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TAKEOVER AND SHAREHOLDERS' AGREEMENTS

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Introduction

Having already dealt with the subject of “Takeover And Shareholders' Agreements” during my course of study and having felt a deep interest in it, I decided to agree with the Chair, held by Professor Sacco Ginevri, to develop my thesis on this subject, analysing the Italian context in the light of comparative ideas.

Takeover bids represent one of the most important elements of corporate and commercial law, since their multidisciplinary nature is found in many areas of both law and finance.

Therefore, I approached this subject not only with regard to the economic aspects but also, and above all, to the legal and economic aspects, as the subject itself requires. During the course Cases in Business Law, I had already come into contact with extremely topical issues that offered me a new and different view of the European economic and legal landscape.

Of course, when dealing with law, one can hardly indulge in fanciful theses, in fact, in my work I have tried to comment and evaluate some of the most important events that have taken place in the subject matter.

I specifically mentioned the Fondiaria-Sai case as well as several Consob communications.

My work has aimed to show that the complex system of takeover bids is certainly inherent in what is called the market for control and, therefore, I have developed a synthesis regarding the absolute necessity of the maintenance of the relevant rule system.

In the course of this research, I was able to make use of numerous sources, including documents drafted by international law firms, academic textbooks on the subject and, of course, for a retrospective of the concrete case, Consob's notebooks and communications. All this is accompanied by the Civil Code, the Consolidated Financial Act, the Consolidated Banking Act and the Regulation of Issuers.

In addition, the use of numerous economic articles and newspapers of the time for a better treatment of specific cases.

Thus, I have tried to show how complex but necessary legislation is in a capitalist system such as the Western one, and, by referring to the Chinese case, how even a socialist economy has made use of these typical tools of law and finance.

CHAPTER 1 - THE OPA

Notions of takeover bids

A *takeover bid is what is* referred to in the Anglo-Saxon context as a *takeover bid*.

In the Italian specification, OPA literally means Public Purchase Offer. An offer therefore, with the implicit elements: an offeror, the recipients of the offer and the object of the offer.

If we want to outline the main actors mentioned above, we could configure the offeror/bidder as an entity (a normal investor, a speculator, an unscrupulous risk-taker...). The receiver of the offer: the shareholders of a company and, of course, depending on the case, the board of directors of the company.

Finally, the object of the offer: corporate control, the latter obtainable by offering cash or shares, when permitted also in the terms, in exchange for shares with voting rights in the company's shareholders' meeting.

The reasons that may have led the legislator, first at European level and then at national level, to broaden the regulatory framework on tendering may be varied. Just as there may be various *underlying ideological* orientations.

The need was therefore felt to shed light on a market, that of control, which in Europe could sometimes appear uncertain and densely bureaucratic; on the other hand, the rules on public offers and takeovers have been consolidated for decades in the US and UK markets.

Certainly, the logic of a *takeover bid* is subject to the desire for control, in fact the bid is almost always triggered when there is an inkling that a company is starting not to perform as it should. There are also the borderline cases, those where the bid is purely speculative, regardless of how the company is run, whether it is thriving or not. Implicit in this is how a generic company which, for example, yields $40 a share, could, if conducted differently, yield $60 or even just a few dollars more; hence the investor's idea of buying the shares, appointing to the top management (the board) elements that suit him and initiating a different corporate direction.

One might think at this point that the rationale for a takeover bid is to discipline the market, to instil in board members the seed of doubt, i.e. to tend to think that if one does not maximise shareholder value, if one fails for whatever reason to satisfy the wishes of shareholders, if one does not run the company in the best possible way, it will be taken out by a potential bidder with a more effective strategic vision.

Of course, this vision, which might be acceptable, risks being sidelined by cautious reasoning aimed at reconfirming the status quo, focusing only on the short term, renouncing a wide-ranging perspective in order to reassure shareholders.

It should be pointed out that the corporate long run is different from the macroeconomic long run. It is no coincidence that Keynes, in his famous maxim, implied that at the state level short run measures, such as employment and wages, may perhaps prove more important than long run measures.

The long term of the company, on the other hand, concerns investments, compensation plans for board members and middle management, expansion plans, marketing actions, i.e. all those specifications that are essential for a company to survive further decades in an optimal way.

It is not obvious, therefore, that the threat of a hostile takeover is an effective deterrent to realigning the interests of management with those of shareholders.

The Takeover Bid Regulations, which came into force with a legislative decree on 19/02/2007, thus implementing the EU directive of 21/4/2004,, are part of the complex corporate dynamics that have developed over the years, the "control market". Its logic has evolved to the point of pushing the legislator to find solutions to adapt the Italian regulatory framework to that of other systems and above all to ensure the protection of shareholders in the event of a "change of control".

Change of control occurs as a result of a change in the corporate governance structure. As a result, a shareholder who has acquired or purchased specific shares in a particular company may, following a change in control of that company, no longer have any intention or interest in continuing to hold those shares in that company.

The motivations for holding shares in a given company are closely linked to the trust placed in the company's management and therefore in its corporate vision. It is clear that a new management could lead to a loss of the motivations that led shareholders to bet on that particular company, which is another reason for the takeover bid: to allow a way out even in the event of a radical change in management, company vision or lack of confidence following the arrival of the new organisational chart.

In this respect, it is necessary to highlight the regulation of takeover bids, which allows shareholders, sometimes especially minority shareholders, a way out that is not detrimental to them.

Certainly, a takeover bid is a very powerful tool to gain control of the company, but there are still some significant structural difficulties, one of which could be the *non-acceptance of* minority shareholders to the offer, or the bidder could find himself competing with other potential bidders. Not only that, but the bidder itself may find itself fighting against a hostile board. The subject matter is therefore dynamic and far from stale.

The European directive provides us with a precise framework: Article 1 immediately outlines the areas of application, laying down measures for the coordination of regulations, laws and administrative provisions.

Article 2 defines a *"takeover bid" or "bid" as a public offer (excluding a bid by the company itself for its own securities) addressed to the holders of the securities of a company for the purpose of acquiring all or some of those securities, irrespective of whether the bid is mandatory or voluntary, provided that it follows or is instrumental to the acquisition of control under national law of the offeree company. It* also describes in detail the parties involved, such as the offeror, the persons acting in concert, the securities and above all the parties to the bid.

Recognising and distinguishing the various forms of control within a company

Corporate control is explicitly not limited to a mere numerical consideration, it follows that in order to speak of control, it is necessary to verify an essential requirement: the ability to influence shareholders' meeting decisions and, above all, the ability to appoint new board members.

In this perspective, the TUF provides us with a general and applicative framework: in Article 93TUF[1], the legislator defines the contexts and structural characteristics, which allow us to configure corporate control in the Italian panorama.

In fact, Article 93tuf[2] states in point (a): *Italian or foreign undertakings over which a person has the right, by virtue of a contract or a clause in the articles of association, to exercise a dominant influence, where the applicable law permits such contracts or clauses.*

It continues with point (b) *Enterprises, whether Italian or foreign, over which a shareholder, on the basis of agreements with other shareholders, alone has sufficient votes to exercise a dominant influence in the ordinary shareholders' meeting.*

Article 93tuf in point (a) emphasises the term "dominant influence", i.e. the ability to influence the dynamics and direction of the company, an ability which may be revealed according to Article 2359 in three main terms, *de jure, de facto and by external contractual dynamics*[3]

A note should be made at this point in order to distinguish at this early stage the differences between the different types of corporate control.

Article 106TUF[4], speaking of the total takeover bid, clearly states that whoever exceeds the threshold of thirty per cent is obliged by Consob to launch a takeover bid for the total number of securities.

De jure control occurs when a shareholder at the ordinary shareholders' meeting holds a majority of the shares with voting rights.

However, the dynamics are not strictly linear: there is an interesting case, namely the form of *de facto* control, which occurs when, although not holding a majority of the shares with voting rights, a person is nevertheless able to control the progress of the meeting and to heavily influence its management. This occurs because even though the number of shares is below the minimum threshold, these shares, compared to the number of shares held by the other shareholders, are still able to be predominant.

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1 Please read Article 93tuf

2 Please read Article 93tuf

[3] Andrea Sacco Ginevri "Commentaries and Cases on Italian Business Law" Wolters Kluwer, 2020, p.120

[4] Article 106TUF, Paragraph 1, "*Whoever, as a result of purchases, comes to hold a shareholding exceeding the threshold of thirty per cent promotes a public takeover bid addressed to all holders of securities on all the securities admitted to trading on a regulated market in their possession.*

It follows that the configuration of the control must be analysed taking into account the different specifications of the case, and one cannot abandon oneself to a definitive view.

Of paramount importance is the *corporate governance*[5] *report*, which, together with the financial statements, is essential to provide shareholders and potential investors with a "snapshot" of the company's ownership structure.

The corporate governance report is rooted in Article 123bis Tuf, from which we can draw a clear vision of the legislator on the subject, i.e. the proof that the orientation of the discipline is strongly predisposed to the protection of the good function of the market and the shareholders. In fact, in paragraph a) we can clearly read: *the structure of the share capital, including securities that are not traded on a regulated market of an EU State, with an indication of the various categories of shares and, for each category of shares, the related rights and obligations, as well as the percentage of share capital they represent*[6]*;*

Paragraph (a) emphasises the importance of the structure of the share capital and of the securities traded in Community countries and the difference in the type of shares. The need for such distinctions is precisely prompted by the need to accommodate the potential investor in a situation where the shareholder nature of the company is easy to interpret.

In addition to clarifying the *field of* play, the article also describes the scope of applicability in the presence of restrictions and limitations on the transfer of securities; paragraph (b) reads: *any restriction on the transfer of securities or the need to obtain the approval of the company or other holders of securities*[7]*;*

Further on, it may be noted that the legislator also refers to Article 122, i.e. the presence or absence of shareholders' agreements.

A reading of the article shows that the intention of its very nature is to shed light on the ownership structure, with an emphasis on the type of shareholding, with or without voting rights.

Voting shares are precisely the ones that allow one to impose one's will in the shareholders' meeting: it follows that any corporate disclosure report must account for them in the most absolute manner.

The main purpose of the rules on public[8] *offers is the need for transparency and the protection of the information of the recipients of the offer*[9]*, and* it can be deduced, also in the light of Cera's summary, that the key purpose of the rules is the protection of savers, minority shareholders and the safeguarding of the market and its dynamics. In fact, Cera goes on to say that *a further aim is the protection of minority shareholders and the correct and efficient functioning of the market. (M..Cera)*

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[5] Gaetano Presti Matteo Rescigno "Corso di Diritto Commerciale, Volume 2, Società" Zanichelli Editore 2019 p 617
[6] Article 123bis TUF, paragraph 1 point a
[7] Article 123bis TUF, paragraph 1 point b
[8] Article 93-bis et seq.TUF)
[9] Quote taken from M.Cera, Le società con azioni quotate nei mercati, second edition, Zanichelli editore, Bologna, 2018, p 190

Types of takeover bids

A takeover bid consists of a number of elements which are essential to its nature.

One of these elements is the *prospectus, an* information document subject to approval by CONSOB: the latter is required to verify that the elements of this prospectus are clear, intelligible and easy to interpret, even for non-experts.

Article 98-ter of the TUF provides us with the key information for investors, but above all reiterates the central role of CONSOB in the context of offers, *the offer to the public of units or shares of Italian open-ended UCITS, EU and non-EU FIAs is preceded by a communication to CONSOB*[10]

The nature of the prospectus is inherent in the need for transparency and clarity, and it is Article 94-bis of the Consolidated Law on Finance itself which reiterates the need for *comprehensibility,* stating that *the prospectus shall contain, in an easily analysable and comprehensible form, all information which, depending on the characteristics of the issuer and the financial products offered, is relevant to an investor so that he or she may make an informed assessment of the assets and liabilities, profits and losses, financial position and prospects of the issuer and of any guarantor*[11]*...*

The reading of Article 94 bis openly expresses the intentions of the legislator, the ratio of the prospectus is not limited to being a mere bureaucratic exercise as an end in itself or with irrelevant dynamics; its essence is to be found in the total need to protect not only minority shareholders but any other person, internal or external, wishing to know the characteristics of the offer.

In fact, the prospectus, again referring to Article 94-bis, must contain a *summary*, which must be in user-friendly language; *the format and content of the summary, the* article goes on to say, shall *provide, together with the prospectus, adequate information about the key features of the financial products to help investors when considering whether to invest in such products.*

The obligation of clarity and usability is a further derivation of the Italian vocation concerning the absolute protection of public savings, in fact it is the same Article 93-bis paragraph that 3places further emphasis on the expositive rigour of the document, stating in fact that *the document containing the key investor information and the prospectus must allow investors to reasonably understand the nature and risks of the proposed investment,* referring then to the need to allow investors to choose in the most complete certainty and transparency.

It should be added that the TUF has to be coordinated with Article 8 of the Issuers' Regulation, which is of vital importance as it provides peculiar notations concerning the acceptance of the prospectus by CONSOB.

[10] Article 93-ter TUF
[11] Article 94-bis, Paragraph 1

The same Consob has functions more on the method than on the merit: more than verifying the company specifications, the goodness and the characteristics inherent in the offer (it is well to repeat how it alludes to the offer of financial products already put into circulation), it is required to investigate and verify the legal validity of the prospectus. Its primary role is to ascertain: *Consob, after verifying the completeness, consistency and comprehensibility of the information provided*[12]*...*

In fact, it is *Consob that is responsible for the protection of investors and the* good and proper functioning of the markets, *Consob exercises the powers provided for in this part with regard to the protection of investors and the efficiency and transparency of the corporate control market and the capital market.*

The entry into force of EU Regulation 1129/2017, as quoted by the Department for European[13] Policies, published in the European Official Journal on 30 June 2017, approved by the Council of Ministers on 29 January 2021 and published in the Official Gazette No. 46 of 24 February 2021, tends to define the scope relating to *the approval and dissemination of the prospectus to be published for public offer of securities.*[14]

It allows us to move more effectively in a relatively complex field: whereas previously the only form of regulation was the provisions of the TUF, European legislation provides greater clarity and the possibility of acting within a Community framework.

Recalling that the takeover bid *involves the offer of money or financial products in exchange for financial products and is subject to rules, in part analogous and in part differentiated from those of the takeover bids and the ps*[15]*,* it is necessary to define how many and which types of takeover bid exist and above all when the need to launch a takeover bid arises. (The fundamental rationale of the takeover bid is precisely that of allowing the minority shareholders, in the event of a change of control and therefore the realistic hypothesis of a real change of direction and nature of the company, a *way out*).

The Consolidated Law on Financial Intermediation (Testo Unico Finanziario) explains the different types of takeover bids, the most important of which are the mandatory takeover bid, i.e. the one imposed by the legislator on the occurrence of certain conditions, and the voluntary takeover bid.

(According to the approach of the TUF, Article 1(u) states that *"financial products: financial instruments and any other form of investment of a financial nature; bank or post office deposits not represented by financial instruments do not constitute financial products".*

Any offer or invitation to offer for the purchase or exchange of *securities* must not be addressed to less than 150 persons for a total amount of between EUR[16] 1,000,000 and EUR 8,000,000.)

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[12] Art.94-bis paragraph 3 TUF
[13] Department for European Policies, Regulation (EU) 2017/ 1129 , 24 February 2021
14 Elements of the measure, Regulation (EU) 2017/1129, 24 February 2021
15 Gaetano Presti Matteo Rescigno "Corso di Diritto Commerciale, Volume 2, Società" Zanichelli Editore 2019 p 613
[16] Art. 34 -ter Issuers' Regulations.

A voluntary takeover bid, as the definition itself shows, is not subject to any obligation on the part of CONSOB. In fact, it is permissible to acquire control of a listed company: *in most cases, the takeover bid is launched on the autonomous and voluntary initiative of the bidder.*[17]

In the case of a partial offer, as provided for in Article 107 of the TUF, *the obligation to make an offer is waived if the shareholding is held following a public purchase or exchange offer for at least sixty percent of the securities of each class.*

A voluntary takeover bid, sometimes also referred to as an *optional* takeover bid, falls within the scope of *price-sensitive* transactions, *and* in this case too, absolute transparency will be essential in order to avoid hindrances and market distortions.

The elements of a voluntary takeover bid are: the offer made by an offeror in respect of the shares held by the shareholders of a target company and the object of this offer, which must be higher than the current market price.

Compulsory takeover bids (the legislator, when speaking of compulsory, alludes to the fact that holdings of securities, shares with voting rights, exceed a certain threshold) can be divided into different types, here we will recall the *totalitarian, incremental and residual* types.

Article 106 of the Consolidated Law on Finance sets this threshold at 30 per cent. In the case of a ***takeover*** **bid**, *anyone who, as a result of purchases or an increase in voting rights, comes to hold a shareholding of more than 30 per cent or has voting rights of more than 30 per cent promotes a takeover bid addressed to all holders of securities on all the securities admitted to trading on a regulated market in their possession.*

Returning instead to the definition of *de facto control*, in companies other than SMEs, the purchase obligation is also triggered when the 25% threshold is exceeded, but only if there is no other party with a shareholding sufficient to constitute a controlling party.

Of absolute importance therefore is the concept of *participation*, which as defined in Article 105 TUF Paragraph 2 for *the purposes of this section, participation means a share, held also indirectly through trustees or nominees, of securities issued by a company referred to in Paragraph 1*[18] *which confer voting rights in shareholders' meeting resolutions concerning the appointment or removal of directors or the supervisory board.*

Since the functions of the takeover bid are linked to the change of account, the rationale for the fixed fee can be understood. Only in this way is it possible to protect those within the company who will not look favourably on the new dominant shareholders.

[17] Mario Cera, "Le società con azioni quotate nei mercati", Società Zanichelli Editore, Bologna 2018 p 201

[18] Article 105 TUF, Paragraph 1, provides that *Without prejudice to Article 101b, Paragraphs 4 and 5, the provisions of this section apply to Italian companies with securities admitted to trading on Italian regulated markets.*

Each company is obviously different from the other: this means that a control threshold in one company will be different from the control threshold in another, since internal corporate dynamics are related to one's own corporate governance. In fact, the doctrine originally envisaged a case-by-case calculation. The reason for *pre-established standard* thresholds therefore fits into this context.
The provisions stipulate that the offer must be launched within 20 days once the critical threshold has been crossed.

The legislator also requires a takeover bid to be launched in all those cases where the share is reached indirectly: Article 105(2) states, *through trustees or intermediaries;* in fact, it may happen that the purchase of a shareholding in a company, which in turn already holds a significant shareholding in another company, may trigger the obligation to launch a takeover bid.

The provisions of Article 106, paragraph 3, letter a) *through the acquisition of shareholdings in companies in which the assets mainly consist of securities issued by another company with listed shares, are* recalled, but of significant importance is the provisions of Article 45 of the Issuers' Regulation, which establishes in paragraph 1 as follows: *The acquisition, including in concert, of a shareholding that allows the holder to have voting rights in excess of the thresholds indicated in Article 106, paragraphs 1, 1-bis and 1-ter, on the matters indicated in Article 105 of the Consolidated Law on Finance of a listed company, or to hold control of an unlisted company, results in the obligation of a public offer, pursuant to Article 106, paragraph 3, letter a), of the Consolidated Law on Finance, when the purchaser thus holds, indirectly or as a result of the sum of direct and indirect shareholdings, a shareholding in excess of the thresholds indicated in Article 106, paragraphs 1, 1-bis and 1-ter, of the Consolidated Law on Finance in a listed company.*

Concerted action is the method whereby parties make purchases, possibly even separately, in order to gain control of the company, thus motivated by similar and coordinated[19] intentions and interests.

From this also follows the existence of the concerted purchase which, although unlike individual purchases it is carried out by several persons, has as its primary purpose the hegemony of the company's ownership structure, therefore the risk of change of control and the need to protect weak parties from strong ones would continue to exist.

The action of concert, as stated in Article 101 Bis, paragraph 4, is prefigured also in the presence of invalid or ineffective agreements. In fact, the intentions of the concert parties are not always moved by vocations aimed at worthy protection, and it is precisely for this reason that CONSOB is called upon to shed light on the presence of any shareholders' agreements, which are sometimes concealed within the corporate reality.

[19] Article 101bis (4) *"Persons acting in concert" means persons who cooperate with each other on the basis of an agreement, whether express or tacit, verbal or written, even if invalid or ineffective, aimed at acquiring, maintaining or reinforcing control of the offeree company or at thwarting the attainment of the objectives of a takeover or exchange offer.*

The nature of shareholders' agreements is governed by Article 122 TUF, while the regulation of purchases in concert is governed by Article 109 TUF, which states: *persons acting in concert are jointly and severally liable for the obligations provided for in Articles 106 and 108 when they come to hold, as a result of purchases made even by only one of them, a total shareholding of the percentages indicated in said articles. The same obligations exist for those acting in concert, following an increase, even in favour of only one of them, of voting rights, when they acquire voting rights in excess of the percentages indicated in Article 106.* [20]

The nature of purchases and concerted actions is characterised by the difficulty for the guarantor authority to detect their presence, especially in the presence of shareholders' agreements; in fact, precisely in order to avoid uncertain and unclear situations, in the case of shareholders' agreements, there is an obligation to launch a takeover bid even when the purchases, and not the increase[21] capable of exceeding the relevant threshold, are made in the twelve months preceding the agreement.

The difficulty of the presence of a shareholders' agreement and of actions in concert lies precisely in identifying the parties involved, since it is interesting to note that purchases for valuable consideration made by a member of the agreement, but without the consent of the other members, would be considered ineffective when the threshold is exceeded.

However, we refer to a more extensive discussion of shareholders' agreements and the nature of concerted action in the second chapter of this paper.

Remaining on the merits of the mandatory takeover bid, there is also the case of the **incremental takeover bid, which is** linked to the *de facto* control discipline. That is to say, if the total public offer is configured once the critical threshold of 30% has been exceeded, with all the consequent specifications, there is also the case in which the critical threshold of 30% is not exceeded, and yet the CONSOB configures the obligation to purchase.

Recalling the provisions of Article 106 in terms of control, i.e. in describing the transition from de *facto* to *de jure* control, *the obligation to make an offer results from acquisitions in excess of, or increases in, voting rights by more than five per cent by those who already hold the shareholding indicated in paragraphs 1 and 1-ter without holding a majority of the voting rights in the ordinary shareholders' meeting.*[22]

The vulnus of the incremental takeover bid is precisely this, a person who does not have a majority of votes in the ordinary shareholders' meeting but finds himself, as a result of purchases, increasing his position.

Consob through the issuers' regulation, in Article 46, also provides us with the following specifications, *The obligation to make an offer pursuant to Article 106, paragraph 3, letter b), of the Consolidated Financial Act*

[20] Article 109 TUF, Paragraph 1
[21] Gaetano Presti Matteo Rescigno "Corso di diritto commerciale" 2018, Zanichelli editore, Bologna, p 638
[22] Article 106 TUF, paragraph 3 letter b.

results from majorities, or the acquisition, including indirectly pursuant to Article 45, of more than five per cent of the total number of voting rights or of the capital represented by securities giving voting rights on the subjects indicated in Article 105 of the Consolidated Financial Act within a period of twelve months.

Therefore, it is precisely the timing that determines whether or not there is an obligation to make an offer, and in any case the obligation would be incumbent on those entities already holding a stake of more than 30% as a result of acquisitions.

It remains to be said that once control of the company has been achieved, and therefore stable and less fluctuating control has been established, the dominant party will be free to make further purchases without any limitation whatsoever, except for that which could be configured in another case, namely that of the **residual takeover bid**.

Paragraph 1 of Article 108 provides that an *offeror who, following a public offer, holds a participation of at least ninety-five per cent of the capital represented by securities in a listed Italian company is obliged to purchase the remaining securities from any person who so requests. If more than one class of securities is issued, the obligation exists only for those classes of securities for which the ninety-five per cent threshold has been reached.*

The approach of Article 108 should also be reported. T.U. n.58 of 1998*, anyone who comes to hold more than ninety percent of the ordinary shares promotes a public purchase offer on all the shares with voting rights at the price fixed by CONSOB, if he does not restore within one hundred and twenty days a free float sufficient to ensure regular trading.*

In fact, the legislator has also introduced an obligation to purchase more than 90%. The rationale behind the residual takeover bid is to prevent the liquidation *of* the shares. In a company where almost all the shares with voting rights are now in the hands of a single person, or several persons with more or less clear-cut agreements, it can happen that the remaining shares can literally count as "zero", with all the disadvantages that this entails. Will a shareholder with 2% or 1% in a company where there is a party that is over 90% strong be able to come out of it in a way that is worthy and honourable for its financial position?

In this context, there is a need to extend the regulation of takeover bids to all those contexts where, even if control has already been secured, guaranteed and disclosed, situations prejudicial to minority shareholders may still arise.

Article 109 allows us to identify with more certainty the individuals who will be required to launch the offer under the residual takeover bid: as we know in the case of concerted purchases, *the source* or *nexus upstream of the offer is* not always obvious.

If, therefore, the protection of minority shareholders and the guarantee of the *certainty of control are the* legislator's elements of maximum protection, the question then arises as to whether the mandatory takeover bid, even in the residual case, is always mandatory. If the control threshold of 90% has been reached following a full takeover bid, it follows that minority shareholders have already had the opportunity to take the *exit route.* After the launch and subsequent success of a mandatory takeover bid which has secured the offeror a 95% strong controlling position, the offeror has the right to compulsorily purchase the securities of the minority shareholders.

The rules are laid down in Article 111 of the TUF. *An offeror who, as a result of a public offer, holds a stake of at least ninety-five per cent of the capital represented by securities in a listed company has the right to acquire the remaining securities within three months of the expiry of the deadline for acceptance of the offer, if he has declared in the offer document his intention to exercise that right.*

In the event that several classes of securities are issued, the right to purchase may only be exercised for those classes of securities for which the threshold of ninety-five per cent has been reached.

According to the approach of G.Presti and Matteo Rescigno, the function of the residual takeover bid would be to *eliminate marginal shareholdings, often maintained for the sole purpose of disruption, and to remove an obstacle to the delisting of shares which, however, because of the thinness of the stock, would inevitably have abnormal negotiations*[23]

Of absolute relevance in order to provide a clear contextualisation of the indirect takeover bid or *squeeze out*, is the *CONSOB* communication *"Consob informa n.28 July 2000".*

In fact, Consob illustrates a particular case, involving an offeror intending to launch a totalitarian takeover bid with the objective of obtaining *the delisting of the offeree company's securities;* the same offeror had specified in the offer document its intention to purchase other shares from the target company, including during the offer period.

Consob reports that the document clearly stated the offeror's intention to launch a residual takeover bid if the critical threshold of 90% was reached and that, of course, if it exceeded the 98% threshold, it would comply with the provisions of Article 111 TUF, i.e. the right to purchase.

In this context, the purchases made outside of the OPA take on additional importance. In fact, after having informed the Guarantor Authority that the critical thresholds had been exceeded, i.e. 98% of the shares with voting rights and therefore control, Consob has widely questioned whether it was the case to admit to the evaluation, again in accordance with the provisions of Article 111 TUF, also the whole series of purchases made outside of the complex dynamics of the OPA.

