IPSOA

AMMINISTRAZIONE &FINANZA

SPECIAL EDITION

2023

2

US FLIP: HOW ITALIAN START-UPS ARE PREPARING TO RAISE CAPITAL IN THE UNITED STATES

Authors

Stefania Monda
Paolo Siniscalco

ISSN 1971-5013 - Anno XXXVIII - Febbraio 2023 – n. 2 - Direzione e redazione Viale dei Missaglia, n. 97, Edificio B 3 – 20142 Milano (MI).
Tariffa R.O.C.: Poste Italiane Spa - Spedizione in abbonamento Postale D.L. 353/2003 (conv. in L. 27/02/2004 n. 46) art. 1, comma 1, DCB Milano

Wolters Kluwer

US Flip: how Italian start-ups are preparing to raise capital in the United States

by Stefania Monda (*) and Paolo Siniscalco (**)

The so named US Flip (or Delaware Flip)

With the most flourishing capital market in the world and one of the most advanced technological ecosystems, the United States has always been a popular destination for the most promising and ambitious start-ups from all over the globe. But to raise capital from American investors, many factors come into play; among these, the corporate structure of the entity subject to investment.

American investors, both institutional and angel, are reluctant to invest in foreign companies. Many American investment funds are prevented by statute from investing in companies incorporated outside the United States, or even outside the state of Delaware. For this reason, very often the c.d. US Flip becomes an express sine qua non of the investment.

The CD. US Flip (or Delaware Flip) is a corporate restructuring operation that allows the shareholding structure of the foreign (i.e., non-US) company to be reversed (indeed, Flip) so that the latter becomes the subsidiary of (i.e., the daughter company wholly owned by) a holding company incorporated under US law.

The graph in Table 1 shows the impact on the corporate structure.

The advantages of the Delaware Flip for the european start-up

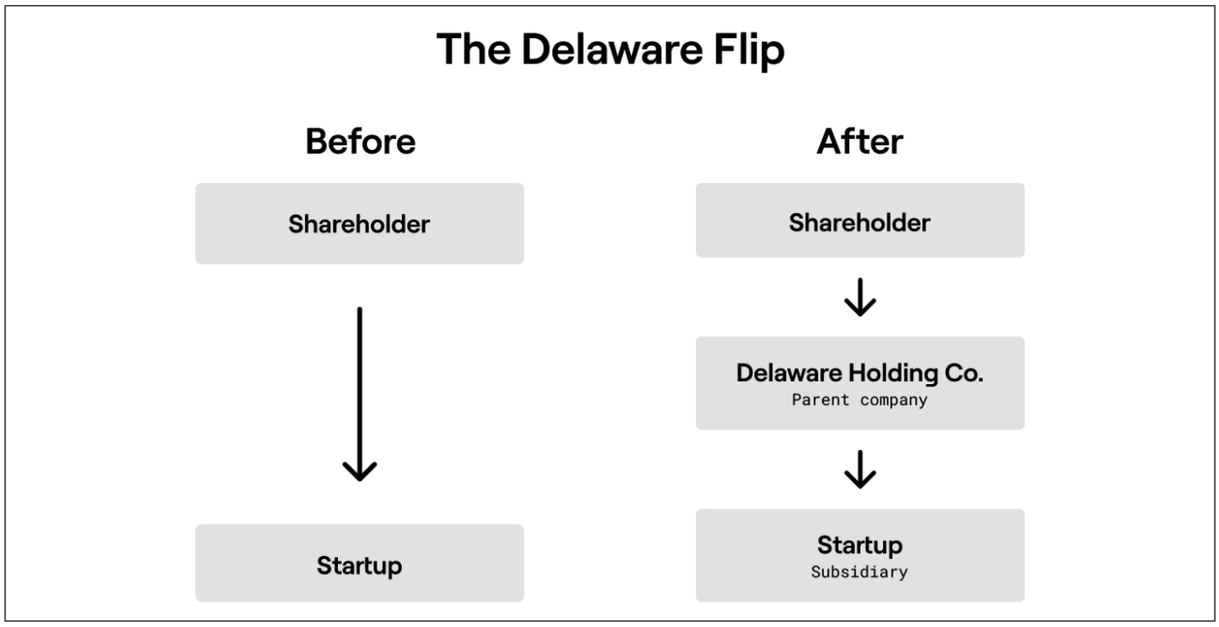
There are three main reasons why European start-ups decide to carry out the operation known as US Flip or Delaware Flip:

a) access to capital. The United States is by far the largest market for venture capital in the world. Most American venture capital funds and angel investors invest only in companies incorporated in the United States. Also, usually target of investment are only companies incorporated in the State of Delaware and having the form of a corporation. The reasons for this clear preference for Delaware corporations are connected to the greater familiarity that American investors have with Delaware companies which certainly simplifies the legal and financial due diligence activities, to the typically US tendency to standardize implement contractual processes and tools with a view to simplification and efficiency, as well as tax implications that make investing in foreign entities more onerous. The biggest downside to trying to raise money in Europe is that most European countries, outside of tech hubs like London, don't have mature markets for venture capital. In most European markets it is possible to access capital in the early-stage phase (pre-seed and seed), but there is a lack of funds willing to invest in series A rounds or to provide growth stage capital. For example, Portugal, despite a disproportionate number of unicorn start-ups for such a small country, only saw the birth of its first Serie A fund in 2021. Successful Portuguese start-ups such as Outsystems and Unbabel have moved their companies abroad, usually in the United States, in order to access the necessary growth capital. London is perhaps the only city on the European continent with a mature and developed venture capital ecosystem, and despite this, many British companies still choose to set up in the United States as Delaware corporations.

Note:
(*) Lawyer licensed in Italy and the US*, Managing Partner di Tech Legal Partners (New York - Milano)*
(**) Founder di Siniscalco YIA (Roma - Milano - New York)

The reasons are to be found in the larger size of US funds compared to European ones. On average, the US venture capital market is five times larger than the European one both in terms of investment size and in terms of stock exchange listings and purchase prices of successful start-ups. The size of the venture capital sector influences the behavior of funds: smaller funds need to invest less per funding round in order to still have liquidity to diversify by investing in other companies and are unlikely to invest in late-stage start-ups where there is a need for a high availability of capital. On the other hand, larger funds, having more liquidity, can invest a lot without compromising the portfolio's diversification needs;
b) more exit opportunities. The United States certainly offers more exit opportunities, both through the sale of the company and through the listing on the stock exchange.
The investment practices of US funds - different, as mentioned above, from those of European funds - have a significant impact on the growth of start-ups and, at the same time, on the probability and expected value of the future exit .Start-ups financed by American funds, having more funding to use, are able to scale the business faster and more likely to arrive at an exit with a higher expected value than the exits of start-ups financed only by European funds.
Furthermore, a structured technology start-up like the Delaware corporation is more likely to be acquired because most of its potential buyers are US-based technology companies. Listing on the stock exchange in the United States can also be simpler: think, for example, of alternative mechanisms such as the Spac which allows you to be listed relying on a simplified procedure compared to a traditional IPO. In other words, the absence of an American holding company can drastically limit exit options;
c) less bureaucracy and a more business-friendly environment. The American economy has always been pro-business: it eliminates useless bureaucracy and encourages the creation of new companies through tax rules (such as the QSBS exemption, whereby founders, under certain conditions, can potentially benefit from a tax exemption of up to $10 million when they sell their company). Conversely, many European countries have extremely high tax rates on capital gains, and European founders face a myriad of bureaucratic and tax hassles just to sell digital assets such as software.

