

GETTING THE
DEAL THROUGH 

Private Equity 2018

Contributing editor

Bill Curbow

Simpson Thacher & Bartlett LLP

Reproduced with permission from Law Business Research Ltd
This article was first published in March 2018
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

© Law Business Research Ltd 2018
No photocopying without a CLA licence.
First published 2005
Fourteenth edition
ISBN 978-1-78915-054-4

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between January and February 2018. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Global overview	7	Saudi Arabia	94
Bill Curbow, Atif Azher, Peter Gilman, Fred de Albuquerque and Audra Cohen Simpson Thacher & Bartlett LLP		Robert Eastwood and Mai Alashgar Legal Advisors Abdulaziz Alajlan & Partners in association with Baker & McKenzie Limited	
Fund Formation		Singapore	99
Australia	10	Low Kah Keong and Felicia Marie Ng WongPartnership LLP	
Adam Laura, Deborah Johns and Muhunthan Kanagaratnam Gilbert + Tobin		Spain	105
Austria	17	Carlos de Cárdenas, Alejandra Font, Víctor Doménech and Manuel García-Riestra Alter Legal	
Martin Abram and Clemens Philipp Schindler Schindler Rechtsanwälte GmbH		Switzerland	113
Brazil	24	Shelby R du Pasquier and Maria Chiriaeva Lenz & Staehelin	
Carlos José Rolim de Mello, Felipe Demori Claudino, Alexandre Simões Pinto, Michele Pimenta do Amaral and Flavia Costella de Pennafort Caldas Rolim de Mello Sociedade de Advogados		United Kingdom	120
Cayman Islands	28	Richard Sultman, Catherine Taddei and Katherine Dillon Cleary Gottlieb Steen & Hamilton LLP	
Chris Humphries, Simon Yard and James Smith Stuarts Walker Hersant Humphries		United States	129
China	37	Thomas H Bell, Barrie B Covit, Peter H Gilman, Jason A Herman, Jonathan A Karen, Parker B Kelsey, Glenn R Sarno and Michael W Wolitzer Simpson Thacher & Bartlett LLP	
Richard Ma and Brendon Wu DaHui Lawyers		Transactions	
Croatia	42	Australia	140
Branko Skerlev Law Office Skerlev		Rachael Bassil, Peter Cook, Deborah Johns, Muhunthan Kanagaratnam and Hanh Chau Gilbert + Tobin	
Germany	47	Austria	148
Detmar Loff Ashurst LLP		Florian Philipp Cvak and Clemens Philipp Schindler Schindler Rechtsanwälte GmbH	
Indonesia	54	Brazil	154
Freddy Karyadi and Mahatma Hadhi Ali Budiardjo, Nugroho, Reksodiputro		Carlos José Rolim de Mello, Felipe Demori Claudino, Alexandre Simões Pinto, Michele Pimenta do Amaral and Flavia Costella de Pennafort Caldas Rolim de Mello Sociedade de Advogados	
Israel	60	Cayman Islands	159
Miriam Haber, Rachel Arnin and Shemer Frenkel Raveh Haber & Co		Chris Humphries, Simon Yard and James Smith Stuarts Walker Hersant Humphries	
Italy	65	China	163
Dante Leone, Nicola Rapaccini and Barbara Braghioli CP-DL Capolino-Perlingieri & Leone		Richard Ma and Brendon Wu DaHui Lawyers	
Japan	72	Croatia	171
Makoto Igarashi and Yoshiharu Kawamata Nishimura & Asahi		Branko Skerlev Law Office Skerlev	
Korea	78	Germany	175
Je Won Lee and Kyu Seok Park Lee & Ko		Holger H Ebersberger and Benedikt von Schorlemer Ashurst LLP	
Luxembourg	84		
Marc Meyers Loyens & Loeff Luxembourg Sàrl			

India	182	Saudi Arabia	227
Aakash Choubey and Sharad Moudgal Khaitan & Co		Omar Iqbal Legal Advisors Abdulaziz Alajlan & Partners in association with Baker & McKenzie Limited	
Indonesia	190	Singapore	232
Freddy Karyadi and Mahatma Hadhi Ali Budiardjo, Nugroho, Reksodiputro		Ng Wai King and Kyle Lee WongPartnership LLP	
Italy	196	Sweden	241
Giancarlo Capolino-Perlingieri and Maria Pia Carretta CP-DL Capolino-Perlingieri & Leone		Sten Hedbäck, Niclas Högström and Vaiva Eriksson Advokatfirman Törngren Magnell	
Japan	202	Switzerland	248
Asa Shinkawa and Masaki Noda Nishimura & Asahi		Andreas Rötheli, Beat Kühni, Dominik Kaczmarczyk and Mona Stephenson Lenz & Staehelin	
Korea	208	Turkey	255
Je Won Lee and Kyu Seok Park Lee & Ko		Duygu Turgut and Orcun Solak Esin Attorney Partnership	
Luxembourg	214	United Kingdom	262
Gérard Maîtrejean, Pawel Hermeliński, Olivier Lesage and Jean-Dominique Morelli Dentons Luxembourg		David Billington and Michael Preston Cleary Gottlieb Steen & Hamilton LLP	
Nigeria	222	United States	268
Tamuno Atekebo, Eberechi Okoh, Omolayo Latunji and Oyeniyi Immanuel Streamsowers & Köhn		Bill Curbow, Atif Azher, Peter Gilman, Fred de Albuquerque and Jay Higdon Simpson Thacher & Bartlett LLP	

