



Additional amendments to the Italian takeover legislation

Over the last few months, the government and market regulator have amended the Italian legislation on public tender offers. We have covered those amendments in various briefings. Most recently, the Italian government has intervened again on the subject. This briefing aims to provide a summary of the most significant amendments approved in that context.

By a decree published on 22 October 2009 (the decree), the Italian Council of Ministers approved certain amendments to the Italian takeover legislation, as set out in Legislative Decree No. 58 of 24 February 1998 (the Act).

The amendments to the Act purport to introduce more flexibility in the Italian financial legal framework and to overcome certain interpretive concerns relating to the application of the Italian rules on public takeover bids, as well as to ensure consistency with the EU legislative framework.

This briefing focuses on some of the key changes the decree has introduced in the Italian takeover rules, and notably on the re-introduction of the so-called 'passivity rule', certain amendments to the provisions on public exchange offers relating to debt instruments, the (possible) inclusion of derivative financial instruments in the calculation of the relevant shareholding thresholds for mandatory takeover bids and a 'new' definition of 'persons acting in concert'.

Defensive measures

The decree has partially modified the provisions enacted during the recent global financial crisis to prevent Italian listed companies from being easy targets of hostile takeover bids (see April 2009 briefing). The decree has re-instated in the Italian legal framework the so-called 'passivity rule', ie the rule that forbids directors of Italian listed companies from taking any action during the offer

period which may frustrate the bid, unless such action was previously approved by the shareholders' meeting. This is indeed the most fundamental change set forth by the decree.

The re-introduction of the 'passivity rule' will become effective on 1 July 2010. However, listed companies may decide to derogate the above general rule and voluntarily implement a waiver of the 'passivity rule' in their by-laws. This explains the effectiveness as of July 2010 of this amendment, since the time lag will enable the interested companies to amend the by-laws at the annual general shareholders' meeting called to approve the 2009 financial statements.

This is indeed the most fundamental change set forth by the decree. In the wake of the implementation of the passivity rule, it is generally held that a significant barrier to the launch of takeover bids on Italian listed companies will be removed, thus opening the market to new potential takeover opportunities.

The decree has left untouched other provisions enacted in the context of the 'emergency legislation'.

In particular the so-called 'breakthrough rule' (ie the rule allowing the disapplication in the context of a takeover offer of those provisions in the bylaws or shareholders' agreements of a listed company which have the effect of hindering the acquisition of control by a bidder) has remained unchanged and is therefore applicable only if expressly provided for in the articles of association of the relevant listed company (see April 2009 briefing).

Finally, the decree confirmed the existing legal regime governing mandatory offers when a person holds more than 30 per cent of a listed company's voting securities, but less than the majority of the company's voting securities (the so-called *OPA da consolidamento*). In such circumstances, that person will be bound to launch a mandatory offer on 100 per cent of the company's vote shares if he subsequently increases his stake by an amount exceeding 5 per cent during any twelve-month period.

Public exchange offers

The decree introduced a new provision dealing with the rules applicable to public exchange offers for bonds or other debt financial instruments. Even though the rules apply to any exchange offers concerning bonds or debt instruments, in practice the change is expected to have an impact on those cross-border offers in which several bondholders or holders of debt financial instruments are resident in Italy. In essence, under the new rules, in these circumstances the offeror may rely on the prospectus authorised by the market regulator of its EU member state and merely request the Italian market regulator, Consob, to vet it under Directive 2003/71/EC (the Prospectus Directive).

Traditionally, in light of the broad definition of 'public offer' under the Act, an offer (whether for equity or debt instruments) launched abroad and extended to Italy was considered as a domestic offer (and as such subject to the relevant provisions of the Act), if there were more than 100 Italian resident bondholders or holders of debt financial instruments and the value of the offer was higher than €2.5m. Hence, under the prior legal regime, offerors could not benefit from the EU passport rules under the Prospectus Directive, and were consequently forced to draw up a specific offering document – subject to the approval of Consob – relating to debt exchange offers addressed to Italian investors. This burdensome requirement inevitably led to the exclusion of Italian investors from a number of cross-border exchange offers.

The amendment implemented by the decree is consistent with the position of Consob, adopted in a communication of April 2009 (see June 2009 briefing). In that context, Consob had held that if a bond exchange offer involves more than one EU member state, the offeror can request permission to use, for the purpose

of extending the offer to Italian investors, a prospectus authorised by the home member state's market regulator, in accordance with the Prospectus Directive, as opposed to an offering document drafted according to the relevant provisions of the Act. Indeed, Consob initiated the debate, which has led the decree to amend the Act in order to simplify the requirements applicable to debt exchange offers.

Derivative financial instruments to be computed for the launch of a mandatory takeover bid

A new provision has been implemented by the decree, providing that a Consob regulation – which has not yet been adopted – will govern circumstances and means under which derivative financial instruments based on underlying shares of a listed company must be computed for the purpose of determining the shareholding triggering a mandatory takeover bid under the Act.

It is not yet clear how Consob will use such delegated authority, in particular if only physically settled derivatives, or also cash-settled derivatives, will become relevant for this purpose.

The above is consistent with and follows the ongoing debate in several European countries, prompted by recent headline cases such as the takeover of Continental by Schaeffler, as to the relevance of synthetic stakebuilding for the purposes of the transparent analysis of corporate control and mandatory takeover rules.

In relation to the above, Consob has already recognised the relevance of physically settled derivatives for the purpose of disclosure of relevant holdings in listed companies (see April 2009 briefing).

The new definition of 'persons acting in concert'

Last, but not least, the decree has introduced a clear (and in some respects broader) definition of 'parties acting in concert', according to which, 'persons acting in concert are those persons who cooperate with each other based on an agreement, express or tacit, oral or written, even if invalid or ineffective, having the aim to acquire, maintain or strengthen the control over the issuer or to frustrate the goals of a public takeover bid or exchange offer'.

The notion of ‘persons acting in concert’ is extremely relevant under Italian takeover law, since the rules on mandatory offers also apply when the relevant holding thresholds are passed by persons acting in concert.

The above definition is complemented by a list of circumstances, which give rise to a non-rebuttable presumption that the persons are ‘acting in concert’. Furthermore, Consob is empowered to identify through general regulations other instances in which the existence of a concert is presumed (but subject to rebuttal evidence), as well as the circumstances in which the ‘co-operative behaviours’ do not qualify for the ‘acting in concert’ test. To date, Consob has not yet issued the relevant regulations.

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