Implementation of the Cross-Border Merger Directive in Italy

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EC Directive No. 2005/56/EC on cross-border mergers of limited liability companies, adopted on October 26, 2005, (the "Directive") lays down, for the first time, a set of rules aimed at facilitating cross-border mergers between various types of limited liability company governed by the laws of different EU Member States. The Directive is based on the principle that the Member States must allow the cross-border merger of a national limited liability company with a limited liability company from another Member State, if the national law of the relevant Member States permits domestic mergers between such types of company[1].

Legislative Decree No. 108 of May 30, 2008 (the "Decree") implementing the Directive was published in the Italian Official Gazette on June 17, 2008[2]. This memorandum provides an overview of the new rules introduced by the Decree effective as of July 2, 2008 (the "New Rules"), highlighting their innovative import against the background of the legal regime previously applicable to cross-border mergers in Italy[3].

I. Cross-Border Mergers in Italy prior to the Implementation of the Directive

Prior to the implementation of the Directive in Italy, mergers between an Italian or a foreign company and a foreign company from a different State were considered admissible under Italian law, since Section 25, paragraph 3, of Law No. 218 of May 31, 1995 (the "Private International Law Act") provided that these mergers could be given legal effect in Italy if carried out in compliance with the national laws of each merging company. Section 25, paragraph 3, of the Private International Law Act has

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1 The most important implication of the Directive is that cross-border mergers must now be permissible in the European Union and can no longer be made impossible by Member States. The Directive is the result of protracted negotiations among the Member States on Commission proposals dating back to 1972.

2 The Directive should have been implemented in Italy by December 15, 2007. Italian Law No. 13 of February 6, 2007 delegated the Italian Government to implement the Directive by March 4, 2008 and did not lay down any specific implementation criteria.

3 This memorandum is primarily focused on the New Rules and, therefore, does not aim to provide a comprehensive description of the regime applicable to cross-border mergers in Italy.

been generally interpreted by Italian scholars as requiring that, to the extent they are applicable according to their own purpose and compatible with one another, all substantive rules of national laws involved in cross-border mergers must be observed if these mergers are to be legally effective and enforceable in Italy.

The legal regime applicable to cross-border mergers in Italy prior to the implementation of the Directive was in line with the decision rendered on December 13, 2005 by the Court of Justice of the European Communities ("ECJ") in case C-411/03 (the "SEVIC Decision"), holding that the refusal of a national commercial court to register a cross-border merger among EU companies could constitute a violation of the freedom of establishment under Article 43 of the EC Treaty[4]. Under this favourable legal regime two notable cross-border mergers between an Italian public company and a public company from another EU Member State were carried out in 2006[5] and 2007[6].

II. Scope of the New Rules

The application of the Directive is limited to cross-border mergers between limited liability companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the EU ("EU Companies"), provided at least two of them are governed

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[4] In 2003, SEVIC Systems AG, a German company, appealed a decision rejecting the application for registration in the German commercial register of its absorption of a Luxembourg company on the ground that the German Transformation Act only provided for mergers between domestic companies. At the time of the proceedings, German law did not contemplate cross-border mergers and applications for registration of such mergers in the commercial register were generally rejected. The German court referred the question to the ECJ for a preliminary ruling. The ECJ noted that the right of establishment set forth in Articles 43 and 48 of the EC Treaty covers an EU company's right to effectively participate in the economic life of another Member State under the same conditions applying to such Member States' national operators. Thus, the ECJ concluded that the limitation of mergers to domestic companies was to be regarded as a difference in treatment between EU companies unlawfully restricting the right of establishment, unless justified by imperative reasons in the public interest.

[5] 2005 *ECR* I-10805. On September 11, 2005, Allianz AG (now Allianz SE) and RAS Holding S.p.A. ("RAS") announced their intention to merge RAS into Allianz AG in a cross-border merger and on December 15 and 16, 2005, the Board of Management of Allianz AG and the Board of Directors of RAS agreed upon the merger plan, which was registered in the Italian commercial register on December 28, 2005. On February 3, 2006, the meetings of holders of RAS ordinary shares and of RAS savings shares and on February 8, 2006, the extraordinary shareholders' meeting of Allianz AG approved the merger plan. Effective with the registration of the merger in the German commercial register on October 13, 2006, Allianz AG changed its legal form to a European Company (Societas Europaea, or SE) and absorbed RAS.

