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Agenda and Subcommittee Reports Inside

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FOR **M&A TRANSACTIONS**

Italy's Spin-Off Demerger after Legislative Decree No. 88/2025

FABIO ILACQUA *Partner*, Gianni & Origoni

A FLEXIBLE TOOL FOR CORPORATE REORGANIZATIONS AND M&A TRANSACTIONS

The Italian legal framework governing corporate reorganizations has undergone significant development in recent years, particularly following the implementation of Directive (EU) 2019/2121 on cross-border corporate mobility. Among the most noteworthy innovations introduced into Italian corporate law is the "spin-off demerger" (*scissione mediante scorporo*), a legal mechanism that has rapidly attracted attention in both academic and professional circles due to its potential relevance for corporate restructuring and transactional practice.

Legislative Decree No. 19 of March 2, 2023 (the "**2023 Decree**"), introduced this new form of demerger by inserting Article 2506.1 into the Italian Civil Code (the "**ICC**"). The provision created a distinct model of corporate reorganization under which a company may allocate assets and liabilities to one or more beneficiary companies while receiving, in exchange, the shares or quotas issued by those beneficiaries.

Unlike traditional demergers, however, the shares issued by the beneficiary companies are not attributed to the shareholders of the transferring company but rather to the transferring company itself. This structural feature distinguishes spin-off demergers from the ordinary demerger models historically recognized in Italian law and produces a different set of governance and economic effects.

Legislative Decree No. 88 of June 19, 2025 (the "**Reform Decree**"), subsequently introduced several corrective provisions designed to clarify the scope and practical application of the new instrument. These amendments significantly expand the flexibility of spin-off demergers and resolve several interpretive issues that had emerged during the first phase of implementation.

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formulations that may be more protective for sellers.

FRAUD

Under French law, fraud (*dol*) can exist when a party (directly or via a representative) lies, engages in "maneuvers" or intentionally hides information "*which it knows is determinative for the other party*"[15] — the latter standard taking some elements listed in article 1112-1, but adding the extra element of intent.

Of course fraud can exist in the M&A context when the seller provides false financial information.[16] There may be fraud whether or not the buyer has access to extensive data on the target, as illustrated by two recent decisions:

- In one case,[17] involving the acquisition of a wind turbine maintenance company subject to a locked box price term, the court inferred the intent necessary for fraud from the failure of the seller to spontaneously reveal the loss of a key client, when the information disclosed, including in a data room, did not allow the buyer to discover this information easily.
- But in another case[18] fraud was held to exist when the buyer did not conduct any due diligence, because the seller did not spontaneously reveal the target's liabilities and contracts.

So there is a significant body of case law in France on these M&A issues — and surely more will come.

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[15] C. civ. articles 1137 and 1138.
[16] Cass. com. May 26, 2009, n° 08-15.980; Cass. com. January 20, 2015, n° 13-24.195.
[17] Cour d'appel of Rennes, May 27, 2025, n° 24/03183.
[18] Cass. com. September 18, 2024, n° 23-10.183.

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STRUCTURAL CHARACTERISTICS OF THE SPIN-OFF DEMERGER

The defining feature of the spin-off demerger lies in the allocation of the beneficiary's shares to the transferring company itself. This design produces several distinctive consequences that differentiate the instrument from both ordinary demergers and other corporate restructuring techniques.

From a corporate governance perspective, the transaction preserves the shareholder base of the transferring company. The shareholders remain invested in the same entity and do not receive direct participations in the beneficiary company. Instead, they maintain an indirect interest in the transferred assets through their participation in the transferring company.

From an economic standpoint, the operation is often described as a form of patrimonial substitution. The transferring company replaces first-level assets — such as business units, tangible assets, contractual relationships, and liabilities — with a second-level asset consisting of a participation in the beneficiary company.

In many cases, the company's net equity does not decrease as a result of the transaction. Rather, the composition of its assets changes: operating assets are replaced by shareholdings in the newly structured entity.

This feature distinguishes the spin-off demerger from many other restructuring mechanisms and explains its growing importance in corporate reorganization practice.

RELATIONSHIP WITH CONTRIBUTIONS IN KIND

The spin-off demerger is frequently compared to contributions in kind (*conferimenti in natura*), since both mechanisms can lead to a similar economic outcome: the transfer of assets in exchange for shares issued by another company.

Despite these similarities, the two operations differ significantly from a legal and procedural perspective.

Contributions in kind are governed by the rules applicable to capital increases and asset transfers. They are typically implemented through resolutions of the shareholders' meeting of the receiving company and may require valuation procedures designed to protect creditors and shareholders.

Spin-off demergers, by contrast, fall within the broader category of extraordinary corporate reorganizations. As a result, they are subject to the procedural framework applicable to demergers, which includes the preparation of a demerger plan, approval by the shareholders' meeting of the transferring company, and the application of creditor protection mechanisms.

Another important distinction concerns the treatment of liabilities. In a spin-off demerger, both assets and liabilities may be transferred as part of the allocated patrimony, even if they are not strictly connected to a specific business unit. Contributions in kind, however, typically involve assets or business units and only include liabilities that are functionally linked to the contributed assets.

These differences mean that, although the economic results may appear similar, the legal framework governing spin-off demergers is structurally distinct.

PRACTICAL APPLICATIONS IN CORPORATE REORGANIZATIONS

Spin-off demergers have quickly emerged as a valuable instrument for corporate reorganizations.

