Italy
Takeover Guide

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INTRODUCTION

This guide provides an overview of Italian rules on takeover bids, whether mandatory or voluntary, for Italian listed companies carried out by means of public offers to the holders of securities, to acquire all or some of the securities.

This guide deals with the main rules on takeovers as of 31 January 2022. Its content is intended for general guidance only and does not constitute definitive advice. Anyone considering or involved in takeover action for an Italian listed company should seek specialist advice.

THE REGULATION ON PUBLIC TAKEOVERS

The aim of Italy's laws and regulations on public takeovers is to protect the holders of securities of the target company and create a single level playing field for all of them during the bid.

Public takeover rules aim to promote an efficient, competitive and informed market. These rules therefore ensure that holders of securities of the target company:

- know who the main holders of securities are in the target company;
- know the identity of the bidder;
- have sufficient information to enable them to take an appropriately informed decision on the offer;
- have a voice in respect of certain defensive measures that will require their prior approval;
- have a reasonable period of time to consider and assess the offer;
- are given equivalent treatment when they belong to the same class of securityholders; and
- are aware of the competent authority and applicable law for cross-border takeovers.

Public takeovers in Italy are regulated by the Testo unico delle disposizioni in materia di intermediazione finanziaria contained in Legislative Decree No 58 of 24 February 1998, as amended (the 'Finance Act'), and certain aspects of corporate law as laid down by the Italian Civil Code.

Other important rules relating to public takeovers must be observed, such as the regulation adopted by the Commissione Nazionale per le Società e la Borsa ('CONSOB') under the Finance Act, with its Resolution No 11971 of 14 May 1998, as amended (the 'Regulation'), the rules governing regulated markets and other applicable laws that impose restrictions on takeovers involving companies that operate in certain sectors, such as banking, financial and credit intermediation, and insurance. In addition, CONSOB provides substantial guidance as to permissible conduct by means of its resolutions (*comunicazioni*), whereby it examines specific issues and enquiries submitted for its consideration by regulated parties or other interested parties.

GENERAL CONCEPTS

When do takeover rules apply?

The rules on public offers provided under the Finance Act and Regulation apply to any offer that is addressed to at least 150 holders of securities resident in Italy and for an aggregate consideration amounting to at least €8m.

For the purposes of this guide on takeovers, 'securities' shall mean securities carrying voting rights in a company.

The rules concerning takeovers apply if the target company has its registered office in Italy and its shares are listed on a regulated market in at least one European Union Member State ('Italian listed companies').

Applicable law

Italian law applies to all aspects of the takeover offer where the target company has its registered office in Italy and its securities are listed on a regulated market in Italy. The Italian mandatory public offer rules apply solely under these circumstances.

Italian law applies to certain aspects of the takeover offer where the securities of the target company are:

- listed on a regulated market in Italy only and the target company has its registered office in an EU Member State; or

- first admitted to trading in more than one Member State simultaneously. In this case, the target company has the right to choose its supervisory authority from those of the relevant Member States and CONSOB, notifying the regulated markets and the relevant supervisory authorities thereof on the first day of trading.

Where CONSOB is the competent supervisory authority (see 'Determining which is the relevant supervisory authority' below), Italian law shall apply to: (1) matters relating to the consideration offered in the event of a bid; (2) matters relating to the bid procedure, in particular, information on the bidder's decision to make a bid; and (3) the contents of the offer document and disclosure of the bid.

Where the target company has its registered office in Italy, Italian rules concerning the trigger events for mandatory public offerings, defending a takeover and providing information to the target's employees apply, even if the securities are admitted to trading on regulated markets of other Member States.

Method and main types of takeover

A voluntary public takeover offer is the most frequent method of takeover, whereby a bidder offers to acquire all the target's securities that are not already held by that bidder. Alternatively, subject to certain conditions, the takeover offer may be aimed at purchasing at least 60 per cent of the target's securities with voting power.

A bidder can also acquire a qualified interest in the target company. Once the bidder has purchased a qualified amount of the target's securities, a mandatory public offer is required in order to acquire all of the target's remaining securities.

Mandatory public offer rules do not apply if the voting power is below the applicable qualifying threshold after an acquisition, although other rules, such as the requirement to declare substantial shareholdings, do apply (see ‘Disclosure obligations’ below).

What triggers a mandatory public offer?

A public offer must be made:

- by any party that, acting individually or in concert, has acquired securities of an Italian listed company, whereby said party:
  - increases its voting power to more than 30 per cent of the target’s securities; or
  - holds more than 30 per cent but less than 50 per cent of the target’s securities and increases its voting power by more than five per cent over a 12-month period;
- if certain conditions for offers concerning at least 60 per cent of each class of securities of the target are not met (see ‘Voluntary public offers’ below); or
- where terms and conditions allowing for the exemption to launch a mandatory public offer are not satisfied.

The qualifying threshold of 30 per cent is reduced to 25 per cent when the target is not a small or medium-sized enterprise (SME, as defined in the Finance Act) and on the condition that no other securityholder owns a larger portion of the target’s securities.

The Finance Act allows SMEs to adopt special rules concerning the qualifying threshold in their articles of association. These companies are allowed to set a qualifying threshold between a minimum of 25 per cent and a maximum of 40 per cent. In addition, SMEs are allowed to adopt articles of association that state that the duty to launch the mandatory public offer by any party that, acting individually or in concert, holds more than 30 per cent but less than 50 per cent of the target’s securities and increases its voting power by more than five per cent over a 12-month period does not apply.

The qualifying threshold may also be exceeded in the event of an increase in voting power attached to the target’s securities under the company by-laws.

Voting power, direct and indirect holdings, associates and concert parties are key concepts in mandatory offer rules.

Voting power

For mandatory offers, voting power is determined by taking into account the securities of the target company that give the right to vote on resolutions for the appointment and/or removal of directors or members of the supervisory board of an Italian listed company.

For other types of public offer, securities have voting power whenever they entitle the securityholder to vote at shareholders’ meetings, including the right to vote on certain matters only.

