



ITALY

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Germany and Italy can look back on a history of strong cultural, political and military links and lively economic relations. This closeness which has grown over time has been further consolidated on all levels since the formation of the European Union. For example, in 2012 Germany was the most important trading partner for Italy in terms of exports and imports. Germany is also one of the countries with the most direct investments in the country with the greater part being made in northern Italy.

In Italy foreign entrepreneurs find legal conditions for the founding of a company or branch office, formation of contracts and judicial enforcement of claims which are basically comparable to the German legal system. However, when dealing with the Italian authorities the entrepreneur has to come to terms with a considerable amount of bureaucracy which can frustrate a schedule and also require a lot of patience as in addition to the high number of forms the implementation and interpretation of the laws may be handled differently with the various authorities in the different regions. In addition, there are peculiarities which should be taken into account by German companies who wish to get involved in Italy. In the following we would like to give you some illustrative examples:

In the judicial enforcement of claims, civil procedures provide comparable processes such as the court order, court injunction, appeal and revision. In practice, despite many reforms to accelerate proceedings, the Italian legal procedures are still characterised by their lengthiness. For example, even with simple legal disputes a civil court ruling in the first instance on average takes three to five years. Therefore, depending on the constellation of the case, contractual arrangements for arbitration are recommended. The time advantage gained by arbitration, however, has to be set against the usual high costs. The drafting of the contract should also take into account measures to secure claims and continuous monitoring of outstanding claims must be undertaken.

Labour law is historically characterised by strong union representation and a worker-friendly legislation and case law. Article 1 of the Italian constitution 1 January 1948 already declares in the first paragraph that Italy is a "democratic republic based on work". As a result, numerous collective wage agreements are also used in questions of interpretation even if the parties had explicitly excluded their application. In addition, there are numerous conditions designed to protect workers which impede a notice of termination or which have a negative financial result for the employer. Furthermore, the fragmentation of the labour law into numerous separate laws and sub-provisions leads to interpretations in favour of the employee in case of doubt.

In addition to this aspect of the legal situation, in Italy there are high employee on-costs to be taken into account which for normal employees usually amount to 27 to 29 % for the employer.

As previously was the case in the United States regarding the social security number, in Italy it is the personal tax number with which the identity of a natural person can be established or noted. The “codice fiscale” is often required in connection with nearly all contracts or for matters concerning daily life even without any relevance for tax. Therefore, one of the first actions undertaken by a German citizen who wishes to become active as an entrepreneur in Italy is to apply for such a tax number via the Italian diplomatic representation in Germany or directly in Italy at the appropriate office. The allocation of the tax number which is valid for life does not itself, however, lead to tax duties requiring action.

The payment of taxes in Italy is made with many deviations to the German practice. Instead of the sequence of “tax return – tax assessment – payment of tax”, in Italy the tax payment must first be made (to deadlines which cannot be extended) according to own calculations which is followed by the submission (to deadlines which cannot be extended) of the tax return after which there may be a tax audit. If this process establishes that tax payments have been omitted, are too low or are late (also even by a single day), the result is penalty payments with significant amounts. The tax payment itself can also not be made simply by bank transfer, but as is the case with most public taxes it has to be made via an electronic form (F24) at the account-holding Italian bank which requires the input of the respective code number for the tax type, the beneficiary public authority and the respective tax period.

In addition, at the beginning of the activity a tax analysis should be undertaken of possible consumer taxes. For example, in Italy there is a tax on lubrication oil which is due on imported products containing lubrication oil (e.g. engines) and which leads to compulsory membership of a consortium for the disposal of waste oil. Although these taxes generally do not have a great economic impact, their non-observance can lead to a criminal liability.

When calculating the tax liability, the relationship of turnover to fixed assets should be examined. If this has a negative deviation, a minimum amount has to be taxed under application of an increased corporation tax rate which already has to be taken into account with the payment of the tax (balances and advance payments) which in particular has consequences for inactive companies. The tax authorities also check the amount of the declared assessment basis for the paid taxes using statistical comparable values for the reference field in order to determine possible deviations and in such cases are likely to carry out a tax audit.

It is not only the payment of taxes which is complicated. The recovery of overpaid tax is also difficult, whereby requests for refunds of sales tax balances which cannot be set off must include a bank guarantee and a number of years has to be allowed for the process. For proper financial accounting, certain registers have to be set up and maintained such as a

journal and the sales tax register in which all the respective invoices and movements have to be entered. These and further special points regularly lead to practical difficulties when the German financial accounting software should also find application in the Italian subsidiary.

The points presented here only represent a small part of the special legal and tax points to be found in Italy.

Personal consultation and the elaboration of individual concepts for all questions relating to an entrepreneurial commitment in Italy is possible with 150 German and Italian employees available at our offices in Milan, Rome, Padua and Bozen who have many years of experience and technical expertise in the areas of legal consulting, tax consulting and auditing.

# Practical examples

## Taxes

### Background facts:

The D GmbH company founds a subsidiary in Italy and the company is equipped with substantial fixed assets in order for it to pursue its operations. In the first years, however, due to start-up difficulties it only achieves a low turnover and a corresponding loss according to civil law.

