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TENDER OFFERS IN THE M&A PROCESS

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INTRODUCTION

Companies must continuously grow in order to remain competitive and survive to market changes. Indeed, firms have two possibilities: to grow organically or inorganically[1]. However, the inorganic growth is the faster solution and can be achieved through the M&A activities.

In fact, companies can exploit different typologies of extraordinary transaction which can be defined as operations not "*under common control*"[2]. Although, the most used and appealing transaction among them is the take-over, also commonly denominated as "*acquisition*". This term is generally used in a broad way and it refers to the proper M&A transactions – a macro-class among the extraordinary transactions– which are aimed at obtaining control over a target firm and require the involvement, simultaneously or in different moments, of both target and bidder's shareholders.

The choice of the inorganic growth is based on different drivers among which the achievement of synergies. The latter can be defined as the effect resulting from the consolidation of two or more counterparties which permits the unified entity to have a higher value than the sum of the single components. Synergies are such a relevant element that it deeply influences the decision about the acquisition and the settlement of the transaction price.

Since synergies permit the top management to maximize the value of the firm – which enables, as a consequence, to meet the shareholders objectives – M&A is usually preferred than organic transactions.

However, there are many cases where a target firm may receive proposals by bidders without a prior engagement between the two entities. These cases are defined as hostile takeovers, which are commonly present in the landscape of the acquisition market and have also connotated the fourth merger wave, which occurred in the 1980s. In particular, an acquisition is generally defined as hostile when the target firm's management does not accept the unexpected proposal and seeks several tactics to avoid the target's shareholders to approve

[1] The organic growth can be achieved through investments in technology, new product lines and working force, whereas a firm can grow inorganically by deciding to expand in the market and obtaining control over other companies.

[2] Operations under common control can be defined as transactions which do not generate a distinct change in the ownership composition of the firm which, instead, it occurs with extraordinary transaction.

the transaction. Despite friendly takeovers present more advantages than the hostile ones, the latter is deeply present nowadays.

Based on the above, the aim of this paper is to provide a general landscape of the extraordinary transaction, by focusing on the takeover case. Moreover, the overview will shift towards the hostile and friendly situations, by highlighting the differences between the two types of takeovers and the reasons why entities may engage in a hostile solution.

Finally, in order to better explain the theoretical concept of friendly and hostile takeover, this paper will also provide an analysis of two practical cases: in particular, the recent hostile OPAS[3] between Intesa San Paolo S.p.A. and UBI S.p.A., – the most discussed acquisition of the 2020 – and the friendly takeover between Retelit Digital Services S.p.A. and Retelit S.p.A., which also occurred in 2020.

[3] OPAS stands for "*offerta pubblica di acquisto e scambio*" and it identifies a transaction where, firstly, the entity buys control of the target company in exchange of shares and cash, then, it approves the merger between the two companies.

CHAPTER 1 – ACQUISITIONS

1.1 DEFINITION OF M&A AND ITS HISTORICAL TRENDS

There are generally two ways in which a firm can grow its business: firstly, through the organic growth, which is pursued through the technological or product innovation but also thanks to the turnover of working force. Then, another option that can be chosen by a firm is the inorganic growth, which, on the contrary, gives many more possibilities to the company and allows the firm to achieve target performance in a faster way than the organic option. For these reasons, the inorganic growth is generally preferred by companies.

Indeed, according to researchers, a company needs to constantly grow to survive in the market. Moreover, they point out that the organic growth may not be sufficient and, depending on market conditions, may not be the successful strategy to be pursuit by a company because, in some cases, the only way to outgrow its competitors is through the M&A activity[4].

But what does M&A stand for?

As it is commonly known, M&A stands for "Mergers and Acquisition" and includes a broad list of operations which – as they will be further analyzed in more detailed – are part of the category of transactions known as "*extraordinary transactions*". The main types of such as transactions are: *purchase of share, merger and demerger*. These operations are grouped together because usually present a common feature: the generation of a change in the company's control composition. However, it is important to make a distinction within the group of extraordinary transactions. In fact, it is possible to identify two macro-classes of operations: the M&A transactions and the non-M&A transactions.

[4] *"Winning the merger endgame: A playbook for profiting from industry consolidation"* G. Deans, McGrawn-Hill, 2020.

All those operations which (*i*) allow the bidder to acquire the corporate control of a target firm and (*ii*) need the involvement of both bidder and target firm's shareholders are defined as M&A transactions – also generally denominated as *take-over.* Whereas, those typologies of extraordinary transaction that do not present both conditions can be defined as non-M&A operations *strictu sensu*.

Generally, takeovers (also commonly denominated "acquisitions") are aimed at reaching synergies in order for the counterparties to increase their efficiency and competences.

Indeed, M&A transactions are very powerful and they are commonly used in order to achieve the value creation, which it represents one of main reasons that pushes the top management to pursue the inorganic growth.

In fact, by way of example – focusing on non-banking companies – studies have shown that when companies start to get larger, they rely more on M&A transactions in order to grow. Moreover, M&A also entails a positive correlation between long term strategy finalized to acquisitions and shareholder returns since researchers demonstrated that, as long as the firms disclose their intention or actually engage in takeovers, the inorganic growth choice has a positive impact on its share price.[5]

In addition, a focus on the banking sector – in which the sentence "*too big to fail*" had become extremely famous – also shows that M&A is a solution for them to become stronger and resilient. In fact, starting from the financial crisis of 2008, the European Banking Authority had started to strongly push banks to engage in extraordinary transactions (among which mergers) in order for them to respect the parameters which trigger early intervention by the Central Banks in case of "signs of crisis"[6].

1.1.1 The five merger waves

The acquisition activity has never remained constant over years. Rather, it is generally accepted that mergers happen in waves, since when a consolidation takes place in a sector, competitors cannot avoid following it.

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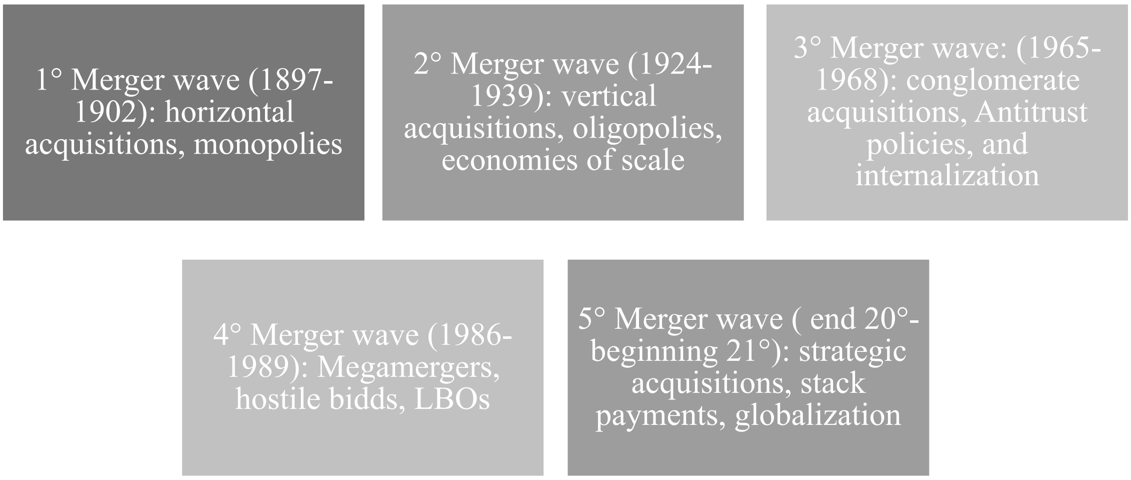
[5] "*Taking a longer-term look at M&A value creation*", McKinsey Quarterly, Corporate Finance Practice, 2012.

[6] "*Final report: Guidelines on the interpretation of the different circumstances when an institution shall be considers as failing or likely to fail under Article 32(6) of Directive 2017/59/EU*" European Banking Authority, 2015

It is possible to signal five distinct waves during the 20th century as reported in the diagram below[7].



It is important to underline that the first waves of M&A were predominant in USA but occurred in a smaller scale in Europe[8]. Whereas the last wave registered was connotated as an international phenomenon.

As regard to the first merger wave, it was located mainly in the United States and in the United Kingdom and took place between 1897 to 1902. It was characterized by horizontal acquisitions[9] in sectors of transportation and communication; moreover, it resulted in the creation of monopoly players "ruling" many industries.

The second merger wave was registered between the 1924 and 1930. It differs from the first wave because, instead of focusing on horizontal acquisitions (which partly occurred), this second phenomenon was mainly driven by vertical acquisitions[10], even if in the same sectors as the first wave. The technological development was the turning point of this wave because companies struggled to achieve economies of scale in order to increase their production.

[7] *"Investment Banking Explained- an insider's guide to the industry*", Michael Flueriet, McGraw-Hill, 2008

[8] "*Merger Movement in American Industry, 1895-1956*", R.L. Nelson, Princeton University Press, 1959

[9] The horizontal acquisition is defined as the take-over that targets a firm operating in the same sector as the bidder. Hence, the transaction is aimed at acquiring a direct competitor of the buyer firm.

[10] The vertical acquisition can be defined as the take-over which targets a firm operating above or below the bidder in the production chain. Thus, the buyer firm is intentioned to acquire either its supplier or its client (in case the bidder operates as a supplier for the client company).

Moreover, differently from the first wave, the second one resulted in the creation of oligopolies more than monopolies.

Turning to the third merger wave, it occurred between 1965 and 1968 and strongly differs from the first two waves. In fact, thanks to the internationalization, companies realized that had to become larger if they wanted to remain competitive. Moreover, in the United States the Antitrust regulation was aimed at avoiding companies to generate monopolies by exploiting the integration strategy. Therefore, the implementation of the horizontal and vertical transactions could not be the solution. For these reasons, the third merger wave is known as the "*conglomerate deals phenomenon*" where firms, in order to grow, acquired companies with which they did not have a direct business relationship[11].

As regard to the fourth merger wave, it occurred between 1986 and 1989. In this respect, the 1980s decade is known as the "*merger mania*" because many extraordinary transactions exceeding one billion of dollars took place. Moreover, this period was characterized by many hostiles offers[12] and constitutes the revers of the third merger wave since financial acquisitions and LBOs (leveraged buyouts)[13] terminated the conglomerates that were born in the late 1960s. Indeed, these transactions were aimed at ending the conglomerates' failure to deliver value since the value of the singles entity was deemed lower to the value of its components.

Finally, the last merger wave took place between the 20th and the 21st centuries. The 1990s decade was aligned with the "*megamergers trends*". However, differently from the fourth merger wave, hostile takeovers and leveraged buyouts constantly declined because management incentives were better aligned towards the shareholders' ones. Moreover, most of the transactions took place in the same sector, where the dominating industry was involving the transportation of data and telecom companies. Finally, this last M&A wave was focusing on international expansion[14], giving birth to "*cross-borders M&As*".

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[11] *"The market for mergers and boundaries of the firm"* P. Gaughan, CESigo Forum, 2006.

[12] "*Corporate Governance and Merger Activity in the U.S.: Making Sense the 1980s and 1990s*" B. Holmstrom & S. N. Kaplan, NBER WORKING PAPER SERIES, 2001

[13] The leverage buy-out is a transaction which is characterized by the usage of high level of debt to finance the acquisition of a target company.

[14] "*The Cross-Border Mergers and Acquisitions wave of the late 1990s*", S.J. Evenett, NBER WORKING PAPER SERIES, 2004.

Shifting toward nowadays, it is possible to notice that the global M&A activities have deeply grown in the last 10 years. What results surprising is the resilience of this industry in 2020, a year which was characterized by the outbreak of the COVID-19 pandemic. In fact, the global M&A market was still able to close more transactions than the 2019 (in more details, 2020 registered 37.230 deals vs 36.834 occurring in 2019)[15]. Moreover, United States of America always result to rule this sector, by contributing as actor in the 50% of the global M&A deals. However, new players are starting to penetrate the market: in fact, China was able to surpass the EU in the latest years.

Focusing on the Italian M&A market – which represents the location of the business cases' analysis – it follows the same growth direction which distinct the global M&A market. However, Italy results to be less involved in activities compared to the other most relevant European forces. Despite this, Italy shows to be more engaged in M&A transactions targeting foreign firms rather than local ones – resulting to be 50% of the overall Italian M&A deals. In fact, by analyzing the top 10 M&A Italian deals, it is possible to notice that half of them targeted foreign companies: Vodafone Towers S.r.l. (English firm), Nexi S.p.A. (American firm), Arqiva Services Ltd (English firm), Red de Carreteras de Occidente SAB de CV (American/Mexican firm) and CK Hutchison Networks (Hong Kong/ Austrian firm). Moreover, the major big deals – which consist of transaction valued more than 1 billion of euro – are majorly concluded in two sectors: Finance Services and TMT[16].

Finally, relating to the effect of the Covid pandemic – which has deeply shocked the whole economy among all its effects – Italy registered a slowdown in the take-overs' closing which also impacted in a negative way the aggregate countervalue of the transaction. As a summary, the table below presents a comparison between the years 2020 and 2019 relating to the number of transactions and M&A volumes that occurred in the Italian market.

[15] "Rapporto M&A 2020 - Dal mercato una prova di resilienza alla pandemia" KPMG, 2020.
[16] "Rapporto M&A 2020 - Dal mercato una prova di resilienza alla pandemia" KPMG, 2020.

	2020		2019	
Euro mln	Deal	Euro mld	Deal	Euro mld
> 1.000	7	19,3	9	21,5
Between 100 and 1000	54	19,7	84	24,7
Between 50 and 100	32	2,4	41	3
< 50	787	2,6	951	3,2
Total	**880**	**44,0**	**1.085**	**52,4**
M&A average volume (in Euro mln)	**50**		**48**	

1.2 M&A TRANSACTIONS

As previously anticipated, the extraordinary transactions are the tools available to achieve the inorganic growth and can be defined as those operations that are not "*under common control*".

But what does it mean?

Generally, transactions under common control do not generate a distinct change in the ownership scheme of the firm. Despite they also represent extraordinary transactions, the under common control operations are aimed to reorganize activities and business units in order maximize their efficiencies. Thus, they do not imply a change in the corporate control of a firm. For example, consider a group of companies which each of them presents an IT business unit. A transaction under common control that may take place relates the decision to centralize and spin off the IT business units so that the group can exploit the new created external IT advisor[17].

Differently, the extraordinary transactions *strictu sensu* are those which occur when an entity may decide to engage in this type of operation for the purpose to gain a *corporate control*. However, after the termination of this type of transaction, it is not excluded the incurrence of operations under common control finalized to increase efficiencies of the companies, as it was previously described[18].

According to the juridical doctrine and the Consob resolutions, an entity is holding a corporate control when it can exercise a dominant influence over a certain company.

[17] "*Manuale delle operazioni straordinarie*", Enrico Zanetti, 2018 (pag 1-57).

[18] "*Operazioni straordinarie*", Ceppellini Lugano & Associati, Wolters Kluwer, 2020.

Moreover, the main element that characterize the exercise of a dominant influence is the capability to appoint the majority of the Board of Directors and to approve the financial statement. In fact, through the election of the majority of directors, that specific shareholder (that can be either a single person, an entity or many of them bounded by a shareholder agreement) is able to indirectly control the management of the corporate business which is one of the activities pursued by the Board of directors itself.

Moreover, according to article 2359 of the Italian Civil Code[19], it is possible to differentiate the corporate control according three levels:

- *De iure control*: it occurs when a shareholder holds at least 50% of the voting rights in the ordinary shareholders' meeting;
- *De facto control*: it verifies in case a subject holds a percentage of the voting share capital lower than 50% (generally between 20% and 35%) but still enough to exercise in practice a relevant influence in the ordinary shareholders' meeting;
- *Contractual control:* this situation occurs in case a shareholder is able to exercise a dominant influence over the company thanks to a contractual relationship.

Thus, for a transaction to operate in the M&A sector, it must present two conditions:

1. the transaction must allow the buyer to acquire the corporate control over a target firm; and

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[19] Article 2359 of the Italian Civil Code states:

"Subsidiaries are considered to be:

1) companies in which another company has a majority of the votes that can be exercised at the ordinary shareholders' meeting;

2) companies where a third party owns sufficient votes to exercise a dominant influence over the Ordinary Shareholders' Meeting

3) companies that are under the dominant influence of another company by virtue of special contractual ties with it.

For the purposes of application of numbers 1) and 2) of the first paragraph, votes due to subsidiaries, trust companies and third parties are also counted: votes due on behalf of third parties are not counted.

Companies over which another company exercises significant influence are considered associated companies. Influence is presumed when at least one fifth of the votes can be exercised at the ordinary shareholders' meeting, or one tenth if the company has shares listed on regulated markets."

2. it is needed the shareholders' involvement, simultaneously or in different moments, of both the bidder and target firm.

As previously stated, the main extraordinary transactions which are presenting these conditions are: purchase of shares, merger and demerger.

These operations are underline three modalities of tender offer which are normally launched to acquire the corporate control of a target company: OPA, OPAS and OPS – whose deep analysis is the second chapter's object –.

Regarding to OPA, it stands for "Offerta *pubblica di acquisto*" and identifies a transaction where the bidder offers to acquire the entire share capital –or at least a stake higher than 50%– of the target firm by paying only with cash. According to the colloquial slang, the transaction is defined as "*cash vs paper*".

Firstly, the bidder must find the financing to fulfil the payment, since the transaction is fully paid in cash. Indeed, the company has two options: either debt or equity financing. However, in most of the cases the bidder relies on equity financing. Thus, the bidder's shareholder meeting is asked to approve the share capital increase[20] in order to finance the take-over.

[20] In general, the share capital increase can be subscribed either in cash or in kind. In the second case shareholders contribute with one or more assets. These provisions are legislated by the art 2342 of the Italian Civil Code which states:

"*Se nell'atto costitutivo non è stabilito diversamente, il conferimento deve farsi in danaro.*

Alla sottoscrizione dell'atto costitutivo deve essere versato presso una banca almeno il venticinque per cento dei conferimenti in danaro o, nel caso di costituzione con atto unilaterale, il loro intero ammontare.

Per i conferimenti di beni in natura e di crediti si osservano le disposizioni degli articoli 2254 e 2255. Le azioni corrispondenti a tali conferimenti devono essere integralmente liberate al momento della sottoscrizione.

Se viene meno la pluralità dei soci, i versamenti ancora dovuti devono essere effettuati entro novanta giorni.

Non possono formare oggetto di conferimento le prestazioni di opera o di servizi."

Moreover, the share capital increase usually confers the *option right* – which is a legal tool used to avoid the dilution of the previous shareholders' stake. The option embedded gives to existing shareholders the right but not the obligation to purchase new issued shares at a discount. Thus, in case not all the existing shareholders exercise it, third parties can take part to the bidders' control composition by purchasing new issue shares. The

The second step that occurs is the launch of the public tender offer to the target's shareholders. Finally, the latter are asked to manifest their intention by either accepting to liquidate their investment in the target firm in exchange of a cash payment or to not sell their participation.

Concerning the OPS, it stands for "*Offerta pubblica di scambio*" and identifies a public tender offer where the bidder aims at acquiring the total share capital of the target firm in exchange of its own shares. According to the colloquial slang, this type of transaction is called "*paper vs paper*". In this case the bidder's shareholders are asked to approve the share

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share capital increase can also occur with a partial option right or with the exclusion of the option right. These provisions are regulated by the article 2441 of the Italian Civil Code which states:

"Le azioni di nuova emissione e le obbligazioni convertibili in azioni devono essere offerte in opzione ai soci in proporzione al numero delle azioni possedute. Se vi sono obbligazioni convertibili il diritto di opzione spetta anche ai possessori di queste, in concorso con i soci, sulla base del rapporto di cambio.

Coloro che esercitano il diritto di opzione, purché ne facciano contestuale richiesta, hanno diritto di prelazione nell'acquisto delle azioni e delle obbligazioni convertibili in azioni che siano rimaste non optate. Se le azioni sono quotate in mercati regolamentati o negoziate in sistemi multilaterali di negoziazione, i diritti di opzione non esercitati devono essere offerti nel mercato regolamentato o nel sistema multilaterale di negoziazione dagli amministratori, per conto della società, entro il mese successivo alla scadenza del termine stabilito a norma del secondo comma, per almeno due sedute, salvo che i diritti di opzione siano già stati integralmente venduti.

Il diritto di opzione non spetta per le azioni di nuova emissione che, secondo la deliberazione di aumento del capitale, devono essere liberate mediante conferimenti in natura. Nelle società con azioni quotate in mercati regolamentati o negoziate in sistemi multilaterali di negoziazione lo statuto può altresì escludere il diritto di opzione nei limiti del dieci per cento del capitale sociale preesistente, a condizione che il prezzo di emissione corrisponda al valore di mercato delle azioni e ciò sia confermato in apposita relazione da un revisore legale o da una società di revisione legale. Le ragioni dell'esclusione o della limitazione nonché i criteri adottati per la determinazione del prezzo di emissione devono risultare da apposita relazione degli amministratori, depositata presso la sede sociale e pubblicata nel sito internet della società entro il termine della convocazione dell'assemblea, salvo quanto previsto dalle leggi speciali.

Quando l'interesse della società lo esige, il diritto di opzione può essere escluso o limitato con la deliberazione di aumento di capitale."

capital increase which is aimed to distribute the new issued shares to the target's shareholders that desire to exchange their shares with the bidder ones. Consequently, after the launch of the public tender offer, the target's shareholders decide whether to accept the offer and, eventually, enter in the control composition of the acquiring firm according to the exchange ratio defined in the proposal.

Finally, relating to the OPAS, it stands for "*Offerta pubblica di acquisto e scambio*" and is identified in case the bidder launches a public tender offer aimed at acquiring the entire share capital –or at least a stake more than 50%–of the target firm by financing the transaction with both cash and exchange of shares. The OPAS also requires the prior approval of the share capital increase by the bidder's shareholders meeting in order to finance the public tender offer in cash and/or to introduce the target's shareholders through the merger. Whereas, the target firm's shareholders are involved in the transaction to manifest their eventual intention to accept the offer made by the acquirer.

Thus, in continuity with the aim of the analysis, this section will focus on the transactions that are underlain the M&A operations –also known as take over– which are:

1. purchase of share
2. merger
3. demerger

1.2.1 Purchase of shares

A legal procedure that a company can use in order to acquire a target company is through the purchase of its shares.

This type of transaction results different from the purchase of a business because in the second case the bidder must interface with the top management of the target firm – not with its shareholders–. Whereas, in the case of the purchase of shares, the buyer interfaces directly with the shareholders who, afterwards, show eventually their interest to terminate their investment in the target firm and liquidate their participation in exchange of cash. Thus, the difference between the two types of transactions is visible in the differentiation of the approving bodies on both buyer and seller side. In fact, in case the operation is aimed at acquiring a business, the buyer's Board of Directors is in charged to approve the transaction since it does not affect the shareholders' composition. Only in case the buyer does not dispose of enough financing, its shareholders meeting may be called to approve a share capital increase. On the seller side, only the target's Board of Directors is asked to approve the transaction[21].

Whereas, relating to the purchase of target's shares, on the buyer side the Board of Directors must approve the M&A transaction. However, in case the buyer does not dispose of enough financing, its shareholders meeting may be called to approve a share capital increase. On the seller side, only shareholders are asked to take the decision since they must decide whether to liquidate their participation in the target company or continue to invest.

Furthermore, it is important to notice that this operation can be described as *"paper vs cash"* since the buyer acquires shares of the target company (paper) in exchange of a cash payment.

1.2.2 Merger

The merger is one of the most important extraordinary transactions which occurs frequently in the M&A sector. This operation can be defined as the transaction through which the equity of a target company merges into the incorporating company. Thus, there is an exchange of shares against shares and not a counterbalance in cash – as it was explained in the situation of the purchase of shares–[22].

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[21] "*Manuale di Diritto Commerciale*", G. F. Campobasso, M. Campobasso, UTET, 2017

[22] However, the merger project may also include a cash payment which cannot exceed the 10% of shares/quotas' value. These conditions are legislated by article 2501 ter of the Italian Civil Code which states:

"*The administrative body of the companies participating in the merger shall draw up draft merger plan, from which must in all cases result:*

1) the type, name or business name, and registered office of the merging companies;

2) the Memorandum of Association of the new company resulting from the merger or of the incorporating company, with any amendments resulting from the merger;

3) the exchange ratio of the shares or quotas, as well as any cash adjustment;

4) the manner in which the shares or quotas of the company resulting from the merger or of the acquiring company are to be allocated

5) the date from which such shares or units shall participate in profits;

6) the date from which the transactions of the merging companies shall be charged to the financial statements of the company resulting from the merger or of the acquiring company;

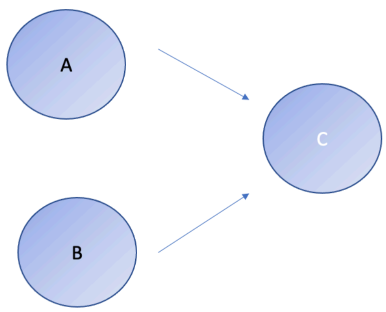
7) the treatment, if any, reserved to particular categories of shareholders and to holders of securities other than shares;

Through the merger, the incorporating company takes on assets and liabilities of the company that is targeted in the transaction. However, the approval of both the extraordinary shareholder meetings of the firms involved is necessary: the target company must approve its extinction, whereas, the incorporating company must vote for the share capital increase. Furthermore, the latter's extraordinary shareholder meeting must also decide the settlement of the exchange ratio between the shares of the merged company and the merging one.

There are many typologies of merger. A possible first distinction can be:

- "*proper merger*": this typology of transaction involves two or more companies which merge and transfer their assets and liabilities into a new resulting firm.
- "*incorporating merger*": it occurs thanks to the transfer of the assets and liabilities of the involved companies into one of the existing firms engaged in the transaction[23].

PROPER MERGER

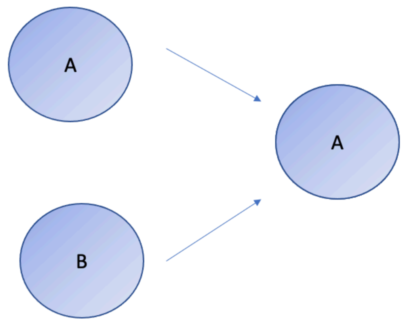


8) any special advantages that may be proposed in favor of the persons entrusted with the administration of the companies involved in the merger.

The cash adjustment indicated in number 3) of the previous paragraph may not exceed ten percent of the nominal value of the shares or quotas assigned."

[23] "*Manuale delle operazioni straordinarie", Enrico Zanetti, 2018 (pag 1-57)*

INCORPORATING MERGER



On a second level distinction, it is important to consider different special cases of mergers: in particular the homogeneous and heterogeneous mergers.

Both situations occur in case the resulting company presents a different corporate nature than the firms involved. Thus, a transformation process is necessary.[24]

The homogeneous merger takes place in case all merged firms are profit-making companies/partnerships. In these situations, the merger is always permissible and may eventually require a homogeneous progressive or regressive transformation. The first case occurs in case the profit-making partnership transforms into a profit-making company. Instead, the second case results when a profit-making company transforms into a profit-making partnership[25].

Regarding the heterogeneous merger, it occurs when one of the players presents a different legal nature than the profit-making profile. Thus, the resulting merged company must follow a heterogeneous transformation process. Though this eventuality may prevent the pursuing

[24] The transformation is a transaction aimed at changing the corporate nature of a firm or entity. Through the change of the corporate profile, the entity still continues to exercise its rights and fulfill its obligations which were created by the prior entity. – article 2498 of the Italian Civil Code. The transformation may be homogeneous or heterogeneous depending on whether the profit-making company approves its transformation by choosing a new juridical nature within the same class of companies – homogeneous transformation – or the profit-making company changes its corporate nature into one other legal dress and vice versa – heterogeneous transformation.

