Public Mergers and Acquisitions in Italy

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A Practice Note outlining the law and regulation of public takeovers and principal considerations involved in a public takeover in Italy.

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This Note looks at the law and regulation of public takeovers in Italy and provides an overview of how takeovers of Italian listed companies are usually conducted.

Regulation of Public Takeovers

Most of the rules relating to public takeovers in Italy are contained in the *Legislative Decree no 58/1998* (TUF) and in the *CONSOB implementing issuers' regulation no 11971/1999* (Issuers' Regulation) which, jointly, shape the form, structure and timetable of public takeovers in Italy and are mostly based on the *Takeovers Directive* (Directive 2004/25/EC).

Statute and Regulation

In addition to the TUF and the Issuers' Regulation, the parties involved in a public takeover are subject to certain other statutory and regulatory provisions, including:

- The *Civil Code* (Codice Civile), which contains the basic rules applicable to all Italian public limited companies (*società per azioni* (SPAs)).
- The *EU Market Abuse Regulation,* particularly the provisions relating to insider dealing, market abuse and market soundings.

- The *Listing Rules of Borsa Italiana* (*Regolamento dei Mercati organizzati e e gestiti da Borsa Italiana S.p.A.*), which are relevant to all Italian listed companies and may be relevant, among others, in the context of a bidder wishing to achieve the delisting of the target.
- The *EU Prospectus Regulation* (Regulation (EU) 2017/1129), which may be relevant in shares for shares transactions.
- The statutory provisions concerning the regulation of foreign direct investments in Italy with particular focus on the foreign direct investment screening regime, if applicable. See *Foreign Direct Investment*.
- The statutory provisions concerning merger control and competition law, if applicable. See *Merger Control*.
- The Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market (Foreign Subsidies Regulation), if applicable. See *Foreign Subsidies Regulation*.

Regulatory Bodies

The two main regulatory bodies for takeovers involving Italian public companies are:

- The *National Commission for companies and the stock exchange* (*Commissione Nazionale per le Società e la Borsa* (CONSOB)), which is the public authority responsible for supervising the takeover process and has significant powers to ensure compliance with the public takeover rules (including the power to impose administrative fines).
- *Borsa Italiana SpA* (*Borsa Italiana*), which is a private company that oversees the management and organisation of the Italian securities markets and manages certain aspects of public takeovers (for example, the duration of the acceptance period and de-listing).

If a transaction is subject to merger control clearance or the target operates its business in a regulated sector, certain additional procedures and authorisations from other regulatory authorities may be needed, for example, from:

- The *Bank of Italy* (*Banca d'Italia*) or the European Central Bank.
- Antitrust authorities, including the *Italian Competition Authority* (*Autorità Garante per la Concorrenza e il Mercato*) or the European Commission in relation to concentrations in the EU.
- The *Insurance Industry Regulatory Authority* (*Istituto per la Vigilanza sulle Assicurazioni* (IVASS)).

Notification to the Italian government may be required according to the foreign direct investment regime (see *Practice Note, Regulation of Foreign Investment in Italy*).

Obtaining Control

Under Italian law an individual or legal entity is deemed to have control of a company where they:

- Hold the majority of the outstanding voting shares.
- Hold sufficient voting rights to exercise a dominant influence at the general shareholders' meeting.
- Exercise dominant influence over the company as a result of a contract or a clause in the articles of association.

- Exercise a dominant influence over the company by means of shareholders' agreements with other shareholders.

(Article 93, TUF.)

The acquisition of the control of an Italian public (listed) company can be obtained through any of the following means:

- Public tender offers, which are the most common mean to acquire the control of a listed company and can be voluntary or mandatory and are discussed in this Note.
- Mergers, either merger by formation of a new company or merger by absorption, either domestic, that is, all the participating companies are Italian, or cross-border, that is, at least one of the participating companies is non-Italian. As an effect of the merger two or more companies merge into another (surviving) company and therefore disappear as standalone legal entities. In an M&A context a merger is normally structured as the merger of the target into the buyer (as the surviving company). The shareholders of the target receive (as consideration) shares in the buyer. The merger requires shareholder approval from each participating company (with a supermajority of two-thirds of the share capital represented at the relevant general shareholders' meeting, in case of Italian listed companies). (Article 2368(2), Civil Code.)

  Statutory mergers may or may not trigger a subsequent mandatory tender offer (see *Mandatory Offers*).
- Subscription of reserved capital increases. The buyer obtains control of the target through the subscription of the shares newly issued by the target. The buyer can subscribe for the new shares using either cash or assets. Subscription of reserved capital increases may or may not trigger a mandatory tender offer (see *Mandatory Offers*).

The acquisition of the control of Italian public companies most often takes the form of public tender offers, launched on a friendly basis: when the target is controlled by a shareholder or group of shareholders, bidders generally negotiate with the target's majority shareholders to take control. Following execution of the agreements with the controlling shareholder(s) of the target the bidder launches the tender offer. These agreements generally provide for the bidder to either:

- Purchase the majority stake in the target from the controlling shareholder(s) (and launch a mandatory tender offer for the residual outstanding shares, if relevant thresholds are exceeded).
- Launch a voluntary tender offer with the irrevocable commitment of the majority shareholders to tender their shares to the offer.

For the irrevocable undertakings, see *Irrevocable Undertakings*.

The voluntary tender offer structure is generally used when conditions need to be attached to the offer (for example, minimum acceptance or regulatory approvals), as mandatory offers cannot contain any conditions to completion (see *Conditions*).

Types of Public Tender Offer

Public tender offers can be voluntary or mandatory:

- A mandatory tender offer must be launched when certain participation thresholds are reached or exceeded (see *Mandatory Offers*). A mandatory tender offer is always totalitarian (that is, launched for 100% of the voting shares of the target). (Article 106, TUF.)
- A voluntary tender offer can be totalitarian or partial (that is, launched for only part of target's shares). However, if the bidder reaches or exceeds the relevant participation thresholds of the target's voting shares following a partial voluntary

tender offer, it must launch a mandatory tender offer for the remaining shares (see *Mandatory Offers*), unless the offer is structured as a prior partial bid pursuant to Article 107 of the TUF (see *Exceptions*).

Both voluntary and mandatory tender offers can be recommended or hostile.

- The tender offer is hostile when, in its statement on the offer (*comunicato dell'emittente*), the target's board of directors does not recommend the tender offer (that is, there is no agreement with the target's board of directors or the relevant target's shareholders do not support the offer).
- The tender offer is recommended when, in its statement on the offer (*comunicato dell'emittente*), the target's board of directors recommends the target's shareholders to accept the tender offer or there is support for the offer by the relevant or majority shareholders of the target.

