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Rationales Behind Public To Private Transactions: Compliance Cost As A Driving Factor

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A mio fratello.

Perché possa avere dalla vita

tutto ciò che merita e desidera.

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Introduzione

Il presente elaborato si pone come obiettivo di analizzare le operazioni di delisting da una duplice prospettiva, economica e giuridica. Tradizionalmente, infatti, la letteratura accademica si è sempre focalizzata maggiormente sul fenomeno della quotazione nei mercati regolamentati, e ha talvolta tralasciato il fenomeno inverso, ossia proprio quello dell'uscita dalla borsa.

Il motivo per cui si è scelto di affrontare tale tematica risiede nella recentissima ondata di delisting che ha colpito il mercato italiano, dal quale nel 2022 sono uscite numerose società aventi un'elevata capitalizzazione. Pertanto, ci si è interrogati sulle motivazioni che hanno spinto così tante emittenti a prendere la stessa decisione nello stesso periodo storico, sulla convinzione che dovesse esistere un motivo di fondo, comune a tutte, a determinare la transizione verso lo status di società private.

Alla luce dell'analisi condotta e delle considerazioni derivanti dalla stessa, è parso chiaro sin da subito che il principale motivo per abbandonare Borsa Italiana risieda nei costi derivanti dalla disciplina speciale applicabile alle società quotate in Italia. Non sembra un caso, infatti, che a seguito dell'ondata di delisting del 2022 il Governo italiano abbia presentato un disegno di legge al Parlamento, il Ddl Capitali, per semplificare la normativa applicabile alle società quotate. L'obiettivo sottostante tale progetto normativo è di favorire, da un lato, la permanenza in borsa delle società attualmente quotate e, dall'altro, l'ingresso in borsa di nuove società, con la speranza di recuperare anche quelle che in precedenza avevano deciso di migrare verso mercati finanziari stranieri.

Alle considerazioni suesposte si è giunti alla fine di un percorso impervio, che si è articolato lungo tre linee direttrici. La prima, come anticipato, è incentrata sul quadro normativo cui sono soggette le società quotate in Italia, fortemente caratterizzante rispetto alle regole applicabili alle omologhe non quotate, il quale presenta notevoli ricadute in termini economici per le imprese tenute a conformarvisi. La seconda, invece, ha avuto ad oggetto un focus su presupposti e modalità di compimento delle operazioni di delisting. La terza, infine, ha compreso lo studio di alcuni casi reali, e ha ripercorso le operazioni di delisting di tre grosse società: (i) AS Roma S.p.A., oggi trasformata in S.r.l., (ii) Exor N.V., e (iii) Atlantia S.p.A., oggi rinominata Mundys.

Scandagliando maggiormente i contenuti delle tre linee direttrici cui si è appena fatto cenno, si è voluto in primo luogo dar conto degli obblighi di trasparenza e di informazione cui sono soggette le società quotate. Questi sono rivolti a vari aspetti della vita aziendale e coinvolgono più soggetti protagonisti nel governo societario. In particolare, ci si è riferiti agli obblighi informativi sulle partecipazioni rilevanti e incrociate, agli oneri pubblicitari che competono agli aderenti ad un patto parasociale, agli obblighi sul trattamento delle informazioni privilegiate, nonché alla trasparenza in materia finanziaria e per alcune operazioni di maggior rilievo.

Si è argomentato che gli obblighi riferiti agli assetti proprietari sono giustificati, perché consentono agli investitori di poter ragionevolmente dedurre l'esistenza di un eventuale azionista di controllo in grado di influenzare le scelte di *governance*. Inoltre, permettono di individuare la sussistenza dei presupposti per il lancio di un'OPA obbligatoria, la quale – come sappiamo – si rende tale al superamento di determinate soglie di capitale stabilite dalla legge. Tuttavia, non si è mancato di notare che tali disposizioni si pongono in contrasto con le esigenze di anonimato degli azionisti, con la conseguenza che, anch'esse, possono contribuire a stimolare l'uscita dalla borsa.

Successivamente, in merito alla rassegna degli obblighi informativi in materia finanziaria, si è evidenziato che se, da un lato, è chiaro che tali obblighi siano funzionali a garantire agli investitori la possibilità di assumere scelte consapevoli, calcolando i rischi connessi all'investimento da effettuare, dall'altro è anche vero che un'eccessiva frequenza nella divulgazione di informazioni finanziarie sia controproducente per la società, i suoi azionisti e i potenziali investitori stessi.

Infatti, si è argomentato che, per effetto della trimestralità dell'obbligo di divulgazione, gli amministratori potrebbero essere fortemente tentati di privilegiare gli obiettivi economico-finanziari di breve termine, a causa della necessità di accontentare gli investitori e a scapito, invece, della sostenibilità aziendale di lungo periodo. Così facendo, gli amministratori potrebbero fornire agli investitori un quadro finanziario maggiormente mirato ad ottenere consensi tra il pubblico, che ambisce a guadagnare dai profitti derivanti dall'incremento di valore delle partecipazioni azionarie.

Simili obblighi sono poi previsti nel caso di operazioni con parti correlate, le quali sono assoggettate ad un'articolata procedura di controlli interni ed esterni, con un ruolo di primo piano svolto dalla CONSOB. Pur condividendo le ragioni di fondo alla base della disciplina in parola, non si manca di sottolineare come essa possa scoraggiare gli investimenti, dato che, anche per via della sua applicabilità alle operazioni infragruppo, essa può comportare un'eccessiva burocratizzazione del sistema.

Eccessiva burocratizzazione che, in secondo luogo, si rinviene conducendo un'analisi approfondita della normativa speciale in tema di *corporate governance*. Infatti, l'apparato burocratico di una società quotata è estremamente più articolato rispetto a quello proprio di una società non quotata, considerando l'obbligatorietà di svariati organi societari cui sono deputate funzioni di controllo sul *management*, nonché considerando i requisiti speciali che sono richiesti ad amministratori e sindaci, e che invece sono assenti nella disciplina applicabile alle società private.

Infine, non si è mancato di illustrare il sistema di controlli esterni che caratterizza ulteriormente la disciplina applicabile alle società quotate. Vi sono numerosi organismi pubblici, a livello sia europeo che nazionale, con funzioni di controllo sulle operazioni societarie. Alcuni di questi sono anche dotati di potestà regolamentare, che li rende in grado di incidere profondamente sulla *governance* societaria, seppur nel rispetto dei parametri fissati dal legislatore.

I controlli esterni sono infine svolti anche da alcuni organismi di diritto privato, quali Borsa Italiana S.p.A., che è – come già affermato – l'operatore del mercato finanziario italiano, e il revisore legale dei conti, chiamato ad una verifica sul rispetto della disciplina in materia di informazione finanziaria.

La seconda linea direttrice, invece, ha riguardato l'analisi tecnica del fenomeno, sia rispetto alle cause che lo determinano, sia rispetto alle modalità con le quali viene posto in essere.

La principale complessità connessa all'oggetto di studio del presente elaborato risiede nella forte eterogeneità che caratterizza il fenomeno del delisting. In tale ottica, è stata sin da subito evidenziata la distinzione tra delisting volontari e delisting involontari. Come suggerito dagli stessi vocaboli utilizzati per descrivere tali procedure, la differenza tra le due concerne il soggetto da cui si origina la volontà di addivenire all'uscita dalla borsa. Nel caso dei volontari, è la stessa società a muovere i passi verso il delisting, sulla base di una serie di ragioni che gli studi accademici – e, con loro, questo elaborato – hanno tentato di catalogare e razionalizzare. Nel caso del delisting involontario, invece, la società subisce una decisione che proviene da un ente terzo, generalmente rappresentato dall'operatore del mercato finanziario ove le azioni sono quotate.

Tuttavia, l'eterogeneità di cui si scriveva poc'anzi non si limita alle sole cause del fenomeno in parola. Nell'ambito del delisting involontario, infatti, svariate sono anche le operazioni societarie che consentono di giungere al risultato ambito dalla *public company*. Il delisting, infatti, può essere realizzato (i) mediante la proposizione di un'OPA, con conseguente riduzione del flottante al di sotto delle soglie minime previste dalla normativa, (ii) mediante il compimento di un'operazione di fusione, consistente nell'incorporazione della società quotata all'interno del veicolo utilizzato per la sua acquisizione, o (iii) mediante una semplice deliberazione dell'assemblea straordinaria, volta a richiedere all'operatore del mercato di rimuovere le proprie azioni dallo stesso.

Diversi, poi, sono anche i possibili esiti dell'operazione. Una linea fondamentale va tracciata tra i delisting che comportano una successiva negoziazione pubblica delle azioni e i delisting che, al contrario, hanno l'effetto di ridurre le possibilità di *trading* alle sole negoziazioni private. Tra i primi, sono stati trattati i fenomeni (i) del *trans-listing*, ossia la migrazione verso altro mercato regolamentato, (ii) del *cross-delisting*, ossia l'uscita dalla borsa estera in cui la società era quotata contemporaneamente alla quotazione nel mercato domestico, e (iii) del *going dark*, ossia l'uscita dal mercato regolamentato e il susseguente ingresso nei mercati non regolamentati, ossia mercati in cui non è presente, salvo alcune eccezioni, la supervisione di un'autorità pubblica.

Invece, per quanto attiene al delisting involontario, l'elaborato si è preoccupato di analizzare i presupposti in presenza dei quali è sollecitata la decisione dell'operatore del mercato di rimuovere le azioni di una società dalle negoziazioni. Tale analisi è stata condotta primariamente in riferimento all'esperienza italiana e, quindi, in riferimento alle decisioni adottate da Borsa Italiana. A differenza del delisting volontario, in questo caso la possibilità che le azioni vengano successivamente negoziate in altro mercato regolamentato – e non – sembra da escludersi, a meno che, successivamente al delisting, la società scelga di intraprendere un nuovo progetto di quotazione.

Infine, si è voluto dar conto delle conseguenze di un'operazione di delisting sugli azionisti di minoranza. Se è infatti vero che, escluso il caso del delisting involontario, gli azionisti di maggioranza influiscono sulla decisione di uscire dalla borsa e spesso è proprio il loro interesse a determinare la decisione societaria, lo stesso non può dirsi con riferimento alle minoranze, le quali si trovano esclusivamente nella posizione di sopportare gli effetti dell'operazione, senza avere una concreta possibilità di intervento nelle dinamiche di *governance*.

Proprio in virtù di quanto appena affermato, il legislatore italiano ha voluto predisporre più strumenti per consentire agli azionisti di minoranza di difendersi da eventuali delisting che contrastino con i propri interessi. In primo luogo, infatti, sono presenti una serie di obblighi di trasparenza relativi alle operazioni finalizzate al delisting delle azioni. In secondo luogo, il legislatore ha ideato una serie di meccanismi di *exit* dalla società, strutturati a seconda del tipo di operazione posta in essere. In sostanza, agli azionisti di minoranza può essere concesso il diritto di recesso, con rimborso della quota detenuta in società, o il cosiddetto *sell-out right*, ossia il diritto di vendere coattivamente le proprie azioni ad un offerente che, a seguito di OPA, si trovi a detenere una partecipazione superiore al 90% del capitale.

Ultima, ma non per importanza, la terza linea direttrice dell'elaborato, che è incentrata sullo studio di alcuni dei delisting che, come si diceva poc'anzi, hanno caratterizzato il panorama finanziario italiano del 2022. Si è scelto di raccontare le vicende che hanno portato al delisting di AS Roma S.p.A., Exor N.V. e Atlantia S.p.A., data l'eterogeneità nelle procedure che hanno condotto queste emittenti ad abbandonare la borsa.

In particolare, il caso Exor è quello che maggiormente si differenzia dagli altri, dato che la società della famiglia Agnelli – già olandese dal 2016 – ha deciso non di abbandonare la quotazione, bensì di migrare verso il mercato finanziario di Amsterdam, animata dalla duplice volontà di quotarsi in un listino di maggior prestigio internazionale e di sottrarsi alla pressione della supervisione esercitata dalla CONSOB.

Controllo pubblico e disciplina normativa, queste, che sembrano essere alla base delle motivazioni che hanno condotto tutte le società oggetto di studio ad abbandonare la borsa e a scegliere la via delle negoziazioni private o, in alternativa, della migrazione. Infatti, dalle dichiarazioni rese dagli esponenti delle società in questione si evince chiaramente come la scelta del delisting fosse funzionale a snellire le società, così da poter avere maggiori spazi di manovra nell'implementazione di piani di investimento e nell'elaborazione di strategie di crescita.

Il tutto, come si diceva, nell'attesa del Ddl Capitali, che ci si auspica possa finalmente dare nuova linfa e attrattiva ad un mercato in forte difficoltà.

Abstract

The purpose of this paper is to analyse delisting operations from a dual perspective, economic and legal. Indeed, the traditional academic literature has always focused more on the phenomenon of listing on regulated markets, while sometimes neglecting the reverse phenomenon, i.e. precisely that of exiting the stock exchange.

The reason we chose to tackle this issue lies in the very recent wave of delistings witnessed by the Italian market, from which numerous highly capitalised companies exited in 2022. Therefore, the question was raised as to the motivations that prompted so many issuers to take the same decision in the same historical period, on the belief that there must have been an underlying reason, common to all of them, to determine the transition to the status of private company.

In light of the analysis conducted and the observations arising from it, it seemed clear from the outset that the main reason for leaving Borsa Italiana lays in the costs arising from the special regulatory framework which is applicable to listed companies in Italy. As a matter of fact, it seems no coincidence that, following the wave of delistings in 2022, the Italian government submitted a bill to the Parliament, named *Ddl Capitali*, in order to simplify the regulations applicable to listed companies. The underlying objective of this draft legislation is to favour, on the one hand, the continued presence of those companies that are currently listed in the stock exchange and, on the other, the entry of new companies on the stock exchange, perhaps by incentivizing those, which previously left Borsa Italiana in favour of foreign financial markets, to move back to the Italy.

The above reflections emerged at the end of an impervious path, which was articulated along three guidelines. The first, as anticipated, focused on the regulatory framework to which listed companies in Italy are subject. This framework is very distinguishable from the rules that are applicable to unlisted undertakings and it implies several repercussions in economic terms for companies having to comply with its stricter requirements. The second guideline, instead, focused on the prerequisites and procedures for delisting operations. The third, finally, included the study of a number of real cases, and retraced the delisting operations of three major companies: (i) AS Roma S.p.A., now transformed into a S.r.l., (ii) Exor N.V., and (iii) Atlantia S.p.A., now renamed Mundys.

Having to go deeper into the contents of the three above-mentioned guidelines, we made reference, on the first place, to the transparency and information obligations to which

listed companies are subject. These concern various aspects of the company's routine and involve several actors of the management bodies. In particular, we focused on disclosure requirements for significant and cross-shareholdings, on disclosure obligations for the parties of a shareholders' agreement, on transparency in financial matters and for certain major transactions, and on obligations concerning privileged information.

It has been argued that the obligations referring to ownership structures are justified, because (i) they allow investors to reasonably infer the existence of a possible controlling shareholder who can strongly influence governance choices, and (ii) they are helpful to detect if the prerequisites for launching a mandatory takeover bid are triggered, given that a tender offer is mandatory only when certain capital thresholds established by law are exceeded. However, we did not fail to underline that such provisions stand in contrast with shareholders' demands to remain anonymous, with the consequence that such norms end up contributing to the stimulation of a going private decision.

Subsequently, with regard to the inspection of financial disclosure obligations, it has been pointed out that, on the one hand, it is clear that such obligations are instrumental to ensure that investors are able to make informed choices and to calculate the risks associated with the investment to be made; on the other, it is also true that an excessive frequency in the disclosure of financial information is self-defeating for a company, its shareholders and potential investors.

Indeed, it has been argued that, as a result of the quarterly nature of the requirement to disclose financial documents, directors may be strongly tempted to favour short-term financial objectives, due to the need to please investors and at the expense of long-term corporate sustainability. In doing so, directors could provide investors with a financial picture aimed at achieving consensus among the public, who usually hopes to gain profits deriving from the increase in stock prices.

Similar obligations are also provided in the case of transactions with related parties, which are subject to an articulated procedure of internal and external controls having CONSOB as a leading player. Despite agreeing with the ground reasons behind such regulation, it is inevitable to emphasize its predisposition to discourage investments, given that, also due to its applicability to intra-group transactions, it may lead to an excessive bureaucratisation of the system.

Secondly, such excessive bureaucratisation can be observed by conducting an in-depth analysis of the special regulations on corporate governance. In fact, the bureaucratic apparatus of a listed company is extremely more articulated than that of an unlisted firm, considering the obligatory nature of several corporate bodies entrusted with control functions over management, as well as the special requirements needed in order to be appointed as directors or auditors, which are absent in the regulations applicable to private companies.

Finally, we gave account of the system of external controls that further typifies the legal framework applicable to listed companies. There are numerous public bodies, both at the European and national level, which are entrusted with control functions over corporate operations. Some of these bodies are also endowed with regulatory powers, which means that they are able to profoundly affect corporate governance, albeit within the parameters set by the legislator.

External controls are also carried out by a number of private bodies, such as Borsa Italiana S.p.A., which is - as already stated - the operator of the Italian financial market, and the statutory auditor, to whom is demanded the verification of the compliance with financial reporting regulations.

The second guideline, instead, concerned the technical analysis of the phenomenon, both with respect to the causes that determine it and the ways in which a delisting is carried out.

The main complexity associated with a PtP transaction lies in the strong heterogeneity that characterises the delisting phenomenon. In this respect, we immediately highlighted the distinction between voluntary and involuntary delisting. As suggested by the very words used to describe these procedures, the difference between the two concerns the subject from which the desire to delist originates. In the case of voluntary delisting, the company itself takes the first steps towards delisting, based on a series of reasons that academic studies – and, together with them, this paper – have attempted to catalogue and rationalise. On the other hand, in the case of involuntary delisting, the company undergoes a decision that comes from a third party, generally the operator of the financial market where the shares are listed.