Preface

Private Equity 2018

Fourteenth edition

Getting the Deal Through is delighted to publish the fourteenth edition of *Private Equity*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Croatia, Israel and Korea. The report is divided into two sections: the first deals with fund formation in 19 jurisdictions and the second deals with transactions in 21 jurisdictions.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Bill Curbow of Simpson Thacher & Bartlett LLP, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
February 2018

Italy

Dante Leone, Nicola Rapaccini and Barbara Braghiroli

CP-DL Capolino-Perlingieri & Leone

Formation

1 Forms of vehicle

What legal form of vehicle is typically used for private equity funds formed in your jurisdiction? Does such a vehicle have a separate legal personality or existence under the law of your jurisdiction? In either case, what are the legal consequences for investors and the manager?

The main vehicles used for private equity funds in Italy are investment funds organised as a collective investment scheme structured as a separate pool of assets (FCIs) or funds structured as corporations, namely variable capital investment companies (SICAVs) or fixed capital investment companies (SICAFs).

An FCI is a collective investment scheme, typically managed by an external Italian asset management company (SGR). Assets in FCIs are separate for all purposes from the assets of their investors, the SGR and any other assets managed by the same SGR.

A SICAV is an open-ended investment fund in the form of an Italian joint-stock company with variable capital, whereas a SICAF is a closed-ended investment fund in the form of an Italian joint-stock company with fixed capital. Both these corporations are formed for the exclusive purpose of collective investment of assets and they could be managed internally by their internal governing body or externally by an SGR.

Each of the above-mentioned legal vehicles also typically qualifies as an Alternative Investment Fund (AIF) pursuant to European Directive No. 2011/61/EC on Alternative Investment Fund Managers (the AIFMD), as reflected in the Italian legal framework.

Until very recently, it was unclear whether private equity funds structured as FCIs could be deemed to have legal personality. Often, FCIs' assets and legal relationships were considered separate from those of the investors and of the managing entity but not directly owned by the investment fund itself. A very recent decision by the Milan tribunal (No. 7232/2016) instead established that private equity funds should be considered as entities with their own legal personality, thus entitled to own in their name all the assets of the investment funds.

2 Forming a private equity fund vehicle

What is the process for forming a private equity fund vehicle in your jurisdiction?

The formation of a private equity fund generally requires the adoption of the fund rules or the articles of associations or by-laws of the relevant entity, the appointment of the management entity and, in certain situations, the approval by the Bank of Italy of the fund governing documents.

FCIs that are reserved for investment by professional investors may be formed relatively expeditiously by authorised SGRs, subject only to the adoption of appropriate fund rules and a notification to the Bank of Italy.

SICAVs and SICAFs are additionally subject to compliance with certain corporate requirements including, but not limited to the following:

- the adoption of the legal form of Italian joint-stock companies;
- the establishment of the registered office and head office in Italy;

- the adoption of the minimum fully paid-up capital (see question 12);
- experience, independence and integrity requirements for persons performing administrative, management and supervisory functions; and
- specific integrity requirements for persons holding a controlling interest in the investment funds.

As regards FCIs, corporate requirements similar to those listed above apply to their SGRs, as mentioned in question 12.

In addition to corporate law requirements, the formation of an AIF also requires a prior authorisation by the Bank of Italy of the Italian AIF manager. It should be noted that, pursuant to the AIFMD passport, European authorised managers may also carry out management activities in respect of Italian private equity funds, based on their home European State authorisation and subject to a prior notification to the Italian competent authorities (see question 12).

As a general rule, the involvement of a public notary is not required in the formation process of a private equity fund; however, as the SICAVs, the SICAFs and the asset management companies for FCIs are joint-stock companies, the formation of these entities requires a notarisation of their formation deed and the relevant publication in the Italian commercial register.

3 Requirements

Is a private equity fund vehicle formed in your jurisdiction required to maintain locally a custodian or administrator, a registered office, books and records, or a corporate secretary, and how is that requirement typically satisfied?

The assets of Italian private equity funds (retail or non-retail) must be held through a separate local custodian authorised by the Bank of Italy to provide depositary services to investment funds. Italian law expressly requires that fund managers appoint a depositary for each investment fund they manage. The depositary is liable in accordance with Italian law towards the fund manager and to fund investors for any loss suffered by them as a result of the depositary's wrongful failure to perform its obligations.

