The Real Estate M&A and Private Equity Review

Fifth Edition

Editors
Adam Emmerich and Robin Panovka

The Law Reviews

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PREFACE

The covid-19 pandemic has had a profound impact on the commercial real estate industry, including real estate investment trusts (REITs) and real estate private equity. In addition to health and safety issues, many REITs and real estate private equity portfolio companies have been confronting difficult issues involving liquidity, rent collection, dividend payouts, disclosure and guidance, among many other things. Strategic planning and risk management have required intense focus, as some business models have been challenged by the pandemic or its resulting acceleration of technological change, including increases in e-commerce and remote working and decreases in travel, leisure and activities that require congregating in concentrated spaces. There is very limited knowledge of how long the pandemic will last and what its long-term impact might be, which makes strategic planning and risk management very difficult but also essential. Hopefully, we will have a clearer picture of the new normality by the next edition.

Stepping back from the immediate crisis, prior to covid-19, publicly traded real estate companies and REITs, with help from real estate private equity, have steadily transformed the global real estate markets over the past 25 years. Their principal innovation, and 'secret sauce', has been liquid real estate. Unlike traditional property ownership, equity in publicly traded real estate vehicles is highly liquid, and can be bought and sold in large volumes, literally in minutes, on numerous global exchanges.

Publicly traded real estate vehicles have an aggregate market capitalisation of approximately US$1.6 trillion globally, including over US$1 trillion in the United States and approximately US$150 to US$250 billion in each of Europe and Asia. As public REITs and other vehicles have aggregated these properties and grown in scale and sophistication, so too have real estate-focused private equity funds, playing an important role catalysing hundreds of billions of dollars of REIT and real estate M&A transactions and IPOs.

However, despite that massive growth and despite the current pandemic, potential growth is far larger both in long-standing REIT markets and in newer REIT jurisdictions, where the trend is more nascent. With increasing development and urbanisation, the world is producing more and more institutional-grade properties, and a growing percentage of this expanding pool – an estimated US$5 trillion and counting, so far – will inevitably seek the advantages of liquidity by migrating to the publicly traded markets. The growth is expected to be both local and cross-border, with nearly 40 countries already boasting REIT regimes.

REITs and other publicly traded vehicles for liquid real estate have grown because they are often a superior vehicle for stabilised assets. Greater liquidity and transparency – and often superior governance – are attractive to investors, resulting in a lower cost of capital and superior access to vast amounts and varieties of capital in the public markets. In addition to cheaper capital, REITs and other public vehicles benefit from efficiencies of scale, sophisticated management and efficient deal structures, to name just a few advantages. With these advantages, the global march of real estate to the public markets seems unstoppable.

This publication is a multinational guide for understanding and navigating the increasingly complex and dynamic world of liquid real estate and the transactions that mostly produce it. The sea change in the markets, sometimes called the 'REIT revolution', has meant that major real estate transactions have migrated from 'Main Street' to 'Wall Street'. They now often take the form of mergers, acquisitions, takeovers, spin-offs and other corporate transactions conducted in the public markets for both equity and debt. They have grown exponentially in complexity and sophistication, and increasingly represent cross-border multinational transactions fueled by the now global real estate capital markets and M&A deal professionals. And they are often intermediated by international investment banks rather than local brokers, and financed with unsecured bonds or commercial mortgage-backed securities. In a fair number of cases they are catalysed by private equity firms or similar actors, sometimes building portfolios to be taken public or sold to public real estate companies, and sometimes through buyouts of public real estate companies for repositioning or sale.

To create this publication, we have invited leading practitioners from around the globe to offer practical insights into what is going on around the conference tables and in the markets in their jurisdiction, with an eye to cross-border trends and transactions. As will quickly become evident, the process of liquefying real estate and transactions involving public real estate companies require a melding of the legal principles, deal structures, cultures and financial models of traditional real estate, public company M&A and private equity. None of this, of course, happens in a vacuum, and transactions often require expertise in tax, corporate and real estate law, not to mention securities laws and global capital markets. Each of our distinguished authors touches on these disciplines.

