DIPARTIMENTO DI GIURISPRUDENZA

Cattedra di Diritto Privato Comparato

THE COOPERATION BETWEEN ENTERPRISES IN THE ITALIAN LEGAL SYSTEM: A COMPARATIVE ANALYSIS WITH THE CORPORATE FORMS PROVIDED BY LUXEMBOURG AND FRANCE.

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Anno Accademico 2016-2017

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INTRODUCTION

The economic growth of an enterprise on the relevant markets is highly influenced by its ability to interact with all possible operators. Basically, the possibilities for an enterprise to expand its business dimension depends from the role that the firm plays within the market. To this extent, it is no surprise that enterprises, willing to increase their business advantage on a relevant market, conclude cooperation and coordination agreements. The cooperation between enterprises may ultimately be considered one of the possible extensions of the "freedom of private economic initiative", enshrined in Article 41 of the Italian Constitution. As all the economic phenomenon, the cooperation between enterprises fall within strict legal boundaries. Substantially, the cooperation between economic operators may be realized through the coordination, and integration of the respective business activities, as well as the accurate predisposition of organizational structures used in common by the cooperating firms. In this framework, the legal instruments provided by the national lawmaker are essential for regulating the interactions between undertakings.

Over the years, the Italian lawmaker aimed at encouraging the cooperation agreements, and developing an efficient legal framework. The need to set forth legal devices for the cooperation between foreign economic operators, together with the globalization of the markets, asked for major legislative actions by the EU lawmaker. Thus, there is a comprehensive range of forms for the cooperation between enterprises. The choice of a given cooperation agreement depends essentially on the degree of integration that two or more firms are willing to achieve, when consolidating their business activities. As will be discussed in the first chapter, there are several business integration mechanisms provided by the Italian legal systems. Whereas, some of those forms of cooperation are flexible contract-based legal devices, there are many others that provide more complex organizational and structural duties upon the parties. In the latter, there may be cooperation agreements that bring two or more firms to conduct

business through a newly-created business vehicle. Furthermore, there are several factors that may influence the choice of a given legal device, such as the stability of the common organization, the duration of the cooperation agreement, or liability profiles *vis-à-vis* third parties.
In fact, it is common that for long-term, highly-integrated business, enterprises choose to cooperate through Contribution Agreements, entailing the constitution of a group of enterprise, or the creation of new legal entities (such as Merger Agreements). Concluding cooperation agreements with foreign operators brings many firms to strengthen their position in the global market, to the point they reach a multinational connotation. At that point, it is understandable that multinational corporations saw M&A operations as the only possible and profitable way to expand their business activities, increase revenues and broaden their industrial customers base. In order to strengthen their position in the relevant markets, large scale enterprises tend to conduct jointly their businesses activities through a more stable organization of their financial assets. In general terms, the cooperation between large companies, or between SMEs (ndr. small and medium-sized enterprises), entails very often the reshape of the structure of the concerning firms, or the acquisition of new assets, as well as the coordination of the financial and organization resources held by each firm.

All the national legal systems provide certain tools for the cooperation between enterprises. The free movement of goods and services within the European Union have called for the harmonization of the legal devices provided for the cooperation between enterprises[1]. As a matter of fact, the *corpus* of provisions regulating contractual relations between firms have called all national legal systems for a major flexibility. This explains why the contractual models for cooperation and integration have converged towards a common set of rules[2]. Clearly, the establishment of an EU internal market has brought all the Communitarian legal systems to provide similar clauses within their cooperation agreements, but it went further. The European lawmaker has set forth a proper European legal framework in order to allow EU

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[1] *Manuale di Diritto Privato Europeo – Volume* 2, Carlo Castronovo & Salvatore Mazzamuto, pp. 252.

[2] Ibid. pp. 251.

enterprises to cooperate following coherent regulations. Indeed, the peak of this harmonization process has been achieved on June 2008, when the European Commission introduced the Small Business Act (SBA), with the specific aim to encourage the creation of a coherent network for the cooperation between small and medium-sized enterprises. Gradually, common standards and clauses in the cooperation agreements have consolidated a flexible legal framework. By doing so, it can be made the point that the so-called *acquis communautaire* has reduced the legal distances between the contractual models, provided by each national legal system[3].
Indeed, for the purpose of this work the comparative analysis will concern the corporate-structured vehicles for the cooperation between enterprises.
Another side of the spectrum of the creation of an EU internal market is the freedom of establishment held by a given company, with respect to the incorporation seat[4]. In fact, since the *Daily Mail* case, the European Union have prioritized the resolution of potential conflicts between corporate law regimes, rather than the harmonization of a comprehensive European Corporate Law regime[5]. That is not to say that the European lawmaker did not harmonize some major corporate subjects at supranational level (e.g. Directive 2004/25/EC, the so-called '*Takeover Directive*'). However, in such corporate-driven markets, such as the Communitarian one, choosing the incorporation seat plays a crucial role, with respect to the corporate law environment a jurisdiction offers.
Going straight to the point, one of the main criteria to value the success of a corporate model may well consist in its ability to attract foreign investments. As said above, highly-integrated business models bring encourage stable cooperation, using legal instruments that either give much more stability to the common organization of two or more independent firms (such as the formation of a newly created corporation), or allow them to conduct business as a sole entity (as a result of a merger).

[3] *Il codice civile europeo, Il dibattito, i modelli, le tendenze*, Ioriatti Ferrari, pp. 155

[4] Article 49, Treaty on the Functioning of the European Union.

[5] *Choice of jurisdiction in European Corporate Law: perspectives of European Corporate Governance*, Tobias H. Tröger, pp. 4.

The scope of this work will be to explain how the corporate-structured vehicles, provided by the Italian legal system are less attractive for foreign investors, that would rather choose to conduct business in other European corporate environments. Having a competitive corporate environment encourages foreign enterprises to make long-terms investments in a given country. For the purpose of this work, there will be made strictly legal considerations. So, there will be no mention to the other factors which may influence the choice of a large scale firm to incorporate in a country, such as the unstable political and economic environment. Furthermore, among the *società di capitali* models, only the Srl and the Spa will be subjects of study. The two most used limited liability corporate vehicles in Italy are the s*ocietà a responsabilità limitata* and the *società per azioni*. Whereas the Srl will be under scrutiny for the flexibility of management given by the national lawmaker, the public companies, as well as all the Spa, have several implications, given by the possibility to raise the shares to the public. Despite the growing increase of Foreign Direct Investments in Italy, it must be acknowledged that the foreign investments in our country have a less sustained pace than in others. According to *Santander Trade Portal,* the data concerning the 2016 foreign direct investment flow and stock in Italy are recessive when compared to countries like Luxembourg and France[6]. Starting from an analysis of the business integration mechanisms provided by the Italian jurisdictions, the focus will shift to two major business operations, where the contracting parties have chosen to not incorporate the parent company of the resulting group in Italy. During this work, it will be explained why the enterprises have decided to establish their incorporation seat in other European countries. Substantially, the work will be structured in two main chapters.

In the first part of the work, there will be three major topics of discussion and interest: a) the cooperation between enterprises; b) the Joint Venture between Wind and H3G; c) the Luxembourg corporate environment. In the first paragraph, it will be explored in general terms the phenomenon of the cooperation between enterprises, and the Joint Venture agreements. Then, the focus will be on how Italy has addressed the cooperation agreements. There will be a deep explanation of the legal devices that the

[6] Santander Trade Portal – Italy: Foreign Investments.

Italian lawmaker has set forth for the cooperation and coordination agreements. In the second paragraph, it will be faced the main featuring aspects of the Joint Venture between Wind and H3G, with particular emphasis on the choice made to jointly conduct business through a *société a responsabilité limitée*, incorporated under Luxembourg substantial corporate laws. In the third and final paragraph, the topic will be the Luxembourg corporate environment, and the major attractiveness that the Luxembourg's corporate law regime draws, when compared to the Italian one. Considerable attention will receive the above-mentioned S.à.r.l., in an attempt to draw a comparison with our S.r.l., as well as the *société par action simplifiée,* a legal entity non provided by our jurisdiction. All this will lead to the conclusion that the Luxembourg corporate-structured models for the cooperation between enterprises are more effective than the Italian ones, as regards their ability to attract foreign investors. The second part of the work will be divided in two sub-chapters: a) the EssilorLuxottica merger; b) the *société anonyme*, and the public companies in France. Object of the first sub-chapter will be the Contribution Agreement between Luxottica and Essilor, entailing a merger by incorporation of the former in the latter. Besides the analysis of the several steps that brought the two joint stock corporations, a particular attention will draw the procedural aspects required French corporate law for the completion of the transaction. In this case as well, there will be highlighted the reasons behind the choice of a given incorporation seat. The corporate law regime for public companies (and for joint stock corporations in general) in France holds very peculiar aspects. With the second chapter, it will be addressed the comparison between the *società per azioni* and the *société anonyme*. Thus, the aim will be to explain why choosing France as incorporation seat is a better choice for a public company, starting from the reasons that brought EssilorLuxottica to be *société anonyme*.

This work will aim at demonstrating that the corporate law regime provided for the cooperation between enterprises are not recessive factors in the lack of consideration that the Italian legal system has towards the foreign investors.

CHAPTER 1

THE COOPERATION BETWEEN ENTERPRISES: A COMPARATIVE ANALYSIS OF THE LEGAL FRAMEWORK PROVIDED BY THE ITALIAN AND LUXEMBOURG JURISDICTION

1. THE COOPERATION BETWEEN ENTERPRISES: THE JOINT VENTURE AGREEMENT AND THE ITALIAN LEGAL SYSTEM

Summary: 1. The cooperation between enterprises: a general characterization of the phenomenon; 2. The cooperation between enterprises and the notion of Joint Venture; 3. The distinction between contractual Joint Ventures and Joint Venture corporations; 4. Considerations on the parallelism between the Joint Venture agreement and the Partnership in the US legal tradition; 5. The cooperation between enterprises in the Italian legal system; -5.1 The cooperation between enterprises in the Italian legal system: the Joint Venture agreement as a contratto atipico*; 5.2. The cooperation between enterprises in the Italian Legal system: the Joint Venture agreement and the freedom of contract;*
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1. The cooperation between enterprises: a general characterization of the phenomenon.

Since the last decades of the Nineteenth century, cooperation between companies has become necessary as a much as a needed tool for the realization of economic initiatives that, due to their complexity and size used to go beyond the capacities and policies of individual companies. Next to the needs of concentrating financial resources and sharing the business risk, companies felt the growing exigency to expand their businesses[7]. The cooperation between enterprises is an economic phenomenon that all the jurisdictions needed to address at different levels. Over the years, the law has been called to answer to the systematic evolution of the forms through which the cooperation between enterprises manifested. As will be pointed out in this paragraph, the cooperation may concern, for instance, different stages of the same business activity or a merely financial commitment between the parties. Here, it can be made the point that the cooperation between enterprises is characterized by the combination and integration of complementary and differentiated resources addressed to a common project[8].

The cooperation between enterprises has engaged all legal experts in delicate and controversial operations of legal qualification. Thus, jurisprudential and doctrinal elaborations have tried to cast this socio-economical phenomenon in already-existing legal models. At the preliminary stage of this work, it might be useful to suggest that there is not a consolidated legal framework, either at national or international level, that would allow companies to integrate their businesses following an univocal legal

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[7] *Dequalificazione e fonti normative di disciplina del contratto di cooperazione tra imprese*, Sergio Carbone e Andrea D'Angelo, pp. 25.

[8] *Evoluzione degli accordi di Joint Venture*, Andrea Astolfi, pp. 6 from *Le Joint Ventures – Profili Giuridici e Modelli Contrattuali*, introduction made by Piero Bernardini.

pattern. The qualification of the cooperation between enterprises in fixed legal standards would be a difficult operation itself for several reasons.
Clearly, the traditional discipline that regulate the integration mechanisms between companies has historical and economic implications that look at the regulatory Anglo-American models. There can be little doubt that Anglo-American legal systems do not set up an exhaustive discipline for contractual arrangements, as in the *civil law* systems (i.e. Italy or Germany)[9]. This brings to the evident result that the international practice adapts the terms of the cooperation of enterprises to a regulatory framework that sets forth in general and self-contained terms of the collaboration.
Moreover, the common experience showed how the national legal systems have put little emphasis on implementing a coherent discipline of the cooperation of enterprises within the group. Lately, the lawmaker has been more invested in prioritizing the interactions of the group with third parties, regulating the institutional forms of the organization and the forms through which the grouping of enterprises would engage with third parties, as well as tender offers, where enterprises may jointly take part and the civil liability profile of these interactions[10]. As will be better pointed out further, the Law n° 584 of 8Th August 1977 may well represent the first attempt made by the Italian lawmaker to give a legal framework to one of the possible expressions of the cooperation between enterprises.

The combination of these two circumstances brought to a general consolidation of the practice to recognize as main source of the cooperation between enterprises the *autonomia privata*. Moreover, the international practice played a huge role in giving uniformity and objective rules to the national lawmakers. Customizing the discipline of the cooperation of enterprises on parties' contractual needs and international standards has dramatically reduced the scope of action of national lawmakers. To this extent, it could be proposed an uniform and transnational approach to the contractual cooperation between enterprises, as fostered by international trades and expression of

[9] *I contratti del commercio internazionale*, Sergio Carbone & Riccardo Luzzatto, pp. 158, in *Trattato di diritto privato*, coordinated by Pietro Rescigno.

[10] *Dequalificazione e fonti normative di disciplina del contratto di cooperazione tra imprese*, Sergio Carbone e Andrea D'Angelo, pp. 33.

the *autonomia privata* recognized to the companies in all major jurisdictions. However, at the national level, the traditional approach in the *civil law* countries to cast all economic phenomena in fixed legal schemes led to a comparative approach of the already-existing legal devices[11]. Despite this being the clear path in order to value the cooperation between enterprises in legal terms, the first attempt to define in general terms the cooperation between enterprises come from the *common law* countries, notably the US Courts[12]

2. The cooperation between enterprises and the notion of Joint Venture

A premise that deserves to be made is that the cooperation between enterprises may manifest in several forms. Two or more enterprises may cooperate through the integration of their respective business activities, or through the mere provision of a performance from one party to another (i.e. sale agreement, employment contract, license agreement)[13]. In this section, the scope will be limited to the integration mechanisms of businesses between enterprises.
The economic and juridical phenomena that allow enterprises to cooperate on different levels for business purposes are known in the international practice as Joint Ventures[14]. Since the Nineteenth century, the judgments ruled by the US Courts helped fostering a first notion of Joint Venture, with the purpose to describe negotiated models devoid of any formalities not entailing stable corporate structures[15]. The difficulties to set forth a general classification of the Joint Venture agreement, comprehensive of all the possible forms of cooperation between enterprises, brought the US Courts to

[11] *Le associazioni temporanee di imprese*, Diego Corapi, pp. 570.

[12] *What constitutes a Joint Venture*, Joseph Taubman, pp. 641, from the *Cornell Law Review*.

[13] *Le associazioni temporanee di imprese*, Diego Corapi, pp. 570.

[14] *L'associazione temporanea di imprese – Il contratto di Joint Venture*, Giovanni di Rosa, pp. 7.

[15] *Origini e lineamenti dei contratti di Joint Venture*, Cesare Vaccà, pp.104.

conflicting definitions. In Leiner v. Wass (1946) a judge states that *"A joint venture is an association of two or more persons in the nature of a partnership, to carry on a business enterprise for profit"*[16], whereas another judgement of an Appeal Division Court of New York identified the Joint Venture as a *"Limited partnership; not limited in a statutory sense as to liability, but as to scope and duration; and under our law, joint adventures and partnerships are governed by the same rules"*[17]. An important point that will be scrutinized further is the close relationship between the partnership and the joint venture. However, drawing a cut-off line between the partnership and the Joint Venture has always been a difficult exercise. The partnership has been characterized by an organic discipline both in the United Kingdom and the United States[18]. The original legal framework of the Joint Venture, as a device for *"unincorporated association"* between enterprises, was coherent with the Partnership framework. Some authors have pointed out how the original conception of the Joint Venture differs from the Partnership under a "*quantitative"* aspect. The arrangement between the parties was qualified a Joint Venture when it was limited to a single-project cooperation, whereas, a Partnership for ongoing businesses involving many transactions[19].

Furthermore, the US Courts did not merely try to classify the Joint Venture circumscribing in merely legal terms. As said above, whereas the cooperation between enterprises is a socio-economical phenomenon, the Joint Venture may be considered as the worldwide-welcomed contractual manifestation of such a phenomenon[20]. An important ruling of the Washington Supreme Court, *Penny v. Berry* (1942), stated that

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[16] *Leiner v. Wass*, Supreme Court of New York County, 1946.

[17] *Haxton & Sons v. Rich*, Appeal Division of New York State, 1944. As mentioned in *What constitutes a Joint Venture*, Joseph Taubman, pp. 641.

[18] In the US, the *Uniform Partnership Act* is dated back to 1914, whereas in the UK it can be found a complete discipline of this legal device in the *Partnership Act* (1890), *Limited Partnership Act* (1907) and the *Companies Act* (1967).

[19] *Business Law and the Regulatory Environment*, J.P. Mallor and others, pp.394.

[20] *Dequalificazione e fonti normative di disciplina del contratto di cooperazione tra imprese*, Sergio Carbone e Andrea D'Angelo, pp. 43.

"The joint venture, as a useful legal device, is therefore not limited to strictly business transactions, but may also find application in connection with enterprises having the attainment of pleasure as their sole objective, so long as the association of the parties is not motivated merely by a desire for social companionship"[21]. In this specific case, the Court applied the principles set forth the *Carboneau v. Peterson* (1939) case and applied them to an automobile trip[22]. According to the Court, the objective the parties had in common was that of reaching a certain destination for a particular common purpose, adding that *"While the benefit to be derived from the trip was measureable in terms of mental stimulus and physical enjoyment rather than in terms of dollars and cents, it was nonetheless an objective that could be sought and attained through the medium of a joint venture"*[23]. As suggestive this ruling may seem, there is no trace of the clearly business denotation that the most recent legal scholarship gave to the Joint Venture agreement. However, the *Penny* case re-affirms other circumstances that give the Joint Venture the structure of an arrangement: a) the presence of a contract between the parties; b) a common purpose; c) a community of interest; d) equal right to a voice, accompanied by an equal right of control[24].

Through the years, the notion of Joint Venture has increasingly been circumscribed to the cooperation between enterprises, adding to the above-mentioned four components a fifth one, the *"integrated business"* of the contracting parties. The grading of the level of integration of businesses of the respective parties will be utterly useful to understand the different manifestations of the Joint Venture agreement.
To this extent, it can be adopted the definition of Joint Venture given by a recent legal scholarship, whereby *"Each party to the operating joint venture makes a substantial contribution in the form of capital and technology, marketing experience, personnel and physical assets"*[25].

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[21] *Penny v. Berry*, Supreme Court of Washington, 1942.

[22] *Carboneau v. Peterson*, Supreme Court of Washington, 1939.

[23] *Penny v. Berry*, Supreme Court of Washington, 1942.

[24] Ibid.

[25] *The concept*, Burzynski, cit. pp.184; *Le Joint-Ventures, Profili Giuridici e Modelli Contrattuali, Aspetti Generali*, Andrea Astolfi, pp.6.

3. The distinction between contractual Joint Ventures and Joint Venture corporations

The US scholarship gave a huge contribution to the definition and classification of the Joint Venture. The degree of reciprocal contribution, as well as other factors such as the accountability of the so-called *co-venturers* or the sharing of control, may be crucial components when choosing a certain type of cooperation. Before analyzing how the cooperation between enterprises work in Italy, and in which terms our country has embodied the Joint Venture agreement, it may be useful to describe the general classification fostered in the worldwide practice, based mainly upon the US legal scholarship's work.

Under an organizational and structural profile, the Anglo-American experience has distinguished between contractual Joint Venture and Joint Venture corporation.

In the practice the flexibility of the Joint Venture agreement makes possible to create intermixed forms of joint venture that can help to achieve the scope of the operation. Whereas, in the Joint Venture corporations the *co-venturers* conduct the cooperation through the creation of a company, serving as a vehicle for conducting their respective businesses; in the contractual Joint Venture, parties estimate to carry out the common business without the creation of a corporate vehicle[26]. Anyway, it would be useful to explain how *co-venturers* cooperate in both models.

The contractual Joint Venture does not give rise to a new autonomous legal entity nor the creation of organizational structures different from the ones of the firms taking part in it[27]. For this reason, the contractual Joint Venture essentially implies a less marked

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[26] *I contratti di Joint Venture come modelli di penetrazione commerciale nei mercati esteri*, R. Cappello, pp. 661.

[27] *L'associazione temporanea di imprese – Il contratto di Joint Venture*, Giovanni di Rosa, pp. 10.

integration mechanism for the enterprises involved. As a matter of fact, each party takes part to the business risk of the common activity to the extent of the obligations arising from the Joint Venture agreement[28]. This is only a preliminary consideration about the legal qualification of the Joint Venture agreement that will be deepen going further. At this preliminary stage, it may result useful to stress the independence, and the individual legal entity, that each party maintain entering in this particular kind of Joint Venture agreement.

Basically, the mere absence of a corporate vehicle for integrating each party's business is the most recognizable distinguishing feature between the two models of Joint Venture. However, this does not automatically entail that *co-venturers* cannot use a separate structure for organizing their respective businesses. For instance, parties may well decide to set up a joint office for the coordination of the common venture.

Following this final consideration, it could be drawn an internal classification of the contractual Joint Venture. As far as the internal structure and the allocation of the business risk, the cooperation between *co-venturers* can follow two distinct directions. On the one hand, while integrating their own business, *co-venturers* may agree to take on individually the business risk related to the activity jointly performed. In this specific case, it may result an obvious choice for *co-venturers* to be deemed individually liable vis-à-vis third parties for the obligations deriving from the execution of their part of the project. Nevertheless, parties may well decide to regulate the terms of their internal agreement otherwise. Thus, *co-venturers* may opt for a separate allocation of the total costs of the work. This model may be very useful when parties do not hold alone the technical requirements to conduct individually a business activity.

On the other hand, *co-venturers* may agree to integrate their respective businesses in a major way. The legal arrangement may provide for the undertakings the joint execution of the *opera*, and additionally, the creation of a separate non-corporate body. By doing so, the *co-venturers* may decide to fund this body, or center of business, with all the financial resources needed carry on the joint activity. As a consequence, it would the separate body to sustain all the costs. In such a way, parties may decide to

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[28] *Le "joint ventures": tecnica giuridica e prassi societaria*, Bonvincini Daniele, pp.139.

share the obligations deriving from the joint conduction of the business. Not to mention that sharing the business risk may result in a proportional allocation of the dividends[29]. Substantially, there are handful reasons behind the adoption of a contractual model. Even if some authors have found out that the contractual Joint Venture may be used to circumvent national and competition laws (e.g. Invisible Investments[30]), there are two substantial reasons behind the adoption of an "unincorporated Joint Venture". First, the creation of a corporation in order to conduct business would entail limitations in the decision-making power that the two firms may have as separate legal entities[31]. Moreover, parties would remain independent contractors, and it would be unlikely that a *co-venturer* is deemed liable vis-à-vis third parties for the negative outcome of a *facere* or *non facere*[32].

Among the three forms of Joint Ventures, the Joint Venture Corporation is wholly recognized as the best fit for hosting foreign investments[33]. Substantially, there are several advantages of using a corporate vehicle for conducting a common business[34],

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[29] *Manuale di diritto commerciale internazionale*, Giuseppe de Marinis, pp. 108

[30] In *International Joint Ventures, Mergers and Acquisitions*, cap. 12, Thierry Jacomet defines Invisible Investments as *"Special forms of contractual Joint Venture although they generally involve corporations as joint venture vehicle"*. Furthermore, it is specified that *"These contracts effectively confer economic control over an undertaking without the investor taking an interest in the capital of the relevant undertaking"*.

[31] *Joint Ventures*, Edgar Herzfeld.

[32] *Le Joint-Ventures, Profili Giuridici e Modelli Contrattuali, Aspetti Generali*, Andrea Astolfi; it is therefore explained how Art. XVIII (a) of the Joint Venture Agreement between LAMCO and Bethleim Steel Co clarifies that *"Nothing contained in this agreement shall be deemed to constitute either participant, the partner, agent or legal representative of the other participant for any purpose whatsoever"*.

[33] *Le Joint-Ventures, Profili Giuridici e Modelli Contrattuali, Aspetti Generali, Andrea Astolfi*; *Joint Ventures*, Edgar Herzfeld

[34] In *Contratto di Joint Venture*, Andrea Astolfi, the author explains the difference between a *"Joint Venture Operativa"* where the parties, as a consequence of their investments carry on several activities, and *"Joint Venture Strumentale"* where the firms stipulate the agreement as a preliminary stage of a subsequent agreement, which should involve third-party obligations.

providing an entity different from the firms that take part in it with its own legal status. However, defining in general terms the featuring aspects of a Joint Venture corporation is not an easy task. A preliminary consideration about this model is that the applicable provisions depends from several circumstances; among the others, there are: the type of corporation chosen, the incorporation seat, the ancillary agreements.

When *co-venturers* choose to structure the Joint Venture as a separate jointly owned entity, one of the most used legal model is the limited liability company. For instance, the Anglo-American model of the private limited company, as it will be better stressed further, may give some advantages to the enterprises involved[35]. Whereas the provisions of the chosen corporate structure may already set a solid legal framework, *co-venturers* tend to set the terms of the cooperation making broad usage of shareholders 'agreement. One of the clear consequences of using a corporation to carry on a Joint Venture is that the legal entity set up by the *co-venturers* will become accountable for the financial results of both parties 'business.

Furthermore, the corporate form, and the freedom of contract, calls the national legal frameworks for a fair balance. As it will be pointed out in the next paragraphs, *co-venturers* are likely to discipline the corporate governance, and their internal affairs, through useful legal devices, such as the inclusion of a cumulative voting clause[36].

An example of *"Joint Venture Operativa"* is given when two firms agree to exploit oil reserves: in this situation the object of the contract concerns the fulfilment of a business, where the conduction of a common business do not entail for *co-venturers* to enter into agreement with third-parties. An example of *Joint Venture Strumentale* is a tender procedure: in this case, the joint venture agreement is motivated by the opportunity to coordinate the activities of two or more firms with a third party, the Public Administration, that will conclude an agreement with the co-venturers.

[35]*Joint Ventures*, Edgar Herzfeld, the author stresses the fact that *"In exceptional cases a public limited company may be used, particularly if some of its financial needs are to be raised directly from the public"*.

[36] *Le Joint-Ventures, Profili Giuridici e Modelli Contrattuali, Aspetti Generali*, Andrea Astolfi, p.16, it is specified that usually the *co-venturers* holding the highest number of shares are more likely to converge their votes towards more candidates when it comes to board and auditors' election.

This would result in a partition of the management's seats, in proportion to the real contribution of both parties in the business.
Nonetheless, even in general terms, the allocation of the business risk is a topic that deserves to be introduced. Generally, *co-venturers* are jointly and severally bound vis-à-vis third parties for the obligations taken in the name of the Joint Venture. However, "*The parties inter se are liable for the obligations of the Joint Venture only in proportion to their respective share*"[37]. These preliminary considerations must be read in connection with the corporate form chosen. Despite this, the entity of the contribution is not always indicated in merely financial terms, or by the *quota* of each party in the business. The obligations taken by the *co-venturers* may carry out a different risk rate, and being "qualitatively" different from the ones of the other *co-venturers*. So, it may be unfair to define the contribution of each party only with respect to the financial risk attached to its *quota* (or capital share)[38].

In order to deeply understand this issue, it may be more useful to make a concrete example. The considerations that will be made just below may well apply to both contractual Joint Venture and Joint Venture corporation. However, they may be useful to understand the profile of the allocation of risks within a corporation. As said above, two enterprises may decide to cooperate for technical needs: for instance, in order to carry on a project that requires technical requisites that *co-venturers* alone do not own. By doing so, *co-venturers* may integrate their respective business on a vertical level, or on a horizontal one.
Whereas, in a vertical business integration model, parties carry on "qualitatively" different and heterogeneous activities; in a horizontal one, *co-venturers* performs "qualitatively" similar deeds, as part of a common project too burdensome to be conducted individually[39]. There is clear connection between this distinction and the possible breach of the contract of the *co-venturers*. When performing a common obligation in the horizontal scheme, the only profile of liability that deserves attention

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[37] Ibid., note 45.

[38] *Autonomia contrattuale e attività d'impresa*, Giovanni Di Rosa, p.164-165.

[39] *Il contratto di Joint Venture. La disciplina giuridica dei raggruppamenti temporanei di imprese*, Andrea Astolfi, p.64.

is the one related to the *facere* or *non facere* of an obligation carried out by a *co-venturer*[40]. In a horizontal business integration model, it is rare to see a leading firm that, due to its coordination and direction role, may be deemed accountable for the other *co-venturers*.

On the other hand, in a vertical model, each firm's contribution is functional to its areas of expertise, and seemingly there is more need of a leading firm that, while coordinating the other firms, grants for the fulfilment of the whole obligation[41]. This profile of accountability would not exclude the one deriving from the performance of the work by the firm. This issue may be faced by the *co-venturers* with the adoption of shareholders' agreements. As said above, the characterization of these profiles follows very a quite general classification. There is a broad range of solutions that national jurisdictions may provide to fix these *inter partes* situations. A possible solution may consist in the allocation of the liability for an unfulfilled obligation jointly on the leading firm, and on the *co-venturer* which missed out on its side of the obligation. This adjustment would be more effective by putting on the leading firm a *beneficium excussionis,* similar to the mechanism provided by the article 2304 of the Italian Civil Code for *società in nome collettivo*[42].

4. Considerations on the parallelism between the Joint Venture agreement and the Partnership in the US legal tradition.

As it was pointed out before, the definition of Joint Venture has been historically influenced by the intrinsic parallelism with the US discipline for partnerships.

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[40] See note 4, *L'associazione temporanea di imprese – Il contratto di Joint Venture*, Giovanni di Rosa, p. 15.

[41] *I contratti di collaborazione*, di P.Serena, cap. Giovanni di Rosa: La Joint Venture p. 1118

[42] *Autonomia contrattuale e attività d'impresa*, Giovanni Di Rosa, p.164-165.

Thus, there are some authors that, nowadays, keep including the Joint Venture in the same branch of law of partnerships[43]. However, the majority of the US legal scholarship tend to find an intrinsic incompatibility between the two devices[44]. The application of partnerships related provisions to Joint Ventures agreement has always created substantial problems, as far as the applicable discipline.

The authors that agrees on the applicability of Partnership-related provisions to the Joint Venture agreement focuses on the substantial aspects of the former[45]. The Partnership may be used as an intermediary stage for the cooperation between enterprises. Parties may decide to integrate further their business, by transforming the Partnership Agreement into a Joint Venture corporation one. Furthermore, a distinguishing aspect between the Partnership and the contractual Joint Venture may be detected, as far as the allocation of the profits[46]. Thus, according to some authors, there is a contractual Joint Venture when the profits of the business are jointly sought rather than being attributed separately to the parties of the agreement. This kind of distinction is well-explained by the US law practice[47]. Additionally, the traditional forms of Joint Ventures were meant to constitute a flexible vehicle for cooperation between firms.
For instance, it can be mentioned the so-called *silent partnership*, the first theoretical attempt made by some jurisdictions to extend the scope of the Partnership agreements[48]. It is worth mentioning this legal device, because there may have cases where enterprises willing to cooperate with others are reluctant to appear as parts of a common venture vis-à-vis third parties. The best definition given for silent partnership has been provided by the Greek law in the Section Fifth of Law 4072/2012, where at

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[43] *Joint Ventures*, Edgar Herzfeld.

[44] *Partnership Taxation*, George K. Yin, Grayson M., Karen C. Burke, chap. 2

[45] *Joint Ventures*, Edgar Herzfeld.

[46] *Le Joint-Ventures, Profili Giuridici e Modelli Contrattuali, Aspetti Generali*, Andrea Astolfi, pp. 15.

[47] Ibid.

[48] *International Joint Ventures, Mergers and Acquisition*, Susan Meek, Wilson Chu, Chapter 12.

Art.285 is stated *that "One of the partners (a visible partner) grants to another or other partners (silent partners) the right to take part to the results of one or more commercial transactions, or a complex commercial operation carried out in his own name, however, in the public interests of the partners"*, it follows *"The silent partner has no legal personality"* meaning that the partners preserve their individual feature. Additionally, Art. 287 of of Law 4072/2012 says that *"Third parties acquire rights and assume obligations only towards the visible partner"* while Art. 288 clarifies that *"The management of the company is carried out by the visible partner"*. This legal device has some aspects in common with the general characterization of the contractual Joint Venture made above, such as the freedom to regulate the *inter partes* obligations. As a matter of fact, the "*visible partner*" in this form of cooperation is the one taking the major business risks, and so it holds more powers, such as the management of the partnership. However, the peculiarity and the unique nature of this legal device, as well as the historical attempts made by the US Courts to distinguish the Joint Venture from the Partnership, have given so far more credit to other opinions[49].

