The Legal 500 Country Comparative Guides

Italy: Mergers & Acquisitions

This country-specific Q&A provides an overview of mergers & acquisitions laws and regulations applicable in Italy.

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1. **What are the key rules/laws relevant to M&A and who are the key regulatory authorities?**

M&A transactions involving unlisted companies are regulated by the Italian Civil Code (“ICC”) and the Italian Antitrust Law (Law No. 287/1990, as amended).

M&A transactions involving listed companies are regulated by the ICC; the Consolidated Act on Finance enacted by Legislative Decree No. 58/1998, as last amended by Legislative Decree No. 49/2019 in force as of 10 June 2019 (“TUF”), CONSOB Regulation No. 11971/1999, as last amended by Resolution No. 21016/2019 in force as of 6 August 2019 (“CONSOB Regulation”), the rules and regulations issued by Borsa Italiana S.p.A. concerning the Milan Stock Exchange, and the Italian Antitrust Law. Takeovers carried out by mergers are regulated by articles 2501 to 2505 of the ICC.

The key regulatory authorities in the field of M&A transactions are the National Commission for Companies and the Stock Exchange (“CONSOB”), Borsa Italiana S.p.A. and the Italian Antitrust Authority (“AGCM”).

2. **What is the current state of the market?**

In the first 9 months of 2019 the Italian market recorded approximately 740 mergers and acquisitions (+18.4% compared to 626 in 2018) for a total value of Euro 32 billion (-15.4% compared to 38 billion in 2018), according to the KPMG 2019 M&A report. The market combines positive and negative aspects since the two main indicators (that of the overall value and that of the number of operations) diametrically opposed.

The sharp decline in the market of the overall value is mainly due to the reduction in the so-called Big Deals, caused by instability in the geopolitical framework (in particular the duties war between USA and China, and the lack of clarity on Brexit) and by the economic slowdown, coming not only from Italy, but also from historically leading European countries such as Germany.

3. **Which market sectors have been particularly active recently?**

There has been an acceleration in the trend of using M&As as a lever for growth by SMEs, as shown by the increase in terms of number of operations, even if of a more contained value.

We are witnessing an interesting phenomenon of consolidation in several sectors of the “Made in Italy” (such as manufacturing, fashion and food). These are often small-sized operations which denote a growth-oriented entrepreneurial attitude. Italian entrepreneurs are realizing that size is a strategic variable for competitiveness and that M&A transactions accelerate growth and internationalization processes. In 2019, 381 transactions were finalized between Italian companies, with an increase of 23% compared to the figure for the
previous years.

4. **What do you believe will be the three most significant factors influencing M&A activity over the next 2 years?**

   The most significant factors are estimated to be the rate of Italy’s economic growth in the framework of the global market, the ability of Italian companies to attract investment opportunities, and the acceleration of the internationalization processes.

5. **What are the key means of effecting the acquisition of a publicly traded company?**

   The means of acquiring publicly traded companies typically involve takeover bids, with cash tender offer or, in whole or in part, other consideration such as securities. Takeover bids may be divided into mandatory and voluntary. The alternative means of acquisition of both listed and unlisted companies involve direct or reverse merger with the target company.

6. **What information relating to a target company will be publicly available and to what extent is a target company obliged to disclose diligence related information to a potential acquirer?**

   The information publicly available on a target company from the Registry of Companies include the target’s name, corporate capital, registered office, tax code and VAT numbers; the directors, shareholders (including share options) and statutory auditors; bonds issued (if any); any transfers of going concerns, mergers or demergers; enrolment in specific registers; and already approved financial statements. In addition, a potential acquirer may obtain from the Registry of Companies a certificate of good standing of the target, as well as copies of the by-laws, deed of incorporation, minutes of shareholders’ and board of directors’ meetings approving the financial statements, and any special powers of attorney granted.

   As regards listed companies, in addition to the information registered with the Registry of Companies, CONSOB makes publicly available also other information such as, for example, if the target companies’ by-laws allow the increase of voting rights, if the company has issued multiple voting shares, the investments in financial instruments and aggregate investments, the extracts of shareholders’ agreements, if the company has carried out operations on its own securities, communications by the holding companies, and other information.