Consob, which is responsible for supervising the proper functioning of the market, and therefore of the offers, considered it right to recognise the offeror's right to purchase, the commission therefore considered it

[23] Gaetano Presti Matteo Rescigno "Corso di diritto commerciale" 2018, Zanichelli editore, Bologna, p 641

appropriate to recognise for the purposes of the squeeze out *also those purchased by the same offeror outside the tender offer*[24]

The nature of this decision finds its rationale in Article 111 TUF and Articles 41 and 42 of the Issuers' Regulation.

Article 41(1)(b) provides that *the offeror and those acting in concert with it, if they intend to sell to third parties, even indirectly or through intermediaries, the financial products covered by the offer, shall notify CONSOB and the market within the day before the transaction. Companies belonging to the group of the offeror and of those acting in concert with it shall not be considered third parties.*

Article 42, also mentioned in the Consob communication, instead refers to principles for the protection of minority shareholders: *If, in the period between the communication provided for in Article 102, paragraph 1 of the Consolidated Law and the final date for payment of the consideration, the offerors or persons acting in concert with them, directly, indirectly or through intermediaries, purchase the financial products subject to the offer, or take long positions with such products as underlying, at prices higher than the consideration for the offer, they shall adjust the latter to such price. Article 44-ter, paragraph 6, shall apply mutatis mutandis.*[25]

Article 102 is essential to the understanding of the discipline, precisely because it emphasises *"without delay"*, *in* fact, paragraph 1 of Article 102 states that *the decision or the occurrence of the obligation to launch a public purchase or exchange offer shall be communicated to Consob* ***without delay*** *and simultaneously made public. Consob shall lay down by regulation the contents and the manner of publication of the communication.*

This is the vulnus of the discipline, transparency intended as an instrument of health of the financial market; it is precisely in this context that procedures are configured to avoid market circumvention or prejudicial acts. Within twenty days of the Consob communication, communication of intent to purchase, the bidder must comply with what is imposed by the legislator, i.e. fulfil a rigorous documentation. Should it fail to comply with the deadline or should it be flawed, Consob may reserve the right not only to reject its offer, but the bidder may no longer make an offer towards the same target company for a period of twelve months.

Consob will then, within fifteen days of the completion of the documentation, review it further and, only then, authorise the publication of the tender offer. The review period could last approximately one month.

[24] Comunicazione Consob *Acquisti effettuati fuori OPA e "Squeeze Out" (in "Consob informa" n.28 of 10 July 2000)*
[25] Article 44-ter paragraph 6 provides that For the *purposes of determining the price referred to in Article 106, paragraph 2 of the Consolidated Law, the sum of the reference price contractually attributed to the securities underlying the financial instrument and the amounts paid or received for the purchase of the long position shall be considered.*

Subsequent defence techniques.

Pre- and post-emptive defences have had a mixed trend in Italian commercial law. Until 2007, the legislative framework was favourable to the contestability of listed companies; between 2008 and 2009, this option was completely overturned, due to the reversals in the financial markets. The rationale became that of protecting existing ownership structures from coups d'état, which was later partially restored.

Since the beginning of 2009, if the offer related to shares of Italian companies listed on an Italian or EU regulated market, the so-called *passivity rule was* introduced: the directors of the company, after receiving the first communication, could not carry out acts and transactions that could hinder the achievement of the objectives of the offer, unless expressly authorised by the ordinary or extraordinary shareholders' meetings. Such shareholders' meetings were required to vote in favour of at least 30% of the share capital. The rule therefore entailed a shift of competences pending the offer. Transactions normally falling within the exclusive management competence of the directors, once the offer had been launched and if they were likely to counter its objectives, had to be authorised in advance by the shareholders' meeting. Moreover, both for these transactions and for those decided or authorised by the ordinary or extraordinary shareholders' meeting, a special majority was required which did not replace but was in addition to the majority normally required. These majorities were very high and difficult to achieve in companies with dispersed shareholders.

The meaning of this rule, which did not prevent countermeasures from being taken, was based on the misalignment of interests that the offer created between directors and shareholders, i.e. the latter were the recipients of the offer and it was up to them alone, therefore, to decide whether or not to join. Moreover, the directors also knew that in the event of a successful hostile bid they would be replaced in office. For this reason, our legislator strengthened the position of the shareholders by preventing the directors from deciding autonomously on manoeuvres that could have the effect of defeating the offer.

However, the subject matter did not lend itself to certainty at all; other legal systems left a free hand to the directors as they were considered the best guardians of the shareholders' interests, sometimes even of the national economy in the face of offers from abroad. Therefore, it was precisely these disputes on the *passivity rule that were at the* root of the reasons that delayed the approval of the European directive, resulting in a compromise that was, on balance, unsuitable for ensuring effective harmonisation between the regulations of the individual EU countries.

Consob had also defined and concepts and types of acts and transactions that could counteract the achievement of the objectives of the offer:

1) those that aim to increase the cost of achieving the number of subscriptions that the offeror intends to obtain (e.g. capital increase, conversion of non-voting shares into voting shares, etc.)

2) those aimed at changing the company's assets and liabilities (e.g. sale of significant assets or business divisions, mergers, demergers, etc.)
3) those that otherwise hinder the offeror's intentions (e.g. launching an offer for the offeror's shares, acquiring a company that poses antitrust problems for the offeror, etc.)

On the other hand, the search for another person to make a non-hostile bid for the company's shares, which does not affect the characteristics of the company and does not tie the hands of its shareholders, but rather increases their choice, did not fall within the scope of defensive transactions, which are always subject to authorisation by the shareholders' meeting. Nor does it cover the execution of transactions that merely implement obligations or decisions taken prior to the commencement of the passivity rule.

It was in this context that the EU directive was approved, the result of a political compromise between those who were in favour of protecting national companies from the risk of hostile bids and those who were more in favour of their contestability. However, it was not binding. Thus, Member States could also decide not to apply it to companies with their registered office in their territory. Member States could also exempt from the passivity rule domestic companies that were subject to it if a takeover bid was launched against them by a company that did not apply the passivity rule, for example because it belonged to a state such as the US.

The directive also provided for a general rule of neutralisation (so-called *break-through*) of the so-called preventive defences, i.e. all those clauses in the articles of association or contractual agreements that set up ex ante barriers to hostile takeovers. In Italy, most of these instruments cannot be used by listed companies. Clauses in the articles of association restricting the circulation of shares prevent them from being listed on the stock exchange in accordance with the regulations of Borsa Italiana s.p.a.

In view of the varied landscape in the various countries of the Union, the Directive laid down uniform rules according to which: (a) statutory clauses and shareholders' agreements restricting the transfer of shares do not apply to a person who has launched a takeover bid (b) statutory clauses and shareholders' agreements restricting voting rights or granting multiple voting rights do not apply to shareholders' meeting decisions on subsequent defences, unless the limits are compensated by specific pecuniary advantages (c) similar restrictions apply if the takeover bid reaches a threshold of acceptances amounting to at least 75% of the voting capital.

When implementing the Directive, the Italian legislator opted for the preservation of the *passivity rule* from the time of the first disclosure until the closing of the offer and for the introduction of the *break-through rule.*

The enactment was limited to a few clarifications. For example, that authorisation by the shareholders' meeting was also required for the implementation of any decision taken previously, which had not yet been implemented in whole or in part, which was part of the normal course of the company's business and the implementation of which might conflict with the achievement of the objectives of the offer; or that the limits on share transfers established by shareholders' agreements would continue to be governed by Article 123(3) TUF.

With this choice, Italy placed itself among the countries most favourable to the contestability of companies, making it difficult for Italian companies to carry out defensive manoeuvres, either before or after the launch of a takeover bid.

Other European countries, on the other hand, opted for a more protectionist approach and chose not to adopt the passivity rule and/or the neutralisation rule. In view of this situation and the varied rules in the various non-European countries, the provision of these rules was accompanied by the so-called reciprocity clause, which allowed Italian companies not to apply the above-mentioned provisions if they were subject to a takeover bid launched by a (clearly foreign) entity that was not subject to the same liability and neutralisation rules or to equivalent rules.

In such a case, both the prior defences and the fact that the directors could implement subsequent defence techniques remained effective, provided, however, that there was express authorisation by an extraordinary shareholders' meeting, with a view to a possible public offer, in the 18 months preceding the launch of the offer.

However, the liberalist choice of 2007 was then completely overturned and subsequently partially reinstated. Decree Law No. 185/2008, converted into Law No. 2/2009, overturned the above-described regulatory framework, establishing that the bylaws of listed Italian companies may provide (so-called *opt-in*) that, when a takeover bid or exchange offer is launched for the securities they have issued, liability and neutralisation rules apply.

Subsequently, with Legislative Decree 146/2009, the passivity rule was reinstated, but no longer, as was originally the case, in a mandatory form, as companies may now decide to exclude it with a specific clause in their bylaws; moreover, authorisation by the shareholders' meeting no longer requires the enhanced quorum of 30% of the share capital. The neutralisation rule, on the other hand, remained subject to the *opt-in* regime. Correspondingly, the reciprocity clause now applies only in cases where the articles of association of companies subject to a takeover bid do not exclude the *passivity rule* or provide for the *break-through rule*. Following the introduction of multiple-vote and plus-vote shares in 2014, the break-through rule, if *opted-in*, also applies to them. Therefore, at shareholders' meetings and the first shareholders' meeting after the takeover bid (if the 75% threshold is exceeded), they are entitled to only one vote. The changes were mainly introduced by Decree-Law 185/2008.

Of relevance for this discussion is Directive 2004/25/EC on takeover bids.

The directive is designed to reconcile and coordinate the different visions of the individual EU Member States in this area, and provides important specifications regarding the *passivity rule* [26]and the *breakthrough rule.*[27]

The regulatory references of the defensive techniques in the matter of takeover bids are outlined in Article 104 TUF, paragraph 1 in perfect line with what has been stated above, emphasises the liberal nature of the ratio, in fact it states: *Unless authorised by the ordinary or extraordinary shareholders' meeting for the resolutions within their competence, the Italian listed companies whose securities are the subject of the offer shall refrain from carrying out acts or transactions that may conflict with the achievement of the objectives of the offer. The obligation to abstain shall apply from the time of the communication referred to in Article 102(1) until the closure of the bid or until the bid lapses. The mere seeking of other offers shall not constitute an act or transaction contrary to the objectives of the offer. This shall be without prejudice to the liability of the directors, members of the management and supervisory boards and general managers for the acts and operations performed.*

The directive, EC Directive No. 2004/25/EC on takeover bids, was adopted on 21 April 2004. Its aim, its innovative side, was precisely that of having tried to equalise the various regulations in force in Europe between the various States.

It is worth noting that, although from a hierarchical point of view, European norms are superior to national ones, a directive should not be understood as having *the full function of a law,* but rather as a guideline to be undertaken; in fact, the directive was subsequently implemented by the Italian legal system in 2007 with Legislative Decree NO.229, which enriched the *takeover directive* in the Italian context. Subsequently, the law became fully operational as of 28 December 2007.

The EU *Takeover* Directive has been implemented in three stages, which can be framed in the following historical context.

The first phase, which sanctioned the mandatory *neutrality* and *breakthrough rule,* took place under the Prodi government, and the second under the Berlusconi government, which tended to be more liberal. However, it should be emphasised that the decision to make it optional can be seen in the context of the period of economic crisis that afflicted the capital market after the 2008 crisis. Recently, however, the board's neutrality in takeover matters has made a comeback.

As a result, the discipline of preventive and defensive takeover measures has seen a continuous and sometimes sharp change of course, depending on the various governments and the priority given to the object worthy of protection.

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[26] *See Article 9 of the Directive*

[27] *See Article 11 of the Directive*

The trade off is mainly the choice between the protection of the national interest, i.e. what we might call a protectionist viewpoint, aimed at protecting national companies from possible foreign but also domestic interference, and the liberalist viewpoint, which in this case is expressed by opting for a more dynamic and takeover-friendly system.

Thus, following the procedure outlined in the preceding pages, the Directive was first implemented and Article 104 of the Consolidated Financial Services Act (CFSA) *already prohibited managers from undertaking actions that might frustrate the bid*[28]*. The* approach was similar to that of the London City Code, although the scope of the *neutrality rule* was not always clear.

Also during the first phase in which the directive was transposed, or *first statute,* the *breakthrough rule,* set out in Article 11 of the takeover directive, was also implemented. Unlike many European countries that preferred not to adopt the *breakthrough rule*, Italy was one of those countries that implemented it.

It was previously specified that during the first phase under the Prodi government, the legislator opted for a more "target friendly" approach, in the sense of granting greater protection to the board of the target company from possible hostile takeovers. The *breakthrough rule* is just that, a system designed to prevent or render less efficient the defences put in place *by* the target company, whether they are put in place *bylaws* or *shareholders agreements*.

It should be noted that the function of the *breakthrough rule* (Article 11) of the EU Takeover Bid Directive (Directive 2004/25/EC) is primarily to regulate the behaviour of the target company's management in the period immediately before and immediately after the offer.

Let us analyse the modalities, context and applications relating to the *breakthrough* rule. It prevents an acquisition process, or an attempted offer, from being thwarted. Once a takeover (or bid) proposal has been launched, shareholders will be free to accept the proposal regardless of the opinion of the board members or the provisions of *the bylaws*, any restrictions on voting rights will have no effect at the shareholders[29]' meeting, and finally, if, during the final stage of the offer, the bidder owns at least 75% of the shares with voting rights, any restrictions on voting rights and extraordinary rights regarding the removal or appointment of board members will not take effect at the first meeting of shareholders, which is scheduled after the offer to discuss the company's organisational structure.

It should be noted that the restrictions on voting rights provided for *bylaws* relating to *preferred shares* will not be subject to the *breakthrough rule*.

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[28] Guido Ferrarini, Geoffrey P.Miller, *'A Simple Theory of Takeover Regulation in the United States and Europe',* Cornell International Law Journal, Volume 42 Issue 3 fall 2009, CIT, p 42

[29] *"Any Restrictions on voting rights provided for in the bylaws or in any shareholders' agreement of the target company have no effect at the shareholder's meetings at which shareholders resolve upon the defensive measures mentioned under Paragraph II above,* CIT, *Implementations of the takeover Directive in Italy,* Cleary Gottlieb, Rome/Milan, January 15, 2008

In addition, all shareholders who suffer a decrease in their share value as a result of the *breakthrough rule* must be adequately compensated by the bidder; this is provided for in Article 11.5 of the Takeover Directive.

In the Italian context, the discipline introduced by the *breakthrough rule did* not, however, represent a completely innovative legal concept, since a system preventing or strongly discouraging the use of pre-bid defences, such as *multiples voting shares*, *voting caps*, *non voting shares and share-transfer restrictions*, had already been in place for some time.

It should be noted, however, that *a "mini-breakthrough rule" was also in force with respect to shareholder agreements*[30], which provided that shareholders were allowed to opt out of voting agreements, *blocking agreements and similar arrangements*[31], when a takeover offer covering approximately 60% of the votes was in place.

The subject matter, as already mentioned, has continued to change over time: in fact, during the financial crisis, the discipline was again revised, making the *breakthrough rule* and the *neutrality rule* completely optional. This meant that such rules would no longer be applicable in the Italian financial context unless the companies themselves arbitrarily chose to do so.

Of course, this change was perceived as a sudden and radical change of course, but it should be contextualised in the period of the crisis, and the legislator therefore opted for a protectionist regime rather than the defence of corporate freedom.

The third phase, dating back to 2010, witnessed the reintroduction of the neutrality rule but continues to provide a degree of discretion for the *breakthrough rule*.

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[30] "A Simple Theory of Takeover Regulation in the United States and Europe", Cit, p 325, Guido Ferrarini, Goeffrey P.Miller, Cornell International Law Journal, Volume 42 , Issue 3 fall 2009

[31] G. Ferrarini, G. P. Miller, "A Simple Theory of Takeover Regulation in the United States and Europe", p 325.

The US control market and details of M&A and tender offers

A *public company* in the US context must primarily comply with the requirements of the US Securities Act of 1933 and the US Securities Exchange Act of 1934.

A public company, or generally a listed company, is the type of company where its share value is quoted on stock exchanges.

The US Securities Act of 1933, also known as *thruth in securities law, has* two main purposes, namely to ensure that investors receive adequate and truthful information and to ensure against fraud and market deception.

The Securities Act Exchange of 1934 sanctioned by Congress the creation of the *Securities and Exchange Commission:* the law granted the newly created body regulatory and investigative authority over the financial market, as well as the possibility of sanctioning and regulating prejudicial conduct. In a way we could compare it to the Consob in the Italian context.

Also known as *Delaware corporate law*, the American model *is built upon the notion of centralised management or director supremacy*[32]. In this context, there is a presumption that the board, as if inspired by a broad vision, represents the will of the company and is therefore in charge of its management, despite the shareholders. In this system there is very often a clear separation between ownership and control and directors enjoy considerable independence in all areas of decision-making.

In the United States of America, the market is firmly oriented towards shareholder protection, and the entire capitalist system is centred on the absolute fluidity and dynamism of the market. Mergers, acquisitions, takeover bids, are the essence of the US business code, to the point that the major business law firms, *big law*, operating mainly in Manhattan, have made M&A one of their main core businesses.

It is not surprising that there is a strict regulatory framework in place and that, especially since the economic crisis of 2008, the need for strict corporate compliance has become imperative.

In the US public offering scenario, the main players always remain, exactly as in Italy, a *bidder or offeror* and the target company, i.e. the scalable company. The companies are subject to the law of the individual states of the Federal Union and it is interesting to note that more than 50% of the public companies and almost two thirds of the companies compiled by the US Fortune 500 are incorporated in the state of Delaware.[33]

[32] Cit, Shen Wei and Colin Mengshan Xu *'Collective Action in Chinese Takeover Rules: Deficiency and Difficulty in Protecting Target Shareholders in a Hybride Regime. P 910*
[33] Latham&Watkins LLP, "Guide to Acquiring A US Public Company

While in the Italian context a takeover bid, whether voluntary or mandatory, is mainly addressed to the shareholders and the board of directors is reserved a sometimes passive role (excluding all those cases where the latter will try to hinder the acquisition of control resulting from the purchase of the shares), the US case is somewhat different. *Delaware law* allows a wide scope of action and decision-making power to the board of directors of the company: in fact, it is the board that will determine the success of the *change of control* through merger or share purchase, and of course the approval of a significant percentage of shareholders is also appropriate.

In this context, the provisions of Title 8, concerning *corporations*, of the Delaware Corporation Code, Chapter 1, are of significant importance. General Corporation Law, under Chapter 9 *Merger, Consolidation or Conversion, paragraph b) The board of directors of each corporation which desires to merge or consolidate shall adopt a resolution approving an agreement of merger or consolidation and declaring its advisability*. *The agreement shall state:*

I. *The terms and conditions of the merger or consolidation*
II. *The mode of carrying the same into effect*[34]

The Delaware law itself provides further evidence of the enormous decision-making power enjoyed by the board: it is literally stated that it is the board itself that must adopt a resolution, an approval. One could therefore come to the conclusion that the board has enormous veto power, and with the strength of this power it will be the board itself that decisively conducts negotiations with potential buyers, whether we are talking about mergers or the purchase of shares in order to gain control.

The buyer, rather than 'tickling' the shareholders with tempting proposals, will have to literally get in tune with the board members in order to achieve the set objectives.

It is worth noting that board members in the US, especially in that context where the separation between ownership and control is clear-cut, act from a short-term perspective in order to maximise corporate actions and not from a long-term perspective. This phenomenon can lead to two paths.

In the first case, the short-term view may prove effective: the shares grow in value, dividends are flourishing and part of the profits are reinvested, more growth, new profits. However, it can also happen that the short-term approach is short-sighted, the board limits itself to ordinary administration, carrying out all those acts and manoeuvres aimed at maintaining the status quo. The company will certainly not go to ruin, but the potential will not be expressed. This is exactly where the logic of the control market lies; so while on the one hand there will be directors on the board who have taken their leadership of the company for granted, on the other hand, to protect the shareholders, there will be investors with a broader perspective ready to breathe new life into the business.

[34] For the other paragraphs, please refer to the Delaware Corporation Law.

Therefore, having ascertained that the board could adapt to a short-term logic, one can guess the logic behind the regulations on takeover bids.

Whether the board is adopting *short term* behaviour is not so obvious, as there are many studies on the subject.[35]

A takeover can be either hostile or non-hostile. A takeover is hostile when the bidder, intending to acquire the company, does not consult the board of directors of the target company in advance.

According to the Californian law firm Latham&Watkins, in the above-mentioned briefing paper, a non-hostile takeover is preferable to a hostile takeover: the reason stems mainly from the advantages obtainable in a 'transparent' context, such as *due diligence*, fairness of information and ease in achieving the intended objectives.

Of course, a hostile takeover should not be excluded a priori, but its scope of application is more contextualised to all those cases of *extreme ratio,* i.e. when the nature of the relations with the board of the target company are irreversibly compromised or when, right from the start, the bidder, not considering a "negotiated" type of operation as convenient, immediately finds a hostile manoeuvre preferable.

Several states, including Delaware, have anti-takeover statutes. Generally, anti-takeover statutes consist of two forms: *control share acquisition statutes* or *business acquisition statutes.*

Control acquisition statutes impose purchase limits on the bidding shareholder, so there is a threshold beyond which one cannot go.

Business acqusition provides that a shareholder after exceeding a certain threshold, usually 15%, cannot enter into business transactions with the target company for a whole period of time unless it has received a positive opinion from the majority of the shareholders of the target company.

What should be specified is that, in the US context, the tender offer falls within the very broad field defined as M&A and that offers can be of various types, nature and motivations. We speak, for example, of *consolidations, mandatory share exchanges.*

An acquisition may be one-step, in the case of statutory mergers, regulated by US state law, or a tender offer.

Usually one can refer to a tender offer followed by a back-end as a two-step merger.

Statutory merger or one step is, as required by corporate law, a merger of two corporate entities.

[35] Should one wish to explore the theory underlying human behaviour in economic domains, the following readings are recommended, Florian Moslein, '*Behavioural Analysis and Socio-Legal Research, in Research Methods in consumer Law 441, at 446-450* (Hans-W Micklitz, Anne-Lise Sibony & Fabrizio Esposito, eds, Edward Elgar 2018)

In the one-step merger, the bidder is expected to enter into an agreement with the board of directors of the target company. It should be noted that at this stage a rift can appear, because whether the board's decision is positive or negative, the bidder will still have to 'talk' to the company's shareholders, and will of course have to obtain their approval. The approval threshold may vary, and depending on the state, increases may be imposed on the type of minimum percentage required to obtain approval at the shareholders' meeting.

This type of merger is generally referred to as 'reverse triangular merger'.

This type of acquisition is called a "triangular" acquisition, as its "logical architecture" resembles a triangulation. The actors are: the parent company (the acquirer), the subsidiary company (or vehicle company, used for the sole purpose of acquiring the target company) and finally the target company, i.e. the company being acquired.

Of course, the relevant regulations provide that the entire procedure should follow standard *merger agreement* lines; which, composed of various elements, is basically designed to provide a whole series of guarantees useful for the proper conduct of the procedure.

For example, one speaks of "deal protection" when there are *no-shop provisions*, i.e., those provisions that would allow the board of the target company to disengage and "trust out" if it became necessary.

In addition, it could happen that during an acquisition the bidder might interface with a company where a shareholder with a significant stake is on the board. In this case, the bidder could negotiate an offer or exchange agreement with him and thus involve him in the merger.

Naturally, the *Merger Agreement* also provides indications of merit, such as emphasising the importance of corporate compliance, of adhering to good conduct and of following all those behaviours aimed at the sound and correct management of the market. In this sense, it is worth remembering the absolute emphasis placed by the US regulator on correct information and avoiding manipulative situations aimed at altering the market.

The US financial market is strongly oriented towards shareholder protection both because of the extreme nature of market liberalism and because of the typical dynamism of the US financial market. For these reasons, the shareholder is absolutely protected.

If we want to quote a relevant film work, it is impossible, at this point, not to remember Gordon Gekko's (Micheal Douglas) speech in Oliver Stone's 1987 masterpiece 'Wall Street'.

In fact, the protagonist, Gordon Gekko, a seasoned speculator in the New York *yuppies* of the late 1980s, in the midst of Reagan hedonism, finds himself in the middle of a shareholders' meeting of the *Teldar Carta* company, with the obvious aim of putting the members of the board out of action, whom he defines as bureaucrats, dedicated to business lunches, in contrast with the shareholders, who instead represent the beating heart of the company, *the true essence of America.*

The emblematic scene reinforces two concepts already clarified above, namely the absolute importance of the shareholder figure in the life of a company, and the 'mismanagement of a company', which is often awaited by speculators and financial predators ready to launch hostile and unfriendly takeovers.

Hostile or non-hostile, the fact remains that an offer to acquire a company is only ever made in one context, when you are convinced that you can do better, that you can take a company and make it yield its potential.

In the same Italian context, it is always inefficient market management that stimulates a takeover bid. On the other hand, poor market management will lead to a lowering of the share value, and this is precisely where the bidder, or bidders, come in, with their far-reaching vision, convinced of a rosy or better future, will be willing to buy the shares even at double the price, convinced of the enormous future return guaranteed by the brilliant management of the new board. It is further emphasised that the distinctive element of an acquisition is the change of board following the acquisition.

The purpose of a bid is the desire to acquire a company, the desire to own it, the insight into the potential of the company if it were taken away from the current management.

However, some shareholders may refuse to offer their shares because, for example, they may not consider the offer price to be up to their expectations or may not have been promptly informed of the existence of an offer.

The US M&A context is so vast that it is not possible to frame the matter within rigid canons, in fact when talking about mergers and tender offers, it is always appropriate to contextualise, to analyse case by case, specific by specific.

It may be that in a *spin-off, ownership interests in one business are distributed to shareholder of a company that retains other businesses*[36], which will clearly result in the transfer of control in a new *spin-off* company. Or there may be cases where mixed situations arise, such as when a company incorporates *one business into a corporation and sells its stock to the public for cash.*[37]

Different types of *currencies can be* used in an M&A. While cash is generally the most conventional form of currency, it is not uncommon for debt to be used as a means of purchase, or for promises of seller financing, or for mixed solutions, such as half stock and half cash.

To delve into the regulatory side of US M&A, I would start by talking about the *Proxy Statement* and the strict criteria it must follow, in full compliance with the rules dictated by the SEC. It is the target company itself that will have to file a Proxy Statement in section 14A concerning the shareholder vote on the transaction.

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[36] John C. Coates IV *"Mergers, Acquisitions and Restructuring: Types, Regulation, and Patterns of Practice".* Harvard Law School, 2014 p 7

[37] The reference to the above-mentionedpaper follows.

A proxy statement can be defined as a document of an informative nature, providing important information about the business environment of the target company as well as information about the merger itself and the acquirer.

The same document requires that light be shed on the composition of the majority shareholders, the directors and the voting patterns of the target, as well as the *target board's recommendation as to the reasons for the merger.*

We can therefore come to the conclusion that the proxy statement can be framed not only as *informative,* but also as *cognitive;* its purpose is not simply to provide specifications concerning the target company, but to accommodate the procedure, making the parties aware of all those of relevant importance.