Following the Anglo-American legal scholarship's work on the subject at stake, the majority of the authors affirm the total inconsistency between the disciplines of Joint Venture and of Partnership[50]. Thus, in the US, the creation, organization and dissolution of Partnerships is embodied in several laws, adopted by several US states, such as the *Uniform Partnership Act*, the *Agency Law* and the *Uniform Limited Partnership Act*. A particular mention deserves the *Uniform Partnership Act* (ndr. '*UPA'*), previously drafted in 1914 as *Original Partnership Act*, and amended several times[51].

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[49] Law. 4072/2012 voted by the House, signed by President of the Hellenic Republic, art. 285-292; Ibid.

[50] See note 3, *Joint Ventures*, Edgar Herzfeld.

[51] See *Uniform Partnership Act (1997), drafted by the National Conference of Commissioners on Uniform State Laws; 1992-Promulgation of Uniform Partnership Act by the Uniform Law Commissioners; 1993, 1994,1996 and 1997 -Amendments to Uniform Partnership Act*.

Substantially, there are several provisions of the *UPA* that deserves a further examination. As regards the allocation of the assets, the *UPA* states that *"Property acquired by the partnership are property of the partnership and not of the partners individually"*[52], meaning that the property acquired by means of *inter vivos* transfer, or otherwise, belongs to the Partnership as an entity rather than the individual partners[53]. This may look at odds with the general characterization of the contractual Joint Venture, where a crucial role is played by the freedom of parties to regulate the substantial aspects of their cooperation, such as the allocation of rights *in rem*[54]. Anyway, there are several contractual models that falls within the general US definition of Partnership. It would be useful to underline some featuring aspects.

However, it may be a difficult task to evaluate the adaptability of the Joint Venture agreement to a Partnership. In general terms, the Partnership agreement compensates a strict regulation of the internal relationship between the enterprises to a more feasible discipline on the obligations vis-à-vis third parties. Indeed, as for the partner's liability, *"All partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law",* adding that *"An obligation of a partnership incurred while the partnership is a limited liability partnership, whether arising in contract, tort, or otherwise, is solely the obligation of the partnership"*[55].

Moreover, some authors defined the Joint Venture-Partnership relationship in terms of a *genus ad speciem* one[56]. Before the enactment of the *Companies Act* in 1985, it was forbidden for corporation-structured enterprises to cooperate as partners, in the framework of a General Partnership agreement[57]. As it was pointed out before, the applicable law to Joint Venture agreements has for long time been the Partnership one. By applying the Partnership law to Joint Venture agreement, *co-venturers* would result as unlimitedly liable for the obligations performed as partners. As a consequence, the

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[52] *Uniform Partnership Act (1997)*, Section 203 on Partnership Property.

[53] *Comment on Uniform Partnership Act (1997),* Section 203.

[54] See note 3, *Joint Ventures*, Edgar Herzfeld.

[55] *Uniform Partnership Act* (1997), Section 306 on *Partner's Liability.*

[56] *Profili di diritto societario degli accordi di Joint Venture*, Diego Corapi, p151.

[57] *The principles of modern company law*, Gower, p161.

limited liability recognized by the corporations was a better choice for enterprises. However, the corporate structure does not grant the flexibility that the partnership does. Then, enterprises have begun to provide atypical clauses, as well as structured shareholders' agreement, derogating from the discipline of the corporations.

Before the Second World War, there was not a clear distinction between the Partnership and the Joint Venture Agreement. Subsequently, it sounded an unfair practice the adoption of the corporation as vehicle for a Joint Venture agreement. This circumstance ended up creating controversial situations between the unlimited liability principle of the Partnership agreements, and the limited liability nature of the corporations. The US case law addressed this issue through to the application of the *ultra vires rule,* which prevented two or more corporations from being partners of a Partnership agreement[58].

Then, after the Second World War, US case law showed how the *ultra vires* rule, and the principle enshrined in the *Jackson v. Hooper* case were outdated. The US case law moved on from this radical orientation, and *co-venturers* were allowed to to use the corporation as vehicle for their common business[59].

The industrial growth and the "Internationalization" of the trade between enterprises have called for a more flexible discipline. As it was stressed out at the beginning, the historical evolution of the cooperation between enterprises had a great influence on the subsequent legal framework, adopted by the national jurisdictions.

As a socio-economical phenomenon, the cooperation between enterprises had several difficulties to find efficient legal devices that would serve the purpose of the agreement. Before the theorization of a Joint Venture agreement in legal terms, every jurisdiction has tried to transpose the *co-venturers'* needs into already existing legal arrangements.

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[58] See note 22, chap.2.2.; this was confirmed in the *Jackson v.Hooper* case, where the New Jersey Court of Errors and Appeals held that J. And H. *"Cannot treat the corporation as an agency in carrying out the partnership agreement between them and as a corporation towards third parties"*. For a more detailed explanation, see *Right of Joint Adventurers Holding All the Stock of a Corporation to a Dissolution and Accounting in Equity*, Horace LaFayette Wilgus.

[59] See note 22; *Isaac Arditi v. Aaron Dubitzky* case, U.S. Court of Appeals for the Second Circuit, Decided December 29, 1965

5. The cooperation between enterprises in the Italian legal system

From a general qualification of the cooperation between enterprises, and the theorization of the Joint Venture agreements, the focus will shift to the Italian models for the cooperation between enterprises. As it will be pointed out further, the national laws on the agreements for the cooperation between enterprises have pursued the European lawmaker's exigency to boost the competitiveness within the EU.
Anyway, the legal devices chosen by the Italian lawmaker to enhance the cooperation between enterprises provides different business integration mechanisms. Choosing a given legal arrangement may be motivated by the needs to pursue, for instance, durable and common business interests, or short terms projects. Other featuring aspects may consist in the entity of the contributions all the enterprises are willing to confer for the business purpose, or the creation of a common center of interests for their activities.
In our legal system, there are different contractual models that discipline the cooperation between enterprises. Every legal arrangement provides for different regulatory aspects. Moreover, before going through the main contractual legal devices for the cooperation between enterprises, it would be useful to have a look on how the Italian legal scholarship has theorized the Joint Venture agreement.

5.1 The cooperation between enterprises in the Italian legal system: the Joint Venture agreement as a *contratto atipico*

In the previous paragraphs, it was evident how many difficulties foreign lawmaker and courts found in confining the Joint Venture into fixed legal standards. So, there is no surprise that in our jurisdiction there is no substantial law, giving a proper definition

of the Joint Venture agreement. At the same time, there is neither a comprehensive discipline of the internal duties of *co-venturers,* or a summary regulation of the relationship of the *co-venturers* with third parties. At this preliminary stage, the same general considerations made upon the qualification of the Joint Venture agreement, as a worldwide legal arrangement, may be applied to the Italian Joint Venture.
Considering the Joint Venture corporation, the Joint Venture agreement serves an ancillary function, with respect to the corporation created by the *co-venturers* to carry on the common business. As remarked by some authors, the joint ventures agreements fall within the legal category of the *contratti atipici*, where the *co-venturers* may more easily adapt the scope and the clauses of the contract to their needs[60].

The absence of an organic legislation on Joint Venture brings many authors to apply for Joint Venture agreements the general provision of Art. 1322 of the Civil Code, where it is prescribed that *contratti atipici* should be designed for the pursuit of interests the legal system consider as deserving of protection[61]. Furthermore, even in this case, the heterogeneity of the Joint Venture agreements makes it a difficult task to find the main substantial aspects of their discipline. Nonetheless, the crucial aspects of the agreement between *co-venturers* are influenced by several circumstances: such as the scope of the agreement, the durability of the common business, perspectives on the future developments of the Joint Venture[62]. As will be discussed below, the Italian law leaves a lot of freedom to the individuals to regulate the featuring aspects of a contractual agreement between enterprises.

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[60] *La qualificazione e la disciplina giuridica degli accordi di joint venture nell'ordinamento italiano*, Massimo Ferrero, p.51

[61] Art. 1322 Italian Civil Code paragraph 2 – *"Le parti possono anche concludere contratti che non appartengano ai tipi aventi una disciplina particolare, purché siano diretti a realizzare interessi meritevoli di tutela secondo l'ordinamento giuridico"*; *International Joint Ventures – The Comparative Yearbook of International Business*, Dennis Campbell - Italy section, Fiorella F. Alvino pp. 197 e ss.
This part is meant to find a general qualification of the Joint Venture agreement. This is not meant to deepen into the featuring aspects of atypical contracts.

[62] Ibid.

It may be made the point that the absence of a discipline of the Joint Venture agreement is a clear choice made by the lawmaker. The Joint Venture agreement is deemed to provide contractors the most flexible way to set up the terms of their cooperation and coordination. The main purpose of the *co-venturers* is to benefit in terms of sharing of resources, and all the possible models of Joint Ventures provides a different type of collaboration. A fundamental role in characterizing the nature of a Joint Venture agreement is played by the *intuitus personae* and the duration of the agreement.

Very often, the main Joint Venture agreement is followed by other ancillary agreements, so-called Collateral Agreements. Whereas the main Joint Venture agreement regulates the substantial terms of the cooperation (e.g., division of the workload, the internal coordination of the contracting companies, internal obligations, third-party liability), the Collateral Agreements are deemed to regulate the transactions connected to the former agreement (e.g., transfer of technology, know-how, patents, trademark; product distribution; supply of funds and intermediary services)[63].

The Italian legal system gives a broad range of solutions for the regulation of the cooperation between enterprises; as it will result more evident during this chapter, the legal arrangement adopted is highly influenced by the duration of the cooperation.

Further considerations may be made on the nature of the Joint Venture Agreement.

Following the initial categorization of the business integration models, the cooperation between *co-venturers* may well be classified as having horizontal, vertical or conglomerate integration scope. It will be used the term *'horizontal Joint Ventures'* when parties take part in the same kind of business, and cooperate for a common purpose[64]; a '*vertical Joint Venture'* takes place when the *co-venturers*, while conducting the same common business, are engaged in heterogeneous activities, belonging to the same manufacturing process, or when they create a joint undertaking

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[63] See note 41*, International Joint Ventures – The Comparative Yearbook of International Business,* Dennis Campbell - Italy section, Fiorella F. Alvino.

[64] See note 3, *Joint Ventures*, Edgar Herzfeld; *Il contratto di joint venture. La disciplina giuridica dei raggruppamenti temporanei di imprese*, Andrea Astolfi.

that respect coherently the different stages of process[65]; some authors admits the existence of a *'conglomerate Joint Venture'*, the one formed between venturers in different markets with no prior actual or potential business relationship[66].
From the kind of activity performed by the contracting parties, it may be clear if the joint management is meant to establish merely internal center of interest, or a separate body that operates with third-parties. This clear cut in the *modus operandi* of the *co-venturers* explains the further distinction between 'entity with a merely internal scope' and 'entity with external scope': in the former, the internal bond has no relevance for third-parties, which enter into obligations with the one contracting party directly engaged in the agreement; in the latter, co-venturers share a common center of interests that is the one and only legal subject to enter into obligations with third parties[67]. These considerations on the internal bond of the *co-venturers* may easily be applied to all the contractual arrangements that provide a business integration and decision-making mechanism between two or more parties. This distinction is the starting point to understand the difference between contractual Joint Venture and Joint Venture corporations. The nature of the third-party (e.g., individuals or other enterprises; private or public entity; authority or companies) and the kind of relationship engaged is an essential element in the choice of legal form of the contracting parties.

The parties who start a contractual Joint Venture needs the Joint Venture to be a more flexible tool for the realization of their common business interests; creating a separated corporate-structure, as provided by Joint Venture corporations, would lack of that flexibility, and it would be a better tool for long-term commitments, and a more integrated business mechanism than the merely contractual device[68].

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[65] Ibid. Edgar Herzfeld specifies that the stages of the manufacturing process, while being homogenous in substance, could also be located in an earlier or later stage.

[66] See note 3, *Joint Ventures*, Edgar Herzfeld; Antitrust basics, Thomas V. Vakerics, - Joint Venture section.

[67] *Diritto civile e commerciale 2, Obbligazioni in generale. Contratto in generale section*, Francesco Galgano.

[68] See note 4, *L'associazione temporanea di imprese – Il contratto di Joint Venture*, Giovanni di Rosa, p. 22.

To this extent, the public procurement of works, supplies and services is considered the moment where started a progressive consolidation of the temporary grouping of companies. In awarding public contracts, very often enterprises face the need to meet all the requirements of the tender procedure: on the one hand, there are situations where enterprises alone do not reach those standards (e.g., they do not meet the technical or business requisites); on the other hand, there are enterprises that, while having all the requirements needed, are willing to claim a competitive advantage on the the other tender participants[69]. The adaptation of the Joint Venture agreement to already existing legal arrangements is a phenomenon that will be analyzed further in this chapter. According to several authors, the substantial terms of a Joint Venture agreement essentially comes from the combination of typical legal arrangements with clauses that have the sole purpose of adapting the agreement to the *co-venturers'* needs[70]. There is not always absolute compatibility between the traditional arrangements chosen by the contracting parties and the original *ratio* of that institute; since the Law N° 406 of 19th of December 1991 came into force, the phenomenon of the cooperation between enterprises has found a more comprehensive legal framework, especially through the recognition of suitable legal arrangements in order to take part in public concessions and calls for tender[71].

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[69] *Gli appalti pubblici di lavori, forniture e servizi nei settori dei trasporti, telecomunicazioni, acqua ed energia*, Galli e Guccione.

[70] *Associazioni temporanee di imprese per l'esecuzione di opera pubbliche*, De Martini; See note 4, *L'associazione temporanea di imprese – Il contratto di Joint Venture*, Giovanni di Rosa, p. 23.

[71] Law n°406/1991 – Titolo V "*Norme comuni di partecipazione*" – Art.*22 Riunione di Imprese* – The article in description will be fully scrutinized going through this chapter.

5.2. The cooperation between enterprises in the Italian Legal system: the Joint Venture agreement and the freedom of contract

As suggested before, Article 1322 of the Italian Civil Code theorizes the *contratti atipici*: it was made clear how the absence of a comprehensive discipline leaves *co-venturers* the freedom to model the Joint Venture agreements on their needs.

"Parties are free to regulate the content of the contract without exceeding limits imposed by law[72]": the freedom of contract is the starting point to understand how the phenomenon of the Joint Venture developed in Italy and, in general, what are the effects on the cooperation between enterprises. Thus, contracting parties are allowed to go beyond the provisions concerning *contratti tipici,* expressly disciplined by the Italian Civil Law, with the only recommendation to not exceed *"limits imposed by law"*. The provision of Article 1322 has to be read in conjunction with Article 1343 of the Civil Code that specifies in what these limits consist, by stating that *"A contract is null or void if it violates mandatory rules, public order or public morality*[73]".

Moreover, considering the Joint Venture as a *contratto atipico* may raise important doubts on which general discipline is to be applied to the Joint Venture agreement. Before going through all the typical legal arrangements provided by our legal system, it would be useful to define if the discipline of the *contratti atipici* has to be applied on a full scale to the Joint Venture agreement. According to the Civil Code, all contracts, even the atypical one, should follow the general rules of Title II (Art.1321-1469 bis)[74], that enshrines the general provisions on the Law of contracts. According to some authors, there is no mention in Title II of the effects of a given legal

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[72] Article 1322 (1) Italian Civil Code

[73] Article 1343 Italian Civil Code – Another specification may be needed at this point: the article does not refer on the contract as a whole, but to the causa of the contract. We need to address the concept of *causa* by giving to it the meaning of the business purpose the contracting parties are willing to achieve. The concrete notion of causa is generally preferred to the one that address the causa as the socio-economic function of the *negotium*.

[74] Article 1323 Italian Civil Code.

arrangement falling within the category of *contratti atipici*[75]. From the general discipline on contracts, it is made reference to the formation of them, claim over flaws, interpretation and general integration of the sources. However, it is difficult to draw an exhaustive general discipline on the effects of *contratti atipici* on parties'internal regulation, and relationship with third parties[76]. To this extent, it is even more complicated to draw in general terms the contractual effects of a Joint Venture agreement. A solution can be found applying to the Joint Venture agreement the relevant rules on the effect of *contratti tipici*. These rules may be applied to *contratti atipici*, as long as there is compatibility between the contract and the *negotium* the contracting parties are willing to enter into.

Some authors tend to build the discipline of the Joint Venture agreement through the so-called *metodo tipologico*[77]. At the heart of this technic there is the global analysis of each contractual model regulated by law, and the comprehensive *studium* of the legal arrangement at stake; thus, it will be easier to apply to the Joint Venture agreement the discipline of several contractual forms provided by the lawmaker[78]. Moreover, one clear thing at this stage of the work is that there is no single contract that embodies all the characteristics of the Joint Venture agreement. This point of view can help to define the legal nature of the Joint Venture in the Italian legal system. Finally, the Joint Venture can be defined as a multilateral agreement that, while being on its own a *contratto atipico*, may present the main features of contracts legally provided by the lawmaker.

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[75] *I problemi di legittimità e di disciplina dei negozi atipici*, Ugo Majello pp. 19; *Le Joint-Ventures, Profili Giuridici e Modelli Contrattuali, Aspetti Generali*, Andrea Astolfi

[76] Ibid.

[77] *Il tipo contrattuale*, Giorgio De Nova.

[78] Ibid.

5.3 The Joint Venture Agreement and Article 2341*bis*

Article 2341*bis* on the so-called *patti parasociali* (ndr. shareholders 'agreements), sets forth in paragraph 3 that the provisions of Article 2341*bis* shall not be applied *"To agreements instrumental to cooperation agreements for the production or exchange of goods and services relating to companies wholly owned by the participants of the agreements"*[79]. By doing so, it may be clear the *ratio* behind the above-mentioned paragraph of the Italian Civil Code. The lawmaker wanted to exempt the "agreements instrumental to cooperation agreements (such as the Joint Venture)" from the five-years terms set out for the shareholders' agreements, as provided by Article 2341*bis*. Furthermore, the terms of Article 2341*bis* par. 1 is subject to the condition that the cooperation agreements, as well as the agreements instrumental to them, concern companies wholly owned by the parties of the agreement. In this paragraph, it must be acknowledged a clear reference to the corporate Joint Venture, where the *co-venturers* conduct their business through a newly created company.

Anyway, few considerations shall be made on this exemption. The agreements between *co-venturers* that fall within the scope of letters a), b) and c) of Article 2341*bis* do not aim at stabilizing the ownership structure and the management of a company. They are addressed, instead, to finalize the integration of the business activities of the *co-venturers*[80]. It must be observed that the "instrumentality" of the *patto parasociale* is a crucial factor for the exemption to be granted. In fact, if the *patto parasociale* does not aim at the realization of a common business purpose, as a result of the cooperation agreement, the exemption shall not be granted to the parties. Moreover, the absolute overlapping of the *co-venturers* with the parties of a *patto parasociale* mitigate enormously the risks of sacrificing shareholders 'interests, that many shareholders' agreements bring on[81].

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[79] Article 2341*bis* paragraph 3, Italian Civil Code.

[80] *Il contratto di opzione – Volume I*, Elisabetta Panzarini, pp. 296.

[81] *I patti parasociali nelle società di capitali: focus sulle società chiuse*, Emanuele Rossi, pp. 2.

Another point to be discussed concerns the disclosure obligations ex Article 2341*ter*. Whilst, it is stated that the *"Shareholders' agreements related to companies that resort to the risk capital market must be communicated to the company and disclosed at the opening of each shareholders' meeting"*, there is no express mention of the cooperation agreements of Article 2341bis par. 3. Indeed, Article 2341*bis* sets forth only the disapplication of the five year limitation provided for *patti parasociali* instrumental to Joint Venture. This leads to the fact that these agreements shall be subject to the disclosure obligations of Article 2341*ter*. In fact, there is no clear reason that should uphold the disapplication of the disclosure obligations to these agreements. Additionally, it may well be made the point that the capital market, in which the Joint Venture operate, shall be made aware of the possible shareholders 'agreements.

6. The cooperation between enterprises and the Italian legal arrangements.

In this section, the focus will be on the legal devices provided by the Italian legal system, through the analysis of the contractual models that enhance the cooperation between enterprises. The choice of a contractual model has at its core the different needs the parties want to achieve through the cooperation. Several times during this work have been stressed how the historical development of the cooperation between enterprises has influenced the regulation of this socio-economical phenomenon.
The first kind of cooperation between enterprises has been through the setting up of temporary groups of enterprises. The need to establish long term cooperation has been felt after the "Internationalization" of the cooperation between enterprises.

Following a general classification made of the possible forms of cooperation and integration agreements between enterprises by Marco Cian[82], there will be a scrutiny

[82] Marco Cian (1973) is professor of Corporate Law at the University of Padova, and at the University of Innsbruck. He is author of several pubblications and monographs, such as *"Diritto commerciale"* (2 voll., Torino, 2014) and *"Manuale di diritto commerciale".*

of the different business integration mechanisms. This distinction is highly inspired by the same categorization it has been drawn in the framework of the Joint Venture agreements. Thus, there may have:

a) contract-based forms of cooperation between enterprises;

b) company-based forms of cooperation between enterprises.

Whereas, the former finds their source of law in the law of contracts, the latter entails cross-holding agreements between the enterprises involved.

Moreover, the contract-based forms of cooperation between enterprises may be further distinguished into:

i) "potentially flexible forms of cooperation";

ii) "forms of cooperation compulsorily structured"[83].

However, it would be necessary to define all these possible forms of cooperation. Basically, the contract-based forms of cooperation between enterprises allow the parties to cooperate, while maintaining a certain degree of juridical and economic autonomy.

Contract-based forms of cooperation may entail, on the one hand, "forms of cooperation compulsorily structured", such as the *consorzio,* the *società consortile,* and the GEIE. Substantially, these legal devices require the set-up of an organizational and operational structure that would allow parties to conduct more stable and durable business. On the other hand, there may have "potentially flexible forms of cooperation", such as the *associazione in partecipazione*, *associazione temporanea di imprese* and *contratto di rete*. These agreements are devoid of a rigid internal structure, and they are often designed for a merely occasional cooperation between enterprises, with the specific aim to pursue contingent objectives.

Furthermore, company-based forms of cooperation between enterprises are characterized by shareholders and governance close relationship between two or more firms, entailing the formation of a new legal entity. This new organizational structure holds a major degree of economic and juridical autonomy, with respect to the contributing firms.

[83] *Diritto Commerciale: Aggiornato alla legge 11 agosto 2014, n. 116*, Marco Cian, pp.170.

Then, there will be addressed all the above-mentioned forms of cooperation between enterprises, from the most flexible legal devices to the company-based business integration mechanisms.

6.1. The cooperation between enterprises and the Italian legal arrangements: *"associazione temporanea di imprese"*

In the Italian experience, the debate around the contractual Joint Venture has long been dominated by the expression *"associazione temporanea di imprese"*. At the core of this work, there is the analysis of the different forms of cooperation between enterprises, which our legal system has initially identified as *"associazione temporanea di imprese"*[84]. This phenomenon found a crucial turning point only in 1977, despite many preliminary approaches[85]. The *"associazione temporanea di imprese"* has fairly been introduced with Law n°584/1977 in the specific framework of public tenders, and modified by the lawmaker with Law n°406/1991 and the Frame Law n°109/1991 in the field of public works[86]. According to the legislative act of 1977,

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[84] See note 4*, L'associazione temporanea di imprese – Il contratto di Joint Venture*, Giovanni di Rosa, p. 21

[85] Since 1965 with Law n° 1213/1965 on *Nuovo ordinamento dei provvedimenti a favore della cinematografia*, the lawmaker has given enterprises specific standards to follow when collaborating on a common cinematographic work. All this entailing a limited and complementary integration of resources by the producers of the opera. Another step in that direction has been Law n° 613/1967 on *Ricerca e coltivazione degli idrocarburi liquidi e* gassosi nel mare territoriale e nella piattaforma continentale, where it is stated that the *"Enterprises collaborating in mining activities are jointly and equally liable towards third-parties",* adding that "*They need to appoint a legal representative of their interests"*.

[86] *Consorzi, riunione temporanea di imprese, Geie. L'associazionismo imprenditoriale nel Codice dei contratti pubblici*, Guido Arturo Tedeschi, pp. 344.

"Each enterprise preserves its autonomy and individuality for what concerns management, taxes and dues"[87]. The creation of a common center of interest, and each party's desire to maintain their individual features, are two of the major aspects that triggers the choice of a given legal form for the cooperation between enterprises.
The *ratio* behind the introduction of a discipline concerning the "*associaizione temporanea di imprese*" had the sole purpose to expand the scope of public tender procedures, involving more and more enterprises to take part to the offer.
By doing so, the Italian lawmaker ended up granting a major competitiveness on the market, while allowing enterprises to maintain their legal personality[88]. Unquestionably, a higher level of the competition on awarding a public contract leaves the public administration with a more qualified contracting party at the end of the procedure.
The "associazione temporanea di imprese" calls for an internal regulation of the relationships between the firms involved. To this extent, firms make broad usage of the figure of the "*mandato con rappresentanza*". Indeed, this one is highly used for the public tender procedures, when two or more enterprises decide to cooperate[89]. As set forth in Art. 1703, the object of the mandate is the performance of legal acts, not the regulation of a whole activity[90]. In the specific case of a tender, the *mandato* given to the parent enterprise (*impresa capogruppo*) has the scope to present an offer that meets all the standards and the stipulation of the public tender contract, not the execution of the activities, which all the enterprises reunited commit to accomplish[91].

The above-mentioned Art. 20 of Law 584/1977 among the enterprises qualified to present an offer in a public tender procedure puts the ones that confers a *mandato speciale collettivo con rappresentanza* to the parent enterprise that presents the offer on its and other enterprises 'behalf. Some scholars assume that the *mandato collettivo* conferred to the *capogruppo* means that, while all the enterprises are engaged in

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[87] Art.22 (3) Law n°584/1977.

[88] Cons. Stato 246/1987.

[89] *Le associazioni temporanee di impresa*, Diego Corapi pp.124.

[90] Ibid.

[91] Ibid.

reaching their individual interests, there is a common utility that does not correspond to the totally of the individual interests[92]. The conferral of representative powers is a crucial step in the *mandato collettivo*; according to the case-law, the *mandato collettivo* has to be qualified as a contract characterized by the plurality of the "mandating" enterprises[93]. Moreover, the final stipulation of the agreement is finalized only when all the contracting parties have given their consensus[94]. In this context, the *capogruppo* holds exclusively all the representative powers in the grouping of enterprises, and as a matter of fact leaves the Public Administration with a sole "*interlocutor*", with the task to do everything in its powers to achieve the ultimate scope of the cooperation[95].

As one of the profiles analysed in this section lies in a scrutiny of how the enterprises' several forms of cooperation interact with third parties, the exclusive representation of the *mandante* is certainly an inherent topic. The *mandato con rappresentanza* is functional to the achievement of the grouping's scope. The representation may well be intended as '*voluntary' ex origine*[96], but '*legal'* considering its effects[97]. The *capogruppo* is entitled to do all the operations and ordinary and extraordinary acts, connected to the tender, even if not concerning all the "mandating" enterprises[98]. As pointed out by Art. 22 of Law n°584/1977 the representative powers concerns only the relationships occurring with the Public Administration; there is no mention of a managerial power that would leave to the mandated enterprise to be the sole

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[92] *Mandato, commissione, spedizione, in Trattato di diritto civile e commerciale*, Angelo Luminoso pp. 161.

[93] C. d'App. Cagliari 26th May 1988.

[94] Ibid.

[95] Art. 22 (2) Law 584/1977 which provides that the mandated party holds the exclusive representation, both substantial and processual, of the mandating enterprises vis-à-vis the Public Administration for all operations and acts of every kind, connected to the public tender.

[96] *Commento agli art. 20-23 l. 8 agosto 1977, n 584*, Daniele Bonvincini pp.360.

[97] Ibid.

[98] Ibid.

representation of the group[99]. The co-venturers usually provide particular organizational structure for the resolutions and for strategical actions[100].

6.2. The cooperation between enterprises and the Italian legal arrangements: the *"contratto di rete".*

Another legal device contemplated by the Italian law on contracts for the cooperation between enterprises is the *"contratto di rete"*[101]. This contractual model provides the reciprocal integration of the business of each party, to the extent of each party's technical area of expertise, in order to increase enterprises 'level of market competitiveness. The *ratio* behind this contract is to ultimately increase each party's innovativeness, through a contribution that may well consist in the reciprocal disposition of each party's *know-how*[102]. The "*contratto di rete*" has found a solid and harmonized legal environment at the Communitarian level as well, especially after the introduction of the *Small Business Act for Europe*. It must be pointed out the growing trend to boost the competitiveness of the small and medium enterprises at both national and Communitarian level. However, the Law N° 33/2009 states that the enterprises, entering into such an agreement, should set forth the common strategies, aiming at increasing their level of competitiveness, either alone or in conjunction with the other contractors. Moreover, the enterprises must define a network program that contains the rights and obligations assumed by each contractor, as well as of the methods for realizing the common purpose. These preliminary considerations are useful to understand the nature of this legal device. The lawmaker through the "*contratto di rete*" intends to provide a flexible means for the cooperation between enterprises, leaving to the parties of the agreement the possibility to regulate in the broadest possible way their internal obligations. However, the "*contratto di rete*" is an

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[99] See note 126. *Le associazioni temporanee di impresa,* Diego Corapi pp.126.

[100] Ibid.

[101] Article 3, paragraph 4-*ter*, d.lg. 5/2009 of 10 February 2009.

[102] *Manuale di Diritto Privato*, Andrea Torrente and Piero Schlesinger, pp.989.

instrument of open market. Other entrepreneurs may decide to take part to the agreement, and through an adhesion procedure, which must be regulated by the parties, contribute to the common objectives of the agreement.

The enterprises may decide to raise their initial, and subsequent contributions to a "*fondo commune"*[103], whose substantial aspects are regulated by Art. 2615 on the constitution of a "*fondo consortile*". Moreover, the "*contratto di rete"* may provide the appointment of a managerial body, responsible for carrying out and coordinating the activities of the enterprises, acting in their name vis-à-vis third parties. Furthermore, the enterprises must set forth in the agreement who carries on the representative, and managerial powers within the network.
Definitely, the *ratio* behind the "*contratto di rete*" is to provide the enterprises with the most flexible legal instruments, and boost the level of innovation and know-how that each enterprise individually holds. All this is achieved is achieved through the maintenance of parties' individual characterization. Indeed, no separate entity is created through the "*contratto di rete*". Through this contractual model, parties can combine the rights and obligations of each firm in different ways.

6.3. The cooperation between enterprises and the Italian legal arrangements: the *"associazione in partecipazione"*

The so-called *associazione in partecipazione* (Art. 2549-2554) is a contract where the associating party grants to the associated party a participation in the profits of the enterprise, or the business carried on, as result of a contribution[104]. The level of business integration is arguably the lowest among all the legal arrangements under scrutiny. From art. 2549, legal scholars have concluded the contribution of the

[103] Ibid. pp. 990.

[104] *Multilingual texts and interpretation of Tax Treaties and EC Tax Law,* Guglielmo Maisto, pp. 260

associated party being an essential element of the *negotium*[105]. However, the first aspect that distinguishes the *associazione in partecipazione* from the company is the absence in the former of the exercise of a common business activity[106].

This featuring aspect is enhanced by the fact that the purpose of a cooperation between enterprises is the willingness of the contracting parties to share business, technological and working resources in order to pursue a common project. Even the dichotomy between the scope of the associating partner, aiming at developing its business, and the one of the associated partner, aiming the maximizing his profit, do not itself constitute a breaking factor[107]. The integration mechanisms are directly addressed to the common business project, and the associated party, by taking part in the business, may hint to a minimum interest in the carrying on of the whole project[108]. In the *associazione in partecipazione* the coordination and the liability of the business activity are entirely upon the associating party. This contract does not provide in any case the unlimited participation in the losses derived of the associated party. The certainty of the contribution and the limited participation to the business risks are unequivocal elements[109].

Starting from this consideration it may be drawn a line between the association in participation and the *"associazione temporanea di imprese"*. While in the former the relationship between the associating and associated parties has an internal denotation only and the only relationship vis-à-vis third parties is accomplished by the associating party[110], in the "*associazione temporanea di imprese"* there is the *esteriorizzazione* of the internal bond, even without the creation of a new entity[111]. The crucial point here

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[105] *L'associazione in partecipazione,* Ghidini pp. 68

[106] Trib. di Verona, 27th September 1993.

[107] *Contratti di Joint Venture, in Dizionari del Diritto Privato 3, Diritto Commerciale e industriale*, Andrea Astolfi pp. 296.

[108] See note 102. *Il contratto di Joint Venture. La disciplina dei raggruppamenti temporanei di imprese*, Andrea Astolfi pp.300.

[109] Trib. Bologna 3rd May 1972.

[110] See note 111. *Le Joint Ventures: tecnica giuridica e prassi societaria*, Daniele Bonvincini.