Italian private equity fund managers are registered in the official list of regulated investment vehicles maintained by the Bank of Italy and must maintain a registered office in Italy. They are required to maintain books and records of each fund they manage in accordance with the provisions of the applicable law.

In general, fund administration is not a regulated activity in Italy. However, investment fund managers may outsource essential or important operations, services or activities, to fund administrators only to the extent that the administrators are qualified to manage the delegated functions with the diligence required by the nature of the assignment and as long as such fund managers remain responsible towards the investors for the actions of the delegated subjects. Fund managers must retain the ability to supervise the delegated third parties at all times, so as to be able to give further instructions with regard to the delegated functions at any time, and revoke such mandate with immediate effect, if and when appropriate to protect the interests of investors.

Fund managers wishing to delegate to third parties specific duties related to the performance of their services are generally required to inform the Bank of Italy and the Italian Stock Market Regulatory Authority (Consob) of such intention.

4 Access to information

What access to information about a private equity fund formed in your jurisdiction is the public granted by law? How is it accessed? If applicable, what are the consequences of failing to make such information available?

As private equity fund managers are typically registered with the Italian commercial register, certain information about the managing entities is a matter of public record.

However, as regards AIFs, no information on the identity of the investors or their commitments is disclosed or accessible by third parties.

5 Limited liability for third-party investors

In what circumstances would the limited liability of third-party investors in a private equity fund formed in your jurisdiction not be respected as a matter of local law?

Notwithstanding the interpretation of Italian courts on the principle of the legal personality of investment funds (see question 1), the limited liability of the investors has always been an undeniable milestone of the Italian legal framework, irrespective of the legal form of the private equity fund and of its regulated or non-regulated structure as well as any specific rule applicable to any investor pursuant to its respective country of incorporation. In fact, the liability of non-managing investors is limited to the amount of their commitment to the investment fund and in no event may investors be requested to contribute to the investment fund or to any third party any excess amount. The decision by the Court of Milan (No. 7232/2016) described in question 1 confirmed the principle of the limited liability of the investors.

6 Fund manager's fiduciary duties

What are the fiduciary duties owed to a private equity fund formed in your jurisdiction and its third-party investors by that fund's manager (or other similar control party or fiduciary) under the laws of your jurisdiction, and to what extent can those fiduciary duties be modified by agreement of the parties?

As a general rule, Italian fund managers are liable toward both private equity funds and their investors pursuant to Italian general civil law principles, for the execution of the mandate entrusted to them and for any misconduct in the management of the corporate affairs of the managed investment fund (misconduct does not necessarily imply a fault on the part of the fund managers, who may incur liability for their passive attitude, their negligence or their carelessness). The fund managers' fiduciary duties are governed by the same duty-of-care standard to act as a 'bonus pater familias' in similar circumstances for the execution of a similar mandate, as set forth in the Italian Civil Code: in particular, fund managers must act in a professional manner, with the diligence that can be expected from a prudent and diligent person with expertise in the management of private equity funds, and must comply with the relevant investment policies and constitutive documents.

Generally, such ordinary level of fiduciary duties may not be modified by an agreement among the parties nor treated differently in the constitutive documents of the private equity funds. Nevertheless, the governing documents of a private equity fund may provide for higher standards of fiduciary duties. It is also possible to limit the liability of the fund managers towards the investors or the investment fund by contractual provisions or in the formation documents of the private equity funds, excluding the fund managers' liability for 'ordinary negligence'.

As most Italian private equity funds qualify as AIFs, the fiduciary duties set forth in the AIFMD also apply to Italian AIF managers, and they may not be opted out of, or minimised by, contractual provisions among the parties. Such fiduciary duties require the Italian fund managers, *inter alia*, to act honestly, with due skill, care and diligence and fairly in conducting their activities, and in the best interests of the AIFs or the investors of the AIFs they manage and the integrity of the

market; to have and employ effectively the resources and procedures that are necessary for the proper performance of their business activities; to take all reasonable steps to avoid conflicts of interest and, when they cannot be avoided, to identify, manage and monitor and, where applicable, disclose, those conflicts of interest; to comply with all regulatory requirements applicable to the conduct of their business activities; and to treat fairly the investors in an AIF.

7 Gross negligence

Does your jurisdiction recognise a 'gross negligence' (as opposed to 'ordinary negligence') standard of liability applicable to the management of a private equity fund?

Yes, as mentioned, Italian law distinguishes between 'gross negligence' and 'ordinary negligence', as described in question 6.

8 Other special issues or requirements

Are there any other special issues or requirements particular to private equity fund vehicles formed in your jurisdiction? Is conversion or redomiciling to vehicles in your jurisdiction permitted? If so, in converting or redomiciling limited partnerships formed in other jurisdictions into limited partnerships in your jurisdiction, what are the most material terms that typically must be modified?

There are several restrictions or requirements to private equity fund vehicles depending on the legal form of the vehicle and on whether they qualify as AIFs or not. For example, according to Italian law, certain restrictions apply to transfers of interests in Italian managers of private equity funds, as mentioned in question 26. Also, Italian private equity funds are subject to certain diversification and borrowing limits.

