Mergers and Acquisitions Report 2014

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MERGERS AND ACQUISITIONS REPORT 2014

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Section 1: REGULATORY FRAMEWORK

1.1 What legislation and regulatory bodies govern public M&A activity in your jurisdiction?
The Italian Securities and Exchange Commission (Consob) has the primary responsibility for regulating listed companies and the Italian Stock Exchange, and enforcing the applicable laws and regulations. *Borsa Italiana* (the Italian Stock Exchange) is a private company in charge of the management of the Italian capital markets. AGCM (*Autorità Garante della Concorrenza e del Mercato*) is the Italian antitrust authority.

The rules applicable to listed companies are provided by the Italian Civil Code and the Financial Act. Consob and the *Borsa Italiana* have adopted secondary implementing regulations (also applicable to cross-border transactions).

1.2 How, and by what measures, are takeover regulations (or equivalent) enforced?
Takeover regulations are enforced by Consob, among others, through: (i) surveillance activity; (ii) investigation activities and requests to disclose documents and information; and (iii) application of sanctions.

Section 2: STRUCTURAL CONSIDERATIONS

2.1 What are the basic structures for friendly and hostile acquisitions?
The acquisition of an Italian listed company may be carried out, among others, through: (i) public tender offers; (ii) mergers; or, (iii) subscription of reserved capital increases.

A merger or a capital increase is carried out on a friendly basis, since both transactions require the cooperation of the target's board of directors or controlling shareholders.

The most common way to acquire control of an Italian listed company is through a public tender offer, which may generally be either: (i) voluntary tender offers (voluntary OPA); and (ii) mandatory tender offers, launched when certain participation thresholds are exceeded (the first threshold being the acquisition of more than 30% of the voting capital) (mandatory OPA). Both mandatory and voluntary OPAs may be launched on a hostile basis, since they do not strictly require the cooperation of the target's board of directors, although their success is obviously subject to a certain number of shareholders tendering their shares to the relevant offer.

2.2 What determines the choice of structure, including in the case of a cross-border deal?
The structure of the transaction mainly depends on the plans of the bidder. For example, if the purchaser intends to integrate the business of the target with and into its business, the merger transaction could be the most suitable structure.

The structure may also change depending on the consideration offered, either in cash or shares. In the latter case, the requirements are generally more burdensome.

In the case of cross-border deals, certain peculiarities may affect the structure (for example, it is common that a non-Italian bidder incorporates an Italian vehicle that launches the public tender offer).

2.3 How quickly can a bidder complete an acquisition? How long is the deal open to competing bids?
A tender offer procedure usually takes from 90 to 110 days. However, the duration depends on several aspects including the nature of the tender offer, the possible suspension of the terms by Consob, and possible defensive measures during the offer period.

A competing offer may be launched up to five days before the expiration of the acceptance period. The original bidder is entitled to raise its offer within five days from the launch of the competing offer.

Both merger and reserved capital increase procedures may take up to 100 days.

2.4 Are there restrictions on the price offered or its form (cash or shares)?
In the case of mandatory OPAs, the price should be: (i) equal to the highest price paid by the bidder for any acquisition of securities of the target during the 12 months preceding the offer; or (ii) in the absence of previous purchases of shares, not lower than the weighted market average over the 12 months preceding the offer.

The consideration for the offer may be represented by shares. In the event the shares offered as consideration are not listed on an EU-regulated market, the bidder must also offer to the recipients of the offer an alternative consideration in cash.

For voluntary OPAs, the offered price may be freely determined by the bidder.

2.5 What ownership and other conditions determine whether the bidder makes the acquisition and can satisfactorily squeeze out or otherwise eliminate minority shareholders?
The bidder who reaches a participation equal to at least 95% of the target's capital: (i) is obliged to purchase the remaining shares from any requesting shareholders; and, (ii) has the right to purchase the residual shares.

