

In recent years, national enterprises in Italy and other European countries have generally been protected from possible acquisition by foreign entities interested in investing in the Italian market. Such a trend, although largely spread (especially due to the worldwide financial crisis), has mostly involved those businesses incorporated and developed in Italy with a brand strongly connected to the Italian territory, so that a possible change of ownership in favour of foreign companies could be seen as a loss by the Italian business community of one of its national champions and, of course, of the relevant turnover.

In particular, in spite of continuing efforts to reduce economic barriers among countries inside the European Union, the European market witnessed a wave of protectionism by the governments of member states aimed at bolstering the companies established inside their borders and at limiting the unemployment growth throughout the EU countries: protectionism has been perceived as a tool for governments to defend themselves from the profound effects of the financial crisis.

This approach, however, could undermine the economic situation of the other states. In addition, the more individual governments that implement such measures, the more difficult the attainment of a true single market becomes.

Of course, if the economic and financial protection measures taken by individual member states are not compatible with EU laws governing the internal market, the EU institutions responsible for safeguarding the interests of the community as a whole should take appropriate action against them.

Case record

The protectionism cases which have occurred in Europe may substantially be divided into two categories: (i) proper measures enacted by the internal governments of the European countries; and (ii) moral suasion imposed by certain internal governments with respect to some transactions involving important companies strictly linked to the country in which they were incorporated.

With respect to Italy, after the implementation of the European Directive 2004/25/CE regarding public takeover bids over listed

Italian companies, the regulations on defensive measures against hostile takeover bids have been amended by introducing, in addition to the pre-existing passivity rule, the breakthrough rule (and the reciprocity clause).

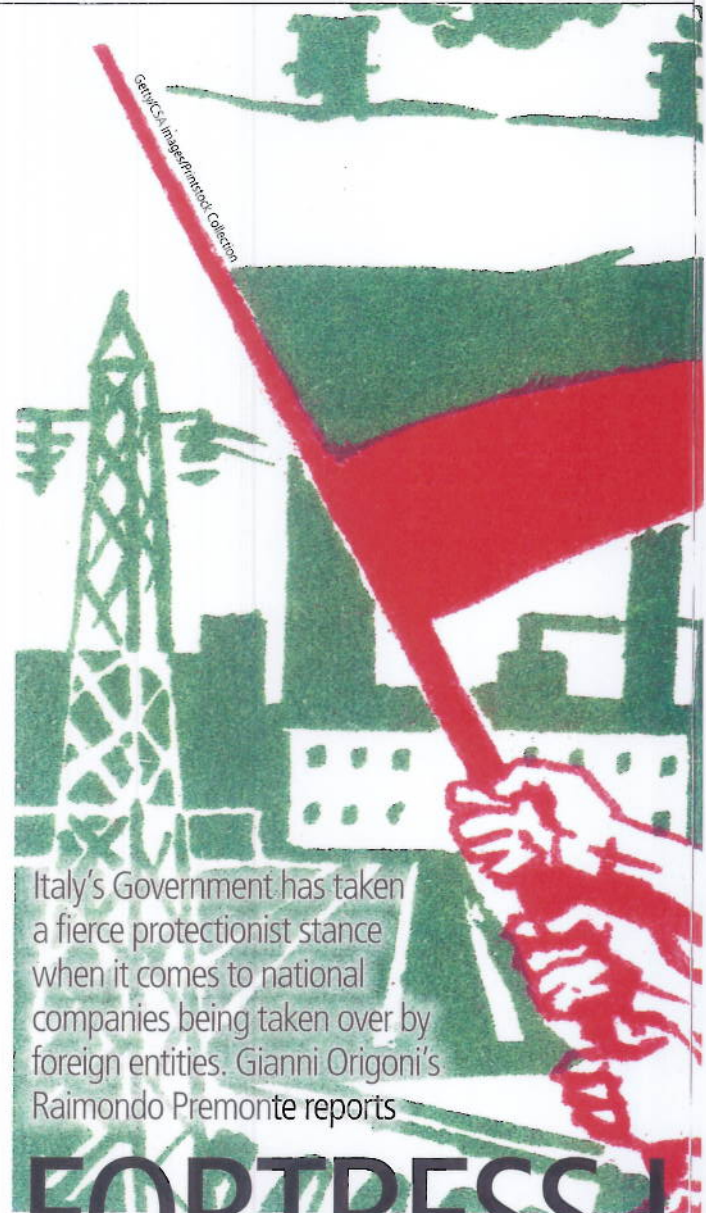
Substantially, such rules respectively provide that (i) the board of directors of the target company (except in case of express authorisation by the shareholders' meeting) shall abstain from carrying out acts or operations that could prevent the achievement of the purposes of a takeover bid, and (ii) the bylaws of the target company or any shareholders' agreements, which in turn prevent the fulfilment of a public takeover bid (eg, by limiting the transfer of the shares), are not applicable in case of a takeover bid.

These regulations, however, were weakened by certain amendments enacted in November 2008 and confirmed by law in January 2009. The main amendment was that the passivity rule and the breakthrough rule (which were previously of a mandatory nature) became applicable only to those Italian-listed companies that expressly provide their applicability in the respective bylaws.

