NEWSLETTER NR. 34 - Mergers and Acquisition 2010

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1 RELEVANT AUTHORITIES AND LEGISLATION

1.1 What regulates M&A?

M&A transactions involving public companies in Italy are primarily regulated by:

- the Italian Civil Code;
- the legislative decree n° 58/1998, "*Testo Unico della Finanza*" ("TUF"), as subsequently modified and amended;
- the Consob Regulation n° 11971/1999 ("*Regolamento Emittenti*") as subsequently modified and amended; and
- the Regulation issued by Borsa Italiana ("*Codice di autodisciplina per le società quotate*"), as modified and amended, setting forth the governance standards that should be adopted by companies whose share are listed at the Milan Stock Exchange.

Companies may also be subject to:

- merger control regulation, which can be handled by Italian authorities pursuant to law n° 287/1990 or, in case of larger cross-border transactions, by the European Commission, pursuant to the EC Merger Regulation; services businesses are subject to the provisions of the legislative decree n° 385/1993, "*Testo Unico delle leggi in materia bancaria e creditizia*", ("TUB").

1.2 Are there different rules for different types of public company?

Italian regulation on M&A transactions depends on the kind of companies involved.

The applicable rules to transactions involving private companies (S.p.A., S.A.p.A. and S.r.l.) are provided for by the Italian Civil Code.

M&A transactions involving "*Italian listed companies*" are regulated by Section II TUF concerning tender offers.

According to Article 101-*bis* TUF, these rules apply to companies having their registered office in Italy and securities (meaning shares bearing voting rights, also limited to specific topics, at ordinary or extraordinary shareholders' meeting) admitted to trading on an EU Stock Exchange.

According to Article 101-*ter* TUF, Consob shall supervise the implementation of public offerings involving securities (bearing voting rights in the ordinary or extraordinary general meetings) issued by a company either (i) with registered office in Italy and listed on the Milan Stock Exchange, or (ii) bearing voting rights in the ordinary or extraordinary general meetings, with a registered office in a Member State of the European Union and listed solely at the Milan Stock Exchange.

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1.3 Are there special rules for foreign buyers?

In general terms, there are no special rules applicable to foreign buyers, as they shall be subject to the same provisions regulating tender offers promoted by Italian buyers.

Nevertheless, according to the combined provisions of Articles 104 ("*Defensive Measures*"), 104-*bis* ("*Breakthrough*") and 104-*ter* ("*Reciprocity clause*") TUF, an Italian target company may adopt defensive measures against any takeover bid promoted by a foreign company which is not subject to defensive measures regulation (see question 8.2 below) equivalent to those provided for under the Italian regulation.

As provided for by the last paragraph of Article 104-*ter* TUF any defensive measure against tender offers need to be authorised by the target's company shareholders' meeting at least 18 months before the (potential) tender offer is promoted and communicated.

1.4 Are there any special sector-related rules?

There are special sectors related rules concerning M&A transactions aimed at the acquisition of relevant participations into:

- listed financial institutions - in these cases the transaction shall need to be approved by the Bank of Italy; and
- listed insurance companies – in these cases the transaction shall need to be approved by ISVAP (*Istituto per la Vigilanza sulle assicurazioni Private e di Interesse Collettivo*).

Furthermore, there are certain special sectors (such as telecommunications, media and broadcasting, transportation, public utilities) which are highly regulated in light of the activity carried out and therefore subject to special rules concerning the ability of any tender offer promoter (whether Italian or foreigner).

There are also some specific rules granting the Italian State with special powers (so-called "golden shares") in order to oppose those takeover bids which are aimed at the acquisition of relevant participations into previous State-owned companies. However, following some recent European Court of Justice decisions, Italian regulation on golden shares (Art. 2449 of the Italian Civil Code) has been recently modified in order to reduce the powers of Italian public entities, providing that the voting rights granted to the Italian State can be reflected in a special financial category of shares.

1.5 What are the principal sources of liability?

The main source of liability in M&A transactions (whether realised by tender offer, exchange offer or merger) is the failure to comply with procedural rules as well as with any relevant disclosure obligation, depending on the structure of the transaction.

In case the transaction is realised by a cash/equity tender offer, the offer document shall identify those persons who shall be considered liable for the content of the offer and for the truthfulness of the information given to the market. TUF prohibits and sanctions any market abuse, either through misleading information, insider trading or market manipulation.