In addition, if any person comes to hold a participation exceeding 90% of the share capital of a listed company: (i) the relevant person is obliged to purchase the outstanding shares of the company from any requesting shareholder; and, (ii) the shares of the company are delisted. Such purchase obligation and the delisting may be avoided if the relevant person restores a so-called sufficient float on the market within 90 days. The level of floating that is considered sufficient for the above purposes is determined on a case-by-case basis by Consob, and usually corresponds to a float of around 10% of the voting capital.

2.6 Do minority shareholders enjoy protections against the payment of control premiums, other preferential pricing for select shareholders, and partial acquisitions, such as mandatory offer requirements, ownership disclosure obligations and a best price/all holders rule?
The conditions offered should apply to all a target's shareholders. The bidder may not agree upon a favourable price with specific target shareholders.

Under the so-called best price rule, if during the offer period the bidder purchases securities at a higher price than the offer price, the latter shall be increased accordingly. The same applies to purchases made by the bidder in the six months following the offer.

2.7 To what extent can buyers make conditional offers, for example subject to financing, absence of material adverse changes or truth of representations? Are bank guarantees or certain funding of the purchase price required?

A mandatory OPA may not be subject to conditions. However a voluntary OPA may be subject to certain conditions, provided that (i) the conditions are specified in the offer document, and (ii) the conditions do not merely depend on the bidder's will.

Conditions such as reaching a minimum level of acceptances, the issuance of an antitrust clearance, the absence of defensive measures, and the absence of any fact that causes a material adverse change in the financial conditions of the target, have been considered acceptable.

The offeror shall provide evidence to Consob that it has available funds for the payment of the entire offer price. This may be cash or readily disposable securities, for an amount equal to the maximum value of the takeover, along with a cash confirmation from a bank.

2.8 How do buyers and sellers seek to maximise value through their price and other deal strategies?

Generally, the price for the acquisition of listed companies is directly connected to the trading price and, in case of a mandatory OPA, is imposed on the bidder by law. The voluntary OPA allows the bidder to freely determine the price. However, in order for the bidder to achieve the maximum shareholding of the target, the price should usually incorporate a premium.

The bidder and the target may maximise the value of the transaction through post-acquisition integration strategies, to be planned before closing. For example: (i) during the due diligence phase (if any), the bidder should evaluate issues concerning the possible integration of the target; and (ii) the amount of the purchase price should take into account the costs and length of the integration. For this purpose, the purchaser and the target could also merge to have a single entity able to reduce costs and improve synergies.

Section 3: TAX CONSIDERATIONS

3.1 What are the basic tax considerations and trade-offs?

a) *Capital gains*

In general, gains realised as a result of a divestment in listed shares are subject to ordinary income tax or to a 20% substitute tax. However: (i) Italian tax resident corporate shareholders can benefit from a participation exemption of 95% of the gain, and such exemption applies provided that certain conditions are met; and (ii) non-Italian tax resident entities, capital gains arising from the sale of listed shares, if not realised through an Italian permanent establishment, are taxable in Italy depending on the percentage of participation:

- if the amount of participation sold during a 12-month period does not exceed two percent of the voting rights or five percent of the capital or equity in the Italian company, the capital gain is not regarded as Italian-source income (these participations are referred to as non-qualified participations); and
- if the amount of participation sold during a 12-month period exceeds two percent of the voting rights or five percent of the capital or equity in the Italian company at least once in the 12-month period, only 49.72% of the gain is included in the taxable income of the seller and it is taxed in Italy at the general corporate income tax rate (27.5%) whereas 50.28% is exempt (these participations are referred to as qualified participations).

b) *Dividends*

The tax treatment of dividends distributed by Italian tax resident listed companies varies depending on the legal status of the recipient:

- Italian tax resident corporate entities: only five percent of the dividend is subject to ordinary corporate tax (plus regional tax on productive activities under certain circumstances); and,
- non-Italian tax resident entities: a 20% domestic withholding tax applies. However, there are a number of provisions that reduce or eradicate the withholding tax rate.

c) *Tobin Tax*

The transfer of shares of Italian listed companies is subject to a domestic financial transaction tax (Tobin Tax). Such tax applies irrespective of the place of execution of the transfer and regardless of the residence of the parties involved.