[25] "*Manuale di Diritto Commerciale*", G. F. Campobasso, M. Campobasso, UTET, 2017

of the M&A transaction, it is established practice[26] that a merger that occurs between mixed entities – both profit-making profile and non– is acceptable as long as the heterogeneous transformation among them is possible.[27]

Another relevant typology of merger is the *leveraged buy-out* (also indicated as LBO). It can be defined as a merger that occurs after the conclusion of a precedent acquisition of the target's share capital mainly financed with debt. In fact, the portion of debt involved in the financing of the transaction is comprised between the 60% and the 70%[28]. Moreover, the obtaining of the debt resources is based on the target company's covenants, not the buyer ones. For this reason, it is necessary that the target company presents specific features in order for the LBO to be successful. The target company must have, first of all, a stable and predictable cash flows, a low leverage before the conclusion of the transaction, a strong market position –which allows the company to register strong and stable earnings–. Moreover, the target firm must present a strong management team which is capable to face a stressed situation due to the high level of leverage and it must hold many tangible assets to be used as covenants for the ineptness process. These conditions are relevant for the target firm to support the high level of leverage of the transaction.

The leverage buy-out can be promoted either by the target firm's management (management buy-out), the management of other companies (management buy-in) or by the target firm's

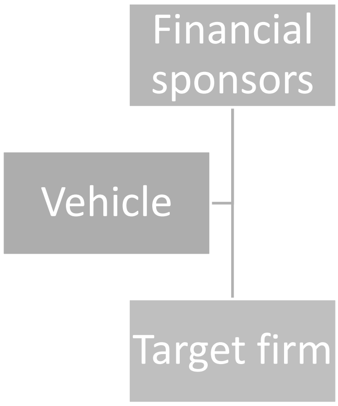
[26] Maxim n 52 of 19.11.2004 of the Milan's Notary Council which states "*E' legittima la combinazione del procedimento di fusione (o scissione) con quello di trasformazione eterogenea a condizione che, nell'ambito del procedimento complesso che in tal modo si pone in essere, sia verificata la ricorrenza dei presupposti e sia data puntuale esecuzione agli adempimenti pubblicitari stabiliti tanto per la trasformazione quanto per la fusione (o scissione).*"

[27] Moreover, the Notary Council resolved the main issue of the heterogeneous merger which relates the disclosure duties that are essential during this type of transaction. In fact, if entities different from the profit-making profile are involved, coordination problems relative the legal publicity of the transaction might occur. This aspect results extremely important because it is needed to protect the shareholders' interest of the firms that participate to the merger and, especially, the third party's interest. Thus, the Milan's Notary Council stated that during an heterogeneous merger (*i*) the pursuit of disclosure duties is guaranteed by article 2500 of the Italian Civil Code – which relates the application of the legal publicity legislations during the transformation process–, (*ii*) third party's interest is ulteriorly protected by article 2500-*novies* of the Italian Civil Code because the heterogeneous transformation is deemed to have effect only after 60 days from the act's registration to the Firms' Register – time sufficient to render at the same time effect the merger's act.

[28] "*Investment banking- Valuation, Leveraged buyouts, and Mergers & Acquisitions*" J Rosenbaum, J Pearl, Willey, 2019

employee (workers buy-out). However, generally the LBO is started by a financial sponsor[29] which is intentioned to buy control over a target firm; although, the bidder does not operate directly but uses a financial vehicle – a newco created for the specific transaction– which receives the financial resources and acquires the target firm with a combination of debt and equity as previously described.

CONTROL CHAIN DURING AN LBO



Thus, the vehicle buys control of the target firm in exchange of its shares and, frequently, it approves the merger between the two companies.

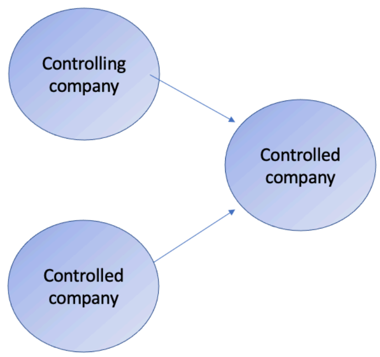
The reason why a company seeks an LBO operation derives from the high returns that the investor achieves thanks to an ephemeral initial investment and the strong performance generated by the target company. In fact, the financial sponsor uses the target's cash flow to primary repay the debt outstanding. On the other hand, the investor also wishes to improve the target's performance which, as a consequence, determines an increase in its enterprise value. Indeed, this category of investors engages in LBOs by always having a clear exit solution which may be either the sale to another financial sponsor, the sale to a strategic buyer – who would pay more for the potential synergies due to the integration of the bidder

[29] Investors can be categorized in two groups: financial sponsors and strategic buyers. Regarding the first class, a financial sponsor is defined as a firm that does not have any relationship or experience in the industry where the target company is segmented –hence, they generally are hedge funds–, and may be willing to pay a lower price than the sum of the target company's value plus the synergies that may reach with the unification. Instead, a strategic buyer – defined as a firm that is operating in the same sector of the target one– may be willing to pay a higher price because of the synergies that can be achieved with the integration of the two entities.

with the target company– or the IPO[30] – in case the target firm is not listed. Thus, the higher the enterprise value of the target firm, the higher would be the financial sponsor's liquidation[31].

Relating to the typologies of mergers, the final category is the "*reverse merger*" which can be defined as an "incorporating merger" that works in an opposite way. In fact, at the end of this transaction the controlling company will be incorporated in the controlled one and not vice versa. In order to achieve this result, both firms must be bound by a controlling relationship.

REVERSE MERGER



Generally, the choice to engage in this merger's typology occurs in case the controlling company is a financial holding which presents on its balance sheet only participations in companies. Thus, the controlled company is the one in charge for the management of the operating activities and it's the owner of brands, licenses or, generally, results to be the counterparty in contracts. For this reason, it results easier and more convenient to incorporate the controlling company into the controlled one in order to allow the continuation of the

[30] IPO stands for Initial Public Offer and it identifies the transaction through which a company opens its capital by offering its shares to the equity capital market and giving the possibility to third party investors to take part to the control composition of the firm.

[31] *Investment banking- Valuation, Leveraged buyouts, and Mergers & Acquisitions*" J Rosenbaum, J Pearl, Willey, 2019

operating activities. In practice, the reverse merger is generally chosen in the contest of an LBO.[32]

However, it is important to analyze a problem that might occur in case the reverse merge takes place in the scenario of joint stock companies. Indeed, if the incorporating company is a joint stock firm whose partial or total share capital is hold by the incorporated company, the merging firm is "purchasing" its own stocks during the merger.

However, the Legislator has introduced limitations on this action since the company, by purchasing its own shares, is refunding its shareholders. Indeed, this transaction may impact the capability of the company to fulfill its liabilities since the shareholders' refunding occurs thought the usage of the firm's assets. For this reason, the law has imposed restrictions in the purchase of its own shares.

Regarding to the limitation of purchase of own share, the transaction is possible only if financed by the company's net income and reserves resulting from the latest approved Financial Statement. Moreover, the firm can purchase only the shares owned by shareholders who have terminated to fully finance their investment. These provisions are disciplined through the article 2357 of the Italian Civil Code.[33]

However, the article 2357-bis of the Italian Civil Code legislates that the restriction provided by the prior article are not binding in case of a merger. The only constraint that exists relates

[32] "*Manuale delle operazioni straordinarie", Enrico Zanetti, 2018 (pag 1-57)*

[33] "*The company cannot purchase its own shares except within the limits of distributable profits and available reserves resulting from the latest regularly approved financial statements. Only fully paid-up shares can be purchased.*

The purchase shall be authorized by the Shareholders' Meeting, which shall establish the terms and conditions, indicating the maximum number of shares to be purchased, the duration (not exceeding eighteen months) for which the authorization is granted, the minimum and maximum consideration.

The nominal value of the shares purchased in accordance with the first and second paragraphs by companies that have recourse to the risk capital market may not exceed one fifth of the share capital, considering for this purpose also the shares held by subsidiaries.

The shares purchased in breach of the previous paragraphs must be disposed of in accordance with procedures to be established by the General Meeting, within one year of their purchase. Failing this, they must be cancelled without delay and the share capital reduced accordingly. If the shareholders' meeting fails to do so, the directors and auditors shall ask for the reduction to be ordered by the court according to the procedure provided for in art. 2446, second paragraph.

The provisions of this article shall also apply to purchases made through trust companies or third parties."

the limit for the joint stock companies to alienate or nullify the stocks that exceed the threshold of 20% of the share capital within 3 years.[34]

1.2.3 Demerger

The demerger is a type of extraordinary transaction which works in the reverse sense than a merger. In fact, the aim of the demerger is to divide the share capital of a target company, either partially or totally, and to distribute these portions to other existing or new companies. Thus, the demerger's outcome may lead either to the extinction of the target company or to the continuation of its life. At the end of the transaction, the companies that received the part of the share capital by the demerged company becomes accountable for the assets and liabilities of the prior company. Moreover, the firms involved in the transaction are solidly liable – according to the limits of the share capital's value that have received– for those obligations that the demerged firm was not able to fulfil prior the extraordinary transaction. As the merger, there are many types of demergers. The first distinction depends on whether the beneficiary companies already exist or are newcos.

Relating to the first case, the demerged company deals with a beneficiary which exists and increases its share capital thanks to the contribution of the target company– the demerged one–. The rational of the transaction can be either an incorporation –in case the two companies are bounded by a control power– or a patrimonial aggregation –in case the control relationship is not present–. In both cases the demerger produces effects which can be matched to the merger.[35]

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[34] Article 2357-bis of the Italian Civil Code states:

"*The limitations contained in art. 2357 do not apply when the purchase of own shares takes place*

1) in execution of a resolution of the Shareholders' Meeting to reduce the capital, to be implemented by means of redemption and cancellation of shares;

2) free of charge, provided that the shares are fully paid up

3) as a result of universal succession or merger or division

4) on the occasion of forced execution to satisfy a company's claim, provided that the shares are fully paid up.

If the nominal value of treasury shares exceeds the limit of the fifth part of the share capital as a result of purchases made in accordance with numbers 2), 3) and 4) of the first paragraph of this article, the penultimate paragraph of article 2357 shall apply to the excess, but the term within which the sale must take place is three years."

[35] "*Manuale delle operazioni straordinarie", Enrico Zanetti, 2018 (pag 1-57)*

Regarding the distribution of the demerged share capital to newcos, the beneficiary firm is created *ex novo* as an effect of the extraordinary transaction. Thus, the operation can be deemed a "*real demerger*" since it does not result in an incorporation or a patrimonial aggregation –as it was described in the former case.
The second distinction among the classes of demergers depends on the corporate nature that the companies engaged present. As it was priorly explained, when the firms involved in the extraordinary transactions do not present the same juridical form, a transformation process is requested. Based on this, it is possible to identify four potential scenarios of demergers:

1. *Homogeneous split-off*: it occurs in case all companies involved in the extraordinary transaction results either profit-making partnership or company;
2. *Split-off with implied progressive transformation*: in this scenario the demerged company is a profit-making partnership and the beneficiary is a profit-making company;
3. *Split-off with implied regressive transformation*: this type of demerger occurs when the demerged company is a profit-making company and the beneficiaries is a profit-making partnership – opposing to the former scenario;
4. *Split-off with implied heterogeneous transformation*: it occurs in case one of the companies involved in the extraordinary transaction –either the demerged firm or the beneficiary– presents a different legal form than the profit-making corporate nature.

An ulterior discrimination among the class of demergers depends on the choice of the demerged company to pursuit a partial or total split-off. Relating to the partial split-off, the demerged company partially transfers its share capital to one or more firms but still continues its activities. Whereas, in a total split-off, the target company distributes its entire share capital between the beneficiaries and, as a result, terminates its existence.
Finally, one last possible distinction among demergers depends on the choice relative the shares' allocation among the demerged shareholders. Indeed, it is possible to identify three situations: proportional, non-proportional and asymmetrical distribution.
Relating to the first case, the demerged shareholders can receive shares of the beneficiaries proportionally to the portion of share capital owned in the demerged company.
The second situation available to demerged shareholders is the beneficiaries' share allocation which does not follow a proportional distribution relative the prior stake hold in the

demerged company. However, the demerged shareholders still obtain shares from all the resulting companies that were involved in the extraordinary transaction.
Finally, relating to the last scenario, demerged shareholders may happen to not own shares of the beneficiaries but they might only obtain additional shares of the demerged company. This last situation is known as "*asymmetrical split-off*" and is legislated by art 2506 co.2 of the Italian Civil Code[36]. It can occur during a partial demerger and only if the demerged shareholders meeting approves unanimously the exclusion of one or more shareholders from the allocation of beneficiaries shares and, as a consequence, to be compensated through additional shares of the demerged firm[37]. Thus, some demerged shareholders may be excluded from the distribution of beneficiary firms' stakes, whereas, in the second scenario all the demerged shareholders become investors of the resulting firms with a proportionality different from the participation hold in the targeted company – resulting with no shareholder is excluded. [38]

1.3 DRIVERS OF THE ACQUISITION ACTIVITY

As it was previously clarified, the aim of this paper is to provide a general comprehension of the extraordinary operations and to focus on the take-overs' cases.
Before continuing this path, it is important to explain why a firm may decide to engage in an M&A activity– so, to opt for the inorganic growth solution. Actually, there are many drivers which can be categorized according to the extent of their domain: micro-level drivers, industry level drivers and macro-level drivers.

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[36] Article 2506 co.2 of the Italian Civil Code states:
"A cash adjustment is permitted, provided that it does not exceed ten percent of the nominal value of the shares or quotas assigned. It is also permitted that, by unanimous consent, some shareholders are not distributed shares or quotas of one of the companies benefiting from the demerger but shares or quotas of the demerged company."

[37] *"Manuale delle operazioni straordinarie", Enrico Zanetti, 2018 (pag 1-57)*

[38] "*La scissione non proporzionale"* A. Morano, quaderni della Fondazione Italiana del Notariato e-library,

1.3.1 Micro-level drivers

Micro-level drivers result firm specific and include a broad category of incentives that induce a firm to pursuit M&A. These drivers are schematized in the diagram below.

According to the *operational strength*, synergies and economies of scale drive take-overs[39]. Synergies can be defined as the effect that occurs after the combination of two entities which allow the unified company to have a higher value than the sum of the two single firms.

$$(A+B)' = A+B+S$$

S= synergies

In practice, this economic effect can derive from two elements: revenue and cost synergies. Relating to the revenues synergies, they allow the company to increase prices and volumes since the two companies share both tangible and intangible resources. Whereas cost synergies are generated by the elimination of duplication of costs and resources. Hence, synergies permit the company to reach higher levels of efficiency. Moreover, they result to be a relevant variable which drives the buyers' willingness to pay a higher price for the target

[39] *"Evidence for the effects of Mergers on market power and efficiency",* B.A. Blonigen, J.R. Pierce, NBER WORKING PAPER SERIES, 2016

company. Indeed, investors can be categorized in two groups: financial sponsors and strategic buyers. Regarding the first class, a financial sponsor is defined as a firm that does not have any relationship or experience in the industry where the target company is segmented and it is generally willing to pay a lower price than the sum of the target company's value plus the synergies that may reach with the unification. Instead, a strategic buyer – defined as a firm that is operating in the same sector of the target one– may be willing to pay a higher price because of the synergies that can be achieved with the integration of the two entities. Moreover, if the two counterparties are segmented in the same sector, their combination may also guarantee the achievement of the economies of scale. Economies of scale are actually connected with the synergies and, as a consequence, this effect is providing the company higher levels of efficiency since it permits the firm to decrease unitary costs after having exceeded a certain threshold of production levels.

The second group of micro-level drivers relates *growth and expansion*. As it was mentioned previously, a company may engage in an M&A activity since it results a faster way to reach growth rather than the organic choice. Indeed, acquisitions enable the company to adapt to market changes –resulting from variations and competition– by expanding in the market and targeting firms which allow the buyer to become stable and diversify its business. As a consequence, acquisitions permit the buyer to expand geographically, which is a faster solution than building from scratches a new activity in an unknown territory. Relating this reasoning, studies show that the M&A activity is generally pursued to enter to new markets which present high entry barriers[40]. Whereas, the organic growth leads to slower result and may not be sufficient to face these market dynamics. Furthermore, the M&A activity allows the company to reach higher levels of dividends which permits the top management to achieve the goals of satisfactions of the shareholders' appetite.

A third consideration relates the *access to new assets*. Indeed, thanks to acquisitions, the buyer can integrate in its structure a target company operating in the same sector but specialized in providing a complementary activity than the acquirer's one. Consequently, with the combination of the two entities, the unified company can achieve the economies of scope that enables the firm to cut costs thanks to the expansion in the production chain. Moreover, a buyer may decide to acquire a company to obtain new technologies or exploit

[40] "*Foreign Entry into U.S. Manufacturing by takeovers and the creation of new firms*" R. E. Lipsey, Z. Feliciano, NBER WORKING PAPER SERIES, 2002

the target's know-how to achieve technological developments. Relating the same *ratio*, a buyer may also acquire brand loyalty by integrating with a strong branded company rather than invest for the improvements of its own trademark. This last eventuality is aimed to transform the buyer's corporate identity. Finally, the M&A activity may be pursued to reach new distribution networks.

The fourth group of micro-level drivers relates the *competitive strength*. Indeed, a buyer may try to either increase its market share through horizontal acquisitions or to gain higher market power[41]. Market power can be defined as the capability of the company to sell its products at a higher price than competitors and to achieve cost redactions compared to the latter. Furthermore, relating to the competitive strength's scenario, in some cases a buyer may decide to acquire a target company available in the market to avoid the possibility for its competitors to do the same and reach competitive advantages.

An ulterior class of drivers to consider relates *financial objectives*. Regarding this point, a firm may decide to engage in M&A activity not only to mitigate risk through the diversification –in order to not be exposed to firm specifics fluctuations– but also to optimize the company's balance sheet by increasing the debt component until its sustainable and profitable level.

The final group of micro-level drivers depends on *management issues*[42]. First of all, managers of the buyer firm may be incentivized to provide to a small target company the right managerial skills which must be developed as soon as the business of a company starts to grow. However, the acquisition activity may also relate to a strong enthusiasm developed by the top management of the bidder which is driven by irrational reasoning. As a consequence, the transaction may be driven by the management ego to prove their strengths to the market, without fulfilling the shareholders' interests.

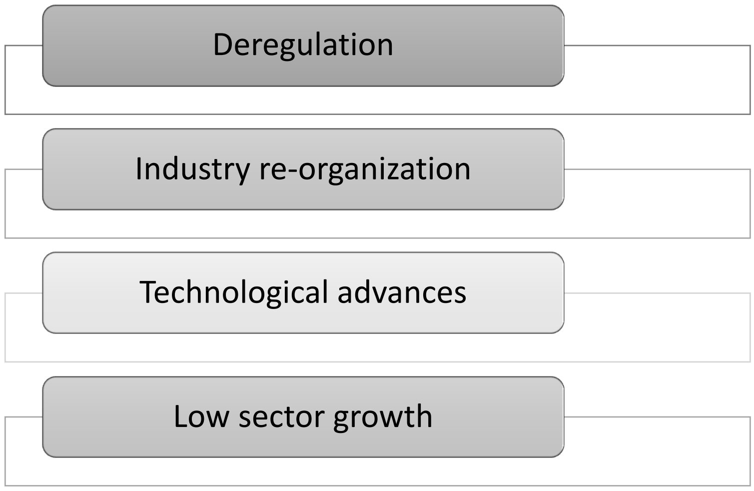
1.3.2 Industry level drivers

As it was previously noticed, M&A activity came in merger waves differentiated according to different period of times. However, the distinction among the phases depended also on the industries involved. Indeed, takeovers can also be driven by shocks that occur in the

[41] "*Evidence for the effects of Mergers on market power and efficiency",* B.A. Blonigen, J.R. Pierce, NBER WORKING PAPER SERIES, 2016

[42] "*Do managerial objectives drive bad acquisitions*?", R. Morck, A. Shleifer, R.W. Vishny, NBER WORKING PAPER SERIES, 1989

industry. Shocks can be defined as those factors whose presence alters the structure in the industry. Hence, the variations that may occur in industries also push buyers to engage in M&A activities are the following:



Relating to the first industry drivers, deregulation results a key element that incentivizes acquisitions. Indeed, when a period characterized by government policies which impose industries to be artificially segment ends, deregulation occurs and allows firms to become active and to improve their efficiencies thanks to the engagement in transactions aimed to aggregate the parties[43]. However, in some cases the deregulation's effects may lead to the opposite result: disaggregation of entities which were maintained unified during the regulation period sustained by both national government and central banks.

Another driver which usually causes shock in industries is technological advances. However, this element is not only influencing the industry but it may also impact on a more general level –as it will be further discussed. Regarding this level of drivers, technological advances may push for industry consolidation due to the creation of surplus capacity.[44]

Moreover, acquisitions may be driven by changes in industry's schemes due to vertical or horizontal integrations which trigger an increase in the competitiveness among buyers.

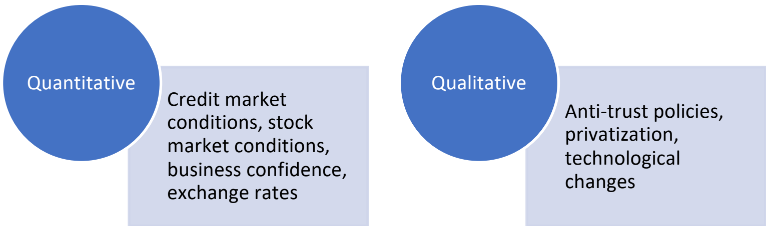
[43] *"Mergers: What can go wrong and how to prevent it."* P. Gaughan, 2005

[44] *"New evidence and perspectives on mergers"* Andrade, G., Mitchell, M. Stafford, Journal of Economic Perspectives, 2001

Finally, since sectors that are growing in low terms may prevent a firm to achieve shareholder's appetite, a buyer company may engage in M&A activities in order to exit from that specific industry and achieve faster levels of growth.

1.3.3 Macro level drivers

There are many macro level drivers that may induce acquisitions. However, they must be divided into quantitative drivers – which can be measures in a well-defined manner– and qualitative drivers.



Most of the studies show that a positive relationship between the *stock market* and the M&A activity exists. Thus, when the stock market flourishes, there is an increase in the acquisition trends. Moreover, this condition of causality starts with the stock market which then influences the acquisition activities, not vice versa. But why does this relationship exist? Generally, when the stock market is overperforming, there is a tendence to register improved financial abilities which push for higher valuations. Since the market performance is affecting in a positive way the value of stocks, the market optimism increases giving confidence to investors to engage in M&A transactions. Indeed, researchers point out that acquisitions increase their frequency when the bidders' stocks are overvalued than the target's ones because acquirers can use its shares to pay for the targeted company[45].

[45] *"Winning the merger endgame: A playbook for profiting from industry consolidation"* G. Deans, McGrawn-Hill, 2020.

Moreover, when the stock market is over performing, it spreads a general optimism which persuades managers of the bidders to acquire target companies in order to improve their performance. However, the market may not always value stocks in an efficient way: indeed, researchers demonstrated that most of the M&A transactions that occurred when the stock market was booming were focusing on counterparties which were overvalued. These cases happened especially in the merger waves of the 1960s and 1990s – well described by the word "*misevaluation*".

Another quantitative driver relates the *credit market conditions*[46]. Indeed, researchers have proven that there is a linear relationship between the engagement in the M&A and the credit market conditions: as long as the usage of third-party financing results easy, acquisitions can be concluded thanks to the access to the debt capital market.

Furthermore, M&A activity may occur on a favorable *economic environment*: indeed, this condition determines a booming stock market and flourish debt capital market.

Relating to additional macro level drivers, firstly the *business confidence* must be analyzed. If the bidders consider the business to deteriorate in the proxime future, they will not engage in this transaction by searching for another more profitable business area[47]. Also *exchange rates* drive take-overs*:* as long as the bidder currency is stronger than the target one, the transaction results more appealing.

On the other hand, qualitative macro level drivers exist and they may also influence the decision in the take-over's engagement. As it was mentioned before, this type of drivers cannot be precisely measured because they relate to governmental or political decisions but also depend on technological developments –as it was previously mentioned. Indeed, relating to the government decisions, such antitrust policies, privatization or free trade affect the decisions of companies to be involved in M&A transactions. For example, when the government is imposing strict market conditions, there is also a reduction in the acquisition activities whereas, it is possible to notice an expansion of this type of transactions when government conditions results opposed from the former scenario. Moreover, it is possible to notice that also the technological developments have a positive influence over the M&A trends since they facilitate the process of controlling an international business.

[46] "*Corporate Liquidity, Acquisitions, and Macroeconomic conditions*" I. Erel, Y. Jang, B. A. Minton, M. S. Weisbach, NBER WORKING PAPER SERIES, 2017

[47] "*The market for mergers and the boundaries of the firm*" K. Gardiner, CESifo Forum, 2006

1.4 STEPS OF AN ACQUISITION PROCESS

So far it was possible to build a general understanding of the proper M&A transactions and explain why firms may decide to engage in the inorganic growth's activities. In continuity with the acquisitions' landscape, it is also worth to understand the different modalities which shape the process of take-overs. Indeed, the process may function as an auction –where the target company wishes to find the perfect bidder thanks to the selection of many counter parties– or as a direct bilateral negotiation. However, the choice between these two solutions depends on the firm specific characteristics and to the necessities requested. In fact, it is duty of directors to choose the most profitable process in order to maximize value to shareholders. Moreover, directors are generally advised by investment banks which are appointed for these specific transactions and follow the client (both buyers and sellers' sides) throughout the whole process.

Thus, both process's solutions present advantages and disadvantages –which will be further explained– and, depending on the firms' needs, one may suit more than the other. A successful auction needs higher preparation before the starting of the transaction phases such as marketing, resources and organization. Thus, it is more time consuming than a single party negotiation. Moreover, it is a type of process generally chosen by the target firm which takes the initiative because wishes to sell its business. However, due to the involvement of several bidders, it may result in the spreading of confidential information. For this reason, before any negotiation process the bidder is asked to sign a non-disclosure agreement in order to avoid the incurrence in this risk. Indeed, listed companies are subject to strong restrictions regarding the disclosure of confidential information, which are legislated by the Market Abuse Regulation (also known as MAR). The MAR aims at avoiding the divulgation of "*inside information*" which can be defined as a non-disclosed information of precise nature relating one issuers or specific financial instruments which would have a significant impact on the share price if it had been disclosed.[48]

On the other side, relating to a negotiated transaction, it is generally initiated by a specific buyer and needs, firstly, less pre-negotiation preparation and it also reduces the potential risk of sharing confidential information to different counterparties.

[48] "Commentaries and Cases on Italian Business Law", A. Sacco Ginevri, CEDAM, 2019

Based on the above, the aim of this section is to provide a full comprehension of the acquisition process and show the distinctions between the auction and the bilateral negotiation choices.