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2 MECHANICS OF ACQUISITION

2.1 What alternative means of acquisition are there?

In general terms, the controlling participation in a listed company can be acquired by means of:

- cash tender offer;
- equity swap offer; or
- merger (direct or reverse merger).

2.2 What advisers do the parties need?

In a public M&A transaction the parties usually retain legal and financial advisors, accountants and public relation consultants. Even though not required by law, the board of directors of the target company may retain financial, legal and public relation consultants.

2.3 How long does it take?

The time schedule for the transaction depends on its structure, on form of consideration and whether it is friendly or hostile.

The timeline is subject to an additional extension depending on the type of regulatory approvals the transaction may require.

Cash/Equity swap tender offers: in the voluntary cash or equity swap tender offer, either in case it is direct to acquire 100% of the target company securities (see Articles 102, 105-106 TUF) or in case is a preventive offer to acquire at least 60% of the target company securities, (see the Article 107 TUF) the decision to promote a tender offer shall be notified to Consob without delay and, at the same time, shall be disclosed to the target company and to the public. The communication shall be complete and contain the evidence that the bidder has already the proper warranties required for by the law. In case of an equity swap tender offer, the offering document to be completed shall also include the resolutions adopted by the offering company to issue the securities offered as a consideration to the target company's shareholders.

Within the following **twenty days**, the bidder shall formally file with Consob the offering document for the publication. Within the following **fifteen days** (from the filing of the offering documentation) Consob will grant its approval. In case Consob does not consider the offering document complete, Consob shall ask that it is integrated and the time schedule for the approval is suspended until the offering document is considered complete. Any integration in the offering documents required by Consob has to be submitted within the following **fifteen days** from the request. The term for Consob to grant its approval is extended to **thirty days** in case the consideration for the offer is an equity swap.

Once the offering document has been approved by Consob, its content shall be made publicly available either by publication of the document - in its entire form – on a newspaper, or by deposit of the offering document by financial advisors, to allow the market to be informed about the terms and conditions of the offer.

The duration of the offer shall be agreed upon by the offeror and the Milan Stock Exchange. In any event, the offer shall be left open for a period:

- that cannot be less than **twenty five** and more than **forty** opening market days, if the offer is mandatory to

purchase 100% pursuant or if it is a preventive offer to acquire at least 60% of the target company securities; and

- that cannot be less than **fifteen** and not more than **twenty five** opening market days for the other types of offers (i.e. voluntary pursuant to Article 102 TUF).

Consob, upon request of the offeror, may extend the duration of the offer for a period of up to a maximum of **fifty five** opening market days.

Merger: The timetable for a merger is longer than the one provided for by the cash or equity tender offers. The merger, in fact, requires that first the board of directors and then the shareholders' meeting of all the companies involved in the merger approve the merger and the merger documents.

In particular, the board of directors of the companies involved in the merger shall prepare the merger plan and the report concerning the merger. The merger plan shall include, among others, the exchange rate for the merger as set forth by the board of directors. The report concerning the merger shall set forth the reasons that justify the merger from a legal and economical point of view. For each company involved in the merger, one or more financial experts appointed by the board of directors shall confirm the fairness of the exchange rate. Furthermore, the exchange rate shall be confirmed by an expert appointed by the Chairman of the Court where each of the companies involved has its legal seat. Special rules are required with reference to mergers made through leverage (so-called "merger leveraged buy out", see question 2.10 below).

All the merger documents involving listed companies shall also be filed with Consob for its review.

All the merger documents shall be deposited at the company registered office, at least 30 days prior to the date of the extraordinary shareholders' meeting called to vote for the merger.

Public companies extraordinary shareholders meeting is regularly held with the attendance of a number of company's shares representing at least 50% of the company's share capital and resolves with the favourable vote of two third of the represented share capital.

Once the merger is approved by the extraordinary shareholders' meetings of the companies involved, the resolutions approving the merger shall be deposited, together with the rest of the documentation, in the public registry. After 60 days from the deposit of the documentation, the merger can be executed through a deed drafted by a notary public. The deed of merger shall be recorded in the public registry. Once recorded in the public registry, the merger cannot be invalidated for any reason.

