The pursuit of a company's interest over the life of a company

Corporate Acquisition and Joint Ventures Commission

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National Report of Italy

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Introduction

The typical lifecycle of a company consists of various phases, as for example, startup, growth phase, maturity (mid- to large-size privately held company), IPO and listed phase, and finally the acquisition by another company.

The various stakeholders in a company – understood in a very broad sense including equity holders, debt holders, management, employees, advisors and public – have expectations in the company. According to the stakeholder-value-theory all these expectations of the stakeholders form the company's interest.

Undoubtedly, the expectations of the various stakeholders and, therefore, the company's interest change and develop over the life cycle of the company.

The general report and the working session focus on these changes and developments, how they are reflected resp. influenced by the rules of the various jurisdictions and what the consequences are for us, the legal advisors. For efficiency reasons, the general report is limited to the developments of certain stakeholders' expectations (see A to D in the below matrix)

The following matrix provides an overview of the stakeholders (A to D) and the phases (1 to 5) that are covered by this general report. At the same time it provides an overview of the structure of this questionnaire (chapters A to D, each having sub-chapters 1 to 5). Our goal is to shed light on one or several aspects of a specific stakeholder's interests in each phase so that, as a result, the entire questionnaire provides an overview of the development of the interests of the various stakeholders over the life cycle of the company and, thus, shows the development of the company's interest as such.

	1. Startup	2. Growth	3. Maturity	4. IPO / Listed	5. Acquisition
A. Equity holders	A.1	A.2	A.3	A.4	A.5
B. Debt holders	B.1	B.2	B.3	B.4	B.5
C. Management / Employees	C.1	C.2	C.3	C.4	C.5
D. Lawyers	D.1	D.2	D.3	D.4	D.5

The general report and the working session focus on these changes and developments, how they are reflected resp. influenced by the rules of the various jurisdictions and what the consequences are for us, the legal advisors.

A. Interest of equity holders

1. Start-up phase

In the start-up phase, an entrepreneur or third parties may wish to invest in a business idea as equity holders in a business association. In this context:

1.1 In your opinion, what is an entrepreneur's typical reasoning for setting up a specific business association? Attract investments by third parties? Avoidance of personal liability? Tax reasons? Protect IP rights and technology?

The main reasons are based on the attraction of investments by third parties and the avoidance of personal liability considering that as better described below the limited liability companies are the most common vehicle used to set up a business association. In general terms, the tax perspective is not a key element. As far as IP rights and technologies, they are normally protected better on an individual basis than on the corporate side.

1.2 What kind of business association structures does your jurisdiction offer to equity holders (e.g., partnerships, corporation, LLC, etc.)?

The equity based vehicles commonly used to set up a business venture are limited liabilities companies. Indeed, the most widespread types of companies in Italy are: *Società per Azioni* – S.p.A. (joint- stock companies) and *Società a responsabilità limitata* – S.r.l. (liability limited companies). Partnerships like the *Società in nome collettivo* are generally characterised by (i) unlimited joint and several liability of partners for company obligations and (ii) each partner acts as a director of the company with managing powers; this kind of vehicle is set up for a very small business.

- ***What are the most crucial differences between these business association structures from an equity holder's perspective?***

The limitation of personal liability is the reason which grounds the choice of a limited liability company respect to a partnership by an entrepreneur.

The S.p.A.[1] is a very structured model in terms of corporate governance (the board of statutory auditors is mandatory) and has a minimal share capital of euro 50,000. The S.r.l.[2] is a vehicle more flexible than the S.p.A, the minimal share capital is equal to euro 10,000 for incorporating an ordinary S.r.l.

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[1] See articles 2325 of the Italian civil code.
[2] See article 2462 of the Italian civil code.

Recently, in addition to the ordinary model, a new type of S.r.l. has been introduced the Simplified S.r.l. (*Società a responsabilità limitata semplificata)* – "**S.r.l.s.**"[3]. The main differences among ordinary S.r.l. and the S.r.l.s. are the following:

(i) S.r.l.s. can be only incorporated by individuals (a wholly-owned S.r.l.s. is allowed); therefore, legal entities (such as companies) are excluded. Conversely, an ordinary S.r.l. can be incorporated by individuals as well as legal entities;

(ii) S.r.l.s. capital may not be lower than Euro 1.00 and higher than 9,999.99. Conversely, the capital of an ordinary S.r.l. may not be lower than Euro 10,000.00

(iii) S.r.l.s. capital contributions can be carried out in cash only. Conversely, in the event of ordinary S.r.l., in-kind contributions, contributions of receivables, and contributions of services may be also made. This vehicle can be useful to set up an holding company investing and controlling into Opco vehicle.

- ***If statistics on the use of business association structures are available in your jurisdiction: which are the most commonly used business association structures for start-ups? Do you see a particular reason for the dominance of one specific structure?***

The ordinary S.r.l. is the most commonly used business association structure for start ups considering the low share capital required, the less complex corporate governance requirements and its flexibility: as matter of fact shareholders can provide a tailor made set of participation rights by the by-laws. Indeed, the by-laws may derogate from much of the legislation governing an S.r.l.

- ***In case of a corporation or LLC (in the following we simply refer to the "company"): are there any equity instruments other than common shares that are typically used for equity investments? Non-voting shares? Other forms of participation rights?***

Corporate law provides investors of S.p.A. with certain categories of shares embodying privileged rights especially in terms of distribution of dividends, liquidation preference and non – voting shares. As far as the S.r.l. investors can negotiate certain special rights connected to their shareholding (the so called "*quota*")[4], which can be set forth not only by shareholders agreement but also by the by-laws. These special rights are various and can be divided in economic rights (i.e. liquidation preference and preferred rights for distribution of dividends) and administrative rights (i.e. preferred voting rights, appointment of administrative bodies members).

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[3] See article 2463 *bis* of the Italian civil code.
[4] See article 2468, paragraph 3 of the Italian civil code.

The Law no 221/2012 has provided a new regulation (the 'Law')[5] aimed at encouraging innovation through the creation and development of new companies qualified as 'innovative start-ups' (the "Innovative Start Ups"). The Law refers to "innovative start-ups" to make it clear that it is not dealing with any new company but only those S.p.A. and S.r.l.[6] whose business is clearly linked to innovation and technology. The by-laws of the Innovative Start Ups, incorporated by the S.r.l. vehicle, can set forth certain categories of shareholdings including special rights both economic and administrative.

- ***Can equity investors remain anonymous (for example by the use of bearer shares)? Anonymous towards the company, other investors, the public? In the event equity investors cannot remain anonymous when holding shares, is there any alternative scheme that can be implemented to participate on an anonymous basis (for example, silent partnership schemes)?***

Investors can subscribe for bearer shares only in S.p.A. also by virtue of an holding company or a trust company[7]. The participation on an anonymous basis is not allowed into Innovative Start Ups where it is mandatory to declare the beneficial owners (for both the trust and the holding companies) of the relevant shareholdings. In addition it is questionable if trust companies can subscribe for shareholdings into ordinary S.r.l.[8]

1.3 Once the entrepreneur has set up a company: what could be a typical focus of third party equity investors when they invest in a company in this phase?