Bidders can be discouraged from launching hostile tender offers on listed companies having one or more large shareholders (shareholding concentration). Normally a hostile tender offer has higher chances of being successful where the target's shareholders' base is fragmented.

Public Tender Offer: Timeline

The following high-level timeline applies to making a public tender offer, both voluntary and mandatory, on an Italian public company:

- Announcement of the offer by the bidder (see *Announcing the Offer*).
- Draft offer document is prepared by the bidder. The offer must be launched within 20 days after the announcement by filing the draft offer document with CONSOB (Article 102(3), TUF). If the bidder fails to comply with this term:
    - the bidder is prevented from launching a new offer for the target's shares for the next 12 months;
    - the voting rights attached to the bidder's shareholding cannot be exercised and the shares exceeding the thresholds triggering a mandatory tender offer, if any, must be sold within 12 months (see *Mandatory Offers*); and
    - the bidder is required to pay a fine ranging between EUR25,000 and the maximum disbursement that the bidder would have paid if the mandatory tender offer had been launched on time.
- Filing of the draft offer document with CONSOB, typically by means of an online filing to the CONSOB certified email address (consob@pec.consob.it).
- CONSOB reviews the draft offer document. Once the offer document is filed with CONSOB, the latter has 15 days to provide comments on the draft offer document or to approve it. This term can be extended once, if CONSOB requires additional information from the bidder. If the target company is active in a regulated sector (for example, banking) the bid must be authorised by the competent supervisory authority (for example, the European Central Bank and the Bank of Italy) and the CONSOB's review period is suspended pending authorisation by the competent supervisory authority. Should this be case, CONSOB must issue its approval within five days from the date the competent supervisory authority has issued its authorisation. The offer document is deemed approved on the expiry of the 15-day term if no comments are provided or additional information requested (Article 102(4), TUF).
- The bidder delivers to CONSOB:

  - the cash confirmation letter, that is, confirmation by a bank that the bidder has sufficient means to satisfy the cash component of the consideration (Article 27-bis, Issuers' Regulation); and
  - if the consideration includes securities (non-cash consideration), a copy of the resolution approving the issue of these securities. (Article 37-bis, Issuers' Regulation.).

  See *Committed Funding*.

- Publication of the offer document. Promptly after its approval by CONSOB, the offer document must be published by the bidder (Article 102, TUF and Article 38(2), Issuers' Regulation). For the means by which the publication obligation can be accomplished, see *Electronic Communications and Use of Websites*. The offer document is also promptly sent to both the bidder's and the target's employees' representatives (or in their absence, to the employees). (Article 102(2), TUF.). See *Publication of the Offer Document*.
- Publication of the statement of the target's board of directors on the offer (only if not already included in the offer document, as usually happens in the context of recommended bids; see *Statement of the Target's Board on the Offer*). This must be published by the last day preceding the starting of the acceptance period (Article 40, Issuers' Regulation).
- Acceptance period starts. If the statement of the target's board of directors on the offer (*comunicato dell'emittente*) is not included in the offer document, the acceptance period cannot start before five market days after the offer document is published (to enable the target's board of directors to prepare its statement) (Article 40(5), Issuers' Regulation). During the acceptance period the bidder can increase the offer provided that all shareholders benefit from the increase. See *Acceptance Period*.
- Competing offers (if any). Any competing offers must be launched five market days before the end of the acceptance period. (Article 44, Issuers' Regulation.)
- Increased offers (*rilanci*) and other amendments. If a competing bid is launched, subsequent increased offers and other amendments to the original offer must be made and published within five market days of publication of the competing bid. If no competing bid is launched, amendments to the offer are possible until the day preceding the end of the acceptance period. In any case the bidder may not reduce the offer price and quantity of the financial instruments object of the offer. In case of amendments, the acceptance period cannot end before the third market day after the day of publication of the amendment. (Article 43, Issuers' Regulation.)
- Re-opening of the acceptance period in case of insider bids, if certain conditions are met (see *Possible Changes to the Acceptance Period*). (Article 40-bis, Issuers' Regulation.)
- Final results. Once the acceptance period has lapsed, the final results of the offer are made public by the bidder (for the means by which the publication obligation can be accomplished, see *Electronic Communications and Use of Websites*).
- Payment of the offer price (settlement of the offer). Payment is made to the sellers by the bidder on the date set out in the offer document. Ownership of the shares is transferred to the sellers at the same time as the payment.

Outline of Offer

Offer Planning

Preliminary planning and analysis of the target are essential to the success of any public takeover.

The nature of the planning and the extent of enquiries a potential bidder can make are mostly determined by whether the bid is likely to be recommended or hostile (see *Types of Public Tender Offer*). However, there are certain key matters all bidders are likely to consider when planning a takeover:

- Analysis of the publicly available information (see *Information in the Public Domain*).
- Analysis of the shareholders' base and potential support by existing shareholders.
- Price range.
- Source of financing and form of consideration.
- Likelihood of merger control or FDI or other regulatory authority approvals.
- Likelihood of competing offers.
- Conditions (for example, minimum level of acceptance, MAC clause) (only relevant in voluntary tender offers).
- Timing.

The structure and main features of the offer will largely depend on the outcome of the preliminary planning and the analysis of these issues.

Due Diligence

Although there are no statutory rules expressly requiring that due diligence is carried out in the context of a tender offer, a certain amount of due diligence is typically carried out before a tender offer is launched. The extent of the due diligence exercise depends mostly on whether the offer is recommended or hostile, several additional factors must be considered. In terms of timing, the offer is irrevocable once launched (and cannot be withdrawn by the bidder), so any due diligence exercise should be conducted before the launch of the offer, to assess in advance whether and under what conditions investment in the target is desirable.

Recommended Offer Due Diligence Approach

In a recommended tender offer, the level of due diligence is negotiable, depending on the nature of the proposed takeover, the size of the target, and whether the bidder is a competitor or not. In general, this is a delicate matter to be assessed on a case-by-case basis. For the meaning of recommended bid, see *Types of Public Tender Offer*.

In disclosing and accessing non-public information the parties must always be aware of the rules on disclosure of price-sensitive information and insider dealing legislation, and the target's directors' duties. For a note that outlines the obligations to disclose and control inside information under Article 17 of the EU Market Abuse Regulation (Regulation 596/2014), see *Practice Note, EU MAR: Inside Information: Disclosure and Control*.

Indeed, directors are required to act in the best interest of the company and in principle will grant the bidder access to confidential information only to the extent that the potential offer is deemed to be in the interest of company and its shareholders.

It is also customary and advisable to have the target and the bidder entering into a confidentiality agreement, as most of the information provided during the due diligence would be (commercially) sensitive or non-publicly available.

