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Practice Note

Investing in Italy: Key legal issues for investors in the Gulf

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ABSTRACT

Recent market data and press reports seem to confirm a growing interest, including from the Gulf, for investments in private and listed companies in Italy. In taking advantage of the opportunities presented by the Italian market (including the disposal plans announced and in part already enacted by the Italian government), investors should be aware of some key legal issues and practical factors. This article briefly outlines some of these key legal issues and factors as they may apply to investors from the Gulf region. It first addresses some of the disclosure and mandatory tender offer obligations that may be triggered in connection with investments in companies listed in Italy. It then provides some legal and practical insights regarding shareholders' agreements, including certain related merger control considerations. It also provides a general overview of the new foreign investment control regime applicable to investments in the sectors of defense and national security, and in certain assets in the sectors of energy, transport and communications. Finally, it makes brief reference to the potential regulatory-specific approvals that may be required for investments in certain sectors and industries or in respect of certain assets. This article condenses the presentations and discussions that took place at the seminars hosted on this topic by Cleary Gottlieb in Abu Dhabi and Dubai in May 2014.

Keywords: Italy, foreign investments, disclosure, shareholders' agreements, tender offer

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1. INTRODUCTION¹

Recent data seems to confirm a growing interest of foreign investors, including investors from the Gulf region, for investments in private and listed companies in Italy. Among others, the A.T. Kearney Foreign Direct Investment Confidence Index for 2014 ranked Italy on the rise among the top twenty destinations for foreign direct investment.² With specific regard to investors from the Gulf region, an upward trend for Italian inbound investments may be expected.³

Major Italian inbound investments from the Gulf region reported by the press in recent years include the acquisition of a controlling stake in Piaggio Aero Industries by Mubadala; the acquisition of the Italian retail and supply network of Shell by Kuwait Petroleum; the acquisition of the Valentino and Ferré fashion houses, as well as a number of significant investments in real estate (particularly in Milan, Florence and Sardinia), banks and joint ventures for further investments in Italian businesses.⁴ Etihad Airways' recent successful acquisition of a minority stake in Alitalia may also pave the way for future investment opportunities.⁵

In addition, the Italian government has announced, (and is in part already conducting,) disposal plans regarding stakes in relevant Italian companies, including *CDP Reti* (gas and energy transmission grids),⁶ *Poste* (postal services and banking) and *Fincantieri* (shipbuilding). Attractive opportunities may also include investments in national champions in the luxury, design, food and beverage, regulated and infrastructure sectors, as well as stress-driven consolidations in other sectors.

When considering the opportunities provided by Italian markets, investors from the Gulf region should be mindful of potential legal and regulatory hurdles, given that these may also differ, at times substantially, from those encountered in other jurisdictions. This article will briefly outline some of the key legal issues and other practical factors that foreign investors (specifically, investors from the Gulf region) should consider when acquiring minority stakes in listed or private Italian companies.⁷

2. DISCLOSURE OBLIGATIONS IN LISTED COMPANIES

Investors should first consider the disclosure obligations triggered by investments in companies that are listed in Italy.⁸ The current Italian legislative framework is mainly the result of the transposition into national law of the European directives on market abuse and transparency.⁹

¹This article has been prepared for general information purposes only and is not, and does not purport to provide, legal advice. Investors interested in investing in Italy should seek advice from legal counsel.

²AT Kearney, *Foreign Direct Investment (FDI) Confidence Index*. Available at: <http://www.atkearney.com/research-studies/foreign-direct-investment-confidence-index> (last visited January 18, 2015).

³Press reports and market data regarding deals announced seem to indicate an increasing interest of investors from the Gulf. In addition, and on a more political level, the potential relevance of Italian inbound investments from the Gulf region may be confirmed by the fact that the Italian Prime Minister has visited the region three times in just over three years, twice in the last 11 months, and most recently in January 2015. See further in this article for examples of certain major Italian inbound investments from the Gulf region in recent years.

⁴For example, in 2012 Fondo Strategico Italiano and Qatar Holding were reported as having set up a joint venture to invest in Italian companies operating in "Made in Italy" sectors including food, food distribution, fashion, luxury, furniture, design, tourism, lifestyle and leisure. In November 2014, the joint venture company was reported as having signed an investment agreement for the acquisition of an interest in Inalca S.p.A., a company 100%-owned by Cremonini S.p.A. and a European leader in meat-processing and food distribution.

⁵The Italian Prime Minister's visit in Abu Dhabi in January 2015 came just days after the completion of the Alitalia-Etihad transaction was announced.

⁶In November 2014 Cassa Depositi e Prestiti S.p.A. (CDP), a company controlled by the Italian government that finances investments in public entities, infrastructure and national enterprises, announced the transfer to State Grid Europe Limited (a company owned by State Grid Corporation of China) and to some Italian institutional investors of a 40.9% stake in CDP Reti, a CDP subsidiary that holds 30% of Snam S.p.A. (a group focused on transport and dispatching, regasification, storage and distribution of natural gas) and approximately 29.8% of Terna S.p.A. (the grid operator for electricity transmission).

⁷This article concentrates on certain key legal issues and other practical factors that investors from the Gulf region should consider when investing in Italy, in recognition of the fact that the interests and concerns of these investors may differ from those of other investors in the global marketplace.

⁸Reference throughout this article to companies or issuers listed in Italy is intended to broadly capture a number of variations of this definition as contained in the applicable Italian laws and regulations. Given the intended scope of this article, as well as its concise and general nature, the specific and varying definitions have not been indicated each time, although they may of course be relevant in practice.

⁹In particular, Directive 2003/6/EC of the European Parliament and Council on insider dealing and market manipulation (market abuse), and Directive 2004/109/EC of the European Parliament and Council on the

It should be noted, however, that these directives at times, and where allowed, have been transposed differently in European Union (EU) member states so that, by way of example, disclosure obligations triggered by an investment in a listed issuer in France may not coincide entirely with those triggered by the same investment in a listed issuer in Italy.