In general, Italian regulations do not allow limited partnerships formed in other non-European jurisdictions to redomicile in Italy. However, specific rules are provided with respect to cross-border mergers. European private equity funds do not need to redomicile as long as a European passport is in place (see questions 12 and 27).

9 Fund sponsor bankruptcy or change of control

With respect to institutional sponsors of private equity funds organised in your jurisdiction, what are some of the primary legal and regulatory consequences and other key issues for the private equity fund and its general partner and investment adviser arising out of a bankruptcy, insolvency, change of control, restructuring or similar transaction of the private equity fund's sponsor?

As discussed in question 5, investment funds' assets are separate from the assets and liabilities of its managing entity and, as a result, the bankruptcy, insolvency or similar events at the level of the manager do not affect investment funds' assets and the interests of the investors.

However, the governing documents of the investment fund generally set forth the consequences of any such event of default at the level of the manager, which may include the right of the investors to terminate the investment period of the investment fund, to replace the manager or to liquidate the investment fund.

Regulation, licensing and registration

10 Principal regulatory bodies

What are the principal regulatory bodies that would have authority over a private equity fund and its manager in your jurisdiction, and what are the regulators' audit and inspection rights and managers' regulatory reporting requirements to investors or regulators?

Consob and the Bank of Italy are the principal regulatory bodies that have authority over private equity funds and their managers. They both have very wide-ranging inspection rights on SGRs.

Specifically, the Bank of Italy is mostly responsible for the risk containment, asset stability and sound and prudent management of private equity funds and fund managers, whereas Consob is responsible for the transparency and correctness of their conduct. These

authorities operate in a coordinated manner and notify each other of the measures adopted and the irregularities discovered in carrying out their supervisory activities.

Both the Bank of Italy and Consob have the ability to fine private equity funds and managers in the event of compliance, administrative and reporting irregularities, by taking the relevant and appropriate measures. In addition, in the event that the tenure of the corporate representatives of asset management companies, SICAVs and SICAFs is detrimental to the sound and prudent management of these qualified subjects, the Bank of Italy may order their removal.

AIF managers are required to provide Consob with yearly, half-yearly or quarterly information regarding the following:

- the main instruments in which they are trading;
- the principal exposures and the most important concentrations of the AIFs that they manage;
- the relevant markets where they actively trade;
- the overall level of leverage employed by each AIF;
- the illiquid assets and the relative arrangements for managing them;
- the current risk profile of the AIFs and the relevant risk management systems; and
- the main categories of assets in which the AIFs have invested.

Fund managers are required to disclose to investors on a yearly, half-yearly or quarterly basis, the following:

- the percentage of the AIF's assets that is subject to special arrangements arising from their illiquid nature;
- any new arrangements for managing the liquidity of the AIF;
- the current risk profile of the AIF and the risk management systems employed by the AIF manager in order to manage those risks;
- any changes to the maximum level of leverage that the AIF managers may employ on behalf of the AIF as well as any right of use of the collateral or any guarantee granted under the leveraging arrangement; and
- the total amount of leverage employed by the AIF.

11 Governmental requirements

What are the governmental approval, licensing or registration requirements applicable to a private equity fund in your jurisdiction? Does it make a difference whether there are significant investment activities in your jurisdiction?

Both the organisation of private equity funds and the activity of fund managers are subject to licensing processes and to compliance with specific requirements pursuant to Italian and European laws and regulations. These processes and requirements differ based on the features of the manager, the type of the investment fund and the prospective investors.

In general, with respect to private equity funds, the Bank of Italy must approve the fund rules of the investment funds (other than for AIFs reserved for investment by professional investors), as well as the relevant amendments. Private equity funds managers must be authorised by the Bank of Italy, as described in question 12. Special simplified authorisation requirements apply to managers of European Venture Capital Funds and European Social Entrepreneurship Funds.

12 Registration of investment adviser

Is a private equity fund's manager, or any of its officers, directors or control persons, required to register as an investment adviser in your jurisdiction?

The activity of fund managers is subject to licensing and compliance processes pursuant to Italian and European laws and regulations. These processes and requirements differ based on the features of the manager, the type of the private equity fund and the prospective investors.

In order to obtain the authorisation to provide asset management services, irrespective of the nature of the managed investment fund, Italian fund managers must comply with a number of detailed requirements, including the following:

- the adoption by the fund manager of the legal form of an Italian joint-stock company;
- generally, a minimum fully paid-up capital of €1 million, subject to certain exceptions for managers of AIFs reserved to professional

investors (for which the minimum capital is set at €500,000) and managers falling below certain thresholds in respect of assets under management pursuant to the AIFMD (for which the minimum capital is set at €50,000);

- experience, independence and integrity requirements for persons performing administrative, management and supervisory functions;
- specific integrity requirements for persons holding a controlling interest in the fund manager; and
- appropriate organisational and functional structures, as indicated in a specific report to be prepared for the benefit of the Bank of Italy.

