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Recent CONSOB rulings on exemptions from the obligation to launch a public tender offer

Over recent years, the legal framework applicable to public tender offers has undergone sweeping reforms. One of the matters most reformed, first by the legislator and then by CONSOB, is the exemption from the obligation to launch a public tender offer upon meeting certain conditions. In four separate rulings in just a few months, CONSOB has intervened to provide clarification on some application-related issues of significant interest for potential investors.

The exemptions, in fact, are highly significant technical instruments in cases involving the "rescue of companies in financial distress".

This briefing reviews the recent CONSOB notices regarding the "rescue" exemptions (but not only) and aims to analyse the least common denominator of CONSOB case precedents on exemptions to provide market operators with an overview of the application of the exemptions system in practice.

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Introduction: the exemptions, scope of application, primary and secondary legislation

Article 106(5) and (6) of Legislative Decree no. 58 of 24 February 1998 ("**TUF**") is the primary legislation governing the conditions for exemption from the obligation to launch a public tender offer ("**OPA**"). These exemptions concern the obligation to launch an OPA when the relevant threshold of 30% is exceeded (Article 106(1) TUF), as well as the obligation to launch an OPA when a person already holding a 30% relevant stake makes a purchase of more than 5%, without holding a majority of the voting rights at the ordinary shareholders' meeting (Article 106(3)(b)).

More specifically, Article 106(5) TUF contemplates and describes a series of cases for exemption and contemporaneously empowers CONSOB to establish the conditions for application of these cases for exemption. CONSOB accordingly amended its Regulation no. 11971 implementing the TUF provisions (the "**Regulation on Issuers**") in matters of public tender offers and, specifically, Article 49 of the Regulation on Issuers entitled "Exemptions".

Article 106(6) TUF gives CONSOB additional and broad powers to grant "individual" exemptions in cases, other than the cases envisaged in Article 106(5) and Article 49 of the Regulation on Issuers, which in the abstract are analogous to the exemptions under 106(5) although not explicitly contemplated therein.

Specifically, pursuant to Article 106(5) TUF, when the threshold for the purposes of an OPA is exceeded, there is no offer obligation if there are one or more shareholders who already control the company or is a result of:

a) a transaction for the purpose of rescuing companies in distress;

b) a transfer of securities between persons associated by significant shareholding relationships;

c) causes not attributable to the purchaser;

d) temporary transactions;

e) merger or de-merger transactions;

f) transfers for no consideration.

Article 49 of the Regulation on Issuers establishes the conditions upon which the exemptions described in the primary legislation (i.e. TUF) may be applied. Specifically, with regard to the exemption in sub-section a), Article 49(1)(b) describes in detail the (three) cases in which an exemption may be obtained for rescues of companies in distress despite the fact the relevant threshold will be exceeded. These conditions are of great interest in our analysis. In particular, the relevant purchase is exempt from the obligation to launch a mandatory public tender offer if made:

1) in the context of a recapitalisation or other capital increase and the company is in a situation of financial distress certified by: (i) admission to insolvency proceedings; or (ii) approval of a debt restructuring agreement pursuant to Article 182-*bis* of Royal Decree no. 267 of 16 March 1942 (the "**Italian Bankruptcy Law**"); or (iii) a request made by a supervisory authority;

2) in the absence of other purchases made or agreed upon in the preceding twelve months, and exclusively by subscribing a capital increase of a listed company excluding pre-emption rights and in implementation of a work-out plan disclosed to the market, the reasonableness of which has been certified by a professional in accordance with Article 67(3)(d) of the Italian Bankruptcy law;

3) in a situation of distress other than the situations described at 1) and 2) provided the transaction has been approved without any contrary votes by a majority of the shareholders, other than the purchaser and the shareholders holding, individually or in concert, a majority (including a relative majority) exceeding 10 per cent (so called whitewash).

