Protectionism and Parmalat: analysing the Groupe Lactalis takeover bid

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Introduction

On July 8 2011 French dairy company Groupe Lactalis confirmed the acquisition of 83.3% of Parmalat SpA's stock capital on the conclusion of a !3.4 billion takeover bid. The transaction makes Groupe Lactalis the world leader in dairy products.

Following Groupama's attempted takeover of Premafin, EDF's interest in Italian Edison and the takeover of Bulgari by LVMH, the acquisition is the latest in a number of cross-border deals and attempted deals involving Italian and French businesses. Groupe Lactalis's interest in Parmalat sparked a protectionist backlash, but the Italian government failed in its attempts to block the takeover.

Parmalat was left with !14 billion in debts following a financial crisis in 2003. Thanks to an industrial restructuring programme led by its former chief executive officer, Enrico Bondi, it boosted its net assets by !2.4 billion and its liquidity by !1.47 billion, reducing its debts to around !34 million.

Groupe Lactalis did not originally plan to launch a takeover bid for Parmalat - it could have acquired control without making a public offer, and this would probably have been an easier path to take. This update analyses the main events and legal issues which led the French company to opt for a public offer.

Anti-takeover measures

On January 26 2011 private equity funds Mackenzie, Zenit and Skagen consolidated their share packages in Parmalat to create a 15.3% stake - enough to acquire control of Parmalat's board of directors. Groupe Lactalis's interest in the target was disclosed early in March 2011, when it attempted to acquire a sufficiently large stake to file its own list of directors - its aim was to replace Parmalat's board and thereby control the company's management. Analysts regarded Groupe Lactalis's interest as genuine, as it already had operations in Italy through Galbani, Invernizzi, Locatelli and Vallelata. These four controlled companies focus on cheese products - a complementary market to that of Parmalat, which is the leader in the Italian milk market.

Parmalat's board called a shareholders' meeting for April 14 2011 to approve the company's financial statements and appoint a new board. Therefore, Groupe Lactalis had to move fast in order to secure the right to appoint its preferred management team at the meeting. However, this deadline was not the only

reason for attempting a rapid acquisition of Parmalat. The government was thought to be working on an anti-takeover decree that would require foreign acquirers to obtain prior government approval of a takeover of an Italian public company. Thus, if Groupe Lactalis were forced to delay its plans, the government might be in a position to veto them. A longer process might also give Italian market players time to prepare public offers for Parmalat, whereas Groupe Lactalis presumably hoped to make the first offer, rather than a higher counter-offer.

In one week Groupe Lactalis - with the help of two banks, Société Générale and Crédit Agricole - acquired a 28.97% stake in Parmalat. On March 15 2011 a first tranche of 3.1% of Parmalat shares was purchased, followed by further small transactions. Meanwhile, Société Générale started buying Parmalat shares under an equity swap agreement; the shares were to be sold back to the French group at a fixed price and on a fixed date. On March 22 2011 Groupe Lactalis, Société Générale and Crédit Agricole purchased the 15.3% share package held by Mackenzie, Zenit and Skagen.

As a result, Groupe Lactalis held 29.87% of Parmalat, either directly or indirectly. Under Italian law this percentage holding did not trigger a mandatory takeover bid (for which the threshold is 30%); however, it entitled Groupe Lactalis to appoint nine out of 11 directors to Parmalat's board during the shareholders' meeting.

Protectionist steps

The risk of Parmalat falling under French control was material. The government began to investigate measures to keep the company - which it considered a strategic Italian business - under Italian control. There were no rules against foreign takeovers of Italian companies and the adoption of new rules on 'golden shares' would probably have been opposed by the European Commission. However, one option was to find and sponsor Italian acquirers for Parmalat. At the time, a consortium of banks and industrial interests was already working on the deal, but was struggling to find a common strategy and needed more time to pool resources.

In an attempt to buy time and block the Groupe Lactalis acquisition, on March 25 2011 the government issued Legislative Decree 26/2011. The use of a legislative decree - an interim measure which requires ratification by both houses of Parliament - was justified by the need to act quickly in order to prevent foreign acquisitions. Officially, the legislative decree was not prompted by a particular takeover, but it was clearly a reaction to the threat to Parmalat. The legislative decree provides that:

- the board of directors of a listed company can postpone a shareholders' meeting that has already been called; and
- shareholders can file new lists of directors within a term to be calculated on the basis of the date of the postponed meeting.

When the legislative decree was enacted, three lists had already been filed by Groupe Lactalis (28.97%), Intesa San Paolo (2.14%), Assogestioni (2.28%) and the equity funds (15.3% in total) before they had sold their shares to Groupe Lactalis. Postponement of the meeting would have allowed new players to file new lists. The legislative decree focuses on four economic sectors: agro-industry, energy, telecommunications and defence.

The Parmalat board, which had already declared its opposition to Groupe Lactalis's planned acquisition, took advantage of the new rights under the legislative decree and postponed the meeting until the end of June 2011. Groupe Lactalis filed an action before the Court of Parma to stay the board's decision. It claimed that the directors' decision breached conflict of interest rules, as the directors in office had already been nominated as candidates for the new board by a minority shareholder, Intesa San Paolo. Therefore, they had an interest in postponing the meeting in order to negotiate with other minority shareholders (and potentially with the Italian consortium). Moreover, Groupe Lactalis maintained that the board's decision had caused substantial damages, since it had jeopardised the !1.5 billion investment that Groupe Lactalis had made to purchase the control package from the private equity funds. Groupe Lactalis maintained that the allegedly high share price that it had paid to the funds was mainly due to the short timeframe available to negotiate a deal in view of the meeting on April 14 2011.