However, the heterogeneity described above is not limited solely to the causes of the phenomenon. In the sphere of involuntary delisting, in fact, there are also a variety of corporate transactions that enable the public company to achieve the desired result. Indeed, delisting can be achieved (i) through the launch of a takeover bid, with the consequent reduction of the free float below the minimum thresholds required by law, (ii) through the completion of a merger transaction, consisting in the incorporation of the listed company within the vehicle used for its acquisition, or (iii) through a simple resolution of the extraordinary shareholders' meeting concerning a request addressed to the market operator to delist the shares from the market.

The possible outcomes of the transaction are also different. A fundamental line must be drawn between delistings that entail subsequent public trading of the shares and delistings that, on the contrary, have the effect of reducing trading possibilities to private trading only. Among the former, we studied the phenomena of (i) trans-listing, namely the migration to another regulated market, (ii) cross-delisting, consisting of the exit from a foreign stock exchange of a firm that was contemporarily listed on its domestic market, and (iii) going dark, i.e. leaving the regulated market and subsequently entering unregulated markets, which are markets where there is no supervision by a public authority, except from few exceptions.

On the other hand, with regard to involuntary delisting, the paper was concerned with analysing the prerequisites that stimulate the market operator's decision to forbid a company's shares from being traded publicly. This analysis was conducted primarily with reference to the Italian experience and, with reference to the decisions adopted by Borsa Italiana. Unlike in the case of voluntary delisting, in this case the possibility of the shares to be subsequently traded on another regulated – or not regulated – market seems to be ruled out, unless, following delisting, the company chooses to undertake a new listing project.

Lastly, we took into account the consequences of a delisting operation on minorities. Indeed, if it is true that, except in the case of involuntary delisting, majority shareholders influence the decision to exit the stock exchange and their interest is the one determining the corporate decision, the same cannot be said with reference to the minorities, who are obliged to bear the effects of the operation, without having a concrete possibility of intervention in the governance dynamics.

Having regard to what has just been stated, the Italian legislature decided to provide several instruments to allow minority shareholders to defend themselves against any delisting that conflicted with their interests. Firstly, there are a set of transparency obligations in relation to transactions that may imply the delisting of the shares. Secondly, the legislator has devised a series of mechanisms for exiting the company, which are structured according to the type of transaction that is carried out. In essence, minority shareholders may be granted the right of withdrawal, including the settlement of their stake in the company, or the so-called sell-out right, which is the right to compulsorily sell their shares to a bidder who, as a result of a takeover bid, is found to hold more than 90% of the share capital.

Last but not least, the third guideline of the paper focuses on the study of some of the delistings that, as mentioned earlier, characterised the Italian financial landscape in 2022. We have chosen to narrate the events that led to the delisting of AS Roma S.p.A., Exor N.V. and Atlantia S.p.A., given the heterogeneity of the procedures that led these issuers to leave the stock exchange.

In particular, the Exor case is the one that differs the most from the other two, since the company owned by Agnelli family – which has been Dutch since 2016 – decided not to abandon the listing, but to migrate to the Amsterdam financial market, motivated by the dual desire to be listed on a list of greater international prestige and to escape the pressure of supervision exercised by CONSOB.

As a matter of fact, public supervision and regulatory framework seem to have been the rationales leading all the companies studied under this paper to abandon the stock exchange and choose the path of private trading or, alternatively, migration. In fact, the statements made by the representatives of the companies in question made it clear that the decision to delist was beneficial in order to streamline the companies, so as to have more room for manoeuvre in the implementation of investment plans and in the elaboration of growth strategies.

We considered all of the above while awaiting the *Ddl Capitali*, which we pray would finally provide with fresh appeal and attractiveness a market in great difficulty.

Chapter 1. The impact of the law on listed firms' cost structure

1.1 Overview

The aim of this chapter is to provide an overview on the regulatory framework that is applicable to Italian listed companies. As is known, such companies have to comply with higher requirements that their unlisted fellows.

Consequently, the cost of compliance increases after listing, whereas it decreases in case of a delisting. Indeed, as it will be remarked in this paper, having to bear lower costs of compliance is one of the rationales driving a decision to go private.

In this respect, it is interesting to report that, at the time of writing, there are ongoing discussions in the Italian Parliament concerning the so called "*Ddl Capitali*", which is a draft law submitted by the Italian Government. The first commentators on the bill[1] noted that the main objective pursued by the enactment of this legislation is to enhance the competitivity of the Italian market, given the huge delisting wave of 2022. On the one hand, the *Ddl Capitali* introduces simplifications with regard to the listing procedure, and it also incentivizes stock trading, for instance by simplifying the rules on financial intermediaries. On the other hand, it aims to make the information disclosed to foreign investors more usable and to encourage the return of foreign-listed companies to Italy.

1.2 Disclosure requirements

Listed companies must comply with several disclosure requirements, which will be mainly shown in this paragraph. Instead, the transparency duties in case of a delisting transaction, their study will be postponed to the next chapter. The issue of transparency is very relevant in the context of listed undertakings. Indeed, according to some authors[2], disclosure requirements constitute a defining trait of listed companies' regulatory framework.

The first issue to be considered concerns the recipients of disclosure requirements. At first glance, one may be tempted to believe that such duties are addressed only to company's shareholders, so to enable them to make an informed decision when exercising their voting rights in the general meeting.

[1] BARRÌ, *Contro la febbre da delisting*, in Il Corriere della Sera, 17th of April 2023.
[2] CERA, *Le società con azioni quotate nei mercati*, 33.

However, according to part of the Italian doctrine[3], the real recipients of undertakings' disclosure duties are all the investors. This is confirmed by several norms, such as Articles 125-*ter* and 125-*quater* TUF. The former requires that the report on the issues on the general meeting's agenda shall be made available both in the company's offices and website. Instead, the latter poses an obligation to publish on the company's website all the documents that will be presented to the general meeting.

Since a website is accessible by everyone, the aforementioned norms seem to suggest that shareholders are not the only recipients of the disclosure. In fact, if that was the case, there would be no reason to require companies to make the information available not only in their offices, but also in the website.

A possible reason behind such theory could reflect the fact that the information provided to the general meeting have a market value. In other words, since such information regard the undertaking's business activity, they are helpful to predict the firm's future performances. As a consequence, if such information were provided only to shareholders, these would be advantaged in respect to other investors. It is evident that such unequal treatment of investors would represent a critic violation of the stock markets' governing principles.

From a general perspective, disclosure requirements may be divided into three categories:

i. regulated information, which are required by the law or by other regulations;
ii. extraordinary information, which are required in specific circumstances and for specific transactions;
iii. periodic information, which are required at regular time intervals and usually regards financial information.

Finally, it is useful to remark that such duties impact on the firm's cost structure, comprehending both the costs for the research and publication of the information, as well as costs related to fees to be paid to legal advisors. Such costs inevitably increase the cost of compliance and the likelihood of a delisting decision.

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[3] SACCHI, *L'informazione nella e per la assemblea delle società quotate*, in Analisi Giuridica dell'Economia, (2013), 101, *ivi* 102.

1.2.1 Shareholders transparency

One of the main transparency duties is set in relation to the company's ownership. One the one hand, such duties are aimed at providing shareholders and investors with a fair overview on the share capital composition, so to properly consider the influence of any major shareholder on the business strategies and the contestability of control of the listed company[4]. In this respect, being unlisted provides shareholders with greater anonymity.

On the other hand, some rights are granted and some obligations emerge only if a single shareholder holds a quantity of shares higher than a threshold set by law. Therefore, shareholding transparency ensures that the overcoming of such threshold can be constantly verified by the Supervisory Authority. It seems clear that the effect of delisting is to relieve shareholders from the application of such a provision, with the consequence that they could manage their holdings without the concern of triggering – for instance – a takeover obligation.

As for the content of the transparency duties, we note that the obligation to constantly verify the amount of stocks held by each shareholder represents an economic burden for listed undertakings. This is truer considering that the thresholds set by law are not that excessive: paragraph 2 of Article 120 TUF states that, whether the holdings of a single shareholder exceed the 3% of the share capital ("significant holdings"), there is an obligation to notify the CONSOB. Such threshold is increased to 5% for small and medium-sized enterprises (SME). It is also possible that CONSOB requires to be notified even in case of lower shareholdings, if there is the necessity to protect investors and to preserve the efficiency and transparency of the market.

Moreover, there is a duty to disclose shareholder agreements, given by the waiver of Articles 122 and 123 TUF to the general discipline set by the Civil Code in relation to unlisted companies. The *ratio* is to ensure transparency for any agreement between shareholders that is able to impact on the regular functioning of the general meeting.

In particular, shareholders entering into an agreement concerning limitations to voting rights or to shares transfer have an obligation to (i) notify the CONSOB, (ii) publish the content of the agreement on a newspaper, and (iii) file the agreement in the commercial

[4] GIUDICI, *Commento all'art 120*, in *Il testo unico della finanza*, directed by Fratini and Gasparri, 2012, 1617

register where the company has its legal office. The violation of such obligations determines the nullity of the agreement and the impossibility to exercise the voting rights for shareholders who are parts of the deal.

The Italian jurisprudence[5] also clarified that these rules apply regardless of the form of the agreement. Therefore, it does not matter whether the arrangements were entered into orally or by conclusive facts. Again, listing implies a reduction of shareholders' freedom, in particular with reference to the possibility to enter into agreements in order to regulate their behaviour in the general meeting.

Finally, it is useful to conclude by recalling Article 123-*bis* TUF, according to which companies are required to periodically produce a report on corporate governance and corporate structures. Such report shall include the information regarding, among others, (i) the composition of the share capital, (ii) any limitation to voting rights, (iii) the existence of significant holdings, and (iv) the presence of any shareholder agreement. Article 123-*bis* constitutes an additional safeguard to the effectiveness of transparency duties.

1.2.2 Financial transparency

Financial transparency is another significant pillar of listed companies' disclosure requirements. It is clear that this represents a delicate issue for listed companies. In fact, the financial situation is mostly taken into account by investors when deciding to purchase securities of an undertaking. Therefore, on the one hand, there are several norms providing the rules to be followed when drafting financial documents, and, on the other hand, there are several mechanisms that ensure the completeness and accuracy of the financial information. Once again, it has to be highlighted that the cost associated to the drafting and the publication of financial documents is remarkable, in particular if taking into account the mechanisms of control on the veracity of the document which the company has to finance.

First of all, as for unlisted companies, there is an obligation to publish the financial statement and, when it is necessary[6], the consolidated balance sheet at the end of each

[5] Court of Appeal, Milan, 28th of February 2003.
[6] According to Article 25 of the Legislative Decree 127/1991, the obligation to draft the consolidated balance sheet applies to any undertaking which (i) controls another undertaking, and (ii) does not fall under the dispensation provided by Article 27 of the same decree.

financial year. However, Article 154-*ter* TUF derogates from the general rule set by Article 2429 of the Civil Code, by requiring listed companies to make financial documents available for shareholders consultation 21 days[7] prior to the general meeting that is called to approve the financial statement. The legislator wished to increase the time in favour of shareholders to consult financial documents, in order to ensure their full awareness when exercising their voting right.

There are other major exceptions to the standard regulation that is applicable to the unlisted *società per azioni*[8], mostly introducing further requirements. This is the case of the biannual financial report, which, according to paragraph 2 of Article 154-*ter* TUF, shall be published within three months from the first semester of the financial year.

It seems that the legislator wanted to prevent investors from being deprived of financial information on the company for a long period. In fact, the peculiarity of listed companies is that their shareholder base repeatedly changes, due to the high liquidity of the stocks. Thus, there is a constant need to provide the market with up-to-date data on the business performance.

It shall be noted that an excessive frequency in the disclosure of financial information may be detrimental to the firm and that the will to avoid the compliance with such norms may be regarded as a delisting rationale. In fact, some scholars[9] believe that managers may be tempted to privilege short-term results that can be immediately observed by investors in the interim reports. Consequently, long-term objectives risk to be shelved, causing a significant damage to the company's future performances.

Moreover, Law n. 262/2005 introduced the role of the manager responsible for drafting the corporate accounting documents (hereafter, accounting manager). According to paragraph 3 of Article 154-*bis* TUF, the accounting manager shall ensure that adequate administrative and accounting procedures are in place when drafting the financial statement or any other financial communication[10].

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[7] In unlisted companies, such period is lowered to 15 days, as provided by paragraph 3 of Article 2429 c.c.
[8] Joint-stock companies.
[9] CERA, *Le società con azioni quotate nei mercati*, 41.
[10] In particular, the accounting manager shall draft a report on any financial statement, certifying:

a) the adequacy and the effective application of the administrative and accounting procedures;
b) the compliance with the International Accounting Standards;
c) the conformity to the company's accounting records;
d) the documents' suitability to illustrate a true and correct representation on the company's financial situation;

For this purpose, the accounting manager must be provided with proportionate powers and means to exercise their duties. In particular, they shall be (i) able to access any relevant information, (ii) included in the internal informational flows, (iii) provided with adequate technical, physical, and financial resources, and (iv) granted the possibility to obtain data and information from any corporate structure.

The appointment of the accounting manager is subject to the preliminary opinion of the supervisory board. Some authors[11] noted that the accounting manager is subject to a double liability. Indeed, paragraph 6 of Article 154-*bis* TUF affirms that the rules on directors' liability are also applicable to the accounting manager, without prejudice to actions exercisable on the basis of the employment relationship with the company. Thus, the accounting manager is liable both as a director and as an employee of the undertaking.

1.2.2.1 Audit control

The audit on the financial documents is entrusted also to a third subject which is not part of the company. In unlisted companies, it is possible that the audit is entrusted to the supervisory board, if the bylaw so provides, which surely permits the company to save costs. However, the same possibility is not granted to listed companies, which are qualified as entities of public interest. Thus, listed companies have to appoint an auditor or an auditing company[12] at their own expenses, having to choose from the Register of statutory auditors.

The auditor shall verify the compliance of the company's financial documents with the applicable accounting rules. In particular, the auditor shall certify the correspondence between the situation described in such documents with the actual situation of the firm. The academic literature[13] did not fail to note that such auditing activity cannot be correctly performed unless statutory auditors apply uniform accounting and auditing standards, and

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e) that the management report contains a true and fair analysis on the company's management and on the business risks;
f) that the biannual management report illustrates all the relevant events concerning the first six month of the financial year, and the other information required by paragraph 4 of Article 154-ter TUF.

[11] SANTOSUOSSO, *Il dirigente preposto alla redazione dei documenti contabili societari nell'organizzazione delle società per azioni*, in Rivista di Diritto Societario, 2007, 133; STRAMPELLI, *Il dirigente preposto alla redazione dei documenti contabili nella governance societaria*, in *Amministrazione e controllo nel diritto delle società. Liber amicorum Antonio Piras*, directed by Calvosa and Presti, 2010.
[12] Hereafter we will use the term "auditor" to refer both to the auditor or the auditing company, when the distinction has no consequences on the applicable rules.
[13] CERA, *Indipendenza e revisione contabile nelle società quotate tra forma e sostanza*, in Analisi Giuridica dell'Economia, 2022, 501.

they document the compliance with such principles. Today, the ISA (International Accounting Standards) set some operational and evaluation standards that cannot be easily circumvented by auditors.

Furthermore, the auditor shall express their judgement on the financial statement. Such judgement can result in four different outcomes, namely:

a) positive judgement, if the financial statement is compliant with the applicable norms;
b) qualified opinion, in case of (i) significant mistakes that do not have pervasive effects, or (ii) significant limitations to the acquisition of sufficient evidence;
c) adverse opinion, in case of mistakes having a pervasive effect;
d) disclaimer of opinion, if it is impossible to acquire sufficient evidence and there also are significant mistakes having a pervasive effect.

In the last three circumstances, the auditor shall also immediately inform the CONSOB. However, the general meeting's power to approve the financial statement is not affected by the outcome of the auditor's judgement. Such judgement, if it is the case of (a), produces a relevant effect in terms of opposition to the general meeting's resolution approving the financial statement. In particular, such resolution will be challengeable only by shareholders representing at least the 5% of the share capital[14]. In the other 3 cases, it is evident that something was missing in the financial documents. Therefore, it is plausible that the investors' trust on the company may decrease.

To conclude, it is to be highlighted that the auditor is provided with a range of powers so to properly exercise their duties. In particular, the auditor is entitled to receive from the managers any document or information that is useful for the financial supervision. In addition, the auditor can autonomously carry out inspections and check business papers. If the supervision is performed on a parent company, the above powers can also be exercised towards the companies that are part of the same group. Despite being justified in light of the need to ensure that financial documents correspond to the truth, the auditing function is another element that implies intrusion of a third subject in the company's business; thus, it stands to reason that undertakings might frown upon such an activity and would prefer to entrust it to the supervisory board.

[14] Please see Article 2434-*bis* of the Italian Civil Code.

1.2.3 Transparency on operations

The third pillar of listed companies' disclosure duties is the transparency on some operations that may impact on stock prices. The information related to the performance of specific transactions is what we already defined as extraordinary information[15].

Generally speaking, there are some operations – such as mergers, divisions, and acquisitions – that involve a relevant modification of the company. As such, these transactions have to be approved by the extraordinary general meeting, which requires a higher *quorum* than the ordinary one. The objective is to ensure that shareholders are provided with sufficient information to decide whether or not to vote in favour of the resolution.

Thus, the law obliges managers to (i) deposit in the company's main office a set of documents related to the transaction, and (ii) publish them on the company's website. For the content of the required documents, we recall Paragraph 2.5.1 of Chapter 2, which will provide an overview on the disclosure requirements in case of a merger or a tender offer.

Moreover, there are specific rules for the case of transactions with related parties. According to the IAS 24, a relationship between two entities qualifies them as related parties if one entity exercises (i) the control, (ii) the joint control, or (iii) a dominant influence on the other one. Consequently, any operation performed by companies of the same group shall be regarded as a transaction with related parties. CONSOB Regulation n. 17221/2010 (hereafter, "OPC Regulation") implemented the definition of transactions with related parties, by affirming that the control or a dominant influence exist both in the cases of direct and indirect relationships[16].

