

Implementation of the Takeover Directive in Italy

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EC Directive No. 2004/25/EC on takeover bids, adopted on April 21, 2004, (the “Takeover Directive”) lays down, for the first time, a set of rules aimed at harmonizing at the EU level the regulation of takeovers of companies whose securities are admitted to trading on a regulated market of an EU member state.

On December 13, 2007, Legislative Decree No. 229 (the “Decree”), which amended Legislative Decree No. 59/1998 (“the Italian Securities Act”) to implement the Takeover Directive in Italy, was published in the Italian Official Gazette (*Gazzetta Ufficiale*). The new legislation came into effect on December 28, 2007. The Italian securities commission (“CONSOB”) will amend its regulations within six months to complete the implementation process.

This memorandum provides an overview of the new rules introduced by the Decree.¹

I. Procedural Rules

The procedural rules governing takeover bids in Italy have been partially amended. Article 102 of the Italian Securities Act, as amended, provides that the decision or the obligation to launch a bid must be communicated to CONSOB and disclosed to the market without delay. Within 20 days from such communication², the bidder must file the offering document with CONSOB, to allow its review. If the bidder fails to respect such deadline, strict sanctions apply: CONSOB will not accept the offering document and the bidder will not be permitted to carry out a takeover bid in respect of the same target company for a 12-month period.

¹ This memorandum is focused on the new rules and, therefore, does not aim to provide a thorough description of the regime applicable to takeover bids in Italy. If you have any questions concerning the general Italian takeover bid regime, do not hesitate to contact the persons indicated below.

² With respect to mandatory tender offers, the 20-day period runs from the day on which the bidder crosses the relevant ownership threshold in respect of the target company.

Within 15 days from the filing, CONSOB should complete its review of the offering document and authorize its publication³. This review period may last up to 30 days from the filing if (i) the bid has as its object securities that are not admitted to trading on an Italian regulated market nor widely held by the public or (ii) securities satisfying such description are offered by the bidder as the consideration.

Finally, if there are rumors of a possible bid which abnormally affect the price of the securities that would be the object of the bid, CONSOB may ask the potential bidder to disclose its intentions.

II. Defensive Measures – Board Neutrality Rule

The board neutrality or passivity rule, which has been a basic tenet of the Italian takeover bid regulation since 1998,⁴ has been only partially amended by the Decree, in accordance with Article 9 of the Takeover Directive.

Pursuant to Article 104 of the Italian Securities Act, as amended, Italian listed companies⁵ must refrain from taking any action which may result in the frustration of a bid, unless authorized by a resolution adopted by shareholders representing at least 30% of the company's share capital. Moreover, the shareholders must also authorize the implementation of resolutions taken before the announcement of the bid and not yet or only partially implemented, if such resolutions fall outside the ordinary course of the company's business and their implementation may result in the frustration of the bid.

The revised provision expressly states that the mere seeking of alternative bids does not require any authorization by the shareholders of the target company.

Although the matter is not free from doubt, the shareholders' authorization must be adopted with the favorable vote not only of shareholders holding at least 30% of the company's share capital (as the passivity rules requires), but also in accordance with the corporate rules governing *quorums* at ordinary and extraordinary meetings.⁶

³ If the bid is subject to the approval of other authorities (e.g. Bank of Italy or the Italian Insurance Authority), CONSOB's deadline is extended to 5 days after the approval of the relevant regulatory authorities.

⁴ EU member states where shareholder approval for post-bid defensive measures was not mandatory before the implementation of the Takeover Directive (*inter alia*, Denmark, Germany and Luxembourg) have chosen not to apply the rule on a mandatory basis.

⁵ "Italian listed companies" are defined as those companies having their registered offices in Italy and whose securities are admitted to trading on a regulated market of an EU member state.

⁶ This means that (i) at ordinary meetings the relevant resolutions must be adopted by shareholders representing more than 50% of the shares present or represented at the meeting (provided that such shareholders also represent at least the 30% of the company's share capital) and (ii) at extraordinary

However, according to the reciprocity principle implemented by the Italian legislature⁷, if the bidder may validly adopt defensive measures in its jurisdictions regardless of the aforementioned 30% threshold, then the Italian target company may also adopt defensive measures with the ordinary *quorums* provided for an extraordinary or ordinary shareholders' meeting, as the case may be.

Further, under Italian corporate law, those shareholders which may have a conflict of interest with respect to the resolution to authorize defensive measures (such as the bidder or the target company's majority shareholder) may validly vote on the authorization. However, the resolution may be challenged by alleging that (i) the resolution would not be passed without the vote of the conflicted shareholder and (ii) the resolution may be detrimental to the target company.

