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The Italian Parliament Adopts New Laws Making Hostile Takeovers More Difficult and Costly

On April 9, 2009, the Italian Parliament adopted Law No. 33, which enacts Italian Decree-Law No. 5, dated February 10, 2009 (the “Italian Law on Economic Incentives”), with the overall objective of stimulating economic growth in Italy. The Italian Law on Economic Incentives contains, among other things, provisions that amend (i) the Italian tender offer law, (ii) the disclosure requirements with regard to material shareholdings in listed companies in Italy, and (iii) the rules governing the treasury stock of Italian companies. Commentators have noted that the general effect of these amendments will be to facilitate the ability of companies listed in Italy to defend themselves from hostile takeovers. The Italian Law on Economic Incentives was published on April 11, 2009, and entered into force on April 12, 2009.

Introduction

Since the ongoing turmoil in the financial markets has significantly depressed the valuations of a large number of listed companies in Italy and could therefore fuel speculative hostile takeovers with relatively modest capital outlays, lawmakers in the Italian Parliament felt it was necessary to introduce new rules, including by making certain specific amendments to Legislative Decree No. 58 dated February 24, 1998 (the “Italian Securities Act”) and the Italian Civil Code, allowing for more effective defensive measures against hostile takeovers. This is in line with the approach taken with Italian Law Decree No. 185 of 2008, which relaxed the Italian Securities Act rules on the adoption of defensive measures against hostile takeovers (for example, the

“passivity rule” is no longer mandatory – see our Client Memo dated December 19, 2008).

In the paragraphs below we will briefly summarize the main new provisions introduced by the Italian Law on Economic Incentives having a direct or indirect impact on the Italian takeover regime.

New Maximum Amount of Incremental Purchases Permitted without Triggering a Mandatory Tender Offer

Article 106, paragraph 3, letter (b), of the Italian Securities Act, which was in effect prior to the entry into force of the Italian Law on Economic Incentives, mandated the *Commissione Nazionale per le Società e la Borsa* (“CONSOB”, the Italian financial markets authority) to set the maximum amount of additional shares that a shareholder holding more than 30% of

the share capital of a listed company (but not having the majority of the votes exercisable at the ordinary shareholders' meeting) could purchase during any consecutive 12-month period, without having to launch a mandatory tender offer on the balance of the outstanding shares. Originally, CONSOB had set this threshold at 3% (Article 46 of CONSOB Regulation on Issuers No. 11971 of May 14, 1999).

Article 7, paragraph 3-*quater*, of the Italian Law on Economic Incentives increased this threshold from 3% to 5% (New letter (b) of Article 106, paragraph 3, of the Italian Securities Act). As a result, any person holding more than 30% of a listed company, but not having the majority of the votes exercisable at an ordinary shareholders' meeting, may further consolidate its position by purchasing (or otherwise exercising rights or subscribing for) additional shares up to a maximum of 5% of the relevant company's share capital during the course of any consecutive 12-month period, without having to launch a mandatory tender offer on the remaining shares.

It is notable that while previously the law had granted CONSOB the authority to establish the threshold, the new amendments set out the threshold in the law itself, decreasing the flexibility to make future changes to the threshold, which will now require an amendment to the Italian Securities Act.

New Threshold for the Disclosure of Material Shareholdings in Listed Companies

The provisions set forth under Article 120 of the Italian Securities Act and the implementing rules of the CONSOB Regulation on Issuers require shareholders to disclose shareholdings (with voting rights) in listed companies when the shareholdings (i) exceed 2% of the company's share capital, (ii) are equal to or exceed any of the following thresholds: 5%, 10%, subsequent multiples of 5% up to 50%, 66.6%, 75%, 90% and 95% of the company's share capital, or (iii) decrease below any of the thresholds set forth under (i) and (ii) above (new Article 117 of CONSOB Regulation on Issuers (effective as of April 24, 2009) implementing EU Directive 2004/109/CE, the so-called "Transparency Directive").

Article 7, paragraph 3-*quinquies*, of the Italian Law on Economic Incentives introduced a new paragraph 2-*bis* to Article 120 of the Italian Securities Act, under which CONSOB may, for purposes of protecting investors and guaranteeing the efficiency and transparency of the Italian capital markets, require disclosure of shareholdings of less than 2% for a limited period of time. However, this lower disclosure threshold may only be applied to companies:

- (a) having a high current market value; and
- (b) with shareholdings disseminated broadly throughout the investing public.

These two criteria appear to be rather vague and more precise standards would have been preferable. It will be necessary to wait for the first practical applications and CONSOB interpretations in order to better understand the scope of the impact that any such CONSOB intervention will have on Italian companies.

The decrease of the disclosure threshold below 2% (even though on a temporary basis) could potentially have a significant impact on the disclosure obligations of numerous investment funds and investment managers holding shares in companies listed in Italy.

Article 7, paragraph 3-*quinquies*, of the Italian Law on Economic Incentives also amended Article 193, paragraph 2, of the Italian Securities Act (regarding applicable sanctions for violations of these rules) to make it clear that the same sanctions will also apply to failures to comply with any CONSOB order requiring disclosure of shareholdings below 2%. The applicable sanctions are: (i) from Euro 25,000 to Euro 2,500,000 for failures to disclose; and (ii) from Euro 5,000 to Euro 500,000 for delays (not exceeding two months) in making required disclosure.

New Maximum Amount of Treasury Stock

Article 7, paragraph 3-*sexies*, of the Italian Law on Economic Incentives (replacing the existing paragraph 3 of Article 2357 of the Italian Civil Code) provides that a listed company may now purchase own shares (within the limits of distributable dividends and/or distributable reserves) and hold treasury stock positions of up to an aggregate nominal value of 20%

of its overall share capital (this is an increase of 10% from the current maximum threshold of 10%).

Since according to Article 2357-ter, paragraph 2, of the Italian Civil Code, the voting rights of treasury stock are suspended, any repurchase of shares would have the indirect effect of proportionally increasing the voting power of any leading shareholder or group of leading shareholders.

Conclusion

It is too early to predict what impact these new rules will have and, in particular, whether they will increase stability, efficiency and transparency in the Italian market or merely discourage takeovers of Italian listed companies and depress market valuations.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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