We hope this compilation of insight from our remarkable multinational authors produces clarity and transparency into this exciting world of liquid real estate and helps to further fuel the growth of the sector.

Adam Emmerich and Robin Panovka
Wachtell, Lipton, Rosen & Katz
New York
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Chapter 9

ITALY

Umberto Borzi[1]

I OVERVIEW OF THE MARKET

The Italian market offers a number of different investment schemes that may adapt to the needs of qualified investors (whether local or foreign). Large-ticket real estate transactions, able to attract the main global players, are typically carried out through real estate alternative investment funds and SICAFs benefiting from favourable tax regimes. The renovation of the Italian listed real estate joint-stock companies (SIIQs) legal framework of 2014 gave a new momentum to this corporate vehicle. However, the spread of such structure appears still limited compared to that of similar vehicles in other European markets such as French SIICs.

Real estate investors have been especially active in the Italian market in 2019, leading to the solid growth of the commercial real estate industry, which marked a notable transaction volume of more than €12 billion. Among the top-performing sectors, the hotel segment experienced outstanding results in 2019, with an increase of 37 per cent compared to the previous year, being one of the best performances in the European market. The office segment also has seen impressive growth, especially in Milan, which accounts for 70 per cent of the relevant market in Italy. This is followed by the logistics market, which has benefited from the steady development of the e-commerce industry.[2]

Milan and Rome are still the most dynamic cities and the most liquid markets in Italy. In particular, Milan is seeing major regeneration projects and developments, which are also connected to the 2026 Winter Olympic Games, drawing the attention of major real estate players around the world.

Of course, pipeline transactions are being affected by the covid-19 pandemic, and market trends for the next months are uncertain at the moment.

II RECENT MARKET ACTIVITY

i M&A transactions

During the past three years, the Italian real estate market has been particularly active in terms of M&A transactions with large-ticket deals involving leading international players.

One of the most noteworthy transactions was the merger of Beni Stabili SIIQ SpA, listed in the Italian stock exchange, into French investor Covivio SA (formerly, Foncière

1 Umberto Borzi is a partner at Chiomenti.
2 Source: Real Estate Market Outlook 2020, Italy, CBRE, 4 February 2020.

des Régions). The transaction was completed in December 2018 for an overall value of approximately €560 million and through this deal Covivio confirmed its investment strategy in Italy, which is centered on Milan and the development pipeline.

More recently, UniCredit SpA acquired 32.5 per cent of the shares of Villata SpA, the real estate holding company owner of a great part of the real estate pertaining to the Esselunga group, one of the major supermarket chains in Italy. The deal was completed in March 2020 for an acquisition value of approximately €435 million and, as of today, represents the largest real estate transaction of the Italian market for the current year.[3]

ii Private equity transactions

In the past few years, the most prominent PE investors have deployed considerable resources in the Italian real estate market. Among the top tier PE firms, Lendlease and Blackstone have played a primary role by closing two of the main deals of recent years.

In October 2019, Landlease acquired, through a real estate investment trust (REIT) listed in Singapore, the SKY headquarters in Milan, owned by the listed Italian real estate property developer Risanamento SpA for an overall consideration of approximately €262 million.

During Q1 2019, Blackstone acquired from Covivio a real estate portfolio of office buildings located in different Italian cities, including Milan, Rome and Venice, for an overall purchase price of approximately €263 million.

As a final remark, it is worth mentioning that Ardian is about to complete the largest PE real estate transaction of 2020 by acquiring from Banca Monte dei Paschi di Siena SpA – MPS a portfolio of 28 buildings. The closing of the transaction is expected to fall in Q2 of 2020 for an envisaged purchase price of approximately €350 million.[4]

III REAL ESTATE COMPANIES AND FIRMS

i Publicly traded REITs and REOCs – structure and role in the market

Although under Italian law there is no investment vehicle that may be specifically qualified as REITs or REOCs, the Italian real estate market provides for similar structures that can be considered when planning an investment through a publicly traded entity. Such structures may be divided between real estate companies and collective investment undertakings.