The Tobin Tax applies on the net daily balance of transactions on the same financial instrument by the same subject, and it is borne by the buyer and levied by the financial intermediary involved in the relevant transaction.

In principle, the Tobin Tax is levied at 0.1% rate in cases where the transfer of shares is executed on a regulated market or a multilateral trading facility established in an EU member state or in a European Economic Area state allowing an adequate exchange of information with the Italian tax authorities.

Certain shares transactions benefit from exemptions or exclusions. For example, the transfer of shares executed in the context of a corporate reorganisation are excluded from the Tobin Tax.

3.2 Are there special considerations in cross-border deals?

Apart from the above-mentioned exemptions from capital gain taxes for non-Italian tax resident shareholders, Italian tax laws provide for a special tax-neutral regime for certain transactions such as mergers, exchanges of shares, spin-offs and contributions-in-kind in a EU cross-border context. However, the Italian tax authorities have broadened the applicability of the mentioned tax neutrality regime to some cross-border reorganisations involving non-EU entities.

Section 4: ANTI-TAKEOVER DEFENCES

4.1 What are the most important forms of anti-takeover defences, including antitrust, national security or protected industry review, foreign ownership restrictions, employment regulation and other governmental regulation?

Consob pointed out three main categories of defence: (i) actions aimed at increasing the financial burden of the bidder; (ii) actions aimed at modifying the net-worth structure of the target; and (iii) actions that generally hinder the success of an offer.

Moreover, a newly-enacted law has granted the Italian government with some special intervention powers in relation to the ownership structure of Italian-based companies: (i) involved in defence and national security; and (ii) considered strategic in the energy, transport and communications sectors. The proposed purchaser or the target should file a request of clearance to the government. The Italian government has the power to review the proposed transaction and impose conditions or measures to the same, or to stop the deal in case of exceptional threat of serious prejudice.

4.2 How do targets use anti-takeover defences?

During the offer, the target's directors should refrain from taking actions which might jeopardise the success of an offer, unless such actions are expressly authorised by the shareholders' meeting (the so-called passivity rule).

Anti-takeover measures may be carried out with no restrictions before a public tender offer is launched. However, measures approved before the offer but not wholly implemented, which may jeopardise the achievement of the offer's purposes, should be approved by the shareholders' meeting.

4.3 How do bidders overcome anti-takeover defences?

The bidder who is trying to challenge the defensive devices may report to Consob that the circumstance triggering the application of the passivity rule should have been disclosed to the market. Consob may sanction the target.

In addition, under the so-called breakthrough rule, on the launch of an offer any transfer restrictions on the shares set out in the target's by-laws will not apply to the bidder, and any restrictions on voting rights set out in shareholders' agreements or in the target's by-laws will not apply at shareholders' meetings called to authorise defensive measures.

4.4 Are there many examples of successful hostile acquisitions?

There are only a few (not recent) examples of successful hostile acquisitions in Italy. The most significant hostile acquisitions are Olivetti's acquisition of Telecom Italia, and Generali's acquisition of INA.

Section 5: DEAL PROTECTIONS

5.1 What are the main ways for a friendly bidder and target to protect a friendly deal from a hostile interloper?

In principle, no specific protections against competing offers are available, since the rules governing public tender offers aim at protecting minority shareholders and maximising the value of their shares.

A bidder may, however, implement certain measures that could jeopardise the launch of competing offers, such as entering into agreements with majority shareholder(s), whereby they undertake to tender their shares to the offer.

5.2 To what extent are deal protections limited, for example by restrictions on impediments to bidding competition, break fees or lock-up agreements?