[6] Following BNP Paribas S.A.'s ("BNPP") acquisition of control over Banca Nazionale del Lavoro S.p.A. ("BNL") in the first half of 2006, on January 31, 2007, the companies announced their intention to merge BNL into BNPP in a cross-border merger and on March 7 and 8, 2007, the Board of Directors of BNL and of BNPP agreed upon the merger plan, which was registered in the Italian commercial register on May 28, 2007. On May 15, 2007, the extraordinary shareholders' meeting of BNPP and on July 2, 2007, the extraordinary shareholders' meeting of BNL approved the merger plan. On October 1, 2007, following registration of the merger in the commercial registers of Paris and of Rome, BNPP absorbed BNL.

by the laws of different Member States (the "EU Corporate Mergers"). The Directive allows Member States not to apply its provisions to cross-border mergers involving a cooperative society, even in cases where the latter would fall within the definition of limited liability company subject to the Council Directive 68/151/EEC of March 9, 1968 (the so-called First Company Law Directive). Finally, the Directive does not apply to cross-border mergers involving a company the object of which is the collective investment of capital provided by the public, which operates on the principle of risk-spreading and the units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of that company ("SICAVs").

In line with the Directive's scope, the New Rules apply, first, to EU Corporate Mergers involving at least an Italian limited liability company (*società per azioni*, *società in accomandita per azioni*, *società a responsabilità limitata*, *società cooperativa*), a European Company (SE) or a European Cooperative Society (SCE)[7].

However, in keeping with the SEVIC Decision, whose reasoning is not limited to EU Corporate Mergers but relates, more generally, to any cross-border mergers involving two or more companies or commercial partnerships governed by the laws of different Member States (even if no limited liability company participates), where the surviving company is an Italian or other Member State company (the "EU Mergers"), the New Rules apply[8] also to any EU Merger, including mergers involving (a) an Italian commercial partnership (*società in nome collettivo, società in accomandita semplice, società semplice*), or (b) a limited liability company other than EU Companies, provided in each case that the transaction is governed by equivalent rules under the national laws of each of the other Member State companies concerned[9].

Under the New Rules, EU Corporate Mergers and EU Mergers involving an Italian company are admissible only between types of companies (or commercial partnerships) that are allowed to merge under the national laws of their respective Member States[10].

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7 The New Rules do not apply to mergers involving Italian SICAVs established under Section 43 of Legislative Decree No. 58 of February 24, 1998).

8 However, if no EU limited liability companies participate to the merger, the employee participation provisions described in paragraph VI below do not apply.

9 By contrast, the New Rules do not apply to cross-border mergers involving only one or more Italian companies on one side and one or more non-EU companies on the other ("International Mergers"), which remain subject to Section 25, paragraph 3, of the Private International Law Act. The Italian legislature decided not to apply the Directive's provisions to International Mergers in consideration of the significant heterogeneity that characterizes legal regimes governing companies outside the EU.

10 Italian primarily mutual cooperatives regulated by Article 2512 of the Italian Civil Code may not take part in a EU Merger.

III. Applicable Law and Right to Withdraw

Article 4 of the Directive provides that, save as otherwise indicated in the Directive, a company taking part in a EU Corporate Merger must comply with the provisions and formalities of the national law to which it is subject, including those concerning the decision-making process relating to the merger, the protection of creditors, debenture holders, holders of securities or shares, and employees. A Member State may adopt provisions designed to ensure appropriate protection for minority shareholders of its domestic company who have opposed the EU Corporate Merger. Finally a Member State may enable its national authorities to oppose a EU Corporate Merger on the same grounds of public interest that would be applicable to an internal merger[11].