As regards the first group, the most significant scheme to invest in the Italian real estate market through public companies is the SIIQ. On the other side, investments through Italian collective investment undertakings typically involve real estate investment companies with fixed corporate capital (known as SICAFs) and real estate alternative investment funds (known as REIFs).

An additional investment scheme recently offered to sophisticated investors in the Italian real estate market is represented by real estate securitisations.

3 Source: elaborations by Mediobanca on Mergermarket sources.

4 Source: elaborations by Mediobanca on Mergermarket sources.

SIIQs

The Italian SIIQ regime was introduced by Law No. 296/2006 with the purpose of providing for a special civil law and tax regime applicable to Italian real estate investment companies that meet certain requirements and whose main activity is the leasing of real estate. In 2014, the SIIQ legal framework was substantially reformed (by Law No. 164/2014) in the context of the adoption of new measures aimed at stimulating the Italian real estate industry.

The main features of the Italian SIIQs may be summarised as follows.

SIIQs are incorporated as joint-stock companies resident in the Italian territory whose stocks are listed on the Italian Stock Exchange, or on regulated markets of EU or EEA States, which allow an adequate exchange of information for tax purposes with Italy, and are subject to the supervision of Consob (the body monitoring the Italian Stock Exchange). SIIQs benefit from a special tax regime (as better detailed below), provided that certain requirements are met. In particular:

a shareholding structure: no single shareholder must hold, directly or indirectly, more than 60 per cent of the voting rights and participation in profits; and at least 25 per cent of the stocks must be held by shareholders that, individually, do not represent more than 2 per cent of the voting rights and the participation in profits;

b business activity: the main business carried out by an SIIQ is represented by the leasing of real estate;

c assets:
- at least 80 per cent of the total assets must consist of real estate assets (owned or held by virtue of other rights) to be leased; and
- participations accounted as fixed assets in other SIIQs, as well as in non-listed real estate joint-stock companies that are subsidiaries of SIIQs and meet certain requirements – known as SIINQs – and Italian REIFs or SICAFs, which in turn hold real estate for lease or participations in other real estate investment companies, REIFs or SICAFs representing at least 80 per cent of the respective total assets (qualifying REIFs and SICAFs); and

d revenues: in each financial year, at least 80 per cent of the positive components of income must be represented by proceeds from lease activity, dividends from leasing activity raised from participations in SIIQ, SIINQ and qualifying REIFs and SICAFs, and capital gains realised on real estate held for lease or in participations in SIIQs, SIINQs and qualifying REIFs and SICAFs.

In addition, SIIQs are subject to certain requirements with respect to the distribution of profits. Indeed, SIIQs shall distribute each year 70 per cent of the lower of net profits generated from leasing activities or from participations in other SIIQs, SIINQs and qualifying REIFs and SICAFs; and total profits available for distribution. Furthermore, SIIQs shall distribute to its shareholders 50 per cent of the capital gains deriving from the disposal of real estate held for lease or from participations in SIIQs, SIINQs and qualifying REIFs and SICAFs in the two years following on from the relevant disposal.

From a tax perspective, an SIIQ's income deriving from a leasing activity is exempt from corporate income tax (IRES, applied at a rate of 24 per cent) and a regional tax on business activities (IRAP, applied at a rate of 3.9 per cent). Income deriving from other activities is subject to the ordinary IRES and IRAP regime.

Dividends deriving from an SIIQ's exempt leasing activity are subject to a 26 per cent withholding tax on distribution. Non-resident shareholders may benefit from double tax treaties, if applicable. A specific exemption is provided for Italian pension funds and Italian undertakings for collective investments. Dividends deriving from different activities are subject to the ordinary tax regime depending on the recipient.

