Outbound dividend distribution from an Italian company to a Swiss company

The recent Swiss tax reform that repealed the special status available for Swiss companies could have a relevant impact in the cross-border scenario where a Swiss company retrieves Italian-source income

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The dividend distribution by an Italian company to a Swiss shareholder is a transaction that triggers a number of tax ramifications that should be duly considered, in particular with reference to the application of the Italian withholding tax, the responsibility in the application of which lies in the hands of the Italian distributing entity. Favorable conditions could be reached under the application of the Italy-Switzerland Double Tax Treaty or of the EU-Switzerland Agreement, provided that specific subjective conditions are met and that the anti-abuse rules are respected. This article intends to go through the main Italian tax rules applicable to the transaction, also in light of the latest Swiss developments.

I. Main Italian tax implications for outbound dividend distribution ... 502
II. The Swiss tax reform ... 503
III. The application of the DTT and the Agreement ... 503
IV. Application of the DTT ... 505
V. Application of the Agreement ... 506
VI. Conclusion ... 507

I. Main Italian tax implications for outbound dividend distribution

Under Italian tax law, a non-Italian tax resident company without a permanent establishment that receives dividends distributed by an Italian tax resident company is deemed to realize an Italian-source income, relevant for Italian tax purposes[1].

With the clear purpose of protect the effective supervision in the application of the tax and its effective collection, the Italian income tax is applied by means of a final withholding tax (WHT) at 26% rate, applied by the Italian company that distributes the dividends[2]/[3].

In case of dividend distribution to a Swiss tax resident company, the Italian WHT may be[4]:

- reduced to 15% under the conditions of the Double Tax

[1] As an "*income from capital*" (reddito di capitale), art. 151 and 23(1)(b), Italian Income tax code (Presidential Decree 22.12.1986 no. 917, published in Italian Official Gazette 31.12.1986 no. 302, hereinafter "Italian Tax Code" or ITC). As a general consideration, non-Italian resident companies without a permanent establishment in Italy are liable to tax in Italy for all the income deemed to be Italian-source regardless the fact that such income derives from a business activity or from other sources, so called *principio del trattamento isolato dei redditi*; on this topic refer to Circular no. 6/E/2016; Resolution no. 41/E/2007; ROBERTO BAGGIO, Il principio di territorialità ed i limiti alla potestà tributaria, Milano 2009, p. 460; FRANCESCO PADOVANI, Riflessioni in tema di trattamento fiscale dei soggetti non residenti svolgenti attività d'impresa all'estero e privi di stabile organizzazione in Italia, con particolare riferimento alle sfide poste dall'economia digitale, in: Rivista di diritto tributario, 1/2019, p. 55. For a critical approach refer to AUGUSTO FANTOZZI/ANTONIO MANGANELLI, Qualificazione e determinazione dei Redditi prodotti da imprese estere in Italia: applicabilità della normativa dei prezzi di trasferimento nei rapport tra stabile organizzazione e casa madre, in: Studi in onore di Victor Uckmar, Padova 1998, p. 404.

[2] Art. 27(3), DPR 29.9.1973 no. 600, published in Italian Official Gazette 16.10.1973 no. 268. About the concept of the "final withholding tax", i.e. a method of application of tax that concludes all the tax accomplishments in the hands of the taxpayer to which an income is attributable, refer to AUGUSTO FANTOZZI, Il diritto Tributario, Torino 2003, p. 65.

[3] Italian domestic tax law provides for an irrebuttable presumption, according to which any equity distribution is regarded as a distribution of retained earnings and profits reserves up to the amount of freely distributable retained earnings accounted by the Italian company, regardless of the content of company' shareholder meeting resolution related to the (equity) distribution (art. 47[1], ITC).