While preparing the tax return for the second year the company determines that the regulations regarding fictitious companies applies. If, with the existence of a certain level of fixed assets, a certain minimum turnover is not realised, the company is deemed to be fictitious ("Società di comodo") and is subject to higher taxation. The higher taxation is achieved by raising the tax base and application of a higher tax rate. For the tax base a profit is assumed which is oriented to the amount of the fixed assets (and is usually substantially higher than the effective tax base). Corporation tax, on the other hand, amounts to 38 % instead of the normal tax rate of 27.5 %. Resulting from the application of the regulation for fictitious companies it is not allowed for the company to offset existing sales tax balances.

### What can be done now?

As the deadlines for the application for suspension of the regulation for fictitious companies have already expired, Rödl & Partner Italy assists the subsidiary with the preparation of the tax return, whereby the correct application of the regulation for fictitious companies is observed.

## What should one have done differently from the beginning?

The client should have contacted Rödl & Partner Italy in order to learn about the country specific regulations in Italy. The comprehensive support for clients includes the continual monitoring of whether the regulation for fictitious companies is potentially applicable to clients. If there is a corresponding risk, Rödl & Partner makes a preventive application to the local tax office in order to suspend the regulation in the actual case of the company. In this respect, objective reasons for the specific case are presented to the tax office to justify suspension of the regulation.

If the application is well prepared, the request to suspend the regulation for fictitious companies is usually granted and the client can make the tax calculation according to the usual regulations and is not subject to restrictions in the handling of tax assets.

## Law

### Background facts:

The Italian subsidiary of a German industrial group receives a statement of claim from a former managing director who was dismissed from his position after disagreements on business policy. The former managing director who also worked for the parent company in Germany was also appointed as a managing director at a number of subsidiaries in Italy and one of these – not the one which received the claim – had paid the complainant an impressive remuneration which in line with the common understanding at that time was meant to cover all the offices.

The managing director now claims from the defending company (i) additional payment of a managing director's remuneration and (ii) the subsequent payment of his salary as in his opinion he worked as a company executive, plus compensation for damages and settlements associated with unfair dismissal from his employment contract and the alleged unpaid social contributions. Due to the activity of the complainant for many years at the Italian subsidiaries and the worker-friendly regulations in particular for company executives, the claims – without the social contributions should the company lose the case – amount to several million euros.

### What can be done now?

The appointment of a managing director to an Italian company and the definition of his powers should always take into account aspects of company and labour law. Usually the Italian managing director is only awarded remuneration on which due to a special classification

between dependent employees and free employees social contributions are only due to a low extent. As soon as a managing director, however, is subordinate to the instructions of a shareholder or a different managing director such that he is no longer free to manage the operative business, then he is considered to be a subordinate employee to be remunerated accordingly and his salary is subject to full payment of social contributions. Due to the special qualification which is assumed to exist for such a position, the classification of this employee is regularly that of an executive manager (*dirigente*).

In order to avoid the claims from the alleged employment relationship it is therefore necessary to provide evidence that the managing director in the performance of his duties was not subject to instructions about the manner in which he should perform his duties.

However, regarding the remuneration for performance of his duties it was necessary to provide evidence that it was the common understanding of the parties that the remuneration paid by the affiliated company was also meant to cover the performance of duties in the defending company which implies that the complainant had renounced a separate remuneration.

### What should one have done differently from the beginning?

Already with the appointment of a managing director the company law and labour law specialists at Rödl & Partner work closely together to carefully co-ordinate the position with regard to labour law, the classification according to company law and limits of power of the managing director regardless of whether the new managing director previously had the status of an employee in the company or not.

If the managing director should also not be an employee of the company, it must be ensured that he can autonomously carry out the operative business on the basis of comprehensive powers and also that in the performance of his work he is not otherwise subject to the instructions of others, e.g. through the specification of holiday days or working times. If the performance of his duties is furthermore not remunerated, for example, because as in the case described, the managing director is already comprehensively remunerated in a different group company, an express waiver of the remuneration should be added to the documentation.

But if the transfer of such comprehensive powers and freedom is not desired, then a contract of employment should be concluded from the start with obligations in particular with regard to compulsory contributions. The same is reversely true. If an employee is also to be appointed a managing director without losing his legal position with regard to social contributions, his powers have to be limited.

The exact arrangement respectively depends on the individual position of the managing director, the corporate governance rules of the company group and the actual operative situation at the local level in order to elaborate the most appropriate solution for a problem free co-operation between managing director and shareholders and consensual separation at a later date.

## Law

### Background facts:

The Italian subsidiary of a client located in Milan would like to initiate legal proceedings to recover a receivable which in the meantime has risen to a high amount from a customer located in southern Italy and gives a corresponding mandate.

The contracts made by the client for delivery of goods are subject to the client's general terms and conditions for goods which are formulated according to Italian law which foresees Milan as the court of jurisdiction. The general terms and conditions are printed on the written offers of the client and the customer has countersigned the letter of offer as a sign of acceptance.