Despite a favourable tax regime, as of today there are only a few SIIQs listed on the Italian Stock Exchange.[5]

SICAFs and REIFs

Undertakings for collective investment in the real estate sector can either be corporate vehicles as joint-stock companies with fixed capital (known as SICAFs) or contractual vehicles as alternative REIFs. Both of these vehicles are subject to the EU legal framework set out in the Directive on Alternative Investment Fund Managers[6].

The main features of these investment structures may be briefly summarised as follows:

a funds of the relevant vehicle shall be collected from a variety of investors through issuance, or the offer of stocks or units;

b these vehicles have a limited scope (for example, these vehicles are not entitled to directly carry out building activity), and the relevant assets shall be invested on the basis of an investment policy defined *ex ante*;

c investors in such kind of vehicles act as passive investors and can be involved only with respect to certain main investment decisions, as the management powers must be exercised independently. An exception is made for internally managed SICAFs, which offer the shareholders a deeper involvement in governance as it is directly managed by a board of directors whose members are appointed by the relevant shareholders. The management of the vehicle is, in most cases, assigned to an external regulated alternative investment manager. The investors' involvement in the decision-making process is generally regulated under the fund rules (in the case of REIFs) or the by-laws (in the case of SICAFs) of the vehicle; and

d the incorporation and set-up of these vehicles is subject to prior approval by the Bank of Italy, and their operations are supervised by the Bank of Italy and Consob.

With particular reference to the real estate SICAF, it is worth highlight the following:

a shareholder requirements: real estate SICAFs may be qualified as non reserved or retail when its shares may be subscribed by retail investors, or as reserved, in cases where the investment in such vehicle is limited to Markets in Financial Instruments Directive professional clients and non-professional clients investing at least €500,000;

b business activity and assets: the main business carried out by real estate SICAFs is to provide collective asset management through investment in the acquisition of real estate and property rights, as well as in real estate funds, real estate SICAFs or SIIQs, which shall represent in aggregate, at least two-thirds of the overall assets of the vehicle;

c management structure: real estate SICAFs can be either externally managed (likewise for REIFs) by an alternative investment manager, or internally managed. In this latter case, the SICAF generally has a governance structure that reflects the presence of business shareholders (which participate, for management purposes, providing the SICAF with its management and organisational structure and with the financial resources needed

5 The official Consob website reports that, as of May 2020, there are five SIIQs listed on the Italian Stock Exchange (http://www.consob.it/web/consob/home).

6 EU Directive No. 2011/61/EU.

to carry out its business and meet the regulatory capital requirement) and investor shareholders (who are granted the voice rights generally recognised for the investors in the funds);

d listing: unlike SIIQs, no listing requirement is provided with respect to real estate SICAFs; and

e leverage: specific restrictions to leverage recourse apply with respect to retail real estate SICAFs (i.e., a maximum permitted ratio between exposure and the net asset value equal to two), while no specific limitations apply to reserved SICAFs, with an exception being made for those provided under a company's by-laws.

REIFs have several elements in common with SICAFs since, as mentioned above, they are both collective investment undertakings subject to the regulatory framework (e.g., the Alternative Investment Funds Managers Directive), although SICAFs must also comply with ordinary corporate law provisions set forth under the Italian civil code.

REIFs' most distinctive characteristics, compared to real estate SICAFs, can be summarised as follows:

a contractual form and management structure: investment funds under Italian law lack legal personality and are able to operate only through a separate and independent management company; therefore, real estate funds can only be externally managed; and

b authorisation process: unlike the incorporation of a SICAF, the set-up of investment funds reserved for professional investors is a very smooth process, as it does not require any prior authorisation from the regulatory authorities.

