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Consob approves the new takeover bid regulations

*Following implementation in Italy of EC Directive 2004/25 on takeover bids (the "**Takeover Directive**"), Consob has approved new secondary regulations which aim to implement the powers delegated to it by Legislative Decree no. 58, 24 February 1998 (the "**TUF**") and to render Consob Regulation No. 11971 of 14 May 1999 (the "**Regulation on Issuers**") consistent with the newly amended legislative provisions.*

Regulatory intervention by Consob, adopted following a dual consultation phase with the market and with the declared objectives of strengthening protection for minority shareholders and improving transparency and efficiency in the market for corporate control, also provided the opportunity to deal with issues that have arisen following application of the takeover bid rules, and to consider the comparative analysis of the applicable regulations in the principal European countries.

Because the intervention is of a broad nature, and several of the provisions are entirely new, a transitional regime has been created to allow the regulations to take effect gradually and in various phases.

Below is a summary of the most important novelties introduced.

Mandatory takeover bids

Derivatives to be taken into account for the purposes of the relevant percentage of shareholding for mandatory takeovers

In implementation of the power delegated to Consob by article 105 (3-bis) TUF, according to which Consob is required to issue a regulation establishing events and procedures whereby derivative instruments must be included in the calculation of the relevant shareholding (i.e., 30% or 5% in case of a consolidation takeover) for the purposes of establishing whether an obligation to launch a takeover exists (the "**Takeover Threshold**"), the Authority held that derivative instruments, including those held indirectly, which allocate a so-called "long position" in the underlying share (which is defined by Consob as a financial position whereby the contracting party has an economic interest positively correlated to performance of the underlying share) should be included.

The calculation of the relevant shareholding will take into account either the total number of securities underlying the derivative contract or, if the number of such securities is variable, the maximum number provided for by the derivative contract.

This regulatory choice, criticised during the consultation phase because of its extremely broad scope of application, was confirmed in the final draft of the new Regulation on Issuers. Consob, however, has announced it intends to render these rules complementary to the rules on transparency applicable to relevant shareholdings pursuant to article 120 TUF (and therefore to commence consultation with the market on this matter as soon as possible) and it has also partially mitigated the scope of the general rules by providing for certain exceptions.

Key Issues

Derivatives to be taken into account for the purposes of threshold in mandatory takeovers

New rules on treasury shares

Rebuttable presumptions of actions in concert and no concert situations

New exemption regime for mandatory takeovers

Reopening of the offer period

Novelties regarding the best price rule

Recognition of cross-border offer documents

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In particular, Consob has provided that the calculation of the Takeover Threshold may exclude derivative instruments that confer a "long position" in the underlying securities if the derivative instruments:

- are traded on regulated markets;
- have as their underlying securities that will be issued in the future;
- are subject to provisions of shareholders' agreements that aim to resolve any deadlocks or are applicable in case of breach of these agreements;
- are held by those authorised to hedge clients' positions; or
- are offset by derivative instruments that confer a "short position" in the underlying securities, provided that they are of the same type and have the same counterparty and equivalent terms.

The inclusion of derivative instruments in the calculation of the Takeover Threshold has made necessary the creation of an ad hoc rule for the purposes of determining the price for the mandatory takeover if the obligation to launch an offer is the result of the purchase of a derivative instrument: in such event the determination will consider the total of the reference price contractually attributed to the securities underlying the derivative instrument and the amounts paid or received for the acquisition of the "long position".

Treasury shares

The regulations aim to establish whether treasury shares are relevant for the calculation of the Takeover Threshold, considering two conflicting needs: that to avoid that treasury shares be used as an instrument to evade the mandatory takeover regulations and that to allow a company to "lawfully" use treasury shares, and therefore to acquire treasury shares when in the interest of the company and of the shareholders.

The new regulation governs two different circumstances: 1) where a shareholder acquires a shareholding in a target that already owns treasury shares, and 2) where the target acquires treasury shares and this causes one or more shareholders to exceed the Takeover Threshold.

In the first case, the new regulation provides that treasury shares held by the target, including indirectly, are excluded from the share capital in respect of which the Takeover Threshold is calculated, save for the treasury shares:

- that are the result of transactions implemented in accordance with the conditions set out by Consob in its Resolution No. 16839 of 19 March 2009 (whereby Consob identified the market practices it would allow for the purposes of exemption from the market abuse regulations), solely with respect to market practice involving conservation and disposal of securities to be used as consideration for extraordinary transactions already approved, including for share swaps (and therefore excluding the market practice relating to actions to sustain liquidity that normally should lead to holding securities for an extremely short time); and
- purchased to meet obligations deriving from stock option plans approved pursuant to article 114-bis TUF.

