

Amendments to the Regulation of Takeover Bids – Passivity Rule Once Again in Force (with Opt-out Mechanism)

On September 18, 2009, the Italian Council of Ministers adopted a legislative decree (the “Decree”) amending the existing regulation of public tender or exchange offers (“Takeover Bids”) regarding voting securities issued by Italian listed companies.¹ The new provisions mainly concern the “passivity rule” (i.e., the principle according to which the target’s managing body should remain neutral in the context of a Takeover Bid), the definition of “acting in concert,” and the powers of the Italian Commission for Corporations and the Stock Exchange (“Consob”) with respect to offers concerning bonds and financial products other than voting securities.

Takeover Bids are primarily governed by the legislative decree dated February 24, 1998, no. 58 (the “Italian Financial Act”), which was modified in 2007 by the implementation of the European Directive 2004/25/CE (the “Directive on Takeover Bids”),² and was further amended by the decree-law dated November 29, 2008, no. 185 (“Decree-Law 185/2008”),³ adopted to deal with the recent financial crisis.

This memorandum will briefly illustrate how the Decree amends the existing regulation of Takeover Bids.⁴

I. The *passivity rule*

By amending Article 104 of the Italian Financial Act, Article 1, paragraph 3 of the Decree makes the passivity rule the default rule applicable to all Italian listed companies⁵

¹ The Decree has not yet been published in the Italian Official Gazette.

² The Directive on Takeover Bids has, for the first time, set forth a series of provisions aimed at harmonizing the regulation of Takeover Bids at the European level. The Directive on Takeover Bids was implemented in Italy by the legislative decree dated November 19, 2007, no. 229 (“Decree 229/2007”). For further information, please see our [alert memorandum of January 15, 2008](#).

³ Decree-Law 185/2008 radically amended the Italian regulation of Takeover Bids with respect to the passivity rule, the breakthrough (or neutralization) rule, and the reciprocity principle. For further information, please see our [alert memorandum of December 10, 2008](#).

⁴ This memorandum only examines the most important amendments to the existing regulation of Takeover Bids, as set forth in the Decree, and as such it does not contain an exhaustive description of the existing rules and regulations concerning Takeover Bids.

whose by-laws do not expressly provide for an alternative rule.⁶ The Decree allows an Italian listed company to partially or fully waive the passivity rule by means of a specific provision to that effect in its by-laws.⁷

If a company's by-laws do not include any provision to this effect, following the announcement of a Takeover Bid⁸ the target company⁹ shall abstain from carrying out any action or transaction that may conflict with the goals of the Takeover Bid, except for such actions or transactions that have been previously authorized at a shareholders' meeting (either ordinary or extraordinary, depending on the purpose or type of action or transaction).¹⁰ Shareholder authorization is also necessary for the execution of any decision that (i) was made before the bid was announced, but which has yet to be partially or fully executed, (ii) does not fall within the ordinary course of business of the company, or (iii) is potentially contrary to the achievement of the goals of the bid.¹¹ The mere search for other bids does not constitute an obstacle to the bid.

⁵ An "Italian listed company" means a company that has its registered office in Italy and that has voting securities admitted for trading on a regulated market in the EU (Art. 101-*bis*, sub-section 1 of the Italian Financial Act).

⁶ The Decree therefore reversed the principle introduced by Decree-Law 185/2008, which provided for the passivity rule to apply only when it was expressly called for in the by-laws of an Italian company. However, the Decree does not provide for the mandatory application, without exception, of the passivity rule, as was originally called for in the Italian Financial Act and later reaffirmed by the regulation implementing the Directive on Takeover Bids.

⁷ In such case, a company must notify Consob and the regulatory authorities responsible for regulating Takeover Bids in the Member States where its voting securities are admitted for trading (or where it has filed a request to have its voting securities admitted for trading) of the provisions of its by-laws that waive the passivity rule (Article 1, paragraph 3, letter c, of the Decree). It is worth noting that such amendments to the by-laws must be preceded by a detailed report discussing the proposed amendments submitted to the shareholders by the board of directors or other managing body and that a minority (i.e., shareholders with 1/3 of the votes at the shareholders' meeting) is capable of exercising a veto to block the amendments at issue. Finally, special attention should be paid to those aspects relating to appraisal rights possibly deriving from such amendments to the by-laws (Article 2437 of the Italian Civil Code).

⁸ Such rule also applies from the communication of the intention (or obligation) to launch a Takeover Bid until closing or expiration of such bid.

⁹ By amending Article 101-*bis*, paragraph 3, letter c, of the Italian Financial Act, Article 1, paragraph 1, letter a, of the Decree specified that the passivity rule (and other provisions of the Directive on Takeover Bids, such as the provision of information concerning the Takeover Bid to employees, the breakthrough rule and the reciprocity rule) does not apply to Takeover Bids by bidders "owning" (not merely "holding") the majority of votes in the ordinary shareholders' meeting. Therefore, the scope of the regulation appears to have been enlarged.

¹⁰ The Decree did not reintroduce the rule (previously contained in the Italian Financial Act and later repealed by Decree-Law 185/2008) that the authorization of defensive measures requires the approval of a "qualified" majority of at least 30% of the share capital.

¹¹ Shareholder authorization is without prejudice to the responsibility of directors, members of the managing board and supervisory board, and other executive officers, for the actions and transaction they have carried out.