Tavola 1 - Delaware Flip: impact on capital structure



How to structure a Delaware Flip

Aware of the advantages deriving from having a company incorporated under American law, more and more founders decide to set up their own start-up in the United States right from the start. In most cases, however, this does not happen: start-ups take shape in the countries of origin of the founders, where they begin to raise early-stage capital, and then try to access the American capital market during the more advanced. At that point, the Delaware Flip often becomes the path to success. The path to follow to make the Flip is not the same for everyone, and its greater or lesser complexity varies on the basis of a series of factors. It is essential to rely on professionals who are experts in the sector and are able to navigate the legal and tax aspects of both the jurisdictions involved, the American one and the one of origin. In its simplest configuration, the Delaware Flip consists of the following steps:

- the non-US corporation ("HomeCo"), whether based in Europe or elsewhere, creates a Delaware corporation ("USAcorp");
- the shareholders of HomeCo transfer the shareholdings they hold in HomeCo to USAcorp, obtaining in exchange the shares of USAcorp, of which they become shareholders;
- HomeCo becomes a wholly owned subsidiary of USAcorp and, therefore, USAcorp becomes the parent company of HomeCo.

Alternatively, HomeCo may contribute its company to USAcorp in exchange for stock. In such event, the HomeCo shareholders become indirect shareholders in USAcorp through their interest in HomeCo. Then follows a merger between HomeCo and USAcorp by virtue of which only USAcorp remains alive. This type of transaction, however, often triggers a taxable event for HomeCo. In another scenario, HomeCo can license its intellectual property rights and know-how to USAcorp, receiving shares in USAcorp in return.

- There are various conceivable structures for carrying out the operation, and the creativity of the professionals involved in the operation can make a huge difference. Among the factors to be considered are: the greater or lesser complexity of the shareholder structure of the starting company, the need to maintain tax benefits acquired by the investing shareholders, the need to reduce the tax impact of the transaction as much as possible, in addition to any specific requests from American investment funds (with reference, for example, to intellectual property rights).

When to structure a Flip

The Delaware Flip represents a widespread operation among start-ups from all over the world interested in accessing the American capital market. The benefits are obvious; however, it is an operation that must be evaluated very carefully. As mentioned, its realization can be all the more complex the more complicated the structure of the share capital. For this reason it is generally advisable not to wait too long to carry out the Flip. On the other hand, however, the Flip is an operation that is difficult to reverse, so you have to be sure that the American market is really the reference market. Sometimes it is advisable to wait for an American investment fund to expressly request it. Relying on an expert team of professionals will also be essential to understand the timing associated with the creation of the Flip; times that can also vary considerably depending on how the same is structured.

The tax aspects of a Flip

In a corporate reorganization with, moreover, the provision of a transfer abroad of the main center of interest, the tax aspects must not be overlooked which, if not well analyzed, can generate charges that are sometimes even disproportionate to the nature of the operation , or create potential situations of presumption of foreign investment. The above is even more true when the above operations concern the transfer of the company's residence to countries, such as the United States of America, outside the European Union (EU) or the European Economic Area (EEA), in relation to the applicability of the tax regime (so-called exit tax) provided for by art. 166 of Presidential Decree 22 December 1986, n. 917 (T.U.I.R.).
In fact, pursuant to art. 166, paragraph 3, T.U.I.R. is taxable in Italy, among other things, "the capital gain, determined as a unit, equal to the difference between the total market value and the corresponding fiscally recognized cost of the

assets and liabilities..." of the person who transfers his residence abroad or is incorporated by a company resident abroad, if these assets and liabilities are not previously transferred to a permanent establishment located in the territory of the State.
It should be noted that pursuant to art. 166, paragraph 14, T.U.I.R., "The transfer abroad of the tax residence of a capital company does not in itself involve any taxation of the shareholders of that company. Moreover, the operations to be implemented must be analyzed in advance in order to avoid possible disputes by the tax authorities.
We refer, in particular, to the provision pursuant to art. 10-bis of Law 26 July 2000, n. 212, which if on the one hand gives the tax authorities the power to disregard any undue tax advantages achieved by the taxpayer through one or more transactions without economic substance, while in formal compliance with the tax rules (so-called abuse of rights), on the other sets certain limits to any ascertaining action, stating that "In any case, transactions justified by valid non-fiscal, non-marginal reasons, also of an organizational or managerial nature, which respond to the purpose of structural or functional improvement are not considered abusive of the company ... omitted) and "the taxpayer's freedom to choose between different optional regimes offered by the law and between transactions involving a different tax burden remains unchanged" (art. 10-bis, paragraphs 3 and 4, cited Law no. 212/2000). Another aspect to consider is the location in the country of destination, in this case the United States, of the State in which to set up the company and locate the center of interest.
Direct taxes on companies, Corporate Income Tax (CIT) in the USA are applied at the federal, state and, in some cases, local level: as regards the CIT, in particular, the rate is equal to 21%, while in state level can vary from a minimum of zero (Nevada, Ohio, Texas, Washington) to a maximum of 11.5% (New Jersey), then, as mentioned, there are additional taxes also at the local level: the city of New York , for example, provides for the application of an additional tax (Business Corporation Tax) equal to 8.5% of taxable income, to be added to the federal and state taxes. It is added that, regardless of the place of incorporation of the company, the taxation between the various States is divided (so-called apportionment) as a function of a coefficient which normally takes into consideration the turnover, the cost of personnel and that of the Offices present in each of the States where the activity is actually carried out. In summary, therefore, a company can be incorporated in the State of Delaware, but also carry out business in other States and, therefore, discount taxes both at the federal level - with a rate equal to 21%, regardless of the place of exercise of the activity - and at the state and local level, in relation to the percentage of business and the rates of each of the States themselves.

Table 2 exemplifies the methods of applying taxes for a company incorporated in the State of Delaware, which also carries on business in various other States.