[4] *Rectius*, according to art. 75, DPR no. 600/1973, international provisions such as the Italy-Switzerland Double Tax Treaty or the EU-Switzerland Agreement prevail in the hierarchy of legal sources over Italian domestic tax law, except in case the latter is more convenient for the taxpayer (art. 169, ITC). About the prevalence of the international provision over Italian domestic tax law, reference could be made to CLAUDIO SACCHETTO, Le fonti del diritto internazionale tributario e dell'ordinamento fiscale europeo, in: Claudio Sacchetto (ed.), Principi di diritto europeo; PIETRO BRACCO, Italy in Tax Treaties and Domestic Law, in: Guglielmo Maisto (ed.), IBFD Online Books, 2006, chapter 10.2.; MARCO PIAZZA, Rimborso delle ritenute applicabili sui dividendi corrisposti a non residenti. Conflitto fra la norma interna e la norma convenzionale, in: Riv. dir. trib., 2001, p. 40; PAOLO ARGINELLI/CATERINA INNAMORATO, The Interaction between Tax Treaties and Domestic Law: an Issue of Constitutional Legitimacy, European Taxation, 2008, p. 299.

Treaty signed between Italy and Switzerland[5]; or
- excluded under the conditions of the Agreement between the European Union and Switzerland[6].

The applications of the DTT and the Agreement are alternative and there is no hierarchy in the election[7].

The Italian distributing company is responsible for the application and payment of the Italian WHT, since it acts as the WHT's agent in the relationship between the Italian tax authorities and the non-Italian company[8]. Penalties in case of misapplication of the WHT are due by the withholding tax's agent. Therefore, the Italian company, can directly apply the reduced/zero WHT provided by the DTT/Agreement and no advance approval from Italian tax authorities is required[9].

As an alternative, the Italian subsidiary applies the WHT at the full rate and then - providing evidence that all the conditions required are met - the Swiss recipient company is entitled to ask Italian tax authorities for the refund of the Italian WHT suffered, either up to the reduced rate set forth by the DTT or for the whole amount under the condition of the Agreement. In both cases, the non-Italian recipient shall file a specific refund request with Italian tax authorities within 48 months from the Italian WHT application.

II. The Swiss tax reform

With the aim of creating an internationally compliant and competitive tax system for Swiss companies, the Swiss referendum held on 19 May 2019 approved the Federal Act on Tax Reform and AHV Financing (TRAF), at the end of a long political process during which two previous proposal have been previously rejected.

Among various measures, the Reform has basically repealed the special status available for companies, such as these available for management companies, holding companies and mixed companies[10], that predominantly operated at international level rather than within the Swiss market and that have come under increasing public scrutiny, especially after the OECD anti-BEPS strategies.

As a consequence, the arrangements for Cantonal status companies – no longer accepted internationally – have been repealed, and, in order for Switzerland to remain an attractive business location, a number of favorable measures have been introduced, such as new tax-related special arrangements to promote research and development and the possibility for Cantons to introduce a special deduction for self-financing as well as a possible increase of Cantons' share of direct Federal tax revenue to 21.2% (from the previous 17%)[11].

III. The application of the DTT and the Agreement

As a general principle, the DTT or the Agreement can be invoked exclusively by entities that are "resident" in Switzerland according to the definition contained, respectively, in the DTT and in the Agreement.

With reference to the DTT, art. 4 provides that a company "liable to tax"[12] in Switzerland is considered as "resident" for the purposes of the application of the DTT. In the same line, the Agreement is applicable by a company that is resident for tax purposes in Switzerland, i.e. that is subject to Swiss corporation tax without being exempted[13].

[5] Double Tax Treaty between Italy and Switzerland signed in Rome on 09.03.1976 and ratified by L. no. 943/1978; the Tax Treaty has been amended by the Amending Protocol signed in Milano on 23.02.2015 and ratified by L. no. 69/2016. The Double Treaty between Italy and Switzerland, together with the Amending Protocol, is also referred as the "DTT").

[6] Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, published in the OJ L 29.12.2004 no. 385, integrated by the Amending Protocol to the Agreement between the European Community and the Swiss Confederation published in OJ L 333/12 of 19.12.2015 (Council Decision [EU] 2015/2400 of 8.12.2015; the Agreement and the subsequent Amending Protocol are jointly referred hereafter as the "Agreement". The Agreement is directly applicable in Italy, even without a domestic law of implementation, under the provision of article 218, Consolidated version of the Treaty on the Functioning of the European Union of 13.12.2007, OJ C 326 of 26.10.2012 (as confirmed by Italian tax authorities in Resolution no. 93/E/2007).

[7] Italian Supreme Court Decision no. 27111/2016.