[15] Please see Paragraph 1.2

[16] According to Annex 1 of the OPC Regulation, a subject is a related part to a company if:

a) they directly or indirectly (i) control or are controlled by the company, (ii) exercise a dominant influence in the company due to their stake, or (iii) jointly control the company;
b) it is an affiliated company;
c) it is part of the same joint-venture of such company;
d) they are a manager with strategic responsibilities in such company or in the parent company;
e) they are a close relative to the subjects referred to in letters (a) or (d);
f) it is a company where the subjects referred to in letters (a) or (d) directly or indirectly exercise (i) the control, (ii) the joint control, (iii) a dominant influence, or (iv) hold at least the 20% of the share capital with voting rights;
g) it is a complementary pension fund that operates in favour of the employees working for such company or for a company to which this is related.

In this respect, it shall be noted that being part of a group of companies is a standard business practice and that intercompany operations are a very efficient tool to provide each undertaking of the group with the financial resources that are needed to carry on its business activity; thus, we suggest that the rules that we will briefly show below are able to hinder the economic growth of companies and, again, they may contribute to the going private decision.

Any transfer of resources, services, or bonds between related parties, irrespective of the presence of any consideration, constitutes a transaction with related parties. Such transactions need to be subject to strict transparency procedures, due to the fact the subjects involved may exploit their privileged relationship with the company to the detriment of shareholders and investors. In fact, the presence of any conflict of interests may lead to entering into agreements that pursue the interests of the subjects controlling the company, rather than pursuing the interests of the company itself.

Article 2391-*bis* of the Italian Civil Code sets the general principle lying behind the rules on transactions with related parties: managing bodies must adopt rules which ensure the transparency and correctness of the transaction, from the point of view of both substance and procedure. Such principle was implemented by the OPC Regulation, based on which the transactions with related parties are contingent upon the positive opinion of a committee, composed by independent and unrelated managers. Such committee is named committee for operations with related parties and it is particularly spread in companies with large dimensions and high level of capitalization. In fact, for such companies it is easier to amortize the costs associated to the implementation of the committee.

In particular, the committee for operations with related parties shall examine the operations and it shall issue non-binding opinions. It can also require to be assisted by independent experts. It has to be noted that the OPC Regulation made a distinction between operations of major and minor significance, depending on the fulfilment of a set of parameters[17]. This distinction is relevant because the committee has a veto power in case of operations of major significance. Such veto power can only be counteracted by means of the whitewashing rule. This consists of a general meeting's authorization, which shall be voted by the majority of non-related shareholders. As affirmed by the Italian

[17] In particular, major transactions are those exceeding the 5% threshold of one of the following parameters: (i) equivalent-value relevance ratio, (ii) asset relevance ratio, and (iii) liabilities relevance ratio.

Court of Cassation[18], the controlling process of operations with related parties shall also involve the supervisory board.

1.2.4 Privileged information

According to the EU Regulation n. 596/2014 (hereafter "Market Abuse Regulation" or "MAR"), an information is defined as privileged if, after it being revealed to the market, it is able to affect the stock prices. That is why this category of information is also referred to as "price sensitive information". For instance, a price sensitive information is any news regarding extraordinary business activities, or regarding the people controlling the company. Article 18 of the MAR requires listed companies to keep an up-to-date record of all the persons that possess privileged information.

As for the content of this disclosure duty, listed companies have an obligation to promptly communicate to the market any privileged information concerning the company itself. In particular, it must be ensured that investors can rapidly learn about such information. The above obligation is set by Article 114 TUF, which also affirms that listed companies – more specifically, their managers – have to self-evaluate the privileged nature of an information.

However, it is important to stress that CONSOB is given a relevant role in the qualification of an information as privileged. Indeed, according to paragraph 5 of the same Article 114 TUF, CONSOB may request to listed companies the divulgation of news and documents that are necessary for the information to the market. In case of non-compliance, CONSOB may directly proceed to the disclosure at the expenses of the company. In order to counteract such broad power, companies may present an opposition to the CONSOB's decision by means of a motivated complaint. After that, CONSOB has seven days to decide on the complaint. It is evident that such opposition power has a limited effectiveness, given that it is examined by the same subject – the CONSOB – that adopted the challenged decision in the first place.

Additionally, the CONSOB's power that we just described is very oppressive for listed firms, given that it consists of a public authority having the power to interfere in a decision to disclose or not a particular information. Sometimes, the disclosure of an information may have repercussions on the company's strategy. For instance, as it will be shown in

[18] Cassazione Civile, sez. II, n. 1601, 26th of January 2021.

the analysis of the AS Roma delisting[19], the disclosure of some information to the public may be burdensome for firms because it may reveal to competitors the company's strategy or the company's approach to certain matters, thus resulting in a disadvantage for the listed undertaking in respect to its unlisted competitors.

1.3 Corporate governance and corporate control

Listed companies' additional requirements are not only related to disclosure duties. This paragraph will provide an overview on the regulatory framework concerning corporate governance in listed undertakings. The aim is to show the complexity of the corporate structure that listed companies are required to adopt, which inevitably increases compliance costs and the desire to go private.

As it is known, Italian companies may opt between three different governance systems: the traditional, the one-tier system and the two-tier system. In the traditional one, the managing body and the supervisory body are both appointed by the general assembly. In the one-tier system, there is only a managing body, which is appointed by the general meeting, whereas the supervision is performed by a committee that is part of the same managing body. Finally, in the two-tier system the general meeting appoints a supervisory body, which later appoints and supervises the board of directors. Our analysis will be mainly focused on the traditional system. However, any relevant difference – for the purpose of this dissertation – from the other two systems will be highlighted.

The Italian Civil Code and the TUF are not the only applicable norms to listed undertakings. Indeed, the market operator and industry associations can issue codes of conduct[20], posing additional rules related to corporate governance. The subscription of such codes is not mandatory. However, undertakings that choose not to comply have to explain the reasons behind such decision. Indeed, as affirmed in Article 123-*bis* TUF, the report on corporate governance shall illustrate whether or not the company applies a code of conduct and it shall motivate any partial or full non-compliance.

[19] Please see Paragraph 3.2.2.
[20] Among them, the most important is the *Codice di Corporate Governance* (in English, Code of Corporate Governance) issued by Borsa Italiana.

1.3.1 Board of directors

First of all, the main implication of being listed is the impossibility to appoint a sole manager, since several norms make reference to a board of directors. That being said, there are specific rules for the election and subsequent composition of the board. In particular, these are the result of the combination of the company's bylaw with the law and CONSOB requirements. In any case, the following principles shall be respected:

a) candidacies shall be presented to the general meeting in electoral rolls;
b) a minimum holding is required to present an electoral roll[21];
c) the board shall be composed by a minimum quota of independent directors;
d) at least one of the directors shall represent minority shareholders[22];
e) gender equality shall be respected.

Article 147-*ter* states that at least one director shall be independent (two if the board is composed by more than seven members). The independence is given by the possession of a set of requisites established by Article 148, paragraph 3, TUF[23] and, eventually, by the company's bylaw or the applicable code of conduct.

In particular, the *Codice di Corporate Governance* qualifies as independent those directors who do not have a relationship with the company, which may affect their judgement autonomy. From a general perspective, such code poses stricter requirements than the ones set by TUF.

Regardless of them being a minority or an independent director, each member of the board shall possess some personal requisites, which are stricter than those required to unlisted companies' directors. First of all, we already mentioned that gender equality shall be respected. This rule applies for six consecutive years; thus, it can be subsequently

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[21] According to Article 147-*quinquies* TUF, such quota cannot be higher than the $^{1}/_{40}$ of the shares with voting rights. However, the threshold can be modified by the CONSOB, taking into account the capitalization, the level of the free float, and the ownership structure.

[22] Points (a) and (d) are strictly related. In fact, at least one candidacy from the second electoral roll shall be appointed as director. However, it is important to bear in mind that the "minority" electoral roll is the one resulting from the elections as the second most elected roll. Therefore, the current regulatory framework does not ensure that such electoral roll is actually representing all minority shareholders.

[23] According to such provision, a manager shall not be qualified as independent whether they are:

- in one of the conditions set by Article 2382 of the Italian Civil Code;
- a close relative to the directors of the company, its parent company, or the companies it controls;
- related to the company, its parent company, or the companies it controls by a professional or patrimonial interest that may affect their independence.

derogated unless the bylaw differently asserts. In this respect, several studies[24] investigated whether there is a correlation between diversity in board composition and the firm financial performance, particularly in the case of listed undertakings. Based on their results, the market performance of the undertakings and their independence and effectiveness are positively affected by the heterogeneity in board composition, which is measured in terms of (i) respect of the gender equality rule, and (ii) differences in age, origin and background.

Secondly, Article 147-*quinquies* requires directors to possess some additional requisites, which are established by a regulation issued by the Italian Minister of Justice. CONSOB is entitled to monitor the compliance with the above requirements. In case of any violation, it is possible for CONSOB to demand the removal of any irregularity and issue sanctions.

Thirdly, it shall be noted that the presence of independent directors is pivotal for the purpose of constituting committees within the board. Such committees are one of the main additional requirements set by the *Codice di Corporate Governance*. Their implementation and maintenance clearly weight on the company's coffers. There are two categories of internal committees[25], namely executive committees and advisory or policy-making committees.

Only the formers are mentioned in the Italian Civil Code, and in particular in Article 2381, according to which the managing board may delegate its functions to an executive committee formed by some of its members, if permitted by the bylaw and the general meeting. It shall be stressed that such committee may also be formed in an unlisted company, but it is mandatory only for companies adopting the *Codice di Corporate Governance*.

As it has already been said, the executive committee is entrusted with executive functions, thus it manages the company within the area of the proxy issued by the board. Some

[24] ERHARDT, WERBEL and SHRADER, *Board of Director Diversity and Firm Financial Performance*, in 11 Corporate Governance: An International Review 102-111, (2003); TERJESEN, BARBOSA COUTO and MORAIS FRANCISCO, *Does the presence of independent and female directors impact firm performance? A multi-country study of board diversity*, in 20 Journal of Management and Governance 447-483, (2016); HARJOTO, LAKSMANA and LEE, *Board Diverisity and Corporate Social Responsibility*, in 132 Journal of Business Ethics 641-660, (2015).

[25] Audit committees within the management board will be debated in the next paragraph.

authors[26] noted that the management organization of listed companies seems to privilege the issuance of proxies in favour of executive directors, whereas the board acts as a guide to the executive members. Consequently, the issue is to organize the company in a way to avert an excessive concentration of powers in the hands of executive directors, so to prevent possible abuses. Therefore, Article 2381 c.c. regulates both the flow of information between the committee and the board and the supervisory powers that the board can exercise. In particular, the board shall determine the width of the powers delegated to the committee and the related limits. However, regardless of having delegated its functions, the board maintains its powers and it can always issue directives to the committee or take some operations upon itself.

Instead, advisory committees fulfil different functions. Primarily, it shall be noted that the *Codice di Corporate Governance* demands the institutions of at least three compulsory committees:

a) committee for appointments;
b) committee for remunerations;
c) committee for control and risks.

The board of directors is responsible for the attribution of powers to those and other potential committees. It is also possible that the board decides to take charge of the functions of such committees, or to unify them in a single body, on condition that all the legal obligations are correctly performed. The ground rule for the composition of each committee is that the majority of the members shall be independent.

In particular, the committee for control and risks shall assist the board in the implementation of the internal audit mechanisms. The functions performed by such committee can be summarized as follows:

a) assessment on the correct application of accounting standards when drafting the financial statement and the consolidated financial statement;
b) issuance of opinions on the main aspects related to business risks;
c) evaluation of the relevant periodic reports, particularly of those concerning the internal audit system;
d) monitoring of the autonomy, adequacy, and efficacy of the internal audit;

[26] NUZZO, *Sulle sedi di decisione nelle società quotate e sulla prevenzione di abusi di concentrazione di potere*, in Analisi Giuridica dell'Economia, 2003, 81.

e) periodical report to the management of its activities and on the adequacy of the internal audit.

It is evident that the functions of this committee partially overlap those of the supervisory board. However, some authors[27] stressed that the decisions on the structure of the internal control monitoring system are an expression of the managing power, which is exclusively entrusted to the board of directors. Consequently, the efficiency of the whole control monitoring system depends on the level of integration of the company organization, which implies that each employee shall be considered liable for the supervisory activities. On the other hand, it is also evident that the implementation of such a complex structure is financially burdensome for listed undertakings.

With respect to the costs associated to the flow of information between the committees and the board, it is interesting to report that certain authors[28] considered the idea that in the future such flows could be managed by the artificial intelligence, or by the implementation of the blockchain technology in the corporate governance. In particular, the use of such tools could free directors from the compliance with the rules in question, and it would make the decision-making process much more efficient and effective, resulting in the reduction of the costs associated to the implementation of the committees.

Finally, with reference to the alternative governance systems, it shall be noted that in a one-tier system the supervisory activity is not performed by a supervisory board, rather by a committee formed within the management board. Such committee is named *Comitato per il controllo sulla gestione* (in English, committee for the control of management) and it is regulated by Article 2409-*octiesdecies* of the Italian Civil Code.

This feature has been the focus of attention in Italian doctrine. First of all, the fact that the subjects empowered with supervisory duties are themselves part of the board which is supervised poses some issues in relation to the effectiveness of the control; secondly, recent years witnessed an increase in the spread of the one-tier system among European undertakings, which seem to be oriented towards board-centred corporate governance

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[27] PARMEGGIANI, *Il collegio sindacale e il comitato per il controllo interno: una convivenza possibile?*, in Giurisprudenza commerciale, 2009, 306.
[28] MOSCO, *Roboboard. L'intelligenza artificiale nei consigli di amministrazione*, in Analisi Giuridica dell'Economia, 2019, 247.

systems, because of (i) an increase in efficiency and (ii) a reduction in costs. It was noted[29] that the coincidence between controllers and controlled does not necessarily imply a lower effectiveness of the supervision. Indeed, the corporate structure of listed companies resulting from the application of TUF is not that different from the supervision performed by the *Comitato per il controllo della gestione*. This evidence is also suggested by the fact that foreign scholars[30] do not seem to excessively mark the differences between the one-tier system and the traditional system, although they clearly do not fail to note some deviations in the normative framework.

Therefore, we suggest that, in order to reduce the costs associated with the implementation of a complex internal audit machine, the legislator should provide listed firms with the possibility to choose between the adoption of a supervisory board or the adoption of the internal committees, on the ground that their roles partially coincide and that the resulting efficacy of the controlling machine would not decrease. Otherwise, the number of firms wishing to go private will inevitably increase overtime, given their desire to reduce costs.

1.3.2 Supervisory board

The regulatory framework of a listed company's supervisory board is a mixture of the rules of the Italian Civil Code and the TUF. Unlike the management board, there are just a few differences on the rules applying to listed companies' supervisory boards in respect to the same board of an unlisted firm. The main diversities regard the relationship of this body with CONSOB, as we will show later in this paragraph.

Certain authors[31] noted that the legal framework which is applicable to listed companies poses some issues in relation to the actual usefulness of the supervisory board and on the real content of its duties. In particular, it is questioned whether the supervisory board shall be "silent", meaning that it should limit its activity to a mere external scrutiny of the board, or "invasive", meaning that it should complement the activity of the management

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[29] LENER, *Monistico come modello "ottimale" per le quotate? Qualche riflessione a margine del rapporto Consob sulla "corporate governance"*, in Analisi Giuridica dell'Economia, Studi e discussioni sul diritto dell'impresa, 2016, 35.

[30] DAVIES and HOPT, *Corporate Boards in Europe – Accountability and Convergence*, in 61 The American Journal of Comparative Law 301-376, (2013).

[31] ABRIANI, *Il ruolo del collegio sindacale nella governance del nuovo millennio*, in Vietti, *La governance delle società di capitali. A dieci anni dalla riforma*, 2013.

board. Moreover, it has been argued[32] that such uncertainties, together with the blurring boundaries between the roles of the supervisory board and the internal audit committee, make the supervisory board a weak spot of the traditional corporate governance system. Nonetheless, as we are going to show, the supervisory board is subject to strict rules that oblige firms to bear elevated costs.

First of all, the supervisory board in a listed company shall be composed by at least three members and two substitutes. Similarly to the management board, the method of electoral rolls and the gender equality rule are both applicable[33]. A peculiarity is that the president shall be appointed by the general meeting among minority members. Thus, their role is much more enhanced in a supervisory board rather than in a management board.

The members of a supervisory board are subject to a limitation of offices accumulation. This is the result of auditors' old custom to be contemporarily in charge in several companies. The legislator believed that such a situation would hinder a correct performance of the delicate tasks entrusted to the supervisory body. Thus, Article 144-*terdecies* of the *Regolamento Emittenti* lays down some criteria to determine whether the above limitation is not respected. In any case, an auditor can simultaneously exercise their tasks in no more than five listed companies[34].

The duties of the supervisory board depend on the peculiarities of the controlling machine in a listed company. In fact, the supervisory board is the cornerstone of the whole internal controlling system. Thus, it shall monitor the compliance with both the law and bylaw and it shall monitor the overall adequacy and efficacy of the internal audit.

For this reason, auditors can participate to the meetings of the other company's bodies and they are dragged in a constant flow of information. In particular, according to Article 150 TUF, at least every three months directors have the duty to inform the supervisory board on the business activity, on major operations, and on transactions involving potential conflicts of interests. Besides, the supervisory board has the power to ask

[32] LOCATELLI, *Modelli societari e governance nelle società quotate. Alcuni spunti di riflessione*, in Analisi Giuridica dell'Economia, 2019, 559.
[33] Please note that the gender equality rule requires that at least $^2/_5$ of the board is composed by the least represented gender. However, such rule is not mathematically applicable in a supervisory board composed just by three members, as it is the case of most of Italian listed companies. Thus, CONSOB issued an interpretative communication, according to which the gender equality rule in a supervisory board is respected whether at least $^1/_3$ of the board is composed by the least represented gender.
[34] This threshold can be further lowered by the company's bylaw.

directors about news and information on the company and its associated companies' business. It can also file a charge before the competent court in case of a well-founded suspect of serious irregularities in the directors' activity.