The Decree has not amended Article 104-bis with respect to the breakthrough rule (or neutralization rule), which will still be applicable only to those companies that expressly include it in their by-laws.

The provisions of the Decree concerning the passivity rule will enter into force on July 1, 2010. By such date, Italian listed companies are called upon to examine the market rules applicable to their control and to make the most appropriate decisions with respect to the Decree, considering their governance and control structure and their strategic goals. In particular, companies that wish to carry out acquisitions through a Takeover Bid in EU Member States (including Italy) should consider that the possible introduction in their by-laws of a waiver of the passivity rule may enable the target company to invoke the so-called reciprocity clause.¹²

II. Acting in concert

The Decree has clarified the definition of “acting in concert,”¹³ in the context of the regulation of Takeover Bids.¹⁴ Along with the typical cases where an action in “concert”¹⁵ is assumed to exist, without the possibility of proving the contrary, there is also now a general definition. The Decree includes in the notion of “concert” all those persons cooperating on the basis of an agreement (whether implied or explicit, oral or written, including if it is invalid) aimed at acquiring, maintaining or strengthening control over the issuer, or with the intent of undermining the goals of a Takeover Bid.

In this respect, the Decree has also assigned significant regulatory powers to Consob, which will be entitled to identify cases in which the action in concert is assumed (unless proved otherwise), and cases in which cooperation among different persons is not relevant.

¹² The reciprocity principle, set forth in Article 12, paragraph 3, of the Directive on Takeover Bids allows Member States to provide that the passivity rule and/or breakthrough rule not apply to the target company in the event the bidder is not subject to similar rules. The principle was introduced by article 104-ter of the Italian Financial Act, upon the implementation of the Directive on Takeover Bids.

¹³ Article 1, paragraph 1, letters c) and d) of the Decree have amended article 101-bis, paragraph 4, of the Italian Financial Act with respect to the definition of “persons acting in concert.”

¹⁴ According to the rules regarding mandatory Takeover Bids pursuant to Articles 106 and 108 of the Italian Financial Act, for purposes of the obligation to launch a Takeover Bid for all of the voting securities of an issuer, the connections existing among different persons are relevant in addition to the voting securities held by any single person. Indeed, provided that all of the conditions set forth by the law are met, all persons acting in concert are jointly subject to the obligations of the Takeover Bid regulation.

¹⁵ The typical “concert” cases identified by the Decree are the following: (a) members of a shareholders’ agreement, even when it is void; (b) an entity, its controlling entity, and its controlled entities; (c) companies subject to the common control of an entity or entities; and (d) a company and its directors, members of the managing board of supervisory board, or managers.

III. Powers of Consob concerning bonds and other financial products

The Decree¹⁶ entitles Consob to identify cases of exemptions with respect to the Takeover Bid regulation,¹⁷ considering both the need for reducing burdens on bidders and the need of disclosure to ensure the adequate protection of investors.¹⁸

Consob will therefore be entitled to identify general categories of transactions to which the Takeover Bid regulation does not apply (in whole or in part) with respect to public offers to purchase or to exchange financial products other than voting securities.¹⁹

Moreover, pursuant to the new Article 102, paragraph 4-bis, of the Italian Financial Act, Consob will be entitled to authorize, upon the request of the bidder, the application of regulations concerning public offers of sale or subscription, which are generally more favorable to the bidder, to public exchange offers concerning bonds and other debt securities.²⁰ Consob would issue such authorization within 15 days from the request, if it does not conflict with the principles of protecting investors and market transparency.²¹

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If you have any questions concerning this memorandum, please feel free to contact Giuseppe Scassellati-Sforzolini in our Rome office (+39 06 69 52 21), Pietro Fioruzzi in our Milan office (+39 02 72 60 81), any of our other Italy-based partners and counsel listed under M&A or Capital Markets Practice Areas under the “Practices” section of our website at <http://www.clearygottlieb.com>, or any of your regular contacts at the firm.

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¹⁶ See Article 1, paragraph 1, letter b, and paragraph 2 of the Decree.

¹⁷ Among Consob’s regulatory powers introduced by the Decree, it should also be noted that Consob has the power to decide in which cases derivative financial instruments are to be considered for the purpose of determining the threshold for the application of the mandatory Takeover Bid obligations (Article 2, paragraph 1, of the Decree).

¹⁸ The Government seems to have therefore accepted Consob’s request for such amendments to the Italian Financial Act (See Consob Communication of April 16, 2009, no. DEM /9034174).

¹⁹ “Financial products” means financial instruments and any other form of investment of a financial nature; bank or postal deposits without the issue of financial instruments do not constitute financial products (Article 1, paragraph 1, letter u of the Italian Financial Act). “Voting securities” means financial instruments carrying voting rights at the shareholders’ meeting (Article 101-bis, paragraph 2, of the Italian Financial Act).

²⁰ Therefore, in cases of public offers to exchange bonds, launched at the same time in different countries of the European Union, the bidder will be entitled to use the so-called “European passport” pursuant to the 2003/71/CE Directive (the Prospectus Directive).

²¹ In practice there have been cases (e.g., cross-border public exchange offers linked to debt restructurings) where the applicability of the Takeover Bid regulation contributed to the exclusion of Italian investors from the offer, thereby jeopardizing their interests (see the Explanatory Note to the Decree).

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