[8] Art. 64, DPR no. 600/1973. Where the Italian company fails to apply and pay the WHT, Italian tax authorities are entitled recourse to the non-Italian recipient company, which is jointly and severally liable for the payment of the tax with the Italian company (art. 35, DPR no. 602/1973). For an analysis of the role of the WHT agent, refer to LAURA CASTALDI, Sulla figura del responsabile d'imposta, in: Rivista di Diritto Tributario, 2018, I, p. 21.

[9] As confirmed by Italian tax authorities in Resolution no. 86/E/2006.

[10] For an overview of these regimes (as applicable before the Reform enacted in Switzerland, detailed *infra*) refer to Peter Steimle, La disputa fiscale tra Svizzera ed UE e l'imposizione cantonale delle persone giuridiche a tassazione speciale, in: NF 3/2011, p. 20; Xavier Oberson/Jérôme Meyer/Stefan Eberhard, Switzerland - Holding Companies, in: Country Tax Guides, IBFD. For an historical overview of Swiss favorable tax regimes, see Ernst K. Briner, Tax-privileged corporate structures in Switzerland, in: Intertax, 1983, 6-7, p. 245.

[11] For a general overview of the Reform see: https://www.efd.admin.ch/efd/en/home/dokumentation/legislation/abstimmungen/staf/fb-steuervorlage17.html (03.08.2020) and, for a detailed analysis Samuele Vorpe, Novità legislative nel campo del diritto tributario, in: RtiD II-2019, p. 511; Samuele Vorpe, La riforma fiscale delle imprese in Svizzera, in: Patrimoni, finanza e internazionalizzazione, 2019, p. 22, p. 49.

[12] As reported by art. 4(1) of the DTT "*l'espressione «residente uno Stato contraente» designa ogni persona che, in virtù della legislazione di detto Stato, è assoggettata ad imposta nello stesso Stato*". As provided by art. 2(3)(b) of the DTT, the Swiss taxes considered by the DTT are these "*imposed by the Confederation, the Cantons and the Municipalities*". The term "*assoggettata*" can be translated in English as "liable to tax". It should be noted that the DTT has been drafted exclusively in Italian (art. 31 of the DTT) and this should ease the interpretation of the provisions reported therein. About the interpretation of double tax treaties, with particular focus on the "multilingual" treaties, refer to Paolo Arginelli, Chapter 7 – Interpretation of Multilingual Treaties, in: Multilingual Tax Treaties: Interpretation, Semantic Analysis and Legal Theory, IBFD 2015.

[13] Art. 9(1) of the Agreement. As provided by the Italian version of the Agreement, the Swiss company shall be "*assoggettata all'imposta diretta sugli utili delle società senza beneficiare di esenzioni*". Under Italian tax authorities' guidelines, the Swiss corporate tax should be considered as the sum of taxation of taxes levied at federal, cantonal, regional and municipal level (Resolution no. 93/E/2007 and Resolution no. 288/E/2007). The interpretation according to which the expression in English "subject to tax" should be read as "liable to tax" has been put forward by authoritative authors such as Paolo Arginelli, The Subject-to-Tax Requirement in the EU Parent-Subsidiary Directive (2011/96), in: European Taxation, 2017, 8, p. 57; Guglielmo Maisto, Temi attuali nell'applicazione della Direttiva Madre-Figlia: Guglielmo Maisto (ed.), La tassazione dei dividendi intersocietari, p. 571; Andrea Fedele, La direttiva "madre-figlia" e la disciplina attuativa come complesso normativo unitario e

In this respect, under the established view of the Italian Supreme Court, it is generally not required that taxes are actually paid on the Italian-sourced income by the beneficiary in its residence State**[14]**.

In this respect, it should be noted a different approach was adopted in another early line of cases dealt by the Italian Supreme Court**[15]**, recently revamped**[16]**, which held that, in order to be granted the reduction of the Italian WHT under an international provision (such as a double tax treaty or an EU-based provision such as the Agreement), it is required that the non-Italian company retrieving Italian source income is subject to tax on such income in its Country of tax residence also in lack of any specific "subject-to-tax clause" expressly reported in the specific international provision. Therefore, the application of measures aimed at counteracting economic double taxation in the Country of residence of the company retrieving Italian-source dividends, such as the dividend exemption, could taint the application of the DTT or the Agreement.

