Private Equity

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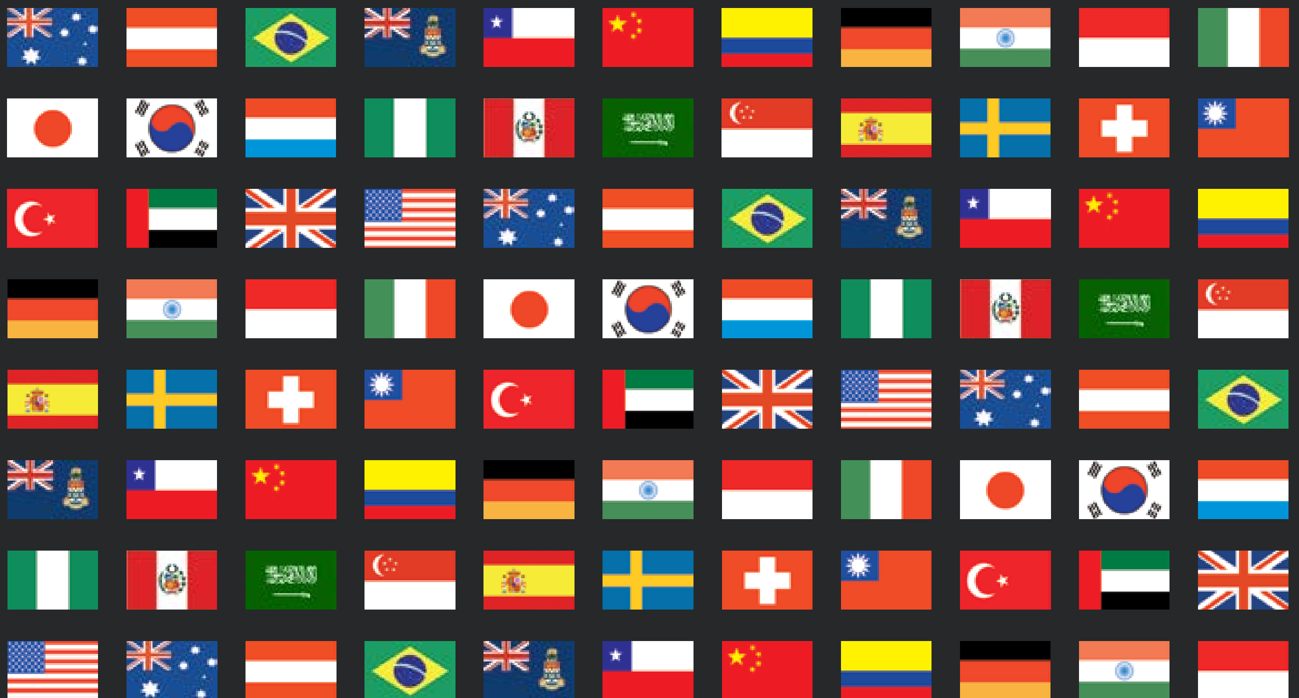

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Italy

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1 Types of private equity transactions

What different types of private equity transactions occur in your jurisdiction? What structures are commonly used in private equity investments and acquisitions?

Leveraged buyout (LBO) and expansion and replacement transactions represent the majority of private equity investments. To a lesser extent private equity investors sponsor restructuring, venture capital, management buyout and going-private transactions. Equity kicks are also common in mini-bond debt financing, which was introduced in 2014.

Expansion and replacement transactions are the most natural equity financing for restructuring and venture capital transactions. They are also very popular for financing traditional private equity deals during the periods when private equity investors have excess dry powder available or banks are reluctant to provide debt acquisition financing.

LBO transactions are now organised with two-step structures. Investors form a special-purpose vehicle (SPV) with minimal stated capital and legal reserves. The SPV receives equity funds from private equity investors as surplus capital and short-term debt financing from banks. The SPV uses contributions to acquire a target. Thereafter the target company merges into the SPV, with the SPV being the new target company surviving entity, which uses reserves and borrowings under the senior facility to reimburse the short-term financing. Bank revolving facilities are also made available to the new target company for working capital purposes. This structure replaced the three-step structure when amendments to the Italian Civil Code were introduced in 2004 and 2008 to increase legal certainty for LBOs in Italy.