The court rejected Groupe Lactalis's application and confirmed that the board's decision complied with the applicable rules, including the new legislative decree.

Authorities' further reactions

Despite the government's efforts, the Italian consortium was beset by problems. Confectionery group Ferrero, which was considered the only suitable industry partner, imposed several conditions on its participation. Dairy group Granarolo was interested in the deal, but was not big enough to afford it - it could raise only !500 million, compared with Groupe Lactalis's !1.5 billion. However, financial sponsors would not support a takeover without an industry project behind the deal.
These difficulties led the government to propose another measure: the creation of a fund for investments in strategic companies. The chosen vehicle was the holding company Cassa Depositi e Prestiti SpA (CDP), 70% of which is owned by the state. Legislative Decree 34/2011[1] was issued to allow CDP to acquire either shares or quotas of companies that are deemed to be "of national interest" - that is, companies that operate in a strategic field and are significant to the national employment market. The strategic role of such companies must be assessed through an administrative procedure involving Parliament and the Ministry of the Economy. CDP can invest either directly or through corporate vehicles or investment funds in which it participates.

The new regulation on CDP is clearly inspired by the French Fonds Stratégique d'Investissements, which was incorporated to protect and support French companies in strategic fields. The similarities between the two vehicles may also be a precaution against a possible breach of EU antitrust rules. CDP's investments and operations potentially risk being penalised by the commission. As a result, the government has analysed the French protectionist rules behind the Fonds Stratégique d'Investissements - and in this case used them against French attempts to acquire a strategic Italian company. If a regulation issued by the French government is deemed valid, a comparable rule in Italy should be regarded in the same way.

The CDP began talks to assemble an Italian consortium, with Intesa San Paolo as financial partner and Granarolo as industrial partner; however, it soon became clear that the three entities' interests would be difficult to reconcile. The CDP's primary objective was to save Parmalat from a foreign takeover, either by acquiring Groupe Lactalis's shares or by launching a takeover bid; it planned to involve Granarolo only in the secondary phase, following the appointment of new management. However, Granarolo's aim was to be the industrial pivot of the transaction from the beginning and to participate in the new managerial appointments, thereby protecting the interests of thousands of milk producers in Granlatte, the cooperative which owns 80% of Granarolo's shares. Intesa San Paolo found itself caught in the middle, being a shareholder in both Granarolo (20%) and Parmalat (2.14%).

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Takeover bid

Given the measures undertaken by the Italian authorities, a public takeover bid was the only option available to Groupe Lactalis. On April 27 2011 Groupe Lactalis launched its bid at an offer price of !2.60 a share. On the Milan Stock Exchange, Parmalat's securities rose to !2.56, approaching the offer price.

The bid imposed the following conditions:

- Groupe Lactalis's participation in Parmalat was to be at least 55%. The acquirer already had a 28.9% stake; therefore, it needed a further 26.1% to reach the threshold for a successful bid.
- The number of shares in circulation after the bid was to be no greater than the number involved in the bid.
- The competent authorities were to approve the acquisition by the first day of stock exchange trading after the deadline for joining the bid.
- Parmalat was to refrain from operations that might hinder the transaction.
- Neither laws nor regulations were to be issued to limit the power to appoint a majority of directors or the right to vote in the shareholders' meeting.

The bid was structured so as to insulate Groupe Lactalis from 'poison pills' prepared by Parmalat or the government. The prospectus was approved by the market regulator, CONSOB, on May 13 2011.

Given the size of the parties involved, potential antitrust issues were identified in several jurisdictions. The transaction required antitrust authorisation in the European Union, Canada, South Africa, Ukraine, Russia and Colombia. The transaction was notified to the European Commission for merger control clearance on

May 5 2011. On June 14 2011 the proposed deal was cleared. The commission cited the different product markets in which the companies operate and stated that the transaction would not restrict competition in Italy or any other EU state; however, the transaction might be subject to specific divesture activities, particularly in Italy and France.

On May 17 2011 the board rejected Groupe Lactalis's offer on the basis of a fairness opinion that estimated the fair value at up to !3.17 a share. Groupe Lactalis did not increase its offer - on the basis of market analysis, it was confident of hitting the 55% minimum threshold without changing the offer price. The bid also prompted reactions outside the company. Codacons, the Italian consumer association, filed a brief before the Administrative Court of Rome to stop the public offer, arguing that relevant information which was required to protect consumers had not been provided. The court dismissed the preliminary injunction and refused to suspend the bid. Codacons has appealed to the State Council.

As Parmalat's majority shareholder, Groupe Lactalis could take effective control of the company by appointing directors to nine of the 11 seats on the board. The appointments were made on June 28 2011 for a one-year term. The new chairman is Franco Tato, a former head of Enel SpA. The shareholders' meeting paved the way for the full takeover by Groupe Lactalis. However, the Italian consortium is still looking for a way into the transaction - CDP is seeking to negotiate the purchase of a 10% share package after the conclusion of the takeover bid.

Outstanding issues

The Milan Public Prosecutor's Office has opened two inquiries into the takeover. The first was opened on March 25 2011 against persons unknown for possible market manipulation; the second, which was opened on May 11 2011, concerns possible insider trading. The latter inquiry focuses on four people, including Patrizia Micucci, the head of corporate and investment banking at Société Générale in Italy, and her husband Fabio Canè, the head of investment banking at Intesa San Paolo. The Milan Public Prosecutor's Office is considering whether the manager of Intesa San Paolo would have been aware of confidential information regarding the price that the bank had offered to the private equity funds to acquire their shares in Parmalat SpA, and whether he might have transmitted this information to his wife, thereby allowing Groupe Lactalis (which was advised by Société Générale) to offer a slightly higher price.

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Endnotes

(1) Ratified and converted into law on May 25 2011.

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