After formation of the fund management entity and once these requirements are complied with, an authorisation request is submitted to the Bank of Italy. If all requirements and conditions are fulfilled, after a 90-day period from the submission of the request, the manager is expressly authorised by the Bank of Italy and listed in a special register held by the Bank.

The requirements described above apply to fund managers established in Italy. As a general rule, a foreign manager is not entitled to perform management activities or provide asset management services to Italian investors without complying with certain specific requirements pursuant to applicable Italian and European regulations. Such requirements differ depending on whether the overseas manager is a European or a non-European entity, and whether such manager is already authorised in its own country (the home country) as an AIF manager under the AIFMD.

A non-European fund manager must be authorised by the Bank of Italy or another competent European authority to perform management activities in Italy, while the performance of asset management activity in Italy by an authorised European fund manager requires a notification to the Bank of Italy by the competent authority of the home country of such fund manager.

Upon enactment of the Italian regulations on cross-border operations for authorised non-European investment fund managers, the Bank of Italy will list non-European fund managers authorised to perform services in Italy in a special section of the register held by such authority.

13 Fund manager requirements

Are there any specific qualifications or other requirements imposed on a private equity fund's manager, or any of its officers, directors or control persons, in your jurisdiction?

Managers of retail as well as non-retail private equity funds are subject to specific organisational and governance requirements that are intended to ensure sound and prudent management, risk mitigation, proper accounting reporting obligations and the resolution of conflicts of interest.

Among other things, in line with the European legal framework, Italian regulations expressly require that fund managers establish the following:

- a permanent internal corporate body with supervisory functions that oversees the investment strategies and remuneration policy of the managed investment funds (with respect to non-retail private equity funds, this requirement does not apply to managers falling within the AIFMD's definition of below-the-threshold fund managers);
- a remuneration committee responsible for the structuring of the remuneration policy of the fund manager (with respect to non-retail investment funds, this requirement does not apply to managers falling within the AIFMD's definition of below-the-threshold fund managers);
- a permanent internal corporate body with risk management and compliance functions, which operates independently and is not involved in the performance of services or activities it monitors; and
- a permanent internal corporate body with internal audit functions that maintains and evaluates the adequacy and the effectiveness of the internal control mechanisms and arrangements (with respect to non-retail investment funds, this requirement does not apply

to managers falling within the AIFMD's definition of below-the-threshold fund managers).

Each of these functions (which, based on the size of the investment fund managed by the fund manager, either may or may not have to be entrusted to separate internal bodies) and related internal policies are also subject to periodic update and review.

In addition, fund managers are subject to several organisational and capital adequacy requirements such as the fulfilment of sound administrative accounting procedures, control and safeguard arrangements for electronic data processing and adequate internal control mechanisms including, without limitations, rules for personal transactions by their employees or for the holding or management of investments in order to invest on their own account.

With respect to the periodic reporting requirements imposed on the fund managers, see question 10.

14 Political contributions

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure of, political contributions by a private equity fund's manager or investment adviser or their employees.

The Italian rules applicable to public and private political contributions have been recently amended. The applicable legal framework set forth specific limits and disclosure covenants with respect to political contributions, however there are no rules specifically applicable to managers or advisers of private equity funds.

15 Use of intermediaries and lobbyist registration

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure by a private equity fund's manager or investment adviser of, the engagement of placement agents, lobbyists or other intermediaries in the marketing of the fund to public pension plans and other governmental entities. Describe any rules that require a fund's investment adviser or its employees and agents to register as lobbyists in the marketing of the fund to public pension plans and governmental entities.

There are no specific rules in Italy governing the marketing of regulated or non-regulated private equity investment vehicles to public pension plans and other governmental entities.

16 Bank participation

Describe any legal or regulatory developments emerging from the recent global financial crisis that specifically affect banks with respect to investing in or sponsoring private equity funds.

The Italian legal and regulatory framework provides for some specific limits that affect banks with respect to investing in or sponsoring private equity funds. In particular, following the recent global financial crisis, the Bank of Italy has adopted a stricter approach, aiming to limit the risk of an excessive immobilisation of assets deriving from financial or non-financial equity investments and to promote sound and prudent management. Further to that, and to such an extent, the investment by banks in equity or immovable properties made through a third institution (ie, a private equity fund) has certain limitations, as follows:

- it is generally limited to the amount of own funds at a consolidated level;
- it may require authorisation by the Bank of Italy; and
- it is also subject to concentration limits and other organisation requirements, depending on the type of the investment.

Banks can also be affected by internationally driven changes to European legislation and the legislation of foreign jurisdictions, such as the Basel III regulations providing for stricter capital requirements for banks and classifying private equity as a high-risk operation.

Taxation

17 Tax obligations

Would a private equity fund vehicle formed in your jurisdiction be subject to taxation there with respect to its income or gains? Would the fund be required to withhold taxes with respect to distributions to investors? Please describe what conditions, if any, apply to a private equity fund to qualify for applicable tax exemptions.

