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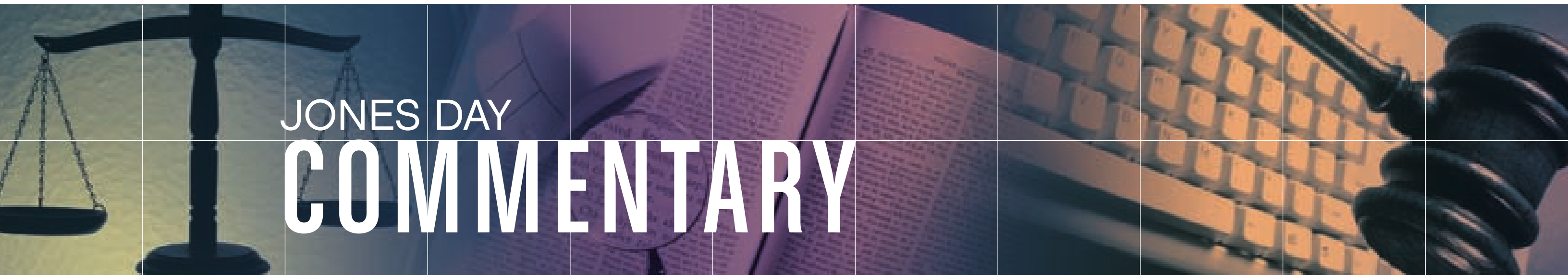

TENDER OFFERS IN ITALY

Italy has not yet implemented the Directive on Takeover Bids (Directive 2004/25/EC, the "Directive") in its internal legal system.[1] However, Italian tender offer rules currently in force, as set forth in Legislative Decree no. 58 of February 24, 1998, and CONSOB[2] Regulation no. 11971 of May 14, 1999, already provide for many of the concepts set forth in the Directive, since the Italian legislation, when enacted, was based on a previous draft of the Directive. We will provide here an overview of the main concepts and rules that apply to tender offers in Italy, noting where they differ from the principles set forth in the Directive.

THE CONCEPT OF MANDATORY TENDER OFFERS

Both the Directive and Italian law aim to ensure equal treatment of, and prevent discrimination against, the target company's shareholders—hence the provision, in addition to the rules governing voluntary tender offers, of a set of rules governing the so-called "mandatory tender offers."

In a nutshell, the concept of a mandatory tender offer is such that whoever comes to hold a controlling stake in an Italian listed company shall be required to launch a tender offer for all of the remaining shares of such company at an equitable price to be determined in accordance with Italian law, thus allowing the minority shareholders to tender their shares to the bidder at a price that is the same as or comparable to that paid by the bidder to acquire the controlling stake in the target company.

Italian law provides for three main types of mandatory tender offers:

1. The deadline for implementation by Member States was May 20, 2006.
2. CONSOB is the regulatory agency supervising the Italian securities markets—basically, the Italian equivalent of the SEC.

1. The *basic type of mandatory tender offer* is triggered by the crossing of a threshold in the outstanding voting shares of the target company that is presumed to grant control of such company. Anyone who, as a result of an acquisition for consideration, comes to hold *more than 30 percent* of the voting shares of a company organized under the laws of Italy and listed on an Italian regulated market shall launch a mandatory tender offer for all of the voting shares of such company within 30 days of the crossing of the threshold.

2. The so-called "*incremental tender offer*" is triggered whenever someone holding *more than 30 percent and less than 50 percent* of the voting shares in an Italian listed company acquires for consideration, subscribes to, or converts securities into more than 3 percent of the voting shares of such company within any given 12-month period. This rule is aimed at frustrating silent stake building.

3. The so-called "*residual tender offer*" is triggered whenever someone (i) comes to hold *more than 90 percent* of the voting shares of the target company and (ii) does not elect to refloat, within the following 120 days, enough voting shares to ensure a regular and liquid market.[3]

While Italian law provides for certain exemptions from the obligation to launch a basic-type mandatory tender offer or an incremental tender offer, no exemptions from the obligation to launch a residual tender offer are granted.

CONSIDERATION

Generally speaking, Italian-law rules regarding the consideration to be offered in the context of a tender offer are stricter than the requirements set forth in the Directive.

In a *voluntary tender offer*, the bidder may offer, in consideration for the tendered shares, cash, securities admitted to trading on a regulated market of an EU country, or a combination of both.

In a *mandatory tender offer*, the bidder may offer, in consideration for the tendered shares, cash, securities listed on a regulated market of an EU country, or a combination of both, *provided*, however, that Italian law permits the bidder to offer such securities only to the extent that:

1. The acquisitions of shares in the target company carried out by the bidder in the 12-month period preceding the launch of the mandatory tender offer were made using the same securities as consideration; and

2. The consideration of the mandatory offer provides the same ratio between cash and such securities as the preceding acquisitions of shares in the target company.

