BonelliErede

Energy and Infrastructure Focus Team

26 April 2020

Energy and Infrastructure M&A in the Age of Covid-19: Italy

Energy and Infrastructure Focus Team

Focus Team Leader
Mario Roli
mario.roli@belex.com
tel. +39-02-77113306

Authors

Mario Roli
mario.roli@belex.com
tel. +39-02-77113306

Barbara Napolitano
barbara.napolitano@belex.com
tel. +39-06-84551504

Giorgio Frasca
giorgio.frasca@belex.com
tel. +39-06-84551279

Giulia Elisabetta Uboldi
giulia.uboldi@belex.com
tel. +39-02-77113843

1. RISKS AND LEGAL ISSUES

1.1 Stricter rules for FDI screening ("Golden Power")

The government's Golden Power to veto/impose conditions on the acquisition of strategic assets has been expanded:

- new sectors, such as banking, biotech, data, food supply and safety, healthcare and insurance sectors are now also subject to screening (in addition to defense and national security, 5G networks and components, energy, transport and telecommunication sectors);
- government clearance is also needed, until 31 December 2020, for acquisitions that entail an EU entity gaining control of the business; for non-EU entities, the thresholds triggering screening have been lowered significantly, i.e., 10% (for an investment of at least EUR 1 m), 15%, 20%, 25% and 50%; and
- the government can conduct investigations also ex officio in the absence of notification.

For more details, check out our April newsletter.

> Investors pursuing opportunities in the infra space (inc. core-plus and non-core assets) will most likely have to go through screening, meaning that an additional condition precedent to closing needs to be added to the related contract and an extension to the interim period to closing should be considered (see the next point).

1.2 All terms for administrative procedures suspended until 15 May: process delays

Closings of acquisitions of infra assets are often subject to administrative authorisations (e.g., for motorways, from the Ministry of Infrastructure and Transport). The Covid-19 emergency regulations have put all administrative procedures (inc. Golden Power procedures) on a stop-the-clock from 23 February to 15 May (only in exceptional cases of emergency will filings submitted during that period be processed). For more details, check out our April newsletter.

Process delays are expected also after the suspension – which could be extended – given the inevitable backlog of screening filings (also due to the increased scope of Golden Power).

> Investors pursuing opportunities in Italy may face delays in obtaining closing authorisation and, in turn, longer interim periods. We highly recommend contacting the public authority to check whether the envisaged time to complete the authorisation procedure is compatible with the envisaged time for closing.
>
> MAC clauses should be drafted to take account of longer interim periods and possible future effects of the pandemic on the target's business.

1.3 Lower thresholds for disclosure of acquisitions of shareholdings in listed companies and for declarations of intent

For acquisitions of shares in 104 key, listed companies, the thresholds that trigger the disclosure obligation have been lowered to 3% for SMEs (normally 5%) and 1% for non-SMEs (normally 3%) – for 11 April–11 July. Moreover, the first threshold (in addition to the others) triggering the requirement to issue a declaration of intent (i.e., the declaration which an investor must issue disclosing its goals for the business in the first six months) has been halved to 5%. For more details, check out our April newsletter.

> Investors pursuing opportunities in listed companies need to consider disclosure obligations, which are clearly aimed at preventing opportunistic purchases and stake-building, and short-termism in general.

1.4 Challenges in pending revision of economic-financial plans (PEF) and the risks related to potential economic and financial imbalance (*disequilibrio*) for concession-based businesses

The global uncertainty is obviously creating challenges for operators revising (both on an ordinary or extraordinary basis) their PEF plans, especially when it comes to the assumptions and forecasts. These challenges are likely to prolong the revision time and could also impact the outcome of that revision.

The current emergency is also likely to cause an economic and financial imbalance (*disequilibrio*) under concessions. Grantors and operators will need to adopt short-/long-term measures (e.g., PEF revision) to address any such economic and financial imbalance.

Investors pursuing opportunities in concession-based businesses should consider possible delays in PEF revision and the risks and uncertainties related to potential economic and financial imbalance (*disequilibrio*) under the concessions.

1.5 Temporary ban on paying dividends and buying back shares for companies that take out a Covid-19 state-backed loan

Companies hit by the Covid-19 emergency may apply for a state guarantee to secure loans with a maximum term of six years granted between 9 Apr. and 31 Dec. of this year. Granting of the guarantee is conditional on the company (and for groups, all other Italy-based companies) not paying dividends or buying back shares this year.

Investors evaluating businesses that have a state-backed loan should keep the ban on paying dividends and buying back shares in mind. Holding companies need to keep this in mind too, given that the ban extends to all group companies.