From a tax perspective, REIFs are exempt from IRES and IRAP if they satisfy the regulatory requirements to be considered as investment funds under Italian law and, in any case, if they are participated in exclusively by institutional investors (e.g., undertakings for collective investments and pension funds established in whitelist states, and vehicles more than 50 per cent-owned by any of the aforementioned entities). The same tax treatment applies to SICAFs, with some differences for IRAP purposes.

Proceeds distributed by REIFs and SICAFs to non-resident investors are subject to a 26 per cent withholding tax, that may be reduced under double tax treaties, if applicable, (generally 10 per cent). A domestic exemption from withholding tax is provided for certain non-resident investors (including undertakings for collective investment established in whitelist states).

In recent years, the Italian market has been experiencing growth in real estate that is owned by externally managed SICAFs on the initiative of large foreign investors acting as the founding shareholders of a SICAF and having selected an Italian asset management company.

Real estate securitisation

In 2019, Italy extended the securitisation schemes to real estate. In light of this new legal framework, special purpose vehicles (SPVs) meeting certain requirements can carry out securitisation of proceeds arising from real estate and related rights.

It is worth noting that real estate and related rights underlying a securitisation owned by an SPV constitute a segregated pool of assets that is separated from the other assets of the same SPV. The securitised assets will be segregated in favour of investors of the SPV, counterparties of the derivative contracts signed by the SPV for hedging purposes and grantors of the funds raised by the SPV.

These SPVs will not need to be regulated and shall have a corporate purpose contemplating the acquisition, management and valorisation of real estate and registered movable assets in the exclusive interest of the same securitisation transaction. The management of the pool of assets in the interest of the noteholders shall be carried out by entities that shall not necessarily be regulated asset managers (pursuant to the AIFM Directive and its implementing provisions).

Italian law does not provide for a specific tax regime for real estate securitisations and the Italian Revenue Agency has not provided clarifications to date. However, due to the recall of tax rules for securitisation transactions on receivables, real estate securitisation vehicles under certain conditions should not have a taxable income subject to corporate income taxes.

Interests on notes are ordinarily subject to 26 per cent substitute tax, with the exception of certain investors (inter alia, Italian companies, Italian collective investment undertakings and foreign investors resident in whitelist states).

With reference to indirect taxes (VAT, mortgage, cadastral and other stamp duties), the ordinary tax rules provided for the sale of real estate apply.

Real estate PE firms – footprint and structure

A number of PE firms invest actively in the Italian real estate market through structured investment schemes including REIFs and externally managed SICAFs established under Italian law. Most frequently, such investors are leading PE operators with a worldwide presence that focus on large portfolios with a value-added strategy.

IV TRANSACTIONS

i Legal frameworks and deal structures

In the Italian market, real estate deals are typically structured either as share deals, where the investor acquires an interest in an entity owning real estate, or as asset deals, which entail the direct acquisition of real estate. The reason to prefer one investment scheme over the other may lie in a number of elements. This choice may carry major consequences, especially in terms of process, timing, tax regime and potential liabilities of the investor.

Asset deal

Asset deals are usually simpler than share deals as, in such a case, the purchaser does not take over the liabilities and contracts of the seller, except for certain specific tax liabilities and for certain contracts that are transferred by operation of law together with the property (e.g., lease agreements). Therefore, the relevant legal due diligence may be limited only to certain matters, including:

a title of ownership;
b existing encumbrances;
c compliance of the property with applicable laws;
d main terms and conditions of the relevant lease agreements (if any); and
e with reference to tax-related matters, an assessment of the regular fulfilment of obligations concerning the payment of certain indirect taxes related to the real estate, which may give rise to a real estate lien provided by law.

On the other hand, asset deals entail certain complexities, as they need to comply with certain acquisition formalities provided by law. For example, under Italian law, a transfer deed shall include certain mandatory provisions (e.g., declaration on the cadastral and building compliance of the asset transferred) and, for the for the purposes of its enforceability vis-à-vis third parties, shall be notarised and recorded in real estate registries.

