



## Public takeovers in Italy



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This booklet is a guide to the regulations governing public takeovers in Italy. It forms part of a series covering countries where Freshfields Bruckhaus Deringer has an established M&A practice. The series is aimed at those with an interest in acquiring or advising on an acquisition of a public company in the different European jurisdictions.

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## Introduction

### **How common are recommended or hostile takeovers of public companies in Italy?**

Hostile takeovers of public companies in Italy were virtually unknown before 1999. Recommended bids remain more common. However, there have been some examples of hostile bids, such as Olivetti's offer for Telecom Italia, Generali's offer for INA, the Tyche (De Agostini Group) offer for Lottomatica and the Italenergia offer for Montedison and Edison. More recently, the first offer by ABN AMRO for Banca Antonveneta and the offer by BBVA for Banca Nazionale del Lavoro were both hostile.

### **Are public takeovers regulated?**

Public takeovers in Italy are regulated by the Testo Unico delle disposizioni in materia di intermediazione finanziaria, contained in legislative decree 58 of 24 February 1998, as amended (the Testo Unico), which, together with the provisions of the Italian civil code and the recently enacted law on public savings (law 262 of 28 December 2005), also sets out the regime for other aspects of Italian corporate law (including insider trading and corporate governance)<sup>1</sup>.

The Testo Unico prescribes general principles of good conduct for takeovers and delegates implementation of those principles to the Commissione Nazionale per le Società e la Borsa (Consob). The implementing regulations were first issued by Consob on 14 May 1999 (the Regulations) and have been amended several times to reflect changes to the provisions of the Testo Unico and new interpretations of the matters it covers (primarily arising from Consob's day-to-day work).

This legislation provides for several principles already present in other jurisdictions, including disclosure obligations during a takeover bid, restrictions on frustrating action, the ability to 'squeeze out' minority interests and rules on concert parties. In addition, it restates several fundamental principles of Italian corporate law, such as equal treatment of all shareholders.

In principle, the Testo Unico applies to any public offer for an Italian company, whether or not the company is listed in Italy. However, the rules governing mandatory bids apply only where the target is an Italian company whose ordinary shares are listed on an official Italian stock exchange.

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<sup>1</sup> Italy is expected to adapt its legislation to reflect the provisions of the European Takeover Directive, which is required to be implemented by 20 May 2006.

### **Is litigation a feature of takeovers?**

Italian takeovers have seldom involved litigation. However, in recent cases, courts have had an increasing role in the process, contributing to the structure and outcome of the bid.

### **Antitrust and regulated industries**

#### **What is the relevant legislation and who enforces it?**

Law 287 of 10 October 1990 (the Antitrust Law) regulates merger control in Italy in cases not governed by the EU Merger Regulation. The Antitrust Law is enforced by an independent body, the Autorità Garante della Concorrenza e del Mercato (the Authority), which under law 262 of 28 December 2005 also evaluates concentrations in relation to banks. In the past this was done by the Bank of Italy and the Authority's role was limited to giving a prior and mandatory, but non binding, opinion to the Bank of Italy.

The Antitrust Law applies to any concentration (that is, any merger or acquisition of joint or sole control over the whole or part of an undertaking) where the combined aggregate turnover in Italy of all undertakings concerned, as of the last audited consolidated annual reports, exceeds €21m, or if the turnover in Italy of the target, as of the last audited annual report, exceeds €2m. These thresholds are increased annually to take account of inflation.

The Authority must be notified in advance of any concentration (ie before closing). The Authority examines the effect of the concentration on competition and has 30 days from notification to decide whether to clear it or to order a full investigation (phase I). Where the filing is deemed to be incomplete, phase I may be interrupted by the issue of a formal written request that has the effect of 'stopping the clock'. In this case, phase I starts afresh only when the Authority is provided with the requested information. In case of an investigation (phase II), the Authority has 45 days to give its conclusions to the undertakings concerned. The Authority may extend this period for a further 30 days if the undertakings fail to supply all the information requested.

If a national public takeover bid amounts to a notifiable concentration, the transaction must be submitted to the Authority at the same time it is filed with Consob. In this case phase I is reduced to 15 days.

A concentration will be cleared if the Authority concludes that it does not operate to create or strengthen a dominant position likely to reduce competition substantially and on a lasting basis.

**What are the waiting periods and does implementation of the takeover have to be suspended?**

Strictly speaking, under the Antitrust Law, implementation of the transaction does not have to be suspended and once notification is made to the Authority, the transaction may close. However, if the Authority opens phase II proceedings it may order the parties not to implement the transaction until it makes a final decision. This would have to be justified on the grounds that the transaction raises serious competition concerns.

If the Authority issues such a suspension order in the context of a takeover bid, the bid may be completed provided that the bidder does not exercise voting rights at the shareholders' meetings of the target until the transaction has been cleared.

Subject to this, implementing a transaction that has been notified but not cleared does not infringe the law. However, there is a risk that the Authority may decide not to authorise it and may order measures including divestiture to restore the parties to their pre-merger positions.

**Are any industry sectors protected from takeovers?**

Current legislation imposes limitations on holding broadcasting services licences where the home country of the purchaser does not ensure reciprocity of legal treatment with Italy. A special regime applies to mergers in the 'integrated system of communications' that are likely to create a dominant position in the relevant market or jeopardise pluralism in the communications sector. There are also restrictions in airline transportation and, in certain circumstances, other areas regarded as sensitive to the national interest.

Offers involving a bank or other regulated financial company are subject to the prior approval of the Bank of Italy. The bidder must inform the Bank of Italy at least seven days before its board of directors meets to resolve on an offer. A formal request for authorisation has to be notified within 30 days of this pre-notification.

Mergers among insurance companies are subject to the prior approval of the Istituto per la Vigilanza sulle Assicurazioni Private e di Interesse Collettivo (ISVAP).

**Are there any restrictions on overseas ownership of companies or assets?**

Except for restrictions for certain sensitive industries (which may not in any event discriminate against EU nationals), there are no restrictions on overseas investment and Italy has no exchange control regime.