In addition, to comply with the equal treatment principle governing public tender offers (pursuant to which all bidders must be treated equally), a listed target must allow all competing bidders to review information disclosed to any other bidder.

Hostile Offer Due Diligence Approach

Due diligence in a hostile tender offer is restricted to information available to the public (see *Information in the Public Domain*). For the meaning of hostile bid, see *Types of Public Tender Offer*.

Information in the Public Domain

The following documents and information concerning listed companies are available to the public at Companies House (*Registro delle Imprese*), on the websites of CONSOB, Borsa Italiana, and the company itself (as applicable):

- Annual, semi-annual, and quarterly accounts (the latter only if prepared on a voluntary basis or on request by CONSOB) with reports from the directors, statutory auditors, and the company's auditing firm. (Article 154-ter, TUF.)
- Reports on corporate governance and capital structure (Article 123-bis, TUF) with information on:
    - restrictions on share transfers or voting rights (or both);
    - shares conferring special control rights;
    - rules on corporate governance (composition, structure, and role of the corporate bodies);
    - amendments to the articles of association; and
    - any material agreement containing change of control clauses.
- Selected information on shareholders' agreements (if existing). (Article 122, TUF.)
- Reports on the remuneration of directors, auditors, and key employees, with information on base salaries and incentive schemes. (Article 123-ter, TUF.)
- Information on stock options for managers and employees. (Article 114-bis, TUF and Article 84-bis, Issuers' Regulation.)
- Information on significant corporate transactions, including:
    - statutory mergers and de-mergers;
    - purchases and disposals of assets;
    - bond issues;
    - amendments to the articles of association; and
    - capital increases and reductions.
- Any price-sensitive information (Article 114, TUF).
- Shareholders crossing certain thresholds (either upwards or downwards) in the share capital or voting rights. (Article 120, TUF and Article 117, Issuers' Regulation.)

Specific disclosure rules also apply to related-party transactions. The disclosure is graduated according to the materiality of the transaction. Material transactions are subject to both immediate and periodic detailed disclosure. After entering into a material related-party transaction, companies must publish an information document describing the transaction, its terms and the key elements of any independent adviser's fairness opinion. Further, the half-year and annual reports must include a description of material related-party transactions entered into in the period of reference.

Listed companies must also disclose their adherence to codes of conduct (for example, the corporate governance code issued by Borsa Italiana) and, in the positive, provide information on compliance with the provisions of these codes of conduct. (Article 124-ter, TUF and Article 89-bis, Issuers' Regulation.)

Maintaining Secrecy

The decision to launch a tender offer or the occurrence of the requirements for a mandatory offer must be disclosed by the bidder to CONSOB without delay (see *Announcing the Offer*).

Before that, discussions between a potential bidder and a target or its shareholders should remain confidential and appropriate measures should be adopted to ensure (and preserve) confidentiality. This is done, among other means, through the execution between the bidder and the target or the target shareholders of non-disclosure agreements covering the existence and content of ongoing negotiations, information exchanged among the parties, and undertakings to tender shares (see *Obtaining Control*).

Committed Funding

Before announcing the tender offer, the bidder must ensure it can fulfil the payment obligations in respect of cash consideration or adopt all reasonable measures to ensure that non-cash consideration obligations are met.

Where an offer is for cash or includes cash (even as an alternative), the bidder must send documents to CONSOB confirming the availability of the relevant funds within the market day before publication of the offer document (see *Public Tender Offer: Timeline*). To this purpose, the bidder must either:

- Deposit cash or readily disposable securities for an amount equal to the maximum amount that the bidder may be required to pay in case of full acceptance of the offer.
- Obtain a "cash confirmation" letter from a bank or other suitable financial institution confirming availability of the funds for the same amount and which is irrevocable and unconditional.

Where the consideration includes securities (non-cash consideration), a copy of the resolution approving their issue must be sent to CONSOB within the same timeframe. (Article 37-bis, Issuers' Regulation.)

Announcing the Offer

The decision to launch a voluntary tender offer or the occurrence of the requirements triggering the obligation to launch a mandatory tender offer, must be notified to CONSOB without delay and simultaneously disclosed to the market (Article 102, TUF). This applies to both, hostile and recommended offers.

Italian law does not fix the exact number of days that must elapse between the decision or the occurrence of the events triggering the mandatory tender offer and the notification to CONSOB. As the law provides that such notification must be made "promptly", market practice is that, in case of voluntary tender offers, the notification is made to CONSOB on the same day as the day of the bidder's board of directors' decision to launch the offer and, in case of mandatory tender offers, on the same day as the day the obligation to launch the offer is triggered (for example, the closing of the transaction under which the bidder receives the shares in the target in excess of the relevant thresholds).

The notification must be filed with CONSOB, typically by means of an online filing to its certified email address (consob@pec.consob.it), and must provide the key information about the offer, which must include at least the following:

- The key terms of the offer, including the name of the bidder and any person acting in concert with the same, the name of the target, details on the price, number and class of securities to be tendered, the objectives of the offer, any intention to delist, and the conditions attached to the offer.
- Details on the shareholding in the target held by the bidder and any person acting in concert.
- Details of any authorisations required by applicable law for the offer, with an indication on the starting of the relevant proceedings.

(Article 37, Issuers' Regulation.)

On filing of the notification with CONSOB, the bidder must simultaneously disclose the offer to the target and the market by publishing a press release containing the same information included in the notification to CONSOB (for the means by which the publication obligation can be accomplished by the bidder, see *Electronic Communications and Use of Websites*).

For a high-level timeline applicable to making a public tender offer, both voluntary or mandatory, see *Public Tender Offer: Timeline*.

Failed Offer

The TUF and the Issuers' Regulation do not prevent a bidder from re-launching an offer if the first offer is unsuccessful. There are no restrictions on the number of offers a bidder can make for the same target.

A temporary restriction only applies if the bidder fails to "formally" launch an offer after the announcement of the offer it. The offer must be launched within 20 days after the announcement by filing the draft offer document with CONSOB (see *Public Tender Offer: Timeline*). If the bidder fails to comply with this term, they are prevented from launching a new offer for the target's shares for the next 12 months. (Article 102, paragraph 2, TUF.)

Electronic Communications and Use of Websites

Italian law enables electronic forms of communication, including website publication, to be used to disclose documents, announcements and information relating to the offer.

If information must be disclosed to the market, it is considered disclosed if it is jointly (in electronic or hard copy form):

- Filed with CONSOB. Normally the filing is carried out online to the certified email address of CONSOB (consob@pec.consob.it).
- Sent to two news agencies.
- Filed with Borsa Italiana.