[111] C. di Cass. 11th June 1991 n°6610.

is the qualitative aspect of the two legal form. The structure of the two legal forms presents several distinguishing aspects, which the most prominent is certainly the fact that in the *associazione temporanea di imprese* the contribution of the *associato* is direct to take part in a business activity taken on by the other party[112]. The co-venturer's participation in the business activity result in a pro parte execution of the work, while the contribution of the associated party has nothing does not entail a *stricto sensu* cooperation on the same activity[113].

6.4. The cooperation between enterprises and the Italian legal arrangements: the *"consorzio".*

The Italian legal system gives to the consortium agreement a comprehensive discipline enshrined in the Italian Civil Code (art. 2602-2620). With the *consorzio*, *'Two or more entrepreneurs set up a common organization for the regulation and development of specific stages (fasi) for their respective entrepreneurships"*[114]. The peculiarity of the *consorzio* gives to the contracting parties the possibility to choose between a common organization of purely internal nature (*consorzio con attività interna*) and a joint management that interacts with third parties (*consorzio con attività esterna*). It is worth noting that this legal device has been reformed by Law n° 377/1977, that made it possible for entrepreneurs belonging to different sectors to join forces for different business purposes or performing jointly some of the activities of the firms involved[115].

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[112] See note 102. *Il contratto di Joint Venture. La disciplina dei raggruppamenti temporanei di imprese*, Andrea Astolfi pp.306.

[113] Ibid.

[114] Art. 2602 Italian Civil Code.

[115] See note 41*, International Joint Ventures – The Comparative Yearbook of International Business*, Dennis Campbell - Italy section, Fiorella F. Alvino.

A first consideration about the nature of the cooperation entailing a *consorzio* is about the duration of this legal arrangement. As it may be clear from art. 2602, there is a high level of business integration mechanism, when two enterprises choose the *consorzio.*

Of course, not as high as the choosing of a company for the cooperation and coordination of their common interests. The *consorzio* implies a stable organization aiming at a constant contribution of activities, assets and financial means for the contracting firms. Another consideration may be made on the applicability of the discipline of the *consorzio* to a general Joint Venture agreement[116]. Some others think the *consorzio* with merely internal activity may well fit the kind of cooperation implied by the Joint Venture agreement[117]. The *"Regulation and development of specific stages of their respective entrepreneurships"* constitutes a very generic reference to the business program of a given firm, and it well may be referred to a single business operation[118]. Therefore, it is complicated to separate the business program of a firm in stages and the Civil Code does not give an exhaustive explanation of what the lawmaker's intention was. It could be assumed that the object of the contract is limited to the common organization, and the carrying out of the activities the common organization had as a scope[119].

Moreover, the *"common organization"* aspect of the *dictum* of Art. 2602 represents a central aspect of this legal device. The common organization of the business may well constitute a general attribute for all kind of cooperation and coordination agreements. The clauses of the Joint Venture agreement can include the common organization of the business as part of the contract. However, it is not specified if "common organization" entails the predisposition of a separate structural device, or just a generic

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[116] *Consorzi tra imprenditori. I) Diritto Commerciale*, Volpe Putzolo.

[117] See note 41.

[118] *Consorzi e società consortili nel diritto commerciale*, da *Digesto delle discipline privatistiche* Luigi Filippo Paolucci, pp 442.

[119] Ibid.

expression to underline that the firm must operate with a minimum organization at the base[120].

Defining the scope of the "common organization" reference in the Civil Code may help us to to grab important information on the *inter partes* relationship of the *consorzio*. So, there may be some doubts on the legal personality of the common organization of the *consorzio*. This issue can be deemed admissible for what concerns the *"consorzi con attività esterna"*, for which the lawmaker provides the *"Establishment of a joint office for the carrying out of business with third parties"*[121]. nvolved. The case-law have deeply addressed the issue at stake.
It has been affirmed a certain separation between the common organization established with the *consorzio* and the enterprises taking part in it. A judgment of the Consiglio di Stato , while admitting that some consortium agreements provide the joint liability of its members, affirmed that the legal personality of the consortium has been previously denied by the *Corte di Cassazione*[122]. In spite of this, the Consiglio di Stato states that *"Nothing excludes the possibility for the consortium to act on behalf and in the interests of the firms participants, extending to them the joint and individual liability, as expressly mentioned in Art. 2615 (2)*[123]*"*. As a matter of fact, the enterprises stipulating a *consorzio* conserve their individuality vis-à-vis third parties.

The topics of the consortium fund (*fondo consortile*), and the joint liability are undeniably linked to the legal personality issue of the consortium with external activity. This is another important aspect concerning the cooperation between enterprises, as it expands the scope of the "common organization" feature in the *consorzio*. Following a judgment of the Supreme Court, "*The legal provisions concerning the consortium with external activities aimed at realizing a common*

[120] *Il contratto di Joint Venture. La disciplina giuridica dei raggruppamenti temporanei di imprese*, Andrea Astolfi, pp. 327.

[121] Art. 2615 ter (1) Italian Civil Code

[122] Ibid., Cass. 1052/1970

[123] See note 76.

organization entitled of all legal relations, separated from the single firms"[124]. Article 2614 states that the contributes and goods acquired by the contracting firms constitute the *fondo consortile,* adding that *"For the entire term of the consortium agreements, the members cannot ask for the division of the fund and members 'own creditors cannot levy execution on the member's share of the fund".* The consortium fund is essentially what link contracting parties' investments and what limits their liability for the obligations arisen during the term of the collaboration.

The importance of the consortium fund is bolstered by Art. 2615 that "*As regards as obligations assumed on behalf of the consortium by its representative members, third parties may levy execution solely on the consortium fund"*. Moreover, *"As regards as obligations assumed by the consortium's organs on behalf of its members, the latter are jointly liable with the consortium fund"*[125]. Art. 2615 stresses the distinction between the obligations taken by the representative members of the consortium on its behalf, and the obligations taken by consortium's bodies on behalf of its members; for the first ones creditors can levy execution on the *fondo consortile*, while for the second ones can claim against each member of the consortium jointly with the consortium fund[126].

As provided in its judgment by the Supreme Court, the ratio behind this choice is to be found in the business purposes pursued by the management: in the first case the representative members take care of the interest of the consortium as a whole, in the second case the joint office look after the interests of single members of the consortium agreement[127]. Moreover, the consortium fund is not assisted by the same guarantees and publicity rules governing the share capital; the consortium does not hold a public capital like corporations and there are no provisions governing the integrity of the capital share. This implies the possibility for the contracting parties to cut down the amount of the *fondo consortile*, and, in doing so, third parties and the Administration

[124] Ibid.

[125] Art. 2615 (2) Italian Civil Code

[126] Cass. 4130/1979

[127] Ibid.

in public tender have interest in levying execution on the consortium fund as well as the enterprises involved in the trade relationship[128].
Another particular aspect of Law n°377/1976 has been the introduction of the *società consortile* with the provision of Art. 2615 *ter.* This mechanism of cooperation between enterprises entails the applicability of the provisions concerning the corporate form chosen, thus, applying the consortium rules which do not contrast with the legal form chosen for the company[129]. As some authors pointed out, contracting parties may well regulate their internal relations through the constitution of a common organization very often in the form of a consortium company or just consortium; and this horizontal arrangement can happen in the framework of an agency contract (*mandato*)[130]. The device provided by Art. 2615 *ter* permits companies to pursue consortium purposes[131]. Furthermore, the *società consortile* may help stressing some particular aspects of the Joint Venture agreement, like the regulation of specific stages of co-venturers' activities[132]. It is well-established that the consortium agreement may satisfy the same structural need sof the joint venture agreements. However, the *consorzio*, especially in the form of a company, suggests a long-term agreement which is hardly suitable for a contractual joint venture, characterized by flexibility.

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[128] Ibid.

[129] See note 2, *Le Joint-Ventures, Profili Giuridici e Modelli Contrattuali, Aspetti Generali*, Andrea Astolfi

[130] *Associazioni temporanee di imprese*, Bonvincini pp.7

[131] *Tipologia degli accordi e relativa qualificazione civilistica*, Victor Uckmar p.31; Trib. Milano 1985

[132] *Le associzioni temporanee di imprese*, Diego Corapi pp. 41

6.5. The cooperation between enterprises and the Italian legal arrangements: the "*GEIE*".

The European Economic Interest Grouping (EEIG, in Italy GEIE) has been introduced with the Regulation CEE 2137 of the 25th July 1985. It is widely considered the first supranational integration mechanism among enterprises and regulated by the European Law[133]. The great flexibility of this instrument ,and the formal institutionalization of the Joint Venture agreement by the European lawmaker made it a fundamental business tool for the cooperation between enterprises[134]. As set forth by the lawmaker, it should be applied to GEIE the provision concerning *"Public procurement and concessions for opera or public or public utility works, for public supplies provided for temporary groupings of enterprises and consortiums"*[135]. This implies the willingness to pair GEIE with other legal arrangement contract that govern the cooperation and coordination between enterprises. The absence of an organic discipline for the Joint Venture agreements raised many questions on the possible manners to regulate the GEIE[136].

The GEIE pursues an autonomous business activity through a common structural organization; the profits attributed to GEIE are basically considered profits of its members, individually considered[137]. Moreover, the liability and bankruptcy issues of GEIE impose the unlimited liability of its members, like for the unlimited society[138]. Legal scholars did not find in GEIE overall any specific affinity with the temporary grouping of enterprises[139]. This can be justified by few specific elements: 1) GEIE is

[133] *Joint-Venture (aspetti contrattuali),* Cesare Vaccà pp.251

[134] *Associazioni temporanee di imprese,* Daniele Bonvinvcini .

[135] Art.10 Law 204/1991.

[136] *Il Gruppo Europeo di interesse economico: un nuovo strumento contrattuale per la collaborazione tra imprese*, Diego Corapi.

[137] Art. 21 Regulation CEE n° 2137/1985.

[138] Art. 9 D.Lgs 240/1991.

[139] See note 160. *Il Gruppo Europeo di interesse economico: un nuovo strumento contrattuale per la collaborazione tra imprese*, Diego Corapi.

meant to accomplish an extensive cooperation between enterprises[140]; 2) the *causa* of the agreement, having as fulcrum a business activity performed by all participants, assimilates GEIE mores to a "*consorzio con attività esterna*"[141].

6.6. The cooperation between enterprises and the Italian legal arrangements: the company.

Under many aspects, the company model, as regulated by our legal system, has long been the most suitable vehicle for the cooperation between enterprises. The variety of the companies' models provided by our legal system do not allow itself an exhaustive debate above all the main legal entities. This paragraph will face the matters concerning the organization of the enterprises in a company-structured cooperation and coordination mechanism. The creation of a company is the highest level of business integration that parties may reach through their cooperation. By using a company vehicle for carrying on their business, enterprises show a great level of commitment, demonstrating to be ready to contribute in substantial terms to each other's business.

Since the *società civile* provided by Art. 1697 of the Italian Civil Code dated back to 1865, particular emphasis has been put on the applicability of the company model to the cooperation between enterprises. What the outdated model of *societas* provided was a contract where *"Two or more parties agree to put something in common in order to share the profits of the activities"*[142]*;* the scope of *società civile* clearly collide with the Joint Venture *causa*, where the contracting parties aim at acquiring the direct economic benefits in a framework of activities performed as a result of a trade relationship[143]. Moreover, the business utility deriving from a mere cooperation

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[140] Ibid.

[141] Ibid.

[142] Art. 1697 -1865 Italian Civil Code.

[143] *Contratto di Joint Venture*, Andrea Astolfi pp. 425.

between enterprises goes beyond the sharing *"of the profits of the activities"* of Art. 1865[144].

After having briefly discerned the differences between the *società civile* and the Joint Venture agreement, it may be useful to compare the latter with the company model provided by the Civil Code of 1942. *"With a company contract two or more persons pool goods and services for the pursuit of a business activity in order to divide the profits"*[145]. There are compatibility issues concerning the "*carrying out of an economic activity"*, not provided by the Joint Venture agreement, and coessential to the company contract[146]. Some authors consider an available and practical solution the creation of a company, ex Art. 2247, for a single transaction, excluding the need for the activity to be continuous[147].

However, another important aspect to consider is the possibility that two or more enterprises sets up a *de facto* company[148]. Before going through the model of *società di fatto,* it is worth noting that case-law excluded the presence of a company bond in situations, where there was no evidence of business activities pursuant profits for the contracting parties[149]. Here, it must be considered if in the Italian legal system is possible the configuration of a company agreement without the creation of a real *vinculum societatis*. According to the Supreme Court, in order to clarify the existence of a *società di fatto* vis-à-vis third parties, it is necessary to verify the existence of a vinculum, proven by the fact that two or more persons, through behaviors unequivocally direct to pursue company scope, convince third parties of the existence

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[144] Ibid.

[145] Art.2247 Italian Civil Code

[146] *Associazioni temporanee di imprese*, Bonvincini pp. 164.

[147] Italian Private Law, Guido Alpha and Vincenzo Zeno-Zencovich, pp. 99.

[148] See note 4, *L'associazione temporanea di imprese – Il contratto di Joint Venture*, Giovanni di Rosa, p. 80.

[149] C. d'App. Modena 20 Maggio 1890. It was excluded the presence of a company bond of two enterprises taking part in a public tender on the basis that each company gained its own profit lacking of interest towards the profit of the other company.

of the company[150]. Moreover, the regulation of a business relationship has to reach some standards before being recognized as *vinculum societatis*.
There is no mention in Art.2247 that the existence of a company could be limited to a single trade relationship. Again, while reviewing a judgement of the *Corte d'Appello* on the existence of a *de facto* company between three entrepreneurs taking part in a public tender, the Supreme Court has made clear that the activity of the three persons was meant to last beyond the tender procedure[151]. In this case, the three entrepreneurs 'scope was not to conclude a *unius negotii,* whose end coincide with the end of the collaboration; the intention of the contracting parties was to make the collaboration last for a longer period of time, while conferring means and services through a common organization and a financially autonomous entity. To this extent, the fact that for the whole span of the tender contract the three contracting parties relied on their own patrimony for their cooperation or that the whole opera was performed by one only of the entrepreneurs[152]. However, some authors denied the admissibility of a *unius negotii* company, stating that the business carried is casual even considered in the framework of a long and complex trade relationship[153] (e.g., the Appeal Court of Catania did not consider casual a company formed for the purpose of erecting a building and selling out its apartments[154]).
The model provided by the Joint Venture cannot be defined *occasionale* in the above-mentioned way; some authors, while recognizing the affinity between the two legal forms, tends to give Joint Venture a *sui generis* connotation[155]. Furthermore, it could be difficult to admit the "*appearance*" of a *vinculum societatis* between co-venturers; even admitting the possibility of its appearance when dealing with third parties, it may result unfair to expose all the parties to a *uti socii* liability, when one or more members

[150] Cass. 6 November 1981.

[151] Cass. 10 June 1980.

[152] Ibid.

[153] *Le società in genere. Le società di persone*, Francesco Galgano pp. 19.

[154] C. d'Appello Catania 5th October 1982.

[155] See note 85. *Associazioni temporanee di imprese*, Bonvincini

intended to involve all the venturers in carrying out the obligations[156]. According to Andrea Astolfi, the the co-venturers may well be seen as members of a company by violating the Joint Venture agreement or not showing any reaction to others 'wrongdoing. This can be justified by the substantial diversity of the Joint Venture agreement from the company contract; the existence of a company can be proven only by the breach of contract or from its transformation in a different type of contract[157]. As showed years later by the case-law, the grouping of enterprises does not itself configure a new entity on the model of company; however, this does not absolutely exclude the case of a different business relationship between the enterprises involved, when all the elements that prove the existence e.g. of a company are met[158]. From a different perspective, the existence of a *società di fatto* can be concretely proven through the analysis of the internal and external relations of the enterprises: the first ones could be justified by the presence of a shareholders' agreement or other fundamental elements (common fund, common management of activities, proportional sharing of gains and losses, *affectio societatis*); for what concern external relations, the exteriorization ("esteriorizzazione") of *vinculum societatis* is enough to put joint liability on the whole grouping. This should be sustained by behaviors on which third parties unequivocally relied on as coming from a company[159]. In its judgment, the *Corte di Cassazione* states the irrelevance of contracting parties 'true purpose or the actual stipulation of a company contract; from the *dictum* of the Court, it may well be acknowledged a higher grade of protection for third parties, being needed the prove of an internal agreement[160].

In the Joint Venture, the set-up of a corporation is never the aim of the agreement, but always the vehicle through which the contracting parties may reach the scope of the

[156] *Il contratto di Joint Venture. La disciplina dei raggruppamenti temporanei di imprese,* Andrea Astolfi pp.262.

[157] Ibid.

[158] Cass. 27th October 1995 n°11152.

[159] Ibid.

[160] Ibid.

agreement[161]. The company agreement serves as a frame agreement to the Joint Venture, serving as a tool to regulate all the aspects of the collaboration. In case of inconsistency or conflict between the provisions of the Joint Venture Agreement and the statutory clauses of the Joint Venture corporation, the first ones prevail[162]. As mentioned before, the Joint Venture Agreement is usually the main of many other agreements (called "Collateral Agreements") that set forth in detail the conventional part of the agreement; even in this case, the provisions of the other ancillary agreements may be preferred in case of conflict[163]. In order to better regulate their business, grouping of enterprises may use the form of the Joint Venture corporation. The incorporated Joint Ventures usually take the form of *società per azioni*, the Italian form of the joint stock corporation, as provided by the Italian Civil Code (Art. 2325-2447 *decies*), and *società a responsabilità limitata*, the standard Italian form of limited liability company, whose discipline is always embodied by our Civil Code (Art. 2462 – 2483). In order to better serve the purposes of the co-venturers, these *"legal shells"* may well include several clauses that regulate both internal and external relationship of the Joint Venture. For the purpose of this work, it would be useful to briefly analyze the clauses that limit the acquisition or disposal of shares, as they interfere with the freedom of the co-venturers to entertain business relationship with third parties[164]. These limits in the right of disposal play an important role, by allowing the co-venturers to act as shareholders of the corporations. Going through all the clauses would be burdensome to the purpose of this work; anyway, Daniele Bonvincini in *Le Joint Ventures: tecnica giuridica e prassi societaria* studied how the US practice influenced the Italian way of adjusting the Joint Venture agreements to the needs of the participants. Clauses are generally valid if addressed to the realization of a lawful purpose and if they do not preclude in an absolute way the right of disposal of the

[161] *Profili di Diritto Societario degli accordi di Joint Venture*, Diego Corapi pp.153.

[162] Ibid.

[163] See note 41, *International Joint Ventures – The Comparative Yearbook of International Business*, Dennis Campbell - Italy section, Fiorella F. Alvino.

[164] *Profili di diritto societario degli accordi di Joint venture*, Diego Corapi, pp.153.

shares[165]. In the Italian practice, statutory clauses that control the transfer of shares are essentially *first refusal* and *approval* clauses. The first ones give the shareholders priority rights over other buyers on disposed shares on equal terms. The second ones provide the possibility for the Board (or rarely the shareholders 'meeting) to veto the efficacy related to the acquisition of the membership[166].

In our legal system, the *società per azioni* (S.p.a.) and *società a responsabilità limitata* (S.r.l.) had a different reception of the above-mentioned clauses. The validity of the clauses for S.p.a has been recognized by the Civil Code, where Art. 2355 (3) set forth *"The corporation's charter (atto costitutivo) can impose certain conditions for the disposal of registered shares (azioni nominative)".* For what concerns S.r.l., Art. 2497 (2) confers a withdrawal right upon the disposing stockholders *"If the corporation's charter provides the non-transferability of the stock or subordinates it to the approval rights of corporate organs, other shareholders or third parties without subjecting it to limits or conditions, or provides limits and conditions that prevent the disposal* mortis causa*"*[167]. Moreover, the case-law has for longtime limited the efficacy of *approval* clauses that did not set forth objective situations justifying the rejection of the *placet*[168]. The ruling of the Supreme Court has been modified by Art. 22 of Law n° 281/1995, where it is stated that have *"No effectiveness clauses of corporation's charter, which subordinate the effects of the disposal of shares to the mere approval (mero gradimento) of corporate organs".* This leaves some discretion to the corporate organs, without leaving them with an absolute power of disposal. In the Joint Venture, this particular clauses play an important role as long as they set limits to the freedom

[165] *Le Joint Ventures: tecnica giuridica e prassi societaria*, Daniele Bonvincini pp. 432. There are several clauses taken from the Anglo-American practice (first option, first refusal, cross option, entry plan, buy back, buy sell ecc.). The author mentions *Laws of Corporations*, Henn-Alexander, pp.762, an exhaustive opera that recalls the main acts and judgments meant to form a solid framework for US corporate law.

[166] Ibid.

[167] Ibid.

[168] C.di Cass. 1978 n° 2365

of co-venturers to interact with third parties or them in the management of the joint venture[169].

The above-mentioned legal forms deals in different ways with third parties; as for the transferability clauses, there are different aspects that make one form more suitable for specific trade relationship. As provided by Art. 2325 of the Civil Code, *"In a* società per azioni *any liability arising from obligations contracted, may be satisfied solely with the company's assets".* As previously mentioned, the exclusion of a *uti singuli* liability serve the co-venturers a fundamental legal device. Moreover, the Italian law makes clear how the registration in the business register (*registro delle imprese*) may have different effects on liability towards third parties, as far as stating the joint and unlimited liability of *"Those persons who have acted on behalf of the company before registration"*[170]. The liability is extended as well to the *"Sole founding shareholder and the other shareholders, that according to the corporation's charter or with a separated act have decided, authorized or consented to the implementation of the operation*[171] *"*. However, this may result utterly burdensome if not mitigated by the provisions of the subsequent paragraph, according to which if the above-mentioned transactions are approved by the company after the registration, the company may as well be considered liable and must raise (*rilevare*) those who acted on its behalf up from their liabilities[172].

The liability issue is one of the most controversial and debated by Italian legal scholarship; going through all the manuals and theories of the joint stock company would result pretentious and would not fully serve the purposes of this work. The scope of building up a corporation is essentially to give rise to an entity distinct from the *singuli,* with the capacity to interact with third parties[173]. Before the formation of the company, the promoters are the ones assuming the biggest portion of the risks. As provided by our Civil Code, they are "*Jointly liable towards the company and third*

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[169] See note 111. *Le Joint Ventures: tecnica giuridica e prassi societaria*, Daniele Bonvincini.

[170] Art. 2331 (1) Italian Civil Code.

[171] Ibid.

[172] Art.2331 (2) Italian Civil Code.

[173] See note 31. *Contratto di Joint Venture*, Andrea Astolfi.

parties: 1) for the entire subscription of the share capital and for the deposits required for the setting up of the company; 2) for the existence of the contributions in kind in conformity with the sworn report ex Art.2343; 3) for the truthfulness of their communications towards the public for the formation of the company"[174]. The lawmaker does not exclude from liability *"those persons on whose behalf promoters have acted"*[175]. The second paragraph of Article 2339 is meant to assure investors the highest degree of protection for the risk capital market investors. The matter relating to the extension of liability has long been debated by the Italian scholars, since Tullio Ascarelli expressed the necessity to held jointly and severally liable even those persons on whose behalf Board members have acted[176]. The corporate form in a Joint Venture, except for specific derogations, serves the co-venturers with the so-called entity shielding. Having an entity legally distinct from their owners and managers afford a certain degree of protection to the individuals behind the business transactions[177]. However, the Italian legal system very often would prefer to protect third parties e.g. creditors who relied on the economic and organizational capacity, then proven insolvent. They were already examined in detail the limits that the promoters and the persons on whose behalf they acted face. As set forth in Art. 2325, there may exist an inverse form of entity shielding, which some authors called "owner shielding"[178] with the scope of protecting the personal assets of firm owners from the claims of firm creditors. Moreover, our Italian legal system affords creditors, and third parties in general, important legal protection against directors 'actions 'harming the share capital's integrity' or 'directly injuring' them. These rules find their legal basis in the limits imposed by Art. 2394, Art. 2394 *bis* and Art. 2395. *"The directors are liable to the company creditors for non-observance of their duties concerning the preservation*

[174] Art.2339 (1) Italian Civil Code.

[175] Art 2339 (2) Italian Civil Code, where it is stated that those on whose behalf the promoters have acted are jointly liable towards the company and third parties.

[176] *Interesse sociale e interesse comune nel voto in Studi in tema di società*, Tullio Ascarelli, pp. 157.

[177] *The Essential Role of Organizational Law*, Henry Hansmann & Reinier Kraakman pp. 387.

[178] *The New Business Entities in Historical Perspective*, Henry Hansmann, Reinier Kraakman & Richard Squire.

of the share capital integrity"; the action faces the fundamental limit of the insufficiency of company assets, so that creditors cannot satisfy their claims[179]. The third subparagraph of Article 2394 specifies as well that no connection exists between the corporate action for liability, provided by Art. 2393, and the creditors 'action. As it will be discussed more in detail the discipline of the creditors and their influent role in firms 'decisions it must not be overlooked the other rights of which third parties are entitled. As set forth in Art. 2395, the provisions of Section VI-bis *"Does not affect the right to compensatory damages of an individual shareholder or a third party directly damaged as result of directors' negligent or fraudulent actions"*. Art. 2395 is the final regulation in a system aiming at introducing an individual action against the directors[180]; this kind of action does not embody any contractual liability. There is a natural difference between the actions proposed ex Art. 2394 and ex Art. 2395: basically, in the former directors' behaviors directly damaged the share capital's integrity, while in the latter the injury occurred at the expense of the third party[181].

However, not always the enterprises decide to use a joint stock corporation as legal form for their Joint Venture. As underlined by Diego Corapi, the *società a responsabilità limitata* provides a more flexible tool with a minimum registered standard of 10.000 euros[182]. The rules on liability and third parties 'protection do not differ greatly from the ones of s.p.a.; for instance, Art. 2462 recalls Art. 2325 stating that s.r.l. is liable for the company's obligations only with their own assets. Moreover, for what concerns the liability to the company's creditors, the Italian limited liability company adopts the same provisions regulating the *società per azioni*; as recently set forth by a ruling of the Tribunal of Vicenza, Art.2394 on the liability to company 'creditors (applicable to s.p.a) and the general clause of Art.2043 can be applied to s.r.l.[183] Furthermore, it exists a direct and personal liability upon s.r.l.' directors to

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[179] Art. 2394 (1).

[180] C. di Cass., 23rd June 2010, n°15220.

[181] *La responsabilità civile degli amministratori di società per azioni*, Cesare Conforti pp. 1038.

[182] *Le associazioni temporanee di impresa*, Diego Corapi pp. 77.

[183] Trib. Vicenza ordinanza 26th July 2010

company ‘s single creditor, whenever the integrity of the share capital is at risk due to directors ‘negligence. The judgment of the Court gave several reasons that brought to the applicability of Art. 2394, even if it just followed the previous case-law[184]. This liability comes from the application of general principles: the creditors can take actions reserved to the company’s shareholders with the corporate action for liability ex. Art.2476 or, ex Art. 2043, act concerning the compensation for unlawful act[185]. The second case provides a case of tortious liability (*responsabilità extracontrattuale*) for damages caused by *“negligent or intentional acts that caused an unjustified injury”*[186]. It is worth recalling the importance of the *intuitus personae* both in the corporations’ model provided by Italian law and Joint Venture agreements. As seen before, the Joint Venture corporation may serve an important tool for operating with third parties, affording a certain degree of protection to company’s creditors.

[184] Trib. di Roma Sez. II 17th December 2008

[185] Trib Vicenza 2010

[186] Art.2043 Italian Civil Code

2. THE JOINT VENTURE BETWEEN WIND AND TRE: A COOPERATION BETWEEN ITALIAN ENTERPRISES WITH INTERNATIONAL ASPECTS.

Summary: 1. Wind and H3G: explaining the development of the telecommunication services in Italy. -2. The formation of the Joint Venture. -3. The EU control on concentrations: Iliad and the market integration. -3.1. Segue: the role of local authorities in the Merger test. -4. Legal framework and Parties 'commitments. -5. Wind's indebtedness and opposition by creditors: how can creditors safeguard their privileged position during an M&A operation? -6. VIP-CKH Luxembourg S.à.r.l. and the choice of a Luxembourg-incorporated entity as shell for the Joint Venture: final considerations on the operation.

1. Wind and H3G: explaining the development of the telecommunication services in Italy

Here, there will be discussed the Joint Venture agreement, which brought both Wind and H3G to consolidate their respective businesses in the telecommunications field. In this sub-chapter, there will be discussed the substantial aspects of the Combination Agreement between these two groups. However, this constitute as well one of the most recent example in Italy of concentrations *"with a Community dimension"*[187]. As a matter of fact, it would be important to explain how the Communitarian framework impacted the cooperation between these two enterprises.
The simultaneous presence of a plurality of competing economic operators in the same relevant market fulfils the demand of goods and services coming from the public. All this leads to increasing levels of competition within a given market that may affect the business interactions among the several companies that provide homogeneous goods

[187] Council Regulation (EC) No. 139/2004, Preamble.

and services. Moreover, there are several markets, where the cooperation between service providers is unavoidable for the preservation of certain levels of competitiveness[188].
Indeed, the role played by an enterprise in a relevant market may well be influenced by several factors, such as: the distribution of natural resources in a given area, the huge capital investments required by modern mass industrial production, the lack of mobility of the workforce, the impossibility to produce at competitive costs if large scale businesses are not achieved. Whereas, all these components severely limit the freedom of access to a relevant market for new operators, they encourage companies already operating at high level to increase further their business size. This may be achieved through forms of cooperation between enterprises that guarantee high levels of competitiveness, such as concentrations.
However, the business integration of two or more firms may well be subject to the supervision of EU Authorities. In fact, very often concentrations within oligopolistic markets, such as the telecommunication one, have serious implications not only at the national level, but at the Communitarian one as well. The consolidation of Wind and H3G's business may apparently have a national-only connotation. As it will be better explained further, there are several aspects, such as the Merger test, and the choice of the company exercising *"attività di direzione e coordinamento"* (a Luxembourg-based company) on the whole group, which do not strictly concern the Italian legal framework.

The concentration of the telecommunication business of both H3G and Wind consist of two steps:

a) the acquisition of joint control by Hutchison Europe Telecommunications S.à.r.l (*'HET'*) and VimpelCom Luxembourg Holdings S.à.r.l ('*VIP'*) of a newly created Joint Venture;

b) the merger by incorporation of Wind Telecomunicazioni Spa (VIP's subsidiary) in H3GSpa (HET's subsidiary).

[188] *Diritto Commerciale 1 – Diritto dell'Impresa*, edited by M. Campobasso, pp. 220.

Indeed, HET and VIP operate in the Italian telecommunication market through their subsidiary companies, which are respectively H3G and Wind. The Contribution Agreement between these two enterprises aims at the creation of a *Joint Venture paritaria*[189]. That entails that, after the transaction, both groups will contribute up to the 50% in the Joint Venture.
Subsequently, the main legal aspects of the operation will be discussed, going through the applicable substantial law, as well as the crucial role played by the shareholders in the choice of the possible legal devices. Furthermore, both HET and VIP are two limited liability company, whose discipline is regulated by Luxembourg legal framework. At the end of both steps, Wind Tre will figure out as a subsidiary of a Luxembourg-based company. For the purpose of this work, it will be interesting to look into the decision to incorporate the parent company of the Wind Tre group in Luxembourg.
Whereas the Joint Venture will carry out the majority of its business activities on the Italian floor, it may still raise some doubts the choice of a non-Italian limited liability company to wholly own Wind Tre after the transaction.

This comparative work is enhanced by the clear and highly-profitable choice made by the holdings to create a *shell company* incorporated under Luxembourg law.
Lately, Luxembourg has set forth an effective legal framework through the adoption of widely used corporate and banking laws. Over the years, it is becoming more and more less surprising the choice made by several enterprises to make use of a Luxembourg regulated corporate vehicle, pursuant their concentrations. Moreover, the adoption of the so-called *New Law* has brought new important changes in the Luxembourg corporation that reflects the need of more flexible mechanisms for the incorporating companies (such as the introduction of the *Société par actions simplifiées*).
Furthermore, a relevant part of this chapter is dedicated to the historical and legal aspects that brought these two groups to merge, explaining why the entrance of a fourth

[189] AGCOM, Delibera N. 426/61/CONS

telecommunication company, Iliad, was a necessary step to maintain a certain equilibrium from a competition standpoint.
The Communitarian legal framework provides relevant restraints, when two big groups in a relevant market agree to consolidate their business. It is not the purpose of this work to deepen the substantial aspects of the EU law applicable to mergers. However, the approval by the EU Commission played a huge role in the concentration process, and it would be appropriate to describe the most significant steps of it, in order to have a better understanding of the merger at stake. Lately, the European Commission has made it difficult to set up mergers in the European telecommunications field[190]. This looked a serious concern as seen in the Three-O2 telecoms merger blocked by the European Commission on the 11th of May, 2016. The transfer of a relevant part of the spectrum, along with other supplies (such as the transfer of many location sites to the new operator), played a meaningful role in the decision of the Commission.