1.4.1 Auction process

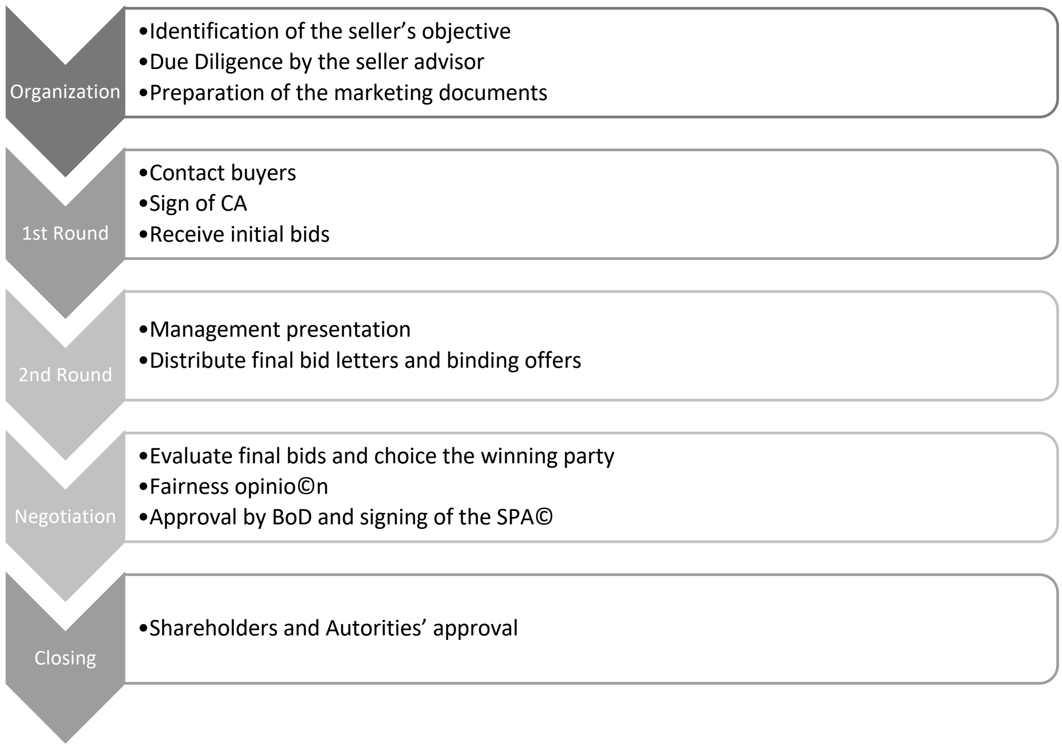
As it was previously noticed, the auction process is generally started by a target firm which appoints an advisor and construct together the phases of the process in order for the seller to achieve the maximization of requested results. Indeed, it is duty of the advisor to run the process in the most effective way.

There are two types of auctions:

- Broad auction: it sees the involvement of many potential bidders, by including both strategic buyers and financial sponsors. This selection choice is aimed at increasing the likelihood to find the most suitable binding offer thanks to the inclusion of a large number of participants. Indeed, the broad auction guarantees the creation of stronger competitive dynamics but also it provides a higher comfort to the target firm's Board of Directors because it may have satisfied its fiduciary duties to maximize the value of the transaction by increasing the likelihood to find the higher sale price. However, it is a type of process which requires higher levels of pre-organization and may result more difficult to preserve confidentiality.
- Targeted auction: it is a type of acquisition auction which allows the selection of specific potential bidders that presents strong strategic fit or a clear financial capacity to effort the acquisition. Indeed, it is a solution which reduces the possibility to spread confidential information. However, by focusing on specific buyers, the auction may be less successful because the target firm may have excluded a potential bidder which leads to *"leave money on the table"*. Moreover, the first selection of participants also reduces the competitive dynamics that are created by a broad auction

The auction process is generally divided in steps which are represented in the diagram below.[49]

[49] "*Investment banking- Valuation, Leveraged buyouts, and Mergers & Acquisitions*" J Rosenbaum, J Pearl, Willey, 2019



In the preparation phase, the aim of the investment bank in charged to be the advisor of the seller side is to identify the objectives of its client and to design a tailor-made process. In fact, in this circumstance the investment bank must decide whether to organize a broad or a targeted auction. The next step is to perform a first due diligence of the target company in order for the advisor to have a comprehensive understanding of the company itself, its business and the vision of the management team. Indeed, this action is extremely important because the advisor would be able to better prepare the marketing phase of the process. Moreover, it allows also to understand the potential valuation that will be conducted by the buyers since it will be their main driver in the submission of the binding offer.

In the organization phase it is also important to select the group of potential bidders: it results to be one most critical phase because the inclusion or exclusion of a potential buyer might ruin the whole process.[50] During a broad auction, the mix of bidders is generally composed by both strategic buyers and financial sponsors. Relating to the first potential category of counterparty, the advisor analyzes the capability of the strategic bidder to generate synergies with the target firm – this is an important element that may push the buyer to offer an higher price for the purchase–. Regarding the second category, the bank selects the financial sponsor according its "ability to pay" since it constitutes its force. However, also other

[50] "*Auction vs Negotiations*" J. Bulow, P. Klemperer, NBER WORKING PAPER SERIES, 1994

elements are scrutinized such as bidders' track records, their fund life cycle or whether they can be defines as sector expertise.

When the advisor has finished to complete the potential bidder list, it is presented to the target company's BoD for the approval.

Another key element to be considered during the preparation phase is the creation of the marketing materials. They are extremely important to "catch the eyes" of the bidders and to provide them essential information in order for them to start preparing an initial valuation analysis. The marketing documents are two: the teaser and the confidential information memorandum. Relating to the first document, the *teaser* is a brief marketing document which summarizes information such as: overview, track records, investment highlights etc. Whereas, the *Confidential Information Memorandu*m is the most important marketing document because it provides information relative the sector where the target firm works – including its customers and suppliers–. Moreover, it shows details about the management and employees. However, the most important element given is the financial section which provides historical and forecasts of the financial flows. It may also include suggestion on future transaction that the company may conclude in terms of expansion after the integration with the bidder. Indeed, this element tends to be tailored in respect to the buyer to whom it is distributed.

The last key element of the auctions' organization focuses on the preparation of the confidentiality agreement which is a binding contract that obliges bidders taking part to the auction to not disclose any information about the target company –as it was it was previously noticed.

When the preparation of the auction has concluded, the first-round starts. Firstly, the advisor of the target firm starts to contact the potential bidders in order for the competition to start. The buyers must receive the confidentiality agreement before the auction commencement to preserve the target firm's information. The document is presented to their legal advisors so that they can formulate any comments on the confidentiality contract and then discuss with the seller side.

Once the Confidentiality Agreement is executed, the sell side advisor can distribute the Confidential Information Memorandum which will be studied by the potential buyers to deeper their understanding. At this point, the buyers may also appoint a buy-side advisor who will help the client to assess an estimation of the value of the target firm through valuation techniques based on the marketing document distributed. Indeed, the buy-side advisor should help the bidder to formulate a competitive initial bid price which will allow the client to pass the second round of the auction. [51]

When the target firm distributes the Confidential Information Memorandum, it also provides buyers the *initial bid procedures letter* which is a letter that states the date, terms and time by which the competitors must submit an initial non-binding offer. Indeed, their non-binding offer must specify the purchase price, the form of payment, the assumptions used for the valuation, timing of completing of the deal, buyer contract information, the required approvals etc [52].

While bidders are analyzing the marketing documents, the target firm must start to prepare the management presentation, which will take place in the second stage of the auction, and to set up the data room for the future due diligence. The data room is extremely important because it provides very specific information regarding the target firm starting from the accounting profile to the legal one. Indeed, the target firm must choose which kind of information to include in order for the bidder to take a well-informed acquisition decision but also to avoid the possibility of disclosing sensitive information.

Another activity that must be completed by the investment bank advising the target company relates the preparation of the stapled financing package. It is generally prepared for private companies and results as a pre-arranged financial package which is provided to the bidders to allow them to finance the transaction.

When the due date of the non-binding offers has come, the sell side advisor starts to collect and analyze the documents submitted by also contacting some bidders for clarifications. Then, the target firm's Board of Direct receives the summary of the offers with highlights on the most appealing ones and selects the potential buyers that should proceed with the second round of the auction.

At this point the next phase can start. The second round of the auction focuses on the due diligence process because –as it was previously stated– it is the critical phase where bidders have access to deep accounting, financial and legal information of the target firm. In fact, it is necessary for the buyer to have a full comprehension of the firm because it permits them to take a well-informed investment decision and to avoid possible future unknown issues since they had been dealt before.

[51] "*Bid Takers or Market Makers? The effect of Auctioneers on Auction Outcomes*" N. Lacetera, B. J. Larsen, D. G. Pope, J. R. Sydnor, , NBER WORKING PAPER SERIES, 2013

[52] Investment Banking- Valuation, Leveraged Buyouts, and Mergers & Acquisition" J. Rosenbauman, J. Pearl

The second stage of the process starts with the management presentation which is the very first moment that the bidders meet with the target firm's management. The presentation focuses on the integration of the information firstly provided by the Confidential Information Memorandum and results to be an important moment because buyers can have a taste of how the management works. Moreover, buyers can have site visits of the firm to understand the target's assets and business.

Lately, the seller side advisor provides the access to the data room to the buyers which are monitored in order for the advisor to understand the core elements that interest the most the counterparties. The due diligence process can last for many weeks and generally bidders can use as much time as they want.

When the deep dive session in the target firm as concluded, the sell-side advisor distributes to buyers the *final bid procedures letter* which is a letter that specific the time and conditions according to which bidders must submit their binding offer. In this case it is also required that the bidders must share a markup of the share and purchase agreement –the contract legislating the transaction– in the form that they would be willing to sing. They also must provide an attestation to completion of the due diligence, attestation that the offer is binging, board of directors' approval and estimated time to sign and close of the transaction.[53]

Then, the sell side advisor collects the binding offers and evaluates the most appealing ones. At this point the negotiation phase starts. Firstly, the advisor and the Board of Directors of the target firm analyzes the biding offers and select the buyer or buyers with whom the firm will negotiate the terms of the definitive agreement. At the end of the negotiation, only one bidder is selected with the definitive markup of the share and purchase agreement which is then presented to the target's Board of Directors. Generally, the seller has the right to reject the bidders whereas the buyers have the right to exit from the process at any time. However, both solutions result in a failure of the auction.

When the target firm is a listed company, upon the Board of Directors' approval of the contract, it is required financial advisors to perform a fairness opinion of the consideration offered in the transaction. Hence, the fairness opinion is supported by a valuation analysis submitted by an independent financial advisor which proves the fairness of the terms of the transaction payments. This element is important for the target's board of directors to approve the definitive share and purchase agreement.

[53] "Investment Banking- Valuation, Leveraged Buyouts, and Mergers & Acquisition" J. Rosenbauman, J. Pearl

Once the contract is approved and executed, the closing phase starts which focuses on the obtainment of the regulatory approvals but also the shareholder meeting's one.

1.4.2 Negotiated sale

Focusing on the second possibility of process during a take-over, the negotiated sale is a bilateral negotiation which allow a direct dialogue between the buyer and the seller. It is often started by buyer who engages the seller with a phone call or a meeting. After the first meeting, depending on the outcome of the first approach, the two parties may sign a confidential agreement to facilitate the negotiation and the understanding of each other.
This type of process mimics the auction but in a resized way: indeed, –in continuity with the auction process– the target firm's advisor must firstly perform a due diligence process in order to evaluate the client and monitor the set-up of the data room, coordinate site visits etc. The negotiated sale is always more effective when there is a strategic buyer who can create strong synergies with the target firm. This condition allows the process to be more flexible and faster since it is customized. Moreover, the interface with one single counterparty guarantees a lower risk of disclose of confidentiality information. However, this solution does not create competitions since there is a dialogue with a single party.[54] In fact, the transaction may face the risk of being concluded not at the maximum value for the seller, due to the exclusion of a potential bidders.

[54] *Auction vs Negotiations*" J. Bulow, P. Klemperer, NBER WORKING PAPER SERIES, 1994

CHAPTER 2 – WHAT MAKES A TENDER OFFER HOSTILE

As it was explained in the first chapter, the proper M&A transactions are defined as those operations that, firstly, cause a change in the control composition of a company and also imply the involvement of the shareholders of both companies for the approval/acceptance of the transaction.
Following this *ratio*, only three types of operations can be signaled: merger, demerger and purchase of shares.
Dealing with listed companies, the abovementioned operations are usually achieved through a modality known as "*Public Tender Offer*". It consists of a public offer which is launched by an acquirer and it is aimed at buying the listed securities of a target company from several target's shareholders (minorities) at a specific price and equal conditions.[55]
The Public Tender Offer can be differentiated according to the M&A transaction underlining it: OPA ("*Offerta Pubblica di Acquisto*"), which occurs when the purchase of shares of the target company is paid exclusively in cash, OPS ("Offerta Pubblica di Scambio"), which occurs when the public tender offer is aimed at merging the two firms, since the bidder fixes an exchange ratio between its shares and those of the target company as payment modality, OPAS ("*Offerta Pubblica di Acquisto e Scambio*"), which occurs in case the counterbalance for the acquisition consists of a combination between cash payment and exchange of shares.
These kinds of Public Tender Offers are heavily legislated by the Italian Regulation whose specific provisions will be deeply analyzed in this chapter.

[55] "*Commentaries and Cases on Italian Business Law*", A. Sacco Ginevri, 2019, CEDAM.

Shifting towards the acquisition process, generally either the target firm engages with one or more buyers in order to sell its business and maximize the shareholders' exit value – as it was described in the first chapter through the auction process –, or the buyer itself negotiates directly with the target firm by having a first contact with its management who may facilitate the sale of shares by the target's shareholders – in continuity with the bilateral negotiation process. Indeed, when the target firm's top management is informed and asked to intermediate for the purchase of shares, the acquisition is considered to be as a "*friendly takeover*".

However, the request of a bidder to acquire a target company is not always expected by the target firm's management, since there are some cases in which a buyer directly launches a Public Tender Offer to the target firm without a prior engagement with the latter' top management. This second situation is commonly known as "*hostile takeover*".

Based on the above, the aim of the second chapter is to firstly provide a deep dive session of the provisions which regulate how the Public Tender Offer can operate according to its different typologies. Then, the vision will shift towards the hostile takeover scenario by explaining its relevant features – in contraposition to the friendly situation – and introducing the "defensive tactics" available to the target's firm in order to obstacle the fulfillment of the acquisition process.

2.1 THE ITALIAN PROVISIONS OF THE PUBLIC TENDER OFFER

The Public Tender Offer is disciplined by the TUF ("*Testo Unico dell'Intermediazione Finanziaria*") introduced by the Legislative Decree 24th February 1998, n. 58.

Starting from article 102, the TUF provides a landscape of all the possible rules applicable which result common whether the acquirer launches on the target company either the OPA, OPAS or OPS.

As it was previously anticipated, the Public Tender Offer is a modality available for operators to acquire the corporate control of a firm and it is activated following the disclosure of the buyer's intention to the market.

Since this type of transaction is located in the corporate control market of listed companies, the participants must follow specific rules which result tighter than those applicable for the operators in the private market. In fact, even though listed firms present more advantages than the non-listed companies – among them, the easy access to the equity and debt capital market, which is something prevented to the non-listed firms[56] – they are subject to more duties which are introduced by the Legislator in order to protect the minority investors.

One of the obligations that listed firms are subject to is the disclosure duty. In fact, in the contest of the Public Tender Offer, according to article 102 of TUF[57], the acquirer is firstly

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[56] "*Listing Advantages Around the World*", K. Ueda, S. Sharma, NBER WORKING PAPER SERIES, 2019.

[57] The Article 102 of TUF states: "*La decisione ovvero il sorgere dell'obbligo di promuovere un'offerta pubblica di acquisto o di scambio sono senza indugio comunicati alla Consob e contestualmente resi pubblici. La Consob stabilisce con regolamento i contenuti e le modalità di pubblicazione della comunicazione.*

Non appena l'offerta sia stata resa pubblica, il consiglio di amministrazione o di gestione della società emittente e dell'offerente ne informano i rispettivi rappresentanti dei lavoratori o, in mancanza di rappresentanti, i lavoratori stessi.

Salvo quanto previsto dall'articolo 106, comma 2, l'offerente promuove l'offerta tempestivamente, e comunque non oltre venti giorni dalla comunicazione di cui al comma 1, presentando alla Consob il documento d'offerta destinato alla pubblicazione. In caso di mancato rispetto del termine il documento d'offerta è dichiarato irricevibile e l'offerente non può promuovere un'ulteriore offerta avente a oggetto prodotti finanziari del medesimo emittente nei successivi dodici mesi.

Entro quindici giorni dalla presentazione del documento d'offerta, la Consob lo approva se esso è idoneo a consentire ai destinatari di pervenire ad un fondato giudizio sull'offerta. Con l'approvazione la Consob può indicare all'offerente informazioni integrative da fornire, specifiche modalità di pubblicazione del documento d'offerta nonché particolari garanzie da prestare. Il termine è di trenta giorni per le offerte aventi ad oggetto o corrispettivo prodotti finanziari non quotati o diffusi tra il pubblico ai sensi dell'articolo 116. Qualora si renda necessario richiedere all'offerente informazioni supplementari, tali termini sono sospesi, per una sola volta, fino alla ricezione delle stesse. Tali informazioni sono fornite entro il termine fissato dalla Consob, comunque non superiore a quindici giorni. Nell'ipotesi in cui, per lo svolgimento dell'offerta, la normativa di settore richieda autorizzazioni di altre autorità, la Consob approva il documento d'offerta entro cinque giorni dalla comunicazione delle autorizzazioni stesse. Decorsi i termini di cui al presente comma, il documento d'offerta si considera approvato.

Limitatamente alle offerte pubbliche di scambio che abbiano ad oggetto obbligazioni e altri titoli di debito, l'offerente può richiedere alla Consob che l'offerta sia soggetta, anche in deroga alle disposizioni del presente capo, alla disciplina delle offerte al pubblico di vendita e di sottoscrizione, di cui al capo I del presente titolo. La Consob, entro quindici giorni dalla presentazione della richiesta, accoglie la medesima, ove ciò non contrasti con le finalità indicate nell'articolo 91.

Non appena il documento sia stato reso pubblico, il consiglio di amministrazione o di gestione della società emittente e dell'offerente lo trasmettono ai rispettivi rappresentanti dei lavoratori o, in mancanza di rappresentanti, ai lavoratori stessi.

In pendenza dell'offerta la Consob può:

a) sospenderla in via cautelare, in caso di fondato sospetto di violazione delle disposizioni del presente capo o delle norme regolamentari;

obliged to communicate its intention to launch a tender offer, by filing with Consob[58] a specific release which is simultaneously published for the market.

Within 20 days from the publication of the abovementioned release, the bidder is then obliged to file with Consob an offer document that includes all the information of the public tender offer – which are necessary for the offer receivers in order to take an informed decision – and is also subject to publication. If the offer document is not filed in time, the acquirer cannot launch another Public Tender Offer concerning the same target company for the following 12 months.

The offer document is considered final and can be published after the Consob's approval, which generally occurs within 15 days from the reception of the offer document itself (it may also be the possibility that Consob requires additional information and, therefore, the term is suspended) or, if the target company or the bidder are subject to authorization of other authorities, within 5 days from such authorizations.

It results relevant to notice that the acquirer's directors cannot launch the Public Tender Offer until the preparation of the offer document. Its preparation results a very delicate phase since it needs the involvement of many professionals, such as advisors and management, which may increase the insider trading risk. Moreover, it should be highlighted that, in case there is the disclosure of information or tips prior the preventive communication to Consob, the bidder cannot anymore invoke the so called "*passivity rule*", which is a rule that aims at safeguarding the contestability of listed companies by preventing directors from implementing "defensive initiatives" to avoid external bids and acquisitions and will be better described further in this chapter.

b) sospenderla, per un termine non superiore a trenta giorni, nel caso intervengano fatti nuovi o non resi noti in precedenza tali da non consentire ai destinatari di pervenire ad un fondato giudizio sull'offerta;

c) dichiararla decaduta, in caso di accertata violazione delle disposizioni o delle norme indicate nella lettera a).

Ai fini dell'esercizio delle proprie funzioni di vigilanza sul rispetto delle disposizioni del presente capo, la Consob esercita i poteri previsti dall'articolo 115, comma 1, lettere a) e b), nei confronti di chiunque appaia informato dei fatti. In caso di fondato sospetto di violazione delle disposizioni del presente capo o delle norme regolamentari si applica l'articolo187-octies.

In presenza di indiscrezioni comunque diffuse tra il pubblico in merito ad una possibile offerta pubblica di acquisto o scambio e di irregolarità nell'andamento del mercato dei titoli interessati, ai potenziali offerenti si applica l'articolo 114, commi 5 e 6."

[58] Consob stands for *Commissione Nazionale per le Società e la Borsa* and is the authority responsible for the regulation of the Italian financial markets.

Regarding the preventive communication features, a recent amendment of the TUF, adopted with the Law Decree n. 229/2007, introduced a change in the disclosure duties' provisions, since, previously, any potential buyer who had the intention to launch a Public Tender Offer was obliged to communicate it to Consob. However, the definition of "*intention*" was confusing and created many contraposing interpretations. For this reason, the most recent legal reform fixed as triggering parameter the "*actual launch*" of the Public Tender Offer.
In addition, it should be highlighted the importance of these disclosure duties. In fact, since the TUF is aimed at protecting investors and at guaranteeing the efficiency and transparence of both the capital market and the corporate control market, the preventive communication and the offer document are created in order to respect these principles. Relating to the first element, the preventive disclosure must provide all the information which results to be sensible and may influence the fair and transparent contractual activities. Whereas, the offer document must allow the receivers of the offer to elaborate an accurate judgment[59].
So far, the analysis was focusing mainly on the offeror's disclosure duties. However, it must be noticed that also the targeted firm must respect specific communication requirements. In fact, according to article 103 of TUF[60], the company that receives the offer must publish an issuer's public release which specifies the target's top management opinion over the Public Tender Offer. This document results relevant for the targeted shareholders to make a well-informed decision since the issuer's public release specifies the valuation made by its board of directors over the offer. In this respect, this document provides an indication of whether the takeover bid is hostile or friendly. In the first case, the issuer's public release would state that the target's top management does not agree with the offer according to several reasons

[59] "*Le offerte pubbliche di acquisto - La nuova disciplina delle opa nel Testo Unico della Finanza*", P. Belvedere, A. Manzini, S. Mechelli, N. Moreschini, N. Mincato, F. Papi Rossi, N. Squillace, C. Tatozzi, Il Sole 24 Ore.

[60] The article 103 of TUF states:

"Il consiglio di amministrazione dell'emittente diffonde un comunicato contenente ogni dato utile per l'apprezzamento dell'offerta e la propria valutazione sulla medesima. Per le società organizzate secondo il modello dualistico il comunicato, eventualmente congiunto, è approvato dal consiglio di gestione e dal consiglio di sorveglianza.

Il comunicato contiene altresì una valutazione degli effetti che l'eventuale successo dell'offerta avrà sugli interessi dell'impresa, nonché sull'occupazione e la localizzazione dei siti produttivi. Contestualmente alla sua diffusione, il comunicato è trasmesso ai rappresentanti dei lavoratori della società o, in loro mancanza, ai lavoratori direttamente. Se ricevuto in tempo utile, al comunicato è allegato il parere dei rappresentanti dei lavoratori quanto alle ripercussioni sull'occupazione."

aimed at disincentivize its shareholders to subscribe to the transaction. Whereas, in case of a friendly takeover, the target's Board of Directors would openly support the offer in such document.

However, despite the disclosure duties, the TUF obliges market participants which are involved in a Public Tender Offer to fulfill other duties and rules.

Therefore, the aim of this section consists of analyzing the special cases of the Public Tender Offer and providing an understanding of the applicable rules, by focusing also on the merger provisions which apply in case a buyer – after having obtained the corporate control over the target firm – consequently approves the merger between the two transactions.

In particular, the special cases of the Public Tender Offer that will be analyzed are the following:

1. mandatory tender offer;
2. voluntary tender offer;
3. preventive tender offer;
4. sell out and squeeze out.

2.1.1 Mandatory Tender Offer

The article 106 of TUF[61] disciplines the mandatory tender offer.

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[61] The article 106 of TUF states:

"*1. Chiunque, a seguito di acquisti ovvero di maggiorazione dei diritti di voto, venga a detenere una partecipazione superiore alla soglia del trenta per cento ovvero a disporre di diritti di voto in misura superiore al trenta per cento dei medesimi promuove un'offerta pubblica di acquisto rivolta a tutti i possessori di titoli sulla totalità dei titoli ammessi alla negoziazione in un mercato regolamentato in loro possesso.*

1-bis. Nelle società diverse dalle PMI l'offerta di cui al comma 1 è promossa anche da chiunque, a seguito di acquisti, venga a detenere una partecipazione superiore alla soglia del venticinque per cento in assenza di altro socio che detenga una partecipazione più elevata.

1-ter. Gli statuti delle PMI possono prevedere una soglia diversa da quella indicata nel comma 1, comunque non inferiore al venticinque per cento né superiore al quaranta per cento. Se la modifica dello statuto interviene dopo l'inizio delle negoziazioni dei titoli in un mercato regolamentato, i soci che non hanno concorso alla relativa deliberazione hanno diritto di recedere per tutti o parte dei loro titoli; si applicano gli articoli 2437-bis, 2437-ter e 2437-quater del codice civile.

2. Per ciascuna categoria di titoli, l'offerta è promossa entro venti giorni a un prezzo non inferiore a quello più elevato pagato dall'offerente e da persone che agiscono di concerto con il medesimo, nei dodici mesi anteriori alla comunicazione di cui all'articolo 102, comma 1, per acquisti di titoli della medesima categoria.

Its rules are based on two fundamentals: the protection of the "*corporate control market*" – as previously anticipated – and the "*parity treatment*" within shareholders.
These principals may acquire several outcomes such as: avoiding market disturbances, protecting saving-shareholders, distributing the controlling premium and guaranteeing the stability of the corporate control scheme[62].
Thus, the mandatory tender offer regulation is aimed at generating an equilibrium in the corporate control market and reinforcing the position of the minority shareholders in respect to the controlling one, by protecting them through the possibility of a "*fair exit*". In particular, minority shareholders have the possibility to sell their participation – either partially or totally – to the offeror and the right to exit is generally available in case there is a strong change in the control composition of a firm; hence, the typical outcome of a successful Public Tender Offer.
But when does the mandatory tender offer is triggered?
It occurs whenever anybody – either an entity, a physical person or participants acting in concert[63] – holds a stake in a firm higher than the 30% of the voting share capital, as a result of shares acquisitions. The threshold is reduced to the 25% of the share voting capital in case no other shareholders own a stake greater than this latter percentage.
Thus, only when these percentages are exceeded the subject is obliged to launch a mandatory tender offer aimed at acquiring the stocks of all the firm's shareholders.

Qualora non siano stati effettuati acquisti a titolo oneroso di titoli della medesima categoria nel periodo indicato, l'offerta è promossa per tale categoria di titoli ad un prezzo non inferiore a quello medio ponderato di mercato degli ultimi dodici mesi o del minor periodo disponibile. Il medesimo prezzo si applica, in mancanza di acquisti a un prezzo più elevato, in caso di superamento della soglia relativa ai diritti di voto per effetto della maggiorazione ai sensi dell'articolo 127-quinquies.

2-bis. Il corrispettivo dell'offerta può essere costituito in tutto o in parte da titoli. Nel caso in cui i titoli offerti quale corrispettivo dell'offerta non siano ammessi alla negoziazione su di un mercato regolamentato in uno Stato comunitario ovvero l'offerente o le persone che agiscono di concerto con questi, abbia acquistato verso un corrispettivo in denaro, nel periodo di cui al comma 2 e fino alla chiusura dell'offerta, titoli che conferiscono almeno il cinque per cento dei diritti di voto esercitabili nell'assemblea della società i cui titoli sono oggetto di offerta, l'offerente deve proporre ai destinatari dell'offerta, almeno in alternativa al corrispettivo in titoli, un corrispettivo in contanti […]".