All press releases, notices and documents relating to the offer must be published also on the target's website and on the website indicated by the bidder in the announcement of the offer (Article 36, Issuers' Regulation).

Publication of the Offer Document

Promptly after its approval by CONSOB (normally on the same day or the day after), the offer document must be published by the bidder (Article 102, TUF and Article 38(2), Issuers' Regulation).

For the means by which the publication obligation can be accomplished, see *Electronic Communications and Use of Websites*).

The offer document is also promptly sent to both the bidder's and the target's employees' representatives (or in their absence, to the employees). (Article 102(2), TUF.)

Offer Timetable

Acceptance Period

For a high-level timeline applicable to making a public tender offer, either voluntary or mandatory, see *Public Tender Offer: Timeline*.

The acceptance period begins five market days after the offer document is published. This five market-day period is granted to enable the target's board of directors to prepare a statement on the offer which will support the shareholders' decision to handover or not the shares (see *Statement of the Target's Board on the Offer*).

In recommended bids, the target's board's statement is usually included in the offer document, in which case the acceptance period can start the day following the publication of the offer document.

A bid must be open for:

- 15 to 25 market days for mandatory tender offers.
- 15 to 40 market days in any other circumstances.

CONSOB can decide to extend the duration of the offer up to a maximum of 55 market days (Article 40, Issuers' Regulation).

Minimum Period for Which Offer Must Remain Open for Acceptance

An offer must be open for a minimum of 15 market days (see *Acceptance Period*).

Revised Offers

During the offer, a bidder may decide to improve the terms offered to target shareholders (Article 43, Issuers' Regulation). This happens in particular if competing offers are launched. Competing offers can be launched at any time up to five market days before the end of the acceptance period of the original offer. Subsequent increased offers (*rilanci*) and other amendments to the original offer must be made and published within five market days of publication of the competing bid (Article 44, Issuers' Regulation).

If no competing offer is launched, amendments to the offer are possible until the day preceding the end of the acceptance period. In case of amendments, the acceptance period cannot end before the third market day after the day of publication of the amendment. Therefore, if necessary, the acceptance period is extended to allow this to happen (Article 43, Issuers' Regulation).

Possible Changes to the Acceptance Period

The basic timetable rules apply regardless if the offer is recommended or hostile (see *Public Tender Offer: Timeline*).

However, a change to the acceptance period may occur in case of competing offers. A competing offer can be published at any time up to five market days before the date the original offer is due to close. In this scenario, the acceptance period of the first offer must be aligned with that of the last competing offer unless the first bidder notifies CONSOB and the market, within five days of the publication of the competing offer, that it intends to keep the original acceptance period unchanged (Article 44, Issuers' Regulation). A re-launch following a competing offer is permitted if certain conditions are met (see *Revised Offers*).

Changes to the acceptance period are possible also in the context of insider bids (Article 106, TUF and Article 39-bis, Issuers' Regulation).

Insider bids are offers launched by:

- Shareholders of the target company owning voting securities in excess of 30% (or, 25% in target companies other than small medium-sized enterprises (SMEs) which are defined as companies with a market capitalization of less than EUR1 billion (Article 1, paragraph 1, lett. w-quater.1) TUF) and a list of which is available on the CONSOB’s website (*www.consob.it*).
- Parties to a shareholders' agreement owning in aggregate voting securities in excess of 30% (or, in target companies other than SMEs, 25%).
- Directors of the target company.
- Persons acting in concert with the parties listed under the points above.

The acceptance period of insider bids must be re-opened for five (market) days (unless specific exemptions apply) in the following circumstances:

- The offer is subject to a condition and the condition is met or waived (see *Conditions*).
- The offer is not subject to any conditions, but:
    - the bidder has reached a participation exceeding half of the target's share capital; or
    - the bidder's initial participation already exceeded half of the target's share capital but was lower than two-thirds of the share capital, and the bidder has reached a participation exceeding two-thirds of the share capital.
- The bidder has acquired at least half of the securities object of the offer.

Conditions

A mandatory tender offer cannot be subject to conditions. Normally any required regulatory clearance is a condition precedent to the closing of the acquisition of the stake triggering the obligation to launch the offer. Filings are usually made shortly after signing of binding agreements and the tender process would start only after the closing of the transaction has occurred (that is, once the relevant conditions, including regulatory clearances, have been satisfied).

Voluntary tender offers can be subject to certain conditions provided that the occurrence of the event does not merely depend on the bidder's will (Article 40, Issuers' Regulation). The law sets out no other restrictions. Conditions can include:

- Competition clearance (see *Merger Control*.
- Regulatory authorisations regimes, such as:
  - the authorisation under the foreign direct investment screening (see *Foreign Direct Investment*); and
  - the foreign subsidies regulation (see *Foreign Subsidies Regulation*).
- The absence of material adverse changes in (or frustrating actions by) the target.
- Minimum acceptance thresholds.

In case of offers aimed at the delisting of the target, the minimum acceptance threshold is often set at 90% or 95%, being the percentages a bidder must hold to obtain the automatic delisting of the target or the full squeeze out of the minority, respectively (see *Buying up Outstanding Minorities*).

The minimum acceptance condition can always be waived by the bidder if a lower percentage of acceptances are received (and provided it has reserved the right to waive in the offer document). However, CONSOB would typically require the bidder to disclose in the offer document the minimum percentage below which the condition may not be waived.

All offer conditions must be satisfied or waived by the market day preceding the settlement of the offer.

Stakebuilding

In principle, a bidder can acquire shares in a target company without restrictions before announcing its decision to launch an offer provided it complies with the applicable rules relating to:

- Insider trading.
- Disclosure obligations (see *Disclosure Obligation*).
- The requirement to launch a mandatory tender offer if certain thresholds are exceeded (see *Mandatory Offers*).
- Merger control notification for antitrust purposes (if thresholds are met). See, *Merger Control*
- Other regulatory approvals if requirements are met. See for example *Foreign Direct Investment*.

Disclosure Obligation

Whenever a person comes to hold the following stakes in an Italian listed company it must disclose it to the company and CONSOB:

- More than 3% of the company's voting share capital or overall number of voting rights (5% in case of SMEs).

- A percentage equal to or higher than 5%, 10%, 15%, 20%, 25%, 30%, 50%, 66.6%, or 90% of the company's voting share capital or overall number of voting rights.

(Article 120, TUF and Article 117, Issuers' Regulation.)

The same rules apply when a stake meeting the above thresholds is reduced below these thresholds.