Case study

A particularly interesting case study is reported below, in which an innovative Italian start-up (here defined, for reasons of confidentiality, "Alfa") has created a Delaware Flip of particular complexity due to a series of needs predominantly related to the fragmented nature of the social structure. Alfa is 90% owned by the founders while the remaining 10% was acquired by a large number of small minority investors ("Minority Partners"). Alfa also owns a minority stake in another American company ("Beta") which is part of the group. For entrepreneurial reasons related to the international growth of the Alfa group, the majority shareholders of Alfa intend to reorganize the corporate structure of the same with the aim of having an American holding company in Delaware which owns the various operating companies. According to Italian legislation, Alfa enjoys the status of "innovative start-up" by virtue of which minority shareholders benefit from a tax credit. The US Flip operation was structured in the following steps:
Step 1) establishment of a Delaware corporation ("Gamma"). Gamma's shares remain authorized under US law, but not yet issued.
Step 2) Alfa sets up a S.r.l. under Italian law ("New Alfa") through the contribution of

Tavola 2 - Taxartion in the USA of a Delaware corporation

USCO INC., a DELAWARE CORPORATION

Description	Amount										
2021 Taxable Income	1,923,583										
		States									
	Federal Tax	CA	CT	FL	GA	DE	IL	NJ	NYS	NYS-MTA	NYC
2021 Taxable Income	1,923,583	1,923,583	1,923,583	1,923,583	1,923,583	1,923,583	1,923,583	1,923,583	1,923,583	1,923,583	1,923,583
Apportionment %		59.4872%	3.0000%	0.1726%	0.2295%	0.4752%	0.6974%	0.1258%	35.8123%	35.8123%	35.8123%
State Taxable Income		1,144,286	57,707	3,320	4,415	9,141	13,415	2,420	688,879	688,879	688,879
Tax Rate	21%	8.84%	7.50%	3.535%	5.75%	8.70%	9.50%	9.00%	6.50%	1.95%	8.85%
Tax	403,952	101,155	4,328	117	254	795	1,274	218	44,777	13,433	60,966
Less: Payments Overpayment Applied	-	(877)	(500)	-	(250)	-	-	(250)	(2,399)	(782)	(2,106)
Balance Due	403,952	100,278	3,828	117	4	795	1,274	(32)	42,378	12,651	58,860
Rounded to	**450,000**	**40,000**	**5,000**	**500**	**200**	**800**	**1,600**	**-**	**45,000**	**15,000**	**65,000**

its own assets. As consequence of the transfer:

- the Alfa ongoing passes to New Alfa which thus becomes the operating company;
- shares representing the entire share capital of New Alfa are assigned to Alfa. See Table 3 in this regard.

Step 3) Step 3) Alfa transfers its shareholdings in Beta and New Alfa to Gamma (Table 4).
As consequence of the transfer:

- shares representing the entire share capital of Gamma are assigned to Alfa;
- New Alfa changes ownership becoming 100% owned by Gamma;
- the investment held by Alfa in Beta passes to Gamma..

The structure of the group, therefore, assumes the configuration shown in Table 5.

Step 4) reverse cross-border merger by incorporation of Alfa into Gamma. As a result of this merger:

- Alfa ceases to exist, while Gamma remains as the holding company of the group;
- Gamma succeeds in all juridical relationships headed by Alfa;
- Alfa shareholders are assigned shares in Gamma.

In this regard, see what is reported in Table 6.

Main legal and tax issues related to the transaction

Step 1

The first step of the operation consists in the establishment of a Delaware corporation ("Gamma"). Gamma's shares remain authorized under US law, but not yet issued. In other words, Gamma takes

Tavola 3 - Contribution of the ongoing in an Italian NewCo

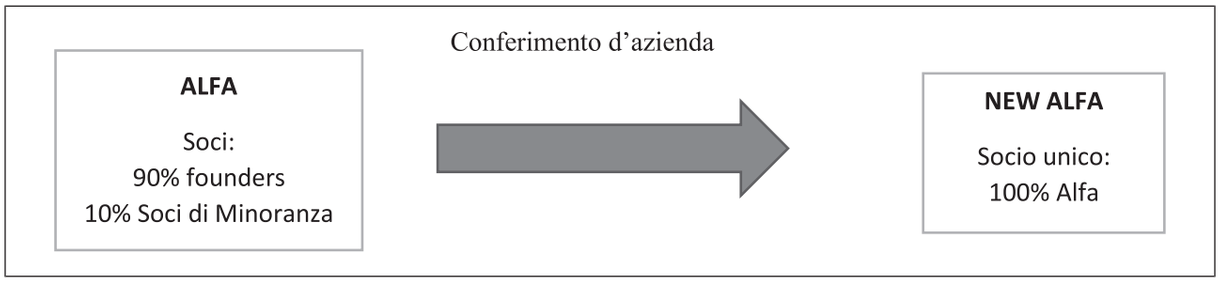


Tavola 4 - Contribution of stocks in a Delaware Corporation

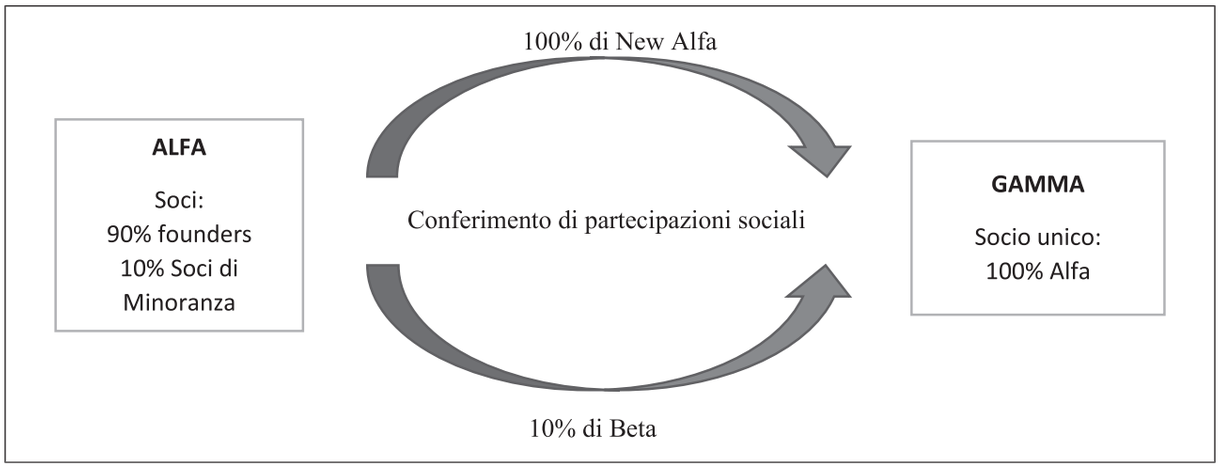
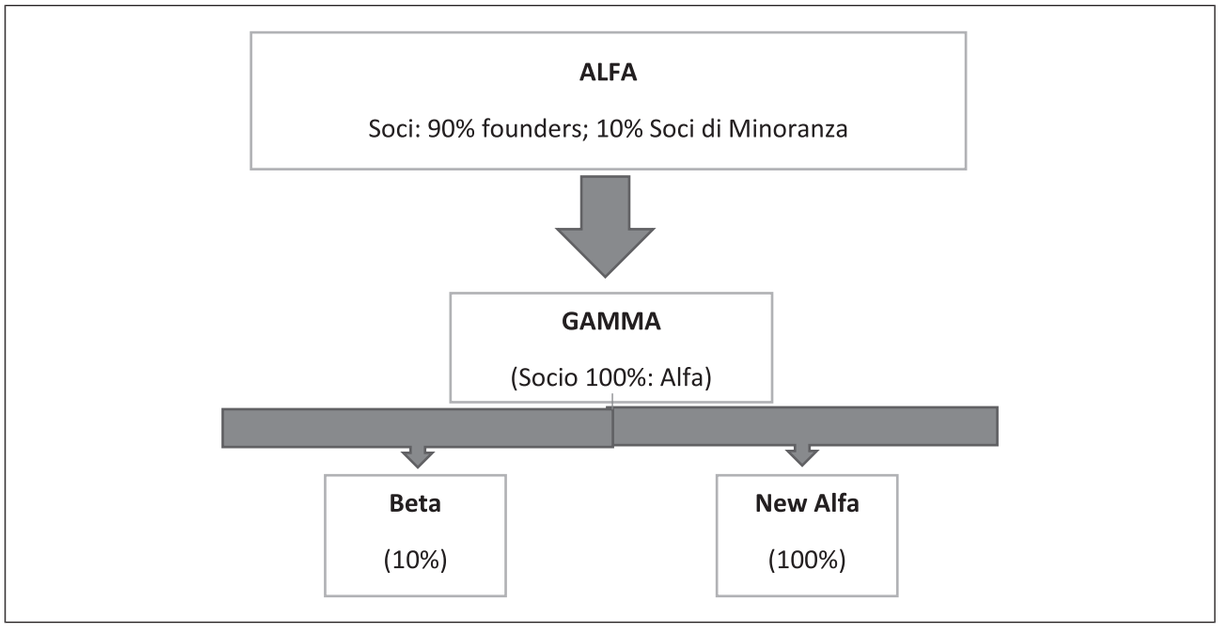