By way of background, the Italian Consolidated Financial Act (CFA) sets forth the disclosure obligations at a statutory level that are applicable in respect of listed issuers in Italy, while the Italian Issuers' Regulation (IR) contains provisions implementing the CFA.¹⁰

A. Disclosure of holdings in listed companies

As a general principle, when shareholdings in listed issuers in Italy reach, increase above, or fall below certain thresholds set forth in the applicable laws and regulations, they become subject to disclosure obligations. The aim of these disclosure obligations is, of course, to achieve greater transparency in respect of listed issuers' ownership structures and the entity exercising ultimate control. Certain amendments have recently been adopted at the EU level, *inter alia* aimed at imposing additional disclosure obligations in order to prevent financial instruments other than shares from being used to achieve 'hidden ownership' and 'empty voting' of shares.¹¹ However, as briefly outlined below, similar obligations already exist in Italy and the transposition into national law of these amendments should not significantly impact current disclosure obligations.

Under Italian law, disclosure obligations are triggered when any direct and indirect holding increases above or falls below 2% of a listed issuer's share capital, or reaches, increases above or falls below 5%, 10%, 15%, 20%, 25%, 30%, 50%, 66.6%, 90%, and 95% of a listed issuer's share capital.¹² In the case of small and medium enterprises,¹³ the 2% threshold does not apply. In addition, for a limited period of time, the *Commissione Nazionale per le Società e la Borsa* (hereinafter, CONSOB), may set - for the purposes of investor protection, efficiency and transparency of the market - thresholds lower than 2% (or 5%, in case of SMEs) for issuers with a high current market value and a particularly broad shareholder base.¹⁴

These disclosure obligations apply to owners of shares in listed issuers, even if the shares cannot be voted on (for example, if the voting rights are suspended or are exercisable by a third party). In addition, in certain cases these obligations apply to persons that do not own the shares but can vote them (by way of example, as a result of a pledge agreement, a custodian agreement or a proxy, if the voting rights may be exercised at the depositary's or proxy's discretion).¹⁵ Accordingly, these disclosure obligations may apply to persons that are not direct shareholders for corporate law purposes, and the same shares may be counted more than once pursuant to these

Footnote continued

harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (transparency), both as amended and implemented.

¹⁰The Consolidated Financial Act was adopted by L.D. 24 February 1998, n. 58 (It.), as amended from time to time (hereinafter, the CFA). The Issuers' Regulation was adopted by CONSOB Res. n. 11971 of 14 May 1999, as amended from time to time (hereinafter, the IR). Please note that CONSOB - *Commissione Nazionale per le Società e la Borsa*, is the Italian Securities Commission.

¹¹Directive 2013/50/EU of the European Parliament and Council has amended the Transparency Directive and such amendments will need to be transposed into national law. Hidden ownership relates to the circumstance that, at the end of a cash-settled equity derivative, its holder may be in a privileged position to acquire the underlying shares (even without contractual rights to this effect), also because its counterparty may have hedged its exposure with the underlying shares. Empty voting relates to a scenario where the holder of a cash-settled equity derivative may ask the underlying shareholder to vote in its interest, exerting potentially significant voting power over a company without direct ownership of its shares.

¹²CFA, *supra* note 10, at art. 120, sec. 1; *see also* IR, *supra* note 10, at art. 117, sec. 1. Pursuant to art. 116-*terdecies*, sec. 1, of the IR, "share capital" means the issuer's voting share capital or, for issuers whose articles of association envisage increases in voting rights in respect of so-called 'loyalty shares' or multiple voting shares, the total number of voting rights. Please note that under art. 127-*quinquies* of the CFA, the articles of association of listed issuers can envisage that increased voting rights (up to two votes) are granted to shares held without interruptions by the same holder for a period of at least twenty-four months (loyalty shares).

¹³CFA, *supra* note 10, at art. 1, sec. 1, small and medium enterprises (hereinafter, SMEs) are issuers of listed shares that, based on their last approved financials, have a turnover of up to €300 million or an average market capitalization in the last calendar year lower than €500 million. Issuers are not considered SMEs if they exceed both thresholds for three consecutive financial or calendar years.

¹⁴CFA, *supra* note 10, at art. 120, sec. 2-*bis*.

¹⁵IR, *supra* note 10, at art. 118, sec. 1. In case of stock lending agreements, by way of further example, shares are attributed to both the lender and—subject to limited exceptions—the borrower.

obligations.¹⁶ For issuers whose articles of association envisage increases in voting rights in respect of loyalty shares or multiple voting shares, for the purposes of these disclosure obligations, relevant holdings are determined with regard to the number of voting rights carried by the relevant shares.¹⁷

Disclosures must be made to the relevant issuer and to CONSOB promptly and in any case within five trading days from the triggering transaction, regardless of the actual date of settlement.¹⁸ Information required to be disclosed generally includes: basic corporate information regarding the disclosing entity; its relevant direct and indirect holdings; and the corporate ownership structure, including the ultimate controlling entity. In addition, it should be considered that once a person obtains a significant holding under these rules, it is potentially subject to additional scrutiny by CONSOB, which may require further disclosure of information and documentation.¹⁹

If the above disclosure obligations are not complied with, voting rights may not be exercised.²⁰ Further, if they are exercised, any shareholders' resolutions passed with the decisive vote of the relevant shares may be voided in court.²¹ In addition, failure to disclose major holdings and any violation of the voting rights' suspension are subject to an administrative fine of between €25,000 and €2,500,000.²²

As mentioned briefly in the introductory paragraph above, investors should also consider that under Italian law, similar disclosure obligations are triggered by other holdings, such as:

1. financial instruments that confer the right to acquire, by physical settlement and at the holder's initiative, a listed issuer's voting shares (hereinafter, Potential Holdings); and
2. shares, Potential Holdings and 'Other Long Positions' (hereinafter, Aggregate Long Positions), where 'Other Long Positions' are broadly defined as financial instruments (other than Potential Holdings) that lead to the assumption of an economic interest positively linked to the underlying shares.²³

Potential Holdings trigger disclosure obligations if, directly and indirectly, an investor's holding reaches, increases above, or falls below 5%, 10%, 15%, 20%, 25%, 30%, 50%, and 75% of a listed issuer's share capital, having regard to the underlying shares.²⁴ Aggregate Long Positions trigger disclosure obligations if, directly and indirectly, an investor's position increases above or falls below 10%, 20%, 30%, and 50% of a listed issuer's share capital, having regard to the underlying shares.²⁵ In determining Potential Holdings and Aggregate Long Positions, no netting is allowed with any short position regarding the same shares.²⁶

The law sets forth some further general criteria to guide the application of disclosure obligations with respect to Aggregate Long Positions. In particular, Other Long Positions are relevant for determining disclosure requirements regarding Aggregate Long Positions only if they exceed 2% of the listed issuer's share capital.²⁷ In addition, disclosure obligations regarding Aggregate Long

¹⁶IR, *supra* note 10, at art. 119-bis, a number of exemptions from these disclosure obligations are available, including *inter alia* in respect of custodians (if they can vote the shares only on the basis of written or electronic instructions from shareholders) and market makers (for holdings below 10%, provided certain conditions are met).