2.4 What are the main hurdles?

Cash Tender Offer: a preliminary condition to launch a tender offer is an agreement in principle with the main shareholders as well as with the management of the target company. Once a decision to launch an offer is taken, the main hurdle is the obtainment of any conditions, regulatory approval and expiration of any antitrust waiting period. In addition, considering that generally an offer is financed in full or in part through the recourse to third party financing, then before an offer is launched the offeror shall also have obtained the approval of the financial institutions that will provide the financing.

Equity Tender Offer: Since in an equity tender offer the consideration is represented by equity swap, prior to launching the offer the offeror shall have obtained all the required resolutions and authorisations of the shareholders meeting to issue the equity swap.

Merger: The main hurdles regarding mergers are the complexity of the process to prepare the merger documents and the fact that a merger requires the involvement of financial and accounting experts to confirm, among others, the fairness of the exchange rate. In addition, the merger has to be approved by the extraordinary shareholders' meeting.

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2.5 How much flexibility is there over deal terms and price?

In case of a voluntary cash or equity swap tender offer, the offeror is free to set the price.

In case of a mandatory offer, the price shall not be lower than the highest price paid by the offeror in the twelve months prior to the exceeding of the relevant threshold. In case no purchase against payment for securities was made in such period, the tender offer is promoted at a price not lower than the weighted average market price calculated making reference to the prior twelve-month period. If during the offer, the offeror purchases some company's securities at a higher price than the one offered in the tender offer, then all the shareholders adhering to the offer have the right to obtain the higher price.

In squeeze out takeovers, the price is determined by Consob.

2.6 What differences are there between offering cash and other consideration?

An offeror may offer cash, existing or new shares, other securities (i.e. different types of shares, convertible bonds or warrants) or a combination of any of these. However, according to Italian law, if securities offered as consideration are not admitted to trading on any EU stock exchange or the offeror in the twelve-month period prior to the launch of the offer has made a cash purchase of the company securities granting at least 5% of the voting rights in the target company shareholders meeting, then the offeror shall offer a cash payment as an alternative.

In a squeeze out procedure the holder of the company securities shall have the right to require that consideration is paid in full in cash. In such case, the price is determined by Consob.

2.7 Do the same terms have to be offered to all shareholders?

Pursuant to what set forth by Article 103 TUF, the tender offer shall be irrevocable and shall be made at the same conditions to all the holders of securities to which the offer is directed.

As already pointed out under question 2.5, if during the offer the offeror purchases some securities of the target company at a higher price than the one offered in the tender offer, then all the shareholders adhering to the offer have the right to obtain the higher price.

2.8 Are there any limits on agreeing terms with employees?

There are no specific limits for an agreement with employees of the target company. However, any agreement reached with employees shall be disclosed and described in the offer document.

Furthermore, as soon as the offer has been made public, the board(s) of directors of the target company and of the offeror shall inform the representatives of their respective employees, or, in case there are no such representatives, to the employees themselves. Likewise, the notice issued by the target company's board of directors containing a description and an evaluation of the terms of the offer shall be made available to representatives of the employees, or, in case there are no such representatives, to the employees themselves. Also the offering documents and the target company statements shall be made available to representatives of the employees, or, in case there are no such representatives, to the employees themselves.

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2.9 What documentation is needed?

In general terms, the documentation needed in order to promote a takeover bid is the following:

- a communication disclosing the bidder's intention to promote the offer to be filed with Consob together with:
- the offer document;
- the acceptance form;
- documentation assessing guarantees for the payment of the consideration (or, alternatively, a document stating the obligations undertaken by the bidder in order to obtain such guarantees prior to the acceptance period).

The board of directors of the target company shall provide a statement (which is to be sent to Consob at least two days before its publication and to be made available to the public not later than the first day of the acceptance period) containing:

- all information needed in order to analyse the offer;
- an evaluation concerning the offer made by the target's board of directors;
- any decision to call the shareholders meeting of the target company in order to approve any defensive measure; and
- the potential effects of the offer on target company interests, with special reference to employees rights.

These documents shall be completed with a statement of target companies employees representatives – if available – analysing the takeover effects on the target company.

As for the documentation needed in case of a merger, see question 2.3 above.

2.10 Are there any special accounting procedures?

Cash/Equity swap offer: the offering document contains elements regarding both the target and the offeror relevant accounting and financial information.