The regulatory model adopted by the Directive does not mandate the substantive harmonization of national laws governing cross-border mergers in the EU[12], but solves the problem of contradictory laws by determining which national legal system is entitled to regulate each specific aspect of a EU Corporate Merger. The New Rules follow this approach and provide that, save as otherwise indicated therein, an Italian company participating in a EU Merger remains subject to the rules that are applicable to domestic mergers. However, since the Directive's regulatory model does not prevent positive or negative conflicts of laws among the different legal systems involved, the New Rules also arrange for the necessary coordination of conflicting domestic laws and provide that, without prejudice to the overarching requirement that the merger contract be certified in notarized form, the national law of the foreign company resulting from the EU Merger must prevail over conflicting Italian rules.

In compliance with Article 4 of the Directive, the New Rules have opted (i) to maintain any authorization or opposition powers vested with the Italian Antitrust Authority, the Bank of Italy, Consob, ISVAP or the Italian Ministry of the Economy in connection with mergers involving an Italian company and (ii) to preserve the withdrawal rights under Article 2437 of the Italian Civil Code of shareholders of an Italian company who do not vote in favor of the EU Merger, if the surviving company is governed by the law of another Member State.

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11 The third Recital of the Directive explains that no restrictions on freedom of establishment or on the free movement of capital should be introduced by EU national laws save where (i) these can be justified in accordance with the case-law of the Court of Justice and, in particular, by requirements of the general interest, and (ii) are both necessary for, and proportionate to, the attainment of such overriding requirements.

12 Doing so would have eliminated all conflicts among different corporate laws applicable to cross-border mergers, but would also have contradicted the subsidiarity principle set forth in Section 5 of the EC Treaty.

IV. Preparatory Merger Procedure and Merger Decision

IV.A Merger Plan

In line with the Directive, the New Rules require that the management body of Italian companies participating in a EU Merger draw up and pass upon the common draft terms of the EU Merger ("Merger Plan"). The Merger Plan must include, in addition to the terms required under Article 2501-*ter* of the Italian Civil Code[13], at least the following items: (a) the type, name, registered office and governing law of the surviving company, as well as the governing law of each participating company; (b) any special conditions concerning the right of shareholders of the surviving company to share in profits[14]; (c) any special advantages granted to the experts who examine the draft terms of the EU Merger or to members of the supervisory bodies of the merging companies; (d) where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participate in the company resulting from the EU Merger are determined; (e) likely repercussions of the EU Merger on employment; (f) information on the evaluation of the assets and liabilities which are transferred to the company resulting from the EU Merger; (g) reference dates of the merging companies' accounts used to establish the terms of the EU Merger; (h) any other item of information required by the national law of the other companies participating in the EU Merger; and (i) the effective date of the EU Merger or the criteria for determining such date.

By way of derogation to Article 2501-*ter* of the Italian Civil Code, and in keeping with Article 3 of the Directive, the New Rules provide that the Merger Plan may indicate a cash payment exceeding 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of the securities or shares representing the capital of the surviving company, in cases where the law of at least one of the Member States concerned allows such cash payment.

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[13] Article 2501-*ter* of the Italian Civil Code requires that the Merger Plan specify at least: (1) the type, name and registered office of each of the merging companies; (2) the bylaws of the surviving company; (3) the share exchange ratio and the amount of any cash payment, which cannot exceed 10% of securities or shares representing the capital of the surviving company; (4) the terms relating to the allotment of shares in the surviving company; (5) the date from which the holding of such shares entitles the holders to participate in profits; (6) the date from which the transactions of the participating companies are treated for accounting purposes as being those of the surviving company; (7) the rights conferred by the surviving company on the holders of shares to which special rights are attached and to the holders of securities other than shares; (8) any special advantage granted to the members of the merging companies' management bodies.

[14] However, where a EU Merger by absorption is carried out by a company holding all the shares of an Italian company, the Merger Plan need not specify the conditions affecting the right of shareholders of the surviving company to share in profits.

IV.B *Publication Requirement*

Under the New Rules, in addition to the publication requirement set forth in Article 2501-*ter* of the Italian Civil Code[15], a notice must be published in the Italian Official Gazette providing the following information: (a) the type, name, registered office and governing law of every merging company; (b) the companies' register in which each merging company is registered and the relevant registration number; (c) an indication, for each of the merging companies, of the arrangements made for the exercise of the rights of creditors and of any minority shareholders of the merging companies and the address at which complete information on those arrangements may be obtained free of charge.