This last approach has been considered not consistent with the general provision of a double tax treaty drafted in line with the OECD Model Tax Convention**[17]**, in lack of specific "subject-to-tax clause" in the proper double tax treaty (and the DTT does not provide for any clause in this respect)**[18]**.

With reference to the Agreement, the mentioned approach has been considered not consistent with Italian and European tax law framework**[19]**, mainly leveraging on the fact the dividend exemption is one of the two optional methods envisaged at EU level to relieve economic double taxation**[20]**. Indeed, only entities that benefit from a "subjective full exemption" (*i.e.* the entity as whole is exempt from corporation tax) and not from "objective exemption" (*i.e.* a specific category of income is exempt from taxation in the hands of the entity)**[21]** can be considered as not eligible for measures aimed at counteracting economic double taxation in a cross-border scenario, such as the EU Parent-Subsidiary Directive**[22]** and the Agreement**[23]**.

In this respect, Italian tax authorities acknowledged that the exclusion from the Italian WHT under the Agreement is applicable also in case Italian-source dividends are subject, in the hands of the Swiss parent company, to the Swiss participation relief applied on a cash basis (*riduzione per partecipazioni*)**[24]**, being its rationale aimed at counteracting the "economic double taxation" and therefore a "systematic" measure, aligned to the Italian participation exemption regime granted to Italian tax resident companies**[25]**.

As provided under Italian tax authorities' guidelines, the Swiss company should provide the Italian subsidiary - before the dividend distribution - with the documentation supporting the existence of all the relevant conditions for application of the DTT or of the Agreement, including a certification of Swiss tax authorities stating the residence of the Swiss company**[26]**.

sistematico: i criteri interpretativi, in: Rassegna Tributaria, 2001, 5, p. 1256.

[14] Italian Supreme Court Decisions no. 10706/2019, 27588/2011, 27592/2011, 12458/1999, 1231/2001, 2432/2001. Since judgments before the Italian Supreme Court are exclusively centred on legal interpretation, the analysis of the factual elements of the litigation usually plays a marginal role.

[15] Italian Supreme Court Decisions no. 3861/2000 and 7890/2000.

[16] Italian Supreme Court Decisions no. 25490/2019 and 32255/2018. In these Decisions, the Supreme Court held that the exemption from the Italian WHT under the EU Parent-Subsidiary Directive cannot be granted if the Italian-source dividends received by a Luxembourg parent company are not taxed in Luxembourg due to the application of the participation exemption regime provided by under Luxembourg domestic law.

[17] As provided by art. 10, para 8.11 of the OECD Model Tax Commentary (2017), quoted by Italian Supreme Court Decision no. 10706/2019, "*in many States, a person is considered liable to comprehensive taxation even if the Contracting State does not in fact impose tax. For example, pension funds, charities and other organizations may be exempted from tax, but they are exempt only if they meet all of the requirements for exemption specified in the tax laws. They are, thus, subject to the tax laws of a Contracting State. Furthermore, if they do not meet the standards specified, they are also required to pay tax. Most States would view such entities as residents for purposes of the Convention*". For a detailed analysis of the Italian Supreme Court Decision no. 10706/2019 refer to Carlo Romano/Daniele Conti, Il corretto significato del requisito di assoggettamento ad imposta ai fini della riduzione convenzionale delle ritenute: è lui Godot?, in: NF 3/2020, p. 163.

[18] For the analysis of the "subject-to-tax clause" contained in the double tax treaties entered by Italy, refer to Paolo Conci/Siegfried Mayr, in: IFA Cahiers 2004 – Double non-taxation, IBFD, Vol. 89a, p. 465.

[19] Massimo Antonini/Raul-Angelo Papotti, Il requisito dell'assoggettamento a imposta per l'esenzione da ritenuta sugli utili a società non residenti, in: Corriere Tributario, 4/2019; CFE ECJ Task Force, Opinion Statement ECJ-TF 2/2019 on the ECJ Decisions of 26 February 2019, in: European Taxation, 2019, p. 10.

[20] Case C-446/04 (*Test Claimants in the FII Group Litigation*), Joined Cases C-436/08 and C- 437/08 (*Haribo and Osterreichische Salinen*).

