

THE LEGAL PROFESSION IN ITALY AND THE RULES FOR OUTSOURCING LEGAL SERVICES

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In recent years, given the rise of the globalized digital economy and the increasing profile of multinational companies, the practice of legal outsourcing has become more common. Outsourcing of legal services often involves a parent or multi-national company retaining the legal services of attorneys registered with bar associations different to the home country of the parent company or client. As there are few internationally registered attorneys who are fluent in Italian, this practice is less common in the Italian legal system. At the same time, Italian multinational companies and/or international law firms—may on occasion find it necessary to outsource some or all of legal services. Additionally, Italian law firms or attorneys may collaborate with legal professionals in other countries on multinational client cases. This paper will outline the legal decrees and ethical codes regulating the practice of legal outsourcing in Italy and in so doing establishes how companies can do so in accordance with international and domestic laws while ultimately serving client needs.

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INTRODUCTION: PRACTICING THE LEGAL PROFESSION IN ITALY

To understand the extent to which legal services can be outsourced to third parties, it is important to outline first the rules that regulate the legal profession in Italy. Articles 2229 to 2238 of the Civil Code discipline all intellectual professions and set forth the professions for which it is necessary to be registered with special associations or registers. For these

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professions the identification of the requisites to be registered and the disciplinary powers are granted to the relevant bodies, which for lawyers are the local bar associations (Consiglio dell'Ordine) and the National Bar Council (Consiglio Nazionale Forense).

The legal profession is still regulated by Decree 1578/33, Law 36/1934, Decree 37/1934 and by the most recent Law 247/2012 (hereinafter "Professional Law"). According to the Professional Law, no one can exercise the functions of attorney without being registered with the local Bar Association, which is established in the jurisdiction of any Court (Tribunale).

The conditions to be registered with the relevant Bar include: (i) to be an Italian citizen, a citizen of a EU State, or a foreign citizen legally residing in Italy, in possession of a title that qualifies him as a lawyer duly recognized in Italy; (ii) to have a law degree with an Italian University or recognized by the Italian Ministry of Justice; (iii) to have practiced the legal profession for a 18 months apprenticeship, among which 6 months can be carried on in any other EU country, accordingly to recent Decree 70/2016; (iv) to have taken and passed the State exam for admission to the Bar Association; (v) to be resident in the Court's jurisdiction; (vi) not to have convictions or disciplinary sanctions.

Furthermore, in order to avoid being removed from the Bar Association register, lawyers must accomplish other requirements, including: (i) exercise the legal profession on an ongoing and prevalent basis; (ii) fulfill the obligations of professional updating; (iii) subscribe to an insurance policy to cover civil liability arising from the profession.

The following are considered elements of incompatibility for the registration with the Bar Association and the practice of the legal profession: (i) to practice of commercial activities; (ii) to be hired a subordinate-worker, either public or private; (iii) to practice other regulated professions. This rule is derogated for in-house lawyers working with Public Bodies, who are registered in a special section of the register and for professors (University and Public Secondary Schools). In-house counsels working for private companies cannot be registered with the relevant Bar Associations.

I. PROFESSIONAL ASSOCIATIONS AND ATTORNEY PARTNERSHIPS

Attorneys duly registered with the Bar Association are allowed to practice their profession jointly. The Professional Association is not a legal entity and cannot substitute for its single members that represent specific clients in cases where by law this is not permitted, such as where there is a power of attorney to represent a client in front of a Court. The Professional

Association can issue invoices for the services performed, and it has its own fiscal autonomy. The partners are however solely responsible for criminal and civil liabilities.

Law 183/2011 provided new rules for practicing the legal profession using Partnerships of Attorneys, called “Società tra professionisti” (STP) and introduced the possibility of establishing multidisciplinary STPs, that is companies established by differently qualified professionals, such as lawyers and CPAs. All partners must follow the ethical rules of their own professional body.

To that end, an STP can be incorporated only by individuals who are enrolled with professional associations (lawyers, accountants, etc.), and partnership can be extended to any EU citizen who has the necessary qualifications. A further relevant aspect introduced by Law 183 is the possibility to establish STPs also with partners who contribute only capital funds.