## **Barriers to acquiring control**

### **Are shares in public companies freely transferable?**

Shares of Italian companies are generally in registered form and are freely transferable. One class of shares, *azioni di risparmio* (savings shares with no voting rights but with preferred dividend rights), may be in bearer form. These are also freely transferable.

Shares in listed companies are held in dematerialised form. All transfers and exchanges of shares now take place through an automatic book entry system.

Despite the general rule that shares are freely transferable, contractual restrictions on transfers of shares in listed companies have historically been common. Owners of substantial holdings of shares have often entered into shareholder or syndicate agreements. These typically limit the ability of any of the parties to transfer their shares. Under article 122 of the Testo Unico, details of such agreements must be communicated to Consob within five days of execution, published in summary form in national newspapers within 10 days of execution and filed with the relevant companies' registry within 15 days of execution. Failure to comply will render such agreements void.

These agreements cannot last longer than three years under the Testo Unico. If they are not for a fixed term, they may be terminated by any party on six months' notice. The Testo Unico also permits any party to such an agreement to withdraw from the agreement and the related share transfer restrictions, at any time and without notice, if a mandatory offer or an *Offerta Preventiva* (see page 17) is made in respect of the shares subject to the restrictions. It is unclear whether this also applies in the case of a voluntary offer for 100 per cent of the issued shares.

### **Are there any company law provisions or common provisions in constitutional documents that make takeovers difficult?**

Some previously state-owned companies retain a 'golden share' that permits the Italian government to block a change of control. Similarly, the government enjoys special powers to oppose the acquisition of a company where 'vital interests of the state' are at stake. It is worth stressing that the validity of such powers has been challenged by the EU.

The articles of association of privatised companies often limit the number of shares that an individual shareholder may hold.

The Testo Unico clarifies that, in the event of a mandatory offer or a takeover offer for 100 per cent of the issued shares, such limit falls away if it is exceeded as a result of the takeover. However, there is some debate as to the effectiveness and scope of this rule.

It is worth stressing that Italian listed companies are entitled to issue shares where the voting rights are conditional on the occurrence of certain events. It is therefore possible to make the effectiveness of such voting rights conditional on a public takeover offer for the shares of that company being launched. However, in order for such dormant voting rights to fully vest the shareholders of the target company must pass a resolution and a favourable vote of at least 30 per cent of the company's share capital is required.

With these exceptions there are generally no provisions that make the acquisition of a controlling interest impossible.

**At what level of shareholding can a bidder replace the board of directors of a target company and control shareholder resolutions?**

Under the Italian civil code, the directors on a company's board can be removed from office at any time by a simple majority of an ordinary shareholders' meeting. Any director removed from office in this way has the right to claim damages if he has been removed without 'cause' (*giusta causa*). In this respect, a bidder planning to replace the board of directors of the target should note that under recently enacted rules the board must include representatives of the minorities, as well as non-executive, independent directors.

To control shareholder resolutions generally (including those concerning the appointment and removal of directors<sup>2</sup> but excluding those to be adopted by an extraordinary shareholders' meeting – see below), under the Italian civil code an ordinary shareholders' meeting can pass resolutions only if the following requirements are satisfied (a second call being made if the first call is unsuccessful).

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<sup>2</sup> This assumes a company with a single-tier management structure. Under Italian law, joint stock companies may have a two-tier management structure, whereby the management and control of the company is performed by (a) a management board (*Consiglio di Gestione*) and (b) a supervisory board (*Consiglio di Sorveglianza*). In two-tier structure companies, the appointment and removal of members of the *Consiglio di Gestione* (which is entrusted with general management powers) is the responsibility of the *Consiglio di Sorveglianza* and not of the shareholders' meeting. However, to date, no Italian listed *Società per Azioni* has adopted the two-tier management structure.

	<b>Attendance quorum</b>	<b>Resolution threshold</b>
First call	50 per cent of total share capital.	Simple majority of those present, unless the articles of association require a higher threshold.
Second and subsequent call <sup>3</sup>	No attendance quorum provided.	Simple majority of those present, unless the articles of association require a higher threshold.

An extraordinary shareholders' meeting is required to resolve on a statutory merger (with certain exceptions that can be set out in the relevant articles of association) on any amendment to the articles of association (for example, an increase or decrease in the share capital or a change of the company's name) and on the appointment of a liquidator. Under the Testo Unico, an extraordinary shareholders' meeting of a listed company may pass resolutions only if the following attendance quorum requirements are satisfied (although the articles of association may impose a higher requirement).

First call	50 per cent of the company's share capital.
Second call	Over 33.3 per cent of the company's share capital.
Third call	20 per cent of the company's share capital.

To be validly passed on first, second or third call, resolutions proposed at an extraordinary shareholders' meeting must be passed by a two-thirds majority of the share capital in attendance. This represents a serious blocking power for organised minorities.

#### **Can public companies in Italy make themselves bid-proof?**

As there have been few hostile takeovers in Italy, no practice has developed in the use of so-called poison pill clauses in constitutional documents and the legitimacy or enforceability of such provisions has not been tested in the courts. See page 4 for sample provisions in constitutional documents that may be relevant in a takeover context.

<sup>3</sup> Subsequent calls are permitted to the extent provided for in the company's by-laws.

However, the Testo Unico expressly permits a shareholders' meeting of a target company facing a hostile bid to authorise the board of directors to adopt measures aimed at frustrating the bid. Holders of at least 30 per cent of the company's share capital must pass the resolution granting such authorisation for it to be valid. It is open to question whether this special requirement is in addition to, or instead of, the voting thresholds applicable to resolutions passed at shareholders' meetings.

## **Access to information**

### **What information will be publicly available on the target?**

Basic information on a company's shareholders, directors, constitutional documents and related areas is available from the relevant companies' registry and from Consob. Italian law and regulations also impose a number of disclosure obligations on listed companies.