- ***What could typically be the friends', family's and fools' ("FFF") focus? Helping the entrepreneur to get his / her business going?***

FFF support the business idea at an initial stage up to the incorporation of the company. Their commitment depends on the kind of business run by the entrepreneur and by the amount of the equity required for the early stage phase.

- ***What could typically be the professional investor's focus?***

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[5] Several incentives as well as exceptions to the general rules applicable to enterprises are provided by the Law to stimulate investments in Innovative Start Ups. Only the companies existing for no more than 48 months starting from 2012 can be registered like Innovative Start Ups provided that certain requirements are met. On the assumption that all the above law requirements remain unchanged, a start-up is considered 'innovative' only for the first four years following its incorporation. A different term, not exceeding six years, will apply in case the Start Ups has been incorporated before the enactment of the Regulation.

[6] It is questionable if the Law can be applied to the S.r.l.s because certain provisions of the Law cannot be suit with this vehicle which is standardized with a mandatory by-laws.

[7] See the Law no 1966/1939 which governs the Italian trust companies.

[8] At a money laundering level, it is mandatory to declare the beneficial owner of the shares by the money laundering regulation .

Founders usually think of Start Ups as ideas, but investors think of their feasibility and sustainability especially if ideas need to be developed by a material process of R&D. At this stage, their investment is sized on the said priorities.

- ***If there is a difference in focus among the various equity investors, how is this typically reflected in the legal relationship (be it corporate or contract law)? Are there legal instruments that are only used by certain investors (e.g., only by professional investors)?***

The leading difference may be the size of investment committed during the early stage phase. However, the angel investors, which fund the company at “seed” and “early stage” level, can also give considerable support with significant know-how, managerial and technological expertise by a medium-term involvement to establish Start Ups in their market.

At a contractual law level, the different weight of the investors can be reflected by special rights concerning the corporate governance and the distribution of dividends agreed by a shareholders agreement. It is worth noting that the Innovative Start Ups cannot allowed the distribution of dividends to the shareholders on the purpose that dividends must be reinvested in the companies.

There are not special legal instruments for professional investors other than what described above in relation to the participation with special rights.

2. Growth phase

In the start-up phase a business idea comes into existence: the idea is put into a business plan, a company is set up, first steps relating to production, service, distribution, sales etc. are made. The growth phase allows potential new investors to better assess not only the viability of business idea, but also the commitment of the people involved. In this phase, the new investors are usually not FFF, but professional investors. As a result, the FFF who invested in the start-up phase are faced with more demanding and skilled potential new co-investors. Against this background:

2.1 In your opinion, does the focus of the equity holders (e.g., the FFF or professional investors) shift in the growth phase (as compared to the start-up phase)?

The focus of the equity holders shifts in the growth phase from the sustainability of the business idea to the go to market strategy.

- ***If so, what could be a particular focus for equity holders in the growth phase? Protection from dilution?***

At this stage investors think of their investment in terms of ROI depending on the go to the market strategy and revenues. At the same time they aim at keeping their corporate control at a board level. As far as the dilution is concerned, they normally negotiate a full ratchet or weighted average mechanisms at their entry into the companies when they are willing to minimize the risk that any next round of funding could be at a lower price per share than what they are paying their round. A full ratchet formula can be more easily negotiate by VCs but it can be problematic for the investors in a syndicate (like angel investors). This protection is typical for investments in hi tech business where the risk of the venture and the decrease of the pre-money evaluation at a second round may be frequent.

- ***In your experience, do the equity investors from the start-up phase participate in further capital rounds in the growth phase? Do they usually accept dilution? Do they usually cash out at this point in time?***

It is mostly common that VCs or other professional investors participate in further capital rounds in the growth phase to the extent they are subject to the achievement of certain milestones in terms of know how findings or turnover results. On the other hand, angel investors seldom if ever participate in further capital rounds.

They can accept the dilution of their shareholdings provided that they maintain the board control especially on certain decisions related to strategies and capex. In addition, they can accept to be diluted to the extent they can improve the percentage of the dividends which can be not proportional to their shareholding if set forth by a special right both at shareholders agreement and by-laws level.

2.2 In your jurisdiction, does the company law provide existing equity holders protection from being diluted in further financing rounds in the growth phase? If so, how are they protected? Is there a need for equity holders to seek protection on a contractual basis?

In theory, the company law does not provide any direct protection for existing equity holders because the increases of the share capital can be fully allocated to new shareholders in order to finance the company to the extent it is provided by the Articles of Association. In this case the existing equity holders are entitled to withdraw from the company and to be liquidated their shareholdings pursuant to certain mandatory criteria provided by the law or by contractual provisions (included at a shareholders agreements level) quantifying the value of the shareholdings[9].

[9] If the increase of the share capital is not allocated to a new shareholder it must be allocated to all the existing shareholders which have an option rights on the issuing shares. At a S.p.A. level, this option right can be excluded or limited to the extent there is an evidenced interest of the company in this respect. At S.r.l. level this possibility must be set forth by the by-laws. The Italian Courts void shareholders resolutions of increase of share capital

The contractual provisions in use to avoid or mitigate the dilution effects are the full ratchet and weighted average mechanisms.

2.3 ***When new potential investors offer to come on board during the growth phase, the existing equity holders may be reluctant to provide the information required to satisfy the potential new investor's need for valuation. The reason for the existing shareholders' reluctance may be, for example, that the required information contains (still) unprotected intellectual concepts, knowledge or ideas. In your experience, which legal instruments are used to find a balance between the potential new investor's need for information and the existing equity holders' wish to keep such information confidential? Do existing equity holders have legal means to prevent management from disclosing such information?***

There is a various set of non disclosure and confidentiality agreements which can be agreed with the new potential investors during the preliminary and due diligence phases. On the existing equity holders side, the enforceability of these contractual means are quite unpredictable especially on the IP and know how sides, therefore the best deterrent may be: (i) a penalty in case of any breach of the non disclosure/confidential duty, (ii) lock out agreements excluding for the new potential investors any negotiation with competitors of the target for a certain period; (iii) a non compete commitment for a determined period in the event of the negotiation collapses for any reason.

In general terms, the management is under a strict duty of loyalty aiming at (i) not disclosure information also indirectly (i.e. through the new potential investors) to competitors and (ii) not to damage the company.