[62] "*Il testo Unico della Finanza – Tomo secondo*", M. Fratini, G. Gasparri, UTET.

[63] "*Information on shareholder cooperation and acting in concert under the Takeover Bids Directive*", European Securities and Markets Authority, 2019.

It is possible to notice that the TUF's reform of 2007 has introduced a specific threshold with the new legal reforms, since previously the requirement which caused the trigger of the mandatory tender offer was the mere intention or the acquisition of a relevant stake in a firm. However, as previously stated, this definition was considered too broad and caused conflicts in the interpretation. For this reason, the TUF's reform was also aimed to insert a specific threshold in order to guarantee a higher clarity and certainty within the market participants. Moreover, the specification of the triggering stake results in continuity with the legal rules applied by the other European Member States and USA.

Other than the threshold's overcoming, the other feature which triggers the mandatory takeover bid is the actual acquisitions of share. In fact, if this requirement is not respected, it does not oblige the subject to launch the Public Tender Offer. Indeed, the mandatory OPA,OPAS and OPS are not applicable when the individual arrives to exceed the threshold in two situations: (*i*) in case of shares nullification after a share capital decrease and (*ii*) the buyback of shares. As a result, the new calculation of the participations may induce the specific shareholder to hold a stake higher than the 25% or 30% without an actual acquisition.

Therefore, analyzing the mandatory takeover bid's scheme, it is possible to notice that it is structured according to two steps:

1. the acquisition of a controlling stake (at least 25% of the share voting capital);
2. the trigger of the article 106 of TUF which obliges the subject to launch a totalitarian acquisition of the remaining share capital.

This scheme changes in the scenario of the voluntary tender offer since it is structured following only one step – as it will be further analyzed.

Shifting towards the object of the mandatory takeover bid, the TUF's reform of 2007 has deeply ampliated the typology of securities object of the tender offer. Previously, the mandatory tender offer was aimed at acquiring exclusively the listed shares, whereas, as a consequence of the legal reform, the acquirer now must buy listed securities which allow the buyer to exercise the voting right in the shareholder meetings aimed at nominating or revoking the board of directors[64].

In continuity with the object of the mandatory tender offer, the purchasing price constitutes a relevant topic.

[64] "*Il testo Unico della Finanza – Tomo secondo*", M. Fratini, G. Gasparri, UTET.

Indeed, the TUF's reform of 2007 introduced the "*best price rule*" according to which the bidder must buy the listed securities at a price higher than the price paid by the offeror – or by entities operating in concert with him – in the 12 months prior the launch of the mandatory takeover bid. In case the buyer has paid different prices for the purchase of securities categorized according to different groups, the Legislator provides the opportunity for the offeror to offer different prices for each typology of securities which are the object of the bid. Relating to the time period, the TUF disciplines that the 12 months backward calculation starts from the offer disclosure towards the market when the offering price is clearly specified in the release.

However, in case the offeror did not purchase shares in the year prior the launch of the takeover-bid, the *best price rule* is substituted by the settlement of the offering price calculated as the weighted average of the market prices registered in the last 12 months or according to a shorter period.

Moreover, in accordance with the *best price rule*, the Legislator also extended onward the period of application of the offering price calculation. In fact, the offeror must apply the *best price rule* in case he purchases more than 0,1% of the listed securities object of the tender offer in the six months consecutive the closing of the public tender offer. If that situation occurs, the bidder must modify the price through the assignment of an adjustment towards the shareholders who subscribed the offer. The reasons underlying the price adjustment must be disclosed through a specific release.

Furthermore, by analyzing the offering price settlement, there are situations in which it may be decreased or increased compared to the rules above described[65].

[65] According to article 106, paragraph 3, letters c) and d), of TUF:

"*3. La Consob disciplina con regolamento le ipotesi in cui:*

[…]

c) l'offerta, previo provvedimento motivato della Consob, è promossa ad un prezzo inferiore a quello più elevato pagato, fissando i criteri per determinare tale prezzo e purché ricorra una delle seguenti circostanze:

1) i prezzi di mercato siano stati influenzati da eventi eccezionali o vi sia il fondato sospetto che siano stati oggetto di manipolazione;

2) il prezzo più elevato pagato dall'offerente o dalle persone che agiscono di concerto con il medesimo nel periodo di cui al comma 2 sia il prezzo di operazioni di compravendita sui titoli oggetto dell'offerta effettuate a condizioni di mercato e nell'ambito della gestione ordinaria della propria attività caratteristica ovvero sia il prezzo di operazioni di compravendita che avrebbero beneficiato di una delle esenzioni di cui al comma 5;

Relating to the offering price decrease, the possibility occurs upon the offeror request to Consob within five days from the preventive communication's delivery. In this scenario, the offeror must specify the reasons that may lead to a price reduction and the circumstances underlying it. In this respect, the TUF identifies three situations which may activate the offering price reduction: (*i*) extraordinary events that impacted the market prices, (*ii*) in case of grounded suspicion of manipulation which determined an increase in the market prices and (*iii*) in case of a particular sale.

Relating to the first two situations, Consob has identified the modalities to calculate the new offering price which must be the higher between:

1. the highest price paid by the offeror in the prior 12 months, by considering a price which was not influenced either by market manipulations or extraordinary events;
2. the price resulting from the weighted average of market prices during the 15 days prior and 15 days consequent the event that abnormally increases the firm's price.

Whereas, analyzing the case of "a particular sale", the adjusted price is calculated by not considering the sale price occurring in transactions which beneficiate of the "*safeguarding exemption*" provided for in article 49 of the Consob Issuers' Regulation adopted by resolution no. 11971 of 14th May 1999.

Shifting towards the possibility to increase the offering price compared to the *best price rule*, the Consob admits the price increase in case it deems to be necessary for the investors' protection. In particular, contrary to the decrease of the offering price, the request to increase it may be activated either by the Consob itself or by whoever holds an interest in the mandatory tender offer. In these cases, the price identification will generally be the highest

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d) l'offerta, previo provvedimento motivato della Consob, è promossa ad un prezzo superiore a quello più elevato pagato purché ciò sia necessario per la tutela degli investitori e ricorra almeno una delle seguenti circostanze:

1) l'offerente o le persone che agiscono di concerto con il medesimo abbiano pattuito l'acquisto di titoli ad un prezzo più elevato di quello pagato per l'acquisto di titoli della medesima categoria;

2) vi sia stata collusione tra l'offerente o le persone che agiscono di concerto con il medesimo e uno o più venditori;

3) ...omissis...;

4) vi sia il fondato sospetto che i prezzi di mercato siano stati oggetto di manipolazione.

[…]".

price that the offeror may fix with potential securities' sellers in the hypothesis of a deal between them.
After having described the strict rules that the offeror of a mandatory tender offer must follow to set the price, one question that may occur relates to the payment modalities.
In this respect, as it was previously stated, the TUF legislation results applicable for OPA, OPS and OPAS. Consequently, the offeror may pay according to three modalities: (*i*) total cash payment (OPA), (*ii*) total securities payment (OPS), (*iii*) a mix of cash and securities payment (OPAS). In all these cases, the purchase must be priorly fully financed.
However, it is important to underline the bidder's duties in case he is intended to pay using partially or totally securities. In more details, if the modality of payment consists of non-listed securities, according to the TUF legislation the buyer must also offer a cash payment as an alternative. The same occurs in case the offeror has purchased at least 5% of the target's voting share capital in exchange of only cash during the 12 months prior the launch of the mandatory tender offer.
These limitations are aimed at both protecting and guaranteeing the equal treatment of shareholders. In fact, relating to the first case, the Legislator wants to avoid the shareholders to incur in a worse situation since they shift from holding listed securities –which can be easily sold since they are traded in the market – to owning non-listed ones which, on the contrary, cannot be easily sold[66].
Relating to the second case, the Legislator wants to guarantee the equality of treatment between the investors that received the cash payment before the launch of the tender offer and those to which the offer is targeted.
Shifting towards the triggering event, as previously stated, the mandatory tender offer is launched in two circumstances:

1. when anybody holds a stake in a firm higher than the 30% of the voting share capital as a result of securities' acquisitions;
2. the threshold is reduced to the 25% of the voting share capital in case no other shareholders owns a stake greater than this latter percentage.

However, it is possible to identify one more possible scenario which determines the offeror's obligation to launch of the mandatory takeover bid and it is connected to the *consolidation*

[66] "*Listing Advantages Around the World*", K. Ueda, S. Sharma, Nber Working Paper Series, 2019.

process[67]. In particular, the article 106, paragraph 3, letter b), of TUF[68] states that the mandatory tender offer is also triggered in case anybody purchase within 12 months more than 5% of the voting share capital when they already hold a stake higher than 30% + 1 but cannot exercise the majority in the ordinary shareholder meeting.

The ratio of this legal scenario is always related to the protection of minority shareholders. In fact, it is less possible for an investor to obtain control over a firm when there is a shareholder exercising a "*de iure* control" rather than when there is one exercising a "*de facto* control"[69]. For this reason, the Legislator has introduced this provision aimed at protecting minorities shareholders from those that have a *de facto* control and are aimed to consolidate their position by reaching a *de iure* control.

Finally, concluding the overview of the mandatory tender offer, it is notable that the offer is not subject to precedent or subsequent conditions whereas this feature changes the voluntary tender offer's landscape.

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[67] "*Consob risponde a quesito su Opa obbligatoria da consolidamento e voto maggiorato*" A. Gafforio, il Societario, 2019.

[68] According to article 106, paragraph 3, letter b), of TUF:

"*3. La Consob disciplina con regolamento le ipotesi in cui:*

[…]

b) l'obbligo di offerta consegue ad acquisti superiori al 5% o alla maggiorazione dei diritti di voto in misura superiore al cinque per cento dei medesimi, da parte di coloro che già detengono la partecipazione indicata nei commi 1 e 1-ter senza detenere la maggioranza dei diritti di voto nell'assemblea ordinaria;

[…]".

[69] As it was mentioned in the first chapter, according to article 2359 of the Italian Civil Code, it is possible to differentiate the corporate control according three levels:

- *de iure control*: it occurs when a shareholder holds at least 50% of the voting rights in the ordinary shareholders' meeting;
- *de facto control*: it verifies in case a subject holds a percentage of the voting share capital lower than 50% (generally between 20% and 35%) but still enough to exercise in practice a relevant influence in the ordinary shareholders' meeting;
- *contractual control:* this situation occurs in case a shareholder is able to exercise a dominant influence over the company thanks to a contractual relationship.

2.1.2 Voluntary Tender Offer

So far it was analyzed the situation of a public tender offer which is requested to be launched when an operator in the corporate control market exceeds the thresholds provided for in article 106 of TUF. However, the takeover bid may not always be initiated under legal impositions since the offeror himself may decide to launch a public offer to a target firm according to its own willingness. This situation is commonly known as "*voluntary tender offer*".

Compared to the mandatory typology, the voluntary tender offer presents less tighter provisions. This more permissive legal landscape derives from the clear intention of the offeror to acquire control over a firm by offering a direct exit opportunity to minorities shareholder. Hence, the interest of the latter is protected by the voluntary launch of the public offer. Whereas, in the contest of the mandatory tender offer, the Legislator requires the entity, which is buying a controlling stake, but not the entire share capital, to launch a totalitarian offer so that minorities are protected.

Getting into more detail, the voluntary takeover bid targets listed securities – in continuity with the mandatory case – and must be aimed to either buy the total voting share capital (100%) or to at least the 60% in order to avoid the incurrence in a subsequent mandatory takeover bid. For this reason, contrary to the mandatory typology, the voluntary tender offer presents a "one step" structure, since the bidder directly launches a public purchase request without the prior trigger of thresholds.

Another element which differentiates the voluntary takeover bid from the mandatory one is the price settlement. Indeed, in the voluntary landscape the offeror can freely set the price without restrictions and it can be increased until the last day prior the closing of the offering period[70]. However, the *best price rule* occurs whenever the listed securities object of the public tender offer are purchased at a price higher than the offering one during the tender offer period. In this case, the voluntary buyer must increase the offering price. Moreover, in continuity with the mandatory scenario, the best practice rule also applies in case the offeror purchases more than 0,1% of the listed shares object of the tender offer in the six months consecutive the closing of the public offer.

Relating to the modality of payment, the voluntary tender offer operates as the mandatory one. In fact, the offer must be priorly fully financed and the counterbalance can be either

[70] "*Commentaries and Cases on Italian Business Law*", A. Sacco Ginevri, CEDAM, 2019.

total cash, total securities or both cash and securities. In case the buyer offers to pay through non-listed securities, the provisions explained in the mandatory takeover are also applied in the voluntary one.

Counter to the mandatory tender offer, the voluntary takeover bid admits the introduction of conditions in the offer document which must not be dependent to the offeror's willingness. In fact, conditions such as the authorities' approval, MAC[71] or minimum number of acceptances can be introduced and modified within the last day before the closing date of the offer and can be waived until the end of the offering period.[72]

Finally, only in case of voluntary tender offers, during the fulfillment of the tender offer's disclosure duties the offeror is protected by the "*passivity rule*" which prevents the target firm's directors from implementing "defensive initiatives" to avoid external bids. As a consequence, the incurrence of defensive tactics characterizes a hostile takeover which will be further analyzed in this chapter.

2.1.3 Partial Preventive Tender Offer

The partial preventive tender offer is legislated by article 107 of TUF[73] and can be defined as a takeover bid which is aimed at purchasing a portion of the target's voting share capital

[71] The MAC stands for "Material Adverse Change" and it is a clause that is activated when unfavorable events occur between the deal and the closing. It confers the right to the buyer to withdraw the contract or change the offering price.

[72] "*Le offerte pubbliche di acquisto- La nuova disciplina delle opa nel Testo Unico della Finanza*", P. Belvedere, A. Manzini, S. Mechelli, N. Moreschini, N. Mincato, F. Papi Rossi, N. Squillace, C. Tatozzi, Il Sole 24 Ore

[73] The article 107 of TUF states:

"*1. Oltre che nei casi indicati nell'articolo 106, commi 4 e 5, l'obbligo di offerta pubblica previsto dal medesimo articolo, commi 1 e 3, non sussiste se la partecipazione viene a essere detenuta a seguito di un'offerta pubblica di acquisto o di scambio avente a oggetto almeno il sessanta per cento dei titoli di ciascuna categoria, ove ricorrano congiuntamente le seguenti condizioni:*

a) l'offerente e le persone che agiscono di concerto con lui, non abbiano acquistato partecipazioni in misura superiore all'uno per cento, anche mediante contratti a termine con scadenza successiva, nei dodici mesi precedenti la comunicazione alla CONSOB prevista dall'articolo 102, comma 1, né durante l'offerta;

b) l'efficacia dell'offerta sia stata condizionata all'approvazione di tanti possessori di titoli che possiedano la maggioranza dei titoli stessi, escluse dal computo i titoli detenuti, in conformità dei criteri stabiliti ai sensi dell'articolo 120, comma 4, lettera b), dall'offerente, dal socio di maggioranza, anche relativa, se la sua which allows the offeror to obtain the corporate control without the obligation to launch a mandatory tender offer.

In fact, the partial preventive bid must be aimed at purchasing at least the 60% of listed securities for each category, without an actual clarification whether it must target the 60% of all the typologies of securities issued by the firm or just a single class of them. This threshold represents the minimum limit which nullifies the partial preventive tender offer if not respected. Moreover, the purchase of at least 60% of the firm's securities is calculated without counting the stake already hold by the buyer.

Regarding the modality of payment, this latter typology of takeover bid has several differences from the former two offers. In fact, the offeror can freely decide whether to pay in cash or securities – in continuity with the first two cases – but if he decides to pay in securities, the buyer is not obliged to exclusively provide listed securities. In fact, in case the offeror pays through unlisted financial instruments, he is not required to also offer a cash alternative[74].

Through the analysis of this typology of tender offer, it is possible to understand the willingness of the Legislator to provide an alternative modality than the mandatory takeover bid which also permits to acquire the corporate control of firms. Indeed, the only presence of the latter may have had negative impacts in the change of corporate control of listed firms since the features of the mandatory tender offer result to be too expensive and tightening. For this reason, the TUF has introduced the partial preventive tender offer which facilitates

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partecipazione sia superiore al dieci per cento, e dai soggetti a essi legati da uno dei rapporti indicati 102-bis, comma 4;

c) la CONSOB accordi l'esenzione, previa verifica della sussistenza delle condizioni indicate nelle lettere a) e b).

2. Le modalità di approvazione sono stabilite dalla CONSOB con regolamento. Possono esprimere il proprio giudizio sull'offerta ai sensi del comma 1, lettera b), anche i soci che non vi aderiscono.

3. L'offerente è tenuto a promuovere l'offerta pubblica prevista dall'articolo 106 se, nei dodici mesi successivi alla chiusura dell'offerta preventiva:

a) l'offerente medesimo o persone che agiscono di concerto con esso, abbiano effettuato acquisti di partecipazioni in misura superiore all'uno per cento, anche mediante contratti a termine con scadenza successiva;

b) la società emittente abbia deliberato operazioni di fusione o di scissione."

[74] "*Il testo Unico della Finanza – Tomo secondo*", M. Fratini, G. Gasparri, UTET.

the change in the controlling shareholders, thanks to the requirement to not buy the total voting share capital and by also guaranteeing the protection of minority shareholders.
At this point, it is noticeable that the partial preventive tender offer constitutes an exemption of the mandatory takeover bid. However, in this case the Legislator has introduced tighter duties for the offeror since this modality allows the buyer to obtain the control of a firm, but it does not provide the exit right to all minority shareholders. As a consequence, the regulations want to prevent the incurrence in abuses.
Hence, as just anticipated, the preventive tender offer is subject to different obligations which, if not respected, trigger the launch of the mandatory takeover bid. Indeed, it is the Consob's duty to verify the existence of these assumptions.
Regarding the restrictions, the offeror must not purchase firm's securities for an amount superior to the 1% of the voting share capital in the 12 months prior the launch of the preventive tender offer. The reason for this first duty derives from the willingness to firstly avoid the buyer to consolidate its position prior the launch of the public offer, but also to protect minority shareholders which may be persuaded by a selective securities' sale. In fact, in case the buyer firstly purchases more than the 1% of the voting share capital, the parity of treatment among shareholders would be lead on an economic profile since there might be a strong difference among the offering prices prior and during the launch of the preventive tender offer.
Moreover, the prohibition to purchase at least 1% of the voting share capital prior the launch of the bid must be respected also during the 12 months after the offering closing. In fact, the incurrence of this latter situation proves the financial capability for the offeror to promote a totalitarian tender offer which was not launched for the mere elusive intention of the buyer.
In conclusion, if both restrictions are not respected, the offeror is obliged to promote a totalitarian mandatory tender offer.
A further obligation relates to the necessary offer's approval by the majority of the firm's shareholders – without considering the stakes higher than the 10% of the voting share capital which are owned, either directly or indirectly, by the offeror or by the majority shareholder. Hence, the offer approval must be reached by the majority of the "*disinterested shareholder*", also known as minority shareholders. The *ratio* of this duty is related to the impossibility for all the minority shareholders to exercise the exit right since the offer results partial. For this reason, the latter are asked to vote and evaluate whether to exploit the situation and exit or continue to remain in the firm after the change in the control composition.

A final obligation for the offeror relates to the prohibition during the 12 months subsequent the offering closing to approve the following extraordinary transactions: merger and demerger[75]. This ultimate duty is aimed at protecting – once again – minority shareholders from a potential unfavorable exchange ratio that may be fixed in these transactions. In fact, minorities may be jeopardized since they would not have the possibility to exit according to the preventive tender offer conditions but only according to the merger/demerger's ones. In continuity with the former situations, if this duty is not respected, the offeror is required to launch a mandatory tender offer.

2.1.4 Sell out and squeeze out

The article 108 of TUF[76] legislates the duties of a majority shareholder when he reaches a participation of at least 90% of the voting share capital of a firm. The Legislator, indeed,

[75] "*Operazioni straordinarie*", Ceppellini Lugano & Associati, Wolters Kluwer, 2020.

[76] The article 108 of TUF states:

"*1. L'offerente che venga a detenere, a seguito di un'offerta pubblica totalitaria, una partecipazione almeno pari al novantacinque per cento del capitale rappresentato da titoli in una società italiana quotata ha l'obbligo di acquistare i restanti titoli da chi ne faccia richiesta. Qualora siano emesse più categorie di titoli, l'obbligo sussiste solo per le categorie di titoli per le quali sia stata raggiunta la soglia del novantacinque per cento.*
2. Salvo quanto previsto al comma 1, chiunque venga a detenere una partecipazione superiore al novanta per cento del capitale rappresentato da titoli ammessi alla negoziazione in un mercato regolamentato, ha l'obbligo di acquistare i restanti titoli ammessi alla negoziazione in un mercato regolamentato da chi ne faccia richiesta se non ripristina entro novanta giorni un flottante sufficiente ad assicurare il regolare andamento delle negoziazioni. Qualora siano emesse più categorie di titoli, l'obbligo sussiste soltanto in relazione alle categorie di titoli per le quali sia stata raggiunta la soglia del novanta per cento.
3. Nell'ipotesi di cui al comma 1, nonché nei casi di cui al comma 2 in cui la partecipazione ivi indicata sia raggiunta esclusivamente a seguito di offerta pubblica totalitaria, il corrispettivo è pari a quello dell'offerta pubblica totalitaria precedente, sempre che, in caso di offerta volontaria, l'offerente abbia acquistato a seguito dell'offerta stessa, titoli che rappresentano non meno del novanta per cento del capitale con diritto di voto compreso nell'offerta.
4. Al di fuori dei casi di cui al comma 3, il corrispettivo è determinato dalla Consob, tenendo conto anche del corrispettivo dell'eventuale offerta precedente o del prezzo di mercato del semestre anteriore all'annuncio dell'offerta effettuato ai sensi dell'articolo 102, comma 1, o dell'articolo 17 del regolamento (UE) n. 596/2014, ovvero antecedente l'acquisto che ha determinato il sorgere dell'obbligo.
5. Nell'ipotesi di cui al comma 1, nonché nei casi di cui al comma 2 in cui la partecipazione ivi indicata sia raggiunta esclusivamente a seguito di offerta pubblica totalitaria, il corrispettivo assume la stessa forma di

considers distinctly two potential situations – the squeeze out and the sell out – which present differences in their rational.

Relating to the squeeze out, whenever a shareholder holds at least 95% of the firm's voting rights, according to article 108, paragraph 1, of TUF, he is obliged to purchase the remaining participations from the minorities. After having fulfilled the squeeze out procedure, the offeror may decide either to restore the free float or to exercise the right provided for in article 111 of TUF[77] to purchase any remaining participations from the minorities. Generally, the offeror will decide to exercise the right *ex* article 111 of TUF when he intends to proceed with the delisting of the target firm. Since the obtainment of such a stake is achieved thought a tender offer, either voluntary or mandatory, the offeror must have specified his intentions in the tender offer prospectus.

Based on the above, the ratio of this procedure is indented to eliminate the "*pressure to tender*" to which minority shareholders are exposed[78].

quello dell'offerta, ma il possessore dei titoli può sempre esigere che gli sia corrisposto in misura integrale un corrispettivo in contanti, determinato in base a criteri generali definiti dalla Consob con regolamento.

6. Se il corrispettivo offerto è pari a quello proposto nell'offerta precedente l'obbligo può essere adempiuto attraverso una riapertura dei termini della stessa.

7. La Consob detta con regolamento norme di attuazione del presente articolo riguardanti in particolare:

a) gli obblighi informativi connessi all'attuazione del presente articolo;

b) i termini entro i quali i possessori dei titoli residui possono richiedere di cedere i suddetti titoli;

c) la procedura da seguire per la determinazione del prezzo".

[77] According to article 111 of TUF:

"*1. L'offerente che venga a detenere a seguito di offerta pubblica totalitaria una partecipazione almeno pari al novantacinque per cento del capitale rappresentato da titoli in una società italiana quotata ha diritto di acquistare i titoli residui entro tre mesi dalla scadenza del termine per l'accettazione dell'offerta, se ha dichiarato nel documento d'offerta l'intenzione di avvalersi di tale diritto. Qualora siano emesse più categorie di titoli, il diritto di acquisto può essere esercitato soltanto per le categorie di titoli per le quali sia stata raggiunta la soglia del novantacinque per cento745.*

2. Il corrispettivo e la forma che esso deve assumere sono determinati ai sensi dell'articolo 108, commi 3, 4 e 5746.

3. Il trasferimento ha efficacia dal momento della comunicazione dell'avvenuto deposito del prezzo di acquisto presso una banca alla società emittente, che provvede alle conseguenti annotazioni nel libro dei soci".

[78] "*Vendita di azioni e offerta pubblica di acquisto: riflessioni a margine di una pagina non "limpida" né "illibata del nostro recente passato*" E. Desana, Pluris, 2011.

Regarding the sell out, according to article 108, paragraph 2, of the TUF, an offeror – as soon as he holds a stake comprised between 90% and 95% – is obliged to purchase the participations of those minority shareholders who want to exit from the firm, unless he decides to restore the free float within 90 days from the exercise of the sell out. Also in this case the bidder must have indicated his intentions in the tender offer prospectus.

The *ratio* of this second procedure is aimed at protecting minorities from a potential illiquidity of the firm's securities which might occur due to the offeror almost-total purchase of the target's share capital. Thus, the Legislator provides to residual shareholders the possibility to exit from the firm without being damaged by the totalitarian participation of the bidder.

It is important to notice two potential scenarios.

Firstly, in case the offeror who holds a stake equal to 95% does not exercise the squeeze out, he is obliged to proceed with the sell out and, as a consequence, to purchase the shares of the residual shareholders who are intended to exit from the firm.

Moreover, the squeeze out, if conducted, may be exercised either after the tender offer – if already reached the triggering threshold – or at the conclusion of the sell out.

Shifting towards the price determination, the two procedures present similarities since, in order to guarantee a "*fair treatment*", the price may be determined according to two modalities.

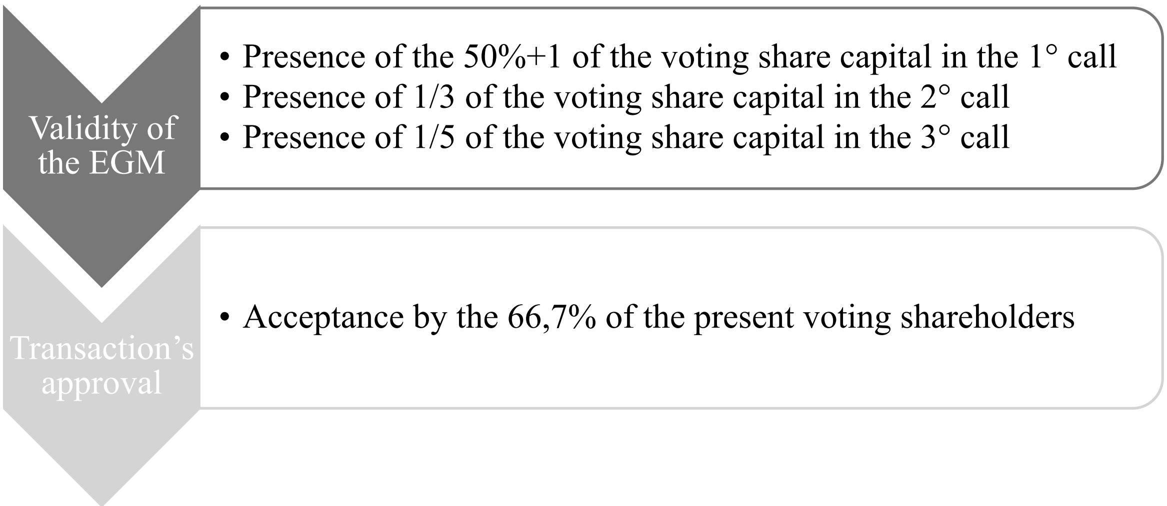
The first possibility consists of following the prior tender offer's price – either voluntary or mandatory – through which the offeror was able to achieve almost a totalitarian participation (at least 90% of the share voting capital). Since the sell out/squeeze out price is in continuity with the tender offer's path, the offering price may be modified through the reopening of the offer's terms. Moreover, the payment modalities are equally aligned to the previous tender offer prospectus but the residual shareholders may request a cash alternative.