Finally, another featuring aspect of this case law regards the right of creditors to oppose a merger. In this case, the creditors' rights vis-à-vis the merging entities systematically collide. The merger by incorporation of Wind in H3G has been considered the best possible legal instrument, to save creditors' preferential rights. The assets of a company serve as guarantees to company's creditors; the merger entails creditors of both companies to concur for the satisfaction of their claims. By doing so, the level of security accorded to the preferential creditors of a single company is put at risk. The concurrence of creditors covers a central role in the decision to opt for a merger by incorporation, instead of a mere asset or stock purchase.

[190] *European Commission clears Three/Wind merger in Italy, Financial Times*, September 1, 2016.

2. The formation the Joint Venture

The procedure that brought both companies to consolidate their business activities faced several steps.

As previously said, the first step of the Contribution Agreement consists in the acquisition of both HET and VIP of the joint control of a corporate vehicle, through which both groups will jointly conduct business in the Italian telecommunication market. In order to make things clearer, it would be useful to spend few words on the corporate structure of the *co-venturers*:

a) HET is a Luxembourg based company, indirect and wholly owned subsidiary of CK Hutchinson Holding Limited (referred as '*Hutchinson*')[191]. Hutchinson is a Hong Kong-headquartered multinational corporation, listed on the Hong Kong Stock Exchange Limited. Hutchinson provides telecommunication services in Italy through its indirect wholly owned subsidiary, H3G Spa.

b) VIP is a Luxembourg based company, indirect and wholly owned subsidiary of VimpelCom Ltd (referred as *'Vimpelcom'*)[192]. Recently, Vimpelcom has changed name into VEON. Vimpelcom is an Amsterdam-based multinational corporation, listed on the NASDAQ Global Select Market. Vimpelcom provides telecommunication services through its indirect wholly owned subsidiary WIND Telecomunicazioni Spa.

From this first scrutiny into the corporate structure of both groups, there could be made few assumptions. Both Hutchinson and Vimpelcom have chosen a *société à responsabilité limitée*, incorporated following the Luxembourg substantial law, as

[191] CK Hutchinson Holding Limited is a Hong Kong based company listed on the Hong Kong Stock Limited

[192] VEON is headquartered in Amsterdam and is listed on the NASDAQ Global Select Market through the company VimpelCom Amsterdam B.V

vector for their investments in Italy. Whereas, both Hutchinson and Vimpelcom are public companies listed on different stock exchanges, WIND and H3G are joint stock corporations, which have no access to the capitals market.
Then, the concentration procedure involving VIP and HET consisted of several steps has started with the completion of the Contribution Agreement between the parties.
Indeed, on August 6, 2015, Vimpelcom and Hutchison, together with their respective above-mentioned subsidiaries, VIP and HET entered into a Contribution and Framework agreement to form an equal joint venture holding company.
As a result of the Contribution Agreement, VIP-CKH Luxembourg S.à.r.l. (referred as '*VIP-CKH'*, or the '*Joint Venture'*) would own the telecommunications businesses of both groups in Italy.
The Joint Venture will operate, and works as telecommunication services provider for both the Hutchinson and Vimpelcom groups in Italy. As said above, the Contribution Agreement led each of Hutchinson and Vimpelcom owning 50% of the Joint Venture, which in turn indirectly owns 100% of the Italian operating subsidiaries WIND and H3G[193].
On September 1, 2016, the European Commission approved the transaction, including nominating the French operator Iliad as an appropriate remedy taker.
On October 24, 2016, the transaction also received final approval from the *Ministero dello Sviluppo Economico* ('*MISE'*) in Italy, which expressed its consensus on the transaction, and on the merging parties. The transaction has been effective since November 5, 2016.

The second step of the Contribution Agreement consisted in the merger by incorporation of Wind Telecomunicazioni Spa in H3G. Whereas, the contribution of HET and VIP into a newly created company, VIP-CKH, was deemed to create the parent company of the future group, the merger procedure involving Wind and H3G formed the subsidiaries of the Wind Tre Group.

[193] Case M.7758-HUTCHISON 3G ITALY/ WIND / JV - Merger Procedure pursuant Article 8(2) Regulation (EC) 139/2004.

On December 30, 2016, WIND and H3G finally merged. H3G was the incorporating company that, after the transaction, ultimately changed its name to Wind Tre S.p.A. As a result of the second step, the corporate structure of the resulting Wind Tre Group has been reshaped: VIP-CKH is the parent company of the group, which wholly and indirectly owns, through Wind Italia Spa, the 100% of Wind Tre Spa.

Pursuant to the terms of a shareholders' deed of VIP-CKH Luxembourg Sà.r.l., which has been incorporated into the bylaws of its subsidiaries, no party may reduce its aggregate indirect holding in VIP-CKH Luxembourg S.a` r.l. below 50% for the first year following completion. After the first year, either party may sell its shares in VIP-CKH Luxembourg S.à.r.l. to third parties after offering a right of first offer to the other party.

After having approved the Merger, the European Commission required a divestment of sufficient assets to allow a new operator to enter the Italian market as a fourth mobile network operator. Iliad, the French telecommunications operator, entered into contractual arrangements to purchase certain divested assets from Wind Tre. On the 1st of September 2016, Hutchison Europe Telecommunications S.à r.l and Vimpelcom Luxembourg Holdings S.à r.l notified the *Autorità per le Garanzie nelle Comunicazioni* (referred as AGCOM below) of the integration of their businesses in the field of telecommunications in Italy through the formation of an equal Joint Venture aimed ultimately at the merger by incorporation of Wind Telecomunicazioni S.p.A. in H3g S.p.a.[194]. All the stock transfer agreements concerning "companies exercising business in the telecommunication field in Italy" are deemed to receive the authorization of AGCOM[195]. Then, the AGCOM starts a preliminary activity in order to verify the compliance with the rules imposed by D. Lgs. 177/2005 on competition and regulation[196]. As subsequently amended and supplemented by the so-called *Decreto Romani*[197]*,* the definition of the business areas concerning the Integrated

[194] AGCOM, Delibera N. 426/61/CONS

[195] L. n° 249/1997, art. 1, par. 6, lett. c), n.13; the discipline has been utterly redefined by the document alleged to Delibera 368/14/CONS, art. 3, par. 1.

[196] Art. 43 of D.Lgs. 177/2005, *"Dominant positions in the Integrated Communication System"*

[197] D.Lgs. 44/2010, art.2 par. 1

Communications System (SIC) has been extended to all "*radio and audio-visual media services*". Hutchinson Europe Telecommunication S.à.r.l conducts indirectly business in the Integrated Communication System through its Italian subsidiary, H3G S.p.A, in the field of audio-visual media services on the digital terrestrial TV, satellite and online. As already stressed above, AGCOM controls all the consolidations and frame agreements intervening among entities operating in the SIC, insofar as they comply with the provisions of Art. 43 of the D.Lgs. 177/2005.

The consolidation process, aiming at the formation of an equal Luxembourg based Joint Venture between Hutchison Europe Telecommunications S.à.r.l. and Vimpelcom Luxembourg Holdings S.à r.l entails the integration of the Italian business of both parent companies, and a second incorporation of Wind Telecomunicazioni S.p.A. in H3G S.p.A.
Furthermore, the type of control exercised by AGCOM concerned as well the dominant position that the new operator would have covered in the SIC. The limits imposed by law provides the respect of the 20% threshold for total revenues in the Integrated Communication System. All the companies registered as communication providers[198] cannot directly or through subsidiaries earn revenues above the 20% threshold in the SIC. Going through the actual valuations expressed by AGCOM on the respect of the consolidation limits regarding 2014, the Hutchinson group earned revenues below the above-mentioned 20% threshold, while the VEON group had no revenues in the Integrated Communication System. Revenues referred to in Art. 43 par. 9 are the ones concerning the public broadcasting service being net of any related Treasury rights, from national and local advertising, teleshopping, sponsorships, dissemination activities and other sales and online marketing activities involving the public authority[199]. Referring to the type of control provided by Art. 43 par. 11, the companies taking part to the joint venture do not earn revenues above the 40% threshold of the total earnings in the electronic communications sector[200]. According

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[198] Art. 43 par. 9 of D.Lgs. 177/2005*, "Dominant positions in the Integrated Communication System"*; Art. 1, par. 6 a), n° 5), of Law. 31 luglio 1997, n. 249.

[199] Art 43 par. 10 of D.Lgs. 177/2005.

[200] Ibid.

to Art. 43 par. 11, companies that even through their subsidiaries earn revenues above the 40% threshold in the electronic communications sector cannot earn revenues above the 10% in the SIC

Going through the others important steps of the merger, a huge role in the merger has been played by the European Commission. On September 1st, 2016 CK Hutchinson and Vimpelcom received the final approval by the European Commission. In this specific case, the decision by the European Authority has been motivated by two different exigencies: on one side, Vodafone and BT's Everything Everywhere would have left as the only other two competitors in UK telecommunications, resulting in higher prices for mobile services in the UK and less choice for consumers than without the merger; on the other side, by hampering the development of mobile network infrastructure in the UK, the quality of services for customers would have been lowered[201].
However, there is a clear distinguishing factor between the above-mentioned operation and the Wind Tre Joint Venture: fearing a negative outcome from the European side, the Italian companies have proposed a fourth new operator, Iliad, to acquire part of the spectrum and impose itself as the fourth mobile phone operator in Italy. In the next paragraphs, this step will receive further explanations on the type of control exercised by the European Commission on the control of concentrations between undertakings. Here, what is important to state is clearly the fundamental role played by Iliad in this Joint Venture. In order to maintain a competitive market in Italy for mobile phones, the presence of Iliad and so, of a fourth mobile phone operator was a crucial factor in the ruling of the EU.

[201] Ibid.

3. The EU control on concentrations: Iliad and the market integration

In order to express a more exhaustive explanation of the merger it would be a coherent choice to briefly introduce the opinion expressed by the European Commission. To this extent, it is necessary to mention the role of Iliad in the Wind Tre merger.

Iliad S.A. is a French group, established by Xavier Niel (who holds the 59,22% of the total capital share) in 1991 and chaired by Cyril Poidaz since 2004. In the French telecommunications market, Iliad is at the moment the fourth biggest mobile phone operator behind Orange, SFR from the Vivendi group and Bouygues Telecom. Without analysing further, the history and the corporate structure of Iliad, the decision to enter the Italian market was made after Wind and Tre have decided to enter into negotiations with the company. Furthermore, the substance of the agreement between Wind Tre and Iliad may well be explained going through the decision of the European Commission. The remedies which have persuaded the European Commission to give the green light on the merger were essentially:

1) The transfer to Iliad of a certain amount of the radio mobile spectrum belonging initially to the Joint Venture and coming from different frequency bands (900 MHz, 1 800 MHz, 2 100 MHz e 2 600 MHz);
2) The transfer/co-location, as well as sharing, of several thousands of sites for the installation of mobile base stations from the Joint Venture to the new operator;
3) The interim agreement that would grant access to 2G, 3G and 4G, as well as new technologies, which allows the new operator to use the Joint Venture network to provide customers with mobile services nationwide until Iliad has established its own network.

The transfer of frequency bands and mobile base sites will increase Iliad's competitiveness in the Italian telecommunication market. Moreover, the presence of four mobile phone operators was an essential feature to maintain a competitive environment. Alongside the four operators, there are other "virtual operators" on the Italian market: Fastweb and PosteMobile are the two most recognizable on the Italian

market. These *virtual operators* are not owners of the networks they use to provide mobile services to Italian consumers. Basically, they have concluded agreements with one of the other four operators in order to use their network. According to the European Commission, the Joint Venture would have put at risk these *virtual operators* as well, by reducing their competitiveness on the telecommunication market.

As stressed above, the European Commission shall exercise a general control over all mergers and acquisitions that concern corporations. A very explicative discipline is embodied in Council Regulation (EC) No. 139/2004 on the control of concentration between undertakings; these provisions are clearly inspired by the need to ensure that competition in the internal market is not distorted[202]. Thus, major corporate reorganisations, as the one analysed in this chapter, are essentially the results of the lowering of international barriers to trade and investments, as well as a consequence of the enlargement of the European Union[203]. The stability of the internal market encompasses several developments that through the most recent FTAs (Free Trade Agreements) aimed at improving the conditions of growth in the community.

In order to better understand the importance of such a control by the European Commission on all concentrations and the difficulties the merger between Wind and Tre faced, it might be useful to stress the relevant provisions of the Regulation.

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[202] Art. 101 (1) of the Treaty on the Functioning of the European Union prohibits "*All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market (...)*". On the other hand, Art. 101 (3) provides an exception by declaring the provisions of paragraph 1 inapplicable *"In the case of:*

1) any agreement or category of agreements between undertakings;

2) any decision or category of decisions by associations of undertakings;

3) any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit".

[203] Council Regulation (EC) No. 139/2004, Preamble.

First of all, the primary consideration of the Commission was to value if the concentration had a Community dimension, falling within the scope of the Regulation[204]. According to the Regulation, the concentration has a Community dimension when the combined aggregate worldwide turnover of all the undertakings concerned exceed €5000 Million and the aggregate Community-wide turnover of at least two of the undertakings concerned is above the €250 Million threshold. Even if the aggregate Community-wide turnover falls below the threshold, the concentration has Community dimension if two thirds of the aggregate Community-wide turnover of an undertaking are achieved within a single Member State. Giving a look to the Balance sheet of both undertakings, it is clear how both undertakings met the standards enshrined in Article 1 of the Council Regulation. Thus, if it is taken as sample the *data* of both companies as indicated in their Balance sheets for the year 2015, it may result easy to consider full compatibility between the threshold of Article 1 and the actual revenues of the companies at stake[205]. Hence, the aggregate worldwide turnover of Wind and Tre correspond respectively to €4428 Million and €1830 Million.

What falls within the meaning of *"aggregate turnover"* is specified by the same Council Regulation, defining it as the *"Amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services"*[206]. The consolidated balance sheet of a corporation may provide a useful tool to grasp all the relevant information to calculate the aggregate turnover. Above all, the aggregate turnover of an undertaking concerned should be calculated adding to the turnover of the undertaking itself the ones of the undertakings under direct or indirect control: (a) with more than half the capital or business assets; or on which the parent company (b) has the power to exercise more than half the voting rights; or it (c)

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[204] Article 1, Council Regulation (EC) No 139/2004

[205] The data taken into account for the aggregate worldwide turnover of Wind Telecomunicazioni Spa are the ones taken from the Balance Sheet of December 2015 and corresponding to the total revenues of the year 2015 of the Wind Group.
Similarly, the study on the data of the 3 Italia Group are the ones published by the company and its subsidiaries at the end of the financial year 2015.

[206] Art. 5, Council Regulation (EC) No 139/2004

has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings; or it (iv) owns a general right to manage the undertakings' affairs[207]. The aggregate turnover takes, as well, account of those undertakings which have in the undertaking concerned the above-listed powers[208].

While from the Balance sheets it can be clear that both companies' aggregate worldwide turnover combined exceed the €5000Million threshold, it can only be assumed that the limits concerning the aggregate Community-wide turnover are met. Moreover, both companies explicate their business activities in the context of the European Union only, particularly on the Italian soil. Particularly, this is confirmed by the fact that Wind Telecomunicazioni S.p.a., the undertaking with the highest results in terms of revenues, before the merger used to exercise direct control over one Italian company (Wind Reatail Srl) and three Luxemburg-incorporated companies (Wind Acquisition Finance SA, Wind Finance SL SA, Wind Acquisition Finance II SA).

As mainly stressed in this paragraph, the concern towards the framework in which the Wind Tre joint venture will operate is a reality that involves all the other competitors. The main effects are synthetically and exhaustively summarized in the Guidelines: the merge Wind and Tre will strengthen or create a dominant position, by eliminating important competitive constraints on one of the two[209] and by changing the nature of the competition and enhancing forms of coordination between enterprises[210]. Another considerable conglomerate effect is represented by the fact that H3G is the only mobile network operator that is not a fixed operator, thus leaving the Joint Venture with a huge incentive to foreclose wholesale access to its mobile network to rival fixed

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[207] Ibid.

[208] Ibid.

[209] *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, paragraph 22. These are referred to by the Guidelines as non-coordinated effects.

[210] Ibid. paragraph 22. These are referred to by the *Guidelines* as coordinated effects. A changement in the nature of the competition may make coordination *"easier, more effective or more stable for firms which were coordinating prior to the merger"*.

operators seeking to offer mobile services[211]. In markets with few competitors like telecommunications, the creation of "*collusive oligopolies*" is certainly a risk, which the European authorities are aware of. The independence of these enterprises may bring them to interact in such forms that do not directly assimilate to abuses of dominant positions: among the others, there may be tacit collusion and cooperation[212]. Basically, lowering the number of competitors may lower the standards in transparency and credibility in the relevant markets. Furthermore, on the basis of these considerations, we can state that in an oligopolistic market the chance for new operators to emerge. The merged firm may control and influence the market in such a way that would lower the impact of new or developing rival firms, as well as the supply of inputs or distribution possibilities[213]. This explains the entrance of a fourth operator in the telecommunication market and why Iliad will be granted from the merged entity all the above-mentioned supply of resources.

4. Legal framework and parties 'commitments

I had the chance to meet up with Mark Alexander Shalaby, the Director of Legal Compliance and Regulatory department in Wind Tre S.p.A., and before that Director of the Legal Affairs Unit for Wind Telecomunicazioni spa as well as Group Legal Director for the Europe and North America Business Unit of Vimpelcom[214]. One of the first and most interesting question I had the pleasure to ask him concerned the applicable law of the whole process. The deeds and the procedure followed the applicable Italian law, explicated in the well-known discipline of the *Libro Quinto* of

[211] CASE M.7758-HUTCHISON 3G ITALY/ WIND / JV - Merger Procedure pursuant Article 8(2) Regulation (EC) 139/2004

[212] See note 207. I*l sistema del controllo delle concentrazioni in Italia,* pp. 152

[213] *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings,* paragraph 36

[214] Wind Tre website – Menagement Team section

the Italian Civil Code (Art.2501- 2505 *quater*). The choice of the Italian Civil law procedure was well-explicated by the fact that both Italian companies used an Italian framework well-before the agreement. Moreover, the Joint Venture sees as featuring characters two multinational companies with a huge infrastructure and operating in several countries. The scope of the operation is the one to give birth to biggest mobile phone operator in Italy (detaining a quote up to 33,1% of the market share) and the second fixed mobile operator in Italy (detaining a quote up to 13,1% of the market share), behind Telecom Italia[215]. Despite the freedom of establishment rules in the EU[216], if the incorporation process has been completed in Italy, the Italian Law applies to the substantial corporate discipline[217]. Paragraph 2 of the Law n.218/1995 concerning the International Private Law system reforms says that Italian Law applies to the following corporate matters: legal nature of the entity; company name; incorporation process, transformation and extinction; its legal capacity; appointment, powers and functioning of the organs; the legal representation of the entity; the rules for acquiring and losing shareholder quality and the rights and obligations connected; liability for entity's obligations; and consequences of violation of laws and bylaws[218]. However, it is impossible to not mention the European legal framework for what concerns the competition aspects of the concentration. As broadly explicated in the previous pages, the Community dimension character of the concentration imposes the respect of the procedure embodied in Council Regulation (EC) 139/2004.

[215] AGCOM – Osservatorio sulle Comunicazioni n°1/2017; the data contained are updated to December 2016

[216] *PART THREE – TITLE 1, The Internal Market* - Art. 26 TFEU; *Right of Establishment* - Art.49 – 55 TFEU; *Services* – Art.56 – 62 TFEU.

[217] Art. 25 L. 218/1995 says that *"Le società [...] sono disciplinate dalla legge dello Stato nel cui territorio si è perfezionato il procedimento di costituzione. Si applica, tuttavia, la legge italiana se la sede dell'amministrazione è situate in Italia ovvero se in Italia si trova l'oggetto principale di tali enti".*

[218] Art. 25 L.218/1995; *European Company and Financial Law Review*, 1 March 2007, p.52-75; *Cross-border Mergers, Change of Applicable Corporate Laws and Protection of Dissenting Shareholders: Withdrawal Rights under Italian Law*, Marco Ventoruzzo .

Clearly, the control exercised by AGCOM on some specific issues have showed how the European discipline has always needed to be integrated with the Italian regulatory framework for mobile telecommunications. At any moment in time, AGCOM would give its expert advisory opinion on other issues such as: the general market conditions in the Italian retail mobile telecommunications market; the authorisation by MiSe of the transfer of the Revised Divestment Spectrum and all the other related implications of such authorisations regarding the release of the Revised Divestment Spectrum; and questions regarding the laws and regulations applicable to radio frequency emissions at the Revised Sites[219]. As mentioned above, many aspects of the internal relationship between the co-venturers were left to the autonomy of the parties. Some of the featuring aspects of the deal were embodied in a Contribution and Framework Agreement, as well as a Shareholders' Deed, signed by Vimpelcom and Hutchinson on 6 August 2015[220]. Hutchinson 3G Italy Investment S.à.r.l. is the corporation in which the parties will make their contribution and, at the end, surviving as a Joint Venture. That is to say the Joint Venture shell will not be subject to Italian corporate laws, as being an entity incorporated in Luxemburg. As a result, the general provisions governing the commercial entities will be the ones set forth in the Luxembourg Act of 10 August 1915 on commercial companies (the so-called *"Luxembourg Companies Act"*), as amended over the years. Going further in the analysis, it will be presented which is the legal framework of the two most used Luxembourg-legal instruments (*Société Anonyme*; *Société à Responsabilité Limitée*).

As for the commitments of the Parties, subject to the Market test of the European Commission, it may be easily acknowledged the presence of a high number of commitments between the mobile network operators concerned and the European Union. Thus, this set of agreements entails long term binding efforts vis-à-vis third parties the parties are deemed to have complied with before the concentration is implemented. Among the others, these binding commitments comprise: a) a framework and transfer agreement; b) a national roaming service agreement; c) a RAN sharing agreement; d) a co-location of the services and structures with Iliad S.A.

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[219] See note 218. CASE M.7758

[220] Ibid.

On 18 July 2016, the Parties have then submitted to the Commission their further commitments towards the new mobile network operator, forming thus the *"Final MNO[221] Commitment"*. Substantially, the *Final MNO Commitment* consist of four main parts:

a) an agreement entailing the divestment of spectrum and sites (the *"Divestment Agreement").* This agreement includes a deal to transfer part of the spectrum of the Joint Venture to the new operator, as well as a transfer deal of the sites and co-location of wireless equipment to Iliad;
b) an agreement on the disposal of RAN sharing in areas with a low population density (the "*RAN[222] Sharing Option*");
c) a deal granting the national roaming for a transitional period (the *"National Roaming Agreement"*);
d) a commitment with Iliad concerning the provision of transitional services, such as interconnection and transmission.

All these commitments concern the regulation of the relationships between the Joint Venture and the new operator. The considerations expressed in the precedents paragraph about the high standards for competition for the telecommunications market required an intense effort and control from the European Authorities. Indeed, Iliad plays the role of *"remedy taker"*[223] in this transaction, as a huge load of commitments of the Joint Venture vis-à-vis third parties are taken towards the new operator.

[221] MNO is the abbreviated form of Mobile Network Operators.

[222] RAN is the abbreviated form of Radio Access Network.

[223] *Wind and 3 Italia Merger: transformative transcation completion*, Jean-Yves Charlier – Chief Executive Officer, Andrew Davies – Chief Financial Officer

5. Wind's indebtedness and opposition by creditors: how can creditors safeguard their privileged position during an M&A operation?

After having broadly analysed the possible effects that such an operation may have on the European Internal Market from a competitive standpoint, it may be useful to consider how the financial situation of the merging entities was such a relevant factor in the concentration. One of the main reasons that has lately refrained Wind from taking into consideration other significant investments to improve its 4G network was the high level of financial indebtedness[224]. The Parties have submitted a report to the EU Commission where it is stated that Wind was highly indebted, since at the end of the 2015 its debt was estimated approximately 9.9 Billion € of net debt, equal to almost six times its EBITDA[225]. Moreover, it is quite clear that in this contest there is no *"failing firm defence"* situation that would justify itself the compatibility with the common market. Additionally, the three criteria that would be compatible with a *"failing firm defence"* are not met: a) the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking; b) there is no less anti-competitive alternative purchase than the notified merger; c) in the absence of a merger, the assets of the failing firm would inevitably exit the market[226]. The capability to invest in the 4G network covers an important role in the merger, as in the foreseeable future Italy as well will be obliged to make such a

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[224] See note 218. CASE M.7758. From the submission made by the parties on the likely competitive constraint exerted by Wind absent the Transaction, Wind's high debt was one main factor, along with the (b) margins and revenues being mostly absorbed by servicing the high debt, thereby limiting WIND's ability to finance new projects; (iii) contractual covenants which restrict its ability to source further financing; and (iv) WIND's owner VimpelCom faces very limited incentives to provide financial support to WIND

[225] EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization) is a financial measure taking account of the total revenues, less cost of goods sold and selling, general and administrative expenses. Definition taken from the NASDAQ website.

[226] See note 212. Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, paragraph 90.

step to meet customers ‘exigencies of a modernized network. The lack of investments by both parties in this area is a crucial factor: on the one hand, H3G cannot build up a competitive network because of its small scale, if compared with the other competitors; on the other hand, Wind is trapped by debts matured and grown to an amount estimated approximately five-six times higher than its actual turnover[227]. On H3G side, there may be very similar considerations to the ones expressed on the difficulties that Iliad will face: by entering the market just in 2003, H3G had many difficulties to reach a critical scale. This is due to the fact that in the Italian telecommunications market there are very high barriers to entry, and, as noted by the Commission, any late entrant has to acquire spectrum, deploy a nation-wide network and, only at a later stage, try to develop large customers ‘base. The financial relationship between the co-venturers and their respective parent companies show as well differences: on the one hand, H3G does not possess any significant debt with third parties, and Hutchinson is willing to invest more in its subsidiary; on the other hand, as regards capital injection, Vimpelcom was perceived as having limited or no incentive to provide any further financial support to Wind since all the losses would be attributed to Vimpelcom and all the revenues would be used to service interest payment[228].

While the competition discipline relies mainly on the European Union treaties and regulations, as it was discussed in the previous paragraph, all the procedures and deeds concerning the merger followed the applicable Italian law. Basically, this entails that creditors could ultimately rely on the relevant Italian provisions, whose a great bulk is embodied in the Civil Code. Before going to analyse the actual discipline provided by our Civil Code, it may be useful to stress two key *facta* emerging from the report of the European Commission: a) the high level of indebtedness of Wind derives greatly from investment deals with third parties (e.g. banks) before Vimpelcom’s acquisition of Wind in 2011; b) Wind’s indebtedness did not impact at all the company’s financial growth over the last years. Thus, the former is an indication of the fact that creditors have a huge leverage in Wind’s business conduct in the telecommunication market; all the investors having a creditor-debtor relationship with Wind could exercise all the

[227] See note 218. CASE M.7758.

[228] Ibid.

rights that the law in force empowers them of. Even so, I must acknowledge that there is no press release or any official document, or even judicial acts, published by the undertakings concerning an opposition by creditors exercised in the framework of the merger. From the conversation with Mr. Shalaby and from the latest consolidated Wind's balance sheet[229], it was clear that Wind's financial situation was clearly under the supervision of the banks and other creditors. From Wind's financial statements dated back to 31st March 2016, it is stated that Wind's total financial liabilities amounted up to 11 billion €, whose more than 10 billion € are bond loans (on the balance sheet, *prestiti obbligazionari*) and over 600 million € are attributed to bank financing[230]. Wind's financial liabilities have slightly increased over the year and were symptomatic of its financing difficulties.
With the spectrum of the opposition by creditors, banks and other major investors could have easily influenced the legal procedure ultimately chosen. The fact that Parties opted for the acquisition within the meaning of Article 3 (1) (b) of the Merger Regulation of the joint control of a Luxembourg incorporated Joint Venture is a choice the merging parties could have had serious difficulties to take without investors 'approval. The merger formula is clearly the one that mostly consent secured creditors to retain their priority rights over over general creditors. The substance of the real impact of Wind's indebtedness on its actual performances plays a relevant role because it is index of its ability to invest in its network. Whilst the leverage investors have on Wind, its results have not been impacted in the last years. Actually, Wind's last balance sheets and data on its increasing EBITDA have raised controversial opinions on its ability of conducting a successful business in the long-term[231]. Despite this, the Commission has reputed Wind a very high competitor on the market, and this obviously raised the level of trust upon its investors.

[229] Wind Group – Balance Sheet, 31st March 2016.

[230] Ibid.

[231] From CASE M.7758, there are different opinions on Wind's future position in the market. According to the Parties, WIND's performance in the recent past has been declining, in particular due to poor network quality. On the other hand, the Commission argues that Wind has been successful in conducting its business even with the "hammer" of the high indebtedness.

In order to better understand in which Wind is leveraged by its investors, it may be useful to go through the most relevant tool provided by our jurisdiction to contrast a Merger plan: Opposition by creditors. The *ratio* behind this legal device has to be found in the necessity by the lawmaker to provide third parties, highly involved in the business activities of a company, a "tool" with the potentiality to impede any significant operation. There is no mystery the board of directors and shareholders are the ones planning, deliberating and ultimately implementing the merger. The assets of an undertaking constitute guarantee for its creditors and, as a consequence of the merger, creditors of both undertakings concur on the assets of both companies[232].
According to this perspective, the opposition may well belong to the means preserving the guarantee over a company's assets set forth in Article 2740, being thus qualified *"lato sensu precautionary"* in scope[233]. Actually, the creditors with the highest risk *ratio* are the ones of the less financially solid company. It would be easy to fall in the mistake to consider H3G the most solid of the two because of Wind 's high level of indebtedness, but Wind's actual assets and future profitability are crucial factors it would be difficult to count out. Furthermore, the ones entitled to opposite a merger are creditors whose claims antedate the filing of the Merger Plan on the Business Register[234]. The analysis of the position recognized to creditors in Joint Venture concentrations cannot be separated from the examination of real and compensation remedies creditors hold. The law set forth the possibility for creditors to express their dissent towards the merger 60 days after the last of the registrations in the Business Register, required by Article 2502-bis. Taking into account that this kind of formalities concern two or more enterprises (two in this case), it is stated that all the companies have to file for registration their merger decision at the Register of companies[235].
In case the registrations of all companies happen in different days, the last registration is the relevant one[236]. As a result, the opposition terms for at least one of the companies

[232] Trib. Brindisi, 17th July 1998

[233] Trib. Milano, 27th October 1997

[234] Art. 2503, Italian Civil Code

[235] Art. 2502 bis, Italian Civil Code

[236] *L'opposizione dei creditori alla fusione nel quadro dei mezzi di conservazione della garanzia patrimoniale*, Renato Oriani, pp. 31

may be longer than 60 days. Expiring the 60 days terms, there is a preclusion on creditors ‘opposition rights.

Furthermore, it may be useful to analyse which are the possible consequences of an opposition by creditors on merging companies and how this mechanism works. Exactly, in what does the opposition by creditors consist? In the past, it was highly debated if the opposition had to be provided by judicial means or by simply showing its own dissent towards the concentration. It has already stressed above the link between the opposition by creditors and the means provided in Article 2740; as a result, there is clear evidence that the *ratio* behind this mechanism consist basically in the capital protection of a firm’s assets[237]. The need of appropriate means of protection of a firm’s assets is corroborated by the fact that only the risk of a capital loss may justify and be compensated by appropriate guarantees[238]. This has been confirmed in a judgment expressed by the Tribunal of Milan on the topic stating that *“Article 2503 par. 1 allows a merger to be carried out without opposition whenever the audit firm has proved the absence of any harm for a firm’s creditors”*[239]. From an analytical read of these words, it would not be difficult to eventually figure out that the evaluation on the harm creditors might have from a future capital loss is confined to the assets of the undertakings involved and its group, without thus concerning an eventual *garanzia commerciale*[240], that is the new entity’s capability to create revenues. The doubts concerning the influence of the evaluation on the future commercial revenues of the resulting firm may result in a closer analysis of the financial situation of all the merging firms and relative groups, thus causing a bigger burden of proof on the creditors. However, the solution may be found pursuant a read of Article 2501-septies, which states the need to deposit, among the other documents, the ones concerning the

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[237] *L’opposizione dei creditori,* Matteo Erede, pp. 406, from *Trasformazione, fusione, scissione*, edited by Antonio Serra.

[238] Ibid.

[239] Trib. Milano, 14th November 2011

[240] The thesis of a garanzia commerciale has been supported by many authors, according to which an evaluation of the assets of the company on which the creditors rely to have guarantee of their credits alone may limit the functionality of the legal device under scrutiny, for a more detailed explanation of the topic see La fusione e la scissione, Antonio Serra, pp. 373

financial situation of the company and its group. All this in order to give all the Parties involved a perspective of the undertaking' real assets and economic growth. Moreover, it is pacific the read that creditors must prove the risk of harm that the operation may cause them, as well as proving that changing assets' ownership may result in a concrete and actual risk of creditors' chances to claim their credits back[241].