Unlike Italian law, the Directive allows the bidder to offer for consideration illiquid securities (*i.e.*, not admitted to trading on a regulated market), provided that the bidder also offers a cash alternative.

While in a voluntary tender offer the bidder is free to determine the amount of the consideration offered, in a mandatory offer context the bidder is required to offer an "equitable price," as follows.

As far as the *basic type of mandatory tender offer* and the *incremental tender offer* are concerned, the consideration to be offered by the bidder shall be equal to the arithmetic mean between the weighted average market price of the target company's shares in the last 12 months and the highest price the bidder agreed to pay over the same period to acquire shares of the same class. Such a rule does not seem to comply with the requirements set forth by the Directive, according to which the "equitable price" that the bidder shall offer in the context of a mandatory tender offer shall be equal to the highest price paid by the bidder to acquire the same securities over a period of six to 12 months.

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3. Generally, a free float of 25 percent of the outstanding voting shares is presumed to be sufficient to ensure a regular, liquid market on the Italian Stock Exchange.

As far as the *residual tender offer* is concerned, the consideration to be offered by the bidder shall be determined by CONSOB based on (inter alia) the following criteria:

- If the 90 percent threshold is crossed as a result of a previous tender offer, the consideration offered therein;
- The weighted average market price of the target shares in the last six months;
- The target company's shareholders' equity adjusted to current value;
- The target company's earning results and prospects.

However, if the residual tender offer has been triggered by a preceding tender offer for all of the outstanding shares of the target company, and more than 70 percent of the shares subject to such offer were tendered thereto, then the consideration of the residual tender offer shall be the same as that of the preceding offer.

TENDER OFFER PROCESS

The main steps and indicative timeline of a tender offer on an Italian listed company (which mostly comply with the relevant requirements set forth by the Directive) are as follows:

- Filing with CONSOB of a notice stating the bidder's intention to launch a tender offer with the following documents attached:
    1. The *offering document*, which sets forth the necessary information for the holders of the target company's securities to make a properly informed decision on the offer;
    2. The *tender form*, through which a holder of the target company's securities can tender them to the offer; and
    3. The *evidence of* the issue of *the performance guarantees* securing the payment of the consideration offered or the commitment to have them in place by the commencement of the tender period.
- Issuing of a press release informing the market of the filing as described above.
- Within the 15-calendar-day period following the filing, CONSOB shall review the documents filed and, if they comply with applicable requirements, shall authorize the bidder to publish the offering document.
- Publication of the offering document.
- At least two business days before the commencement of the tender period (see below), the target company shall file with CONSOB the issuer statement indicating whether the target's management recommends acceptance or rejection of the tender offer. (This step is not necessary in case of a friendly bid, in which the issuer statement is attached to the offering document and therefore filed with CONSOB as described above.)
- The duration of the tender period (*i.e.,* the period during which the holders of the target's securities may tender them to the offer) shall be agreed with the market regulator and, subject to certain exceptions, shall comprise:
    1. 25 to 40 business days for a voluntary offer; or
    2. 15 to 25 business days for a mandatory offer.
- Commencement of the tender period, subject to:
    1. Following publication of the offering document, the passage of five business days or one business day, respectively, in case the issuer statement was separate from the offering document or was attached to the same (as described above);
    2. In case the target is a bank or a broker/dealer, authorization by the relevant regulatory agency;
    3. Provision to CONSOB of evidence that (i) the performance guarantees are in place (in case of a cash offer) or (ii) the issuing of the securities to be offered in exchange for the tendered shares was approved by the necessary corporate resolution (in case of an exchange offer).

- Publication of the issuer statement by the first day of the tender period.

- Publication of the results of the tender offer (daily during the tender period and then after the end of the tender period and before payment of the consideration).

- Payment of the consideration of the tender offer.

Italian law also provides a set of specific rules governing competing offers.

DISCLOSURE AND ANTIFRAUD PROVISIONS

Italian law sets forth a number of disclosure requirements and antifraud provisions relating to the tender offer process. Among these, the most relevant are the following:

- The bidder, the target, and their affiliates can publish information regarding the offer or the target only through press releases, to be transmitted to CONSOB at the time of their publication;

- The bidder, the target, and their affiliates shall notify CONSOB and the market on a daily basis of any acquisition or sale of the securities subject to the tender offer or of securities or rights entitling their holders to purchase or sell the securities subject to the tender offer, specifying the relevant consideration;

- The bidder and its appointed brokers shall inform the market on a daily basis, through the market regulator, of the amount of the securities tendered into the offer;

- Anyone holding more than 2 percent of the voting rights in an Italian listed company shall disclose her participation by notifying CONSOB and the issuer. Additional disclosure duties apply if greater percentages set forth under Italian law are exceeded;

- Once launched, a tender offer is irrevocable and must be extended, under the same terms and conditions, to all holders of the securities subject to the offer;

- The bidder must pay to all security holders the highest consideration paid to any other security holder during the offer period. This provision also applies in case the bidder acquired, for a consideration greater than the tender offer's, the right to purchase on a later date the securities subject to the tender offer (*e.g.*, under a call option).