Moreover, it is also important to mention the particular relationship of a listed company's supervisory board and CONSOB. Article 149 TUF states that the supervisory board communicates to CONSOB any irregularity observed during its surveillance activity and transmits the related documents. Consequently, the supervisory board can be regarded as the eye of CONSOB inside listed companies. The aim pursued by the legislator is to favour the activities of the Italian Supervisory Authority, given that it protects a delicate public interest, which is the safeguard of public markets. More importantly, in case of any irregularity committed by the supervisory body in the compliance with its duties, CONSOB can file a charge[35] before the competent judicial court. In addition, CONSOB has the power to issue sanctions[36] to the members of the board who omitted to perform their controlling obligations. From the above, one may infer that the supervisory board is in turn supervised by CONSOB.

Finally, some authors[37] pointed that the CONSOB's power to file a charge against irregularities of the supervisory board poses some issues in relation to the alternative corporate governance systems, namely the two-tier and the one-tier. As is known, the supervisory board in a two-tier system is also entrusted with high managerial attributions. Besides, the members of the Committee for the management control in a one-tier system are themselves directors of the company. Therefore, Article 152 TUF may imply an excessive power in the hands of CONSOB, which judgements risk to be extended also to the management activity. This observation is added to all the elements suggesting that being listed implies the risk to being subject to the intrusion of a public authority in the ordinary business, which is an element that every undertaking wishes to avoid. Unfortunately, this is not just a matter of companies adopting alternative corporate governance systems: indeed, the intrusion of CONSOB in the management activity is also a characteristic of the traditional corporate governance structure. This surely represents a reason to delist.

[35] Please see Article 152 TUF.
[36] Please see Article 193 TUF.
[37] *Inter alia*: CERA, *Le società con azioni quotate nei mercati*, 152.

1.3.3 Supervision by external entities

Up to now, our focus was limited to the internal structures entrusted with supervisory duties. However, given the vastity of listed companies' stakeholders, the legislator introduced a complex system of controls that have to be performed by external bodies. This paragraph aims to illustrate the role of the several actors involved in the external controls. In particular, we will provide a brief overview on the controlling activities performed by public entities.

As anticipated, this work suggests that the current regulatory framework of listed companies is excessively burdensome. We believe that the major incentives leading to a PtP transaction can be found in the external supervisory machine, as Chapter 3 shows when analysing the delisting transactions performed by some Italian undertakings in 2022. However, we do not wish to affirm that the current framework lacks a rational justification. Indeed, as we constantly repeat, several controls are needed to protect the interests of investors, which risk to suffer the consequences of a hasty business management in which they cannot interfere. Nonetheless, what we would like to suggest is that the current balance of interests is tilted more in favour of stakeholders and is excessively at odds with the companies' need for simple and efficient corporate governance.

First of all, this work mentioned several times the CONSOB, which is the National Commission for Companies and the Market[38]. It is the Italian Supervisory Authority responsible for regulating the securities market in Italy. CONSOB was founded in 1974[39], when it finally became evident that the issues of a regulated market are not only relevant for undertakings and their shareholders, but for any investor wishing to purchase securities. CONSOB is part of a European net of supervisory authorities, guided by ESMA, which provides national supervisors and regulated entities with regulatory guidance on the financial supervision and promotes the harmonization of the supervisory standards to be applied by the National Supervisory Authorities[40]. According to certain scholars[41], the institution of a European net of supervisory authority was a response to the

[38] In Italian, *Commissione Nazionale per le Società e la Borsa*.
[39] Law n. 216/2974.
[40] www.esma.eu
[41] MOLONEY, *The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (1) Rule-Making*, in 12 European Business Organization Law Revies (EBOR) 41-86, (2011).

2008 financial crisis, which clarified that financial markets needed a harmonized supervision at least at the EU level, given the interconnections of a globalized economy.

CONSOB is entrusted by the TUF with regulatory powers. In this regard, the most important regulation is the *Regolamento Emittenti*, issued by means of the resolution n. 11971/1999. Such regulation has a dual foundation: on the one hand, sometimes the law requires CONSOB to issue a norm in order to implement some legislative provisions; on the other hand, sometimes CONSOB itself finds it necessary to implement some provisions in order to clarify the compliance duties for listed companies. This element surely contributes to listed companies' desire to delist, on the ground that they do not want to be subject to the supervision of an entity which is both a regulator and a controller. Such rationale will be better discussed in the Exor case[42].

In fact, CONSOB has to supervise the correct functioning of Italian public markets, having regard to the objectives set by the first paragraph of Article 5 TUF[43]. For this purpose, Article 115 TUF grants CONSOB with a range of powers to be exercised towards (i) listed companies, (ii) the subjects controlling them or controlled by them, and (iii) the subjects owning a significant shareholding or participating to a shareholder agreement in a listed company or in any company whose securities are purchased in an Italian trading system. As we showed, CONSOB is entitled to require the disclosure of news and documents by the above subjects and, whether it is necessary, it can demand the implementation of the information provided. It can also be informed by means of a hearing of the members of the company's bodies, or carry out inspections in order to check the business papers and obtain duplicates.

Additionally, in case of any violation of the applicable regulations[44] by a listed company, CONSOB may exercise the powers set by Article 187-*octies* TUF. Such article provides the Italian Supervisory Authority with a wide array of methods to acquire information in order to ascertain the effective existence of a violation and issue sanctions. CONSOB may also challenge the general meeting's resolution approving the financial statement

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[42] Please see Paragraph 3.3.3.

[43] Article 5 states that CONSOB's supervision aims to:

a) safeguard the trust of the financial system;
b) protect investors;
c) guarantee the stability and good performance of the financial system;
d) ensure the competitiveness of the financial system;
e) monitor the compliance with financial regulations.

[44] In particular, in case of any violation of the Market Abuse Regulation.

before the competent judicial court. Similarly, the Italian Supervisory Authority may also file charges against the members of the company's bodies in case of any major irregularity. The intrusiveness of such supervision is self-evident, in particular if we consider the several costs that firms have to face in relation to the compliance with the information duties and the fact that CONSOB is able to interfere with the business activity.

However, the oversight of listed companies does not end here. As is known, each Stock Exchange is managed by a market operator, which also issues a regulation concerning the organization and functioning of the market. In Italy, the most important market operator is Borsa Italiana, which manages, among others, the *Borsa*, namely the most relevant Italian Stock Exchange. Borsa Italiana issued the *Regolamento dei mercati organizzati e gestiti da Borsa Italiana S.p.A.* (in English, "Regulation on markets organized and managed by Borsa Italiana S.p.A"; and, hereafter, "Market Regulation"), providing the rules governing the markets under its management. The Market Regulation sets, *inter alia*, the conditions for the admission, suspension, and exclusion of companies' securities in the market. Moreover, such regulation also poses some additional disclosure obligations, which are aimed to provide correct information to investors and to ensure that Borsa Italiana is able to correctly perform its management duties.

In particular, listed companies have a duty to provide Borsa Italiana with every news and document that it deems necessary for the correct performance of the market, and, in any case, with the information contained in Article 2.6.2 of the Market Regulation. For the same purpose, Borsa Italiana is entitled to compulsorily disclose news and data to the market, in case of non-compliance of a company with the market operator's request to do so. In such a circumstance, the listed company can avoid the compulsory disclosure by means of an opposition asking for its delay, which can be promoted whether the disclosure of the information might cause a serious damage to the company. The opposition shall be promoted before the CONSOB by means of a reasoned claim.

Finally, we have to report another set of rules that is applicable to listed companies, namely the *Codice di Corporate Governance*, which is the code of conduct issued by Borsa Italiana and to which we repeatedly made reference in this work. Even though its application by listed undertakings is subject to a "comply or explain" principle[45], it has to be remarked that the code is significantly important. Indeed, it is one of the elements that investors take into account when considering an investment decision. Moreover, the application of the *Codice di Corporate Governance* is significant also for CONSOB and the market operator. In this regard, it shall be noted that every year the Committee for Corporate Governance drafts a report on the application of the code, in order to inform investors on its degree of implementation and on the actual governance of listed companies. As for the undertakings choosing to apply the *Codice di Corporate Governance*, they have to give notice of their decision in the report on corporate governance[46]. If they fail to do so, they may be subject to sanctions, as stated by Article 192-*bis* TUF. In addition, whether they choose to implement the code, its rules become mandatory. Consequently, any violation shall be noticed also by the supervisory board and the CONSOB.

Such final elements add to the long list of burdens that listed undertakings have to bear. In particular, as we already mentioned, the issue is that companies are subject to the intrusion of third entitites in their own business. It is clear that this situation increases the difficulties associated with the development of a given business strategy, which risks to be twisted by CONSOB or disliked by Borsa Italiana. In our view, a simplification of the current regulatory framework applicable to listed companies is desirable. Hopefully, the *Ddl Capitali* will be the first step.

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[45] We already claimed that listed undertakings may choose not to apply the *Codice di Corporate Governance* or to apply just a part of its rules. However, in this case they must explain and motivate the reasons why they decided for the partial or full non-application.

[46] Please see Article 123-*bis* TUF.

Chapter 2. Delisting

2.1 Definition

In the previous chapter, we argued that the current regulatory framework which is applicable to listed companies is financially burdensome, thus several firms decide to go private in order to avoid the compliance with such norms. However, we did not explain what delisting is, how it is performed and what are the rationales that, according to the academic literature, drive the decision to go private.

Delisting is an operation carried out by a listed company that wishes to remove its securities from a stock exchange. It is also referred to as Public to Private transaction (PtP) and it can be voluntary or involuntary. In the former case, a listed company independently decides to perform the removal of its securities, whereas in the latter case the operation is compulsory, due to the occurrence of certain conditions set by the law or the regulated market.

Moreover, after a delisting it is also possible that securities continue to be traded in a public market. As we will show, this is the case of trans-listing, cross-delisting and going dark transactions, which are all driven by the company's will. Instead, an involuntary delisting usually implies that securities will only be traded by means of private negotiations.

2.2 Voluntary delisting

Voluntary delisting is also known as "Going Private Transaction" (GPT). In a voluntary delisting, a listed company autonomously decides to remove its securities from the Stock Exchange, as part of its business strategy. The economic literature[1] provided a long list of reasons that may lead to a GPT, as well as there are several ways to perform such a transaction. The aim of this chapter will be to outline the principal features of this phenomenon.

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[1] *Inter alia*: MARTINEZ and SERVE, *Reasons for delisting and consequences: a literature review and research agenda*, in 31 Journal of Economic Surveys 733-770, (2016); MACEY, O'HARA and POMPILIO, *Down and Out in the Stock Market: The Law and Economics of the Delisting Process*, in 51 The Journal of Law & Economics 683-713, (2008); EHN, *Leaving the public capital market: a literature survey about the going private decision*, in 11 European Scientific Journal 240-263, (2015).

2.2.1 Agency theory and agency cost: the incentive realignment hypothesis

This paragraph aims to analyse one of the most common rationales behind a GPT, especially in the Anglo-Saxon world. The agency theory focuses on the principal-agent relationship, which is pivotal in the context of corporations, where the managers (agent) act on behalf of the shareholders (principal).

The issue is related to the incentives for the managers who are not the firm's security holders to pursue the shareholders' interest rather than their own. For instance, if a shareholder is usually interested in collecting a dividend, managers may prefer to keep the cash and reinvest it in order to increase the value of the firm in the long run. In such a circumstance, which interest should underlie the decisions to be made?

The first author to focus on said theory was Adam Smith, who believed that markets work best when every agent pursue their own interest. Consequently, he questioned how to prevent a manager to pursue their own interest when this is contrary to the interest of shareholders. This question was later implemented, when the following literature also emphasized the informational gap between directors and security holders. This is due to the fact that the formers possess all the information regarding the company and use them to develop business strategies, whereas the latter are provided with access to such information only through the intermediary of the board.

As a consequence, the concern of the economists shifted to the following question: how is it possible to make sure that a manager (agent) acts in the interests of shareholders (principal) if the agent has both more information and different objectives than the principal? The answer was to grant managers with options to buy shares of the firm at discount as part of their emoluments. As a result, not only the interests of the agent would be aligned to the interests of the principal, but also the company would face lower expenses for the remuneration of the board, since options do not have to be treated as costs in the income statement.

However, this outcome still has a negative implication: if directors exercise their option, the portion of the firm owned by shareholders would be reduced (in terms of shares held by them relative to the total). In other words, shareholders would face a cost represented by the decrease in their ownership stake in the company. That being said, we can now focus on the structure of the agency cost and see how this is relevant in the context of a decision to go private.

According to the economic literature[2], the agency cost consists of three elements: the monitoring cost, the bonding cost, and the residual loss. The monitoring cost includes the cost related to the monitoring and assessing of the agent's performance in the firm. In particular, owners have to appoint a supervisory board, whose members must be remunerated at the company's expense. Monitoring cost is notably relevant in listed companies, because their dispersed shareholder structure makes it more difficult and costly to control the activity of the board. The bonding cost is the expense incurred by the agent to demonstrate their compliance to the contractual obligations to which they are subject. It is inversely proportional to monitoring cost. Finally, the residual loss is the result of inefficient managerial decisions, taken on the basis of the managerial interest, that lead to a reduction of shareholders' wealth.

A specific case in which a residual loss occurs is when managers want to sell a portion of their stake to outsiders and are incentivized to extract private benefits. In such a case, according to the incentive realignment hypothesis[3], a GPT represents a feasible solution because it contributes to realign the interests of managers and shareholders and it leads to a restructuring of the board. This is particularly true in firms with low managerial ownership, which is the case of companies in the Anglo-Saxon world. On the contrary, European firms are characterized by a strong managerial ownership. We will deepen on the incentives for European firms to go private in the following paragraph.

2.2.2 Extraction of private benefits by managers and controlling shareholders

As we briefly pointed above, the incentive realignment hypothesis cannot adequately explain a GPT in a firm with a high managerial shareholding. Because of the correspondence between agents and principals, their interests coincide (hence agency cost is zero) and the probability that a GPT would lead to a board restructuring falls.

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[2] JENSEN and MECKLING, *Theory of the firm: Managerial behavior, agency costs and ownership structure*, in 3 Journal of Financial Economics 305-360, (1976).

[3] Among others: RENNEBOOG, SIMONS and WRIGHT, *Why do public firms go private in the UK? The impact of private equity investors, incentive realignment and undervaluation*, in 13 Journal of Corporate Finance 581-628, (2007); DJAMA, MARTINEZ and SERVE, *What do we know about delistings? A survey of the literature*, in SSRN Electronic Journal, (2011).

However, according to some authors[4], it is more likely to find a higher management ownership in companies that decide to go private. The explanation behind this supposedly controversial finding is that CEO-owners seek to obtain private benefits through the delisting. In particular, the main consequence of a GPT is a decrease in the number of shareholders and an increase in the independence of the board from the assembly. Therefore, managers would decide to go private in order to benefit from the financial gains generated by the transaction and to maximize the value of growing opportunities, especially if they are based on private information that the public market would not be able to properly consider.

Similarly, the incentive realignment hypothesis fails to explain the GPT of a firm with a concentrated shareholding structure. In fact, the greater is the portion of shares owned by a single individual, the higher are the incentives for the dominant shareholder to bear the cost for the control of the activity of the board. Thus, it would be more challenging for managers to pursue an interest other than the one pursued by the controller. Instead, conflicts of interest arise between the large shareholder(s) and minority shareholders, since the former would probably attempt to exploit their privileged position to obtain private benefits.

In particular, dominant shareholders would be pushing for a decision to go private when they foresee an imminent growth of the company and they want to exclude the minorities from extracting the related profits. This is possible due to the fact that large shareholders are more likely to be provided with access to strategic information, hence they find it easier to predict the future performance of the firm. Similarly, for dominant shareholders it is easier to predict the future performance of the firms' investments. Thus, the probability of a GPT increases if dominant shareholders expect high returns in the company's portfolio.

In both scenarios of this paragraph, the GPT was aimed at consolidating control in the hands of the existing majority or directors. In fact, delisting usually implies the elimination of minority shareholders and the consequent minimization of the pressure on the board deriving from the control exerted by minorities.

[4] WEIR, LAING and WRIGHT, *Undervaluation, private information, agency cost and the decision to go private*, in 15 Applied Financial Economics 947-961, (2005).

2.2.3 Cost-benefit trade-off

The trade-off between costs and benefits of listing is the ground on which firms base their decision to go public. However, based on certain scholars' researches[5], the same trade-off can also push a company to a GPT. This paragraph is aimed at providing a brief overview on the gains and losses of being listed from an economic perspective. We will later discuss some circumstances in which it is common for companies to decide to go private.

On the one hand, the benefits that a company seeks to obtain from listing are mainly three: (i) financing investments, (ii) transferring wealth from new shareholders to the existing ones, and (iii) increasing liquidity. In addition, there are at least other two non-financial reasons, namely the improvement of the bargaining power with banks and the enhancement of the company's reputation and popularity.

On the other hand, a listed company has to face three major costs. First of all, fees have to be paid to the company that manages the Stock Exchange. Secondly, there is an indirect cost of collecting the information that have to be provided to the market. Last, but not least, there is the cost of compliance, which sharply increased after the introduction of Sarbanes-Oxley Act in the US and similar reforms in other countries.

Generally speaking, a company decides to go private when the expected costs overwhelm the expected benefits, and vice versa. Further, smaller firms are generally more prone to go private than the larger ones, since the latter are more efficient at amortizing fixed listing costs.

Firstly, the probability of a GPT increases in case of undervaluation[6], which means that the value of securities is lower than their real worth[7]. In this hypothesis the economists highlighted the concept of opportunity cost of undervaluation. This is the benefit forfeited by the company due to the decision to stay public. In fact, if securities are undervalued, managers have the chance to purchase them for a lower price and extract private benefits, hence a PtP is profitable.

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[5] BHARATH and DITTMAR, *Why do firms use private equity to opt out of Public Markets?*, in 23 The Review of Financial Studies 1771-1818, (2010).
[6] TUTINO, PANETTA and LAGHI, *Key factors in delisting process in Italy: Empirical Evidence*, in 2 GSTF Journal on Business Review (GBR), (2013).
[7] Definition provided by www.merriam-webster.com

Undervaluation is possible because of the asymmetry of information between managers and investors. In fact, given that managers possess a wide range of information, it is relatively easy for them to detect undervaluation and gain profits. Instead, investors may not be fully aware of the firm's growth opportunities, thus they may sell their undervalued securities not noticing that they could have made a far greater profit.

