C O N S O B
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15 November 2010

Comments to the Consultation on 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,

Hermes, CalPERS, F&C, Local Authority Pension Fund Forum, Mn Services, Railpen are international institutional investors and pension funds with substantial investments in the Italian capital market. Many of us are signatories to the United Nations backed Principles for Responsible Investments (PRI).

Investors are widely encouraged (i.e. *United Nations Principles for Responsible Investments*, *UK, South Africa and other developing Stewardship Codes*) to exercise ownership rights actively so as to ensure an appropriate level of oversight of boards and management of companies they invest in. In order to be more effective in doing so, investors are encouraged to work together. A number of active investors already share information and analyses about companies, in particular regarding specific agenda items for upcoming shareholders' meetings. However, in order to advocate effectively for good governance, particularly in companies with widely dispersed ownership, much more co-operation is required.

We are therefore very pleased to have the opportunity to provide feedback on the CONSOB consultation document on the Takeover Directive 2004/25/CE. While we appreciate the breadth of the consultation document and the proposed regulatory solutions, and some of us will respond more fully to the consultation as a whole, we will focus our comments in this letter on *Question 25* related to the cases of cooperation among shareholders that do not represent "acting in concert".

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 of the articles 2367, 2377, 2388, 2393-*bis*, 2395, 2396, 2408 and 2497 of the Civil Code, as well as of the 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 a number of candidates that is less than half of the total number of board seats are not considered acting in concert. 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, authorisation to carry out related party transactions, and discharge of the directors of the board is 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 welcome the continued attention by the Commission to these crucial issues for the development of the Italian financial market. We would welcome dialogue on the issues noted in this letter or regarding our activities if that would be of assistance to you.

Yours sincerely,

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