



## UPDATES ON TRANSPARENCY OBLIGATIONS IN THE CORPORATE CONTROL MARKET IN ITALY

### 1. Introduction

Italian Law Decree No. 23 of 8<sup>th</sup> April 2020 (the so-called “**Liquidity Law Decree**”), introduced special measures relating to financial support, credit access and tax obligations for companies – as well as new provisions on healthcare and employment. These measures are part of a set of interventions focused on strengthening investors’ protection and the efficiency and transparency of the corporate control market – currently characterized by extreme price volatility due to the health emergency caused by the COVID-19 outbreak.

The Liquidity Law Decree, among other things, intends to strengthen the so-called “Golden Power”<sup>1</sup> regulation, which is mainly focused on protecting the ownership structure in the current emergency context and on avoiding that the possible price drop of shares could facilitate – in sectors of strategic relevance – hostile takeovers by foreign investors and, consequently, adversely affect the national economic and financial interest.

### 2. Amendments to the Italian Securities Act and to the Issuers’ Regulation

The Liquidity Law Decree introduced a series of major amendments to Italian Legislative Decree No. 58 of 24<sup>th</sup> February 1998, as subsequently amended (the “**Italian Securities Act**”), with respect to significant shareholdings and related transparency obligations, including SMEs with shares listed on regulated markets.

In particular:

- the *Commissione Nazionale per le Società e la Borsa*, the Italian securities regulator (“**CONSOB**”), is granted with powers to set, for a limited period of time, thresholds lower than the usual 3% and 5% for the disclosure of significant investments held in the share capital of listed issuers, irrespective of the “high current market value” which was previously required (and is temporarily eliminated);
- CONSOB is granted with powers to lower (from 10%) to 5% the minimum threshold, relating to the purchase of significant shareholdings in the share capital of listed issuers with a particularly widespread shareholding structure, the achievement of which triggers the requirement to submit the so-called “anti-raid declaration” (the “**Anti-Raid Declaration**”)<sup>2</sup>.

On 9<sup>th</sup> April 2020, CONSOB exercised its newly granted powers with the adoption of two separate measures, resolution No. 21326 and resolution No. 21327, which are in force, unless previously

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<sup>1</sup> The so-called “Golden Power” regulation, mainly governed by Decree Law No. 21/2012, identifies a series of extraordinary powers that the Italian Government could exercise when necessary in order to protect the ownership structure of companies operating in sectors considered as strategic and of national interest.

<sup>2</sup> The purchaser is required to state in connection with its investment with a view to the six months following such investment: i) the financing methods for the acquisition ii) whether the investor is acting alone or in concert with others; iii) whether the investor intends to cease or continue its acquisitions and whether its intention is to acquire control of the listed issuer or exercise influence over the management of the company and, in such cases, the strategy such investor intends to adopt and the transactions to implement it; iv) its intentions with regard to any shareholders’ agreements of which it is a party; v) whether or not there is an intention to propose the integration or removal of the administrative or supervisory bodies of the listed issuer. Such a statement is a national disclosure requirement, which supplements the statements which entities having a significant shareholding in the capital of listed issuers are required to publish in compliance with Directive 2004/109/EC (Transparency Directive), as amended by Directive 2013/50/EU.



revoked, for a period of three months starting from 11<sup>th</sup> April 2020 (and, therefore, until 11<sup>th</sup> July 2020).

In its analysis in view of the issuance of such measures, CONSOB took into account, among other things, the following aspects related to the economic and financial impact deriving from the current emergency situation:

- recent price trends of shares listed on the *Mercato Telematico Azionario* managed by Borsa Italiana, closely linked to the spread of the COVID-19 epidemic;
- the need for greater investor protection, as well as the need to ensure the efficiency and transparency of the corporate control market, against any possible speculation affecting the securities of listed companies carried out in an economic-financial context characterized by a marked drop in the share price due to the ongoing health emergency.

Furthermore, on 27<sup>th</sup> June 2019, CONSOB launched a consultation entitled "*Proposals to amend the Issuers' Regulation on corporate transparency*", which ended on 17<sup>th</sup> July 2019, concerning certain proposals to amend the Regulation adopted by resolution No. 11971 of May 14, 1999, as subsequently amended (the "**Issuers' Regulation**"). With resolution No. 21320 of 7<sup>th</sup> April 2020, which became effective on 11<sup>th</sup> April 2020, CONSOB issued a series of amendments to the Issuers' Regulation.