In the second case, the new regulation provides that treasury shares will be included in the share capital in respect of which the Takeover Threshold is calculated only if the threshold is exceeded as a result of the purchases of treasury shares by the target, including indirectly, in implementation of a resolution approved by whitewash mechanism, i.e. also with the favourable vote of the majority of shareholders other than the shareholder(s) that, severally or in the aggregate, hold the majority stake or a relative majority stake in excess of 10%.

To ensure that shareholders are fully aware at the time they vote, the report on items on the agenda must contain detailed information on the exemption from the obligation to launch an offer that will arise from the approval of the resolution as described above.

Finally, with reference to calculation of the relevant shareholding for the purposes of mandatory acquisition pursuant to article 108 TUF, Consob has opted for a different criterion, considering its aim to guarantee regular trading on the stock exchange. In this event, therefore, treasury shares are not excluded from the share capital but rather are added to the relevant shareholding for the purposes of calculating the thresholds provided by articles 108 and 111 TUF.

Actions in concert

Following one of the most recent regulatory interventions by the Italian Government on takeover rules contained in the TUF, significant amendments have been made to provisions relating to takeovers by persons acting in concert. In particular, article 101-bis (4) TUF introduced a general definition of "persons acting in concert" (persons cooperating together on the basis of an express or tacit agreement, whether oral or written, even if invalid or ineffective, for the purpose of acquiring, maintaining or strengthening control over the target or for opposing achievement of the aims of a

takeover bid or an exchange offer). Secondly, the existing unrebuttable presumptions of an action in concert were confirmed, i.e. events in which it is presumed that certain persons are acting in concert and in respect of which no contrary evidence can be provided (parties to a shareholders' agreement, even if invalid; a company, its parent and subsidiaries; companies subject to common control; and a company and its directors, members of the management or supervisory board or general managers).

However, to avoid the risk of excessive rigidity upon application, certain rebuttable presumptions, or rather events in which it is presumed that the persons involved are persons acting in concert based on the general definition contained under paragraph 4 unless these persons prove that the conditions under such paragraph have not been fulfilled, have been introduced. A possibility has also been provided to exclude an action in concert where, although it is not possible to exclude cooperation between various persons, this cooperation does not pursue the aims indicated under paragraph 4.

Consob has been given the authority to identify exactly and precisely what the above circumstances should be.

Pursuant to this authority, Consob has identified circumstances which give rise to a rebuttable presumption that persons are acting in concert, i.e. events in which it is presumed that persons are cooperating with each other, save for contrary proof. These include:

(a) a person and his/her spouse, cohabitant and direct and collateral relatives within the second degree and sons of his/her spouse or cohabitant;

(b) a person and his/her financial advisors in transactions involving the target, where such advisors or companies belonging to their group have purchased shares of the target, after their appointment or in the month prior to their appointment, other than in the context of trading activities on their own behalf and in accordance with ordinary trading at market conditions. As clarified by Consob, this presumption includes purchases allocated to the securities portfolio held by anintermediary and those made in the context of trading on own behalf that show an anomaly (for example not at market conditions or for volumes that differ from ordinary trading in respect of that security).

Examples of cooperation between shareholders that is exempt from the provisions on action in concert include:

(a) coordination between shareholders for the purpose of exercising actions and rights granted to minority shareholders by the Italian Civil Code and the TUF;

(b) agreements for the submission of lists for the election of company bodies, provided that the number of candidates on the list is less than half of the members to be elected or the list are created so as to cause the election of minority representatives;

(c) cooperation between shareholders to contrast approval of an ordinary or extraordinary resolution of the shareholders' meeting concerning: 1) compensation for members of the corporate bodies, remuneration policies or fee schemes based on financial instruments; 2) related party transactions; 3) authorisations pursuant to article 2390 of the Italian Civil Code (for the realisation of competing activities or for the purpose of directors becoming shareholders with unlimited liability in competing companies) or article 104 TUF (for the implementation of defensive measures in case of a hostile takeover bid);

(d) cooperation between shareholders to: 1) encourage approval of a resolution concerning liability for members of corporate bodies or a proposal on the agenda; 2) attract votes for a list setting out a number of candidates that is less than half of the members to be elected or created so as to cause the election of minority representatives, also through the solicitation of voting proxies for the purpose of voting on that list.