Theoretically, the shareholder(s) are entitled to withdraw from any such agreements as soon as a competing offer is launched. However, these shareholder(s) may be dissuaded from withdrawing by including break-up fees in the relevant agreement.

Section 6: ANTITRUST REVIEW

6.1 What are the notification thresholds in your jurisdiction?

A transaction should be notified to the Italian Competition Authority (ICA) where the following two cumulative thresholds are met: (i) the combined aggregate turnover in Italy of all undertakings concerned exceeds €482 million ($667 million); and (ii) the aggregate turnover in Italy of the target exceeds €48 million. Thresholds are updated yearly by the ICA.

The assessment is normally carried out on turnover data of the latest audited financial statements.

Special rules for the calculation of the relevant turnover applies to certain categories of undertakings (such as banks and financial institutions, and insurance companies).

6.2 When will transactions falling below those thresholds be investigated?

Transactions which do not satisfy the above-mentioned turnover thresholds are not subject to merger control. One exception is provided for companies carrying out services of general economic interest or operating under a statutory monopoly: they should notify any new incorporation or acquisition regardless of whether the turnover thresholds are met.

6.3 Is a notification filing mandatory or voluntary?

Notification of transactions exceeding the turnover thresholds is mandatory.

6.4 What are the deadlines for filing, and what are the penalties for not filing?

There is no specific deadline for notification, but the filing should take place before the purchaser acquires control over the target. The ICA requires the parties to have entered into binding agreements before assessing the proposed transaction.

The transaction can be completed without waiting for clearance, but this is advisable only if the transaction does not raise any antitrust issues.

6.5 How long are the review periods?

A pre-notification procedure is not required but can be carried out on a voluntary basis. A draft form should be submitted at least 15 days prior to formal filing.

The ICA normally has 30 days from receipt of the formal filing to either issue a phase-one clearance decision or to open a phase-two investigation. Longer time limits are provided for transactions concerning insurance, media or telecom sectors. Public bids notified also to Consob are assessed within 15 days.

A phase-two proceeding should be closed within 45 days from its opening (the ICA may extend it for an additional 30-day period).

6.6 At what level does your authority have jurisdiction to review and impose penalties for failure to notify deals that do not have local competition effect?

Failure to notify a reportable transaction before its completion can be fined up to one percent of the concerned undertakings' turnover in the financial year prior to the one in which the ICA opens its infringement proceeding.

Section 7: ANTI-CORRUPTION REGIMES

7.1 What is the applicable anti-corruption legislation in your jurisdiction?

The Italian legislation concerning corruption is set out in the Italian Criminal Code and in the Italian Civil Code. The Criminal Code considers bribery and corruption of persons related to public bodies, while the Civil Code rules private bribery and corruption.

7.2 What are the potential sanctions and how stringently have they been enforced?

Anyone who is found guilty of a corruption offence may be sanctioned with imprisonment (up to six years for persons related to public bodies, and up to three years for private corruption; however, for private corruption involving persons related to listed companies the term of imprisonment is doubled).

Companies may be liable for corruption offences committed by their officers in the corporation's interest. In these cases, pecuniary sanctions may apply if the company does not prove that appropriate measures to prevent corruption have been implemented before the offence.

The enforcement of the Italian anti-corruption legislation may be considered average, with some deficiencies with respect to the rules concerning private corruption.

Section 8: OTHER MATTERS

8.1 Are there any other material issues in place in your jurisdiction that might affect a transaction?

Depending on the business carried out by the target (for instance, supply of energies, banking and insurance sectors), the potential purchaser should carry out additional activities and communications, and request authorisations in order to proceed with the acquisition.

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About the author

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Andrea received a degree in economics in 1993 and a law degree in 1996, both from the University *La Sapienza* of Rome. Before joining the firm in 2000 he worked as an international associate in foreign leading law firms both in London and in Paris. He is a member of the Italian professional accountant Bar as well as the Italian Bar. He speaks Italian and English.