Global Private M&A Guide - Limited External Content - Italy

Quick reference guide

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# Due diligence, pricing and closing

**Typical due diligence issues**

In Italy, it is customary to finalize the due diligence before the execution of the acquisition agreement. There are no particular issues that a foreign investor should be aware of when undertaking a due diligence review of an Italian entity or group of assets other than those usually reviewed. The main areas of review in the due diligence process vary from project to project, but generally include material contracts, financing agreements, corporate documentations, compliance, real estate, employment, health & safety and pension, IP, IT and personal data processing, regulatory/public law matters, environmental law matters and litigation. Competition law analysis has also received increased attention in due diligence exercises.

It is essential to precisely determine the target company's business to ensure an efficient legal due diligence review.

The legal due diligence is typically limited to a review of documents uploaded in a virtual data room, sometimes supplemented by management interviews. The potential buyer may submit questions to the seller and/or its consultants, or to the target's management to clarify specific issues identified during due diligence. For larger auction sales, it is common for a seller to provide a vendor due diligence report as part of the information granted to bidders.

**Pricing and payment**

In a typical private M&A transaction (share deal or asset deal), there is no statutory requirement to obtain independent appraisals to support the valuation of the target. However, Sellers may carry out certain corporate transactions as preparatory steps between signing and closing (e.g., capital contributions in kind), in respect of which independent appraisals are mandatory.

There are generally no restrictions on pricing or payment of the purchase price from a legal perspective. The purchase price is usually paid in euro. In any event, a conversion in euro of the price as of the date of transfer is required: (i) for the purpose of paying the tax applicable to the transfer of shares ("**Tobin Tax**") in the case of a joint-stock company (Società per Azioni — S.p.A.); and (ii) in the case of a transfer of quotas by means of a notarial deed of transfer for a limited liability company (Società a Responsabilità Limitata — S.r.l.).

**Signing/closing**

*Pre-contractual obligations*

Under Italian law, parties negotiating a transaction, including a sale and purchase of shares, assets, or a business, are under a general obligation to conduct the negotiations in good faith. This entails, among other things, that negotiations that are at a reasonably advanced stage where a party can reasonably expect that a transaction will occur, in principle, cannot be terminated unilaterally without due and reasonable justification. Where there is a breach of pre-contractual obligations, the party in breach may be held liable for damages.

*Acquisition methods*

Under Italian law, a concentration of two or more businesses into one company may be achieved mainly by the purchase of shares or purchase of assets. Generally, Italian sellers tend to prefer share transactions because the share purchases can usually be finalized more quickly with the completion of certain corporate formalities without the need for prior consultation with trade unions. Moreover, Italian sellers may prefer share deals because, in asset deals, they usually remain jointly and severally liable with buyers for liabilities existing on the closing date. In asset deals, it is, in any event, common to enter into contractual arrangements limiting, between the parties, the joint liability between seller and buyer.

*Share sale*

In an acquisition of shares, the buyer steps into the position of the seller in respect of the acquired company. The acquired company will be transferred subject to all existing liabilities, although these can be addressed by means of warranties and indemnities (between the parties).

The shares in an S.p.A. and participation in an S.r.l. are freely transferable, unless otherwise provided for by the bylaws. An S.p.A.'s bylaws may prohibit the transfer of the shares absolutely for a maximum of five years from the company's incorporation or from the date of the special shareholders' resolution that resolved to include this restriction in the bylaws. Restrictions may also be included in the shareholders' agreements. Restrictions in the bylaws are binding on, and enforceable against, the shareholders and the company, as well as third parties. Restrictions in shareholders' agreements are only binding on, and enforceable against, the shareholders. The bylaws may subject the transfer of the shares in the S.p.A. to the discretionary approval of the company's corporate bodies or the shareholders. If approval is not granted, either of the following will apply:

The company or the other shareholders must purchase the shares.

The selling shareholder can exercise its right of withdrawal from the company.

If the bylaws of an S.r.l. provide for the absolute non-transferability of quota, or require that the transfer be subject to the prior approval of the company's corporate bodies, quota holders or third parties, either without conditions or limitations or with conditions and/or limitations that do not practically allow the transfer, then the quota holder may withdraw from the company. The bylaws of an S.r.l. may provide for a term of up to two years from the incorporation of the company or subscription of the quota, before which the right of withdrawal may not be exercised.