Vendors' loans and rollover financing are also frequently employed in private equity transactions.

2 Corporate governance rules

What are the implications of corporate governance rules for private equity transactions? Are there any advantages to going private in leveraged buyout or similar transactions? What are the effects of corporate governance rules on companies that, following a private equity transaction, remain or later become public companies?

Italian corporations are typically organised as companies limited by shares or limited liabilities companies, both being subject to statutory governance rules (to a lesser extent for limited liability companies) that heavily impact private equity transactions: for instance, majority shareholders may be accounted for mismanagement of the target and loans from shareholders are junior to other sources of debt financing.

Governance rules may also be freely contractually agreed. Indeed, in private equity transactions, governance is heavily negotiated, particularly in respect to qualified majorities and veto rights for the adoption of corporate resolutions and share transfer restrictions. Contractually agreed governance rules affecting voting rights may only be entered into for a limited time period (maximum of five and three years, for privately held and listed companies, respectively), unless they are reflected in the by-laws.

Going-private transactions imply several advantages in terms of simplification of the company's structure. Remaining or becoming listed companies exposes such to extensive laws (mainly Legislative Decree No. 58/1998) and regulations from the securities and exchange commission, which provide for disclosure obligations, establishment of ad hoc committees, exposure to mandatory tender offer rules, etc.

3 Issues facing public company boards

What are the issues facing boards of directors of public companies considering entering into a going-private or private equity transaction? What procedural safeguards, if any, may boards of directors of public companies use when considering such a transaction? What is the role of a special committee in such a transaction where senior management, members of the board or significant shareholders are participating or have an interest in the transaction?

As a general principle applicable to both listed and privately held Italian companies, a director must act in the best interests of the company and its creditors. A director must inform the other directors and the statutory auditors of any conflict of interest; if the conflicted director has executive powers, he or she shall abstain and refer the matter to the board.

When a tender offer is made in connection with a going-private transaction, directors issue a public statement containing all useful information contributing to evaluating the offer and their own assessment on the offer, including regarding the fairness of the price and if such assessment is substantiated by an expert opinion. Directors also disclose whether resolutions in respect of a tender offer were adopted with unanimous consent or, alternatively, the name of the dissenting directors and the reason for their dissent. Also, the statement must indicate whether directors participated in the negotiations of the going-private transaction. Directors immediately inform workers of the existence of an offer and of their assessment on the offer.

Independent directors may play a key role in connection with a going-private transaction, for instance, when one or more directors directly or indirectly promote an offer. In this case, a reasoned assessment on the offer, substantiated by an expert opinion, as the case may be, must be prepared and approved by the independent directors well before the board of directors at large issues the public statement evaluating the offer and its assessment of the offer. Also, independent directors, if they so request, must be informed of any communication made by the issuer to banks providing financing in connection with leveraged going-private transactions.

4 Disclosure issues

Are there heightened disclosure issues in connection with going-private transactions or other private equity transactions?

There are no specific disclosure rules in connection with going-private transactions.

General disclosure obligations apply to listed issuers (the obligation to disclose to the public any information that may have a material effect on the price; stock option plans for officers and directors, etc), their shareholders (the obligation to inform the securities and exchange commission and the issuer of the holding of qualified participations in excess of 3 per cent or higher thresholds; disclosure of shareholders'

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agreements regulating the exercise of voting rights, etc) or officers and directors (who are under the duty of disclosing their dealings on the shares within five business days).