The Regulation addresses the case in which the voting power attached to the securities is frozen by the operation of law (including situations in which the target company has purchased its own shares) for the purposes of calculating the percentage thresholds of voting power.

Direct and indirect holdings

The voting power of holders of securities is deemed to include votes attached to:

- the securities they own, even if the voting rights belong or are assigned to third parties, and the securities for which they have been assigned or own the voting rights;
- the securities owned by nominees, trustees or subsidiary companies and the shares for which they own or have been assigned the voting rights.

Indirect holdings are considered for the purposes of mandatory public offers whenever the interest in the listed company indirectly held through a holding company is material in relation to the total assets of the holding company or the price paid for the control of the holding company.

Derivatives

Pursuant to the Regulation, derivatives are taken into account for the purposes of calculating the percentage thresholds of the voting power of securities when the derivatives give their owner a long position in the target securities. In general, the securities underlying these derivatives are treated as if they were purchased by the party holding the long position. The Regulation provides for certain exemptions to the general procedure, on the basis of the nature of the derivative, its structure, its use (eg, as a remedy in shareholders' agreements) and allows, under certain circumstances, the offset between long and short positions over the same target securities held by the same party.

Associates and concert parties

Associates of a party include all the parties acting together in concert. The concept of concert is broad and encompasses parties operating – on the basis of any agreement, even if null and void, entered into either in writing or verbally, expressly or tacitly – to acquire, maintain or consolidate control in the target company or to oppose the takeover; natural or legal persons and the relevant controlling parties; companies subject to joint control; and companies, their directors and general managers. If one or more of the above parties own securities at any time in excess of the triggering thresholds (see 'What triggers a mandatory public offer?' above), they are jointly and severally obliged to launch a public offer for the remaining securities of the target company.

Under the Finance Act, CONSOB has set out in the Regulation the circumstances in which concert is held to apply, unless evidence of an absence thereof is provided by the interested parties. These circumstances include the presence of family or similar relationships and/or the provision of financial advisory services. CONSOB has also set out circumstances in which concert is expressly excluded, for example, cooperation between minority shareholders to appoint directors or other members of company bodies.

Exemptions from mandatory offers

The Finance Act outlines several circumstances in which the acquisition of securities causing the aforementioned thresholds to be exceeded does not oblige the purchaser to launch a mandatory offer on the target company.

These exemptions include purchases or enhancements of voting rights:

- carried out when other securityholders or other parties acting in concert have control of the target;

- in order to bail out companies subject to reorganisation measures or winding-up proceedings (generally the purchase concerns new equity issued by the target);

- carried out between related entities (including the case of subsidiaries with the same parent or of transactions between the parent and its subsidiaries);

- not contingent on the purchaser's will (including the case of a rights offering only partially subscribed by other shareholders, donations and inheritance); and

- of a temporary nature:

  - when the purchaser has undertaken to transfer the excess securities to non-related parties within 12 months and not to use the voting rights attached to the excess securities;

  - carried out by underwriters in connection with the issue and/or placement of securities when the purchaser has undertaken to transfer the excess securities to non-related parties within 18 months and not to exercise the voting rights attached to the excess securities; or

  - concerning derivatives in excess of the thresholds, when the purchaser has undertaken to transfer the excess securities to non-related parties within six months and not to exercise the relevant voting rights, if any.

Voluntary public offers

In addition to the above exemptions, the acquisition of qualified shareholdings in the target's securities with voting power does not trigger the obligation to launch a mandatory public offer if that threshold is exceeded as a result of:

- a public offer launched on 100 per cent of the target's securities with voting power and the consideration offered is in cash or other securities listed on any EU Member State regulated market; or

- a public offer launched on 60 per cent or more of the securities of each existing class of securities with voting power of the target while certain other circumstances apply (*offerta pubblica di acquisto preventiva*).

The latter rule on exemption (*offerta pubblica di acquisto preventiva*) applies provided that all the following conditions are satisfied:

- the majority of the target company securityholders have approved the public offer (in this case, the definition of 'majority' does not include the bidder, securityholders with an absolute or relative majority holding greater than ten per cent, or parties acting in concert with the bidder);

- the bidder (directly or indirectly, or parties acting in concert with it) has not acquired a stake representing more than one per cent of the target company in the preceding 12 months (including securities acquired under forward contracts maturing at a later date); and

- CONSOB confirms that a mandatory public offer need not be launched after receiving satisfactory evidence of compliance with the two preceding conditions.

Upon completion of the public offer, the bidder will nonetheless be obliged to launch an offer for all the securities with voting power if, over the course of the following 12 months, it (individually or acting in concert with other parties) purchases securities representing more than one per cent or if the target company has resolved on a merger or demerger.

Application of the public offer rules to foreign transactions

The rules triggering a mandatory public offer apply to acquisitions of securities in an Italian company irrespective of whether the acquisition of the securities takes place in Italy or abroad.

In some circumstances, even though the target is a foreign company, the purchase of its shares may indirectly result in the acquisition of shares in an Italian company, and shall therefore be subject to the Italian regulatory system. This may be the case if, for example, the acquired foreign company holds 30 per cent or more of the voting power attached to securities in an Italian company (see 'Direct and indirect holdings' above).

Disclosure obligations

In order to ensure that the target company shareholders know the identity of the main securityholders in their company, the Finance Act and Regulation lay down several disclosure obligations on both securities and derivatives.

The Regulation takes into account three classes of holdings: 'actual holdings', which consist of securities issued by an Italian listed company; 'potential holdings', which include put and call options or other contracts that entitle one party to acquire securities in an Italian listed company and are settled by the delivery of the securities; and 'overall holdings', which consist of the aggregate of the actual and potential holdings plus any security underlying any other derivatives that give to their holder a long position in the securities. For the calculation of the overall holdings, it is not possible to offset long and short positions for the same target securities.

Under these rules, any party is required to notify the company, CONSOB and the market when its interest, either directly or through nominees, trustees, subsidiaries or controlled companies reaches or exceeds (or if its interest falls below any such threshold):

- three per cent, five per cent, ten per cent, 15 per cent, 20 per cent, 25 per cent, 30 per cent, 50 per cent, 66.6 per cent or 90 per cent of actual holdings; and

- five per cent, ten per cent, 15 per cent, 20 per cent, 25 per cent, 30 per cent, 50 per cent or 66.6 per cent of potential or overall holdings.