To this extent, the judicial relevance of the opposition by creditors is found in the Italian Civil Code, according to which the tribunal may set forth the operation to take place, when it considers unfounded the risk of harm to a company's creditors or when the company has given appropriate guarantee[242]. The combined read of Article 2503 and Article 2445, as amended by the D. Lgs. 5/2003, has brought to the acceptance of a judicial remedy as the right wat to propose opposition[243]. Moreover, this read uphold creditors' possibility to bring on legal actions and recourse to a trial. Actually, Article 2445 set forth provisions concerning capital share reduction that may well result in a harm for creditors. It is, therefore, easy read a similarity on the *ratio* behind the two above-mentioned provisions: both Article 2503 an d Art. 2445 par. 4 aims at granting appropriate countermeasures against operations carried out that can harm the substance of the estate of the company. A clear reference is made by the second paragraph of Article 2503 that directly recalls Art 2445, thus confirming the thesis of a judicial remedy for the opposition by creditors[244]. The protection of third parties and the need for stability of shareholders' resolutions bring the attention to possible conflicts between the company and its creditors when special operations are at stake.

Nevertheless, it is not always guaranteed that the opposition by creditors exert its effect on the merger. There are two main cases where the opposition does not freeze out the concentration process. The first case was explained in the previous pages, as the court through an evaluation can consider as being unfounded the risk of harm[245]. As said above, this evaluation concerns as well the future capability of the company to overcome its indebtedness; it is worth noting that Article 2445 talks about "risk of

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[241] Trib. Genova, 13th July 1992

[242] Article 2445 par. 4, Italian Civil Code

[243] Trib. Roma, 18th December 2008

[244] See note 247. *L'opposizione dei creditori*, Matteo Erede, pp. 412

[245] Article 2503 par. 2, Article 2445 par. 4 Italian Civil Code

harm" (*pericolo di pregiudizio*), and not about a real and actual harm[246]. The point here is what might be the consequences in case between the prognosis of the court and the increasing insolvency difficulties of the resulting entity. Creditors can invoke the liability of the Board of the merging companies[247].

Another case where the opposition by creditors does not stall the merging process is when companies offer appropriate guarantees. The law does not give a proper definition of what would be considered an "appropriate guarantee"; the Italian law scholarship tends to assimilate this expression to one of the provisions enshrined in Article 2503 says, that is the corresponding amounts of the credit of the dissenting creditors have been deposited at a bank[248]. Another instance of "appropriate guarantee" may well be considered the one of a bank guarantee: it would be difficult to prove the financial insolvency of a bank.

After having scrutinized the possible outcomes of an inaccurate evaluation of the risks on third parties side, it may be worth spending few words on the strategy and precautionary measures adopted by Wind to avoid third parties 'interference in its business activities. Going back to the Wind Tre Joint Venture, an important aspect that clearly had influence on the decision made by Wind's creditors to ultimately uphold the merger was the existence of a Senior Facility Agreement[249]. There is no mistake that the whole operation has been influenced by the high level of protection granted by a financing agreement with a bank and the fact that a relevant part of the indebtedness consisted in senior debts, notoriously secured and less risky. According to Article 46 T.U.B. (*Testo Unico Bancario*), medium and long term loans in banks-undertaking business affairs could be granted a special preferential right (*privilegio speciale*) on movable goods; and it can consist in: a) existing and future facilities and works, licenses and capital goods; b) raw materials, in-process materials, stocks, finished products, interests, livestock and goods; c) goods in any case purchased with

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[246] See note 247. *L'opposizione dei creditori*, Matteo Erede, pp. 408; *Fusione di società e opposizione di creditori,* Valerio Sangiovanni, pp. 16

[247] In the specific case, it can be invoked Article 2476 par. 7 of the Italian Civil Code, as being a coherent provision concerning on the Italian società a responsabilità limitata.

[248] See note 247. *L'opposizione dei creditori*, Matteo Erede, pp. 412

[249] Wind Group – Balance Sheet, 31st March 2016

the loan; d) credits, even future ones, resulting from the sale of the goods therein indicated. Additionally, the *privilegium* may also consist in the guarantee of bonds and other securities, pursuant to Articles 2410 or 2483 of the Italian Civil Code[250]. Thus, among the guarantees provided by Wind to third parties, there is the special preferential right accorded to all the banks and the other creditors therein specified financing the Senior Facility Agreement on present and future assets of the Wind Group, as amended and integrated through the years[251]. Moreover, the guarantees towards the third parties of the Senior Facility Agreement do include as well a pledge on trademarks and intellectual property rights of the Parent Company; as well as, a pledge on 12.006.200 shares representing 100% of the share capital of the subsidiary Wind Acquisition Finance SA held by WIND Telecomunicazioni SpA in favour of other banks financing Wind[252]. Furthermore, banks are not the only third parties Wind entered into financing agreement with. There is as well a total amount of 108 million€ by insurance and credit institutions sureties: a) 21 million € were issued by insurance companies in order to permit Wind to take part in tender procedures; b) 87 million € were issued by credit institutions for tender procedures as well, whose 34 million € in favour of MiSe in the framework of the granting of usage rights on frequencies and other leasing agreements. Even if other internal documents have not been available to the public, it remains impressive the amount of information that materials like balance sheets and report from the European Commission can provide. Finally, Wind's business profile has always allowed the Group to maintain its competitiveness on the market, as well as a high the level of profitability.

As made in previous considerations, investments in the new technologies are a crucial factor for both enterprises to still play their role in the telecommunication market. Taken into account the entity of debts, further investments would raise the level of awareness on Wind's financial situation. From the prognosis made by the European Commission, there must be no doubts on the fact that creditors have considered the merger to be an unavoidable choice for the stability of the Wind Group.

[250] Article 46 TUB, par. 1-bis

[251] Wind Group – Balance Sheet, 31st March 2016

[252] Ibid.

6. VIP-CKH Luxembourg S.à.r.l. and the choice of a Luxembourg-incorporated entity as *shell* for the Joint Venture: final considerations on the operation

How may the choice of a *société à responsabilité limitée* be linked to the financial indebtedness of Wind? Yet, in the previous paragraph, it has been addressed the dramatic financial situation that the merged entity will have, pursuant to the high indebtedness of Wind prior to the transaction. However, Vimpelcom has always been confident in the possibility to flow investments through its wholly owned companies. Thus, a fundamental "piece" of its corporate structure has always been the S.à.r.l., and this one will continue to play a key role at the end of the transaction as well. The Senior Facility Agreement has showed how a major part of the financial resources provided to Wind by Hutchinson comes from the debt securities market.
This assumption has a solid proof in the data taken from the Luxembourg Stock Exchange (LSE) disclosed floating exchange notes. According to the database of the LSE, Wind Tre has issued several Senior Secured Notes, redeemable in the long term. Regardless of any merely financial evaluation on the real entity of these notes, it must be acknowledged that this choice comes after the possibility for a S.à.r.l. to issue debt securities to the public, granted after the enactment of the "New Law", which amended several provisions on corporate law. The possibility to have free access to the debt securities market, without any need of an intermediary or *"investitore professionale"* for the subscription of the securities like in Italy, makes the S.à.r.l. a competitive vehicle. As a matter of fact, through the Joint Venture both Hutchinson and Vimpelcom have the possibility to flow investments to their subsidiaries. The intercompany loans made by VIP-CKH Luxembourg to Wind Tre will make it easier for the merged company to hold the financial assets needed to compete on the telecommunication market. The notes secured to the LSE will be effectively subordinated in right of payments to all of the future secured indebtedness of the Wind Tre Group.

Most of the considerations on the S.à.r.l. will be made in the next chapter.
However, few things must be said on what led both Hutchinson and VEON to subject the VIP-CKH Luxembourg S.à.r.l.[253] to the Luxembourg discipline for corporations. There was the precise intention to avoid listing VIP-CKH on the capital market: generally, by choosing a S.à.r.l. the founders give up to the possibility to list their company on the stock exchange, as well as issuing public bonds until the "*New Law*". As it will be better explained in the next paragraphs, the S.à.r.l is vastly used for more flexible corporate governance and concentrations that would rather confine their business among the shareholders making their contribution. To this extent, it would be clear the purpose to maintain VIP-CKH as a static vehicle serving to balance the board members' initiative.
Luxembourg offers a set of corporate and banking laws internationally widely used by international investors, and from a certain point of view a relieving taxation system. For instance, Luxembourg does not levy withholding tax on interest and royalties. I will better explain the general legal framework of a Luxembourg-incorporated company. In the next sub-chapter it will be widely explained what advantages that corporation might have, if compared to an Italian Joint Venture. Basically, it may be said that in order to retain their competitiveness in the business affairs Wind and Tre choose a "competitive" legal environment.

[253] VIP-CKH Luxembourg S.à.r.l. will be referred as "VIP-CKH" or "Joint Venture"

3. HOW DOES LUXEMOURG PROTECT FOREIGN INVESTORS? AN INSIGHT TO THE LEGAL BACKGROUND OF THE COMPANY-BASED FORMS OF COOPERATION BETWEEN ENTERPRISES.

Summary: 1. Introduction. -2. Bill n 5730, Law of 10 August 2016 – the "New Law" – modernisation of company law. -3. S.à.r.l., S.a.s and partnership agreement: internal structure and functionality for Joint Venture agreements, creditors' protection. -4. How Luxembourg became attractive to foreign investors? Going through the four Luxembourg laws that changed the European corporate landscape. -5. Tax matters: what are the relevant fiscal features for corporations in this contest?

1. Introduction

Lately, Luxembourg has been one of the most active countries in the field of corporate law, but in general in the whole European landscape was the one that mostly understood was had to be done to facilitate incorporations. Very recently, Luxembourg set up important legal devices in order to stimulate collective investments in many areas of law: corporate, banking, finance, real estate and tax. By doing so, Luxembourg has developed an unbelievable set up for investments slowly becoming the "default choice" for investments and, with the due proportions, establishing in the European Community what Delaware is for the United States: a cornerstone for investors and fund managers[254]. However, it must not be made the mistake to confuse the discipline of the Joint Venture to the one of the alternate investment fund. When investors and enterprises opt for entering into business in the EU, Luxembourg may serve very interesting options. As it will be discussed in the sections below, funds have a totally different regulation if compared to the Joint Venture. The purpose of this sub-chapter

[254] *Luxembourg – the Delaware of Europe for alternative investment funds?* - Claude Niedner and Pierre Beissel.

is to show how the Luxembourg legislator has lately created new legal instruments that permit the constitution of the joint venture an even more attractive regulatory environment.

2. Bill n 5730, Law of 10 August 2016 – the *"New Law"* – modernisation of company law

The Law of 10 August 2016 is without doubt the main topic of this sub-chapter. As revolutionary this law might be considered for the renewal of the company law discipline in force, there is room to consider this as the final step of an extraordinary reform bringing modernization to the world of enterprises. Therefore, pursuing an intent to facilitate the read I must divide the object of the reform in three parts, that are the most relevant sections of the *"New Law"*, all requiring to be treated separately: a) modifications common to all types of companies; b) modifications concerning the private limited liability company (S.à.r.l); c) modifications concerning the public limited company (S.A.). The introduction of the *société par actions simplifiée* is clearly another cornerstone of the whole bulk of amendments, but I will treat this entity separately in the next paragraph, as being an important Joint Venture vehicle.

Going through the main modifications affecting the general provisions, certainly one of the most important amendments is the one allowing a company to have "tracking shares". This is a category of shares, whose value depends from the performances within a business Group of its subsidiaries or parent companies[255]. As said by the

[255] *Dalle tracking shares alle azioni correlate: brevi riflessioni sull'esperienza domestica italiana*, Ferdinando Bruno. According to the author, tracking shares can be subsequently divided in two other categories: divisional shares and subsidiary shares. The second ones are shares of the parent company that gives shareholders a right to gain on the performances of its subsidiaries. The divisional shares are the traditional ones, whose explaination will be given above.

Luxembourg Civil Code, when there are more classes of shares, the social contract can correlate the financial rights of these shares to the performance of one or more assets and activities of the company[256]. The US experience, the one where this category of shares had a great success, shows how tracking shares serve as a great tool in conglomerate groups, where the ones investing on it are people having interests on some specific sectors of the company only[257]. As a result, tracking shares does not serve best their purpose within average size or mono-sectorial companies. A further analysis of these shares concern the substantial rights they give to their owners: a) dividend rights, for instance the ones correlated to a specific business sector of the company; b) voting rights, generally on the same matters ordinary stockholders have the right to vote, unless statutory provisions say otherwise; c) liquidation and exit rights, providing the same discipline applicable for ordinary shares.

Moreover, Bill n 5730 clarifies the controversial situation and rights upon the bare owner and the usufructuary in the case an usufruct-encumbered share. In that case, unless there are decisions concerning profits allocation, voting rights belong to the *nu-propriétaire* (bare-owner). As it happens in Italy, the usufructuary will have dividend rights as well on these shares[258]. Additionally, in the case the company opts for the "buy-back" of the shares, the bare-owner and the usufructuary shall have be liquidated the value of their corresponding right on those shares. As for the *"failing firm"* situations, the Civil Code confers the usufructuary or the quasi-usufructuary the right to receive back the sums paid to the bare-owner.

The two other most relevant and substantial modifications made on the general provisions of company law are the ones embodied in Articles 1855 and 1864bis of the Luxembourg Civil Code. These two provisions, as amended by the Law of 10 August 2016, concerns respectively the formal recognition of voting arrangements and a simplification of the sole shareholder discipline: two very different topics, whose amendments to the previous discipline deserve their specific space in this work.

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[256] Art. 1853 of the Luxembourg civil code, as amended by the 5730 Bill

[257] *Tracking stock, Marrison*, pp. 235-239, taken from the International Company and Commercial Law Review, 2000..

[258] Art. 1852-bis of the Luxembourg civil code, as amended by the 5730 Bill

As for the provision set forth in Article 1855, the agreements between future or actual shareholders on the acquisition or disposal of social rights are deeme.d to be allowed[259]. The only condition posed by this provision is that these agreements must not have as their main object the affection of profit-sharing or contribution to losses. According to many, this might consist in the express recognition of the *conventions de portage*[260].

This provision is an example of modernization with the standards provided by the other European countries, that Luxembourg has introduced only since the entry into force of the Bill n 5730. This law expresses in a different and more synthetic way what our Italian Civil Code enunciates in Articles 2341-bis (*Patti Parasociali*) and 2265 (*Patto leonino*). The distinction between Article 2341-bis of the Italian Civil Code and Article 1855 of the Luxembourg Civil Code is that the latter does not expressly introduces any time limitation for these agreements, while the Italian discipline imposes a five years limitation. Even if agreements between shareholders or shareholders and third parties provide a duration longer than the five years period, these are deemed to last for five years, with the possibility to renewing at the end of this period. On the other hand, Luxembourg law does not any time limit to these *conventions de portage.* Moreover, Article 1855, by providing the nullity of any agreement concerning the profit-sharing or contribution to losses as direct object of it. The similarity with the provision of Article 2265 of the Italian Civil Code is clear, as there might be agreements concerning the total exclusion of shareholders from any payments right (e.g. dividend rights) deriving from the ownership of shares. As said by the Italian case law, an exit option excluding a shareholder from the eventual losses of the company might undermine the "business risk" principle[261]. As for the provision of the new Article 1865-bis, there is the formal recognition of a simplified liquidation procedure for companies with a sole shareholder. Basically, one of controversial points of the "*prior-New Law"* discipline was the legal qualification of the situation where a single shareholder held all the shares of a company. According to Article 1865-bis, no dissolution of the company is

[259] Art. 1855 paragraph 3 of the Luxembourg civil code, as amended by the 5730 Bill.

[260] *The Luxembourg Law Company Reform*, Alex Schmitt; *Reform of Luxembourg Company Law*, Chan Park.

[261] Trib. Milano, 30th December 2011.

provided in the case a sole legal person owns all the shares of an undertaking. Any interested party may request such a dissolution if no regularization has taken place within a year, to which the tribunal may add six more months in case of delay. Notwithstanding the possibility for the solo shareholder to dissolve at any time the company whose shares are in his hands, the dissolution may be requested as well by creditors, as being qualified as "*interested party*". The procedure is a simplified one and the code disciplines the effects of the dissolution on the shareholders and the interested parties. Thus, the dissolution entails the universal transfer of the company's assets to the sole shareholder, without there being any need for liquidation (*transmission universelle du patrimoine*). The creditors may, within 30 days of the publication of the dissolution, ask the President of the District Court ruling on the matter, the constitution of security measures (*sûretés*). The president can only reject this request if the creditor has adequate guarantees or if it is not deemed as necessary to take into account the assets of the partner. From the comparison between the sole shareholder discipline between Italian and Luxembourg jurisdictions, there may be a lot of information about the formalities and both lawmakers' purpose with these two discipline. The procedure described by Italian law is more detailed than the one embodied in Article 1865-bis. In the latter, there is no mention to the board members' role when all the shares belong to a person. The *ratio* behind our Article 2362 is to assure transparency, by notifying with the appropriate means provided by law, about who are the ones conducting the business within the company. Additionally, the need for transparency is justified by an unconventional usage of the corporate vehicles. Luxembourg company law seems to drive all the attention on the fact that a sole shareholder company is not a long-lasting situation. While the Italian lawmaker does not censure the presence of sole shareholders 'S.p.a.[262], widely accepted and used in our national corporate experience (see *shell companies*), Luxembourg law sees the sole shareholder company as an irregular situation that may happen during the course of a corporation "life"[263].

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[262] Article 2328, Italian Civil Code.

[263] Art. 1865-bis paragraph 1 of the Luxembourg civil code, as amended by the 5730 Bill, as it says *"Tout intéressé peut demander cette dissolution si la situation n'a pas été régularisée*

For what concerns the modifications regarding the private limited liability companies, it must be admitted that Luxembourg lawmaker opted for the introduction of very important substantial changes in their discipline. S.à.r.l. and S.A. are the two most used corporate entities and the ones being mostly affected by the reform. The overall structure of a *Société à responsabilité limitée* has significantly changed; first of all, the number of shareholders shall not be higher than 100 and even in the case the company counts more than 100 members the company has a one-year period to regularize the situation[264]. This way, along with other changes that will be discussed below, Luxembourg has made clear that S.à.r.l. could potentially serve as an instrument with a higher possibility to interact with third parties; an important step has certainly been raising the minimum number of shareholders from 40 to 100[265]The minimum capital share required to incorporate a S.à.r.l. set up to 12.000€ (instead of 12.394,68€, as it was before the *"New Law"* was implemented)[266]. Moreover, in addition to shares that represent the corporate capital it is possible to issue beneficiary shares to a specified person (the so-called *parts bénéficiaires*), then statutory norms shall specify the object and the rights attached to those shares. This is arguably the most significant change introduced with the reform concerning the private limited liability company: by not specifying if the "*specific person"* has or not to be a shareholder, S.à.r.l. are potentially open to the public. This freedom receives some restraints in Article 189, where it is stated that *"neither corporate units or profit units*[267] *with voting rights may be transferred inter vivos to persons"* without the consent of at least three-quarters of the

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dans le délai d'un an. Le tribunal peut accorder à la société un délai maximal de six mois pour régulariser la situation".

[264] Art. 181 of the Law of 10th August 2015, introduced by Law of 18 September 1933, as amended by the 5730 Bill.

[265] *Legislation relating to commercial companies*, Philippe Hoss & Elvinger Hoss Prussen, pp.165.

[266] Art. 182 of the Law of 10th August 2015, introduced by Law of 28 April 1988, as amended by the 5730 Bill

[267] Law of 10th August, 1915 makes use of the term "units" instead of shares in order to distinguish them from the shares of the *sociétés anonymes*.

shareholders. S.à.r.l. may lower this term down to half of the shareholders[268]. Article 189 introduces a new discipline for the transfer of shares, inspired by the need to assure certainty about third parties entering the company as shareholders or, simply, as beneficiaries. In the case, the company does not approve the transfer of those shares, the members have two possibilities: a) acquire the shares; b) cause other third parties to acquire them at a determined price[269]; c) decide to reduce its capital by the amount corresponding to the nominal value of those shares and redeem such units at a determined price[270]. Furthermore, the *"New Law"* has authorized the possibility to issue a new class of "units": the Redeemable Shares[271]. The corporate capital can be made totally or partially by redeemable shares and their conditions and redemption terms shall be fixed by the articles of association of the company. As regards managers, they have two important roles in the administration of this class of share: a) they can decide not to pay all or part of the distribution in case of financial difficulties due to possible insolvency of company's obligations; b) they can cancel corporate units redeemed by the company and decide to correspond a capital reduction. Modernization exigencies inspired the deep reform of the role of both management and general meeting of shareholders. As it was already seen, Bill n5730 has introduced the figure of the board of managers as a separate corporate body entitled to take any action necessary to realise corporate object, except where expressly reserved by law

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[268] Art. 189 of the Law of 10th August 1915, introduced by Law of 18 September 1933, as amended by the 5730 Bill

[269] As said in Article 189 par. 3, in case of disagreement between parties as to the transfer price, this shall be determined in a judicial procedure by the President of the District Court dealing with commercial matters.

[270] As said in Article 189 par. 1, the company can decide for this last option with the consent of the transferring shareholder only.

[271] See note 279. Article 182 of the Law of 10th August 1915. *Smith & Keenan's Law for Business,* Denis J. Keenan,Kenneth Smith, pp.531, explains that redeemable shares are corporate units the company may decide to buy-back in the future. Usually, the terms are decided by the company and the expiring terms to buy them back is a fixed date.

or articles of association to shareholders[272]. Managers cover a representing role vis-à-vis third parties and in legal proceedings; moreover, one or more managers, officers and other agents, who may but are not required to be shareholders, acting individually or jointly, can be delegated the "day-to-day management of the business of the company" and the correlated power to represent the firm for those operations[273]. The scope of Article 191-bis has to be found in the need to establish a management committee for S.à.r.l., trying to limit its roles and balance their duties with their powers.

Furthermore, managers are also empowered, if the articles of association provide so, to decide upon the payment of interim dividends[274]. It is worth mentioning the four conditions that, according to Luxembourg law, those payments should have: a) interim accounts should be drawn up showing sufficient funds; b) the amount distributed shall not exceed the total profits made since the end of the last financial year for which the annual accounts have been approved; c) managers can pay off interim dividends at least two months after the creation of interim accounts; d) the above-mentioned conditions shall be subject to the control of supervisory or statutory auditors[275]. As it has been stated before, the introduction of a discipline about managers was mainly influenced by the need to modernize even the corporate structure of small-medium sized companies. This purpose, together with the need to safeguard the intrinsic flexibility of this legal entity, drove the legislator to leave huge statutory margins to the articles by association[276]. For instance, if expressly stated by statutory norms,

[272] Article 191-bis of the Law of 10th August 1915, introduced as a result of the implementation of the EU directive 2009/101/EC, as amended by the 5730 Bill. *Directorships of Luxembourg companies: Duties, lessons from case law, and practical tips*, Marc Feider, Peter Myners, Vincent Naveaux, pp. 5

[273] Article 191-bis of the Law of 10th August 1915 carries on stating that *"The liability of persons entrusted with day-to-day management for such management shall be governed by the rules on mandates"*, by doing so, providing a general legal framework for their liability during their appointment.

[274] Article 198-bis of the Law of 10th August 1915.

[275] Ibid.

[276] *Joint Ventures in the International Arena*, Darrell Prescott & Salli Swartz, pp.224

managers could authorise the transfer of the registered office of the company from one municipality to another or within the same municipality[277].

The last bulk of laws, reformed by Bill 5730, on the S.à.r.l. concerns the role of shareholders, specifically the new regulation introduced to their voting rights. If there are more owners of the same unit, managers are allowed to suspend the exercise of the correlated rights until there is only one person designated as the owner vis-à-vis the company[278]. Another important article, fully reformed by the *"New Law",* is the one concerning the exercise of voting rights in the contest of general meeting of shareholders: Article 195. It has been recently introduced the possibility for managers to suspend a member's voting rights *"In default of his obligations under the articles or his deed of subscription or deed of commitment".* This new provision sets up upon the management committee a form of disciplinary measure. As it could certainly be deduced from Article 195, the owner of a unit has to fulfil the duties that derive from the qualification of member of a *Société à responsabilité limitée,* while the managers are recognized discretionary powers for what concern the voting rights suspending measure. From the implementation of the *"New Law*", not only managers can decide upon the exercise of voting rights of an undertaking's member, but shareholders as well may decide not to exercise part of all of their voting rights for a period of time or indefinitely. Furthermore, voting rights may be object of shareholders' agreements; however, coherently with the general provisions of Article 1855 of the Luxembourg Civil Code, these agreements shall be void: a) if they violate the provisions of the Law of 10th August 1915, as amended and integrated by the *"New Law"* provisions, or are contrary to corporate interest; b) when a member undertakes to follow the voting indications coming from the company, its subsidiaries or any of its corporate bodies; c) if the owner of the unit undertakes to approve the proposals coming from the corporate bodies of the company towards them[279].

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[277] Art. 199 of the Law of 10th August 1915, introduced by Law of 18 September 1933, as amended by the 5730 Bill.

[278] Art. 186 of the Law of 10th August 1915, introduced by Law of 18 September 1933, as amended by the 5730 Bill.

[279] Art. 195-bis of the Law of 10th August 1915, as amended by the 5730 Bill.

After having gone through the main changes the legislation concerning the private limited company faced, it would be useful to stress the most crucial modifications regarding the public limited liability company. As will be discussed in the next paragraphs, the *sociétés anonymes* and in general the discipline of large scale corporations has found in Luxembourg a legal basis for market practices well-established in the European community. The main reason for which investors incorporate a S.A. is the access to the capitals market, that neither S.à.r.l. or the new S.A.S. can guarantee. After the reform of 2016, SA's share capital has been decreased down to 30.000€ (instead of 30.986€, as it was before the reform) represented entirely by shares [280]. One of the most recognizable change introduced is the possibility to issue shares below the accounting par value of the existing shares of the same category. The transaction must be subject to two detailed reports: a first report must be made from the board of directors, or even the managers, with specific regard to the issue price and financial evaluation of the transaction; a second report must be drawn by an independent approved auditor, *réviseur d'enterprises*, stating the adequacy and fairness of the information and financial evaluation expressed by the corporate body that dealt with the draft of the first report[281]. The issuance of these shares, as well as the attached reports, must be announced in the agenda of the general meeting, in order to permit shareholders to make their own evaluations before the vote on the transaction. The reports, especially the one of the statutory auditor, are of crucial relevance, and this is testified by the intention of the lawmaker to impose them as mandatory corporate practices: on the one hand, all the shareholders have the right to obtain copies of the reports at least eight days before the meeting; on the other hand, the failure to provide a report from the independent body within eight days from the general meeting concerning the vote may alone affect the validity of therein expressed. The role of the *réviseur d'enterprises* has been enhanced with respect to the past, in order to strengthen the transparency for the actions taken by the directors and

[280] Article 26 of the Law of 10th August 1915 Law, as amended by the 5730 Bill.

[281] Article 32 of the Law of 10th August 1915 Law, as amended by the 5730 Bill. *The Luxembourg Company Law Reform*, Alex Schmitt.

managers. Thus, the presence of an independent body, even if appointed by the Board, can increase the level of trust between the administrative body of a corporation and its members[282]. Pursuing this intent, the Bill n5730 sets up a bulk of provisions concerning the role of the statutory auditor: for instance, a report from the *réviseur* is required for all operations concerning the issuance of convertible bonds, as well as any other debt instrument entailing a contribution in kind to be made[283]. The Luxembourg Law, on the other hand, does not require any report to be attached to operations pursuant the conversion of bonds and other debt instruments into capital share.

However, the "*New Law*" went further by admitting the possibility to transfer or transmit, either *inter vivos* or *mortis causa,* shares, beneficiary shares, subscription rights or any other debt instrument convertible into capital. Such prohibition shall be limited in time. Statutory norms may limit the transferability *inter vivos* or the transmissibility upon death of certain categories of securities. By doing so, it is evident the purpose of the lawmaker to leave a higher space to the agreements among shareholders, intent already made clear from the analysis concerning the *société à responsabilité limitée.* For instance, the regulation of the rights attached to non-voting shares is entirely left to the statutory norms[284]. Basically, the articles of association shall expressly determine even *"The right to a dividend in the event of distribution of profits, the right to reimbursement of the contribution and (...) the right to distribution of liquidation"*[285].

The organization of the management within the S.A. has received three relevant changes: a) introduction of the possibility for the managers to establish committee with specific tasks; b) set up of a bulk of rules dealing with the conflict of interest; c) introduction of the executive committee or the chief executive officer. First, the Board of directors may decide to create committees, deciding even upon their composition

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[282] *La société en poche Luxembourg*, C.Duro, pp. 724.

[283] Article 32-4 of the Law of 10th August 1915, as amended by the 5730 Bill.

[284] Article 45 of the Law of 10th August 1915, as amended by the 5730 Bill. Non-voting shares may be issued not only if provided for by statutory norms, but as well as a consequence of an increase of capital or by the conversion of ordinary shares into non-voting shares.

[285] Ibid.

and duties and which shall exercise their activities under its responsibility[286]. To better understand the value of this provision, it may be worth mentioning that with the Law of 25 August 2006 has been introduced for the S.A. the possibility to opt for a two tier system, providing the coexistence of a management board and a supervisory board, as alternative with respect to the one tier system[287]. In the two tiers system, the management board may decide to create and discipline committees with specific duties that may exercise their activities under the responsibility of the management board[288]. Second, the already-mentioned exigency to ensure the transparency of the activities performed by the Board brought Luxembourg to introduce a set of provisions regulating the conflict of interest. Article 57 states that *"Any director, having a direct or indirect financial interest conflicting with that of the company in a transaction which has to be considered by the board of directors, must advise the board thereof and cause a record of his statement to be included in the minutes of the meeting".* The deliberations concerning a conflict of interest may exclude the interested party from the vote. In order for all the shareholders to receive all the necessary information before they vote the resolution, a special report shall be drawn containing all the details of the transactions which may fall within the object of Article 57. Moreover, this is a provision, whose main purpose is to impede directors with a conflicting interest to take part in important operations and decisions made by the company. That is why all the ordinary businesses are excluded from the *dictum* of this article. Rarely, shareholders can replace the board of directors in the performance of its activities: as a result of the conflict of interest, it may happen that he number of directors that statutory norms require to decide and vote on the relevant matter is not met. In that case and for that specific matter, shareholders can take action replacing directors' powers. Article 57 embodies a general rule that is applicable not only to the board of directors but even to other corporate bodies: officers, managers and other agents[289], as well as each member of the management board and supervisory board in the corporations adopting

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[286] Article 54 of the Law of 10th August 1915, as amended by the 5730 Bill.

[287] *La société en poche Luxembourg*, C. Duro, pp 113.

[288] Article 60bis-7 of the Law of 10th August 1915, as amended by the 5730 Bill.

[289] Article 60-2 of the Law of 10th August 1915, as amended by the 5730 Bill.

the two tier system[290]. The third change introduced to the management discipline has a lot of traits in common with the discipline of the S.à.r.l.; statutory norms may authorise the board to delegate their management functions to a management committee or a managing executive officer (*directeur general*)[291]. As pointed out by the Law, this provision does not entail upon the management body the power to affect the general policy of the company or the whole of the actions reserved to the board of directors. However, a member of the management committee may or may not be a director as well. Additionally, the articles of the association shall set up the rules concerning the appointment, removal, remuneration and term of the office of the management committee. Finally, it has been introduced a right of action upon minority shareholders against the management committee or board of directors or supervisory board in the two tier system. The threshold for this action is set up to the 10% of the shares attributing a right to vote[292].

3. S.à.r.l., S.a.s and partnership agreement: internal structure and functionality for Joint Venture agreements, creditors' protection.

With this paragraph, it would be worth describing the two most functional corporations and explain why these two, among all the corporations and partnerships provided by Luxembourg law, may serve the best Joint Venture corporations for average size operations. Furthermore, in order to better underline the main analogies and differences with the Italian discipline, it will be briefly explicated the discipline provided for temporary partnerships between undertakings.

The choice of the legal entity and of the partner to form a joint venture may depend from many factors; Luxembourg legal tradition in the corporate area has been mostly influenced by the French jurisdiction since the entry into force of the New Law. In this

[290] Article 60bis-18 of the Law of 10th August 1915, as amended by the 5730 Bill.

[291] Article 60-1 of the Law of 10th August 1915, as amended by the 5730 Bill.

[292] Article 63bis of the Law of 10th August 1915, as amended by the 5730 Bill

paragraph, it will be discussed the adaptability of the joint ventures resulting from small-medium scale concentrations to the legal entities Luxembourg Law provides, paying duly regards to the legal instruments that permits third parties to interact with the joint venture. Even Luxembourg maintains the substantial distinctions between unincorporated and incorporated joint ventures; often a joint venture is created through a contractual arrangement in the form of a consortium aimed at a specific project[293]. If the joint venture aimed at conducting a business in order to achieve a determined project, the contractual form is the preferred one; while, the Joint venture corporation is the best choice in case two or more undertakings are willing to create a business, entailing ongoing obligations, responsibilities and financial involvement, such as the division of profits.