Presumptions relating to actions in concert no longer include submission of a list that aims to elect the majority of the members of the corporate bodies, which was removed following much criticism during the consultation phase, mainly based on the fact that this presumption did not allow for contrary proof and would operate irrespective of the actual appointment of the majority of members. Consob, however, has clarified that it will continue to evaluate this circumstance when it assesses whether an action in concert exists.

Exemption regime

The primary objective of protecting minority shareholders played a fundamental role in the construction of the new regime regarding exemption from the obligation to promote a takeover bid, through provision for the direct involvement of minority shareholders – using the whitewash mechanism.

With reference to the exemption linked to the bail-out of companies in distress (crisis), the Regulation provides for three new and different possibilities.

The first case includes events of a "clear" crisis identified by Consob as (i) admission to a bankruptcy procedure as provided by Royal Decree 267/1942 or by other special laws; (ii) approval of a restructuring agreement entered into with

debtors, pursuant to article 182-bis of the same Royal Decree, and disclosed to the market; or (iii) requests from the supervisory Authority aiming to prevent use of extraordinary administration or forced mandatory liquidation pursuant to the TUF, Legislative Decree 385/1993 and Legislative Decree 209/2005. In this event, for the purpose of application of the exemption, the potentially relevant acquisition need only be accompanied by recapitalisation of the company or any other equity strengthening intervention.

The second case catches those purchases which would have otherwise been relevant for the obligation to launch a tender offer if the purchases had been made 1) in absence of other purchases or agreements to purchase during the prior twelve months, and 2) by way of subscription in the context of a company's capital increase transaction without the right of pre-emption implemented to assist, including through debt restructuring, the turnaround of the company's leverage and to ensure improvement of the company's financial condition, and implemented in the context of a turnaround plan that (i) is disclosed to the market, (ii) is evidence of the crisis condition, and (iii) has been certified as reasonable by an expert in accordance with article 67(3)(d) of Royal Decree 267/1942.

Finally, in all events of crisis other than those mentioned above, the exemption is applicable based on the whitewash mechanism, when in case of a transaction subject to approval or authorisation by the shareholders' meeting, such shareholders' resolution is approved not only by the normal majorities required by law, but also without the unfavourable vote of the majority of shareholders other than the buyer, and shareholder(s) that hold, alone or in the aggregate, the majority stake or a relative majority stake in excess of 10%. If the transaction does not require approval by the shareholders' meeting and therefore the whitewash mechanism is not practicable, the transaction must be approved by the favourable vote of the majority of shareholders other than the buyer, and the shareholder(s) that, in the aggregate, hold the majority or relative majority stake, through a declaration contained in a voting form made available by the company.

With reference to possible exemption linked to mergers and spin-offs, a requirement for these transactions to be approved based on actual and justified business needs no longer exists. Rather the resolution of the shareholders' meeting must be approved not only with the normal majorities required by law but also in the absence of a contrary vote by the majority of shareholders other than the buyer of the shareholding exceeding the relevant threshold and by the shareholder or shareholders that, alone or in concert, hold the majority stake or a relative majority stake in excess of 10%. To heed the criticism raised during the consultation phase in relation to the whitewash mechanism – and of the possibility that this mechanism may allocate excessive importance to non-qualified minorities, a provision has been included – applicable only to this exemption and not to the exemption related to bail out transactions – to state that the by-laws can provide that for the purposes of approval the majority of contrary shareholders will preclude the exemption solely where they represent at least a certain quota of the capital with voting rights present at the meeting, to be no greater than 7.5% (according to a mechanism previously adopted by Consob in the new regulations on related party transactions).

In all events in which the whitewash mechanism applies, the report on the items on the agenda must contain detailed information on the exemption from the obligation to launch an offer that arises from the approval of the transaction based on whitewash mechanism or the failure to reach the minimum threshold provided by the by-laws (where applicable). In case of an exemption in the context of a bail out and where the transaction is not subject to a shareholders' resolution, the same information must be provided by the company management body, and made available together with the voting form and published on the company website.

Further amendments have been made in terms of exemptions for temporary transactions: firstly the tolerance threshold of 3% has been maintained for takeovers pursuant to article 106 (1) (and therefore with reference to shareholdings exceeding the 30% threshold) whilst an additional 1% threshold has been introduced in case of an obligation to launch a consolidation takeover (pursuant to article 106(3)(b), as long as, in each case, the purchaser undertakes to transfer to non-related parties the excess securities within 12 months, and to refrain from exercising the voting rights attaching to the excess securities. A provision has also been introduced whereby if one of the thresholds provided for a takeover bid is exceeded by a person qualified to provide investment services who is an underwriter in the context of a capital increase or a transaction for the placement of securities, the quantitative limits mentioned above do not apply and the excess shares must be sold over a longer period, of eighteen months. The commitment not to exercise related voting rights remains unchanged.