IV.C *Report by the Management Body*

The New Rules require that the management body of Italian companies participating in a EU Merger draw up a report explaining, in addition to the legal and economic aspects of the EU Merger and the criteria for determining share exchange ratio[16], the implications of the EU Merger for shareholders, creditors and employees of the Italian company. The report must be made available to the representatives of the employees or, if there are no such representatives, to the employees themselves, not less than 30 days before the date of the general meeting convened to decide on the merger. If an opinion from the representatives of the employees is received in good time, that opinion must be appended to the report.

IV.D *Report by an Independent Expert*

The New Rules require that independent experts draw up a report for each of the Italian companies participating in a EU Merger (i) stating whether in their opinion the exchange ratio is fair and reasonable (ii) indicating the method or methods used to arrive at the proposed exchange ratio; (iii) stating whether such method or methods are adequate in the relevant case; (iv) indicating the values arrived at by using each such method; (v) giving an opinion on the relative importance attributed to such methods in arriving at the value decided on and (vi) describing any special valuation difficulties which have arisen in the relevant case[17].

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15 Article 2501-*ter* of the Italian Civil Code requires that the draft terms of merger be filed with the relevant office of the Italian companies' register, for each of the merging companies, at least 30 days before the date fixed for the general meeting which is to decide on the domestic merger.

16 As already required by Article 2501-*quinquies* of the Italian Civil Code for domestic mergers.

17 As already required by Article 2501-*sexies* of the Italian Civil Code for domestic mergers. However, where a EU Merger by absorption is carried out by a company holding 90 % or more but not all of the shares of an Italian company, no report by independent experts is required to the extent that minority shareholders of the acquired company are given the right to sell their shares at the appraisal value provided for by Article 2437-*ter* of the Italian Civil Code.

The experts must be chosen among auditors or audit companies enrolled in the register maintained by the Italian Ministry of Justice. If the surviving company is an Italian limited liability company, the experts must be designated by the court having jurisdiction over the location where the surviving company has its registered office. As an alternative to experts operating on behalf of each of the merging companies, one or more independent experts, appointed or approved at the joint request of the participating companies by a judicial or administrative authority in the Member State of one of the merging companies or of the company resulting from the EU Merger, may draw up a single written report. The experts must be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties. No expert report is required if the shareholders of each of the companies involved in the EU Merger unanimously agree.

IV.E *Approval by the General Meeting*

Under the New Rules, the shareholders of the Italian companies involved in the EU Merger must approve the Merger Plan with the same majorities applicable to domestic mergers[18]. The shareholders of each merging company may reserve the right to make implementation of the EU Merger conditional on their subsequent ratification of the arrangements concerning the participation of employees in the surviving company. The resolution approving the EU Merger may amend the Merger Plan only insofar as the proposed amendments (i) do not affect the rights of shareholders of any participating companies or of any third parties and (ii) are approved by the shareholders of all companies involved in the EU Merger.

If the law of another Member State to which a merging company is subject provides for a procedure to scrutinise and amend the ratio applicable to the

[18] Pursuant to Article 2502 of the Italian Civil Code, domestic mergers must be approved by the extraordinary meeting of limited liability companies and by a majority of the votes held by the members of commercial partnerships. An Italian listed company's extraordinary shareholders' meeting convened to pass upon a merger is validly constituted, on first call, if at least 50% of the voting share capital is represented, or, if a quorum is not reached upon the first call, if more than one-third of the voting share capital is represented on the second call, or, if a quorum is not obtained on the second call, if more than one-fifth of the voting share capital is represented on the third call: resolutions on first, second, or third call must be adopted by the affirmative vote of holders of at least two-thirds of the shares represented at such meeting. An Italian privately held limited liability company's extraordinary shareholders' meeting convened on first call may pass upon a merger with the affirmative vote of shareholders representing at least 50% of the voting share capital. On second call it is validly constituted if at least one-third of the voting share capital is represented and may pass upon a merger with the affirmative vote of at least two-thirds of the shares represented at the meeting; however, if the merger entails the change of the company's legal form or the transfer of its registered office abroad, the relevant resolution must be approved, on second call, with the affirmative vote of at least one-third of the voting share capital. However, if the absorbing company in a EU Corporate Merger holds 100% of the shares of an Italian company, shareholder approval is not required (the merger will be approved by the board of directors of the absorbed company). Further, when an Italian company owns 100% of the shares of the absorbed company, the bylaws of the Italian surviving company may empower the board of directors to approve the merger (unless shareholders holding at least 5% of the shares request a shareholder resolution).

exchange of securities or shares, or a procedure to compensate minority members, without preventing the interim registration of the EU Merger, such procedure may be applied only if the members of all Italian merging companies accept it when approving the Merger Plan.

