Derivatives Under The New Italian Takeover Bids Regulation

By Maria Cristina Storchi, Antonio Coletti, and Isabella Porchia, of Latham & Watkins LLP, Milan.

Under the Commissione Nazionale per le Società e la Borsa (CONSOB)'s new regulation on takeovers, both derivatives granting a long position over the shares of a target company are counted towards the relevant thresholds which trigger the obligation to launch a mandatory offer.

On April 5, 2011, after two rounds of public consultation with market participants carried out in October 2010 and February 2011, CONSOB, the Italian financial regulator, approved Resolution No. 17731 (the Resolution)1. The Resolution contains several significant amendments to the provisions on takeover bids set forth in CONSOB Regulation 11971/1999 (the Regulation)2. The Resolution completes the implementation in Italy of the E.U. Takeover Bids Directive (Directive 2004/25/EC) begun in 2007 with the reform of Legislative Decree 58/1998 (the Single Financial Act)3. Among the most significant amendments resulting from the Resolution are those concerning the extension of certain mandatory takeovers rules to derivatives granting a long position over listed shares of the target.

This article summarises this new regulatory framework.

Background

Italian takeover rules require any person acquiring more than 30 percent of an Italian-listed company's shares to launch a mandatory takeover bid for the entire company4. The same obligation to launch a mandatory bid applies to any person holding more than 30 percent of a listed company's shares without controlling a majority vote and acquiring more than 5 percent of the same company's shares in a 12-month period5. Before the amendment to the Regulation, shares of the target counted towards the 30 percent and 5 percent thresholds, included only those directly or indirectly held (i.e., through trust companies or nominees) for which the holder had voting rights in shareholders' meetings called to resolve the appointment and removal of the directors (the Voting Shares), which is among the most relevant evidence of the existence of control over a company. Under the previous regime, neither physically settled nor cash-settled derivatives were counted towards the Relevant Thresholds.

Between 2007 and 2009, following similar reforms in other European Union Member States and recent high-profile cases in which cash-settled derivatives and other contracts for difference were used to build hidden stakes in listed issuers, the Italian Parliament delegated CONSOB to amend the current regulatory framework. CONSOB was also directed to extend general disclosure requirements and provisions governing mandatory takeovers to cover equity positions held through cash-settled and physically settled derivatives.

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The New Definitions of ‘Derivatives’, ‘Long Position’ and ‘Short Position’

The Resolution introduces specific definitions of ‘derivative’, ‘long position’ and ‘short position’ for the purposes of the Italian mandatory takeover bids rules. The new definition of derivatives12 includes the E.U. Markets in Financial Instruments Directive (MiFID) definition,3 at derivative as: a contract that gives rise to rights and duties that are determined at the time of the contract or at a future time, as regards an underlying security.5 A derivative is a derivative if, in whole or in part, its value depends on the value of one or more financial instruments or indices. Derivatives includes: (i) standard derivatives such as contracts for difference, futures, options and swaps, and instruments based on such contracts; (ii) all other derivatives, whether standardised or not; (iii) all other contracts with derivative features; (iv) a right that is not a derivative to buy or sell a financial instrument in the future; and (v) a derivative that is not subject to any of the previous categories.

The Main Changes Resulting from the Resolution

The New General Rule to Count Derivatives Towards the Relevant Thresholds

The Resolution introduces a new general rule to count derivatives towards the Relevant Thresholds. The new general rule applies to any type of derivative that entitles the holder of a long or a short position over the underlying shares to the maximum amount of Voting Shares provided for the Relevant Thresholds. The new general rule aims at avoiding that, in case the derivative is executed with a financial intermediary, the obligation to launch the mandatory tender offer on a financial intermediary as a financial institution.

The Calculation of the Relevant Thresholds and the Relevant Exceptions

The Resolution provides19 that the calculation of the Relevant Thresholds includes derivatives which are a long position over the outstanding Voting Shares of the target and such derivatives:

1) are issued to regulated institutions;
2) have as their underlying Voting Shares of the target that have not been issued yet;
3) are subject to the provisions of shareholders' agreements that are to be considered in determining whether the holder has an economic interest that is positively linked to the fluctuations of the underlying security.

The Resolution also provides that the acquisition of the outstanding Voting Shares of the target should be considered as the Relevant Thresholds only upon the following conditions:

1) the calculation of the Relevant Thresholds includes derivatives which are a long position over the outstanding Voting Shares of the target and such derivatives:
2) are issued to regulated institutions;
3) have as their underlying Voting Shares of the target that have not been issued yet;
4) are subject to the provisions of shareholders' agreements that are to be considered in determining whether the holder has an economic interest that is positively linked to the fluctuations of the underlying security.
target is admitted for the purposes of calculating the Relevant Thresholds to the market the purchase agreements or derivatives of the same type exercised with the same counterparty in the same terms and conditions.