   The target company does not have per se a legal duty to disclose due diligence related information, but it usually discloses to the potential acquirer the information required by it.

7. **To what level of detail is due diligence customarily undertaken?**

   Legal, financial, tax and operational due diligence is customarily undertaken to the level of detail required by the potential acquirer.
8. **What are the key decision-making organs of a target company and what approval rights do shareholders have?**

The decision-making organs of the company are the board of directors and the shareholders’ meeting. The approval of the shareholder’s meeting of the target is necessary only in the case of a merger.

9. **What are the duties of the directors and controlling shareholders of a target company?**

Company directors have a general duty to perform their office in compliance with the law and the company’s by-laws, acting with due diligence. The directors of the target company should, on the one hand, protect and facilitate the “corporate interest” of the shareholders and, on the other, they should preserve the right of the target company to confidentiality, on penalty of liability under articles 2391 and 2392 of the ICC. Specific duties are not provided for controlling shareholders.

10. **Do employees/other stakeholders have any specific approval, consultation or other rights?**

Employees do not have approval rights, but in the case of a tender offer, the employees’ representative for both the bidder and the target company should be given detailed information on the offer as regards the employment conditions of the target employees.

In the case of a merger between companies employing more than 15 employees, both companies must comply with an information and consultation procedure involving the relevant trade unions and works council, to be completed at least 25 days before the execution of the merger’s public deed or before the signing of any other binding agreement.

11. **To what degree is conditionality an accepted market feature on acquisitions?**

In the case of listed companies, the bidder may make its tender offer subject to the condition of obtaining: (i) acceptance of more than 50% of shares incorporating the voting rights when the offer is aimed at acquiring legal control of the target; or (ii) 66.6% of the voting right when the offer is aimed at acquiring control of the extraordinary shareholders’ meeting.

If the bidder does not achieve the level of acceptance to which the offer is subject, the takeover bid becomes ineffective. The bidder may choose to launch a new offer over the same shares with different terms and conditions, in compliance with the disclosure requirements set forth under article 102, paragraph 3 of the TUF.

12. **What steps can an acquirer of a target company take to secure deal exclusivity?**

To secure deal exclusivity, an acquirer would typically ask for a non-disclosure and exclusivity
agreement to be signed, according to which the target and its shareholders undertake not to enter into negotiations with third parties during the negotiations.

13. **What other deal protection and costs coverage mechanisms are most frequently used by acquirers?**

An acquirer may ask to insert a break-up fee clause in the letter of intent and in the preliminary agreement. If the other party breaks off the negotiations without reasonable cause, it must indemnify the acquirer by paying such fee.

14. **Which forms of consideration are most commonly used?**

The consideration offered may be cash, existing or new shares or other securities (such as convertible bonds or warrants), or a combination thereof. In the case of mandatory takeover, however, the bidder is required to offer cash payment as an alternative if the offer includes securities that are not traded on any EU Regulated Market.

CONSOB should receive and analyze all necessary documentation relating to the guarantees at least one day before the date of publication of the offer document, as the bidder must provide evidence that the consideration, whether in cash or securities, is available in advance of the acceptance period.

15. **At what ownership levels by an acquirer is public disclosure required (whether acquiring a target company as a whole or a minority stake)?**

1. In relation to shares: Under article 120 of the TUF, parties with a shareholding in an issuer of listed shares, having Italy as their home Member State, in an amount greater than 3% (5% if the issuer is an SME) must notify the company and CONSOB.

   Under article 117 of CONSOB Regulation, parties holding the share capital of a listed company must notify the investee company and CONSOB:

   a) when the threshold of 3% is exceeded, if the company is not an SME;
   b) when the thresholds of 5%, 10%, 15%, 20%, 25%, 30%, 50%, 66.6% and 90% are reached or exceeded; and
   c) when the investment falls below the thresholds indicated under letters a) and b) above.