For SMEs, the three per cent threshold concerning actual holding does not apply. For listed companies whose shares do not follow the rule of one share, one vote, the thresholds are calculated on the basis of the voting rights.

Ordinarily, disclosure must take place within four trading days as of the date of the trade triggering the requirement, regardless of the date when it is to be settled. The Regulation also specifies other rules for the calculation of the above thresholds and for defining who is the principal obligor for the disclosure in the presence of pledge, securities lending, repos or third-party rights over the securities.

The Finance Act requires that the communication issued by the party declaring its participation when the thresholds of ten per cent, 20 per cent or 25 per cent are reached or exceeded must also contain said party's intentions and objectives for the next six months. The information to be provided shall include, inter alia, the arrangements for financing the acquisition of the holding; whether said party is acting alone or in concert; if it intends to acquire control of the issuer or otherwise exercise influence over the management of the company; its intentions in relation to any shareholders' agreements to which it is a party; and whether it intends to propose any additions to, or the dismissal of, the issuer's administrative or supervisory bodies. The disclosure obligation on the above matters is continuous and must be updated during the six months following the occurrence of any changes in the intentions and objectives of the reporting party.

In addition to the above, Italian listed companies must specify in their financial reporting the structure of their capital, any restrictions on the transfer of securities, significant direct and indirect shareholdings (including those held through pyramid structures and cross-shareholdings); the holders of any securities with special control rights, together with a description of those rights and various other items of information on corporate governance, and the powers of, and agreements with, board members. These disclosure rules are relevant in order to enable bidders to exercise the breakthrough rules (see ‘Breakthrough rules’ below).

Investors in banks, insurance companies, asset management companies and financial intermediaries must fulfil specific disclosure obligations under the Banking Act, the Finance Act and Insurance Act. Similar provisions apply to companies operating in other regulated sectors.

The Regulation also lays down certain disclosure duties that are specific to the bidder, parties acting in concert, the management or members of the target company bodies (board of directors, board of statutory auditors etc). Some of this information is contained in the offer documents, while the remainder (including direct or indirect purchases of securities) is the subject of specific communications pending the offer.

Consequences of breach

The acquisition of securities that trigger mandatory public offers or breach the rules on exemptions or voluntary takeover bids does not invalidate the acquisition of the target securities.

The breach of the duty to launch a mandatory public offer affects the corporate rights attached to the securities in the target. In such a situation, the voting power attached to the securities held in violation of the aforementioned duty is suspended and, as a consequence, the relevant voting rights cannot be exercised. This disciplinary measure applies to the entire shareholding of the non-compliant parties. In addition, the purchased shares in excess of the threshold must be sold within 12 months of the date when the threshold was exceeded. Alternatively, CONSOB has the power to impose a mandatory bid for all of the target’s securities and set the relevant offer price. In exercising its powers, CONSOB shall take into account the reasons for the breach and the effects of a change in the company’s shareholding structure. Failure to comply with these rules could result in administrative penalties or criminal proceedings.

The Finance Act also contains sanctions concerning the conduct and disclosure duties of the bidder and the powers held by CONSOB to ensure compliance with public offer rules.

THE TAKEOVER BID

Subject, bidder and addresses

A public takeover bid usually takes the form of an offer to all the securityholders of a target company to purchase their securities in the target for a specified consideration. Offers of mandatory takeover bids are for 100 per cent of the securities, whereas, under certain circumstances, voluntary offers can be launched for a minimum of 60 per cent of each existing class of securities. Without prejudice to the application of mandatory offer rules, it is also possible to bid for smaller stakes in the target company.

Documentation for public takeover bids

This documentation includes the bidder’s announcement, the bidder’s offer document and the target’s statement.

The bidder and the target's directors are held personally responsible for the announcement and offer document, and target statement respectively.

The launch of the takeover bid

The offer is launched by announcing the bid to CONSOB, the market and the target company.

The announcement to the market contains the essential terms and conditions of the offer, including:

- the bidder's identity and the identity of the bidder's controlling shareholders;
- the bidder's identity and the parties acting in concert with it;
- the target company;
- information on the securities subject to the offer (type and amount);
- details of the consideration offered for the securities and the total exchange value of the offer;
- the reasons for the offering and/or information on the event triggering the mandatory takeover (where applicable);
- any intention to delist securities subject to the offer;
- in the event of a conditional takeover, the relevant circumstances;
- details on the bidder's shareholdings (including derivatives) and of the parties acting in concert with it;
- all the communications or authorisations required in law to purchase securities issued by targets operating in certain sectors (banking, insurance, financial intermediation and other regulated activities);
- any request by the bidder or the intention of the bidder to ask CONSOB not to apply certain provisions of the 'passivity rule' and/or of the 'breakthrough' under the 'reciprocity rule' (see 'Defensive measures' below);
- any request by the bidder or the intention of the bidder to ask CONSOB not to apply certain rules on pricing (see 'Pricing a bid' below); and
- indication of the website where documents and public statements related to the offer are available for consultation.

While non-listed bidders are not required to announce the bid before the offer document has been filed with CONSOB, bidders that are Italian listed companies must comply with price-sensitive and insider dealing information rules.

The bidder may announce the offer on condition that it is able to meet its payment obligations for the cash component, after all reasonable steps have been taken to ensure the issuance of the securities to be delivered in the event of an exchange offering.

Should any event that triggers a mandatory takeover offer occur, the bidder must, in any case, announce the offer without delay.

Once the announcement has been made, the bidder is obliged to proceed with the offer.

The offer must be carried out within 20 days of the date when the announcement is made, for which purpose the bidder must file the offer document with CONSOB and produce evidence to that effect to obtain consent for the offer from any other competent regulatory authority.