### 3. Reduction of the thresholds for the initial shareholding declaration in listed companies

CONSOB resolution No. 21326 provides:

- i. for the introduction of an additional threshold equal to 1% of the share capital of those listed issuers, not controlled by law and not qualifying as SMEs pursuant to the Italian Securities Act, expressly indicated in annex A to the resolution, above which disclosure obligations to CONSOB and to the subsidiary company, provided under the applicable law<sup>3</sup>, are required;
- ii. for the introduction of an additional threshold of 3% in the share capital of listed issuers not controlled by law and qualifying as SMEs pursuant to the Italian Securities Act, expressly indicated in annex B to the resolution, above which the disclosure obligations to CONSOB and to the subsidiary company, provided under the applicable law<sup>3</sup>, are required; and
- iii. that anyone holding, on the date of entry into force of such resolution, an interest, in the voting capital of listed companies mentioned in the annexes to the resolution, higher than the thresholds set forth in points (i) and (ii) above and lower than the 3% or 5% thresholds, is required to give notice to CONSOB in the manner and within the time limits set forth by the Italian Securities Act within 10 working days from that date (and, therefore, by 24<sup>th</sup> April 2020). This is without prejudice, however, to cases where the relevant communication has already been made in compliance with the provisions of resolution no. 21304 of 17<sup>th</sup> March 2020.

Simultaneously with the issuing of resolution No. 21326, resolution No. 21304 of 17<sup>th</sup> March 2020 was repealed. The latter resolution introduced similar enhanced transparency obligations for 48 listed companies, identified on the basis of two concurrent criteria (prior to the issue of the Liquidity Law

<sup>3</sup> Article 120, paragraph 2 of the Italian Securities Act provides as follows: "Those who hold a shareholding interest in an issuer of listed shares with Italy as the Member State of origin in excess of 3% of the capital are required to notify the subsidiary company and CONSOB. If the issuer is a SME, this threshold is 5%".



Decree) represented by: i) high market value and ii) the shareholding structure; as a result, the scope of application of the new disclosure obligations was broadened.

The new list of issuers covered by resolution No. 21326 includes 1 additional listed issuer not qualifying as a SME and 55 additional listed issuers qualifying as a SME, thus increasing from 48 issuers, pursuant to the previous resolution, to a total number of 104.

In short, through the measure in question, CONSOB has extended both the timing and the objective scope of application of the resolution originally adopted on 17<sup>th</sup> March 2020.

#### **4. Enhancement of the so-called “anti-raid regulation”**

CONSOB resolution No. 21327 provides for the introduction of an additional 5% threshold<sup>4</sup> upon reaching and/or exceeding which the obligation to make the Anti-Raid Declaration for listed issuers with a broad shareholder base, expressly indicated in the annex to the resolution, is triggered. Such resolution is not applicable to those entities or individuals already holding, at the date of entry into force of the resolution, a shareholding equal to or greater than 5% and lower than 10% in one of the issuers indicated in the annex.

As stated by CONSOB in its final assessments of the consultation, the obligation to make the Anti-Raid Declaration applies not only to cases where the thresholds of 10%, 20% and 25% are exceeded as a result of the purchase of equity investments in shares, but also as a result of investments in financial instruments or in the event that any of such threshold is exceeded as a result of a combination of investments in shares and financial instruments.

#### **5. Amendments to the Issuers’ Regulation – CONSOB consultation “Proposals for amendments to the Issuers’ Regulation on corporate transparency”**

On 27<sup>th</sup> June 2019, CONSOB launched a consultation concerning certain amendments to the Issuers’ Regulation. In particular, the following points have been subject to consultation:

- i. some amendment proposals to the Issuers’ Regulation, concerning disclosure of shareholdings in a range between 3% and 5% in companies where the SME status is lost, taking into account the need to ensure full transparent disclosure for the market, as well as the consistency of the information available to CONSOB, with regard to the ownership structure of Italian listed companies; and
- ii. certain regulatory proposals for the implementation of the power granted to CONSOB to identify, through its own regulations, cases where the Anti-Raid Declaration is not due, taking into account the nature of the entity or individual submitting such declaration or the company whose shares have been acquired. The proposals subject to consultation, therefore, identify a series of possible exemption from such obligation, because of the irrelevance - in the cases outlined - of the assessment of the purchaser’s intention.