Companies must deposit their financial statements (including the *nota integrativa* explaining the policies adopted by the board in preparing the financial statements) at their registered office and with the relevant companies' registry together with the related attachments (that is, the reports of the board of directors and of the board of statutory auditors and the statement of the external auditors). The shareholders' resolution approving the financial statements must also be made available to the public. Financial statements are frequently posted on a company's website and are also communicated to Borsa Italiana (the company managing the stock exchange).

A listed company, as well as the persons controlling it, must notify the market without delay of any non-public information concerning the company that, if disclosed, could have a material impact on its share price. The information must be communicated at the same time to Consob. Such dissemination of information can be delayed only in limited circumstances.

Listed companies must also release information relating to 'extraordinary' transactions such as mergers and demergers, significant purchases and disposals of assets, bond issues, amendments to the articles of association, purchases and disposals of their own shares and capital increases and reductions.

Information may also be available in the surveys that the sponsor (or the specialist) of a newly listed company has to publish in the one-year period following listing.

### **How can the bidder get information about target shareholders?**

Consob is an important source of information on listed companies. Any person who holds more than 2 per cent of the share capital of a listed company is required to notify both Consob and the company concerned. This information is published on Consob's website. If a listed company holds more than 10 per cent of the share capital of a non-listed joint stock company or a limited liability company (even if the company is foreign), it must inform both the company and Consob.

In addition, shareholders in a listed company must notify the company and Consob each time they cross certain thresholds in reducing or increasing their holding (see page 14). Consob publishes this information.

Details of target company shares held by its directors – as well as compensation plans based on the provision of shares or other securities in favour of directors, employees or other associates of the company – must be disclosed.

The existence and contents of any shareholders' agreements (including an extremely wide range of agreements relating to share capital) must be disclosed to Consob. These agreements must be deposited at the relevant companies' registry and details published in the national press (see page 4). Details are also available on Consob's website.

Consob has the power to require companies that directly or indirectly hold shares in listed companies to provide the names of their shareholders and, with regard to fiduciary companies, the names of the beneficial owners. Such information is made available through Consob.

Shareholders have a right to inspect the shareholders' ledger (though this is in practice difficult to implement).

### **Can the bidder rely on the target's accounts?**

In principle under the Italian civil code a bidder could be entitled to claim damages from the target company's directors and the statutory auditors if any loss is suffered as a direct consequence of inaccurate or misleading statements contained in the accounts.

Also, the Testo Unico provides that external auditors certifying a company's financial statements can be liable for losses suffered by the company and by third parties resulting from non-compliance with the accountants' obligations or from negligent or wilful misconduct. In such circumstances, a bidder may be entitled to bring an action for damages against the auditors if it can be demonstrated that the bidder relied on the company's accounts and that such reliance gave rise to a loss.

## **Preliminary issues**

### **Negotiation**

**Is a bidder required to negotiate before announcing an offer and, if so, with whom?**

There is no legal requirement under Italian law for a bidder to negotiate before announcing an offer.

However, pre-bid negotiations generally do take place in the case of recommended bids. The nature of these negotiations varies from case to case depending, among other things, on the bidder's overall strategy, the number of free float shares in the market and the shareholding structure of the target.

Negotiations may also take place with major shareholders of the target company, for example with a view to increasing the bidder's holding in the target company's shares. In the context of such negotiations, a bidder should be aware of the disclosure requirements on shareholdings and dealings imposed by the Testo Unico and the Regulations and the insider dealing legislation (see pages 13-14).

In practice, bidders will also usually make contact with Consob and any other relevant regulatory authority before a bid is launched.

### **Will a merger agreement be used?**

There will not usually be a merger agreement between a bidder and a target: the transaction is essentially between the bidder and the target's shareholders.

### **Can the bidder expect contractual representations or warranties?**

A bidder will not, as a rule, have the benefit of any representations or warranties. None will be included in the terms of the offer made to shareholders generally.

The bidder might seek to obtain representations and warranties from a major shareholder (for example, in the context of an irrevocable undertaking to accept the offer). However, these are likely to be limited and to be dependent on the relative bargaining strengths of the bidder and the shareholder concerned.

### **What liabilities can arise for misstatements or omissions during negotiations?**

In theory, despite the absence of contractual representations and warranties, persons involved in pre-bid negotiations could be held liable for misstatements made during negotiations, in furtherance of the general principle of good faith in the framework of contractual negotiations (see next page). In addition, any agreement reached (for example, with major shareholders) could be annulled if it was entered into on the basis of misleading statements when such behaviour amounted to fraud.

**Is there a requirement to negotiate in good faith?**

Under Italian law parties to a proposed agreement must negotiate that agreement in good faith. The principle also applies to negotiations in the context of a takeover offer.

Any failure to comply with this requirement can give rise to pre-contractual liability. The resulting damages will usually be restricted to certain types of loss, including irrecoverable costs and any loss of opportunity incurred by the other party.

**Confidentiality**

**Will the bidder be expected to sign a confidentiality agreement?**

When negotiations or due diligence activities begin a confidentiality agreement will usually be required.

**Will the bidder be expected to agree to a standstill restricting the acquisition of shares or making of a hostile bid?**

Agreements between the bidder and the target aimed at limiting the acquisition of shares in the target by the bidder are not common. However, following practice in other jurisdictions, they might become more widely requested.

**Due diligence**

**What is the usual level of due diligence?**

A certain amount of due diligence will usually be carried out before a takeover offer. In the context of a recommended offer this is usually negotiable, depending on the nature of the proposed takeover and the size of the target. Parties should always be aware of the rules concerning disclosure of price sensitive information and the insider dealing legislation.

Due diligence in the context of a hostile offer is obviously restricted to the information available on public record (for example, through Consob, the company managing the stock exchange and the relevant companies' registry).

**Is there an obligation to publish details of any information exchanged between the bidder and the target?**

In principle, details of information exchanged between the bidder and target do not need to be disclosed. However, there are rules on selective disclosure and a company is obliged to disclose any non-public information that, if made available to the public, could have a material impact on its share price. Moreover, a company's officers may not disclose price sensitive information to third parties without a justified reason.