In STPs, partners only contributing capital funds may enter but must always retain minority shares with respect to practicing attorneys. In fact, this law stipulates that two-thirds of partners must be practicing attorneys and compose the majority of managing partners who hold the office of directors. Partners must inform clients in writing and provide all information on how the mandate shall be carried out and clients must be given the power to choose the professionals who will carry out the activities, as well of any possible conflict of interest. Clients must always be informed if the selected professional/s shall be replaced for some activities, of any auxiliaries and of the names of “non-professional” partners (i.e. those who only contribute capital to the STP).

Law 247/2012, called “Professional Law” as previously mentioned, regulates specifically the legal profession and confirms that lawyers can exercise their profession: i) individually; ii) joining a lawyers’ professional association (PA); iii) joining a multidisciplinary STP; and iv) joining an STP whose members are solely lawyers. Lawyers can currently be partners at the same time of more than one PA or STP, as well as a simultaneous participation to a PA and an STP is currently allowed. In each case, the professional service remains personal, even if the lawyer participates in a STP or a PA. *The lawyer, the partners and the company are all liable vis-a-vis the client.*

The latest laws 81/2017 and 124/2017 have given a further push to law firms to increase their size and open up to different subjects, even outside the world of the legal professions. The aim of the recent laws is to allow professionals to participate in public tenders and to contribute to the

assignment of tasks and tenders of large companies that, due to their complexity, require the contribution of a plurality of professionals. According to the law 31/1982 and Decree 96/2001, the Attorneys of another EU country are allowed to practice the legal profession in Italy, upon the admission to the local Bar Association¹.

EU attorneys have access to fast-track procedures and may ask to the Italian Ministry of Justice to have their professional title recognized; upon completion, they can register with the local Bar Association in a special section as “avvocato stabilito” and, after 3 years of regular practice in Italy, they will become genuine and lawful practicing attorneys of the host country, called “avvocato integrato” and will enjoy the same treatment applied to an Italian lawyer².

II. OUTSOURCING OF LEGAL SERVICES

Outsourcing of legal services (i.e. the practice increasingly used by US and UK law firms in outsourcing part of the services to foreign companies or firms in countries including India and the Philippines) is a practice that is still relatively uncommon for Italian companies and law firms.

This is mainly due in Italy to: a) restrictions and limitations set forth by laws for the practice of the legal profession (which is strictly regulated as outlined in this paper); b) the Italian language is spoken and used only in Italy and therefore it is unlikely that non-Italian mother tongue workers could effectively perform any services.

The outsourcing of legal services is not specifically regulated by Italian law and we therefore reference the general principles set forth by the Civil Code for the execution of service contracts, autonomous work and intellectual professions. We will also take into account the rules set forth by the National Bar Association in the *Ethical Code of Conduct* that applies to lawyers and law firms.

It is worth noting that the Council of Bars and Law Societies of Europe (CCBE) has also drafted a European Code of Conduct and has indicated some guidelines on legal outsourcing which, though not mandatory, constitute an interesting point of reference in assessing the principles and rules which are advisable to follow in this field.

Among other things, CCBE has indicated that:

¹ www.consiglionazionaleforense.it.

² For an overview on the recognition in Italy of the professional qualification “Abogado” (Spanish lawyer), see Prof. Mario Carta, *Federalismi.it Rivista di diritto pubblico italiano, comparato, Europeo*, Quando i migranti sono avvocati (20.12.2017).

The protection of the outsourcing lawyer requires the application of specific measures e.g. before undertaking legal outsourcing, it is advisable that the outsourcing lawyer verifies with the external legal service provider that the core values of the legal profession remain protected; the outsourcing lawyer should be made aware of the importance of such measures; and it would also be useful to provide the outsourcing lawyer with a “due diligence” template checklist.³

According to the Art. 1228 Civil Code, unless differently expressed by the parties and where allowed, the debtor who makes use of a third party to fulfill an obligation, is also responsible of the third party’s intentional or culpable acts⁴. With regards to the intellectual professions, such as the legal profession, the Art. 2232 of the Civil Code provides that the attorney responsible for the mandate can avail “under his sole direction and responsibility” another professional or auxiliary, if the collaboration is allowed by the contract itself or does not become incompatible with the subject of the service.

