



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.

The information and opinions contained in this document are not intended to be a comprehensive study, nor to provide legal advice, and should not be relied on or treated as a substitute for specific advice concerning individual situations.

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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 were the norm, reflecting the fact that relatively few Italian companies are listed on the stock exchange. However, recent bids show that attitudes are changing, for example Olivetti's offer for Telecom Italia and Generali's offer for INA in 1999, and more recently the Tyche (De Agostini Group) offer for Lottomatica and the Italennergia offer for Montedison and Edison.

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 also sets out the regime which applies to certain other aspects of Italian corporate law (including insider trading and corporate governance)¹.

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 current set of implementing regulations issued by Consob took effect on 14 May 1999 (the Regulations). The Regulations are amended occasionally by Consob in order to reflect new interpretations of the matters covered by the Testo Unico (primarily arising from Consob's day-to-day work).

This legislation introduced 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 restated several fundamental principles of Italian corporate law, such as equal treatment of all shareholders. This regime was designed to modernise the Italian market by facilitating takeover activity and permitting the transfer of shareholdings free from restrictions that had been typical in Italian shareholding structures.

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 only apply where the

¹ A radical reform of the Italian corporate law system came into force on 1 January 2004. This introduced a series of important changes to the legislative framework for company law in force in Italy since 1942. As a result, some changes have also been made to the Testo Unico.

target is an Italian company whose ordinary shares are listed on an official Italian stock exchange.

Is litigation a feature of takeovers?

To date, there has been little litigation surrounding Italian takeovers. Consob, whose rulings have rarely been challenged in court, has usually resolved disputes about the application of the law. This is partly because the majority of transactions have been recommended. However, on the hostile bid by Generali, INA went to the Rome Administrative Tribunal and, on appeal, to the Consiglio di Stato, to challenge an opinion of Consob on the applicability of the passivity rules (see page 12).

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 applies to any concentration where the combined aggregate turnover in Italy of all the undertakings involved exceeds €398m, or if the aggregate turnover in Italy of the acquired undertaking exceeds €40m. These thresholds are increased annually by indexation based on certain economic measures.

A concentration must be notified in advance to the Italian Antitrust Authority (the IAA). The IAA 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. If there is a full investigation, the IAA has 45 days to give its conclusions to the undertakings concerned. The IAA may extend this period for a further 30 days if the undertakings fail to supply all the information requested by it.

The banking regulator (the Bank of Italy) also acts as antitrust authority on banking mergers and takeovers. However, the IAA has stated that it retains jurisdiction over non-banking aspects of a concentration among financial entities. This was confirmed on Banca Intesa's offer for Banca Commerciale Italiana where the IAA commenced a full investigation of the proposed merger.

A concentration will be cleared if the IAA 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, implementation of the transaction does not have to be suspended. However if the IAA opens second-phase

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.

Implementing a transaction that has been notified but not cleared does not infringe the law. However, there is a risk that the IAA may decide not to authorise it and may order measures including divestiture to restore the parties to their premerger positions.

Are any industry sectors protected from takeovers?

Current legislation imposes restrictions and prohibitions on persons who can hold licenses for broadcasting services, unless certain nationality criteria are satisfied. Other restrictions exist in airline transportation and, in certain circumstances, in other areas regarded as sensitive to the national interest. A special regime applies to newspaper mergers that are likely to create a dominant position in the relevant market.

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. The Bank of Italy has a period of 30 days to provide or refuse its authorisation for the bid.

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 automated 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 shareholders 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 competent Companies' Registry within 15 days of execution. Failure to comply will render such agreements null and void.

Under the Testo Unico, these agreements cannot exceed three years in duration. If they are not for a fixed term, they will be terminable 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 person makes a mandatory offer, a voluntary offer for 100 per cent of the issued shares or an *Offerta Preventiva* (see page 16).

Are there any company law provisions or common provisions in constitutional documents which make takeovers difficult?

Some previously state owned companies retain a 'golden share' that permits the Italian government to block a change of control. The validity of golden share powers has been challenged by the EU and as a result tend not to be used by the government.

Also, by-laws 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, the 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.

In addition, following the extensive reform of Italian corporate law referred to on page 1, which took effect on 1 January 2004, Italian companies can, among other things, issue shares where the voting rights are conditional upon the occurrence of certain events. In particular, an Italian listed company can now issue shares where the voting rights are conditional upon a public takeover offer for the shares of that company being launched. 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 capital is required.

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

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 an ordinary shareholders' meeting, requiring a simple majority. Any director removed from office in this way has the right to claim damages if he has been removed without 'cause' (*giusta causa*).