Share deals

With respect to share deals, as the investor acquires an interest in the entity that owns the real estate, it assumes, indirectly, all the risks relating to the previous operation of the business exercised by the target. Therefore, this investment structure usually requires a broad due diligence to investigate, in addition to the matters mentioned above with respect to asset deals, a number of aspects relating to the target, including an analysis of the corporate documentation and agreements (e.g., company by-laws and shareholders agreements, or fund rules), which may provide for restrictions to the transfer of shares or units jeopardising the transaction, employment relationships and IP rights held by the target (especially when investing in the hotel industry).

With reference to tax-related matters, share deals require broader tax due diligence on the whole target entity (e.g., formalities related to tax returns, payment of direct taxes and other specific issues for real estate companies).

Additional specific aspects to be carefully addressed by the investor may be the following:

a governance: following the execution of a transaction, the investor may need to restructure the governance, including through the resignation and replacement of the members of the management body and the release of responsibilities vis-à-vis the resigning directors;

b change of control: clauses pursuant to which a change in the shareholding resulting from the transaction may trigger the termination of agreements potentially crucial for the entity's operations; and

c group reorganisation: the investor might need to carry out certain post-closing activities to achieve a functional group structure or to pursue certain tax efficiencies, or both. Such reorganisation process is often intended by the investor as an essential part of the deal and, therefore, may be decisive when defining the structure and the funding of the transaction.

Apart from specific considerations on the applicable tax regime, the structure of a share deal may offer certain benefits that may lead an investor to prefer such investment scheme over an asset deal (for example, in terms of potential time savings).

Indeed, the acquisition of an interest in the target may allow the investor to avoid the application of certain requirements relating to the transferability of the real estate connected to compliance with the law and to cultural or historical interests, or both, over the property (possibly entailing a preemption in favour of the competent authorities). In certain cases, this may significantly accelerate the acquisition process.

Compared to those required for an asset deal, acquisition formalities to be met in a share deal are less burdensome. Whereas in the case of an acquisition of interests in a limited liability company the transfer shall be notarised and filed with the competent company register for the purposes of its enforceability, if the target is joint-stock company, the transfers are made by means of endorsement. Moreover, when a joint-stock company is listed in a stock exchange, the trading does not require specific acquisition formalities and may be completed through licensed intermediaries.

In this respect, it is worth mentioning that when the transaction consists of the acquisition of a qualified interest in a public entity listed in a regulated market (such SIIQs and listed REIFs), additional formalities and incisive restrictions relating to tender offer regulations will apply. However, tender offers are not seen particularly frequently in the Italian real estate market.

Acquisition agreement terms

The typical structure of the acquisition agreements entered into in the context of real estate transactions are quite similar both in the case of asset deals and share deals, regardless of the type of investor involved. The most common contractual scheme is indeed developed from the common law model, which generally focuses on the following aspects.

Scope

In the context of asset deals, the definition of the exact scope of a transaction requires a precise cadastral identification of the real estate. As the performance of such activity entails the analysis of cadastral registries, an investor may benefit from the support of a public notary and of technical advisers. Such consideration applies also to share deals relating to M&A and real estate transactions as the ultimate assets acquired are real estate.

Price

When directly purchasing real estate, the purchase price is usually determined *ex ante* as a fixed amount based on a number of factors such as the expected profitability of the property. The mechanics to determine the purchase price of a target entity are usually less straightforward. Based on recent market practice, they are frequently subject to various forms of adjustments to be carried out post-closing, mainly to reflect the business performance of the target between the time the purchase price is agreed upon and the date of closing.

Representations and warranties

The set of representations and warranties typically requested in M&A and real estate transactions covers:

a full title of ownership;
b absence of encumbrances and liens, such as mortgages, easements and preemption rights;
c the validity and effectiveness of lease agreements;
d compliance of the property with applicable laws;
e the fulfilment of tax obligations; and
f an absence of litigation.