Finally, another possibility of payment is the price determination by Consob which estimates it based on the previous tender offer prices and on the market prices registered in the six months prior the offering announcement.

2.1.5 Merger's legislations

As it was previously explained, the TUF sets provisions which are uniformly applied to all the typologies of tender offers – OPA, OPS and OPAS.

However, it is also important to introduce the laws applicable to mergers since it may occur as a consequence of the launch of a totalitarian takeover bid, after which the majority shareholder holds a controlling stake lower than 90/95% of the voting share capital.
Recalling the first chapter, a merger is an extraordinary transaction through which the equity of a target company merges into the incorporating company. In order to execute the transaction, the Extraordinary Shareholders' Meeting of both companies are called to vote and the companies can proceed only if the approvals reach specific thresholds.
Relating to the merger approval, the Extraordinary Shareholders' Meeting results valid when there is the presence of the 50% + 1 of the voting shareholders in the first call, 1/3 of them in the second one and 1/5 in the third call.
In order to execute the transaction, however, the proposal must be approved by the 66,7% of the present voting shareholders and there must not be any opposition by the creditors since their right is always protected by the Legislation[79].



Relating to minority shareholders protection, the Italian Civil Code operates in continuity with TUF since it provides the absent and dissenting shareholders with the exit right[80].
In fact, according to article 2437 of the Italian Civil Code[81] minorities shareholders are protected whenever there is a significant change in the company's activity which may change

[79] "*Manuale di Diritto Commerciale*", G. F. Campobasso, M. Campobasso, UTET, 2017.

[80] "*Il diritto di recesso nella riforma del diritto societario*" E. Bergamo, Pluris, 2006.

[81] The article 2437 of the Italian Civil Code states:

"*Hanno diritto di recedere, per tutte o parte delle loro azioni, i soci che non hanno concorso alle deliberazioni riguardanti:*

the risk conditions of their investment (in this respect, the merger's occurrence is considered a "triggering event").
When the withdrawal right is exercised, the absent and dissenting shareholders of listed firms must be compensated through a divestment price that is computed as the average of the closing prices in the six-months prior the call of the Extraordinary Shareholders' Meeting for the approval of the merger[82]. However, the exit right must be exercised within 15 days from the filing within the competent Companies Register of the shareholders' meeting resolution concerning the extraordinary transaction.

2.2 HOSTILITY IN TAKEOVERS

So far, the second chapter's analysis was focused on the discipline of the different typologies of tender offers. Now, the view will shift towards the analysis of the possible natures of a voluntary takeover bid.

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a) la modifica della clausola dell'oggetto sociale, quando consente un cambiamento significativo dell'attività della società;
b) la trasformazione della società;
c) il trasferimento della sede sociale all'estero;
d) la revoca dello stato di liquidazione;
e) l'eliminazione di una o più cause di recesso previste dal successivo comma ovvero dallo statuto;
f) la modifica dei criteri di determinazione del valore dell'azione in caso di recesso;
g) le modificazioni dello statuto concernenti i diritti di voto o di partecipazione.
Salvo che lo statuto disponga diversamente, hanno diritto di recedere i soci che non hanno concorso all'approvazione delle deliberazioni riguardanti:
a) la proroga del termine;
b) l'introduzione o la rimozione di vincoli alla circolazione dei titoli azionari.
Se la società è costituita a tempo indeterminato e le azioni non sono quotate in un mercato regolamentato il socio può recedere con il preavviso di almeno centottanta giorni; lo statuto può prevedere un termine maggiore, non superiore ad un anno.
Lo statuto delle società che non fanno ricorso al mercato del capitale di rischio può prevedere ulteriori cause di recesso.
Restano salve le disposizioni dettate in tema di recesso per le società soggette ad attività di direzione e coordinamento.
È nullo ogni patto volto ad escludere o rendere più gravoso l'esercizio del diritto di recesso nelle ipotesi previste dal primo comma del presente articolo."
[82] As it is stated by article 2437-*ter* of the Italian Civil Code.

As previously explained, the voluntary tender offer consists of a modality of acquisition which is disclosed publicly and is activated by the offeror who voluntary wants to launch a totalitarian tender offer, even though he has not triggered any threshold of participation's possession.

Contrary to the mandatory takeover bid, voluntary takeovers can be differentiated according to two macro categories: hostile and friendly tender offers.

As it was explained at the beginning of this chapter, the friendly takeover occurs when the offeror firstly engages with the target firm's Board of Directors which results to support the bidder and cooperates with the latter in order to facilitate the success of the tender offer by incentivizing the target's shareholders to exit from the firm, whereas it does not happen in the hostile scenario.

Therefore, the aim of this section consists of analyzing the hostile tender offer, by providing an understanding of its relevant features.

Later, the focus will shift towards the defensive tactics available for the target firm which can be used to neutralize the unwanted offeror's proposal.

2.2.1 Definition of hostile takeover and its trends

As previously anticipated, during a purchase of shares the buyer launches an offer directly to the target firm's shareholders since they must decide whether to disinvest from the company and sell their shares or to refuse the proposal. Hence, the target's Board of Directors is not asked to approve the transaction, but it is generally engaged in order to facilitate the success of the offer since directors may incentivize the firm's shareholders to exit from the firm.

However, this situation does not always occur.

In fact, a takeover is defined hostile when the potential buyer launches a public tender offer directly to the target's shareholders by bypassing its top management. Hence, the proposal results to come "*out of the blue*". Moreover, the target's Board of Directors may oppose the offer and try to persuade the shareholders to not sell their shares.

A question that may occur relates to the frequency of hostile takeovers: are they a common solution used in the M&A sector?

Studies have shown that, in general, hostile tender offers tend to be a small fraction of the overall acquisitions that occur in the market. In fact, by focusing on the number of M&A deals that occurred in the last 5 year, only 134 out of 796.953 were hostile.[83]
However, it is possible to notice an exemption on this statement since, as shown in the first chapter, hostile takeovers were predominant in the fourth merger wave which occurred in between the 1980s and the 1990s[84]. Despite this circumstantial megatrend, the hostile modality is not very present. In fact, by analyzing the last 10 years, data reports a general trend which shows a very few presences of hostile transactions compared to the friendly ones (the percentage of hostile transactions' volumes stands at around 1% over the whole acquisitions volumes registered)[85].

2.2.2 Value creation of hostile takeovers

Once explained what distinguishes a hostile offer from a friendly one, it is important to understand why a buyer may opt for this modality rather than the friendly offer.
It is generally accepted that hostile takeovers are pursued in order to replace the target firm's top management which is deemed to be underperforming and destroying value for the company and its shareholders (whereas, in case of friendly takeovers, the buyer is normally driven by the goal to achieve the synergies thanks to the combination of the two entities).
Based on this, there is a common view which sees the hostile bidder as a "raider" operating only according to its own interest which may damage other market operators and targets solid companies only for the intent to add value to himself.[86]
On the contrary, the reputation of friendly buyers results positive.
However, it is possible to notice that not all the friendly acquisitions deliver value since they may rather destroy it. In particular, this possibility can occur in case the target's top management results positive over a certain friendly public tender offer and incentivizes the

[83] Zephyr Database at 2021
[84] "*Corporate Governance and Merger Activity in the U.S.: Making Sense the 1980s and 1990s*" B. Holmstrom & S. N. Kaplan, NBER WORKING PAPER SERIES, 2001.
[85] Mergermarket Database at 2020.
[86] "*Are Friendly Acquisitions Too Bad for Shareholders and Managers? Long- Term Value Creation and Top Management Turnover in Hostile and Friendly Acquirers*" S. Sudarsanam, A. A. Mahate, British Journal of Management, 2006

shareholders to accept to exit from the company according to an offer which is actually not maximizing the value for the latter. In this possible scenario, the top management fails to deliver value for the target's shareholders and damage them.

For this reason, the presence of hostile takeovers in the corporate control market results actually positive because, even though they are connotated by a strong turnover of the top managements, they can replace an underperforming management and add value to both bidder and target firm.

Focusing on the role of the target's top management, they may have two possible reactions when facing an offer.

In case there is almost a perfect alignment between the interest of the shareholders and its management, the latter may solicit to reject a possible bid because they deem the offer to be too low compared to the actual value of the firm. Thus, the target's top management is aimed at reaching a higher offering price which also allows the targeted shareholders to have a higher and fair premium.

Relating to the second possible reaction, the firm's top management may push to reject the offer due to an exit price which does not maximize the return achievable by shareholders: their actual reasoning relates the eventuality to lose their jobs or privileges since they may be replaced[87].

Based on the above, a question that may occur relates to which type of voluntary tender offer may be preferable between the friendly and the hostile solution.

Firstly, it is important to underline that the hostile takeover may be considered more expensive than the friendly one since the bidder adds a consistent premium over the market price of the target's securities in order to increase the possibility of shareholders to accept the proposal and to reduce the success of potential counter bids.

Moreover, during a hostile tender offer, since the target's top management results to oppose the bid, the buyer has low possibilities to conduct a deep and complete due diligence and this situation increases the possibility for the offeror to incur in potential problems in the future, due to the lack of information prior the investment. As a consequence, this may lead to potential reputational damages for the hostile bidder.

Relating to a friendly takeover, even though the bidder does not incur in these potentialities which increase the overall costs sustained by the acquirer, it can also generate added indirect

[87] "*Management Ownership and Market Valuation: an Empirical Analysis*", R. Morck, A. Shleifer, R. W. Vishny, Journal of Financial Economics, 1998.

costs due to the retention of an inefficient top management which is not changed since the public tender offer is friendly and, thus, conducted thanks to the target's top management support.

Therefore, even though hostile tender offers present theoretically more disadvantages than friendly ones, they may be more preferable depending on the circumstances since they may deliver more value to shareholders in respect to friendly acquisitions.

Finally, as a consequence, the literature's view of hostile bidders has greed and focused only on short term returns that can be confuted. In fact, even if hostile takeovers are generally used to replace the top management deemed inefficient – which drives the target's price down because of this – this is not the only driver of the acquirer. Indeed, one of the other main drivers that stimulates the buyer is the achievement of synergies which allow both entities to deliver value in a long-term time horizon[88].

2.2.3 *Target of hostile takeovers*

An ulterior element that results interesting to be analyzed relates to the type of company that is generally targeted by a hostile takeover and how it can be identified.

As explained above, there is the general idea that a typical firm which attracts a potential hostile offeror is a company poorly managed. In fact, once the underperforming directors are replaced, the bidder can maximize value for both offeror and target's shareholders.

However, a question that may occur regards the capability to identify a poorly managed firm. Before introducing the possible indicators, it is important to highlight the definition of the stock price since it constitutes the starting point.

Listed firms can trade their shares in the market and the latter embody the current information of the company and its future prospective.

As regard to the incorporation of the future prospective, it is generally accepted that the stock prices can be calculated as the present value of a stream of cash flow – which can have different natures – that will be generated in the future by the firm.

$$PRICE = \sum_{t=0}^{n} \frac{CF1}{(1+i)^1} + \frac{CF2}{(1+i)^2} + \ldots + \frac{CFn}{(1+i)^n} + \mathrm{TV}$$

[88] "Are Hostile Takeovers Different?" L. E. Browne, E. S. Rosengren, NBER WORKING PAPER SERIES

Based on the above, one view sees the identification of poorly managed firms based on the price-earning ratio. This indicator is calculated as the ratio between the market Equity value of a firm over its Net Income, as represented in the formula below.

$$\frac{P}{E} = \frac{Market\ Cap}{Net\ Income}$$

This indicator is generally used to compare firms and evaluate their performance because it is a "pure" ratio that is less affected by the firm specific characteristic. Thus, the higher the price-earning ratio, the better the performance of the company and vice versa.

However, this indicator may not be the most suitable to assess the top management's performance. In fact, the price-earnings ratio is effective if used with firms that present earnings in a normal range. Moreover, this indicator may be affected by a negative downturn due to external circumstances which cannot be either controlled by the best top management (a contemporary example can be the outbreak of the pandemic)[89].

Another uncertainty about the price-earnings ratio relates to the actual capability of the share price to represent the company's prospects. As regard to this topic, it is important to notice that generally prices of listed firms are also subject to rumors or uncertain information which can determine a negative impact. In fact, it can also occur that a firm's share price can be cheap simply because the company was not brought to the investors' attention in the later periods.

Focusing to other possible tools used to identify a poorly managed firm, Jensen had developed a theory called the "*free cash flow hypothesis*". In particular, the author states that the free cash flows are the excess cash flows of those used to finance projects which present a positive Net Present Value[90]. Based on this definition, a company is deemed to be underperforming if the top management uses the cash flow in excess to develop low-value initiatives rather than paying out its shareholders. This element will be reflected in the company's stocks which will register a decrease.

[89] "*Are Hostile Takeovers Different*?", L. E. Browne, E. S. Rosengren, NBER WORKING PAPER SERIES.

[90] "*Agency Costs of Free Cash Flow, Corporate Finance, and Take-overs*", M. Jensen, American Economic Review, 1986.

Thus, a hostile buyer will eventually target this type of firm, by acquiring the corporate control, and will determine an increase in the firms' stock prices by firstly eliminating the underperforming top management and replacing it with a management body that will disinvest excess cash flow from low valued activities and distribute cash to its shareholders.

2.3 DEFENSIVE TACTICS

As just described, a hostile takeover occurs whenever the bidder launches an offer directly to the target's shareholders without a prior discussion with the latter's top management which results contrary to the transaction. Later, it was explained the reasons for a buyer to choose this type of public tender offer and which is the ideal target firm.
But what about the target firm? Can the top management oppose to the unwanted proposal by trying to discourage the transaction through the usage of defensive tactics?
The article 104 of TUF[91] provides an answer about this topic. Therefore, this section will analyze the tools available to the target firm which enables it to oppose to the hostile tender offer according to the Italian applicable provisions.

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[91] The article 104 of TUF states:
"*1. Salvo autorizzazione dell'assemblea ordinaria o di quella straordinaria per le delibere di competenza, le società italiane quotate i cui titoli sono oggetto dell'offerta si astengono dal compiere atti od operazioni che possono contrastare il conseguimento degli obiettivi dell'offerta. L'obbligo di astensione si applica dalla comunicazione di cui all'articolo 102, comma 1, e fino alla chiusura dell'offerta ovvero fino a quando l'offerta stessa non decada. La mera ricerca di altre offerte non costituisce atto od operazione in contrasto con gli obiettivi dell'offerta. Resta ferma la responsabilità degli amministratori, dei componenti del consiglio di gestione e di sorveglianza e dei direttori generali per gli atti e le operazioni compiuti.*
1-bis. L'autorizzazione assembleare prevista dal comma 1 e richiesta anche per l'attuazione di ogni decisione presa prima dell'inizio del periodo indicato nel comma 1, che non sia ancora stata attuata in tutto o in parte, che non rientri nel corso normale delle attività della società e la cui attuazione possa contrastare il conseguimento degli obiettivi dell'offerta.
1-ter. Gli statuti possono derogare, in tutto o in parte, alle disposizioni dei commi 1 e 1-bis. Le società comunicano le deroghe approvate ai sensi del presente comma alla Consob e alle autorità di vigilanza in materia di offerte pubbliche di acquisto degli Stati membri in cui i loro titoli sono ammessi alla negoziazione su un mercato regolamentato o in cui è stata chiesta tale ammissione. Tali deroghe sono altresì tempestivamente comunicate al pubblico secondo le modalità previste dalla Consob con regolamento.
2. L'avviso di convocazione relativo alle assemblee di cui al presente articolo è pubblicato con le modalità di cui all'articolo 125bis entro il quindicesimo giorno precedente la data fissata per l'assemblea."

2.3.1 *Passivity rule*

The Italian discipline of the takeover result very similar to the American legislation. However, it is possible to find a relevant contraposition between the two legal systems. In the USA, target firms of a hostile takeover can use different defensive tactics whose usage is approved by the target's Board of Directors. On the contrary, the Italian Legislator provides for a limitation of the top management activities during an unwanted public offer: the "*passivity rule*".

In particular, the passivity rule consists of a ban to the target's Board of Directors to use defensive tactics after the launch of a public tender offer without the prior authorization of its shareholders meeting. In fact, during a hostile takeover the top management may take actions against the introduction of a new controlling shareholder – who can displace them – even though the transaction can maximize value for the target's shareholders. Thus, the rational of this provision is aimed at avoiding the possible conflict of interest which may arise between the target's Board of Directors and shareholders.

Analyzing the first form of the passivity rule, the previous discipline fixed a tighter restriction regarding the shareholders' approval of the defensive tactics. In fact, the Legislator imposed a quorum of 30% of the share voting capital during any call of the shareholders meeting. This requirement of participation was aimed at guaranteeing a consensus coming from the shareholders which was not occasional or changeable but representative of a relevant ownership stake[92]. However, the quorum was deleted in the latest reform of 2007 and the passivity rule became a default amendment from which the company statutes may derogate, whereas before it was an optional rule.

Shifting towards the typologies of entities subject of the passivity rule, the article 104, first paragraph, of TUF is applicable only to companies that have a legal seat in Italy and are listed either in Italy or in other European Member States. Moreover, the defensive tactics are available only in case the object of the hostile tender offer is to purchase securities which provide the voting right to the buyer[93].

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[92] "*Il testo Unico della Finanza– Tomo secondo*", M. Fratini, G. Gasparri, UTET.

[93] "*Le offerte pubbliche di acquisto- La nuova disciplina delle opa nel Testo Unico della Finanza*", P. Belvedere, A. Manzini, S. Mechelli, N. Moreschini, N. Mincato, F. Papi Rossi, N. Squillace, C. Tatozzi, Il Sole 24 Ore.

A further question that may occur relates to the duration of the passivity rule. In this respect, the Legislator has introduced as time extension the period that starts from the communication of the tender offer until its closing or its premature termination. The settlement of this tenure is aimed at protecting two interests: firstly, to avoid the target's management from being bounded to the tender offer pending, then, to guarantee a protection of the offeror from potential defensive tactics.

Even though the temporal reference result clear, the juridical doctrine resulted to be in contrasts on its determination. In particular, regarding the start of the passivity rule's application, there was a debate relating to whether to apply the top management's block starting from the tender offer's communication to the market – including Consob and the target company – or from the reception of the offer document[94]. The doctrine's contention ended when the Legislator identified as starting point the offeror communication to the market of his intention to launch a takeover on the target company.

This solution may seem to favor the offeror since the target's top management is prohibited to engage in any defensive tactics prior the shareholder's approval even though the communication does not disclose the offer's specific details. However, listed firms are obliged to respect specific disclosure duties – as previously discussed –, so also the bidder communication to the market must present specific details of the offer such as the covenants used to fulfill the offeror's commitments. Moreover, the target firm results to be also protected since the offer document must be published within 20 days from the takeover communication[95].

Relating to the identification of the termination of the passivity rule's application, its effects ends either when the tender offer is concluded or with its premature termination. In the first case, the juridical doctrine agreed to identify as conclusion point the expiry of the offer period since the offer cannot be changed and is considered to be closed. However, the Legislator has fixed as ending point the publication of the adhesion results[96]. Whereas, the premature termination may occur in case of punitive events or in case the termination clauses

[94] It must be noted that if the offeror fails to priorly communicate his intention of engaging in a takeover prior the Consob's approval, the buyer loses his protection from the target firm's usage of defensive tactics since the passivity rule is not applicable in this situation.

[95] "*Passivity Rule e D.Lgs. N. 6/2003*", S. Perugino, OneLEGALE, 2004.

[96] "*Il testo Unico della Finanza – Tomo secondo*", M. Fratini, G. Gasparri, UTET.

are verified: for example, in case the offeror fails to obtain the takeover approvals by the responsible Authorities.
An ultimate point that needs to be discussed is the role of the shareholders during the application of the passivity rule.
As priorly explained, when the passivity rule is effective, the target's Board of Directors cannot themselves adopt defensive tactics, but they must obtain the shareholders' approval. However, the call of the target's shareholders' meeting during the running of a tender offer results slightly different than during the normal course of events. In fact, the shareholders' meeting is convened in a reduced timeframe since the notice of call must be published 15 days prior the occurrence of the shareholders' meetings.
In addition, relating to the types of shareholders' meetings called for the approval of defensive tactics, it can be either convened in the ordinary or in the extraordinary form. The latter occurs whenever the defensive tactics proposed by the top management may modify the target's by-laws or relate to the issuance of convertible securities. Moreover, the extraordinary shareholders' meeting need the attendance of at least half of the share voting capital and the approval of at least 2/3 of the attending shareholders during the first call; whereas, during the second call, the attending shareholders must be at least 1/3 of the share voting capital while the approval still remains 2/3 of the attendees.
Shifting towards the attendance of the ordinary shareholders' meeting, it is called whenever the defensive tactics consists of tools that either result within the competence of the ordinary meetings or can be classified as mere firm's management. In this latter situation, in fact, the corporate body's competence would have been the Board of Directors. However, since the passivity rule is applied, the ordinary shareholders meeting must be called to approve the opposition tactics. Moreover, the latter is also in charged to vote for those transactions partially or totally pending which occurred prior the launch of the tender offer and were approved by the top management but may obstacle the takeover success, also known as the "*preventive defensive tactics*" (as they will be later analyzed)[97].
Finally, a question that may arise relates to who can attend the shareholders' meetings to approve the defensive tactics.

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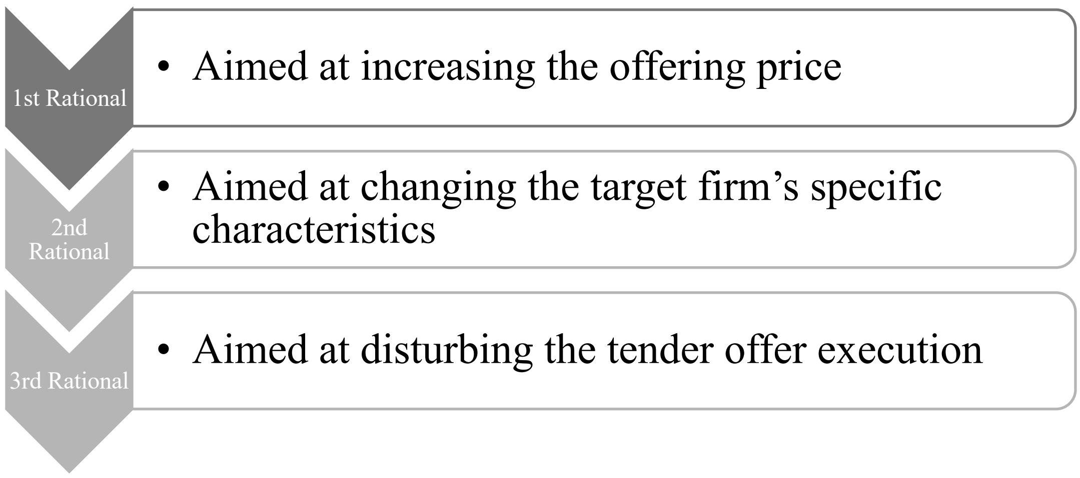
[97] "*La nuova normativa italiana sulle OPA e le misure difensive contro le OPA ostili. Cosa cambia?*", G. Opromolla, OneLEGALE, 2017.

The general rules state that the shareholders who hold shares which provide the expression of the voting right can attend the meeting for the approval or rejection of the defensive tactics. However, in case the tender offer is aimed at purchasing securities which provide the voting right – so, it does not only target shares – also the holders of securities different from shares which allow them to express the vote must attend the shareholders' meeting. Moreover, the shareholders' meeting must be attended also by those shareholders who hold shares which provide them the exercise of the voting right only in case of specific situations, like in case of the occurrence of a tender offer.

2.3.2 Reactive defensive tactics

As previously explained, the target firm has a pool of tools available to contrast a hostile tender offer. However, these defensive tactics must be priorly approved by the shareholders when the passivity rule is effective.
Relating to the defensive tools, the opposing activities may be divided in two groups: the reactive and preventive defensive tactics.
Focusing on the first category, the reactive defensive tactics can be defined as those initiatives proposed by the target's top management – and, as previously stated, subject to the shareholders' meeting – once the bidder has publicly launched the tender offer. Hence, they occur post the beginning of the hostile takeover.
The reactive defensive tactics can be differentiated according to following three *ratio*:



Analyzing the first category of reactive defensive tactics, the target's Board of Directors can firstly propose *a share capital increase*. In case the extraordinary shareholders' meeting approves this transaction, their participation would be diluted and would require, as a consequence, the bidder to modify its offer by increasing the number of shares to be purchased in order to maintain the same participation post acquisition[98].

Linked to this first option, the Italian regulation also provides the firm's Board of Directors with the possibility to approve the share capital increase through the "*delegated share capital increase*" in accordance with article 2443 of the Italian Civil Code[99]. In particular, this second type of share capital increase allows the target firm's directors to approve the increase once or more times until the achievement of a predetermined amount within 5 years from the filing within the competent Companies' Register. However, the delegation of this power to the Board of Directors must have been reported in the corporate by-laws prior the announcement of the public tender offer.

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[98] "*Le regole in materia di misure difensive tra vecchia e nuova disciplina dell'OPA*", L. Scipione, OneLEGALE, 2009.

[99] Article 2443 of the Italian Civil Code states:

"*Lo statuto può attribuire agli amministratori la facoltà di aumentare in una o più volte il capitale fino ad un ammontare determinato e per il periodo massimo di cinque anni dalla data dell'iscrizione della società nel registro delle imprese. Tale facoltà può prevedere anche l'adozione delle deliberazioni di cui al quarto e quinto comma dell'articolo 2441; in questo caso si applica in quanto compatibile il sesto comma dell'articolo 2441 e lo statuto determina i criteri cui gli amministratori devono attenersi.*

La facoltà di cui al secondo periodo del precedente comma può essere attribuita anche mediante modificazione dello statuto, per il periodo massimo di cinque anni dalla data della deliberazione.

Il verbale della deliberazione degli amministratori di aumentare il capitale deve essere redatto da un notaio e deve essere depositato e iscritto a norma dall'articolo 2436.

Se agli amministratori è attribuita la facoltà di adottare le deliberazioni di cui all'articolo 2441, quarto comma, qualora essi decidano di deliberare l'aumento di capitale con conferimenti di beni in natura o di crediti senza la relazione dell'esperto di cui all'articolo 2443, avvalendosi delle disposizioni contenute nell'articolo 2443-ter, il conferimento non può avere efficacia, salvo che consti il consenso di tutti i soci, prima del decorso del termine di trenta giorni dall'iscrizione nel registro delle imprese della deliberazione di aumento, contenente anche le dichiarazioni previste nelle lettere a), b), c) ed e), di cui all'articolo 2343-quater, terzo comma. Entro detto termine uno o più soci che rappresentano, e che rappresentavano alla data della delibera di aumento del capitale, almeno il ventesimo del capitale sociale, nell'ammontare precedente l'aumento medesimo, possono richiedere che si proceda, su iniziativa degli amministratori, ad una nuova valutazione ai sensi e per gli effetti di cui all'articolo 2343. In mancanza di tale domanda, gli amministratori depositano per l'iscrizione nel registro delle imprese unitamente all'attestazione di cui all'articolo 2444 la dichiarazione prevista dall'articolo 2343-quater, terzo comma, lettera d".