Finally a new exemption has been introduced for temporary transactions, where the Takeover Threshold is exceeded due to the purchase of derivative instruments and the buyer undertakes to transfer the excess derivatives or securities to non related parties within six months and not to exercise voting rights attaching to the excess securities during that period.

Price adjustment

Article 106 (3) of the TUF granted to Consob the power to regulate mechanisms for the adjustment of the mandatory takeover price in certain circumstances, increasing or decreasing it in relation to the price calculated in accordance with the criteria under article 106 (2) (i.e., the highest price paid by the bidder or by persons acting in concert with the bidder

in the 12 months prior to communication of the offer, or in the absence of acquisitions during this period of time, a price no lower than the weighted average market price for the last 12 months or any shorter available period).

In particular Consob has the power to govern the following circumstances, when the offer must be launched:

(A) at a price lower than the highest price paid, provided that one of the following circumstances occurs: 1) market prices have been influenced by exceptional events or there is a grounded suspicion that they have been manipulated; or 2) the highest price paid by the bidder or by persons acting in concert is either the buy and sell price used in market terms transactions involving the shares object of the takeover, and in the context of ordinary trading practices or the buy and sell price of transactions that would have benefited from one of the exemptions from the launch of a mandatory tender offer;

(B) at a price higher than the highest price paid provided that at least one of the following circumstances occurs: 1) the bidder or persons acting in concert with the bidder have agreed to purchase the shares at a price higher than the price they have paid to acquire shares of the same class; 2) there is evidence of collusion between the bidder or persons acting in concert with the bidder and one or more sellers; 3) there is a grounded suspicion that market prices have been manipulated.

On implementing this legislative power, Consob's intent was that of limiting its own discretional power, so as not to introduce elements that distort the conduct of investors and bidders, such as expectations of a different offer price.

In relation to the situation under point (A)(1), Consob established that the decreased offer price will coincide with the higher of: the highest price paid for the purchase of securities of the same class by the bidder or persons acting in concert with the bidder, in the twelve months prior to communication of the offer pursuant to article 102 TUF, which was not influenced by the event itself or by manipulative conduct, and the weighted average market price in the fifteen days prior and subsequent to the exceptional event/manipulative conduct, excluding market prices relating to trading days influenced by the event/conduct.

In relation to the situation under point (A)(2), Consob has established that the offer price will be determined by Consob without taking into account the highest price paid by the bidder, if such higher price is the price for buy and sell transactions: *a)* made at market conditions, in the context of trading on own account, for an overall quantity that does not exceed 0.5% of the shares object of the offer; b) that have benefited from the exemption from launch of a mandatory offer as they are linked to bail out transactions for a company in distress or mergers and spin-offs (article 49 (1) sub-paragraphs *b)* and *f)*) or which could have benefited from the exemption under article 49 (1) sub-paragraph b) number 1 (i.e. transactions that could have benefited from the exemption because they fall within the turnaround exemption for clear events of crisis, which do not provide for whitewash mechanisms).

With regard to determination of a higher price, in the situation under point (B) (1), the offer price is the price actually agreed for purchase of the shares. In the situation under point (B) (2), the offer price is the price eventually established as a result of the collusion. Finally, in the situation under point (B)(3), the offer price increased by Consob coincides with the weighted average market price for a period corresponding to the fifteen days prior and subsequent to occurrence of the manipulative conduct, excluding market prices relating to trading days influenced by such conduct.

Sell out and squeeze out

Consob has attempted to limit its discretionary powers again when drafting the provisions applicable to determination of the price in the event of a sell out or squeeze out.

Aside from events provided directly by law, whereby it is established that the price for sell out or squeeze out is the same as the previous offer price, this mechanism for rendering the price equivalent to the previous offer price is extended by Consob to further events also, i.e. when the purchase obligation has arisen out of a voluntary takeover bid:

a) launched pursuant to article 107 TUF (i.e. a previous partial takeover bid);

b) a global offer pursuant to article 40-bis (3) sub-paragraph *d)* (i.e. an offer in respect of which in principle there would be an obligation to reopen the offer period, but which is exempted from this obligation because the bidder has rendered the effectiveness of the offer irremediably subject to approval of holders of a majority of the securities tendered and the offer has been approved as provided in the specific section of the acceptance form – see "Offers launched by insiders" below") or which the bidder voluntarily made subject to the obligation where the offer has been approved by holders of the majority of the securities tendered;

b) a global offer subject to rules regarding reopening of the offer period specified under article 40-bis (1) or voluntarily rendered subject to these rules by the bidder, provided that in both events at least 50% of shares object of the offer were tendered during the first phase of the offer.