The offer document

The offer document must be drawn up in accordance with the standards laid down by CONSOB in the Regulation and is subject to review and approval by CONSOB before it can be published. CONSOB has the power to ask the bidder to amend the offer document or to provide any information it deems relevant to the offer. CONSOB must complete its review within a period of 15 days commencing from the date of filing of the offer document (30 days if the consideration consists of non-listed securities).

The offer document must also be sent by the bidder and the target company to their respective employees' representatives or, in the absence thereof, to their employees.

The offer document must be drawn up in line with the regulatory standards and contain the following information:

- risk factors;
- the identity of the bidder, its business and financial prospects and, when the bidder is a company, the type of company, name and registered office, its main shareholders, the bidder's group, the members of its management body(ies) and the parties acting in concert;
- the identity of the target, its share capital, the members of its management body(ies), its business and financial prospects;
- the securities or where appropriate, the class or classes of securities for which the bid is made;
- any indirect interests of the bidder in the target company, including derivatives relating to the securities issued by the target company;
- the consideration offered for each security or class of securities and, in the case of a mandatory bid, the method adopted to determine it, specifying the way in which the consideration is to be paid; if the bidder has acquired securities, whether directly or indirectly, the prices paid in the relevant transactions;
- details of any existing holdings of the bidder and of the parties acting in concert with it, in the target company;
- the terms and conditions of the offer;
- the maximum and minimum percentages or quantities of securities that the bidder undertakes to acquire;
- the compensation offered for the rights that might be removed as a result of the breakthrough rule (see below), specifying the way in which said compensation is to be paid and the method used to determine it;
- all the conditions to which the bid is subject;
- the time allowed for acceptance of the bid and the possible extension of the offer;

- when the consideration offered by the bidder includes securities of any kind, information on said securities;

- information on the credit facilities supporting the bid and the guarantees to ensure any payment and delivery obligations of the bidder vis-à-vis the offerees;

- the bidder's intentions with regard to:

  - the future business of the target company and, in so far as it is affected by the bid, the bidder;

  - the safeguarding of the jobs of the target employees and management, including any material change in the conditions of employment; and

  - in particular, the bidder's strategic plans for the two companies and the likely repercussions on employment; and the locations of the companies' places of business; and

- the national law that will govern contracts concluded between the bidder and the holders of the target company's securities as a result of the bid, and the competent courts.

The Finance Act and Regulation also set out provisions on the passporting of the offer documents approved by the competent supervisory authority of other EU Member States or of other non-EU regulators when a cooperation agreement has been entered into.

Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market lays down rules concerning the information to be provided in respect of the securities offered in connection with public takeover by means of an exchange offer.

The target's statement

Once the market has been informed of the public offer and the offer document has been forwarded to the target company, the directors of the latter must issue a target's statement.

The purpose of the target's statement is to provide target securityholders with information to assist them in their decision on whether or not to accept the offer. In this document, the directors must address issues and disclose matters laid down by CONSOB under the Regulation, including:

- any interests of members of the board of directors or the supervisory board (on their own account or on behalf of third parties) relating to the offer, with a description of the nature, terms, origin and scope thereof;

- any information useful to evaluate the offer;

- a reasoned assessment of the offer and the fairness of the offer price; in this respect, the document must disclose: (1) the approving majority reached by the management board in its decision, with the names of any dissenting or abstaining board members, where applicable, also specifying the reasons for their dissent or abstention; and (2) whether the target availed itself of independent expert opinions or specific assessment documents, the methods and criteria used, and the relevant results;

- any participation by members of the board in negotiations for the definition of the transaction for any reason;

- any information on material matters not covered in the latest annual or interim report published by the target;

- any information on the target's recent performance and the prospects of the target, if these are not specified in the offer document;

- an assessment of the effects that a successful bid would have on the target company's interests, as well as on employment and the location of production sites; and

- if the offer is launched by 'insiders' (shareholders or parties to a shareholders' agreement holding more than the target's voting share capital thresholds that trigger the mandatory launch of the offer, directors of the target company acting individually or in concert), a reasoned opinion on the offer and the fairness of the offer price to be drawn up by independent board members unrelated to the 'insiders'. In addition, if a merger is envisaged by the bidder, this opinion must disclose and address any increase in the debt of the target, the company's debt resulting from the merger, the effects of the merger on existing loan agreements, on the related guarantees and on the need to stipulate new loan agreements.

In reaching a decision, the directors of the target often consider it appropriate to avail themselves of the support of an independent expert to assess the fairness of the offer from a financial point of view and the relevant opinion must be attached to the target statement.

The target's statement is disclosed to the market and must be sent to CONSOB no later than the first day before the acceptance period.

Fairness and equivalent treatment

Pursuant to the Finance Act, all securityholders of the target company must be treated equally and fairly. The terms and other conditions of the public offer must therefore be the same for all target securityholders. In this respect, the Regulation expressly requires that the 'interested parties' abide by the principles of proper conduct and equal treatment, do not carry out transactions on the market with a view to influencing acceptance of the bid and abstain from any conduct and/or from entering into any agreements aimed at altering the circumstances affecting any condition precedent concerning a mandatory bid or mandatory exchange tender offer. The term 'interested parties' means the bidder, target and parties linked to them by controlling relationships, companies subject to common control, affiliates, members of the management and control bodies and managing directors, shareholders of the bidder or the target, parties to a shareholders' agreement and those acting in concert with the issuer or bidder.

In order to ensure the application of this general principle, the Regulation sets out transparency duties that apply during the offering and after its completion.

For the period commencing with the announcement of the offer and ending on the date of its settlement:

- the bidder and any party acting in concert with the bidder must disclose to CONSOB and the market any transfer of the securities concerned by the bid to third parties that they, directly or indirectly, intend to carry out no later than the day prior to the date scheduled for the transaction; and

- the 'interested parties' must disclose to CONSOB and the market any trade with third parties of the securities concerned by the bid or of derivatives whose underlying assets are the same securities, specifying the relevant price, as well as the terms and conditions. Trading carried out indirectly or through nominees must also be disclosed and should take place no later than the end of the trading date.

