sodali ALIGNING INTERESTS GWM GROUP

43, Via XXIV Maggio, 00187 Rome
2, Via Verdi, 20121 Milan
25, Upper Brook Street, London W1K 7QD
Solow Bldg., 9 West 57th Street, 26th Floor, New York 10019

Spettabile
CONSOB
Divisione Studi Giuridici
Via G.B. Martini, 3
00198 - Roma

c.a. Dott.ssa Francesca Fiore

Sent by mail: f.fiore@consob.it

Rome, November 25th 2010

Re: Comments on the Consultation of the "Recepimento della Direttiva 2004/25/CE del Parlamento Europeo e del Consiglio e Revisione della Regolamentazione in Materia di Offerte Pubbliche di Acquisto e Scambio"

Dear Sirs,

We are very pleased to have the opportunity to provide feedback on the CONSOB consultation document, on the Takeover Directive 2004/25/CE. As per Sodali role within the international financial markets, our considerations come from our experience in dealing with institutional investors, global and local custodians and proxy advisors on shareholders meetings and extraordinary transactions matters. For this reason, we decided to respond to only the questions that to some extent may have a consistent impact over a efficient and facilitated exercise of the shareholders' rights.

In this letter we will discuss other matters covered in the consultation not by answering the questions proposed one by one, but by providing comments on the main issues addressed in the consultation.

Q1 and Q2. "Questioni generali"

We welcome the scope and breadth of the regulatory objectives set by the Commission in this consultation. We are particularly pleased with the prominence given to the protection of minority shareholders and to the improvement of clarity in some areas of the existing regulation.

Q3."I rimedi per limitare la pressure to tender" – additional accepatances period

In light of some recent bids launched on Italian listed companies, we consider that the "pressure to tender" is in fact a situation of potential concern for investors.

In relation to this, we think that a decision over tendering the shares comes from the analysis between the offer price and the expected value of the price of the company. It seems to us, that the rationale behind the proposed amendments moves from a different perspective. It is clear that shareholders should

evaluate which will be the price of the shares after the end of the tender offer, whatever the result. It is also clear that these two analyses are quite different and may bring completely different behaviors. If the shareholders look at share price only, as an effect of the result of the tender offer, they will likely be keener to adopt "wait and see" behavior rather take a decision on their own. They might think to tender part of the shares as a plan to opt for a second chance if the tender offer goes through and this "unfair" behavior cannot be clearly highlighted by the law.

On the other hand, we believe that the mechanism to better protect minority shareholders in such situations is to increase, as much as possible, the access to the information and the clarity of this information – it is clear now, that retail shareholders do not tent to read the entire prospectus at all and that they rely completely on their financial advisors or Borsini – moving into quality versus quantity. Perhaps a different document prepared to unsophisticated investors, as the retail are, could be a solution and probably will allow them to be more informed directly.

We therefore do not welcome the proposed "additional acceptance period" as the only mechanism to better protect minority shareholders in such situations.

Q4. "I rimedi per limitare la pressure to tender" – mandatory fairness opinion by independent members of the Board

We also welcome the proposal of a mandatory fairness opinion about the offer to be issued by the independent board directors. However, we note two aspects that make such provision a duplication of the independent members of the Board role and asymmetry over the cases of the tender offer where this provision is mandatory.

In the first case, as per the new provision of article 39, the Board of Directors should issue a statement with the declaration over the acceptance of the offer and the indication of any members that were absent or voted against the offer proposed, including the rationale behind such vote. This is a general provision for all the tender offers and any independent members of the Board that are against the offer should be mandatory to declare their vote and reason. Therefore we do not understand why the new article 39b provides a mandatory statement by the independent members of the Board where they should have reported before. In this respect we see a duplication of the duty of the independent members of the Board and no value added in a statement which is already included in the Board of Directors one.

In the second case, the mandatory statement from independent members of the Board is required for all the tender offers launched by "Insiders". We certainly welcome such provision but we do not understand why such mandatory statement is not also required in the case of any hostile tender offer where such provision becomes more important to be evaluated by the shareholders.

Q6 to Q16. "Il rafforzamento della trasparenza in corso d'OPA" and "La rilevanza dei derivati per l'obbligo di OPA"

We welcome the increased disclosure regime for the parties involved in an offer. We strongly support the extension of the offers' mandatory disclosure regime to cash-settled derivatives' positions. Specifically, we consider that the transparency regime should apply to all cash-settled derivatives' positions regardless of the contracts' terms (i.e. the disclosure requirement should apply also to contracts with ex-ante clauses excluding

the possibility of physical delivery), as we suspect that any exclusion might encourage manipulation of contract terms to avoid the disclosure regime, with the substance of deals being different from their apparent terms.