In today's highly globalised market, the question arises as to whether access to the control market is easily penetrated by foreign investors. Indeed, Section 721 of the Defense Production Act of 1950 delegated to the Committee on Foreign Investment in the U.S (CFIUS) the task of protecting the national interest from the hypothetical onset of foreign investment.

Naturally, high-tech companies, aerospace, telecommunications, armaments, information technology are protected. All those companies having to do with national security.

In 2018, the inherent subject matter of protection was reviewed and contextualised to the current landscape, in fact The Foreign Investment Risk Review Modernization expanded the scope of CFIUS.

The new law has further expressed constraints against foreign insurgency in sectors such as domestic shipping plus other restrictions of a similar nature. In addition, there are sectors such as gaming, media, mining and insurance that, although accessible to outside investors, remain subject to extensive and stringent regulation.

The board may certainly have valid reasons for not accepting an offer, in which case one tactic might be not to inform shareholders of the proposal received. Bearing in mind the decision-making importance of a US board, it is clear that this freedom of action is not without foundation after all.

The board thus appears to be a total arbiter, to the extent that it can decide to enter into the qualitative merits of the offer received. In its structural vocation, the board must therefore analyse the terms of the offer, assess its characteristics and act in the total and absolute interest of the shareholders.

Indeed, in complex transactions such as a merger or takeover, under Delaware law, once the board has accepted the proposed acquisition and decided to sell, it must attempt to conduct the transition in the manner that is most convenient and least prejudicial to its shareholders. This conduct is generally known as "Revlon Duties". Board members will be required by law to act in the best interests of their shareholders to avoid opportunistic situations that could materially harm the normal financial function of the company.

Delaware law itself states that the board of a target company may put in place procedures to defend itself against a hostile takeover attempt.

Indeed, recalling that an acquisition may be amicable, *pursuant to a definitive agreement negotiated between the acquirer and the target and its board of directors, or on an unsolicited or hostile basis, without the initial involvement or approval of the target's incumbent board of directors*[38].

Recalling the principle of arbitrariness of the board in the US system, it will be required, as stated above, to assess the merits of the offer and possibly reject it, or even oppose it in the case of a hostile takeover.

The rationale behind the board's decision-making powers is the protection of shareholders: the board will act to safeguard shareholders from all those potential acquirers who could seriously jeopardise the company by purchasing shares for the sole purpose of controlling the company; furthermore, the problem of a collective action by shareholders following individual purchases by the acquirer could also arise.

The common law legal system, as is well known, finds its structure principally in precedent, and in this case the case law offers an interesting case, useful in understanding the rationale behind what might superficially appear to be excessive powers in the hands of the board: *Unocal v. Mesa of 1985, 493 A.2d 946*

It should first be pointed out that one of the ways in which the board can resist the hostile takeover attempt is to buy the company's own shares on the market in order to *make scorched earth* around the potential buyer. Let us further specify that the buyer is driven by the desire for control and thus to be able to define the corporate structures according to his personal vision.

The above-mentioned case gives an overview of this context, as Unocal Corporation, an oil company that existed until 2005, resorted to a self-tender to resist and defend itself against Mesa Petroleum's tender offer attempt. This case is interesting for a particular reason: until then, the business judgment rules applied universally, so board members could arbitrarily choose how to behave in case of takeover and merger attempts. In Unocal v. Mesa, however, the Delaware court ruled that the board could only act and defend itself when there was a threat to the company.

In fact, in Unocal v. Mesa, the Delaware court ruled that the target company, or rather the board, may defend itself and adopt all appropriate procedures to prevent a takeover if there is a real threat to the company, and that the defensive measures must be proportional to the threat.

The Delaware court applies various standards in evaluating the conduct of the board of the target company subject to a hostile takeover attempt, such as the *corporate interest standard, the fairness standard and the business judgment rule.* [39]

[38] The Latham & Watkins Take -Private Guide: An Overview of acquiring a US public Company, cit p 16
[39] David R. Singleton, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985), 14 Fla. St. U. L. Rev. 301 (1986) . Cit p 302

In the above case, the threat was clear, as the company Mesa Petroleum had bought a fair share of Unocal's stock and then initiated a front-end-loaded two tier tender offer, amounting to 37% of Unocal's outstanding stock. Unocal's "right to defend" appears clear.

The case took on interesting connotations when, subsequently, the cases analysed by the Delaware court further broadened the cases in which a threat can be found. In fact, according to recent doctrine, any takeover attempt is considered a potential threat. As in the specific case of Unocal, the threat is not only in the event of a front-end-loaded two-tier tender offer, but can arise in any context where the offer is potentially harmful or coercive. It follows that even a one-tier all-share tender offer may be "useful" to undermine the shareholders of the target company.

One way in which the board of the target company could prevent a hostile takeover is by implementing anti takeover statutes in the company's by-laws. In addition, some companies have adopted so-called *poison pills*, i.e. shareholder rights plans, in their articles of association.

A takeover or merger attempt may be thwarted by the board of the target company, poison pills can be considered as deterrence tools to thwart takeover attempts by an acquirer, *these plans are designed to deter coercive takeover tactics and encourage third parties attempting to acquire a company to negotiate with the target company board.*[40]

In the "defensive" panorama, other tactics are present, also because the defensive strategy must be contextualized: in fact, it is well to repeat that in these scenarios, it is not possible to resort to a standardized manual, but to guidelines to be applied case by case. Therefore, if the ratio of the poison pill is to discourage 'the enemy' from carrying out other hostile actions, and to make acquisition unbearable for him, then there are also the *shark repellents*[41]

Another defensive practice is *leveraged recapitalisation, a* tool to provide shareholders with a more attractive financial alternative by creating a block of shares controlled by management, all of course with the aim of making the target company less desirable to unconvincing claims.

Mention should also be made of the defensive tactic *white squire*[42] *which is* also part of the preventive defences (i.e. all those defences that the board is willing to implement prior to shareholder approval of any type of bid),

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[40] The international Comparative Legal Guide to: Merger & Acquisitions 2019, Published by Legal Groups, Cit p 424

[41] *"The shark repellent' is a by-law provision which is designed to discourage any unwanted takeover. The provision may provide for a variety of limitations on the company's ability to engage in business in combination with another company. The target company frequently adopts such a provision as a part of its long-term anti-takeover planning.* See, A Legal Perspective of Hostile Takeover Defensive Measures in China and Malaysia, Hasani Mohd Ali & Liu Kai, Business Law Review 2014, p 55.

[42] The "white squire" is an invited friendly third party in a hostile takeover to take a strategic blocking stake in the target company. Shares may be acquired from the shareholders who have expressed a desire to sell. The "Crown jewel" is an option granted to a white squire to purchase the particular asset for what might be considered an advantageous price outside the Take over context. It is often a key division or subsidiary of the target company. Cit, . A Legal Perspective of Hostile Takeover Defensive Measures in China and Malaysia, Hasani Mohd Ali & Liu Kai, Business Law Review 2014, p 55

such as shark repellent, shareholder right plans, poison pills, structural changes. That is, all those actions having the nature of a disincentive.

Then there are the reactive defences, i.e. those put in place in response to the *ongoing* threat, i.e. subsequent to the takeover offer; these may involve changes to the capital structure or the sale of significant company assets. These may involve changes to the capital structure or the sale of significant assets. In such a case, a *scorched earth* scenario would be created, with little *appeal to the* hostile buyer.

However, the board is protected by the business judgment rule: unless board members act unlawfully or under duress of bribery, they will always be held blameless. It follows that if shareholders were to accuse them in a derivative suit, or if they were to sue them for breach of fiduciary duty if they were to say no to a proposed merger, they would be presumed innocent. If and only if they have acted in the best interests of the company, its shareholders and with the best of intentions.

Another factor of absolute importance, again related to the Unocal case, is the element of *price adequacy*; this occurs when the offer price is substantially lower than the real company value or simply not deemed worthy by the board of the target company. Price inadequacy is also a threat and fits perfectly into the logic of coercion. An acquirer could propose a purchase price to the shareholders, making it clear that if they did not accept it in full, he could then launch a further offer of a residual nature but on drastically inappropriate terms. The coercion lies precisely in this factor: the shareholder will feel pressured, threatened, will understand the real risk of having to sell at a derisory price later on. So he might accept the first offer which, it must be reiterated, will always be unfair too (if, of course, it is a detrimental offer).

At the point analysed above, it is the board that decides, so, although it tends to be theoretical, shareholders may be free to accept the offer as well as reject it. Therefore, the central role of the board seems to have been reaffirmed, the board members are informed about the situation, they are aware of every single detail and only they are aware of the real needs of the shareholders. In short, the board has the broadest vision, and therefore it is the board that will determine the dignity of the offer price. A vision that, on first reflection, may appear excessively corporatist, but the logic behind it is correct, for a number of reasons.

First of all, no matter how well informed and attentive shareholders may be, the members of the board, in addition to having an often relevant professional background, are actually in possession of privileged information. Thus, there is an information asymmetry, and it is this asymmetry that tips the balance (of power) within the board.

Furthermore, let us look at the previous case in point: let us assume that a bidder, in this case a potential buyer, deliberately decides to make an offer to a generic target company. It follows that he will propose a price and that instead of talking only to the members of the board, he decides to "entice" the shareholders as well. The latter, and we repeat, out of fear, greed and lack of a "long" vision, could give in to the offer, almost certainly losing out and making a bad deal. The board, on the other hand, knows, is aware. This is what the doctrine requires.

Returning to the Unocal case, which is emblematic for the purposes of our analysis, we alluded earlier to the concept of "defence proportionate to the type of threat in place" (naturally, the threat must have precise, defined and recognisable characteristics). The Court will have to analyse the individual cases, in fact, rather than drawing guidelines, it will have to assess in the concrete case whether the board really acted in the interest of the shareholders and not simply to ensure the presence at the top. This is because, as a rule, following an acquisition, the new controlling party will liquidate the old board members by replacing them, and this is precisely the nature of corporate control, that of placing in the top positions persons chosen who will best respond to its own vision. Therefore, it is not impossible to exclude the case in which the board, against all reasonable doubt, declines an offer, hiding behind the fear of a hypothetical threat when in fact it is not a threat at all.

This is why the Court will have to assess case by case, although it must be acknowledged that the Delaware court itself has been lenient with the proportionality[43] requirements.

Furthermore, if poison pills were used, which could, for example, preclude a hostile buyer from acquiring the target company, this would theoretically not be sufficient to put the buyer out of business, precisely because the latter could engage in a proxy contest and replace the board members.

Continuing the comparative analysis concerning takeover actions, and in any case what may be relevant for the purposes of the discussion, it is interesting to go into the Chinese case.

[43] Collective Action Problems in Chinese Takeover Rules: Deficiency and Difficulty in protecting Target Shareholders in a Hybrid Regime, Shen Wei and Colin Mengshan Xu, p 913

Bids and acquisitions in China

China is undergoing profound financial reforms, and this process is sometimes based on rules and regulations that are already in place in other countries.

In fact, according to a paper by Shen Wei and Colin Mengshan Xu, the Chinese legislator has copied the Anglo-Saxon model tout court, without, however, being fully aware of the British and US context of take-over rules.

The Chinese *corporate* model is obviously peculiar: a communist country that has found itself playing very often in the capitalist camp, *socialism with Chinese characteristics.* China, now the world's leading power, has had to come to terms with a whole range of issues relating to corporate governance, financial regulation and, of course, everything to do with it, such as M&A.

First of all, it is interesting to note that, also in the Chinese panorama, the logic of change of control is preponderant: in fact, in companies with a dispersed and fragmented shareholder base, the rationale of control is fundamental, with the related and consequent questions, who controls? How does it control? How many controlling entities are there? Are they allied? Do they act in concert?

This is the exact opposite of the Italian context, where there are often strong *monolithic* groups*;* in China, despite a very strong state presence, there can also be cases of companies with diffuse shareholding, also because many Chinese companies, for strategic reasons, are sometimes listed on foreign markets (Hong Kong for example).

What is important, however, and becomes apparent when analysing comparative models, is the complexity of an acquisition and an offer. Apparently, summarising, a takeover bid, followed by a takeover, appears as a pure and simple *dialectic of events:* one party wants to buy because it wants to control, the other wants to sell because it no longer believes in the new management or, as in the residual takeover bid in the Italian case, fears that very soon its shares will lose value.

The complexity lies in the way control is obtained: it can be achieved through a *straight merger* or, of course, through a series of purchases aimed at gaining consensus and visibility in the target company's shareholders' meeting.

The hybrid model mentioned, i.e. the Chinese model, has strong similarities with the US and UK models because it takes aspects of them and then makes them its own, adapting them to the complex Chinese reality. In this case, hybridisation takes place through an ad hoc acceptance and remodelling of the model.

The market for control is now well established in the United States of America. We can trace its explosion back to the 1950s, when companies in the most developed markets began to resort to buying shares in other companies in order to *control them.* Obviously, given their complexity, the real novelty was hostile takeovers, i.e. those conducted through the purchase of shares from shareholders without the authorisation of board members.

However, a distinction has to be made between cases. While in the case of public companies with a large shareholder base a hostile takeover attempt might prove successful, the case of a hostile takeover attempt in a private company is quite different. This is because in a private company in almost all cases there is no separation of ownership and control and therefore no obligation to accept any kind of offer. In the private company there is no agent-principal, board-shareholder relationship. Ownership does not have to respond to specific interests, but acts with total discretion.

The Chinese case is interesting precisely for these reasons, because while on the one hand the opening up to the financial markets is evident, on the other hand the dirigiste approach persists, and it is therefore the state that takes charge of the capitalist system, acting as an investor in the various markets and exploiting the market in the service of the nation.

Although the Chinese capital market was conceived and developed later than the Western nations, it has established itself globally and, in the context of the bidding process, is even able to position itself as the leader, given its protectionist policies.

The *market for hostile takeovers* in China began in 1993. At that time, there was no anti-hostile takeover legislation in the People's Republic of China and it was in this context that Shenzhen Baoan Group Company Limited acquired Shanghai Yanzhong Industrial Company Limited. Prior to that time, there had never been a hostile takeover in China, which prompted the relevant authorities and companies to think about the introduction of defensive anti-takeover instruments in the capital market.

One of the most important features defining the scenario of Chinese hostile takeovers is the presence of a diffuse shareholder base, which allows hostile takeovers to accumulate a large amount of shares in the capital market.

The presence of a diffuse shareholder structure can represent a weakness precisely because it does not provide for a defined shareholder structure; a diffuse shareholder structure lends itself easily to raiders and hostile takeovers. Generally, there are two structures, concentrated and diffuse. The diffuse structure is widely found in *common law* legal systems, where there are listed companies with a highly dispersed shareholder base. This is precisely because of their high level of capitalisation.

Referring to the Chinese case history, the discussion of agency relationships comes to the fore. There can be two agency relationships in a company: those relating to the principal-agent relationship, where problems may arise between shareholders and board directors, and those between minority shareholders and majority shareholders.

In the Chinese model, agency costs are high and the conflict of interest between majority and minority shareholders is especially visible. In a dirigiste context, where companies enjoy virtually unlimited funds, it is clear that the majority shareholder will enjoy particular advantages from a corporatist and state perspective. So, while the Chinese model is hybrid and therefore alludes to the UK model, it is also true that it is not possible to analyse the Chinese model without proper contextualisation.

Unlike the UK, where the presence of institutional investors is significant, in China it is the state and the companies it manages that play the leading role. To confirm the thesis of the hybrid model, it should also be noted that the Chinese model has also adopted elements of the so-called German dualistic model. The German model has two boards. The first is responsible for the control and management of day-to-day operations, while the second, defined as the 'supervisory board', has the function of monitoring the board, i.e. ensuring that the latter and its members act according to principles of correctness.

The motivation that may have led China to implement specifics of this model, too, may be found in the need to ensure that managers do not undermine the interests of shareholders.

The People's Republic of China has not yet opened the doors of the capital market to foreign institutions and investors (however, it is interesting to recall the first Chinese hostile takeover in history, which took place in July2008, when the Chinese Sinosteel Corporation acquired the Australian Midwest Corporation Limited.) and, while maintaining a protectionist stance towards foreign investors, is instead massively active in the global *takeover market.*

In 2006, the *Takeover Rules of Listed companies were* promulgated, which were revised in the following years.

Of course, the document and its logic are strongly inspired by the US and UK models, but there are problems with this: the economic and social logic of their respective models can never be the same as that of the Chinese context, so there is a risk of a cumbersome adaptation that does not capture the nuances of their respective systems.

Unlike the US and the UK, the Chinese situation is different, starting with the different attitude to market logic. The government itself, perhaps aware of its relative youth in the capital market, has not yet expressed a clear position regarding the entry of outside investors, but we can still draw some guidelines to better understand its attitude towards them.

The China Securities Regulatory Commission stipulates that foreign-owned or wholly foreign-controlled companies may not be listed on the Shanghai Stock Exchange (SSE) or the Shenzhen financial centre.

Therefore, the study of the Chinese case history draws attention to the absolute necessity of defining a legislation on the subject that responds to the specific structural differences compared to other contexts and, given the latest financial developments in the People's Republic of China, a future growth of the same seems clear.

Comparative European case studies

At this point in the discussion it is appropriate to argue about various European cases, as the market for control has undergone a major development in recent years.

The issue of agency relationships, a cornerstone of the whole matter, appears essential.

The same subject, which is in turn intertwined with the study of *Corporate Governance*: in fact, it should be remembered that depending on the national system, the lines of thought and the "current economic trend", there will be various subjects and interests worthy of protection. Some systems will emphasise the need to protect shareholders, others will focus on the interests of shareholders, while others will consider it appropriate to protect shareholders and employees simultaneously.

The EU directive does not therefore aim to regulate, or rather to harmonise European governance models, but to provide all those *soft laws*, so to speak, that are useful to make a subject of absolute importance, takeovers, as homogeneous as possible at EU level.

First of all, there was the need to overcome what could be called the *Delaware Effect,* i.e. the US-style practice of referring at legislative level, in this case on regulatory matters, to those states with a low level of regulatory framework. It is easy to understand how this approach can be valid in a federal context, such as the United States, which is very different from the European Community context, which, although integrated at the financial and mercantilist level, is currently a union of States with specific regulations and disciplines characterised by sometimes different approaches.

The need to achieve a common regulatory apparatus has placed the respective governments in a position of adjustment, aimed at facilitating the Community control market. Cross-border transactions, in fact. A historical reference can be found at the end of the 1990s, when Vodafone tried to launch a takeover of Mannesmann AG without consulting the board of the latter. Of further relevance to the historical picture is the friendly merger of Hoechst/Rhone-Poulenc (Aventis) and the takeover of Bankers Trust by Deutsche Bank AG.

The reasons that prompted the European Union to undertake a wide-ranging review of take-over regulations, as already stated, were varied. The one that stands out, however, was the need to harmonise the subject matter between States. The development of intra-European trade, the growth of transactions, and the increase in takeovers brought a number of problems to the attention of the Community institutions, especially the question of shareholder protection. In fact, if, as theory recommends, on the one hand financial dynamism and manoeuvres such as takeovers can create value, give rise to market synergies and, above all, reduce agency costs, it is still true that in a changing context such as the European one (which has seen interaction between States with different characteristics from the outset) the need has arisen to adopt measures aimed not only at protecting the financial system, but also at protecting shareholders themselves.

The shareholder's interest is in the protection of his shares; he who holds a stake in a company expects the management not only not to diminish his share value but possibly to double it, if not more. However, this is the theory, the reality is drastically less prosperous and more cynical, in fact, if a company were to begin to suffer losses or began to operate a short-sighted management, a potential bidder could emerge and start to buy shares from the target company. But what is the logic? That the bidder will address the individual shareholders individually and not at the general meeting, as is the case in a merger, [44]enticing them; and that a takeover transaction is certainly preferable to a merger, as there is no need for a continuous dialogue with the board of the target company. In fact, the board of the target company, during a merger-type transition, might fear ex post subordination. This could induce it to find intra-bargaining solutions that would end up precluding the proper conduct of the transaction.

Therefore, assuming the fact that a take over is certainly preferable as an instrument used to obtain control, it is necessary to look at the party most concerned: the shareholders.

The latter will be interested in accepting an offer for a variety of reasons, one might even say psychological.

One factor to be considered is the *control premium*, which will bring considerable advantages in the view of a representative shareholder, while the following case study is relevant for the psychological factor.

We further reiterate, given its importance, that a shareholder from a purely theoretical point of view must be framed as a rational subject. Rational in the economic sense, ergo he will never do anything that will preclude his shareholding. It follows that the logics triggering an acceptance or rejection will also demonstrate the same. Indeed, in the presence of a bidder, interested in obtaining total control and therefore willing to purchase the entire share value of the company, the shareholders will be faced with a dilemma. First of all, the information capacity; it is not to be excluded that the nature of the bidder plays a significant influence in the decision-making process, this peculiarity will be useful for two reasons, one of greater interest for the board, one for the shareholders.

The board might fear a radical change of corporate direction, or worse, a radical change of board. The shareholders in the process of acquisition might fear a bad deal, so it all ties in further with what I would call the *dialectic of corporate events.*

The rational shareholder will only accept if *from his (informed) point of view the bid price is higher than the target's value*[45]. So it is the expectation, the prospect of economic convenience, that is the real driving force behind the shareholders' decision. There is, however, an interesting detail, and it is here that we detect a psychological component, as could be argued according to that branch called Behavioural Economics: in fact, the shareholders could find themselves faced with the unpleasant eventuality that in a hypothetical victory of

[44] "A framework for Adequate Shareholder Protection" Patrick C. Leyens , European Business Review March/April 2001
[45] A Framework for Adequate Shareholder Protection, Patrick C. Leyens, Cit p 43

the bidder, the latter could, by virtue of the predominance, situation of control, cause a significant deterioration of their shares. Therefore, also at European level, it is clear that the underlying ratio is the same as in Italy.

The shareholders of a target company may often find themselves in a disadvantageous situation, either by selling, which would entail the risk of a bad deal (selling at a lower price than the market suggests), or by not selling, in which case they would become minority shareholders.

In the light of what has been said, it is interesting to note that also in other EU economic contexts, in the case we will see the German one, reference is made to the *mandatory bid* as an instrument for the protection of minority shareholders.

Starting the analysis of public takeovers in Germany it is worth remembering that the reference directive is of course always the European Community one, i.e. the European Takeover Directive (2004/24/EC), which in Germany has been implemented through the takeover law *Wertpapiererwerbs-und Ubernahme-gesetz, WpUG.*

The takeover of a public company, unlike a private one, is strictly regulated because of the parties involved. In a private takeover the *actors in the* dialogue are the buyer and the seller, but in a public takeover there are several parties involved. From shareholders to governmental interests, this could be the case with companies having to do with the national interest, defence, aerospace, telecommunications...

The Takeover Act in Germany was introduced in 2002. Prior to that, the non-binding Takeover Code was the legal reference. It did not provide for any sanctions and there was no obligation to comply with its provisions.

The law is changeable, the result of customs and times, in fact the need to introduce the Takeover Act was a consequence of it: European harmonisation was envisaged, moreover the growing number of transactions, acquisitions, mergers, takeovers had laid the inevitable prodromes.

The Takeover Act is applicable to public offers concerning German target companies, or rather, companies with shares listed in Germany. Naturally, the legislator has also taken the European context into account and has provided that the rules on takeover bids, offers and the scope of action of the board of directors may also be extended to all German companies whose shares are listed on other EU stock exchanges.

Germany has a number of special features, first and foremost the structure of the corporate organisation chart. In fact, the *two tier board system is* famous, which provides for the presence of two distinct boards, the management board (Vorstand) and the supervisory board (Aufsichtsrat), which is responsible for deciding on board appointments (Vorastand) and monitoring their actions regarding company matters.

This dualistic view, as we shall see, fits well with another feature of German corporate governance, another important aspect being employee co-determination.

The German codetermination defines the economic direction taken by the German legislator in corporate matters, in fact the system provides and establishes a series of rules aimed at allowing an active participation of employees in the activity and choices of the company.

German law makes a distinction between *workplace* and *company*, just to give an idea of the importance attached by the legislator to the working environment and to the protection of German workers.

It will therefore come as no surprise that in German companies employees will not only take an active part, together with the shareholders, in the election of the members of the supervisory board but may also express elected representatives on the supervisory board.

This serves to define the economic scope, it follows that a hypothetical bidder might interface with a case that is sometimes different from the usual cases.

In the German control market, the same principles already mentioned in the discussion apply, i.e. which type of company is the subject of a bid. It follows that the economic motives will remain the same here, as a bidder will be motivated by the intention to acquire control in undervalued companies with the prospect of restructuring them and bringing them back to profitability. The bidder, however, will have to deal with a peculiarity typical of the German legal system: after acquiring control of the company, the acquirer will not be able to deliberately order the "all at home" and replace the top positions at his own free and arbitrary choice, but will have to comply with the following two specifications: firstly, board members can be replaced only if they have designated their resignation in advance, and secondly, also with regard to the members of the supervisory board, they can be replaced only during the general meeting of the shareholders. A lengthy process, therefore, that lets us understand how the German legislator, while on the one hand permitting the institution of takeover, on the other is oriented towards protecting pre-bid management, perhaps in order to protect employees.

The Takeover Act, which is the law that regulates and implements the European Directive on Takeover Bids (Directive No. 2004/25/EC on Take-Over Bids of 21 April 2004), does not differ radically from the Italian one, in fact the law regulates three types of offers, which can be defined in this way: *Regular Offers, Takeover Offers and Mandatory Offers.*

What is interesting to note, for the purposes of a comparative analysis with the other national systems, is not only the type of offer but also the aims; in fact, again in the German legal system, the aims underlying the existence of the takeover act are to protect the proper functioning of the market, the fairness of the board of the target company, and the fairness of the bidder itself. In this sense we note the Community intention in a broad sense.

In 2014, with the further implementation of the new regulatory regime, the Market Abuse Regulation (MAR) Directive tightened its grip even further on all opportunistic behaviour related to financial markets. The new regime, which came into full effect in July3 2016, also profoundly affected takeover cases.

Since 2015, the German market has seen a steady increase in takeovers in certain sectors, first and foremost the real estate market. According to the law firm Freshfields Bruckhaus Deringer one third of German voluntary offerings in 2015 were in the real estate market [46]

The Mandatory Offer is extremely important for the purposes of this examination and, as we have seen above, is one of the founding principles of the control market. In the German case, too, the mandatory offer is triggered by the acquisition of 30% of the voting shares.

It follows that if the aggregate sum of the voting shares exceeds 30%, the bidder will be obliged to disclose the situation and launch a mandatory bid on the remaining outstanding shares, whether entitled or not, listed or unlisted.[47]

A normal takeover bid does not always result in the acquisition of control, e.g. all those acquisitions below 30%, or those acquisitions of a residual nature already made by a controlling party. In a takeover, on the other hand, as the term *takeover* itself suggests, the bidder intends to acquire control, for the reasons already amply mentioned.

In the Italian context we have referred to the distinction between voluntary and mandatory offers; if we want to make a comparison with the German model we can equate Voluntary Offers to our voluntary offers, Mandatory Offers to mandatory offers, while Takeovers are split between voluntary and mandatory offers.

Control, it is important to note, will not only be achieved through the use of the purchase of new shares but also through agreements with other shareholders. Control can be achieved through shares held through intermediaries, which is usually done to avoid having to launch a mandatory offer.