Pending tender offers, a higher degree of transparency applies to the extent that dealing on shares must be disclosed before the close of day. In case of rumours on the offer, the securities and exchange commission has the right to request the information necessary to inform the public. Confidentiality (and, therefore, delaying disclosures) may be opposed to the securities and exchange commission only if adequately reasoned. Also, under the fairness rules issued by the securities and exchange commission, the issuer has a duty of providing to a competing offeror, if any, the same information provided to the original offeror.

5 Timing considerations

What are the timing considerations for a going-private or other private equity transaction?

Timing of going-private transactions is strictly regulated by Legislative Decree No. 58/1998 and securities and exchange commission resolution No. 11971 of 14 May 1999.

The offeror must promptly inform the securities and exchange commission and the public (with certain minimum standard information to be complied with) of its intention to submit a voluntary takeover bid (or that the conditions for a mandatory takeover bid are met). The offer document must be submitted to the securities and exchange commission within the following 20 days. In principle, the securities and exchange commission must complete a review and authorise publication of the offer document within 15 days (or suspend the procedure if additional documents and information are required, for a period not exceeding 15 days).

The offer or subscription period starts one to five days from the publication of the offer document (depending on whether the offer document includes the notice issued by the target commenting on the offer). Its duration is usually comprised between 25 and 40 days for voluntary offers (and between 15 and 25 days for mandatory offers) and is agreed with the stock exchange or the securities and exchange commission, depending on whether or not it relates to financial products admitted to trading in a regulated market.

In addition to the foregoing general rules, other specific circumstances may impact on timing, as follows:

- if launched in more jurisdictions, the offer or subscription period may be extended one or more times by the securities and exchange commission by up to 55 days or may follow different time schedules;
- defensive measures may be adopted by the target company consistent with applicable law (mainly if approved by the shareholders' meeting) or the target by-laws;
- the original offer is modified (in such case, the offer must remain open for at least three days);
- competing bids (to be communicated within five days from expiry of the offer or subscription period) and counter offers (within the following five days) are launched;
- where the bidder becomes the holder of 95 per cent or more of the securities of the target company, sell-out or squeeze-out sales may be forced by the remaining shareholders and the bidder, respectively; and
- clearance of the transaction by other authorities, etc.

On the contrary, consistent with international practice, the timing of private equity transactions relating to privately held companies changes on a case-by-case basis, depending on the complexity of the due diligence process, the length of negotiations, the specific structure of the deal (including financing), clearance by competent authorities, etc.

6 Dissenting shareholders' rights

What rights do shareholders have to dissent or object to a going-private transaction? How do acquirers address the risks associated with shareholder dissent?

Several options are available to shareholders wishing to express their dissent pending a going-private transaction, both under corporate and public bids rules.

Qualified minorities may convene shareholders' meetings. They may initiate (and agree to settle) lawsuits against directors. Also, more recently, a higher degree of flexibility has become possible when structuring by-laws of public companies, which may contribute in balancing the conflict between majority and minority shareholders, including in connection with public offerings. For instance, special shares may be issued to minority shareholders, who enjoy extra voting rights or special rights for the appointment or termination of directors. However, rights under the special shares may not be enforced in connection with public offers whereby the qualified majority of 75 per cent or more of the capital is obtained at the close of the offer period and a shareholders' meeting is convened to modify the by-laws or to appoint the new directors.

Acquirers wishing to address shareholders' dissent in going-private transactions seek support from large groups of shareholders and customarily condition the transaction to obtaining minimum thresholds as a result of the offer (95 per cent of the capital) and thereafter squeeze out the minority shareholders (if the intention to exercise such right was originally stated in the offer document).

7 Purchase agreements

What notable purchase agreement provisions are specific to private equity transactions?

No specific representations and warranties provisions apply to private equity transactions on the buy-side. Consistent with international practice, private equity investors customarily obtain full title and business representations and warranties from sellers (particularly for majority deals) and heavily negotiate price adjustment mechanisms, particularly accounting principles to establish debt and working capital as of the closing date.