### What can be done now?

According to the Italian code of civil procedure, in the absence of a deviating agreement the court of jurisdiction is the location of the defendant. Such a deviating agreement can also be concluded between business persons in the general terms and conditions. Sections 1341 and 1342 of the Italian civil code, however, foresee that certain provisions which deviate from the law to the disadvantage of the contract partner must be separately listed and also countersigned to indicate acceptance.

If such a separate acceptance has not taken place, the agreement for the court of jurisdiction is not a legally effective part of the contract. The legal action must be brought via a communicating lawyer before the court at the location of the customer.

### What should one have done differently from the beginning?

In addition to the correct preparation of the content, the numerous formalities of the Italian law must be observed. The separate listing which was not made and signing of the conditions of the general terms and conditions such as for example concerning the deviating court of jurisdiction, liability restrictions, tacit contract renewal clauses or reasons for termination is an error which frequently occurs which can lead to the invalidity of these provisions. The inclusion

of these provisions in the contract to be legally effective must therefore be observed in the preparation of the general terms and conditions and the design of the contract documents and with the conclusion of the contract itself by making sure that the separate signature is appropriately made.

## Law

### Background facts:

The German majority shareholder of an Italian S.r.l. (GmbH) receives a copy of a court application filed by the managing director of the company to liquidate the company due to inactivity of the shareholders' meeting according to section 2484 no. 3 of the Italian civil code "codice civile". In the application the managing director claims that despite repeated formal summons to shareholder meetings to discuss the financial crisis of the company, the majority shareholder has not reacted to the summons and therefore the shareholders' meeting could not take place due to the absence of quorum.

The client, on the other hand, claims that he did not receive the summons in question, but that in the case of important questions the shareholders' meeting had previously met according to the rules, for example, to authorise the last annual financial statement. He now asks for advice on the best possible course of further action.

### What can be done now?

In order to object to the court application, the client must intervene in the action brought before the court with a plea in writing. This plea in writing must already include the reasons why the application should be rejected, i.e. the mentioned summons which was not received and the approval of the annual financial statement which took place.

The settled case law defines the approval of the annual financial statement as a typical case for an important decision which is the responsibility of the shareholders' meeting. As far as over a time period of at least three financial years no approval is given for the annual financial statement, this is regarded as a clear sign of the inactivity of the shareholders' meeting. In this respect the actual approval of the last annual financial statement is a substantial piece of evidence for the functionality and activity of the shareholders' meeting.

The court accepted the argumentation of the majority shareholder and has rejected the application to liquidate the company.

## What should one have done differently from the beginning?

The dispute with co-partners and in this case the attempt of a shareholder to use all legal means to realise the result he seeks is unfortunately impossible to prevent. With a majority of shareholders – and particularly with shareholdings of respectively 50 % which in our experience are not advisable – there should therefore always be clear rules concerning the majority required in the articles of association and if applicable also in collateral agreements which on the one hand should protect minority shareholders but should also not lead to a deadlock. The same should be made on the level of the company management so that the interests of the shareholders in proportion to their entrepreneurial commitment are also protected with regard to operative questions. Finally, such deadlock situations should be regulated by a corresponding process which can be legally mutually agreed before the situation arises. The corporate law specialists of Rödl & Partner are able to comprehensively advise the client with the contract design due to their experience with the courts in order to prevent such disputes.

## Transfer Prices

### Background facts:

In addition to other subsidiaries, D GmbH also has a subsidiary in Italy with which it maintains different business relations. In order to minimise possible risk associated with transfer pricing adjustments and the resulting increase in taxes, D GmbH has drawn up a master transfer price documentation file in the English language which corresponds to the EU master file method. Partly due to resource reasons, however, the transfer price documentation was not checked for compliance with local transfer price regulations.

In its tax return the Italian company stated that it maintains a transfer price documentation file. Shortly afterwards a company tax audit was carried out and the transfer price documentation was required for inspection.

### What can be done now?

The taxpayer only had ten days of notice to submit the transfer price documentation and as the transfer price documentation in Italy must correspond to strict formal requirements (including a special breakdown) and be available in the Italian language, the existing documentation could not be adjusted to comply with the Italian regulations within the given time period. According to a provisional audit finding the adjustment of the transfer prices resulted in an increase in taxes and a penalty payment amounting to 200 %. In an extrajudicial arbitration proceeding, Rödl & Partner was able to reduce the increase in taxes and reduce the penalty payment to 100 %.

### What should one have done differently from the beginning?

In principle, the taxpayer did not make a significant mistake because he attempted to minimise the transfer pricing risk through preparation of a master transfer pricing file on the basis of a method which is generally also accepted in Italy ("EU master file method"). But it would have been urgently advisable to at least have the master file reviewed locally in advance as this would have enabled the identification of special local peculiarities and a quicker reaction as required. This is especially true in Italy where due to the current financial crisis the tax authorities have intensified audits to check the appropriateness of the transfer prices. This has been made primarily with the objective of generating more tax through transfer pricing adjustments and in addition in the case of formal deficiencies of the transfer pricing documentation to demand penalty payments.