A party is not always obliged to launch a takeover bid, which is the case in all cases where, although a specific threshold is reached, a controlling party with a larger share already exists.[48]

A takeover has to be launched on 100% of the circulating shares of the target company but, unlike the mandatory offer, the voluntary takeover is less binding in nature, but still subject to conditions. One of these is the existence of a minimum threshold of acceptance by shareholders, which, if not met, would mean that

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[46] For further clarification on this issue, we recommend reading the information paper "Public Takeovers in Germany", prepared by the law firm Freshfields Bruckhaus Deringer.

[47] See further the above-mentioned 'Public Takeovers in Germany'.

[48] *In addition, BaFin, may (but is not obliged to) exempt a controlling shareholder from the mandatory offer obligation if, for example, the controlling shareholder unintentionally acquired 30 per cent of the voting rights, or the controlling position was acquired: in connection with a financial rescue of the target; or as a result of a reduction of the target's share capital.* Quote from "Public Takeovers in Germany" p 26

the offer would fall. In any case, "conditional" offers are not always admissible, as the bidder cannot withdraw an offer at its full discretion.

The mandatory takeover bid is not subject to any kind of conditionality, unless BaFin itself has established specific cases providing for exemption, and must be for 100% of the shares with voting rights.

As mentioned in the preceding pages, there are a number of ways to exempt a hypothetical bidder from the bidding obligation.

First of all, let us immediately establish the analogy with the Italian context. There are two government agencies, Consob and BaFin, which are required to supervise and regulate the most varied cases inherent in the matter; in fact, BaFin itself, in analysing the cases of exemption, establishes that in the counting of the shares, useful for calculating the participation of the bidder, a distinction must be made.

A bidder who has reached or exceeded the 30% threshold may not be obliged to launch a mandatory takeover bid, because the threshold may have been reached by obtaining voting shares in the following ways: inheritance, donation, corporate restructuring...

Second, a bidder could be exempted by BaFin from launching a mandatory takeover bid in all those cases governed by the WpUG Offer Ordinance. In this respect, BaFin will choose arbitrarily whether to exempt the bidder or not.

A takeover bid must be addressed to all shareholders, including those domiciled outside Germany[49], and the takeover bid must be intended to cover all issued shares.

Exactly as in Italian law, the question of the offer price arises in all cases of a takeover bid and naturally the price will depend on the bid itself. The price will be set by strict constraints of the Takeover Act, which dictates that it must be established on the basis of a weighted average of the last three months preceding the publication of the decision to launch the takeover bid or the respective acquisition. [50]

Returning to the analysis of the mandatory takeover bid, the German legislator envisages a course of action similar to that of the Italian system, in that the bid itself must be structured in accordance with certain criteria. During the due diligence phase, the target company and its shareholders will provide the relevant documentation, naturally with the approval of the board of directors, since the due diligence phase is enshrined in law.

This is one of the most delicate phases of a takeover bid. Certainly, the bidder will also have to meet bureaucratic obligations, since, according to the Takeover Act and the WuPG *offer ordinance*, he must be able

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[49] *The BaFin can however allow the bidder upon his request to exempt shareholders from the offer who are domiciled in certain jurisdictions outside the EEA. However, such an exemption is in practice only rarely granted.* CIT Andreas Lohner/ Gerald Schumann, January 2014, Baker&McKenzie "Public Takeovers in Germany" p 12

[50] For further clarification, we recommend viewing "Public Takeovers in Germany", published by the law firm Baker&McKenzie.

to provide: his personal documentation (name, personal data), as well as indicating other parties involved (acting in concert), a correct description of the type of offer, the conditions of the offer, the dates of the offer... in short, all the bases useful to ensure a proper conduct of the operation and therefore a further reminder of the need for transparency.

The timing of the acquisition of control, for the parties involved, is one of the most interesting elements of the offer; in fact, according to the requirements of the ***Section 10 notification***, if the bidder does not inform the board of the target company, the latter will be made aware of the offer in place by the Section 10 notification, which will be published online on the websites provided after having adequately informed BaFin and the guarantor authorities.

Establishing the correct publication date is crucial for establishing the offer price, as publication is binding for the calculation of the three-month period from which the calculation of the price based on the weighted average will start.

What is interesting, after looking at some elements of the German case history, is the similarity with the Italian context and it is precisely in these similarities that we see a similar Community matrix.

Wanting to continue a comparative analysis, in the following pages we will limit ourselves to dealing with some specific cases that have concerned some European countries in recent years.

As is well known, the European Directive has succeeded in harmonising the subject matter at Community level, which has not only made the control market more efficient at European level but also facilitated access to it for investors from outside the European Union.

The EU directive has also allowed all EU nations to enjoy the benefits of such harmonisation, allowing nations that once risked being cut off from the control market to take part in it, making them attractive to foreign investors.

The Polish capital market is one of the most flourishing in Europe, and Poland's geographical location, straddling east and west and close to Russia, makes it particularly attractive. Poland is also one of the few countries to have withstood the shockwave of the 2008 economic crisis, so it is not surprising that the Warsaw Stock Exchange (WSE) is a very attractive marketplace for emerging European economies such as Ukraine, Bulgaria and Hungary.

Poland is also attractive for investment because of its ability to untangle various business sectors, from *IT* to civil engineering companies.

It is worth noting that the way in which a tender offer is carried out in Poland is also related to Directive 2004/25/EC of 21 April 2004, the *Takeover Directive.* Here too the logic of control is repeated. In fact, just as in Italian law, the purchase of shares above a certain threshold must be made through a tender offer.

In the Polish context, it is significant that there are two thresholds for mandatory tender offers, in fact, while the Community law "suggests" a threshold of 30%, in this specific case there are two thresholds: 33% and 66%.

The logic seems to be as follows: if an investor were to buy 33%, he could choose to buy no more than 66% or possibly the entire amount of shares. The 66% threshold, on the other hand, if exceeded, would lead to an immediate mandatory tender offer of 100%.

The aforementioned situation is certainly not in line with Community practice, the Polish Financial Supervision Authority (PFSA) itself has begun to realise how this "double threshold" system could prove extremely cumbersome, suggesting the adoption of a single threshold, that of 33%. Even if, the same authority, assumed that the 66% threshold could prove useful in the case where the target company is a banking institution. This, above all, as an instrument of guarantee and transparency for stakeholders.

Once the thresholds triggering the bidding obligation have been established, the focus should be on the minimum bid price: as in other cases, it should not be lower than the price calculated on the basis of the weighted average of the highest price over the last three months. In the event that the 66 per cent threshold is exceeded.

The minimum bid price itself shall not be lower than the highest price offered in the last six months on the WSE, or in the last twelve months by an investor or its affiliates.

Moreover, since the regulatory reference is the well-known European Directive, it is stressed that the offer is reserved indiscriminately for all shareholders regardless of their type of share held.

As is the practice, the bidder may offer cash, securities or a combination of the two, and in continuing the analysis of the Polish context, we must briefly refer to Articles e4 of the 5Directive. These articles provide us with important details regarding the rules concerning the offer price.

Once the so-called preliminary stages have been completed, the documents required by the PFSA must be drawn up in conjunction with the Warsaw Satock Exchange, after which the offer must be published through official channels. The offer shall not be subject to any degree of approval, however, the PFSA may request structural changes or additions to the offer document.

Squeeze-out situations are also foreseen in this case. If an investor or majority shareholder wishes to acquire the entire company, even with a view to a possible delisting, he or she may, as in the case of a takeover, contact a broker and announce the purchase. A *squeeze-out* purchase must be made within three months of the 90% threshold being exceeded (it should be noted that this will be done without the consent of the minority shareholders).

Delisting was alluded to earlier and it should be noted that unlike a tender offer or a *squeeze-out* purchase, a delisting requires the approval of the competent authorities, in this case the PFSA.

The purpose of delisting is to privatise a formerly public company by purchasing all the shares and thus "eliminating" the outstanding shares, thus preventing other parties from gaining control of the company. However, this procedure is not regulated by the Takeover Directive, although in practice it is similar to the takeover and residual takeover.

A delisting procedure, precisely because it concerns the purchase of shares, is preceded by a tender offer. One might therefore ask why the rules laid down in the European Takeover Directive do not apply in this case. Well, one answer could be that, unlike takeovers, delisting aims to revoke, cancel or withdraw a company from stock exchange trading, whereas a takeover aims to ensure control of the company to the acquiring party.

So, we repeat, in the case of takeover the object is control, in the case of delisting the aim is the withdrawal of the securities from trading. (takeover directive is applicable to all offers resulting from an acquisition or change of control).

After providing a retrospective on the institution of the takeover bid in Poland, we will analyse a case on the subject: The Case of Bogdanka.

This case pits two companies against each other, the "Target" company (Bogdanka) and the "Bidder" company (Czech Coal Mining Holding NWR).

The study of this case history is useful to better understand the defensive measures that a company can take in the course of a hostile takeover.

As is well known, a bidder will make judgements on the merits before venturing into a takeover, since bearing the burdens and efforts of a takeover bid will involve legal fees, disclosure, economic risks and many other situations that could prove unpleasant. Therefore, it will only launch a takeover if it is really enticed by the prospect.

Bogdanka (Lubelski Wegiel "Bogdanka" S.A), a mining company, at the time of the takeover had all the characteristics that made it "the perfect target". This was for several reasons: the main one was the shareholding structure and the composition of the shares. In fact, the share capital was dispersed: more than 50% of the share value was allocated to pensions and investment funds.

Moreover, the company, once under the control and aegis of the Ministry of the Treasury, had broken relations with the latter and the interests of the ministry were missing. So there was no controlling entity, no majority shareholder, the shares were dispersed. It is easy to understand that in situations like this it is not at all difficult for a potential bidder to lay the foundations for control.

This is referred to as "stock building". i.e. the building up of a relevant share package through purchases.

If the Ministry of the Treasury had continued to hold a stake in the company, the situation might have been radically different: a *golden share situation* might have arisen, *which occurs whenever* a company is worthy of protection because of its national interest.

A company may resort to reducing voting rights in certain circumstances, naturally in order to prevent takeovers and always if the company's bylaws so provide. However, in some cases, the board of directors will have to obtain the approval of the shareholders before implementing defensive takeover solutions. This is still possible also in the Polish context and is in fact regulated by Article 9 section of the 2aforementioned Directive. In principle, this would be the so-called neutrality principle.

It is also worth noting that the Polish legislator has included the *breakthrough rule in* article 112.

After these further remarks, we can return to the conclusion of the case. We immediately note that after NWR announced the tender offer, the target company Bogdanka categorically contested NWR's hostile intentions. The duty to make a judgement at the tender stage is provided for in the tender rules[51], and in this case the judgement was overwhelmingly negative.

Specifically, the board of Bogdanka complained that NWR underestimated its share value. In fact, NWR proposed a price that was considered inappropriate by the board of Bogdanka.

The matter was resolved in the midst of media clamour, in fact NWR triggered a real media storm: even thematic forums were organised by the Polish and Czech authorities.

The Bogdanka company "won" the battle, which underlines how effective communication and synergy with its base, workers and shareholders, can be.

Another interesting case is France.

The French Republic has implemented the European directive, based on the studies of the *Lepetit Report*[52], which reiterates the need to adopt the *neutrality rule as* long as it is subject to the principle of reciprocity.

Of course, the purpose of the principle of reciprocity is to protect the national economic interest and to prevent the emergence of disadvantageous and asymmetrical situations for French public companies.

The Commission itself advised against the implementation of the *breakthrough rule* during the pendency of the bid, going so far as to state that the advantages obtained by the latter did not equal the advantages.

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[51] Directive 2004/25/EC Article 3, *General Principles, section 1 b)* The holders of securities of an offeree company must have sufficient time and information to enable theme to reach a properly informed decision on the bid; where it advises the holders of securities, the board of the offeree company must give its views on the effect of implementation of the bid on employment, conditions of employments and the locations of the company's places of business

[52] *An official advisory committee study chartered by the government to recommend how France should implement the new rules,* CIT p 317 A Simple Theory of Takeover Regulation in the United States and Europe, G.Ferrarini, Goeffrey P.Miller

Unlike the other contexts analysed, however, the French economic system focuses on the *stakeholders' model and aims at the same time to satisfy the shareholders, the managers, the employees, the bank and the contractors* rather than emphasising the protection of shareholders.[53]

The takeover directive was implemented at the end of March 2006; as a result, the French *Code de commerce* now provides for an obligation of board neutrality. Obviously, the reciprocal relationship continues to apply: the board of the target company will not be subject to the neutrality obligation if the bidder or the entity controlling the bidder does not itself provide for the neutrality obligation.

Thus, the concept of reciprocity[54] is of great importance in the French set-up; moreover, the so-called "Danone Amendment", which has its origins in a takeover attempt, attracts attention in French law.

It happened that PepsiCo was rumoured to be about to launch a takeover bid for Danone, so in response the French regulator, *The Autorité des marchés financiers* (AMF), from then on tacitly stipulated that a potential bidder would have to disclose its plans to the AMF and the public.

With regard to the *breakthrough rule* mentioned above, although the French legal system has de facto not implemented the well-known rule in its own system, it does allow companies the optional option of implementing it and in any case any company adopting the *breakthrough rule* will be subject to the principle of neutrality.

In conclusion, we can consider the French model, although in line with the EU directive, as highly protectionist. On the other hand, it is well known that the French system is aimed at protecting its large and consolidated industrial groups, such as Vivendi, which has recently come into the limelight (in addition to its well-known and sensational past) for its takeover bid on Lagardere.

[53] "Stakeholders theory and company law" by F.G Trebulle

[54] *If several companies launch a bid, the French target company may invoke reciprocity if even one of theme is not subject to board neutrality,* CIT Guido Ferrarini, Geoffrey P.Miller "A Simple Theory of Takeover Regulation in the United States and Europe", p 318

CHAPTER 2 - SHAREHOLDERS' AGREEMENTS

Regulatory sources and definition of covenants.

Continuing the analysis of takeover bids, which are inherent in the control market, it is an absolute must at this point of the discussion to introduce the concept of *Shareholders' Agreements.*

They are governed by Article 122 of the Consolidated Law on Financial Intermediation, paragraph 1 of which states that *agreements, in whatever form they are concluded, concerning the exercise of voting rights in companies with listed shares and in companies controlling them within five days of their conclusion are:*

a) *Announcements to Consob*
b) *Excerpts published in the daily press*
c) *filed with the commercial register of the place where the company has its registered office*

d) *Notices to companies with listed shares*[55]

<u>Pact</u>. According to the Treccani encyclopaedia, it has its origin in Latin: Pactum, a derivation of *pacisci* or to *bargain*, and then later defined as *In general, convention, agreement between two persons or between two parties: to make, conclude, enter into a p. with someone.* Thus, shareholders' agreements could be defined as *agreements executed between the shareholders of a company, which define their right and obligations.*[56]

Continuing the regulatory framework, Article 123[57] of the Consolidated Law on Finance stands out (Duration of agreements and right of withdrawal), which provides a general overview of the time frame within which agreements are applicable.

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[55] Paragraph first replaced by Article 3 of Legislative Decree No 146 of 25.9.2009; subsequently amended by Article 20 of Decree-Law No 91 of 24.6.2014 which replaced subparagraphs (b) and (d); and by Conversion Law No 116 of 11.8.2014 which deleted the provision of Decree-Law No 91 of 24.6.2014 which replaced the subparagraphs in question.

[56] Cit, 'Shareholders' Agreements: Examining the Increasingly Common Phenomenon' Aditya Seth, Business Law Review, Volume 41, Issue 2 (2020) p 44

[57] Article 123 (Duration of agreements and right of withdrawal), Consolidated Law on Finance, 1) The agreements indicated in Article 122, if for a fixed term, may not last longer than three years and shall be deemed to have been concluded for that term even if the parties have provided for a longer term; agreements may be renewed on expiry; 2) Agreements may also be concluded for an indefinite term; in such case, each contracting party shall be entitled to withdraw with six months' notice. Article 122 (1) and (2) shall apply to withdrawal; 3) Shareholders intending to take part in a public purchase or exchange offer promoted pursuant to Articles 106 or 107 may withdraw from the agreements indicated in Article 122 without notice. The declaration of withdrawal shall not take effect unless the transfer of the shares is completed.

The issue of control is once again of relevance. Although the legislature has long established that a situation of control exists once a certain threshold has been reached and exceeded, there may be a number of cases where control is not of such immediate relevance.

This is the case whenever there is an agreement, even an implicit and tacit one, not expressly written, between shareholders, with a view to achieving certain objectives.[58]

Of course, the above recalls the case of concerted action, and it is worth noting that shareholders' agreements and concerted action must be viewed from a simultaneous perspective.

On the other hand, it is precisely the covenant that could be defined as the synthesis of the purpose of the concerted action itself; the complexity of the matter is found in the difficulty of identifying the concerted action, which, it should be emphasised, has as its objective the joint control of shareholder value in order to influence choices (think, for example, of all those situations of board seeking).

The concept of "Concert Action" is perhaps the most challenging component to deal with when investigating the complex world of takeover bids.

There is a reasonable reason for this: in fact, Article 106(1) of the Consolidated Law on Finance states that anyone who reaches the 30% threshold must, by law, launch a public purchase offer. This is absolutely easy to do, unless you want to invoke absurd and impractical cases; it will not be difficult to detect the purchases of a single shareholder, quantify them and thus determine whether or not it will be convenient to launch an offer. In the case of concert shares and therefore also of concert purchases, the difficulty will be inherent in establishing whether the general shareholder will have purchased for a purely individualistic or concert purpose.

The examination could lead to real multi-faceted scenarios, but what has always been clear is the need to identify the intentions of the concert performers, i.e. the aims of their mutual and coordinated action. At this point we could establish a useful outline to define, at least from a general point of view, what the necessary and useful components should be, or at least could be, in order to speak of *concerted action:* these could be the intention to control, to define the company guidelines, to explicitly dictate a line. Hence, control.

Article 101-bis, paragraph 4-bis, defines the persons who may be classified as *acting in concert*[59]; the same article, in point a), further refers us to Article 122 concerning shareholders' agreements.

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[58] Article 101a(4) "*Persons acting in concert" means persons who cooperate with each other on the basis of an agreement, whether express or tacit, oral or written, even if invalid or ineffective, aimed at acquiring, retaining or reinforcing control of the offeree company or at thwarting the attainment of the objectives of a takeover or exchange offer".*

[59] Article 101 paragraph 4-bis *They are in any event persons acting in concert:*

a) *Adherents to an agreement, even a null agreement, provided for in Article 122 (1) and (5) (a), (b), (c), (d);*
b) *An entity, its parent and the companies it controls;*
c) *Companies under common control;*
d) *A company and its directors, members of the management board, supervisory board or general managers*

At this point, it is necessary to underline what is really the underlying rationale of the purchase obligation resulting from the configuration, or rather, the identification of a group of aggregation acting in concert.

One of the founding reasons is to avoid and certainly curb all those situations that could seriously compromise the transparency and fairness of corporatist management.

If control is the main issue, it is clear that a group of individuals with the same aims and objectives could seriously compromise the impartiality of the processes.

A distinction must be made: there are different classifications of concert performers. This is because, according to the approach adopted by Alessandro Triscornia, there are different types of concert, depending on the source of origin, the purpose, the modus operandi and the subjects involved[60].

It classifies and defines three different types of concert[61], *endosocietal, relational and covenantal.*

This means that it is not possible to make a qualitatively objective judgement about the nature of the performers and the concert action.

Many have repeatedly called for greater shareholder involvement in corporate affairs, the so-called activism having already been reiterated by the directive of 17, 2008 issued by the European Securities Markets Expert Group, regarding *Preliminary view on the definition of "acting in concert" between the Transparency Directive and the Takeover Bids.*

As we shall see below, for the purposes of detecting prejudicial conduct, only those acts aimed at calling into question the contestability of the issuer count.

The need, therefore, to identify the prejudicial aims and ambitions arising from the concerted action, and not the concerted action itself, becomes even more crucial for the protection of minority parties.

Not only the protection of minority shareholders but also the functioning of the market, thus an anti-avoidance function.

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[60] Lawyer Alessandro Triscornia, one of the founders of the law firm Gilberti Triscornia e Associati, in the publication "Mandatory takeover bid: is the presumption of concert by shareholders' agreement still absolute?" Giurisprudenza Commerciale,2019, proposes an interesting level of definition for the different types of concert;

[61] *The endocorporate concert, based on the fact that several persons belong to the same corporate group, whereby 'the following are, in any event, persons acting in concert: [...] b) a person, his parent and the companies controlled by him; c) companies subject to common control'.*

The relational concert, the core of which is constituted by family or role relationships and which is the subject of a presumption iuris et de iure under Article 101-bis, paragraph four bis, letter D) of the Consolidated Law on Finance, where the relationship is between "a company and its directors, members of the management or supervisory board or general managers".

The concert agreement pursuant to Article 101-bis, paragraph 4-bis, letter a) of the Consolidated Law on Finance, according to which "the parties to an agreement, even if null and void, provided for in Article 122, paragraph 1 and paragraph 5, letters a,) b,) c,) and d)" are considered "concert participants". CIT Avvocato Triscornia, p 477-488 "Mandatory takeover bid: is the presumption of concert by shareholders' agreement still absolute?"

It follows that the agreements, naturally those relating to listed companies, pursuant to Article 122 of Legislative Decree No. 58/1998, must be notified to Consob and subsequently filed with the register of companies where the company is located, under penalty of nullity.

It is also relevant, for the purposes of a proper analysis, to the provisions of Article 2341-ter[62] of the Civil Code concerning the disclosure of agreements at the opening of the shareholders' meeting.

The reason for these provisions is based on the above-mentioned need for protection in the event of a change of control. Of course, an agreement which then evolves into a covenant does not always "degenerate" into a radical change of the controlling corporate structures, but the risk still exists.

Among other things, and this applies in all corporate contexts, correct information not only reduces all the problems associated with agency costs, but also has the additional advantage of increasing the participation of shareholders in the life of the company.

However, although covenants tend to be grounded and logical in the regulations and the directive, and although they have been accepted in our system, unlike in other legal systems where they are not considered, they clearly have grey areas.

On the other hand, if in the ideal sense the agreement follows the approach described above, it is also true that there are many cases where the agreement itself contains interpersonal clauses, unknown to outsiders, and therefore a further degeneration of the shareholders' agreement could be the creation of a micro decision-making cosmos in the shareholders' meeting.

There is therefore a 'dialectic between transparency and confidentiality'[63], which occurs because although the legislator's calls for transparency impose the need for investors to be informed, it is also true that there is highly confidential corporate information which, if disclosed, could compromise management, such as all information concerning business strategy.

Having ascertained the centrality regarding control, we will go into the subject in greater depth by arguing about the judgments of merit expressed by Consob regarding a real case history.

Let us begin by giving the definition of Article 93 of the Consolidated Banking Law, which states that, in addition to the undertakings referred to in Article 2359, first paragraph, numbers 1 and 2 of the Civil Code, controlled *undertakings are* also *Italian or foreign undertakings over which a person has the right, by virtue*

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[62] Art 2341-ter of the Civil Code *In companies that use the venture capital market, shareholders' agreements must be notified to the company and declared at the opening of each shareholders' meeting. The declaration shall be transcribed in the minutes and the latter shall be filed with the office of the commercial register.*
In the event of failure to make the declaration provided for in the preceding paragraph, the holders of the shares to which the shareholders' agreement relates may not exercise their voting rights and the resolutions of the shareholders' meeting adopted with their casting vote may be challenged pursuant to Article 2377.

[63] Alessandra Rosa "Shareholders' agreements, management and corporate information: an (Italian) issue really resolved?" Il Mulino-Rivisteweb, cit p 134

of a contract or a clause in the articles of association, to exercise a dominant influence, when the applicable law permits such contracts or clauses.[64]

Consob argued, and this can be deduced from the consultation document *Control of Olimpia and Olivetti: Reasons for Consob's evaluation (In "Consob informa" n.43 of 5 November 2001)*

that Olivetti SPA was controlled by Olimpia, which in turn was under the direct control of Pirelli.

Consob specified that, although the notion of control is assimilable (this always with regard to judgments on the merits) to all those situations in which it is possible to control the regular administrative operations of the company, there are obviously also those cases where control is evident not so much for the ability to influence the management as for the ability to influence the work and the decision-making choices of the ordinary shareholders' meeting.

In the light of all this, Consob's conviction will become clearer. In fact, Pirelli S.p.A. held 60% of Olimpia's capital, a clear majority. Not only that, Olimpia's bylaws also stated that the majority required for the ordinary shareholders' meeting was the one set out in the code, so it was clear that Pirelli could really enjoy control over Olimpia.

The case began to take on intriguing connotations when, in light of the content of Article 93(1)(b) concerning shareholders' agreements, Consob began to wonder about the notion of control and whether it should be extended to all situations under Article 93 TUF.

In fact, as we shall see below, Consob expressed its orientation in this regard by stating that, under the terms of corporate control, and in view of Article 2359 of the Civil Code, as well as the 93 TUF already cited, the *question arises as to whether such agreements may be relevant not only to grant control to a minority shareholder but also to "weaken" a shareholder who alone has "the majority of the votes exercisable in the ordinary*[65] *shareholders' meeting".*

In relation to the hypothetical weakening of Pirelli, it must be said that, according to the shareholders' agreement signed, Pirelli would not be deprived of the right to pin the majority of the board of directors to be appointed.

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[64] Article 93-TUF Paragraph 1 point 1.
The same Article 93-TUF continues in paragraph 1 with point b) *companies, whether Italian or foreign, over which a shareholder, on the basis of agreements with other shareholders, alone has sufficient votes to exercise a dominant influence in the ordinary shareholders' meeting.*
For the sake of clarity and for the sake of a correct understanding of the case, paragraph 2 of the aforesaid article is *also* reproduced here: For *the purposes of paragraph 1, the rights pertaining to controlled companies or exercised through trustees or intermediaries are also considered; those pertaining on behalf of third parties are not considered.*

[65] Extract from Documenti di consultazione *Controllo di Olimpia e di Olivetti: Motivazioni della valutazione Consob (in "Consob informa" n.43 of 5 November 2001),* the same document goes on to say
(...) one should (...) always monitor the possible weakening of the position of the absolute majority shareholder with regard, first of all, to its ability to influence the formation of the will of the ordinary shareholders' meeting and only secondarily with reference to the way in which the administrative body operates

In *order to exclude solitary control, it is necessary that the majority of the directors are precluded, by virtue of contractual clauses, from taking decisions relating to the ordinary management of the company in the absence of the consent of the directors representing the minority*.

None of this occurred in the above-mentioned case, because the shareholders' agreement expressed by Pirelli and Edizione Holding, which was naturally published and communicated in compliance with Article 122 TUF, did not preclude the directors pinned by Pirelli, who represented the majority on the board, from making important corporate decisions.

This proved to be correct and true, since if it was necessary to take action on "sensitive" issues, the favourable opinion of at least one director of the "current" Edizione Holding was expected.

In fact, the director of the Edizione Holding area could also not be present, so there was no so-called "veto power" resulting from the obligation to be present and vote.

Thus, although Edizione Holding's opinion of the director was desirable, it was not essential, given that his presence was not mandatory.

