Takeover Bids and 'Italian' Reciprocity

BY MARCO LAMANDINI, PROFESSOR OF SECURITIES AND COMPANY LAW, UNIVERSITY OF BOLOGNA, ITALY

Introduction

1. Article 2, paragraph 5, of the Italian Legislative Decree No. 229 of 19 November 2007 implementing in Italy Article 12, paragraph 3 of Directive 2004/25/EC of 21 April 2004 on takeover bids, brings about the so-called *'reciprocity clause'*, inserting a new Article 104-*ter* in the Italian Securities Act (TUF). The new article sets out that the provisions of Articles 104 and 104-*bis*, paragraphs 2 and 3 (and namely the passivity rule and breakthrough rule) do not apply to Italian listed companies when they are the target of a takeover launched by a bidder which is not subject to the same provisions, or by companies or entities controlled by the latter.

2. There are a number of interpretative questions raised by this national provision and its practical functioning; nonetheless, in the first place, one should address the issue whether the Italian legislator could in fact introduce in its current form the clause and, thus, whether such a new provision really complies with Community law. Should the answer be negative, as it seems possible to me, the reciprocity clause might result in a defensive measure that is merely fictitious for Italian companies: an 'optical illusion', thus. In turn, the provision might prove only an apparent safeguard from foreign bidders that are not contestable in comparable terms to those imposed by the Italian legislator on Italian companies, and would (or could) simply 'evaporate' due to non application further to a hostile bid (obviously, only if and when the national judge, following a possible reference of the ECJ, recognizes the necessity of non application) or due to a possible infringement proceeding prompted by the European Commission.

The scope of the reciprocity rule

3. The reason why it seems to me that the Italian reciprocity clause could be contrary to European law depends on the very fact that Directive 2004/25/EC designed such provision in the context of Article 12, where the so-called 'optional arrangements' are regulated, i.e. within a frame that does not contemplate the case of a national rule rendering compulsory Articles 9 and 11 of the directive (respectively providing for the passivity rule and the breakthrough rule) but implies the opposite. Even though the wording of the directive is ambiguous on this point (Article 12, paragraphs 2 and 3 literally refer to *'companies which apply* Article 9, paragraphs 2 and 3, and Article 11' without more), a more careful examination reveals that the directive made – at least so it seems to me – a different policy choice. It reserved the reciprocity only to those companies that, albeit governed by national laws that chose to opt out from the provisions contained in Articles 9, paragraphs 2 and 3 and/or 11, nonetheless apply them in their by-laws pursuant to Article 12, paragraph 2. This was clearly aimed at offering companies an incentive to align their choices with the policy objectives of the directive, also within a national context that deviates from such European benchmark (representing, though, a non mandatory policy goal after the adoption of the opt out provision of Article 12). Certainly, such an incentive could and perhaps should have been provided also to national legislators (as it was suggested in the European legislative process), in order to avoid a generalized recourse to the 'opt out' provision set out in Article 12, paragraph 1 (as it then occurred in practice in the national implementation), but the European regulatory choice, maybe inconsistently but not necessarily discriminatorily, seems to have been different: the reciprocity, as already said, seems to have been reserved only to companies that chose to adopt the contestability provisions in their by-laws using the optional regime within a national context that derogates from Articles 9 and/or 11.

4. It seems to me that this view is literally confirmed by Recital 21 of the directive, where it is stated that *'Without prejudice to international agreements to which the European Community is a party, Member States should be allowed not to require* **companies which apply those provisions in accordance with the optional arrangements** *to apply them when they become the subject of offers launched by companies which do not apply the same provisions, as a consequence of the use of those optional arrangements.'* As a matter of fact, the recital, in evoking companies that apply the passivity rule and the breakthrough rule 'in accordance with the optional arrangements' seems to expressly limit the scope of the reciprocity rule only to companies that make this choice pursuant to Article 12, paragraph 2: in other words, companies that apply these provisions as required by national law are not covered by the optional arrangements. The specification to be read in the recital appears, thus, to be relevant for the proper construction of paragraph 3 of Article 12. Indeed, even if the wording of this paragraph does not expressly dis-

tinguish between companies that apply Articles 9 and 11 as a consequence of a legal requirement under national law or as a contractual choice made with their by-laws (as noted, Article 12 does not use the same wording of Recital 21), such 'silence' of Article 12 could be explained by the very fact that such provision is inserted in an article exclusively devoted to optional arrangements and therefore to a situation which implies an opt out choice from the national legislator. In other words, the rule, despite its ambiguous wording and as evidenced by its location and proper systematic construction, should refer only to companies that apply the optional arrangements and therefore are not required by law to apply Articles 9 and/or 11.