The restriction on defensive measures applies from the time the bidder discloses its intention (or obligation) to launch a bid until the end of the acceptance period or until the bid lapses.

III. Breakthrough Rule

One of the most relevant changes in the Italian Securities Act is the introduction of the so-called breakthrough rule, set forth in Article 11 of the Takeover Directive. This rule is designed to make robust takeover defences contained in a target company's bylaws or shareholders' agreements unenforceable against a bidder during the offer and to facilitate takeovers by lifting incumbent shareholders' disproportionate control rights.⁸

While the vast majority of EU member states have decided not to impose the breakthrough rule, Italy has opted to make the rule mandatory. As a result, when a bid is launched in respect of voting securities⁹ issued by an Italian listed company (with the exception of cooperative companies) the following rules apply:

meetings (*e.g.* for resolutions concerning mergers and de-mergers, issuances of equity or convertible securities or amendments to the by-laws), the relevant resolutions must be adopted by at least two-thirds of the shareholders present or represented at such meetings (or more than 50% of the company's share capital in case of issuances of equity securities for cash consideration with waivers of preemptive rights).

⁷ See Paragraph IV below.

⁸ The new breakthrough provisions are without prejudice to the breakthrough rule existing in the Italian Securities Act prior to the implementation of the Takeover Directive, according to which those shareholders which intend to tender their shares to the bidder may withdraw, without any prior notice, from the shareholders agreements' that they have entered into.

⁹ "Voting securities" are defined as any securities entitling the holder to vote at general (ordinary or extraordinary) shareholders' meetings.

- (a) while the offering is open, the target's shareholders may freely transfer their voting securities to the bidder, regardless of any restrictions provided for in the bylaws of the target company;
- (b) any restrictions on voting rights provided for in the bylaws or in any shareholders' agreement of the target company have no effect at the shareholders' meetings at which shareholders resolve upon the defensive measures mentioned under Paragraph II above; and
- (c) if, at the end of the bid, the bidder holds at least 75% of the target company's voting capital, (i) any restrictions on voting rights (set forth in the target company's bylaws or shareholders' agreements) and (ii) any extraordinary rights concerning the appointment or removal of board members (set forth in the target's bylaws) do not have effect at the first shareholders' meeting of the target company called after the bid to resolve upon the appointment/removal of board members¹⁰ or amendments to the bylaws.

Note, however, that restrictions on voting rights provided in the bylaws with respect to preferred shares (*i.e.*, those shares with special economic rights) are not subject to the breakthrough rule and, therefore, remain applicable.

Moreover, as required by Article 11.5 of the Takeover Directive, under the new Italian regime if the bid is successful, the bidder must provide equitable compensation for any economic loss suffered by the target company's shareholders whose rights were neutralized by the breakthrough rule. In case of disagreement, the amount of the indemnification will be determined equitably by a judicial decision, having regard, *inter alia*, to the comparison between the market price average in the 12 months preceding the announcement of the bid and the market price after the completion of the bid.

IV. Reciprocity Principle

The Italian legislature has chosen to implement the reciprocity principle set forth in Article 12(3) of the Takeover Directive. Accordingly, the board neutrality rule and the breakthrough rule do not apply if the bidder or its controlling shareholder (or any of the bidders in case of a joint bid) is not subject to equivalent provisions. CONSOB is entrusted with the power to decide whether the provisions applying to the bidder are equivalent to those applying to the target company.

The effectiveness of the reciprocity principle is partially subject to the decision of the target's shareholders. Indeed, even when the reciprocity conditions are

¹⁰ "Board members" means directors and, for companies adopting the so-called two-tier governance system, members of the management board and supervisory board.

not met, the right of the board to take defensive measures does not flow automatically. In particular, defensive measures must be authorized by a resolution adopted at an extraordinary shareholders' meeting within the 18 months preceding the launch of the bid. It could be speculated that not all Italian companies will decide to grant such *ex ante* authorization to their board members, given that the shareholders would have no knowledge of the possible bidder when they gave such authorization.

V. Mandatory Tender Offer

The obligation to launch a mandatory tender offer is generally triggered in Italy when a person, directly, indirectly or acting in concert with others, acquires¹¹ more than 30% of the voting securities¹² of an Italian company admitted to trading on an Italian regulated market¹³. The main changes brought about by the Decree with respect to the Italian rules governing mandatory tender offers concern the subject matter of the offer and the offer price.