The criterion of the previous offer price will obviously also apply in case the previous offer was an exchange or purchase and exchange, and in such events both the price and the form of payment will remain unchanged together with the ratio of securities and cash.

Where the purchase obligation arose following a takeover bid that does not fall within those mentioned above, Consob will establish the purchase price taking into account: *a)* the previous offer price, also in view of the percentage of acceptances; *b)* the weighted average market price for shares under offer in the six months prior to communication of the offer; *c)* the value allocated to shares or to the target by any existing valuation reports, prepared by independent experts no earlier than six months prior to the purchase obligation arising, based on criteria generally used for financial analysis; *d)* any other acquisitions of securities in the same class during the last twelve months by the person subject to the purchase obligation or by persons acting in concert with him.

If the prior offer involved price payable entirely or partially by securities, the price will take the same form as the previous offer, but the value of the price and therefore the ratio between securities and cash payment will be established by first valorising securities offered in exchange, based on the weighted average of the official prices recorded during the 5 days prior to the date of payment under the offer. In the event that securities offered in exchange are not listed, the evaluation indicated by the bidder during the previous offer will be applied. The ratio between securities and cash payment will be established, commencing from a value determined in monetary terms, based on the weighted average of official daily prices for securities offered in exchange, weighted according to quantities traded, recorded by the market in the month previous to determination of the price by Consob. In the event that the securities offered in exchange are not listed, the evaluation indicated by the bidder during the previous offer will apply.

Finally, in the event that the purchase obligation did not arise following a previous takeover bid, the price will be established by Consob based on the higher of: i) the highest price provided for the purchase of securities of the same class over the last twelve months by the person obliged to make the purchase or by persons acting in concert with him; and ii) the weighted average market price for the six months prior to the obligation arising.

Offers launched by insiders

Reopening of the offer period

The same purpose of protecting minority shareholders inspired new regulatory provisions which aim to limit so-called pressure to tender. Pressure to tender is a situation whereby shareholders receive the offer and, despite believing that the price is not suitable, accept the offer in the fear that they will remain in possession of shares that are destined to depreciate following closure of the offer. Detailed analyses conducted by Consob on this issue led Consob to hold that this phenomenon, despite being inherent to any offer, requires greater protection in case of offers launched by persons qualified as insiders (persons who directly or indirectly hold shares in excess of 30% of the capital with voting rights, who are parties to a shareholders agreement and who have an overall shareholding in excess of the mentioned threshold, directors of the issuer, persons acting in concert with these persons) because these offers involve greater potential imbalances in disclosure between bidders and minority shareholders and greater risks of conflict of interest on the part of the management body.

Consob's solution for the purpose of limiting pressure to tender in case of offers launched by insiders, is that of reopening the offer period. In particular, the offer launched by insiders must be reopened on the day following the payment date, for an additional period of five days, in case of:

(a) offers conditional upon the acquisition of a certain percentage of the target's equity capital, where a bidder communicates fulfilment or waiver of the condition;

(b) non-conditional offers where the bidder discloses that (i) he has achieved a shareholding in excess of half or, if the bidder's initial shareholding was greater than half and less than two thirds, in excess of two thirds of the share capital; or (ii) he has acquired at least half of the securities object of the offer.

Reopening of the offer period is excluded:

1. when fulfilment or waiver of the condition in conditional offers or fulfilment of one of the conditions for success under points (b) (i) or (ii) occurs at least five days prior to the acceptance period;

2. if the bidder has exceeded the 90% threshold upon termination of the acceptance period and is about to to perform the obligation to purchase all remaining shares;

3. in case of preventive partial offers launched pursuant to article 107 TUF;

4. in case of competing offers;

5. in case of offers having as their object securities issued by *società cooperative*;

6. in case of offers other than mandatory offers, in respect of which in principle there would be an obligation to reopen if (i) the bidder has made the offer irrevocably conditional upon the approval of the holders of the majority of securities tendered in the offer, not counting the approvals of those holders who are acting in concert with the bidder; and (ii) the offer receives approval as provided in the specific section of the acceptance form. In such events, acceptance of the offer will be considered equivalent to a declaration of approval if it is not accompanied by a contrary declaration.