Disclosure to the company and CONSOB is also triggered when:

- The thresholds of 5%, 10%, 15%, 20%, 25%, 30%, 50%, and 66.6% are reached by adding together the stakes held by shareholders with an interest lower than 3% (or 5% in SMEs) participating to an agreement regarding the exercise of voting rights or the exercise of a dominant influence over the company.
- A person comes to hold (directly or indirectly) a participation in financial instruments (that is, an aggregate of potential shareholdings and other long positions) that reaches or exceeds (or reduces below) 5%, 10%, 15%, 20%, 25%, 30%, 50%, and 66.6% thresholds.
- A person comes to hold (directly or indirectly) an aggregate position (that is, an aggregate amount of shares and financial instruments of the company) that reaches, exceeds, or reduces below 5%, 10%, 15%, 20%, 25%, 30%, 50%, and 66.6% thresholds.

(Articles 118 and 119, Issuers' Regulation.)

Disclosure of the above holdings must be made within four market days of the date the person required to fulfil the disclosure obligations gains knowledge of the relevant triggering event. CONSOB then discloses this information to the public. The disclosure to CONSOB is typically made by an online filing to its certified email address (see *Electronic Communications and Use of Websites*).

In addition, investors building up stakes equal to or higher than 10%, 20%, or 25% must disclose to CONSOB and to the target their intentions or goals for the following six months, including:

- Information on the financing used for the acquisition.
- If the investor is acting in concert with other investors or alone.
- If the investor intends to continue acquiring stakes and take control of the target or influence its management.
- The investor's intentions in relation to any shareholders' agreements to which the investor is a party.
- If the investor intends to add or remove members of the target's board of directors or the board of statutory auditors. If circumstances subsequently change, causing the investor to change its intentions, this must also be disclosed in the same way.

Irrevocable Undertakings

When the target is controlled by a shareholder or group of shareholders, the tender offer is normally launched on a friendly basis, that is, the bidder negotiates with the target's majority shareholders to take control. The agreement between the bidder and the target controlling shareholder(s) generally provides for either:

- The obligation of the bidder to purchase the majority stake in the target from the controlling shareholder(s) (and launch a mandatory tender offer for the residual outstanding shares).
- The obligation of the bidder to launch a voluntary tender offer and the irrevocable undertaking of the majority shareholders to tender their shares to the offer.

However, the benefit of irrevocable undertakings in agreements between a bidder and the existing shareholder(s) can be hampered by the rule that when a competing bid is launched, committing shareholders can walk away from the obligation to tender or revoke their acceptance to tender their shares to the competing bid (Article 103, TUF and Article 44, Issuers' Regulation).

Mandatory Offers

A mandatory tender offer for 100% of the voting shares in a public company is triggered when a person comes to hold (either alone or with concert parties):

- More than 30% of the target's voting shares (following either an acquisition, grant of increased voting rights, or the issue of multiple-voting shares).
- More than 25% of the voting shares in a company that is not an SME, unless another shareholder holds a higher interest.
- More than an additional 5% of the outstanding shares with voting rights in any 12-month period, when the concerned person already holds (directly or indirectly) more than 30% of the outstanding voting shares but does not hold the majority of the voting rights in an ordinary shareholders' meeting (for SMEs, a different threshold set out in the articles of association can apply).
- More than 30% (or 25% where applicable in case of SMEs) of the shares with voting rights in a listed parent company, or a controlling interest in a non-listed parent company, where the listed or non-listed parent company's assets are mainly composed of interests in the listed subsidiary target and the bidder will hold (indirectly or as a result of direct and indirect interest) a stake exceeding one of the thresholds triggering a mandatory bid.

  (Article 106, TUF.)

In relation to the first two bullet points above, the articles of association of listed SMEs can set out a different triggering threshold of between 25% and 40%. In relation to the third bullet above, the articles of association of listed SMEs can set out an exemption from this obligation, but only until the date of the shareholders' meeting called to approve the annual accounts for the fifth financial year following the listing of the company's shares.

Derivative financial instruments (whether held directly or indirectly) that grant a long position (that is, a position where the economic interest is positively linked to the trend of the price of the underlying assets) on the company's outstanding voting shares must be computed to determine the shareholding that triggers mandatory bid obligations.

Exceptions

The obligation to launch a mandatory tender offer is not triggered (whether or not the relevant threshold is exceeded) when any of the following occurs:

- Other shareholders (either alone or in concert) already hold the majority of the voting rights exercisable at the ordinary shareholders' meeting.
- The triggering shareholding is the result of a capital strengthening plan (as opposed to a debt restructuring plan) implemented in certain specifically identified instances of serious financial crisis or through subscription for shares in a reserved capital increase under a restructuring plan announced to the market and certified by an independent expert (if no acquisition of shares has occurred or has been agreed on in the preceding 12 months).
- The company is in a critical financial situation and the relevant transaction:
    - must be decided by the shareholders' meeting of the target company and is approved without the negative vote of the majority of the company's shareholders attending the meeting (excluding shareholders who, as a result of the transaction, exceed the mandatory offer threshold and shareholders holding the majority stake in the company, if their shareholding is higher than 10% of the voting share capital); or
    - if falling outside the competence of the shareholders' meeting of the target company, is approved by the majority of its shareholders (excluding shareholders who, as a result of the transaction, exceed the mandatory offer threshold and the shareholders holding a majority stake higher than 10% of the voting share capital) under an ad hoc declaration made available by the company.
- There is a transfer of shares between sister companies (companies under common control), or from one company to its controlling shareholders.
- The triggering shareholding occurs as a result of either:
    - the exercise of an option, conversion, or subscription right; or
    - the acquisition of derivative instruments and the acquirer undertakes to sell the securities or instruments in excess to non-related parties within six months and to refrain from exercising the voting rights exceeding the relevant threshold in the interim.
- The purchaser undertakes to sell the excess shares to non-related parties or to decrease the excess voting rights within 12 months (18 months where the acquirer is a financial institution acting as guarantor in a capital increase or placing of securities) and to refrain from exercising the related voting rights in the interim.
- The triggering shareholding occurs in companies the articles of association of which provide for increased voting rights or the issue of multiple-voting shares and the relevant thresholds are exceeded as a result of a reduction of the overall voting rights (unless the relevant party has acquired in concert with others a stake that exceeds one of the mandatory tender offer thresholds, taking into account the aggregate of the securities, and grants the right to vote at a shareholders' meeting on resolutions concerning the appointment or removal of members of the target's board of directors and supervisory board).
- The triggering shareholding results from a statutory merger or de-merger approved by a shareholders' resolution of the company whose shares would otherwise have been subject to a mandatory tender offer, provided that the majority of the shareholders attending the meeting (other than the shareholders holding the largest stake in the company and the shareholder who, as a result of the transaction, will exceed the mandatory offer threshold) did not vote against the transaction.
- The triggering shareholding occurs as a result of inheritance or free of charge transactions between living individuals.