2. In relation to financial instruments:

   Under article 119 of CONSOB Regulation, parties who, directly or through nominees, trustees or subsidiary companies, hold an investment in financial instruments, must disclose to the investee company and to CONSOB when:
a) the thresholds of 5%, 10%, 15%, 20%, 25%, 30%, 50% and 66.6% are reached or exceeded; and
b) the investment in financial instruments is reduced under the thresholds set forth by letter a).

Under article 122-bis of CONSOB Regulation, anyone who holds financial instruments to which the appointment of a member of the board of directors or of the board of statutory auditors is reserved, shall inform the issuer and CONSOB if either:

a) it is able to elect on its own a member of the board of directors or of the board of statutory auditors, or it ceases to be able to do so; or
b) it exceeds, with respect to the aggregate amount of financial instruments issued in the same category, the thresholds of 10%, 25%, 50% and 75%, or falls below such thresholds.

16. **At what stage of negotiation is public disclosure required or customary?**

Negotiations between the bidder and the target or its shareholders are usually covered by confidentiality agreements. The decision to launch a bid for a listed company should however be made public with a press release and the bidder offer documents should be filed with CONSOB within 20 days thereof. In case of a leak of information that could affect the market, the bidder and the target should consult immediately with CONSOB and provide the market with clarifications on the status of ongoing negotiations.

17. **Is there any maximum time period for negotiations or due diligence?**

A maximum time period for negotiations or due diligence is usually not established.

18. **Are there any circumstances where a minimum price may be set for the shares in a target company?**

Where the tender offer is voluntary, the offeror enjoys a higher degree of flexibility in setting the terms and price of the deal, while in mandatory offers the terms and conditions of the bid are set by the law. As all shareholders having the same class of shares must be treated equally, the offer should ensure the same conditions. Shareholders have the right to obtain a higher price if, during the offer period, the bidder has acquired securities of the target company at a price higher than that indicated in the initial offer.

19. **Is it possible for target companies to provide financial assistance?**

Financial assistance by the target companies is generally prohibited.

20. **Which governing law is customarily used on acquisitions?**
The acquisition of shares is normally governed by Italian law. In cross-border transactions, it is possible for the parties to agree on the application of a law other than Italian law, subject to application of overriding mandatory rules of Italian law as applicable to the target company.

21. **What public-facing documentation must a buyer produce in connection with the acquisition of a listed company?**

In the case of public takeover bids, the required documentation would typically include:

1. The bidder’s communication, to be filed with CONSOB.
2. The bidder’s offering document.
3. The bidder’s guarantees for payment of the consideration.
4. The statement of the target company, including, inter alia, any decision to adopt defensive measures and an assessment of the potential effects of the offer on the target.
5. The statement of the employees’ representative of the target company concerning the effects on the target company.

The communication to CONSOB should clearly state, *inter alia*, the offeror and its controlling entity, the number of securities to be purchased, the consideration offered, the reasons for the offer, the conditions to which the offer is subject, and if any other authorisation is required. The offeror may submit the communication only after having obtained the necessary financing for the offer or, if it is an exchange offer, once it has called the competent corporate body for the issue of securities to be exchanged.

The key elements of the bidder’s offering document include the guarantees for the offer, the financial statements regarding the offeror, and the strategic plans of the offeror concerning the target.

The statement of the target company should include, *inter alia*: any data useful for appraising the offer and an assessment of the offering by the board of directors of the company, indicating the majorities adopting the resolution as well as dissenting directors, if any; the decision to call the shareholders’ meeting in order to authorise acts or operations that may affect the offering; and updated information on the directors’ and the general managers’ remuneration.

22. **What formalities are required in order to document a transfer of shares, including any local transfer taxes or duties?**

As regards unlisted companies, in joint stock corporations (*Società per azioni* – “SpAs”), the formalities required to transfer shares include (i) the endorsement of the share certificates by
the seller, to be signed before a Notary and hand over to the purchaser, and (ii) the recording of the purchaser by a director of the target company in its shareholder’s ledger. The new shareholder should then be recorded at the Registry of Companies. In limited liability companies (Società a responsabilità limitata – “Srls”), the corporate capital of which is made up of quotas, the transfer of quotas typically require the signature by the parties to a deed of transfer before a Notary and the recording of the transfer at the Registry of Companies.