Shifting towards other reactive defensive tactics, the target firm can also *purchase its own shares* resulting in a reduction of the number of shares available in the market. This type of defensive tactic is known as "*restructuring*".
In this situation the offeror would have to sustain a higher price for a reduced number of shares and the target firm will also be impacted on a financial availability basis.
Finally, the shareholders can also approve the conversion of shares from non-granting voting rights into stocks which allow the owners to exercise the voting rights in the shareholders' meeting. This specific conversion will impact the offeror in a negative way since he will purchase a stake which will not allow him to exercise the control that intended due to the presence of shareholders which priorly could not vote.
Relating to the secondo ratio (*i.e.* defensive tactics aimed at changing the firm characteristics after the launch of a tender offer), the target's Board of Directors can suggest several initiatives subject to the shareholders' approval. First of all, the firm can be subject to *mergers, demergers or transformations* which must be concluded within the time horizon of the tender offer[100]. Moreover, the top management can also increase the level of leverage of the target firm until levels which result to be inadequate for the bidder's capacity (this is again *a restructuring defensive tactic*). In addition, the firm can either purchase undesirable assets or sell strategic ones in order to incentivize the offeror to close prematurely the tender offer. The sale of strategic assets is known as the *sale of "crown jewels"* tactic. Finally, the firm can also expand itself through acquisitions after which it may determine a concentration in the industry and trigger the antitrust authority's incompatibility.
As regard to the last ratio of reactive defensive tactics, the firm can follow the "*Pac-Man strategy*" which results to be a contemporary launch of public tender offer by the targeted firm aimed at acquiring either the offeror or its controlled firms. As a consequence, this defensive tactic results to be a disturbing element to the bidder.

2.3.3 The white knight

So far, the analysis was focused on the reactive defensive tactics which, as already stated, need the approval of the shareholders for their application when the passivity rule is

[100] "*Le offerte pubbliche di acquisto - La nuova disciplina delle opa nel Testo Unico della Finanza*", P. Belvedere, A. Manzini, S. Mechelli, N. Moreschini, N. Mincato, F. Papi Rossi, N. Squillace, C. Tatozzi, Il Sole 24 Ore.

effective. However, it is possible to notice that the so called "*white knight*" was not included among them.
Firstly, it is important to understand what the "*white knight*" is.
In particular, it is commonly defined as "*white knight*" a third company which is engaged by the target firm's Board of Directors in order to be saved from the "*black knight*", *i.e.* the hostile offeror.
Generally, the white knight is a firm which is deemed by the targeted company to be the ideal counterparty during an acquisition. Thus, it is engaged by the target's top management in order to enter the acquisition landscape and launch a competitive tender offer which, likely for the target's directors, may be preferred by shareholders rather than the hostile one[101].
The research for a white knight is identified as a reactive defensive tactic in the American legislation and results coordinated with the Italian regulation. However, the Italian Legislator clearly stated in the article 104 of TUF that this defensive tool results to be an exemption from the passivity rule application. In fact, the research for another offer is not deemed to be in contrast with the tender offer's functioning since it triggers a mechanism of competitivity which maximize the exit value of minority shareholders. Thus, it does not generate a potential conflict of interest that may damage investors[102].

2.3.4 Preemptive defensive tactics

Focusing on this last macro class of defensive tools, what distinguishes the preemptive defensive tactics from the reactive one is the usage of these devices prior the launch of a tender offer and, as well, may contrast the fulfillment of the transaction.
In order to trigger the passivity rule, these defensive tactics must present two requirements:
1. the decision must be at least partially implemented; and
2. they must not fall under the normal course of the firm's business.

Based on the above, it is possible to identify different types of preemptive defensive tactics.
First of all, there are two tools which derive from the American landscape and results to be

[101] "*Are Friendly Acquisitions Too Bad for Shareholders and Managers? Long-Term Value Creation and Top Management Turnover in Hostile and Friendly Acquirers*", S. Sudarsanam, A. A. Mahate, British Journal of Management, 2006.
[102] "*Il testo Unico della Finanza – Tomo secondo*", M. Fratini, G. Gasparri, UTET.

suitable also for the Italian environment: the "*shark repellents*" and the "*golden parachutes*"[103].

As regard to the "*shark repellents*", they are considered as amendments of the company by-laws which are aimed either at introducing higher threshold levels for the approval of specific categories of transactions (such as mergers or the sale of strategic assets) – and are known as the "*super-majority provision*" – either at protecting the top management from its turnover by the introduction of limitations in the management's removal or by introducing three different categories of directors, each of them elected every year for a period of three years (this tactic is known as "*staggered board*").

As it can be noted, these provisions in the company by-laws have a negative impact over the hostile offeror since, as a consequence, he needs either to purchase a stake that allow him to approve the elimination of these clauses or to convince other shareholders to vote for the provisions' removal.

Relating to the "*golden parachutes*", they are contractual clauses which regulate the relationship between the company and its management and Board of Directors. In particular, these clauses guarantee the payment of extremely high liquidations to managers and directors in case they are revoked (for example, due to the introduction of a new controlling shareholder).

This type of defensive tactic is aimed to lessen the appeal of the target firm "in the eyes" of the hostile offeror. In fact, the elimination of either the management or the Board of Directors may trigger the outlay of extremely expensive liquidations and may also determine a block in the business activities of the firm itself.

However, it can be noted that the Italian legislation does not accept the introduction of the golden parachutes in the Board of Directors' contract since it may create a conflict of interests between them and the shareholders. Moreover, these clauses may also be in contrast with the revocability rules provided for in article 2383 of the Italian Civil Code[104].

Shifting towards other preemptive defensive tactics which are not imported from the American landscape, the so called "*endorsement clauses*" state that the transfer of shares

[103] "*La nuova normativa italiana sulle OPA e le misure difensive contro le OPA ostili. Cosa cambia?*", G. Opromolla, OneLEGALE, 2017.

[104] "*Le regole in materia di misure difensive tra vecchia e nuova disciplina dell'OPA*", L. Scipione, OneLEGALE, 2009.

must be subject to the approval of a specific corporate body. However, this defensive tactic is prohibited in the listed market since it is applicable only for non-listed firms.
Moreover, it is possible to find clauses which *limit the voting right.* These provisions allow the controlling shareholders to maintain the control over the firm and its management cannot be changed due to the introduction of a new controlling participant. As a consequence, the potential offeror is disincentivized to purchase a controlling participation since he may not exercise the voting right proportionally to its stake. Again, as the "*endorsement clauses*", these clauses may be applied only for non-listed firms[105].
Focusing on defensive tactics which are also applicable for listed companies, the so called "*shareholders agreement*" can be used to prevent tender offers since shareholders may agree to not sell their stakes for a certain period and, consequently, not being object of the purchase intentions of buyers.
In addition, firms can issue shares which *do not grant the voting right.* In fact, this type of stocks can be a barrier for a potential offeror since they grant the voting rights only to certain shareholders. However, companies that issue these shares are subject to tighter transparency duties and shares are traded at a lower price than those that provide the holder with the voting right.
As regard to the so called "*chinese boxes*", firms can protect themselves through the creation of pyramidal groups. In fact, the controlling company is generally a non-listed firm which is the head of a long chain of subsidiaries that may be listed. As a result, the creation of this type of long controlling chain makes more difficult for an external offeror to obtain a control power over one of the listed subsidiaries, whereas the controlling company is not subject of tender offers because it is not listed. It should be highlighted that the Italian Legislator prohibits the listing of the Chinese box's controlling firm, but this possibility may be allowed to the subsidiaries if the financial statements of the controlling company is not exclusively composed by the participations in its subsidiaries (hence, unless the controlling firm is not a financial controlling).
Another preemptive tactic that can be used is the approval of the *share capital increase with the exclusion of the option right*, which allows the entrance of the "*white knight*" in the target firm's control composition and renders more difficult future tender offers by hostile buyers.

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[105] "*Passivity Rule e D.Lgs. N. 6/2003*", S. Perugino, OneLEGALE, 2004.

Also *the delegated share capital increase* results to be a defensive tool which may be applied prior the launch of a takeover and may reduce the possibility of potential offers.
Finally, the "*distribution of shares to employees*" can be categorized as a preemptive tactic. This decision is used not only to make management more loyal and reduce the potential agency problem which can arise between the shareholders and the top management due to a non-alignment between their interests. In fact, the distribution of share to employees – in more respect to top management – can also reduce the number of shares available in the market object of a potential tender offer since the employees are less likely to sell their shares once they have received them[106].

[106] "*Vendita di azioni e offerta pubblica di acquisto: riflessioni a margine di una pagina non "limpida" né "illibata del nostro recente passato*", E. Desana, Pluris, 2011.

CHAPTER 3 – CASE STUDIES

So far, this paper has provided an overview of the M&A transactions, its drivers and then has focused on what a Public Tender Offer is and how it works depending on the possible facets that it can take one. As a reminder, the voluntary takeover bid is a public proposal – launched by one or more entities acting in concert– to purchase the entire share capital of a target firm, or at least the 60% of it. This modality of acquisition can be exercised only in the listed firms' market since the *ratio* of the public tender offer is to protect minority shareholders and the corporate control market. Instead, the market of non-listed companies does not require this protection since their share capital are not traded and cannot be bought by investors in the open market.

Then, the analysis has focused on the cases of hostile and friendly voluntary tender offers. As regard to the hostile case, even though it is rare and may have a negative perception due to biases, studies have proven that they do not destroy value compared to friendly acquisitions since the outcome of the two modalities tends to follow similar patterns. However, the Italian Legislator has introduced the possibility for the targeted firm's top management to oppose to a hostile bidder but it must follow tight restrictions such as the prior approval of defensive tactics by the target's shareholders meeting.

Based on the above summary, this last chapter is aimed at analyzing two case studies which consist of a hostile tender offer – the OPAS launched by Intesa San Paolo S.p.A over UBI Banca S.p.A. – and a friendly one – the OPA between Retelit Digital Services S.p.A. and Retelit S.p.A.-. Their description, indeed, is finalized to provide an understanding of how these two situations actually operate.

3.1 HOSTILE CASE: OPAS BETWEEN INTESA SAN PAOLO AND UBI BANCA

This voluntary tender offer occurred in 2020 and has quite monopolized the news from its beginning until its completion.

Why did it result to be the Italian financial market's protagonist in 2020? Firstly, UBI Banca was perceived to be an "*aggregating actor*" in the Italian banking sector. In fact, it was created through the incorporation of several medium banks and, as a consequence, its objectives were to continue on this path by reaching the "third pole" status. This means that its goal was to become the third largest and strongest bank in Italy. However, Intesa San Paolo S.p.A. deleted this possibility by incorporating in its portfolio the targeted bank.

Moreover, the OPAS between Intesa San Paolo S.p.A. and UBI Banca S.p.A. occurred in a period which has deeply shocked the course of the normal life: the COVID-19 pandemic. Its arrival, in fact, caused the block or the slowdown of several transactions, whereas this specific OPAS still continued and successfully terminated despite the unfavorable market conditions.

As regard to the hostility features of this transaction, there are some elements that need to be noticed and will be later analyzed. Firstly, the initial opposition of UBI's top management which invoked to the MAC condition's trigger – it is one of the clauses that renders invalid the tender offer. Then, the issuer's public release was published and publicly communicated the disagreement of UBI's Board of Directors over the transaction. In addition, the indirect disagreement of the target's top management over the AGCM approval must be noticed.

As a consequence, ISP[107] increased the offering price in the middle of the acceptance period in order to facilitate the consensus of UBI's shareholders since the percentage of subscription was very low until that point. Finally, it must be noticed the resign of UBI's CEO as a result of the successful offer closing.

Focusing on the analysis of the case study, firstly this section will provide an historical overview of the transaction. Then, the analysis will concentrate on the features of the offer document published by Intesa San Paolo S.p.A. and, later, the behavior of UBI's top management. Finally, it will be analyzed the change in the offer contribution which occurred in order to increase the likelihood of deal's closing.

[107] ISP stands for Intesa San Paolo

3.1.1 Historical events

17 February 2020: Intesa San Paolo S.p.A. discloses to Consob and to the market the launch of a totalitarian OPS over UBI Banca S.p.A. by targeting its entire share capital. Briefly describing, the offer consists of an exchange of 17 ISP's shares every 10 UBI's ones, which means that the target firm's shareholders would receive a premium of 27,6% once dividends are distributed.
Moreover, ISP specified the intention to delist the target firm and to proceed with a consequent merger.

19 February 2020: UBI's Board of Directors informs to have visioned the preventive communication and discloses its intention to appoint advisors to help formulate an understanding of the Intesa San Paolo's offers on the basis of information available so far.

6 March 2020: Intesa San Paolo S.p.A. deposits the offer document to Consob whose approval is needed.

19 March 2020: ISP modifies the agreement with BPER Banca and UnipolSai which were aimed at transferring branches in order to respect the ACGM's requirements –the Italian Antitrust Authority.

31 March 2020: both ISP and UBI's Board of Directors disclose the intention to not distribute the dividends of 2019 according to the suggestions that were provided by the ECB in order to better face the pandemic.

26 May 2020: UBI's Board of directors has decides to file for an investigation aimed at verifying the triggering of the MAC condition due to the start of the pandemic. This action is started because ISP failed to timely renounce to the tender offer. As a consequence, UBI's top management states that all the takeover bid's effect are nullified –including the passivity rule application – since the takeover is deemed to be terminated due to the clause trigger.

5 June 2020: ISP obtains the OPS's approval by the ECB.

8 June 2020: ISP also obtains the OPS's approval by Bank of Italy.

15 June 2020: ISP modifies the agreement with BPER Banca under AGCM's indication.

16 June 2020: ISP's Board of Directors approves the delegated share capital increase through which the new issued shares are destinated to be used in the OPS. The BoD had obtained the delegation by the shareholders' meeting in the end of April.

17 June 2020: IVASS approves the OPS.

25 June 2020: Consob approves the offer document provided by ISP and stabilizes that the acceptance period would have started on the 6th of July and would have ended on the 28th of the same month.

26 June 2020: ISP publishes the offer document

3 July 2020: on the basis of the offer document's analysis, UBI's Board of Directors publishes the issuer's release which states that the offer is unfair and specifies the reasons why the target's shareholders should not subscribe to the offer launched by ISP.

6 July 2020: ISP's top management clarifies the relevant doubt which were issued by the target's top management explaining the hypothesis underlying the valuation made by the bidder.

7 July 2020: UBI's top management again discloses its disagreement with the offer made by the ISP.

16 July 2020: AGCM approves the OPS

17 July 2020: UBI's Board of Directors discloses its doubts relative the impossibility for ISP to respect the Antitrust duties in case the offeror would not be able to reach the subscription of the 66,67% of the target's share voting capital. On the same day ISP increases the offering price by adding a cash compensation. Due to the combination of cash and shares, the tender offer modifies from OPS to OPAS.

23 July 2020: UBI's Board of Directors communicates that it considers the increased offer price not representative of the true UBI's value.

27 July 2020: Consob extends the accession period until the 30th of July.

3 August 2020: the offer is subscribed by the 91,0149% of the UBI's shareholders and ISP proceeds with the delisting of the bank. UBI's CEO, Victor Massiah, resigns.

3.1.2 The offer document

As regard to the offer document – which was published by Intesa San Paolo on the 26th of June – there are four points which result to be relevant for the aim of analysis and are reported[108] below:

1. Reasons underlying the offer
2. Effectiveness conditions of the offer
3. Offering price and its determination
4. BPER and UnipolSai agreements

Their understanding is relevant since most of them will be used by UBI's top management as reasoning to discourage its shareholders from subscribing to the offer.
As regard to the reasons underlying the launch of the voluntary tender offer by ISP, the offeror main objective was to *consolidate its position* in the Italian and European market. This decision relates the idea that the financial sector is projected over a consolidation phenomenon – which will occur in the future years– and requires banks to be proactive and updated. As a consequence, ISP was intended to find a possible partner which resulted to have similar characteristics and enabled the integrated entity – as a result of the merger occurring between the two banks –to reach synergies and become one of the most relevant top players in both Italian and European market. Among the possible partners, UBI Banca was deemed to be the most suitable entity due to the similarities on several topic – by way

[108] The information is provided in the Offer Document published by Intesa San Paolo S.p.A. on the 26th June 2020

of example, in the management's values, geographical coverage, market positioning, orientation over the Italian economic support –. In fact, the integration of the two banks would have allowed the maximization of the entities' potentiality thanks to:

1. the strengthening of the stakeholders positioning;
2. the increase in the shareholders' value creation thanks to the distribution of sustainable dividends;
3. the achievement of synergies – Euro 662 MIO in 2023 and Euro 700 MIO in 2024;
4. the management's integration – which results to be a distinctive feature of hostile offers as it was previously described;
5. to provide a support to the Italian economy thanks to the integration of the two banks;
6. develop the Corporate Social Responsibility section;
7. maintain a solid CET 1 ratio;
8. accelerate the de-risking activities of UBI's assets.

By focusing on the COVID-19's consequences, Intesa San Paolo S.p.A. believed that the integration of the two entities assumed greater significance in such contest since it would have allowed the banks to reach synergies – among them, in particular, the cost typology – and permitted to guarantee a higher coverage over the unlikely to pay and the Non-Performing Loans.

Shifting towards the offering price analysis, the Voluntary tender offer targeted UBI's ordinary shares since ISP was intended to purchase the entire share capital of the target firm – constituted by n 1.144.285.146 shares –. Consequently, the offeror's intention was to merge the two banks into one unique entity and this event could have occurred either with or without the delisting of UBI.

Focusing on the offering price, Intesa San Paolo's Board of Directors, with the support of the financial advisor Mediobanca S.p.A., identified as exchange ratio 1,7 ISP's shares every 1 share of UBI. How was determined such exchange ratio? Firstly, it must be noticed that the offeror itself stated in the offering document that it identified some limitations and difficulties in the evaluation process especially due to the lack of updated public financial information of the target company. In fact, ISP used as source of data the financial information relative the financial performance of UBI registered in the 2019 – since the target firm did not published yet its forecasted Business plan by the 17th of February–. Moreover, the offeror elaborated an exchange ratio without performing a due diligence and without relying on recent and comparable transactions – an ulterior element that characterizes hostile offers. As it will be later discussed, the hypotheses used by the offeror to determine the offering price will be contested by UBI's top management as an opposing behavior.

Analyzing the valuation methodologies implemented by the ISP, five major methods have been applied: the Method of the Stock Exchange Listing[109], the Linear Regression Method[110], the Market Multiples' Method[111], the Method of Target Prices [112] and the Dividend Discount Model[113]. The outcome of these valuation techniques identifies as exchange ratio 1,7 ISP stock every 1 UBI's stock. The determination of such "price" meant that UBI's stocks were valued at a price equal to Euro 4,254 which implied a premium of 27,6% after the dividend's distribution–calculated on the 17th February.

The determination of such exchange ratio was also approved by PwC Advisory S.p.A. and KPMG S.p.A.: as a clarification, the first entity was appointed as an independent expert during the delegated share capital increase and the second one was the audit company in charged by ISP.

As regard to the effectiveness conditions of the offer, the offeror had specified the clauses which, if not respected, guaranteed him the possibility to withdraw from the tender offer. These conditions are five and consist of:

1. Antitrust condition;
2. The minimum acceptance threshold condition;
3. Relevant actions condition;

[109] This method uses the stock exchange listing prices as estimation of the firm's economic value. The main characteristic of this method relies on the possibility to express in relative terms the relationship between the values of the companies in question as perceived by the market.

[110]According to this second method, the equity value of a firm can be identified according to parameters estimated on the basis of the multiples' correlation obtained by a comparable firms' samples.

[111] The market multiples' method identifies the equity value of a firm based on the indicators of the listed comparable companies. In particular, ISP used as comparable firms both listed Italian and European banks such as: Unicredit, MPS, BNP Paribas, Crédit Agricole, CaixaBank etc.

[112] This method deeply relies on the independent financial analysts' valuation which are published on financial databases – among them Bloomber–.

[113] The DDM is an evaluation method which identifies the equity value of a firm based on the hypothesis that it can be calculated as the present value of a stream of future cash flow plus the Terminal Value – it is the normalized cash flow that the company will generate when it will reach a stable status.

4. Defensive tactic condition;
5. MAC condition.

As regard to the Antitrust condition, the tender offer's prosecution resulted valid as long as Intesa San Paolo S.p.A. would have obtained either the unconditional approval by the AGCM – the Italian Antitrust Authority– or the approval by the latter conditional to the agreement that the offeror had subscribed with BPER Banca and UnipolSai, whose objects were the sale of branches in order to avoid ISP, or the unified entity, to assume a power concentration in such specific sectors.
Focusing on the minimum acceptance threshold, the tender offer resulted effective if at least the 66,67% of the target's share voting capital subscribed to the transaction. However, ISP had the possibility to nullify this condition and purchase a lower number of shares if the offer had reached at least the 50%+1 subscription by UBI's shareholders.
As regard to the third and fourth clauses, the relevant action condition and the defensive tactic one resulted to have similar *ratio*. In respect to the first condition, the offeror could preventively close the tender offer if the target's top management had approved or managed transactions which may significantly damage the equity or the financial situation of the firm itself. By way of example, ISP considered operations falling under this profile the following transactions: the share capital increase or decrease, the distribution of reserves or of extraordinary dividends, all those transactions which are not categorized as ordinary and prudent management. As regard to the defensive tactic condition, instead, the offeror could terminate the tender offer whenever the target firm had exercised actions or transactions which resulted in opposition to the achievement of the offer's objectives. Thus, both conditions blocked any intention of UBI's top management to develop activities which could have contrasted the tender offer launched by Intesa San Paolo.
Finally, the MAC condition[114] stated that the tender offer bid could terminate in two situations: firstly, in case extraordinary events verify –which can occur on a national or international level– and consequently may negatively impact either the political, financial, economic and legal situation or the market condition and, as a result, create impediments in the offer effectiveness. In particular, the offeror stated that the premature close of the transaction could have occurred in case the spread between the Italian BTP and the German BUND exceeded the 350 bps or in case UBI's CET1 ratio fully loaded decreased under the

[114] As previously stated, MAC condition stands for "Material Adverse Change" condition.

9,25% level. In respect to the pandemic, ISP publicly communicated on the 5th of June 2020 that the COVID-19 outbreak was not considered an event which triggers the MAC condition since it did not seriously damaged UBI's situation and activity.
Moreover, the MAC condition could nullify the voluntary tender offer if events or situations about the target firm previously unknown – which could seriously damage its financial and economic position – become public.
The last relevant element of the offer document which needs to be analyzed is the BPER and UnipolSai agreements that ISP signed with the two entities. In both cases, the agreements were subscribed on the 17 February of 2020 – contextually the launch of the public tender offer – and were aimed to facilitate the integration between Intesa San Paolo and UBI by assuring the AGCM's approval of the transaction. In particular, the BPER contract was finalized to transfer an ISP's banking unit to the counterparty. This agreement was modified twice due to the Antitrust Authority's indications and the last form stated that the transaction had as object the transfer of 532 branches at a price resulting the minimum between:

1. 0,55 times the CET 1 of the banking unit transferred, and
2. 78% of the implicit multiple that ISP would recognize to the CET 1 of UBI Banca.

Intesa Sanpaolo pointed out that this specific business unit transfer would have not negatively impacted the CET 1 ratio of the two combined entities – as a clarification, the bank resulting from the merger between ISP and UBI Banca – which should result to be equal to 13% in 2021.
Whereas, the UnipolSai agreement was aimed to transfer the assurance units owned by UBI Banca to the counterparty once the tender offer would had been concluded.

3.1.3 The behavior of UBI's top management

As previously anticipated in the second chapter, the target's top management generally tries to oppose the offeror by using either preventive or reactive tactics during a hostile takeover. In this specific case, it is possible to notice that UBI's top management opposition consisted firstly in the invocation to the effectiveness conditions' triggers –which has just been analyzed – and consequently in its manifestation of disagreement stated in the issuer's public release.

In order to better understand the target Board of Directors' behaviors, three specific actions must be analyzed according to a chronological point of view:

1. Revindication of the MAC condition;
2. Issuer's release which discloses UBI top management's opinion over the OPS;
3. Confutation of the AGCM's approval.

The first event that showed the disagreement of UBI's top management over Intesa San Paolo's tender offer was the press release that was published on the 26th of May. On this specific communication, the target's Board of Directors invoked the trigger of the "Material Adverse Change" condition due to the breakout of the Covid-19 pandemic.[115] Since the offeror did not waive this clause, UBI pursued a declaratory action aimed at verifying this point and also stated that the passivity rule could not apply anymore due to the trigger of the MAC condition. This public release constitutes the first moment in which UBI's top management disclosed its opinion over the offer and, as it is possible to notice, it resulted to be in opposition and not aimed at supporting Intesa San Paolo since it revendicates the ineffectiveness of the tender offer.

On the contrary, the offeror replied to the target's top management stating that the Covid-19 was not a triggering event and, as a consequence, the OPS continued. Moreover, ISP formally introduced this specification in its offer document – published one month later – which stated that the MAC condition, if triggered, nullifies the Voluntary Tender Offer but

[115] The specific public release states "***Milan, 26th May 2020*** –The Board of Directors of UBI Banca S.p.A. ("UBI Banca" or the "Bank"), during the meeting held today, resolved to pursue a declaratory action aimed at ascertaining that, due to the occurrence of the "material adverse change" (MAC) condition affecting the public exchange offer launched by Intesa Sanpaolo S.p.A. ("ISP") – determined by the "Covid-19" pandemic – and ISP's failure to waive that condition in a timely way, the effects of the Notice issued by ISP on 17th February 2020, pursuant to Art. 102 of the Italian Consolidated Finance Law, have ceased, with all the relative consequences, including the application of the "passivity rule" to UBI Banca. The judicial action is aimed at protecting the subjective rights of UBI Banca and is complementary to the initiative submitted before the Consob with the purpose of protecting stakeholders and investors as well as market efficiency and transparency, as reported in the press release issued by the Bank on 19th May 2020."

the pandemic could not be considered a causing event because it did not change irreversibly the economic and financial conditions of UBI Banca S.p.A..
Consequently, UBI's Board of Directors published the issuer's press release on the 3rd of July in which it openly stated its opinion over the tender offer. This document– as it was described in the former chapter – is required to be disclosed by the target company during a public tender offer and it represents the opinion of the target's top management over the offer. Thus, it is the main element which indicates whether the takeover bid is a friendly or a hostile one.
In this case, UBI's board of directors openly opposed to the transaction by firstly highlighting that the voluntary tender offer was not arranged between the two parties ("*l'OPS non concordata con l'emittente*"). Then, the target's top management summarizes all the elements according to which its shareholders should have not accepted the transaction since the offer was not deemed to be convenient for the latter. Its reasoning is composed by the following considerations:

1. The contribution in shares places also over UBI's shareholders risks relative the achievement of the tender offer's strategic goals defined by ISP. Moreover, the payment modality is not considered to be adequate to face such risks and it allocates more synergies in favor to the offeror compared to the target;
2. The offer consideration does not enhance UBI Banca's real value and damages its shareholders compared to ISP's ones;
3. UBI's shares present high potentialities for growth in standalone value based on the updated Business Plan published in the same press release;
4. The ISP's capability to achieve the strategic goals of the offer results to be uncertain due to the respect of several factors among which the consecutive merger and the BPER and UnipolSai agreement;
5. Those dissenting UBI's shareholders would be protected by the regulatory legislation;
6. The real objective of ISP is to eliminate a competitor from the Italian landscape and, as a consequence, strengthening its positioning in Italy without impacting its ranking in the European market.