¹⁷IR, *supra* note 10, at art. 118, sec. 3-bis.

¹⁸IR, *supra* note 10, at arts. 121 and 122. Investors should note that special rules apply to the triggering date for disclosure in case of increases in voting rights in respect of loyalty shares. In addition, they should note that the above disclosure obligations (other than with regard to the 2% threshold) could be triggered as a result of a reduction or an increase in the issuer's share capital pursuant to art. 117, sec. 2, of the IR.

¹⁹CFA, *supra* note 10, at art. 115. In order to monitor the correctness of information disclosed, CONSOB may *inter alia* require major shareholders or parties to relevant shareholders' agreements to: disclose additional information and documentation; acquire information (including through hearings) from them; and carry out inspections at the offices of the above-mentioned persons in order to verify and obtain a copy of the relevant corporate documents.

²⁰CFA, *supra* note 10, at art. 120, sec. 5.

²¹*Id.*

²²CFA, *supra* note 10, at art. 193, sec. 2. If the delay in disclosure does not exceed two months, the applicable fine is between €5,000 and €500,000.

²³IR, *supra* note 10, at art. 116-terdecies.

²⁴IR, *supra* note 10, at art. 119, secs. 1 and 5. Voting shares that may be acquired by exercising warrants or conversion rights count as Potential Holdings if the purchase can occur within 60 days.

²⁵IR, *supra* note 10, at art. 119, sec.2.

²⁶*Id.*, at sec. 4.

²⁷*Id.*, at sec. 6-ter.

Positions do not apply if the reduction or increase of a holding is already subject to disclosure under rules on shares or Potential Holdings, and the investor does not hold Other Long Positions.²⁸

B. Disclosure of internal dealing transactions

Investors should also be aware that once they have acquired a stake in a listed issuer in Italy, trading in shares of the listed issuer may, in certain cases, trigger disclosure obligations linked to insider dealing and market manipulation (market abuse) rules.²⁹ In particular, investors that own 10% or more of a listed issuer in Italy (or otherwise control it), or are members of its management (hereinafter, insiders) are under an obligation to disclose any purchases, sales, subscriptions or exchanges of shares in the issuer or of financial instruments connected to the shares (hereinafter, Internal Dealing Transactions, or IDTs).³⁰ Relevant financial instruments are broadly defined by Italian rules.³¹

Insiders must also disclose any IDTs carried out by 'connected persons', which include persons with close family ties to insiders (hereinafter, family members); legal entities, partnerships and trusts managed by an insider or a family member; and legal entities directly or indirectly controlled by an insider or a family member.³²

Timing for the required disclosure differs depending on the insider.³³ Insiders, other than persons holding at least 10% of an issuer's share capital, must disclose IDTs carried out by them and their connected persons within five trading days.³⁴ Shareholders holding at least 10% of an issuer's share capital, or otherwise controlling the issuer, must disclose IDTs carried out by them and their connected persons no later than the fifteenth day of the month following the month in which the transaction occurs.³⁵

A number of exemptions to the obligation to disclose IDTs are available to insiders, including regarding transactions having an aggregate amount of less than €5,000 in a single calendar year and transactions between an insider and its connected persons.³⁶ Persons required to disclose IDTs may be subject to an administrative fine between €5,000 and €500,000 if they do not comply with their obligations.³⁷

C. Disclosure of shareholders' agreements

Investors seeking to acquire a holding in a listed or private company in Italy may propose to enter into a shareholders' agreement with other shareholders of the target company governing the terms and conditions of their investment, including future investments, the management of the target company and their exit rights. Investors should be aware that special disclosure obligations apply to shareholders' agreements relating to listed companies that:

1. govern the exercise of voting rights in a listed company or in its controlling entities;
2. require prior consultation for the exercise of voting rights in a listed company or in its controlling entities;
3. limit transfers of shares of the companies mentioned in (1) above or of financial instruments which grant the right to purchase or subscribe for such shares;

²⁸*Id.*, at sec. 6-*quater*, of the IR. Italian regulations also provide for a number of other exemptions from disclosure obligations applicable in respect of Potential Holdings and Aggregate Long Positions (e.g., for market makers, provided that certain conditions are met).

²⁹Please note that this article does not consider a number of related rules, including the disclosure of privileged information, insider dealing and market manipulation.

³⁰CFA, *supra* note 10 at art. 114, sec. 7; *see also*, IR art. 152-*septies*, sec. 2. Under art. 152-*sexies*, sec. 1(c), of the IR, insiders specifically include: members of the management and supervisory boards of the issuer; the issuer's general managers; the issuer's executives who have regular access to inside information and may take management decisions that may influence the issuer's evolution and future prospects; the above-mentioned persons within any subsidiary of the issuer, the book value of which represents more than 50% of the issuer's total net assets; and persons holding at least 10% of the voting share capital of the issuer, as well as any controlling entities.

³¹IR, *supra* note 10, at art. 152-*sexies*, sec.1(b).

³²IR, *supra* note 10, at 152-*sexies*, sec.1(d).

³³IR, *supra* note 10, at art. 152-*octies*.

³⁴*Id.*

³⁵*Id.*

³⁶IR, *supra* note 10, at art. 152-*septies*, sec. 3.

³⁷CFA, *supra* note 10, at art. 193, sec. 1.