[21] In an EU context, reference could be made to Case C-448/15 (*Wereldhave*), paras 32 and 40; Case C-303/07 (*Aberdeen Property Fininvest Alpha Oy*), para. 27, AG Opinion in *Wereldhave Case*, para. 44. For a detailed comment on *Wereldhave Case*, reference could be made to Paolo Arginelli, The Subject-to-Tax Requirement in the EU Parent-Subsidiary Directive (2011/96), in: European Taxation, 2017, p. 334; Satenik Melkonyan/Filip Schade, Flow-Through Holding Companies in Light of the Parent-Subsidiary Directive: The Thin Line between Tax Planning and Tax Abuse, in: Intertax, 2019, 47, 6-7, p. 590.

[22] Directive 2011/96/UE [2011], published in OJ L 345 (as amended by Directive 2014/86/UE and Directive 2015/121), which object "*to exempt dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and to eliminate double taxation of such income at the level of the parent company*", transposed in art. 27-*bis*, DPR no. 600/1973.

[23] As reported above, the Agreement provides "*for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments*". For the relation between the EU Directives and the Agreement, refer to Marcel R. Jung, Art. 15 of the Switzerland-EC Saving Tax Agreement: Measures equivalent to those in the EC Parent-Subsidiary and the Interest and Royalties Directive – A Swiss perspective, in European Taxation, 2006, p. 112.

[24] For a detailed analysis of the regime, refer to Lucia Lehmann, Il sistema svizzero della riduzione per partecipazioni, in: NF, Edizione speciale, 2013, p. 46; Roger M. Cadosch, Switzerland – Corporate Taxation sec. 6., Country Tax Guides IBFD, 2020, para. 6.

[25] On the systematic nature of the Italian participation exeption (PEX) regime, refer to Guglielmo Maisto, Italy Country analysis, in: Taxation of Companies on Capital Gains on Shares under Domestic Law, EU Law and Tax Treaties, IBFD Online Books, 2013; para. 19.2.1; Francesco Pedrotti, La participation exemption quale nuovo regime ordinario di circolazione delle partecipazioni societarie, in: Rivista di diritto tributario, I, 2005; Pasquale Salvatore/Raimondo Rossi, Portfolio investment in società estere: il Decreto ATAD aggiorna i criteri per qualificare la provenienza dei redditi, in: Diritto24, 11.1.2019; refer also to Resolution no. 288/E/2007 and Circular no. 7/E/2013.

[26] Resolution no. 68/E/2000.The request should be executed through the ad hoc *Forms* released by Italian tax authorities with Order 10.7.2013, Prot. no.

With reference to both the application of the DTT and the Agreement[27], it should be considered the application of the Italian anti-abuse measures, also as provided by Italian domestic tax law[28].

Furthermore, the anti-abuse provisions contained in the Multilateral Convention (MLI, still to be ratified by Italy) should be duly considered upon the envisaged entry into force of the MLI in the relations between Italy and Switzerland[29].

IV. Application of the DTT

According to art. 10 of the DTT, the Italian WHT applicable upon dividend distribution cannot exceed the rate of 15% as long as a number of specific requirements are met by the Swiss recipient entity, namely[30]/[31]:

a) it is tax resident in Switzerland;
b) it does not carry out a trading or industrial activity though a permanent establishment located in Italy, to which the Italian participation distributing the dividends can be attributed;
c) it is the beneficial owner (BO) of the Italian-sourced income;
d) it complies with the specific limitation-on-benefits (LoB) rule set forth by art. 23 of the DTT, as well as with the Italian anti-abuse provisions.

With reference to the BO clause, in lack of an official definition either under Italian tax law or in the DTT (apart from that implementing the EU Interest-Royalty Directive)[32], reference can be made to the Commentary to the Model Tax Convention[33]. Accordingly, considering that the BO requirement was originally introduced in the Commentary to counteract uses of a double tax treaty (aimed limiting the double taxation of a cross-border income) in the hands of entities that received the income acting in the capacity of agent or nominee or acting as conduit of another person, the BO should be intended as the recipient of the dividend that does have the right to use and enjoy the dividend unconstrained by contractual or legal obligation to pass on the payment received to another person. Furthermore, although the obligation will normally derive from relevant legal document it may also be found to exist on the basis of facts and circumstances showing that in substance the recipient clearly does not have the right to use and enjoy the dividend unconstrained[34].