**Will the receipt of any information affect the bidder's ability to make a bid?**

If the information amounts to privileged information, as defined in the relevant insider dealing rules, the bidder could commit an offence by acquiring shares if the information was not subsequently made public (see pages 13-14).

This is a difficult area of law and requires careful thought before negotiations commence and information is made available.

**Will the information have to be disclosed to a rival bidder?**

There is no obligation on a target company to provide the same information to rival bidders, although the provision governing price sensitive information must be taken into consideration.

**Deal protection**

**What can the bidder do to deter other bidders from coming in?**

It is not usual for a target company to agree any deal protection measures with a bidder. Such arrangements are more common between the target's shareholders and a bidder.

Irrevocable undertakings by the target's shareholders to accept an offer are still rare in Italy and may in any case provide little protection, as shareholders can withdraw their acceptances of the bid if a competing offer is made (see page 12).

In practice, the most common and effective way of trying to deter a competing bidder is to acquire as many target shares as possible before the bid is made. However, because of the disclosure requirements for shareholdings in listed companies, it is difficult for a bidder to build up covertly a substantial stake in the target.

**Can the target agree to pay a break fee?**

Break fees are not common in the Italian market and may give rise to directors' fiduciary duty issues.

**Rights of employees**

**Do target employees or their representatives have to be consulted before the offer is announced?**

The Testo Unico does not contain any specific provision concerning the involvement of unions or works councils, or obligations to notify or consult, in the context of a takeover offer. Mandatory consultation procedures apply only to transfers of assets as a going concern and in certain circumstances to certain mergers and demergers.

**What rights do employees have to challenge an offer at any stage?**

Employees of the target have no rights to challenge an offer.

**Does a bidder have to say anything about the future of target employees?**

An offer must make clear the bidder's intention for the target, including the impact the offer may have on the employees. In particular, a bidder must disclose in the offer document any current plans concerning the target company and its group – with particular reference to major restructuring and reorganisation plans, but also with reference to the workforce – and indicate which of these plans is expected to be implemented in the 12 months following the payment of the offer price.

**Approaches to target shareholders****Are there any restrictions on the bidder approaching target company shareholders?**

Negotiations with target shareholders are possible and may lead to the execution of an irrevocable undertaking to sell at a certain price should the bidder launch an offer.

The Testo Unico makes clear that where a competing offer is launched, shareholders who have already accepted an offer may withdraw their acceptances and accept the competing bid instead. It is thought that the same principle applies to irrevocable undertakings. According to Consob's interpretation, such arrangements are not automatically to be treated as shareholders' agreements within the meaning of article 122 of the Testo Unico, but rather are likely to be considered as preliminary sale and purchase agreements. The contents of irrevocable undertakings should be analysed carefully on a case-by-case basis to determine whether they could be treated as shareholders' agreements.

Again, parties should be aware of the rules in the Testo Unico requiring disclosure of price sensitive information and the insider dealing legislation in general.

**Announcement obligations****What is the earliest time the bidder will have to announce its interest or offer?**

Under the Regulations, the bidder is not required to announce its intention to launch a bid until the draft offer document is deposited with Consob for comments. At the same time as depositing the draft offer document with Consob, the bidder is required to send a communication to the market and to the target company. This must contain the essential elements of the offer, the purposes of the offer, details of how the offer will be financed (and any guarantees), the offer conditions, a confirmation as to any holding of the bidder and its concert parties in the target and the names of any advisers. The offer period is deemed to commence from this moment, triggering the rules on dealings in target shares, the prohibition on frustrating

action in the absence of shareholders' approval and the rules on equality of treatment for target shareholders.

This announcement obligation is, however, without prejudice to the general disclosure obligations of listed companies in relation to price sensitive information (see page 7). Accordingly, if the bidder is a listed company, it might be required to announce its intention to make a bid even before the offer document is deposited with Consob. This might have important consequences, in particular if the bid is not recommended, as the target company will be prevented from taking frustrating action without shareholder approval only from the time the draft offer document is deposited with Consob.

These provisions are without prejudice to the obligations on a bidder to inform the Bank of Italy at least seven days before its board of directors meets to resolve upon the offer where the target company is a bank or the bidder, as a consequence of the bid, would acquire control of a bank (see page 3).

**Does a target have to make an announcement if it receives a bid approach?**

The Testo Unico does not impose any specific duty on a company to make an announcement when it receives a bid approach.

However, the insider dealing regulations and disclosure obligations of listed companies may require a company to inform the market of the accuracy of bid speculation if there is any untoward movement in its share price. It will also have to respond to any specific Consob request.

## **Share dealings**

**Are there any insider dealing or other restrictions on share dealings either before the offer is announced or during the offer?**

A bidder may acquire shares without restriction in a target company before an offer is announced, subject to the insider dealing rules, disclosure obligations and the requirement to make a mandatory bid if it acquires more than 30 per cent of the shares giving the right to vote at shareholders' meetings on the appointment, removal or liability of the company's directors (see page 24).

The Testo Unico provides that anyone who uses, directly or indirectly, privileged information about listed shares to purchase, sell or otherwise deal in the securities, or induces others to deal in the securities on the basis of such information, or who discloses such privileged or confidential information without any justifiable reason to third parties, will be subject to fines and imprisonment. This applies to specific, non-public information about securities or their issuer that, if made public, could materially influence the price of

those securities and that came to the person's knowledge by virtue of his position as a shareholder, director, manager or auditor of the company or through his profession, office or function (including a public one).

If, during the offer period (that is, from the filing of the draft offer document with Consob until the date of payment), the bidder purchases target shares, or acquires the right to purchase target shares after the offer closes, whether directly or indirectly, at a price higher than the offer price, the offer price will have to be increased to that higher price.