In the light of relevant national and international cases of market distortions, due to the use of and lack of transparency on cash-settled derivatives, we strongly support the proposed regulation which would comprise all derivative instruments in the computation of the level of shareholdings relevant for mandatory bids.

On the other hand, we also believe that the derivative positions should not be taken in consideration as it is. In relation to the above mentioned purposes, we believe in the difference between ownership and voting rights. In the specific, we suggest that all the derivative positions should be considered not for the amount of share capital they represent but for the voting rights they carry which are fundamental for the identification of the amount of shares that clearly represents a control over the company.

Q17 to Q18. "Il voto degli independent shareholders nelle esenzioni"

We lend our support to the proposed exemption regime for mandatory bids on distressed companies. We welcome the role given to the independent shareholders in granting such exemption. We note again that a clearer framework of the acting in concert regulation would allow more effective collaboration among independent shareholders of distressed companies, thus enhancing the decisional process and the voting behavior.

Q19 - Q23, Q28 - Q30, Q31 - Q33. "Interventi per favorire la dinamicità del mercato del controllo societario", "Riduzione dei costi di compliance per gli offerenti", and "Parità di trattamento per investitori italiani ed esteri ed armonizzazione con la disciplina degli altri Paesi"

We support the proposed simplification of the procedures surrounding the launch of offers, as they would make it easier for potential bidders to make offers, thus improving the overall functionality of the market for corporate control. We also strongly support the requirement that the same information should be disclosed to all bidders. This requirement will make the bidding process more transparent and efficient as it is in the ultimate interests of market participants.

Q24 to Q27. "Attuazione delle deleghe legislative in materia di azione di concerto"

In general, we consider that the proposed regulatory approach which includes explicit "negative presumptions" is particularly useful in tracing a bright line between the exercise of shareholders' duty, as responsible owners, and acting in concert. In fact, institutional investors who would like to share information and work together are often faced with considerable legal uncertainty. In a number of cases the vague definition of acting in concert regulations has prevented investors, who have no intention to gain, keep, or strengthen company control, from co-operating. We therefore particularly welcome the approach adopted by the Commission in explicitly defining a number of cases and situations where shareholders may collaborate and coordinate the exercise of their voting rights without falling into the definition of "acting in concert".

We support the inclusion of the coordination among shareholders aimed at exercising the rights as stated in articles 2367, 2377, 2388, 2393-*bis*, 2395, 2396, 2408 and 2497 of the Civil Code, as well as articles 126-*bis*, 127-*ter* and 157 of the TUF.

We also support the explicit mention that discussions and agreements to submit slates of nominees, to represent minority shareholders on the board, are not acting in concert. In principle, we would prefer not to have the presumption that only lists which comprise of a number of candidates that is less than half of the total number of board seats, not considered as acting in concert.

Even though it can be difficult to evaluate the "acting in concert" purpose that may come from a co-operation between major shareholders in presenting a list of candidates for the Board of Directors, we believe that a negative presumption may create a distortion of the general principle. Major shareholders, which are not acting in concert in relation to other company's matters, should not be prevented to present a common list of candidates for the Board of Directors.

Nevertheless, we understand that sensible and practical criteria should be identified to facilitate the implementation and enforcement of the proposed regulation. We therefore lend our support to this proposed text.

Finally, we support the explicit mention that the coordination of shareholders when they exercise their voting rights on matters such as management and directors' remuneration, authorization to carry out related party transactions, and discharge of the directors of the board as not acting in concert. While these matters are of importance for responsible owners, they clearly do not exhaust all the possible situations where coordination of voting may lead to better decisions at shareholders' meetings, benefiting both the company and shareholders. We therefore lend our support to the negative presumption mechanism on such matters, but we would encourage the Commission to add a further reference for a negative presumption applying to all the corporate governance issues whose aim is not to gain, keep or strengthen company control.

We therefore welcome the continued attention by the Commission to these crucial issues for the development of the Italian financial market. We welcome dialogue on these issues noted in this letter or regarding our activities, if that is of any assistance to you. Please do not hesitate to contact Sodali for any clarification the Commission may need

Yours sincerely,

Andrea Di Segni

Sodali
Andrea Di Segni
Head of Operations
Tel. +39 06 45212803 | Mob. + 39 335 5865995
Via XXIV maggio 43, Rome - 00187 - Italy
Mail. a.disegni@sodali.com