In the context of a share deal, a customary set of representations and warranties may include also the following:

a the power and capacity of the seller;
b employment matters and social security compliance;
c the validity and effectiveness of main agreements;
d the accuracy, correctness and completeness of financial statements; and
e commercial licences and IP.

Indemnity obligations

With respect to indemnity obligations, there are no significant differences between asset and share deals. Save for those relating to breach of representations and warranties covering title of ownership and tax liabilities, the duration term of the indemnity obligations usually ranges between 12 to 24 months.

It is worth mentioning that during the past few years, warranty and indemnity insurances have experienced remarkable growth in the Italian real estate market as they allow a clean exit for the seller. However, such coverage has to be meticulously negotiated in order to match the set of representations and indemnities agreed by the parties: this may entail longer timeframes and some additional costs.

ii Hostile transactions

Due to a number of factors relating to both structural and subjective characteristics, in recent years the Italian market has not experienced hostile transactions concerning the real estate industry.

iii Financing considerations

Although the structure of real estate financing transactions is usually standard, certain peculiarities may be observed depending on the structure of the underlying transaction.

In asset deals, the loan is granted directly to the purchaser of the asset, as borrower, through a mortgaged medium-term loan facility agreement. Subject to certain legal requirements, this allows lenders to benefit from a significant reduction of the consolidation period of the mortgage for the purposes of the clawback period under Italian insolvency law. Additional security interests, such as the assignment by way of security of receivables arising out of the transaction documents or a pledge over the bank accounts of the borrower, usually assist the financing.

In share deals, a transaction is normally structured as a merger leveraged buyout pursuant to Article 2501-bis of the Italian Civil Code. Accordingly, a loan is granted to an SPV incorporated for the purposes of the acquisition of the target and, indirectly, the real estate. Pursuant to the Italian law provisions on financial assistance preventing a company from (directly or indirectly) granting loans or guarantees for the purchase or subscription of its shares, at closing, lenders cannot benefit from any security interests over the target's real estate and its cashflows. The financing transaction is thus structured in two stages:

a the first stage, starting at closing, during which the loan is granted to the SPV and is only secured by an assignment by way of security of the receivables arising out of the transaction documents and a pledge over the shares of the SPV; and

a the second stage, starting upon completion of the merger leveraged buyout between the SPV and target to be performed within a limited period after closing (usually less than six months). During the second stage, the security package includes also a first ranking mortgage over the real estate, a pledge over the bank accounts on which cashflows are credited and an assignment by way of security of the receivables arising out of any insurance policy covering the property.

iv Tax considerations

The indirect taxes regime applicable to the purchase of real estate properties located in Italy depends on the characteristics of the seller, on whether the property qualifies as commercial or residential and on the renovation works executed by the seller.

For VAT purposes, assuming that the seller is registered for VAT in Italy and a transaction involves a commercial property, the purchase would be:

a compulsorily subject to VAT (at 10 or 22 per cent without the reverse charge procedure) if the seller has executed certain renovation works (specifically listed by the Italian building code) in the five years prior to the purchase; or

b otherwise exempt from VAT or subject to VAT (at 10 or 22 per cent with the reverse charge procedure) by option of the seller. The application of the exemption may give rise to certain limitations with respect to the deduction of input VAT.

For transfer taxes purposes, the purchase of commercial properties is subject to a fixed registration tax (€200) and to proportional mortgage and cadastral taxes (respectively 3 and 1 per cent). Such taxes are reduced to one-half (respectively 1.5 and 0.5 per cent) if part of the transaction is a REIF or a SICAF or if the purchase is made by a SIIQ.

On the other side, share deals involving Italian real estate companies are not subject to VAT and the related deed of purchase, if executed in Italy, they are subject to fixed registration tax (€200). Moreover, if a purchase involves the shares of an Italian joint-stock company, the financial transaction tax (Tobin tax) would apply at 0.2 per cent of the price of the shares.