Consob itself pointed out that with regard to "certain resolutions on matters defined as significant", the opinion of "at least" one director of Edizione Holding would be required "if present", alluding to the director of Edizione Holding.

Therefore, having ascertained that the presence of the latter was not subject to precise obligations, it will not be difficult to convince ourselves that the dominant position belonged to Pirelli; in fact, if the parties (Pirelli, Edizione Holding) had found themselves in disagreement on a relevant issue or not, and following a consultative "bylaws" process, having ascertained the objectivity of the non-conciliation, Edizione Holding's delegates would have abstained from taking part in further board meetings.

It follows that the Pirelli directors who remained in the majority continued to maintain hegemony in the company.

The above analysis is salient in clarifying that Pirelli's hegemonic position as parent company of Olimpia did not disappear even after the shareholders' agreement with Edizione Holding.

I intend to underline how, in the light of a "wide-ranging" view, the whole plot underlying the case is still the configuration of control. Specifically, we refer to de facto control, pursuant to Article 2359(1).

Olivetti S.p.A. at that time was held by Bell and despite this, Consob did not attempt to venture superficial conclusions, but a few months later, in July 2001 to be precise, an agreement was reached between Bell, Pirelli and Edizione Holding for the *sale of the shareholding in question.*

The committee therefore defined a modus operandi aimed at further investigating the implications of the shareholders' agreement, which tended to set out investigative conduct for the purposes of knowledge of the company's financial statements, examination of the ordinary shareholders' meetings, verification of the shareholdings capable of constituting situations of control, non-occasional controls...

The necessary investigations conducted by Consob led to an outcome: Olimpia, pursuant to Article 93 TUF, controlled Olivetti.

Numerically speaking, Olimpia was able to have enough votes in the shareholders' meeting, even when the agenda was extremely important, as for example when it came to voting for the appointment of the entire board of directors. Well, all sixteen directors who were elected were those nominated by Olimpia.

With regard to Olivetti's shareholding structure, it must be said that, despite the stake sold by Bell, *the relevant shareholdings of more than 2% remained virtually unchanged.*

Furthermore, and[66] in conclusion, Olimpia's control over Olivetti is also evident from the clause in paragraph 8.01 of the shareholders' agreement between Pirelli and Edizione Holding, which provides that *where Pirelli assumes commitments regarding the conduct of Olivetti's directors, it is clearly assumed that Olimpia will always be able to advise those directors.*

[66] Control of Olimpia and Olivetti, Consob document.

Situations that could exempt from the Opa Obligation.

One might now wonder about all those situations in which an exemption from the launch of a mandatory takeover bid could be envisaged.

Consob, in its Communication No. 1187953 of 24 November 2020, clarifies the issue by referring to a real case history.

The supervisory authority replied to '*Company A' on* a question concerning the purchase of shares subject to withdrawal[67].

Consob, analysing the case as usual, expressed a series of judgements on the merits; in fact, the same communication, referring to exemptions *for causes beyond the control of the purchaser,* specifies first of all that Article 49, paragraph 1, letter d of the Issuers' Regulations was adopted *at the time of the first implementation* of Article 106 TUF, paragraph 5, *referring to increases in shareholdings connected to the exercise of option rights in the context of capital increases*[68]

Consob pointed out that the "Technical notes on the regulation of public purchase and exchange offers" specified all those cases which the *secondary* legislator wished to exempt.

Consob has consistently interpreted Law No. 149/92 to mean that the conditions for a mandatory takeover bid do not exist in the event that a shareholder, in the context of a capital increase, increases his shareholding by simply subscribing to his option rights, solely because other shareholders waive their rights. Such a situation arises, in fact, not as a result of the shareholder's intention to acquire a significant shareholding, but as a result of a choice made by others which is not attributable to him. (...) It should be stressed that in all the above hypotheses, the exceeding of the threshold must be not only passive, but also objectively not attributable to the person potentially bound by the obligation".

This communication, in its entirety, as already pointed out, set out to clarify all situations concerning the exemption from launching a takeover bid.

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[67] We prefer to report this part of the communication in its entirety, for the purpose of a more complete treatment, *Reference is made to the questions sent by [...Company A...], through the Law Firm, [.... Law Firm....] (the "Law Firm"), in particular, with a note dated [...omissis...] (collectively, the "Queries") in order to request confirmation, firstly, that - with reference to the possible purchase of the Withdrawal Shares in the context of the procedure pursuant to Article 2437-quater of the Civil Code, as a result of the Transformation of [...Company B...] into S.p.A. - "the possible exceeding of the threshold of 25% (...) of the share capital of [...Company B...], exclusively as a result of the exercise of its pro-rata option right and the failure to exercise the option and/or pre-emption right by the other entitled parties, would not determine any obligation to make a public tender offer, since the exemption for the exercise of "rights originally due" pursuant to Art. 106, paragraph 5, letter C) of the Consolidated Law on Finance and Article 49, paragraph 1, letter D) of the Issuers' Regulations".*

[68] Please refer further to Communication No. 1187953 of 24 November 2020.

Specifically, it is worth recalling Art. 106, which in para. 5 lit. c writes that there is an exemption from the obligation to make an offer in those cases involving *causes beyond the control of the purchaser*[69].

Again with regard to Communication No. 1187953 of 24 November 2020, please refer to Article 49, paragraph 1 letter d) of the Issuers[70]' Regulation.

The subject of exemptions from the Purchase Obligation is of absolute importance; point a) of Article 106 TUF, paragraph 5 states that one of the cases of exemption is the occurrence of *Transactions aimed at rescuing companies in crisis.*

Therefore, when analysing exemptions from mandatory takeover bids, the primary regulatory source is Article 106 TUF, specifically paragraphs five and six. 106 TUF is essential in regulating all those situations that result in an exemption from launching a takeover bid.

Another interesting Consob communication is No. DEM/11081302 of 30-9-2011.

This was a request for a reasoned ruling of exemption from the obligation to make a public tender offer, specifically, the law firm through which the request was made by Company A, based its legal reasons on paragraph five, letter a) of Article 106 Tuf, thus referring to the exemption from the obligation in case of *transactions aimed at rescuing companies in crisis.*

Consob's response was negative, however, and it did not find any kind of exemption for the reasons we will see shortly, in the meantime we will analyse how the case unfolded in more detail.

Company A' was in a state of absolute crisis, the balance sheets showed negative EBIT and almost all the operating results of recent years pointed to an uncomfortable trend.

Even the preliminary results for the period January to May 2011 were negative, so it was certain that the situation was in bad shape. The question naturally arose as to how the situation could be reversed.

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[69] Article 106 of the Consolidated Law on Finance, Paragraph 5, for the sake of clarity, the cases providing for exemption from the obligation to launch a takeover bid are listed below.
Paragraph 5, Consob shall establish by regulation the cases in which the exceeding of the shareholding indicated in paragraphs 1, 1-bis, and 1-ter or in paragraph 3, letter b), does not entail the obligation to make an offer where it is realised in the presence of one or more shareholders, who hold control or is determined by

a) Transactions aimed at rescuing companies in crisis;
b) Transfer of the securities provided for in Article 105 between persons linked by significant shareholding relationships;
c) Causes beyond the purchaser's control;
d) Transactions or exceedances of the threshold of a temporary nature;
e) Merger or demerger operations;
f) Free purchases.

[70] Article 49 of the Issuers' Regulations states that the offer obligation under Article 106 does not apply if, as stated in paragraph 1, point d), the *threshold is exceeded as a result of the exercise of option, subscription or conversion rights originally due.*

An extraordinary operation was therefore proposed, the aim was to rescue and rehabilitate the company's crisis, so the boards of directors of "Company A" and the controlling shareholder of Company A, which Consob defines as "Company AA", agreed to purchase the entire capital of "Company B".

On the same day, agreements were signed, first and foremost the 'Framework Agreement'. The Framework Agreement provided that under certain conditions, by a certain date, company A would acquire the whole of company B. The consideration for the acquisition would consist of two parts, a fixed part and a variable part. The consideration for the acquisition would consist of two parts, a fixed part and a variable part. The deferred payment would of course give rise to a claim of the shareholders of Company B against Company A.

The steps of the rescue procedure continued in the following additional ways,

The board of directors of "Company A" would have convened the shareholders' meeting in order to deliberate on the following manoeuvres: the regrouping of the ordinary shares of "Company A" and the launching of two capital increases of Company A.

Specifically, the first capital increase *will be carried out through the issuance of ordinary shares offered in option to the current shareholders pursuant to Article 2441, paragraph 1, of the Italian Civil Code,* while the second capital increase *will be for a maximum amount of EUR (omissis) at the service of "warrants" to be assigned free of charge to the subscribers of the First Capital Increase and exercisable within 12 months from the First Capital*[71] *Increase,* while the second capital increase would have been at the service of *warrants to be assigned free of charge to the subscribers of the First Capital Increase.*

Subsequently, after the first capital increase, 'Company AA' was to transfer for consideration to the shareholders of Company 'B' a portion of its option rights, while the shareholders of 'B', *as consideration for the transfer of those rights,* were to transfer to 'AA' a portion of the claim.

Once the capital increases had been completed, the shareholders of 'B' would have become shareholders of the issuer, and they would have held more than 30% of the shares. The known threshold.

The issuer's capital would be distributed as follows.

A shareholders' agreement was established, which would be finalised when the shareholders of 'B' became shareholders of the issuer.

The shareholders' agreement concerned the company "AA" and the shareholders of "B", and provided that no one member of the agreement would have a dominant position of control. Thus, they would control both.

The capital increases would have exceeded the threshold, in this regard, however, the law firm pointed out the critical economic condition of the issuer.

[71] See "Description of the case", Cit, p 1 of Consob Communication No. DEM/11081302 of 30-9-2011.

In fact, the same study held that the conditions existed to obtain an exemption from the mandatory public purchase offer. They clearly referred to Article 106. Consob does not accept the requests, therefore it does not consent to the exemption.

The reasons provided by the guarantor authority were the following. First of all, the authority specified that Article 49 of the Issuers' Regulation, in paragraph 1, letter b, distinguishes various cases of exemption.

One of which has a residual character, Consob itself, in providing the reasons for the refusal, reports paragraph 5 of article 106 "Consob establishes by regulation the cases in which the exceeding the participation indicated in paragraph 1 or paragraph 3, letter b), does not entail the obligation to offer where it is made in the presence of one or more shareholders who hold control or both determined by: a) operations aimed at rescuing companies in crisis;... ". Paragraph 6 of the same article also provides that "Consob may, with a motivated provision, order that exceeding the participation indicated in paragraph 1 or paragraph 3, letter b), does not entail obligation to offer with regard to cases attributable to the hypotheses referred to in paragraph 5, but not expressly provided for in the regulation approved pursuant to the same paragraph ".

Consob, in addition to not having detected the necessary conditions for the exemption, even pointed out that the aforementioned case should not even be considered similar to the provisions of article 106, moreover the same guarantor authority found that even in the light of Article 49 of the Issuers' Regulation, the conditions for advocating an exemption principle were lacking.

A further case where it is possible to speak of an exemption concerns those cases where a company in crisis is rescued through the use of a so-called *whitewash* operation.

Once again, as usual, Consob provides adequate clarification: in fact, Consob communication no. 12002448 of 12 January 2012 places absolute emphasis on the subject of rescue or, more precisely, exemptions from the launch of a takeover bid by a company in crisis.

The subject of the communication was as follows (naturally, for the sake of formal rigour, we shall quote what the Supervisory Authority said in the communication).

Request for an opinion on the applicability of the exemption from the obligation to make a tender offer pursuant to Article 106, paragraph 5, letter t a) of Legislative Decree No. 58/1998 ("Tuf") and Article 49, paragraph 1, letter b), no. 3, of Regulation No. 11971/99 ("Issuers' Regulation").

In this communication, an issuer in crisis was to be rehabilitated, for which purpose the board of directors of "A", the company in question, convened a shareholders' meeting; the topic of discussion was: *"Measures pursuant to Article 2446 and, possibly, Article 2447 of the Civil Code"*.

With a view to reorganising the company, the board of directors called for two scenarios for a capital increase, *one with the exclusion and the other without the exclusion of subscription rights, according to* the announcement.

In the same vein, company "A" (the issuing company), had initiated a solicitation of proxies[72].

The solicitation prospectus clearly implied that the capital increase, by means of the so-called *whitewash*, would be sufficient to avoid the occurrence of a mandatory takeover bid. This would be the case for subscribers to the capital increase and for those who had signed a shareholders' agreement.

There was, however, a relative uncertainty regarding the parties present at the meeting; with the exception of a few companies present, many were not even related to the same industrial sector as the issuing company.

Once the capital increase was approved, the issuing company and Beta (an industrial company) signed an underwriting agreement.

They also discussed an industrial recovery plan for the issuing company, the subscription (aimed at industrial recovery), however, entailed exceeding the now known threshold of 30%, so that both the companies "Alfa" and "Beta", in view of their shareholders' agreement, saw the obligation to purchase arise.

The question becomes relevant precisely at this point, namely the analysis of the exemption from takeover bids. In fact, the parties questioned, through an appeal to Consob, whether this was not one of those cases in which it was permissible to speak of a *bailout exemption, as* provided for in Article 49 of the Issuers' Regulation in paragraph 1(b).

Consob responded positively, since the shareholders had been correctly informed about the two possible alternatives, so that, according to Consob, the shareholders had been able to express an opinion on the correct information, as well as on fundamental details concerning the capital increases and pricing. As well as all key specifications, such as information on the new Beta investors.

In the Authority's opinion, the shareholders had therefore made an informed decision regarding the inapplicability of the takeover obligations arising from the approval of the resolution through the so-called whitewash mechanism and, therefore, it confirmed the existence of the conditions for the exemption provided for by Article 49, paragraph 1, letter B), no. 3, of the Issuers[73]' Regulation.

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[72] *i.e. a request for the conferral of representation for the exercise of voting rights at the meeting by its shareholders*

[73] Clifford Chance, Public M&A briefing, June 2012 " Takeover bid exemptions: recent Consob guidelines", Cit, p, 5

Concert action

When speaking of concerted action, it must be emphasised that the occurrence of the latter does not imply an automatic triggering of the offer obligation.

On the other hand, a correct and healthy activism on the part of the shareholders could prove to be successful, because a transparent dialogue would be established with the management and possibly even align their interests.

Consultation is therefore not to be understood in a negative light, as an opportunistic element. It must be understood, however, that there are various types of activism and not all forms can be assimilated to the same; the shareholders themselves could interact on a sporadic basis and in this case there would be no regulatory problem since their action, by virtue of the sporadic meaning, could at most bring a benefit to the company.

The affair could also take on interesting connotations when shareholders start to organise themselves, to create a control base aimed at obtaining advantages in the shareholders' meeting.

What is relevant for concerted action is therefore the sharing of a similar and common objective, and in this sense the mandatory takeover bid stands out even more, since in the presence of a coordinated and cohesive group it is not difficult to assume that the new situation may cause harm to minority shareholders.

The notion of change of control, therefore, given the different nature of concerted action, which by its very nature is dynamic and changeable, will have to be assessed on a case-by-case basis, also by virtue of the presence or absence of pacts aimed at determining the performance of the company.

It is worth recalling the takeover bid by Banco di Bilbao on BNL[74], given the complexity of the subject and the fact that its reception may not always be unanimous.

While the TUF gives us a specific view of what concerted action is, it is nevertheless true that the practical reception is not always so homogeneous.

Indeed, the dynamics of concerted action and shareholders' agreements are not exclusive to the corporate context but also to the banking context.

In this particular area, which is subject to stringent regulations and constant amendments, the transparency directive, the Trasnsparency Directive, is of prime importance.

The TUF itself, by implementing the OPA and Transparency directives, places emphasis on concerted action in order to ensure the proper conduct of the market, not least because there is undoubtedly a certain

[74] For further details, please read Action in Concert and Mandatory Takeover, Chiara Mosca. p, 5

presumption of culpability guilty of wanting to give rise to obscure forms of control in the corporate[75] structure.

However, it should be noted that the Transparency Directive does not provide a precise definition of the type of agreement referred to.

If, therefore, all those who have an ongoing relationship are considered to be concert performers, then it is true that the calculation of the threshold for the purposes of the compulsory nature of the takeover bid will have to be made taking into account the contribution of the totality of the concert performers; the legal reference reminds us that by virtue *of their own purchases or the purchase by persons acting in concert with it.*

In addition, according to a certain established approach, the so-called transparency obligations would only concern long-term agreements, because in principle only the long-term view is able to make a real contribution to business reality.

As far as the banking dimension is concerned, it should be noted at once that this has centralised forms of control within the administrative bodies. It is therefore no coincidence that the most common form of company for a banking institution is the joint-stock company, as this would allow immediate and rapid identification of the controlling entities.

It will be recalled that the Consolidated Banking Law (Testo Unico Banca) lays down provisions on banking, and in Articles 14 and 56 it establishes criteria of sound and proper management.

Sound and proper banking management, in addition to regulating all evasive and discriminatory conduct, also has implications of considerable importance in regulating the relationship between shareholders and directors.

Article 19 Tub is exemplary in this respect, as it regulates the acquisition of participations in bank capital.[76]

The Bank of Italy itself, having regard to the articles of the Consolidated Banking Law (TUB), has deemed it necessary to emphasise all those practices and behaviours useful to prevent majority shareholders from interfering with the sound and proper management of the company.

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[75] An excerpt from "Institutional investors, corporate governance and stewardship codes" S.Alvaro, M.Maugeri,F.Strampelli page 54 is reported in full
As is well known, the Consolidated Law on Finance (implementing the European Transparency and Takeover Bids Directives) explicitly emphasises the importance of shareholders' agreement for the twofold purpose of: (a) to guarantee to the market the transparency of information (aggregate) in relation to the existence of significant shareholdings held in the share capital of a listed company by a plurality of persons who are in a particular "static" situation of concert resulting from the existence of shareholders' agreements and (b) to neutralise conduct (purchases in concert or acting in concert) that circumvents the rules on takeover bids by emphasising the relationships existing between several persons - legally distinct - in order to consider as unitary the shareholding held by them in a listed company.
[76] The following is an excerpt from "The role of shareholders and shareholders' agreements" Andrea Turci *In implementing the provisions of the Consolidated Law on Banking, the Bank of Italy has interpreted the authorisation powers vested in it as aiming at "preventing significant shareholders from exercising their powers to the detriment of the sound and prudent management of the bank and the parent company*

A major problem arises with regard to *the autonomy of the directors in relation to the shareholders (A. Tucci),* because, as in all agency relationships, conflicts of interest may arise.

At times it almost seems as if the current regulatory approach has tried to tip the balance in favour of the directors by trying to limit the action of the shareholders, a curb on the latter's possible involvement in decision-making.

In this sense, we can introduce the notion of dualistic control, which has interesting implications for the life of the shareholders in the shareholders' meeting. This is because the implementation of the dualistic control system results in a profound reduction in the powers of the shareholders during the meeting.

In fact, the reformed Civil Code provides for a differentiated regulation of the competences of the shareholders' meeting (in ordinary session), depending on whether the companies are <<owned>> (Article 2364 of the Civil Code) or <<with>> (Article 2364-bis) supervisory board; in this second hypothesis, it operates a transfer of some competences that until now were more <<jealously>> assigned to the supervisory[77] *board.*

This will result in an extension of the competences of the supervisory board also with regard to operations of a strategic nature, and industrial and financial plans, programmed by the management board, somewhat blunting the exclusive management competence of the management board (Articles 2380-bis and 2409 undecies) (Bonelli, 2004, 238; Mosco, 2006, p. 41; Cariello, 2007, p.57).

The report accompanying legislative decree no. 6/2003 states that the dualistic model is the one best suited to achieving *dissociation between ownership (of shareholders) and powers (of the company bodies)* (Andrea Tucci).

Emphasis is placed on the legislator's intention to target this model of corporate governance primarily at companies with *shareholders (particularly institutional investors) who are interested in management control rather than management,* although it may also be useful for *family-owned companies* (Gambino and Santosuosso, 2006, p 156).

The (real or presumed) ability to *stabilise corporate governance, by* making it less *sensitive* to changes in ownership[78] structures, could therefore explain the recent *success of* the dualistic model in the banking sector.

In this context it may be of some interest to ask, also in the light of the banking system, whether a further downsizing of the position of the shareholders is taking place, who would only have to choose between the alternative solutions offered by the system without the possibility of alternating the *typicalities* (Angelici, 2003, p. 116).

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[77] Andrea Tucci "The role of shareholders and shareholders' agreements" cit p 445
[78] Spada, 2006 p.51

It is now necessary to highlight the position of the shareholder in the banking company structure. In fact, one of the characteristics of the joint-stock banking company lies in the concentration of the management function in the hands of the administrative body and the consequent *weakening of* the role of the shareholders[79]' meeting.

The organisational structure must comply with the criteria of sound and proper management, which are monitored by the Bank of Italy. The adequacy of the organisational structure with respect to the characteristics of the banking company is one of the points of reference for regulatory supervision, as provided for in Article 53 of the Consolidated Banking Act.

The supervisory authority, moreover, favours criteria of certainty in the division of competences between the corporate bodies and of company functionality.

The need to preserve the autonomy of managers and the clear distinction of roles between corporate bodies underlies the authorisation regime for the acquisition of major holdings in the capital of banks and financial and parent[80] companies.

The Bank of Italy has interpreted its authorisation powers as aiming to *prevent shareholders from exercising their powers to the detriment of the sound and prudent management of the bank and the parent company* (Andrea Tucci).

Finally, the problem of directors' autonomy from shareholders is particularly evident with regard to the possible emergence of situations of conflicts of interest and the danger of *polluting* the proper management of the banking business, in financial relations and in the granting of credit.[81]

The sector's regulations place the need to preserve the autonomy of the directors and the division of competences between the company bodies as a barrier to possible *interference* by shareholders in company affairs.[82]

The investigation on this subject should be oriented towards verifying the possibility of a reconciliation between the demands of *sound and prudent management* and the aspiration of shareholders to interact with the holders of management power, without however altering the organisational structure of the entity.

The rigorous approach summarised above is undoubtedly justified by the fact that in the banking company the danger of conflict between different decision-making centres, or even of an overlap of competences, involves interests outside the company organisation. This is more evident than in all shareholding companies, because

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[79] Brescia Morra, 2000, p 3; Cera, 2001, p 24)
[80] Article 19 TUB
[81] Guaccero, 1997,
[82] Brescia Morra, 2000, p; Cera, 2001, p. 60; Sepe, 2004, p. 291; Associazione Disiano Preite, 2006, p 238)

of the need to take into account the protection of that particular category of company creditors, the depositors-savers, whose position has risen to the level of a constitutionally protected[83] interest.

One of the guiding principles of the reform was, in fact, the enhancement of the relationship between the shareholders' and directors' meetings and the clearer definition of the demarcation line between the competences of the administrative body and those of the shareholders' meeting, implementing the doctrine that wanted the management of social enterprises to be the sole responsibility of the directors.

The adoption of the dualistic system by joint stock companies in the banking sector could, therefore, constitute a further step in the process of progressive *emancipation of* management from *ownership, confirming* the view that the objective pursued by the banking legislator with the choice of the joint stock company type was precisely *the separation between ownership and management* (Brescia Morra and Morera, 2006, p 137).

It seems clear, therefore, that the main issues at stake are member activism and the *source of control.*

Starting from the Transparency Directive, however, what is relevant, we might say from a formal point of view, is that the directive requires the conclusion of an agreement on a long-term vision as well as a common social management policy.

It is also true that all this could turn out to be a sort of sword of *Damocles:* after all, why should members be encouraged to band together, even for laudable and noteworthy purposes for social activity, if the shadow of a regulatory complex that is sometimes not very tolerant could loom over them?

This could certainly be one of the great risks that would prevent the development of the phenomenon called *engagement*, which would certainly make even those virtuous behaviours deriving from the *coordination* between partners fail. (A. Kostiuk, A. Sacco Ginevri "Acting in Concert" in the banking and financial sectors, cit., p 268)

Concerted action could be defined as *a form of collaboration characterised by a stable and close relationship, which shareholders enter into with the intention of avoiding the application of mandatory rules.*[84]

It is recalled that the obligation to purchase in full is enshrined in Article 106 TUF.

The concerted action, however, could be perceived in the Italian legal system as something unclear, we could say not very positive: this is because there is a prejudice that would have it that the collaboration between shareholders, certainly stable and coordinated, is aimed at circumventing the regulatory rules.

The highest form of evasion is found in the context of the offer obligation. Let us now imagine that their action is motivated by concert and their aim is hegemony in the shareholders' meeting, i.e. control.

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[83] Ferri, 1975; Ferro-Luzzi, 2004

[84] Giovanni Carletti "The discipline of concert in the ownership structures of banks. Reflections on substantive profiles and the burden of proof" Banca Impresa Società, Issue 3, December 2020, CIT p, 577

Takeover obligations arising from concerted action

We will start by making it absolutely clear that it is not the action of concert in itself that determines the obligation to offer, and in this connection we will quote the provisions of the City Code of London, which clearly has inspired EU practice in many areas;

It does in fact, through the *notes* to Rule 9.1 para. 1, *acting in concert requires the co-operation of two or more parties. When a party has acquired an interest in shares without the knowledge of other persons with whom he subsequently comes together to co-operate as a group to obtain or consolidate control of a company, and the shares in which they are interested at the time of coming together carry 30% or more of the voting rights in the company, the Panel will not normally require a general offer to be made under this Rule.*

However, the Takeover Directive remains the cornerstone and it is the agreement between the parties itself that defines the concert, precisely that concert whose purpose is an agreement, whether tacit or written, to obtain control of the company or *to thwart the achievement of the objectives of the offer.*

Therefore, the fact that concerted action may have virtuous implications is clear, in the light of the same anti-avoidance provisions laid down by the regulatory framework, as is the high risk of opportunistic attitudes aimed at implementing purposes that are anything but profitable.

As already mentioned in the preceding pages, there is a certain and evident difficulty on the part of supervisory institutions in detecting *sub-plots* deriving from concerted action. Certainly, however, there may be some theoretical guidelines useful in defining the profile of *opportunistic concertism.*

The determining element of the concert is the agreement, i.e. *the intention to* act in order to achieve a goal.

Bidding obligations arise and relate to those shareholders (by means of their own purchases) or by persons acting in concert who come to hold a controlling position at the meeting.

It is based on Article 109 of the TUF, which states: '*Persons acting in concert shall be jointly and severally liable for the obligations provided for in Articles 106 and 108 if, as a result of purchases made by one or more of them, they hold a total shareholding exceeding the percentages specified in those Articles.*

It is evident that, should the necessary structural conditions be met, the obligation to purchase or what can be called a *sell-out* operation will also materialise for concert-goers.

So, to summarise, unlike the *classic* takeover bid, *which* presupposes an offeror who voluntarily or compulsorily launches an offer on the share capital, in this case the actors will be multiple, given their symbiotic nature.

Article 106, moreover, is clear, suggesting that the rules can and should also be extended to those acting in concert. Article 45 (Consolidation of shareholdings) of the Issuers' Regulation is also relevant for a better understanding of the regulatory framework.[85]

In this regard, it is interesting to draw attention to Consob communication no. DIS/99024712. The latter specifies and clarifies the scope of applicability of the mandatory takeover bid in the light of Article 109 TUF.