Temporary Holding Exception
Where the Relevant Thresholds are not reached as a consequence of the purchase of derivatives resulting in a temporary holding of a long or short position in the underlying Voting Shares, such a position can be acquired from the obligation to disclose pursuant to the mandatory takeover bid. Any person interested in a long position in the underlying Voting Shares within six months of the execution of the transaction is entitled to a short position in the underlying Voting Shares and vice versa. Any person acquiring in good faith a long position in the underlying Voting Shares within six months of the execution of the transaction is entitled to a short position in the underlying Voting Shares and vice versa. A person being the holder of a long position in Voting Shares is required to launch a mandatory takeover bid upon the occurrence of two conditions: the holder of the relevant long position (i) has undertaken to sell such a long position within six months of the execution of the transaction and (ii) has received the consideration for the purchase of the long position. The consideration paid to non-related parties for the underlying Voting Shares of the target is required to be equal to the market price of the underlying Voting Shares of the target. Under the new provision,

The Offering Price When the Relevant Thresholds Are Reached Through Derivatives
With respect to the offering price of the mandatory takeover offer, the Resolution has carried out the following measures which are usually temporary transactions carried out for pure financial purposes.

The New Disclosure Rules Applicable to Derivatives in the Course of a Takeover Bid
Another significant amendment introduced by the Resolution is the extension of the disclosure requirements which apply during the mandatory bid to any derivatives which are in whatsoever form and whether settled through a full coverage of the purchase transactions carried out at market standard conditions. The Resolution has provided the following transitional regime applicable to the new provisions concerning derivatives:

1. Any person acquiring a long position in the underlying Voting Shares within six months of the execution of the relevant transaction is entitled to a short position in the underlying Voting Shares and vice versa. The person acquiring the relevant long position is required to launch a mandatory takeover bid upon the occurrence of two conditions: the holder of the relevant long position (i) has undertaken to sell such a long position within six months of the execution of the transaction and (ii) has received the consideration for the purchase of the long position. The consideration paid to non-related parties for the underlying Voting Shares of the target is required to be equal to the market price of the underlying Voting Shares of the target. The Resolution has provided the following transitional regime applicable to the new provisions concerning derivatives:

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The Extension of the Best Price Rule to Derivatives
The Resolution extends the so-called best price rule to derivatives which grant a long position in the underlying Voting Shares of the target. Under the new provision, the offering price is equal to the strike price for the options; the strike price for the options is determined in accordance with the terms set out in a specific press release.

The New Disclosure Requirements for Offerings
The Resolution has carried out the following measures which are usually temporary transactions carried out for pure financial purposes.
settled Derivatives under Italian Securities Laws – Current Law and Environmental Impact

April 8, 2011, S.O. no. 95. 

by Article 2 of Legislative Decree 146/2009.


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12 See Article 35, paragraph 1, letter i) of the Issuers Regulation.

11 The consultation closed on June 6, 2011. On June 21, 2011, CON- 

9 See our Client Alert No. 1042 of June 10, 2010, ‘Disclosure of Cash- 

5 For instance, in the United Kingdom and France.


1 The Resolution was published in Italian Official Gazette no. 81 of 

NOTES

1 The material has not been published in Italian Official Gazette no. 35 of 

2 See Article 37, paragraph 1, of the Single Financial Act.

8 The consultation procedure provided for in Article 1, paragraph 1, of the Single Financial Act.

7 See Article 36, paragraph 1, letter a), of the Single Financial Act.

28 See Article 42, paragraph 4 of the Issuers Regulation.

27 See Article 42, paragraphs 2 and 3, of the Issuers Regulation.

26 See Article 35, paragraph 1, letter b), of the Issuers Regulation.

25 See Article 35, paragraph 1, letter g) of the Issuers Regulation.

24 See Article 49, paragraph 1, letter f) of the Issuers Regulation.

23 See Article 44-ter, paragraph 4, of the Issuers Regulation.

22 See Article 44-ter, paragraph 3, of the Issuers Regulation.

21 See Article 44-ter, paragraph 2, of the Issuers Regulation.


19 See Article 44-ter, paragraph 1, of the Issuers Regulation.

18 See Rule 9.1 of the Takeover Code.

17 See Article 44-ter, paragraph 1, of the Issuers Regulation.

16 See Article 35, paragraph 1, letter h) of the Issuers Regulation.

15 See Article 35, paragraph 1, letter g) of the Issuers Regulation.

14 According to Article 1, 3rd par., of the Single Financial Act, deriva-

13 The SOB published the responses of market participants and is now ex-

10 The substitution of the ESMA shall be implemented as of June 1, 2010, 

8 The consultation procedure provided for in Article 1, paragraph 1, of the Single Financial Act.

6 The consultation closed on June 4, 2011. In June 2011, CON- 

Maria Cristina Storchi and Antonio Coletti are Partners, and 

Isabella Porchia is an Associate, with Latham & Watkins LLP,

lw.com, antonio.coletti@lw.com, and isabella.porchia@lw.com.