In this context, the BO clause should be interpreted considering the rationale (object and purpose) behind it, *i.e.* to counteract the application of the DTT to any entities acting as "a conduit for another person who in fact receives the benefit of the income concerned"[35].

With reference to the LoB, the specific clause is applicable upon dividend distribution if the Swiss recipient company is directly or indirectly controlled by persons who are not resident in Switzerland[36]. In particular, upon the distribution of dividend, the Swiss company may benefit from the DTT as long as[37]:

2013/84404. As confirmed by Italian tax authorities in the FAQ to the Forms, it is possible to use a form different than the ones provided by Italian tax authorities as long as all the conditions for the application of the DTT/Agreement are reported therein. As provided by Italian tax authorities' guidelines, the request for the application of the EU-Switzerland Agreement should include appropriate documentation supporting that the Swiss company is not subject to any privileged regime in Switzerland (Resolution no. 93/E/2007).

[27] Art. 9(1) of the Agreement.

[28] As provided by the Italian domestic general anti-abuse rule (GAAR), set forth by art. 10-*bis*, L. 27.7.2000 no. 212, published in the Italian Official Gazette 31.7.2000 no. 177, a transaction (even if formally consistent with tax law) constitute abuse of law if it lacks economic substance and is essentially aimed at obtaining undue tax savings. A transaction is deemed to be lacking economic substance where it consists of facts, acts and contracts, also interconnected, which do not generate significant effects other than tax savings, and undue tax savings consist of tax benefits, even if not immediate, obtained in contrast with the purpose of tax provisions or the principles of the tax system.

[29] The MLI has been signed by Italy on 7.6.2017 but has still to be ratified. The entry into force of the MLI should be considered in particular with reference to the anti-abuse provisions contained therein. For a general overview of the legislative Italian *iter* of the MLI, refer to Arno Crazzolara, Il trattato multilaterale BEPS è self-executing, in: Rivista di diritto tributario – supplemento online, 24.5.2017. Switzerland has signed and ratified the MLI respectively on 7.6.2017 and on 29.8.2019 and the instrument is in force from 1.12.2019.

[30] For a detailed analysis of the DTT, reference could be made to Angelo Contrino, La Convenzione fra l'Italia e la Svizzera contro le doppie imposizioni, in: Carlo Garbarino (ed.), Le Convenzioni dell'Italia in materia di imposte su reddito e patrimonio, EGEA 2002; Siegfried Mayr, Il nuovo regime fiscale dei dividendi tra l'Italia e la Svizzera, in: Bollettino Tributario d'informazioni, 2005, 12, p. 2927; S. Bianchi, La Convenzione tra Svizzera e Italia intesa ad evitare la doppia imposizione ed a regolare alcune altre questioni d'imposte sul reddito e sul patrimonio, in: Bollettino Tributario d'informazione, 1976, p. 1475; Siegfried Mayr, La Convenzione Italo-Svizzera, in: Bollettino Tributario d'informazione, 1976, p. 1646; Carlo Salvatores, Il regime fiscale delle royalties fluenti dall'Italia verso la Svizzera in una interessante (ma non condivisibile) pronuncia della Commissione tributaria provinciale di Milano, in: Bollettino tributario, 2013 19, p. 1442; Francesco Avella, Il regime tributario dei dividendi distribuiti a società residenti nel territorio della Confederazione Svizzera, in: Rivista di diritto tributario, 2007, V, p. 207.

[31] The provisions contained in the DTT could be amended upon entry into force of the Multilateral Convention (MLI, see above note 29).

[32] Directive no. 2003/49/EC of 3.6.2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, transposed in art. 26-quarter, DPR no. 600/1973. It should be considered that art. 4(5), lett. a) of the DTT between Italy and Switzerland provides for the definition of the "*seeming recipient of the income*" (beneficiario apparente dei redditi) that, according to Italian doctrine, can be read as the mirror concept of the BO clause contained in art. 10 of the DTT; refer to Contrino (note 30), p. 881 and Conci/Mayr (note 18), p. 469.

