

ClientAlert

Milan Office

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Important changes to Italian mandatory tender offer Rules

The *Decreto Competitività* (as converted into Law with amendments, the “**Decree**”)¹, published on August 20, 2014, in the Italian Official Gazette (*Gazzetta Ufficiale della Repubblica Italiana*), has made some important changes to the Italian mandatory tender offer rules.

The key changes introduced by the Decree in this area relate to the thresholds at which mandatory tender offers are triggered:

- Large Companies: a new 25% mandatory tender offer threshold for Large Companies (*i.e.*, companies which are not small and medium-sized enterprises “**SMEs**”) has been introduced, subject to the exemption in the event another shareholder owns a higher stake. The previous 30% threshold will continue to be applicable, subject to the exemption in the event another shareholder owns more than 50% of the shares or any other exemption applies.
- SMEs²: an SME has the option to set a mandatory tender offer threshold in its by laws, at a level between 25% and 40%. If a company opts in to a different threshold, such threshold would replace the 30% threshold mandated by law. SMEs that do not opt into an elective threshold will continue to be subject to the 30% threshold.
- Shares with increased voting rights (*i.e.*, two votes per share, “*azioni a voto maggiorato*”) and multiple voting rights shares (*i.e.*, three votes per share, “*azioni a voto multiplo*”) will be taken into account when determining whether the relevant thresholds are exceeded.

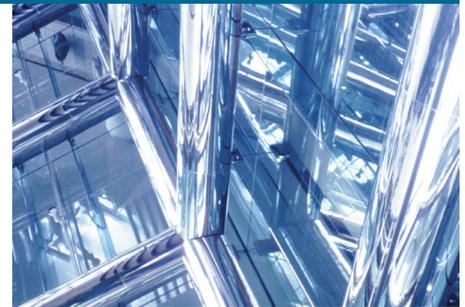
New mandatory tender offer thresholds

The Decree introduces (i) an additional threshold of 25% applicable only to Large Companies (as defined below) and (ii) allows SMEs to set different mandatory tender offer thresholds (between 25% and 40%) by amending their by laws.

Large Companies are those companies which exceed either the revenues or market capitalization thresholds of an SME. While the Decree is not entirely clear, it appears that companies which exceeded only one of such thresholds (or both thresholds for less than three consecutive calendar or fiscal years) cannot presently qualify as an SME but will be able to qualify as an SME in the future. On the contrary, companies which exceed both the revenues and market capitalization thresholds for three consecutive calendar or fiscal years will not be able to qualify as SMEs in future.

¹ Law Decree No. 91 of June 24, 2014, was enacted on June 25, 2014. The conversion law was published on the Italian Official Gazette (*Gazzetta Ufficiale della Repubblica Italiana*) on August 20, 2014, and became law No. 116 of August 11, 2014, effective as of August 21, 2014.

² SMEs are companies having (i) revenues of less than Euro 300 million, according to the latest available annual financial statements; or (ii) an average market capitalization during the latest calendar year of less than Euro 500 million. Companies which exceed both the revenues and market capitalization thresholds for three consecutive calendar years or fiscal years will not be able to qualify as SMEs in future.



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Consob is expected to enact implementing regulations regarding a number of matters in the new rules, including the way voting rights are counted for the purpose of the thresholds and, potentially, exemptions for persons or entities exceeding the thresholds on a temporary basis and definition of SME and Large Companies.

Large Companies: new mandatory threshold

For Large Companies, the Decree provides for a new 25% threshold in addition to the “standard” 30% threshold, which remains applicable.

Based on the new rules, there are two different thresholds with two main exemptions. The obligation to launch a mandatory tender offer for the entire share capital of a listed company will now be triggered if a person or an entity (the “**New Shareholder**”): (i) acquires more than 25% of the voting rights, subject to an exemption in the event another shareholder (the “**Significant Shareholder**”) owns more than 25% of the voting rights; or (ii) acquires more than 30% of the voting rights, subject to the exemption in the event a Significant Shareholder owns more than 50% of the voting rights.

The Decree does not clarify if the New Shareholder will be exempted from launching a mandatory tender offer in all circumstances in which the Significant Shareholder has a stake of more than 25% or only if the New Shareholder acquires a stake that is above 25% but below the level of the holding of the Significant Shareholder. Our preliminary view is that the exemption would apply in all circumstances in which the Significant Shareholder has a stake of more than 25%, but this interpretation will depend on the wording of the Consob implementing regulations.

SMEs: new optional threshold

SMEs may amend their by laws to set a new threshold for mandatory tender offers. This threshold can be set at any level between 25% and 40%, as an alternative to the standard 30% threshold. If by laws are amended accordingly, the 30% threshold would not apply to SMEs that have opted in. If a

resolution is passed by a listed SME resolving upon the introduction of an alternative threshold, dissenting shareholders may withdraw from the company at a price not less than the average of the closing prices of the shares during the six months prior to the date of publication of the notice calling the relevant shareholders’ meeting.

Further, the by laws of the SMEs may exclude, for a period of up to five years following the listing of a company’s shares, the application of the “consolidating” mandatory tender offer rules that normally impose a requirement on any person or entity – holding between 30% (or the different threshold provided for in the bylaws as set out above) and 50% of an Italian company and acquiring more than 5% of additional shares or voting rights in a 12-month period – to launch a mandatory public tender offer for the entire capital of the company.

New shares with increased voting rights and multiple voting rights shares are also relevant for the purposes of the new thresholds

As per our previous Client Alert³, the Decree has introduced a concept of shares which carry increased voting rights.

As a consequence, shares with increased voting rights (*i.e.*, two votes per share, “*azioni a voto maggiorato*”) and multiple voting rights shares (*i.e.*, three votes per share, “*azioni a voto multiplo*”) would count for their multiple when determining whether the obligation to make a mandatory tender offer has arisen.

However, neither shares with increased voting rights (*azioni a voto maggiorato*) nor multiple voting rights shares (*azioni a voto plurimo*) can be used as anti take-over measures, which provides that each such share will bear only one vote in the shareholders’ meeting convened to approve defensive measures.

³ See White & Case Client Alert on *New Italian finance law to facilitate company financings*, dated August 26, 2014, on www.whitecase.com.