5. In addition to that, this interpretative result seems to be confirmed also by an examination of the European legislative process. The reciprocity clause, in fact, was inserted for the first time in the text of the proposal after the Council meeting of 19 May 2003, to integrate the previous text of 7 May 2003 No. 8845/03 that, in turn, broadened the application of the breakthrough rule contained in the Commission's original proposal, in order to cover also multiple votes. In order to surmount the political hostility of some Members States in respect of a directive with such a broader breakthrough rule, the representatives of the Portuguese Government proposed (formally on 2 June 2003) the reciprocity clause in a wording, though, that was significantly different from the one finally adopted by Article 12 of the directive. Article 11-A of the so-called 'Portuguese compromise' provided indeed in paragraph 1 that 'Member States may require application of both or any of Articles 9 and 11 to all companies having registered offices in their territory. *In that case, the articles whose application is required remain applicable in all cases to an offeree submitted to their regime, even if they are not applicable to the offeror*'. The illustrative report of the Portuguese proposal clarified, consistently, that 'the second sentence deals with the problem of reciprocity, which is assumed as a general principle presiding over relations between offerors and offerees *when a regime is not imposed (by Member States) on one of them*' (...). 'Therefore in a take-over scenario, the following possibilities may occur: 1) *Member States impose Articles 9 and/or 11: the offeree is submitted to its regime in all cases, even if both or any of Articles 9 and 11 are not applicable to the offeror*'. A similar principle was followed, albeit with a different wording, in the first 'revised draft report' to the European Parliament from the rapporteur Mr. Lehne of 3 September 2003 (PE327.239/rev). Finally, the current text of Article 12, paragraph 3, was proposed during the Italian presidency on 31 October 2003 and was adopted by the Council and the European Parliament (PE327.239/1-30) on 27 November 2003. In its last version, the original paragraph 1 of Article 11-A of the Portuguese proposal was ruled out together with any reference to the case where Member States rendered compulsory the provisions contained in Articles 9 and/or 11. At the same time, however, a recital was adopted (No. 18/b, due then to become Recital No. 21 of the final text) which, as said above, clarified the meaning and the scope of application of the reciprocity clause.

Conclusion

6. The Italian reciprocity clause runs thus the risk of dissolving like a mere 'mirage' of institutional defensive measures. The main question is then whether, now that the European ambition to create a level playing field for the contestability of corporate control clearly failed (as clearly epitomized by the history of national implementation of the directive), it is wise from the side of the Italian legislator to deal with an issue of such strategic relevance (especially if one considers the ongoing process of transnational corporate restructuring and the current status of international financial markets, where a growing amount of liquid resources are managed by politics and/or for political goals of other nations) through a mere 'optical illusion', without taking a clearer and more transparent position. Obviously, the decision whether to opt in or opt out the provisions of Articles 9 and/or 11 does represent, politically, a difficult balancing exercise, where national short term interests should be weighed against long and medium term interests in a forward looking scenario which, though, looks difficult to read both as regards possible future development of international financial markets and geopolitics. It seems to me, however, that it could be preferable to renounce the reciprocity clause, introducing, though, at the same time and solely for sectors of truly strategic importance for national interest, clearer, more transparent and effective presidia of the interest of the national community, in accordance with Article 21 of Regulation 2004/139/EC and of the EC rules on the free circulation of capital as well as in compliance with the international obligations which Italy and the European Union are subject to. Lacking such a re-thinking of the current Italian provision introducing the reciprocity clause, what will happen if a sovereign wealth fund launches a takeover on a national champion like Intesa San Paolo, Unicredit or Generali?