4. provide for the purchase of shares or financial instruments mentioned in (3) above;
5. have as their object or effect the exercise, including joint exercise, of a dominant influence over the companies mentioned in (1) above; or
6. are aimed at favoring or frustrating a public tender offer.³⁸

Any such shareholders' agreements relating to a listed issuer or its controlling entity and, in the aggregate, to 2% or more of the share capital, must be disclosed within five days of their execution.³⁹

Investors may be sensitive to the disclosure of information regarding their investments, themselves and/or their corporate groups. In this regard, it should be noted that the disclosure required under Italian law with respect to these shareholders' agreements is quite extensive. Shareholders' agreements must be: reported to CONSOB;⁴⁰ published in summary form in a national daily newspaper;⁴¹ notified to the issuer; and filed in their entirety in the relevant enterprises' register where they will be made publicly available to any interested persons.⁴² If these disclosure obligations are not complied with, a shareholders' agreement is considered *per se* null and void.⁴³ In addition, in such case the voting rights attaching to the shares that are subject to the shareholders' agreement may not be exercised, and, if exercised, any shareholders' resolution passed with the decisive vote of such shares may be voided in court.⁴⁴ Finally, failure to disclose shareholders' agreements and any violation of the voting rights' suspension are subject to an administrative fine between €25,000 and €2,500,000.⁴⁵

Investors that are—or become parties to—shareholders' agreements relating to shares in a listed issuer in Italy should be aware that holdings of less than 2% (or 5%, in case of SMEs) of the share capital of a listed issuer may also be relevant for disclosure obligations.⁴⁶ In particular, such holdings must be aggregated to the holdings of the other parties to any shareholders' agreement under subdivisions (1), (2) and (5) listed above, for purposes of determining the notification requirements for the thresholds of 5%, 10%, 15%, 20%, 25%, 30%, 50%, and 66.6% pursuant to the disclosure obligations for holdings in listed companies.⁴⁷ To avoid duplication, however, this separate disclosure will not be required if certain relevant information is included in a timely manner in the disclosure made in summary form and on the website described above.⁴⁸

3. THE MANDATORY TENDER OFFER OBLIGATION

Investors considering purchases of shares in listed companies in Italy should also be aware that, unlike certain other jurisdictions, in certain cases Italian law sets forth a mandatory tender offer obligation.⁴⁹ In practice, given the costs involved in tender offers, mandatory tender offer

³⁸CFA, *supra* note 10, at art. 122. Investors should also note, however, that disclosure obligations may also apply to certain shareholders' agreements in respect of non-listed Italian companies.

³⁹*Id.*

⁴⁰IR, *supra* note 10, at art. 127, all parties to the agreement are jointly bound to report the agreement to CONSOB. IR, *supra* note 10, at art. 128, certain events affecting shareholders' agreements must also be disclosed to CONSOB within five days, including certain changes, amendments, renewal and termination.

⁴¹CFA, *supra* note 10, at art. 122, sec. 1. *See also*, IR, *supra* note 10, at arts. 129 and 130, the summary must include certain information (e.g., type of shareholders' agreement, percentage of voting share capital or aggregate voting rights involved, and relevant issuer and parties) and refer the public to a website where information necessary to assess the shareholders' agreement may be found. Under art. 131 of the IR, certain changes and amendments including renewal, withdrawals and termination must also be published in summary form and/or on the website.

⁴²CFA, *supra* note 10, at art. 122.

⁴³CFA, *supra* note 10, at art. 122, sec. 3.

⁴⁴*Id.*, at sec. 4.

⁴⁵CFA, *supra* note 10, at art. 193, sec. 2.

⁴⁶IR, *supra* note 10, at art. 120.

⁴⁷IR, *supra* note 10, at art. 120.

⁴⁸*Id.*

⁴⁹Generally speaking, a mandatory tender offer is an obligation to offer to purchase the stock held by all stockholders of a listed issuer, subject to certain terms and conditions. In this article, we have indicated only what we consider to be the most relevant cases and thresholds triggering a mandatory tender offer obligation for investors from the Gulf region. However, it should be noted that the mandatory tender offer obligation may also be triggered in other cases. In addition, the relevant rules were amended in 2014 and the application in practice of these new rules may be relevant in determining mandatory tender offer obligations in the future. Given the scope of this article, we have not focused on certain elements regarding the mandatory tender offer obligation which, however, may be relevant in practice.

considerations - including available exemptions therefrom - may often affect the way transactions regarding listed issuers are structured in Italy.

As a general rule, absent an exemption, any person that (i) as a result of share purchases comes to hold a stake exceeding 30% of the voting share capital of a listed issuer, or (ii) as a result of increased voting rights in connection with loyalty shares comes to hold more than 30% of the voting rights of a listed issuer, will be under an obligation to launch a tender offer within twenty days for the remaining voting share capital of the issuer.⁵⁰ The articles of association of SMEs can set forth a different threshold, not lower than 25% nor higher than 40%.⁵¹

An obligation to launch a mandatory tender offer is also triggered if, as a result of share purchases, any person comes to hold a stake greater than 25% in a listed issuer that is not an SME, and no other shareholder holds a greater stake.⁵²

It should be noted that treasury shares are generally not taken into account when determining the share capital of an issuer for purposes of calculating a relevant threshold.⁵³

The purchase of holdings amounting to less than any relevant stake mentioned above may in certain cases also trigger an obligation to launch a tender offer, if the investor enters into a shareholders' agreement (or otherwise "acts in concert") with other persons.⁵⁴ Where persons are acting in concert, the mandatory tender offer obligation is joint and several.⁵⁵ Persons "act in concert" if they cooperate on the basis of an agreement (whether express or tacit, written or verbal, even if invalid or without effect) that is aimed at purchasing, maintaining or strengthening control over an issuer or contrasting the achievement of the objectives of a tender offer.⁵⁶ Italian law provides a vast array of examples of persons acting in concert, some of which are always considered to be cases of acting in concert (e.g., parties to shareholders' agreements under subdivisions (1), (2), (3), (4) and (5) above; a company, its controlling entity and its subsidiaries; and companies subject to common control), and some of which are presumed to be cases of acting in concert by virtue of a rebuttable presumption (e.g., close family members and, in certain cases, a person and its financial consultants).⁵⁷

Investors should also note that mandatory tender offer rules apply not only with respect to purchases of voting shares, increases in voting rights in respect of loyalty shares, or multiple voting shares, but also in respect of long positions on shares.⁵⁸ These rules were introduced into Italian law following cases of undisclosed stock building in listed issuers and currently provide a broad definition of "long positions," as well as a number of significant exemptions, which should be considered with care by prospective investors.⁵⁹

Assuming certain conditions are met, investments in private companies that own relevant stakes in listed issuers may also trigger a mandatory tender offer obligation.⁶⁰ In particular, a mandatory tender offer obligation may be triggered when an investor acquires (alone or acting in concert) control of a private company, if in so doing it comes to hold (directly and indirectly) one of the

⁵⁰CFA, *supra* note 10, at art. 106, sec. 1.