The attorney is entitled to take benefit of the services of other professionals or auxiliaries to carry out the mandate received (regardless of whether they are partially or totally involved in the provision of services), as long as the collaboration is provided by the contract’s terms and conditions.

In that case, the third parties involved in the mandate, do not have any direct contractual relationship with the client and, therefore, the client does not directly relate with them for the accomplishment of the service, nor can they relate with the client for the offset to be paid. The auxiliary, moreover, is not legitimated to act against the client for the payment, as this duty pertains to the professional having delegated a third party for the accomplishment of the service.⁵

If the use of substitutes or auxiliaries occurs with no agreement in place with the client or if the contract’s terms do not allow it, the professional will be responsible, due to breach of contract, of the potential damages caused by the substitutes or auxiliaries, regardless of the intent.

On the other hand, if the use of the substitutes or auxiliaries occurs with respect to the restrictions provided by the Art. 2232 Civil Code, the professional will be objectively responsible, apart from the assessment of his fault, for the damages inflicted to the client by the third party collaborating.

Art. 2232 Civil Code, using the expression “under direction”, does not

³ CCBE Guidelines on Legal Outsourcing, www.ccbe.eu.

⁴ Amongst others, Judgement 20808/2010 of the Court of Cassation, confirmed that the debtor who fulfills his obligation using the cooperation of a third party, is personally liable for the intentional and negligent acts of the latter.

⁵ *Cass. 27.08.1986, n. 5248; TAR Trento sect. I, 11.03.2010 n. 83.*

allude to a particular bond existing between the professional and the substitutes or auxiliaries, but ratifies a duty for the professional who is proposed by the client to handle the case.

Art. 1229 Civil Code outlines the exemption clauses for responsibility, but also establishes that these clauses become invalid when the debtor has not fulfilled the duties correctly, or in case of a serious fault, or a minor fault if there has been a violation of the general order rules. Additionally, the second paragraph of article 1229 Civil Code prohibits the clauses which exonerate the debtor from compensation when the handling constitutes a violation of the general order rules; in that case the exemption clause is null even in the case of non-fulfillment for minor fault. As a matter of responsibility, without doubts the professional is the only addressee for complaints in case of unsatisfied clients for the services provided.

III. OUTSOURCING OF LEGAL SERVICES FROM PUBLIC BODIES⁶

The new law governing public procurements (Legislative Decree. 50/2016, which implemented EC Directives n. 23, 24 e 25 of 2014) regulates, amongst other things, the appointment of lawyers and legal counsels by Public Office and entities⁷. Such appointments are qualified as “services” and no longer subject to the rules of art. 2330 of the Civil Code, according to which there must exist a fiduciary relationship between the customer and the lawyer.

With the new law is therefore no longer possible for Public bodies and entities to appoint a lawyer without putting in place a procedure which guarantees that the adjudication of the work is performed applying fair and impartial procedures, an appropriate publicity is implemented and the rules for a fair competition are safeguarded. Lawyers can be appointed taking into account the principles of value for money, impartiality, equal treatment, transparency, proportionality and publicity.

Public bodies can establish lists of qualified counsels from which they can select—in an impartial way—the ones to be invited for the selection. The criteria to be considered for the selection are the following: i) the

⁶ For a comprehensive analysis, see Enrico Folieri, *Gli incarichi legali conferiti dalle pubbliche amministrazioni* Convegno organizzato da C.N.F. e Fondazione C.N.F. Roma 25 ottobre 2017; and *L'affidamento dei servizi legali*, Documento di consultazione, issued by the Autorità Nazionale Anticorruzione.

⁷ For an in-depth analysis on Legislative Decree. 50/2016, i.e. see Mario P. Chiti, *The New Code on Public Contracts*, in *GIORNALE DI DIRITTO AMMINISTRATIVO* (n. 4) 436-521 (2016); A. Barbiero, *Appalti: per gli incarichi agli avvocati serve la «mini-gara»*, published on *Il Sole 24 Ore* (16 May 2016).

lawyer's experience in the specific sector; ii) his professional and technical capacity; iii) the dimension, organization and structure of his firm; iv) the value for money.