On the sell-side, private equity investors usually seek insurance coverage to secure their indemnification obligations (and freely distribute proceeds from the sale of portfolio companies to limited partners or managers). Covenants are more elaborate. Pre-closing covenants include the obligation of the private equity investor to cause the establishment of, and the contribution of equity financing to, the acquisition vehicle and seek short-term financing and irrevocable commitment for post-merger long-term senior financing. Post-closing covenants spell out in detail the parties' obligations in respect of the post-closing merger, in particular the adoption of the relevant corporate resolutions and compliance with certain other Italian Civil Code requirements, including cooperation in describing the financial resources for the transaction, in preparing a merger report on the legal and financial reasons underlying the merger and appointing an expert to deliver an opinion as to the adequacy of the exchange ratio and of the merger report. These post-closing covenants are now seen in share purchase agreements for LBO private equity transactions in spite of a consolidated case law whereby the assets of the target may only qualify as a generic guarantee for the acquisition. Arguably, this is based on the assumption (untested in court) that the 2004 and 2008 reforms of Italian corporate law now expressly regulate the cases of a merger of two companies (whereby the acquiring entity uses debt to acquire the target) and, under certain quantitative and procedural conditions, of a corporation limited by shares offering financing or guarantees for the purchase or subscription of its own shares, respectively.

Closing may or may not be conditional to financing, depending on the negotiation leverage of the private equity investor. If this condition is successfully negotiated by the private equity investor, sellers usually obtain a liquidated damages payment if the transaction does not close.

8 Participation of target company management

How can management of the target company participate in a going-private transaction? What are the principal executive compensation issues? Are there timing considerations for when a private equity buyer should discuss management participation following the completion of a going-private transaction?

Management incentives are a structural part of any private equity transaction and are discussed from the very outset of the negotiations. Private equity transactions in Italy typically focus on businesses where the funder and his or her team played (and are expected to play) a key role. Funders are usually offered a rollover investment (often substantial) in the acquisition vehicle and a casting vote on key governance resolutions. Funders and their team are offered a service

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agreement with the target company, which provides for equity-based incentives vested over a three to five year period, based on agreed-upon performance thresholds of the target or the achievement by the private equity investor of agreed-upon returns. Vesting is accelerated upon exit by the private equity investor or termination of the manager, or both (bad and good leaver provisions regulate economic terms and the duration of the non-compete restriction).

Financial assistance rules do not apply to transactions aiming at facilitating the acquisition of shares by employees, provided that certain quantitative limits (distributable profits and reserves) are met.

Additional arrangements may be evaluated on a case-by-case basis in connection with going-private transactions, depending on existing incentive schemes, which are customarily entered into and adequately disclosed by listed companies pursuant to applicable securities laws.

9 Tax issues

What are the basic tax issues involved in private equity transactions? Give details regarding the tax status of a target, deductibility of interest based on the form of financing and tax issues related to executive compensation. Can share acquisitions be classified as asset acquisitions for tax purposes?

In the absence of a sound business purpose, Italian tax authorities have often challenged interest deductions in connection with LBOs. Under a recent release from Italian tax authorities (dated 30 March 2016), based on the acknowledgment that LBO transactions are an established market practice and are specifically regulated by the Italian Civil Code, interest payments made in connection with LBO transactions may be deducted either in the case of a merger or in the case of the election of tax consolidation between the SPV and the target for a percentage of up to 30 per cent of the gross operating margin, subject to the general transfer pricing rules. This general rule applies irrespective of whether shareholders and lenders qualify as Italian-based entities.

Under no circumstances can fees for services rendered by managers in the exclusive interest of the private equity fund or its investors be deducted if charged to the SPV or target. Accordingly, tax authorities will customarily scrutinise fund rules (in particular clauses providing for the total or partial offsetting of management fees against fees charged to the SPV or target) and other fee-sharing arrangements that are not in line with market practice.

By the same token, according to the foregoing recent release of tax authorities, VAT on transaction costs may not be deducted by the SPV, unless commercial activities are actually carried out by the SPV (the mere holding of a participation, without an active involvement in its management, does not per se qualify as a commercial activity subject to VAT).