⁵¹*Id.*, at sec. 1-*ter*.

⁵²*Id.*, at sec. 1-*bis*.

⁵³IR, *supra* note 10, at art. 44-*bis*. See also art. 44-*bis*.1, if the articles of association envisage increased voting rights in connection with loyalty shares or multiple voting shares, the thresholds are determined having regard to the relevant number of voting rights compared to the total number of voting rights.

⁵⁴CFA, *supra* note 10, at art. 109, depending on the stake held by such other persons (i.e., if together the persons cross a relevant threshold) and/or the terms of the shareholders' agreement. The mandatory tender offer obligation triggered as a result of purchases of shares does not apply if the threshold is crossed by way of execution of a shareholders' agreement relevant under article 122 of the CFA (see above in the article), unless the parties thereto have crossed in the aggregate the threshold in the preceding 12 months. CONSOB has indicated in the past - with regard to the 30% threshold - that even if following purchases by a party to a shareholders' agreement, the relevant aggregate share capital remains unchanged (and above 30%), a mandatory tender offer obligation may nonetheless be triggered in light of the new content of the agreement (e.g., as a result of changes to the balance of powers therein).

⁵⁵CFA, *supra* note 10, at art.109, sec. 1.

⁵⁶CFA, *supra* note 10, at art. 101-*bis*, sec. 4.

⁵⁷CFA, *supra* note 10, at art. 101-*bis*, sec. 4-*bis* and *ter*; see also, IR, art. 44-*quarter* of the IR.

⁵⁸IR, *supra* note 10, at art. 44-*ter*.

⁵⁹*Id.* However, the rules and definitions hereunder differ from those regarding the disclosure of material holdings in listed companies in Italy.

⁶⁰See further in the article.

relevant triggering stakes mentioned above.⁶¹ These rules apply provided that, for the indirect holding, certain conditions relating to the assets of the private company consisting prevalently in shares of the listed company are met.⁶²

The price in a mandatory tender offer must not be lower than the highest price paid by the investor and any persons acting in concert in the preceding twelve months, or, in the absence of any relevant purchases for consideration, not lower than the weighted average market price of the last twelve months.⁶³ Investors should note that in certain cases, the price for the mandatory tender offer may be adjusted by CONSOB.⁶⁴ For example, the price may be increased in light of the price actually agreed by the investor or persons acting in concert for the purchase of the triggering stake, including in light of any relevant ancillary agreements.⁶⁵

A number of exemptions from the mandatory tender offer obligation are available for investors, including in the following circumstances:⁶⁶

1. if the transaction is structured as a merger and approved by a shareholders' meeting of the issuer without the opposition of a majority of 'independent' shareholders (so-called "whitewash procedure");⁶⁷
2. if one or more other shareholders already own a majority of the voting rights exercisable at the ordinary general meeting of the issuer;
3. if the relevant threshold is exceeded as a result of any preemption, subscription or conversion rights originally held by the investor;
4. if the relevant purchase occurs for free or as a result of a succession in case of death (*mortis causa*);
5. in other cases, a number of which are related to financial crises of the issuer.

Sanctions for breaches of mandatory tender offer rules include the prohibition to vote the entire stake held and the obligation to sell the shares exceeding the threshold within twelve months.⁶⁸ During such period, any shareholders' resolution adopted with the decisive vote of these shares can be voided in court.⁶⁹ Administrative fines can be levied for an amount between €25,000 and the amount that would have been owed by the investor if a tender offer had been made.⁷⁰

4. SHAREHOLDERS' AGREEMENTS

As is common practice, investors may choose to enter into an investment or shareholders' agreement to govern the terms and conditions of their investment and the governance of the target company, both in respect of listed or private Italian companies.

A. Term of shareholders' agreements

A number of limitations apply to the term of shareholders' agreements in Italy, and such limitations differ between listed and private companies. These limitations may affect the number and type of relevant transaction documents, as well as how, in practice, the transaction is structured. Shareholders' agreements relating to listed companies can have, alternatively, a fixed term of up to three years, renewable, or an indefinite term, in which case any party can withdraw

⁶¹CFA, *supra* note 10, at art. 106, sec. 3(a); *see also*, IR, *supra* note 10, at art. 45. This rule may also be triggered in case of increased voting rights in connection with loyalty shares but not with regard to the obligation to launch a mandatory tender offer in case of share purchases resulting in a holding greater than 25% in a listed issuer that is not an SME, with no other shareholder holding a greater stake.

⁶²IR, *supra* note 10, at art. 45, secs. 2 and 3.

⁶³CFA, *supra* note 10, at art. 106, sec. 2. The twelve-month period runs from the notice given to CONSOB regarding the obligation to launch a mandatory tender offer, which notice must be given promptly upon the occurrence of the relevant facts or circumstances.

⁶⁴CFA, *supra* note 10, at art. 106, sec. 3. *See also*, IR, art. 47-bis *et seq.*

⁶⁵IR, *supra* note 10, at art. 47-septies.

⁶⁶IR, *supra* note 10, at art. 106, sec. 5. *See also*, IR, art. 49.

⁶⁷For these purposes, "independent" shareholder means any shareholder holding less than 10% of the voting share capital of the issuer.

⁶⁸CFA, *supra* note 10, at art. 110.

⁶⁹*Id.* As an alternative to the sale of the shares exceeding the threshold, CONSOB can impose that the investor make a tender offer at a price it determines.

