Changes to Italian Public Tender Offer and Related Financial Market Regulations

Introduction

On April 11, 2009, Italy passed a law intended to protect shareholders of Italian companies and companies listed on the Italian stock exchange from investors seeking to speculate on low share prices in the current economic environment. Italian law decree n. 5 of February 10, 2009 (the Incentives Decree) modifies existing rules with respect to (i) increasing the percentage interest a significant shareholder of a listed company may purchase prior to launching a mandatory tender offer, (ii) lowering the threshold for disclosure to the Italian stock market regulator (Consob) by a shareholder of its equity stake in a listed company and (iii) increasing the percentage of its own shares that a company may purchase. These changes are generally viewed to provide Italian-listed companies with additional protection from hostile takeovers.

Highlights of the Incentives Decree

Specifically, the Incentives Decree introduced the following measures:

(i) Increased threshold of additional purchases by significant shareholders that require the launch of a mandatory tender offer:

Previously, if a shareholder that owned a voting interest of between 30 percent and 50 percent in a company increased its holding by more than 3 percent in any 12-month period, the shareholder was required to launch a mandatory tender offer to acquire all of the outstanding shares of the company pursuant to Consob’s Regolamento Emittenti. Under the new law, the percentage threshold has been raised from 3 percent to 5 percent, and as a result, a significant shareholder will be able to increase its stake in a listed company more rapidly without necessarily being required to launch a tender offer and incur its related costs.

(ii) Threshold lowered for Consob notification of equity stake:

Previously, investors that acquired an interest greater than 2 percent of the share capital of a listed company were required to notify the acquisition to both the listed company and Consob (and the market, through Consob’s publication of the notice on its Web site). Under the new law, Consob has the authority to require, for a limited period of time, notification of purchases of less than 2 percent of those listed companies that have a large market capitalization and a large shareholder base. Consob can impose the lower threshold if it determines there is a need either to protect shareholders...
of the company or for “efficiency and transparency” in the market. The lower threshold has not yet been applied by Consob, but it is clear that the purpose of the new regulation is to notify the listed company, Consob and the market when an investor is buying a significant stake in a listed company, and to provide shareholders additional protection in the event such investor is purchasing shares with the intent of a possible takeover. It should be noted that only Italy and Portugal have a 2 percent threshold for notice requirements, which is significantly lower than the maximum threshold of 5 percent set forth in the Transparency Directive, adopted by most of the member states of the European Union, and the 3 percent threshold in place in the United Kingdom, Germany and Spain.

(iii) Increased purchase thresholds for a company’s acquisition of its own shares:
Under the new law, listed companies (including their subsidiaries) can now own up to a maximum of 20 percent of their own shares. Given that the prior limit was 10 percent, the new law allows shareholders that either own a majority of votes or are able to exercise influence on the other shareholders to cause the listed company to incur the costs necessary to purchase up to 20 percent of its own shares, and therefore make it less vulnerable to takeovers. The new rule, however, appears to be in contradiction with the generally accepted concept (reiterated in the European Directive regarding tender offers) that values the contestability of listed companies, and also could have a negative impact on minority shareholders looking to exit the company through a tender offer.

Prior Reforms of November 2008
These new measures were adopted in addition to reforms of the tender offer rules that were introduced with law decree n. 185 of November 29, 2008 (the Anti-Crisis Decree). The Anti-Crisis Decree eliminated the “passivity rule” and the “neutralization rule” requirements, and effectively provides further protection to listed companies from hostile takeovers.

Elimination of the Passivity Rule Requirement
Previously, the directors of a company were required to obtain the authorization of holders of at least 30 percent of the share capital before they could take defensive actions against a tender offer that had been announced and not yet closed (the so-called passivity rule). Such actions include, for example, steps that make it more expensive for the offeror to obtain control of the target company, the sale of certain material or strategic assets of the company, increasing the debt of the company or commencing a competing public tender offer. The Anti-Crisis Decree eliminated the 30 percent shareholder approval requirement, allowing listed companies subject to a tender offer to carry out defensive actions, as long as such transactions are authorized in compliance with the corporate laws and regulations generally applicable to a listed company. Despite the removal of the shareholder approval requirement, a listed company can nonetheless include a provision in its bylaws that directors cannot adopt defensive measures (such as the actions listed previously) without the authorization of a certain percentage of shareholders.

The rules regarding shares with voting rights conditional upon the launch of a public tender offer were also changed. Previously, shares with such voting rights were allowed to exercise their vote only if such right to vote was approved by the holders of at least 30
percent of the share capital. Under the Anti-Crisis Decree, shareholder authorization is no longer needed in order to exercise the right to vote.

