

# New liability management opportunities

Following a market consultation process commenced on 6 October 2010 and concerning takeover bid regulations in general, Consob issued Resolution no. 17731 on 5 April 2011 (the "**Resolution**"), approving new secondary regulations which aim to ensure that rules on takeover bids and exchange offers ("**OPA**" and "**OPS**") concerning debt securities are consistent with European regulations.

The amendments are contained in Title II, Part II of the Regulation approved by Consob by way of resolution no. 11971, as subsequently amended (the "**Regulation on Issuers**").

The amendments described below will take effect on the day following publication of the Resolution in the Gazzetta Ufficiale.

## OPA and OPS concerning debt securities

### New exemptions

The Resolution renders Italian rules consistent with international liability management practice, and for multiple aspects ensures that rules on initial public offerings also apply to OPA and OPS involving financial instruments other than shares.

One of the principal novelties is the legal framework governing exemptions. In particular, the obligation to prepare an offer document to be approved by Consob will not apply in the following events:

- a) OPA and OPS concerning financial instruments other than shares, directed exclusively at qualified investors;
- b) OPA regarding debt securities that the bidder intends to purchase or, in case of an OPS, offer in exchange, with a par value equal to at least 50,000 euro;
- c) OPA and OPS for the acquisition of financial instruments other than shares, where such financial instruments, which bidder intends to acquire or, in case of an OPS, offer in exchange, are money market instruments issued by banks having a maturity at issue of under twelve (12) months.

In order to benefit from the exemptions under points b) and c) above, the offer will need to be launched by the issuer of the financial instruments under the OPA or OPS, or by any parent companies, subsidiaries or companies subject to common control.

Additional exemptions have been included, the most important of which is the exemption provided for OPA and OPS involving financial instruments other than shares issued by a Member State of the Organisation for Economic Cooperation and Development (OECD) or by international public bodies that include one or more Member States of the OECD or that benefit from unconditional and irrevocable guarantees from them.

### Key issues

**New exemptions for OPA and OPS on debt securities**

**New passporting rules**

**Novelties regarding consent solicitations**

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### *Passporting procedure*

The Resolution also regulates in greater detail the procedure, previously introduced in May 2009, to be followed in case of an OPS for the acquisition of debt securities made simultaneously in more than one EU Member State. In place of the offer document provided for under Article 38 of the Regulation on Issuers, the bidder may use in Italy the offer prospectus or admission document for trading on a regulated market approved by the regulator in the Home Member State, in compliance with Directive 2003/71/EC (the so called Prospectus Directive). In such events the bidder shall submit an application to Consob including a draft of the prospectus sent to the competent regulator and including a summary containing the following information:

- procedure and terms for acceptance of the offer in Italy;
- procedure for payment of the price and related tax regime;
- risk factors of relevance for the purposes of acceptance of the offer;
- existence of potential conflicts of interest between persons involved in the transactions, such as the bidder, persons appointed to collect acceptances, advisors and lenders;
- essential elements relating to issue of the financial instruments offered in exchange and the related exchange ratio.

Of particular interest is the introduction of a provision whereby in case the bidder intends to use a basic prospectus, additional information to be included in the summary analysis may be included in a separate document to be annexed to the application.

### *Consent solicitation*

Finally, with the Resolution, Consob has clarified that the events in which holders of financial instruments will be called upon to approve amendments to the terms, conditions or other clauses of the regulations that will be also binding upon any abstaining or dissenting parties (so-called *consent solicitation*) do not fall under the category of OPA and OPS. In such events in fact Consob held that information made available to holders of securities through documentation required under applicable corporate regulations is sufficient.

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This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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