In case of merger, the main corporate formalities typically include: (i) the filing of the merger project, duly approved by the boards of directors of both companies, at the Registry of Companies or the companies’ registered offices at least 30 days prior to the shareholders’ meetings resolving upon said merger; (ii) the filing of the shareholders’ resolutions approving the merger at the Registry of Companies at least 30 days prior to the execution of a merger’s public deed before a Notary; and (iii) the filing of the merger deed for recording at the Registry of Companies.

As regards listed companies, the decision to launch a public offering, as well as the arising of the duty to do so, must be promptly communicated to CONSOB and to the target company, together with the offering document, and a form to be used to accept the offer. After CONSOB’s approval of the offering document, the company must promptly communicate CONSOB’s approval to the market and then publish the offering document on websites or in newspapers.

The transfer of shares is subject to the so called “Tobin Tax”, which is equal to 0.2% of the purchase price for unlisted companies and 0.1% in the case of listed companies, and to a fixed registration tax of Euro 200.

23. Are hostile acquisitions a common feature?

The TUF admits friendly as well hostile acquisitions, but hostile acquisitions are not a common feature on the Italian M&A market.

24. What protections do directors of a target company have against a hostile approach?

Directors of the target company can take defensive measures i.e. any measure to prevent or frustrate the success of the takeover. This type of action is aimed at raising the costs or reducing the benefits for the bidder and can be adopted by the target before or after the bid has been launched. The TUF regulates defensive measures in principle but does not provide any rules detailing cases or circumstances which would amount to defensive measures. The effectiveness of defensive measures is affected by the “passivity rule” (i.e. any defensive action in response to an offer must first be approved by the target company’s shareholders under article 104 of the TUF) and by the “breakthrough” (i.e. restrictions on voting rights and limitations on the transfer of securities shall have no effect, under article 104-bis of the TUF).

Typical defensive measures available to the company are: (i) share capital increase by the
target company, or the purchasing of its own shares by the target company; (ii) conversion of ordinary shares into other financial instruments, or merger with other companies; (iii) sale of assets; and (iv) awarding “golden handshakes” to the target’s directors if they are removed from office. Listed companies have the right to waive the passivity rule, in whole or in part, by amending their articles of association and by communicating this decision to CONSOB. While the offeror’s board of directors acts independently, that of the target would need the previous authorisation of the shareholders’ meeting in order to take defensive measures.

25. **Are there circumstances where a buyer may have to make a mandatory or compulsory offer for a target company?**

Under article 106, paragraph 1 of the TUF, any person acquiring more than 30% of an Italian-listed company’s shares must launch a mandatory takeover bid for the entire company. Under article 106, paragraph 3, letter b) of the TUF, the same obligation to launch a mandatory offer also applies to any person holding more than 30% of a listed company’s shares, without controlling a majority, who acquires more than 5% of the same company’s shares in a 12-month period.

Under article 44-ter of CONSOB Regulation, for the calculation of the thresholds of article 106 TUF, derivatives held directly or indirectly, through trustees or nominees, which offer a long position, are calculated according to the amount of the total number of underlying securities. If the number of underlying securities is variable, reference is made to the maximum quantity envisaged by the financial instrument.

26. **If an acquirer does not obtain full control of a target company, what rights do minority shareholders enjoy?**

Minority shareholders enjoy the rights attributed to them by the law and by the company’s by-laws.

27. **Is a mechanism available to compulsorily acquire minority stakes?**

According to article 106 TUF, whoever has acquired (directly or indirectly) a shareholding in excess of 30% of the ordinary share capital of a publicly listed company is obliged to launch a takeover bid on all the remaining ordinary shares. The obligation also arises for whoever already holds 30% of voting shares and acquires more than 5% of the share capital.