3. Maturity

During the various capital rounds in the growth phase, the circle of equity investors in a company typically becomes larger and the atmosphere may become less familiar. Also, in the maturity phase the management of the company may become more professional in the sense that there is a management in place which is not, or not significantly, invested in the company (i.e., intensification of the principal-agent-conflict). As a consequence, legal concepts that govern the relationship between equity holders (such as fiduciary duties of majority equity holders) as well as legal concepts that govern the relationship between management and equity holders (such as fiduciary duties of the board members / management, duty of loyalty, principle of equal treatment) may become more important. In other words, corporate governance may become more important. Against this background:

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adopted just in order to dilute minority shareholders on a willful conduct of the majority shareholders if duly evidenced by the plaintiff.

3.1 In your opinion, how does the equity holder base change between the start-up phase, the growth phase and the maturity phase? How does the focus of the equity holders change? Focus on fair distributions of earnings?

The equity holders base change in relation to the level of maturity of the company. Mid term investors (e.g. incubators, accelerators, angel investors) leave the floor to professional investors which most of the time have scaled the majority of the company but keeping a strict relationship with the minority shareholders which are represented by the founders. As a consequence the focus changes in parallel with the maturity of the company on the market. The equity holders target in this phase is to keep as sustainable as possible the lifecycle of the company in relation to the maintenance of the share market. Distribution earnings policies vary on the single case basis in respect to the different sectors, but as general rule there is fair and prudent trend also considering the enduring credit crunch and the economic crisis which suggest to finance the business as much as possible by the internal cash flow. As underlined under the paragraph 1.3 Section A, the Innovative Start Ups cannot distribute dividends to the shareholders.

3.2 In your jurisdiction, does the law provide for stricter corporate governance rules for large (privately-held) companies as compared to small companies? If so, what exactly triggers the application of the stricter corporate governance rules? In which sense are the corporate governance rules different / stricter?

There is not any corporate governance rules for large companies compared to small companies. However the control on the governing bodies of the large companies is stricter considering that the board of statutory auditors (*collegio sindacale*) is mandatory for the S.p.A., the S.A.P.A. (*società in accomandita per azioni*)[10] and the ordinary S.r.l. (also if Innovative Start Ups) subject to certain parameters[11].

3.3 In your jurisdiction, do (certain) equity holders (e.g., majority shareholders) have obligations towards (certain) other shareholders or the company (e.g., duty of loyalty)? Please explain such obligations.

No, there are not any obligations of equity holders to other shareholders or the company.

[10] This is a partnership limited by shares which is used not so often even though it allows two categories of equity holders *accomandatari* and *accomandanti* depending on they are willing to invest and manage the company in this case they have an unlimited liability or to just invest without being involved in the management and so being unlimited liable. The minimal share capital is equal to Euro 120,000.00.

[11] According to article 2477, paragraph 3 of the Italian civil code, the board of statutory auditors is mandatory if the company (i) is subject to the consolidated financial statements, (ii) controlling a company subject to external auditors and (iii) has exceeded two of the following parameters for two consecutive years: assets exceeding Euro 4,400,000, turnover exceeding Euro and more than 50 employees.

3.4 Does the company have any means to control the circle of its equity holders (i.e., can the articles of incorporation prevent competitors from holding shares in the company?) or have such restrictions to be agreed among the other equity holders (e.g., shareholders' agreement)?

There is not any legal means aiming at controlling the circulation of the participations owned by the equity holders.

At a shareholders agreement level, it can be set forth mechanisms which allow the entry of the new shareholders subject to the prior consent of the other existing equity holders or of the governing bodies; this tools can be useful in order to avoid the involvement in the company of its competitors.

4. IPO / Listed phase

Following the IPO, a company enters into a new phase of being listed. The listing has potentially a great influence on the equity holder: the sale of their interest becomes easier. Against this background:

4.1 How does the focus of the shareholders change through the going public as compared to the maturity phase? Does the fact that a shareholder may at any time sell the residual value in its share (ideally) at a fair price in your opinion soften the focus on distribution of earnings? Does the focus shift from long term to short term?

Italian companies that go public are, mainly, of a familiar structure (owned by founders and their family) and the listing shareholders is normally used to cash in on their past investment. If the founders remain the managers of the company (or retain exclusive right to appoint the managers), as is often the case, their focus doesn't change much as they remain strongly interested in the company and its results (including dividends payout). If the founders loose the right to manage the company they normally divest their investment, if convenient.

4.2 In your jurisdiction, are there publicly available records on the identity of (certain of) the shareholders in a listed company? If so, does this in your opinion influence the shareholders' focus?

As it happens in most EU countries only significant holders (i.e. those holding more than 2% of the share capital) shall notify their holding. This list is publicly available.

4.3 An efficient allocation of resources requires a most accurate pricing of the shares.

- ***In this regard, are companies that are listed in your jurisdiction under an obligation to publish price-relevant information (ad hoc publicity)? If so, please***

provide a short overview of the respective rules including the exemptions from such obligation.

All price sensitive information shall be published with no exception. The definition of price sensitive information is very wide and includes business (e.g. contracts), corporate (e.g. shareholders agreements, significant shareholdings, codes of conduct), administrative (type of management structure) and accounting matters (annual and interim reports). Issuers may, under certain circumstances, delay the publication if believed to be potentially detrimental. In this case, though, the information shall be given to the Italian Securities Commission (CONSOB) which may impose the publication.

- ***It can be assumed that no jurisdiction requires listed companies to publish all price sensitive information. If this is correct in your jurisdiction, how does the law protect the market and its participants (including, the equity holders in the company) from market abuse? Are there insider trading and market manipulation prohibitions? If so, please provide a short overview and, if you can, provide certain peculiarities about them?***

All price sensitive information shall be published. Furthermore all listed companies must create, hold, keep and update a register containing the name of the persons holding privileged information. Any violation of the rules on the register is sanctioned with fines and the conviction of the person at fault. The abuse of privileged information is a criminal offence and sanctioned with fines and the conviction.

In its life cycle, the company may itself become the object of an acquisition and integration into the acquirer's structure. At this point the life cycle of the company ends. For the purpose of the remainder of this questionnaire, we assume the acquirer proceeds via a public tender offer. Against this background:

4.4 In case a listed company (target) is approached by another company (bidder), the board of the target will have to decide whether it supports the offer (friendly offer) or not (unfriendly offer). What are the interests that the board of directors needs to take into consideration for this decision? Shareholders' interests only (e.g., offer price only)? The interests of other stakeholders (employees, community etc.)?

In Italy the BOD can only express an opinion but cannot “fight” the offer. The real point, though, is that most Italian listed company (and probably all of them) have much less than 50% of their shares freely floating on the market, the rest being tied in shareholders agreements or in “family safes” (i.e., holding companies which are not listed), so there is no need to fight the offer. The few Italian listed companies that have been taken over were acquired off the market (Telecom Italia is the best example).