Tavola 5 - Capital structure after contribution of stocks

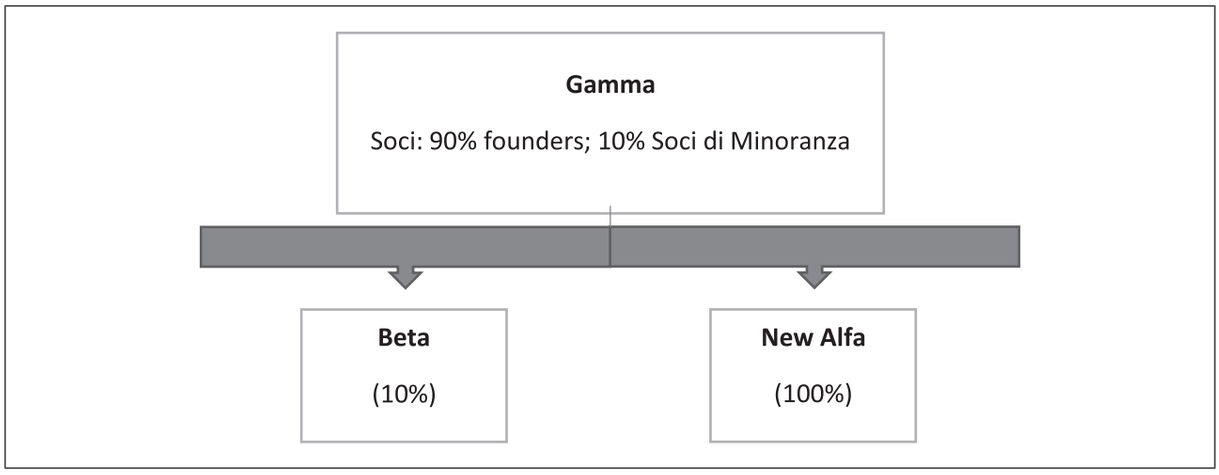


Inserto

life without shareholders: it will have Alfa as a shareholder when it assigns its shares to the latter in exchange for the contribution of shareholdings held by Alfa itself in New Alfa and in Beta. In the United States, unlike in Italy, the company is set up without shareholders but through a so-called incorporator (generally, the lawyer who deals with the constitution of the company) who, together with the constitution, appoints the members of the board of directors (i.e. the board of directors) who, in turn, in a next phase

issue and transfer the company's shares (among those initially "authorized" by the incorporator) to future shareholders. In other words, the company was born without shareholders and without share capital; the share capital is not paid in when the company is set up, but rather in conjunction with the subsequent transfer by the company to third parties of its own shares against a consideration which may be in cash and/or in kind) . From a tax point of view, this synallagmatic relationship does not generate any taxable income for

Tavola 6 - Struttura aziendale post fusione inversa transnazionale



the company pursuant to the provisions of Section 1032 (a) of the Internal Revenue Code (IRC) (1)

Step 2
The main legal issues by step 2 are as follows:

1) which body is competent to decide on the transfer of the company; And
2) if the minority shareholders will have the possibility of withdrawing as a result of the aforementioned contribution.
3) The applicable rules are contained in the articles 2479 and 2473 of the civil code Pursuant to art. 2479 of the civil code "in any case, the decision to carry out operations which involve a substantial modification of the corporate purpose determined in the deed of incorporation is reserved to the competence of the shareholders (...). Furthermore, pursuant to art. 2473 of the civil code (withdrawal of the shareholder of S.r.l.), "in any case, the right of withdrawal belongs to the shareholders who have not consented (...) to carry out operations which involve a substantial modification of the object of the company determined in the 'deed of incorporation". Both of which are mentioned refer to the notion of "transactions which involve a substantial modification of the corporate object determined in the deed of incorporation". In this regard, various sentences confirm that the transfer of a business from one company to another between constitutes a de facto change of the corporate object of the first from an operating company to a holding company (see, for example, Court of Rome, Section Spec. Companies, dated 27 January 2020 (2) and Court of Piacenza, 14 March 2016) (3).

The deal asset transaction from Alfa to New Alfa therefore represents an operation which entails a substantial modification of the corporate object of Alfa and as such constitutes a decision reserved to the competence of the shareholders (pursuant to art. 2479, paragraph 2, no. 5 of the Civil Code). Furthermore, shareholders who had not consented to this contribution would have the right to withdraw (pursuant to article 2473 of the civil code). The fact that Alfa's minority shareholders do not have the right to vote does not affect the right of withdrawal since, by unanimous interpretation, they are "shareholders who have not consented" - and therefore have the right to withdraw - not only dissenting shareholders , absentees, and abstained, but also those without the right to vote.