The bylaws of S.p.A.s and S.r.l.s may also provide for pre-emption or first refusal rights, requiring a shareholder that intends to transfer its shares to first offer them pro rata to the other shareholders.

Subject to certain limitations, other examples of restrictions on share transfers in the company bylaws may include lock-up provisions, as well as tag-along and drag-along rights.

**Signing:** At signing, seller(s) and buyer(s) usually execute the acquisition agreement with its annexes. There are no specific formalities under Italian law for the execution of the relevant preliminary share (or quota) sale and purchase agreements — either for an S.p.A. or for an S.r.l.

**Closing:** For an S.p.A., the participation is usually transferred by (i) endorsing the share certificate(s) in favor of the buyer, to be executed before a notary public and subsequently recorded in the shareholders' ledger (libro soci) with all of the buyer's details, as a new shareholder of the S.p.A. (this is the most common way) **or** (ii) executing a notarial deed of transfer from seller to buyer, then the buyer's details are to be recorded in the share certificate(s) (if existing) and in the shareholders' ledger (libro soci) (this is usually implemented when no share certificates exist, i.e., in the case of "dematerialized shares").

For an S.r.l., the sale of quota must be perfected by a final quota transfer agreement signed before a notary public — either as a public deed or as a private agreement with notarized signatures — and registered by the notary public with the local Registry of Enterprises within 30 days of execution.

In most cases, signing and closing do not occur simultaneously, with the parties usually agreeing to conditions precedent to closing (including obtaining any clearance from competition or foreign investment authorities that may be required to complete the transaction).

*Asset sale*

The acquisition of the assets of an Italian target business as a going concern may be achieved through a sale or contribution of either the entire target's business (azienda) or a line of the business (ramo d'azienda).

A purchase of assets gives the buyer a higher degree of isolation from the overall liabilities of the seller. However, the buyer has to undertake more preparatory work to ensure that the acquired business is able to operate from day one after closing.

In the event the acquisition concerns only a line of business, it is essential to identify the perimeter of the business (assets and liabilities) to be acquired, in order to: (i) ensure that the buyer acquires all assets required to operate the business post closing; and (ii) identify any separation step from the portion of the business remaining with the seller, that may be needed in view of the sale. Failing to identify certain assets (registered assets and contracts) as part of the business to be acquired might adversely affect their assignment to the buyer.

Although the buyer and the seller remain jointly liable vis-a-vis the seller's creditors for the seller's liabilities (and the relevant unsatisfied creditors of the seller could therefore later on also raise their claims against the buyer of the business), this is limited to liabilities specifically reflected in the seller's accounting books (which the buyer should thoroughly inspect before entering into the sale agreement). Between the buyer and the seller, such joint liability can be further limited through specific provisions to be inserted in the transaction documentation.

Specific rules are provided with respect to labor and tax liabilities. The buyer will be liable, jointly with the seller, for the following:

Vis-a-vis the employees for the payment of severance (TFR) and any other payments or obligations connected to the employment relationships that were accrued at the time of the transfer;

The seller's tax liabilities (including unpaid taxes and penalties due for any noncompliance with tax laws) of the transferred business related to the year in which the closing occurred and the two prior years (and for any tax assessments by the tax authority in the same period), regardless of whether they were reflected in the seller's accounting book.

Before completion of the transfer, the buyer can apply for a certificate relating to the seller, to be issued by the tax authorities, stating whether there are any outstanding liabilities at the transfer date. If the certificate shows there are no such liabilities or the authority does not issue a certificate within 40 days, the buyer is exempted from the joint liability for pre-transfer taxes. Otherwise, if the issued certificate shows pre-transfer taxes, the buyer's liability is limited to those indicated in the certificate.

**Closing:** Each asset must be transferred according to the transfer formalities that apply to that type of asset. The transfer of a business as a going concern must be perfected by a business transfer agreement signed before a notary public — either as a public deed or as a private agreement with notarized signatures — and then filed with the local Registry of Enterprises and any other relevant local register, depending on the nature of the assets transferred. For example, if real estate assets were transferred, the change of ownership of that real estate must also be recorded in the local Real Estate/Land Registry.