4.5 ***In case of an acquisition of the listed company (target) by another company (bidder), the shareholders' are at a disadvantage as they cannot communicate efficiently or act in concert (for example, regarding the rejection of a low offer). A rational bidder should try to use this disadvantage of the shareholders to his benefit. In your jurisdiction, how does the law protect shareholders of the target in case of public tender offers? (for example, is there a specific process for public takeover offers which provides protection? Does the bidder need to treat target shareholders equally? Are there, for example, minimum price rules and/or best price rules?)***

The offer must be the same for all the shareholders. No minimum price rules nor best price rules exist. In that respect, the opinion of the BOD of the target approving or criticizing the offer may be of help.

4.6 ***As mentioned above, a listing provides (ideally) liquidity for the company's shares and ensures a high level of information for a potential new investor. In fact, equity investors may invest in listed companies exactly for these reasons. In your jurisdiction, how is an equity investor protected from a delisting? Does the delisting require (qualified) shareholder consent? What are the deadlines for the delisting? Do issuers need to provide for an off-exchange trading for a certain period following delisting?***

The only protection for an equity investor is either to hold enough shares so as to block a compulsory IPO or to accept the offer. Delisting is decided by the Stock Market if, in its opinion, there is not enough dealing on a specific share. No consent of the shareholders is required. There is no deadline for the delisting but the process should last 60 days during which the Stock Market decides on the facts and not necessarily upon issuer’s request. Issuers do not have to provide for an off-exchange trading.

B. Interest of debt holders

1. Start-up phase

In the start-up phase, the entrepreneur may ask the so called "FFF" (friends, family and fools) for a loan. In other words the entrepreneur asks them to invest in a business idea as debt holders. In this context:

1.1 In your experience, what could be the typical focus of the FFF in this phase? Helping the entrepreneur to get his / her business going? How is this focus reflected in the legal relationship? For example, will such debt holders be likely to refrain from asking for security? Is the agreed interest rate likely to correctly reflect the risks for the debt investor?

In the start up phase, FFF (just if angel investors) are used to get repayable loans to the companies, with small rates, reimbursable by a short term (e.g. six months).

Most of the time, no securities are required on the company assets (e.g. trademark, patent) whose value at this stage is not easily quantifiable, on the other hand it appears strategic leaving these assets "clean" to attract further investors for the additional rounds. Loans are granted by FFF just to finance the working capital irrespective to get interests [12].

In these case no guarantee or compensation in favor of the shareholder grantor are allowed; for this reason at the start up phase the risk of the granting loans is quite high.

1.2 In your experience, is it common for professional investors to act as debt holders in this phase? If so, how is the different focus of professional investors typically reflected in the legal relationship? What are the legal instruments commonly used in your jurisdiction to protect their interests? For example, is it common for the professional investors to request a personal security by the entrepreneur in case the company does not yet have (a lot of) assets to secure a loan?

It is not common for professional investors to act as debt holders in the start up phase, loans granted into S.r.l. are governed by the rules described under paragraph 2.3. section B above. Their investment is a typical capital contribution funding. Also for professional investors loans have mid term duration, however in the event of an early way out the professional investors sell the credit related to the loan to their buyers in order to cut the risk of remaining a company creditor after their way out when *de facto* they would leave any control on the management of the business.

Personal security may required on a case by case basis.

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[12] [12] Especially Innovative Start Up participate into call for tenders: public calls to get access to public funding and financial incentives (without equity participation) aimed at supporting and facilitating the' launch and development of start-ups.

2. Growth phase

2.1 In your experience, who provides debt in this phase and what could typically be their focus (e.g., high return on investment)?

At this stage professional investors are the typical debt holders. The relevant focus is based on the different angle of perspective of their debt, indeed the financial investors may be an equity holder as well with a direct control of the management of the company and on the covenants related to the loan. It is material to rule by a written agreement the terms of the loans in order to clarify their nature and the relevant repayment otherwise there is the risk that such funding can be qualified like equity contribution which cannot be repaid to the grantor.

- ***Are the debt holders and their focus in the growth phase typically different from the ones in the start-up phase? Is it now mostly professional investors (and no FFF)?***

Professional investors are more often directly involved also as debt holder during the growth phase, the focus is funding the working capital and further investments also under the assets side. The size of the funding required in this phase cannot be afforded by FFF.

These professional investors are in most of the cases also "institutional" investors: investors that manage capital for third parties and invest in start ups through a structured process which involves an evaluation team, regardless of their legal nature (e.g. Sgr, Sicar, S.p.A.).

The professional investors can finance S.p.A. (also Innovative Start Ups), S.A.P.A. and Innovative Start Ups by special financial instruments (i.e. *Strumenti Finanziari Partecipativi*) which [13] can be allocated subject to their provision of the By-laws, granting economic (e.g. interests or profits connected to the profitability of the company) and also administrative rights (e.g. voting rights only on specific matters, appointment of members of the governing bodies) to their beneficial.

- ***If there is a difference, how could this be reflected in the contractual relationship? For example, do the interest rates or the security for the debt change?***

The interest rate can be negotiated on a contractual basis also providing a variable rate connected to the achievement of certain milestones in terms of profitability of the company. The personal guarantees granted by the entrepreneur may be advisable also at a second stage in case the company trend does not guarantee the repayment of the loans.

[13] These financial instruments can be issued also against the contribution of work and services from its quota-holders or third parties.

2.2 What kind of security is commonly request by debt holders in this phase? For example, rather collateral (pledge, etc.) or personal guarantees by the entrepreneur? What is the reason for the preference of a specific kind of security?

In this phase strict covenants are common to allow the monitoring of the company by the debt holders. As far as securities, personal guarantees by the entrepreneur are commonest than guarantee by the company which may have its assets already secured by third parties debt holders. First demand guarantee (also issued by banks) can protect debt holders both on the company and the entrepreneur side. These guarantees are enforceable faster than the mortgage or pledge on company assets which would reduce *de facto* the value of the company in the event of the relevant enforcement.

2.3 During the growth phase, the burn rate of the company may be quite high and the company may continuously be at the verge of over-indebtedness. Will investors usually be willing to subordinate their debt? Usually only the entrepreneur / FFF from the start-up phase or also professional investors?

In S.r.l. any loan granted by its shareholders (including founders, FFF, professional investors) is subordinated to any loan granted by third parties if the company was in a distressed status evidencing by thin capitalization or an imbalance between the equity and the over-indebtedness and the fact that capital contributions would have been necessary rather than shareholders loan[14]. It is questionable if this principle is applicable also to any loan granted by the shareholders of S.p.A.; by the way on a contractual basis the subordination of debts can be implemented as the case may be in order to remove funding from the company [15]

3. Investors providing debt in this phase may wish to keep the possibility to participate in the potential valuation upside. How could this wish be accommodated in your jurisdiction? For example, are profit-participating loans or convertible loans commonly used instruments?