The exemption for a transaction which may qualify as a rescue of a company in financial distress

In Notice No. 11081302 of 30 September 2011, CONSOB denied a request seeking a reasoned ruling of exemption from the obligation to launch a public tender offer pursuant to Article 106(6) TUF for the reasons set out below.

As the conditions for the direct application of an exemption by operation of law (Article 106(5) TUF) were not satisfied in the case at hand, the exemption request was presented under Article 106(6) TUF by drawing an analogy to the “rescue-related” exemption cases in Articles 106(5)(a) TUF and 49(1)(b) of the Regulation on Issuers.

Specifically, the rescue transaction described in the query referred to CONSOB involved, *inter alia*:

1) the purchase by a listed issuer (“**Company A**”) of the entire share capital of another company ("**Company B** "), with payment of a portion of the price on a deferred basis, giving rise, therefore, to a receivable owned by the shareholders of Company B and due from Company A;
2) the launch of two capital increases in Company A: the first to be offered with pre-emption rights to the shareholders and the second to service the warrants to be awarded as a bonus to the subscribers of the first capital increase;
3) the transfer, by the controlling shareholder of Company A ("**Company AA**") to the shareholders of Company B, of a portion of its option rights in exchange for the assignment of a portion of the receivable held by the shareholders of Company B and due from Company A for the sale of the shareholding in Company B;
4) the execution of a shareholders’ agreement between Company AA and the shareholders of Company B, whereby no accepting party will exercise, on its own, control over Company A; and
5) the entry into Company A’s shareholding structure, following the subscription of the capital increase, of Company B’s shareholders, who, together with Company AA, will hold a shareholding exceeding the relevant threshold of 30% triggering the obligation to launch a public tender offer.

In stating the grounds for its refusal, the Authority first of all pointed out that Article 49 (1)(b), of the Regulation on Issuers establishes three different cases for exemption. As the circumstances envisaged under the first case (Article 49(1)(b)(1)) (i.e. the existence of insolvency proceedings, a debt restructuring agreement, or a request from a regulatory authority) did not apply in this case, CONSOB decided to base its analysis on the second case for exemption contemplated under the above Article.

In particular, as a condition for eligibility, the second case requires all three of the following elements be met: (i) a work-out plan notified to CONSOB and to the market certifying the fact that the company is in financial distress, certified as reasonable by a professional under Article 67(3)(d) of the Bankruptcy Law; (ii) no other purchases are made or agreed over the twelve months preceding the purchase; and (ii) the relevant threshold is exceeded due to the subscription of a capital increase, excluding pre-emption rights, aimed at rescuing a company in financial distress.

According to CONSOB, this last requisite in particular is aimed at achieving a two-fold purpose: first, funds raised through the subscription of the capital increase (excluding pre-emption rights) are to directly increase the assets of the company in distress (and not those of the individual shareholders who sell their shareholding/option rights); second, all shareholders are treated equally (i.e. the dilution effect of the subscription of the share capital by the new shareholder affects all shareholders equally and no shareholder benefits from the possibility of exiting the company).

In the case in question, CONSOB found that the conditions under (i) and (iii) had not been met for the purposes of applying the exemption by operation of law (i.e. a work-out plan certified by a professional and subscription of a reserved capital increase, respectively), and also rejected the possibility that the exemption may apply by analogy to this specific case pursuant to Article 106 (6) of the Financial Services Act. Indeed, the equal treatment of the shareholders was not guaranteed. Only the shareholder transferring its pre-emption rights (Company AA) could benefit, albeit partially, from the right to exit the share capital. According to CONSOB, "the actual circumstances of this case are not only different, they are inconsistent with the rationale underlying the exemption under Article 49 (1)(b)(2) of the Regulation on Issuers".