In order to control shareholder resolutions generally (including those concerning the appointment and removal of directors), under the Italian Civil Code an ordinary shareholders' meeting can pass resolutions only if the following quorum requirements are satisfied (a second call being made if the first call is unsuccessful)².

	Attendance quorum	Resolution quorum
First call	50 per cent of total share capital	simple majority of those present
Second and subsequent call ³	no attendance quorum required	simple majority of those present

Under general Italian corporate law, an extraordinary shareholders' meeting is required to resolve on a statutory merger (except a merger with a company at least 90 per cent or more controlled by the absorbing company, if so provided by the relevant by-laws), on any amendment of the by-laws (for example an increase or decrease of the share capital, a change of the company's name or its registered office) and on the appointment of a liquidator of the company. Under the Testo Unico, an extraordinary shareholders' meeting of a listed company may only pass resolutions if the following attendance quorum requirements are satisfied (although the by-laws may impose a higher quorum requirement).

² This assumes a company with a single tier management structure. The recent reform of Italian corporate law now allows *Società per Azioni* to adopt 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, appointment/removal of members in the *Consiglio di Gestione* (who has the general management powers of the board of directors in the traditional single tier model) is a responsibility of the *Consiglio di Sorveglianza* and not of the shareholders' meeting. However, to date, no single listed Italian *Società per Azioni* has adopted this two tier management structure.

³ Subsequent calls are permitted to the extent provided in the company's by-laws.

First call	50 per cent of total share capital, plus one share
Second call	over 33.3 per cent of the total share capital
Third call	20 per cent of the total share capital, plus one share

To be validly passed at a first, second or third call, resolutions proposed at an extraordinary shareholders' meeting are required to be passed by a majority of two-thirds of the share capital present. 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.

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. To be valid holders of at least 30 per cent of the company's share capital must pass the resolution granting such authorisation. It is open to question whether this special quorum is in addition to, or in lieu of, the two-thirds quorum for resolutions for extraordinary 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 other related information is available from the relevant Companies' Registry. Italian law and regulations also impose a number of disclosure obligations on listed companies.

Companies are required to deposit at their registered office or the competent Companies' Registry their interim and annual financial statements (including the *nota integrativa* explaining the policies adopted by the board in the preparation of financial statements), together with related attachments (ie the report 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 (showing the total number of shareholders and identifying those holding more than 2 per cent of the share capital) must also be available to the public. Financial statements are frequently posted on a company's website.

Also, a listed company, as well as persons controlling a listed company, must notify the market immediately of any non-public information in its sphere of activity that, if disclosed, could have a material impact on its share price. The information must be disclosed at the same time to Consob.

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

Information may also be available in the form of market and sector research that the sponsor or the specialist of a newly listed company has to publish for at least one year after listing. Listed companies may disclose this information to the public provided that it is simultaneously deposited with Consob and the stock exchange and it contains specific disclaimers explaining that it has not been independently prepared.

How can the bidder get information about target shareholders?

An important source of information on listed companies is Consob. Any person who acquires 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 company, it must inform that company and Consob.

In addition shareholders in a company must notify the company and Consob each time they cross certain thresholds (see page 13). Consob publishes this information.

The existence and contents of any shareholders' agreements (including an extremely wide range of agreements relating to share capital) must also be notified to Consob. These agreements must be deposited at the competent Companies' Registry for public inspection and details published in the national press (see page 4). Details are also available on Consob's website.

Consob also 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) and in case of proxy solicitation, the person effecting the solicitation has other inspection rights as detailed in the Regulations.

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 if any loss is suffered as a direct consequence of inaccurate or misleading statements contained in the accounts.

Also, the Testo Unico provides that certifying accountants can be liable in damages for loss suffered by a company and by third parties that results from non-compliance with the accountants' obligations and from negligent or wilful misconduct. In such circumstances, a bidder may be entitled to bring an action for damages against the accountants 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 floating shares in the market and the shareholding structure of the target.

Negotiations may also take place with major shareholders in 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 page 13).

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

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 target 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 dependant 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 addition, any agreement reached, for example with major shareholders, could be declared null and void if it followed misleading statements when the bidder would not have concluded the contract in the absence of such statements.

The parties would also need to have regard to the good faith principle referred to below.

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. Any resulting damages will usually be restricted to such losses as 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 begins a confidentiality agreement will usually be required.