Taxation of incentive plans is in principle subject to employment income tax at ordinary progressive income tax rates. Since the entry into force of Law Decree No. 112/2008, income from the exercise of stock options schemes (the difference in excess between the strike price and the normal value of shares issued in connection with a stock option plan) also falls under employment income tax (however, it is exempt from social security contributions). Ad hoc stock options may follow different and more favourable tax paths if certain precautionary measures are adopted, including paying consideration for the stock option.

Sellers incorporated under Italian law benefit from a 95 per cent exemption on corporate tax income (IRES) for capital gains arising out of the disposal of shares held in, or dividends received by, Italian or foreign companies. The exemption applies if shares are held – without interruption – for 12 months or more before the sale, are accounted as financial fixed assets in the first financial statements approved after their purchase, and are shares in a company carrying out a commercial activity that does not generate a substantial part of its income in a tax haven jurisdiction or in a jurisdiction with a special tax regime (the latter two requirements must exist for at least three consecutive years before the sale or the life of the company, if less).

The transfer of shares in Italian corporations limited by shares is subject to financial transaction tax (Tobin Tax) of 0.2 per cent (0.1 per cent for listed companies) tax rate on the value of the transaction (certain exemptions apply to intra-group transfers or sales made in connection with a group reorganisation). No VAT applies to transfers of shares, quotas, bonds and other securities.

Gains arising out of sales of corporate assets are subject to IRES (at a 24 per cent rate). VAT or registration tax applies, depending on whether the disposal relates to one or more assets, or assets organised as a going concern, respectively.

Capital gains or losses are generally excluded from regional tax on productive activities (IRAP). Interest costs deduction for IRAP purposes is restricted to financial institutions or holding companies.

10 Debt financing structures

What types of debt are used to finance going-private or private equity transactions? What issues are raised by existing indebtedness of a potential target of a private equity transaction? Are there any financial assistance, margin loan or other restrictions in your jurisdiction on the use of debt financing or granting of security interests?

Most frequent private equity transactions – traditional mid-market LBOs – are now organised with a two-step structure (see question 1).

In connection with the merger, among other things, directors of the SPV and target must indicate the financial resources that will allow repayment of the acquisition debt, such indication to be substantiated by third-party independent assessment.

Following the 2004 and 2008 reforms of Italian corporate law, the case of a merger of two companies whereby the acquiring entity uses debt to acquire the target, and, under certain quantitative and procedural conditions, a corporation limited by shares is permitted to offer financing or guarantees for the purchase or subscription of its own shares, respectively, is expressly regulated. The merger procedure in connection with an LBO transaction is benefiting from a clear legal framework, and the two-step structure is now market practice, provided that the safe harbour provisions introduced by the 2004 and 2008 reforms are strictly respected.

11 Debt and equity financing provisions

What provisions relating to debt and equity financing are typically found in going-private transaction purchase agreements? What other documents typically set out the financing arrangements?

Under standard private equity transactions, parties heavily negotiate and regulate the financial conditions to closing and the risk allocation between buyer and seller if financial resources fail to materialise between signing and closing.

Under going-private transactions, the securities and exchange commission regulations aim at minimising the uncertainty of funding and require the bidder to make financing arrangements for wholly fulfilling all payment commitments in cash or in kind immediately, in any event before informing the securities and exchange commission and the public of its intention to submit a voluntary takeover bid. Such financing arrangements are typically set out in performance guarantees issued by financial or insurance institutions. In the case of exchange offers, financing arrangements include the adoption of all resolutions necessary for the issuance of the financial products offered in kind as price consideration.

12 Fraudulent conveyance and other bankruptcy issues

Do private equity transactions involving leverage raise 'fraudulent conveyance' or other bankruptcy issues? How are these issues typically handled in a going-private transaction?