PASSIVITY RULE

Pursuant to the Directive, the board of the target company shall obtain the prior authorization of a general shareholders' meeting before taking any action (other than seeking alternative bids) that may result in the frustration of the tender offer and in particular before issuing any shares that may result in a lasting impediment to the bidder's acquiring control of the target company. This provision, which in effect prevents target companies from adopting most of the poison pills or shark repellents that are common in U.S. practice, is called the "passivity rule."

The passivity-rule concept set forth by the Directive has been implemented by Italian tender offer rules, which provide that, unless previously authorized by a shareholders' meeting resolution, throughout the offer period Italian listed companies shall refrain from any actions or transactions that may frustrate the goals of a tender offer. In addition, if a shareholders' meeting is called to resolve such an authorization, the same shall be approved with the favorable vote of a qualified majority of 30 percent or more of the target's outstanding shares.

The purpose of the passivity rule is to afford the target shareholders, as opposed to the target management, the right to decide on the merits of a tender offer. In the absence of such a rule, managers who find themselves in a conflict-of-interest position vis-à-vis the shareholders in a hostile tender offer scenario might try to protect their own interests and positions by frustrating a tender offer that would be beneficial to the target shareholders.

CONCERTED ACTIONS

Pursuant to Italian law, the provisions regarding mandatory tender offers shall also apply to, and bind on a joint and several basis, any of the following persons, in case such persons come to hold (as a result of acquisitions for consideration performed by one or more of them) a participation in a target company that, in the aggregate, exceeds any of the relevant thresholds for a mandatory tender offer (see "The Concept of Mandatory Tender Offers" above):

- The members of a written or oral shareholders' agreement, regardless of its validity (in this case, all acquisitions carried out within the 12-month period preceding the execution of the shareholders' agreement shall be relevant for the purpose of ascertaining a concerted action);
- A person and her subsidiaries;
- Companies subject to the common control of another person;
- A company and its directors or general managers.

In essence, Italian law presumes that any of the foregoing categories of persons are acting in concert to acquire the control of a target company with a view to eluding the mandatory tender offer rules.

SQUEEZE-OUT RIGHT AND SELL-OUT RIGHT

Following a tender offer for all of the outstanding securities of the target company, the Directive requires Member States to grant the bidder and the holders of the target's remaining securities (the "Minority Shareholders") the right to require, respectively, the Minority Shareholders to sell the bidder all of such remaining securities (the so-called "squeeze-out right") and the bidder to purchase all of the remaining securities held by the Minority Shareholders (the so-called "sell-out right"), in each case (i) "at a fair price" and (ii) provided that the bidder either (x) comes to hold securities representing 90 percent or more of the target's voting capital stock and 90 percent or more of the target's voting rights (Member States are permitted to increase such percentages up to 95 percent) or (y) acquired, in the context of the preceding tender offer, securities representing 90 percent or more of the target's voting capital stock and 90 percent or more of the target's voting rights.

Italian law does not currently comply with the Directive requirements in terms of squeeze-out and sell-out rights in that (a) it does not provide any sell-out right in favor of the Minority Shareholders and (b) although it contemplates a squeeze-out right in favor of the bidder, it sets a triggering threshold of 98 percent of the target company's voting shares, which is significantly higher than the maximum threshold permitted by the Directive (95 percent).

Italian law provides that the consideration to be paid by the bidder for the purchase of the remaining shares as a result of the exercise of the squeeze-out right shall be determined by a court-appointed expert based on, among other criteria, the consideration of the previous tender offer and the market price of the target shares over the last six months. In this regard, Italian rules comply with the Directive's requirements only in part.

The Directive generally requires Member States to ensure that a fair price is guaranteed in the context of the exercise of a squeeze-out right (in which respect Italian law is in compliance with the Directive) and then provides for two presumptions (which have not been implemented by Italian law), whereby:

(1) Following a voluntary tender offer, the consideration offered therein shall be presumed to be fair if the bidder, as a result of such tender offer, acquired 90 percent or more of the voting securities subject to the offer; and

(2) Following a mandatory tender offer, the consideration offered therein shall be presumed fair.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General e-mail messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Stefano Crosio
39.02.7645.4148
scrosio@jonesday.com

Giulio Zampini
39.02.7645.4117
gzampini@jonesday.com