Further, CONSOB highlighted that the transaction may, however, benefit from the third exemption possibility envisaged under Article 49(1)(b) of the Regulation on Issuers. Under this provision, rescues related to situations of financial distress other than self-evident financial difficulty (referred to in points 1 and 2 of the Article) are exempted, provided that the transaction is approved by the independent shareholders by way of a whitewash (and, in other words, without a dissenting

vote on the part of the majority of the shareholders other than the purchaser, and the shareholders who either individually or in concert hold on aggregate a majority (including a relative majority) shareholding exceeding 10 percent).

Indeed, in CONSOB's view, "*the mere concern that the transaction will not be viewed favourably by independent shareholders based on the past conduct of these shareholders in exercising their voting rights", referred to in the exemption request, may not, in any case, lead to a disapplication of the whitewash mechanism and the "replacement*" of this mechanism with a ruling under Article 106(6) TUF.

The exemption for the rescue of a company in financial distress by way of whitewash

Subsequently, in Notice 12002448 dated 12 January 2012, CONSOB once again expressed its view on the matter of "rescue" exemptions. This time CONSOB found the conditions had been met for the exemption under Article 49(1)(b)(3) of the Regulation on Issuers (a rescue in a situation of financial distress where the financial difficulties are not self-evident, and which is approved by independent shareholders by way of the whitewash mechanism).

At the first signs of financial distress and for the purposes of implementing a work-out plan, the Board of Directors of the listed issuer called an extraordinary shareholders' meeting to consider two alternative share capital proposals, one excluding and one including pre-emption rights. In order to facilitate approval of the relevant resolution, the issuer launched a solicitation of proxies, i.e. a proxy for its own shareholders to exercise voting rights in the shareholders' meeting. The solicitation prospectus specified that the approval of the reserved capital increase (and, in other words, excluding pre-emption rights) by the shareholders' meeting by way of the whitewash mechanism would exempt persons/parties who agreed to subscribe and enter into a shareholders' agreement from the obligation to launch a public tender. Not all of these persons/parties were, however, known at the time of the shareholders' meeting resolution: in addition to the company Alpha, additional subscribers could have been identified among qualified investors or industrial companies belonging to the issuer's sector according to the solicitation prospectus criteria.

Following the approval of the capital increase, the issuer and another industrial company (Beta) entered into an agreement to subscribe a capital increase in the former company, as part of a broader work-out plan, causing the relevant threshold of a 30% shareholding in the issuer to be exceeded by Alpha and Beta (following execution of a shareholders' agreement) thus triggering a mandatory public tender offer.

In submitting their case to CONSOB, the parties argued the approval of the transaction by the extraordinary shareholders' meeting through the whitewash mechanism came within the rescue exemption under Article 49(1)(b)(3) of the Regulation on Issuers, even if at the time of the resolution Beta's identity was not yet known to the shareholders. The parties argued the shareholders were in possession of sufficient information to allow them to choose between the two alternatives, one of which imposed a duty upon them to rescue the issuer, and also to make an informed decision whether or not to grant third parties, in the event of a capital increase without pre-emption rights, the possibility of entering the company's share capital in order to facilitate the rescue, benefitting from the exemption from the obligation to launch a mandatory public tender offer.

CONSOB agreed with this argument on the grounds that the directors' report provided all elements necessary to ensure shareholders could exercise their voting rights in an informed manner and included detailed information on the reasons for and the intended purposes of the capital increases, on the pricing criteria, on the envisaged dilution and on the suggested characteristics of the new investors (later identified as Beta). In the Authority's view, the shareholders expressed an informed decision regarding the inapplicability of the obligation to launch a public tender offer as a result of the approval of the resolution through the whitewash mechanism. CONSOB consequently confirmed that the conditions for exemption provided under Article 49(1)(b)(3) of the Regulation on Issuers had been met.

The exemption on account of a previous voluntary public offer over the entire share capital

Article 106(4) TUF contemplates an exemption from the obligation to launch a public tender offer for parties who have reached the relevant shareholding following a previous voluntary purchase or exchange offer directed at all holders of the securities for the entire shareholding in their possession provided that, in the case of the exchange offer, securities listed on a regulated market of an EC member state or, alternatively, a cash sum, are offered as consideration.