Pursuant to the provisions of article 73 of the Italian Tax Code (Presidential Decree No. 917 of 22 December 1986, as amended from time to time), Italian private equity funds are treated as tax-neutral for Italian corporate income tax purposes provided that they, or their management companies, are subject to any form of supervision. Thus proceeds (dividends or capital gains) realised by them are exempt from Italian income taxes and could be received gross of any Italian withholding or substitute tax. In line with the interpretation of the Italian Tax Authority, investment funds resident in Italy are entitled to the application of double tax treaties (DTT), as mentioned in question 22.

The tax regime for investors depends on both the type of proceeds and investors as well as on the tax residence of the investors.

Italian-resident investors

Italian-resident investors are generally subject to a 26 per cent withholding tax on the distribution of proceeds by Italian private equity funds. As a general rule, corporate taxpayers who are resident in Italy according to Italian tax law are liable to corporate income tax (at a rate of 27.5 per cent, reduced to 24 per cent from 1 January 2017).

Foreign investors

Foreign investors, resident in countries that allow an adequate information exchange with Italy (the 'white listed countries' (WLC)) may obtain exemptions from taxes on some capital income and different income of a financial nature, as discussed in question 18.

18 Local taxation of non-resident investors

Would non-resident investors in a private equity fund be subject to taxation or return-filing requirements in your jurisdiction?

Both in the case of capital income and capital gains realised through the sale of units, no taxation occurs if the recipient does not have any permanent establishment in Italy in addition to any of the following:

- for tax purposes, the recipient is resident in a WLC (and is the beneficial owner of the income);
- is an international entity or body set up under international agreements in force in Italy; or
- is a central bank or organisation managing official state reserves.

In the event of other foreign investors, a 26 per cent final withholding tax is levied by the private equity funds or the relevant management company on capital income, potentially reduced under any DTT, if existent and applicable as described in question 22.

19 Local tax authority ruling

Is it necessary or desirable to obtain a ruling from local tax authorities with respect to the tax treatment of a private equity fund vehicle formed in your jurisdiction? Are there any special tax rules relating to investors that are residents of your jurisdiction?

On 21 March 2016, the Italian Tax Authority updated its administrative provisions for the implementation of new rules on advance tax agreements for enterprises with international activities. According to these provisions, all enterprises with international activities may enter an advanced tax agreement with the Italian Tax Authority on specific subject matters, regarding, among others, transfer pricing and permanent establishment issues, application of company migration rules, taxation of inbound and outbound dividends, interest, royalties, etc, according to domestic legislation and DTT provisions.

After reaching an agreement with the taxpayer, the Italian Tax Authority issues a tax ruling, which is binding and remains in place

for five fiscal years (potentially renewable) upon the condition that the juridical or factual circumstances of the agreement do not change and the taxpayer fully abides by its provisions.

20 Organisational taxes

Must any significant organisational taxes be paid with respect to private equity funds organised in your jurisdiction?

There are no significant taxes associated with the organisation of a private equity fund in Italy, other than Bank of Italy filing and registration fees.

21 Special tax considerations

Please describe briefly what special tax considerations, if any, apply with respect to a private equity fund's sponsor.

As a general rule, corporate taxpayers who are considered resident in Italy pursuant to the Italian Tax Code, are liable to corporate income tax on their overall income, regardless of its sources (worldwide taxation principle). Management fees are exempt from VAT and subject to Italian corporate income tax in the hands of the SGR. Taxation of carried interest is still a controversial matter in Italy, but, in the event that it is received by the management company, it would be subject to standard Italian corporate income tax.

22 Tax treaties

Please list any relevant tax treaties to which your jurisdiction is a party and how such treaties apply to the fund vehicle.

As of April 2017, Italy had entered into approximately 94 DTTs with many foreign countries, both inside and outside the European Union, to avoid double taxation on income and property. These agreements provide for some specific rules governing the tax process of each category of income and, depending on the categories involved, they provide that both countries could tax the same income (concurrent taxation) or the exclusive taxation by one country only. Only foreign investors that are not resident in a WLC may rely on the DTT directly, submitting a request for refund.

23 Other significant tax issues

Are there any other significant tax issues relating to private equity funds organised in your jurisdiction?

There are no other significant tax issues specifically related to private equity funds. However, Italian tax rules are very complex and constantly subject to significant changes, so that appropriate tax advice is highly recommended in most cases.

Selling restrictions and investors generally

24 Legal and regulatory restrictions

Describe the principal legal and regulatory restrictions on offers and sales of interests in private equity funds formed in your jurisdiction, including the type of investors to whom such funds (or private equity funds formed in other jurisdictions) may be offered without registration under applicable securities laws in your jurisdiction.