Another element to take into account is the risk-sharing advantage[8]. If the securities of a company are listed, this means that the controlling shareholder is sharing part of the risk with market investors who purchased those securities. It is evident that the higher is the risk, the greater will be the risk-sharing advantage deriving from a public sale of equity by the controlling shareholder. Therefore, if the risk associated with the business activity is low, there will be no more advantage for the owner to share it with market investors and the firm will be more likely to go private.

According to the previous paragraphs, managers can be tempted to pursue their own interest rather the shareholders' one[9], so the latter have to bear the cost of monitoring the activity of the board. However, unlike the controlling shareholder, minority shareholders in a listed company do not usually have adequate knowledge, incentives and resources to invest in controlling the directors, due to the small portion of shares they own.

This gives rise to the phenomenon of free riding, namely that some shareholders benefit from monitoring services without bearing the related costs, which are incurred by the major shareholder. The cost of free riding is proportional to the dispersion of share ownership and it increases the wealth gains generated by a GPT, given that the reunification of equity ownership implies the disappearance of free riders.

Finally, there is another element that could determine a fall in the shares' price and a consequent decision of the firm to delist. According to the law, shareholders do not have a right to earn dividends and the company may wish to keep the extra profits in order to self-finance its business activity. However, a tight distribution policy is generally frowned upon by investors, especially if the firm's value is growing, which may also cause a depreciation of securities. Therefore, a decision to go private could also be grounded on the avoidance of such a problem.

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[8] SHAH and THAKOR, *Private versus public ownership: investment, ownership distribution, and optimality*, in 43 The Journal of Finance 41-59, (1988).

[9] Please see Paragraph 2.2.1

The above list of hypothesis and reasons of a GPT is not exhaustive. In fact, a GPT is usually the result of a combination of the factors above with other elements that vary on a case-by-case basis. However, we have been able to dwell on the major causes of delisting according to the economic literature. Our next step will be to show the most common legal ways to perform a GPT.

2.2.4 "Pure" delisting

If a listed company wishes to remove its securities from the Stock Exchange, it usually performs the envisaged operation by putting in place other transactions that provoke a delisting decision by the market operator. The Italian doctrine – as it is better discussed hereunder – seems to consider another option aimed at accomplishing delisting, which is a general meeting's resolution deciding on the removal of the shares from the market. Such possibility is regarded as "pure" delisting, since the going private is a direct consequence of the general meeting's resolution. Instead, without prejudice to the voluntary nature of the firm's decision, in the former case delisting is achieved by means of an additional corporate transaction.

As anticipated, in Italy a huge debate took place before the 2003 company law reform on the admissibility of a pure delisting. The two relevant articles were art. 131 TUF and art. 133 TUF. The former set a right of withdrawal in favour of shareholders who did not contribute to the adoption of a merging or splitting resolution by the general meeting that implied the allocation of unlisted shares. Instead, the latter stated that Italian companies could delist by means of a general meeting's resolution if they aimed to list in another stock exchange (trans-listing[10]), on condition that shareholders could be provided with equivalent protection according to the applicable law after migration.

On the one hand. some authors[11] interpreted the combination of the above articles as follows: the only allowable pure delisting was in case of migration to another market. Therefore, a deregistration from the stock exchange that did not imply a subsequent trading of the stocks could only be achieved by means of a merger or a company splitting. According to such theory, listing in a Stock Exchange represents an irreversible natural step in a company's lifepath.

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[10] Please see Paragraph 2.3.1.

[11] *Inter alia*: NOTARI, *Il recesso per esclusione dalla quotazione nel nuovo art. 2437-quinquies*, in Rivista del Diritto Commerciale, 2004, 529, *ivi* 545.

On the other hand, others[12] favoured an interpretation by analogy of art. 131 TUF, since they felt it necessary to fill a gap in legislation. In their view, recognizing the existence of a shareholders' right of withdrawal was a necessary and sufficient shelter for shareholders' interests.

However, as we anticipated above, the 2003 company law reform was a game changer. Particularly relevant was the introduction of art. 2437-*quinquies* in the Italian Civil Code, which sets a right of withdrawal in favour of the shareholders who do not contribute to the general meeting's resolution to delist. In addition, the abrogation of art. 131 TUF clarified that art. 2437-*quinquies* c.c. applies regardless of the specific legal tools used for deregistration. In other words, there was no more reference only to merger or splitting transactions.

Therefore, the above thesis on the irreversibility of the listing process does not hold anymore: the Italian legislator decided to provide companies and their governing majorities with greater freedom of action. Moreover, the reform seems to allude that the law is focused on the effects of a general meeting's resolution to delist, regardless of the object of such resolution.

As a consequence of the reform, certain authors[13] suggested that art. 2437-*quinquies* could be regarded as the *lex generalis* to which art. 133 TUF acts as *lex specialis*. In this regard, the right of withdrawal represents the standard safeguard in favour of shareholders in case of a GPT, but it is not necessary if the company migrates to another EU Stock Exchange, provided that the law in the country of destination ensures an adequate level of protection to shareholders' rights. In such a circumstance, the additional protection given by the withdrawal right would be unnecessary and excessively burdensome for firms.

To sum up, nowadays the Italian doctrine seems to unanimously agree on the allowability of a pure delisting. Given that a GPT is able to impact on the liquidity of stocks, the resolution aimed at going private must be adopted by the extraordinary general meeting, which requires higher thresholds of capital with voting rights to vote in favour of the decision.

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[12] *Inter alia*: GALLETTI, *Il recesso nelle società di capitali*, 349 ss.

[13] POMELLI, *Delisting di società quotata tra interesse dell'azionista di controllo e tutela degli azionisti di minoranza*, in Rivista delle società, 2009, 407.

Finally, there is an issue related to the evaluation of the receding shareholders' stocks, in particular concerning the relative applicable criteria. As we will see later in this chapter, this could be solutioned by reference to the withdrawal right's general framework: article 2347-*ter* c.c. affirms that the stock liquidation must be calculated according to the average market value of the relevant stocks during the six months before the calling of the general meeting that decided on the GPT.

2.2.5 Takeover bid

Listed companies have the duty to keep a free float above a certain amount, according to the specific rules of the Stock Exchange. The free float is a portion of a company's shares that is made available to the market for trading[14]. Controlling stakes, shares related to a shareholders' agreement and shares subject to transferability constraints do not have to be accounted when calculating the free float.

Italian firms are required by Borsa Italiana S.p.A., which is the Italian Stock Exchange operator, to maintain the free float over a certain amount[15]. If a firm fails to comply with such obligation, it can be subject to the removal of its shares from the Stock Exchange. In such a case, although the formal decision to delist the shares is made by the market operator, it could still be the case of a voluntary delisting. In fact, the reduction of the free float may be the result of the firm's strategy to provoke the operator's delisting decision.

The main way to do so is through a takeover bid. This is a public offer to the target company's shareholders to purchase their shares in exchange for money or for other companies' shares. At the end of a successful takeover bid, the offeror may happen to hold a participation that is incompatible with the required free float. In this case, there is an alternative between selling the participation in excess or provoking the delisting decision. In the Italian legal framework, the takeover bid can be voluntary or mandatory, based on whether the initiative of the offeror was spontaneous, or the bid was launched because of a legislative provision that required the offeror to launch it.

The legislator introduced the mandatory takeover bid with the objective to protect minority shareholders who are not part of the controlling group. However, the interests protected by the provision of a mandatory takeover change over time, and they reflect the

[14] Available at www.borsaitaliana.it
[15] Please note that thresholds vary depending on each market segment.

peculiarities of the financial market of the country in which the norms are applicable[16]. In Italy, the ratio of a mandatory takeover bid oscillated between (i) the need to provide minority shareholders with an exit opportunity in the event of a change in the controlling majority, and (ii) the need to remunerate minority shareholders with a premium for having sold their stake to a subject who is going to acquire the control of the undertaking.

Indeed, the acquisition of the control in the company is a crucial element of the takeover bid, as affirmed in Article 2 of the EU Takeover Bid Directive (2004/25/CE), according to which the bid shall "*follow or have as its objective the acquisition of control of the offeree company in accordance with national law*".

The obligation to launch a mandatory takeover bid on the totality of the shares of a company is triggered whether a subject happens to hold a participation higher than the 30%, following an acquisition or an increase in voting rights[17]. For companies that are not a small-medium enterprise, such threshold is lowered to 25%, provided that there is no other shareholder owning a higher stake.

The above obligation can be triggered not only by a single subject, but also by two or more subjects that act in concert. The definition of persons acting in concert is provided by Article 101-*bis* TUF (paragraph 4), which qualifies them as persons that cooperate on the ground of an explicit or tacit agreement, regardless of it being legally valid or enforceable, in order to (i) acquire, maintain or reinforce their control on the listed company, or (ii) oppose a takeover bid launched by someone else. Additionally, according to paragraph 4-*bis* of the same Article 101-*bis* TUF, some subjects are always presumed to act in concert[18].

However, it shall be noted that in the recent years there has been a change of perspective of the public authorities in the correlation between the existence of a shareholder agreement and the presumption of acting in concert for the purposes of Article 109 TUF[19].

[16] TRISCORNIA, *Riflessioni sull'OPA obbligatoria, ripercorrendone la "ratio"*, in Banca Impresa Società, 2018, 105.
[17] Article 106 TUF.
[18] These subjects are: (i) those that entered into a shareholder agreement concerning voting rights, shares transferability constraints, or the exercise of a dominant influence in the company, (ii) an entity with its parent and the companies it controls, (iii) the companies which are subject to the same parent company, and (iv) a company with its directors or the members of its supervisory board in a two-tier system.
[19] TRISCORNIA, *OPA obbligatoria: la presunzione di concerto per patto parasociale è ancora assoluta?*, in Giurisprudenza Commerciale, 2019, 63.

In fact, both the CONSOB and the ESMA[20] highlighted a set of hypotheses in which, notwithstanding the existence of – for instance – a shareholder agreement concerning the exercise of voting rights, the presumption of acting in concert does not apply. Such hypotheses are grounded on the idea that the presumption of acting in concert shall be interpreted in light of the *ratio* of Article 109 TUF, which seeks to prevent any circumvention of the obligation to launch a takeover bid pursued through agreements aimed at acquiring, maintaining or consolidating the control on the company. Thus, the presumption in question seems to be inapplicable any time that the agreement entered into by shareholders does not weigh on the ownership structure of the listed undertaking.

A specific focus is due in relation to the hypothesis of the change of control in an unlisted holding that owns a large participation in a listed undertaking. Based on Article 45 of the *Regolamento Emittenti*, the obligation to launch a tender offer is triggered also in the event that an entity purchases a controlling participation in an unlisted company, when they consequently happen to hold, indirectly or directly, a stake in a listed company which is higher than the thresholds set by Article 106 TUF.

However, another condition is required, namely that the assets of the holding must be mainly formed by participations in listed undertakings, so that it can be presumed that the will to acquire the control of the holding is actually driven by the will to acquire the control of the listed company. In other words, what seems to be crucial for the obligation to launch a tender offer is, once again, an interpretation driven by the *ratio* of the mandatory takeover bid[21]. If the objective of the acquiror is the control of the company, then a takeover bid shall follow, so to protect the interests of minority shareholders.

As for the consideration to be offered to shareholders, the Takeover Bid Directive defines the concept of "*equitable price*" in Article 5. According to the directive, the equitable price is "*the highest price paid for the same securities by the offeror (...) over a period (...) of not less than six months and not more than 12*" before launching the offer. However, national supervisory authorities shall be empowered by Member States to adjust the price in presence of some circumstances that have to be determined by the law,

[20] Please see Paragraph 1.3.3 for further details on such authorities.
[21] Triscornia, *Variazione del controllo e OPA indiretta: un (tentativo di) inquadramento sistematico tra norme e casistica – Change in control and chain principle in the mandatory tender offer framework*, in Rivista di diritto societario, 2021, 75.

and they have to set the criteria used for the calculation of the equitable price in such circumstances.

Another issue to be highlighted concerns the defensive measures that the target company can adopt in order to counteract a takeover[22]. First of all, Article 104 TUF states that the target company shall refrain from any operation that is in contrast with the objectives of the public offer (passivity rule). However, the general meeting can authorise managers to overcome the above provision. In any case, the directors of the target company can always seek for another bidder, given that such activity, despite being in contrast with the objectives of the original offer, is justified on the ground that the new offer will be accepted by shareholders only if it is more convenient for them[23].

Secondly, Article 104-*bis* TUF poses the breakthrough rule, which neutralises the effects of any agreement or rule concerning (i) limitations on voting rights, (ii) shares transferability constraints, (iii) multiple voting rights, and (iv) special rights of appointment. Finally, Article 104-*ter* states that both the breakthrough rule and the passivity rule do not apply whether the offeror's bylaw derogates from them. This is called the reciprocity rule.

To sum up, the Italian rules on takeover bids seem to oscillate between the need to protect investors and the need to provide the contestability of corporate control. However, some authors[24] noted that there are some specificities that need to be fixed. For instance, the obligation to launch a mandatory takeover bid is triggered also in the event that an entity overcomes the legal threshold as a consequence of a statutory increase in voting rights; it seems obvious that such a situation would be paradoxical, given that an entity owning a stake close to the threshold would rather avoid the increase in their voting rights so not to comply with the takeover obligation. However, this conduct would result in reducing their influence in the company.

[22] It shall be noted that the rules that we are going to highlight are not mandatory for undertakings, which can choose to opt out in their bylaws.

[23] BERTOLOTTI, *La defensa italiana de la OPA hostil*, in 5 Revista de derecho del mercado de valores 237-249, (2009).

[24] SACCO GINEVRI, *Quali regole per il "gioco dell'O.P.A."? Alcune proposte a trent'anni dalla legge 149/1992*, in Rivista Trimestrale di Diritto dell'Economia, 2021, 512.

2.2.6 Buy-outs

There are several ways to perform a takeover bid. In the context of a GPT, the most relevant operations are the leveraged buy-out (LBO) and the buyout offer with squeeze out (BOSO). The former is commonly used in the Anglo-Saxon markets, whereas the latter is mostly used in Europe.

Buy-out offers with squeeze-out differ from LBOs because of both the reasons driving the transaction and the agents who put them in place. There exist two types of BOSO transactions. The first one follows an acquisition or a merger and it is usually initiated by a corporation. This is just the consequence of the previous transaction, hence delisting here can be regarded as involuntary[25]. The second one follows a tender offer and it is usually initiated by the historic controlling shareholder. In this case delisting is voluntary, because the bid was aimed at reaching the threshold to exercise the squeeze-out right.

The right to squeeze-out the remaining minority shareholders was established by the Thirteenth Directive on Takeovers, which we briefly discussed above. In particular, Recital 24 states that "*Member States should take the necessary measures to enable an offeror, who, following a takeover bid, has acquired a certain percentage of a company's capital carrying voting rights to require the holders of the remaining securities to sell him/her their securities*". The ratio is to prevent remaining shareholders from hindering or blackmailing the offeror.

As we can figure out from the above Recital, the squeeze-out right consists of a right to compulsorily acquire the remaining stocks from the holders who did not accept the tender offer. The consideration must be fair; hence it has to be determined by a National Supervisory Authority according to the tender offer's consideration and to the market value. In this regard, the consideration of a mandatory bid is presumed to be fair and can be extended to the squeeze-out, whereas the consideration of a voluntary bid is considered fair if the offeror has been able to acquire not less than the 90% of the capital.

Article 15 of the Takeover Directive sets the general rules that Member States must follow when legislating the squeeze-out right. In particular, such article requires Member States to set a threshold, between the 90% and the 95% of the capital carrying voting rights,

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[25] MARTINEZ and SERVE, *The delisting decision: The case of Buyout offer with squeeze-out (BOSO)*, in 31 International Review of Law and Economics 228-239, *ivi* 229 (2011).

above which the major shareholder must be entitled to squeeze-out the minority. In Italy, such threshold is set by article 108 TUF at 95% of the share capital.

Leveraged buy-out consists of purchasing a controlling share in a target company (hereafter "target") using a small portion of equity and a large portion of outside debt capital[26], usually from a bank. The first step is to form a new company (hereafter "newco") with low share capital, which will be the formal acquiror of the target. This newco will apply to a bank to receive funds for the acquisition. The target's assets will be used as collaterals for the loan.

Secondly, the newco will acquire the control of the target, either by promoting a takeover bid, or by means of private transactions. After the acquisition of control, the target company's general meeting will decide for a merger by incorporation in the newco's parent company. This will use the target's profits or resell part of it to repay the debt.

Before the 2003 company law reform, Italian scholars strongly debated on the allowability of leveraged buy-outs. In fact, according to the first paragraph of Article 2358 of the Italian Civil Code, companies are forbidden to provide loans or guarantees for the purchase of their shares, which seems to be the case of a leveraged buy-out. Some scholars[27] and the jurisprudence of the Italian Court of Cassation (ruling n. 16675/2016) argued in favour of the admissibility of LBOs, on the ground that the use of the target's assets as collaterals is a just a consequence of the merger, hence there is no direct violation of the law. On the contrary, other scholars[28] argued that such a transaction constitutes fraud against the law, especially whether the objective of the transaction is just to obtain tax benefits.

However, in 2003 the Italian legislator introduced the new article 2501-*bis* in the Italian Civil Code, which admits the possibility to perform an LBO and provides its regulatory framework. This article poses some rules related to the transparency of an LBO transaction, aimed at preventing any possible fraud by the controlling shareholder or managers.

In particular, article 2501-*bis* c.c. requires the disclosure of:

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[26] KAPLAN and STRÖMBERG, *Leveraged buyouts and private equity*, in 23 Journal of Economic Perspectives 121-146, (2009).
[27] *Inter alia*, SCHLESINGER, *Merger leveraged buy out e riforma societaria*, in Corriere giuridico, 2003.
[28] *Inter alia*: PERRINO, *La riforma della disciplina delle fusioni di società*, in Rivista Societaria, 2003.

a) the financial resources used for the transaction;
b) the objectives pursued through the transaction;
c) the information related to the economic sustainability of the transaction, which must respond to a serious business plan and which must not be the mere consequence of a predatory strategy;
d) an audit report on the fairness of the above information.