In notice 12019484 of 16 March 2012 CONSOB took the opportunity to clarify certain requirements for application of this exemption.

The transaction submitted to CONSOB in that case involved the launch of an exchange offer over the entire share capital by the listed company KME Group S.p.A. (“**KME**”) over its treasury shares, with consideration in the form of bonds issued at the same time by the same company, to be listed on the *Mercato Telematico delle Obbligazioni* (carrying voting rights for the appointment of an independent director through a separate procedure outside the shareholders’ meeting).

As a result of the offer (due to the purchase of the treasury shares by KME and their subsequent cancellation), by increasing its shareholding to an annual level exceeding 5%, KME’s controlling shareholder would have exceeded the relevant threshold for purposes of the mandatory offer “due to consolidation”. In the query submitted to the Authority, the latter was asked to exempt this shareholder from the obligation to launch a mandatory offer because the relevant shareholding would have been reached by the latter following a previous voluntary exchange offer over the entire share capital and, therefore, in accordance with the provisions of Article 106(4) TUF.

In its decision, CONSOB based its analysis on the characteristics which the securities offered in exchange under the prior offer over the entire share capital must have, pursuant to Article 106(4) TUF to exempt the shareholder from the obligation to launch a subsequent public tender offer (i.e. the notion of securities listed on the regulated market of an EU member state).

Since the term "securities", as defined in the TUF, refers to financial instruments with voting rights, which may also be limited to specific matters in the ordinary and extraordinary shareholders’ meetings, according to CONSOB, the national legislator intended, on the one hand, to broaden the scope of application to include financial instruments other than shares *stricto sensu* (which typically grant voting rights to their holders) and, on the other hand, to establish a limit on the requisite of voting rights in the ordinary or extraordinary shareholders’ meeting.

Financial instruments that grant voting rights that may be exercised exclusively outside shareholders’ meetings or, in other words, indirectly through different procedures (i.e. class shareholders’ meetings, expression of opinions/vetoes, shareholders’ agreements) cannot be considered to come within the notion of securities. In this case, therefore, the exemption in question would only apply if the bonds offered as consideration were granted direct voting rights at the shareholders’ meeting for the appointment of an independent director.

Since for the purposes of the exemption from the obligation to launch a public tender offer the securities (as defined above) must be listed on a regulated market, CONSOB also analysed this additional requisite, with a view to clarifying whether this term must be deemed to refer to securities that are already traded or whether an authorisation to trade these securities (as envisaged in such case) would be sufficient for the purposes of the exemption.

In assessing this issue, CONSOB stressed the difference in terminology used in Article 106 TUF, which simultaneously uses two different terms: "listed" and "admitted to trading". Paragraph 4 (under discussion) uses the term “listed securities” in referring to offer price in the context of a preliminary public tender offer, while paragraph 2 *bis*, uses the term "admitted to trading" in referring to the consideration for the mandatory public tender offer.

According to CONSOB, this difference in terminology is a clear indication of the legislator' s intention to require securities offered as consideration in the context of a preliminary tender offer over the entire share capital to already be traded (since a ruling of admission to trading would not be sufficient in this regard). This is based upon the legislator's intention to grant greater protection in the event of a voluntary tender offer – “*guaranteeing not only the element of liquidity but also the effective valuation through stock market trading*” – on account of the fact that the latter would be considered a voluntary initiative, as opposed to the mandatory public tender offer (which suggests greater regulatory action).