One common application involves the creation of holding or sub-holding companies within a corporate group. By transferring a business unit or asset portfolio to a newly established company and retaining the shares of that company, the transferring entity may transform itself into a holding company while preserving continuity of ownership.

Another frequent use concerns the separation of different business lines within a company. In complex corporate groups, it may be desirable to isolate specific activities in separate legal entities in order to improve operational efficiency, facilitate management autonomy, or reduce operational risks.

Spin-off demergers may also serve as preparatory steps for future M&A transactions. For example, a company may isolate a business division in a separate subsidiary before opening that entity to strategic investors, private equity funds, or joint venture partners.

Because the shares of the beneficiary company remain in the hands of the transferring company, the existing shareholder structure remains stable throughout the process. This can be particularly advantageous in family-owned companies or closely held corporations where preserving the existing shareholder structure is a priority.

EXPANSION OF THE INSTRUMENT UNDER THE 2025 REFORM

Although the 2023 Decree introduced the spin-off demerger into Italian corporate law, certain aspects of the new provision remained subject to interpretive uncertainty.

Two issues in particular attracted significant

attention: whether the beneficiary company had to be newly incorporated and whether the operation could involve the transfer of the entire patrimony of the transferring company.

The Reform Decree addresses both issues.

First, the reform clarifies that spin-off demergers may also be carried out in favor of pre-existing beneficiary companies. Under the original wording of Article 2506.1 ICC, the provision referred only to newly incorporated beneficiary entities. Many practitioners therefore assumed that the creation of a new company was a mandatory requirement.

The Reform Decree removes this limitation and expressly allows companies to allocate assets directly to companies that already exist within a corporate group.

This clarification significantly increases the operational flexibility of the instrument, since corporate reorganizations often involve entities that are already present within the group structure. Second, the reform confirms the admissibility of so-called "total spin-off demergers," in which the entire patrimony of the transferring company is allocated to one or more beneficiary companies.

Unlike traditional total demergers, however, the transferring company is not dissolved. Instead, it remains in existence as the shareholder of the beneficiary company, effectively transforming itself into a holding entity.

This solution allows companies to reorganize their corporate structures while preserving the legal identity of the transferring entity.

PROCEDURAL SIMPLIFICATIONS AND GOVERNANCE IMPLICATIONS

The Reform Decree also introduces several procedural simplifications designed to make spin-off demergers more efficient.

In particular, when the operation results in the creation of new beneficiary companies, the obligation to prepare an expert report on the exchange ratio may be eliminated. This reflects the structural logic of the transaction: since the shares of the beneficiary are not distributed to shareholders, the traditional concerns regarding the fairness of the exchange ratio are significantly reduced.

Similarly, certain rights traditionally granted to dissenting shareholders in demerger transactions — such as withdrawal rights or challenges based on the alleged unfairness of the exchange ratio — may no longer apply in the same way when the shares are allocated to the transferring company rather than to the shareholders themselves.

These procedural adjustments reflect the legislature's effort to align the regulatory framework with the structural characteristics of the spin-off demerger.

TAX NEUTRALITY AND FISCAL CONSIDERATIONS

Following demerger transactions, subjective tax positions not referable to specific transferred assets or liabilities are allocated between the dividing company and the beneficiary in proportion to the net book equity transferred and that retained. This rule governs the allocation of tax losses carried forward, ACE surpluses, excess interest expense and residual ROL capacity.

In a spin-off demerger, however, a specific issue arises. The net book equity of the dividing company does not decrease by an amount corresponding to the transferred assets, since the dividing company receives in exchange participations of equivalent value, with the result that its net book equity remains broadly unchanged.

Prior to the 2025 amendments, the Italian Revenue Agency (ruling No. 225/2025) had denied the application of neutrality under Article 173 of the Italian Consolidated Income Tax Act (Testo Unico delle Imposte sui Redditi – TUIR) to a spin-off

demerger in favour of a pre-existing beneficiary, on the grounds that the transaction did not fall within the scope of Article 2506.1 c.c. as then in force. Legislative Decree No. 192 of December 18, 2025 subsequently amended Article 173 TUIR by introducing paragraph 15-ter1, which regulates the spin-off demerger in favour of a pre-existing beneficiary and expressly establishes its tax neutrality.

For a spin-off demerger in favour of a pre-existing beneficiary, paragraph 10 of Article 173 TUIR — concerning "sensitive" pre-existing subjective positions transferred to the beneficiary — has also been made applicable, in order to prevent potentially abusive inter-subjective set-offs.

CONCLUSION

The introduction of the spin-off demerger represents one of the most significant innovations in recent Italian corporate law.

By allowing companies to transfer assets and liabilities to a beneficiary entity while retaining ownership of the resulting participation, the instrument provides a powerful mechanism for corporate reorganizations, asset segregation, and M&A transaction preparation.

The clarifications introduced by Legislative Decree No. 88/2025 further enhance the usability of the instrument by removing interpretive uncertainties and expanding the range of situations in which spin-off demergers may be employed.

In practice, the mechanism now offers companies a flexible tool for restructuring corporate groups, isolating business divisions, preparing investment platforms, and implementing strategic reorganizations while preserving shareholder continuity.

As corporate groups increasingly rely on sophisticated restructuring techniques to adapt to evolving market conditions, spin-off demergers are likely to play a growing role in Italian M&A practice and corporate governance strategies.