Investors can waive the credit related to their loans which can be converted at equity as contribution in kind in exchange of new shares to be issued by an increase of capital.

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[14] Article 2467 of the Italian civil code provides that the loans granted and reimbursed to the shareholders during the year before the company has gone bankrupt must be repaid to the prosecutor because they are deemed as granted in a distressed phase which would have required capital contributions.

[15] Scholars apply the subordination of the shareholders loans also to S.p.A. considering the protection of third creditors and the trend to avoid thin capitalization, in addition article 2411 of the Italian civil code provides the subordination of bonds on contractual basis in S.p.A.

At S.p.A. and S.A.P.A. level, potential investors can subscribe for convertible bonds subject to certain legal requirements are met[16].

3 *After having reached maturity, the structure of debt holders may change fundamentally. Against this background:*

3.1 In your jurisdiction, who is usually the debt holder in the maturity phase (e.g., banks)?

In the maturity phase, banks are surely the debt holder for definition considering the size of the financing normally necessary to support the working capital and the set of assets which can be spent by the company in order to guarantee third party loans.

- ***Are the debt holders and their focus in the maturity phase typically different from the ones in the start-up or growth phase?***

At this stage, debt holders are focused on the interests rate and the guarantee of the loan repayment which is agreed on mid term reimbursement.

In addition to banks and financial investors, S.p.A., S.A.P.A. and S.r.l.[17] (for this latter if provided by the by-laws) can issue in favor of professional investors bonds to the extent that different criteria are met. Bond instruments can represent a profitable resource to diversify the bank indebtedness.

- ***If there is a difference, how may this be reflected in the contractual relationship?***

There is not a substantial difference.

3.2 Before providing debt to a company, the potential debt holder may require information about the company's financial status to assess the default risk. What financial information is publicly available for potential new investors who wish to invest in a privately-held company? Are financial statements available from public registers? Excerpt from the debt enforcement register? Tax returns? Do companies have means to influence the amount of publicly available financial information?

All the financial information included in the financial statements are publicly available at the company register.

Information concerning the solvability of the company are also registered at the data center of Bank of Italy (*Centrale Rischi*), the access to this information is available to banks and financial intermediaries.

[16] S.p.A. and S.A.P.A. can issue convertible bonds provided that the amount of the convertible bonds cannot exceed the double value of the share capital and the reserves as per the last approved financial statements.

[17] According to article 2483 of the Italian civil code, S.r.l. can issue bond to be allocated only to professional investors.

Tax returns and excerpt from the debt register enforcement are not publicly available due to the data protection legislation.

3.3 In your jurisdiction, is it common for privately-held companies to issue notes? Could you provide a short overview of the requirements and the procedure relating to the issuance of notes? Is the focus of note-holders any different from other debt holders?

The issuance of notes are not common for privately- held companies, however, pursuant to the Legislative Decree no 83/2012, small and medium size enterprises as defined by the EU Recommendation no 361/2003[18] can issue the so called *cambiale finanziaria* to be subscribed for by the professional investors. The process for the issuing of this debt instrument is quite complex, as a consequence this factor has discouraged companies from its adoption up to now.

4. IPO / Listed

4.1 Once a company is listed, the debt holders have a considerably higher level of information regarding the company's financial situation. One could expect that this reduces the risk for the debt holder. Thus, in your jurisdiction, do listed companies usually have to pay lower interests?

Truth is that non listed companies can issue notes only in very limited circumstances, as a result the debt market is available to listed issuers only (or almost so). Assuming a non listed company issues notes the interest rate will not necessarily be higher than that payable by a listed company. In fact interest rates are fixed having regard to the solidity of the issuer.

4.2 In your jurisdiction, is it possible to list notes? Could you provide a short overview of the requirements and the procedure relating to the listing of notes? In your opinion, is the focus of holders of listed notes any different from the focus of other debt holders?

The Rules of the Markets Organised and Managed by the Italian Exchange provide for two different procedures for admission to listing of bonds: procedure for financial instruments issued under a programme (art. 2.4.6) and stand alone procedure (art. 2.4.2).

Issuers who intend to implement an issue programme for bonds may apply to the Italian Exchange for a declaration of admissibility to listing of the bonds to be issued under the

[18] Pursuant to the EU Recommendation N. 361/2003 small and mid size companies employ fewer than 250 persons and which have an annual turnover not exceeding 50 million euro, and/or an annual balance sheet total not exceeding 43 million euro.

programme. The Italian Exchange shall issue the declaration within sixty days of the date the documentation to be attached to the application is completed where the issuer satisfies the conditions and requirements laid in the Borsa Rules for issuers of bonds and the characteristics of the instruments do not conflict with the provisions of the Rules. After receiving the declaration of admissibility and after the listing particulars have been made available to the public by the issuer, in order to list bonds issued under the programme, issuers shall submit a listing application to the Italian Exchange, together with the supplementary notice attached to the programme. Within 5 trading days of the date the documentation to be attached to the application is completed, the Italian Exchange, after ascertaining that the conditions and requirements established in the Rules concerning the bonds are satisfied, shall decide and notify the admission decision to the issuer and Consob and announce it in a Notice.

Stand alone procedure: the issuer have to submit the application for admission to listing to the Italian Exchange. Within two months of the day the documentation to be attached to the application is completed the Italian Exchange shall resolve and inform the issuer of the acceptance or rejection thereof and simultaneously notify the decision to Consob (Regulatory Autority). The admission procedure shall be completed when the Italian Exchange, after ascertaining that the listing particulars have been made available to the public, establishes the date for the start of trading and announces it in a Notice.

5. Acquisition

5.1 In your jurisdiction, what is commonly the effect of a public tender offer on listed notes. Do they have to be redeemed? Can holders of listed notes interfere in the process of a public tender offer? If so, by which means?

There is no specific rule on the effects of a public tender offer on listed notes. If successful the notes will either be bought by the bidder or redeemed by the issuer (if it is the issuer who made the bid). Holders of the notes cannot interfere with the tender offer unless they are in a position to avoid delisting. The rules on delisting of notes are as follows:

Borsa Italiana may:

a) suspend the listing of a financial instrument where the regularity of the market for the instrument is temporarily not guaranteed or risks not being guaranteed or where this is necessary to protect investors;

b) revoke the listing of a financial instrument in the event of a prolonged lack of trading or where it deems that owing to special circumstances it is not possible to maintain a normal and regular market for such instrument.

For the purposes of the revocation Borsa Italiana shall refer primarily to the following elements:

a) the dissemination or lack of dissemination of information that may affect the regular operation of the market;

b) the adoption of a resolution reducing the share capital to zero and simultaneously increasing it above the legal limit;

c) the involvement of the issuer in insolvency proceedings;

d) the liquidation of the issuer:

e) an adverse opinion by the statutory auditor or the statutory auditing company or a disclaimer rendered by the statutory auditor or the statutory auditing company for two consecutive financial years.