The series of exemptions in the Fondiaria-Sai case

CONSOB’s most recent decision (Notice 12044042 issued on 24 May 2012) concerned a controversial case involving a complex integration transaction, to be carried out through a merger between Unipol Assicurazioni S.p.A. ("**Unipol Assicurazioni**") and the listed companies Premafin Finanziaria S.p.A. - *Holding* di Partecipazioni ("**Premafin**"), Fondiaria Sai S.p.A. ("**Fonsai**") and Milano Assicurazioni S.p.A. ("**Milano Assicurazioni**") (the latter companies both subsidiaries of Premafin).

The query submitted to the Authority originated on the basis of a request sent by ISVAP to Premafin and Fonsai in January 2012, in which the regulatory authority asked the two companies to provide details of the intervention plan aimed at ensuring adequate recapitalisation of Fonsai to guarantee the solvency (also going forward) of the company and its subsidiaries.

In this context, Unipol Gruppo Finanziario S.p.A. ("**UGF**"), Unipol Assicurazioni's controlling shareholder, and Premafin entered into an investment agreement concerning the above-mentioned integration plan, comprised of the following phases:

a) Capital increase of Fonsai with pre-emption rights of up to Euro 1,100 million aimed at recapitalising the company in compliance with ISVAP's requirements;
b) Capital increase of UGF of up to Euro 1,100 million, aimed at:
   i) Subscribing a capital increase in Premafin reserved to UGF of up to Euro 400 million, in order to endow Premafin with the financial resources necessary to subscribe in full, up to its respective quota, the above-mentioned capital increase in Fonsai; and
   ii) Endowing the subsidiary Unipol Assicurazioni with the financial capital necessary to allow the entity resulting from the merger to comply with the solvency margin requirements applicable to insurance companies;
c) Premafin's preparation of a work-out plan pursuant to Article 67(3)(d), of the Italian Bankruptcy Law, to be implemented, *inter alia*, by approving a specific capital increase;
d) merger by incorporation of Premafin, Milano Assicurazioni and Unipol Assicurazioni into Fonsai.

Following the completion of this plan, UGF will exceed the relevant shareholding thresholds triggering the obligation to launch a mandatory tender offer. As a result of the subscription of Premafin's capital increase referred to in paragraph b)i) above, UGF would directly hold a shareholding with voting rights in Premafin exceeding 50% and would therefore be required to launch a mandatory public tender offer on Premafin pursuant to Article 106(1) TUF. In addition, since as a result of the subscription of this capital increase UGF will indirectly own a shareholding with voting rights in Fonsai exceeding 30% and a shareholding with voting rights in Milano Assicurazioni exceeding 60%, the company may also be required to launch an indirect (or waterfall) mandatory public tender offer. Pursuant to Article 45 of the Regulation on Issuers, if a purchaser of a shareholding exceeding 30% of the voting shares of a listed company (or control over a non-listed company) ends up indirectly holding over 30% of the voting shares of another listed company, it must launch a public tender offer on this second company (as well) if the first company's assets are comprised mainly of shareholdings in listed companies (or in companies which prevalently hold shareholdings in listed companies). The obligation to launch a public tender offer is triggered, under the above-mentioned provision, only where the prevalence is confirmed by one of the following two conditions: (a) the book value of the shareholding represents over one third of the assets and exceeds all other long-term fixed investments registered in the balance sheet of the stakeholding company (known as the objective prevalence criterion); or (b) the value attributed to the shareholding represents over one third and constitutes the main component of the purchase price of securities of the stakeholding company (known as the qualitative prevalence criterion).

Lastly, as the result of the perfection of the merger and the exchange ratios determined by the competent bodies of the companies taking part in the merger, at their discretion, UGF could find itself with an increase in its shareholding in Fonsai (as the company resulting from the merger) by an amount exceeding the increase threshold of 5% per annum. On this basis, it may be under an obligation to launch a public tender offer on account of consolidation pursuant to Article 106(3)(b) TUF and Article 46 of the Regulation on Issuers (which impose an obligation to launch a public tender offer on a party which already holds a shareholding ranging between 30% and 50% and increases its shareholding by over 5% in a 12 month period).