- The triggering shareholding is the result of a (voluntary) offer made for 100% of the target company's voting securities, if, in the case of a share-for-share offer, the consideration securities are listed on a regulated market in an EU member state or a cash payment is offered as an alternative.

In addition, a mandatory tender offer is not triggered when the relevant thresholds are exceeded in the context of a prior partial offer pursuant to Article 107 of the TUF (that is, an offer launched for less than 100% but more than 60% of a target's voting securities), provided:

- The bidder and any concert party has not acquired more than 1% of the target's outstanding voting shares in the 12 months before the offer announcement or during the offer.
- The offer is conditional on the approval by shareholders who together possess the majority of the target's securities (excluding those held by the offeror, any shareholder with an absolute or relative majority shareholding higher than 10% of the voting share capital of the company, or persons acting in concert).
- CONSOB has agreed that the requirements have been met.
- During the 12 months following the completion of the prior partial bid, either:
    - the bidder or persons acting in concert with it do not acquire more than 1% of the target's outstanding shares with voting rights; or
    - the target does not resolve to carry out a statutory merger or de-merger.

In addition, CONSOB can grant an exemption from the obligation to launch an offer for cases not expressly set out in the regulations provided these cases share the same rationale as the provisions expressly excluding the triggering of a mandatory offer.

Consideration

Different rules apply to the offer consideration depending on whether the offer is a voluntary or a mandatory offer.

In a mandatory tender offer, a bidder can opt for a consideration represented, in whole or in part, by securities (Article 106, paragraph 2-bis, TUF). In this case, the bidder must offer shareholders a cash alternative if any of the following occurs:

- The offered securities are not listed on an EU regulated market.
- The bidder (or persons acting in concert) has purchased securities (in cash) constituting at least 5% of the target's outstanding voting shares in the 12 months before the offer announcement, or during the acceptance period.

The consideration can be cash, securities, or a combination of both in case of voluntary tender offers. However, where the voluntary tender offer is for 100% of the target's share capital, the securities must be listed on an EU regulated market (unless a cash alternative is provided).

In both voluntary and mandatory offers, bidders must consider the application of the "best price rule" stemming from the general principle of equal treatment of the shareholders. This rule provides that:

- In a mandatory tender offer, the offer price cannot be lower than the highest price paid for the same securities by the bidder (or by persons acting in concert with it) over a period of 12 months before the offer is announced (see *Minimum Level of Consideration*).
- In any offer, where the bidder, between the offer announcement and the payment date, acquires securities of the target, or long positions which have as their underlying securities of the target, at a price higher than the offer price, the offer price must be increased up to the highest price paid in those transactions. This rule does not apply to buy and sell transactions carried out at market conditions in the context of trading on own account involving an overall number of securities that does not exceed 0.5% of the securities object of the offer.
- In any offer, where the bidder, from the payment date up to six months following the payment date, acquires securities in excess of 0.1% of the securities object of the offer, it has the obligation to pay a cash adjustment of the price to those who accepted the offer. This threshold of 0.1% is increased to 1% in case of buy and sell transactions effected at market conditions in the context of trading on own account.

(Article 106, TUF and Article 42, Issuers' Regulation.)

There are no specific restrictions or requirements on the consideration that foreign bidders must offer to shareholders different from those applicable to any other bidder as set out in this Note.

Minimum Level of Consideration

In a voluntary tender offer, the level of consideration is set by the bidder.

In a mandatory tender offer, the offer must be launched at a price no lower than the highest price paid by the bidder (or any person acting in concert with it) for securities that are of the same category as those subject to the offer for the 12-month period before the offer announcement (Article 106, TUF). However, under certain circumstances, the minimum price can differ. In particular:

- The minimum price must be equal to the weighted average market price in the previous 12 months if, during this period, either:
    - no purchase for consideration of securities of the same category as those subject to the offer was made; or
    - the obligation to launch a mandatory tender offer was triggered as a result of granting increased voting rights and there was no purchase for consideration at a higher price.
- In other specifically identified cases, CONSOB can determine a higher price or a lower price to preserve balanced market conditions (Article 106, paragraph 3, lett. c) TUF). These include cases in which:
    - market prices have been influenced by exceptional events or there is a well-founded suspicion that this has occurred; or
    - there is a reasonable suspicion that market prices have been manipulated.

If, pending the offer or for six months after payment of the offer price, the bidder or its concert parties (directly or indirectly) buy target shares at a higher price than the offer price, the bidder must pay the difference between the higher price and the offer price to those target shareholders who tendered their shares to the offer (this is known as the best price rule; see *Consideration*).

Documents

In both recommended and hostile tender offers the target's shareholders must receive the following documents:

- Offer announcement prepared by the bidder (see *Announcing the Offer*).
- Offer document (including the proposed terms and conditions and an acceptance form) prepared by the bidder (see *Offer Document*).
- Statement of the target's board of directors on the offer (*comunicato dell'emittente*). See *Statement of the Target's Board on the Offer*.

Offer Document

The draft offer document is filed by the bidder with CONSOB within 20 days after the announcement of the offer (see *Announcing the Offer*).

The offer document must contain, among others:

- A summary description of the structure of the transaction and the offer.
- The risk factors relating to the offer.
- A description of the bidder, the target and the intermediaries.
- The financial statements of the bidder for the last two years.
- Details of the financial instruments object of the offer.
- Details of the target's securities directly or indirectly held by the bidder.
- The offer price.
- The procedures for tendering the shares and settling the offer price.
- The financing of the offer.
- The future plans of the bidder with respect to the target, including in respect of the delisting.
- Details of any transactions between the bidder and its related parties and the target or significant shareholders or the members of the board of directors and internal control bodies of the target.
- A responsibility statement as to the completeness and truthfulness of the information included in the offer document.

(Article 102, TUF and Article 38, Issuers' Regulation.)

Statement of the Target's Board on the Offer

The statement of the target's board of directors on the offer contains the information that the board deems useful for the shareholders to evaluate the offer, including the board substantiated assessment of the offer and of the fairness of the offer consideration (Article 103, TUF; Article 39, Issuers' Regulation). It also includes comments on the potential effects of the offer on the target's business, its employees, and the location of its industrial sites.

A decision by the directors to recommend (or not) a tender offer is taken within the framework of the general corporate interest. It must therefore be in the interests of all the shareholders and protect the target's employees and the business operations of the company.

The statement must be sent to the employees' representatives (or in their absence, to the employees). The employees' representatives can express their opinion on the effect of the offer on employment conditions. If received in time, the statement of the employees' representatives is attached to the statement of the target board on the offer.