⁷⁰CFA, *supra* note 10, at art.192, sec. 1. Private claims can also be pursued by other shareholders.

from the shareholders' agreement with six months' notice.⁷¹ Shareholders' agreements relating to private companies can have, alternatively, a fixed term of five years, renewable, or an indefinite term, in which case any party can withdraw from the shareholders' agreement with 180 days' notice.⁷² No time limitations exist for shareholders' agreements that are instrumental to joint ventures in the production or exchange of goods or services, and relate to companies entirely owned by the parties to the agreement.⁷³

In practice, it is fairly common to find tacit renewal clauses in fixed term shareholders' agreements pursuant to which, at the end of the fixed term of three or five years, the agreement is said to be deemed "automatically renewed" unless one of the parties provides a notice to the other, a certain amount of time ahead of the expiry or renewal date.⁷⁴ Investors should note, however, that it is debated to what extent such tacit renewal clauses are enforceable, since it is argued that the parties' intent to renew a shareholders' agreement should consist in a new and fresh expression of intent (rather than a passive intent not to terminate the agreement).⁷⁵ Great care is also required for clauses that limit or condition the freedom of any party to a shareholders' agreement to terminate (or not renew) the agreement, such as put and call options (especially if at punitive prices), as these may be seen as limiting the parties' freedom regarding the decision on whether or not to renew the agreement.⁷⁶

In light of the restrictions regarding the term of shareholders' agreements, in practice, investors will often try to reproduce some, if not all, of the relevant provisions in the articles of association of a target company, which are not subject to the same restrictions as to their term and may thus often be (or become) a highly-negotiated document. Investors should consider, however, that unlike certain other jurisdictions, the content of a shareholders' agreement usually cannot be entirely or exactly reproduced in the articles of association of an Italian target company (which, to a certain extent, may also have structuring implications).⁷⁷ By way of example, no "personalized" rights are allowed in Italian joint stock corporations (e.g., Mr. "B." has the right to "X"), although the articles of association often refer to different classes of shares or relevant percentages as requirements for the exercise of certain rights.⁷⁸ In relation to drag along rights, by way of further example, it is argued that the floor price needs to be at least equal to the price that would be due to shareholders in case of exercise of withdrawal rights.⁷⁹ Similar considerations and limitations also apply to other relevant investors' rights, including exit rights, tag along rights, and put and call options.⁸⁰

B. Merger control considerations

Investments in listed and private companies in Italy may trigger merger filings in Italy or at EU level. A peculiarity of Italian merger control regulations is that closing of a transaction can occur before clearance is obtained – in which case the purchaser will usually bear associated risks – so long as the

⁷¹CFA, *supra* note 10, at art. 123. These rules apply to the shareholders' agreements indicated under § 2C above.

⁷²Art. 2341-bis C.c. (It.). (The Italian Civil Code). These rules apply to shareholders' agreements that in order to stabilize the ownership structure or governance of the company: govern the exercise of voting rights in a joint stock company or in its controlling entities; limit transfers of shares of a joint stock company or of holdings in the controlling entities; or have as their object or effect the exercise, including joint exercise, of a dominant influence over such companies.

⁷³*Id.*, at sec. 3, of the C.c. (It.).

⁷⁴This statement is based on the authors' experience.

⁷⁵Italian scholarship has long debated this issue. Among others, F. Chiappetta; *I patti parasociali nel Testo Unico delle disposizioni in materia di intermediazione finanziaria*, in Riv. Soc., 1998, II, 909 *et seq.*; R. Costi, *Il mercato mobiliare*, VII, Turin, 2010, 318; A. Picciau, *Sub. art. 2341-bis cod. civ.*, in *Commentario alla riforma delle società* (Marchetti ed.), Milan, 2008, 352 *et seq.*

⁷⁶Among others, M. M. Pratelli, *Rinnovo di patti parasociali e opzioni put & call*, in Giur. Comm., I, 2010, 931 *et seq.*, citing and referring to relevant Italian scholarship and decisions.

⁷⁷This is due to the requirements of Italian corporate law and the general principles of Italian corporate law as set forth under the Italian Civil Code (approved by R.D. no. 262/1942 (It.), as amended from time to time).

⁷⁸Based on the authors' experience, the need to reserve certain rights to a specific entity is often in practice addressed, in the articles of association of an Italian joint stock corporation, by referring such rights (or reserving their exercise) to certain classes of shares or pursuant to pre-defined super majorities.

⁷⁹By drag along rights we intend to refer generally to the right of one or more shareholders to force the sale of the shares held by one or more other shareholders, when they sell their shares. The limitation regarding the forced sale price has been the position taken by certain Italian courts, scholarship and public notaries.

⁸⁰By tag along rights we intend to refer generally to the right of one or more shareholders to sell their shares, at the same terms and conditions, when one or more other shareholders (usually the majority) sell their shares.

merger filing is made prior to closing.⁸¹ Depending on the size of the transaction and other factors, EU merger filings may be required, in which case they would be alternative to Italian merger filings.⁸²

In practice, foreign investors, including investors from the Gulf region, may request more governance rights compared to those of a purely “passive” financial investor. Investors should allow for any related investor or shareholders’ agreement to be examined from an antitrust perspective, as such governance rights may trigger merger filing obligations in connection with a situation of “joint control.” In turn, the merger filings may impact the timing of a transaction and trigger disclosure requirements by the acquirer in respect to the transaction, itself and its corporate group. For example, investors should be mindful that veto rights in respect of certain “reserved matters” may trigger a finding of joint control.⁸³ Relevant reserved matters may include, *inter alia*, the approval of the budget or the business plan of the target company, and the appointment of certain key officers of the target company.⁸⁴

Merger filings will require the disclosure of information regarding, *inter alia*, the acquiring investor.⁸⁵ The European Commission and the Italian Antitrust Authority seem to conform in practice to the following principles with regard to State-controlled companies and investment funds:

1. the ultimate controlling entity (the State) is considered neutral; and
2. although controlled by the same entity (the State), companies/funds with independent decision powers are considered different economic entities.⁸⁶

By way of example, in certain merger filings it seems that the European Commission and the Italian Antitrust Authority have considered turnover and activities only of Mubadala (not combined with those of other funds such as the Abu Dhabi Investment Council (ADIC) or the International Petroleum Investment Company, (IPIC)) or, in other cases, of IPIC and its subsidiaries (not combined with other potentially relevant entities).⁸⁷

Accordingly, required merger filing data could be expected to relate to the funds, or group of funds, as part of a center of interests constituting an economic entity (e.g., the turnover of portfolio companies; their activities; *etc.*), and not to other funds or companies controlled by the same State.⁸⁸

5. FOREIGN INVESTMENT CONTROL AND REGULATORY APPROVALS

A. Foreign investment control regime

A new foreign investment control regime was enacted in 2012 in Italy and came into force in its entirety in June 2014.⁸⁹ Under the new regime, investments in the defense and national security

⁸¹Under Italian law, acquisitions and other concentrations must be notified to the Italian Antitrust Authority when (i) the aggregate turnover produced at the domestic level by the target and the acquirer, and (ii) the turnover produced at the domestic level by the target, exceed certain thresholds, periodically updated by the Italian Antitrust Authority.