Subject matter of the offer

Under the previous regime, a mandatory tender offer had to be launched only on the shares of the target company entitling the holders to vote in regard to resolutions concerning the appointment, removal or liability of the members of the board of directors or the managing board. The new regime has expanded the scope of the mandatory tender offer, providing that such offer must be launched in respect of all the voting securities of the target company admitted to trading on a regulated market, thus including, *e.g.*, preferred shares entitled to vote only at extraordinary meetings.

Price of the offer

The rules previously in force in Italy provided that the offering price could not be not lower than the arithmetic average of (i) the weighted average market price for the shares in the previous 12 months, and (ii) the highest price paid for the target's shares by the bidder in the same period.

¹¹ "Acquiring" also means the exercise of subscription or pre-emptive rights in a rights offering or capital increase, other than the pro-rata exercise thereof by an existing shareholder, or the conversion of convertible debt securities. Moreover, note that, under the new regime, crossing the threshold through the acquisition of voting securities for no consideration triggers the obligation of a mandatory tender offer.

¹² Note that the voting securities relevant for purposes of the mandatory tender offer threshold are only those entitling holders to vote on the appointment or removal of members of the board of directors or the supervisory board. Voting securities are counted net of any treasury shares.

¹³ The tender offer obligation does not apply if the threshold is crossed as a result of a bid for 100% of the target's voting securities, provided that, in case of exchange offers, the securities offered are admitted to trading on an EU regulated market or a cash alternative is provided. Other exemptions already provided for under CONSOB's regulations, pursuant to the Italian Securities Act, have been confirmed.

Pursuant to the recent amendments, the offering price must be not lower than the highest price that the bidder (or a person acting in concert with it) paid for such securities in the 12-month period prior to the disclosure of the tender offer obligation.¹⁴ If no purchases have been made of a given class of voting securities, the price must be at least equal to the weighted average market price in the same 12-month period.

Under certain circumstances indicated in the Italian Securities Act, CONSOB may impose, by a reasoned decision, upwards or downwards adjustments from the price standard described above.

By way of consideration, the bidder may offer cash or securities. However, a cash alternative must be offered unless the securities are listed on a regulated EU exchange, or if the bidder has purchased for cash, in the prior 12 months and through the closing of the bid, an interest representing at least 5% of the target's voting rights.

VI. Minorities' sell-out rights and majority shareholders' squeeze-out right

Implementing Article 16 of the Takeover Directive, the Italian legislature introduced minorities' sell-out rights in Italian securities law. The new Italian rules may be summarized as follows:

- (a) any person holding more than 90% of a class of voting securities of an Italian listed company must purchase all of the remaining securities of that class upon the holders' request, unless it restores an adequate float within 90 days so as to ensure proper trading;
- (b) any person holding more than 95% of a class of voting securities of an Italian listed company as a result of a tender offer in respect of 100% of the voting securities must purchase all of the remaining securities of that class upon the holders' request.

In case (b) above (as well as in case (a) above if the 90% interest is purchased exclusively through a tender offer in respect of 100% of the voting securities) the purchase price will be the same as in the prior offer, provided that, if such prior offer was made on a voluntary basis, at least 90% of the voting securities targeted were tendered to the offer. Otherwise, the price is determined by CONSOB, taking into account the price offered in a prior tender offer, if any, or the market price of the shares during the previous six months.

The majority shareholder's squeeze-out right is not new to the Italian securities system. Unlike in other jurisdictions, in Italy this right is triggered only if the

¹⁴ Note that CONSOB rules already set forth the so-called "best price rule" – contained in Article 5(4) of the Takeover Directive – providing that the offer price must be increased to the highest price paid or agreed to be paid by the bidder between the launch and the closing of the bid.

bidder acquires a relevant interest in the target voting capital as a result of a tender offer in respect of the 100% of the voting securities of the target company.

The Decree has slightly modified the applicable rules, reducing the threshold triggering the squeeze-out right from 98% to 95% of the voting securities of a given class. Moreover, the price for the securities acquired by the bidder pursuant to the squeeze-out right is now determined in accordance to the criteria set forth above with respect to the sell-out right.

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Please do not hesitate to contact Giuseppe Scassellati-Sforzolini (+39.06.69.52.21) in our Rome office or Roberto Bonsignore and Pietro Fioruzzi in our Milan office (+39.02.72.60.81) should you have any questions concerning the issues addressed in this memorandum.

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