In the case of share deals, specific aspects relating to the taxation of the Italian company acquired and the repatriation of profits to foreign shareholders should be analysed, both in light of domestic and EU provisions. Moreover, following on from an acquisition, reorganising an Italian company into a REIF may be considered, which, depending on the type of investor, may allow a more efficient structure from a tax perspective.

v Cross-border complications and solutions

Apart from certain specific technicalities, mostly relating to tax and anti-money laundering matters, there are no particular restrictions for foreign acquirers investing in the Italian market, with an exception being made for investments in sectors qualified as being strategic for the purposes of national security and defence. These transactions are, indeed, subject to clearances and constraints (including a veto right) to be released or imposed, as the case may be, by the government to protect such sectors from foreign speculative acquisitions. Moreover, in the context of the covid-19 emergency, the powers of the government have been broadened to include the authority to undertake any action aimed at preserving and strengthening the productive chains of the country. It is still debated whether such 'enhanced golden powers' are likely to produce an impact also in the Italian real estate market.

V CORPORATE REAL ESTATE

In the past few years, it has been possible to observe a marked trend in the Italian market to separate corporate real estate from operating companies (opco/propco separations). Opco/propco structures are frequently used in transactions involving supermarket chains, shopping centres and hotels. In a number of cases, such separations are functional to sale and leaseback transactions, where the company originally owning the real estate transfers the same to another company (a propco) and continues operating the business within the property by means of a lease agreement executed with the propco following the transfer.

In the case of acquisitions carried out though Italian REIFs, such separation is made due to regulatory constraints. Indeed, Italian REIFs may hold directly real estate assets and participations (but not going concerns).

VI OUTLOOK

The covid-19 health emergency has deeply impacted the world economy, bringing to an abrupt halt the global economic growth of Q1 2020. Even the real estate industry (and especially the hospitality and retail segments) have suffered dramatically from the impacts of the pandemic, with several real estate transactions in Q1 2020 interrupted or suspended in light of the challenges and uncertainties in assessing the recovery of the market and price-related risks. Healthcare and logistics assets continue to gather interest of real estate investors as they are perceived as defensive sectors benefiting from income stability, operation criticality and occupational density, which are expected to reduce asset-level risks.[7]

The main players in the market predict a sharp correction in Q2 and a recovery in Q3 2020, but growth in the industry is expected to be achieved only in Q1 2021.[8]

All operators will be called upon to build upon the resiliency they have fostered under the covid-19 crisis by adapting to the new needs for specific health standards and the flexibility of both businesses and consumers. This trend may be a key factor in shaping the real estate sector at all levels in the coming years.

7 Source: COVID-19 Global Real Estate Implications Paper II, Jones Lang LaSalle, 20 April 2020.

8 Source: Impact of Covid-19 Italian investment market, Colliers International, 7 May 2020.

Appendix 1

ABOUT THE AUTHORS

UMBERTO BORZI

Chiomenti

Umberto Borzi is a partner at Chiomenti. Umberto Borzi advises Italian and international clients (banks, funds, listed companies and other regulated entities) on corporate law M&A and real estate transactions with a particular focus on company law, mergers and acquisitions, private equity, joint ventures, real estate acquisitions, asset management, real estate companies' listings and extraordinary capital transactions.

Umberto Borzi has been ranked as a leading lawyer in the most prominent international legal guides such as *Chambers* and *The Legal 500*.

Umberto Borzi joined Chiomenti in 1998 and became a partner in 2003.

He has been a member of the Rome Bar since 1991 and graduated in law from the LUISS Guido Carli University, Rome, Italy in 1987.

CHIOMENTI

Via Giuseppe Verdi 2
20121 Milan
Italy
Tel: +39 02 721 57607
Fax: +39 02 72157230
umberto.borzi@chiomenti.net
www.chiomenti.net

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