This last provision in particular was introduced to accept of principal criticisms raised against the new rules during the consultation phase, i.e. a fear that opening of a second round – even if only potentially – could have contributed to create investor inertia, even in investors who favour the offer; provision has therefore been made for recourse to a referendum as a possibility to opt out of the offer period reopening regime.

Opinion of the independent directors

Further protection of minority shareholders is provided by Consob in case of offers launched by insiders, in the form of an ad hoc opinion prepared by independent directors, which is preliminary and functional to the meeting of the board of directors called to evaluate the suitability of the offer. In particular, prior to approving the target's notice, the independent directors who are not related parties must prepare a reasoned opinion containing their evaluations of the offer and the suitability of the price, and may also make recourse to the assistance of an independent expert, at expense of the target. If the management body accepts the evaluations by the independent directors, they will be contained in the target's notice; if they do not, the independent directors' opinion shall however be communicated separately as an annex to the target's notice.

Transparency and correctness rules

Novelties introduced include new regulatory provisions which aim to strengthen transparency and correctness and which must be complied with when launching a takeover bid.

Firstly an obligation has been introduced:

(i) for interested parties (bidder, target and persons linked to them by controlling relationships, companies subject to common control, affiliates, members of the relative 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 issuer or bidder), to inform the market and Consob, on the same day, about transactions for the purchase and sale of shares under offer and those concerning derivative instruments connected to shares, indicating the essential terms; and

(ii) for bidder and those acting in concert with the bidder, to disclose to the market and to Consob, within the day prior to the transaction, information relating to their intention to sell securities under offer to third parties – and these exclude members of the bidder's group or those acting in concert with the bidder (so as to guarantee prior disclosure to the market of conduct by the bidder that is directly in conflict with the offer).

Secondly, the so-called best price rule (i.e. an obligation for the bidder to align the offer price to the highest price paid in case of purchase of shares under offer by such bidder during the period between communication of the offer and the payment date) has been amended in two areas. On the one hand, the rule will operate not only in case of purchases of securities, including the acquisition of long positions involving underlying securities (and in such event the price will be determined in accordance with the same mechanism provided to establish the price for a mandatory takeover due to purchases of derivative instruments). The best price rule in force up to the date of payment does not apply to buy and sell transactions executed at market conditions in the context of trading on own behalf and for total quantities that do not exceed 0.5%.

On the other hand, the rule has been extended from the date of payment to six months following the payment date in case of acquisitions in excess of 0.1% of the securities object of the offer, with an obligation in such event to adapt the price through a cash adjustment to those accepting the offer. This threshold of 0.1% is increased to 1% in case of buy and sell transactions conducted at market conditions in the context of trading on own account. In order to permit monitoring by Consob, in the six months following the payment date, bidder and persons acting in concert with the bidder have an obligation to inform Consob, monthly, of purchases and sales of the securities object of the offer and those concerning derivative instruments connected to the securities object of the offer made during the month, indicating the essential terms.

The offer period

The offer periods have also been changed. Consob has established that the minimum offer period for preventive global offers or for the purpose of achieving control (and therefore for offers pursuant to article 106 (4) and 107 TUF) which was initially fixed at 25 days shall now be the same as the period for all other offers, and therefore 15 days. Consob in fact held that a longer period for these offers could result in imbalances in competition between potential bidders to the detriment of the first bidder, who sustains all costs of discovering whether a takeover should be attempted.

Competing offers

To remove any obstacles to the submission of more convenient offers for minority shareholders other than in terms of price, the obligation to launch competing offers at a price higher than the original offer price has been removed: competing offers can therefore be made and offers re-launched at prices that are equal to or lower than the original offer. Consob has however specified that the promotion of an offer at a lower price than the previous price must be adequately justified by the bidder and that the promotion of an instrumental offer or an offer which at the time of communication to the market is not intended for completion, could be tantamount to conduct subject to evaluation for the purposes of guaranteeing market integrity.

Communication of the offer and target's notice

In the context of reducing costs for bidders, in relation to compliance considered ineffective in a cost-benefit analysis, and of rendering the control procedure by Consob more rapid, the Authority has standardised the contents of information that must be disclosed to the market. In particular standardisation concerned the bidder's communication of the offer pursuant to article 102 TUF and 37 of the Regulation on Issuers and the target's notice pursuant to article 103 TUF and article 39 of the Regulation on Issuers.