⁸²If the transaction meets requirements set out under EU regulations, the transaction must be notified to the European Commission instead of the Italian Antitrust Authority.

⁸³Such finding would generally trigger merger filing obligations, subject to other conditions being met.

⁸⁴The European Commission’s 2007 Consolidated Jurisdictional Notice, secs. 65 *et seq.*, lists veto rights conferring joint control, which typically include decisions on issues such as the budget, the business plan, major investments or the appointment of senior management (the Notice is published in the EU’s Official Journal n. C95/2008).

⁸⁵In general, please note that Italian rules are set out in L. n. 287/1990 (It.) and in the implementing rules and regulations, while, at the European level, rules are contained in art. 101 and 102 of the Treaty on the functioning of the EU and in the implementing rules and regulations, including in particular regulation n. 139/2004.

⁸⁶This statement is based on the review of the relevant regulations and of the public information made available in respect of certain merger filings by sovereign wealth funds. See also Recital 22 of EU regulation n. 139/2004 and the European Commission’s 2007 Consolidated Jurisdictional Notice, secs. 5.3 and 5.4.

⁸⁷Based on public information regarding certain merger filings, it seems that, with regard to Qatar, the European Commission has in the past looked up the control chain to Qatar Investment Authority (having deemed the level of Qatar Holding insufficient), while the Italian Antitrust Authority has in the past considered the level of Qatar Holding to be sufficient.

⁸⁸See *supra*, note 87. It also seems that the European Commission may be aware of the concerns of certain sovereign wealth funds and other investors regarding disclosure of confidential information, and may be available to discuss/consider more stringent confidentiality protections.

⁸⁹The new regime was adopted by D.L. 21/2012 (It.), as amended and ratified by L.D. 56/2012 (It.), and implemented through implementing regulations (hereinafter, the Foreign Investment Law). The text of the Foreign Investment Law is at times unclear and convoluted: we have tried to provide a general and non-exhaustive indication of some of its relevant provisions, including through tentative translations of its text.

sectors, as well as in certain assets in the energy, transport and communications sectors, are subject to review by the Italian government.⁹⁰

The Italian government will periodically determine the activities and assets subject to this regime among: (i) activities that are strategic for defense and national security (hereinafter, strategic security activities); and (ii) networks, plants (including those necessary to ensure minimum procurement levels and the operation of essential public services), assets and relationships that are strategic for the national interest in the fields of energy, transportation and communications (hereinafter, strategic assets).⁹¹

With regard to strategic security activities, if the fundamental interests of national defense and security could be materially prejudiced, the Italian government can:

1. impose specific conditions relating to the security of procurement and information, the transfer of technologies and export controls, on any purchase of holdings in companies exercising strategic security activities;⁹²
2. prohibit purchases by any person (other than the Italian state or state-controlled entities), directly or indirectly, individually or jointly, of holdings in the voting share capital of a company exercising strategic security activities, which, given their size, may *in the specific case* prejudice defense and national security interests;⁹³ or
3. veto the adoption of resolutions by shareholders or boards of companies exercising strategic security activities relating to certain extraordinary transactions, or impose specific obligations or conditions whenever this is sufficient to ensure protection of the fundamental interests of national defense and security.⁹⁴

With regard to companies holding a strategic asset, the Italian government can:

1. veto resolutions,⁹⁵ acts or transactions leading to a change of ownership, control, availability or purpose of the assets, that result in an exceptional situation where the public interest relating to the safety and operation of networks and plants, and the continuity of procurement, may be materially prejudiced (if such situation is not addressed by any relevant domestic or European legal provision);⁹⁶ and
2. make purchases of a controlling interest (whether joint or individual) by non-EU persons⁹⁷ conditional on commitments aimed at protecting the public interest relating to the safety and operation of networks and plants and the continuity of procurement, if the purchases may raise a threat of a material prejudice to such public interest.⁹⁸

Notification to the Italian government must occur prior to the adoption of the relevant resolutions or transactions by companies exercising a strategic security activity, within ten days of the adoption of the relevant resolutions, acts or transactions by companies holding a strategic asset (but in any case before implementation), and within ten days of purchases of relevant

⁹⁰To date, the new regime has been tested at least twice, in respect of General Electric's acquisition of Avio and of Mubadala's consolidation of its participation in Piaggio Aero Industries. Both Italian target companies were exercising "strategic security activities" (see further in the article).

⁹¹Strategic security activities were identified by D.M. 30 November 2012 (Italian Prime Minister Decree, published in the Official Journal on February 4, 2013) and Strategic Assets were identified by D.P.R. 25 March 2014 (Italian President of the Republic Decree published in the Official Journal on June 6, 2014).

⁹²The Foreign Investment Law, *supra* note 89, at art. 1.

⁹³*Id.*

⁹⁴*Id.* Relevant extraordinary transactions include mergers, demergers, asset disposals, transfer of the corporate seat abroad, dissolution, change of corporate purpose, transfer of *in rem* rights or rights of use, undertaking of obligations that impose conditions upon the use of the company's assets.

⁹⁵The Foreign Investment Law, *supra* note 89, at art. 2. Relevant resolutions include resolutions in respect of mergers, demergers, disposals of relevant assets, transfer of the corporate seat abroad, dissolution, change of corporate purpose, or the granting of security over the assets.

⁹⁶*Id.* The Italian government can instead impose specific obligations or conditions whenever this is sufficient to ensure the protection of the above-mentioned public interest.

⁹⁷The Foreign Investment Law, *supra* note 89, at art. 2, sec. 5. Non-EU persons are not resident or domiciled, with no registered office, headquarters or center of main interest in any EU or EEA member state, and are not established therein.