The exemption query submitted to CONSOB was based on the consideration that UGF's acquisition of direct control over Premafin and indirect (*de facto*) control over Fonsai and (*de jure*) over Milano Assicurazioni, on the one hand, and the increase in the shareholding that UGF will hold in Fonsai as the company resulting from the merger, on the other, would amount to chronologically distinct elements which, from a logical and technical standpoint, constitute phases or elements of a single, over-arching process aimed at restoring the Fonsai group to adequate levels of solvency, both currently and in the future. This would involve the activation of exemption mechanisms which would release UGF from the obligations provided under Article 106 *et seq.* TUF.

In particular, according to the exemption query, the acquisition of the shareholding in Premafin does not trigger any obligation to launch a public tender offer by virtue of the exemption referred to under Article 49(1)(b)(2) of the Regulation on Issuers. Indeed, this would be an acquisition concluded (i) through the subscription of a reserved capital increase aimed at the rescue of a company in financial distress, (ii) in the absence of other purchases concluded or agreed over the preceding twelve months and (iii) as part of a work-out plan pursuant to Article 67(3)(d), of the Bankruptcy Law (therefore, in accordance with the exemption conditions established under the above-mentioned rule).

With regard to the indirect purchase of shares in Milano Assicurazioni, according to the exemption query ,no obligation on

the part of UGF to launch a public tender offer would arise since the two above-mentioned conditions of the indirect public tender offer would not be met. As regards Fonsai (for which the condition set forth in paragraph (a) would be exceeded), the related purchase is exempted under Article 49(1)(b)(1)(iii) of the Regulation on Issuers. This would amount to an acquisition concluded as part of a recapitalization addressing a situation of distress certified by a request put forth by a regulatory authority.

Lastly, the fact that the relevant threshold is exceeded as the result of the consolidation of UGF's shareholding position in Fonsai following the merger is not relevant under public tender offer provisions since such a merger, according to the exemption query, rather than constituting an event that is separate from UGF's subscription of the Premafin capital increase, would represent an essential condition of the same as part of a single process aimed at restoring proper current and future solvency levels within the Fonsai group.

The exemption of Premafin's capital increase

In order to assess the applicability of the exemption under Article 49(1)(b)(2) of the Regulation on Issuers, to this particular case (since the threshold would be exceeded following the subscription of a capital increase reserved to UGF and aimed at rescuing Premafin, in the absence of other purchases made or agreed over the prior twelve months and within the context of a work-out plan pursuant to Article 67(3)(d) of the Bankruptcy Law), CONSOB first of all cited the considerations expressed in Notice No. 11081302 issued on 30 September 2011, described above ("*the rationale underlying the provision in question lies in the fact that if the relevant threshold is exceeded through a subscription of a capital increase with the exclusion of pre-emption rights, a twofold effect is achieved and therefore: i) the funds invested by the shareholder which acquires control are aimed at increasing the assets of the company and not those of the individual shareholders who sell their shareholding or option rights; ii) full equality in the treatment is ensured for all shareholders as they will equally incur the dilutive effect resulting from the subscription of the capital increase by the new shareholder and will not benefit from the possibility of exiting the company* ").

On the basis of this preliminary consideration, CONSOB assessed the nature of certain additional agreements in place between UGF and Premafin and set forth in a side letter, through which UGF, on the one hand, waived the right to bring a liability action against all directors and auditors who have held office over the last five years within Premafin, Fonsai and Milano Assicurazioni (and in their respective subsidiaries) and, on the other, undertook to indemnify and hold harmless Premafin if a corporate liability action were nonetheless approved by resolution in breach of the agreements reached.