In addition, during the offer period, the bidder and any interested parties (the target; any company controlling, controlled by or under common control with the bidder or the target, their directors, statutory auditors and managers; and the shareholders of the bidder or the target who are party to any shareholders' agreement) must disclose daily to Consob and the market any sale and purchase of target shares (or of any rights to purchase them) and the relevant price.

#### **What disclosure obligations apply to share dealings?**

Under the Testo Unico and the Regulations, any person holding voting shares in a listed company is required to notify the company and Consob:

- when his interest exceeds 2 per cent, 5 per cent, 7.5 per cent or 10 per cent of the company's voting capital, and at each successive 5 per cent threshold thereafter; and when
- his interest falls below any such threshold.

In calculating the shares held by one person, the shares held by controlled companies or by fiduciary agents on behalf of such person are also taken into account. Moreover, for the purposes of the 5, 10, 25, 50 and 75 per cent thresholds, the shares that a person has an option to purchase or sell, either directly or through controlled companies, agents or third parties on behalf of such person, are also included.

This notification must be made within five market days. Consob will then publish details within three market days of notification.

Failure to notify can result in the voting rights attached to the shares being frozen and the imposition of fines. Any resolution passed as a result of the exercise of voting rights attached to such shares may be challenged.

In addition, listed companies are required to inform Consob if they hold more than 10 per cent of the share capital of non-listed joint stock companies or limited liability companies.

Persons exercising management functions in a listed company, any shareholder holding a stake equal to 10 per cent of the company's share capital and any other person controlling a listed company must inform Consob and the market of any transaction carried out, directly or indirectly, in relation to the shares or other securities issued by the company. The communication by the shareholder must be made by the end of the 15th day of the month following the month in which the transaction was carried out.

The Bank of Italy imposes disclosure requirements on the acquisitions of shares in banks.

Special daily notification obligations apply during the offer period, which starts when the draft offer document is deposited with Consob (see page 12).

**If the bidder buys shares, does it have to state its intentions regarding the target?**

A person who acquires shares in a company does not have to say anything about his intentions. There are, however, the disclosure obligations referred to above and, if such purchases take the person's holding to 30 per cent of the voting rights, he will have to launch a mandatory bid (see page 24).

**Will share dealings affect the terms of the bid?**

Under the Regulations, if the bidder buys target shares during the offer, or acquires the right to buy target shares after the offer closes, whether directly or indirectly, at a price higher than the offer price, the offer price must be increased to the higher price (the best price rule).

**Are there any rules preventing market manipulation?**

It is a criminal offence to spread false information, enter into sham transactions or take any other steps that could give rise to a material change in the price of any securities (listed or non-listed).

## **Offer structure**

**What is the usual form of takeover offer?**

The usual form of takeover involves the bidder making a general offer to all the target company's shareholders to acquire their shares. Typically, the offer would be for 100 per cent of the voting shares, although it is possible to make an offer for a smaller proportion, subject to the mandatory bid requirements (see page 24). Following approval by Consob, the offer document will be sent to the target and will be made available to the public and to all potentially interested parties together with an acceptance form.

**Is the offer made by the bidder or its financial adviser?**

The bidder makes the offer.

### **Does Italy have a statutory merger alternative?**

Under Italian law, it is possible for companies to merge. Where one company is merged into another, the merged company ceases to exist and all its rights and obligations are transferred to the surviving company. It is also possible to merge companies into a newly incorporated company and all the rights and obligations are transferred to this new company. Shareholders in the merged companies receive shares of the surviving or resulting company in consideration for this transfer.

The merger process, which requires the approval of shareholders, generally takes about six months from the first meeting of the board of directors to the last Consob notification (assuming the merger involves one or more listed companies). This period can be reduced in certain circumstances.

The documentation required includes, among other things:

- a report to shareholders from the directors of the companies involved, containing information specified in the Italian civil code and in the Regulations;
- a merger plan, containing information specified in the Italian civil code; and
- a deed of merger.

Listed companies involved in a statutory merger must prepare an information document on the merger, in accordance with the Regulations. This will contain information similar to that in a full prospectus.

In addition, the merger has to be approved at extraordinary shareholders' meetings of the companies and an expert appointed by the court will have to give an opinion on the fairness of the share exchange ratio.

The Testo Unico and the Regulations provide a specific exemption from the obligation to launch a mandatory bid if a statutory merger or demerger is justified by industrial reasons (even if the 30 per cent threshold is exceeded) and provided that the merger or demerger is approved by the shareholders of the company whose shares would otherwise have been the subject of the mandatory offer.

### **What experience do Italian companies have of dual-headed structures?**

Almost none to date.

## Terms of the offer

### What controls do the authorities have over the price and other terms?

As a general principle, the relevant authorities have no specific control over the offer price (save in the case of residual offers, see page 21). However, the Testo Unico sets a minimum price for mandatory offers (see page 24).

If the bidder buys shares during the offer period at a price higher than the offer price, it will have to apply the best price rule.

Consob has a general power to control the terms, conditions and timing of an offer. This power is exercised through its review and approval of the offer document, as well as its general role of supervising the conduct of the parties during the offer.

### What conditions are permitted or required?

Subjective conditions, being ‘conditions that depend on the mere will of the bidder’, are not permitted. Otherwise, a bidder should be free to make its offer subject to as many conditions, and relating to such matters, as it considers appropriate. Conditions could include antitrust clearances, regulatory authorisations and the absence of material adverse changes in, or frustrating action by, the target company.

Consob has clarified that conditions preventing the target from taking frustrating action or those relating to material adverse change are valid provided that the events triggering the lapsing or termination of the offer satisfy a qualitative and quantitative test. In the case of a share for share offer, the offer will be subject to the shareholders’ meeting of the bidder approving the necessary share capital increase. The acceptance period cannot start until this resolution has been passed.