1.6 Risk of buying a business that is in breach of debt covenants (esp. liquidity- related ones) or facing a debt downgrade – or is at risk of either occurring

Some businesses are suffering a big fall in revenue (esp. in the transport sector), which is denting debtors' credit worthiness and leading to rating downgrades and breach of debt covenants. If no cure period or exceptions are provided in the contractual documentation, to prevent debt acceleration the debtor will need to request waivers from the lenders/bondholders and/or to re-negotiate the financing terms. Liquidity shortage due to falls in revenue can be addressed by obtaining a moratorium from creditors and/or by seeking other sources of funds (inc. assumption of additional debt, to the extent the existing financing terms permit).

Investors need to consider the risks related to acquiring companies that might be in breach of debt covenants due to the emergency. Obtaining waivers from the target's lenders/bondholders and/or negotiating its existing financing terms can certainly help minimise the risks. When it comes to the interim period between signing and closing, investors need to be sure that proper measures are in place to face liquidity shortage.

1.7 Logistical difficulties in managing an acquisition during lockdown

Under the current Covid-19 lockdown protocol, physical due diligences, inspections and facility visits may prove to be impossible or require specific (and potentially burdensome) sanitary measures.

> Investors should seek advice before starting the due diligence process to understand its feasibility under Covid-19 regulations

1.8 Due diligence challenges: disclosure on pandemic effects

The impact of the pandemic on business prospects is highly sensitive in due diligence assessments, and listed companies have to publicly disclose the effects. For more details, see our April newsletter.

> Investors need to fulfil their regulatory disclosures duty to the letter to be sure to avoid market abuse regulation challenges. Equally close attention should be paid to the contractual regulation of the negative consequences of disappointing future results, not to mention to earnouts.

2. Opportunities

2.1 Increased interest in data, TMT and healthcare companies

Covid-19 may lead to increased interest in service providers in non-core infra sectors, e.g., healthcare. Some deals have been seen since the outbreak of the virus – e.g., for nursing homes, hospitals, and companies that provide services to hospitals (e.g., sterilisation of medical instruments). There is also a common sentiment in the market about the increasing importance of data and telecom infrastructures come the post Covid-19 era – and that will likely pave the way to other deals.

2.2 Utilities may divest (minority) stakes in infra assets to cope with pressure from their state shareholders for higher dividends

Many utilities are majority-owned by local municipalities that rely heavily on dividends to subsidise public services to their community. Given the market conditions, municipalities will be struggling to find funds and may resort to pushing their controlled companies to increase the dividend flow. Utilities instead will likely be facing problems in getting customers to pay. These factors combined might well lead utilities to dispose of their (often minority) stakes in core infrastructure (e.g., gas, district heating and electricity network); this could include selling them to entities with a lower cost of capital and lease back certain assets to maintain or increase dividend payments.

2.3 Family-run businesses might be more open to partnerships or bringing in investors

Many Italian infra assets are family-controlled and, once the emergency has passed, some will be more open to new ways to make their business more robust and resilient, such as consolidation, partnerships or outside investors.

2.4 Greater flexibility for concessionaires from public grantors, regulators and EU authorities

Grantors and EU authorities are undoubtedly aware that they will likely need to adopt a more flexible approach towards concessionaires to counter the repercussions of the Covid-19 pandemic on concessions.

2.5 Attractive prices for listed companies

The drastic fall in stock prices means bargains are there to be had in the energy and infrastructure sectors.

2.6 Trend of energy and infrastructure companies aggregating

The economic and financial repercussions of Covid-19 will likely encourage/accelerate aggregation, especially between small and mid-size operators. Indeed, joining forces/resources will enable operators to create a more solid and efficient business. The government could also encourage this by introducing more elasticity in the legal framework applicable to specific sectors, which would certainly boost this trend.

Energy and Infrastructure Focus Team

The Focus Team is a constellation of skills in different practice areas with a focus on energy and infrastructure.

Mario Roli
Corporate

Niccolò Baccetti
Corporate

Riccardo Bicciato
Banking & Finance

Elena Busson
Corporate

Roberto Cera
Corporate

Paolo Daino
Corporate & Litigation

Gabriele Malgeri
Banking & Finance

Giuseppe Manzo
Corporate

Fulvio Marvulli
Corporate

Massimo Merola
Antitrust

Barbara Napolitano
Corporate

Luca Perfetti
Administrative

Alberto Saravalle
Corporate

Andrea Silvestri
Tax

Catia Tomasetti
Banking & Finance

Roberto Flammia
Banking & Finance

Alessandro Rosi
Administrative

Livia Cocca
Corporate

Giorgio Frasca
Banking & Finance

Giovanna Zagaria
Banking & Finance

Giulio Mazzotti
Tax