The marketing of private equity funds is defined as the direct or indirect offer of interests, on the initiative or on behalf of a fund manager, addressed to resident or non-resident investors. Irrespective of whether such investment fund is an Italian or a European-regulated investment fund, such activity requires the prior filing by the fund manager of a notification with Consob, setting forth the business programme of the investment fund, its regulations or articles of association and, for investment funds not reserved for professional investors, the prospectus – and, in certain situations – an express marketing authorisation from Consob and the Bank of Italy. In general, no private placement is allowed for private equity funds, other than a mechanism of reverse solicitation. Notwithstanding the fact that there is no specific reference to the legality of reverse enquiry in the Italian laws, it has long been accepted by Italian scholars and regulators as exempt from public offer rules.

An exception to the general principles described above is expressly provided for Italian-authorised fund managers that fall within the AIFMD's definition of below-the-threshold fund managers and that market units or shares of Italian or European-regulated investment funds reserved for professional investors in Italy: these managers are not required to make any prior notification of their intention to market their private equity funds in Italy. Non-authorised, non-Italian or European fund managers intending to market units or shares of a foreign private equity fund in Italy have to comply with national rules on placement to local investors. Owing to the complexity of Italian placement rules, it is advisable, for the time being, to contract with an Italian-authorised fund manager that would carry out the authorisation procedure required periodically.

25 Types of investor

Describe any restrictions on the types of investors that may participate in private equity funds formed in your jurisdiction (other than those imposed by applicable securities laws described above).

In line with the applicable European legal framework, interests in non-retail AIFs may only be held by professional investors, defined as private or public investors that possess the experience, knowledge and expertise to make their own investment decisions and properly assess the risks that they incur, such as the following:

- entities that are required to be authorised or regulated to operate in the financial markets, in particular the following:
 - credit institutions;
 - investment firms;
 - other authorised or regulated financial institutions;
 - insurance companies;
 - collective investment schemes and management companies of such schemes;
 - pension funds and management companies of such funds;
 - commodity and commodity derivatives dealers;
 - members of a stock exchange market engaging in proprietary trading;
 - stockbrokers; and
 - other institutional investors;
- large undertakings meeting certain size requirements;
- other institutional investors whose main activity is to invest in financial instruments, including entities dedicated to the securitisation of assets or other financing transactions;
- the government and the Bank of Italy; and
- other national and regional governments, public bodies that manage public debt, central banks and international and supranational institutions such as the World Bank, the International Monetary Fund, the European Central Bank, the European Investment Bank and other similar international organisations.

Investors other than those mentioned above, including public sector bodies and private individual investors, may also qualify as professional investors upon request. In such event, the Italian manager should perform an adequate assessment of the expertise, experience and knowledge of the client, based on certain standard tests and criteria. Interests in private equity funds in the retail sector may also be held by retail investors, which are defined by Italian regulations as those investors that do not have the specific professional experience, knowledge and expertise to make their personal investment decisions consciously and to properly assess the risks involved in this kind of investment.

26 Identity of investors

Does your jurisdiction require any ongoing filings with, or notifications to, regulators regarding the identity of investors in private equity funds (including by virtue of transfers of fund interests) or regarding the change in the composition of ownership, management or control of the fund or the manager?

Investors in private equity funds are not subject to any specific notification or approval from the Italian supervisory authorities. However, the Bank of Italy may request the management company to provide certain

Update and trends

As described in questions 12 and 24, the forthcoming enactment of the European rules on the management and marketing in Italy of non-European AIFs, as well as the management and marketing in Italy of investment funds by non-European fund managers, is certainly the most significant likely future development in this sector.

information about the investors in connection with its inspections and verifications of the compliance with applicable rules.

Any physical or legal person that, for any reason, intends to acquire, directly or indirectly, an interest such as that person could have a significant influence on an Italian fund manager, or an interest that assigns a share of voting rights or capital of at least 10 per cent (by taking into account the shares or units already owned by the acquiring person) is required to notify the Bank of Italy before such acquisition. Advance notice shall be given for any changes in the shareholding of a fund manager when the share of voting rights or capital held directly or indirectly by a person is increased or reduced above or beyond 20, 30 or 50 per cent, and in any event when changes result in the acquisition or loss of control of the Italian fund manager. The Bank of Italy has 60 business days to deny the acquisition (or disposition) of the controlling interest if it considers that the sound and prudent management and financial soundness of the acquisition or disposition target are not fully guaranteed.

Voting and other rights related to the person that has control over a private equity fund manager exceeding the thresholds mentioned may not be exercised in the following circumstances:

- the prior notices have not been given;
- the Bank of Italy has denied the acquisition on the basis that the acquisition could be prejudicial for the private equity's sound and prudent management; or
- the time limit has expired.

In addition, the Bank of Italy and Consob, specifying the deadline for the response, may require Italian investment companies, asset management companies, SICAVs and SICAFs, to provide the names of the investors on the basis of the investors' register and other information available to them.

27 Licences and registrations

Does your jurisdiction require that the person offering interests in a private equity fund have any licences or registrations?

As a general rule, regardless of whether the person marketing private equity fund interests is the fund manager, the offering of interests in investment funds in Italy is a regulated activity, so that any person marketing such interests is required to hold appropriate regulatory permissions or authorisations.