As a result, LBOs gained popularity in Italy, where companies started using them for multiple purposes, mostly related to a corporate governance restructuring and to the desire to reduce agency conflicts between shareholders and managers.

The broad class of LBO transactions also includes Management Buy-outs (MBO). These transactions are characterized by the fact that the insider managers launch a tender offer in order to delist the company and become its owners[29]. The issue here is related to the protection of shareholders. In fact, the informational asymmetry between managers and shareholders could be misused by the board to extract undue private benefits[30].

In this regard, managers must comply with several disclosure requirements, which increase the probability of a future litigation and make the MBO less attractive. MBOs usually take place in case of undervaluation, which is likely to be detected by managers. However, if they promote a tender offer, it is plausible that there could be such a rationale, hence the market should be able to easily recognize it.

A similar transaction is the Management Buy-in (MBI), which differs from the MBOs just for the fact that the managers behind the takeover are outsiders. In other words, they are managers of another company. MBOs and MBIs can also be combined: this is the case of BIMBO transactions (buy-in management buy-out), in which part of the capital is acquired through an MBO and the other part through an MBI.

2.3 Delisting with subsequent trading of securities

Up to now, our analysis was strictly focused on the transactions that involve a removal of securities from the Stock Exchange and permanently restrict trading possibilities to private negotiations. However, sometimes a delisting decision does not imply a complete

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[29] Available at www.borsaitaliana.it
[30] WRIGHT, ROBBIE and THOMPSON, *On the finance and accounting implications of management buy-outs*, in 21 British Accounting Review 219-235, (1989).

termination of public trading. In fact, it is possible that securities will continue to be traded in other markets, both regulated or non-regulated, according to the company's business strategy. This is the case of trans-listing, cross-delisting and going dark.

2.3.1 Trans-listing: hints

Trans-listing occurs when a company decides to remove its securities from a Stock Exchange, in order to migrate to another one. The reasons behind such a decision are generally related to the cost of compliance or to simplification strategies.

In the first respect, if the arrival market's applicable regulations are more favourable to the firm, this will be more likely to opt for the migration. In the second respect, it is common that a company is listed in a Stock Exchange of a Country different from the one of its nationality. Therefore, a firm may wish to migrate to its domestic Stock Exchange in order to simplify its compliance requirements.

Finally, as we anticipated above[31], before 2003 many Italian scholars argued that only a trans-listing transaction within the EU could be the object of a firm's resolution to remove its securities from the Italian Stock Exchange, on condition that the law of the Member State of destination granted equal rights to minority shareholders.

2.3.2 Cross-delisting

As just affirmed, it is possible for firms to be listed in more than one country at once. This phenomenon is named cross-listing, which may be viewed as a further step in a firm's growing strategy. Cross-listing happens when a company that is already listed in its domestic market (primary listing) also decides to list its securities in another foreign market (secondary listing). Lately, the same company may decide to delist from the foreign market and to keep trading in the domestic one.

The reasons for a company to cross-list are mainly three. On the one hand, several studies[32] introduced the market-segmentation hypothesis, according to which such a

[31] Please see Paragraph 2.2.4

[32] In particular, please see: ERRUNZA and LOSQ, *International asset pricing under mild segmentation: Theory and test*, in 40 The Journal of Finance 105-124, (1985); ALEXANDER, EUN and JANAKIRAMANAN, *Asset pricing and dual listing on foreign capital markets: a note*, in 42 The Journal of Finance 151-158, (1987).

transaction can positively affect the shares price. On the other hand, other scholars[33] formulated the bonding hypothesis, which refers to the agency theory[34] we discussed above.

Based on their reasoning, cross-listing may be the response to the conflicts of interest between minority shareholders – on the one side – and directors or the controlling shareholder – on the other side. In fact, cross-listing would make the board bonded to a better governance regime, because of further legal requirements deriving from entering in a foreign market. Finally, as argued in the shareholder base hypothesis[35], firms may cross-list in order to increase their visibility and shareholder base.

Historically speaking, US markets are the most coveted by companies wishing to cross-list, due to the higher benefits that can be extracted from such markets. For instance, certain studies[36] showed that, on average, the shareholder base increases by 29% following a cross-listing in the US. However, the introduction of Sorbanes-Oaxley Act (hereafter "SOX") sharply increased the cost of compliance for US-listed companies, reducing the attractiveness of American markets.

Moreover, the recent financial crisis deteriorated the cost-benefit trade-off of cross-listing. As a response, many foreign firms decided to delist from the US Stock Exchange, whereas many US companies decided to cross-list in European markets, especially in the German Stock Exchange.

In general, a cross-delisting decision is the consequence of several factors, mostly related to the cultural and geographical difference between the firm and the foreign market. Such differences worsen the ability to attract investors and analysts, who express a sense of discomfort in owning foreign securities. Moreover, companies that cross-delist are already listed in their domestic markets, thus they are already able to extract listing benefits. This increases their sensibility to a reduction in cross-listing benefits and

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[33] COFFEE, *Racing towards the top: the impact of cross-listings and stock market competition on international corporate governance*, in 102 Columbia Law Review 1757-1831, *ivi* 1780, (2002); STULZ, *Globalization of equity markets and the cost of capital*, in Dice Center Working Paper 99, (1999).
[34] JENSEN and MECKLING, *Theory of the firm: Managerial behavior, agency costs and ownership structure.*
[35] MERTON, *A simple model of capital market equilibrium with incomplete information*, in 42 Journal of Finance 483-510, (1987).
[36] FOERSTER and KAROLYI, *The effects of market segmentation and investor recognition on asset prices: evidence from foreign stocks listing in the United States*, in 54 The Journal of Finance 981-1013, (1999).

facilitates a decision to delist from the foreign market, in particular in case of low host market returns and low firm trading volume in the host market[37].

2.3.3 Going dark

Contrary to the common belief, going private and going dark are not synonyms. Rather, the former is a prerequisite to perform the latter. The main difference between the two is that going dark involves the subsequent public trading of securities, whereas a GPT usually entails that securities will only by traded by means of private negotiations. A decision to go dark is strictly related and complementary to a going private decision. In fact, going dark implies the deregistration from the Stock Exchange and a subsequent listing in a non-regulated market. Non-regulated markets are more popular in the US, where they initially spread under the acronym of "OTC" [38]. However, recent years witnessed a decrease in the number of OTC markets, given that some of them have been regularized[39] and are now qualified as regulated markets.

Instead, in the European and – more specifically, for the purpose of this dissertation – in the Italian context, OTC markets do not exist anymore, whereas non-regulated markets emerged. Nonetheless, it is not unusual to find the two terms used as if they were synonymous with each other. In Italy, the legislator acknowledges the existence of non-regulated markets – among others, the most relevant seem to be the SSO[40] – and sets some ground rules[41] mostly aimed at providing CONSOB with some supervisory powers to monitor the quantity and quality of information disclosed to investors.

In other words, the Italian legislator authorizes the existence of SSO, but is also concerned to ensure a minimum level of investor protection. However, the invention of an SSO is not subject to any administrative authorization regarding the professionality, honourability, or financial soundness of the market operator. More importantly, based on the guidelines issued by CONSOB[42], SSO lack any regulation on pre trade transparency and corporate disclosure. The only applicable rules are related to (i) the duty of informing CONSOB of the invention of the SSO, (ii) the duty to register the agreements entered into

[37] YOU, PARHIZGARI and SRIVASTAVA, *Cross-listing and subsequent delisting in foreign markets*, in 19 Journal of Empirical Finance 200-216, *ivi* 201 (2012).
[38] Over-the-Counter market.
[39] This has been the case of NASDAQ.
[40] "*Sistemi di Scambi Organizzati*", which means "organized trading systems".
[41] In particular, we make reference to Articles 78 and 79 TUF.
[42] Such guidelines are available at www.consob.it

by investors within the trading system, (iii) a reporting duty towards CONSOB – and towards the public, if the SSO is accessible also by non-professional investors – on the rules governing price conditions in the relevant market, and (iv) the duty to disclose, on a daily basis, the information concerning the number of agreements concluded within the market and the related financial aspects, provided that the market is accessible also by non-professional investors.

Similar attributes are also a feature of OTC markets. Indeed, according to the financial glossary provided by Borsa Italiana[43], an OTC is a stock market lacking a specific regulation on its organization and operation. In order words, (i) there is a lack of control and regulation by a supervisory authority, (ii) bargaining arrangements are not standardized, and (iii) it is possible to enter into "atypical agreements". Considering the similarities between SSO and OTC, and also considering the lack of financial studies concerning stock performances in a SSO, it seems productive to briefly report the main issues arising from listing in an OTC market, on the ground that similar observations may be extended to the case of non-regulated markets.

The principal issue related to OTC markets is that the risk of an investment is much higher than in a regulated market. First of all, this is due to prices volatility, which is given by the fact that listing in an OTC follows the rules of supply and demand. Therefore, volatility will increase for less traded securities, which are characterized by a huge bid ask spread; namely, the difference between purchase prices and sales prices. Secondly, there are no guarantees on the real consistency and soundness of stocks. In fact, given the absence of regulation, it is easier for market dealers to manipulate information and extract undue private benefits to the detriment of investors. Thirdly, some studies[44] showed that transactions costs in OTC markets are higher than those in regulated markets.

Given all the above, what are the reasons leading to a going dark decision? Evidently, the most important factor is the avoidance of compliance costs, given by the absence of a reporting duty to a supervisory authority. This is partly counteracted, in Italy, by some disclosure powers granted to the national supervisory authority. In addition, managers and controlling shareholders usually aim to go dark because the non-regulated nature of the

[43] Available at www.borsaitaliana.it

[44] LIN and HOWE, *Insider trading in the OTC Market*, in 45 The Journal of Finance 1273-1284, (1990); BENSTON and HAGERMAN, *Determinants of the bid-asked spreads in the over-the-counter market*, in 1 Journal of Financial Economics 353-364, (1974).

markets allows them to extract private benefits to the detriment of minority shareholders, which is not possible under the legal framework of a regulated stock exchange.

Lastly, it has to be noted that, according to a survey conducted in 2008[45], going dark determines an average halving of securities prices. Hence, because of their attitude to be detrimental to the investors, going dark transactions are a traumatic event for stock markets and they enjoy a bad reputation among investors.

2.4 Involuntary delisting

Involuntary delisting, also known as compulsory delisting, was defined by the economic literature as a transaction that is "*forced (...) by the very exchanges and markets that had courted their listings*"[46]. In other words, it consists of the removal of a company's securities from a Stock Exchange due to a decision of the Stock Exchange operator. It differs from a GPT because the company's will is not taken into account. As we will show in this chapter, the law provides a set of conditions that, when integrated, result in the exclusion of the company from the stock market.

It is important to bear in mind that not every decision of the Stock Exchange to delist a company's securities constitutes an involuntary delisting. For instance, in case of a takeover bid that reduces the free float below the required threshold, the decision to delist the undertaking is formally made by the market operator, but the company wittingly concurred to provoke such a decision. Hence, many authors[47] claimed that the above circumstance would be the one of a voluntary delisting. The same principle applies in case of buy-outs.

Compulsory delisting had a meaningful diffusion in the US, due to the tightening of listing standards and to the recent financial crisis, which contributed to a weaking of US firms' financial capabilities.

[45] MACEY, O'HARA and POMPILIO, *Down and Out in the Stock Market: The Law and Economics of the Delisting Process*.
[46] MACEY, O'HARA and POMPILIO, *Down and Out in the Stock Market: The Law and Economics of the Delisting Process*.
[47] *Inter alia*: MACEY, O'HARA and POMPILIO, *Down and Out in the Stock Market: The Law and Economics of the Delisting Process*; DJAMA, MARTINEZ and SERVE, *What do we know about delistings? A survey of the literature*.

2.4.1 Violation of the Stock Exchange requirements

Each market operator provides a regulation to be followed by listed companies, in order to set some ground rules on the core aspects of corporate management. The violation of such rules can determine the delisting of securities. However, the Stock Exchange operator enjoys a wide discretion when evaluating the existence of a violation of its regulations. The rationale behind the operator's discretion is that firms can be given a second chance, especially if they were characterized by excellent performances before the negative period.

From a general point of view, Stock Exchange requirements can be summarized as follows:

a) Market capitalization – listed firms must preserve a minimum market capitalization. This varies in each Stock Exchange and market segment. For instance, the Italian operator Borsa Italiana requires a minimum capitalization of 40 million euros for companies that wish to list in the STAR segment, which is reserved for notably virtuous corporations;
b) Admissibility requirements – listed undertakings must ensure that all the admissibility requirements are complied with during the whole listing period. As we already pointed out, this is the case of the obligation to keep the free float above a certain threshold;
c) Financial disclosure duties – on a regular basis, listed companies must disclose several information related to their financial situation, so that investors are provided with all the necessary knowledge to make an informed investment decision. In addition, such information must be revised by an independent auditor, in order to verify their accuracy and compliance with reporting standards;
d) Corporate governance – listed corporations must implement a complex corporate governance structure and they have to comply with higher corporate governance requirements than their unlisted counterparts;
e) Transparency duties – there is a further requirement to disclose information related to business affairs that can impact on the value of securities to the detriment of investors. This is aimed at preventing any possible market abuse.

It is fundamental to remark that the above requirements vary according to the applicable law, which is different for each market operator and market segment. However, at the EU level, the European Securities and Markets Authority (ESMA) provided some general rules geared towards the harmonization of Member States' legislation.

Finally, a delisting decision could be the result of the company's insolvency. In fact, whether a company is going through a period of financial instability that results in its being subject to bankruptcy proceedings, the Stock Exchange may decide for the revocation of the listing.

2.4.2 Delisting by Borsa Italiana S.p.A.

Borsa Italiana S.p.A. (hereafter "Borsa Italiana") is the Italian market operator, thus it is the entity which is empowered to make the decision to delist a company.

Article 2.5.1 of the Market Regulation affirms that Borsa Italiana may opt for the removal of securities from the Stock Exchange whether there has been a prolonged absence of negotiations for the relevant securities and it is not possible to maintain a normal and regular market.

Later, paragraph 5 of the same article clarifies the elements that shall be taken into account by Borsa Italiana when making the above decision:

a) Average daily countervalue of trades executed in the market and average number of securities traded, taken over a period of at least eighteen months;
b) Frequency of trades recorded in the same period;
c) Level of public dissemination of financial securities in terms of countervalue and number of holders;
d) Admission of the undertaking to bankruptcy proceedings;
e) Negative opinion of the statutory auditor, or inability of the same auditor to express an opinion on the financial accounts for two consecutive financial years;
f) Dissolution of the company;
g) Suspension from trading for a duration of more than eighteen months.

Also, Borsa Italiana can decide to delist a company if, after a tender offer, the bidder wishes to exercise the squeeze-out right or is obliged to do so by article 108 TUF. In this case, it is manifest that the delisting decision results from the trespassing of the free float threshold. In fact, it could be avoided through the sale of shares by the majority shareholder and restoration of the free float above the required quota. Therefore, as we already claimed, in this case the delisting process shall be regarded as voluntary, since the company concurred to provoke the delisting decision.

The revocation procedure is governed by Article 2.5.2 of the Market Regulation. In particular, Borsa Italiana must send a written communication to the company in order to (i) clarify the grounds on which the revocation is based and (ii) establish a time limit of not less than fifteen days for the submission of written arguments. Both the company and Borsa Italiana may request a hearing; if the company fails to participate to the hearing without a valid reason, Borsa Italiana is entitled to proceed on the basis of the elements which have already been gathered.

Borsa Italiana is given 60 days starting from the dispatch of the above communication to decide on the delisting. Whether it is necessary to acquire more information in relation to relevant facts which happened after the beginning of the revocation procedure, Borsa Italiana may suspend the 60-days' time limit, which will be restarted after the acquisition of the above documentation. In any case, the Italian Supervisory Authority (CONSOB) shall be informed of the revocation procedure.

2.4.3 Suspension from trading

Article 2.5.1 of the Market Regulation also regulates the case of the suspension of listing. In particular, Borsa Italiana may decide to suspend the negotiations of a company's securities whether (i) the integrity of the market for those securities is not temporarily guaranteed, (ii) there is the danger that it could not be guaranteed, or (iii) there is the necessity to protect investors. The most common scenario that leads to a suspension of the shares from trading is the one of an extreme oscillation in the share prices, given its attitude to be potentially detrimental for investors, particularly for the non-institutional ones. In this respect, however, no research has been able to prove the beneficial effects of the suspension; indeed, there are some regulated markets that do not provide for such a rule. As for the Italian market, a study found a positive correlation between the decision to suspend the negotiations and the reduction of price volatility[48].

As a result, the suspended securities cannot be negotiated in the public market until the decision to suspend them is revoked by the same authority that made it on the first place.

48 ANOLLI and PETRELLA, *La sospensione della negoziazione di azioni. Evidenze empiriche dal mercato italiano*, in 3 Banca Impresa Società, Rivista quadrimestrale 319-350, (2005).

Evidently, such a measure has a temporary nature, but it can be renewed if the assumptions that led to its adoption persist or the renewal is necessary. As mentioned in the paragraph above, if the suspension is prolonged for at least 18 months Borsa Italiana may definitely delist the securities.

According to paragraph 2 of the same article, the following issues shall be taken into account when considering to suspend the negotiations for a company's securities:

a) disclosure or non-disclosure of news that may affect the regular performance of the market, such as the nomination of a new board of directors;
b) approval by the general meeting of a resolution to reduce the share capital to zero and to simultaneously increase it above the legal limit;
c) admission of the undertaking to bankruptcy proceedings;
d) dissolution of the company;
e) negative opinion of the statutory auditor, or inability of the same auditor to express an opinion on financial accounts for two consecutive financial years.

Additionally, Article 2.5.1 of the Market Regulation provides three different hypothesis that may lead to the suspension from trading. First of all, Borsa Italiana shall communicate to the company and the market whether the shares prices are below the required minimum threshold, as it is determined in the *Istruzioni* ("Instructions") to the Market Regulation. If this situation endures for more than six months, Borsa Italiana is entitled to declare the suspension.