5.2 In your jurisdiction, what is the typical influence of a public tender offer on existing credit facilities?

The effects of a public tender offer on existing credit facilities is strictly dependent on the price offered.

C. Interest of management / employees

1. Start-up phase

In the start-up phase, it is essential that the key management is committed towards the development of the business idea or project. In this context:

1.1 Which are the most commonly used means to ensure that the management / key employees will not leave the company until the company reaches the growth or maturity phase? Are warrants or similar incentives granted during this stage?

On one hand it is crucial to ensure that the management/key employees do not leave the company, o n the other hand there is not liquidity for sound remuneration at this stage both S.p.A. and S.r.l. level. Cash and stock incentives are the "most popular" schemes, cash incentive are granted only subject to the achievement of goals in a certain period (typically three years) are common. Indeed, these schemes have in common the principle according to which they award the beneficiaries only as variable compensation for their performances or the achievement of certain results but not as a fix one. It is allowed structuring an incentive plan by a mix of cash, equity and other forms of compensation to the extent that this kind of plans are consistent with risk alignment of the granting companies.

Warrant and similar instruments are not included in company remuneration policies.

1.2 It is likely that at this stage, there are not sufficient funds for remuneration of management / key employees. Is it common to grant warrant or stock incentive schemes in your jurisdiction? Is there any other scheme to liaise with this issue?

It is worth remarking that most of the provisions applicable to the incentive schemes concerns the S.p.A.[19] – whether listed or not – even though certain kind of schemes are adopted also by S.r.l[20]. At this stage methods giving immediate access to share capital and methods of remuneration giving future and/or conditional access to share capital are preferred to the cash plans.

[19] Stock Purchase Plans and Restricted Stock Plans are the most common methods of remuneration which allows directors/senior employees to invest in the company or in its subsidiaries. Whereas Stock Grant Plans are normally adopted in order to award directors/senior employees without requirement any payment.

[20] In S.r.l. it is common to award employees by cash – based incentive schemes or by share-based incentive schemes implemented to distribute extraordinary profits to directors according to the article 2389 of the Civil Code. The application of this last scheme – which is typical of S.p.A. - to S.r.l. is quite controversial because it is required the previous approval of the board of the statutory auditors that is not mandatory for S.p.A.

Pursuant to the Law no 221/2012, Innovative Start Ups[21] (both S.p.A. and S.r.l.) are entitled to grant incentive schemes not only for the management but also for the key employees; these remuneration schemes can be stock options and work for equity for individuals who are not shareholders. These instruments benefit from tax incentives. These provisions are applicable to small and medium size enterprises as defined by the EU Recommendation no 361/2003[22] also after the start up phase to the extent they have an innovative core business ("**Innovative PMI**") in accordance with the Legislative Decree no 3/2015.

2. Growth phase

The management plays a crucial part in order that a company achieves going from a start-up phase to a growth phase and tend to assumes considerable risks by devoting to such project. Therefore, it would seem reasonable to protect the management in further financing rounds during the growth phase.

2.1 In case new investors come on board in the growth phase and such investors request replacement of the current management: in such replacement, does the current management usually lose rights granted under an incentive plan? How broad are "bad leaver" provisions usually formulated?

As general rule, incentive plans are in force to the extent the management and/or the key employees are on board. Incentive plans can be aborted when directors/senior employees leave the company before the natural expiration of their mandates or before the normal retirement. Mechanisms can be differ depending on the existence of good or bad leaver.

Bad leavers might be deemed as any termination of the contractual relationship due to (i) dismissal of the beneficiaries when it is not objectively justified, (ii) unjustified resignation, (iii) revocation of directors due to a just cause. However, good leavers might be deemed any termination of the contractual relationship due to (i) dismissal or revocation from the office of the beneficiaries without just cause and (iv) change in control of the subsidiaries where the beneficiary is employed or carries out his office as director[23].

2.2 Upon implementation of an incentive plan, the rights related to the shares that the management will be entitled to receive are usually subject to vesting. Is there any specific vesting period that is applied in your jurisdiction or is the vesting period usually linked to a liquidation event (such as an IPO)?

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[21] According to article 26 of the Law no 221/2012, the tax system applicable to these instruments is advantageous and is tailored on the most common needs of a start-up. Certified incubators can also make use of these instruments.

[22] See footnote no 18.

[23] God leavers provisions include also withdrawal from the employment contract due to physical or mental disease which might cause a long absence and the death of the beneficiaries.

Stock Purchase Plans and Stock Options Plans vest often in a range of three/five years. Stock Purchase Plans can be executed in a very short term. Stock Options Plans vest over a period of time or once certain individual, group, or corporate goals are met (three years). Some companies set time-based vesting schedules, but allow options to vest sooner if performance goals are met.

In relation to the restricted stock units plan, if vesting is contingent on performance, then the company estimates when the performance goal is likely to be achieved and recognizes the expense over the expected vesting period.

2.3 In certain jurisdictions the management may fall out of labor relationship since it is developing executive duties for the company and/or may hold certain stock of the company (it might fall in a special labor relationship or corporate relationship). Is this the case in your jurisdiction? If so, is the loss of labor rights compensated by special laws or by contractual means?

Management can challenge the requalification of its status as employee to the extent certain parameters evidencing *de facto* the criteria of the employment in a subordinated relation to the relationship with executives and the top board members. Collective Bargain Agreements and the labor laws if applicable provide different level of compensation also in terms of right to severance indemnity and social contributions.

3. Maturity

After having reached maturity, the business activity and the relationship between the shareholders and the management / key employees tend to become more complex (in particular, intensification of the principal-agent-conflict). The increasing complexity triggers certain hindrances or deterrents for the ongoing activity of the company. In this context:

3.1 In your jurisdiction, do the various corporate bodies (e.g., board of directors, directors, management) have

- ***an obligation to "act in the best interest of the company"? If so, how is the "interest of the company" defined? Is it the interest of all stakeholders (including the interests of all equity holders (e.g., holder of non-voting shares), debt holders, management, employees and public) or just the shareholders? Are only long term interests taken into account or also short term interests?***

There is not a specific obligation to "act in the best interest of the company", however corporate bodies cannot act to pursue personal interests and/or the interests of certain stakeholders prevailing on the others and/or to damage the company, their goal is to

achieve the company purpose. This commitment is *per se* in corporate offices as a long term interest.

- ***"fiduciary duties" or a duty to treat equity holders equally? How are these defined?***

There is not a specific duty in this respect. The only provided duty on corporate bodies is the management of the company by duty of care.