Merger: Pursuant to Italian law, in case of a merger each company involved in the merger has to prepare a financial report referred to a date that cannot be more than 120 days earlier than the date the merger report is deposited. The financial report shall be prepared applying the same accounting standards and principles applied for the preparation of the company annual financial statements.

Furthermore, in case the merger is done to push some of the acquisition debt in the acquired company through a merger by which the acquired company is merged into the acquisition vehicle with the acquired company as the surviving entity, according to Article 2501-bis of the Italian Civil Code: i) the merger plan shall provide for the resources to be used for the repayment of the liabilities (debts) of the company resulting from the merger; ii) the report concerning the merger shall explain the rationale of the merger and provide a detailed financial plan; and iii) an accounting firm shall draft a report on the merger and its effects.

2.11 What are the key costs?

The main costs in connection with a public takeover bid consist of financial advisors fees, legal fees, accountants fees and other professional advisors fees.

Furthermore, a takeover bid necessarily implies bank expenses and stamp duty costs.

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2.12 What consents are needed?

As set forth in other questions, any offering document shall be approved by Consob. Depending on the nature and size of the transaction, other approvals may be mandatory such as the one of the antitrust authority, or, in case of regulated industries, it is also required the approval of the specific supervisory authority (i.e. Bank of Italy for financial institutions and ISVAP for insurance companies). Furthermore, in case of protected sectors other approvals may be needed prior to make a tender offer.

In addition, in case of a merger, the shareholders approval is needed to consummate the merger.

2.13 What levels of approval or acceptance are needed?

In principles an offer is settled regardless of the percentage of shares tendered. However, the offeror usually specifies as a condition for the tender offer settlement the delivery of a minimum threshold of securities. In particular, in case the offeror is looking to secure:

- the legal control of the target company, the offeror shall seek to hold (further to the offer) a participation amounting to 50% plus one of the company voting rights;
- the control in the extraordinary general meeting, then the offeror shall seek to hold (further to the offer) a participation amounting to 66.6% of the voting rights; and
- the right to de-list the company and squeeze out minorities, then 95% of the company securities will be identified as the minimum threshold to be held by the offeror further to the bid.

In a merger, a good protection is to make sure that certain target shareholders agree to vote in favour of the merger. Under certain circumstances, they can even grant the offeror an irrevocable proxy to vote their shares in favour of the merger.

2.14 When does cash consideration need to be available?

Consideration needs to be available before the beginning of the acceptance period of the offer.

In particular, Article 40, paragraph 3 of Consob Regulation 11971/1999 provides that the acceptance period can not begin in case the bidder did not provide proper warranties with reference to the payment of the consideration (both cash or securities consideration).

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3 FRIENDLY OR HOSTILE

3.1 Is there a choice?

Both friendly and hostile bids are admitted under the Italian system.

3.2 How relevant is the target board?

The replacement of the passivity rule under Article 104 TUF as the default rule (see question 8.2) sensibly reduced the importance of the board of directors of the target company for the success of a tender offer. However, the directors of the target company can still play a crucial role for the outcome of the tender offer.

3.3 Does the choice affect process?

Excepted the case of adoption – by the target company – of any defensive measure against the hostile takeover (see question 8.2), the choice between a friendly and hostile bid marginally affect the takeover process. In case of a hostile bid, in fact, the term for the publication of the offer document is longer (five days) than the one provided for in case of friendly bid (one day, as a result of the approval given by the board of directors of the target company).

4 INFORMATION

4.1 What information is available to a buyer?

In a cash or equity tender offer, the offeror is entitled to review information publicly available such as:

- any report made by the target company to the market pursuant to Article 114 TUF related to price sensitive information;
- any financial annual, semi-annual, quarterly statements referred to at least the previous five years;
- the yearly report of the target company regarding its governance practice and how it has complied with the Code issued by the Stock Exchange;
- By-Laws and minutes of the shareholders' meeting;
- information on the shareholders holdings exceeding 2% of voting rights securities;
- any documents and information related to relevant transactions such as bond offering or other offering of securities;
- details on related party transactions;

- relevant shareholder agreements pursuant to Article 122 TUF; and
- any financial analyst report or any report by a rating agency;

In case of merger, the target company shall make available the documents described in question 2.3 above. Provided there is the approval of the board of directors of the target company, the offeror may also be entitled to conduct some due diligence on the target company.

