](#) (see, among the others, [ruling](#) reply no. 43 of 4 April 2017), such regime may only apply where both the company making the contribution and the company whose shares are contributed are tax resident in Italy.

A similar regime is also envisaged for intra-EU exchanges of participations.

4. New kind of de- merger

3.2 New envisaged regime

The draft of the new proposed legislation is aimed at extending the regime described above even to exchanges of participations where the companies whose shares are contributed are not tax resident in Italy.

The amendments of the rule, however, do not extend the current regime to:

- fact pattern where the company making the contribution is resident abroad; nor
- based on the wording of the explanatory memorandum, to contributions of partnerships (because the law requires that the control requirement is to be checked at a board level and partnerships usually do not have boards).

Finally, the proposed amendment will also affect the regime of intra-EU exchange in order to better align it to the Merger Directive.

Indeed, such Directive provides, where certain conditions are met, that intra-EU exchange of participations must be tax neutral. However, the current Italian tax law presents a relevant caveat as it only grants for the absence of taxation where the acquiring company, through the exchange either acquires the control of a company or increments it.

Nonetheless, under Italian law, the increment in a controlling participation benefits for a neutrality regime where it occurs as a result of a legal or statutory obligation. This last limitation should be removed (from both the domestic and intra-EU transactions).

4.1 Civil law features of the new kind of demerger

Italian civil law has been amended to reflect the provisions of the EU Directive 2019/2121. Among the other amendments, pursuant to the above-mentioned EU Directive, Italian law now provides for a new kind of **demerger** where the participations deriving from it are not attributed to the shareholders of the relevant company but to the company itself, that continues to carry out its own activity.

4.2 Tax consequences of the new demerger

As consequence of this new insertion, the Italian legislator has also amended Art. 173 of the TUIR (which already rules about the tax effects of demergers) in order to provide for a specific tax treatment for these new kinds of transactions.

In particular, the main rules regarding the new demerger may be summarized as follows:

- the participations received by the company transferring the assets will assume the same value that the net assets contributed had in its hand;
- the company that receives the assets will assign to those assets the same value they in had in the demerged company;
- the net equity composition of the demerged company shall not change;
- where, as result of the demerger made by a foreign company, such company transfers the assets of a **permanent establishment** it had in Italy to an Italian company, no capital gain arises in the hands of the non-resident company when the share in the company receiving the assets are attributed to it.

5. Glossary

Italian Tax Authorities (Agenzia delle Entrate)

Agency, under control of the Ministry of Finance, which performs all the functions and tasks assigned by the law in the field of tax revenue and tax duties.

Demerger

Extraordinary operation through which all or part of the assets of a company are transferred or assigned to one or more pre-existing or new-formed companies (beneficiaries).

Legislative decree

It is a decree adopted by government through an express and formal delegation given by Italian parliament. It has the same constitutional value as a law or a law decree.

Merger

Concentration of two or more companies into a single entity; it may give rise to the setting-up of a new company or to the absorption into a pre-existing one.

Non-portfolio participation

Shareholdings other than portfolio participations (art. 67(1)(c) of the TUIR).

Permanent establishment

In international tax law, it defines the threshold for a presence of foreign enterprise to be taxable in another State. The domestic definition is provided under Art. 162 of the TUIR. This definition is substantially consistent with Art. 5 of the OECD Model Tax Convention.

Ruling

Statement of practice issued by the Italian Tax Authorities upon request of a given taxpayer. Through a ruling procedure, a taxpayer may ask for the Italian Tax Authorities' opinion on a specific case concerning his personal position.

Shareholdings contribution

Operation through which a contributor (individual or company) brings shareholdings as capital into a company (transferee), receiving in exchange shares of the company itself.

TUIR (Testo Unico delle imposte sui redditi)

Italian Income Tax Code, enacted through Presidential Decree no. 917/86.