Note:
(1) § 1032, IRC, entitled Exchange of stock for property states that No gain or loss shall be recognized to a corporation on the receipt of money or other property in exchange for stock (including treasury stock) of such corporation.
(2) The Court of Rome, analyzing the art. 2479, paragraph 2, of the Civil Code, concludes that this provision - in establishing that certain decisions are necessarily left to the shareholders - constitutes an imperative rule with the consequence that the deed (in this case, the contribution to another company) which violates the art. 2479, paragraph 2, of the Italian Civil Code qualifies as "void due to contrary to mandatory rule".
(3) The Court of Piacenza provides that "the sale of a company constituting the exclusive activity of the limited liability company following the autonomous initiative of the sole director determines a substantial change in the corporate purpose which can be undertaken exclusively following an authorization resolution by part of the shareholders' meeting pursuant to the provisions of article 2479, paragraph 2, no. 5), c.c. The provision indicated integrates an imperative legal limit to the powers of general representation of the directors of S.r.l. with consequent lack of functional competence of the same who have operated in violation of it".

The prior authorization of the transfer of the company must be approved by the shareholders' meeting in ordinary session. According to the prevailing exegetical orientation, the procedure of written consultation and express written consent envisaged by the Alfa statute will not be usable, since the resolution of the shareholders' meeting is considered essential in the event of a decision to carry out operations which involve a substantial modification of the corporate purpose. As for the term for the possible exercise of this right of withdrawal, the current regulation of the withdrawal in the S.r. L. pursuant to art. 2473 of the civil code - unlike the provisions of the corresponding articles on the subject of S.p.A. - does not provide for a time limit for the exercise of the right. The predominant indoctrinal interpretation is that, in the absence of a contrary statutory provision, the term provided for by art. 2437-bis of the Italian Civil Code in the matter of joint-stock companies and, therefore, in this case, thirty days from the knowledge by the shareholder of the resolution authorizing the transfer. The possibility that all or part of Alfa's minority shareholders exercise the right of withdrawal certainly represents a risk factor for the feasibility and opportunity of the operation. For Alfa, in fact, the exercise of the right of withdrawal could have resulted in a significant cash outlay: pursuant to art. 2473 of the civil code, paragraphs 3 and 4, c. c., the repayment of the shares for which the right of withdrawal has been exercised must be made within 180 days of the notification of withdrawal and in proportion to the company assets "determined taking into account its market value at the time of the declaration of withdrawal" .It was therefore decided:

a) to carry out an adequate and detailed communication to the minority shareholders which illustrated the purposes and effects of the entire operation of which the transfer of the business was part;

b) b) to decisively condition the shareholders' resolution that authorized the contribution to the non-exercise of the right of withdrawal so as to make it no longer effective retroactively in the event that the right of withdrawal had been exercised by even only one of the minority shareholders.

c) As a result of the transfer of the company, pursuant to art. 2558, paragraph 1, of the Italian Civil Code, "unless otherwise agreed", the transferee of the company takes over all existing legal relationships relating to the transferred company, with the exception of those of a personal nature linked to the figure of the entrepreneur. bull. The transfer of the company referred to in step 2, therefore, it made it necessary to analyze the main company contracts to ascertain that they did not contain clauses that prohibited the transfer or made the transfer subject to the prior consent of the other contracting party (so-called anti-assignment clauses).

From a fiscal point of view of direct taxes, in general, the contribution of goods to companies is assimilated to a transfer for consideration and follows the same rules. In particular, pursuant to art. 9, paragraph 2, penultimate paragraph, of the TUIR, in the case of "contributions" the normal value of the assets and credits conferred is considered consideration achieved.

However, the Italian tax system provides for rules that favor corporate structure reorganization operations. o shares of the transferee company - discounts an ordinary tax neutrality regime, pursuant to art. 176, paragraph 1, T.U.I.R., on the condition that the conferring subject assumes as the value of the equity investments received the corresponding latest tax value of the transferred company, and the transferee subject registers the elements of the assets and liabilities of the company conferred with the same book value that they had in the financial statements of the transferor.

As known, there is also the possibility for the transferee to stamp - in the return referring to the tax period in which the operation was carried out or, at the latest, in the following one - any higher values referring to intangible fixed assets and materials of the company transferred through the payment of a substitute tax (art. 176, paragraph 2-ter, T.U.I.R.). Furthermore, pursuant to the combined provisions of the following paragraphs 3 and 4, cited art. 176 T.U.I.R., the transfer operation with subsequent transfer of the shareholding is not considered elusive and the transferring subject, if the time requirement for holding the shareholding (4) exists, can in this case take advantage of the

Nota:

(4) For the purposes of temporality, the art. 176, paragraph 4, T.U.I.R., states that "... The equity investments received from the subjects who made the contributions ... [of the company, Editor's note], under a fiscal neutrality regime, are considered registered as Investment in the financial statements in which the assets of the conferred company were registered or in which the shares given in exchange were registered as fixed assets".

participation exemption regime pursuant to art. 87 of the T.U.I.R.

Finally, from another point of view, the transfer operation discounts the registration tax in a fixed amount and is not considered a sale of goods for VAT purposes.

Step 3
The third step of the proposed transaction involves the interposition (temporary, pending the subsequent merger) of Gamma as a sub-holding located between Alfa (parent company) and New Alfa (subsidiary). The change of ownership of the equity investments in New Alfa (initially wholly-owned by Alfa and, as a result of this transfer of equity investments, wholly-owned by Gamma) could trigger change of control clauses that may be contained in the company agreements passed to New Alfa as a result of the previous transfer of the company. Therefore, it was necessary to analyze the main company contracts included in the company transferred to New Alfa to make sure that they did not contain so-called change of control clauses (i.e., clauses which prohibit the change of control or subject the change of control to the prior consent of the other contracting party). From an Italian tax point of view, the transfer of the equity investment in New Alfa by Alfa to Gamma in exchange for the latter's shares is, for direct tax purposes, a transaction of the implementation type and, therefore , follows the same provisions envisaged for the case of the sale of goods, including the provisions of art. 9 of the T.U.I.R. in relation to the determination of the normal value. However, in the Italian tax system of direct taxes, as previously mentioned, there are some exceptions to the general principle, among which, as far as we are concerned, art. 177 of the T.U.I.R., entitled "Exchange of stocks".
In particular, the art. 177 of the T.U.I.R. provides that the exchange can take place in one of the following ways:

- the exchange (paragraph 1), through which a company acquires or integrates a controlling stake (5) by attributing its own shares to the latter's shareholders, which integrates a transaction under a fiscal neutrality regime;
- the contribution (paragraph 2), through which the transferee acquires or increases control of a company in exchange for its own shares

o shares, which integrates a realization-type operation, therefore not under a tax neutrality regime, and the shares received by the transferor are valued at the corresponding part of the shareholders' equity formed by the transferee company as a result of the transfer (so-called tax of the "controlled realization") (6).
o In relation to paragraph 2, while under the profile of the objective requirement - of acquisition by the transferee of control of the transferred company - there are no doubts, different interpretations have been provided in relation to the concurrent need for the subjective one, provided for by the previous paragraph 1. According to part of the doctrine, the same discipline envisaged for the case of the exchange of shares is applicable to the hypotheses of shareholding exchange through transfer, for reasons of a systematic order, i.e. that both the purchasing/transferee company and the purchased/transferred company must be subjects indicated in art. 73, paragraph 1, lett. a) and b), T.U.I.R., and therefore both be resident in the territory of the State. Conversely, another part of the doctrine considers that, since paragraph 2 expressly lacks a provision similar to that referred to in paragraph 1, nor since there is any reference, the transferee may also be a non-resident company.
o In this regard, the Tax Administration has adhered to the more restrictive interpretation, most recently with resolution no. 43/E of 3 April 2017, stating that "With reference to the subjective sphere, limited to what is not established in paragraph 2 of the aforementioned art. 177 of the T.U.I.R., the same conditions of a subjective order already identified by paragraph 1 of the same article are deemed to apply, concerning the exchange of shareholdings, despite the fact that paragraph 2 does not mention them". If one adheres to the more restrictive interpretation, the shareholding to be contributed - being, as previously mentioned, a construction-type operation to be subjected to the same provisions envisaged for the sale of assets - should therefore be valued at market value (cited art. 9 of the TUIR).