As regard to the first consideration issued by the target firm, UBI's top management pointed out that the profitability targets and the dividend cashflow forecasted by Intesa San Paolo were uncertain and may have placed over UBI's shareholders the risk of failure. As a proof,

the offeror firstly saw their downward in respect to the forecasts announced to the market and then also the modification in the representation of its future dividends. As a consequence, UBI's board of directors suggested its shareholders to consider the randomness of these elements. Moreover, it also stated that the generation of the dividend cashflows was guaranteed by the achievement of extraordinary transaction which could not be replicated and that the revenues generation of the offeror deeply depended on the trading activity which is volatile due to the connection to the market's performance. Finally, the target's BoD believed that the tender offer launched by ISP over UBI was essential to allow the offeror to achieve the strategic objectives of the Intesa San Paolo's Business Plan 2018-2021.
Shifting towards the offer consideration deemed inappropriate, UBI's top management was essentially declaring that the offering price was not representing the real value of the target firm. The inappropriacy derived from two factors: the launch of the tender offer occurring on the same day when the UBI's Business Model was published and the generation of *badwill*. As regard to the first consideration, the launch of the offer on the same day of the target's business model disclosure led to the offeror having evaluated UBI Banca S.p.A. without updated data and, as a consequence, with a valuation that did not represent the actual current value of the firm. Moreover, the contextuality of the two actions did not permit the market to fully appreciate UBI's business plan.
As regard to the generation of *badwill*, the target's BoD stated that the difference between the offering price and the Equity of UBI was equal to Euro 4,600 MIO which would be registered as revenues deriving from favorable price in the ISP's Income statement. Thus, this was an ulterior proof that the offering consideration was not actually representing the real value of the target firm since the offeror would have paid for the purchase at a discount.
Relating to the third consideration suggested by the target's top management, it explained that UBI Banca presented strong potentialities of growth on a stand-alone base which were also illustrated by its updated business plan. In fact, it must be noticed that UBI's board of directors did not just express its disagreement over the offer, but also reported possible alternative growth path to shareholders if they had not decided to subscribe to the offer. Moreover, the target's top management highlighted that the firm had shown its capabilities of solidity and resilience which also maintained during the out brake of the Covid-19 pandemic. Furthermore, UBI's board stated that the bank was a result of an aggregation process thanks to mergers between banks in the same geography. This element represented

its strength on a standalone basis. Hence, the Board believed that continuing on this aggregation path could have allowed the bank to build the banking "*third pole*".[116]

As regard to the uncertainties related the capability of Intesa San Paolo to achieve the transaction's strategic objectives, UBI's top management presented three doubts. Firstly, it deemed the merger between the two entities – one of the transaction's objective – to be uncertain because the offeror may have not be able to reach the 66,67% of the share voting capital's subscription and, as a consequence, may have not disposed of enough votes to approve the later merger. This incapability could have negatively impacted the two banks since they would have been object to the related party transaction's legislations and to additional costs due to the separation of the two entities.

The second doubt related the potential impossibility of ISP to respect the AGCM's directives as regard to the BPER and UnipolSai agreements. In fact, in case the Antitrust Authority's indications were not satisfied, both ISP shareholders and the UBI's accepting ones would have been subject to negative economic consequences.

The final doubt of UBI's Board of Directors related the fact that its shareholders did not dispose of the ISP group's business plan which could provide further information about the post tender offer's results and activities. This lack resulted important because UBI's shareholders may have not disposed of enough information to correctly evaluate the launched offer.

Shifting towards the future situation of UBI's dissenting shareholders, its top management wanted also to reassure them by highlighting that their protection would have always been assured in case they may have decided to refuse the offer according to the Italian legislation of the withdrawal right.

As regard to the final concern highlighted in the issuer release, UBI's board of directors stated that this transaction could not allow ISP to increase its positioning in the European

[116] To better explaine, the issuer reliese stated "la permanenza di UBI Banca quale realtà stand-alone le consentirà di continuare a svolgere un ruolo da protagonista nel procedimento di consolidamento del mercato bancario italiano e di dare impulso a possibili aggregazioni con operatori del settore, con l'obiettivo di creare valore per gli Azionisti di UBI Banca e gli altri stakeholder e di costituire un "terzo polo" bancario caratterizzato dal legame con i territori e da un azionariato stabile di lungo periodo, raccogliendo le istanze provenienti dalle diverse componenti economiche e sociali dei territori."

market since its raking would be only marginally increased but not enough to change its position in such market. On the contrary, the offeror would be able to eliminate a strong competitor in the Italian market and consequently achieve a position of leadership in Italy which could cause strong damages in such landscape. Finally, the transaction was not deemed to be industrial significant since it was aimed at achieving a negative goodwill (also known as badwill).

To conclude the analysis over UBI's top management behavior, it is time to analyze the third element that demonstrated the opposition of UBI's top management in respect to the tender offer lunched by Intesa San Paolo. In this respect, on the 17th of July, UBI's BoD disclosed a public release in which it expressed its doubts relative the AGCM's approval of the transaction. In more details, the target firm again expressed its concerns regarding the BPER and UnipolSai agreement – which have also been described in the issuer's release.

In fact, UBI's doubts were connected to the incapability of the offeror to achieve the 66,67% of the voting share capital and, as a consequence, it may have not been able to proceed with the merger. If that eventuality occurred, ISP could have also presented difficulties in fulfil the two mentioned agreements and, as a result, may have not respected the promised income targets by further damaging UBI's shareholders.[117] Moreover, if ISP did not reach such stake of possession, the offeror would have needed to sell its own branches instead of UBI's ones in order to respect the AGCM's requirement – as regard to the UnipolSai agreement.

As it is possible to understand, this last action constitutes an ulterior tentative to persuade UBI's shareholder to not subscribe to the offer launched by Intesa San Paolo.

[117] As it was stated in the public release: "Come evidenziato dal Consiglio di Amministrazione di UBI Banca nel comunicato *ex* art. 103, commi 3 e 3-*bis*, del D.Lgs. 58/1998 pubblicato il 3 luglio 2020 (il "**Comunicato dell'Emittente**"), e affermato dalla stessa ISP nel documento di registrazione pubblicato il 26 giugno 2020, gli obiettivi strategici dell'operazione annunciati da ISP non riflettono in alcun modo i possibili impatti connessi a misure alternative alla cessione degli sportelli di UBI Banca.
In coerenza con quanto già indicato nel Comunicato dell'Emittente, si rileva al riguardo che, qualora ISP dovesse essere obbligata a cedere filiali di sua proprietà in luogo degli sportelli di UBI Banca oggetto dell'"*Accordo BPER*" e degli "*Impegni ISP*", la realizzazione dei suddetti obiettivi strategici dell'operazione e, per essi, dei *target* reddituali "promessi" da ISP potrebbe risultarne pregiudicata."

3.1.4 Change in the offering price

So far, it was reported the actions conducted by UBI's top management in opposition to the tender offer launched by Intesa San Paolo. As it was possible to notice, the target firm's top management firstly tried to invoke to the trigger of the MAC condition and consequently disclosed publicly to not support the transaction. What happened then?

Since 12 days later the beginning of the acceptance period only the 3% of the share voting capital has subscribed to the offer, the offeror published a press release on the 17th of July in which he decided to increase the offer contribution by providing an added cash remuneration. This modification in the offer transformed the public tender offer from an OPS into an OPAS – because it provided both cash and share payment.

In more detail, Intesa San Paolo decided to offer also Euro 0,57 for each share exchanged between UBI which meant that it valued UBI Banca's shares at a price equal to Euro 4,824 versus the actual value of Euro 3,33 on the 14th February 2020. Hence, UBI's shareholders would have received a premium equal to 44,7%.

The increased offering price was justified by many factors. Firstly, ISP took in consideration the most recent market data of both entities influenced by the Covid-19 pandemic. Then, it also considered the financial situation of both banks reported in the interim Financial Statement at the date of 31st March 2020. Moreover, ISP used the information published on the UBI's Business Plan which was not yet available when the offer was launched. Finally, the offeror also considered the financial and economic effect relative the creation of value which would be generated either if the two banks would have not merger or would have integrated.

Despite the UBI's top management disagreement over the new offering price, the closing of the accepting period registered as final result the subscription to the tender offer by 90,2% of the share voting capital. Thus, Intesa San Paolo finally hold the 91,0149% of UBI's share capital, also considering the stake already owned by the offeror.

This result exceeded everyone's expectations since it was not sure whether ISP could have received enough subscriptions to consequently proceed with the merger between the two banks until the last moment. Instead, the offeror reached such a relevant stake that had to proceed with the delisting of UBI – respecting the sell-out regulation explained by article 108 of TUF – and the liquidation of the non-exchanged shares.

An ultimate element which identifies the hostility feature of this voluntary tender offer is the UBI's CEO resignment which results in continuity with the literature theories reported in the former chapter relative the target top management's turnover during hostile offers.

3.2 FRIENDLY CASE: OPA BETWEEN RETELIT DIGITAL SERVICE S.P.A. AND RETELIT S.P.A.

As regard to the friendly case study, it will be analyzed the acquisition between Retelit Digital Service S.p.A.[118] and Retelit S.p.A. which also occurred in 2020.

This transaction was intended to allow the offeror, RDS, to purchase the 7,23% of Retelit S.p.A.'s share voting capital through a cash contribution – hence, the type of takeover bid is an "*Offerta pubblica di acquisto*". It must be highlighted that the Retelit Digital Service S.p.A. is actually one of the controlled firms of Retelit S.p.A. Hence, it was an intergroup transaction.

Moreover, it is noticeable that both companies operate in the infrastructure sector which is considered to be a strategic one and, as a consequence, it triggers the *golden powers* that can be exercised by the Italian Government[119]. As a clarification, the golden powers provide to the Government the right to insert conditions in the purchase of shares or exercise the veto power during the approval of specific transactions of companies that operates in sectors deemed strategic – by way of example, national defense, transportations, telecommunication etc.

Shifting towards the friendly features of this tender offer, as it will be further analyzed, the transaction did not see any opposition by the target's top management which, on the contrary, expressed its support over the acquisition in the issuer's release. Moreover, the target's board did not try to invoke to the invalidity of the offer due to the trigger of effectiveness conditions – as it was noticeable in the former case study. In fact, the target board of directors' valuation of the offer resulted positive and supporting its shareholders over the subscription.

Focusing on the analysis of the case study, firstly this section will provide an historical overview of the transaction. Then, the analysis will concentrate on the features of the offer

[118] From now on, the company will be referred to as RDS

[119] According to the Law Decree n 21/15-03-2012

document published by Retelit Digital Service S.p.A. and the issuer release published by Retelit S.p.A.'s top management. Finally, it will be analyzed the change in the offer contribution and the final subscription results.

3.2.1 Historical events

23rd March 2020: Retelit Digital Service S.p.A. publishes the preventive communication release aimed at informing both Consob and market about the launch of a partial Voluntary Tender Offer over Retelit S.p.A.. The takeover bid is finalized to purchase maximum 11.875.000 ordinary shares (equal to the 7,23% of Retelit S.p.A. share capital) by paying Euro 1,60 per share.

26th March 2020: Retelit Digital Service S.p.A. deposits to Consob the offer document which must be reviewed and approved by the entity.

1st April 2020: Consob requests the integration of information in the offer document and withholds the tender offer's terms of reference.

10th April 2020: Consob restart the tender offer's terms of reference.

29th May 2020: the Italian Government discloses its intention to not exercise the golden powers over the transaction. Moreover, Consob approves the offer document drafted by the offeror.

30th May 2020: Retelit Digital Service S.p.A. publishes the offer document.

9th June 2020: Retelit S.p.A.'s top management publishes the issuer's release in which it states that the offer results to be fair, respecting the company's real value and convenient for the target's shareholders.

18th June 2020: Retelit Digital Service S.p.A. publishes a public release in which it decides to increase the cash contribution per share. The offeror will pay Euro 1,78 per share which means a premium payment of 30,94% in respect to the target's share price at the date of the tender offer's launch.

2nd June 2020: the final subscription results are published. The offer was accepted by the 5,335% of Retelit S.p.A.'s share voting capital, meaning that it reached the subscription of the 73,792% of the targeted shareholders.

In respect to the hostile case, it is possible to notice a first distinction: the time length of the transaction. In the hostile acquisition, the transaction needed longer time to terminate and it was characterized by the disclosure of many more public releases. Whereas, in this case the transaction went straight forward to the closing without any debate between the two firms.

3.2.2 The offer document

In continuity with the former case analysis, this section will analyze the offer document by focusing on the three elements below[120]:

1. Reasons underlying the offer
2. Effectiveness conditions
3. Offering price and its determination

As regard to the rational of the partial voluntary tender offer, RDS was willing to purchase a portion of Retelit S.p.A.'s share voting capital according to three reasons. Firstly, RDS was intended to use Retelit S.p.A.'s shares as payment modality in the totalitarian tender offer that the offeror had launched to Brennercom S.p.A. In this second transaction, RDS had the possibility to decide to pay for Brennercom's entire share capital through Retelit S.p.A's shares for a maximum of Euro 15 mln (equal to the 5,7% of Retelit S.p.A.'s share capital). However, the offeror could have also decided to use a total cash contribution in the totalitarian takeover bid.
Another reason underlying the launch of the tender offer related the integration of the incentive plans of both firm's board of directors and employees which were approved by the Retelit Group. At the same time, the remaining Retelit S.p.A.'s shares could have been used

[120] Information is provided by the Offer Document published by Retelit Digital Services S.p.A. on the 30th May 2020

as a payment modality in future extraordinary transaction which would be aimed at guaranteeing growth opportunities for both offeror and Retelit's Group.

Finally, the tender offer provided the opportunity to Retelit S.p.A.'s shareholders to divest from the firm through an exit price which incorporated a premium compared to the shares market price.

As regard to the effectiveness conditions imposed by the Retelit Digital Service S.p.A. which, if triggered, nullified the partial voluntary tender offer, it is possible to notice that they are only two and also result less tight than those introduced by Intesa San Paolo during the hostile takeover. In this case, the offer was subject to:

1. MAC condition
2. Competent Authorities' approval condition

In respect to the MAC condition, RDS stated that this clause could be triggered in case extraordinary events or situations occurred at a national or international level involving serious changes in the political, financial, economic, currency or market situation that had substantially detrimental effects on the OPA, on the business conditions or on the equity, economic or financial conditions of RDS or other companies in the Retelit Group.

Relating to the breakout of the Covid-19 pandemic, the offeror announced that the pandemic was not considered a triggering element of the MAC condition unless new tightening restrictions – such as new lockdowns – in terms of nature and time extension occurred.

As regard to the competent Authorities' approval condition, RDS stated that the tender offer may had been prematurely closed in case the competent Authorities either failed to provide the authorization of the partial voluntary tender offer or opposed to the transaction by rending it more expensive.

Shifting towards the last relevant element of Retelit Digital Services's offering document, the price consisted of Euro 1,6 per share including the distribution of the 2019's dividends (which were decided to be paid, in contraposition to the former case's solution).

The determination of such contribution was based according to the final outcome of three methodologies:

1. the listing price of the shares on the trading day preceding the Announcement Date;

2. the daily volume-weighted average price of the shares, based on the official price in certain time intervals: 1 month, 3 months, 6 months and 12 months prior to the Announcement Date;
3. analysis of the average premiums offered in previous market operations similar to this specific takeover bid.

As regard to the first method, Retelit S.p.A.'s shares were traded at Euro 1,3594 on the day prior the launch of the partial voluntary tender offer. Thus, the offering price set by the offeror guaranteed a premium of 17,70%.
Relating to the volume-weighted average price method, the analyzed shares registered a minimum price of Euro 1,140 and a maximum one of Euro 1,847 during the time interval chosen.
In respect to the last methodology used by Retelit Digital Service S.p.A., the offeror analyzed the average premiums of precedent similar transaction occurred in the Italian market. In fact, RDS considered the following tender offers: Riunione Adriatica di Sicurtà S.p.A. –which occurred in 2002–, Telecom Italia Media S.p.A. – which took place in 2005 –, Italmobiliare S.p.A. – occurred in 2017 – and SAES Getters S.p.A. – that took place in 2019.
As a result of the three methodologies, the offering price deemed fair by the offeror was of Euro 1,6 per share
It must be noticed that the three methodologies just analyzed have been considered as a whole, with none of them contributing predominantly. Moreover, Retelit Digital Service S.p.A. evaluated the target company without appointing independent experts. Indeed, it only relied on the support of Intermonte SIM S.p.A., which is an entity in charged to provide financial consulting. This element results an additional differentiation in respect to the former hostile case study. In fact, previously it was highlighted the decision of both Intesa San Paolo S.p.A and Ubi Banca S.p.A. to appoint financial advisors to support the two banks in the formulation of the right valuation estimation. Moreover, ISP also decided to use several methodologies in order to show to UBI's shareholders the extreme accuracy in the offering price determination. Finally, as regard to the distinction in premiums among the two different cases, it can be noticed that the premium choice was higher in the hostile case (as a reminder, firstly it was set at 27% and then increased to 42%) in comparison to the friendly acquisition (firstly the premium was fixed at 17,7% and then increased to 30%). This differentiation results a practical proof of the literature which believes, as previously anticipated, that hostile tender offers are more expensive than the friendly ones.

3.2.3 The behavior of Retelit SpA's top management

Focusing on the target top management's behavior, there are two main elements which highlighted the friendly nature of the partial voluntary tender offer: the issuer's release and the "silence" of the top management.

As regard to the responsive document published by the target's board of director – which results to be the main proof of the transaction's friendliness, it stated that the offering price suggested by the offeror was fair – on the basis of the valuation conducted with the independent expert. Hence, Retelit SpA's top management resulted in agreement with RDS and did not suggest any reason to avoid the subscription of the offer by its shareholders.[121]

Moreover, in contraposition to the hostile case, it was possible to notice the "silence" of the target's board since it did not publish any additional releases disclosing its disagreement over the offer or trying to invoke to the trigger of effectiveness conditions – by way of example, the MAC condition due to the pandemic outbreak.

All these elements permit to understand that the transaction was not unwanted and contested. In fact, the friendly features of the partial voluntary tender offer seem to be obvious considering that the transaction occured between companies operating in the same group and, as a consequence, are following a unique strategic goal. Whereas the tender offer between Intesa San Paolo S.p.A. and UBI Banca S.p.A. was a transaction between competitors where the offeror was one of the two strongest Italian banks, and the target company was hiking the industry by reaching the third place in the Italian banking rating.

3.2.4 The offering price increase

On the 18th of June 2020, Retelit Digital Service published a public release in which it disclosed its intention to increase the offering price from Euro 1,60 per share to Euro 1,78.

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[121] The issuer's public release stated the following:

"Con riferimento al Corrispettivo dell'Offerta, il consiglio di amministrazione di Retelit, all'unanimità dei consiglieri presenti alla riunione del 9 giugno 2020, sulla base delle proprie valutazioni, anche tenuto conto di quanto espresso dall'Esperto indipendente, ritiene che il medesimo sia congruo da un punto di vista finanziario.

Si precisa in ogni caso che la convenienza economica dell'adesione all'Offerta dovrà essere valutata dal singolo azionista all'atto dell'adesione, tenuto conto di tutto quanto sopra esposto, del Parere dell'Esperto Indipendente, dell'andamento del titolo Retelit e delle informazioni contenute nel Documento di Offerta"

This new compensation was also including the distribution of the 2019's dividends and it incorporated a premium of 30,94%.
The decision to increase the offering price in the middle of the acceptance period guaranteed the offeror to achieve an acceptance score of the 73,792% of the share capital's portion object of the partial voluntary tender offer. In fact, the RDS was able to purchase the 5,335% of Retelit's share voting capital which allowed the offeror to hold a stake equal to the 7,678% of the target firm (considering the sum with the participation already owned prior the tender offer's launch).

Conclusions

As a way to summarize, firms prefer to choose M&A transactions to grow in a faster way. These types of operations are generally composed by mergers, demergers and purchase of shares through a cash contribution.

Focusing on listed firms, their general way to engage in M&A transactions is through the launch of a tender offer bid. The latter consists of a public disclosure to purchase shares of a target company through either a cash contribution, share exchange or both solutions – in this respect, the tender offer would be an "*Offerta Pubblica di Acquisto*" in the first case, "*Offerta Pubblica di Scambio*" in the second case and "*Offerta Pubblica di Acquisto e Scambio*" in the last case.

A question that may occur relates the reasons why only listed firms must select this modality of transaction in order to engage in M&A operations. The response relies on the Legislator's aims to guarantee the protection of both corporate control market and, especially, minority investors. Instead, the market of non-listed companies does not require this protection since their share capitals are not traded and cannot be bought by investors in the open market.

As regard to the takeover bids, the two most famous typologies are the mandatory and voluntary tender offer. The mandatory case occurs whenever the offeror possesses a participation that exceed specific thresholds – in general the 30% but the percentage is reduced to 25% if no other shareholders hold a higher stake. In this case, the specific possessor is required by law to launch a totalitarian tender offer aimed at purchasing the entire share capital of the target firm and must respect specific conditions relating to the offering price as well as other features.

On the contrary, the voluntary tender offer is a public launch of an offer aimed at purchasing the entire share capital of a firm – or at least the 60% of it– as a result of the mere offeror's willingness. Since the voluntary case is not triggered by law but depends on the actor's intentions, the latter is subject to less tight conditions, among which the offering price settlement.

As regard to the voluntary tender offer, it is possible to make a further distinction depending on the target's top management behavior. In fact, the transaction is generally defined hostile if the target's top management opposes to the offer launched, whereas, it is considered friendly if it is supported by the latter. The disagreement of the target's board of directors is generally visible through the issuer's release – a document which must be published by the targeted company in respect to the disclosure duties – which states the valuation and considerations made by the top management about the offer. In concrete, by analyzing the Intesa San Paolo S.p.A. and UBI Banca S.p.A. OPAS, it was visible the disagreement of UBI's board over the offer since, as first sentence of the issuer's release, it stated that the offer was not agreed between the parties (the literal words are "*l'OPS non concordata con l'emittente*"). Moreover, it declared that the offer was not fair and representative of the true target's value.

In contraposition, in the friendly acquisition between Retelit Digital Service S.p.A. and Retelit S.p.A., the target's top management publicly supported the tender offer in the issuer's release.

Moreover, a hostile tender offer is characterized by the usage of defensive tactics by the target's board of directors. It is noticeable that in the Italian regulation, the Legislator has imposed to targeted firm the respect of the *passivity rule* – if the offeror fulfills all the disclosure duties – according to which the target's shareholders must priorly approve any defensive tactic proposed by its board of directors.

In respect to the defensive tactics, the Italian legislation differentiates them in reactive defensive tactics – which occur in case the target's board proposes "*intrusive transactions*" consequent the launch of the tender offer – and preventive defensive tactics – which in general are provisions inserted in the corporate bylaw aimed at obstacle any potential tender offer. Analyzing the case studies, however, it was possible to notice that the target firm of the hostile acquisition, UBI Banca S.p.A., did not use explicitly defensive tactics but tried to persuade its shareholders to not subscribe to the offer through the invocation of effectiveness conditions which were set by the offeror in the offer document. Moreover, it also provided a long list of reasoning to avoid shareholder from accepting the offer. In contraposition, Retelit S.p.A., the targeted firm of the friendly tender offer, did not oppose to the transaction and expressed the top management's approval in the issuer's release.

Finally, the literature highlighted a negative view of hostile takeovers because they are deemed to be aggressive and destroying value in respect to the friendly cases. However, even though hostile tender offers present theoretically more disadvantages than friendly ones, they may be preferable depending on the circumstances since they may deliver more value to shareholders in respect to friendly acquisitions. In fact, the hostile case generally generates value through the replacement of an underperforming top management – which it actually occurs as it was noticeable in the hostile case study since the CEO of UBI Banca S.p.A. resigned –, whereas, one of the friendly acquisitions' source of value creation relies on the achievement of synergies which consequently permit to exploit other growth opportunities–

in the friendly acquisition, the purchased shares would have allowed the offeror to close another acquisition which occurred contemporary the partial voluntary tender offer.

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SUMMARY

There are generally two ways in which a firm can grow its business: firstly, through the organic growth, which is pursued through the technological or product innovation but also thanks to the turnover of working force. Then, another option that can be chosen by a firm is the inorganic growth, which, on the contrary, gives many more possibilities to the company and allows the firm to achieve target performance in a faster way than the organic option. In this second situation, a firm can grow inorganically by deciding to expand in the market and obtaining control over other companies. Hence, through the M&A activities.

Since the inorganic growth allows companies to remain competitive in the market in a simpler way, it is generally preferred by companies.

As it is commonly known, M&A stands for "Mergers and Acquisition" and includes a broad list of operations which are part of the category of transactions known as "*extraordinary transactions*". However, it is important to make a distinction within this group of operations. In fact, it is possible to identify two macro-classes of transactions: the M&A transactions and the non-M&A transactions.

All those operations which (*i*) allow the bidder to acquire the corporate control of a target firm and (*ii*) need the involvement of both bidder and target firm's shareholders are defined as M&A transactions – also generally denominated as *take-over.* Whereas, those typologies of extraordinary transaction that do not present both conditions can be defined as non-M&A operations *strictu sensu*.

Generally, takeovers (also commonly denominated "acquisitions") are aimed at reaching synergies in order for the counterparties to increase their efficiency and competences.

Shifting towards an historical analysis, the acquisition activity has never remained constant over years. Rather, it is generally accepted that mergers happen in waves, since when a consolidation takes place in a sector, competitors cannot avoid following it.

It is possible to signal five distinct waves during the 20^{th} century:

1. 1^{st} merger wave (1897-1902) which was characterized by horizontal acquisitions and monopolies;
2. 2^{nd} merger wave (1924-1909) characterized vertical acquisitions, oligopolies, economies of scale;
3. 3^{rd} merger wave (1965-1968) which distinguishes itself due to conglomerate acquisitions, Antitrust policies, and internalization;
4. 4^{th} merger wave (1986-1989) characterized by Megamergers, hostile bids and LBOs;

5. 5th merger wave (end 20°-beginning 21°) which was characterized by strategic acquisitions, stack payments and globalization.

Focusing on nowadays, it is possible to notice that the global M&A activities have deeply grown in the last 10 years. What results surprising is the resilience of this industry in 2020, a year which was characterized by the outbreak of the COVID-19 pandemic.

Analyzing the extraordinary transactions *strictu sensu*, they can be defined as those operations that are not "*under common control*". Generally, transactions under common control do not generate a distinct change in the ownership scheme of the firm. Despite they also represent extraordinary transactions, the under common control operations are aimed to reorganize activities and business units in order to maximize their efficiencies. Thus, they do not imply a change in the corporate control of a firm. Differently, the extraordinary transactions *strictu sensu* are those which occur when an entity may decide to engage in this type of operation for the purpose to gain a *corporate control*.

