CONSOB
COMMISSIONE NAZIONALE PER LE SOCIETA' E LA BORSA

EXECUTIVE SUMMARY

NEW TAKEOVER BID REGULATION

With the revision of Title II, Part II of the Regulation approved by Consob with resolution no. 11971, as amended, (hereinafter, "Issuers' Regulation" or "IR"), Consob enacts the legislative amendments that have gradually been made to the regulation regarding takeover bids or exchange tender offers.

The takeover bid regulation revision was not limited to incorporating the EU provisions contained in the Directive and exercising regulatory powers attributed to Consob by the new legislative provisions[1], but it also took into account some issues that emerged from the experience of applying the previous regulation as well as a comparative analysis of the legislation of other main countries. The set of those actions intends to achieve some objectives which guided Consob in identifying the possible amendments to the regulation and which are inspired by the general regulatory objectives of investor protection and efficiency and transparency of the market for corporate control.

Specifically, the regulatory measures were intended to achieve the following objectives:

a) *strengthening the protection of minority shareholders* during transactions which involve a change in the company's ownership and control structure. For this reason, some provisions have been oriented by the intent to correct the distorted choice problem, to increase the minorities' voice and to correct any regulatory misalignments caused by changes in market practices and by financial innovation;

b) *efficiency and transparency in the corporate governance market*, by means of some new provisions and changes aimed to favour a more dynamic market for corporate control and eliminate uncertainty in the interpretation of regulations which could prevent the activism of investors;

c) *equal treatment for Italian and foreign investors and harmonisation with regulations in other countries*, to govern the recognition of offering documents approved by the

[1] First, Directive 2004/25/EC concerning takeover bids (hereinafter, "Directive") was incorporated into our legislation through Italian Legislative Decree no. 229 of 19 November 2007, which amended and added to Italian Legislative Decree no. 58 of 24 February 1998, (hereinafter, "Consolidated Law on Finance"). After, the takeover bid regulation was subject to further legislative interventions. More specifically: (*i*) Law Decree no. 185 of 29 November 2008, (hereinafter "Anti-crisis decree"), which, *inter alia*, amended the regulation about the passivity rule and neutralisation; (*ii*) Law no. 33/2009 which, in order to reinforce "tools to defend against speculative manoeuvres", contributed amendments to the Consolidated Law on Finance regarding takeover bids from consolidation and ownership transparency and to the Italian Civil Code, regarding the governance of buy-back transactions; (*iii*) Italian Legislative Decree no. 146/2009 (hereinafter, "Corrective decree") containing the additional and corrective provisions of the aforementioned Italian Legislative Decree no. 229/2007.

supervisory authorities of EU member and non EU member states and align the domestic regulation to international market practices, for example regarding liability management;

d) *reduction of compliance costs for bidders* by means of amendments to some provisions in light of their cost-effectiveness and increased standardisation in documents, aimed at making Consob's control procedures more efficient.

This regulation was approved following a consultation which began on 6 October 2010 when the first amendment proposal was published. This proposal was illustrated to market participants during a public hearing held at the Institute on 27 October 2010.

After the consultation, the regulation initially proposed was changed to take some acceptable requests into account, although the basic elements and objectives of the initial regulatory choices were retained. The amendments clarified and simplified some provisions, meeting the requests of operators to reduce the costs of some requirements and refine the application of the more innovative provisions, while maintaining an adequate level of investor protection.

A new and faster consultation regarding the main amendments made to the first regulatory proposal was then opened on 18 February 2011. The responses provided precise observations which allowed for further improving some parts of the regulation.

Overall, the takeover bid regulation was revised as follows.

1. The regulation of **debt securities offers** was simplified in order to align it with the international framework. First, the legislator intervened to align the Italian regulation with international liability management practices, allowing Consob to make the regulation of public offerings applicable to exchange tender offers regarding debt securities (Art. 102, subsection 4-*bis*, Consolidated Law on Finance). Then, Consob enacted regulatory powers about exemptions from the regulation on takeover bids and exchange tender offers, introducing cases of inapplicability regarding offers of financial products other than securities (Art. 101-*bis* subsection 3-*bis*, Consolidated Law on Finance). On that occasion, the applicability of the regulation in question to so-called consent solicitations was analysed in detail. Also in light of the comparative analysis and the particular methods for carrying out those transactions (which involve the approval of a resolution by the proposal addressees, which is binding also as regards any absentees or dissenters), the Commission reconsidered the previous orientations and deemed that those transactions are not included in the category of takeover bids and exchange tender offers.