The consultation ended on 17<sup>th</sup> July 2019 and CONSOB, with resolution No. 21320 introduced a series of amendments to the Issuers’ Regulation, described as follows.

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<sup>4</sup> The thresholds currently set are 10%, 20% and 25% of the share capital with voting rights in the listed issuer.



## 5.1 Disclosure obligations resulting from the loss of the SME status

As for the disclosure of equity investments in a range of 3% and 5% in companies losing their SME status, the resolution provides:

- i. for the obligation for issuers to disclose to the public the change in the status of SME by means of a press release issued following the annual shareholders' meeting called for the approval of the financial statement;
- ii. for the obligation to notify CONSOB and the subsidiary company by any person who – at the time of the loss of the SME status by the subsidiary company – holds an interest of more than 3% and less than 5% within a period of 15 trading days from the date of the press release concerning the change in status published by the company; and
- iii. for the declaration to: *i)* indicate the shareholding held at the date of the relevant press release, and *ii)* be made in specific manners, within a period of 15 trading days from the date of the press release concerning the change in its status published by the company.

## 5.2 Exemptions from the obligation to make the Anti-Raid Declaration

CONSOB also introduces certain exemptions from the obligation to make the Anti-Raid Declaration, despite the fact that the relevant thresholds are exceeded. In particular, the exemption applies:

- i. when: (i) a shareholder holds the majority of the voting rights which may be exercised at the ordinary shareholders' meeting of the listed issuer; (ii) the shareholding is acquired either: (a) as a result of a transfer between companies in which the shareholder holds, also jointly with other shareholders and/or indirectly, through the subsidiary, the majority of voting rights which may be exercised at the ordinary shareholders' meeting or (b) because of a transfer between one of these companies and the abovementioned subjects; (iii) the threshold is exceeded due to the exercise of pre-emptive, subscription or conversion rights; and (iv) the acquisition of the shareholding is the result of inheritances or deeds free of charge between living persons;
- ii. when the purchase of the shareholding is likely to trigger an obligation to launch a mandatory tender offer;
- iii. (a) to those who acquire the shares exclusively for the purpose of the transactions' offsetting and settlement, covering those shares within the cycle after the transaction or to central counterparts for the shares covered by the transactions it guarantees and subjects to executive procedures, within the time limits required for the completion of said procedures; (b) to those who hold the shares within the sphere of the provision of the share custody service, provided that the latter can only exercise the voting rights pertaining to said shares in accordance with the instructions provided in writing or via electronic mediums by the shareholders due the voting right; (c) when the voting rights concerning the shares acquired for the purpose of stabilization are not exercised or otherwise used to intervene in the issuer's management; (d) to shares acquired or sold by the European Central Bank or the national Central Banks of the Member States when exercising their monetary authority functions, including the shares given or received by way of pledge, the shares subject to repurchase agreement or similar liquidity contracts, for the purposes of monetary policy or within the sphere of a payment system; and (e) to short-term transactions and if the condition that the voting rights pertaining to these shares are not exercised is met;



- iv. in the event that the thresholds are reached or exceeded as a result of changes in the share capital and/or the number of voting rights;
- v. to (a) management companies purchasing shareholdings, including in aggregated form, in listed issuers as part of the management activities; or (b) non-EU subjects carrying on an activity for which, if they had their registered office or central administration in an EU Member State, an authorization would be required under Directive 2009/65/EU; as well as (c) Italian AIFs not reserved to professional investors and for EU AIFs whose applicable national law provides for investment limits and conditions equivalent to those provided for by Italian law with regard to AIFs not reserved to professional investors; and
- vi. if the purchase of the shareholding results in an obligation or is implemented as part of a public tender or exchange offer disclosed to the market.

### 5.3 The new Annex 4 to the Issuers' Regulation

Finally, a new annex 4 to the Issuers' Regulation was approved, providing for a standard *format* to be used for the transmission of Anti-Raid Declaration (new model 120/D) and amendments to models 120/A and 120/B aimed at coordinating with the exemptions from the obligations to submit an Anti-Raid Declaration.

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The Equity Capital Markets Department of Legance is available to provide any clarifications, also in respect of any specific situation which may be of interest to you.

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