An offer may be made for less than 100 per cent (but not less than 60 per cent) of the shares giving the right to vote at the shareholders’ meetings on the appointment, removal or liability of the company’s directors (the *Offerta Preventiva*), provided that the following requirements are met:

- the bidder and any concert party must not have acquired or contracted to acquire more than 1 per cent of the target’s shares giving the right to vote at the shareholders’ meetings on the appointment, removal or liability of the company’s directors in the 12 months before the bidder notifies Consob of its intention to make an offer or during the offer itself;

- the offer must be conditional on the approval by a majority of independent shareholders holding shares giving the right to vote at the shareholders' meetings on the appointment, removal or liability of the company's directors; and
- Consob must have agreed that such requirements have been met.

This technique might be used where a bidder wishes to retain a target company's listing or wants to acquire less than 100 per cent for other reasons.

However, the bidder may be forced to launch an offer for 100 per cent of the target company if, in the 12 months following the completion of the *Offerta Preventiva*, the bidder or any concert party acquires (or contracts to acquire) more than 1 per cent of the target's shares giving the right to vote at the shareholders' meetings on the appointment, removal or liability of the company's directors, or the target resolves to carry out a merger or demerger.

In the usual case where an offer is made for 100 per cent of the shares, the acceptance condition can be for any proportion of the target's voting rights. The Testo Unico and the Regulations do not set any lower limit for the acceptance condition but it is likely that a bidder will choose a level that will guarantee control, or at least will provide a veto right on major decisions.

#### **How easy is it for a bidder to walk away?**

Italian law provides that a takeover offer is irrevocable and any clause to the contrary is void. As a consequence, a bidder can only rely on the conditions specified in the offer to walk away.

#### **Is there a requirement to treat all shareholders equally?**

The Testo Unico and the Regulations provide general rules on fairness and equality of treatment of shareholders. The offer must be on the same terms to all target shareholders.

The Regulations provide that the bidder and all the parties involved in an offer must conduct themselves in accordance with the principles of fairness and equal treatment towards the target company's shareholders.

### **Share consideration**

#### **How usual is it to offer new shares or securities as consideration for an offer?**

Traditionally, share consideration has been fairly unusual but recent offers show attitudes are changing.

In the case of a mandatory offer or a voluntary offer for 100 per cent of the target company's shares giving the right to vote at the shareholders' meetings of the company on the appointment, removal or liability of the directors of the company, the consideration shares will have to be listed on a regulated stock market within the EU. Moreover, on a mandatory bid, shares can be used as consideration only if and to the extent that they were used in the relevant transactions in the 12 months before the mandatory bid threshold was triggered. In this case, for the purposes of the exchange ratio, the value of the consideration securities must not exceed the average market price of those securities in the 12 months before the offer.

**If shares are issued is a prospectus or listing particulars required?**

If the shares are listed in Italy, the required information will be contained in the offer document. The situation, however, is not totally clear after the (partial) implementation in Italy of the EU Prospectus Directive. In fact, the Regulations seem now to imply that a prospectus will be needed for share for share offers unless an exemption is available. It remains to be seen how Consob will apply the above in practice.

**Are there any valuation requirements?**

An expert appointed by the court must value the shares acquired in consideration for the issue of new shares by an Italian bidder. The expert must confirm that the value attributed by the bidder to the target's shares is at least equal to the value used for the purpose of the capital increase (nominal value plus any premium) of the bidder. This reflects the Italian civil code requirement that any non-cash consideration received as consideration for new shares must be valued. The bidder's external auditors must also provide a fairness opinion on the exchange ratio.

## **Timing**

**Is there a prescribed timetable once a bid has been announced?**

Consob has 15 days from receiving the draft offer document to provide comments on and approve the offer document. However, the Regulations clarify that the acceptance period cannot commence:

- if the target is a bank or other regulated financial company, until the relevant authorisation is obtained from the Bank of Italy;
- if the offer involves shares as consideration, until the shareholders' meeting of the bidder has approved the issue of the consideration shares; and
- until at least five market days have elapsed after the offer document is published to enable the target company's board of directors to prepare its own communication on the offer (see page 22). If the

target company's communication is already included in the offer document (this is usual in recommended bids), the acceptance period can commence on the market day following the publication of the offer document.

The acceptance period also cannot start until the bidder has delivered to Consob appropriate documentation confirming that the cash portion of the bid, if any, is fully guaranteed.

Following Consob's approval, the offer document is sent to the target company and made available to Consob and to the market through publication in the press.

The bidder has to agree with the stock exchange the starting date of the acceptance period and its duration. A bid must be open for:

- a minimum of 25 market days up to a maximum of 40 market days if the offer is for 100 per cent of the target's shares or if it is an *Offerta Preventiva*; or
- a minimum of 15 market days up to a maximum of 25 market days in any other circumstances.

Consob may decide to extend the acceptance period up to a maximum of 55 market days.

The acceptance period will be adjusted in the event frustrating action is proposed or if there is a competing bid.

Appendix 1 contains an indicative timetable for a voluntary cash tender offer.

#### **Can a bidder revise its offer?**

A bidder can increase or modify its offer up to three market days before the offer closes. Such changes should be published in the same way as the original offer. A bidder cannot lower the threshold of its acceptance condition.

#### **Do target shareholders have withdrawal rights?**

A shareholder accepts the offer by signing an acceptance form made available at the bidder's offices (and those of the investment and depository firms engaged by the bidder). An acceptance is irrevocable unless a competing bid is announced, in which case the target company's shareholders can withdraw their acceptance of the first offer.

A shareholder accepts an *Offerta Preventiva* (see page 17) by completing an additional form prepared by the bidder that can be attached to the offer document. Similarly, the acceptance is irrevocable unless there is a competing bid.

### **Can a bidder make another bid if the first one fails?**

Neither the Testo Unico nor the Regulations prevent a bidder from relaunching its offer if the first offer is unsuccessful. There are also no restrictions on the number of offers that a bidder can make for the same target. In a recent case, a voluntary bid and a mandatory bid were launched almost at the same time for the shares of the same target company.