V. Completion and Entry into Effect of the EU Merger

The Directive provides that the monitoring of the completion and legality of the decision-making process in each merging company must be carried out by the national authority having jurisdiction over any such company, while the monitoring of the completion and legality of the articles of merger ("Merger Contract") must be carried out by the national authority having jurisdiction over the company resulting from the EU Corporate Merger. Furthermore, in the interests of legal certainty, Article 17 of the Directive provides that it should no longer be possible, after the date on which a EU Corporate Merger takes effect, to declare the merger null and void.

V.A Merger Contract

The New Rules require that the Merger Contract be drawn up and certified as a public deed regardless of whether the surviving company is an Italian company or a foreign company from another Member State. If the surviving company is an Italian company, the Merger Contract must be drawn up and certified as a public deed by an Italian notary, who will scrutinise the legality of the EU Merger as regards the procedure for execution of the Merger Contract and, where appropriate, for the formation of a new company. If the surviving company is a company from another Member State, the Merger Contract must be drawn up as a public deed by the relevant authority of such EU State, who will perform an equivalent legal scrutiny under the applicable domestic law or, if local law does not require the drawing up of a public deed, by a local notary. In this case, the Merger Contract must be subsequently deposited with an Italian notary for purposes of obtaining the Merger Certificate.

V.B Preliminary Certificate

Under the New Rules, once the decision-making procedure concerning the EU Merger has been completed and the Merger Contract executed[19], each Italian company involved must request an Italian notary to issue a certificate ("Preliminary Certificate") attesting to the proper completion of the pre-merger and merger acts and formalities. In particular, the Merger Certificate must attest: (i) that the approval of the EU Merger by the company has been filed with the relevant companies' register; (ii) that, as required by Article 2503 of the Italian Civil Code, the 60-day period running from the

[19] The Italian legislature has taken the position that the Merger Certificate should be subsequent, rather than prior, in time to the Merger Contract, so that the Italian notary requested to issue the Merger Certificate may verify and attest that the Merger Contract has been duly certified as a public deed by the relevant national authority.

date of such filing has expired or that the alternative safeguards for the interests of creditors contemplated therein have been complied with[20]; (iii) that, if the shareholders of the company had made implementation of the EU Merger conditional on their subsequent ratification of employee-participation arrangements, such arrangements have been so ratified; (iv) that the shareholders of the company have accepted the procedure to scrutinise and amend the ratio applicable to the exchange of securities or shares, or to compensate minority members, applicable to other Member State companies participating in the EU Merger, where appropriate; (v) that there are no legal impediments to the implementation of the EU Merger concerning the company; and (vi) that the Merger Contract complies with Italian law.

V.C Registration and Entry into Effect of the EU Merger

Once a Preliminary Certificate has been obtained for each of the merging companies, an Italian notary, if the surviving company is Italian, or the relevant Member State authority, if the surviving company is from another Member State, must issue a new certificate ("Final Certificate") attesting: (i) that the merging companies have approved the Merger Plan according to the same terms; (ii) that Preliminary Certificates have been duly issued for each of the companies participating in the EU Merger; and (iii) where appropriate, that arrangements for employee participation have been determined in accordance with the Directive.

The Final Certificate, along with all the relevant Preliminary Certificates and the Merger Contract, must be filed with the companies' registers in which the Italian merging companies and, where appropriate, the Italian surviving company, are recorded within 30 days of its issue. If the surviving company is Italian, the date on which the EU Merger takes effect is the same day on which such registration formalities are completed, unless a subsequent date is specified for a EU Merger by absorption. If the surviving company is from another Member State, the applicable national law determines the date on which the EU Merger takes effect. In any event, the local commercial registry with jurisdiction over the surviving company must promptly notify the companies' register in which each of the Italian participating companies was recorded that the EU Merger has taken effect.