The case in question refers to a sale and purchase transaction between two parties, which Consob itself classifies, for the sake of clarity and brevity, as party *A and party B* respectively.

The object of the analysis was to establish whether the purchases made by subject B, which were subsequently incorporated into the banking[86] shareholders' agreements, were carried out in concert.

What the Supervisory Committee wanted to establish was not so much to ascertain the nature of the individual purchases referred to by subject B in his individual case, but to contextualise it in a 'multi-variable' case, i.e. to establish whether his purchases should be the alarm bell that suggested the existence of an ongoing concerted action with opaque aims.

On the other hand, Article 109 of the Consolidated Law on Finance states that the subject of the agreement may also be the shareholders' agreement, "may be" because the element determining the link between shareholders is not found only in the presence of a shareholders' agreement.

Consob then specifies that the provisions of Article 109 of the *Consolidated* Law on Finance place emphasis on the *total* shareholdings *held by the parties to the agreement, irrespective of whether or not they are bound to it.*

Thus, for the purpose of analysing the covenant and its holdings, one should not only add up the shareholdings in the covenant but also those which the members have not contributed to it.

This approach recalls the aforementioned rationale, i.e. firstly, the parties acting in concert, the *concert promoters, must be* identified, and secondly, it must be ascertained whether or not their action entails an obligation to launch a takeover bid.

Of course, it will be necessary to take into account the nature of the purchases and their temporal phase, because (and remembering that the threshold of obligation is triggered when the thirty per cent threshold is exceeded) the purchases determining the occurrence of the obligation to purchase may turn out to be post agreement, and not ante.

[85] Art. 46 Issuers' Regulations *The obligation to make an offer referred to in Article 106, paragraph 3, letter b), of the Consolidated Law on Finance results from the increase, or the acquisition, including indirectly pursuant to Article 45, of more than 5 per cent of the total number of voting rights or of the capital represented by securities carrying voting rights on the matters indicated in Article 105 of the Consolidated Law on Finance within a period of twelve months.*

[86] Please refer again to the vision of Article 122 TUF.

Not only that, all concertmasters as a result of their specific relationship, once the threshold is exceeded, will all be obliged to launch a bid, regardless of the concertmaster, even if the threshold is reached and exceeded by only one of them.

It is easy to see from this point of view that the matter provides for a constant *"state of alert"*, Consob itself, in the case history just introduced, refers to the concept of *overall shareholding:* it is appropriate to note that for the purposes of the obligation to make a concerted takeover bid, all those purchases that are small in percentage terms but sufficient for an aggregate calculation, precisely a collective one, to trigger the obligation to make an offer, will also become important for the purposes of the collective calculation.

The same analysis can be carried out in the presence of shareholders' agreements, since it is precisely the exact reading of Article 109(1) that sanctions the post-contractual obligation to purchase pursuant to Articles 106 and 108 TUF.

The binder is therefore the covenant, in fact, with reference to the Consob communication, introduced earlier, it is noted that the *overall shareholding of the members of the covenant will not change significantly as a result of the transaction set*[87] *out.*

Again with reference to the Consob communication, the 'percentage' situation of the members of the agreement was as follows:

Member A held 18%, another party held 8.1%, of which approximately 4.5% in convertible shares, and another party held 2%; the total shareholding therefore amounted to approximately 28.1%, to *which must be added the 8.75% shareholding held* (party A) outside the agreement, *for a total percentage of 36.76%* of the bank capital.

It should be noted, however, that the shares held by party A, the ones already mentioned *outside the covenant*, were bound by pre-emption rights to the other two parties to the covenant and that they were therefore also considered to be *conferred in the covenant placing limits on the transfer of the shares and convertible bonds ("Block Agreement")*

The matter found its natural course following the change in the composition of the agreement: this change took place following the withdrawal of 'another party', as defined by Consob, and the accession of a new party B.

This change in membership also led to a structural change in the shareholding structure of the agreement, with the overall shareholding changing from 36.76% to approximately 35.30% of the bank capital for party A, 18% for party B, and 8.55% for the other party, of which approximately 4.05% came from convertible shares.

[87] Consob Communication, No. DIS/ 99024712

Reiterating the call for a case-by-case analysis whenever a concerted situation arises, it is interesting to note that for the purposes of a rigorous analysis, only party A held a threshold "worthy" of mandatory tender offer, not the other parties.

Yet according to 109 and 122, the performers will be mutually obliged to offer.

In relation to the above-mentioned case, in the specificity of the covenants, it is noted that the contribution to the covenants of subject B did not entail any significant changes in the structure of the covenant.

Returning to the specific merits of the purchase obligations resulting from the Concert Action, it is emphasised that the concert promoters, like the individual purchaser, will have the option of opting for a prior public bid in order to avoid a Takeover Obligation.

This would, of course, be the case if the performers exceeded the threshold, so they could, once they realised the scenario, play it by ear and avoid a burdensome obligation.

In any event, it should be emphasised that before establishing the obligation to purchase, it is essential to detect the existence of a coordinated concerted action, and the very chronology of the purchases used to calculate the obligation to purchase is relevant. The same purchases could be dated before or after the conclusion of an agreement or pact.

Article 109 of the TUF is very clear in describing such a situation, because it not only specifies that the obligations imposed by Articles 106 of the TUF and 108 of the TUF shall fall jointly and severally on all concert promoters, but also specifies that *the same obligations shall apply to those acting in concert, following an increase, even in favour of only one of them, of voting rights, if they have voting rights in excess of the percentages indicated in Article 106.*

In addition, there is a certain presumption of concert, but this can only arise after the conclusion of a contract or agreement; it is precisely the presumption of concert that will oblige the concert performers jointly and severally to the obligation to purchase if the conditions are met.

Above all, it is emphasised that some partners may frequently resort to the typical logic of concertation, but outside the classic scheme typical of shareholders' agreements, reference is naturally made to all those dynamics of an elusive nature.

It is precisely for this reason that, in *the case of persons recognised as "concert performers" (pursuant to Article 101-bis, paragraph 4, T.U.F.), purchases should be attributed to the implementation of the programme they share, which affects the control and contestability of the broadcaster*[88].

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[88] Chiara Mosca, 'Concert Action and Mandatory Takeover Bid', Cit, p, 165

However, the vulnus of the matter is as follows. The conclusion of a Shareholders' Agreement does not necessarily imply an obligation to launch a takeover bid.

The legislator therefore wished to give the adherents of the pact 'the benefit of the doubt' since, it will be recalled, the legislator himself welcomes social activism, understood as contribution, contribution and improvement of corporate life and governance.

Paragraph 1, first sentence, does not apply where the holding of a total holding in excess of the percentages set forth in Articles 106 and 108 constitutes the effect of the conclusion of an agreement, including a nullity agreement, as referred to in Article 122, unless the parties to the agreement have come to hold a total holding in excess of such percentages in the twelve months preceding the conclusion of the agreement.

At this point, it should be pointed out that the purchase obligation applies to all concert performers, to all their purchases, even to the purchases of the individual. This is because, should an individual concert pianist, as a result of purchases, exceed the critical threshold, well, all concert pianists will be obliged to launch a takeover bid.

It is clear that the timing of the purchases will play a major role in the "calculation" of the takeover bid.

Indeed, if the concerted action in itself is not a sufficient condition for triggering the obligation to make a public bid, it is quite different if the purchases and thus the shareholdings were obtained in the preceding twelve months.

Article 109(2) of the Consolidated Law on Finance states that <<*Unless the parties have come to hold a total shareholding in excess of the above percentages in the twelve months preceding the conclusion of the agreement* >>.

The motivation for this is the anti-avoidance purpose, as a person might buy securities on the basis of an impending contract.

It seems clear that the legislator's intention is not only to prevent pacts and agreements from developing flawed or opportunistic tendencies, but also to prevent the creation, or rather the branching out, of nerve centres of power with unclear features.

Once again, therefore, the legislative system tends to defend the interests of minority shareholders.

Precisely for this reason, there is an obligation to offer, for all those purchases made at extremely short notice, the conclusion of a covenant.

It should be noted, however, that purchases made in the preceding twelve months may trigger the purchase obligation provided that they were relevant to the crossing of the critical threshold, so it is not the purchases themselves, but their precise contextualisation for the purposes of calculating the threshold.

This, however, suggests that the identification of the individual's shareholding is extremely important, and in this regard it is worth mentioning that Consob, through communication no. DIS/99024712, provides important clarifications on the matter.

The subject of the *question* was: *[Bank]-Question concerning the modification of the shareholders' agreements of [Bank] and the applicability of the compulsory Opa rules under article 109 of Legislative Decree no. 58/98.*

The notice was in response to a specific question concerning a sale and purchase transaction between two persons, A and B.

The question was whether a takeover bid could be applied in this case, given that persons "A" and "B" had acquired an 8.75% shareholding in "Banca" and had subsequently incorporated the shareholding in the bank's shareholders' agreements, in accordance with the provisions of Article 122 of the TUF.

Consob specified that the question had to be read in the light of the provisions of Article 109 TUF and highlighted as a key element of the case the establishment of a situation of concert.

Subject B had made purchases, and the shares purchased were subsequently contributed to the bank's shareholders' agreement. The Supervisory Authority, therefore, made several references to the provisions of Article 109 of the Consolidated Law on Finance, specifying in particular that the Shareholders' Agreement in itself is not a sufficient and necessary condition. Moreover, Consob also pointed out that for the purposes of ascertaining the existence of a takeover obligation, account should not be taken only of the shares contributed to the agreement.

So once again there is a reminder of the need to analyse the shareholding composition in its entirety, i.e. as a whole.

This concerns all members of the covenant: in fact, Consob in the communication just analysed specifies that *The aforementioned provision therefore gives prominence to the overall shareholdings held by the members of the covenant, regardless of whether or not they are bound to the covenant, and in order to ascertain whether there is 'an overall shareholding in excess of the relevant percentages', the shareholdings bound to the covenant must be added to those that the members have not conferred.*[89]

[89] Such an interpretation can clearly be inferred from the letter of the rule. It does not specify that the "total shareholding" held by the parties to the agreement is the one bound to the agreement and, on the other hand, there is no doubt that in the other hypotheses contemplated by Article 109, "the total shareholding" must refer to all the shares acquired or held by the persons indicated therein. It should also be noted that, in practice, the parties to the agreements exercise their voting rights in respect of the shares held outside the agreement in accordance with the constraints arising from the agreements - also taking into account the problems connected with the admissibility of the so-called "divergent vote" - and that, therefore, the parties to the agreements exercise their voting rights in respect of the shares held outside the agreement. Therefore, a different interpretation would allow easy circumvention of the rule in question. For the sake of clarity, the contents of the aforesaid Consob communication are reported below;

In the light of all this, Consob specified that *the overall shareholding held by the parties to the agreement would not be materially altered as a result of the above-mentioned transaction.*

First of all, it should be noted that the case under analysis also and above all complies with the provisions of Article 122 TUF.

The notice went on to list important details concerning the shareholding composition of the members of the blocking and administration agreements, as it turned out:

The total shareholding amounted to 28.1%, of which 18% contributed by subject "A", 8.1% (of which 4.5% in convertible bonds) attributable to "another subject", followed by another 2% *to which must be added the 8.75% shareholding held by [subject A] outside the agreement, for a total percentage of 36.76% of the bank's capital, In this regard, it should also be noted that the shares of [party A] defined as "out of covenant" are in reality bound by a right of pre-emption due to the other two adherents and that, therefore, the latter can also be considered to be conferred in the covenant that places limits on the transfer of shares and convertible bonds ("block covenant")*

After the change in the composition of the covenant, following the withdrawal of 'other person' and the subsequent accession of 'B', all the shares of the members were contributed to the covenant, which changed the overall shareholding.[90]

Consob came to the conclusion that the above-mentioned transaction would not lead to the crossing of the fateful threshold necessary to launch a takeover bid. No obligation of any kind would arise on the part of the individual or of the shareholders as a whole.

[90] The Consob Communication provides the complete shareholder structure;
According to the question, from approximately 36.76% to approximately 35.30% of the bank's capital, [party A] 18.00%, [party B], other party 8.55%, of which approximately 4.05% stems from the convertible bonds.

CHAPTER3 - CASES

The Fondiaria Sai case

At this point, we will introduce a real case history, probably among the most exemplary in the Italian context in recent years. That is, the Fondiaria-Sai case.

The case was widely debated at the time and Consob itself, given the complex discipline and the close interconnection of the "actors" involved in the case, expressed its opinion several times, also harbouring doubts as to the real intentions of the parties involved, or suspicions as to the presence of an action in concert with a specific purpose. It should be remembered that exemptions represent a robust system in all those cases of *rescue of companies in crisis.* As well as it is necessary to provide a historical context, the event in fact took place in 2001: at that time we witnessed the attempted takeover of the Montedison group by Italenergia.

In the same period, Salvatore Agresti's Sai *formalized* a takeover bid for 28.7% of La Fondiaria Assicurazioni shares.

Going into detail, on August 6, 2002, the insurance company Società Assicuratrice Industriale S.p.A notified the competent authorities of its intention to purchase a capital share of La Fondiaria Assicurazioni S.p.A, for approximately 29.97%.

According to the communication, the participation would have been sufficient to guarantee Sai's hegemony over Fondiaria.

One has to consider that normally the participation of shareholders in Fondiaria's meetings has always been lower than 60%, so it is easy to understand how Sai's participation would have really contributed to the latter's control over Fondiaria.

The phase of acquiring the shareholding can be considered a first phase, which was followed by a second phase when on the same date Fondiaria and Sai expressed their intention to merge by incorporation.

It could be argued that the rationale behind Sai's acquisition of Fondiaria was one of control.[91]

In fact, Mediobanca itself, for reasons of obvious convenience, before the takeover bid by Italenergia on Montedison was implemented and the passivity rule action was foreshadowed, supported in the Board of

[91] "In this regard, the following excerpt from "La mancata Opa di Sai su Fondiaria", Margherita Bulzacchelli, Mediobanca, precisely as a result of Italenergia's takeover bid for Montedison, wants to safeguard the control it holds over Fondiaria, of which it is the second largest shareholder after Montedison, p.3

Montedison itself the acceptance of SAI concerning the purchase of ordinary shares of Fondiaria, at a price of 9.5 per share.

The close links between Mediobanca and Premafin justified SAI's choice of acquisition, as the Ligresti family headed the Premafin holding company.

Mediobanca, a financial credit bank, had a turnover[92] of more than EUR 2.5 billion at the time.

The banking company itself boasted numerous shareholdings in a number of Italian companies, and Mediobanca's control was based on a *syndicate* agreement in which Sai, Fondiaria and Generali also participated.

It was envisaged that Fondiaria would be bought in two *tranches,* firstly Sai would buy 6.75%, while the remaining 22.2% would depend on obtaining a pass from the supervisory authority, starting with all the necessary checks to trigger a transaction of such importance.

The opinion of Consob was timely and punctual, but the commission gave a negative opinion, since there was suspicion of concerted action. Therefore, the long-awaited positive opinion was not forthcoming, and indeed Consob itself raised the idea that there was a shareholders' agreement between Sai and Mediobanca.

Consob therefore had suspicions: it was precisely the manner in which the sale and purchase (transaction) was carried out that gave rise to the doubts of the guarantor. It should be recalled that the regulatory source of the agreement is Article 122, specifically paragraph 5, letter c of the TUF.

Consob therefore suspected that the purpose of the shareholders' agreement was the purchase of Fondiaria shares by Sai and Mediobanca, the aim of course being control of the company. Therefore, once again, the action of concert arouses suspicion when it is characterized by an uncertain aura, by an unclear or illicit purpose. (It is quite different, we repeat, from the concerted action that can be seen in the just and healthy activism of shareholders in the company).

Consob naturally wanted to understand whether one of those situations was occurring that could give rise to a mandatory takeover bid and this case had the prerequisites since Montedison sold 28.7% of Fondiaria to Sai, a few hours before the takeover bid of Italenergia on Montedison.

The timing was obvious, the nature of the actors was also obvious, so there was every reason for doubt.[93]

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92 Pursuant to Article 16(2) of Law No 287/90

93 This is what the newspapers of the time wrote, alluding to a Consob verdict. *Mediobanca had resorted to this practice on other occasions in the past, an inveterate practice, characterised by the concert with shareholders linked to it by various types of relationships, and the story is always similar: no one controls the others, no shareholders' agreements are concluded, but all together have control of the company.* La Repubblica, R.Rho

Sai's response was timely, and the hypothesis of a corporate merger with Fondiaria was explored. Probably its board had picked up some atypical maneuver so Fondiaria, in order to accept the proposal, put a number of conditions regarding *corporate governance* for protection.[94]

The transaction came to a standstill when the negative opinion of ISVAP (Istituto per la Vigilanza sulle Assicurazioni) was received. ISVAP noted the financial and equity weaknesses denounced by Premafin itself, uncertainties regarding the business plan, and finally the obligation to take over the company dictated by Consob and the hostility of some Fondiaria shareholders.

Also in that period Fiat came forward through its Toro Assicurazioni, and its intention was clear: to acquire Fondiaria. In this case, however, the assessment of the authorities was positive, there seemed to be all the characteristics necessary to express a positive opinion; after the takeover bid for Italenergia, the relationship between Montedison and Fondiaria had become even closer, and Montedison, by then a Fiat subsidiary, *was at the head of Fondiaria.*

The positive opinion also came from ISVAP, which considered Toro's financial position to be sound.

Among other things, Toro submitted a bid at a price considered lower than the price offered by SAI, which was partly due to the influence that Fiat, through Montedison, exercised over Fondiaria.

The whole economic operation proved to be complex right from the start, and there was a crossfire of objections, appeals to the Consob and so on. The fact is that after months the situation still seemed uncertain, with SAI determined to prevent Fiat from gaining control of Fondiaria.

Salvatore Ligresti, the owner of the Sai group, was in fact determined to honour the commitments made with Montedison, aimed at acquiring the entire Fondiaria package.

The deadline given to Sai by Montedison for the conclusion of the contract was approaching, so it was essential that a buyer be found, not least because Sai and Mediobanca had no intention of allowing the Fiat group to get its hands on Fondiaria.

If we want to provide a historical and economic assessment of the event, it appears emblematic and well representative of the Italian capitalist context, where well-established groups, often of a family nature, sometimes also due to personal grudges, end up fighting each other. (Certain aspects of the French capitalist scene, where the doctrine of 'grouping' has seen the emergence of consolidated industrial realities and poles, strong and positioned also and above all at a transnational level, are placed in a different light).

[94] The document "Sai's failed takeover bid on Fondiaria" is quoted in its entirety in order to correctly report the conditions imposed by Fondiaria to protect and respect the company during the transaction: 1) Exchange close to the value of the takeover bid; 2) The company's registered office and general management remain unchanged and therefore in Florence; 3) The inclusion in the corporate governance of a qualified majority of 4/5 for those resolutions of the extraordinary shareholders' meeting that relate to specific matters.

Among the likely purchasers were financier Gnutti with his Hopa holding company, Interbanca and Munich Re, although the German company seemed unlikely to intervene.

Subsequently, SAI informed the other party of the names of the 'three white knights' who would save SAI: JP Morgan Chase, Interbanca and the financier Francesco Micheli.

The stakes were considerable: the three of them committed themselves to the purchase of 22.2% of Fondiaria from Montedison.

When the attorneys of the respective companies met, they established basic policy points, and [95]the document also set out important details, such as purchase prices.

It should be noted that this part of the transaction also raised legal issues, as the parties involved repeatedly appealed to the guarantor authorities.

In fact, the Liverpool Fund, a *hedge* fund of a speculative nature, filed an appeal with the Lazio Regional Administrative Court. It should be noted, for the sake of completeness, that at the time of the facts the Liverpool Fund appeared to be a minority shareholder of Fondiaria, and, as a minority shareholder, hostile to the merger with SAI like other minority shareholders.

The Liverpool Fund itself, according to the press reports of the time, was pushing hard for SAI to launch a takeover bid for Fondiaria[96].

In reality, the behaviour of the Liverpool Fund seemed to reveal a so-called portage[97] operation, which would have allowed SAI to obtain a 22.2% stake in Fondiaria through mechanisms bordering on the elusive, in order to avoid the mandatory takeover bid.

From what we read, it is easy to see that tensions were decidedly high at the time, not least because the portage operation continued to be officially denied, and Micheli himself, when questioned on this subject, made the following statement: *I want to make it clear, however, that it is not a question of portage. The shares that I, JP Morgan Chase and Interbanca have purchased are fully available to us, they are free of bonds apart from*

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[95] Given the importance of the programmatic points defined in the agreement, we prefer to quote in full "Sai's failed takeover bid for Fondiaria", p 15,

1) *The deposit paid by SAI in July to guarantee fulfilment of the contract will be returned, and the return, according to the document prepared by the companies, should take place at the same time as the payment for the shares by the white knights. This will be used by SAI to pay the three companies the call option, i.e., the right to purchase the shares of Fondiaria at 6.7 euros per share, a price that added to the value of the deposit allows third parties to obtain after the exercise of the option by SAI, what was paid for the purchase;*
2) *The three investors undertake not to make any claims in the unlikely event that some of the approvals are denied;*
3) *SAI, Toro and Montedison abandoned all lawsuits they had brought against each other.*

[96] "Fondiaria runs again, hoping for a takeover bid from SAI" La Repubblica, 28 November 2002.

[97] See in this regard "Sai's failed takeover bid for Fondiaria.

a number of facets that we have already explained to Consob and ISVAP. It was a non-concerted operation, where each of us acted on our own behalf, in full transparency, neither in aid of one nor to hit another.[98]

Given the complexity and intertwined nature of the entire transaction, the authorities themselves continued to harbour doubts; in fact, while waiting for the guarantor authorities to formulate a judgement, negotiations continued and both companies turned to external advisors: Sai to JP Morgan, and Fondiaria to what was once Lehman Brothers.

Both companies wanted to resolve one focal point, namely the exchange. The affair proceeded at a very fast pace, the managers of the respective companies, among other things, had to meet a series of deadlines (since the meetings for the financial statements were set for April), so there was a risk of not having enough time to convene the ordinary meetings to resolve the trans. In the meantime there were further setbacks when, at the end of March, Fondiaria appealed to the court in Florence, where the action of the "five white knights" was denounced.

The reasons for the appeal in the light of future consideration appear to be of a strategic nature, Fondiaria in fact aspired to obtain the freezing of the voting rights of the new purchasers in the Fondiaria shareholders' meeting. In fact, the owner of the shares would have been Ligresti himself. Despite the urgency, the court rejected the appeal, calling it inadmissible[99], since the purpose of the appeal would have been to hinder the vote of the "five knights" of Sai during the first meeting.

In the months to follow, however, Consob expressed a positive[100] opinion, and there was no suggestion that Sai would be obliged to buy.

Subsequently, in order to provide a further detail of a historical-business nature, it is noted that prior to the merger between Sai and Fondiaria, Salvatore Ligresti made use of the "call" option on a 9% package of Fondiaria, while the five "white knights", supporters of Ligresti, controlled a total of 29.9% of Fondiaria. [101]

In conclusion, the merger of Fondiaria with Sai created Italy's third largest insurance group, placing it behind Ras, second only to Generali.

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[98] G. Oddo "Mine is not a portage" Il sole 24 ore, 3 February 2002.

[99] Fondiaria: appeal against "the five knights" rejected, La Repubblica, 21 April 2002

[100] This was the case at the time of the events, and CONSOB said: "*From the information and documentation acquired, it appears that, even if one were to believe that the five investors had purchased approximately 29.9% of Fondiaria shares in their own name but on behalf of Sai, there would still be no basis for the mandatory takeover bid, as the investigation has revealed facts that lead to believe that the aforementioned shareholders' agreement between Sai and Mediobanca no longer exists, nor other relevant agreements under Article. 122 Tuf.*

[101] The press of the time reported the following: "...The next step, namely the merger with Fondiaria, will not be less expensive for Ligresti: the exchange rate set is in fact four Fondiaria shares for each SAI, against a ratio expressed by the stock exchange of 6.8 Fondiaria for each SAI. In short, the adventure in which the Sicilian entrepreneur has entered the first of July last year, going along with the design of Vincenzo Maranghi (whose goal was to secure the shares of Mediobanca and Generali cost in the coffers Florentine) turns out well, but at disproportionate cost. Not least because, in order not to dilute control too much, Ligresti has been forced to tighten the grip of his holding company Premafin on the Turin-based company. According to the latest announcements, Premafin controls 61% of SAI, but movements on the block market continue to be massive, which is why it is likely that in the coming days the holding company will further round up its stake. Most likely by acquiring at least part of the substantial package of own shares (over 9% of the capital) that SAI has in its belly.
In the last few days, mysterious "friendly" hands have then bought a 3% stake in SAI sold by Fondiaria in order to unravel the financial mess". , La Repubblica, "Sai repurchases 9% Fondiaria from the five white knights" 8 August 2002.

The case just described clearly illustrates a case of concerted action: in fact, in 2002, shortly after the merger between Fondiaria and Sai, Consob established the existence of a concert between the latter and Mediobanca. Therefore, there was a real obligation on the part of Sai and Mediobanca to launch a takeover bid for Fondiaria.

Despite this, the committee considered that it was too late to proceed (to this must be added that several appeals were made by the parties involved in the case and one in particular was won by the small shareholders of Fondiaria, gathered in the financial Promofinan. So the Supreme Court recognizing the rights of small shareholders required the Court of Appeals to redo the trial and quantify the damage suffered by the failure to take over Fondiaria.

It was therefore too late to launch a compulsory takeover bid for Fondiaria, which naturally sanctioned the validity of the merger that had just taken place. However, this gave rise to another obligation: SAI and Mediobanca had to sell the shares exceeding 30% of their total stake in Fondiaria.[102]

Consob was completely convinced that there was a hidden pact between SAI and Mediobanca, and it also deduced that Premafin was also involved in the pact.

The Commission, chaired by Luigi Spaventa, also considered that the five investors (to whom the Fondiaria shares still held by Montedison and the Fondiaria shares held by SAI had been transferred on February 18, 2002) were to be considered intermediaries of SAI in the purchase of Fondiaria shares. The five investors were JP Morgan, Interbanca, Commerzbank, Francesco Micheli's Ogra and Mittel.

However, the timing was mandatory, so the event of the mandatory takeover bid by Premafin and Mediobanca no longer occurred precisely because of the timing of the events.

Consob therefore took the view that the determination of the persons who would launch the offer had to come directly under the Consolidated Law on Finance and could not be derived from determinations by the authority.

Therefore, once the agreement between Sai and Mediobanca had been established (18 February 2002, when the transfer of Fondiaria shares to the "five white knights" took place), an obvious inequality was created with respect to the small shareholders who in the meantime had sold their shares.

What should be noted is that the whole affair is closely linked to the rules on takeover bids. In fact, when Montedison was faced with the takeover bid by Endesa and Fiat, it sold its stake in Fondiaria to SAI for purely strategic purposes.

The issue became complicated for the following reason: SAI already owned shares in Fondiaria and since the sale by Montedison was around 30% would be at risk of incurring in a mandatory takeover bid. Therefore, the

[102] La Repubblica, 19 December 2002, "Sai-Fondiaria: For Consob the merger remains valid but...".

parties decided to split the sale: an initial 7% and the remaining 22% would be made only after obtaining the approval of ISVAP and CONSOB.