In the previous paragraph, it has been explained which innovations have lately faced the *société à responsabilité limitée.* Many of the most attractive aspects of incorporating a joint venture in the form of a S.à.r.l. have already been gone through (e.g. the introduction of a board of managers, the possibility to issue redeemable and beneficiary shares). For what concern the role of the newly introduced management committee, the provisions regarding the responsibility of the managers and other bodies vis-à-vis third parties recall the general discipline applicable for the *société anonyme.* By doing so, the general rules on the execution of the mandate shall be applicable for misconducts performed by the directors, the managers and the *directeur générale* for operations made in the name of the company[294]. Moreover, the board and the managers shall be held jointly and severally liable towards the company and third parties for any damage pursuant a violation of the Company Law or statutory articles. There is only one way for directors and managers to be set free of charges: in the case of a misconduct that does not see them as parties involved, they should report such misconduct to the first general meeting, if they are directors, or to the first board meeting, if they are managers[295]. Another important article to clear the role of managers within a S.à.r.l. is Article 191-bis. In the interest of protecting the rights of

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[293] *Joint Ventures in the International Arena*, Darrell Prescott & Salli Swartz, pp. 222.

[294] Article 59 of the Law of 10th August 1915.

[295] Ibid.

third parties, the *ratio* behind Article 191-bis has to be found in the need to preserve the validity of all the agreements concluded by the managers and the just mentioned third parties[296]. In fact, all the business acts performed by the managers on behalf or against the company shall be considered valid vis-à-vis third parties. All the limitations that statutory norms or Article 191-bis impose to the managers shall not be valid vis-à-vis third parties. The issue to incur in a misconduct by managers may be avoided by delegating to only some of the them the representation of the firm, to be exercised alone or jointly. Moreover, the exigencies of flexibility required by the joint venture contract sees as an obstacle the discipline Luxembourg Law assure for the transfer of shares. What strikes mostly is that the transfer of shares shall be approved with a positive vote expressed by members representing at least three quarters of the total capital share. Additionally, it must be acknowledged the possibility to lower this threshold down to half of the total share capital[297]. As even the Italian legal tradition shows, the private limited company is a legal entity built on the *intuitus personae* of its members, and this characterization lower S.à.r.l chances to allow third parties to enter into business with the founders of a joint venture. The presence of very high threshold for entering as a member of a S.à.r.l. may discourage even the owner of non-capital securities willing to convert them in capital units.

Another huge innovation made by the Law of 10th August 2010 has been the introduction of Section VI*bis* and a new legal entity: the *sociétés par actions simplifies.* This model of corporation is characterized by the division of the total capital into shares. It may serve a more flexible governance structure with respect to the joint stock company, in fact the articles of incorporation shall determine its governance rules. A first distinction between the S.A. and S.A.S. consists in the fact that the latter may not be listed and make a public issue of shares[298]. The president is the corporate body entitled to represent the company, even in legal proceedings either as plaintiff or

[296] See note 276. *Legislation relating to commercial companies*, Hoss, pp. 172.

[297] Article 189 of the Law of 10th August 1915, as amended by the Law of 10th August 2016.

[298] Article 101-19 of the Law of 10th August 1915, as amended by the Law of 10th August 2016.

defendant, vis-à-vis third parties[299]. Similar considerations may be made on the protection of third parties, as when it was discussed the role of managers in the S.à.r.l. With respect to third parties, the company shall be bound by the acts performed by the president and *directeurs,* if they are meant as a corporate body by the articles of association. *Directeurs* shall be applied the same regulation provided for the president. The articles limiting the powers of the president shall not be valid vis-à-vis third parties, unless it has been proven that the other party knew the activity performed by the president or other subjects entitled of company's representation. Very important considerations on the responsibility of the apical figures for activities performed in the name of the company are laid down in Articles 101-22 and 101-23. Where a legal entity is appointed president or *directeur* of the company, it shall appoint a permanent representative, which shall exercise that duty in the name and for account of the company. These permanent representatives *"Shall be subject to the same conditions and incur in the same civil responsibility as if fulfilled such duty in his own name and for his own account, without prejudice to the joint and several liability of the legal entity represented"*[300]. Moreover, the president and other representative appointed by no means shall incur in any personal obligation for their commitment in the company. For this reason, the lawmaker considered a right move to apply to these corporate bodies the same general discipline provided for the board of directors and the board of managers in the *société anonyme.* There are several reasons that make incorporating an average size joint venture in the form of a SAS a better choice rather than in the form of a SA. In the SAS, there is no legal obligation for the company to appoint a board of directors or other collegial bodies, making it a less burdensome corporate structure[301]. Furthermore, there is no clear mention of shareholders 'meetings or board assembly, so the decisions may be taken by means of circular resolutions or conferences. Statutory norms may modify the quorums and the majorities required to

[299] Article 101-21 of the Law of 10th August 1915, as amended by the Law of 10th August 2016.

[300] Article 101-22 of the Law of 10th August 1915, as amended by the Law of 10th August 2016.

[301] See note 303. *Joint Ventures in the International Arena,* Darrell Prescott & Salli Swartz, pp. 225.

appoint the board and the officers, as well as expanding shareholders' responsibility for certain management decisions. The Luxembourg's lawmaker seems to have in mind the phenomenon of the joint ventures, when setting up the discipline of the SAS. However, incorporating in the form of a SA may grant the possibility to list the company on the capital market and to issue shares among the public. SAS may seem an advantageous option even if compared with the most common S.à.r.l.: all the considerations made above about the limits of the shareholders' agreement in a SAS are not applicable. On the other hand, the S.à.r.l. require €12.000 only for its constitution and there is no duty to subscribe immediately the entire amount, even if insufficient capital may deprive S.à.r.l. of its limited liability.

It is well-established that there is no specific rule concerning the Joint Venture, aside the rules of the specific legal instruments chosen. To this extent, there are legal entities not entailing the respect of the corporate structure that may serve an interesting option for short-terms combination among undertakings. The Company Law of 10 August 1915 lays down the possibility for parties to join their business in the form of a *société momentanée.* Thus, a *société momentanée* is a "company whose object it is to undertake without using a firm name, one or more specific commercial transactions"[302]. Basically, this article made clear that this is a company without legal personality. As for the grouping of enterprises in the tender procedures, the practice showed that a *société momentanée* may be found in similar cases, as for instance in the construction sector. In practice, there are two types of *société momentanée*: integrated companies and non-integrated companies. Integrated companies aim at sharing own resources for carrying out the common project. In non-integrated companies, each partner performs one or more distinct phases of the project.
The *société momentanée*, in the Luxembourg practice, may well be considered very similar to the partnership for the importance covered by the *intuitu personae.* Similarly to what happens in the S.à.r.l. and the partnerships, the participation is not freely transferable to third parties. The absence of any specific provision on the discipline of this kind of association may hint to the fact that associates shall determine the rules

[302] Article 138 of the Law of 10th August 1915.

for admitting or excluding others from the *société momentanée,* as well as setting up the responsibilities of the parties taking on the project. The company does not have its own assets, which means that associates are jointly and severally liable for the obligations of the company. Among the parties to the association, the contribution to the debts is freely adjusted.

4. How Luxembourg became attractive to foreign investors? Going through the four laws that changed the European corporate landscape

Behind the increasing attention that Luxembourg is drawing from international investors there are not only matters of corporate law. As made clear in the precedent sub-chapter discussing about Wind Tre Joint Venture, it would be a mistake to isolate the debate on the corporations from banking, finance, funds and tax considerations, that very often appear to be more appealing to the investors. To this extent, I have decided to talk about the main modifications introduced by four relevant Luxembourg law, whose two derive from the harmonization of EU directives:

a) the Law of 6 April 2013 on dematerialised securities;
b) the Law of 21 July 2012 on squeeze out/sell out;
c) modifications on banking law, as amended by Law of 20 May 2011, transposing EU directives 2009/110/CE on electronic money institutions and 2009/44/CE on financial collateral agreements;
d) the Law of 13 February 2007 on specialized investments funds.

A thing that strikes at first sight is certainly the fact that the "New Law" is temporarily subsequent to all these four laws, being adapted to the changing legal framework. For the last ten years the legislator aimed to develop new legal instruments with the exact intent to attract investors, private equity firms and multinationals. Even if not directly related to the joint venture discipline, these introductions and modifications are part of a wider trend that brought Luxembourg on investors' map. As a consequence of the creation of flexible legal instruments in an ever-changing environment largely

governed by European regulation, the adaptability of joint venture agreements to investors' needs has played a major role in Luxembourg's success.

The Luxembourg Law of April 6, 2013 has introduced in the Luxembourg legal system the dematerialised securities alongside bearer and registered securities. The object of the reform does include not only the capital securities issued by the joint stock companies, but as well debt securities such as financial instruments. The dematerialisation shall be represented by a record in the securities account in a single securities issuance account maintained by a single settlement organization or a central account keeper[303]. Moreover, the scope of the new law comprises all the securities disciplined by Luxembourg law and by doing so it may directly concern almost all legal entities. For equity securities, the company must be incorporated in the form of a S.A., with the possibility to issue shares, profit shares and subscription rights; coherently, even the *fonds commun de placement* (undertakings for collective investments) may issue their units in dematerialised forms[304]. The choice among the three forms of securities issuance is left for undertaking incorporated under the regime of *société anonyme*, *société en accomandite par actions*, *société par actions simplifiée*. Basically, there is only one form of shares Luxembourg law attributes to the ones willing to incorporate a S.à.r.l.: the registered form. The issuance of capital shares in dematerialised form is subject to three main requisites: a) the adaptation of the articles of incorporation or management regulation in order to include the dematerialisation; b) appropriate measures to ensure that a single settlement organisation or a central account keeper would record all the dematerialised securities of the same type; c) the name and address of the single settlement organisation or the central account keeper should be disclosed on a national newspaper[305]. All the issuers registered in the companies and commercial and companies register in Luxembourg are also required to file an extract indicating the name and address of the central account keeper in order, in order to be successively published in the Luxembourg official gazette. For debt

[303] Article 3 of the Law of 6th April 2003

[304] *Luxembourg introduces a dematerialised securities regime*, Clifford Chance briefing note, May 2013.

[305] Article 4 of the Law of 6th April 2003.

securities, the determination of the terms and conditions applicable, as well as the appointment of a central authority, is a choice left to the management body. The Law then explains the procedure to convert both registered and bearer securities into dematerialised securities. The trait in common for all conversion procedures is the amendment of of the articles of incorporation or management regulation in order to determine: the issuer's ability to issue dematerialised securities; which securities shall be converted in dematerialised securities; which securities must be converted and on which there is only a conversion option[306]; the whole conversion procedure.
An interesting part of this Law regards certainly the provisions of transferability of dematerialised securities. All the securities recorded in a central account shall be transferred by means of book-entry transfer[307]. The provisions of the Law of 1 August 2001 on the circulation of securities, with respect to the ones of this Law, are considered in a *genus ad speciem* relationship, as the former are considered applicable if this Law does not say otherwise. Moreover, *"The transfers between the securities account holders held with the same account keeper shall be carried out by book transfer between these accounts"*[308]. Moreover, the compensation between the account keepers is not required, when the original accounts of the payer and payee are held with different account keepers.

The Law of 21st July 2012 had as a result the expansion of the regime concerning squeeze-outs and sell-outs of minority shareholders by majority shareholders. The companies considered as falling within the scope of this Law are the ones having their registered office in Luxembourg and: a) whose securities are admitted or were

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[306] Article 8 of the Law of 6th April 2003. Article 8 specifies as well that statutory norms shall set the time limit for conversion and santions in case the securities are not presented for dematerialisation. This specification should be made for all securities for which the dematerialisation is mandatory.
[307] Article 13 of the Law of 6th April 2003.
[308] Ibid.

formerly admitted[309] to trading on a regulated market in one or more member states; b) whose securities have been offered to the public, thus having as a result the obligation to publish a prospectus in accordance with Article 3 of Directive 2003/71 / EC of the European Parliament or for which the obligation to publish such a prospectus does not apply in accordance with Article 4 (1) of this Directive, and the start of the offer does not go back more than five years. The law defines the majority shareholder as any natural or legal person detaining alone or with other persons acting in concert, directly or indirectly, securities representing not less than 95% of the capital carrying voting rights and 95% of the voting rights of the company[310]. A holder of securities must notify the company concerned and the *Commission de surveillance du secteur financier* about: the exact percentage of the interest held; the details of the transaction that justified the notification; the date on which the transaction became effective; the identity of the shareholder; and methods of detention of the securities[311]. The notification obligations shall arise when the securities holder become: a) he becomes a majority shareholder, following the above-explained definition; b) he is a majority shareholder; c) he is a majority shareholder and he makes a further acquisition of shares in the company concerned. The squeeze out process is regulated in detail, particularly the part concerning the determination of the fair price. Article 4 deeply regulated the determination of the fair price, by stating that the majority shareholder shall appoint an independent body, making its evaluation and delivering a report on the fair price. At the same time, the minority shareholders have one month to opposite the evaluation made by the expert. As a consequence, the *Commission de surveillance du secteur financier* may ask the company to select other five experts, and the one selected by the Commission shall be the one in charge of delivering a second report. After the publication of the second report, following the Commission's decision on the fair price to be recognized to the minority shareholders, the squeeze out must take place in the briefest time possible. The greatest innovation of this Law is arguably the

[309] Article 2 of the Law of 21st of July 2012. It is specified that the companies admitted to the squeeze-out/sell-out procedure are the ones which have officially been on the market at least five years before the request for the procedure

[310]Article 1 of the Law of 21st of July 2012.

[311]Article 3 paragraph 3 of the Law of 21st of July 2012.

introduction of a sell-out procedure, permitting all minority shareholders to ask for majority shareholders to buy them out of the company by acquiring their shares at a fair price. Both procedures are very similar and they require many steps for the final determination of the fair price by the *Commission de surveillance du secteur financier.*

A third bulk of laws aimed at modifying some featuring aspects of the banking law discipline with respect to the implementation of financial and payment practices provided by the EU secondary laws. The Law of the 20th May 2011 amended the Law of 10 November 2009 on payment services, activity of electronic money institution and settlement finality in payment and securities settlement system. Moreover, the Law of May 20, 2011, which implements the Directive 2009/110 / EC of the European Parliament and of the Council of 16 September 2009 for electronic money institutions, and Directive 2009/44 / EC of the European Parliament and of the Council of 6 May 2009, has amended the law of 5 August 2005 on guarantee contracts financial. The object of the first directive entails the creation of electronic money institutions. Electronic money is defined as a monetary value represented by a claim on the issuer, which is electronically, including magnetically stored, and issued on receipt of funds for the purpose of making payment transactions and accepted, other than the money electronic issuer[312]. Here, what is necessary to underline is the importance that the finance sector has been for the developing of Luxembourg as one of the top investments' site. The Law of 20th May 2011 stresses again the important role played in the financial stability of Luxembourg by the *Commission de surveillance du secteur financier.* Thus, electronic money institutions are required to communicate to the Commission as soon as they have knowledge, all the acquisitions or disposals of qualifying holdings exceeding or falling below determined thresholds imposed by law. Likewise, they shall communicate to the Commission at least once a year the identity of the shareholders or partners possessing qualifying holdings and the amount of those holdings. These *participations qualifiées*, as resulting from information provided at annual general meetings of shareholders or partners, are received in accordance with the provisions applicable to companies whose securities are admitted to trading on

[312] Article 1 of the Law of 10 November 2009.

a regulated market. Moreover, the Commission may make use of its right of injunction or suspend or raise sanctions against the persons responsible for the administration or management of the setting up of electronic money concerned, if their behaviour is deemed to jeopardize right and prudent management the setting up of electronic money. Where a participation is acquired despite the opposition of the Commission, the latter may suspend the exercise of corresponding voting rights, without prejudice to any other sanction that may be applied. The decision to impose a penalty may be referred within one month to the administrative court which rules[313].

The Law of 20th May 2011 went further by modifying the Law of 5th August 2005 on financial collateral. The so-called Collateral Law provides now the possibility for the pledgee to have the pledged assets appropriated by a third party. Moreover, this law confirmed the bankruptcy remoteness applies to security interests governed either by the Collateral Law or foreign laws. It would be difficult to synthetize such a heterogeneous discipline in brief terms. Notwithstanding the technicality of the discipline at stake, this law introduced another huge innovation.

Before the Collateral Law came into force, the appropriation of the pledged assets had to be subject to the completion of the valuation process, but this valuation process was substantially time consuming and at odds with the Luxembourg lawmaker's intention. As a result, the Collateral Law modified this practice and, by doing so, the pledgee may appropriate the pledged assets at a price determined before or after their appropriation[314]. Basically, the valuation process has been postponed with respect to the appropriation.

The fourth law that ends up this analysis on the new legal framework Luxembourg has slowly developed to enhance competitiveness in the investment sectors enhancing the collaboration among enterprises is the Law of 13th February 2007. This Law laid down an exhaustive regulation of the SIF (*specialized investment funds*). The importance of this Law emerges already from the general provisions, by giving a definition of "*well-informed investor"*. That is any institutional investor, professional investor, or any

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[313] Article 24-9 paragraph 7 of the Law of 10th November 2009, as amended by the Law of 20th May 2011.

[314] Article 2 of the Law of 5th August 2005, as amended by the Law of 20th May 2011.

other investor that has stated in writing his adhesion to the status of well-informed investor and invests 125.000€ in the SIF or has been assessed by a credit institution, an investment firm or by a management company about his expertise, his experience and his knowledge for the constitution of a SIF[315]. Moreover, any undivided collection of assets falls within the meaning of common funds. Furthermore, Article 5 stresses that *"The common fund shall not be liable for the obligations of the management company or of the unitholders; it shall be answerable only for the obligations and expenses expressly imposed upon it by its management regulations".* This provision may put an important limitation upon third parties' possibility to claim compensation for their obligations towards the common funds. The discipline of each single common fund shall be set up by the management company and lodged with the trade and companies register and published in the *Memorial,* Luxembourg's official journal.
The assets of the fund shall, in any case, be entrusted to a depositary for safe-keeping, with to perform all operations needed to preserve the fund, as well as dealing with the day-to-day administration of it[316]. An important innovation made by the Law of 13th February 2007 has been the introduction of an apposite discipline for investment companies with variable capital ("SICAV"). In order a company to be considered a SICAV, it shall meet these requisites: a) it shall be incorporated in the form of public limited company, a partnership limited by shares, a common limited partnership, a special limited partnership, a limited company or a cooperative in the form of a public limited company; b) it should have as main object the investment of funds in assets and, by doing so, spread the investment risk; c) their securities and partnership interests should be reserved to well-informed investors; d) the net assets value of the company and the amount of the capital shall be equal[317]. The subscribed capital of a SICAV shall not be less than 1.250.000€. If the capital of a SICAV falls below two thirds of the minimum capital, "the directors or managers must submit the question of the dissolution of the SICAV to a general meeting for which no quorum shall be prescribed and which shall decide by a simple majority of the securities or

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[315] Article 2 paragraph 1 of the Law of 13th February 2007.

[316] Article 17 paragraph 1 of the Law of 13th February 2007.

[317] Article 25 of the Law of 13th February 2007.

partnership interests represented at the meeting"[318]. The introduction of the specialized investment funds regime has stressed Luxembourg as a centre for alternative vehicles. Three years only after this Law's implementation, over 900 new funds have been established[319], increasing Luxembourg attractiveness towards foreign investors and exporting worldwide a new model of investment.

5. Tax matters: what are the relevant fiscal features for corporations in this contest?

Tax matters deserve a separated area for discussion, as corporate taxation principles constitute a great bulk and strong suit of the whole Luxembourg law. The increasing appeal for incorporating in Luxembourg, both listed and non-listed companies, comes from the fact that over the years this country has understood that fiscal burden and flexibility play a relevant role as much as corporate governance and M&A discipline. The corporate taxation field has over the past ten years created a competitive environment. The last innovations introduced by the Luxembourg Law N° 7020 affected both individual and corporate taxpayers. For the purpose of this work, it will be scrutinized the content of the corporate taxation part and the innovations therein introduced. First, it has been decreased the corporate income tax rate from 21% to 19% in 2017 and 18% in 2018; moreover, for small-medium size companies, the ones generating a taxable income below €25.000 per year, the corporate income tax rate will be decreased to 15%. The tax rate will follow up the gradual increase of the taxable income[320]. Furthermore, the tax credit for investments will be significantly increased up to 13%; in addition to that, green investments, whose amount goes up to €150.000

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[318] Article 30 of the Law of 13th February 2007.

[319] *SIF success augurs well for Luxembourg under AIFM Directive*, Simon Gray, Hedgeweek Journal.

[320] Article 174 of the Law of 4th December 1967, as amended by the Law of 27th December 2016.

will receive an incentive, by being recognized a tax credit of 9%. These benefits will be extended to all the other companies having assets in one of the countries that have previously signed the EEA Agreement. Many other innovations concern the VAT Law, as it has been enhanced the sanctions for apical organs. For instance, *de facto* and *de iure* managers are required to ensure compliance with the legal obligations provided by the VAT Law, and in particular the payment of the value added tax due by the financial means which they manage[321]. In the event of culpable breach of the legal obligations incumbent upon the managing directors, the managers and any *de jure* or *de facto* manager responsible for day-to-day management, the *directeur de l'Administration de l'enregistrement et des domaines* or his / her delegate may issue, against these persons, an *appel en garantie* decision as security. This decision gives the administration the right to recover, in respect of such persons, the value added tax payable by the persons liable for the value added tax. The appeal decision is notified to the person concerned, who is supposed to have received it on the date of notification. Furthermore, this Law has increased the penalties amount provided by the original Article 77 of the VAT Law. It may be worth mentioning the increase of the range of the tax penalties that can be imposed by the Luxembourg V A T Authorities from €250 to €10.000[322]. Limiting our analysis to the Law N°7020 would be result in an exhaustive work. The main reasons that clearly made Luxembourg one of the most competitive fiscal environment are to be found in the principles that the income tax law of 4th December 1967, as amended through the years. Luxembourg does not levy withholding tax on interest, royalty payments and it does not provide any branch remittance tax; all the remunerated incomes from profit-sharing bonds and debt instruments are taxed as dividends[323]. Generally, Luxembourg levies dividends a 15% withholding tax unless EU treaties provide a lower rate. Additionally, withholding tax shall not be levied to the dividends distributed by a subsidiary company incorporated

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[321] Article 67-2 of the Law of 12th February 1979, as amended by the Law of 27th December 2016.

[322] Article 77 par. 2 of the Law of 12th February 1979, as amended by the Law of 27th December 2016.

[323] *Taxation and Investment in Luxembourg 2016 – Reach, relevance and reliability*, Deloitte Luxembourg annual newsletter.

in Luxembourg to a qualified EU parent company, only to the extent that the recipient of dividends is incorporated in one of the legal forms provided by the EU parent-subsidiary directive and holds 10% of the capital of the subsidiary company.

The advantages that even such a corporation-friendly fiscal environment brought to foreign investors made have made Luxembourg the second greatest investment funds destination in the World, just after the United States, and the fulcrum of private banking in the whole Eurozone. As described in the previous paragraphs, the success of the model of Joint Venture corporation in Luxembourg is not due only to an efficient Corporate Law reform, such as the "New Law", but even to the excellent work made by the excellent work of Luxembourg legislator in "ancillary fields", such as banking, finance and corporate taxation.

CHAPTER 2

FRENCH AND ITALIAN PUBLIC COMPANIES: THE *SOCIETE ANONYME* AND THE CORPORATE GROUPS IN THE FRENCH CORPORATE LAW

1. ESSILOR LUXOTTICA: THE *SOCIETE ANONYME* FOR LARGE BUSINESS OPERATIONS

Summary: 1. Delfin and Essilor: the evolution of the two public companies and preliminary considerations on the merger; 2. Terms and Conditions of the merger between Essilor and Delfin: an insight of the transaction and the relevant matters of law; 3. The Corporate structure after the merger and the exchange tender offer; 4. The cooperation between enterprises on a large-scale level: risk factors.

1. Delfin and Essilor: the evolution of the two public companies and preliminary considerations on the merger.

In the previous chapter, it was well-explained how the grouping of enterprises related to small and medium sizes operations in Italy face several limitations. The large space left to *autonomia privata* and the absence of a typical discipline brought Italian companies to model the provisions of their combination agreements following other European legislations. Therefore, as it will be discussed in this chapter, it must be noted that the grouping of enterprises is a business and juridical phenomenon that exists on a large scale level as well. The collaboration agreements between enterprises have as their main objects, inter alia, the reduction of the financial risks, the sharing of

technical resources, in order to combine different contributions to provide different services, performances and competences.
All the corporations, after having reached their pinnacle at the national level, tends to look for other ways to expand their businesses. Thus, many undertakings in order to increase their investments are willing to transact their businesses across national borders, thus forming multinational corporations. Following an economic definition of the multinational corporation, this can be defined as the one in which a certain percentages of the earnings, assets, sales or personnel of the firm come from or are deployed in foreign locations[324]. This is not certainly the only possible way to define the multinational corporation, but it could easily be considered the first step in order to limit the scope of these large scale business operations. Large scale concentrations call for a different set of observations on the grouping of enterprises phenomenon that are to some extent different from the ones expressed on the small and medium size ones. For instance, the legal structure of a joint stock corporation may call the board of directors to evaluate the listing of the shares to the public. In that case, the choice of the incorporation seat may well be influenced by the corporate law in force of a certain country, as well as the overall legal framework.
In the Essilor Luxottica merger, it will be discussed how the *société anonyme* is nowadays one of the best vehicle through the grouping of enterprises among joint stock corporations could possibly happen. Through the explanation of the merger operation between Essilor and Luxottica, there will be scrutinized in detail the issues that such an operation might bring to the table, and ultimately how the Italian legal framework does not look as appealing other jurisdictions for international investments.

Over the years, the "Internationalization" has been considered as one of the driving force of the M&A market. As pointed out by some authors, the history of the Italian M&A market has faced two different stages: between the 1988 and 1998, the development of the market has seen the expansion of the *middle market* and the private equity funds played a huge role in it. From the 1998 to nowadays, the

[324] *International Business Theory and Practice*, Riad A. Ajami, Karel Cool, Jason Goddard, pp. 6.

"Europeanization" of the Italian market has brought many companies to open up to cross-border operation[325]. Lately, the ECJ has upheld undertakings 'desire to cross-border mobility through many judgements delivered in the context of Chapter 2 of Title IV of the Treaty on the Functioning of the European Union, entailing the Right of Establishment[326]. In a recent judgment held by the ECJ, it has been stated that *"Cross-border merger operations, like other company transformation operations, respond to the needs for cooperation and consolidation between companies established in different Member States"* and *"They constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market (...)"*[327]. This judgement implies the direct effect of ECJ's jurisdiction on cross-border mergers within the EU. As previously said, the growth of the EU internal market and the need to provide a more coherent legal framework for both Member States and undertakings, brought to the adoption of the Directive 2005/56/CE. Even if the scope of the directive does not include concentrations among non-limited liability companies, the procedure therein specified has frequently been used for reorganisations of group structures[328]. Basically, all the multinational corporations have faced the issue to adapt their business strategies to new economic and legal environments. Additionally, the exigency to strengthen the EU internal market and to facilitate trades between Member States within the EU has brought the EU itself to negotiate and put in place many agreements with third parties (e.g. Customs Unions for the elimination of custom duties in bilateral trade; Free Trade Agreements)[329]. The "Internationalization" process has brought many undertakings to schedule all the steps of M&A deals involving foreign legal entities, relying mainly on the efficiency of

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[325] *20 anni di M&A – Fusioni e acquisizioni in Italia dal 1988 al 2010*, prefazione di Guido Tabellini, KPMG, pp. XIV.

[326] *International M&A and Joint Ventures*, Duco de Boer, Nancy A. Matos, Hermann J. Knott and others, pp 63. Chapter taken from *International Development Year in Review: 2012,* The Year in Review, Volume 47.

[327] Case C-411/03, SEVIC Systems AG, Summary of the Judgment, paragraph 3.

[328] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, Article 2, *Definitions.*

[329] European Commission website, Trade sections, *Negotiations and Agreements.*

entry and establishment procedures. Through the years, the undertakings have developed great sensibility and experience in making investments and dealing with foreign and initially unknown welfare systems. In the previous paragraphs, it was highlighted how internal small-medium size concentrations could undermine certain equilibrium on the competition within the EU internal market. Clearly, the formation of a Joint Venture and the industrial upgrading in order to retain a relevant position in the relevant markets may be considered the first step of a more complex and deep expansion process. Then, the success of an undertaking will certainly depend on its capability to expand its distribution and trade network beyond the internal boundaries, as well as the acquisitions of new brands and firms in order to acquire a more advanced know-how. This does not entail only an expansion of the territorial scope of the firm, but it entails as well a cultural and managerial growth of its governance.

The history behind the success of the Luxottica Group shows how the main driver of its "Internationalization" has been linked to the strengthening of the sales force and distribution network[330]. Originally, the Luxottica business has been launched in 1961, when Leonardo Del Vecchio, with other partners, founded Luxottica S.a.s. in Agordo, near Belluno. At the beginning, Luxottica was nothing more than a small artisan laboratory that used to employ dozens of people in the production of moulds, small metal parts and semi-finished for the optical sector. Gradually, Luxottica began to expand its optical production, by progressively carrying out all the stages of the finished product. In 1969, Luxottica finally became an independent producer: this step was fundamental as it entailed the marketing of a line of own-brand products through wholesalers. After an important expansion of the brand in the following years, Luxottica's intent was to pursue a vertical integration strategy which encompassed the acquisition of national and international independent wholesale distributors and the establishment of branches in all the relevant markets. It would be noteworthy to mention the acquisition of the Torino-based company, Scarrone Spa in 1978, at the time the leading Italian distributor on the eyewear market, as well as the acquiring of

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[330] See note 335. *20 anni di M&A – Fusioni e acquisizioni in Italia dal 1988 al 2010,* pp.15

a 50% *quota* in Avant-Garde Optics Inc. shares, one of the largest distributors on the US relevant market in 1982[331].

In 1990, Luxottica opted for listing its shares on the New York Stock Exchange in order to increase its international visibility and accelerate its financial growth. The expansion of Luxottica stepped up significantly since the acquisition of the *Eyewear* division of Bausch & Lomb Inc., including the distribution and production of very important brands, such as Revo, Killer Loop, Ray-Ban, Porsche-Design and Arnette. Moreover, this transaction has granted Luxottica the access to the whole technology and know-how needed for crystal lens of sunglasses. The "Internationalization" process went on by strengthening Luxottica's presence on the North American retail market with the acquisitions of Sunglass Hut in 2001 and Shoppers Optical in 2006.

Furthermore, it should be made clear that the upcoming step for Luxottica entails a totally different operation that will certainly elevate both Luxottica and Essilor distribution and production. At first sight, this concentration is peculiar for many reasons: a) Luxottica and Essilor are two leaders in their respective fields, being united by the continuous pursuit of excellence and desire to innovate and expand their businesses; b) the concentration concerns two European groups of enterprises, more specifically an Italian and a French one, thus confirming the growing trend that sees Italy and France involvements in relevant M&A operations; c) unlike the previously scrutinized operation (ndr. Wind Tre joint venture), these two companies have listed their shares on capital markets.

First, the merger between two high scale groups may raise important questions on the admissibility and the possible effects the operation at stake might have under a competition standpoint. The legal entity that this operation is going to form will have a certain impact on the global optical market: the consolidated aggregate turnover of the two groups combined amounts up to 15 billion €[332]. Substantially, the measure of this operation, as well as other important featuring aspects that will be analysed further,

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[331] Luxottica website, *About us* section, *Our History.*

[332] Il Sole 24 Ore, 17th January 2017, *Luxottica-Essilor, fusione da 50 miliardi*, pp.2. From the consolidated balance sheets of Essilor and Luxottica, it is stated that they have revenues amounting to respectively 6,7 billion € and 9 billion €.

may have found as needed a control by the European authorities. On 26th September 2017, the European Commission has announced to open an investigation on the Luxottica Essilor merger[333]. From the statement made by Commissioner Margrethe Vestager, it is clear that the in-depth investigation will regard the compatibility of Luxottica Essilor concentration with the Directive 2005/56/EC[334]. The analysis of the EU Merger Test has deeply discussed in the previous paragraphs and, at the time of this work, there is not yet any report or statement made clear by the European Commission on this concentration. Actually, the combination between Wind and Tre may have required a more in-depth assessment from the European competition authorities if compared to the one concerning Luxottica Essilor concentration This consideration would be easily explained by the fact that vertical mergers are generally less worrying than horizontal mergers: the latter may involve two competitors, thus altering the equilibrium of forces in a relevant market. On the one hand, Essilor could arguably be considered the leading ophthalmic optics company, both worldwide and in Europe; on the other hand, Luxottica is the market leader in the distribution, design and manufacturing of eyewear, both worldwide and in Europe[335]. By dealing with different stages of production, the two groups both aim at reducing costs and obtaining important components of a given product. While Luxottica will drastically reduce its investments in the lens sector and achieving another crucial step in the vertical integration of its business, Essilor is looking for an overall growth of its brand in the eyewear sector and spectacle frames. Such a combination of businesses does not only grant them other ways to strengthen their competitiveness on the internal and European market, as it was for the Wind Tre joint venture, but allows the two groups to join forces in the field of research and development (ndr. R&D), in order to compete on worldwide scale.