For any appointments that exceed €750,000, the appointing body must implement a procedure for the bid, adequately publicized in order to guarantee a competition amongst all participants. The notice must contain a description of the services required, of the relative procedure. The appointing body can also implement procedures in order to limit, in a fair and transparent way, the number of participants. In all events, the appointing body is required to indicate in detail the reasons for which a specific counsel was selected and appointed.

IV. THE ETHICAL CODE OF CONDUCT

In addition to the general rules of the Civil Code and to the ones ruling the legal profession, the activity of an attorney is moreover ruled by the norms of the *Ethical Code of Conduct*⁸, which was recently amended in 2014 by the National Bar Council "Consiglio Nazionale Forense". This Code is composed of 73 articles and divided into seven parts: General Principles, Relations with the Client and the Assisted Person, Relations between Lawyers, Duty of the Lawyer before the Court, Relations with Third and Opposing Parties, Relations with Forensic Institutions and Final Provision⁹.

Concerning the topic in question, among the norms to be mentioned, there is Article 3 that regulates professional activity abroad and foreign lawyers' activity in Italy. In the practice of his or her profession abroad, the Italian lawyer shall respect his or her home-country's ethical rules, as well as the ethical rules of the country where he or she is carrying out this activity. In the case of a conflict between the two rules, the one of the hosting country prevails, provided that it does not conflict with the public interest to the correct practice of the professional activity. In the practice of his profession in Italy, the foreign lawyer shall respect the Italian ethical rules.

Furthermore, Article 7 stipulates the disciplinary responsibility for actions carried out by the lawyer's associates, collaborators and substitutes. As outlined in this article, a lawyer shall be personally responsible for the

⁸ Ethical Code of Conduct (Codice Deontologico Forense), approved by the National Bar Association on 31 January 2014 and entered into effect on 15 December 2014. For the official English translation in www.consiglionazionaleforense.it.

⁹ For an analysis of the new code (in English), see the article published by Guido Alpa, *Altalex*, May 29, 2014.

performance of tasks carried out on his behalf by his associates, collaborators and substitutes, unless the circumstances result in their separate and autonomous responsibility.

The following provision outlines disciplinary responsibility of the law firm, that combine with those of the law firm partner when the partner's ethical violation is connected to instructions given by the law firm.

Article 13 stipulates the duty not to disclose confidences and secrets. In the interest of his or her client and the assisted party, a lawyer shall assure the utmost discretion on facts and circumstances anyway given to him by his client within the activity of representation and judicial assistance and in every case for professional reasons.

Article 28 further defines the confidentiality and professional secret. It is a lawyer's principal and fundamental duty as well as his right to preserve confidences and secrets to the utmost, with regard to the services carried out and to the information which has been given to him by his client or the assisted party, as well as to those he has become aware in circumstances relating to his representation. The obligation of confidentiality must be respected even when the mandate has been fulfilled, however concluded, withdrawn or not accepted. A lawyer shall assure that his or her employees, trainees, consultants and professional partners, even occasional ones, concerning facts and circumstances heard as lawyers or because of their activity, respect professional secrets to the utmost. The breach of duty under the previous sub-sections entails the enforcement of censure as disciplinary sanction.

V. PRIVACY PROTECTIONS

The use of personal data by a third party must respect the privacy regulation set forth by the Legislative Decree 196/2003. The transfers of sensitive data to non-EU countries are subject to particular rules, such as the Art. 43 of the abovementioned Decree 196/2003, which outlines the simplification, uniformity and effectiveness of data security as follows:

The transfer of personal information, even temporary and by any means, from Italy to any country outside the European Union, is permitted when: a) the interested party has expressed his consent and, in case of transfer of sensitive data, the assent has to be stated in writing; b) the transfer is necessary for the execution of contractual duties or; for the fulfillment of specifications requested by the interested party before the conclusion of the contract or; for the conclusion or the execution of a contract stipulated in behalf or the interested party.