Once the offer has been settled, the bidder and the parties acting in concert with it must proceed as follows over a period of six months:

- report all the transactions carried out (directly or indirectly) on the securities of the target to CONSOB on a monthly basis, stating the prices and all other terms;
- apply the 'best price rule' (see below) to any purchase carried out directly or indirectly or through nominees of the securities subject to the bid, or if these latter should take up long positions on the same securities by means of derivatives.

In addition to the above, the Regulation also lays down rules on announcements and distribution of information on the offer in general. Under these rules, for the period commencing with the announcement of the offer and ending on the date of its settlement, any 'interested parties' must disclose to the market any statement they make on the offer and/or target. Any announcement intended to promote or deter an offer, irrespective of how it is made, must be recognisable as such. The announcement must contain clear, correct and reasoned information that must be consistent with the documentation already published, and must not be misleading in respect of the characteristics of the offering or the features of the securities involved.

Consideration

The consideration offered under a voluntary takeover bid may take the form of cash, shares, other securities or a combination thereof.

In the case of any offer, either mandatory or voluntary, for 100 per cent of the securities with voting power, when the consideration offered by the bidder does not consist of liquid securities admitted to trading on a regulated market of a Member State, it must include a cash alternative. In any event, the bidder shall offer a cash consideration by way of an alternative if the bidder or the parties acting in concert with it has/have purchased, in cash, securities carrying five per cent or more of the voting rights in the target company during a period commencing 12 months prior to the announcement of the bid and ending when the acceptance period for the offer expires.

'Shares for shares' bids or permitted non-cash considerations require the appointment of an expert to confirm the value of the target company shares to pay for the new shares issued by the bidder if the securities offered as consideration are not traded on regulated markets or if their valuation for that purpose differs from their weighted average market price. In addition, the bidder must appoint independent auditors to provide a fairness opinion on the relevant exchange ratio.

Pricing a bid

Pricing is in principle free for voluntary offers whereas, in the case of mandatory offers, the Finance Act and Regulation lay down specific rules.

A mandatory bid must be launched:

- at the highest price paid by the bidder and the parties acting in concert with it to purchase the company's securities of the same class in the previous 12 months; or
- at the weighted average market price of the company's shares of the same class in the previous 12 months if there has been no purchase of securities in the same period or, in the event that the company's securities have been trading for less

than 12 months, at the weighted average market price over such a shorter period of time.

The Regulation under the Finance Act lays down exemptions to the pricing rules for mandatory offers to take into account certain circumstances that may affect the market price.

The bidder and the parties acting in concert with it can apply for a reduction in the offer price if the highest price they paid in the previous 12 months was affected by extraordinary events, there are grounds to suspect market manipulation, or the price was paid in the context of ordinary trading practices or bail outs of companies subject to reorganisation measures or winding-up proceedings. On the other hand, any interested party and CONSOB are entitled to ask for the offer price to be increased if the bidder or parties acting in concert with it have agreed to purchase securities at a price higher than that paid for the purchase of securities of the same category, there is evidence of collusion between the bidder or parties acting in concert with it and one or more of the sellers, or there are grounds to suspect that the market prices were subjected to manipulation. Any reductions or increases in the offer price are set by CONSOB with a view to offsetting the distorting effects of the aforementioned circumstances on market pricing and the Regulation lays down a set of specific rules for this purpose.

Conditional bids

Public tender offers may be conditional or unconditional. However, conditions that give the bidder sole and absolute discretion are not permitted.

The most common conditions are minimum levels of acceptance, the procurement of antitrust and other regulatory clearances and no material adverse change in the financial position, business or assets of the target.

Once launched, the public offer is irrevocable. Consequently, to avoid proceeding with the offer, the bidder can rely on the conditions stated in the announcement and in the offer document only. Mandatory tender offers cannot be subject to any condition.

Proportional bids

Offers can be made to acquire only a part of the target's shares, but exemption from launching a subsequent mandatory offer applies only if the offer concerns at least 60 per cent of the target's securities and certain conditions are met (see 'Voluntary public offers' above), which include obtaining the approval of the target's shareholders before the proportional bid can proceed. Although possible, public offerings for less than 60 per cent are uncommon.

Duration of the offer

The period during which a public offer must remain open for acceptance depends on the type of offer. For voluntary offers concerning voting power for 100 per cent or 60 per cent of the securities, the offer must be open for a minimum of 15 and up to a maximum of 25 trading days. For any other type of offer, it must be open for a minimum of 15 and up to a maximum of 40 trading days. When requested and in order to protect the securityholders, CONSOB has the power to extend the acceptance period by up to 55 trading days, after consultation with the stock exchange and the bidder. The acceptance period will be extended if a competing bid is launched.

The acceptance period cannot commence unless the bidder obtains confirmation of the guarantee securing payment of the consideration and the relevant documentation is filed with CONSOB.

Amendments to bid terms

The offer can be amended in a number of ways, including by increasing the bid price, extending the bid period, waiving one or more conditions of the offering, or by offering additional and alternative forms of consideration. Amendments can only be made by giving notice thereof to the target, the market and CONSOB and are permitted until the last day before the end of the acceptance period. In any case, a period of three trading days must be allowed to elapse between the date of communication of the last amendment and the date of settlement of the offer.

The bidder is not permitted to reduce the amount of securities subject to the offer or the relevant consideration.

Automatic reopening of the offer

The Regulation lays down that the offer may be reopened for an additional period of five trading days commencing on the day following the settlement of a successful offer when the bidder is an 'insider' (also see 'The Target's statement' above). In particular, the offer must be reopened if:

- the bidder issues notice of fulfilment of or waives the condition on minimum levels of acceptance (as a percentage of the target securities);

- the offer is not subject to the above condition and the bidder, as a consequence of the offer, owns:

  - securities representing half or more of the total target securities;

  - securities representing two-thirds of the total target securities, if the bidder's holdings in the target before the offer exceeded half and represented less than two-thirds of the total target securities; or

  - securities representing half or more of each class of securities concerned by the offer.

Under the above circumstances, the reopening of the offer applies by operation of law and is automatic. The Regulation lays down several exemptions where the reopening of the offer does not mitigate the pressure to tender on minority shareholders and the subsequent distortion of the bid outcome.