According to the Authority, such agreements give rise to a grant of economic benefits in favour of the exiting controlling shareholders, the cost of which would be incurred not only by the new controlling shareholder, but also potentially by the other shareholders of Premafin (in terms of waiver of possible proceeds deriving from the compensation of any damages). Such benefits are therefore incompatible with a rescue transaction that complies with the principle of equal treatment of all shareholders. The applicability of the exemption in question was therefore conditioned upon the revocation of the obligations set forth in the side letter.

The merger also contemplated the grant of a right of withdrawal to Premafin's shareholders since the company would change its corporate purpose (from a holding company to an operating company). In this regard, the Commission reserved the right to conclude that the exemption does not apply if the current shareholders of Premafin exercise their right of withdrawal. The exercise of such a right may, in fact, represent a significant indicator of the existence of agreements conflicting with the rescue purpose and the principle of equal treatment (since it would lead to a conclusion that Premafin's shareholders have agreed in advance upon a leaving bonus in exchange for the loss of their position as controlling shareholders). The subsequent purchase by UGF (or persons/parties related to it) of the shares held by the withdrawing shareholders could therefore prevent the same from availing itself from the exemption, both because it would give Premafin's shareholders an economic advantage that is incompatible with the overall recapitalisation plan, and because it may be considered a "*purchase agreed over the preceding twelve months"* and, as such, incompatible with the conditions imposed under the regulatory rule in question (which requires, in applying the exemption in question, that the relevant acquisition for the purpose of the mandatory public tender offer be made in the absence of other purchases made or agreed over the previous twelve months).

The exemption of the indirect purchase of shares in Fonsai and Milano Assicurazioni

In order to evaluate whether indirect purchases of a shareholding exceeding the 30% threshold in Fonsai (through Premafin) and exceeding 60% in Milano Assicurazioni (through Premafin and Fonsai) may trigger obligations to launch a "waterfall" public tender offer, the Commission first of all verified whether, in the cases in question, the conditions of prevalence

provided under Article 45 of the Regulation on Issuers (referred to above) had been met.

Indirect acquisition of Fonsai shares

As regards the indirect acquisition of Fonsai shares, the condition provided under Article 45(3)(a) of the Regulation on Issuers (known as the objective prevalence criterion) would certainly be met, since the shareholding held by Premafin in Fonsai is the main shareholding held, representing over one third of the shareholders' equity and exceeding all other long-term fixed investments registered on the balance sheet. Consequently, the purchase of this shareholding would trigger an obligation on the part of UGF to launch a waterfall public tender offer.

In this case, CONSOB nonetheless concluded that the exemption provided under Article 49(1)(b)(1) (iii) of Regulation on Issuers applied to the potentially relevant purchase, finding that the requisites under the above-mentioned exemption rule will be met (as the purchase would be part of a recapitalisation plan in order to address a situation of financial distress certified by a request made by a regulatory authority). In this regard, the Authority found that the subscription for the capital increase in Premafin by UGF (which consequently caused the threshold for the indirect public tender offer to be exceeded) is merely an opportunistic act in connection with the merger plan and is aimed exclusively at endowing Premafin with the financial resources necessary to subscribe for (as to its respective quota) the capital increase in Fonsai and, as such, worthy of the exemption. The subscription of Fonsai's capital increases is, in turn, aimed at allowing Fonsai to complete a fundamental first step towards meeting the requests issued by ISVAP.

Indirect acquisition of Milano Assicurazioni shares

As in the case of the purchase of the Fonsai shares, also with regard to the indirect purchase of shares in Milano Assicurazioni, the Commission first of all assessed whether the conditions of prevalence pursuant to Article 45 of the Regulation on Issuers had been met, which are relevant to determine whether or not an obligation to launch a waterfall public tender offer has been triggered.