According to the Art. 44, the transfer of personal data to a non-EU country is moreover permitted when it is authorized by the Guarantor, based on adequate guarantees provided for the interested party: a) decided by the Guarantor in conjunction with guarantees provided by a contract, or by means of rules existing in case of companies belonging to the same group; b) decided in accordance to the Art. 25, paragraph 6, and Art. 26, paragraph 4, of the Directive 95/46CE of the European Parliament and of the Council of the 24 October 1995, according to which the European Commission states that a country not belonging to the European Union grants an adequate level of protection for the sensitive data or that some contractual clauses offer sufficient guarantees.

Lastly, according to the Art. 45, aside for the cases referring to the Articles 43 and 44, the transfer of personal information, even temporary and by any means, from Italy to any country outside the European Union, is forbidden when the ordinance of the destination Country does not grant an adequate level of preservation for the sensitive data. It is also taken into account the modality of the transfer, such as the use of the information, the relevant scope and the security measures.

On 25 May 2018, the General Data Protection Regulation (“GDPR”, Regulation EU 2016/679 on data protection) will become binding for all EU Member States, with a view towards enhancing and harmonizing the data protection of EU citizens and residents in the EU, both inside and outside EU borders.

The expansion of trade and international cooperation, globalization and the spread of online platforms make data flows to non-EU countries increasingly common and frequent. In order to guarantee an adequate level of security, the European legislator therefore deals with the issue of exporting personal data outside the EU and obliges all data controllers (also with their registered office outside the European Union) to deal with data of residents of the European Union to observe and fulfill their obligations.

The main objectives of the European Commission in the GDPR are to give back to citizens the control of their personal data and to simplify the regulatory environment concerning international affairs by unifying and standardizing the law on privacy¹⁰.

¹⁰ Practical Guide on GDPR—Guida all’applicazione del Regolamento Europeo in materia di protezione dei dati personali—by Garante Per la Protezione dei Dati Personali.

VI. LAWYERS AND ANTI-MONEY LAUNDERING PROVISIONS

According with Legislative Decrees n. 231/2007 and n. 90/2017¹¹ on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, lawyers and consultants are covered by anti-money laundering legislation.

Legal professionals shall apply customer due diligence measures when carrying out transactions involving means of payment, assets or values amounting to EUR 15,000 or more, where there is a suspicion of money laundering or terrorist financing and each time there are doubts about the veracity of customer identification data.

Customer due diligence measures shall mainly comprise: a) Identifying the customer and the beneficial owner, verifying their identity on the basis of documents, data or information obtained from a reliable and independent source; b) Conducting ongoing monitoring of the business relationship including scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's or person's knowledge of the customer, the business and risk profile, including, where necessary, the source of funds and ensuring that the documents, data or information held are kept up-to-date.

When the lawyers know, suspect or have reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted they are obligated to report suspicious transactions. Such suspect shall be inferred by the characteristics, the entity, the nature or any other circumstance acquired due to the professional role exercised by the lawyer, also considering the economic background and the activities carried out by the client. Lawyers shall not disclose to the customer the fact that information has been transmitted in or that a money laundering or terrorist financing investigation is being or may be carried out. Bar associations are involved in promoting and supervising the compliance of the lawyers with anti-money-laundering regulations.

CONCLUSION

Outsourcing work to third parties, in some cases to paralegals and non qualified lawyers, is still considered by many old-style lawyers as non-ethical and contrary to the foundations of the legal profession, where the client is supposed to give a personal mandate to a trusted lawyer. In some

¹¹ See the instructions issued by the National Bar Council on the implementation of the new anti-money laundering provisions from lawyers, issued on July 14, 2017.

jurisdictions, the appointment cannot be to the firm but must still personal. On the other hand, most companies are increasingly focused on reducing their operational costs especially when, as for legal fees, they are not considered essential for the growth of the business.

In Italy legal outsourcing is still not very common but in other jurisdictions has become common practice the use of outsourcing also in the legal sector. Allocating part of the work to a cheaper resource, can help lawyers to focus on activities which can add value to the client's business at a lower cost. On the other hand, there are several challenges that lawyers and law firms must take into account, such as security, confidentiality and data risks. Furthermore, if the recourse to outsourcing can meet the client's demand to reduce fees, it can also increase the perception that legal work has become a commodity. This would put at risk and weaken the basic principles that, for centuries, have permeated the legal profession.