The case, we repeat, can be contextualised in the dynamics of para-social pacts and concerted action, precisely because of the immense maze that had been created. We can now speak of "cross-shareholdings", by which we mean all those cross-shareholdings acquired for defensive purposes, aimed at hindering possible corporate takeovers.

Naturally, in this context, reference is made immediately to the intersection created between Fondiaria and Sai, at a time prior to the formalisation of the irrevocable offer to purchase by the latter. [103]

Cross-shareholding acquisitions could degenerate into highly fractious control situations, giving rise to real unstable and uncontrollable situations.

It should be noted that at the material time the notion of concerted purchase was newly introduced and characterised the entire takeover dynamics in a very important way.

The concerted takeover bid, it should be noted, is outlined in Article 109 TUF and describes all those cases in which the bidding obligation hangs over more than one party, unlike Articles 106 and 108 which focus on the single buyer.

In the case listed above, Fondiaria-SAI, Consob has always suspected that there was an action of concert, indeed, the Fondiaria-Sai and Unipol-BNL cases are some of the cases that best describe the areas of applicability of the action of concert.

The connections between the parties were many, the chessboard was intertwined, so it did not seem strange when Consob came to suspect the existence of a shareholders' agreement between Sai and Mediobanca, the latter, it should be remembered, was a relative majority shareholder in Montedison.

A Consob press release of August 10, 2001 stated: "the manner in which the transaction took place suggests, as of today, the existence of a shareholders' agreement, even in unwritten form, relevant under Article 122 TUF, between SAI and Mediobanca for the purchase of Fondiaria shares and for the management of that company".

Consob's investigations led to some interesting conclusions: the analysis of the transaction and its modalities established the existence of a pact between Sai and Mediobanca, in line with the provisions of Article 122 of the TUF. Consob noted the existence of the pact "from the manner" in which the transaction took place. This is definitely interesting, because it further reiterates that elements such as concert or shareholders' agreements can only be detected on a case-by-case, specific-by-specific basis. Of course, covenants may also be written

[103] "Sai's failed takeover bid for Fondiaria", Cit, p,31

and declared, in which case there would be no problem, but when they are hidden, analytical observation is necessary.

Of course, if Consob's hunches had turned out to be true, there would have been an obligation to launch a takeover bid, since the transfer of 22% from Montedison to Sai would have increased the latter's shareholding beyond the minimum threshold.

As mentioned above, ISVAP froze the share transfer, citing the financial instability of SAI and the consequences that would arise.

In fact, Sai had already used considerable resources to buy 28.7% of the shares and if Consob had given the green light to the obligation to buy, the situation would have worsened radically.

It was precisely the refusal of the guarantor authorities that launched Sai into the arms of the three white knights, who in agreement with Sai bought the share in order to implement the merger between Fondiaria and Sai.

Once the merger was completed, the five white knights, in conjunction with Mediobanca, elected the Fondiaria board, and only at that point did SAI, making use of its option right previously established with the five white knights, regain possession of the Fondiaria shares.

At this stage, as mentioned, Consob again expressed an opinion, which established that the white knights were interposed subjects of SAI and consequently took over the concert with Mediobanca.

The case outlined above is an emblematic case of the last two decades, which is interesting in terms of the study of corporate dynamics because it encompasses various cases, from agreements to shareholders' pacts, but not only that, one can grasp the total and absolute instability that has sometimes hovered over these situations.

Unipol-BNL

The affair began on 20 June 2005, when Banco de Bilbao Vizcaya Argentaria launched a public exchange offer for all BNL shares.

For the record, it should be noted that Banco de Bilbao announced its intention to launch a takeover bid.

Consob and Banca d'Italia, as is customary, assessed the nature of the offer and came to the verdict that the transaction was lawful and feasible, and therefore granted the pass (Banca d'Italia was obliged to verify the goodness of the transaction as it was of a banking nature).

The public exchange offer would have ended on 20 July. On the other hand, Unipol would never have accepted such interference, so, since Sun Tzu's 'Art of War' has long since become a popular treatise in the business world, we can say that Unipol literally went on the counter-attack.

In fact, Giovanni Consorte, who at the time of the events was chairman and CEO of Unipol, found himself with a time window of just thirty days, starting on 20 July, in which to close in on the Spanish bank and launch the attack on BNL with a compulsory takeover bid on which he had been working since the spring.[104]

It can be seen that Unipol did not move alone but in concert with other investors: their first move was to buy BNL shares after receiving, as we have seen, the green lights from Consob and Banca d'Italia.

So Unipol was able to increase its stake in BNL; at this point, however, what I would call the 'dialectic of corporate events' took shape, in fact, on one side there were the Spanish who proposed an exchange of securities, five BNL shares in exchange for one Bbva, while on the other side stood the insurance company of Legacoop, which had a large stake in BNL, an estimated 6.78% owned and 3.2% through purchase options.

However, a serious problem could have arisen: if, on the one hand, Consob's authorisation to proceed and Consorte's increase in BNL would have allowed Unipol to lay the foundations for a real acquisition of BNL, on the other hand, there was a probable and impending monetary outlay.

At the time, there were rumours of a certain degree of financial inadequacy on the part of Unipol, and it must be said that Unipol would have had to get by on its own merits, since a head-on collision with Bbva would only have increased the costs of the takeover bid.

[104] Vincenzo Chierchia, Giuseppe Oddo, "BNL, how Unipol hid the plans for the takeover bid".

Not to mention the fact that if the acquisition of BNL had proved successful, the latter would have required immense management, direction and coordination costs. Resources that it was not so obvious Unipol had in its possession.

On 16 June, Unipol and Bbva met, or rather, their representatives attended a working dinner.

Present that evening were Consorte, his deputy and Ivano Sacchetti.

The Spanish were represented by Gonzalo Torano, director of corporate expansion, and Manuel Gonzalez Cid, financial director.

In any case, the subsequent meetings resulted in a perfect deadlock: Unipol asked for the ratification of a document of understanding, but the Spanish could not accept since, according to them, a takeover bid was in progress and therefore all shareholders of BNL should be treated equally.

All this stemmed from Unipol's concerns about the management of the BNL-Vita insurance branch, since Unipol had increased its stake in BNL and they probably expected better treatment in the management of BNL Vita.

The tones changed radically at the third meeting: if up to that point they had sought mediation in order to obtain, in the case of Unipol, particular management advantages over Bnl Vita, then at the third meeting Unipol raised the tone of the confrontation.

It should be noted, just to define the tension relevant to the context, that during that meeting Consorte was not present, only Sacchetti showed up; the latter in relation to Bbva expressed himself with this phrase: "Either we make an agreement to our liking, or we will launch a takeover bid on BNL, to acquire control".

The tenor of the conversation was confirmed by the fact that Sacchetti left the meeting visibly resentful.[105] This is because it seems that the Spanish intentions were to obtain 50% plus one over BNL, hence de jure control.

A further meeting followed, this time attended only by the lawyers of the respective parties, the tone was more accommodating and a draft agreement was drawn up to be submitted to the supervisory authority, Consob.

On 30 June, Unipol, through Consorte, asked the then governor of the Bank of Italy, Fazio, and the head of supervision, Frasca, for approval to increase the shareholding in BNL by 14.99%, all with a view to the takeover bid.

[105] Il Sole 24 Ore, "BNL, so Unipol hid the plans for the Opa".

The governor wondered about the feasibility of the operation. Given the complexity of the operation, he wondered whether there were any resources and, above all, where they would come from to finance the takeover.

Consorte replied clearly: he had Popolare Italiana and Carige on his side and that he would eventually be able to involve Caltagirone as well.

The meeting went well, a few hours later Unipol officially communicated its intentions to the market.

The Spaniards did not react well, of course, as they were convinced that all the negotiations that had taken place up to that point had the sole aim of gaining time and therefore ground (after all, the deadline for launching the takeover bid expired on 30 June).

The Spaniards therefore accused Unipol of having placed the entire blame for the failure of the negotiations on them, stressing several times the fact that Unipol did not have the necessary resources to meet its commitments.

The affair in fact began to take on chiaroscuro connotations, the feeling that Unipol was really lacking in resources began to become more and more substantial, even from the press of the time it seems that Sacchetti himself had reached by private jet Gonzalo Torano, who was on holiday on a Mediterranean island, to ensure that Bbva could be a shareholder of BNL together with Unipol.

From then on, in fact, Unipol did nothing more than seek financing to achieve its objectives.

Unipol intended to launch a takeover bid at 2.7euros on BNL, *the same figure at which the real estate developers today sold their holdings*, wrote "Milano Finanza" in the article "Unipol's takeover bid will start in September and BNL adjusts to the offer price".

Unipol was preparing for the takeover bid, starting to build relationships with numerous individuals and banks[106], and shareholder agreements were also drawn up.

A shareholders' agreement was signed with Credit Suisse First Boston, and Unipol's strategy was clear. To form a group. Aggregate interests and above all holdings in BNL.

Further pacts were signed, including those with Pop Italiana, Società Iniziative Autostradali e Servizi, Pop Vicentina and Alvaro Pascotto.[107]

[106] Milano Finanza, 18 July 2005 "Unipol's takeover bid will start in September and Bnl adjusts to the offer price" Paola Longo, in fact from the article published in Milano Finanza, *the options to rise to 14.9% of the capital of the Roman institute (it happens that on the block market 4,347% bi Bnl to 2.7 euros), also signed with Coop Adriatica, Coop Estense Società Cooperativa, Talea Società di Gestione immobiliare, Nova Coop Società Cooperativa, Nomura International Plc, Banca Carige (+0.68% to 3.50 euros)*

[107] According to the same article, these agreements provided for a concession in favour of Unipol, namely the right to *purchase the Bnl shares held by them equal to 6.6% of the capital, in addition to the reciprocal assumption of further commitments such as*

Of all the pacts, the one that perhaps came into the media limelight most was the one with Deutsche Bank, from which Unipol bought call shares.

It was precisely the agreements made with Deutsche Bank that aroused the suspicions of the regulator. In fact, when Consob discovered the existence of a shareholders' agreement between Unipol and Deutsche Bank, it imposed an increase in the offer price from 2.7 to 2.755.

From a purely economic point of view, the sanction was not a problem, as it would have meant an additional outlay of only eighty million euros, compared to a total of five billion euros.

The harm arose in terms of time, in the sense that the timeframe for concluding the transactions would be extended.

Deutsche Bank did not seem to appreciate the opinion of the Supervisory Authority but, according to statements made at the time, was willing to cooperate with the institutions: in fact, it decided not to file any appeal in order not to further delay the manoeuvres that already seemed to flow into clear problems.

Unipol did the same; they simply took note.

Consob justified its judgement by referring to the best price rule, which it considered to have been disregarded by Unipol.

The agreement was clear, and very significant, since it established Deutsche Bank's commitment not to subscribe to the Unipol takeover bid, let alone to competing bids.[108]

In addition, the agreement placed limits on the transfer of shares in BNL. Consequently, according to Consob, Deutsche Bank was considered to be a party to a shareholders' agreement with Unipol.

However, Unipol's plan seemed to proceed, even though the authorities had picked up on anomalies, and Consorte was fully intent on taking over BNL.

In fact, always from the chronicle of the time, it turns out that Unipol continued to rake the shares at a forced pace: already on June 28, the Popolare di Vicenza, and Euromobiliare as an intermediary, had purchased the

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a lock-up period, a prohibition on the purchase of further shares in the Roman bank and a commitment not to subscribe to the offer made by Bbva.

[108] Paola Pica, Corriere della Sera, in her article 'Unipol and Deutsche Bank, a hidden pact for Bnl' provides an interesting description of the context at the time concerning relations between Unipol and Deutsche Bank in the light of the Consob opinion, '*The German bank's undertaking not to take part in the takeover bid promoted by Unipol, nor in any other competing bids, can be considered a <significant agreement> as it sets limits on the transfer of Bnl shares'.<According to what Lamberto Cardia's investigators have been able to reconstruct <<also thanks to the findings of international cooperation>> some purchases of BNL by Deutsche Bank <<have taken place, in part, at 2.755 euros per share>>. It follows that <<the price of the entire takeover bid promoted by Unipol on Bnl will have to be adjusted to the highest price paid by Deutsche Bank for Bnl shares>>, namely 2.755 euro.*

"blocks" to 0.5% of BNL[109], the purchases continued tight but the story literally began to become unsustainable, also took a "deep throat", as defined by the press (Il Sole 24 Ore), which began to detect the background useful to understand the dark sides of the transaction.

According to that source, it seemed that Unipol was creating a real dark field of intermediary purchases, referring to Carlo Cimbri, who had been the general manager of Unipol, as the mediator, the one who, according to alleged rumours, had indicated the Popolare Vicentina as the recipient of the Bnl securities.

Consorte himself declared that Caltagirone proposed to Unipol an alliance through a partial sale of the shares of the counterparty, in order that once the operation was successfully concluded he (Caltagirone) would become president of BNL for three terms, a presidency that, according to articles of the time, would have been to the liking of Fazio and Gianni Letta, at that time undersecretary to the Presidency of the Berlusconi *three* government.

In the meantime, the Milan public prosecutor's office was moving forward with its investigation into the Antonveneta takeover, and the names of some of the best known names on the Italian business and financial scene - Fiorani, Boni, Gnutti, Ricucci and even Consorte and Sacchetti - were all dropping out of the picture.[110]

The curtain began to fall inexorably on 12 July. As mentioned, Unipol had initiated a series of agreements and dynamics aimed at the acquisition of BNL. After months of strategic manoeuvres, Consorte was ready to inform the authorities and the press that he had exceeded 30%. This was the critical threshold for launching a takeover bid. The agreements with the counterpacting parties at that precise moment seemed to have been concluded in the best possible way, and this would have guaranteed Unipol and its other allies an amount of approximately 51.6% of Bnl.

Consorte, however, pointed out that something unusual occurred: the counterpacting parties demanded payment for the shares from Unipol at the very moment of the sale[111]. This aroused suspicion, as it was considered uncommon behaviour.

Unipol, however, would only officially announce on 17 July that it was planning to launch a takeover bid, or rather, that it had begun negotiations that could have given rise to the obligation of a takeover bid. Consob, which was chaired by Lamberto Cardia at the time, was ready to circulate the announcement and related information to market participants.

[109] "BNL, That's how Unipol hid the plans for the takeover bid". Il Sole 24 Ore.
[110] The above-mentioned article clearly states that at the time of the events, *"For about a week the Milan Public Prosecutor's Office began to intercept the protagonists of the Antonveneta takeover: Gianpiero Fiorani and Gianfranco Boni of Banca Popolare Italiana, Emilio Gnutti, Stefano Ricucci and the same Consorte and Sacchetti, who in agreement with Fiorani had in turn taken over, through Unipol, a stake in Antonveneta.*
[111] "BNL, so Unipol hid the plans for the Opa" Il Sole 24 Ore.

However, Consob censored the pacts with Deutsche Bank of London, which happened after Unipol took over all the shares of the counterpacting pact and this allowed Consob to shed light on the agreements made.

Unipol at that point was really ready to launch the OPA, but this did not happen: in fact the OPA was never launched. There were various reasons for this, but given the complexity of the subject we will leave it to the words of a Bank of Italy communiqué of the period to explain: *The conditions prescribed by the regulations for granting the Unipol group authorisation to acquire control of BNL are not met* (Il Sole 24 Ore).

Consorte aspired to the attainment of 51,6% of Bnl, he would have had to be content with 46,63%. This is because Guido Leoni, of Bper denied him the right of option on 4% of Bnl raked by the bank of Emilia Romagna (Il Sole 24 Ore).

The case described above is more than illustrative in describing first of all the complex nature and logic of shareholders' agreements, making it clear how they can sometimes be a necessary means of creating alliances in order to achieve a goal, in this case obtaining the share necessary to launch a Takeover Bid.

Secondly, the case itself described a situation in which it was precisely because of the pacts that the takeover bid was not launched, as Consob and the authorities had already picked up on a discordant note.

The shareholders' agreement itself with Deutsche Bank was classified as a pact whose function was to limit the transfer of a certain number of shares and, consequently, Consob noted the strategy that Unipol was pursuing, i.e. obtaining control of the company's assets following the launch of the takeover bid.

It is easy to understand that what was imposed by the legislator was widely acknowledged and confirmed, in fact, Article 122TUF, paragraph 5, points a, b, d-bis[112] clearly states that in the event of non-compliance with certain behaviours, the agreements will be null and void. As an indirect effect, this will also result in the nullity of everything that may result therefrom.

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[112] Respectively, the writing of the points in the cited articles is given;

a) *Establishing prior consultation requirements for the exercise of voting rights in listed companies and their subsidiaries;*
b) *Placing limits on the transfer of the relevant shares or financial instruments giving rights to acquire or subscribe for them*
c) Providing for the purchase of the shares or financial instruments referred to in subparagraph (b);
d) having as their object or effect the exercise, even jointly, of a dominant influence over such companies; d-bis) aimed at favouring or opposing the attainment of the objectives of a public purchase or exchange offer, including commitments not to subscribe to an offer.

Other case of exemption

The Consob communication we are about to introduce concerns actors already encountered previously and will be brought to attention as emblematic of a topic already analysed: The issue of exemptions.

In providing precise details, the subject of the Communication will be reported in its entirety: *Response to question regarding the existence of takeover bid obligations in connection with the merger of Unipol Assicurazioni S.p.A. with the companies Premafin Finanziaria S.p.A.- Holding di partecipazioni, Fondiaria Sai S.p.A. and Milano assicurazioni S.p.A. Request pursuant to Article 114, paragraph 5, of Legislative Decree no. 58/98 ("Tuf").*

With regard to the merger of Unipol Assicurazioni S.p.A., Premafin Finanziaria S.p.A. - Holding di Partecipazioni, Fondiaria Sai S.p.A. and Milano Assicurazioni S.p.A., Unipol through "Studio Legale", as stated in the communication, asked the supervisory authority about the hypothetical occurrence of purchase obligations following the above-mentioned transactions.

It should be noted that Premafin already owned a shareholding in Fonsai, amounting to approximately 35.763% and held an (indirect) interest in Milano Assicurazioni of 63.396%.

In January 2012, ISVAP requested detailed documentation from Premafin and Fonsai regarding their plans to recapitalise Fonsai. It was therefore necessary to ensure that Fonsai, even in the long term, would be able to cope with financial contingencies, including those of its subsidiaries.

In this respect, Unipol (UGF) and Premafin entered into an investment agreement, mainly concerning the Unipol capital increase. [113]

[113] The points of the agreement are outlined below, as listed in the Consob Communication itself:

a) Increase of UGF's share capital for a maximum total amount of Euro 1,100 million in order to acquire the necessary resources to:

(i) Subscribing the Premafin capital increase reserved for UGF for a maximum amount of Euro 400 million ("the Premafin Capital Increase"), aimed at providing Premafin with the financial resources necessary to subscribe in full (jointly with Finadin), for its relevant portion, the Fonsai share capital increase ("the Fonsai Capital Increase") (see letters B and C below). B. and C. below) (ii) to provide the subsidiary Unipol Assicurazioni with the capital resources necessary to enable the entity resulting from the Merger to comply on a lasting basis with the rules of the sector regulations on the solvency margin of insurance companies. In particular, UGF will increase Unipol Assicurazioni's capital base by €600 million prior to the Merger;

B) As regards Premafin:

(I) preparation of a reorganisation plan pursuant to Article 67, paragraph 3, letter d), of R.D. No. 267 of 16 March 1942 ("L.F."), in order to reorganise its debt exposure and rebalance its financial situation (the "Reorganisation Plan"); (ii) implementation, in the context of the aforesaid Plan and as an essential part of the Merger, of the Premafin Capital Increase;

C) Fonsai capital increase for a total maximum amount of Euro 1,100 million;

D) Merger by incorporation of Premafin, Milano Assicurazioni and Unipol Assicurazioni into Fonsai.

The integration project could have been problematic, because once the integration process was completed, UGM (Unipol) would have exceeded the canonical threshold provided for in Article 106 TUF.

As a result of subscribing to the Premafin capital increase, Unipol would have seen its holdings in Premafin, Fonsai and Milano Assicurazioni increase.

It would have been precisely the subscription that allowed Unipol to take direct possession of a share, with voting rights, in Premafin, for an amount exceeding 50%.

Unipol itself is said to have obtained, indirectly, a shareholding in the share capital of Fonsai in excess of 30%, with voting rights.

Moreover, following the success of the integration project, Unipol would also have come to hold a shareholding with voting rights in the share capital of Milano Assicurazioni, in this case exceeding 60%, again with voting rights.

The shareholding composition was clear: there would be an obligation to make a mandatory offer. In addition, the Consob communication states that, once the merger had been completed and the exchange ratios had been established, Unipol could have found itself holding a shareholding with voting rights of more than 50% or, in any event, could have increased its shareholding by more than the 5% annual threshold relevant for the purposes of applying the rules on takeover bids on consolidation.

The reasons underlying the request for exemption were based on the assumption that Unipol's control over Premafin, Fonsai and Milano Assicurazioni and the subsequent increase in the shareholding that Unipol would come to hold in Fonsai constituted profiles that were only chronologically distinct, *but were to be treated logically and technically as stages or elements of a single procedure aimed at restoring the Fonsai group's current and future levels of correct solvency.*

Theoretically, this would have ensured the effectiveness of the exemption principles laid down in Article 106 TUF. Specifically, Unipol's law firm was convinced that the participation in Premafin, following the subscription of the capital increase, should be contextualised within the framework of the exemptions established by Article 49 of the issuers' regulation.[114]

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[114] Article 49 of the Regulation on Issuers, paragraph 1, letter b), provides that
Paragraph 1 states that *Where a listed company is recapitalised or otherwise strengthened and the company is in a situation of crisis as evidenced by:*

- *(i)* *Admission to an insolvency procedure provided for by R.D. No 267 of 16 March 1942 or other special laws;*
- *(ii)* *Approval of a debt restructuring agreement concluded with the debtors, pursuant to Article 182-bis of Royal Decree No 267 of 16 March 1942, disclosed to the market.*
- *(iii)* *Requests made by a prudential supervisory authority, in the event of serious losses, to prevent recourse to extraordinary administration or compulsory liquidation within the meaning of the Consolidated Law, Legislative Decree No 385 of 1 September 1993, Legislative Decree No 209 of 7 September 2005*

As already pointed out, it is the history of the purchases that determines whether or not a purchase obligation arises; in this respect, the provisions of Article 106 TUF are recalled.

In fact, in this specific case, the law firm representing Unipol's interests leveraged precisely on this element, arguing that the increase in the shareholding did not derive from purchases made or agreed in Premafin in the last twelve months, but from the simple capital increase in Premafin.[115]

What really matters and is of interest is the reason underlying the request for exemption; in fact, if the protection of minority shareholders is one of the fundamental logics concerning the legal institution, it is equally true that the same mandatory takeover bid is a powerful means to discourage all those situations where the purely speculative logic, by the majority shareholders, take the upper hand.

From what can be deduced a posteriori, Unipol in that specific context was not acting apparently out of mere self-interest but was following a specific logic, in this case contextualised in what is a motivation for corporate recovery.

This is where Unipol's objection lies, which we might consider more in terms of substance than method.

In any event, Consob's reference to its communication no. 11081302 of 30 September 2011 should be noted, as the rationale behind this provision is that if the relevant threshold is exceeded by subscribing to a capital increase with the exclusion of pre-emptive rights, a twofold consequence is achieved, namely: i) the funds invested by the shareholder who acquires control are intended to increase the company's assets and not those of the individual shareholders who may sell their shareholdings or their pre-emptive rights, ii) full equality of treatment is guaranteed among all shareholders, who are equally affected by the dilutive effect of the subscription of the capital increase by the new shareholder and do not benefit from the possibility of exiting the company".

It is therefore clear that Consob wanted to carry out a comprehensive examination, which was necessary to analyse the situation in every single detail.

It is therefore no coincidence that Consob asked for the agreements signed by Unipol with Premafin to be disclosed to the public by means of a side letter.

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[115] Again from the Consob communication in question, we read: As *regards the requirement relating to the reorganisation plan pursuant to Article 67, paragraph 3, letter d), L.F., in the Integration project, as mentioned, the preparation of a Reorganisation Plan for Premafin, aimed at reorganising its debt exposure and rebalancing its financial situation, as part of which the agreements with the company's creditors would be redefined.*

The side letter did, however, raise questions, as it included policy and structural points relating to the economic benefits attributable to the outgoing controlling shareholders.

Therefore, such benefits were supposed to be incompatible with the rationale of a rescue operation, since one of the basic tenets is the equal treatment of shareholders.

A further fundamental detail is that the merger would have led to the emergence of a right of withdrawal for Premafin's shareholders, as the transaction would have transformed it from a holding company into an operating company.

Therefore, the so-called principles of prevalence had to be taken into account, i.e.: the Supervisory Commission had reserved the option not to apply the exemption in case the majority shareholders of Premafin had exercised their right of withdrawal.

At this point, it was necessary to consider the case as a whole, since it appeared to be imperative to assess the nature of the indirect purchases as it was only from their analysis that it would be possible to conclude whether or not a purchase obligation should be created.

It is recalled that Unipol held a stake of more than 30% in Fonsai through Premafin, while Unipol also held a stake of more than 60% in Milano Assicurazioni, in this case through Premafin and Fonsai. It was necessary to understand whether there was a context in which a takeover116 obligation could arise.

In any event, the guarantor authority recognised the principle of exemption, since all the essential prerequisites for compliance with the legislation existed; in fact, analysing the purchases, it was clear that they had been made as part of a recapitalisation and, above all, to stem a serious company crisis situation made even more official by a request for clarification from the guarantor authority.

This is because Consob, of course, wanted to ascertain against all reasonable doubt whether or not a company crisis situation existed.

It follows that the subscription of the capital increase carried out by UGF towards Premafin, which caused the threshold of indirect takeover bid to be exceeded, merely played an instrumental role with the aim of carrying out the integration project; therefore, the purpose was simply to put Premafin in a position to possess the financial resources useful and necessary to fulfil the subscription.

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[116] This is what we read in the already cited Clifford Chance document "Exemptions for takeover bids: recent CONSOB guidelines: *With regard to the indirect purchase of Fonsai shares, the condition set forth in Article 45, paragraph 3, letter a) of the Issuers' Regulation (so-called objective prevalence criterion) would certainly be met, since the equity investment held by Premafin in Fonsai is the main equity investment held, representing more than one third of the assets and being higher than any other fixed asset recorded in the balance sheet. Consequently, the purchase of that shareholding would trigger a cascade takeover obligation for UGF.*

The intention was to contribute to Fonsai's capital increase, so the exemption principle was applicable. Fonsai itself needed the capital increase in order to comply with specific requests made by the supervisory authority.

CONCLUSIONS

We live in a highly globalised world, finance is part of our dynamics, social balances are regulated by the market. Whether it expresses a capitalist, socialist or hybrid vocation, the market dictates the law.

Of course, we are not in an Orwellian dystopia, where large corporations, in our case, rule without any constraints whatsoever. The market must necessarily be regulated, for two reasons.

The first is social and moral. In fact, however much man may resort to the market, it must and must remain an instrument at his service and not an apparatus for its own sake, as if it were an exercise in style.