With regard to communication of the offer, Consob identified elements of this communication in greater detail, taking account of the experience accrued and of its most recurrent requests for information in relation to the content of the communication. The communication must therefore inform of, among other things: *a)* the bidder and any controlling parties; *b)* persons acting in concert with the bidder; *c)* the issuer; *d)* the classes and quantity of financial products under offer; *e)* the price offered and the total countervalue of the offer; *f)* a comparison between the price offered and recent performance in the share, where admitted for trading on a regulated market; *g)* reasons for the offer and, where applicable, the event that resulted in an obligation to launch the offer; *h)* the bidder's plans with particular reference to any intention to remove the financial instruments under offer from trading and to execute extraordinary transactions; *i)* if and to what extent the offer is financed through indebtedness; *j)* the terms of the offer; *k)* any interests, including derivative instruments, that confer a long position in the target, held by the bidder and by persons acting in concert with the bidder; *l)* communications or applications for authorisations required by applicable laws, providing an indication of commencement of the related procedures before the competent authorities; *m)* the website for publication of notices and documents relating to the offer.

The same aims described above inspired Consob to detail the content of the target's notice, also in consideration of the crucial function played by that document in the dynamics of the takeover procedure.

This notice will therefore, among other things: a) set out the names of members of the management and control boards present at the meeting which evaluated the offer and of those absent; b) indicate whether there are members of the management board that have given notice that they hold a direct or third party interest relating to the offer, specifying the nature, terms, origin and scope of that interest; c) contain any information useful for evaluating the offer and a reasoned evaluation of the offer itself and of the suitability of the price, informing also of the adoption by the majority, and the names of any dissenting and abstaining parties, specifying the reasons for any dissent and abstention. The notice will also provide an indication, including a negative indication, of any participation for any reason by members of the management board in negotiations for the definition of the transaction; d) indicates whether issuer made recourse to independent expert opinions or specific evaluation documents on assessing the offer; in the latter event the methods used and the results of each criterion employed must be indicated; e) provides information on relevant events not indicated in the last financial statements and in the most recent published interim accounts; f) provides information on recent performance for and the prospects of the issuer, where this is not included in the offer document; g) where applicable pursuant to the law, contains an evaluation of the effects of possible success of the offer on the business interests, and on the occupation and localisation of production sites; h) where a merger involving the target and a party classified as an insider is planned, which mergers implies additional borrowing by the target, provides information on the indebtedness of the company resulting from the merger; and it also indicates the effects of the transaction on outstanding facility agreements and related security package and the possible need to stipulate new facility agreements; i) where the target's by-laws depart from the provisions of article 104 (1 and 1-bis) TUF (and therefore allows the members of the management board to carry out actions or transactions that may counteract the objectives pursued by the offer in absence of the approval of the shareholders' meeting), it indicates whether issuer has executed, approved or intends to execute such acts or transactions; j) provides updated information on the direct or indirect possession of shares by the target or by its subsidiaries or parent companies and on long positions in such shares directly or indirectly held by members of the management board; k) provides updated information on compensation received for any reason and in any form by members of the management and control boards and by general managers of the target, or approved in their favour.

Guarantees

With reference to the creation of guarantees for the payment of the offer price, the bidder may only make the communication provided by article 37 of the Regulation on Issuers once it is in a position to fully meet every price payment commitment in cash or after having adopted all reasonable measures for the purposes of guaranteeing

satisfaction of commitments relating to fees of any other kind. Where the price includes financial instruments issued by the bidder, it will be sufficient that a meeting of the appropriate corporate body be convened in relation to the issue of such financial instruments.

The bidder's ability to meet its payment obligations must be proven by a specific attestation (to be attached to the communication of the offer) in which the bidder sets out how it has complied with the legal requirements. The actual "creation" of the guarantees must be finalised by the day prior to the date provided for publication of the offer document, by which date bidder must send to Consob: *a)* documentation relating to due constitution of the guarantees in precise compliance with the offer; or *b)* copy of the resolution approving the issue of financial products offered in payment of the price.

Recognition of an offer prospectus approved by foreign regulators

The provisions in question are enacted in implementation of the power granted under article 103 (4) sub-paragraph e) TUF (pursuant to which Consob will regulate recognition of offer documents approved by EC regulators in other jurisdictions or non EC regulators, in case of cooperation agreements) and aim to render the promotion of cross-border public offers more straightforward, based on previous developments in relation to offers to the public and/or admission to trading on regulated markets, through the so-called passporting mechanism.