28 Money laundering

Describe any money laundering rules or other regulations applicable in your jurisdiction requiring due diligence, record keeping or disclosure of the identities of (or other related information about) the investors in a private equity fund or the individual members of the sponsor.

Italian private equity funds and their managers are subject to Directive No. 2015/849/EU of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, implemented in Italy by Decree No. 90 of 25 May 2017, which imposes extensive identification and reporting duties on Italian banks and financial institutions.

Due diligence measures for know your customer purposes include, without limitation, the following:

- identifying each investor on the basis of documents, data or information obtained from a reliable and independent source;
- identifying the beneficial owner, whose information are held in a national central register;
- taking 'reasonable measures' to understand the ownership and control structure of the investor;

- obtaining information on the purpose and intended nature of the business relationship; and
- 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 professional's knowledge of the investor, the business and risk profile, including, where necessary, the source of funds and ensuring that the documents, data and information held are kept up to date.

The financial institutions must report any suspicious transactions and ascertain if the customer is or was politically exposed.

Exchange listing**29 Listing**

Are private equity funds able to list on a securities exchange in your jurisdiction and, if so, is this customary? What are the principal initial and ongoing requirements for listing? What are the advantages and disadvantages of a listing?

Since December 2014, it has been possible to list interests of FCIs, SICAVs and SICAFs qualifying as 'open-ended' investment funds on the Italian stock exchange, provided that the relevant fund complies with European Union Directive No. 2009/65/CE on Undertaking for Collective Investment in Transferable Securities (UCITS IV Directive) and that the fund's documents expressly allow the listing of the fund's interests on a regulated market. The minimum free float in connection with the initial public offering must be no less than €25 million. Specific requirements and placement conditions may be imposed by the Italian Stock Exchange Authority, which is the authority responsible for management and supervision of the Italian stock market.

The main advantages for the investors of the listing of investment funds' interests are the broadening of the accessibility to such financial instruments, the (expected) reduction of placement fees and 'entry fees' owing to the lack of placement agents and intermediaries and the increase of transparency. The main disadvantage for funds' sponsors and management entities is the increase of information to be provided to the investors and regulatory authorities.

30 Restriction on transfers of interests

To what extent can a listed fund restrict transfers of its interests?

No specific limits to the transfer of interests apply to listed private equity funds.

Participation in private equity transactions**31 Legal and regulatory restrictions**

Are funds formed in your jurisdiction subject to any legal or regulatory restrictions that affect their participation in private equity transactions or otherwise affect the structuring of private equity transactions completed inside or outside your jurisdiction?

The rules applicable to Italian private equity funds set forth specific limits and restrictions to the investment activity of each investment fund, which are based on the type and legal structure of each investment fund (AIF, open-ended or closed-ended fund) as well as the kind of investors investing therein (professional or retail). Therefore, each type of investment fund is prevented from participating in a private equity transaction if such transaction is not allowed by the applicable legal framework.

In addition to the foregoing, Italian and European antitrust provisions provide for further limits to the investment by private equity funds in certain businesses if such investments result in an abusive behaviour or a violation of the market concentration limits. As for the limits with respect to non-European private equity funds and managers, see question 27.

32 Compensation and profit-sharing

Describe any legal or regulatory issues that would affect the structuring of the sponsor's compensation and profit-sharing arrangements with respect to the fund and, specifically, anything that could affect the sponsor's ability to take management fees, transaction fees and a carried interest (or other form of profit share) from the fund.

Remuneration and profit-sharing arrangements of professionals performing administrative, management and supervisory functions within fund managers or sponsors are subject to specific limits and criteria that are mostly derived from certain general principles set forth in European regulations (specifically arising out of the guidelines on sound remuneration related to the AIFMD issued by the European Securities Market Authority). In particular, fund managers' and sponsors' compensation policies and profit-sharing arrangements are required to be consistent with and proportional to the nature and size of the managed private equity fund, in addition to the following:

- complying with the risk strategies of the investment fund;
- being in line with the levels of capital and liquidity of the investment fund; and
- being structured so as to prevent or minimise possible conflicts of interest.

Compensation policies shall be approved by the shareholders of the fund managers and take into account the performance and financial results of the managed investment funds. Generally, a specific corporate body of the fund manager acts as a remuneration committee and is responsible for the structuring of the remuneration policy (consisting in both cash and financial instruments). The above-mentioned limits on fund managers' compensation and profit-sharing arrangements do not generally apply to managers that fall within the AIFMD's definition of below-the-threshold fund managers.

CP • DL
milan | lugano

Dante Leone
Nicola Rapaccini
Barbara Braghiroli

dleone@cp-dl.com
nrapaccini@cp-dl.com
bbraghiroli@cp-dl.com

Via Quintino Sella 4
20121 Milan
Italy

Tel: +39 02 8905 0320
Fax: +39 02 7005 27881
www.cp-dl.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com