The rules on residual offers are relevant in this context. These apply when less than 10 per cent (or any lower limit set by Consob, in agreement with the company managing the stock exchange, under general criteria established by Consob) of a company's shares giving the right to vote at the shareholders' meetings on the appointment, removal or liability of the company's directors is freely held in the market (which will be the case where one or more persons acting together hold shares representing more than 90 per cent of the company's share capital). In such circumstances, the principal holder of the 90 per cent stake is required either (a) to restore a sufficiently large free float of shares to ensure the regular operation of market transactions (no level is specified) within 120 days from the passing of the 90 per cent threshold, or (b) to launch an offer to acquire the remaining shares for cash at a price set by Consob based on various parameters listed in the Testo Unico and the Regulations.

However, where the residual offer obligation arises following a previous offer for the entire share capital of the target company where acceptances were at least equal to 70 per cent of the shares being bid for, the price of the residual offer is determined by Consob at the same price as the previous offer, unless there are important reasons to take into account the parameters listed in the Testo Unico and the Regulations.

## **Information for target shareholders**

### **What information is the bidder required to provide?**

In the offer document the bidder must provide certain prescribed information, including:

- information on the bidder and the target (such as major shareholders, members of the board of directors and board of statutory auditors, description of the business carried out by the bidder);
- details of the shares being bid for, the consideration offered and the procedure for acceptance;
- details of target securities held by the bidder;
- the price paid by the bidder for dealings in the target securities in the last two years;

- details of how the consideration offered to target shareholders was calculated;
- the bidder's reasons for the bid and its future intentions; and
- agreements, if any, between the bidder and the target company or its shareholders or directors.

**What information is the target required to provide?**

The target company must prepare and publish a communication containing, among other things, the following information:

- any information that may be useful for the evaluation of the offer, together with the assessment of it by the directors of the target company;
- any resolution to call a shareholders' meeting to resolve on frustrating action;
- information on securities of the target (or of companies controlling, or controlled by, the target) held by the target itself or by its directors and on any shareholders' agreement concerning the target's shares; and
- any significant fact not mentioned in the latest interim or annual financial statements of the target.

This communication has to be sent to Consob at least two market days before the date fixed for its publication and must be made available to the market on the first day on which the offer can be accepted.

**Who is required to take responsibility for published information?**

The directors of the bidder take responsibility for the information in the offer document and any other information published by the bidder. Similarly, the directors of the target take responsibility for the information included in the target's communication on the offer and other information published by the target.

**Are there any special requirements for profit forecasts, asset valuations or statements about merger benefits?**

Not in general. However, depending on the circumstances, Consob may require the publication of any information, financial or otherwise, as it considers relevant.

## **Financing**

### **Can a bid be conditional on financing?**

A bid cannot be conditional on financing.

### **Can the target's cash or assets be used to refinance borrowings incurred to finance the bid?**

No, as this would fall under the Italian financial assistance prohibition. Article 2358 of the Italian civil code provides that a company can neither grant loans nor give guarantees for the purpose of the purchase of or subscription for its own shares.

## **Role of target board**

### **What are the duties of the target board?**

The directors of the bidder and the target have a general responsibility to act in the best interest of their respective companies, not in those of the shareholders. Both boards of directors must also comply with the general rules on insider trading, use of privileged information and disclosure obligations in respect of the shares held by the directors in the respective companies.

The Testo Unico requires the directors of the target company to notify both Consob and the market of their comments on, and recommendation of, the bid by no later than the first day on which the offer can be accepted (see page 19).

### **What scope do the target company directors have to frustrate a bid?**

There is a general prohibition on the directors of the target from carrying out any frustrating action from the time the offer document is lodged with Consob, unless they obtain the authorisation of shareholders (see page 12). Breach of this provision may result in fines and the directors can also be liable for the damages caused to third parties and to the company.

A shareholders' meeting (either ordinary or extraordinary, depending on the kind of action intended to be carried out) may authorise frustrating action provided not less than 30 per cent of the share capital resolves to do so. Even though shareholders may approve frustrating action, the directors can still be liable for the damage caused to third parties and shareholders as a result of the action. The directors may also be liable for the damage to the company.

Italian law does not define frustrating action. Directors, therefore, have only their own judgement to rely upon as to what can amount to frustrating a bid. Consob has provided guidance in this respect.

## **Role of financial adviser**

### **Must the bidder have a financial adviser? If so, what is its role?**

There is no specific provision requiring a bidder to have a financial adviser to make the bid. However, the Regulations oblige the bidder to disclose the name of any advisers it does employ in the communication sent to Consob, the market and the target when the offer document is deposited with Consob.

### **Must the target have a financial adviser? If so, what is its role?**

The target is not required to have a financial adviser. However, as the target company must publish a document containing its comments and recommendations on the bid, the target's directors are likely to seek independent advice.

### **Is it usual to sign an engagement or mandate letter?**

A bidder and the target will typically agree a formal engagement letter with any advisers. Any adviser acting under an engagement/mandate letter governed by Italian law would be subject to the general contractual liability regime established by Italian civil law.

### **Will the financial adviser have to give a public opinion on the offer?**

Neither the financial adviser to the bidder nor the financial adviser to the target has to give any opinion on the offer to the target company's shareholders.

## **Mandatory offers**

### **Are there any rules requiring a bid to be made if a certain level of shareholding is reached?**

Any person who, following an acquisition for consideration other than a general offer for all the shares or an *Offerta Preventiva*, holds (by itself or together with its concert parties) more than 30 per cent of a company's shares giving the right to vote at the shareholders' meetings on the appointment, removal or liability of the company's directors must make an offer (a mandatory bid) for all the shares in that company. The offer must be launched within 30 days at a price not less than the arithmetic mean of:

- the average market price of the shares during the previous 12 months; and
- the highest price paid by the bidder for any of those shares during the previous 12 months.

The acquisitions of companies whose principal asset or assets are listed shares (according to detailed parameters described in the Regulations) will also count towards the 30 per cent threshold (a form of chain principle).