# Approvals/registrations

**Foreign Investment restrictions**

Italy has a mandatory and suspensory foreign investment screening procedure, which means that transactions that meet the relevant criteria need to be notified to the Government and cleared before they can be completed.

The foreign investment review (FIR) regime is limited to certain sectors. For further information, see the more detailed section on "Foreign investment restrictions".

**Antitrust/merger control**

Italy has a mandatory and suspensory merger control regime, which means that transactions that meet the relevant criteria need to be notified to the competition authority and cleared before they can be completed.

It is also necessary to consider EU merger control rules. Mergers involving companies active in several member states and reaching certain turnover thresholds are examined at European level by the European Commission. This allows companies trading in different EU member states to obtain clearance for their mergers in one go. For further information, see the more detailed section on "Antitrust/merger control".

**EU Foreign Subsidies Regulation**

As of 12 October 2023, the EU Foreign Subsidies Regulation (FSR) requires qualifying transactions, and bids in response to certain large public tenders in the EU, to be notified for upfront clearance by the European Commission where the companies involved have benefited from foreign financial contributions (a broad concept) that exceed certain (low) thresholds. Acquisitions of a target with annual revenues in the EU of at least EUR 500 million will trigger FSR deal notifications. Acquisitions of smaller targets will not, regardless of deal value. Outright mergers and large joint ventures will trigger a notification requirement if the EUR 500 million EU-wide revenue threshold is met by one of the merging parties or the joint venture.

**Other regulatory or governmental approvals**

Other regulatory or governmental approvals or filings must be evaluated on a case-by-case basis, depending on the relevant industry, deal structure and actual circumstances (e.g., assignment of public contracts in an extraordinary transaction, transfer of operational permits and renewal of anti-mafia affidavit).

# Employment

**Acquisition of shares**

An acquisition of shares is not considered a transfer of an undertaking, or of a business, for employment law purposes. Therefore, it will not involve the transfer of employees and a change in the employing legal entity, but simply a change in the ownership of the employer. As such, the buyer inherits all the employees' rights, duties and liabilities by virtue of being the new owner of the target company. However, some national labor collective agreements (NLCAs) provide that directors or managers are allowed to resign and receive certain payments in the event of a change of control of an employer. In share acquisitions, there is no requirement to inform or consult trade unions/works councils unless the NLCA provides otherwise.

**Acquisition of assets**

The transfer of a business as a going concern (or part thereof) is regulated by Article 2112 of the Italian Civil Code that implemented the EU Acquired Rights Directive. In an acquisition of assets, the Transfer of Undertakings Protection of Employment (TUPE) principle of continuing the employment relationship and safeguarding employees' acquired rights applies. Mergers, demergers, usufruct or leases of businesses also fall within the scope of the Italian Civil Code and are treated in the same way as an acquisition of assets. When there is a transfer of a business as a going concern (or part thereof), the employment agreements with the transferor automatically continue with the transferee. Transferred employees maintain their seniority-based rights together with their existing terms and conditions of employment, except for any change in the applicable NLCA or shop-level collective bargaining agreements. The transferee is jointly liable with the transferor for all the entitlements and claims of the employees at the time of the transfer. However, the employee may release the transferee from its obligations by signing a release or a waiver before a competent labor office or before unions.

The transfer of a business, itself, is not a valid cause for dismissal. Employees whose terms and conditions of employment are materially affected during the three months following the transfer may resign for just cause, claiming payment of an indemnity in lieu of notice and possibly damages.

By operation of law, a specific consultation procedure with the unions and works councils (if any) has to be carried out before the transfer if the transferor employs more than 15 employees overall. By means of a notice that must include certain information (i.e., the date, or envisaged date, of the transfer; the reasons for the envisaged transfer; the legal, economic and social consequences for the employees, if any; any measures envisaged in respect of the employees), the unions must be notified of the intention to transfer the employees at least 25 days before the transferor and the transferee must execute a binding agreement (i.e., a notary deed to be executed before an Italian notary public). Within seven days of receipt of a notice of request of the unions and/or works council, the transferor and transferee must start and take part in negotiations. The information and consultation obligations upon the transferor and the transferee arise even if the decision regarding the transfer has been taken by another parent company. The parent company's failure to provide the necessary information does not justify non-compliance with the aforementioned obligations. The negotiations are considered concluded (and the planned transaction can take place) if no agreement is reached within 10 days from the start of the consultation procedure.

