Italy

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1. Introduction

1.1 Admissibility of cash pooling agreements

Italy has no specific legislation that governs cash pooling in full. The English term 'cash pooling' is therefore used to define any arrangement providing for a centralised management of the financial resources in a group of companies. Although certain legal scholars have in the past raised some concerns as to the lawfulness of cash pooling agreements[1], today such arrangements are considered fully valid under Italian law.

This opinion – which is in line with that expressed by a large majority of scholars[2] – has been confirmed by a number of acknowledgments of cash pooling in case law[3] and in rulings and circulars issued by several administrative authorities,[4] as well as more recently in certain regulatory measures[5] that make some reference to cash pooling (without, however, providing for full regulation thereof). For these reasons,

1 Reference is to E Gliozzi, "*Direzione unitaria di un gruppo di società e confusione di patrimoni*", published in *Giur It*, 1996, I, 2, page 536 *et seq*; see also E Gliozzi, *L'imprenditore commerciale. Saggio sui limiti del formalismo giuridico,* Bologna, 1998, page 146, footnote 22.

2 Among others, M Tidona, "*Il cash pooling tra le società appartenenti ad un gruppo*", in *www.magistra.com*, 2000; A Daccò, *L'accentramento della tesoreria nei gruppi di società*, Milano, 2002; M Castiglioni, "*Il contratto di tesoreria accentrata (cd cash pooling). I requisiti della società capogruppo nel Testo Unico Bancario*", in *www.tidona.com*, 2002; F Baggio and G Rebecca, "*Tesoreria accentrata e finanziamenti infragruppo con società non residenti. Aspetti tributari*", in *Il Fisco* 2003, n 43, page 23 *et seq*; R Moro Visconti, "Impresa commerciale e industriale", in *Impr. comm. ind.*, 2004, page 395 *et seq*; A Rittatore Vonwiller and M Ippolito, *I gruppi societari*, Milano, 2005, page 442 *et seq*; F Bencivegna and L Galeotti Flori, "*Il contratto di cash pooling*", in *Il Foro Toscano*, 2007, page 251 *et seq*; SA Dalla Riva, *Cash pooling. Il governo centrale della liquidità nei gruppi societari. La gestione in azienda, la normativa, il fisco*, Milano, 2008, page 143 *et seq*; S Colombi, *Le holding e il gruppo di imprese*, Bologna, 2010; A Dragonetti, V Piacentini and A Sfondrini, *Manuale di fiscalità internazionale*, Milano, 2010, page 618 *et seq*; M Peverelli and A Francioso, "*Contratti di cash pooling: deducibilità degli interessi passivi e applicazione delle ritenute*", in *Fiscalità e Commercio internazionale*, 2011, page 57 *et seq*; L Ruggeri, "*Brevi Note circa il cash pooling*", in *Nuova Giurisprudenza Civile Commentata*, 2011, I, page 206 *et seq*; M Miola, "*Tesoreria accentrata nei gruppi di società e capitale sociale*", in VVAA, *La struttura finanziaria e i bilanci delle società di capitali, Studi in onore di Giovanni E. Colombo*, Torino, 2011, page 36 *et seq*; L Gambini and G Battaglia, "*Section on Italy*" in J Jensen, *International Cash Pooling. Cross-border Cash Management Systems and Intra-group Financing*, Munich, 2011, page 201 *et seq*.

3 Courts of Forlì, Civil Division, Decision of June 30 2008, in *dejure.giuffre.it*; Supreme Court, Tax Division, Decision 14730 of June 23 2009, in *dejure.giuffre.it*; Regional Tax Courts of Turin, Division XXV, Decision 16 of March 17 2010, in *dejure.giuffre.it*; Courts of Pistoia, Civil Division, Decision of February 17 2010 in NGCC, 2011, I, page 202 *et seq*.

4 See Revenue Agency Ruling 58/E of February 27 2002; Revenue Agency Ruling 194/E of October 8 2003; Revenue Agency Circular 47/E of November 2 2005; Revenue Agency Circular 19/E of April 21 2009; Revenue Agency Ruling 131/E of May 27 2009; Ministry of Economy and Finance Circular 51/E of October 6 2010.

despite the lack of a complete and specific regulatory framework for cash pooling agreements, we are of the opinion that cash pooling is fully valid under Italian law.[6]

In light of the above, it is important to understand how a cash pooling agreement is classified under Italian law.

Technically speaking, a cash pooling agreement should be considered as a contract mentioned (but not specifically provided for) by law. Despite this, it can still be considered an irregular contract because, as noted above, there is currently no Italian law that provides for complete regulation of cash pooling.