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

Agreements between the bidder and the target restricting the bidder's ability to buy shares in the target are not common. However, following practice in other jurisdictions, they are likely to be 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 stock exchange and the competent 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 which, if made available to the public, could have a material impact on its share price. Also 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 under the offer if the information has not been made public at that time (see page 13).

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 to provide the same information to a rival bidder.

Deal protection

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

It is not usual for a target company to agree any deal protection measures with a bidder. Such arrangements would be more likely between target shareholders and a bidder.

Irrevocable undertakings by target shareholders to accept an offer (which are still rare in Italy) may provide little protection in practice as shareholders can withdraw their acceptances if a competing offer is made (see page 11).

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 covertly build up 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. The mandatory consultation procedures apply only to transfers of assets as a going concern and only then in certain circumstances.

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

Employees of the target have no rights to challenge the 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 to carry out major restructuring of the workforce and indicate the plans that are expected to be implemented in the next 12 months.

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 per se are not to be treated as shareholders' agreement within the meaning of article 122 of the Testo Unico, but they are likely to be considered as preliminary sale and purchase agreements. In any event, a careful analysis of the contents of the irrevocable undertakings is to be carried out on a case-by-case basis to determine whether they could be treated as shareholders' agreements.

Again, parties should also 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?

In April 2000 Consob amended the Regulations on announcements as a consequence of the bid made by Generali for INA. INA challenged in the courts, among other things, the legitimacy of the part of the Regulations that provided that the target was subject to restrictions on taking frustrating action without shareholder approval as from the announcement of the offer and this did not depend on the offer document being filed. Following these amendments, there is no obligation on the bidder to announce its intention to launch a bid until the draft offer document is deposited with Consob for its comments. Simultaneously with the deposit of the draft offer document with Consob, the bidder is required to immediately send a communication to the market and 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, confirmation as to any holding of the bidder and its concert parties in the target and names of any advisers. The offer period, triggering the rules on dealings in target shares, no frustrating action without shareholder approval and equality of treatment for target shareholders, is deemed to commence as from this moment.

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 if the bid is not recommended as the target will only be prevented from taking frustrating action without shareholder approval from the time the draft offer document is deposited with Consob.

The above 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 an offer where the target company is a bank, or the bidder, as a consequence of the bid, will 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 a 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 appoint, or remove, the management body of the company (see page 23).

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 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, which, if made public, could materially influence the price of those securities and which came to the person's knowledge by virtue of his position as a shareholder or through exercising a professional or official function (including a public one).

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

In addition, during the offer period, the bidder and any interested parties (being the target, any company controlling, controlled by or under common control with, the bidder or the target, their directors and statutory auditors and the shareholders of the bidder or the target which are parties to a 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:

- its interest passes through 2 per cent, 5 per cent, 7.5 per cent and 10 per cent of the company's voting capital and each successive 5 per cent threshold thereafter; and

- its interest falls below any such threshold.

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 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 companies.

Disclosure requirements to the Bank of Italy apply to 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.

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 a person's holding through 30 per cent of the voting rights he will have to launch a mandatory bid (see page 23).

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, at a price higher than the offer price, the offer price must be increased to the higher price (best price rule).

Are there any rules preventing market manipulation?

Any person who spreads false information, enters into sham transactions or takes any other steps which could give rise to a material change in the price of any securities (listed or non listed), or which could have a significant impact on the reliance which the public places on the financial stability of banks and banking groups, will be subject to criminal sanctions (this crime is known as *aggiotaggio*).

Offer structure

What is the usual form of takeover offer?

The usual form of takeover involves the bidder making a general offer to all target 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 23). Following approval by Consob, the offer document will be published in the press and will be sent to the target and will be made available to all potentially interested subjects 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 two companies to merge. The merged company ceases to exist and all its rights and obligations are transferred to the surviving company. Shareholders in the merged company receive shares in the surviving company in consideration for this transfer.

Generally, the merger process, which requires the approval of shareholders and the court, 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 a:

- report to shareholders from the directors of the companies involved, containing certain information specified in the Italian Civil Code and in the Regulations;
- merger plan, containing the information specified by the Italian Civil Code; and
- deed of merger.

Listed companies involved in a statutory merger must prepare an information document on the merger, in accordance with the Regulations. It will contain information similar to that required 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 (an accounting firm in the event the merger involves listed companies) 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 part of an industrial reorganisation or rationalisation (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 on the offer price. However, the regulations on takeover bids require a minimum price in the following circumstances:

- mandatory offers (see page 23);
- minority squeeze out (see page 24); and
- residual offers (see page 19).