The statement of the board can be included in the offer document. Whether or not it is included, this impacts on the starting day of the acceptance period (see *Acceptance Period*).

An additional opinion from the independent directors of the target is required in case of "insider bids", that is, offers launched by:

- Shareholders of the target company owning voting securities in excess of 30% (or, in target companies other than SMEs, 25%).
- Parties to a shareholders' agreement owning in aggregate voting securities in excess of 30% (or, in target companies other than SMEs, 25%).
- Directors of the target company.
- Persons acting in concert with the parties listed under the points above.

(Article 39-bis, Issuers' Regulation.)

Buying up Outstanding Minorities

The bidder can or is obliged to buy the shares of the minority shareholders which have not tendered their shares to the offer in two cases:

- Minority squeeze-out mechanism. After a offer for 100% of the target voting shares, where the bidder acquires at least 95% of the target's outstanding voting shares, the bidder has the right to buy the remaining voting rights within three months from the close of the offer's acceptance period, provided the intention to exercise this right was declared in the offer document. The (remaining) minority shareholders of the target have no right to object. (Article 111, TUF.)
- Minority sell-out mechanism. After a bid for 100% of the target voting shares, where the bidder holds (either alone or with concert parties) at least 95% of the target's outstanding voting shares, it must buy the remaining voting securities if their holders request it (the 95% sell-out). The same applies where the acquired stake exceeds 90% of the target's outstanding voting shares (the 90% sell-out). In this case, however, the bidder is relieved of the obligation to buy the remaining shares if it restores, within 90 days, a free float sufficient to ensure regular trading activities. (Article 108, TUF.)

The criteria used to determine the price of the shares in the case of both minority squeeze-out and minority sell-out mechanisms are set out in the Issuers' Regulation. The consideration must be generally equal to the price of the tender offer in both mandatory and voluntary tender offers. In certain instances, CONSOB determines the price taking into account the following:

- The price under the previous offer.
- The weighted average market price in the six-month period before the announcement of the tender offer.
- The value of the target or of its securities resulting from an independent expert's appraisal using typical market criteria and compiled not earlier than six months before the sell-out or squeeze-out mechanisms were triggered.
- The acquisitions of securities of the same kind in the previous 12-month period by the bidder (or its concert parties).

(Article 50, paragraph 4 and Article 50-quarter, Issuers' Regulation.)

The consideration normally takes the same form as that of the tender offer. However, the (remaining) shareholders of the target can request to be paid in cash.

Employee Consultation

Target's employees have no right to challenge an offer. However, they do benefit from some information rights. In particular, the management bodies of the target and the bidder must inform their employees' representatives (or in their absence, the employees directly) about:

- The offer announcement (as soon as it is made) (Article 102, paragraph 2, TUF).
- The offer document (as soon as it is made public) (Article 102, paragraph 5, TUF).
- The statement on the offer by the target's board of directors, which includes an assessment of the bid's effects on employment conditions (as soon as it is circulated) (Article 103, paragraph 3-bis, TUF) (*Statement of the Target's Board on the Offer*).

These documents must be sent to the employees' representatives (or in their absence, to the employees directly). The employees' representatives can express their opinion on the effect of the offer on the employment conditions. If timely received, the employees' representatives' opinion is attached to the statement on the offer made by the board.

The bidder must make clear in the offer document its future plans for the target, including the effect the offer may have on the employees. In particular, a bidder must disclose in the offer document any current plans concerning the target company and its group, with particular reference to restructuring and reorganisation, but also in relation to the workforce. It must also indicate which of these plans will be implemented in the 12 months following completion of the offer.

The employees' information rights do not apply where the tender offer:

- Concerns financial instruments that do not grant any voting rights.
- Concerns shares that do not grant any voting rights in shareholders' meetings for the appointment or removal of directors or statutory auditors (or both), or other matters liable to impact the company's management.
- Is launched by persons that already hold the majority of the voting rights in the ordinary shareholders' meetings of the company.
- Concerns the company's own shares.

Target's Response

Directors' Duties

Italian corporate law lays down a set of fiduciary duties for directors at a general level, which also apply in the event of a bid on the company.

These include the duty of managing the company with diligence and in its best interest and the duty to act in a properly informed manner. Generally, directors are expected to act in the best interest of the company and not in the interest of the shareholders that have designed them for the appointment to the office. For a practice note outlining the general and specific duties of directors of an SPA and an SRL, see *Practice Note, Directors' Duties in an SPA and an SRL (Italy)*.

In the context of a bid, directors are also:

- Required to issue a statement containing all information useful for the shareholders to evaluate the bid and their own assessment of the bid (see *Statement of the Target's Board on the Offer*).
- Prevented by law from taking actions that may frustrate the bid in the absence of prior shareholders' consent, unless the articles of association of the company provide otherwise (see *Defence Mechanisms*).

Defence Mechanisms

When considering possible defences to a hostile bid, in addition to their general duties (see *Directors' Duties*), the target's directors must consider the following three specific rules:

- The passivity rule (or board neutrality rule) (see *Passivity Rule*).
- The breakthrough rule (see *Breakthrough Rule*).
- The reciprocity rule (see *Reciprocity Rule*).

Passivity Rule

Pursuant to the passivity rule, unless otherwise provided in the target's articles of association, once a tender offer is launched, the target's directors must refrain from taking any action that could jeopardise the success of the same offer without the shareholders' meeting prior authorisation (Article 104, TUF).

This rule applies from the offer announcement until the end of the acceptance period or the date on which the offer ceases to have effect (passivity period) (Article 104, TUF).

A shareholders' meeting authorisation is required to the board also to implement any resolution, outside the ordinary course of business, which although was passed before the passivity period, has not yet been fully implemented and could jeopardise the offer.

The main defence mechanisms that, if adopted, would fall within the scope of the passivity rule (and require the shareholders' meeting authorisations), include:

- Capital increases, share buybacks or conversion of non-voting securities into voting securities (to increase the consideration to be offered by the bidder).
- Mergers, demergers, reorganisations, sale of core assets or purchase of non-core assets (to significantly change the business of the target).
- Filing of claims or hostile advertising campaigns against the bidder (to harm the success of the offer).

Mere research by the target's directors for alternative bidders is outside the scope of the passivity rule and as, such, is possible even in the absence of shareholders' authorisation.

Breakthrough Rule
The breakthrough rule applies only if a specific provision is included in the target's articles of association to this purpose (opt-in system).

Pursuant to the breakthrough rule, on the launch of an offer:

- Any restrictions on the transfer of securities in the articles of association has no effect on the bidder.
- Any limitations to the voting rights (set out either in the articles of association or in shareholders' agreements) does not apply at the shareholders' meetings called to authorise the board under the passivity rule.