With regard to offers approved by EU regulators, Consob's approach is that of encouraging the circulation of offer documents approved by other authorities as much as possible, also beyond the perimeters established in the Takeover Directive, which limited recognition by the "host" regulator only if the offer involves shares admitted to trading on regulated markets in that authority's country. This limit has been removed in Italy and therefore an offer document approved by an EU regulator other than Italy will be recognised in Italy – even where the offer concerns instruments that are not admitted to trading on Italian regulated markets – subject to transmission to Consob and translation into the Italian language, together with that regulator's approval of the document. In case the offer document is prepared in a language customary in the sphere of international finance, it can be sent in that language together with a note containing the translation into Italian of parts of the document concerning essential elements of the offer identified under article 6 (3) of the Takeover Directive (including but not limited to the content of the offer, the identity of the bidder, shares under offer, conditions of the offer, intentions of the bidder in relation to future business by the target, terms within which the offer must be accepted, information on financing of the transaction by the bidder) and the paragraph containing warnings and/or risk factors. Information regarding offer acceptance procedures in Italy, procedures for payment of the price and the applicable tax regime must also be drawn up in Italian.

The offer document may be published five days after the date of receipt by Consob (and therefore in the absence of authorisation from Consob). At the very latest by the day of publication bidder must disseminate its communication regarding the offer in Italian. Any target's notice shall also be disclosed to the market translated into Italian. If the notice is prepared in a language customary in the sphere of international finance, it may be disclosed together with a translation into Italian of the sections relating to evaluation of the offer and price suitability.

The passporting regime is less automatic in case of offers approved by non EU regulators with whom Italy has entered into cooperation agreements. In such event, shares involved in the offer must be admitted to trading on regulated markets in the non EU state or rather issuer must be subject to continual supervision by the local regulator and the document must contain at least information regarding essential elements of the offer identified under article 6 (3) of the Takeover Directive, and the warnings and/or risk factors. The language regime is the same as the one established in case of EU regulators (including provisions relating to communication of the offer and the target's notice). The terms available to Consob to evaluate the equivalence of information contained in the foreign offer document and information required by the Takeover Directive are now longer: the offer document may in fact be published ten days after receipt by Consob (which term can be reduced by Consob to five days in consideration of the characteristics of the offer).

Transitional regime

In order to permit a gradual adjustment to the new provisions, there will be a transitional regime in the following terms:

- a period of *vacatio legis* from the date of publication in the *Gazzetta Ufficiale* of the new regulatory provisions to 2 May 2011, when the provisions become effective. Consequently the new provisions will be applicable to all offers in respect of which communication to Consob and to the market pursuant to article 102 (1) TUF or acquisition of a shareholding which results in crossing of the Takeover Threshold after 2 May 2011;

- immediate effectiveness of certain provisions, commencing from the day following publication in the *Gazzetta Ufficiale*, due to the sensitivity of matters regulated by them and related underlying interests. These specifically include provisions governing exemptions from the obligation to launch a mandatory takeover bid (art. 49);

- exclusively for the new exemption for mergers and spin-offs, the new provisions will be applicable to transactions approved by a shareholders' meeting that was convened for such approval by a meeting of the board of directors held after the publication in the *Gazzetta Ufficiale*.

A specific ad hoc regime has been created, finally, for the new provisions on derivatives:

- derivatives held prior to 2 May 2011 are included in the calculation for the Takeover Threshold if further purchases are made after 2 May 2011 (therefore, derivatives held before 2 May 2011 will be counted if the Takeover Threshold is exceeded as a result of purchases made after 2 May 2011);

- any person who, on 2 May 2011, exceeds the Takeover Threshold as a result of calculation of derivatives in accordance with the new calculation criteria will be required to launch a tender offer when it acquires further shares, including any shares underlying the derivatives held prior to 2 May 2011;

- to prevent elusion of the law, any person who exceeds the Takeover Threshold as a result of the purchase of derivatives during the period starting on the date the provisions are published in *the Gazzetta Ufficiale* and ending on 2 May 2011 will be required to launch a tender offer unless it divests of the excess securities by 2 May 2013.

Finally, the persons described in article 114(5) TUF (listed companies, members of the management and control bodies, management, and other persons who hold a relevant shareholding under article 120 TUF or are party to a shareholders' agreement under article 122 TUF) who, as of 2 May 2011, exceed the Takeover Threshold as a result of derivatives they hold are required to publish a notice, within five trading days from 2 May 2011, inform of and describing their holding in detail.