Also, if the bidder buys shares during the offer period at a price higher than the offer price, it will have to increase the offer price to this higher price (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 which depend on the mere will of the offeror’, 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, no material adverse change in the target and no frustrating action by the target.

Consob has clarified that conditions requiring the target not to take any frustrating action nor for there to be any 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 bidder’s shareholders’ meeting 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 appoint, or remove, the management body of the company (the *Offerta Preventiva*) if 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 appoint, or remove, the management body of the company in the 12 months before the bidder notifies Consob of its intention to make an offer, nor during the offer itself;

- the offer must be conditional on approval by a majority of independent shareholders holding shares giving the right to appoint, or remove, the management body of the company; 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 if, in the 12 months following the *Offerta Preventiva*, the bidder or any concert party acquires more than 1 per cent of the target's shares giving the right to appoint, or remove, the management body of the company, or the target resolves to do a merger or demerger transaction.

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 will be 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 principles of fairness and equal treatment towards the target shareholders.

Share consideration

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

Historically share consideration has been fairly unusual but more recent offers show that attitudes are changing.

In the case of a mandatory offer or a voluntary offer for 100 per cent of the target's shares giving the right to appoint, or remove, the

management body of the company, the consideration shares will have to be listed on an official stock market within the EU. On a mandatory bid, shares can be used as consideration only if and to the extent they were used in the transactions completed in the 12 months preceding the passing of the threshold triggering the mandatory bid obligation. In addition, for the purposes of the exchange ratio, the value of the consideration securities must not exceed the average market price of those securities during 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.

Are there any valuation requirements?

An expert appointed by the court must value shares acquired in consideration for an 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 capital increase (nominal value plus any premium) of the bidder. This reflects the Italian Civil Code requirement that any non-cash consideration received for new shares must be valued. The bidder's external auditors must also render a fairness opinion on the exchange ratio between the bidder's and the target's shares.

Timing

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

Consob has 15 days from filing of the draft offer document with it 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 from the Bank of Italy is obtained;
- if the offer involves shares as consideration, until the bidder's shareholders' meeting has approved the issue of the consideration shares;
- until at least five market days after the offer document is published so as to enable the target board of directors to prepare its own communication on the offer (see page 22), unless the target's communication is already included in the offer document (this is usual in recommended bids).

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 published by sending it to the target company and made available to the market through publication in the press and Consob.

The bidder has to agree with the stock exchange the start 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 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 55 market days to allow the regular course of the offer and to preserve the rights of investors.

The acceptance period will be adjusted in the event frustrating action is proposed or 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 it closes. Such changes would have to 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 target shareholders can withdraw their acceptance of the first offer.

A shareholder accepts an *Offerta Preventiva* (see page 16) 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 re-launching 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.

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 stock exchange, pursuant to general criteria

established by Consob) of a company's shares giving the right to appoint, or remove, the management body of the company are freely held in the market which will be the case where one or more persons acting together hold more than 90 per cent of the company's capital. In such circumstances, the principal holder of the 90 per cent stake is required (i) to restore a sufficiently large float of shares to the market (no level is specified) within four months from the passing of the 90 per cent threshold, or (ii) to offer to acquire the remaining shares for cash at a price set by Consob based on various parameters listed in the Testo Unico and Regulations.

However, where the residual offer obligation arises following a previous offer where acceptances were at least equal to 70 per cent of the shares being bid for, the price of the residual offer shall be determined by Consob at the same price as the previous offer, unless there are important reasons to take into account the various parameters listed in the Testo Unico and 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, analysis of the prospects of the target if it is controlled by the bidder);
- details of the shares being bid for, the consideration offered and the procedure for acceptance;
- details of target's securities held by the bidder;
- dealings in the target's securities by the bidder in the last two years;
- consideration offered to the target shareholders and details of how this was calculated;
- bidder's reasons for the bid and its future intentions; and
- agreements, if any, between the bidder and the target or its shareholders or directors.

What information is the target required to provide?

The target company must prepare and publish, on the first day on which an offer can be accepted, a communication containing the following information:

- any information necessary for the evaluation of the offer, together with the target directors' assessment of it;
- any resolution to call a shareholders' meeting to resolve on frustrating action;
- information on securities of the target (or of companies 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 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?

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

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

Generally not. However, depending on the circumstances, Consob may require the publication of such 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, and not those of the shareholders of those companies, and both boards of directors must comply with the general rules on insider trading.

The Testo Unico requires the directors of the target company to communicate to Consob and the market, by no later than the first day on which the offer can be accepted, their comments and recommendations on the bid. In this communication the directors must also state whether they intend to call a shareholders' meeting to obtain authorisation to adopt frustrating action.