A person must also make a mandatory bid if he (together with concert parties) holds, directly or indirectly, a stake higher than 30 per cent, but not higher than 50 per cent, of the shares giving the right to vote at the shareholders' meetings on the appointment, removal or liability of the company's directors, and he acquires or exercises a right to acquire for consideration more than an additional 3 per cent of such target's shares in any 12-month period.

However, the obligation to launch a mandatory offer is not triggered if:

- the threshold is exceeded but another shareholder already has, or other shareholders acting together already have, control over the company;
- the threshold is exceeded by virtue of a subscription for capital of a listed company in financial difficulties as part of a debt restructuring plan of which Consob and the market have been notified;
- the threshold is exceeded by means of a transfer of shares between companies under common control or from one company to its controlling shareholder(s);
- the threshold is exceeded as a result of the exercise of an option, conversion right or subscription right;
- the 30 per cent threshold is exceeded by no more than 3 per cent, and the purchaser undertakes to sell the excess shares within 12 months and to refrain from voting such shares in the interim; or
- the threshold is exceeded as a result of a merger or demerger justified by industrial reasons, provided that the merger or demerger is approved by the shareholders' meeting of the company whose shares would otherwise have been subject to the mandatory offer.

Furthermore, a mandatory bid is required if, in the 12 months following the close of an *Offerta Preventiva* (see page 17), the bidder or any concert party buys or agrees to buy more than 1 per cent of the shares giving the right to vote at the shareholders' meetings on the appointment, removal or liability of the company's directors. The obligation to launch a mandatory bid would also be triggered where a shareholders' meeting of the target approves a merger or demerger.

A residual bid is also mandatory (subject to exceptions, see page 21) if a person holds more than 90 per cent of a company's shares (or such higher percentage set by Consob in conjunction with Borsa Italiana) giving the right to vote at the shareholders' meetings on the appointment, removal or liability of the company's directors. Such a bid must be in cash at a price determined by Consob.

## **Minority squeeze out**

### **Do Italian companies have a procedure for requiring minority shareholders to accept a bid?**

If, following a general offer for all the voting shares in a company, a person acquires more than 98 per cent of such shares, article 111 of the Testo Unico provides that this person has the right to purchase the remaining shares within four months of the close of the offer. The bidder is required to have reserved this right in its original offer document. An expert appointed by the court, taking into account the offer price and the market price of the shares in the last six months, fixes the price.

In such circumstances, the shareholders have no right to object: their shares are automatically transferred to the bidder as soon as it notifies the target company that the purchase price for the shares has been deposited at a bank. The company is then obliged to enter the name of the bidder in the shareholders' ledger.

## Appendix 1

### Indicative timetable for a voluntary cash tender offer<sup>4</sup>

X: announcement date

d: calendar days

dd: stock exchange days

Action	Timing
Meeting of the board of directors of the bidder (or of any other corporate body having the power to resolve to launch the offer)	X
Filing with Consob of the offer announcement under article 102 of the Testo Unico together with the draft offer document <sup>5</sup>	X
Communication to the market and to the target of the filing with Consob of the offer announcement and the draft offer document	X
Filing of the antitrust notification and of the request for any authorisation/consent required for the purchase of the participation in the target company <sup>6</sup>	X
Deadline for comments by Consob on the draft offer document	X + d 15
Posting of the offer document (incorporating Consob's comments, if any) to the target company and Consob, and publication of the offer document in the press	X + d 15

<sup>4</sup> This timetable refers to a voluntary cash tender offer and is purely indicative. It could be subject to significant variations in the case of, among other things, a share-for-share offer (on the issue of the exchange shares) or a mandatory offer. The timetable may also be affected by the conditions to which the offer is subject.

<sup>5</sup> The cash confirmation on the consideration must be obtained before the beginning of the acceptance period. When filing the draft offer document with Consob, it is only necessary to file an engagement letter from the bank organising the financing facilities that indicates the nature of such facilities.

<sup>6</sup> Pre-filing is sometimes required (eg information must be sent to the Bank of Italy at least seven days before the board of the bidder resolves upon an offer where the target company is a bank or the bidder, as a consequence of the bid, will acquire control of a bank).

<b>Action</b>	<b>Timing</b>
Filing with Consob of the comments and recommendations on the offer of the target board of directors <sup>7</sup>	X + d 18
Publication of the Italian target's board communication amended as per Consob instructions	X + d 20
Beginning of the acceptance period <sup>8</sup>	X + d 20
Deadline for the launch of any competing offer	X + d 20 + dd 20
Deadline for the publication of any revision to the offer <sup>9</sup>	X + d 20 + dd 22
Closing of the acceptance period	X + d 20 + dd 25
Verification of the number of the target company's shares tendered to the offer	X + d 23 + dd 25
Payment for the target company's shares	X + d 25 + dd 25 + time necessary for the fulfilment of all the offer conditions

<sup>7</sup> The Regulations require the directors of the target company to communicate to the market, no later than the first stock exchange day on which the offer can be accepted, their comments and recommendations on the bid (taking into consideration Consob's comments). In this communication the target's directors must also state whether they intend to call a shareholders' meeting to obtain the authorisation to adopt frustrating actions.

The communication by the target company's board must be filed with Consob at least two stock exchange days before its publication and must be disclosed to the market by the first stock exchange day of the acceptance period, at the latest.

According to the Regulations, the acceptance period can begin only five stock exchange days after the publication of the offer document, unless the communication by the target company's board is already included in the offer document (as is typical in recommended offers).

<sup>8</sup> In the event of voluntary offers, the duration of the acceptance period is agreed with Borsa Italiana and ranges between 25 and 40 stock exchange days. Consob could extend the offer period up to a maximum of 55 stock exchange days. For the purposes of the present timetable, we assume that the offer period will last 25 stock exchange days.

In the event of mandatory offers and *Offerta Preventiva*, the duration of the acceptance period is agreed with Borsa Italiana and ranges between 15 and 25 stock exchange days. Consob could extend the offer period up to a maximum of 55 stock exchange days.

<sup>9</sup> The offer can be revised up to three stock exchange days before it closes.

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