Moreover, this concentration will continue the cross-border trend that the Italian M&A market has followed in the last years. The mere presence of multinational corporations

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[333] European Commission – Press release– Brussels, 26 September 2017, *Mergers: Commission opens in-depth investigation into proposed merger between Essilor and Luxottica.*

[334] Ibid.

[335] Ibid.

has fostered the business transactions between Italy and France. From a statistical point of view, in the past decade France has been the country that, among the others, has registered the highest number of M&A operations with Italy, either *in* or *out*[336]. However, in the last years, a large part of the Italian acquisitions in France has been carried out by small and medium size enterprises (ndr. SME). French culture and industry has always been very close to the Italian one, making the interaction between these two countries a natural strategic choice for both parties. Over recent years, the transalpine companies have pulled off several operations. The acquisition of Italenergia Bis (Edison holding company) by EDF in 2005 is a strong example of French strong presence in the M&A field, along with other operations in the fashion industry[337]. There are other sectors that witness the involvement of these two countries, such as finance, banking and assurance fields. At the beginning of the Nineties, the interest of credit institutions (e.g. banks) towards Italy was limited to the acquisition of minority stakes, targeting industrial partnership dealings. Since 2000, the consolidation of international banking, alongside the major integration of the finance market in the European Union, favoured operations on major stakes. For instance, in February 2006, after the revocation of the takeover bid by Unipol, the BNP Paribas Group opted for the acquisition of the Italian BNL. Again, in 2007 there was the acquisition by Crédit Agricole of the 85% of Cassa di Risparmio di Parma e Piacenza. On the other hand, even if the total value of the transactions of the two countries exceed 154 billion €, only one third of the total aggregate of these transactions sees Italian groups playing the role of the "buyer"[338]. In French strategic sectors, as the above-mentioned ones (ndr. finance, banking, fashion), France has showed to defend its industrial cornerstones. Therefore, it could be made a case that alimentary and building

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[336] See note 335. *20 anni di M&A – Fusioni e acquisizioni in Italia dal 1988 al 2010,* pp.18. According to KPMG sources, the number of *merger and acquisitions* operations exceeds 900 between 1988 and 2009.

[337] It can be mentioned the operation through which François Pinault took effective control of Gucci in 2001, or still in 2001 Lmvh and Prada Group took the control of Fendi through a 50-50 Joint Venture.

[338] Il Sole 24 Ore, 2 February 2017, *M&A activity between France and Italy worth €154 bn in 20 years but the French are now playing the predators.*

industry are two fields in which Italian companies tend to target French ones. For instance, in 1996 there was a 450 million € purchase agreement between the Italian Eridania-Beghin Say, as the "purchaser", and Compagnie Française de Sucrerie, as the "purchased" company. Not to mention, the high influence Vivendi exercises in the share capital of both Mediaset and Telecom. Specifically, the stake of the Group led by Vincent Bolloré amounts to respectively 28,8% and 23,9% of the total capital share of the two Italian Groups[339]. Additionally, the operation between Essilor and Luxottica were read according to this script by some international presses[340]. This is because the first step in the "marriage" between the two companies will be the acquisition of control of Luxottica by the French counterpart. As it will be better discussed in the next paragraphs, this is only the technicality with which the operation will be implemented. Subsequently, it will be explained why the group will be headquartered in Paris and the reasons behind the choice of the *société anonyme*. To all intents and purposes, the one announced is a merger of equals: the new subject, although listed on the Paris Stock Exchange and with the French overseas headquarters, will see the holding of the Del Vecchio family in the position of first shareholder with a capital share between 31 and 38% while the 81-year-old founder will act as CEO. Briefly, the operation concerning Luxottica and Essilor does not fall within the traditional definition of Italian group in in foreign hands. Also because the history of Luxottica is that of a group that, thanks also to acquisitions abroad, has gained international leadership in the eyewear market.

A third important featuring aspect is important to stress in this preliminary paragraph is the incidence that being listed on public markets means for both Luxottica and Essilor. On 24th January 1990, Luxottica became a publicly traded company as its shares were listed on the New York Stock Exchange, where it subsequently delisted its American Depositary Shares (ADSs) on June 16, 2017, pursuant a strategic choice

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[339] Il Sole 24 Ore, 17 January 2017, *Tra Francia e Italia «nozze» da 154 miliardi in 20 anni.*

[340] Le Monde, 16 January 2017, *Grand mariage en vue entre Essilor et Luxottica,* the press underlines the statement made by Hubert Sagnieres, chairman and CEO of Essilor: *«Ce sera une société de droit français, cotée à Paris et qui aura son siège à Charenton, dans le Val-de-Marne».*

made by the Italian company[341]. This decision has been influenced by three key factors: a) Luxottica's shares have been traded mainly on the Italian market, in fact in the twelve months before May 1, 2017 only the 3,7% of Luxottica's total trading volume was on the NYSE; b) the high administrative costs of registering and listing the shares on a U.S. national securities exchange; c) being listed on the NYSE would complicate the merger plans with Luxottica. However, on 4th December 2000, Luxottica's shares were listed as well on the Milan Stock Exchange, thus, following the provisions enshrined in the *Corporate Governance Code* that *Borsa Italiana S.p.a.* applies to all the listed Italian companies. Although the corporate structure of Luxottica and Essilor will be analysed further, in this frame, it is important to stress that being listed on the Telematic Stock Exchange organized and managed by *Borsa Italiana* brings automatically Luxottica Group to respect the provisions of the Italian Commissione Nazionale per le Società e la Borsa *("CONSOB")* as well. Additionally, the corporate governance, financial statements and many other significant aspects of the corporate law (such as shareholding disclosure rules and the *OPA*) of Luxottica Group is currently regulated by the d.lgs. 58/1998, the so-called *Italian Consolidated Financial Act.* As a result of the merger, while having expressed the clear intent to list the merged entity on the Milan Stock Exchange[342], Essilor-Luxottica will be listed on the French market exchange, notably on compartment A of Euronext Paris[343]. As set out in the Contribution Agreement of the two companies, the new shares of Essilor-Luxottica will be traded under the same ISIN code as the existing ordinary shares of Essilor. Substantially, this information is of great relevance, as all those entities willing to issue securities or whose financial instruments are admitted on the French regulated market must fall under the supervision of the General Regulation of the *Autorité des*

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[341] Luxottica website – Stock Information.

[342] Libero Quotidiano – 16 December 2017, *Luxottica, Leonardo Del Vecchio: "Quotazione anche a Milano e scalata dello Ieo".*

[343] Euronext website – 23 March 2017, *Communiqué : Le projet de rapprochement entre Essilor et Luxottica progresse*

Marchés Financiers (*'AMF'*)[344]. In detail, this Regulation sets out the rules of professional practice, as well as the rules which must be complied with in transactions related to the financial instruments and assets *"which are admitted to trading on a regulated market or on a multilateral trading facility that is subject to the laws or regulations intended to protect investors from insider dealing, price manipulation and the dissemination of false information"*[345]. Moreover, an important area covered by this Regulation, which will be recalled in the following paragraphs, is the one regarding takeover bids relating to securities admitted to trading on a regulated market[346]. Having shares listed on relevant European regulated markets in almost all the European countries means important changes in the regulation of an undertaking's corporate regulation. The business value of this operation may drastically be increased by the role played by both Essilor and Luxottica's trading markets.

To this extent, Luxottica's decision to delist its shares from the New York Stock Exchange does not connote the choice to exit the US market. That would certainly be at odds with Luxottica's business strategy that, according to its last financial data, would entail not taking into consideration the fact that over 51% of Luxottica's employees still work in the North America and that over 59% of Luxottica's worldwide sales are accounted to the North American market[347]. However, Luxottica had to give its investors the possibility to freely trade their shares, except for the fact that since the delisting from the NYSE ADRs will now be traded in the U.S. *"over-the-counter" ('OTC')* market. This only would be enough to suggest Luxottica's intent to opt for a Level I ADR program, instead of its traditional and more secure Level III ADR program. The Level I ADRs programs have two characterizing aspects: a) they are not listed on any US securities exchange; b) they do not require the registration of

[344] Article 621-7, *Code Monétaire et Financier* ('*CMF'*), as introduced by the Law n° 1071 of 16 December, by Regulation n° 1223 of 14 December 2000 for the legislative parts and Decree n° 1007 of 2 August 2005 for the regulatory parts. As it is explained in *Tax Code Concepts in the Countries of Central and Eastern Europe*, Leonard Etel, Mariusz Popławski, pp. 318, the code is a set of uniform legal standards that appeared as a whole only in 2005.

[345] Article 621-7 paragraph 1, Code Monétaire et Financier

[346] Article 621-7 paragraph 2, Code Monétaire et Financier

[347] Luxottica website – New York Stock Exchange Delisting Frequently Asked Questions.

the company's common shares under the US Securities Exchange Act of 1934 (the so-called *'Exchange Act'*)[348]. Not being listed on the US securities exchange would mean the involvement of broker-dealers figures that would buy and sell the shares belonging to the Level I ADRs programs through large networks. The system of trade is totally different from the one used on a regulated market such as the NYSE: the information brokers received about the tenure of their relevant markets are usually taken from the so-called *"pink sheets"* of the National Quotation Bureau. However, while Level III ADRs programs may be used to raise capital in a new offering of shares, Level I may still have save some of the advantages of having a "sponsored" ADRs program, that is the entry into a deposit agreement with a depositary in order to control the creation and the maintenance of the deposit facility. One of the issues that brought Luxottica to reach the decision to delist its shares from the US pubic market (ndr. high administrative costs) was justified by the possibility to avoid the registration duties connected with the ownership of these financial instruments. To this extent, it may be worthy recalling the exemption from registration pursuant to Rule 12g3-2(b) under the *'Exchange Act'*[349]. According to this Rule, a non-US company is exempted from the registration and periodic reporting requirements of the *'Exchange Act'* only by meeting all in the following three circumstances:

a) the foreign private company is not required to file any reports if no public offer or listing of shares has previously taken place[350];
b) the non-US company has a class of securities listed on at least one exchange in its 'Primary Trading Market'[351];
c) the foreign private issuer publishes in English on a website or other electronic information delivery systems material information that: 1) it has made public

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348 *Evolution or Revolution for Companies with Multi-Class Share Structures*, taken from the *"Harvard Law School Forum on Corporate Governance and Financial Regulation"*, Pamela Marcogliese & Elizabeth Bieber.

349 Securities Exchange Act of 1934 (the *"Exchange Act"*).

350 Rule 12g3-2(b) paragraph 2, lett. a), Securities Exchange Act of 1934.

351 Rule 12g3-2(b) paragraph 2, lett. b), Securities Exchange Act of 1934, the 'Primary Trading Market' is explained as *"one or two exchanges in a non-U.S. jurisdiction(s) that comprise more than 55% of its worldwide trading volume"*.

according to the laws of the country of its incorporation, organization or domicile; 2) it has filed with the main stock exchange in its Primary Trading Market on which its securities are traded; 3) it has distributed or been required to distribute to its security holders[352].

Luxottica's decision to delist its shares from the New York Stock Exchange is coherent with the subsequent Essilor' unwillingness to file a registration statement on Form F-4 with the SEC. The registration statement on Form F-4 is, inter alia, provided in case of an exchange offer for securities of the issuer or another entity[353], thus, constituting potentially the perfect tool for the exchange offer that Essilor expects to conduct on Luxottica's remaining shares as part of the merger. A consequence that a 'squeeze out' or 'sell out' procedure may have on those U.S. shareholders that would not be eligible to take part in the above-mentioned exchange offer is the possibility to receive cash in an amount calculated pursuant the provisions of Article 108 of the Italian *'TUF'*. According to paragraph 3 of Article 108, the price is equal to the one of the previous global takeover bid[354]. The featuring aspects concerning the discipline of the takeover bid expected to be done on the remaining shares of Luxottica pursuant the merger will be scrutinized further. In order to better understand this concentration, it would be useful to go inside the real mechanism of the transaction. The most important issues concerning a large scale operation would clearly need to be better discussed in the following paragraphs.

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352 Rule 12g3-2(b) paragraph 2, lett. c), Securities Exchange Act of 1934.

353 United States Securities and Exchange Commission, Washington, D.C. 20549 Form F-4 – Registration Statement under the Secuities Act of 1993; *General Instructions*, A. Rule as to Use of Form F-4.

354 Article 108 paragraph 3, Legislative Decree N° 58 of 24 February 1998 on the Consolidated Law on Finance (ndr. *'TUF'*).

2. Terms and Conditions of the merger between Essilor and Delfin: an insight of the transaction and the relevant matters of law

Starting from the general considerations made above about the Essilor and Luxottica, it might be easier to draw a more complete picture on the merging companies.

Essilor International is a *société anonyme,* incorporated in France. As said above, Essilor is specialized in the design, manufacturing and marketing of a wide range of lenses, becoming the world's leading ophthalmic optics company. Moreover, Essilor is listed on Euronext Paris, one of the biggest capital markets.

Luxottica Group is *società per azioni,* incorporated in Italy. Luxottica's core business is the design, manufacturing and distribution of eyewear. As previously said, Luxottica is currently listed on the Milano Stock Exchange, after having withdrawn from the NYSE.

The core of the transaction between Essilor and Luxottica has been carried out following two steps:

a) the merger by incorporation of Delfin, which holds the 62,5% of the share capital of Luxottica, in Essilor;

b) the subsequent mandatory exchange tender offer to be launched by EssilorLuxottica to acquire all of the remaining outstanding Luxottica shares.

On January 15, 2017, Essilor and Delfin entered into a Combination Agreement setting forth the terms of the transaction. As will be better explained below, the determination of the par value of Luxottica shares was crucial at this stage.

On March 22, 2017 following a completion of the information-consultation process of Essilor's Works Council, Essilor sent its formal acceptance to the transaction.

The completion of the transaction is subject to several satisfactory requirements, some of which have already taken place:

a) the approval by Essilor's general shareholders meeting of the resolutions concerning the terms of the transaction, whose important are the Contribution Agreement, the amendments of Essilor's articles of association and the new Board structure;

b) the approval for cancellation of double voting rights shares by Essilor's special shareholders' meeting;

c) waiver granted by the AMF for the tender offer that Delfin might launch, pursuant its acquisition of the 31% of share capital in Essilor;
d) the Hive-Down[355];
e) approval for listing on Euronext Paris of the shares issued by Essilor, pursuant the transaction;
f) positive opinions expressed by the Antitrust Authorities of the relevant markets.

The "Combination Agreement" between Essilor and Luxottica provides the contribution to Essilor by Delfin S.à.r.l. of 302.846.957 ordinary shares, with a par value of € 0,06 each[356]. Those shares, which represent the 62,54% of Luxottica's share capital and 63,39% of the overall exercisable voting rights at the shareholders' meeting, are contributed to Essilor, in exchange for 139.612.447 new ordinary shares of Essilor with a par value of €0.18 each, issued on the basis of an exchange ratio of 0.461 Essilor share for 1 Luxottica share. Delfin is the Luxembourg-based holding company belonging to the Del Vecchio family: Leonardo Del Vecchio exercises a direct control on Delfin, as he holds 25% of the share capital and the usufruct on the 75% of the share capital that in order to prevent future internal conflicts concerning the inheritance of his assets has been equally distributed among his six sons (owning 12,5% each). As stressed above, the majority shareholder of the Luxottica Group is Delfin, holding the 62,54% of the share capital of Luxottica[357], giving to Leonardo Del Vecchio an indirect control over Luxottica, as falling within the meaning of Article

[355] The Hive-Down is the contribution by Essilor of substantially all of its activities into one of its wholly-owned subsidiary, to be renamed "Essilor International".
[356] Information taken from the 'agreement' including Shareholders' commitments, as have been notified to CONSOB pursuant the disclosure duties provided by Article 122 of the d.lgs 58/1998.
[357] Luxottica's share capital is divided as follows: Delfin holds the 62,54%; Giorgio Armani holds the 4,64%; the 31,57% of the share capital is held by the public; treasury shares constitutes the 1,34%.

2359 of the Italian Civil Code[358]. The acquisition of Delfin by Essilor is just the first step to ultimately acquire all Luxottica's shares; the entire contribution of Delfin's share capital is a choice aware of the fact that, according to the Italian corporate law, Essilor must promote a takeover bid on the remaining issued and outstanding shares of Luxottica at the same exchange ratio provided for the contribution (0,461 Essilor's shares to one Luxottica share).

The parties have committed to trace operations deemed to preserve from any alterations the substance of the exchange ratio. For instance, from the shareholders' agreement we acknowledge that the dividends distribution of both Luxottica and Essilor for the fiscal year 2016 must meet specific thresholds: Essilor 'dividends must remain under the 40% of Essilor's net income, while Luxottica's dividend amount must not exceed the 50% of Luxottica's adjusted net income. The 'Contribution Agreement' and the relevant Italian provisions that will lead to the acquisition of all Luxottica's shares by Essilor, thus moving towards the formation of a French incorporated merged company, will be separately discussed in the next paragraphs.

By any means, the so-called Hive-Down[359] will entail the transfer of a great part of Essilor's business into a wholly owned company, to be renamed Essilor International and, then, EssilorLuxottica. After acquiring Luxottica's shares and completing the partial Hive-Down, Essilor will become a holding company with the new name EssilorLuxottica and ultimately serve as the holding. According to Article 122 of the d.lgs. 58/1998, the information of the agreement related to the exercise of voting rights in companies with listed shares and their parent companies shall be communicated to CONSOB and, then, published in extract form in national daily newspapers[360]. Since

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[358] Article 2359 paragraph 1, Italian Civil Code. This article defines as controlled company, inter alia, the ones *"where another company has the majority of the votes that can be exercised at the ordinary shareholders 'meeting"*.

[359] Autorité des marchés financiers, *Appendix to the report of Essilor's Board of Directors to the general shareholders' meeting convened on May 11, 2017*, pp.2.

[360] Article 122 of d.lgs. 58/1998 provides that the relevant agreements shall be *"filed at the Companies Register of the place where the company has its registered office and communicated to listed companies"* as well.

the existing disclosure duties on contents of the notification to CONSOB, it might not be a difficult task to highlight all the steps and procedures following the contribution.

After the meeting of the Board of Directors of Essilor, needed to evaluate and approve the Combination Agreement, it was a necessary step the process of information and consultation of Essilor's Works Council (*"comité central d'entreprise"*) and European Works Council ("*comité d'entreprise européen*"). The whole consultation and information procedure has been reformed with the Florange Law, which will be deeply scrutinized going forward with this work.
After the consultation of the Works Council, another important step in the transaction is represented by the approval of the cancellation of double voting rights by the Essilor's special shareholders meeting[361]. Then, as a result of the Contribution Agreement, the by-laws of Essilor will be amended so that it can be introduced a 31% voting cap. The reasons behind these modifications has to be found behind the need to balance Luxottica's absence of shares granting double voting rights. The presence of shares awarding more than one vote would impact the internal voting rights giving Essilor's shareholders more votes that the ones prospected in the Contribution Agreement. Moreover, the cancellation of double voting rights attached to shares is an operation that has to be performed before the Completion Date. As set forth in Article L225-124 of the French Commercial Code, the merger of a company shall have no effect on double voting rights, thus giving an advantage to the beneficiary company[362]. However, shares attributing double voting rights are categorized as a special category of shares, which according to the French Corporate Law are granted the possibility to attend special meetings. Furthermore, a decision to vary the rights relating to a share category taken at a general meeting has to be validly approved by the special meeting of that category of shareholders[363]. Thus, the decision to cancel shares that attribute more than one vote has to be made by both Essilor's general shareholders meeting, which will be, inter alia, called to approve the Contribution, and the special meeting

[361] Autorité des marchés financiers, *Appendix to the report of Essilor's Board of Directors to the general shareholders' meeting convened on May 11, 2017*, pp.15.

[362] Article L225-124, French Commercial Code.

[363] Article L225-99, French Commercial Code.

of shares with double voting. Postponing the cancellation of double voting shares after the Completion Date would constitute a high risk for Luxottica. In the worst scenario, Luxottica's prospected 31% of the total voting rights after the completion of the merger would be downsized by the presence of this special category of shares. Not to mention the difficulties that the merged entity would face in cancelling shares with double vote that in any case would require the final approval of the special shareholders 'meeting. The role of the general meeting of shareholders is as relevant as the one played by the special meetings.
However, the prospected cancellation of double voting rights may not prevent EssilorLuxottica from introducing them in a second time. The above-mentioned cancellation may be only a temporary move to find an equilibrium with regard to the ownership structure.

3. The Corporate structure after the merger and the exchange tender offer

Following the completion of the merger, the Delfin will approximately holds between the 31% and the 38% of the EssilorLuxottica share capital, with the above-mentioned voting cap at 31%[364]. As a result of the incorporation by merger, Delfin will be the majority shareholder of EssilorLuxottica. The 31% that Delfin will be holding at the end of the transaction would be enough to exercise a great control on the company, especially if put to comparison with Essilor's total voting rights (4%). Anyway, it must be underlined again that the transaction between Essilor and Luxottica is a "merger of equals". This consideration is proven on two solid grounds: a) the board of directors will be chosen after consultation, so that there is an equal representation of the two firms; b) the majority of the shares of EssilorLuxottica will be issued to the public.

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[364] Autorité des marchés financiers, *Appendix to the report of Essilor's Board of Directors to the general shareholders' meeting convened on May 11, 2017*, pp. 16.

These two points need to be better examined. As for the composition of the Board of Directors, this will be composed of 16 members, with both Essilor and Luxottica appointing eight members of the board. Furthermore, Leonardo Del Vecchio will be Executive Chairman and CEO of the Combined Company, whereas Hubert Sagnières[365] will be Executive Vice-Chairman with equal powers as the Executive Chairman. Moreover, Delfin will designate seven other directors, whose four shall be independent directors after consultation with Essilor. To balance Luxottica's influence in the Board, there will be: two representatives of the employees of Essilor, one representative of Valoptec (the association of employee shareholders and ex-employee shareholders) and four independent directors from the Essilor board of directors in office as of the date of the Agreement[366]. The clear choice of the parties has been to defer the managerial choices of the company to a team comprising well-qualified experts, with the specific aim to balance the powers within the corporate structure of the merged entity. Under French Law, the Board of Directors the broad lines of the company's business activities and ensures their implementation[367]. With the clear exception of the powers that the law expressly attributes to the shareholders' meeting, the Board of Directors shall deal with all the matters relating to the conduct of company's business and deliberates on all the pertinent issues[368]. However, the fact that the President and the *Directeur Général* of the merged company will be Del Vecchio, this does not automatically entail that Luxottica's CEO will hold alone the powers to manage or represent the group vis-à-vis third parties. As pointed out by Article L225-56, following a proposal from the *directeur générale,* the Board of Directors can appoint one or more *directeurs générales délégués* charged with assisting the *directeur général*[369]. This corporate figure, who shall mandatorily be a

[365] Hubert Sagnières has been Chairman and Chief Executive Officer of Essilor before the transaction took place.

[366] Shareholders' Agreement Essilor Delfin - *Estratto del patto parasociale ai sensi dell'art. 122 del D. Lgs. n. 58/1998, nonché dell'art. 129 del Regolamento Consob n. 11971/1999.*

[367] Article L225-35, French Commercial Code.

[368] Ibid.

[369] Article L225-53, French Commercial Code.

natural person, is invested with a broad range of powers to act on behalf of the company vis-à-vis third parties. In agreement with the *directeur général*, the parties shall determine the powers attributed to the *directeur général délégué*[370]. Pursuant to the shareholders 'agreement and to the overall logic to balance the powers within the board of directors, Hubert Sagnières, Essilor's CEO, shall be invested with the same executive powers of Luxottica's CEO. However, as the future Board Chairman, Leonardo Del Vecchio will hold, *inter alia*, some regulatory functions, such as the power to organize and oversee the work of the general meeting and monitor the well-functioning of the directors, by ensuring they will be able to accomplish their tasks.

Furthermore, another important reason that slightly tempers the 31% of Delfin in the merged entity is the high stake the public will hold after the offer. As a result of the merger, the shares that will be issued to the public amount up to the 64,8% of the totality of the shares of EssilorLuxottica. The difference between the total shares of Delfin and Essilor may lead to an interesting suggestion about the nature of the Italian and French market. Thus, the Italian corporate governance system has always seen prominent families playing a crucial managerial role, and the 61,9% of shares carrying voting rights that Leonardo Del Vecchio holds directly or indirectly (through his relatives) in Luxottica[371]. Over the years, France has showed a market-driven attitude that, as will be pointed out in the next paragraph, has attracted more international investors[372]. In France, lately, there is more attention by the institutional investors in the monitoring of listed companies. Basically, all the so-called "open markets" tend to to be considered financial systems, where the control is entrusted to the market, and so to the public itself. This may happen through means of corporate control, such as takeovers, class actions and disclosure mechanism[373]. Any consideration on the nature

[370] *Sociétés Commerciales*, Rédaction des Editions Francis Lefebvre, pp. 641.

[371] *Corporate Governance, Competition and Political Parties – Explaining Corporate Governance Change in Europe*, Roger M. Baker, Chapter 10.

[372] *France*, Alain Couret, Chapter 3, pp. 100, from *Public Companies and the Role of Shareholders – National Models towards Global Integration*, edited by Sabrina Russo and Eugenio Ruggiero.

[373]Ibid, *Introduction*, Sabrina Bruno and Eugenio Ruggiero, pp.5.

of the French market might be enough to weaken the weight of Delfin in the shareholders 'meeting, or the role of the Board of Directors. According to Articles L225-18 and L225-105 of the French Commercial Code, in the one-tier board structure, the shareholders' meeting shall appoint the directors[374], as well as decide to remove one or more directors from office and replace them in any circumstances[375]. Thus, external forces, such as the so-called *"corporate raiders"*, may well monitor the companies 'performances, and might decide to bid for the company[376]. However, France and Germany are two countries that have witnessed to have a broader view of stakeholders 'interest. As a matter of fact, the enactment of rules on the participation of the employees to the corporate governance of the joint stock companies have encouraged among the stakeholders of the company. Indeed, the employee-driven corporate structure of French listed companies has been one of the main reasons that made France the incorporation seat, and Charenton the registered office of this company. As will be pointed out further in this work, the role recognized to the employees in the public companies is one of the main reasons that helped both France and Germany to become so attractive for corporations.

Other considerations shall be made on the 31% of Delfin in the new merged entity. According to the General Regulation of the AMF, where a natural or legal person acting alone or in concert comes to hold more than 30% of a company's equity securities or voting rights, such person is required, on its own initiative, to inform the *Autorité des marchés financiers* immediately and to file a proposed offer for all the company's equity securities, as well as any securities giving access to its capital or voting rights[377]. However, this provision would create major complications, given the subsequent offer that EssilorLuxottica will launch to acquire all of the remaining outstanding Luxottica 'shares. However, the French discipline applied to listed companies holds several analogies with the Italian one. Additionally, both jurisdictions

[374] Article L225-18, French Commercial Code.

[375] Article L225-105, French Commercial Code.

[376] *The Insider's view on Corporate Governance: the Role of the Company Secretary*, Erik Banks, pp. 62.

[377] Article 234-2, General Regulation of the AMF, as amended on 27th September 2012.

have implemented the so-called "*EU Takeover Directive*" (No. 2004/24/EC), which entrusted the market authorities of Financial Markets (ndr. CONSOB and AMF) with a broad range of powers. Indeed, there are several cases, where the French Market Authority may grant a waiver, and one of the conditions to closing of the Delfin stake contribution was the just-mentioned waiver from the regulatory authority to be obtained[378]. According to Article 234-9 of the General Regulation of the AMF, the *Autorité des marchés financiers* may grant a waiver, *inter alia*, in case of a merger or asset contribution subject to the approval of a general meeting of shareholders.

The *dictum* of the provision may seem to leave a wide discretionary power in the hands of the AMF. It is well-established the role that AMF covers within the French regulated market. As a matter of fact, the AMF sets the rules governing public tender offers involving securities traded on French regulated markets; establishes the requirements for mandatory offers and squeeze-out procedures; and oversees compliance with these rules, including approving or rejecting public tender offers[379]. Substantially, the AMF deals with all the issues that may harm the overall protection of investors in French public companies and ensure the respect of disclosure rules for investors. From these interpretations, it might be more adequate to refer to the AMF as holding an extensive role in "policing takeover offers", rather than a discretionary power in interpreting the Offer Rules.

However, it can be drawn a comparison between the merger exemption rule entrusted to the Financial Market Authorities at stake, in terms of a parallelism between the Italian and French general regulations for public companies. Article 106 of the Italian Consolidated Law on Finance provides several cases where the CONSOB can grant the waiver that need to be read in conjunction with the so-called *"Regolamento Emittenti"*[380]. According to the applicable law on takeover bids, CONSOB shall establish cases *"whereby exceeding the thresholds indicated in Article 106 paragraph 1 a takeover bid will not be considered mandatory if implemented in the presence of*

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[378] Autorité des marchés financiers, *Appendix to the report of Essilor's Board of Directors to the general shareholders' meeting convened on May 11, 2017*, pp. 15.

[379] *Guide to Public Takeovers in Europe 2016*, Olivier Assant, pp.20-21.

[380] Article 49 of the *Regolamento attuativo adottato con delibera n. 11971 del 14 maggio 1999.*

one or more majority shareholders or results from (..) mergers or spin-offs"[381]. Among the several exemptions, the one that deserves to be mentioned is contained in Article 49 par.1 lett.g) where it is stated that a Mandatory Offer does not take place if two circumstances occur: a) the mandatory offer is the consequence of a merger operation approved by resolution of the shareholders' meeting of the company whose securities should otherwise be the subject of an offer; b) there is not the contrary vote of the majority of shreholders taking part to the general meeting[382]. The combined read of Article 106 of the Italian Consolidated Law on Finance and Article 49 of *Regolamento Emittenti* would suggest similar substantial terms for the exemption to be granted in both Italian and French Offer Rules. However, in Article 49 there is a further clause, providing the waiver of the mandatory offer without the contrary vote of the majority of the shareholders without taking account of the shareholders acquiring the above-thresholds shares, or the shareholder that alone or in conjunction with others holds the majority stake in the shareholders 'meeting. Whereas the French relevant law does not mention any kind of reference to the voting thresholds for the exemption to be granted, the Italian capitals market law does provide such limitations for the voting mechanism.

4. The cooperation between enterprises on a large-scale level: risk factors

Another aspect that deserves to be mentioned is the burdensome control made by the anti-trust authorities. The cooperation between multinational corporations usually involves corporations with well-established businesses on different continents. As previously said on Luxottica's market expansion history, the Del Vecchio's Group has always been exposed to the local economic and political conditions of the other relevant markets. Basically, such exposure comes from the fact that Luxottica operates in many developing countries in Africa, South America and Asia, and it has been

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[381] Article 106 paragraph 5 lett.e), Italian Consolidated Law on Finance.

[382] Article 49 par. 1 lett.g) of the *Regolamento attuativo adottato con delibera n. 11971 del 14 maggio 1999.*

exposed to many risk factors. The cooperation between enterprises on a large-scale may be influenced by many other circumstances, such as: technical barriers and *in* and *out* restrictions to trade; currency exchange rate fluctuations and currency controls; implementation of rules of compliance, against the corruption; different contractual schemes; potential complications with the capital markets; difficulties linked to the governmental and national political environment; legal or regulatory requirements; the respect of different fiscal regimes; local antitrust and other market abuse provisions; limitations on investments; and laws on the rules of origin of the products[383].

As marked out in the previous paragraphs, the merger is subject to several conditions, which may seriously undermine the completion of the merger itself. Among these conditions, the transaction must be cleared by the relevant Antitrust Authorities[384]. The approval must come by fifteen antitrust authorities: Mexico, Morocco, Taiwan, New Zealand, Australia, India, South Africa, Russia, Canada, Colombia and Japan European Union, the United States, Brazil and China.
A clear distinction between the Wind Tre Joint Venture and the EssilorLuxottica group may well be found in the worldwide relevance of the merger. In fact, the high number of Regulatory Authorities that EssilorLuxottica is significant of the fact that the merged entity may alter the competition on fifteen relevant markets. Many considerations have been made on the Merger Control exercised by the EU, and it would be a more burdensome work going through all the regulatory frameworks to see what are the several implications that such a large-scale corporation may have on the single markets. However, as will be pointed out in the next paragraph, the implications of a cooperation between joint stock corporations may well depend from the market in which they are going to conduct their businesses.

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[383] Autorité des marchés financiers, *Appendix to the report of Essilor's Board of Directors to the general shareholders' meeting convened on May 11, 2017*, pp. 135.

[384] Shareholders' Agreement Essilor Delfin - *Estratto del patto parasociale ai sensi dell'art. 122 del D. Lgs. n. 58/1998, nonché dell'art. 129 del Regolamento Consob n. 11971/1999.*

2. THE SOCIETE ANONYME: EXPLAINING THE REASONS WHY FRANCE REPRESENTS A HIGHLY-COMPETITIVE MARKET FOR PUBLIC COMPANIES

Summary: 1. The cooperation between public companies in France: introduction; 2. Public companies and the securities exchange market: a comparative analysis between the French and Italian legal systems; 3. The role of the employees in the French corporate governance; 4. The Law N° 384/2014: how did the "Florange Law" impact the French Corporate Law?