2. Measures were introduced to correct the effects of **pressure to tender**, a situation faced by retail investors that, although not considering the offer price suitable, are induced to tender their shares expecting that, if the offer succeeds, the post-takeover market value of the shares would decrease due to the new governance structure and/or lower liquidity. This phenomenon is more critical for investors' protection in offers promoted by insiders[2], in which the bidder has private information that can be used when deciding if and under what conditions the takeover bid should be promoted.

[2] That is, parties who hold at least 30% of the capital, participating in a shareholders' agreement which ties up at least the same shareholding, members of the issuer's administration or supervisory board bodies, and persons who act in concert with said parties.

Especially, in the event of a successful offer promoted by insiders, a **reopening of the offer terms** has been set forth in order to allow for investors who did not initially adhere to tender their shares during the second round. Bidders are allowed to make the offer subject to a referendum between the offerees and make it subject to the approval of the majority of the offeree capital, instead of reopening the terms.
Furthermore, in order to decrease asymmetric information and in consideration of the risk that, in offers promoted by insiders, the affiliation between the target directors and the bidder condition its objectivity, it has been set forth that independent directors must draw up an opinion containing their assessment of the offer. Where it is completely shared by the target company's board of directors, the **independent directors' opinion** is contained in the issuer's notice; otherwise, it shall be published as an annex to that notice.
The requirements regarding reopening the terms and the independent directors' opinion apply to offers (promoted by insiders) of "securities" and units of closed-end funds.

3. Some changes involved the **transparency and proper conduct** rules. Among the former, the transparency regime applicable to the "interested parties"[3] during the takeover bid was also extended to derivatives. Furthermore, for sales by the bidder of financial products being offered, a preventive disclosure has been introduced, in order to ensure transparency on bidder's behaviour which acts in opposition to the offer's objectives. The rules of proper conduct include the best price rule which applies not only during the period between the offer notice and the offer closure, but also in the six months subsequent to the last payment date.

4. Some changes have been made to **competing offers** regulation:

(i) the obligation to promote a competing bid at a higher consideration than that of the original offer has been eliminated, in order to give as much responsibility as possible to the market for assessing the offer's cost-effectiveness through an overall comparison of the fundamental elements of the competition; this has occurred because it was deemed that this limitation could inhibit the submission of offers that are more cost effective for shareholders as regards elements other than price.

(ii) in order to decrease the asymmetric information between bidders, it is now required that an issuer that provides information to one of the bidders must immediately disclose the same information to the other bidders which have submitted circumstantiated requests for access.

5. In implementation of a legislative mandate, Consob governed the regime of the relevance of **treasury shares** in calculating the shareholding for the purpose of the mandatory bid. The goal is to avoid the situation where the presence of those shares allows for a substantial elusion of the mandatory bid regulation. If treasury shares are already held by the issuer, they are excluded from the share capital based on which the shareholding is calculated, in order to highlight the effective voting power that a party will acquire.

[3] That is, the bidder, the issuer, persons linked to them by relationships of control, companies subject to common control and associate companies, members of their boards of directors and internal control bodies and their general managers, and the shareholders of the bidder or the issuer who are parties to one of the agreements subject to disclosure pursuant to article 122 of the Consolidated Law in addition to those operating in concert with the bidder or issuer.

If the issuer purchases treasury shares, it was intended to reconcile the two opposing objectives of avoiding a potentially elusive use of those shares, on the one hand, and of allowing companies to buy-back where this is in the interest of all shareholders, on the other. Thus, the regulation establishes the "neutrality" of those transactions in relation to all shareholders (controlling and not, current and potential), subject to the condition that the resolution authorising the buy-back has been approved by the majority of independent shareholders. In any case, the calculation does not include treasury shares purchased for the purpose of compensation plans approved in accordance with art. 114-*bis* of the Consolidated Law on Finance or to be used as payment in corporate finance transactions that have already been resolved.