According to the juridical doctrine and the Consob resolutions, an entity is holding a corporate control when it can exercise a dominant influence over a certain company. Moreover, the main element that characterize the exercise of a dominant influence is the capability to appoint the majority of the Board of Directors and to approve the financial statement. The Italian Civil Code differentiates the corporate control according three levels:

- *De iure control*: it occurs when a shareholder holds at least 50% of the voting rights in the ordinary shareholders' meeting;
- *De facto control*: it verifies in case a subject holds a percentage of the voting share capital lower than 50% (generally between 20% and 35%) but still enough to exercise in practice a relevant influence in the ordinary shareholders' meeting;
- *Contractual control:* this situation occurs in case a shareholder is able to exercise a dominant influence over the company thanks to a contractual relationship.

Following the *ratio* of the M&A transactions which, as previously stated, (*i*) allow the bidder to acquire the corporate control of a target firm and (*ii*) need the involvement of both bidder and target firm's shareholders, there are three extraordinary transactions which present these conditions: purchase of shares, merger and demerger.

As regard to the purchase of shares, the buyer interfaces directly with the shareholders who, afterwards, show eventually their interest to terminate their investment in the target firm and liquidate their participation in exchange of cash. On the buyer side, the Board of Directors must approve the M&A transaction. However, in case the buyer does not dispose of enough financing, its shareholders meeting may be called to approve a share capital increase. On the seller side, only shareholders are asked to take the decision since they must decide whether to liquidate their participation in the target company or continue to invest. Furthermore, it is important to notice that this operation can be described as *"paper vs cash"* since the buyer acquires shares of the target company (paper) in exchange of a cash payment.

Focusing on the merger, it can be defined as the transaction through which the equity of a target company merges into the incorporating company. Thus, there is an exchange of shares against shares and not a counterbalance in cash – as it was explained in the situation of the purchase of shares. Through the merger, the incorporating company takes on assets and liabilities of the company that is targeted in the transaction. However, the approval of both the extraordinary shareholder meetings of the firms involved is necessary: the target company must approve its extinction, whereas the incorporating company must vote for the share capital increase. Furthermore, the latter's extraordinary shareholder meeting must also decide the settlement of the exchange ratio between the shares of the merged company and the merging one.

There are many typologies of merger. A possible first distinction can be:

- "*proper merger*": this typology of transaction involves two or more companies which merge and transfer their assets and liabilities into a new resulting firm.
- "*incorporating merger*": it occurs thanks to the transfer of the assets and liabilities of the involved companies into one of the existing firms engaged in the transaction.

On a second level distinction, it is important to consider different special cases of mergers: in particular the homogeneous and heterogeneous mergers. Both situations occur in case the resulting company presents a different corporate nature than the firms involved. Thus, a transformation process is necessary. Another relevant typology of merger is the *leveraged buy-out* (also indicated as LBO). It can be defined as a merger that occurs after the conclusion of a precedent acquisition of the target's share capital mainly financed with debt. In fact, the portion of debt involved in the financing of the transaction is comprised between the 60% and the 70%. The final category of mergers is the "*reverse merger*" which can be defined as an "incorporating merger" that works in an opposite way. In fact, at the end of this transaction the controlling company will be incorporated in the controlled one and not vice versa. In order to achieve this result, both firms must be bound by a controlling relationship.

As regard to the last typology of M&A transaction, the demerger is a type of extraordinary transaction which works in the reverse sense than a merger. In fact, the aim of the demerger

is to divide the share capital of a target company, either partially or totally, and to distribute these portions to other existing or new companies. Thus, the demerger's outcome may lead either to the extinction of the target company or to the continuation of its life.
As the merger, there are many types of demergers. The first distinction depends on whether the beneficiary companies already exist or are newcos. The second distinction among the classes of demergers depends on the corporate nature that the companies engaged present. It is possible to identify four potential scenarios of demergers: *homogeneous split-off*, *split-off with implied progressive transformation*, *split-off with implied regressive transformation*, *split-off with implied heterogeneous transformation*. An ulterior discrimination among the class of demergers depends on the choice of the demerged company to pursuit a partial or total split-off. Finally, one last possible distinction among demergers depends on the choice relative the shares' allocation among the demerged shareholders. Indeed, it is possible to identify three situations: proportional, non-proportional and asymmetrical distribution.
Before continuing the analysis of the takeover, it is important to explain why a firm may decide to engage in an M&A activity– so, to opt for the inorganic growth solution. Actually, there are many drivers which can be categorized according to the extent of their domain: micro-level drivers, industry level drivers and macro-level drivers.
As regard to the micro-level drivers, they result firm specific and include a broad category of incentives that induce a firm to pursuit M&A. Firstly, the *operational strength* which depends on the achievement of synergies and economies of scale. The second group of micro-level drivers relates *growth and expansion*. A third consideration relates the *access to new assets*. The fourth group of micro-level drivers relates the *competitive strength*. An ulterior class of drivers to consider relates *financial objectives*. The final group of micro-level drivers depends on *management issues*.
As regard to the industry level's drivers, M&A activity can also be driven by shocks that occur in the industry. Shocks can be defined as those factors whose presence alters the structure in the industry. Relating to the first industry drivers, deregulation results a key element that incentivizes acquisitions. Another driver which usually causes shock in industries is technological advances. However, this element is not only influencing the industry but it may also impact on a more general level. Moreover, acquisitions may be driven by changes in industry's schemes due to vertical or horizontal integrations which trigger an increase in the competitiveness among buyers. Finally, since sectors that are growing in low terms may prevent a firm to achieve shareholder's appetite, a buyer company

may engage in M&A activities in order to exit from that specific industry and achieve faster levels of growth.

Shifting towards macro level drivers, they must be divided into quantitative drivers – which can be measured in a well-defined manner– and qualitative drivers. As regard to the first category, the stock market results to be an M&A driver. In fact, when the stock market flourishes, there is an increase in the acquisition trends. Moreover, this condition of causality starts with the stock market which then influences the acquisition activities, not vice versa. Another quantitative driver relates the *credit market conditions*. Furthermore, M&A activity may occur on a favorable *economic environment*. Relating to additional macro level drivers, firstly the *business confidence* must be analyze and *exchange rates too:* as long as the bidder currency is stronger than the target one, the transaction results more appealing.

On the other hand, qualitative macro level drivers relates to the government decisions, such antitrust policies, privatization or free trade. Moreover, it is possible to notice that also the technological developments have a positive influence over the M&A trends since they facilitate the process of controlling an international business.

So far it was possible to build a general understanding of the proper M&A transactions and explain why firms may decide to engage in the inorganic growth's activities. In continuity with the acquisitions' landscape, it is also worth to understand the different modalities which shape the process of take-overs. Indeed, the process may function as an auction –where the target company wishes to find the perfect bidder thanks to the selection of many counter parties– or as a direct bilateral negotiation. However, the choice between these two solutions depends on the firm specific characteristics and to the necessities requested.

Both process's solutions present advantages and disadvantages and, depending on the firms' needs, one may suit more than the other. A successful auction needs higher preparation before the starting of the transaction phases such as marketing, resources and organization. Thus, it is more time consuming than a single party negotiation. Moreover, it is a type of process generally chosen by the target firm which takes the initiative because wishes to sell its business. However, due to the involvement of several bidders, it may result in the spreading of confidential information. For this reason, before any negotiation processes the bidder is asked to sign a non-disclosure agreement in order to avoid the incurrence in this risk. On the other side, relating to a negotiated transaction, it is generally initiated by a specific buyer and needs, firstly, less pre-negotiation preparation and it also reduces the potential risk of sharing confidential information to different counterparties.

Going back to the M&A transactions' analysis, listed companies usually engage in the "*Public Tender Offer*". It consists of a public offer which is launched by an acquirer and it is aimed at buying the listed securities of a target company from several target's shareholders (minorities) at a specific price and equal conditions.

The Public Tender Offer can be differentiated according to the M&A transaction underlining it: OPA ("*Offerta Pubblica di Acquisto*"), which occurs when the purchase of shares of the target company is paid exclusively in cash, OPS ("Offerta Pubblica di Scambio"), which occurs when the public tender offer is aimed at merging the two firms, since the bidder fixes an exchange ratio between its shares and those of the target company as payment modality, OPAS ("*Offerta Pubblica di Acquisto e Scambio*"), which occurs in case the counterbalance for the acquisition consists of a combination between cash payment and exchange of shares. These kinds of Public Tender Offers are heavily legislated by TUF ("*Testo Unico dell'Intermediazione Finanziaria*") introduced by the Legislative Decree 24th February 1998, n. 58. Since this type of transaction is located in the corporate control market of listed companies, the participants must follow specific rules which result tighter than those applicable for the operators in the private market. One of the obligations that listed firms are subject to is the disclosure duty. It results relevant to notice that the acquirer's directors cannot launch the Public Tender Offer until the preparation of the offer document. Moreover, in case there is the disclosure of information or tips prior the preventive communication to Consob, the bidder cannot anymore invoke the so called "*passivity rule*". The importance of the disclosure duties is aimed at protecting investors and at guaranteeing the efficiency and transparence of both the capital market and the corporate control. On the other hand, also the targeted firm must respect specific communication requirements. In fact, according to article 103 of TUF, the company that receives the offer must publish an issuer's public release which specifies the target's top management opinion over the Public Tender Offer. In this respect, this document provides an indication of whether the takeover bid is hostile or friendly.

There are many types of Public Tender Offer. First of all, the mandatory tender offer which is disciplined by article 106. Its rules are based on two fundamentals: the protection of the "*corporate control market*" and the "*parity treatment*" within shareholders. In fact, the mandatory tender offer regulation is aimed at generating an equilibrium in the corporate control market and reinforcing the position of the minority shareholders in respect to the controlling one, by protecting them through the possibility of a "*fair exit".*

But when does the mandatory tender offer is triggered? It occurs whenever anybody – either an entity, a physical person or participants acting in concert – holds a stake in a firm higher than the 30% of the voting share capital, as a result of shares acquisitions. The threshold is reduced to the 25% of the share voting capital in case no other shareholders own a stake greater than this latter percentage. Other than the threshold's overcoming, the other feature which triggers the mandatory takeover bid is the actual acquisitions of share.

Shifting towards the object of the mandatory takeover bid, the TUF's reform of 2007 has deeply ampliated the typology of securities object of the tender offer since all the typologies of securities owned by the targeted firm can be chosen to be purchased. Whereas, as regard to the price settlement, the TUF's reform of 2007 introduced the "*best price rule*" according to which the bidder must buy the listed securities at a price higher than the price paid by the offeror – or by entities operating in concert with him – in the 12 months prior the launch of the mandatory takeover bid. However, in case the offeror did not purchase shares in the year prior the launch of the takeover-bid, the *best price rule* is substituted by the settlement of the offering price calculated as the weighted average of the market prices registered in the last 12 months or according to a shorter period. Furthermore, by analyzing the offering price settlement, there are situations in which it may be decreased or increased compared to the rules above described.

After having described the strict rules that the offeror of a mandatory tender offer must follow to set the price, one question that may occur relates to the payment modalities. In this respect, as it was previously stated, the TUF legislation results applicable for OPA, OPS and OPAS. Consequently, the offeror may pay according to three modalities: (*i*) total cash payment (OPA), (*ii*) total securities payment (OPS), (*iii*) a mix of cash and securities payment (OPAS). In all these cases, the purchase must be priorly fully financed.

However, it is important to underline the bidder's duties in case he is intended to pay using partially or totally securities. In more details, if the modality of payment consists of non-listed securities, according to the TUF legislation the buyer must also offer a cash payment as an alternative. The same occurs in case the offeror has purchased at least 5% of the target's voting share capital in exchange of only cash during the 12 months prior the launch of the mandatory tender offer. These limitations are aimed at both protecting and guaranteeing the equal treatment of shareholders

Shifting towards the triggering, it is possible to identify one more possible scenario which determines the offeror's obligation to launch of the mandatory takeover bid and it is connected to the *consolidation process*. Finally, it is notable that the offer is not subject to

precedent or subsequent conditions whereas this feature changes the voluntary tender offer's landscape.
As regard to the "*voluntary tender offer*", which occurs when the offeror himself decides to launch a public offer to a target firm according to its own willingness, it presents less tighter provisions.
Getting into more detail, the voluntary takeover bid targets listed securities – in continuity with the mandatory case – and must be aimed to either buy the total voting share capital (100%) or to at least the 60% in order to avoid the incurrence in a subsequent mandatory takeover bid. Another element which differentiates the voluntary takeover bid from the mandatory one is the price settlement. Indeed, in the voluntary landscape the offeror can freely set the price without restrictions and it can be increased until the last day prior the closing of the offering period. However, the *best price rule* occurs whenever the listed securities object of the public tender offer are purchased at a price higher than the offering one during the tender offer period. Counter to the mandatory tender offer, the voluntary takeover bid admits the introduction of conditions in the offer document which must not be dependent to the offeror's willingness.
Finally, only in case of voluntary tender offers, during the fulfillment of the tender offer's disclosure duties the offeror is protected by the "*passivity rule*" which prevents the target firm's directors from implementing "defensive initiatives" to avoid external bids. As a consequence, the incurrence of defensive tactics characterizes a hostile takeover which will be further analyzed in this chapter.
Shifting towards the partial preventive tender offer, it is legislated by article 107 of TUF and can be defined as a takeover bid which is aimed at purchasing a portion of the target's voting share capital which allows the offeror to obtain the corporate control without the obligation to launch a mandatory tender offer. In fact, the partial preventive bid must be aimed at purchasing at least the 60% of listed securities for each category. This threshold represents the minimum limit which nullifies the partial preventive tender offer if not respected. Regarding the modality of payment, this latter typology of takeover bid has several differences from the former two offers. In fact, the offeror can freely decide whether to pay in cash or securities – in continuity with the first two cases – but if he decides to pay in securities, the buyer is not obliged to exclusively provide listed securities. In fact, in case the offeror pays through unlisted financial instruments, he is not required to also offer a cash alternative. Through the analysis of this typology of tender offer, it is possible to understand

the willingness of the Legislator to provide an alternative modality than the mandatory takeover bid which also permits to acquire the corporate control of firms.

However, the partial preventive tender it is subject to different obligations which, if not respected, trigger the launch of the mandatory takeover bid. Indeed, it is the Consob's duty to verify the existence of these assumptions

The article 108 of TUF, instead, legislates the duties of a majority shareholder when he reaches a participation of at least 90% of the voting share capital of a firm. The Legislator, indeed, considers distinctly two potential situations – the squeeze out and the sell out – which present differences in their rational. Relating to the squeeze out, whenever a shareholder holds at least 95% of the firm's voting rights, according to article 108, paragraph 1, of TUF, he is obliged to purchase the remaining participations from the minorities. After having fulfilled the squeeze out procedure, the offeror may decide either to restore the free float or to exercise the right provided for in article 111 of TUF to purchase any remaining participations from the minorities. Generally, the offeror will decide to exercise the right *ex* article 111 of TUF when he intends to proceed with the delisting of the target firm. Since the obtainment of such a stake is achieved thought a tender offer, either voluntary or mandatory, the offeror must have specified his intentions in the tender offer prospectus. Based on the above, the ratio of this procedure is indented to eliminate the "*pressure to tender*" to which minority shareholders are exposed. Regarding the sell out, according to article 108, paragraph 2, of the TUF, an offeror – as soon as he holds a stake comprised between 90% and 95% – is obliged to purchase the participations of those minority shareholders who want to exit from the firm, unless he decides to restore the free float within 90 days from the exercise of the sell out. Also, in this case the bidder must have indicated his intentions in the tender offer prospectus. The *ratio* of this second procedure is aimed at protecting minorities from a potential illiquidity of the firm's securities which might occur due to the offeror almost-total purchase of the target's share capital.

Shifting towards the laws applicable to mergers, since it may occur as a consequence of the launch of a totalitarian takeover bid, after which the majority shareholder holds a controlling stake lower than 90/95% of the voting share capital, the Extraordinary Shareholders' Meeting of both companies are called to vote and the companies can proceed only if the approvals reach specific thresholds. Relating to the merger approval, the Extraordinary Shareholders' Meeting results valid when there is the presence of the 50% + 1 of the voting shareholders in the first call, 1/3 of them in the second one and 1/5 in the third call.

In order to execute the transaction, however, the proposal must be approved by the 66,7% of the present voting shareholders and there must not be any opposition by the creditors since their right is always protected by the Legislation.
So far, the analysis was focused on the discipline of the different typologies of tender offers. Now, the view will shift towards the analysis of the possible natures of a voluntary takeover bid. Contrary to the mandatory takeover bid, voluntary takeovers can be differentiated according to two macro categories: hostile and friendly tender offers.
During a purchase of shares the buyer launches an offer directly to the target firm's shareholders since they must decide whether to disinvest from the company and sell their shares or to refuse the proposal. Hence, the target's Board of Directors is not asked to approve the transaction, but it is generally engaged in order to facilitate the success of the offer since directors may incentivize the firm's shareholders to exit from the firm.
However, this situation does not always occur. In fact, a takeover is defined hostile when the potential buyer launches a public tender offer directly to the target's shareholders by bypassing its top management. Hence, the proposal results to come "*out of the blue*". Moreover, the target's Board of Directors may oppose the offer and try to persuade the shareholders to not sell their shares. Thus, if the target firm's top management opposes to the takeover, the transaction is said to be hostile, otherwise, if the Board of Directors supports it, it is defined friendly. A question that may occur relates which of the two options is preferable. It is generally accepted that hostile takeovers are pursued in order to replace the target firm's top management which is deemed to be underperforming and destroying value for the company and its shareholders (whereas, in case of friendly takeovers, the buyer is normally driven by the goal to achieve the synergies thanks to the combination of the two entities). However, it is important to underline that the hostile takeover may be considered more expensive than the friendly one since the bidder adds a consistent premium over the market price of the target's securities in order to increase the possibility of shareholders to accept the proposal and to reduce the success of potential counter bids. Moreover, during a hostile tender offer, since the target's top management results to oppose the bid, the buyer has low possibilities to conduct a deep and complete due diligence and this situation increases the possibility for the offeror to incur in potential problems in the future, due to the lack of information prior the investment. As a consequence, this may lead to potential reputational damages for the hostile bidder. Relating to a friendly takeover, even though the bidder does not incur in these potentialities which increase the overall costs sustained by the acquirer, it can also generate added indirect costs due to the retention of an inefficient top

management which is not changed since the public tender offer is friendly and, thus, conducted thanks to the target's top management support.
Therefore, even though hostile tender offers present theoretically more disadvantages than friendly ones, they may be preferable depending on the circumstances since they may deliver more value to shareholders in respect to friendly acquisitions.
An ulterior element that results interesting to be analyzed relates to the type of company that is generally targeted by a hostile takeover and how it can be identified. As explained above, there is the general idea that a typical firm which attracts a potential hostile offeror is a company poorly managed. However, a question that may occur regards the capability to identify a poorly managed firm. Firstly, one view sees the identification of poorly managed firms based on the price-earning ratio. This indicator is generally used to compare firms and evaluate their performance because it is a "pure" ratio that is less affected by the firm specific characteristic. Thus, the higher the price-earning ratio, the better the performance of the company and vice versa. However, this indicator may not be the most suitable to assess the top management's performance. Focusing to other possible tools used to identify a poorly managed firm, Jensen had developed a theory called the "*free cash flow hypothesis*". In particular, the author states that the free cash flows are the excess cash flows of those used to finance projects which present a positive Net Present Value. Based on this definition, a company is deemed to be underperforming if the top management uses the cash flow in excess to develop low-value initiatives rather than paying out its shareholders. This element will be reflected in the company's stocks which will register a decrease.
Shifting towards the targeted firm's behavior during a hostile tender offer, the article 104 of TUF legislates the defensive tactics that can be used by the firm in such a contest.
First of all, the Italian Legislator provides for a limitation of the top management activities during an unwanted public offer: the "*passivity rule*". In particular, the passivity rule consists of a ban to the target's Board of Directors to use defensive tactics after the launch of a public tender offer without the prior authorization of its shareholders meeting. Thus, the rational of this provision is aimed at avoiding the possible conflict of interest which may arise between the target's Board of Directors and shareholders. It results applicable to companies that have a legal seat in Italy and are listed either in Italy or in other European Member States. Moreover, the defensive tactics are available only in case the object of the hostile tender offer is to purchase securities which provide the voting right to the buyer.
A further question that may occur relates to the duration of the passivity rule. In this respect, the Legislator has introduced as time extension the period that starts from the communication

of the tender offer until its closing or its premature termination. The settlement of this tenure is aimed at protecting two interests: firstly, to avoid the target's management from being bounded to the tender offer pending, then, to guarantee a protection of the offeror from potential defensive tactics. Moreover, it must be noticed that the call of the target's shareholders' meeting during the running of a tender offer results slightly different than during the normal course of events. In fact, the shareholders' meeting is convened in a reduced timeframe since the notice of call must be published 15 days prior the occurrence of the shareholders' meetings depending on the nature of the defensive tactics' proposal

Relating to the defensive tools, the opposing activities may be divided in two groups: the reactive and preventive defensive tactics. Focusing on the first category, the reactive defensive tactics can be defined as those initiatives proposed by the target's top management – and, as previously stated, subject to the shareholders' meeting – once the bidder has publicly launched the tender offer. Hence, they occur post the beginning of the hostile takeover. They can be differentiated depending on the scope of the tactics. The first group of reactive defensive tactics are aimed to increase the offering price. In this respect, the target's Board of Directors can firstly propose *a share capital increase*. In case the extraordinary shareholders' meeting approves this transaction, their participation would be diluted and would require the bidder to modify its offer by increasing the number of shares to be purchased in order to maintain the same participation post acquisition. Linked to this first option, the Italian regulation also provides the firm's Board of Directors with the possibility to approve the share capital increase through the "*delegated share capital*. Shifting towards other reactive defensive tactics, the target firm can also *purchase its own shares* resulting in a reduction of the number of shares available in the market Finally, the shareholders can also approve the conversion of shares from non-granting voting rights into stocks which allow the owners to exercise the voting rights in the shareholders' meeting.

Relating to the second group of the reactive defensive tactics, which is aimed at changing the firm characteristics after the launch of a tender offer, first of all, the firm can be subject to *mergers, demergers or transformations* which must be concluded within the time horizon of the tender offer. Moreover, the top management can also increase the level of leverage of the target firm until levels which result to be inadequate for the bidder's capacity. In addition, the firm can either purchase undesirable assets or sell strategic ones in order to incentivize the offeror to close prematurely the tender offer. The sale of strategic assets is known as the *sale of "crown jewels"* tactic. Finally, the firm can also expand itself through acquisitions after which it may determine a concentration in the industry and trigger the antitrust authority's incompatibility.

As regard to the last group of reactive defensive tactics, the firm can follow the "*Pac-Man strategy*" which results to be a contemporary launch of public tender offer by the targeted firm aimed at acquiring either the offeror or its controlled firms. As a consequence, this defensive tactic results to be a disturbing element to the bidder.

It is possible to notice that the so called "*white knight*", a third company which is engaged by the target firm's Board of Directors in order to be saved from the "*black knight*", the hostile offeror, is not included among the reactive defensive tactics. Inf fact, the Italian Legislator clearly stated in the article 104 of TUF that this defensive tool results to be an exemption from the passivity rule application since it triggers a mechanism of competitivity which maximize the exit value of minority shareholders. Thus, it does not generate a potential conflict of interest that may damage investors.

Focusing on the preventive defensive tools, what distinguishes the preemptive defensive tactics from the reactive ones is the usage of these devices prior the launch of a tender offer and, as well, may contrast the fulfillment any transaction.

In order to trigger the passivity rule, these defensive tactics must present two requirements:

1. the decision must be at least partially implemented; and
2. they must not fall under the normal course of the firm's business.

Based on the above, it is possible to identify different types of preemptive defensive tactics. First of all, there are two tools which derive from the American landscape and results to be suitable also for the Italian environment: the "*shark repellents*" and the "*golden parachutes*".

As regard to the "*shark repellents*", they are considered as amendments of the company by-laws which are aimed either at introducing higher threshold levels for the approval of specific categories of transactions – and are known as the "*super-majority provision*" – either at protecting the top management from its turnover by the introduction of limitations in the management's removal or by introducing three different categories of directors, each of them elected every year for a period of three years (this tactic is known as "*staggered board*").

Relating to the "*golden parachutes*", they are contractual clauses which regulate the relationship between the company and its management and Board of Directors. In particular, these clauses guarantee the payment of extremely high liquidations to managers and directors in case they are revoked (for example, due to the introduction of a new controlling shareholder).

However, it can be noted that the Italian legislation does not accept the introduction of the golden parachutes in the Board of Directors' contract since it may create a conflict of interests between them and the shareholders.
Shifting towards other preemptive defensive tactics which are not imported from the American landscape, the so called "*endorsement clauses*" state that the transfer of shares must be subject to the approval of a specific corporate body. However, this defensive tactic is prohibited in the listed market since it is applicable only for non-listed firms. Moreover, it is possible to find clauses which *limit the voting right.* These provisions allow the controlling shareholders to maintain the control over the firm and its management cannot be changed due to the introduction of a new controlling participant. Again, as the "*endorsement clauses*", these clauses may be applied only for non-listed firms. Focusing on defensive tactics which are also applicable for listed companies, the so called "*shareholders agreement*" can be used to prevent tender offers since shareholders may agree to not sell their stakes for a certain period and, consequently, not being object of the purchase intentions of buyers. In addition, firms can issue shares which *do not grant the voting right.* As regard to the so called "*Chinese boxes*", firms can protect themselves through the creation of pyramidal groups. As a result, the creation of this type of long controlling chain makes more difficult for an external offeror to obtain a control power over one of the listed subsidiaries, whereas the controlling company is not subject of tender offers because it is not listed. Another preemptive tactic that can be used is the approval of the *share capital increase with the exclusion of the option right*, which allows the entrance of the "*white knight*" in the target firm's control composition and renders more difficult future tender offers by hostile buyers. Also *the delegated share capital increase* results to be a defensive tool which may be applied prior the launch of a takeover and may reduce the possibility of potential offers. Finally, the "*distribution of shares to employees*" can be categorized as a preemptive tactic.
Finally, in order two conclude the analysis, two case studies have been reported in order to demonstrate practically the differences between hostile and friendly takeovers.
The hostile takeover case is represented by the OPAS launched by Intesa SanPaolo S.p.A. over UBI Banca. This voluntary tender offer occurred in 2020 and has quite monopolized the news from its beginning until its completion because it was aimed at eliminating an "*aggregating actor*", UBI Banca, in the Italian banking sector. Moreover, the OPAS between Intesa San Paolo S.p.A. and UBI Banca S.p.A. occurred in a period which has deeply shocked the course of the normal life: the COVID-19 pandemic.

As regard to the hostility features of this transaction, there are some elements that need to be noticed and will be later analyzed. Firstly, the initial opposition of UBI's top management which invoked to the MAC condition's trigger – it is one of the clauses that renders invalid the tender offer. Then, the issuer's public release was published and publicly communicated the disagreement of UBI's Board of Directors over the transaction. In addition, the indirect disagreement of the target's top management over the AGCM approval must be noticed.
As a consequence, Intesa San Paolo increased the offering price in the middle of the acceptance period in order to facilitate the consensus of UBI's shareholders since the percentage of subscription was very low until that point. Finally, it must be noticed the resign of UBI's CEO as a result of the successful offer closing.
Whereas, the friendly takeover is represented by the OPA launched by Retelit Ditigal Service over Retelit S.p.A. Analyzing the friendly features of this tender offer, the transaction did not see any opposition by the target's top management which, on the contrary, expressed its support over the acquisition in the issuer's release. Moreover, the target's board did not try to invoke to the invalidity of the offer due to the trigger of effectiveness conditions – as it was noticeable in the former case study. In fact, the target board of directors' valuation of the offer resulted positive and supporting its shareholders over the subscription.