Secondly, a suspension can be declared by Borsa Italiana in the event that a company intends to initiate an extraordinary transaction, owing to which the share price is expected to fall below the minimum threshold, as identified in the *Istruzioni*.

Lastly, Borsa Italiana may order the suspension of negotiations if a company plans to perform a share capital increase in non-divisible option that is not backed by suitable underwriting guarantees.

2.4.3 Effects of an involuntary delisting

The impact of an involuntary delisting is somewhat greater than the one of a GPT. In fact, in a GPT the undertaking already knows that delisting is imminent and it has enough time to plan its exit from the Stock Exchange, minimizing any possible risk. The same does not occur in the event of a compulsory PtP.

A GPT is based on several reasons, which the company evaluates in order to make an informed decision. Hence, the market does not necessarily perceive this kind of exit as a sign of financial weakness. Instead, in the case of an involuntary delisting, investors are traumatized by the Stock Exchange's decision to delist the company. In fact, as we highlighted in the previous paragraphs, the reasons leading to such decision usually reflect negative firm performances.

First of all, a possible effect of involuntary delisting can be measured in terms of liquidity. As is known, an increase in liquidity is one of the major benefits of being listed. Therefore, liquidity inevitably falls following a delisting, given that the absence of a market where to trade shares makes it more difficult for investors to sell. Similarly, since delisting also implies a reduction of the firm's visibility, it will be harder to attract potential investors and to raise capital through stock offerings or other means.

Secondly, a PtP has a negative impact on stock prices. As we noted above, an involuntary delisting can be negatively perceived by the market. As a consequence, trade volumes for the delisting firm fall, which contributes to a general decrease of stock prices. For instance, certain authors[49] investigated the effects of involuntary foreign delisting in the US stock exchanges and noted that the mere announcement of a compulsory PtP leads prices to drop a 4,5% permanently.

Furthermore, sometimes a delisting can trigger a regulatory scrutiny or investigation by the national supervisory authority. Such investigations can be time-consuming and expensive for the undertaking and, most importantly, they can worsen the company reputation, which is a particularly relevant asset.

Finally, the delisting process can be particularly harmful for small companies[50], due to their limited financial capabilities and their lower market value. In addition, these undertakings are subject to greater pressure from market regulators, which increases the probability of delisting in case of any violation. Financial constraints compound such situation, since small firms are not able to properly struggle against a delisting decision and to protect themselves from its detrimental effects.

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[49] LIU, *The impacts of involuntary foreign delistings: an empirical analysis*, in 10 Journal of Emerging Markets 22-39, (2005).

[50] MACEY, O'HARA and POMPILIO, *Down and Out in the Stock Market: The Law and Economics of the Delisting Process*.

2.5 From a minority shareholder's point of view

Up to now, this work provided a general overview on the delisting phenomenon from the companies' perspective, and in particular on the reasons that lead to a PtP. We said that majority shareholders and managers are usually the actors with most interest on a delisting, but we lacked to properly focus on minority shareholders, who have to bear the costs of such transaction.

Delisting poses a threat to minority shareholders' rights. In particular, a PtP transaction can be aimed at the exclusion of small investors from the management of the company and at the limitation of their ability to exercise their rights. In order to prove this theory, we make reference the squeeze-out right, which, following a tender offer, enables the resulting controlling shareholder to compulsorily acquire the remaining shares without negotiating them with their owners.

On the one hand, it is true that some mechanisms are put in place to protect minority shareholders, such as the norms regulating the fair price when exercising a sell-out right[51] and the possibility to appeal to a judicial court. However, on the other hand, those mechanisms are not sufficient, as it has been pointed out by some legal experts[52]. In fact, it would be necessary to introduce new regulations aimed at granting small investors the possibility to negotiate the disposal of their stocks and the right to participate to the company management after delisting is completed. This is not the only argument in favour of the implementation of minority shareholders' rights. Indeed, also the liquidity issue[53] shall be taken into consideration, given that delisting reduces the possibility for small investors to dispose of their shares.

The introduction of safeguards in favour of small investors is a key element in increasing the market attractiveness. That is why there is a need to advocate for more transparency during the delisting process, so to properly inform the whole shareholder base on the transaction and on the implications in terms of share value.

[51] Please see Paragraph 1.5.2

[52] BEBCHUK and KAHAN, *Adverse selection and gains to controllers in corporate freezeouts*, in *Concentrated Corporate Ownership*, edited by Morck, 2000.

[53] VENTORUZZO, *Freeze-outs: transcontinental analysis and reform proposals* in 50 Virginia Journal of International Law 841-918, (2010).

To sum up, the downsides of a delisting on minority shareholders can be classified as follows:

a) Liquidity issues – the removal of the stocks from a public Stock Exchange makes it more challenging for shareholders to sell their securities;
b) Transparency issues – after delisting, a company will not be subject anymore to the control of a supervisory authority and to the consequent disclosure duties. Thus, small investors will be provided with less information. This does not enable them to make informed investment decisions;
c) Risk of expropriation – during a delisting minority shareholders may be offered a consideration lower than the market value of their securities;
d) Raised investment risks – the minor public supervision to which a company is subject after delisting increases the risks associated with investing in its shares.

The above remarks reflect the idea that PtP transactions can be regarded as an extreme case of freeze out. As a matter of fact, usually the delisting also implies freezing out minorities, as it is the case of a delisting performed by means of a BOSO transaction. Indeed, the freeze out of minorities is the practice of limiting or eliminating the participation of minority shareholders in the management of the company by amending the company's statute or taking other measures to reduce their rights. The rationales behind such a transaction are multiple. Among them, it shall be remarked that a freeze out results in the company enjoying a reduction in the costs associated with the organization of the general meeting, and in a greater freedom for the majority shareholder in deciding the corporate strategy[54]. In the following paragraphs we will provide an overview on the current Italian normative framework protecting small investors from abuses by controlling shareholders.

2.5.1 Transparency duties

In Italy, there is a set of transparency rules related to a delisting transaction. These vary depending on the specific transaction chosen for the delisting purpose.

For instance, in the event of a merger, Article 2501-*septies* c.c. states that shareholders have to be provided with the following information, at least 30 days prior to the calling of the general meeting: (i) the merger program with the reports produced by managers

[54] Vos, *"Baby, it's cold outside…" – A comparative and economic analysis of freeze-outs of minority shareholders*, in 15 European Company and Financial Law Review 148-196, (2018).

and auditors, (ii) the annual accounts for the last three fiscal years of the companies participating in the merger, with the reports produced by managers and auditors, and (iii) the balance sheets of the companies participating in the merger.

Moreover, in case of a merger which is the consequence of a leveraged buy-out, Article 2501-*bis* c.c. poses some additional requirements. First and foremost, the merger program shall indicate the financial resources available to pay the liabilities of the company resulting from the merger. In the second place, the managers' report shall indicate the reasons which justify the transaction and shall contain a financial plan illustrating the source of the financial resources and the targets pursued by the transaction. Lastly, the auditor report shall certify the reasonableness of the above indications.

Comparable provisions are set in relation to takeover bids. In particular, the bidder must prepare a prospectus that is aimed at providing shareholders with all the relevant information, so to make an informed decision on whether to accept or decline the offer. Such prospectus is subject to the Consob's approval. It is also possible that Consob requires the bidder to implement the prospectus, whether the information is not complete. However, the supervisory authority cannot verify the veracity of the information contained within the prospectus, except in the case of macroscopic inconsistencies. Such control is demanded to other subjects, such as the company's management, the bidder, and the guarantor, if any.

It is also important to stress that, according to paragraph 8 of Article 94 TUF, the people responsible for the information contained in the prospectus are liable for its veracity and completeness. Consequently, shareholders have the right to be compensated whether they incur any damage as a result of relying on the information at issue. In order to ascertain whether such damage actually occurred, it must be assessed that the falsity and incompleteness of the prospectus information were decisive in the investor's choice.

Furthermore, the Italian Court of Cassation (ruling n. 3132/2001) affirmed that also the Consob can be jointly responsible in case of violation of its control duties. Investors have to prove (i) the existence of an omissive conduct by the supervisory authority, (ii) the existence of a damage, (iii) the wilful misconduct or gross negligence, and (iv) the causation between the conduct and the damage. However, it shall be noted that Article 24 of Law n. 262/2005 introduced several limitations to the accountability of Consob and its officers.

Generally speaking, the Italian legislator aimed to provide a shelter in favour of shareholders for any transaction resulting in a relevant modification of the company's ownership and control. This shelter should enable shareholders to make an informed decision when they are called to vote in the general meeting. It should also prevent managers or controlling shareholders from abusing of their privileged position to extract private benefits to the detriment of the minorities.

2.5.2 Withdrawal from the company

The objective pursued by the legislator with the provision of some exit possibilities from the undertaking is to protect minority shareholders' interests, in particular whether they do not agree on the performance of a transaction involving a restructuring of the shareholder base. In other words, small investors are given the chance to exit the company in case of relevant changes in the firm's ownership.

First of all, we must recall the doctrinal dispute on the allowability of a pure delisting[55]. According to Article 2437-*quinquies* of the Italian Civil Code, shareholders have the right to withdraw from the company if they did not approve the general meeting's resolution to delist securities. Therefore, in such a case *nulla quaestio* on the existence of a withdrawal right in favour of shareholders.

However, we said that GPTs can be performed in several ways. For instance, by a means of a merger in the context of a leveraged buy-out. Do shareholders still enjoy a right of withdrawal? The answer is to be sought in Article 2437 c.c., which provides a list of legal grounds that allow shareholders to exit the company. Such article grants the concerned right, *inter alia*, in case of a general meeting's resolution to transform the firm. A scenario involving this transformation is the one of a merger or a splitting of the company. That is why such transactions have to be regarded as cases for the exercise of the withdrawal right.

Before the 2003 company law reform, some authors[56] argued that listed and unlisted companies were two different types of corporations. Consequently, they believed that delisting could be regarded as a transformation of the company and, as such, it involved the possibility for minority shareholders to exit. This interpretation of the abrogated

[55] See also paragraph 2.2.4
[56] *Inter alia*: OPPO, *Sulla tipicità delle società quotate*, in Rivista di diritto civile, (1999).

Article 131 TUF was driven by the lack of protection of minority shareholders in the event of a delisting that was not performed by means of a merger or an acquisition.

On the contrary, the same authors did not argue in favour of the existence of a withdrawal right in the event of the listing: this difference was evidently unjustified. However, the 2003 reform swept away all arguments in support of that theory, which disappeared from the academic literature.

Nowadays, the existence of a withdrawal right cannot be argued in the event of an involuntary delisting. First of all, based on a literal interpretation of the law, there is no provision granting the concerned right in the case of a compulsory delisting. Secondly, based on a systematic interpretation of the law, we already argued that the objective of the withdrawal right is to protect minority shareholders from the conflicts with major shareholders, especially when the latter make decisions that could be detrimental to the former. It is evident that this is not the case of a compulsory delisting, which is caused by a decision of the Stock Exchange, rather than by a general meeting's resolution.

In relation to takeover bids, the withdrawal right is granted by both the company's statute and the law. According to the law, two different scenarios potentially occur, both leading to a purchase obligation on the bidder's side:

i. if the bidder manages to acquire more than 95% of the share capital, there is an obligation to acquire the remaining parts of the share capital upon request by the owners;
ii. if the bidder manages to acquire more than 90% of the share capital, there is an obligation to (i) repristinate the free float above the required threshold, or (ii) acquire the remaining parts of the share capital upon request by the owners[57].

It is also important to stress that in case of a violation of the purchase obligation, the bidder will not be able to exercise the voting rights associated to the entire stake held and there will be a duty to dispose of the extra holdings that trigger the purchase obligation. The *ratio*, once again, is to provide an additional safeguard to minority shareholders' interests in case of a drastic revolution in the company ownership.

Finally, as for the calculation of the consideration owed to withdrawing shareholders, Article 2437-*ter* c.c. states that the value of liquidation of the shares listed on regulated

[57] However, Consob may still decide that a 10% free float is enough to grant the regularity of negotiations.

markets shall be determined according to the arithmetic mean of the closing prices during the six months prior to the event that justifies the withdrawal. However, Law n. 116/2014 introduced the possibility for the company's statute to derogate from the above rule, on condition that the resulting consideration is not lower than the liquidation resulting from the application of the aforementioned criteria.

Chapter 3: What is going on in Italy?

3.1 Delisting trends

The purpose of this chapter is to provide a fair overview on the current status of the Italian stock exchange and to compare it with other major international stock exchanges. We will show the most common factors that are associated to delisting waves. Additionally, we will investigate on the recent delisting wave from *Piazza Affari* and we will try to assess whether this phenomenon was limited to Italy or it is spreading worldwide.

As we claimed, the likelihood and the rationales of a delisting decision depend on the firm's characteristics. However, there are also other factors contributing to the arise of a delisting wave. First of all, there are legislation-related factors: for instance, the introduction of anti-takeover legislation in the US slowed down the ongoing delisting wave, which started during the '80s. Similarly, innovations in M&A legislation in many countries led to the increase of PtP transactions, as it did the introduction of the Sarbanes Oxley Act, which sharply increased the cost of compliance for US-listed firms. Such evidence seems to suggest that there is a strict correlation between the cost of compliance and a decision to delist.

Secondly, there are economics-related factors. In the UK, starting from 1997, the development of private equity and debt as financial sources, together with the disregard for small companies by institutional investors, increased the number of PtP transactions. Consistent with this approach, the very first delisting wave in the European Community, which took place in the period 2000-2005, stopped before the improvements in the equity market performance. Indeed, such improvement increased the opportunity cost of delisting, making it more attractive for companies to stay listed and obtain the related profits.

Finally, another important factor determining delisting is the reduction of financial visibility[1]. Shifts in financial visibility may depend on the firm's own attractiveness or on the whole market's attractiveness. As we will show in the Exor N.V. case[2], indeed, firms

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[1] MEHRAN and PERISTIANI, *Financial visibility and the decision to go private*, in 23 The Review of Financial Studies 519-547, (2009).

[2] Please see Paragraph 3.3.3

try to opt for the stock exchange providing the highest possible visibility, given that it causes the liquidity and value of the shares to increase.

3.1.1 Delisting features in Italy

Most of the academic literature analysed PtP transactions by focusing on US markets. The organization of American undertakings is very different from the Italian and European firms' one. For instance, Italian undertakings usually have a smaller size than the Americans; thus, listing costs are in percentage higher and they necessarily play a more influent role in the delisting decision. Therefore, many studies on delisting fail to properly explain the dynamic of a PtP transaction performed by an Italian undertaking.

The main feature of an Italian undertaking is the presence of a concentrated ownership structure, resulting in a large dominant shareholder who is able to exercise a significant control in the company. Usually, such shareholder is also a manager of the company and controls the majority of the board. As a result, if the agency theory described by Jensen and Meckling[3] for the US market used to focus on the management-shareholders relationship, in the Italian context such theory needs to be reinterpreted, as conflicts tend to emerge between the major shareholder and minority shareholders.

Moreover, delisting transactions in Italy are frequently performed by means of a takeover bid, usually promoted by the historic shareholder or the managers, if they do not coincide. At the time when the tender offer is launched, the bidder aiming at delisting claims that they have no intention to repristinate the free float whether, after the bid, their participation in the company will result in a portion larger than the 90% of the share capital. At the same time, the bidder also announces their will to exercise the squeeze-out right if, following the offer, their overall stake in the company exceeds the 95% of the share capital. The above outcomes lead to delisting, pursuant to Article 2.5.5 of the Market Regulation[4].

More importantly, and for the reasons stated above, very often a takeover bid in Italy does not imply the restructuring of the board. In such cases, we have to exclude the applicability of the incentive realignment hypothesis, which has a limited applicability in

[3] JENSEN and MECKLING, *Theory of the firm: Managerial behavior, agency costs and ownership structure*.
[4] In Paragraph 1.3.3 we defined as "Market Regulation" the *Regolamento dei mercati organizzati e gestiti da Borsa Italiana S.p.A.*

the Italian market and which, on the other hand, is a major driver of PtP transactions in the US.

Based on the structure of Italian undertakings, the most plausible rationales behind a delisting decision seem to be the undervaluation hypothesis and the public market influence-related hypothesis.

We claimed that, according to the former[5] hypothesis, managers perform a PtP transaction because they aim to purchase the shares at a low price, delist the undertaking, increase its value and extract private benefits. The undervaluation hypothesis seems to adequately explain delisting when this is performed by the controlling shareholder who also is a manager of the company, and in a period of poor market performance[6]. This happens to be the case of several delisting operations in Italy. The same circumstance seems also to favour the idea that Italian PtP transactions may be based on the will to avoid the public market influence. In fact, the controlling shareholder may push for a delisting so to own the 100% of the undertaking's share capital and remove any other shareholder.

However, we suggest that both the above hypothesis have a common thread, which is the cost of compliance. In this regard, the cost of compliance shall not be intended solely as the monetary cost deriving from the implementation of the corporate structure. Such cost also comprehends the opportunity cost of being listed, which depends on the benefits forfeited by the company because of the duty to comply with a stricter regulation.

In particular, as we stressed out, being listed implies the necessity to implement a more complex corporate organization, which can worsen the undertaking's ability to perform some specific transactions. That is why managers delist their firm when they believe that the company is undervalued and they foresee a growth opportunity: they want a simplified organization to pursue the growth strategy.

Additionally, short-period financial requirements push directors to privilege short-term objectives, so to accomplish investors. Instead, going private may represent an opportunity to focus on long-term value creation, without having to worry about the market reaction. This is just an example of how the cost of compliance interacts with

[5] Please see Paragraph 2.2.3

[6] BETTINELLI, DANOVI and FABRIZI, *Why do public firms go private in Italy?*, (2010).

other delisting rationales. Indeed, as we just showed, the cost of compliance seems to cause most of the delisting transactions in the Italian market.

Finally, one of the reasons leading to a listing decision in a regulated market is the will to increase the undertaking's visibility[7]. It seems obvious that the upgrade in visibility also depends on the other firms listed in the same market, given that the market's attractiveness for investors is proportional to the prestige of the undertakings listed in that market. Consequently, if the market is not able to provide firms with the visibility they were seeking, the likelihood of a delisting decision increases. Such relationship is particularly evident in the event of a trans-listing operation, as the Exor case will show.