**Elimination of the Neutralization Rule Requirement**

The Anti-Crisis Decree also made the neutralization rule optional. Pursuant to the neutralization rule, certain statutory or shareholder measures that protect against offers for the company’s shares do not apply during the public tender offer period. The neutralization rule now therefore only applies to Italian-listed companies that expressly include it in their bylaws. Regardless of the change in the rule, however, shareholders that intend to participate in a public tender offer have withdrawal rights from any shareholder agreement to which they are party, even if not expressly provided for in the bylaws.

Importantly, even when included in the bylaws, neither the passivity rule nor the neutralization rule apply if the purchaser (or its subsidiary) does not treat all shareholders equally in a tender offer. Consob has the authority to decide if an offer was made using equal treatment. However, because the issuing company can only adopt defensive measures expressly approved by the shareholders in the 18 months prior to notification of the public tender offer, the equal treatment rule will only apply if it has been previously adopted by the company.

**Conclusion**

The recent modification to the tender offer rules was implemented in light of the current economic crisis that has resulted in steep decreases in the prices of listed companies and therefore exposed companies to an increased risk of hostile takeover. However, these new regulations are not transitory and are intended to change the tender offer regime definitively by increasing the defenses available to a listed company and its majority shareholder. The long term effect will be to limit the possibility of hostile takeovers of Italian companies.

**Endnotes**

1 Law n. 33 of April 9, 2009.
2 D. Lgs. 58/98 regarding the regulation of issuers, adopted by Consob resolution n. 11971/1999, as amended.
3 Article 7, comma 3-quater, of law n. 33 of April 9, 2009, which modifies Art. 106, comma 2, letter b) of D. Lgs. 58/98.
4 Art. 7, comma 3-quinquies, of law n. 33 of April 9, 2009.
5 Directive 2004/109/EC.
7 See Art. 7, comma 3-sexies, of law n. 33 of April 9, 2009, which modifies Art. 2357, comma 3, of the Italian Civil Code.
8 Directive 2004/25/EC.
9 Article 104, 104-bis and 104-ter of D.lgs. 58/98.
10 See Art. 104, comma 2, D. Lgs. 58/98.
11 Specifically, pursuant to the neutralization rule: (i) limits on the transfer of shares set forth in the bylaws do not apply to the offeror during the offer period (Art. 104-bis, comma 2, D. Lgs. 58/98); (ii) limits on voting rights set forth in the bylaws or in shareholder agreements do not apply in shareholder votes for transactions that could conflict with the public tender offer (Art. 104-bis, comma 2, D. Lgs. 58/98); and (iii) if the offeror holds at least 75 percent of the voting share capital following the close of the offer, any limits on voting rights set forth in the bylaws or in shareholder agreements and any special rights regarding the nomination or removal of directors or committee members set forth in the bylaws do not apply in the first shareholder vote to modify the bylaws or to nominate or remove directors or committee members after the close of the offer (Art. 104-bis, comma 3, D. Lgs. 58/98).
12 Article 123, comma 3, D. Lgs. 58/98.
If you have any questions about this Client Alert, please contact one of the authors listed below or the Latham attorney with whom you normally consult:

**Maria Cristina Storchi**  
+39.02.3046.2044  
mariacristina.storchi@lw.com  
Milan

**Antonio Coletti**  
+39.02.3046.2061  
antonio.coletti@lw.com  
Milan

**Isabella Porchia**  
+39.02.3046.2078  
Isabella.Porchia@lw.com  
Milan

**Simona Bormida**  
+39.02.3046.2048  
simona.bormida@lw.com  
Milan

---

Client Alert is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the attorney whom you normally consult. A complete list of our Client Alerts can be found on our Web site at www.lw.com.

If you wish to update your contact details or customise the information you receive from Latham & Watkins, please visit www.lw.com/LathamMail.aspx to subscribe to our global client mailings program.

**Abu Dhabi**  
**London**  
**Paris**

**Barcelona**  
**Los Angeles**  
**Rome**

**Brussels**  
**Madrid**  
**San Diego**

**Chicago**  
**Milan**  
**San Francisco**

**Doha**  
**Moscow**  
**Shanghai**

**Dubai**  
**Munich**  
**Silicon Valley**

**Frankfurt**  
**New Jersey**  
**Singapore**

**Hamburg**  
**New York**  
**Tokyo**

**Hong Kong**  
**Orange County**  
**Washington, D.C.**