3.2 In your jurisdiction, how are conflicts of interest addressed by the law? Are the rules on conflicts of interests for listed companies applied to non-listed companies? Have the rules on conflicts of interests become more rigid in recent years?

At S.p.A. and S.A.P.A. level, conflicts of interest are stronger than at S.r.l. one. Indeed, S.p.A. sets forth the duty of directors to inform the shareholders meeting and the board of statutory auditors about his/her own interest not necessarily in conflict with the company. Directors empowered at a board level (e.g. CEO)[24] must abstain from resolutions related to transactions pertaining his own interests. The board of directors and the board of statutory auditors are entitled to challenge the resolution which is potentially damaging for the company and to the extent (i) the resolution has passed with the decisive vote of the director in question, (ii) lack of his/her abstention or (ii) missing information of the conflict[25].

At S.r.l. level, no obligation of previous disclosure of the conflicts of interest but resolutions passed by the decisive vote of directors in conflicts of interest and potentially damaging the company can be challenged be the board of directors and the board of statutory auditors (if appointed).

The rules provided for the listed companies do not apply to non-listed companies.

The range of these provisions has been quite steady over last years.

3.3 In your jurisdiction, is it common to put in place incentive plans for key management and employees or are they only entitled to receive a cash bonus (usually based on individual and overall performance)? Do incentive plans provide tax advantage for the company?

Incentive plans are not so common in non listed companies as they do not provide tax advantage for the company to the extent they are not Innovative Start Ups and Innovative PMI. As matter of fact, the remuneration of directors and employees by equity

[24] The same duty of information does not apply to Sole Directors.
[25] Agreements executed by directors acting in conflicts can be challenged by the company.

instruments cannot be qualified as taxable income for the assignees and this impact on the companies costs as well.

4. IPO/ Listed phase

Reaching an IPO is often the pinnacle of private companies which have reached certain growth and have an attractive equity interest. Obviously, the management and employees play a significant role in the IPO / listing process. In this context:

4.1 It is our understanding that when a company goes from a private to a public setting it implies considerable changes for management and employees. In your experience and within this framework, what is the most significant change for management and employees? Does going public usually increase the total amount of the compensation and/or does it usually change the structure of the compensation (cash, shares, warrants, etc.)?

A pay rise for managers is quite usual. The hiring of new managers is also quite common. The launch of a stock option plan or similar incentive plan is common too. Shares, options or warrants are more likely to be used instead of pure cash but this may vary according to the applicable tax regime which is not very favorable as it gives a zero rate only to grants below 2.060 euro. All other grants will be taxed as income.

4.2 Following the IPO the management is constantly assessed by the performance of the share price. Also the management's pay may to large extent depend on the share price performance. One could expect that management may abstain from taking any steps that are likely to weaken the share price – even if such steps are beneficial to the company in long term. In your jurisdiction, are there any measures that are commonly taken to address this conflict (i.e., incentives for long term strategies)? Is, for example, by law or by agreement a part of the pay paid in mid- to long term options?

There is no law provision that looks after this potential conflict. Agreements may be reached on a case by case basis. In our experience, though, the wage of managers is not dependent on the share price but rather on the company's results (which, in turn, are not necessarily reflected by the share price).

4.3 Is the management and/or employees bound by a mandatory lock up period upon the IPO? In the event the lock up period is not mandatory, please explain the common standards in your jurisdiction towards implementing a lock up period.

There is no mandatory lock-up period. This is catered for in prospectuses. Three years lock-up period are the most common but 18 months up to five years lock-up periods are used too.

5. Acquisition

In the scenario of the acquisition, it is frequent that the management is essential towards the subsequent development of the company. In this context:

5.1 The focus of the board of directors of a listed company may be set to a large extent on the share price performance. Usually, this should be in line with the corporate interest. However, in case a listed company is being approached by a potential bidder, the board of directors and the management of the potential target may face a conflict of interest: an acquisition that may be beneficial to the shareholders of the potential target, may at the same time require replacement or adjustment of the target's board of directors and management. In your jurisdiction, how is this conflict of interest addressed? For example, are there limits to the defense measures that the board of directors of the target may take?

Defense measures are substantially prohibited by law.

5.2 Which are the common alternatives in order to keep management / key employees focused and keen to continue in the company?

There is no real method. A public tender will inevitably distract the management. Employees, in particular blue collars, would not, in principle, be too interested unless they fear to loose their job. In this case consultations with the trade unions and strikes are a possibility.

5.3 In parallel, is it common to reinforce non-competition and confidentiality undertakings of the management / key employees upon acquisition? Is it common to regulate a non-solicitation by the Seller and that it is enforceable (for which period)?

Non-competition and confidentiality are compulsory as long as the employee/manager is employed by the company. The duty is owed to the employer and not to the sellers (or the buyers). A non solicitation – non competition is quite common and normally last five years. This is enforceable unless in breach of antitrust legislation. Actually, upon an IPO the antitrust authority may even impose for the non-competition clause be limited in time (for instance one year instead of five years) on in territory (for instance just in one part of the country instead of the country as a whole). This is assessed and established on a case by case basis.

D. Interest of advisors / lawyers

1. Startup

During the startup phase, it is one of the most difficult stages to advice companies and/or

projects since the company does not have the resources (funds) to implement an appropriate legal scheme and the management/equity holders tend to think in the short term rather than the long term.

1.1 Which are the common difficulties you liaise with during this stage? How do you tend to structure your fees (for example, do you go below your standard rates and agree to have this difference compensated at a later stage when the company has become more successful)?

It is common practice to quote discounted hourly fees or a cap for the assistance in relation to specific services offered like a package of activities. Discounts are material in this phase.

1.2 In case you accept warrants / rights to shares as compensation for professional services rendered: how do you set the amount or the value of such warrants and rights? Do you rely on valuations of the company? If so, whose valuations? Is it common for an advisor in this situation to request that the company has previously successfully completed a minimum viable product ("MVP") stage which reduces the risk of failure (i.e., as part of the lean startup methodology it is advisable to diminish uncertainty for the project by means of developing an MVP to validate the project)?

In theory, the assistance to Innovative Start Ups and Innovative PMI can be compensated also by work for equity plan[26], however the adoption of this scheme is quite infrequent because *de facto* it is quite questionable how to value the services in respect to value of the company and controversial how combine this tool with certain rigidity of the corporate law (i.e. duty to grant bank guarantees as per the contributions of services which are being compared with the contributions in kind).

2. Growth

Commonly, it is important to provide appropriate legal advice when the company intends to achieve going from the start-up phase to a growth phase. The role of lawyers and advisors would likely enhance the possibilities to effectively reach a solid growth phase. In this context:

2.1 How do you tend to structure your fees during this stage (in particular, is there a difference in the fee structure as compared to the start-up phase)?