4.2 Is negotiation confidential?

In principle, there is no obligation to disclose negotiations. The general rule is based on the need to secure a proper balance between the information needed to be shared with investors and the risk that a premature disclosure of negotiations may jeopardise the completion of the transaction. However, if there are leaks that generate rumours about the pending negotiations creating expectations on the market, the target may be required to provide the market with a clarification. For this purpose, since information with respect to a potential transaction may be "material" ongoing care needs to be taken to avoid triggering a prompt disclosure.

4.3 What will become public?

Before the decision to launch a cash/equity swap offer, the offeror shall inform the market and the target company. Then the offering documents will become public as soon as approved by Consob. Any material element of the offer, including any agreement with target Company's directors and officers shall be disclosed in full.

4.4 What if the information is wrong or changes?

Once the offer is made, it becomes irrevocable. To limited extents, the offer can be conditioned to the occurrence of certain conditions, which must not depend on the offeror's will.

Any information regarding the offeror that need to be ratified requires the offeror to do so by publishing in concrete information as soon as it becomes aware of the inaccuracy.

Once the differing documents are published, however, there is no general obligation to update the information.

5 STAKEBUILDING

5.1 Can shares be bought outside the offer process?

There are no particular restrictions to the ability of a bidder to buy shares or securities of the target company outside the offer process. However, according to Article 42, second paragraph of Consob Regulation 11971/1999, in case - during the offer period - the bidder buys securities (or call option rights) for a price higher than the offer price, this last price shall be adjusted to the highest price paid.

5.2 What are the disclosure triggers?

The relevant disclosure thresholds (in securities bearing voting rights) which any bidder in listed companies must comply with are the following: 2%, 5%, 10%, 15%, 20%, 25%, 30%, 35%, 40%, 45%, 50%, 66,6%, 75%, 90% and 95%.

Any increase of the participation exceeding the above mentioned thresholds shall be notified to the issuer and to Consob. As provided for by Article 117 of Consob Regulation 11971/1999, an equal provision applies to the reduction of the participation within the previous thresholds.

Furthermore, any shareholder participating in the shareholders' agreement involving more than 2% of the share capital must notify Consob and the issuer of the participation subject to the agreement. Pursuant to Article 122 TUF, the duty to communicate the participation to a shareholders' agreement does not apply if the stake owned is below the 2% threshold.

5.3 What are the limitations?

According to Articles 105 and ff TUF, any bidder is required to launch a tender offer on 100% of the listed securities issued by a company, in case its participation exceeds the 30% threshold (to be calculated, in principle, having regard to the share capital bearing voting rights for the appointment or revocation of the board of directors).

Furthermore, the same takeover bid obligation arises in case:

- a shareholder (who already met the 30% threshold) - during the last twelve-month period - increases its participation (as a result of purchases or subscriptions or conversions in the exercise of rights acquired in the same period) of an amount equal to 5%. Such a provision applies until the participation owned does not exceed 50% + 1 of company share capital. Once the threshold of 50% +1 is exceeded, in fact, the holder is free to increase its holdings without being subject to a mandatory tender offer;
- a shareholder exceeds the threshold of 90% of the share capital (without recreating – within ninety days - a reasonable float of shares); and
- a bidder exceeds the threshold of 95% of the share capital.

6 DEAL PROTECTION

6.1 Are break up fees available?

Break up fees that are paid by the target company in case the offer is not successful are not generally common in Italy. It is even questionable whether a break up fee provisions contained in an offering document would be enforceable. In any case the amount should be such to avoid in principle that the break up fees can frustrate the possibility of a competing offer. There is no much guidance in terms of the notion of which amount would make enforceable the beak up fee.

6.2 Can the target agree not to shop the company or its assets?

In general the right to grant exclusivity and assume the obligation not to shop the company belongs to the board of directors of the target company.

In case the board reviews that the offer is in the interest of the target company and the exclusivity is a deal breaker, then the board may agree to grant such terms. Likewise it may agree to desist from shopping the company. Alternatively, the offeror in the offering documents may insert the conditions that the target company board, or its main shareholders, shall refrain from taking any action that may negatively impact the success of the offer such as refraining from shopping around the company.