Failure to comply with the consultation procedure may constitute anti-union behavior, to which the unions may object by filing a petition in court.

# Tax

**Acquisition of shares**

Capital gains triggered by a share deal transaction will be subject to corporate income tax (CIT) at the standard rate of 24%.

However, the capital gain could benefit from an exemption from CIT up to 95% of their amount, provided that the following conditions for benefiting from the participation exemption (PEX) regime are met:

The participation must be held uninterruptedly from the beginning of the 12 months preceding the transfer.

The participation must have been accounted for as a long-term investment (fixed asset) in the first balance sheet of the holding period.

The target company must be a resident of a state or territory other than those having a privileged tax regime, unless a ruling has been obtained that the holding of the participation does not result in localizing the income in a "blacklist" country.

The target company must carry out a real business activity.

The transfer of title to shares by way of endorsement of share certificates is subject to the Tobin Tax. The Tobin Tax is levied on any transfer of title to shares in an SpA as well as in joint-stock companies with registered offices in Italy, even if the transaction is executed between individuals/entities that are not resident in Italy. Buyers of shares pay the tax on the sum paid for shares. For shares of listed companies, the Tobin Tax applies at a tax rate of 0.1% (with an exemption for companies whose average market capitalization in November of the year prior to the year the transaction was entered into is lower than EUR 500 million). For non-listed companies, the rate is 0.2%. The Tobin Tax applies to the value of the transaction (the value of the transaction is deemed to be the net balance of the transactions executed and settled on the same financial instruments by the same subject on the same day or at the paid price). The quota transfer agreement (in an Srl) is subject to a fixed registration tax equal to EUR 200. However, if a third party (e.g., the parent company of a party) is acting as guarantor to the agreement, the guarantees are subject to tax at 0.5%, applicable to the total guaranteed amount. The seller and the buyer are jointly liable for the payment of the registration tax.

**Acquisition of assets**

The capital gain deriving from an asset deal operation is subject to CIT at the standard rate of 24%. The tax basis is equal to the difference between the sale price and the non-amortized cost.

The transfer of a business as a going concern is subject to a 3% registration tax levied on the fair market value of the business transferred, i.e., the value of the assets, including goodwill at its fair market value, less the amount of any liabilities. If there is real property among the assets transferred, the net value of the real property is taxed at 9% (15% for farmland; and EUR 50 each for mortgage and cadastral taxes (total EUR 100) apply as well to both transfers of real property and of farmland). If there are finance leasing agreements related to commercial real property, the transfer of these agreements within the context of the transfer of a business as a going concern is taxed at 4%. Registration tax is calculated as the sum of the following:

The portion of the purchase price referring to the leasing agreements; plus

The principal amount incorporated in the instalments still to be paid; plus

The leasing redemption price

If there are receivables among the assets transferred, these will be subject to a 0.5% registration tax rate, as opposed to the ordinary 3% rate, if the value/consideration paid in lieu of receivables is clearly identified in the agreement. The seller and the buyer are jointly liable for the payment of registration tax applicable to the transfer of a business as a going concern. Cars and other registered movable goods are subject to minor fixed registration taxes.

**Others**

Merger: Mergers are subject to a fixed registration tax equal to EUR 200. Generally, mergers are tax neutral in Italy.

Value added tax (VAT): No VAT is due with respect to either an acquisition of shares or an acquisition of a business as a going concern.

**OECD's Two Pillar Solution**

The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting has put forward a so-called Two-Pillar Solution to address the tax challenges arising from the digitalization of the economy. Pillar Two is intended to introduce a global minimum effective rate of tax of 15% for large businesses in each jurisdiction where they operate and will lead to fundamental changes in the international tax system. It is currently being implemented in a large number of jurisdictions.

Groups will need to consider how the Pillar Two rules could impact on the life cycle of M&A transactions from the pre-acquisition phase (including transaction planning (such as the choice of acquisition structure and financing) and due diligence of the target group), the acquisition phase (such as contractual risk allocation around Pillar Two) to the post-acquisition phase and the impact of Pillar Two on any post-acquisition integration.

# Post-acquisition integration

For information on post-acquisition integration matters, please see our [Post-acquisition Integration Handbook](https://www.bakermckenzie.com/en/insight/publications/resources/post-acquisition-integration-2023).

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