Under Italian law, an irregular contract is fully valid and binding as long as it aims to generate interests worthy of protection according to the laws in force.[7] In order to assess the worthiness of protection, the reasons behind each party entering into a cash pooling agreement need to be verified, just as they would for any other irregular contract.

In almost all cases, the main objective of entering into a cash pooling agreement is to optimise the management of a corporate group's liquidity. This goal is entirely lawful and legitimate under Italian law, and compliant with the principles underlying applicable Italian corporate laws.

Therefore, it should be considered perfectly legitimate for corporations or entities to enter into a cash pooling agreement and for holding companies to set up a cash pooling agreement with group members.

1.2 Types of cash pooling agreement

The objective of optimising a corporate group's liquidity could be reached through different contractual schemes and, as a result, a cash pooling agreement in Italy may be structured in different ways. However, an initial general distinction must be made between physical cash pooling and notional cash pooling (the latter can also be referred to as virtual cash pooling).

A physical cash pooling scheme provides for actual movements of cash from each secondary account[8] to the master account[9] and vice versa. Periodically (usually at the close of business of each business day), the balance of each secondary account is

5 See Regulation of the Authority for the Supervisory over Public Contracts, Services, and Supplies 4/2011 of July 7 2011 (in *Official Gazette of the Republic of Italy* 171/2011 of July 25 2011) providing for Guidelines on traceability of financial transactions pursuant Article 3 of Italian Law 136/2010 of August 13 2010; Regulation of the Authority for the Supervisory over Public Contracts, Services, and Supplies 10/2010 of December 22 2010 (in *Official Gazette of the Republic of Italy* 4/2011 of January 7 2011) providing for additional instructions on traceability of financial transactions; Bank of Italy Regulation of July 5 2011 implementing Title II of Italian Legislative Decree 11/2010 of January 27 2010 regarding payment services; Regulation containing implementation rules of Italian Legislative Decree 58/98 of February 24 1998 on markets, adopted by the Italian Market Authority (CONSOB) with Resolution 16191 of October 29 2007, later amended by Resolution 16530 of June 25 2008, Resolution 16850 of April 1 2009, Resolution 17221 of March 12 2010, Resolution 17389 of June 23 2010 and Resolution 18079 of January 20 2012.

6 Given the absence of significant case law in respect of the validity of cash pooling agreements, all of the opinions expressed in this chapter reflect current common practice adopted in Italian cash pooling transactions according to the authors' experience and interpretation, taking into account, among other things, the views expressed by the Revenue Agency, the Bank of Italy and CONSOB, and the authors' interpretation thereof. However, the authors cannot exclude the possibility that judicial, tax and/or regulatory authorities may, in the future, reach conclusions in respect of the matters falling within the scope of this chapter that differ, even substantially, from the opinions expressed here.

7 Article 1322 of the Code.

transferred to the master account in order to accumulate the liquidity belonging to all group companies[10] into one single account (ie, the master account). Equally, if and when the balance of a secondary account falls below zero, then the master account holder[11] will debit the master account for an amount equal to the negative balance and credit such amount to the relevant secondary account so that the balance of that secondary account is no longer negative. The most frequent types of physical cash pooling are zero balancing and account sweeping.

In contrast to what occurs with physical cash pooling, a notional cash pooling scheme does not provide for any actual transfer of cash between the different accounts. The funds standing to the credit of the master account (if any) and those standing to the credit of the secondary accounts are not transferred and, essentially, remain untouched. The cash pool is obtained through a virtual netting of credits and debits resulting from the positive and negative balances of all relevant accounts. Then, the applicable interest rate is calculated on the aggregate balance of all participating accounts. This type of cash pooling is rarely employed in Italy because the Italian Revenue Agency has provided for the application of a tax regime less favourable than that applicable to physical cash pooling, due to a different classification of this type of cash pooling agreement from that applicable to the zero balancing system.[12]

Given the general distinction above, we will analyse the different types of cash pooling that could be potentially implemented in Italy in more detail, in particular:

- the zero balancing system;
- the account sweeping system; and
- notional cash pooling.

For the sake of clarity, it is appropriate to specify that the only type of cash pooling that may be implemented in Italy without any particular concern is zero balancing.[13]

8 In the context of this chapter, 'secondary account' means each account belonging to a participating group company other than the master account holder.

9 In the context of this chapter, 'master account' means the main bank account used for the cash pooling scheme and managed by the master account holder.

10 In the context of this chapter, 'Group company' means a company participating in a cash pooling agreement.

11 In the context of this chapter, 'master account holder' means the company (usually the parent company or a special treasury entity) that enters into a cash pooling agreement with a bank.