[33] To the use of the OECD Model Tax Commentary as a mean of interpretation of the provisions contained in a double tax treaty, reference can be made to the Italian Supreme Court Decisions 10706/2019 and 32842/2018 and the extensive analysis reported by Alberto Pozzo, L'interpretazione delle convenzioni internazionali, chapter VI, in: Victor Uckmar (ed.), Diritto tributario internazionale, Cedam, 2005, par. 5 and 6.

[34] OECD Model Convention Commentary (2017), art. 10 para. 12.4.

[35] OECD Model Convention Commentary (2017), art. 10 para. 12.3. For a detailed analysis of the concept of BO in the OECD context, refer MARCO PIAZZA, Concetto di beneficiario effettivo: l'analisi di Assonime sulle numerose incertezze, in: Il Fisco, 2017, 3, p. 256; Paolo Arginelli, Spunti ricostruttivi della nozione di beneficiario effettivo ai fini delle convenzioni bilaterali per evitare le doppie imposizioni concluse dall'Italia, in: Rivista di diritto tributario, 2017, p. 29; Francesco Avella, Recent tax jurisprudence on the concept of beneficial ownership for tax treaty purposes, in: European Taxation 2015, 55, pp. 2-3; LUCA ROSSI, L'evoluzione del concetto di beneficiario effettivo, in: Luca Rossi et al. (ed.), Temi di fiscalità internazionale, CEDAM, 2014, p. 312.

[36] *Rectius*, an entity in which non-Swiss persons have, directly or indirectly, a substantial interest.

[37] For a detailed analysis of the LOB, see CONTRINO (nota 30), pp. 967-968;

- the debt/equity ratio towards non-Swiss tax resident lenders is lower than 6 to 1;
- the interest paid on loans contracted with controlling persons is not higher than the arm's length interest rate, to be intended as, for Swiss companies, the average interest rate on debentures issued by the Swiss Confederation plus two percentage points;
- the Swiss company does not attribute (at any title) to non-Swiss entities more than 50% of the Italian-sourced dividends;
- the Swiss company does not deduct from the Italian-sourced dividends any expenses not connected to such dividends; and
- the Swiss company distributes at least 25% of the Italian-sourced dividend.

V. Application of the Agreement

No Italian WHT is levied under the conditions of art. 9 of the Agreement upon the distribution of Italian-source dividend. This favorable regime can be invoked as long as specific conditions are met by the Swiss company, namely:

i. the Swiss company does not carry out a trading or industrial activity though a permanent establishment located in Italy, to which the Italian participation distributing the dividends can be attributed does not have a PE in Italy;
ii. the Swiss company has a direct minimum holding of 25% of the capital of the Italian company for at least two years. This timeframe to be met as at the date of dividend distribution**[38]**;
iii. the Swiss company is tax resident exclusively in Switzerland**[39]**;
iv. the Swiss company is subject to Swiss corporate tax without being exempted and adopts the form of limited company**[40]**.

Furthermore, in line with the provisions contained in the EU Parent-Subsidiary Directive, a number of conditions shall also be met by the Italian distributing company, such as the fact that the latter is tax resident exclusively in Italy, is subject to the Italian corporate tax without being exempted and adopts the form of limited company**[41]**.

According to the approach adopted at EU level**[42]**, the Agreement cannot be applied in case the Swiss company retrieving EU-source dividends benefits from any Swiss favorable tax regimes (such as these available for management companies, holding companies and mixed companies) as these regimes "*provides exceptional tax advantages in that all income earned by holding companies is exempt from cantonal taxation irrespective of the typical requirements in order to be considered income from participations under the general exemption system*"**[43]**. Indeed, the favorable regimes reduce "*the costs that certain beneficiary companies bear in the course of their business and therefore provide advantages to them and to the groups of which they form part within the definition of State aid*"**[44]**, threatening "*to distort competition and may affect trade and are therefore to be regarded as incompatible with the proper functioning of the Agreement*"**[45]**.

On the basis of the above, the Swiss companies benefitting from Swiss special tax regimes are not *ex se* non-eligible for the Agreement (subjective condition), rather the latter is not applied due to the broad State aid rules**[46]**.