The bidder's ability to compete on the market

The bidder may purchase shares and other financial instruments giving the right to purchase the shares of the target company on the stock market in the ordinary course of business. However, if a higher price is paid outside the bid, the price payable under the takeover bid is automatically increased to reflect that higher price ('best price rule'). The best price rule also applies for a period of six months after settlement of the offer.

While the offer is pending, the bidder; target; any company controlling, controlled by or under common control with the bidder or the target; their directors, statutory auditors and managers; and the shareholders of the bidder or target who are party to any shareholders' agreement must disclose any sale and purchase of shares in the target, as well as any rights to purchase them and the relevant price, to CONSOB and the stock market on a daily basis.

While a competing offer is pending, the competing bidders and the parties acting in concert with it are subject to restrictions on these trades (see below).

Competing offers

Competing offers can be launched up to five trading days before the closing of the previous offer and, in any event, no later than the 50th trading day following the publication of the previous offer.

Any increased offer must be published within five days after the closing of the previous offer. There are no limits as to the number of possible increases.

The acceptance period for the original offer is automatically extended to the expiry of any competing offer period, unless otherwise declared by the bidder of the preceding offer. From the date of publication of the competing or increased offer, the acceptance of the preceding offers may be revoked.

If competing offers have been made, and until expiry of the acceptance period, bidders may not acquire target financial instruments that are the subject of the offer or the right to acquire them at a later date at prices higher than those of their offer, either directly or indirectly or through nominees.

ELIMINATING THE MINORITY AFTER A TAKEOVER

The sell-out right

This right is available to securityholders if the bidder, following a bid for all of the target company's securities, acquires not less than 95 per cent of them. Under these circumstances and at the request of any securityholder, the bidder must acquire his/her securities at a fair price.

This right is also available to the holders of the target company's securities if a party holds more than 90 per cent of the relevant securities and the same party has not floated the minimum amount of the same securities on a regulated market to ensure their regular trading within 90 days of the end of the time allowed for acceptance of the bid. Under these circumstances, the securityholders can compel any of the parties holding more than 90 per cent of the relevant securities to purchase their securities at a fair price.

If the target company has issued more than one class of securities, the right of sell-out can be exercised only for the class in respect of which the applicable 95 per cent or 90 per cent threshold has been reached.

The price shall take the same form as the consideration offered in the bid or shall be paid in cash at the request of the securityholder if the offer was mandatory or, if the offer was voluntary, if it concerned 100 per cent of the securities and the bidder reached or exceeded the threshold of 90 per cent of the target company securities as a consequence of that offer, and the minimum floating amount to ensure their regular trading on a regulated market was not restored.

In any other circumstance, the price shall be set by CONSOB, which will take into account the securities price over the six months prior to the announcement of the takeover bid or the securities price before the occurrence of the event triggering the mandatory offer bid.

The squeeze-out right

This right is available to the bidder following a bid for all of the securities of the target company and when the bidder has acquired no fewer than 95 per cent of them.

Under these circumstances, and on condition that the offer document discloses the intention of the bidder to squeeze out the minority, the bidder has the right to compel all the holders of the remaining securities of the target company to sell him/her those securities at a fair price. If the target company has issued more than one class of securities, the right of sell-out can be exercised only for the class in which the 95 per cent threshold has been reached.

If the bidder wishes to exercise the right of squeeze-out, this has to be done within three months of the end of the period allowed for acceptance of the bid.

The pricing rules applicable to the right of squeeze-out are the same as those applicable to the right of sell out.

THE REGULATORY MAZE: IMPORTANT DETAILS

Any action by the bidder before or during a takeover needs careful consideration. The following matters require particular attention and should be subjected to case-by-case analysis.

Pre-bid discussions with major shareholders

A bidder will often hold pre-bid discussions with major shareholders. If the bidder has not yet decided to launch the public offer, it is essential that said discussions do not lead to or result in binding undertakings, whether in writing or otherwise. This is imperative, as the matter is subject to the application of mandatory offer rules, market abuse rules on insider dealing, market manipulation rules and rules on the disclosure of price-sensitive information.

Pre-bid discussions with target

In a friendly bid, a bidder may hold pre-bid discussions with target management to learn more about the company and to decide whether a merger rather than a takeover bid could be an option. It must be emphasised here that these discussions are also subject to market abuse rules and price-sensitive information disclosure rules.

The performance of due diligence

Due diligence activity on the target is ordinarily carried out using publicly available information.

Financial statements and reports, abstracts of shareholders' agreements, main holdings in the company and holdings owned by directors and other interested parties can be found on the CONSOB and stock exchange websites and may be obtained from the competent Register of Companies. Under the Finance Act, the financial statements of Italian listed companies must be certified by external auditors. The target company's directors and statutory auditors are liable for losses that are the direct consequence of inaccurate or misleading statements in the accounts, while the external auditors are liable for losses suffered by the company and third parties resulting from a failure to comply with their professional obligations.

In the event of a friendly bid, the target may, under certain circumstances, allow the potential bidder to carry out a due diligence review. However, the directors of the company are subject to fiduciary duties and might not be able to disclose price-sensitive information and information on the company to third parties without a justified reason. The stipulation of a confidentiality agreement is essential, not only to protect the target but also to regulate the conduct of the parties and ensure that they abide by the relevant disclosure obligations in the event that any 'inside information' should emerge from the due diligence. If the bidder becomes aware of inside information, it might not be able to buy securities in the target without the relevant disclosure to the market or without breaching insider trading rules. Any inside information that the bidder might have obtained in the conduct of and for the purposes of a public takeover shall cease to constitute inside information at the point of acceptance of the offer by the shareholders of the target by means of its disclosure.

In general terms, 'inside information' means information of a precise nature that has not been made public, which relates directly or indirectly to one or more issuers of financial instruments or to one or more financial instruments, and which, if made public, would be likely to have a significant effect on the prices of said financial instruments or on the price of related derivatives.

In the event of competing bids, if the target has provided information to one of the bidders, it is obliged to promptly provide the same information to other bidders seeking access to the same information, in accordance with the general rules of proper conduct and fairness set out in the Regulation.