Since the value of the shareholding held by Fonsai in Milano Assicurazioni only represents approximately 6.6% of the total assets, the criterion of objective prevalence (which requires the book value of the shareholding to represent over one third of the assets and to exceed any other long-term fixed investment entered in the shareholder company's balance sheet) does not appear to have been met in this case. As regards the value-based criterion provided under letter b) (which provides that "*prevalence is found if the value attributed to the shareholdings represents over one third and constitutes the main component of the purchase price of the securities of the stakeholding companies*"), since the same refers, first of all, to the valuation made by the parties on the shareholding (which valuation had not yet been made in this case), CONSOB concluded that it was not in a position to express a view on this point until all relevant information had been made available, including the valuation-related decisions that the companies involved will have to make in view of the prospective merger.

The exemption of the merger of Premafin, Milano Assicurazioni and Unipol Assicurazioni in Fonsai

The final phase of the integration plan consists in the merger by incorporation of Premafin, Milano Assicurazioni and Unipol Assicurazioni into Fonsai, the perfection of which will give rise to an increase in UGF's shareholding in Fonsai (the company resulting from the merger) exceeding 5% over a twelve month period, giving rise to an obligation to launch a public offer as the result of consolidation.

With regard to the merger by incorporation of Milano Assicurazioni and Unipol Assicurazioni into Fonsai, the Commission nonetheless concluded that this merger was eligible for the exemption under Article 49(1)(b)(1)(iii), of the Regulation on Issuers since the purchase by UGF was made as part of the capital reinforcement plan in order to address a situation of financial distress certified by a request put forth by a prudential regulatory authority – and the merger may certainly represent an intervention aimed at "*capital reinforcement"* pursuant to the requirements under the above-mentioned rule.

This conclusion is not changed by the fact the merger was preceded by a capital increase which, in turn, achieved a capital reinforcement, since the transaction in question (comprised of, first, the capital increase in Fonsai and, later, the merger) represents a complex transaction aimed at achieving capital reinforcement that is intrinsically unitary in nature.

Even if one were to break down the transaction into individual components, which are nonetheless interrelated, in evaluating these, the fact that the merger took place after an initial recapitalisation intervention aimed at restoring the minimum conditions of business continuity is not sufficient, in the Authority's view, to rule out the applicability of the exemption in the presence of a transaction prepared following a request by the prudential regulatory authority, which found the transaction

was adequately capable of stabilising the capital reinforcement intervention over time.

However, since ISVAP must assess, at the time of the merger authorisation, the suitability of the transaction to restore, on a stable basis, the solvency margins, the opinion expressed by CONSOB regarding the applicability of the exemption was conditioned upon a finding by ISVAP, at the time of the merger authorisation, that the merger effectively constitutes an integral component in satisfying ISVAP's requests.

As regards the incorporation of Premafin into Fonsai, based upon the assumption (to be confirmed on the basis of the final data) that this merger would negatively impact the resulting company's solvency margin (unlike the incorporation of Unipol Assicurazioni and Milano Assicurazioni into Fonsai) CONSOB concluded that this step in the overall transaction may not be considered a capital reinforcement of Fonsai to satisfy ISVAP's request (and, therefore, the exemption conditions under Article 49(1)(b)(1)(iii) of the Regulation on Issuers were not met). Accordingly, once the effective exchange ratios are determined, a decision will be made as to whether the increase in UGF's shareholding in Fonsai, solely as the result of the incorporation of Premafin, would cause the 5% relevant threshold to be exceeded: if so, UGF would be required to launch a public tender offer on account of consolidation.

Conclusions

The matter of exemptions may be described as highly complex both in terms of the very technical nature of the laws (primary and secondary) and the uncertainty in interpretation necessarily arising out of the role attributed to CONSOB in the matter of "individual" derogations and not exemptions.

In the current economic situation, exemptions for "rescues of companies in financial distress" may represent a valid means of supporting companies in financial distress which, through reorganisations, recapitalisations and other like transactions, may attract new capital.

Likewise, the system of exemptions must be used with great care without undervaluing the underlying legal principles and ratio of the laws in question. With the necessary care, this system will emerge as a valid means to, among other things, address the real needs of companies in financial distress.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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