⁹⁸The Foreign Investment Law, *supra* note 89, at art. 2. The transaction can be vetoed if it may raise an exceptional threat of a material prejudice to the public interest relating to the safety and operation of networks and plants and the continuity of procurement, which cannot be addressed by way of commitments by the investor.

interests.⁹⁹ A standstill obligation applies whereby the effectiveness of the relevant resolution or transaction is suspended and any rights other than economic rights (including voting rights) attaching to the acquired interest cannot be exercised by the investor until the end of the review period.¹⁰⁰

Notifications must provide complete information regarding the resolution or transaction, and, in case of relevant purchases, shall include a general description of the project for the acquisition, the purchaser and its activities.¹⁰¹ The review period is fifteen days and can be suspended for no more than ten days in the event of information requests by the Italian government.¹⁰² If the Italian government does not exercise its “special powers” within such time period, the relevant resolution or transaction may be implemented.¹⁰³ In light of this very brief review period, where possible it may be practical - and may develop as a standard practice in the future - for investors to make contact with the Italian government informally, ahead of the actual date for notification.

The Foreign Investment Law sets forth a number of sanctions for breaches of the rules set forth thereunder. In the event of resolutions or transactions adopted in breach of the new foreign investment control regime, the resolutions and transactions will be deemed automatically null and void.¹⁰⁴ In the event of a breach of the obligations or commitments imposed by the Italian government, voting and other non-economic rights attaching to the acquired interests cannot be exercised and any resolutions adopted with the decisive vote of the shares will be deemed automatically null and void.¹⁰⁵ Fines levied will be equal to (or up to, in certain cases) twice the value of the transaction, and not lower than 1% of the combined revenues of the undertakings involved.¹⁰⁶ In case of the exercise of a veto right by the Italian government, the law envisages a forced sale of the relevant shares if they are not sold voluntarily within one year.¹⁰⁷

The Foreign Investment Law also sets forth a number of criteria upon which the Italian government’s review must be based.¹⁰⁸ These criteria, especially in the absence of numerous or long-standing precedents, may prove hard to characterize with some precision.¹⁰⁹

Criteria for the review of relevant purchases of interests in companies exercising a strategic security activity include, *inter alia*, whether the economic, financial, technical and organizational capacity of the investor, as well as its business plan, are adequate to regularly carry on the activities; safeguard the technological portfolio; guarantee the security and continuity of procurement; and honor certain relevant existing contractual commitments.¹¹⁰

Criteria for the review of relevant purchases of interests in companies holding a strategic asset include, *inter alia*, whether the situation resulting from the transaction, (considering the economic, financial, technical and organizational capacity of the investor,) is suitable to guarantee the security and continuity of procurement; and the maintenance, safety and operation of networks and plants.¹¹¹

In both cases of purchases of interests, applicable criteria include the possible existence of links between the investor and third countries that do not recognize democratic principles or the rule of

⁹⁹The Foreign Investment Law *supra* note 89, at arts. 1 and 2. *Id.*, at art. 1, the law expressly sets out that holdings in listed companies exercising a strategic security activity must be notified when they increase above the 2%, 3%, 5%, 10%, 15%, 20% and 25% thresholds.

¹⁰⁰The Foreign Investment Law, *supra* note 89, at arts. 1 and 2.

¹⁰¹*Id.*

¹⁰²*Id.* It should be noted that D.P.R. 19 February 2014, (as published in the Official Journal on March 20, 2014), sets forth implementing provisions in respect of strategic security activities, and seems to indicate *inter alia* that the 15-day period will start running from when the notification to the Italian government is complete.

¹⁰³*Id.*

¹⁰⁴The Foreign Investment Law *supra* note 89, at arts. 1 and 2.

¹⁰⁵*Id.*

¹⁰⁶*Id.* Please note that this constitutes a general summary; actual sanctions may vary in practice, depending on the specific case.

¹⁰⁷*Id.*

¹⁰⁸*Id.*

¹⁰⁹This statement is based on the authors’ reading of the text of the Foreign Investment Law.

¹¹⁰*Id.*

¹¹¹*Id.*

law, or that have relations with criminal or terrorist organizations.¹¹² A number of other criteria are also set forth by the law.¹¹³

The new regime also specifically refers to the condition of reciprocity as a requirement for purchases of holdings by non-EU persons in companies exercising strategic security activities or holding strategic assets.¹¹⁴

B. Industry-specific regulatory approvals

Investments in sectors other than those to which the investment control regime applies, are typically not subject to general limitations or prior review, apart from those deriving from reciprocity rules and industry-specific regulatory approvals.¹¹⁵

Investors should indeed consider the regulatory requirements applicable to the purchase of securities of companies operating in the industry or sector in which the target operates, and note that regulatory requirements may also apply in respect of specific asset(s) held by the target company.¹¹⁶

6. CONCLUSION

Foreign investors will receive a warm welcome in Italy, as foreign direct investment and the competitiveness of Italian companies have become a key focus of recent Italian economic diplomacy and legislative reforms.¹¹⁷ An example of this new stance was provided in the spring of 2014, when two non-EU funds acquired shareholdings in *Monte dei Paschi di Siena*, the oldest Italian bank.¹¹⁸

To take advantage of the opportunities presented by Italian markets, the key legal issues and other practical factors outlined in this article should be considered by foreign investors, including investors from the Gulf region. Please note, however, that this article is not exhaustive and only provides a general overview of certain Italian laws and regulations that may be applicable to acquisitions of minority stakes in Italian companies by foreign investors.¹¹⁹

¹¹²*Id.*

¹¹³*Id.*

¹¹⁴The Foreign Investment Law, *supra* note 89, at art. 3, sec. 1.

¹¹⁵This statement is based on the authors' experience. *See also*, G. Scassellati-Sforzolini, F. Iodice, *Italy*, in *The Foreign Investment Regulation Review* (Law Business Research, Goldman ed., 2013), 162.

¹¹⁶*See* a succinct list of certain sector-specific authorizations in G. Scassellati-Sforzolini, F. Iodice, *Id.*, 167 *et seq.*

¹¹⁷*See, for example*, the broad program of reforms proposed in the past by the Italian government and available at <http://destinazioneitalia.gov.it/english/> (last visited January 18, 2015).

¹¹⁸The authors believe that this was the first acquisition of stakes in an Italian bank by non-EU funds in a transaction subject to the Bank of Italy's approval.

¹¹⁹In addition, the most recent Italian governments have sought to undergo a vast program of reforms (as discussed above in the article) and, accordingly, applicable Italian laws and regulations are often subject to change. For more information on rules applicable to listed issuers in Italy, *see* Fioruzzi, De Nardis, Puppieni, Saccone, *Italy*, in *European Securities Law* (Oxford University Press, Panasar and Boeckman eds., 2014).