(Article 104-bis, TUF.)

In addition, if the bidder acquires at least 75% of the voting securities of the target as a result of the offer, any limitations to the voting rights or any special rights provided by the articles of association or shareholders' agreements on the appointment or removal of the directors, does not have any effects at the first shareholders' meeting of the target called to amend the articles of association or to remove or appoint the directors after the end of the offer.

Reciprocity Rule
Unless otherwise provided in the articles of association of the target, the passivity rule does not apply to tender offers launched by a bidder that is not subject itself to the same or equivalent rules in the bidder's country of incorporation (by operation of law or due to specific provisions of its articles of association). CONSOB is competent to establish whether the rules applicable to the bidder are equivalent or different to the rules applicable to the target. (Article 104-ter, TUF.)

Regulatory Restrictions

Merger Control

When planning the acquisition of a company by way of public tender offer, careful consideration should be given in advance to whether the transaction is subject to any merger control approvals.

The Italian merger control rules apply to any concentrations (that is, any merger or acquisition of joint or sole control over the whole or part of an undertaking) in any sector or industry where the combined aggregate turnover in Italy of all undertakings concerned, on the basis of the last audited consolidated annual report or available financial figures of the previous year, exceeds EUR567 million, and the Italian turnover of each of at least two undertakings concerned is higher than EUR35 million.

As from October 2022, in addition to its existing powers the Italian Antitrust Authority has also the power to review the transactions, if the following cumulative conditions are met:

- One of the two cumulative turnover thresholds indicated above is exceeded or the combined worldwide turnover of all the undertakings involved exceeds EUR5 billion.
- The transaction could raise potential competition concerns in the national market or in a substantial part thereof, considering the possible detrimental effects on the development of small innovative undertakings.
- Closing of the transaction did not take place more than six months before.

If the applicable Italian thresholds are met (and, conversely, the thresholds set out by the EU Merger Regulation, which would trigger a notification obligation to the European Commission, are not met), the Italian Antitrust Authority must be notified of any transaction amounting to a concentration before the implementation of the same (that is, before closing).

Merger control filings may also be needed outside the EU, under certain conditions.

A peculiarity of the Italian takeover regime is that the offer process is not suspended pending the merger control clearances. However, when opening a phase II investigation, the Italian Antitrust Authority may order the parties not to implement the transaction until it makes a final decision.

In case of voluntary tender offers (which can be subject to conditions), what is generally standard and permitted is a phase I antitrust approval condition. Filings are typically made simultaneously with the offer announcement. Although the tender process is not suspended pending these authorisations, timing of a phase I approval is normally compatible with the tender process.

In case of mandatory tender offers (which cannot be subject to any conditions), it is usual that any merger clearance is construed as a condition precedent to the closing of the acquisition of the controlling stake. Filings are made shortly after signing of binding agreements and the tender process starts only after closing of the transaction has occurred (and merger clearance is obtained).

For further details on merger control approvals in Italy, see *Practice Note, Competition: Private Acquisitions and Joint Ventures (Italy)*.

To view and customize comparison charts on merger control, see *Quick Compare Chart, Merger Control*.

Foreign Direct Investment

Limits on foreign investment can stem from the provisions concerning foreign direct investments (FDI), which contain limitations on certain transactions relating to companies active in Italy or Italian assets in specifically identified strategic industries, including:

- Defence.
- Energy.
- Transport.
- Communications.
- Finance.

- Healthcare.
- Data.

For:

- Further details on the regime applicable to foreign investments in Italy, see *Practice Note, Regulation of Foreign Investment in Italy*.
- Customizable comparison charts on foreign direct investment, see *Quick Compare Chart, Regulation of Foreign Direct Investment (FDI)*.

The offer process is not suspended pending the authorisation on the foreign investment.

In case of voluntary tender offers (which can be subject to conditions), the authorisation is usually provided among the offer conditions. Filings are typically made simultaneously with the offer announcement. Although the tender process is not suspended pending the authorisation, timing of the approval is normally compatible with the tender process.

With mandatory tender offers (which cannot be subject to any conditions), it is usual that any FDI authorisation constitutes a condition precedent to the closing of the acquisition of the controlling stake. Filings are made shortly after signing of binding agreements and the tender process would start only after closing of the transaction has occurred (and relevant FDI authorisation is obtained).

Foreign Subsidies Regulation

Under the Foreign Subsidies Regulation, the European Commission has the power to investigate financial contributions granted by non-EU governments to companies active in the EU. If the European Commission finds that such financial contributions constitute distortive subsidies, it can impose measures to redress their distortive effects.

The Foreign Subsidies Regulation introduces three procedures:

- A notification-based procedure to investigate concentrations involving financial contributions granted by non-EU governments, where the acquired company, one of the merging parties or the joint venture generates an aggregate turnover in the EU of at least EUR500 million and the parties were granted combined aggregate foreign financial contributions of more than EUR50 million in the last three years.
- A notification-based procedure to investigate bids in public procurement procedures involving financial contributions by non-EU governments, where the estimated contract value is at least EUR250 million and the bid involves an aggregate foreign financial contribution of at least EUR4 million per each third country in the last three years.
- An ex officio procedure to investigate all other market situations, where the European Commission can start a review on its own initiative.

The offer process is not suspended pending the authorisation on the foreign subsidies.

For M&A transactions (including public M&A transactions), the review periods are broadly aligned to the EU merger control process, that is, 25 working days for phase 1 reviews and 90 working days for phase 2 reviews. Both terms can be extended by 15 working days where commitments are offered.

A notifiable concentration cannot be completed, unless and until it has been approved by the European Commission.

For a practice note on the new EU regime governing foreign subsidies, see *Practice Note, The EU Foreign Subsidies Regulation*.

Blocked Transactions

Based on the limited public information available, there are no precedents of public M&A transactions vetoed by the government under the Italian foreign direct investment regime.

However, there is evidence of government-imposed conditions on and instructions for public M&A transactions. For example, in relation to the acquisition of control by Vivendi over Telecom Italia S.p.A. (imposition of measures and conditions (not disclosed) on both parties to ensure the continuity of the functions related to the strategic activities).

Regulated Industries

Current legislation provides that acquiring a significant stake or a controlling interest in companies operating in certain regulated areas is subject to the competent supervising authorities' prior approval. The most common are financial, insurance and banking services, media and communications, defence-related or arms and utilities.

If the target operates in any of these sectors, consents or approvals are likely to be required from the competent authorities to complete the transaction.

In those circumstances, the bid process is suspended until the relevant authorisation is obtained.

Exchange Control Restrictions

There are no outstanding restrictions on repatriation of profits or exchange control rules for foreign companies.

END OF DOCUMENT

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