Exclusivity covenants

It is often in the interest of the bidder to obtain acceptance by the target and/or the main securityholder(s) of the commitment not to allow other bidders to perform due diligence and furthermore not to commence negotiations for the disposal of the shares of the qualified shareholder, respectively. In this respect, two issues must be taken into account.

With regard to the target company, the interest in exclusivity must be balanced with the general interest of the company and its shareholders to benefit from an expression of interest or an offer made by another potential bidder, possibly on better terms and conditions and with better prospects for the company's business. For the same reasons, agreements involving break fees are not standard practice and may conflict with the fiduciary duties of the directors. In addition, it is not certain whether break fee agreements would be enforceable under Italian law.

In the case of qualified securityholders, exclusivity could result in a shareholders' agreement that, at the risk of being null and void, must be formally disclosed to the market. In addition to the above, it must be taken into account that shareholders' agreements would not be binding under certain circumstances if another takeover bid is launched.

Pre-bid purchases and purchases during the offer period

In the absence of a competing bid, there are no constraints on the bidder to purchase the securities of the target on the market either before or during the offer period. These purchases must be disclosed in the bid document and to the market if they are carried out after its publication. Purchases and sales of the target's securities must be disclosed on a daily basis if they are carried out during the offer by the bidder and/or any of its directors, statutory auditors and other interested parties.

These purchases increase the level of the bid price if they are carried out at a price higher than the offer price (see 'The Bidder's ability to compete on the market' above). In addition, voluntary offers for at least 60 per cent of the shares with voting power are not exempt from the launch of a mandatory takeover bid if the bidder and any party acting in concert with it have purchased a stake representing more than one per cent of the target company in the 12 months preceding notification of the offer announcement to CONSOB.

Tax and accounting issues

The tax position of both the bidder and shareholders of the target should be examined prior to announcing a bid.

These issues can affect the treatment of the acquired holdings in the bidder's financial statement.

The structure and jurisdiction in which the bidder's acquisition vehicle is established can affect the way in which the transaction is taxed.

THE LIFECYCLE OF A TAKEOVER

The table below outlines the lifecycle of a voluntary offer for the target's entire share capital with a cash consideration and no competing offers. In the table, the letter 'd' after a number denotes a calendar day and the letters 'td' after a number denote a trading day.

Date	Event
D	Board meeting of the bidder to approve the terms of the offer and authorise release of the press announcement Announcement of the public offer to the market, the target and CONSOB
D + 20d	Offer document filed with CONSOB together with the documentation submitted to other regulatory authorities for the clearance of the transaction and the acceptance form
D + 34d	Clearance of the offer document by CONSOB[1] Communication of the offer document to the target Communication of the offer document to the target employees' representatives Legal documentation on the performance guarantees filed with CONSOB
D + 35d	Publication of the offer document (the 'X Day')
X + 1td if the target company's notice is attached to the offer document or X + 5td if the target company's notice is not attached to the offer document X + the time required for clearance of the transaction by regulatory authorities other than CONSOB	Start of the acceptance period (the 'Y Day')

[1] Indicative only and where no additions are requested by CONSOB or supplementary information must be disclosed.

Date	Event
Z – 5td	Last day for competing offers
Z – 1td	Last day for amending the offer
Y + 15td	First permitted expiry date of the acceptance period (the ‘Z Day’)
Z+1d	Fulfilment of all conditions precedent to the offer
Z + 5d	Payment of the shares
Z + three months	Deadline to exercise the squeeze-out right

DEFENDING A TAKEOVER: WHAT CAN BE DONE?

Defensive measures

Defensive measures in the context of a takeover ordinarily include any measure adopted by the target to prevent or frustrate the success of the takeover. Such actions are aimed at increasing the costs or reducing the benefits for the bidder and can be adopted by the target before or after the bid has been launched.

The Finance Act regulates defensive measures in principle, but does not provide rules detailing cases or circumstances that would amount to defensive measures.

The effectiveness of defensive measures is affected by the ‘passivity rule’ and by ‘breakthrough’ provisions that apply only where any and all of the bidders, the parent of the bidder and the parties acting in concert are subject to the same rules or to rules that are deemed equivalent. In the latter case, equivalence is established by CONSOB at the bidder’s or target’s request.

Pre-bid defences

These defensive measures are often set out in the articles of association of the target, and may consist of special voting rights or restrictions on voting rights or the suspension of any enhancement of voting rights attached to the target’s shares.

As a consequence of the passivity rule (see below), preventive defensive measures incorporated in the articles of association or in the features of target’s shares may be deemed ineffective, given their purposes.

Provisions granting special rights to protect interests strategic to the nation may apply in the case of privatised companies.

Post-bid defences

These defensive measures are adopted by the target directors to protect the company from a bid that has already been launched.

The passivity rule for the target company applies from the date of announcement of the offer to the public.

For Italian companies listed on a stock exchange in Italy or any other EU country, any defensive action in response to an offer must first be approved by the target company's shareholders (the 'passivity rule'). The shareholders' consent is necessary not only for defensive measures adopted after the announcement of the bid but also in respect of those measures whose implementation was not yet completed at that time and which require further action.

The shareholders' meeting may be ordinary or extraordinary, depending on the nature of the items on the agenda.

Defensive measures available to the company subject to compliance with the passivity rule include: capital increase in the target's share capital; the target's purchasing of its own shares; conversion of ordinary shares into other financial instruments; merger with other companies; acquisition of assets; and awarding golden handshakes to the target's directors if they are removed from office.

Italian listed companies have the right to waive the passivity rule, in whole or in part, by amending their articles of association and by communicating this decision to CONSOB and the supervisory authority of the relevant EU Member State in which the securities are admitted to trading.