Note:
(5) Or companies in which another company has the majority of votes exercisable in the ordinary shareholders' meeting (art. 2359, paragraph 1, no. 1, of the Civil Code).
(6) See, for the purposes of the legal classification of the case, Circular 17 June 2010, n. 33/E and resolution of 20 April 2012, n. 38/E.

In this case, if a capital gain were to emerge following the equity investment transaction, the so-called participation exemption, established by art. 87 of the T.U.I.R. and, therefore, would not contribute to the formation of the taxable income of the transferring company as it is 95% exempt.
For the purposes of applicability of the regulation in question, however, the following conditions must exist:
- period of uninterrupted possession of the shareholding of 12 months (7);
- classification in the category of "financial fixed assets" in the first balance sheet during the first period of ownership;
- fiscal residence of the investee company in a territory not subject to preferential taxation or obtaining a disapplication ruling;
- effective exercise by the investee company of a commercial activity..

Finally, from another point of view, the transfer operation discounts the registration tax in a fixed amount and is not considered a sale of goods for VAT purposes.
- In the United States, the transfer operation would not give rise to positive income components:
- held by the American transferee Gamma, since the transaction falls within the scope of the aforementioned discipline pursuant to Section 1032 of the IRC;
- in the hands of the Italian transferor Alfa, pursuant to art. 13, par. 4, referred to in the Convention between the Government of the Italian Republic and the Government of the United States of America for the avoidance of double taxation with regard to taxes, which provides for taxation only in the State of residence of the taxpayer who has realized any capital gains.

It should also be noted that, pursuant to American tax legislation, the transfer operation would fall within the facilitative discipline of tax neutrality of extraordinary operations (such as, for example, mergers, transfers of controlling interests and transfers business) carried out in execution of a reorganization plan (8), and therefore would not produce capital gains pursuant to Section 351 (a) of the IRC (9).

Step 4

The merger by incorporation of Alfa inGamma constitutes a cross-border merger between Italian company and non-EU foreign company (so-called non-EU merger).
The main issues raised by step 4 of the operation consist in establishing:
1) which body is competent to approve the merger for the merged Alfa; And
2) if the minority shareholders of Alfa have the option of withdrawing from Alfa as a result of this merger.

The legislation on cross-border mergers imposes heavier documentary and advertising burdens than those of the so-called merger. internal. However, the art. 18 of Legislative Decree no. 108/2008 (made applicable to non-EU mergers by art. 2, paragraph 3, of the same Legislative Decree no. 108/2008) establishes a simplified procedure for the hypothesis of an Italian company wholly owned by the incorporating foreign company. The provisions of art. 18 of Legislative Decree no. 108/2008 expressly refers to the art. 2505 of the civil code, therefore the two provisions must be read and applied jointly. It should be noted first of all that both provisions referred to - while expressly making reference only to the case of merger by incorporation in which the incorporating company owns the entire capital of the incorporated company - according to the absolutely prevailing interpretative orientation and consolidated, are deemed applicable in all other cases in which the determination of the exchange ratio is equally irrelevant, on a substantial level, including the hypothesis of a merger by incorporation in which is the incorporated

Note:

(7) Please note that pursuant to art. 176, paragraph 4, T.U.I.R., the shareholdings received by the conferring subject against the contributions of the company carried out under a tax neutrality regime are considered registered as financial fixed assets in the financial statements in which the assets of the transferred company were recorded.
(8) Section 368(a) containing Definitions relating to corporate reorganizations at number (1) includes, among others, the following operations: (A) a statutory merger or consolidation; (B) the acquisition by one corporation, in exchange solely for all or a part of its voting stock (or in exchange solely for all or apart of the voting stock of a corporation which is in control of the acquiring corporation), of stock of another corporation if, immediately after the acquisition, the acquiring corporation has control of such other corporation (whether or not such acquiring corporation had control immediately before the acquisition).
(9) Section 351(a) of the IRC provides that No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock in such corporation and immediately after the exchange such per- son or persons are in control (as defined in Section 368 c) of the corporation.

to own the entire share capital of the incorporating company (so-called totalitarian reverse merger). Therefore, the aforementioned procedural simplification certainly also applies to the reverse merger by incorporation of Alfa into Gamma (where the merged company Alfa owns a total shareholding in the incorporating company Gamma). From the joint reading of the aforesaid provisions it follows that the Alfa merger resolution can be adopted by its own administrative body (and this without the need for a statutory clause to that effect). As clarified by the Council of Notaries of Milan (summary n. 114), in contrast to some initial comments to the contrary, the need remains firm:

1) of a merger resolution/decision by the administrative body, which assumes the related responsibilities;
2) the documentation of this resolution/decision by the notary with a public deed, in order to proceed with the relative registration in the register of companies following the positive outcome of the checks required by Italian law;
3) the prior (with respect to the decision in question) execution of the advertising formalities required by law, which in the cross-border merger consist in the registration of the joint project in the register of companies and in the publication in the Official Gazette of the information pursuant to art. . 7 of Legislative Decree no. 108/2008.
The issue of withdrawal, then, is governed by art. 5, Legislative Decree no. 108/2008 (applicable to non-EU mergers by virtue of the express reference made by art. 2, paragraph 3 of the same Legislative Decree no. 108/2008) which recognizes the right of withdrawal for "non-consenting shareholder" of the Italian company participating in the cross-border merger if the company resulting from the cross-border merger is a company regulated by the law of a State other than Italy. Among other things, it should be noted that the transaction entails for the incorporated Italian company (Alfa) the transfer of the registered office abroad which is, in turn, a cause for withdrawal already by ordinary provision of the Civil Code (art. 2473, paragraph 1, of the Italian Civil Code, which regulates withdrawal from S.r.l.). The procedure for exercising the withdrawal remains governed by the provisions of the Civil Code which regulate the withdrawal from limited liability companies.
In conclusion, the reverse merger by incorporation of Alfa into Gamma is subject to a simplified procedure and can be decided, for the incorporated Italian company Alfa, with a resolution of the shareholders or alternatively with a resolution of the administrative body (in any case, the notarial form being necessary). In both cases, any non-consenting minority shareholders of Alfa would have the right to withdraw from the company. The cross-border merger procedure starts with the drafting of a "common cross-border merger project" (art. 6, paragraph 1, Legislative Decree no. 108/2008) by the corporate bodies which, in each system, have the competence to take this decision. This project must first of all contain the information referred to in art. 2501-ter, paragraph 1, of the Civil Code integrated with those required by the aforementioned art. 6, paragraph 1, Legislative Decree no. 108/2008, namely:

a) the type, denomination or company name, headquarters of the companies participating in the merger (Article 2501-ter, paragraph 1, no. 1, of the Civil Code); this information must be integrated with the indication of the regulating law of each of the companies participating in the merger (art. 6, paragraph 1, letter a, Legislative Decree no. 108/2008);
b) the deed of incorporation (and/or the articles of association) of the new company resulting from the merger or of the incorporating one, with any amendments deriving from the merger (Article 2501-ter, paragraph 1, no. 2, of the Italian Civil Code) giving evidence of the form, name and registered office of this company (art. 6, paragraph 1, letter a, Legislative Decree no. 108/2008); this information must also be integrated with the indication of the law governing the company resulting from the cross-border merger (Article 6, paragraph 1, letter a, Legislative Decree no. 108/2008);
c) information on the valuation of the assets and liabilities that are transferred to the company resulting from the cross-border merger (art. 6, paragraph 1, letter f, Legislative Decree no. 108/2008), in this regard bearing in mind that, pursuant to art. 2501-quater, of the Civil Code, the administrative body of the Italian company participating in the merger must draw up, in compliance with the rules on the financial statements, the balance sheet of the company itself, referring to a date no earlier than one hundred and twenty days on the day on which the merger plan is filed at the company's registered office or published on its website (paragraph 1); and that said patrimonial situation can be replaced by the financial statements of the last financial year, if this was closed no later than six months before the day of filing of the merger project at the company's headquarters (paragraph 2); and with the specification that in the project of merger

it is also necessary to indicate "the date to which the patrimonial situation or the financial statements of each of the companies participating in the cross-border merger refers, used to define the conditions of the cross-border merger" (Article 6, paragraph 1, letter f, Legislative Decree no. 108/2008).
The simplified procedure applicable to the merger in question by virtue of the combined provision of the aforementioned articles 18 of Legislative Decree no. 108/2008 and 2505 of the civil code, on the other hand, excludes the need to indicate the following information in the merger plan:
a) the exchange ratio of the shares or quotas, as well as any cash adjustment (Article 2501-ter, paragraph 1, no. 3, of the Italian Civil Code);
b) the procedures for assigning the shares or quotas of the company resulting from the merger or of the incorporating company (Article 2501-ter, paragraph 1, no. 4, of the Civil Code);
c) the date from which the shares or quotas allocated by exchange participate in the profits (Article 2501-ter, paragraph 1, no. 5, of the Italian Civil Code) as well as, more generally, "any particular procedure relating to the right to participate in the profits" (art. 6, paragraph 1, letter b, Legislative Decree no. 108/2008);
d) the date from which the operations of the companies participating in the merger are charged to the financial statements of the company resulting from the merger or of the incorporating company (Article 2501-ter, paragraph 1, no. 5, of the Civil Code).
The simplified procedure applicable to the merger of Alfa into Gamma also makes it possible to omit the directors' report pursuant to art. 2501-quinquies of the Italian Civil Code and, in the absence of an exchange, the report of the experts referred to in art. 2501-sexies of the Italian Civil Code (art. 18, paragraph 1, Legislative Decree no. 108/2008 and art. 2505, paragraph 1, of the Italian Civil Code). The merger by incorporation of Alfa into Gamma, as mentioned above, is subject to a simplified procedure (pursuant to art. 18, Legislative Decree no. 108/200). However, compared to the "internal" merger, there are additional documentary burdens. Legislative Decree no. 108/2008, in fact, establishes two specific additional documentary charges for the intra-EU cross-border merger (not expressly referred to, however, for the extra-EU merger). The first of these documentary duties, to be completed in the period between the merger resolution and the signing of the merger deed, consists of drafting a so-called pre-liminal certificate (art. 11, Legislative Decree no. 108/2008) aimed at certifying that the prescribed procedure has been legitimately completed in the various countries of origin of the companies participants in the merger operation and that therefore nothing prevents the completion of the merger. The art. 11 of Legislative Decree no. 108/2008, which establishes the obligation of the preliminary certificate, is not expressly referred to in art. 2, paragraph 3 of the same Legislative Decree no. 108/2008 with reference to non-EU mergers. Therefore, it is not certain whether this additional documental burden is also necessary in mergers between Italian companies and non-EU companies. However, doctrine and practice seem to lean in a positive direction. For Italian companies, the "preliminary certificate" is issued by the Italian notary; for foreign companies, the certificate is issued by the authority competent to issue it according to the applicable legislation.
The other of the aforementioned additional documentary charges consists, however, in the issue of a so-called definitive certification of the completion of the legitimacy check on the implementation of the cross-border merger (art. 13, Legislative Decree no. 108/2008). Also the art. 13 of Legislative Decree no. 108/2008, which establishes the obligation of the final attestation, is not expressly referred to by art. 2, paragraph 3 of the same Legislative Decree no. 108/2008 with reference to non-EU mergers. Therefore, it is not certain whether this additional documentary burden is also necessary in mergers between Italian companies and non-EU companies. However, doctrine and practice seem to lean in a positive direction.
To further complicate the case study in question, is the possibility that before the completion of the merger (i.e., after step 3 but before step 4) investors may enter the American company Gamma as minority shareholders. The main issues to be resolved with reference to the American regulations applicable to the merger by incorporation of Alfa into Gamma, therefore, consist in establishing:
1) which body is competent to decide on the merger for Gamma; And
2) in the event that the merger by incorporation of Alfa into Gamma were carried out subsequent to the entry of any minority shareholders into Gamma, these minority shareholders would have the possibility of "withdrawing" from Gamma as a result of the same merger.
The two issues are closely connected. The reference standards are contained in Sections 264, 251, 267 and 262 of the Delaware General Corporations Law (DGCL). In particular, the merger between domestic (Delaware)

Inserto

corporation and foreign limited liability company is governed by Section 264 of the DGCL which, in lett. c), for the purposes of approving the merger agreement, expressly refers to Section 251, i.e. the regulation sanctioned for mergers between domestic (Delaware) corporations. Therefore, in mergers between a Delaware corporation and a foreign limited liability company (such as that between Gamma and Alfa, the latter being an Italian limited liability company) the approval of the merger agreement should be:

a) first approved by the administrative body, pursuant to Section 251 (b) of the DGCL; And
b) subsequently, approved by many shareholders of the Delaware corporation representing the majority of the share capital with voting rights (majority of the outstanding stock of the corporation entitled to vote), pursuant to Section 251 (c) of the DGCL.
Therefore, if the merger were implemented before the entry of potential minority shareholders into Gamma, the approval of the agreement of merger would be a mere formality and there would be no problem of withdrawal. On the contrary, if the merger takes place following the entry of minority shareholders in the share capital of Gamma, the new shareholders of Gamma should also decide on the approval of the merger agreement proposed by the administrative body, where provided of the right to vote, unless one of the exceptions provided for in Sections 251 (f), 251 (g) and 251 (h) of the DGCL applies, as mentioned, pursuant to Section 264 (c) of the DGCL.
In this regard, it should be noted that:

1) the exception referred to in Section 251 (g) of the DGCL could not be applied as it presupposes a total control relationship between the companies participating in the merger which would be excluded in the present case from the entry into the company of new shareholders;
2) the exception under Section 251(h) of the DGCL assumes that the shares of the Delaware corporation are held by more than 2,000 holders immediately prior to the execution of the agreement of merger. For this exception to apply, therefore, more than 2,000 new investor shareholders should enter the company.
Therefore, the exception referred to in Section 251 (f) of the DGCL remains to be analysed. The rule could be used to exclude the need for shareholder approval if all of the following elements are present: (1) the merger agreement does not change the certificate of incorporation of Gamma, (2) no changes are made to the rights of the shares of Gamma existing at the time of the merger, and (3) Gamma issues within the scope of the merger a number of shares (to be assigned to the shareholders of Alfa) not exceeding to 20% of its share capital before the merger. The use of the exception pursuant to Section 251 (f) of the DGCL, therefore, is theoretically possible but would require Gamma to issue within the merger a quantity of shares (to be assigned to the shareholders of the merged company Alfa) representing less 20% of its pre-merger share capital. The quantity of shares to be issued will depend on the exchange ratio, which cannot be foreseen ex ante.
In conclusion, if investors enter Gamma's capital before the merger by incorporation of Alfa into Gamma, it would not be possible to say with certainty whether an exception to the rule would apply, according to which the approval of the merger agreement by the Gamma partners. However, in this case, two exceptions could apply, depending on the circumstances of the specific case: the one referred to in Section 251 (f) and the one referred to in Section 251 (h) of the DGCL. Furthermore, Gamma's shareholders who entered the company before the merger and who had not consented to this merger could be provided with appraisal rights pursuant to Section 262 of the DGCL. The appraisal right - similar to the Italian right of withdrawal - is a remedy, provided in the United States by various state regulations including the Delaware legislation, which attributes to shareholders who disagree with a resolution approving specifically envisaged transactions (such as, for example, corporate mergers or spin-offs) the power to request the Court of Chancery to determine the liquidation fair value of one's equity investment. The functional contiguity of the two instruments is evident, both of which represent a means for the shareholder to liquidate his investment in the event of decisions involving a significant change in the organizational structure. The fact that between Alfa and Gamma there could possibly be an almost totalitarian control relationship before the merger - with Alfa owning at least 90% of Gamma (i.e., if, through the entry of investor shareholders, shares of representing less than 10% of its share capital) - would not be sufficient to cancel the right to appraisal for Gamma isocids. In fact, pursuant to letter c)

of Section 267 of the DGCL which regulates the merger between a parent entity (which can be a foreign limited liability company such as Alfa) and a subsidiary corporation, in the absence of total control by the parent entity, the shareholders of the subsidiary Delaware corporation have the right to appraisal under Section 262.
Section 262 of the DGCL provides for exceptions to the rule of the appraisal right which are abstractly applicable in the present case, but for which it is not possible to predict with certainty whether they will apply in practice. Pursuant to Section 262 (b) (1) of the DGCL, the right of appraisal does not belong to:

1) shares that are: (i) listed on a national securities exchange, or (ii) held of record by more than 2,000 holders; and
2) in any case in which the resolution to approve the merger agreement by the shareholders is not necessary due to the application of Section 251 (f) of the DGCL.
The exceptions to the appraisal right referred to in Section 262, therefore, coincide with those analyzed above with regard to the issue of the need for approval of the merger agreement by the shareholders of Gamma. Therefore, in the case of entry of new shareholders before the merger, the application of the exception referred to in Section 251 (f) of the DGCL would require Gamma to issue within the merger a quantity of new shares (to be assigned to the shareholders of the merged Alfa) representing less than 20% of its share capital. From an Italian tax point of view, for the purposes of direct taxes, the basic rule is that merger operations, governed by art. 172 of the T.U.I.R., are subject to a regime of fiscal neutrality (10), with reference to all assets, both tangible and intangible, belonging to the companies participating in the same. However, if a non-resident company intervenes as part of a merger and as a result of the same the resident company ceases to exist, the aforementioned art would no longer apply. 172 T.U.I.R. - as the more favorable tax neutrality regime no longer exists - and the transaction could, therefore, generate possible positive or negative income components in the same way as the transfer of a company abroad.
Pursuant to the combined provisions of art. 166, paragraph 1, lett. e), and paragraph 3, lett. e), in fact, if a resident company is incorporated as part of a merger operation in one non-resident company, contributes to forming the income the capital gain, determined as a unit, equal to the difference between the overall market value and the corresponding cost recognized for tax purposes of the assets and liabilities which, before the completion of the transaction, were part of the assets of the tax resident in the territory of the State and which, after this completion, do not flow into the assets of a permanent establishment of a non-resident subject located in the territory of the State (11).
In other words, the merger by incorporation of Alfa, a company resident in the territory of the State, into Gamma, a US company, would be taxable if the assets and liabilities of the former do not converge upon completion of the merger assets of a permanent establishment in Italy of the US company Gamma. Without prejudice to the provisions of art. 168, paragraph 14, of the TUIR, regarding the non-taxability, for the shareholders of the merged company the transaction would be part of a regime of fiscal irrelevance of the share swap (paragraph 3) except in the case of the taxation of sums received by the shareholder in the event of an adjustment (art. 2501-ter of the civil code), which would be taxed as profits from shareholdings pursuant to art. 47, paragraph 7, of the T.U.I.R.
Also in this case, for the purposes of indirect taxes, corporate mergers are not subject to VAT and are subject to a fixed amount of registration tax.
With regard to the American tax system, the merger by incorporation operation would always be framed within the scope of a corporate reorganization plan pursuant to Section 368 (1) (A)/IRC and therefore would take place, in the presence of all the other conditions envisaged by the provisions on the matter, in a regime of fiscal neutrality.

Inserto

Note:
(10) Even in the event of a merger, as in the case of a company transfer, the incorporating company has the right to have the higher values recorded in the financial statements recognized, following the transaction, through the payment of a substitute tax.
(11) The entire reformulation of the art. 166 of the T.U.I.R. took place by virtue of the art. 2, paragraph 1, Legislative Decree 29 November 2018, n. 142, implements the art. 5 of EU Directive 2017/952 which regulates exit taxation (the so-called exit tax) and regulates the tax treatment in relation to the transfer abroad of the residence of taxpayers who are commercial companies.