It depends on the kind of assistance. For a continuous advice discounted hourly fees (higher than for the start up phase) can fit with the need of clients to be supported on the

[26] See footnote n. 21 and paragraph 1.2. of Section C.

whole of its business. Assistance on focused transaction can be quoted agreeing a range of fees in the case facing the matter gets harder than was expected.

2.2 Is it common for advisors (in particular, lawyers) to take board positions during this phase? If so, how is such board member compensated? In cash? Or with exclusivity for providing legal services to the company?

In this phase it is not common, however it depends on case by case.

2.3 As the lawyer you may be asked by the entrepreneur to render advice on the division of equity (in particular to FFF)? What is the basis for your advice regarding the division of equity?

The point start may be the comparison between pre-money and post-money valuation of the company and the relevant their initial investment as founders.

2.4 In certain jurisdictions corporate law is rigid and does not allow to regulate certain rights of the shareholders in the by-laws of the company (such as, preferential preemptive rights, drag along or tag along rights). Please explain (succinctly) which is corporate legal scheme that applies in your jurisdiction. Is the shareholders agreement enforceable against third parties in your jurisdiction or is only binding between the relevant shareholders?

In general terms it is allowed to regulate certain rights of the shareholders in the by-laws; there is a large set of special rights (e.g. both administrative and economic) which can be provided in favor of certain categories of shareholders agreed by the parties (in S.p.A. and S.A.P.A.) or in favor of specific shareholders (in S.r.l.). In Innovative Start Ups and Innovative PIM when incorporated as S.r.l. these rights can be granted also to certain categories shareholders agreed by the parties, the functioning of these categories in S.r.l. is less complex than in S.p.A. [27]. The amendment of these by-laws provisions are subject to the favorable vote of certain high *quorum* the shareholders meeting to be held before the Notary Public.

Shareholders agreement is not enforceable against third parties and is only binding between the relevant shareholders. Sometime it happens that also the company is a part of the shareholders agreement as the case may request.

[27] See the Legislative Decree no 3/2015 for the Innovative PMI and the Law no 221/2012 for the Innovative Start Ups.

3. Maturity

After having reached maturity, the business activity is much more complex and the interests of the company become more intricate. In this context:

3.1 How do you tend to structure your fees during this stage (in particular, is there a difference in the fee structure as compared to the start-up or growth phase)?

It depends on the kind of assistance. For a continuous advice in favor of mid size companies annual agreements detailing the terms of the assistance can be suitable for a long last relationship with the client. For focused transaction, fees can be quoted by a cap in relation to its value and an estimate of the hours to spend on it.

3.2 Are you able to become member of the board of directors of the companies? Do you tend to render more unique advice to companies (while the corporate counsel provides the typical ongoing corporate advice)?

It is possible for a lawyer being appointed to a board of directors but it is forbidden to act as managing director or, more in general, to hold the power to act on behalf of the company as this could lead, in case the company goes bankrupt, in the lawyer being declared bankrupt as well and this is incompatible with the legal profession.

Having said that a number of lawyers are appointed as board members (and some of them have been struck off the rolls).

A corporate law background could be useful at a board level.

Corporate advice can be unique to the extent lawyers provide clients with a proactive approach, well versed in preventing disputes and minimizing the risk of losses due to the legal side of the contractual relationship connected to the business.

3.3 From a lawyers' perspective, how is the conflict of interest of the management liaised with (are there any mandatory provisions that apply in your jurisdiction)?

For definition lawyers must be independent in providing their legal services then it is forbidden to be engaged by clients in a real conflict of interests.

3.4 Does the anti-money laundering provisions in your jurisdiction have changed the form your render advice?

Under a bureaucratic side the money laundering regulation has changed the preliminary phase of the legal service because before being engaged it is material to fulfill all of the

procedure to identify and register clients to the extent there is not any “shadow” in its business which can require the abstention from providing the legal services.

4. IPO/ Listed phase

Reaching an IPO is often the pinnacle of private companies which have reached certain growth and have an attractive equity interest. It is unlikely that the process of becoming a listed company will be successful without the proper advice. In this context:

4.1 How do you structure your fees for an IPO?

Fees in an IPO are normally structured with a low retainer and a success fee, normally expressed in a percentage of the value of the IPO.

4.2 From a lawyers' perspective, which are the main regulatory aspects of offering equity to the public? Is it common that companies reach this stage (in certain jurisdictions becoming a listed company is less rigid)?

The main regulatory aspects consist in preparing a prospectus, filing it with the CONSOB and the Stock Exchange. It is not common for companies to reach the IPO stage although it is recently becoming more common for companies to sell their shares on the Alternative Investment Market a sort of over the counter regulated market.

4.3 Is there any specific secondary market in your jurisdiction that allows early startup companies to become listed with the aim of obtaining more equity (given the complexity of becoming a public company in certain jurisdictions a startup company can become listed in a specific market which is less rigid and allow it to obtain other sources of financing, among others)?

Yes, the AIM.

4.4 Does the fact of becoming a listed company imply that the lawyers and/or advisors adjust rates their rates accordingly?

Not necessarily. Long standing legal advisors tend to maintain the same level of fees as a listed client is an asset and the competition on the legal market is very aggressive. So it may happen that in order to keep the client a law firm may need to lower their fees to fight off competition.

5. Acquisition

In the scenario of the acquisition, it is frequent that lawyers and advisors are highly involved. In this context:

5.1 Which is most frequent scheme of implementing an acquisition (asset deal vs share purchase deal)?

There is no strong prevalence of one scheme on the other. Asset deals are used in order to pick and choose assets and, above all, to avoid liability (in so far as permitted by law). Share deals are equally common as they are more straight-forward and less cumbersome. Furthermore, sometime it is the seller that can impose one scheme or the other.

5.2 From a lawyers' perspective, which are the main differences within the process of acquiring a stake in listed companies versus private companies?

Small stakes in listed companies are purchased on the market via an authorised intermediary. Lawyers are not involved at all unless a public offer is launched. On the contrary, the purchase of a stake in a non listed company almost always requires the appointment of an advisor, it being a bank, a lawyer, an accountant or all of them.

5.3 From a lawyers' perspective, which are the main steps in your jurisdiction in order that a public entity becomes a private entity as a consequence of an acquisition?

Delisting occurs by decision of the Stock Market. Conditions for delisting are described in part B paragraph 5.1. Once a company is delisted most of the transparency obligations as well as certain corporate structure requirements are no longer compulsory. As a result the legal assistance becomes more concentrated on the business rather than on regulatory aspects.

5.4 How do you tend to structure your fees during this stage (in particular, is there a difference in the fee structure as compared to other phases)?

As delisting is almost automatic, there are no specific fees for this phase. Lawyers charge for the public tender and the assistance during the public tender period. Fees are normally structured pretty much in a way not dissimilar to those of an IPO. A low retainer and a bigger success fee once the delisting is completed.