6. Among the most significant new elements is that **derivatives** are now also relevant in calculating whether the mandatory bid threshold has been exceeded (as well as in determining the offer price). The regulation was set forth in implementation of a recently-introduced legislative power (Art. 105, subsection 3-*bis*), which assigned Consob the task of establishing how derivatives are to be counted for the mandatory bid purposes. The new provision is the response to a market evolution which has shown, in some particularly significant cases, that derivatives have been used as a tool to essentially evade the mandatory bid regulation. In implementing this, Consob included in the shareholding for the purposes of the mandatory bid the shares underlying all derivatives or contracts which grant the owner a long position, regardless of whether they involve a cash or a physical settlement.

7. The regulation envisage a more precise identification of the conduct involving **acting in concert** between shareholders (in implementation of the legal powers set forth in Art. 101-*bis*, subsection 4-*ter*, of the Consolidated Law on Finance). On the one hand, Consob has identified the cases in which, unless there is contrary proof, it is assumed that specific parties are acting in concert. These are parties linked to the bidder by family ties or by specific professional relationships (advisors). On the other hand, Consob has identified situations of cooperation between shareholders which fall outside the scope of that case, such as the submission of minority lists or cooperation between shareholders to exercise the minorities' rights. In this way, it was intended to avoid interpretive uncertainties which could hinder the active participation of minority shareholders in the company's governance.

8. In revising the **exemption regime from the mandatory bid** in some cases outlined by the legislator and ruled by Consob, the new regulation increases the involvement of minority shareholders, on the theoretical assumption that those who are potentially harmed by waiving the exit should be determinant in the resolution granting the exemption. The approval by the majority of independent shareholders is now a condition which allows for the exemption from the mandatory bid if this is determined by merger or spin-off transactions. Similarly, it was set forth that, for transactions intended to bail out companies in crisis, outside of specific ascertained crisis scenarios[4], exemption must be subject to the favourable vote of the majority of independent

[4] In cases of: (*i*) admission to one of the bankruptcy proceedings set forth in Italian Royal Decree no. 267 of 16 March 1942, or in other special laws; (*ii*) approval of a debt restructuring agreement stipulated with debtors in accordance with article 182-*bis* of Italian Royal Decree no. 267 of 16 March 1942; (*iii*) correspondence of the intervention to requests put forth by a supervisory authority, in the event of serious losses, in order to prevent admission to bankruptcy proceedings in accordance with the Consolidated Law on Finance, the Consolidated Law on Banking and Italian

shareholders. Only for mergers/spin-offs are companies allowed to set forth in their articles of association a quorum for the effectiveness of the minority's contrary vote, of not more than 7.5%.

9. In revising the **criteria to determine the sell-out and squeeze-out price**, the experience of applying the rules and regulations previously in force made it advisable to limit Consob's discretion in the assessments to be carried out, in order to reduce market uncertainty during the takeover bid and to not introduce distorting elements into investors' behaviours. Within the margins allowed by the legislator, the amendments extend the possibilities in which the sell-out or squeeze-out price following a takeover bid is established as the same price as the previous offer.

10. In order to **reduce compliance costs**, some changes aim to codify the requirements placed on bidders in practice and to simplify others deemed not cost-effective. As regards the first, standardisation has been increased regarding information that must be provided to the market in the bid notifications and document. In relation to the second, for example, the publicity regime and the provisions regarding bidder's guarantees have been simplified.

11. Finally, the **new regulation is expected to come into effect on** 2 May 2011, except for some standards which shall be effective as of the day after the publication of the resolution in the Official Gazette (particularly, those for offers on debt securities, the cases of inapplicability of the takeover bid regulation and exemptions from the mandatory bid). Furthermore, specific transitional provisions have been introduced to calculate derivatives for the purpose of mandatory bids; *inter alia*, it is required that parties who, on the date the regulation comes into effect, are found to be above the relevant thresholds in calculating derivatives for the purpose of the mandatory bid notify Consob and the market (within five trading days of the aforementioned date) about the details of the components of the shareholding held.

Legislative Decree no. 209 of 7 September 2005; (*iv*) exceeding the takeover bid threshold exclusively by subscribing a share capital increase, in the presence of a recovery plan indicated in art. 67 of the Bankruptcy Law.