Such reform was enacted during the economic and financial crisis of recent years and also affects takeover bids on Italian-listed companies – by removing the automatic application of the passivity rule and the breakthrough rule, the law-making bodies were seeking to protect Italian-listed companies from the danger of hostile takeover bids, as well as (and even more importantly) from those originating outside of Italy, facilitated by the strong depreciation of share prices.

In 2005, the French Government enacted new regulations providing the necessity of a prior authorisation by the French authorities on the proposed investment to be made by foreign entities in French enterprises that are included in a list of strategic industries specifically determined by the above-mentioned regulations, such as those operating in the defence, military-related technologies, biotechnology, information security and gambling businesses.

Such regulations were used in order to prevent the takeover by PepsiCo of French food group Danone; in fact, such regulations,



Italy's Government has taken a fierce protectionist stance when it comes to national companies being taken over by foreign entities. Gianni Origoni's Raimondo Premonte reports

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even if not applicable to the food and beverage sector, were applicable to Danone due to its owning of certain gambling properties. Such measures, applied in the Danone case, also impacted any potential bids on national enterprises operating in the fields that the French Government considered as 'strategic'.


Moral suasion

In certain cases, it was not a law or another official act that stopped transactional acquisitions. In fact, the so-called moral suasion of the internal governments is often sufficient to interfere with the

investment of foreign entities in national enterprises, by urging domestic investors to 'save' national companies.

As an example of moral suasion, the Alitalia case is self-explanatory: the Italian Government was able to effectively block an offer submitted by Air France-KLM. In particular, the Italian Government proposed to arrange a bridge loan from the state for a certain period of time, until an 'all-Italian' bid be presented to save Alitalia from falling into foreign ownership.

The idea was to appoint an Italian 'white knight', able to compete against Air France-KLM, to preserve



(CAD), and after a long period of negotiation, CAI purchased Alitalia.

In 2006, the French utility giant Suez and the 80% French state-owned utility company Gaz de France (GdF) carried out a merger to create an European leader in the energy and environment sectors. This was also the measure through which the French state countered a possible bid by Italy's Enel over Suez, thus protecting the country's utilities from a foreign takeover. Of course, such a measure was at that time considered as a means of restriction of the European market carried out by the French internal Government.

Recent cases

Two recent cases of protectionism relate to two large and well-known Italian companies: Bulgari and Parmalat. In particular, in March 2011 the French LVMH acquired Italian watches and jewellery company Bulgari, by acquiring first the Bulgari family's 50.4% stake in the capital of the company and then launching a public tender offer for the remaining share capital listed on the Italian stock exchange.

The Italian press seemed to view the transaction with regret, from an Italian standpoint, for losing the ownership of such an important national enterprise which had been established and grown in Italy and had become one of the most renowned Italian brands worldwide.

Similarly, when in March 2011, the French Groupe Lactalis expressed its intention to acquire (in addition to the stake already owned) a 15.3% participation in the capital of Parmalat, to reach a 29% stake in Italy's largest dairy company, the national press and some leading Italian politicians expressed their concern on another important company falling under foreign hands and insisted on the need to preserve the Italian ownership of Parmalat.

After the acquisition, Lactalis would have had the opportunity to appoint a significant number or the majority of the members of the board of directors of Parmalat at the annual shareholders' meeting scheduled in mid-April, with the consequent management of the company passing under French control. Then, in March 2011, the Italian Government approved a decree allowing Parmalat, as well as all Italian-listed companies, to postpone their annual

shareholders' meetings until the end of June.

Such measures may be considered as a technical solution adopted by the Italian Government, which formally was limited to

intervention by the Italian Government, the small investors in the Italian market have been protected. In fact, thereafter Lactalis launched a voluntary takeover bid over the entire capital

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changing the terms for annual shareholders' meetings but actually postponed the possibility for Lactalis to take control of the management of Parmalat.

With this move, the Italian Government allowed the time and possibility for other Italian entities to launch a takeover bid over the capital of Parmalat, which would imply that the majority stake of Parmalat (and therefore the relevant management control) would continue to be held by Italian entities, as opposed to Lactalis.

As a result of such technical

of Parmalat (with adherence period starting on 23 May 2011), which could result in the protection of small investors from the speculation of large investors and shareholders holding large interests in the capital of Parmalat.

As of today, no counter-takeover bids have been launched by Italian investors. Of course, in case of a counter-takeover bid, the ordinary rules will apply and the control of Parmalat will be acquired by the bidder submitting the best offer.

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the Italian nationality of the carrier.

Thus, Air France withdrew the offer, citing various financial reasons following a long period of negotiations with Alitalia and the trade unions representing the employees. These negotiations did not lead to positive results, and some could argue that this was a consequence of the protectionist reaction coming from the Italian Government and politicians.

Following the impasse regarding Air France-KLM, Alitalia entered into negotiations with the announced Italian bidder, a consortium of Italian entrepreneurs known as Compagnia Aerea Italiana