6.3 Can the target agree to issue shares or sell assets?

The target company may have introduced in its By-Laws defensive measures aimed at providing ways to resist to an unfriendly offer (see Article 104, paragraph 1-*ter*, TUF). However, once the offer is communicated, in case the passivity rule applies, the target company shall refrain from taking any action that may contrast the object of the offer without the prior resolution of the shareholders meeting. (see question 8.2 below).

6.4 What commitments are available to tie up a deal?

In general, the strongest commitment that an offeror can secure is the prior approval to participate in the tender offer by the largest target company shareholders. Alternatively, an offeror can either purchase the target company securities that would allow to exceed the 30% threshold and then launch a mandatory offer or can launch an offer with the agreement of relevant shareholders that will participate in the offer tendering their securities.

Furthermore the offeror may introduce on the offer conditions from a minimum quantity of stakeholding as set forth in the prior question.

7 BIDDER PROTECTION

7.1 What deal conditions are permitted?

As a general rule, the effectiveness of an offer cannot be made subject to conditions which depend on the sole will of the offeror.

However, according to Italian law a cash or equity swap tender offer can be subject to the achievement of certain conditions precedent. Among the typical conditions that can be included in an offering document there are:

- the requirement for a minimum quantity of shares to be tendered;
- the obtainment of any and all approval from the relevant authorities; and
- the absence of certain actions (i.e. the adoption in the target company By-Laws of defensive measures, a capital increase, an increase in target company indebtedness, etc.) whose implementation have an impact on the offer and would determine its withdrawal.

7.2 What control does the bidder have over the target during the process?

In general the bidder cannot exercise any control over the offering process and has limited influence over the target company. However, the bidder can condition the offer to certain conditions precedent as the ones identified in the previous question.

7.3 When does control pass to the bidder?

As soon as the offer is completed and the consideration is settled, the target securities will pass to the bidder. In order to exercise its rights, however, a bidder has to call a shareholders meeting to replace in full or in part the target company board of directors. According to Article 104-*bis* TUF, if - as a result of a tender offer - the bidder acquires at least 75% of the target company securities bearing voting rights in the ordinary shareholders' meeting, at the first shareholders' meeting called to amend the By-Laws or to remove or appoint directors, the followings will not be enforceable:

- limitations on voting rights as provided for in the By-Laws or in a shareholders agreement; and
- any special right provided for in the By-Laws relating to the appointment or removal of the directors.

7.4 How can the bidder get 100% control?

The bidder can acquire 100% securities of the target company (launching one tender offer on the target company) only in case – subsequent to the offer – he holds a participation not lower than 95% share capital of the company. In this case, provided that the intention to squeeze out minority shareholders has been declared by the bidder in the offering document, then - within the following 90 days – the bidder is granted the right to purchase securities from the remaining shareholders.

8 TARGET DEFENCES

8.1 Does the board of the target have to tell its shareholders if it gets an offer?

As outlined in question 4.2, there is no obligation to disclose the negotiation to shareholders. To the extent that the board of directors does not believe the offer to be in the best interest of the company and its shareholders, the same principle applies also to the disclosure of an offer.

8.2 What can the target do to resist change of control?

Italian regulation on defensive measures has been recently modified by the Legislative Decree of September 25, 2009, n. 146, in order to balance the need of contestability of listed companies with the need of shares/securities holders' protection.

The new version of Article 104 TUF provides, as a general rule, that Italian listed companies whose securities are involved in a tender offer shall abstain (from the date of the notice until the end of the offer or until the offer expires) from any action or transactions that could interfere with the success of the offer, unless such action or transactions are approved by the ordinary or extraordinary shareholders' meeting.

Furthermore, shareholders' meeting approval is also required for the implementation of any defensive measure whose decision has been taken before the date of the notice and not implemented yet. To this aim, the new regulation confirmed the elimination of the 30% shareholders meeting *quorum*, previously required by Article 104 TUF for the approval of those acts to be implemented by the board of directors during the offer period (i.e. during the passivity period).

The above rules, set forth in Article 104 TUF, are not mandatory: Article 104, paragraph 1-*ter*, TUF provides that listed companies By-Laws may differ, wholly or in part, from the above referred provisions; in this case, companies shall notify any resolution waiving the passivity rule to Consob and to supervisory authorities for takeover bids in member countries in which their securities are listed.