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 without the authorisation of shareholders from the time the offer document is lodged with Consob (see page 12). Breach of such provision can incur a fine of between €5,164 and €103,291 and the directors can also be liable for damages to third parties and the company.

A shareholders' meeting 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 damages to third parties and shareholders who suffer loss as a result of the action. The directors may also be liable for damages to the company.

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

Role of financial adviser

Does the bidder have to 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 provide that if the bidder has any advisers it must disclose the name of such advisers in the communication on the deposit of the offer document with Consob sent to the market and the target.

Does the target have to 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 up an engagement or mandate letter?

A bidder and the target will typically agree a formal engagement letter with their financial advisers, if any. Any financial adviser acting under an engagement 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 sort of opinion on the offer to target 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 (taken together with its concert parties) more than 30 per cent of a company's shares giving the right to appoint, or remove, the management body of the company, must make an offer (a mandatory bid) for all the shares in that company with the right to appoint, or remove, the management body. 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 over the previous 12 months and the highest price paid by the bidder for any of those shares in the same period.

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, at least 30 per cent but no more than 50 per cent of the shares giving the right to appoint, or remove, the management body of the company, and he acquires or exercises a right to acquire more than an additional 3 per cent of such target's shares in any 12 month period.

These obligations are subject to the following exceptions if:

- the threshold is exceeded, but one or more other shareholders acting in conjunction with each other already have control of the company;
- the threshold is exceeded by virtue of the underwriting of an increase in capital of a listed company in financial difficulties as part of a debt restructuring plan which has been notified to Consob and the stock exchange;
- the threshold is exceeded by means of a transfer of the shares between companies under common control or from one company to its controlling shareholder;

- the threshold is exceeded as a result of the exercise of an option or conversion right or an underwriting;
- the 30 per cent threshold is exceeded by no more than 3 per cent, and the purchaser undertakes to sell the shares exceeding the threshold 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 which is part of an industrial reorganisation or rationalisation provided that the merger, or demerger, is approved by the shareholders' meeting of the company whose shares would otherwise have been the subject of the mandatory offer.

A mandatory bid is also required if, in the 12 months following the close of an *Offerta Preventiva* (see page 16), the bidder or any concert party buys or contracts to buy more than 1 per cent of the shares giving the right to appoint, or remove, the management body of the company, or the shareholders' meeting of the target approves a merger or demerger.

A residual bid (see page 19) is also mandatory if a person holds more than 90 per cent of company's shares giving the right to appoint, or remove, the management body of that company. 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?

Article 111 of the Testo Unico provides that any person who, following a general offer for all the voting shares acquires more than 98 per cent of such shares, has the right to purchase the remaining shares within four months of the date of the offer. This is provided the bidder reserved the right to do so in its original offer document. An expert appointed by the court, taking into account the offer price and the market price in the last six months, fixes the price.

In such circumstances, any non-accepting shareholders have no right to object. Their shares will be automatically transferred to the bidder as soon as it notifies the target that the purchase price for the shares has been deposited in a bank. The company is then obliged to enter the name of the bidder in the shareholders' register.

Appendix 1

Indicative timetable for a voluntary cash tender offer⁴

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 ⁵	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 ⁶	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 and publication in the press	X + d 15
Filing with Consob of the target board of directors comments and recommendations on the offer ⁷	X + d 18

⁴ 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), a mandatory offer and on the basis of the conditions to which the offer is subject.

⁵ The cash confirmation on the consideration must be obtained before the beginning of the acceptance period. Upon filing of 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 characteristics of such financing facilities.

⁶ Pre-filing is sometimes required (eg information 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).

⁷ The Testo Unico requires the directors of the target company to communicate to Consob and the market, no later than the first day on which the offer can be accepted, their comments and recommendations on the bid. In this communication the target's directors must also state whether they intend to call a shareholders meeting to obtain authorisation to adopt frustrating action.

Action	Timing
Publication of the Italian target's board communication amended as per Consob instructions	X + d 20
Beginning of the acceptance period ⁸	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 ⁹	X + d 20 + dd 22
Closing of the acceptance period	X + d 20 + dd 25
Verification of the number of Italian target's shares tendered to the offer	X + d 23 + dd 25
Payment for the Italian target's shares	X + d 25 + dd 25 + time necessary for the fulfilment of all the offer conditions

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

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

⁸ 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 until 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. In any case, Consob could extend the offer period until a maximum of 55 stock exchange days.

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

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