Historically, and up to the year 2000, the Italian Supreme Court closely scrutinised and censured LBOs that ended up with the bankruptcy of the target company. Financial assistance was strictly prohibited under the pre-2008 reform of article 2358 of the Italian Civil Code and was punished with imprisonment of up to three years and fines under article 2630 of the Italian Civil Code.

The reform of Italian corporate law in 2004 (incorporating EEC Directives III and VI) introduced a new provision into the Italian Civil Code, article 2501-bis, which expressly regulates the case of a merger of two companies whereby the acquiring entity uses debt to acquire the target, and provides for a number of safe harbour protections, including that the merger plan clearly shows the financial resources for the reimbursement of the debt (and is substantiated by an independent

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third-party assessment), and the directors of both entities indicate the business reasons underlying the transaction, the financial sources and the objectives of the transaction.

In 2006, the first Supreme Court decision issued after the entry into force of the 2004 reform of Italian corporate law acknowledged that article 2501-bis officially introduced LBOs in the Italian Civil Code and that article 2630 of the Italian Civil Code had been abolished in 2002. It also acknowledged that LBOs may still be relevant from a criminal law perspective and be scrutinised under the fraudulent conveyance principle if the merger is not supported by an adequate industrial project.

The 2008 reform amended article 2358 of the Italian Civil Code and contributed to ensure a safe legal framework for LBOs. A corporation limited by shares may offer financing or guarantees for the purchase or subscription of its own shares, and therefore financial assistance is permitted, provided that certain quantitative limits (distributable profits and reserves) and procedural requirements are met (among other things, directors must describe the business reasons and objectives of the transaction along with the interest for the company and the potential risk and obtain formal approval by the shareholders).

Private and going-private LBOs in Italy must be completed under strict compliance with the safe harbour provisions of amended article 2358 and new article 2501-bis of the Italian Civil Code to minimise the risks of bankruptcy or criminal fines.

13 Shareholders' agreements and shareholder rights

What are the key provisions in shareholders' agreements entered into in connection with minority investments or investments made by two or more private equity firms? Are there any statutory or other legal protections for minority shareholders?

In many circumstances, mostly when private equity firms make minority or majority investments and the original entrepreneur retains control over the day-to-day management, shareholders' arrangements on governance and transfer restrictions are market standard.

Governance arrangements are consistent with international standards and mostly regulate the appointment of directors and other key people (chairperson, CEO, CFO), the powers of executive directors, veto rights on certain reserved matters, deadlock in the case of 50/50 investments, access to periodic financial reports, corporate books and records and inspection rights. Transfer restrictions are also consistent with international standards. Under case law, drag-along rights are enforceable only to the extent that dragged shares are given a value at least equal to the consideration paid to shareholders in cases where they are entitled to withdraw from a company under the Italian Civil Code.

Shareholders' agreements being limited in time (five years for privately held companies), shareholders seek to reflect their arrangements in the by-laws to the maximum extent possible. On the contrary, agreements regulating co-investment or underwriting rights of private equity firms are generally maintained secretly.

Minority shareholders enjoy certain statutory protections (for instance, qualified minority shareholders have the right to challenge shareholders' resolutions (5 per cent of the capital) and to obtain the convening of the shareholders' meeting or the filing of a derivative action for misconducts of the board (10 per cent of the capital)).

14 Acquisitions of controlling stakes

Are there any legal requirements that may impact the ability of a private equity firm to acquire control of a public or private company?

Share transfers of privately held companies are typically subject to transfer restrictions set forth under the relevant by-laws or shareholders' agreement (right of first refusal, tag-along, drag-along). Acquiring control may be subject to clearance of competent authorities, such as antitrust (if given turnover thresholds are met) or other regulators (eg, the Bank of Italy and the Institute for the Supervision of Insurance) depending on whether the target operates a regulated activity.