As provided by Italian tax authorities**[47]**, expressly based on the mentioned approach adopted at EU level, any special regime that grants exemptions from federal, cantonal or municipal tax in Switzerland, including management, holding and mixed company's regime, taints the application of the Agreement.

Nonetheless, in an official Response released in 2019**[48]**, Italian tax authorities acknowledged that Italian-source dividends received by a Swiss company that has formally renounced the benefits provided by Swiss holding company regime can be included in the scope of application of the Agreement.

Furthermore, Italian tax authorities expressly recognized that the exclusion from the Italian WHT provided by the Agreement is applicable also in relation to dividends distributed by the Italian company out of profits accrued in fiscal years in which the Swiss parent company benefitted from the Swiss favorable tax regime**[49]**.

Paola Tarigo, Beneficiario di royalty, holding company e previsioni antiabuso nella Conv. Italia-Svizzera, in: Rivista di Diritto Tributario 2013, p. 546. For an historical analysis of the anti-abuse measures contained in the Swiss treaty network, reference could be made to Walter Ryser, Some reflections on the Unilateral measures taken by Switzerland against the abuse of Treaties for the avoidance of Double taxation in: Intertax, 1975, 2, p. 60.

[38] On this point, refer to Resolution no. 109/E/2005 issued in relation to the application of the EU Parent-Subsidiary Directive.

[39] *i.e.* the company is not considered as tax resident in a third Country under a double tax agreement.

[40] Under Italian tax authorities' interpretation, the Swiss corporate tax should be considered as the sum of taxation of taxes levied at federal, cantonal, regional and municipal level (Resolution no. 93/E/2007 and Resolution no. 288/E/2007).

[41] For a critical approach on these requirements in the hands of the distributing entity in a cross-border scenario, reference could be made to Paolo Arginelli, The Subject-to-Tax Requirement in the EU Parent-Subsidiary Directive (2011/96), in: European Taxation, 2017, 8, p. 57.

[42] European Commission Decision of 13.2.2007 on the incompatibility of certain Swiss company tax regimes with the Agreement between the EEC and the Swiss Confederation of 22 July 1972. Furthermore, in para 44 it is stated that "the Commission considers that they do not constitute general tax measures available to the entire Swiss economy and are therefore selective").

[43] European Commission Decision of 13.2.2007, para. 36.

[44] European Commission Decision of 13.2.2007, para. 37.

[45] European Commission Decision of 13.2.2007, para. 64.

[46] European Commission Decision of 13.2.2007, para. 30.

[47] Resolution no. 93/E/2007. For an analysis of the Resolution, see Giancarlo Cervino, A margine della Direttiva sul risparmio: l'Accordo con la Confederazione Elvetica sul trattamento di interessi, canoni e dividendi ed alcune implicazioni pratiche alla luce della Risoluzione no. 93/E del 10 aggio 2007 dell'Agenzia delle entrate, in: Il Fisco, 2007, 23, p. 3421.

[48] Response no. 57/E/2019, Alessandro Furlan/Luca Sormani, Esenzione da ritenuta dei dividendi corrisposti da società figlie a società madri svizzere, in: Fiscalità&Commercio Internazionale, 2019, 11, p. 21.

[49] In the specific question submitted to Italian tax authorities, dividends

VI. Conclusion

The application of the Italian WHT to outbound dividend distributions to a Swiss company should be duly considered, also in light of the favorable provisions contained in the DTT or in the Agreement.

In this respect, the recent Swiss tax reform that abolished the local favorable tax regimes could have a relevant impact also on dividends distributed by the Italian company out of profits accrued in fiscal years in which the Swiss parent company benefitted from the Swiss favorable tax regimes.

It is recommendable to duly assess the application of the anti-abuse measures aimed at counteracting any improper use of the DTT and of the Agreement as well as to provide, in case of direct application of the DTT or the Agreement, the proper documentation supporting their application.

were distributed out of profits accrued by the Italian distributing company in fiscal years from 2001 to 2017 (and accounted for in a specific equity reserve) while the Swiss parent company had formally renounced the benefits provided under Swiss holding company in 2017. In the Response no. 57/E/2019 it is represented that the distribution of the dividends by the Italian company is executed in fiscal year 2019, and that in the same fiscal year the dividends will be subject to tax, on a cash basis, in the hands of the Swiss recipient company.