The second reason is strategic. A regulated market is more efficient, functions better, and thus allows for sound and prudent management (as the legislator claims) of corporate conduct and life.

This is therefore the link with the institution of the Public Purchase Offer and Shareholders' Agreements.

It was pointed out that the market is global and interconnected, what happens in Tokyo will have repercussions in Paris as well as in Saigon. Today as never before, this is true.

The market for control is just that, the power of certain individuals to influence a specific economic sector and profit from it: nothing is created, at most it is controlled.

To quote Wall Street's Gekko again, "I don't create anything: I own", a phrase I consider emblematic. Of course, the film must be contextualised in the 1980s, but in my opinion it captures the essence of the market of control.

Control is undoubtedly an offshoot of power. Power makes it possible to influence a board of directors, to induce a whole army of minority shareholders to listen to the voice of those who hold that power, to sell off pieces of one company in order to create another.

Let us take, for example, the main Italian case histories on the subject over the last two decades: it makes us think how many of these have become news cases and how many of their authors have been subjected to trials and media pillories.

The problem could start from afar, first of all we need to realise that the market as we understand it 'in the West' is the Anglo-Saxon one, a market strongly devoted to free economic initiative, derived from John Locke's high synthesis.

It is not surprising that, in many respects, the US economic structure resembles the inherent characteristics of many Protestant countries.

In the United States of America, the market has historically been central, acting as a useful mechanism for enrichment, the pursuit of profit.

It is easy to understand that in such a fast and dynamic market, takeovers, IPOs and mergers are key elements of the system.

The US market is buoyant, shareholders act casually, the shareholder base is highly dispersed and fragmented. A company has to be run in an efficient, maximising way, and CEOs know this well. Their job is to maximise profit in the short term, shareholders must enjoy dividends.

Clearly, as we have explored in previous pages, such a system could encourage a short-sighted view of business management: the immediate pursuit of profit, the valorisation of shares in the short term, could lead to disregarding a broader, wide-ranging vision.

The CEO is aware that if he fails to satisfy the shareholders, they may remove him from office, or - and this is the theme of this thesis - outside parties may come in, convinced that they can run the company better, aware of the company's strengths, and ready to meet the shareholders' highest expectations.

It is therefore clear how this system could be subject to formal defects, to unclear situations. The risk of a speculative takeover may be less fanciful than one might think. Hence the reason for the existence of strict regulation.

Turning to the European context, although some Protestant nations have a capitalist system very similar to that of the United States, there is nevertheless a clear harmonisation at Community level in the understanding of the exercise of economic and financial reality. Moreover, the Italian constitution provides for private initiative. There is, however, a radical difference compared to the US context, namely the composition of shareholders.

Italian capitalism could be defined as 'monolithic', and it is no coincidence that in our context the field of market control is more often than not presided over by the usual well-known names, often belonging to families historically active in a particular industrial sector.

At first glance, therefore, the Italian control market may appear more static than that of the United States, the latter being strongly oriented towards protecting shareholders, while the Italian market is oriented towards protecting public savings. The two aspects could be a mirror image of each other, yet there are differences.

While in the United States the shareholder is protected because he is considered the "propellant" of the entire financial system, in Italy the entire OPA discipline has always been oriented towards the protection of the shareholder, but only of the minority shareholder.

The two models, American and Italian, although similar and structurally similar, therefore present divergences that we could define as organic. It is precisely the contexts that differ: in the United States, takeover bids are an integral part of the entire economic model, and top managers change like the coaches of a football team.

In Italy, the monolithic shareholding structure could slow down the dynamics of operations: it is not by chance, therefore, that some companies have stable and immovable shareholding blocks. However, this should not lead to the easy conclusion that the system is not efficient. On the contrary, it is, and the legislator has given ample proof of lucidity in grasping and regulating the mechanisms inherent in the Italian context.

The Italian legislator itself, in wishing to guarantee adequate protection for minority shareholders, has also managed to reconcile the interests of the possible acquirer and the majority shareholder. In perfect line with the European Union, the European directive on takeovers has succeeded in achieving the legislator's objective.

The path taken can be seen in an optimistic and proactive manner, but the challenge will certainly be greater as the international scenario changes.

China's emergence on the global economic stage will mean that, increasingly and exponentially, it will become the main player on the control and capital market; the peculiar Chinese economic organisation will certainly be aimed at the extreme protection of the national interest, therefore, despite the opening to global finance, there are valid reasons to believe that foreign subjects will come to fully control Chinese companies. On the other hand, China is an interesting economic player, and there will certainly be a need for dialogue with it because, as we have seen, protectionism at all costs does not pay. It will therefore be necessary to adjust European and national regulations increasingly towards an international perspective.

When analysing shareholders' agreements in the Italian context, they represent one of the jewels in the crown of the complex corporate dynamic.

The legislator, as we have seen, leaves it up to the members/shareholders to agree and coordinate, but at the same time is careful to want to know the reasons for this.

Activism is therefore encouraged, and participation in the company's activities is welcomed, but only in order to influence events positively. In fact, it is precisely the cases in which organised concertation is used to try to upset the balance of a company in order to impose its own control that are absolutely punished by the supervisory authority.

Shareholders' agreements by definition are inherent in the agreement, in the concerted and programmatically structured action, but it is the context that creates the intentions, and it is the intentions that create the consequences, which may or may not be worthy of protection. Or even opposed by the supervisory institutions.

The regulation of takeover bids has been designed to protect minority parties, the risk being that takeover bids may sometimes follow purely speculative logic, rather than the underlying logic of the law.

In this sense, it will be increasingly necessary to analyse cases specifically and focus on the motivations behind the launch of an offer, assessing well the origin, the issuing company and the precise corporate structures of the company being acquired.

This has also been seen with regard to shareholders' agreements, where the corporate composition has to be assessed on a case-by-case basis. A priori it is possible to set benchmarks, guidelines, but it is the specific corporate composition that defines the context, as well as the pacts themselves.

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Concert Action and Mandatory Takeover Bid, Chiara Mosca, Egea

ABSTRACT

The subject matter of this paper is the analysis and description of takeover bids and shareholders' agreements.

I have divided this into three chapters; in the first one I analysed takeover bids and their different types, in Italy as well as in other countries of the world.

In the second chapter, the Shareholders' Agreements and concerted action, making use of Consob communications and notebooks.

Finally, in the third chapter I have described some cases, with the intention of providing a concrete retrospective of what was examined in the first two chapters.

Here are in detail the topics covered, the salient and founding themes of the discipline in the three chapters.

Chapter 1 - Takeover bids

The first chapter deals mainly with takeover bids.

The discussion begins by describing the different types of offers and their legal rationale, as well as the different parties, such as the offeree company, the shareholders and the offeror.

Naturally, I have placed emphasis on the various types of corporate control and on what is to be understood by the market for control, because it is precisely the logic of control that indirectly determines the legal nature of a takeover bid. Control can be de jure, de facto or defined by external contractual dynamics (page 8).

De jure control occurs when a shareholder at an ordinary shareholders' meeting comes to hold a majority of the shares with voting rights.

De facto control, on the other hand, occurs when, although not holding a majority of the shares with voting rights, a person is nevertheless able to control the progress of the shareholders' meeting and heavily influence its management.

Once a background on what control is and how it should be understood has been provided, the mechanisms preceding the launch of a takeover bid will be described.

From page 9 onwards, the discussion will focus on the corporate governance report, a useful tool for the proper functioning of the market, especially if it is interpreted with a view to market transparency.

Next, the various types of takeover bid will be introduced, and in doing so the prospectus will be discussed. This part of the thesis will relate the nature of the various types of takeover bid and contextualise them in their respective fields.

Obviously, due emphasis will be placed on the central role of the guarantor authority, Consob, and how it is central in regulating takeover bids and the control market in the Italian context. In fact, it is Consob that is responsible for the protection of investors and for the good and proper functioning of the markets: Consob exercises the powers provided for in this part with regard to the protection of investors and the efficiency and transparency of the corporate control market and the capital market.

In the following, the European regulations concerning the discipline will be described; the emphasis will be on a broad view, i.e. rooted in a common European dimension. The so-called harmonisation.

It is only then that the different cases triggering a takeover obligation will be described in detail, and thus also the different types of takeover bids: the voluntary takeover bid, the mandatory takeover bid, the residual takeover bid and other types of takeover bid such as the cascade takeover bid, the incremental takeover bid and the full takeover bid.

Thus, up to page nineteen, an examination of all these types of Offer, similar in nature but different in complex nuances, will be presented and compared with the regulations in force, as well as with the prevailing articles of the Financial Consolidation Act (TUF).

Still within the framework of the takeover discipline, from page twenty we will start to deal with so-called successive defence techniques.

This phase will be important because it will allow us to understand how much this area has been much debated in our legal system; in fact, it will be seen that the subject of preventive and subsequent defences has seen a certain degree of change over time.

In fact, we will focus in detail on the evolution of the passivity rule in our legal system and how it has been more or less accepted by the respective governments that have followed one another over the years.

On the other hand, providing corporate governance with defence instruments is certainly inherent in a certain economic vision, in one case adhering to more liberal forms and therefore less protected, in another the same defences would allow national companies greater protection from possible non-domestic takeovers.

In the following, from page twenty-one, the cases concerning the so-called breakthrough rule will also be examined.

Obviously, given the importance of an argument such as defensive techniques, this topic will also be explored from a comparative perspective.

In this phase of the thesis, the European directive will be emphasised several times, and an attempt will be made to underline the absolute need for total harmonisation at EU level. Defence techniques are strongly related to the European Directive, which is why their analysis will be accompanied by an examination oriented towards the description of the existing regulatory framework.

From page twenty-six, the analysis of M&As in other countries, mainly the United States of America and China, will begin. In this part, reference will be made to so-called M&As, i.e. a discussion of the complex system of mergers in the US context, analysing the corporate dynamics with reference to the market for governance and corporate control.

On page twenty-seven, the US regulatory references will be provided, and the legal apparatus governing this system will be discussed, then the Delaware Corporation Law will be introduced.

The analysis will be conducted by drawing references from academic papers, articles and memoranda drafted by some of the leading US law firms.

Also with reference to the USA, we will describe how an acquisition, a bid and the various corporate dynamics are structured.

It will be specified, as will be read in the course of the thesis, that, in the US context, the tender offer falls within the very broad field defined as M&A and that offers can be of various types, nature and motivations. For example consolidations, mandatory share exchanges.

On page 31, the proxy statements mentioned above will be discussed and reference will be made to Section 721 of the Defense Production Act of 1950, which delegated to the Committee on Foreign Investment in the U.S. (CFIUS) the task of protecting the national interest from the hypothetical onset of foreign investment. This was to analyse the US attitude in the event of a takeover attempt by a foreign country.

In fact, with regard to the above-mentioned law, mention will also be made of The Foreign Investment Risk Review Modernization, which broadened the scope of CFIUS.

After providing a retrospective of the US legal and economic scenario, details concerning the case Unocal v. Mesa will be presented on page thirty-two. It served to describe a concrete application of the elements inherent in bids, acquisitions and M&A in general in the US context.

In the remainder, various defensive instruments will be mentioned, such as shark repellent and leveraged recapitalisation.

With reference to the thesis, I report a passage: In the "defensive" panorama there are other tactics, also because the defensive strategy must be contextualized: in fact, it is well to repeat that in these scenarios, it is not possible to resort to a standardized manual, but to guidelines to be applied case by case. Therefore, if the rationale of the poison pill is to discourage "the enemy" from carrying out other hostile actions, and make acquisition unbearable for him, then there are also the *shark repellents.*

Another defensive practice is *leveraged recapitalisation, a* tool to provide shareholders with a more attractive financial alternative by creating a block of shares controlled by management, all of course with the aim of making the target company less desirable to unconvincing claims.

The thesis on page 35 will examine the issue of the adequacy of the offer price; in this part we will focus again on the US context, and see how the offer price is one of the founding elements of the whole discipline.

After addressing the subject in context in the US, we will start to discuss takeover bids in China from page thirty-seven.

This section will serve to highlight the extent to which financial globalisation is now fully ramified. In fact, China, despite being a strongly socialist state, albeit with 'Chinese characteristics', is experiencing a period of immense economic growth which, according to many, would qualify it as the world's leading power. As a result, there is a preponderant opening up of the capital market and thus, directly but also indirectly, of the control market.

The Chinese landscape is interesting because even in a context so diametrically opposed to that of the West, typical features of Western capitalism take on importance.

It will not come as a surprise to realise that the Chinese model also includes issues such as control discipline and the corporate market.

In dealing with the Chinese model, an analysis of its origins, its future prospects and, of course, a comparison with existing corporate models will be considered.

All this is seen in the light of the regulation of takeover bids and acquisitions.

What is interesting about the Chinese case is the study of the market for corporate control and its derivations, such as a takeover bid, but compared with a state-based economic vision.

The Chinese case will be compared with the US and the UK, and it will be seen how much China has been inspired, but how much more this inspiration needs to be contextualised in the specific Chinese reality.

It will be read that one of the most important features defining the scenario of Chinese hostile takeovers is the presence of a diffuse shareholder base: this feature, in fact, allows hostile acquirers to accumulate a large amount of shares in the capital market.

In the Chinese model, agency costs are high and the conflict of interest between majority and minority shareholders is especially visible.

In a dirigiste context, where companies enjoy virtually unlimited funds, it is clear that the majority shareholder will enjoy particular advantages from a corporatist and state perspective.

Thus, while the Chinese model is hybrid and thus alludes to the UK model, it is not possible to analyse the Chinese model without proper contextualisation.

After emphasising the US and China case studies, the thesis from page 41 will begin an examination of takeover bids and also takeovers in other countries, specifically European ones.

In this section we will return to the European directive and its harmonising logic.

An attempt will be made to show how the aims of the directive are to be applied in the economic sphere, in order to ensure greater transparency and integration between the different financial systems.

From page 43 onwards, the German context and its normative logic will be analysed, the German form of corporate governance will be described and reference will be made to German codetermination. This is done up to page 47, providing a retrospective of its peculiarities and highlighting its legal foundations.

After the German analysis, we will move on to the Polish one: here, too, the details concerning the nature of takeover bids in Poland will be highlighted and the economic and legal technicalities will be analysed.

With reference to the Polish analysis, attention will be drawn to a case, The Case of Bogdanka.

This case was highlighted in order to provide a retrospective view of the defensive measures that a company can take in the course of a hostile takeover.

I have chosen to analyse the Polish discipline as well, because Poland is an interesting business location, for a number of reasons, one of which is the ability to disentangle various environments and industries.

Once the Polish analysis is concluded, on page fifty-one reference will be made to French case law, the Lepetit Report studies and defensive actions will be discussed.

What we have tried to emphasise is the need for total European harmonisation, how inefficient it would be to let individual states adopt measures in stark contrast to others, and in this connection the reciprocity rule was referred to several times in the course of the thesis.

It will be studied that in the French system the principle of reciprocity takes on fundamental importance, in fact the aim of this principle is the protection of the national interest. Rather than placing emphasis on the protection of shareholders, the French framework focuses mainly on the protection of stakeholders.

Again with regard to France, important real-life cases will be mentioned, such as the Danone Amendment.

An excerpt from the thesis is given here, useful for a better understanding of what is to be read: As regards the breakthrough rule mentioned above, although the French legal system has de facto not implemented the now well-known rule in its own system, it allows companies the optional option of implementing it, and in any event any company adopting the breakthrough rule will be subject to the principle of neutrality.

In conclusion, we can consider the French model, although in line with the EU directive, as highly protectionist. On the other hand, it is well known that the French system is aimed at protecting its large and consolidated industrial groups, such as Vivendi, which has recently come into the limelight (in addition to its well-known and sensational past) for its takeover bid on Lagardere.

This comparative analysis is essential, because understanding the different nuances of the subject is necessary to better contextualise such a complex system at global and EU level.

The market is globalised, which is why we could not limit ourselves to a simple Italian analysis: the comparative analysis will also highlight elements such as the strong similarity between the systems but also the different approach that the individual nations have adopted, similar in nature but different in nuance.

In addition, when analysing the German context, due to its particular corporate nature (recall the principle of co-determination), hints were made at the complex German corporate structure. The intuition was that only by analysing the corporate structure would it be possible to investigate how a public offer or takeover could be conducted.

In the first part of the thesis, therefore, the main focus was on assessing takeover bids in their complexity, what they are, why they exist, what function they have. Therefore, their economic and social reason, because they represent an important instrument of regulation and corporate health. In this regard, it was stressed that one of the underlying reasons for the institution of takeover bids is the protection of minority shareholders: in fact, their protection is fundamental, especially in those contexts in which there could be a so-called change of corporate control.

The first part will therefore be more descriptive and theoretical in nature, although the comparative analysis has imposed a reflection of a practical nature.

After this first chapter, the fundamental subject of the Shareholders' Agreements will be introduced,

Chapter 2 - Shareholders' Agreements

Shareholders' Agreements are deeply embedded in the logic of takeover bids. In fact, the pacts, and as will be seen, the concerted action, can entail an obligation of OPA following purchases with very precise and distinguishable purposes. This part will present numerous judgments of merit expressed by Consob, as well as opinions of law firms and real cases. The cases will be used to follow up on what has been expressed in the theory, to show how the matter is sometimes extremely complex (the identification of concerted action and its purpose).

After defining the concept of covenant, we will analyse what it is and why it is necessary to study it. The regulatory sources and the definition of covenants will be discussed, and the content of article 122 of the Financial Consolidation Act will be reported.

After having introduced the content of Article 122, reference will also be made to Article 123 TUF, which is a fundamental article, as it provides strict details regarding the time frame within which the covenants are applicable.

The nature of shareholders' agreements is governed by Article 122 of the TUF, while the rules governing purchases in concert are governed by Article 109 of the TUF, which states: *persons acting in concert are jointly and severally liable to comply with the obligations provided for in Articles 106 and 108 when they hold, following purchases made by even one of them, a total shareholding of the percentages indicated in said articles. The same obligations exist for those acting in concert, following an increase, even in favour of only one of them, of voting rights, when they acquire voting rights in excess of the percentages indicated in Article 106*

Continuing with the thesis, emphasis will continue to be placed on the concept of the market of control; in fact, as will be seen, the subject of control returns to assume relevance once again, in fact, if the legislator has long established that once a certain threshold has been reached and exceeded, a situation of control prevails, there may well be a number of cases where control is not of such immediate relevance.

The covenant could be defined as the synthesis of the purpose of the concerted action itself; the complexity of the matter is found in the difficulty of identifying the concerted action, which, it should be noted, aims at joint control of shareholder value in order to influence choices (think, for example, of all those situations of board seeking).

The pacts will be placed in close relation with the concert action from the outset; their interaction will be studied in order to understand how their symbiosis may be relevant in relation to the occurrence of a purchase obligation on the part of the concert parties. We will try to demonstrate, by referring to the Financial Consolidation Act and to Consob communications, how what is really important in a concerted action is the intention of the shareholders, because it is precisely this which determines whether or not a takeover bid will arise.

Comments on the articles of the TUF and Consob's opinions will follow.

On page fifty-seven a real case study will be introduced, in fact reference will be made to the consultation document Control of Olimpia and Olivetti: Reasons for Consob's assessment (In "Consob informa" n.43 of 5 November 2001).

It is useful to analyse the case in order to assess the complex corporate dynamics in situations involving agreements.

At this point, an excerpt of the thesis concerning the Olivetti case is reported: in fact, as we will see below, Consob expressed its orientation in this regard by stating that, under the terms of corporate control, and considering Article 2359 of the Civil Code, as well as 93 TUF already cited, it is to be wondered whether such agreements may be relevant not only to attribute control to a minority shareholder but also to "depower" a shareholder who alone has "the majority of the votes exercisable in the ordinary shareholders' meeting".

In the course of the chapter, we will not only return to emphasise the absolute importance of the intention of the performers and thus of their aims, but will also allude to the aims of their mutual and coordinated action.

It has been pointed out that some of the main components outlining concerted action are precisely those behaviours aimed at controlling, defining corporate guidelines, explicitly dictating the line. In other words, all those behaviours useful and necessary to exercise control, both indirect and direct.

Subsequently, always with regard to regulatory rigour, reference will again be made to Article 101-bis TUF; specifically, paragraph 4-bis will be analysed and an attempt made to go into detail, i.e. to better understand how the concert dynamic is structured and to better define the nature of the concert performers.

Page sixty introduces a new topic, in fact it will start to discuss situations that might exempt from the Opa obligation.

This part will focus mainly on real cases taken from Consob communications, and will analyse some contexts commented on by the regulator, in order to highlight the elements useful to configure an exemption from Opa.

In dealing with the situations that could exempt a company from the obligation of launching a takeover bid, reference will be made several times to Article 106 TUF, because I considered it essential to focus on the regulatory framework, but above all, what I tried to highlight is the discipline seen from a broad viewpoint, in fact, the same subject of takeover bids presents significant convergence with the concerted action and shareholders' agreements. This has led me, in the course of the discussion, not to dwell solely on a single element, but on several elements in order to better designate this complex universe.

From page sixty-one, Consob Communication number 1187953 of 24 November 2020, we will proceed with the discussion of other communications, specifically Consob Communication number DEM/11081302 of 30-9-2011.

Given the complex theme of the exemptions, this part will mainly analyse the discipline contextualised in real cases, therefore it will provide an analysis that is not only theoretical but also strongly concrete and practical. In the cases analysed we will see how, following various and complex company dynamics, Consob will or will not consent to the exemption from the launch of a compulsory OPA.

After studying the exemptions, page sixty-five will introduce the Concert Actions.

In this section we will start by defining concert actions, their nature and their contextualisation in corporate structures.

The different types of concertismo will be related to the current Italian regulatory system, and textbooks and academic articles will be used to better understand the discipline.

Comparisons will be made with the regulation of shareholders' agreements, given their intrinsic relationship with concerted action; the discussion will continue until page seventy, at which point a new topic will be introduced, namely the Takeover Obligations arising from concerted action.

In this section we will begin by referring to the London City Code and state the provisions of Rule 9.1 para.1 acting in concert requires the co-operation of two or more parties. When a party has acquired an interest in shares without the knowledge of other persons with whom he subsequently comes together to co-operate as a group to obtain or consolidate control of a company, and the shares in which they are interested at the time of coming together carry 30% or more of the voting rights in the company, the Panel will not normally require a general offer to be made under this Rule.

The absolute importance of the Takeover Bids Directive will be highlighted.

On page 71, the nature of concerted action will be discussed: indeed, as will be seen, it may have lawful purposes, understood as corporate activism, but it may have evasive, opportunistic and not at all lawful reasons. Thus, the concept of intention at the basis of concerted action will once again be predominant.

This part of the thesis will analyse the cases in which a takeover obligation arises as a result of the concerted action, obviously in connection with the regulation of shareholders' agreements.

Page seventy-one also discusses a further Consob Communication, number DIS/99024712. The latter specifies and clarifies the scope of applicability of the mandatory takeover bid in the light of Article 109 TUF.

The case just cited deals with purchases made by a single shareholder but subsequently merged into the shareholders' agreements. It was necessary to establish whether the dynamics should be seen in the light of a concerted action.

This section will go on to analyse all the possible cases that could give rise to a takeover obligation; in fact, as will be seen, it is not always easy to recognise an action in concert, but it will be necessary to go into the merits, to analyse each case individually, to take into account the individual percentages held by the shareholders and, above all, to assess the existence or otherwise of an action in concert, its close connection with the shareholders' agreements.

Not only that, but one of the basic elements will be the timing of the purchases, i.e. the chronological order in which the shareholdings are acquired. As will be seen, it is the timing of the purchases that will determine whether or not a mandatory takeover bid is triggered.

An excerpt from the thesis, page seventy-six, is quoted in this connection: Precisely for this reason, there is an obligation to offer, for all purchases made at extremely short notice, the conclusion of a covenant.

It should be noted, however, that purchases made in the preceding twelve months may trigger the purchase obligation provided that they were relevant to the crossing of the critical threshold, so it is not the purchases themselves, but their precise contextualisation for the purposes of calculating the threshold.

However, this suggests that the identification of the individual's shareholding is extremely important. In this regard, it is worth mentioning that Consob provides important clarifications on the matter in its Communication No. DIS/99024712.

The introduction of this Communication will examine another aspect, namely whether or not a purchase obligation arises as a result of changes in the covenants.

From page seventy-eight onwards, part three will begin, focusing mainly on important cases from recent decades.

Chapter 3 - THE CASES

The third chapter was written taking into account periodical newspaper articles and informative and academic documents concerning the cases examined.

Page seventy-eight will introduce the complex and now historic Fondiaria-Sai case, demonstrating how the logic of concerted action and shareholders' agreements can be complex and difficult. A case in which it is demonstrated how difficult concerted action can be to detect and how it is useful to achieve corporate goals. This is followed by a list of names, companies, agreements, pacts, to show how the whole affair was intertwined.

In the analysis, the opinions of Consob but also of the Bank of Italy will play a primary role.

After Fondiaria-Sai we will focus on another real case, the Unipol-BNL case, on page eighty-five. The case will follow the descriptive approach of the previous one.

The case will open with a real dispute, that between Unipol and Banco di Bilbao for supremacy over BNL, followed by detailed information on share packages, opinions of the guarantor authorities, company meetings, and concerted action. Naturally, all this will be done in the light of the OPA discipline and its close interconnections with concerted action and shareholders' agreements.

Page ninety-two, on the other hand, will introduce the last topic, which will deal with a subject that has already been assessed previously, namely the cases of exemption from the launch of a mandatory takeover bid. Reference will be made to the Consob communication, to regulatory references and finally to documents drawn up by law firms.

An excerpt from the thesis is given below: The Consob communication we are about to introduce concerns actors already encountered previously and will be brought to attention as emblematic of a topic already analysed: The issue of exemptions.

In providing precise details, the subject of the Communication will be reported in its entirety: Response to question regarding the existence of takeover bid obligations in connection with the merger of Unipol Assicurazioni S.p.A. with the companies Premafin Finanziaria S.p.A.- Holding di partecipazioni, Fondiaria Sai S.p.A. and Milano assicurazioni S.p.A. Request pursuant to Article 114, paragraph 5, of Legislative Decree no. 58/98 ("Tuf").

With regard to the merger of Unipol Assicurazioni S.p.A., Premafin Finanziaria S.p.A. - Holding di Partecipazioni, Fondiaria Sai S.p.A. and Milano Assicurazioni S.p.A., Unipol through "Studio Legale", as stated in the communication, asked the supervisory authority about the hypothetical occurrence of purchase obligations following the above-mentioned transactions.

Thus, the subject of exemption from takeover bids in the event of company reorganisation.

It will be seen, in fact, as repeatedly stated above, that the concert dynamic related to that of the pacts must be analysed from a wide-ranging perspective, i.e. contextualised and assessed in terms of the goals the concert performers intend to achieve.

In this case, it will be seen that Unipol's subscription increases were for purposes other than what could be described as elusive or unlawful. It will therefore not be surprising to note that Consob agreed to the exemption.

Final conclusions will then follow.

It will be emphasised, also with a view to a reflection on the future, how OPA, concerted action and shareholders' agreements are strongly interconnected, how regulation has been and is necessary given that the market for corporate control represents a complex economic system.

This is followed at the end by the sitography and bibliography used.