12 For further details, see the section on tax law below, at section1.3(c).

13 This is due to the tax regime applicable to notional cash pooling under Revenue Agency Ruling 58/E of February 27 2002 and Ruling 194/E of October 8 2003, but also due to some uncertainties as to the compliance of notional cash pooling with certain Italian laws and regulations (eg, Ministry of Economy and Finance Ruling 8/1605 of December 21 1976; and Articles 26 and 26-*bis* of the Italian Presidential Decree 600/73 of September 29 1973); in this respect, see also F Bencivenga and L Galeotti Flori, "*Il contratto di cash pooling*", in *Il Foro Toscano*, 2007, page 253; S Colombi, *Le holding e il gruppo di imprese*, page 106 *et seq*.; A Dragonetti, V Piacentini and A Sfondrini, *Manuale di fiscalità internazionale*, page 618 *et seq*.; M Peverelli and A Francioso, "*Contratti di cash pooling: deducibilità degli interessi passivi e applicazione delle ritenute*", in *Fiscalità e Commercio internazionale*, 2011, page 57 *et seq*; R Moro Visconti, "*Impresa commerciale e industriale*", in *Impr comm ind*, 2004, page 395 *et seq*; A Rittatore Vonwiller and M Ippolito, *I gruppi societari*, page 442 *et seq*; SA Dalla Riva, *Cash pooling. Il governo centrale della liquidità nei gruppi societari*, page 144 *et seq*.

(a) Zero balancing

Zero balancing involves the physical movement of money between the master account and the secondary accounts. At the close of business of any business day, each secondary account is swept to create a zero balance and all the funds standing to the credit thereof are credited to the master account. In addition to sweeping positive balances in the secondary accounts up to the master account, a debit balance on any secondary account is cancelled by means of a mirrored sweep from the master account. Following any money transfer, the master account holder becomes either a creditor or a debtor in respect of each group company. As a consequence of each transfer, an intra-group relationship is created and is recorded (ie, accounted for) by both the master account holder and the relevant group company in an *ad hoc* accountability statement. Any entry in the master account accountability statements must be followed by an equivalent (inverse) entry in the relevant secondary account accountability statements. Interest accrued on the sums standing to the credit of the master account is paid down at pre-agreed rates to each group company on a *pro rata* basis.[14] In the absence of specific regulation, this type of contractual scheme – although not clearly identifiable either as a regular inter-company loan agreement[15] or as a regular non-bank current account agreement[16] – has been classified as an irregular inter-company loan agreement for tax purposes.[17] This legal classification must be taken into account in determining the rules applicable to a zero balancing cash pooling agreement.

(b) Account sweeping

As with the zero balancing system, the account sweeping system involves the physical movement of sums between the group companies' accounts. However, unlike zero balancing and notional cash pooling, the account sweeping system does not provide for any automatic transfer of sums on pre-agreed terms: each transfer is made upon instruction of the master account holder. Each instruction may be given from time to time with or without a framework agreement. This type of cash pooling is rarely used in Italy, probably as a result of the uncertainties created by the lack of decisions concerning this type of arrangement.[18]

14 For the avoidance of doubt, this is not a legal obligation and the interest accrued on the sums standing to the credit of the master account may be paid down to the group companies on a bullet basis.

15 A cash remittance under a cash pooling agreement may not qualify as a loan because the underlying rationale of a cash pooling agreement differs from the underlying rationale of a loan agreement. In a cash pooling agreement, the rationale is the best management of a group's liquidity, while in a loan agreement the rationale is obtaining immediate availability of money or other fungible goods with the obligation to reimburse the same amount of money or goods (plus interest, if any). In Italy, loan agreements are regulated under Article 1813 of the Civil Code.

16 Cash remittances may not qualify as a non-bank current account agreement mainly because of the unavailability of sums until the account is closed. Non-bank current account agreements are regulated under Article 1823 of the Civil Code, and their underlying rationale is the reciprocal granting of credit.

17 Revenue Agency Rulings 58/E of February 27 2002 and 194/E of October 8 2003.

18 The account sweeping system may sometimes be adopted by groups of micro and small enterprises. See L Del Federico, "*La gestione della tesoreria e del corporate financing attraverso holding di diritto estero*", in *Il Fisco*, No 7, February 13 2006, page 965 *et seq*.