Furthermore, pursuant to Article 104-bis TUF ("breakthrough"), the company By-Laws may provide that, in case a takeover bid or exchange tender offer is launched, the following shall apply:

1. During the bid period, limitations on the transfer of securities and limitations on voting rights provided for by the target company By-Laws or shareholders' agreement shall have no effect on the bidder, in case shareholders' meeting is called to resolve upon the defensive actions and transactions.

2. At the end of the offer, in case the bidder obtains at least 75% of the share capital bearing voting rights for the appointment or revocation of the board of directors or members of the controlling body or supervisory council, limitations on voting rights or special powers provided for by company By-Laws and/or shareholders' agreements in relation to the appointment or to the revocation of directors or members of the control body or supervisory council will have no effect to the bidder. Therefore, in this case, the bidder will be able - notwithstanding any special rights owned by other shareholders or any limitation on voting right – to amend the company By-Laws and to appoint/revoke directors and members of the controlling and supervisory bodies, irrespective of what is provided by the By-Laws or by shareholders' agreement.

In case such shareholders' rights are frozen, Article 104-*bis*, paragraph 5, TUF provides that the bidder has the duty to pay a fair indemnity for any economical loss suffered by shareholders who could not exercise their special rights pursuant to the above referred provisions.

Finally, with respect to foreign bidders, Article 104-*ter* TUF provides that the duty to abstain from any action that could interfere with the accomplishment of the offer ("passivity rule") and breakthrough (if provided for by target company By-Laws) does not apply to takeover bids or exchange tender offers launched by entities which are not subject to such provisions or equivalent provisions in the county where the bidder's securities are listed.

8.3 Is it a fair fight?

In principle, the take over law is aimed at allowing anybody who has the proper resources to launch a tender offer. The target company board of directors may resist to an offer that is not viewed in the best interest of the company and its shareholders. However, in order to adopt any defensive measures it is required the approval of the shareholders, making sure that a large majority is willing to endorse actions to oppose the offer.

9 OTHER USEFUL FACTS

9.1 What are the major influences on the success of an acquisition?

In general terms, the success of a tender offer mainly depends on the ability of the offeror to convince the shareholders of the target company to accept the offer. To this aim, the most relevant factors are: i) a fair (i.e. convenient to the target's shareholders) offer price; and ii) business and economic strategies for the target company.

Furthermore, the success of a tender offer is more likely to occur in case the bidder has previously reached an agreement with the target company's main shareholders and directors and have previously made an effective information campaign on its offer.

9.2 What happens if it fails?

In general, should the offer fail, the bidder is free to launch a new offer on the same securities of the same target company.

Nevertheless, in case the offeror fails to comply with the provisions setting forth the deadline of twenty days from the communication to Consob of its intention to promote the offer, the offer can not be allowed and, subsequently, the bidder is not permitted to launch a new tender offer on company's securities until the term of year has expired.

10 UPDATES

10.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in M&A Law in Italy.

The new regulation on defensive measures introduced by legislative decree 146/2009 (in force from July 1st, 2010), as outlined above, reduces the weight of defensive measures against hostile takeover bids.

The most relevant change regards the switch of the passivity rule from a facultative into a default rule (from now on, it shall be expressly waived by company By-Laws).

Nevertheless, the new regulation on takeover bids confirmed some provisions introduced by law decree 185/2008, and namely:

- The elimination of the 30% quorum for the approval of subsequent defensive measures.
- The switch of the breakthrough rule from a mandatory into a facultative rule.

Acknowledgment

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LAW FIRM PROFILE & AUTHOR DETAILS

Santa Maria law firm was established in 1970 by Alberto Santa Maria, who is tenured professor of international law at the University of Milan and is widely regarded as one of Italy's pre-eminent attorneys. Based in Milan, the firm offers one of the most sophisticated international practices among Italy-based law firms.
Santa Maria law firm has consistently advised the Italian government and important corporate clients in connection with all aspects of European Community law, including antitrust, state aids, international trade law, as well as very complex corporate transactions, privatisations, mergers and acquisitions, joint ventures, restructurings and financings.
Moreover, Santa Maria law firm has been a pioneer in representing Italian companies in the United States market, having offered for a long time integrated Italian and U.S. legal services.

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