The acquisition of qualified participations (in excess of 3 per cent or higher thresholds) in listed companies is subject to certain disclosure obligations. The acquisition of control is strictly regulated both for voluntary and mandatory takeover bids, particularly the latter bids which must be launched if given thresholds are exceeded (a mandatory bid must be launched if the bidder alone or in concert owns 30 per cent or more of the voting rights; if the bidder owns 95 per cent or more of the voting rights as a result of a bid, sell-out or squeeze-out sales may be forced by the remaining shareholders and the bidder, respectively; also certain free-float re-establishment or mandatory bid rules apply if a shareholder owns 90 per cent or more of the voting rights of a public company).

Update and trends

New rules were issued by the Italian tax authority in March 2016, with respect to, among other things, the deducibility of interest payments made in connection with LBO transactions either in the case of a merger or in the case of election of tax consolidation between the SPV and the target for a percentage of up to 30 per cent of the gross operating margin.

In terms of trends, by the end of the third quarter of 2016, the following had taken place:

- 551 M&A transactions for an aggregate value of €39.2 billion were closed, with a 56 per cent increase compared to the same period in 2015 (the most valuable transactions being in the financial services, support services and infrastructure industries);
- private equity investors closed 76 transactions: 30 were closed by international private equity investors (for a total value of €3.3 billion) and the remainder were closed by Italian private equity investors (for a total value of €2 billion); and
- 13 IPOs were successfully launched in 2016, sales to strategic industrial investor and secondary buyouts still being the favourite exit paths for private equity investors.

15 Exit strategies

What are the key limitations on the ability of a private equity firm to sell its stake in a portfolio company or conduct an IPO of a portfolio company? In connection with a sale of a portfolio company, how do private equity firms typically address any post-closing recourse for the benefit of a strategic or private equity buyer?

Private equity firms typically eliminate all restrictions (mainly the right of first refusal) to the free sale of their stakes in portfolio companies and obtain drag-along rights in connection with the negotiation of the principal terms of the investment. Conducting an IPO depends on a number of odds, which are difficult to predict at the time of the investment, including approval by the competent corporate bodies and favourable market conditions. To minimise the risk associated with this exit strategy, private equity firms typically successfully negotiate the right to select, appoint and lead the negotiations with the sponsor or global coordinators.

In connection with the sale of portfolio companies, depending on the funds' rules, private equity firms usually structure the transaction in order to maximise distribution of the proceeds from the sale of portfolio companies to the limited partners and managers of the fund. Insurance coverage and other escrow arrangements for liabilities arising out of the typical indemnifications of the seller for misrepresentations or breaches of covenants, as well as reduced representations and warranties in consideration for price discounts are customary, particularly at the end of the investment period of a fund.

16 Portfolio company IPOs

What governance rights and other shareholders' rights and restrictions typically survive an IPO? What types of lock-up restrictions typically apply in connection with an IPO? What are common methods for private equity sponsors to dispose of their stock in a portfolio company following its IPO?

Rights and restrictions under by-laws and shareholders' agreements do not necessarily perish if they are not incompatible with an IPO. If shareholders' agreements are maintained in force after an IPO, it is assumed that shareholders bound by such agreements act in concert and therefore mandatory tender offer rules apply if the relevant thresholds are exceeded by the parties bound by a shareholders' agreement.

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Typically, stock exchange regulations provide for mandatory lock-up restrictions: for instance, under certain stock exchange regulations, lock-up restrictions apply to shareholders of companies that have run their activity for less than three fiscal years, or in connection with material disposals of shares that were acquired 12 months prior to the IPO. Lock-up restrictions are also entered into on a voluntary basis and on a limited time period as part of the arrangements between key shareholders, including financial sponsors and top managers, and global coordinators or sponsor. Terms and conditions for private equity funds to dispose of shares in their portfolio companies in connection with IPOs are typically part of the exit strategy, and are negotiated by equity sponsors at the outset of their investment, along with all other governance arrangements.

17 Target companies and industries

What types of companies or industries have typically been the targets of going-private transactions? Has there been any change in focus in recent years? Do industry-specific regulatory schemes limit the potential targets of private equity firms?