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20 Article 2503 of the Italian Civil Code protects the interests of creditors of the merging companies whose claims pre-date the publication of the draft terms of merger providing that the merger may take place only after 60 days from the filing of the merger approvals in the relevant companies' registers, unless (i) the consent of all relevant creditors is obtained, or (ii) their claims are paid off, or (iii) corresponding amounts are deposited with a bank, or (iv) the independent expert report is prepared by a single auditing firm which certifies under its own responsibility that the financial statements and assets of the merging companies do not require these protections for the creditors. If none of the above circumstances has occurred, such creditors may object to the merger by filing a petition with the relevant court within the 60-day period, whereupon the court may authorize the merger if it considers the petition unfounded or if the company provides an appropriate surety.

Upon effectiveness of the EU Merger, all the assets and liabilities of the merging companies are automatically transferred to the surviving company. If the surviving company is an Italian company and the laws of other relevant Member States require the completion of special formalities before the transfer of certain assets, rights and obligations by the merging companies becomes effective against third parties, those formalities must be carried out by such Italian company. Without prejudice to claims for damages by the shareholders of the merging companies or by third parties, once the EU Merger has taken effect, it may no longer be declared null and void.

VI. Employee Participation

Under the New Rules, if at least one of the merging companies has, in the six months before the publication of the Merger Plan, an average number of employees that exceeds 500 and is operating under an employee participation system under its own national law, the employee participation arrangements applicable to any Italian surviving company will be regulated by Article 12, paragraphs 2, 3 and 4 of Regulation (EC) No 2157/2001 and by certain enumerated provisions of Italian Legislative Decree No. 188 of August 19, 2005[21]. This is a notable development under Italian law, given that it entails the mandatory application of employee participation arrangements to Italian companies even though such arrangements are not part of the default corporate governance systems that would otherwise be applicable in Italy[22].

VII. Tax Aspects

The EU rules on the tax treatment of cross-border mergers are set forth by Council Directive 90/434/EEC of July 23, 1990, as amended by Council Directive 2005/19/CE of February 17, 2005 (the "Tax Directive"). Under the Tax Directive, mergers involving limited liability companies of two or more Member States are neutral for tax purposes, to the extent that certain conditions are met.

In line with the Tax Directive, Articles 172 and 179 of the Italian tax code (Presidential Decree No. 917 of December 22, 1986, the "ITC") provide that a merger of a limited liability company, resident for tax purposes in Italy, with a company covered by the directive and resident for tax purposes in another Member State, shall not be deemed a taxable event in Italy, provided that any assets and liabilities located in Italy

[21] Italian Legislative Decree No. 188 of August 19, 2005 implemented in Italy Council Directive 2001/86/EC of October 8, 2001 supplementing the statute for a European company with regard to the involvement of employees.

[22] Under the New Rules, if employee participation rights exist within one or more merging companies, the Italian surviving company subject to mandatory employee participation arrangements must adopt a corporate governance system preserving such employee participation rights, *i.e.*, allowing employee participation in its supervisory or administrative body.

and transferred to the foreign surviving company as a consequence of the merger remain effectively connected with an Italian permanent establishment of the surviving company.

Limitations on the carry-over of net operating losses apply. Further, as a rule, no step-up of the tax basis of the transferred assets may occur. However, the 2008 Budget Law has enacted certain changes to the tax regime applicable to mergers (including cross-border mergers), whereby the surviving company may, subject to certain conditions, elect the application of a substitute tax, ranging from 12% to 16%, to obtain the recognition for Italian tax purposes of any accounting step-up of the assets received as a consequence of the merger, deriving from the allocation of any merger deficit (*disavanzo di annullamento* and *disavanzo di concambio*).

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Please do not hesitate to contact Giuseppe Scassellati-Sforzolini, Paola Albano (for tax matters) or Francesco Lione in our Rome office (+39.06.69.52.21) or Pietro Fioruzzi in our Milan office (+39.02.72.60.81) should you have any questions concerning the issues addressed in this memorandum.

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