(c) Notional cash pooling

Unlike zero balancing and account sweeping, notional cash pooling system does not involve the physical transfer of moneys between the master accounts (if any) and the secondary accounts. Nonetheless, under a notional cash pooling agreement, interest accrues on the aggregate amount determined as the sum of the balance of the master account (if any) and the balances of all secondary accounts. The operating bank[19] will notionally calculate the aggregate balance across several accounts and pay or charge interest on the combined balance only. The main feature of a notional cash pooling system is the absence of any actual physical transfer of moneys between the current accounts. This system is almost never used in Italy because the set-off of a credit on one account against a debt on another account is not permitted under Italian law.[20] Another obstacle to notional cash pooling under Italian law is the obligation to calculate positive and negative interest on the balance of each account on a daily basis.[21]

(d) Target pooling, reverse pooling and margin pooling

Hybrid forms of cash pooling, such as a combination of physical pooling and notional pooling, are also possible. However, these are less likely to be used in Italy than zero balancing (if at all), because they are also still virtually untested in the Italian courts. The main hybrid types of cash pooling agreements as follows.

Target balance cash pooling: This is very similar to the zero balancing system, as it involves the physical movement of money between the master account and the secondary accounts, but at the close of business of any business day, each secondary account is not swept to create a zero balance. Instead, all accounts are pooled to ensure a pre-set balance. The extrapolated value date balance on the pooling day is transferred (ie, back values and same-day values are transferred with value date of the pooling day). Target balancing works by means of exchanging SWIFT messages (executing: MT101/103; reporting: MT940/942).[22]

19 In the context of this chapter, 'operating bank' means the bank providing for banking and payment services to the master account holder (if any) and the group companies in the context of a cash pooling agreement.

20 See F Bencivenga and L Galeotti Flori, "*Il contratto di cash pooling*", in *Il Foro Toscano*, 2007 page 254; S Colombi, *Le holding e il gruppo di imprese*, page 120. See also SA Dalla Riva, *Cash pooling. Il governo centrale della liquidità nei gruppi societari*, page 144 *et seq* and, in particular, pages148 and 152, where the author states that "under the Italian Civil Code there is not an express prohibition against notional cash pooling" (page 148) but "the legal issues [underlying to a notional cash pooling] … represent an obstacle that is very hard to overcome despite the best treasurer's will and, as a matter of fact, represent an implicit prohibition against notional cash pooling in Italy" (page 152). On this subject, note Article 1252 of the Civil Code allowing voluntary compensation by agreement of the parties even in the absence of the conditions provided for by the law.

21 See Article 89, seventh paragraph, of Presidential Decree 917/86 of December 22 1986, which states that: "in relation to current account contracts, and banking transactions settled through current accounts, including reciprocal current accounts for services rendered between businesses and financial institutions, interest is treated as accrued also where the interest has been offset, whether that has occurred by law or by contract."
Therefore, the set-off mechanism underlying a notional cash pooling scheme must be disregarded for tax purposes because the lower tax base that results may theoretically be considered to be tax evasion.

22 SA Dalla Riva, *Cash pooling. Il governo centrale della liquidità nei gruppi societari*, page 97 *et seq*.

Reverse pooling: This is a merger between physical and notional cash pooling where balances remain on the secondary accounts while interest accrued thereon is credited to the master account. At the end of each business day, all amounts standing to the credit of the secondary accounts are transferred to the master account, but one minute after midnight (ie, at the start of the following business day), all amounts are credited back to the relevant secondary account. This may be the best way to get a 'notional pooling effect' in Italy, avoiding the downside of notional pooling.[23]

Margin pooling (also known as 'interest enhancement'): This is a variation of notional cash pooling under which margin compensation or interest offsetting is credited to all group companies' linked accounts, regardless of the currency in which they are denominated. The bonus paid is computed on the basis of offsetting carried out for all accounts involved in the pooling process. The advantage of this form of pooling is that interest is first levied on the accounts, as is customary, and bonus interest is subsequently applied. As far as we know, this form of pooling has never been used in Italy.[24]

(d) Cross-border issues

Particular attention to the structuring of a cash pooling agreement should be paid when one of the group companies participating in the agreement is not resident in Italy. As a matter of law, there are specific tax issues concerning the master account holder, with regard to the rate of interest and the fees payable to it, and any group company participating in the cash pooling agreement (including the master account holder), with regard to the effects of value added tax and the taxation of corporate incomes.[25]

1.3 Specific legal requirements from various perspectives

(a) Company law

Italian corporate law provides no any specific provisions with respect to cash pooling agreements. However, the decision to enter into a cash pooling agreement would be subject to the general principles of Italian corporate law. Please see section 2.1 below with respect to, among other things, intra-group relationships, undercapitalisation, financial assistance, conflict of interests and selected aspects of the regulation of listed companies.

(b) Banking regulation

Italian banking regulation, as it affects cash pooling agreements, must be analysed at three different levels:

- the master account holder level;

23 *Ibid*, page 115 *et seq*.
24 *Ibid*, page 119 *et seq*.
25 For further details, see the section on tax law below, at section 1.3(c).