1. The cooperation between public companies in France: introduction

As set forth in the previous paragraphs, the collaboration between enterprises may manifest on different levels. The cooperation between joint stock companies represents the highest level of integration of businesses. The *société anonyme* is the most suitable legal entity for large-scale companies, whose needs of capital cannot be assured by a restricted a number of investors. As a matter of fact, the public companies makes it possible to seek huge amount of capital, by offering shares to the public and by offering investors, in exchange for their investments, securities negotiable on regulated markets. The cooperation between enterprises reaches its pinnacle through the formation of complex and conglomerate organizational structures, set up in the form of groupings of enterprises. The formation, integration and merger of these groupings aims at meeting the needs of greater productivity of undertakings[385]. Substantially, the formation of groups of companies is a phenomenon that all national jurisdictions tend to encourage, as it responds, at the national and international level, to the need for

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[385] *Diritto Commerciale 2 – Diritto delle Società*, M. Campobasso, pp. 290.

rationalization and greater efficiency of the production system. Moreover, the presence of conglomerate of companies is a phenomenon that does not only have a national connotation, however, it concerns a wide range of EU and International issues, whose regulation may raise some concerns. Just to mention few, they can be pointed out the impact of groups on the EU and worldwide competition law; the problematic aspects of harmonizing a comprehensive discipline of International law for the regulation of transnational operations; the difficulties of detecting offenses and abuses through group companies that do not guarantee corporate transparency and valid disclosure mechanisms, because they are made with the sole purpose of working as *off-shore companies.*

All the European countries have made the right adjustments, trying to serve a competitive legal environment in order to attract foreign investors. In the previous chapter, it was made the case of how Luxembourg, through several legislative enactments, set forth a competitive legal framework for the cooperation between small and medium-sized enterprises. It was demonstrated how the success of certain legal entities (ndr. S.à.r.l., S.a.s.) may depend either from the corporate law in force in that country or the overall attitude of the market to attract foreign investors with specific legal devices, such as the regulatory framework for SICAV.

Here, it will be showed how institutional investors find more and more attractive incorporating their joint stock corporation in France rather than Italy.

2. Public companies and the securities exchange market: a comparative analysis between the French and Italian legal systems.

In the previous paragraphs, few considerations on the nature of the French capitals market have been made. It would be the case to analyse deeper the structure and organization of the French capital markets, while making a comparison with the corporate control in the Italian market.

At this preliminary stage, it would be useful to describe the internal organization of the French capital market. The *marchés réglementés* retain the monopoly of the admission of securities to the negotiation. The qualification of a market as "regulated", is based both on its approval (*'agrément'*) as a regulated market, and on the conformity of its internal operational structure with the requirements of the Directive 2004/39/EC (the so-called directive *'MIF'*). However, the registration on the list of the regulated markets that each Member State shall dispose has a merely declaratory purpose[386].

However, the financial instruments can be listed, and negotiated, on other financial markets, different from the *marchés réglementés.* The *systèmes multilatéraux de négociacion* (SMN) are systems, whose operational mechanisms are based on investment services, subject to approval. The financial instruments negotiated on the SMN can be both admitted or non-admitted to the negotiation on regulated markets[387]. Moreover, these systems, while not having a "regulated market status", may be managed by an investment service provider authorised to provide a variety of investment services[388] or, as provided for in the General Regulation of the *Autorité des Marchés Financiers*, by a market undertaking authorised to do so by the AMF[389]. A relevant aspect of the SMN consists in the possibility for the operators to set forth their own rules following a transparent and fair procedure, which entails the supervision of the AMF. Furthermore, a *systèmes multilatéral de négociacion* shall inform the *Autorité des Marchés Financiers* of its intention to provide means of access to its systems in other Member States of the EU or other States party to the European Economic Area Agreement. The AMF shall forward such information to the

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[386] *Sociétés Commerciales*, Rédaction des Editions Francis Lefebvre, pp. 1018.

[387] Ibid.

[388] Article L321-1 of the French Monetary and Financial Code mentions, *inter alia*:

a) the custody and administration of financial instruments for third parties and other ancillary services; b) the granting of credits or loans to an investor to enable him to carry out a transaction relating to a financial instrument in which the company granting the credit or the loan takes part; c) consultancy services; d) investment research and financial analysis or any other kind of general recommendation concerning transactions on financial instruments; e) certain exchange-rate services.

[389] Article L424-1 of the French Monetary and Financial Code.

competent authority of the State concerned[390]. It must be noted that a very similar system is provided in Italy as well, where especially banks and sim (ndr. '*società di intermediazione finanziaria'*) provide such investment services.

On the other side of the spectrum, the *"Mercato Telematico Azionario"* (ndr. *'MTA'*) may well be considered the 'main market' for investors willing to list their shares on a regulated market, organized and regulated by *Borsa Italiana spa*[391]. The implementation of the 2004/39/EC directive has encouraged Italy as well to provide well-functioning multilateral trading facilities, such as MAC or AIM Italia. Despite the clear similarities between the two financial systems, together with a close historical tradition in the financial sector, there are far more companies listed on the French securities exchange markets, and the total capitalization is nine times more voluminous than the Italian stock market. According to NYES Euronext Paris, the deal value of equities trading on Euronext Paris is 1.079 billion € in 2017, whereas the combined Euronext and Alternext counts above 800 listed companies[392]. As part of the London Stock Exchange Group since June 2007, the total market capitalization of the *Borsa Italiana spa* amounted up to 524,9 billion €, as of December 2016[393].

Taking into account the total capitalization of both markets, it would be no surprise that EssilorLuxottica has primary submitted a request to trading its shares on Euronext Paris. As said above, the Italian market for public companies has always been very closed to external capitalizations, due to the huge role played by families in the corporate control. That is to say that very often the shares of public companies have been concentrated in the hands of few shareholders[394]. As of 2009, the average

[390] Article L424-4 of the French Monetary and Financial Code.

[391] *Italy*, Sabrina Bruno and Eugenio Ruggiero, Chapter 2, pp. 56, from *Public Companies and the Role of Shareholders – National Models towards Global Integration*, edited by Sabrina Russo and Eugenio Ruggiero.

[392] NYSE Euronext Paris; Europe, 2014 to 2017.

[393] Borsa Italiana Spa – Italian Market Review 2016.

[394] Despite in 2009, the average amount of shares in the hand of few *'strategici'* shareholders have decreased, it must be noted that their average holding of share capital is still sensibly high, amounting up to 44,87%. Data taken from *FTSE MIB Evoluzione degli assetti*

percentage of shares in the hands of, either foreign or domestic, institutional investors was above the 37%, with the foreign investors holding approximately the 24% of the total shares[395]. A clear example is the total holding that Essilor and Luxottica have in their respective group. The Italian total investors in the listed stock exchange market are still a very low amount if compared to the French ones. The average holding of institutional investors in the French market is 89%, whose 40% is made of foreign investors[396]. At this point it would be fair to made some considerations: in the so-called "insider" systems, the core shareholders, or 'blockholders', are usually the one exercising, either directly or indirectly, the control in the shareholders 'meeting and the direction and coordination activity on the rest of the group. The fragmentation of the capital share calls for a major protection of the minority shareholders, to prevent abuses from the core shareholders[397]. However, it would be a misconception to call France a pure "outsider" system: qualification that may well be given to countries like the United States and the United Kingdom. For long-time, France has been considered an "insider" system, with the only exception that it was the State to play such a blockholding role, unlike the Italian system that saw the families as main characters[398]. However, in France and Germany, the huge role played by the public opinion and the employees has called for a major space to be recognized to the Works Council, and other employees-focused organizations, willing to take part in the management of the firms. A greater attention by all stakeholders for the management of the firms has put public companies into the spotlight. As a matter of fact, foreign institutional investors are getting an advantage of all these external forces that might contest the managerial decisions of the firm.

Another crucial circumstance that make the French capitals market such appealing is

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proprietari ed attivismo assembleare delle minoranze, Luiss G. Carli Ceradi & Georgeson, from *Italy*, Sabrina Bruno and Eugenio Ruggiero, Chapter 2, pp. 59.

[395] Ibid.

[396] Ibid.

[397] *Insiders, Outsiders, and Change in European Corporate Governance*, Roger M. Baker, pp.5.

[398] Ibid. pp. 6.

the presence of Euronext, and Alternext, as operators. Especially Alternext provides to corporate groups a valid framework for their small and medium-sized subsidiaries. Basically, Alternext falls into the category of *systèmes multilatéraux de négociacion,* and more precisely into the French-disciplined category of *systems multilatéraux de négociacion organises* (ndr. '*SMNO'*). An '*SMNO'* holds a more reinforced discipline, providing more mandatory requirements, than the normal '*SMN'*. All '*SMNO'* shall have their regulatory norms approved by the AMF at their request, as well as being subject to the provisions concerning the market abuses. Moreover, they have disclosure duties towards the AMF, as far as the admission of new financial instruments in the system[399]. The advantages of this mechanism are enshrined in the possibility for all the SMEs to have a gradual access to the capital markets. The advantages of this market consists in the possibility to access with fewer obligations.

3. The role of the employees in the French corporate governance.

However, France and Germany that used to be regarded as two "insider" systems have taken the necessary measures to keep up with the current open markets. When it was discussed the whole consultation procedure, it was enhanced the role of Works Council, and the close relationship that may be established between employers and the decision-making process within a firm. It was not enhanced the already-great role played by these actors within the corporate structure of a *société anonyme.* Before going through the actual discipline, the question that must be answered is: why would employee-based corporate models be a better choice for a group of enterprises?
First, the involvement of employees may have direct consequences on the productivity levels of a firm, and strengthen their level of trust towards the decision-making process. Second, employees might have a higher level of awareness than shareholders (especially the ones not interested in the management of the firm) of the possible consequences that such decisions might have on the working and political environment

[399] *Sociétés Commerciales*, Rédaction des Editions Francis Lefebvre, pp. 1018.

of the firm[400]. However, it must be made a distinction from the corporate control that employees may exercise as shareholders of the public company and as managers of it. The above-mentioned “external forces” that may help foreign investors to prevent firms-harming decisions by the majority shareholders are linked to the disclosure of financial prospectus and strategies of the undertaking. In fact, by holding shares, employees may exploit information available to them as employees, as well as those obtained by taking part to shareholders ‘meeting (or having access to the memorandum of such meetings)[401]. Therefore, the role of the employees may be considered as well in light of their dual investment, as they deploy their human and financial capital[402]. Employees may well safeguard their dual investment by taking part to the ratification and general monitoring in the group. Not to mention the advantages that the whole employees group may take from a closer relationship with the board of directors.

Nevertheless, the mere fact that an employee representative acts as a member of the board does not automatically entails that may influence the decision-making process.

Taking part to the activities of the board may well entrust the employee with a wide range of powers, such as, *inter alia*, voting on the revocation and the appointment of the CEO, the approval of the contract of the company and the decision to issue bonds. However, as it was evident in the previous paragraphs, the big load of the managerial decisions within a corporations are in the hands of the *directeur general*, and the *directeurs générales délegués*. Those are positions that could be covered by employees in a corporation, but they are not likely to cover due to substantial reasons. For instance, according to Article L225-28, it is stated that the directors elected by the employees must have an employment contract with the company or with one of the companies of the group. It can be made the point that serving as chief executive of the company, while being employed in it, would be a burdensome task. On the other hand, a public company opened to the interests of a wide range of stakeholders (e.g.

[400] *Strategies for an Employee Role in Corporate Governance*, Brett McDonnell, pp.4.

[401] *Employee Ownership And Corporate Governance: Evidence From The French Market,* Tarek Ben Noamene, pp.1354.

[402] Ibid. pp. 1353.

suppliers, employees, local community) may not serve its purpose of vehicle for the optimization of the private interests[403].

However, the German and French experience showed that the involvement of employees in the management of public companies have important effects on ensuring effective control on the company's activities. For corporations with core shareholders, such as EssilorLuxottica, a conspicuous amount of shares in the hands of employees can be used by the management team as anti-takeover strategy[404]. This is due to the fact that employees, in case of an external acquirer, are more interested in voting in line with the company's management view.
Moreover, there are limitations on the numbers of employees that can be voted as directors in the Board of *sociétés anonymes*. According to the French Commercial Code, the number of these directors may not exceed the number of four in public companies nor may be above one third of the number of other directors[405]. Indeed, there are determined thresholds that have to be met to have employee representatives in the board of directors. When at least the 3% of the total capital share is held by the companies' staff and by the staff of affiliated companies represent, one or more directors shall be elected by the general meeting of shareholders[406]. There are some requisites the directors have to meet to be elected: a) the directors shall be both an employee and shareholder of the company; b) the directors elected by the employees shall be maintain their employment contract with the company[407].
It must be noted that applying the same thresholds to Italian public companies would not exactly have the same effects than in Germany or France. It is quite difficult to see the 3% of the total capital share of a company in the hands of employees. As a matter

[403] *Insiders, Outsiders, and Change in European Corporate Governance*, Roger M. Baker, pp.3.

[404] *Management commitment to innovation and ESOP stock concentration* from the *Journal of Business Venturing*, J. Gamble, pp. 433.

[405] Article L225-27, French Commercial Code.

[406] Article L225-23, French Commercial Code.

[407] Article L225-31, French Commercial Code. Article L225-32 states that *"Breach of the employment contract shall terminate the office of director elected by the employees"*.

of fact, the part of capital share detained by the core shareholders, as well as domestic investors, might be too large. Nonetheless, all these arguments do not take into account of another major factor: the public opinion. The decision to implement an effective tool for the participation of employees to the corporate governance might have such a huge impact on the public opinion that may well affect public companies turning them from business vehicles for multinational corporations into social-driven legal entities.

4. The Law N° 384/2014: how did the "Florange Law" impact the French Corporate Law?

In the previous paragraphs, it was pointed out how the general structure of the capital market, and the preservation of stakeholders 'interests, have played a huge role in the transformation of France from an "*insider*" market into a market-driven system, open to foreign investors. There are few residual considerations that should be made on the corporate law in force.
The Law N°384/2014 (the so-called *"Florange Law"*) had a huge impact, among the others, on the takeover discipline, which had not been reformed since the adoption of the Directive 2004/25/EC on takeover bids. However, it did not impact only the takeover discipline.

First, this Law has introduced a new information and consultation procedure. The French jurisdiction reserves a huge role to the *"comité d'enterprise"*, or Works Council. The discipline concerning the information and consultation procedure has been utterly reformed by the Florange Law. Here, it will be attempted an explanation of the whole procedure, as amended by the Florange Law. According to Article L 2323-33 of the French Labour Code, the Works Council shall be informed and consulted on any modifications in the economic and legal organizations of the company, such as when occurring a merger. This article extends the scope of Article L-2323-1 that sets up general rules on the role of the Works Council, which shall be

"informed and consulted on matters concerning the organization, management and general administration of the company, in particular on the measures likely to affect the size or the structure of the workforce, the duration of the work or the conditions of employment and vocational training". Basically, the *ratio* behind the above-mentioned provisions has to be found in the need to prevent negative employment-related consequences as a result of the transaction. The management of the company shall provide the Works Council all the relevant information concerning the business operation, at the end of which the Works Council must hold a vote and give an opinion to the transaction. In this specific case, both the *comité central d'entreprise* and the *comité d'enterprise européen* have delivered a positive opinion on the merger at stake in a relatively short period of time[408].

This is due essentially to the presence of an agreement between the board of the company and its Work Council setting up the duration of the consultation procedure[409]. However, there may be circumstance where no agreement can be reached and it's the law the maximum duration of the consultation. Basically, the time for the consultation procedure shall not exceed the one-month duration since the Works Council has been notified with all key information of the transaction. The terms can be extended in some particular circumstances: a) extended to two months if the Works Council opts for the appointment of an expert for the assistance during the consultation process; b) extended to three months if the transaction involve a transfer of employees that would justify the consultation of the Health and Safety Committee; c) extended to four months if it is required the consultation of several Health and Safety Committees.

The presence of a Health, Safety and Working Conditions Committee ("*CHSCT*")[410] is a very important feature of the French jurisdiction that provides the mandatory set up of such a committee to all companies with more than 50 employees[411]. The Health

[408] There were about 60 days between the communication of the relevant information of the merger to the Works Council (15 January 2017) and the Works Council's final delivery of the opinion (22 March 2017).

[409] Article L2323-3, French Labour Code.

[410] CHSCT is the abbreviation of *Comité d'Hygiène, de Sécurité et des Conditions de Travail.*

[411] Art. L. 23-111-1., Law n° 994/2015

and Safety Committee is composed at least of five representatives, chosen from the representative employers' professional organizations, and at least five representatives of trade unions representing employees, coming from companies with fewer than eleven employees. Going back to consultation procedure, if the Works Council, or the Health and Safety Committee, has failed to give an opinion on the transaction at the end of the above-mentioned period, the lack of a formal opinion shall be deemed as a negative opinion itself[412]. Anyway, these terms can be extended beyond the deadlines, if the Works Council takes legal action to delay the consultation procedure on the basis that it did not receive sufficient information on the transaction[413]. The French Commercial Code provides for disciplinary sanctions in case of failure to comply with consultation obligations[414]. The criminal offence at stake falls within the definition of "*délit d'entrave*": the legal representative of the undertaking is punished with one-year imprisonment and € 3750, while the company receives a € 18750 fine. The disciplinary sanctions have nothing to do with the operation itself that is not deemed to be rescinded in case of failure of these obligations.

The Italian discipline on the information and consultation to the constituted *rappresentanze sindacali*, trade unions and the respective *associazioni di categoria* is enshrined in Article 47 of Law n° 428/1990. Even if no works council nor employee representative body exists within Delfin, it would be utterly interesting to draw up a comparison with the Italian discipline. The information and consultation duties are provided for any *"trasferimento d'azienda"* that might involve more than 15 employees. In order to draw a definition of "*trasferimento d'azienda"*, it must be recalled Article 2112 of the Italian Civil Code. Substantially, *"any transactions that upon the execution of a sale agreement or of a merger results in the change of ownership of an organized business activity, either profit-oriented or non-profit-oriented"* shall fall within the meaning of *"trasferimento d'azienda"*[415]. Similarly to what provided by the relevant French Law, the company must inform the employees

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[412] Art. L2323-3, French Labour Code.

[413] *Information and consultation obligations on corporate transactions*, Pascale Lagesse, pp. 14.

[414] Article L. 1334-1, French Commercial Code.

[415] Article 2112 paragraph 5, Italian Civil Code.

representative organizations of all the key aspects of the transaction, in particular with respect to the employment-related issues. Moreover, Article 2112 expressly mentions which information shall be given: the reasons of the programmed *"trasferimento d'azienda"*; the juridical, economic and social consequences that such a transaction may have on employees; the eventual measures that the company may take. About the consultation procedure, it is stated that the parties of the transaction and the works council shall initiate the joint examination of the transaction. The reasons behind this are to be found in the need for the parties to make the employees representatives aware of the future business strategy of the transaction. Furthermore, as stated above, the Italian Law does not provide any committee with the same role within the consultation procedure played by the Health and Safety Committee, which could easily be considered a particularity of the sole French corporate practice. Finally, the terms of Article 47 of Law n° 428/1990 for the consultation procedure slightly differ from the ones provided by the French Law. In fact, it is provided that within 7 days from the notification of the operation, the employees representatives and the works council must request the joint examination[416]. There is no mention in Article 2112 of the possible consequences of the expiring term that Article 2323-3 provides for the delivery of an opinion. It can be made the argument that Italian consultation procedure has less formalities than the French one. This can be stated on the basis that the influence of employee representative organizations and works council play a more meaningful role within French corporations. However, in both jurisdictions, the failure to comply with the information and consultation obligations do not entail as a possible consequence the termination of the transaction. To this extent, the Italian Law provides a general discipline for the repression of anti-union behaviours enshrined in Article 28 of Law n° 300/1970 that shall take place through the cessation of the unlawful behaviours and halt the effects on the employees that have suffered the consequences of such a behaviour.

Another important field that has been deeply discussed above is the automatic attribution of double voting rights to shareholders that hold shares for two years. The

[416] Article 2112 paragraph 2, Italian Civil Code.

automatic implementation of this mechanism may be impeded by a public company, only after a modification of its statutory norms[417]. Anyway, if such articles were already implemented in the articles of association of a given company, no modification shall be deemed needed. This legal device has the main purpose of giving shareholders such "*loyalties*" for having taken part to business plan of a company. It must be noted that the "Florange Law" did take into consideration the given circumstance that, by giving double voting rights on determined shares, some 'blockholders' would have ended up crossing the 30% threshold required for the takeover bid. Again, the *Autorité des marchés financiers* is called to play a huge role. The AMF may grant a waiver if the shareholder: a) has already surpassed the 30% threshold at the enactment date of the Florange Law (ndr. 3 April 2014); b) decides to sell part of its shareholding interest and crosses downwards the 30% threshold; c) is expected to cross the 30% threshold upwards because of the attribution of double voting rights[418].

Few considerations on the discipline of double voting rights shall be made, in an attempt to draw a comparison with the Italian discipline. Double voting rights are essentially regulated by Articles L225-123 and L225-124 of the French Commercial Code, as ultimately amended by the Florange Law. As previously said, according to the French Commercial Code double voting rights shares constitute a special category of shares, with all the advantages that this categorization brings.

Moreover, Article L225-123 of the French Commercial Code gives to the corporation the possibility to attribute to the fully paid shares registered in the name of the shareholder for at least two years the possibility to hold a voting right equivalent to twice that attributed to the ordinary shares[419].

Prior the Law n° 2014/384, the choice to attribute, and consequently remove, double voting rights attached to certain category of shares was available by the articles of association of the company. According to French Law, *"only an extraordinary general*

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[417] Combined read of Articles L225-123 and L225-124, as amended by Article 7 of the '*Florange'* Law.

[418] Article 234-9, General Regulation of the Autorité des marchés financiers; *Changes to French Takeover Law*, Allen&Overy pubblication on the Florange Law, 9 April 2014.

[419] Article L225-123, French Commercial Code.

meeting is authorised to amend any provision of the articles of association" [420]. This is a provision that cannot be amended by any other clause present in the statutory norms of the company.

In Italy, the "one share-one vote" rule has been amended only after the Law n° 91/2014. In fact, Article 2351 paragraph 4 has been modified pursuant to the amendments introduced by the so-called *"Decreto Competitività 2014".* This decree has introduced the possibility for the company to issue shares with multiple voting rights *"also in case of special arguments or subordinated to the verification of some non-merely potestative conditions"*[421]. It is worth noting that France was one of the first European countries to introduce the possibility to attribute to shares, meeting the above-mentioned requisites, the *"double vote".* As introduced by the Law n° 537/1966 and successively amended[422], the *société anonyme* has for over sixty years experienced the advantages of the double vote. The *ratio* behind this choice has to be found in the necessity to boost the position of the long-term investors within the company. Article 175 of the Law n° 537 of 24 July 1966 has been a cornerstone for all the European jurisdictions willing to surpass the "one share-one vote" principle[423]. This can be witnessed by the existence within companies open to the public of a large amount of shareholders interested only in the financial rights linked to the ownership of shares. The *double vote* entails a greater influence within the general meetings that may have positive effects on the participation of shareholders in the decision-making process[424]. Overcoming the "one share-one vote" principle in Italy has taken more time than in

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[420] Article L225-96 pargraph 1, French Commercial Code.

[421] Article 2351 paragraph 4, Italian Civil Code.

[422] Law n° 537/1966, as amended by the Law n° 1420/93 and Law n° 912/2000.

[423] Article 175 of Law n° 537/1966 states that *"A voting right double to the one conferred on the other shares, having regard to the share capital they represent, may be attributed, by the articles of association or a subsequent extraordinary general meeting to all fully paid-up registered shares that have been registered for at least two years in the name of the same shareholder".*

[424] *One share – one vote and the case for a harmonised capital structure*, Georgios Psarakis, pp. 725.

other European (i.e. France, Belgium) and non-European countries (i.e. U.S.). The proportionality principle at the basis of the "one share-one-vote", which linked the business risk with the powers taken within the companies, has always been a fundamental principle of the corporative structure of joint stock companies. However, the discipline provided for companies with shares listed on the Italian capitals market is slightly different from the ones provided for the *société anonyme*, and gives us important information about the future investment plans of the merged entity.
Indeed, Article 127 *quinquies* of the Italian Consolidated Law on Finance states that *"the articles of association may specify that increased voting rights (ndr.* "azioni a voto maggiorato"*) may be attributed, up to a maximum of two votes, for each share belonging to the same subject for an uninterrupted period of no less than twenty-four months starting from the date of registration (...). In such a case, the articles of association may also contemplate that the subject holding the voting right may irrevocably renounce, all or part, the increased votes"*[425]. At first sight, this provision might suggest a certain coherency with the provision of Article L225-123 of the French Commercial Code. There are some substantial differences that cannot be overlooked though. While there is no mistake that the *"double vote"* shares, as well as the ones provided by Article 2351 par. 3 for non-listed companies, can be classified as constituting a category of shares, it cannot be said the same about the *"azioni a voto maggiorato"*. Conversely, the increase of the voting rights provided by the *"azioni a voto maggiorato"* does not entail a special categorization of the shares at stake, making them more alike to a form of "loyalty shares", where the ownership of the shares for a prolonged period of time (ndr. two years) privileged long-term investors[426]. The introduction of such a mechanism would induce investors, aiming at increased voting rights, to study deeper the firm's long prospects. Nevertheless, there are other differences between the listed companies' Italian and French double voting mechanisms. The enactment of the Florange Act partially amended Article L225-123 by setting forth that fully-paid shares, which have been registered in the name of the same owners for at least two years, should be granted automatic double voting rights.

[425] Article 127 *quinquies* paragraph 1*,* Italian Consolidated Law on Finance.

[426] *A Primer on Corporate Governance: Italy, Andrea Melis*, Alessandro Zattoni, Part III, Internal Corporate Governance Mechanism.

Anyway, after the enactment of the Florange Act, companies could choose to halt the effects of this provision, by subsequently modifying the by-laws[427].
However, by not classifying the *"azioni a voto maggiorato"* as a special category, the company would give up to all the featuring aspects of such a categorization (i.e. absence of a special meeting of shareholders with increased voting rights). The anticipated lack of such discipline in the Italian legislation could well motivate merging companies to choose a legal framework that would suits subsequent transactions concerning shares with multiple voting rights.

For what concerns the amendments to the takeover discipline, few considerations on the modifications introduced by the "Florange Law" shall be made. As it will happen for EssilorLuxottica after the presentation of the contribution agreement, the mandatory offers may be the consequence of the transfer of a block of shares. It may be raised the point that some bidders, by proposing a very low price to the minority shareholders, would obtain the *de facto* control of the company, even without meeting determined thresholds. Where, at the closing of a public offer the person who submitted the draft offer, acting alone or in concert, does not hold a number of shares representing the 50%+1 of the capital shares or total voting rights, the offer is void[428].
This mechanism puts a huge pressure on the core shareholders. As a matter of fact, it is not enough anymore to acquire the *de facto* control of the company, being necessary to meet the favour of half of the total shares of it.
There are two consequences attached to a lapsed mandatory offer:

a) the person who submitted the draft offer, acting alone or jointly, has the voting rights exceeding the 30% threshold suspended for any general meeting held, until it respects the above-mentioned thresholds;

b) if the number of shares held by the bidder falls within the 30% and 50% of the share capital or the total voting rights, and the mandatory offer was triggered by the acquisition of at least 1% of the share capital, the voting rights

[427] Article L225-123, French Commercial Code, as amended by Article 7 of the Law n°384/2014.

[428] Article L433-1-2, French Monetary and Financial Code.

exceeding the number of shares held before the acquisition shall be suspended[429].

Anyway, it was introduced a duty of information upon the bidder. The shareholders that, acting alone or jointly, have between 30% and 50% of the share capital or total voting rights, and who have submitted an offer subsequently lapsed, may not increase its share capital or voting rights, without informing the *Autorité des marchés financiers.*

The introduction of an acceptance threshold for the takeover bidders, on the one hand, may discourage possible hostile takeovers; on the other hand, it may foster and facilitate a change in the corporate structure of a corporate group.

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[429] Ibid.

CONCLUSIONS

At the end of this work, it shall be important to draw final conclusions concerning the legal framework provided for the cooperation between enterprises in Italy.

During this thesis, it has been addressed how the phenomenon of the cooperation between enterprises has called the Italian lawmaker to ensure a comprehensive legal framework that would meet the needs of all the cooperating firms. As previously said, making an evaluation of all the possible business integration mechanisms may be complicated, however, few considerations shall be made.

It has been widely stated that Italy does not attract foreign investors, and that this assumption does not come from merely political and economic considerations.

In an attempt to draw general conclusions on this work, it must be acknowledged that the whole capital markets, and the choices made by public companies have a great influence on the way SMEs and non-listed joint stock corporations make cross-border investments. Starting from the bottom, it must be taken into account investors' perspective about the Italian capitals market. Market-driven markets, such as France and Luxembourg, are certainly perceived as market open to investors. The high capitalization data coming from the French market are mainly due to the presence of Euronext (and Alternext). These operators grant to the French market a very appealing outset, as well as the possibility for groups with several subsidiaries to having access to great financial assets. Despite the growing number of institutional investors, the Italian capital market is still considered an "insider system", and this is perceived by the investors as well. The tendency to build up joint stock corporations around core shareholders minimize the role of the minority shareholders in the ownership structure. The overall corporate environment gives us a lot of of how the market economy is performing. Substantially, Luxembourg has become one of the most competitive centres in Europe by developing such a complex and articulated legal framework, where the so-called *"New Law"* was just the last missing piece. However, it has been showed how this assumption has solid legal basis. In the comparison drawn with the

Luxembourg jurisdictions, it has been showed how the Luxembourg lawmaker has turned the country into one of the biggest financial centres in the World.
It would definitely be unfair to talk about the substantial corporate laws of a given country, without a mention to the overall structure of the market.
The study made about the ownership structure are clearly linked to the another point that has been raised during this work: the limited consideration that some categories of stakeholders have in the decision-making process of an Italian corporation. It is evident how the decision-making powers in the Italian corporations are mostly in the hands of the board of directors. However, it has been proven how very often there is absolute overlapping of the shareholders with the members of the board, or there is usually their "shadow" behind important managerial decisions. This certainly looks at odds with the choice taken by some major jurisdictions of empowering other categories of stakeholders (such as the employees). In the previous paragraphs, it has already been demonstrated how the presence of an "external force" would prevent abuses from the majority shareholders. Moreover, some large-scale enterprises have major considerations of the outlook that an employee-driven corporation may have on the public opinion. From this point of view, France has given large space to the employees within the corporate structure of joint stock corporations. Additionally, the new reform has encouraged the information and consultation procedure involving the management and the employees. Some may think that Italy is afraid of the fact that giving such large space to the employees in the corporate governance of the company may have negative effects on the business performances of a corporation. However, the experiments made by other jurisdictions in Europe have showed how this is a risk that is worth taking.
Another important topic that deserve a closure in this work is the *società a responsabilità limitata*. Regardless of the considerable flexibility that the Italian lawmaker has given to this company, it shall be acknowledged the fact that the Srl does not look a suitable vehicle to conduct large scale business operations.
In Luxembourg, pursuant the enactment of the *"New Law",* it has been widely reformed the discipline of the S.à.r.l., and introduced a new French-inspired legal entity, the S.a.s. The S.à.r.l. have been made perfect vehicles for parent companies to get investment flowing. This not only due to the perfect taxation system provided by

Luxembourg, but as well from the possibility to resort to other valuable financial assets. Among the others, S.à.r.l. are now formally authorised to issue: "beneficiary units", whose rights are determined by the articles of association; b) tracking shares; c) redeemable shares, whose modalities are set out in the articles of association; d) and most importantly, debt securities to the public.

Some of these legal devices, like the so-called *"azioni correlate"* (the Italian adaptation of the tracking shares), have been enacted by the Italian lawmaker as well, in an attempt to enhance the competitiveness of the Srl, but without success. Even, the possibility to issue *"titoli di debito"* did not have the strong success that was expected. The attractiveness of such instruments has been reduced by the fact that the debt shall be subscribed by *"investitori professionali sottoposti a vigilanza prudenziale",* thus reducing the connection between the investors and the debt securities market. Not to mention the broad usage that the shareholders made of this instrument to conceal shareholders' loans[430].

On the other hand, the introduction of the S.a.s. in the Luxembourg jurisdiction has been greatly inspired by the French legal system. It has been showed how this legal entity is absolutely suitable for the cooperation between enterprises. It holds all the flexibility in corporate governance of a Srl, while having access to the capital market, as a Spa. The implementation of this company-based form of cooperation would give a wide range of solutions to the investors and to the firms willing to operate in our country.

[430] Article 2467, Italian Civil Code

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