Mid-market companies, mostly in the high-tech, luxury, energy, media, fashion, communication and transportation industries have been the target of going-private transactions, in particular in the first decade of the twenty-first century, with a peak in 2008.

In principle, no specific regulatory restrictions apply to private equity sponsors, which benefit from a broad spectrum of investment opportunities in Italy.

However, Bank of Italy regulatory schemes may be opposed to private equity sponsors seeking to gain control over financial institutions. Bank of Italy clearance may be refused, and therefore the closing of the transaction could be at jeopardy, if no adequate evidence is given to the Bank of Italy that, under the new ownership structure, the financial institution would abide by the Bank of Italy sound and prudent management rules. Indeed, lack of a mid-long term investment plan, beyond the typical investment period of a private equity fund, is a factor that the Bank of Italy takes into account when assessing compliance with the sound and prudent management rules. Also, Bank of Italy clearance may be refused under anti-money laundering rules and lack of transparency on the ownership chain may be opposed by the Bank of Italy to those limited partnerships resident in blacklisted jurisdictions seeking to gain control over financial institutions.

18 Cross-border transactions

What are the issues unique to structuring and financing a cross-border going-private or private equity transaction?

Specific foreign investment restrictions may apply to strategic industries (principally safety and national defence). Other than certain tax peculiarities and a certain degree of complexity associated with cross-border transactions in selected industries (financial, insurance, etc), Italy has a friendly legal and business environment for cross-border transactions. Cross-border deals in Italy worth over €100 million increased by 71 per cent in the first half of 2016, compared with the same period in 2015.

19 Club and group deals

What are the special considerations when more than one private equity firm (or one or more private equity firms and a strategic partner) is participating in a club or group deal?

Club and group deals assume heavy governance, transfer restrictions and exit arrangements, which in principle are regulated on a case-by-case basis. More structured schemes have been proposed recently, whereby a manager enters into certain umbrella arrangements with family offices or high net worth individuals, whereby investors are offered a right of first view on selected investments. Consistent with club and group deal industry practice, under these umbrella arrangements, commitments to one or more investments may or may not follow, depending on the investor, which retains the ultimate investment decision.

Under ex-post syndication club and group deals, usually the promoter offers new investors a complete set of representations and warranties in respect of the business and operations of the underlying target.

Particularly in the case where private equity firms team-up with a strategic partner, confidentiality of the target proprietary information must be strictly respected (including for protection of competition).

Finally, in going-private club and group deals, all participants are deemed to act in concert and mandatory tender offer rules trigger accordingly.

20 Issues related to certainty of closing

What are the key issues that arise between a seller and a private equity buyer related to certainty of closing? How are these issues typically resolved?

In smaller deals, signing and closing occur simultaneously. In mid-market and larger deals, there is a time lapse between signing and closing because of certain conditions to be satisfied or actions to be undertaken by the parties.

A number of issues arise between signing and closing. The seller typically covenants to carry the business and operations of the target in the ordinary course of business (in the absence of a statutory definition, this obligation must be carefully spelled out in the share purchase agreement). Other actions are undertaken by the parties before the closing. Unlike conditions, which depend on circumstances outwith the parties' control (eg, antitrust clearance), failure to comply with actions before closing exposes the parties to contractual liability.

Private equity buyers are often successful in negotiating that closing be conditional upon no material adverse changes in the business and operations of the target occurring between signing and closing (in this case, sellers usually succeed in pinning down the definition of material adverse change and anchoring it to objective events, such as a

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pre-defined minimum level of sales). Private equity buyers also obtain a covenant from the seller that the buyer has been duly informed of any material adverse change that occurred up to the closing and known by the seller (in the absence, indemnification for misrepresentations or breach of covenants being the exclusive remedy of the buyer following the closing, the buyer would have no enforcement measure following the closing). Conditions may be waived only by the party benefiting from the condition.

If sellers successfully negotiate termination rights (for instance, if minority shareholders fail to waive the right of first refusal) buyers usually obtain liquidated damages payments.

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