Breakthrough rules

The Finance Act allows companies to adopt articles of association which, pending a takeover bid, provide that:

- any restrictions on the transfer of securities (those set out in: (1) the articles of association of the target company; (2) agreements between the target company and its securityholders; or (3) agreements between securityholders) do not apply to the bidder during the acceptance period for the bid;

- any restrictions on voting rights (those set out in: (1) the articles of association of the target company; (2) in any agreement between the target company and its securityholders; or (3) any agreement between securityholders) have no effect at any general meeting called to approve defensive measures during the acceptance period for the bid; and

- if, following a bid, the bidder holds 75 per cent or more of the voting rights, any restrictions on the transfers of securities or on voting rights (as referred to above) and any special rights of shareholders on the appointment or removal of board members laid down in the articles of association of the target company will not apply at the first general meeting held after the bid has closed to amend the articles of association or to remove or appoint board members.

In the event that rights are removed as a result of these breakthrough provisions, fair compensation must be provided for any loss suffered by the holders of those rights.

Fiduciary duties

Italian corporate law lays down a set of fiduciary duties for directors at a general level, which also apply when the target directors submit a proposal to the shareholders' meeting for the approval of post-bid defensive measures or release the target statement concerning the offer.

These include the duty of managing the company with diligence and to be properly informed, and the duty of the directors to disclose their interests in individual transactions and pursue the company's purposes. In general, courts and commentators agree that directors cannot be held liable for losses or damages resulting from business decisions when such decisions do not also constitute a violation of any of the directors' obligations. In other words, courts will not determine the soundness or suitability of corporate actions, even when such actions have proven harmful to the company, as there is no obligation for directors to manage the affairs of the company successfully. It can therefore be said that Italian corporate law accepts the so-called 'business judgement rule'.

However, given that the standard is the diligence that a normally diligent director would apply in the circumstances, knowledge and understanding of the relevant and applicable law could play a major role in arguing, presenting and interpreting the facts.

While a takeover bid is pending, the legitimate use of defensive measures depends on the existing circumstances that require the director's careful consideration on a case-by-case basis.

HERE COME THE REGULATORS

Determining the relevant supervisory authority

Following implementation of the European Takeover Directive, the Finance Act contains provisions to determine the Member State supervisory authority with responsibility for a bid in the event that more than one jurisdiction is involved.

The authority is determined as follows.

If the target company has securities admitted to trading on a regulated market in the Member State in which it has its registered office, then the supervisory authority shall be the authority of that Member State.

If the target company does not have securities admitted to trading on a regulated market in the Member State in which it has its registered office, then the supervisory authority shall be the authority of the Member State in which its securities are admitted to trading. If its securities are admitted to trading in two or more Member States, it shall be the Member State in which its securities were first admitted to trading.

If its securities were first admitted to trading in one or more Member State simultaneously, the target company can select one of the relevant supervisory authorities by means of notification on the first day of trading.

CONSOB

CONSOB is the main regulator involved in any public takeover concerning an Italian listed company. CONSOB has the powers to issue and amend regulations on this matter and to supervise public takeovers by ordering disclosure, exercising the power to suspend or cancel the public offer, imposing mandatory public offers and applying administrative sanctions in the event of a breach of the rules laid down in the Finance Act and Regulation.

CONSOB also has general supervisory powers over the offer, including the power to ask for further information from the bidder, target, parties acting in concert and their controlling shareholders and subsidiaries, professional intermediaries appointed to negotiate the transaction, and directors, statutory auditors, independent auditors and managers of the above companies.

CONSOB has the power to carry out inspections at the premises of the above parties.

The role of the stock exchange

The stock exchange operates the market and is involved in the distribution of announcements and other communications on the bid and any competing bids. It takes part in the determination of the acceptance period of the public offer and is consulted if that period is extended by CONSOB.

The role of the competition authorities in takeovers

In accordance with competition law, a concentration is deemed to have arisen if a merger transaction results in a lasting change of control.

In particular, if a transaction affects Italy and/or other EU Member States, it is necessary to assess whether it needs to be notified to the European Commission or, instead, to one or more national competition authorities. Several factors should be considered in order to assess which national competition authorities should be notified of the concentration in question. One of the most important factors is the turnover of the companies involved in the concentration, which has to be taken into account in order to evaluate whether it exceeds the turnover thresholds set out in the relevant regulation.

The Italian Competition Act requires that a transaction (concerning industrial companies) be notified to the Italian competition authority (Autorità Garante della Concorrenza e del Mercato or 'AGCM') if:

- the Italian turnover of the bidder's group, target and target's subsidiaries exceeds €511m; and

- the Italian turnover of the target and its subsidiaries exceeds €31m.

If both the aforementioned thresholds are met, notification to the AGCM is mandatory and, in the case of public takeover bids, the bidder is responsible for said notification.

AGCM will not give clearance for the acquisition following the public offer if the transaction creates or strengthens a dominant position on the Italian market, with the effect of eliminating or reducing competition to a considerable extent and for a significant period of time.

On the assumption that the acquisition is to be implemented by means of a takeover bid, AGCM must be notified at the same time as CONSOB. Within 15 days of the notification, AGCM must decide whether to commence a full investigation, which may last an additional 45 days (extendable by 30 days), or not to commence a full investigation and clear the transaction.

The transaction is not automatically suspended by the notification; however, AGCM is entitled to order the entities concerned not to proceed with the concentration until the investigation is concluded. Although AGCM cannot suspend the implementation of a takeover bid, it is entitled to order the bidder not to exercise the voting rights relating to the securities in question.

At EU level, the European Commission has exclusive jurisdiction within the European Economic Area (EEA) for the merger control review of all the concentrations whenever the combined aggregate turnover of all the undertakings concerned exceeds certain thresholds.

Industry regulators and golden power

Advance notice of the offering must also be sent to the relevant industry sector regulatory authorities, and their authorisation must be obtained when the holding exceeds certain levels of the share capital of banks, insurance companies, asset management companies, financial intermediaries, telecoms, broadcasting companies and companies operating in other regulated industries.

The Italian Government retains special powers (golden power) to impose specific conditions on the acquisition of shareholdings and to oppose the acquisition of shareholdings in the defence and national security sectors, as well as certain sectors of activity deemed to be of strategic importance for the energy, transport and communication industries. Preventive notification may be used to pre-empt the application of golden power to a transaction.