3.1.2 Delisting in 2022: the status of the Italian market

In Italy, 2022 witnessed the delisting of several undertakings of big dimensions. Currently, just 5 out of the 500 biggest firms in the world are listed in *Piazza Affari*. As a result, the attractiveness of the Italian stock exchange is low and the risk is that Borsa Italiana could turn into a market for small-medium enterprises.

As a matter of fact, the Italian stock exchange already has some issues related to a scarce attractiveness and to underdevelopment, especially in comparison with the other major European stock markets. In particular, "*the Italian stock market has the lowest free-float ratio among comparable European countries*[8]", resulting in a decreased attractiveness for passive institutional investors, which tend to follow free-float weighted market capitalization indices when allocating their investments.

For this reason, it would be beneficial to abrogate Article 112 TUF, according to which CONSOB is entitled to raise for a specific company the 90% threshold leading to the purchase obligation of the remaining shares, after having heard from the market operator. Such norm is not posed by any EU regulation and no other European country has a similar rule. Other than contributing to the reduction of the free-float index, Article 112 TUF also poses issues in relation to the principle of legal certainty, given that investors may find it challenging to detect when the purchase obligation is triggered.

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[7] PERRINI, *I vantaggi aziendali e per gli azionisti della quotazione delle imprese alla Borsa Italiana: una valutazione del periodo 1995-2001*, in Analisi giuridica dell'Economia, Studi e discussioni sul diritto dell'impresa, 2022, 135.
[8] *OECD Capital Market Review of Italy 2020: Creating Growth Opportunities for Italian Companies and Savers*, OECD Capital Market Series, (2020).

Moreover, the scarce attractiveness of the Italian market is also determined by the regulatory framework which is applicable to listed companies[9]. The Italian regulation seems to be less favourable to firms than the one of other European countries, resulting in a competitive disadvantage of the Italian legal system in the European context[10].

3.2 A.S. Roma

A.S. Roma S.r.l. (hereafter, Roma) is an Italian football company having its establishment in Rome. It used to be a *Società per Azioni* adopting the traditional corporate governance model. After the performance of the PtP transaction, it transformed into a S.r.l.[11]

On the 23rd of May 2000, the former president Franco Sensi decided to list the 29% of Roma's shares on Euronext Milan[12]. The aim pursued through the quotation was to obtain capitals from private investors, as many English football teams began to do from the '80s.

However, going public transactions never experienced a huge spread in the football industry: the peak of listed football companies was reached in 2009, when the securities of 30 football undertakings were traded in international stock exchanges. In Italy, other than Roma, S.S. Lazio and Juventus F.C. were and still are the only Italian football undertakings listed in a public market.

3.2.1 Delisting process

The starting point of Roma's delisting process was on the 5th of August 2020, when a press release[13] announced that AS Roma SPV[14] reached an agreement with The Friedkin Group, Inc. (hereafter, The Friedkin Group), based in Delaware and controlled by the American entrepreneur Thomas Dan Friedkin.

In particular, the parties entered into a binding preliminary Equity Purchase Agreement, pursuant to which AS Roma SPV agreed to transfer its entire 86,6% stake to The Friedkin Group. AS Roma SPV directly owned the 3,3% of Roma's share capital and controlled

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[9] Please see Chapter 1 for a description of the peculiarities in the regulatory framework of listed companies.
[10] MEF, *Libro Verde su "La competitività dei mercati finanziari italiani a supporto della crescita"*, (2020).
[11] Limited liability company.
[12] This is one of the markets managed by Borsa Italiana.
[13] AS Roma, Press release, 5th of August 2020, available at www.asroma.com
[14] AS Roma SPV was Roma's major shareholder.

another 83,3% indirectly, by means of its affiliate undertaking, NEEP Roma Holding S.p.A. (hereafter, NEEP). The consideration agreed by the parties was 0,1165€ per share.

On the 17th of August 2020, the transaction was completed. The formal acquiror of Roma was the Romulus and Remus Investments LLC, an undertaking constituted by The Friedkin Group under the law of Delaware for the sole purpose of the acquisition. The completion of the transaction had several implications.

On the one hand, the management board was restructured. First of all, the parties entered into a shareholder agreement implying (i) the resignation of the other eight members of the management board, (ii) the resignation of the whole supervisory board, and (iii) the appointment of an executive committee, composed by directors chosen by the acquiror and entrusted with the ordinary management of the company. In particular, Thomas Dan Friedkin and his son Ryan became directors of the company. Secondly, the acquiror agreed to call the general meeting within five days from the closing for the renovation of the BoD.

On the other hand, the Equity Purchase Agreement also implied an obligation for Romulus and Remus Investments LLC to launch a mandatory tender offer for the remaining shares of Roma (about the 13,4% of the share capital), pursuant to Article 106 TUF, paragraph 1. According to paragraph 2 of the same Article 106 TUF, the consideration of the takeover bid had to be at least equal to the highest price paid by the offeror for the company's shares during the 12 months prior to the bid, namely 0,1165€ per share.

Together with the launch of the takeover bid, Romulus and Remus Investments LLC declared (i) its intention not to repristinate the free float whether, after the takeover bid, its overall stake in the company resulted in an amount higher than the 90% of Roma's share capital; (ii) its will to acquire the shares upon request of the other shareholders whether, after the takeover bid, its overall stake in the company resulted in an amount higher than the 90% of Roma's share capital, pursuant to Article 108 TUF, paragraph 2; and (iii) its will to exercise the squeeze out right[15] whether, after the takeover bid, its overall stake in the company resulted in an amount higher than the 95% of Roma's share capital, pursuant to Article 111 TUF.

[15] Please see also Paragraph 2.2.6

In other words, Romulus and Remus Investments LLC aimed to acquire the 100% of Roma's share capital and proceed with the delisting of the company. However, the takeover bid was not successful. In particular, the bidder was able to successfully acquire just the 0,2% of the share capital, resulting in an overall stake of 86,8%; thus, the 90% threshold was not triggered. The reason behind such failure concerned the price set for the bid: indeed, despite it being compliant with the law, it was inferior than the minimum price of the shares during the previous 5 years.

Regardless of the first attempt resulting in a failure, Friedkin decided not to give up: on the 11th of May 2022, Romulus and Remus Investments LLC launched a voluntary takeover bid on Roma's floating shares. As for the previous tender offer, the objective pursued by the offeror was to acquire the 100% of the share capital and delist the company from Euronext Milan.

For this reason, the bid was subject to the condition that the adhesions had to enable Romulus and Remus Investments LLC to hold at least the 95% of the share capital, so to exercise the squeeze out right. In the event of a bid failure, the bidder claimed that the delisting would have been performed by means of other extraordinary business operations, such as an inverse merger with NEEP, which would have also implied the exclusion of minorities from Roma's shareholder base.

The consideration for the second takeover bid was 0,43€ per share, which is considerably higher than the one set for the previous bid. Moreover, shareholders adhering to the bid could request to be included in the Assist Club, a loyalty program granting to its members a set of non-financial benefits, mostly attractive for the football team supporters.

After two extensions of the adhesion period and an increase of the consideration to 0,45€ per share, on the 25th of July 2022 Romulus and Remus Investments LLC announced to have acquired the 96,126% of Roma's share capital[16]. Therefore, on the 6th of September 2022, the bidder declared its will to purchase the remaining parts of the share capital by exercising the squeeze out right[17], according to Article 111 TUF. CONSOB then issued resolution n. 22435/2022, determining the consideration for the exercise of the squeeze out right in 0,45€ per share, namely the same consideration of the tender offer.

[16] Romulus and Remus Investments LLC, Press release, 25th of July 2022.
[17] Romulus and Remus Investments LLC, Press release, 6th of September 2022

Lastly, on the 7th of September 2022, Borsa Italiana issued the communication n. 8880, pursuant to Article 2.5.1 of the Market Regulation. Such communication provoked the permanent removal of Roma's shares from the stock exchange. As we already claimed[18], even if the delisting decision was formally made by Borsa Italiana, this delisting has to be qualified as voluntary, given that the market operator's decision was stimulated by the major shareholder's conduct.

3.2.2 Reasons

As we claimed in Paragraph 1.2.3, listed companies have to bear the cost of compliance of being listed. This consists in both the cost related to the maintenance of bodies entrusted with supervisory duties on the management's activities and the cost of collecting the information to be provided to the market. Evidently, the avoidance of such costs can be regarded as one of the rationales behind Roma's GPT.

We also suggest that other delisting rationales can be detected by focusing on the peculiarities of the football industry. The companies in such industry cannot be regarded as competitors in a traditional sense. In fact, they have to cooperate in order to increase the whole industry's revenues. Moreover, they do not aim at removing their competitors from the market, given that the removal would cause a loss for each company of the industry. For instance, AC Milan could never be interested in removing its historical rival, FC Inter, from the Serie A, given that it would lose the extremely high revenues deriving from the football match against their rivals.

However, some spaces for competition still persist. Football teams compete inside the pitch, given that each team wishes to win as many matches as possible and to rank at the highest possible level in both the national and international competitions. Therefore, teams also compete in the players market: they struggle in order to build the strongest possible team, by purchasing players from other football undertakings.

Now, one of the implications of being listed is the obligation to disclose a set of financial information, which could be accessed also by Roma's competitors and, more in general, by everyone who could be interested. This impacted on Roma's negotiating ability when purchasing or selling new players, or when negotiating for the extension of the team members' contracts. In fact, their counterparts could always make reference to Roma's

[18] Please see Paragraph 2.4.2

financial statements so to demand for the highest and bid for the lowest possible consideration.

Another important element to take into account is the peculiarity of Roma's fan base. Historically speaking, Roma's supporters and the Roman press have high expectations on the team's performance, thus they constantly investigate on rumours concerning the players and on the company's business strategy. This is particularly true when the team does not perform as expected: the press immediately seeks for the person or the event responsible for the underperformance.

It often happened that the press individuated the reasons of the underperformance in a bad management of the company's resources. This could be due to the (presumed) excessive consideration paid for the purchase of a given player or to the excessive salary paid to them compared to other members of the team. Also, revealing the differences in the salaries between team members may lead to disputes among them, or to some players asking for a higher wage to the company.

In this regard, delisting implies the termination of the obligation to disclose the information related to the players' purchase and salaries. Therefore, Roma will be free to independently decide which information to disclose and when. As a consequence, delisting helps to alleviate the pressure on team members, which is a pivotal element to improve the performance on the pitch.

More importantly, in the last decade there have been ongoing discussions between Roma and the Municipality of Rome, concerning the intention to build a proprietary stadium. According to several newspapers, it seems that also the new Roma's major shareholder, Thomas Friedkin, considers the proprietary stadium as a pivotal element for the development of his business strategy.

Indeed, as reported by the Italian sport newspaper *Corriere dello sport*, Friedkin declared that one of the rationales behind delisting is the opportunity to make the Roma's business structure more flexible and efficient, so to facilitate the realization of major investments and speed up the fulfilment of the company's growth objectives. In other words, according to the new Roma's owner, delisting represents a crucial step, *inter alia*, towards the realization of the new proprietary stadium.

Lastly, Roma's delisting may be based on what we described as "extraction of private benefits by managers and controlling shareholders[19]". As a matter of fact, before the launch of the voluntary takeover bid on May 2022, Roma was still a listed company with a very concentrated ownership structure and a strong managerial ownership.

We noted that, according to Weir *et al.*[20], companies having the features described above are more likely to delist, given that managers aim to obtain private benefits through the delisting. Such benefits may be both financial and non-financial. In Roma's case, we suggest that the new owners wished to obtain the non-financial benefits of consolidating their control on the company.

In particular, the elimination of minority shareholders and the avoidance of listing obligations determine the disappearance of the pressure on the board's activity, deriving from the control exerted by minorities and supervisory authorities. Consequently, given that the new owners are looking forward to a major transformation in the Roma's business strategy, we suggest that they may wish to do so without having to account for all their operations.

3.2.3 The Assist Club

As for every PtP transaction, the main implication is that the delisted Roma's stocks will only be traded by means of private negotiations. More importantly, as we already claimed above, in this case the delisting implied the elimination of minority shareholders, given that, following the launch of the takeover bid and the exercise of the squeeze out right, Thomas Friedkin held, directly or indirectly, the 100% of Roma's share capital.

However, the 0,45€ consideration was not the only reward for the ex-shareholders who agreed to sell their shares during the takeover bid procedure: as anticipated in Paragraph 3.2.1, in fact, shareholders adhering to the tender offer could freely enrol in the Assist Club. The registration implies the possibility, among others, to dine with the coach or with the president, and a chance to be present at a team's training in Trigoria.

To sum up, the Assist Club provides ex-shareholders with the possibility to obtain a set of non-financial benefits, depending on the amount of shares that each shareholder sold

[19] Please see Paragraph 2.2.2
[20] WEIR, LAING and WRIGHT, *Undervaluation, private information, agency cost and the decision to go private*.

by accepting the tender offer. The new owners were able to exploit the fact that the vast majority of the company's ex-shareholders purchased the share because of their passion for the team: the loyalty programme was a way to preserve that passion, by donating a unique experience to supporters.

Therefore, the Assist club, which represents an absolute novelty in the football industry, was the key for the fulfilment of Friedkin's strategy. Indeed, on the one hand, shareholders-supporters could still feel like they are a part of the team and, on the other hand, the new owner consolidated his control on the company.

3.2.4 An alternative to listing for football undertakings: fan token

We already stated that the main advantage of being listed is the possibility to attract investors and raise liquidity[21]. Therefore, delisting entails the waiver to such advantage and the need for the delisted company to find an alternative way to support its investments.

Starting from 2019, a new financial instrument emerged in the football industry, with the exact scope of answering to football undertakings' demand for liquidity. This is the fan token, a digital asset which is based on the cryptocurrency's technology and which is traded in non-regulated markets. Among others, Roma issued such security on February 2020; thus, we suggest that Roma's delisting decision was facilitated, given that they had already found a different method to achieve the main advantage of quotation.

The nature of fan tokens is disputed, since it is not clear whether they are more resemblant to bonds, shares, or derivatives. However, it is certain that these new securities do not provide their holders with the possibility to earn dividends or to influence the corporate decisions.

From a financial perspective, a fan token has a market value which is associated, *i.a.*, to football matches results[22], to the trend of the cryptocurrency to which they are related[23], to the performance of other fan tokens, and to the demand and supply curve for each token. For these reasons, fan tokens are a highly speculative financial instrument. In

[21] Please see Paragraph 2.2.3

[22] DEMIR, ERSAN and POPESKO, *Are fan tokens fan tokens?*, in 47 B Finance Research Letters 1-7 (2022).

[23] SCHARNOWSKI M., SCHARNOWSKI S. and ZIMMERMAN, *Fan tokens: sports and speculation on the blockchain*, (2021).

particular, investors can only obtain profits if they are able to sell the fan token for a price higher than the consideration paid for the initial purchase.

Rather, from an administrative perspective, fan tokens provide their holders with the possibility to influence some decisions of the company, which are mostly related to marketing issues. For instance, it is possible to vote for the selection of the team's third soccer jersey or for the inclusion of a team's former player in the hall of fame.

It seems evident that fan tokens are a win-win transaction for football companies. Indeed, on the one hand, they are an extremely efficient tool to collect liquidity from the public, without having to comply with the requirements of a stock exchange. On the other hand, the efficiency of marketing campaigns is ensured by the fact that the people voting for some marketing decisions are themselves the recipients of such decisions. In other words, following the previous example, if the aim pursued by the realization of a team's third jersey is to maximise the profits from the sale of the jersey, it is extremely convenient to leave the choice on the main features of that jersey to the same supporters who will have to buy it.

The downsides of fan tokens concern the risks related to the investment, which is considerably higher than the risk associated to investments in stocks. Indeed, as it was shown by Ersan *et al.*[24], the standard deviation of stock returns is between 2,8% and 3,6%, but it is much higher for the fan token, for instance, of Roma (12,2%) or Juventus F.C. (9,5%).

Moreover, the lack of any regulation and the fact that these assets are usually purchased by uninformed investors (mostly supporters of the teams to which the token is associated) sharply increase the risks associated to fan tokens, given the possibility that they may be used for criminal activities, such as money laundering.

In conclusion, as pointed by Zolea[25], there is a need for an intervention of the legislator, perhaps consisting in the introduction of some forms of supervision on the issuance of fan tokens.

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[24] ERSAN, DEMIR and ASSAF, *Connectedness among fan tokens and stocks of football clubs*, in 63 Research in International Business and Finance 1-10, (2022).

[25] ZOLEA, *I "fan token" tra diritto, nuove tecnologie e finanza*, 2022, 132

3.3 Exor N.V.

Exor N.V. (hereafter, "Exor") is a Dutch incorporated company having its establishment in Amsterdam. In 2016, Exor transferred its primary establishment from Italy to The Netherlands, thus forming a *Naamloze Vennootschap*[26].

Exor is a financial holding, with a net asset value of almost €26 billion at 30 June 2022[27]. It was listed in 2009, when its shares were valued almost 6€ and its net asset value accounted for €3,1 billion. Exor's 13 years of listing were definitely successful: in 2022, when the company decided to migrate to Euronext Amsterdam, the value of their shares had increased tenfold.

3.3.1 Cross-border transfer

The first step towards Exor's stock exchange migration is rooted in 2016, when the company decided to move its primary establishment to The Netherlands by means of a cross-border merger between Exor S.p.A. and Exor Holding N.V., which was a Dutch wholly owned subsidiary of Exor constituted for the purpose of the merger.

The decision to move the establishment to The Netherlands was not a news for Exor: in 2013, Fiat-Chrysler Group[28] registered the newly formed Fiat-Chrysler Automobiles N.V. in the *Kamer van Koophandel*[29]. Indeed, as pointed by De Luca[30], nowadays the Dutch legal regime seems to be the most competitive and favourable one for companies within the EU.

The reason is that such regime does not set higher requirements than those defined by European company law directives and, in the recent years, it also experienced the abolition of some rules that were deemed to be too severe for undertakings. Moreover, The Netherlands is considered as the European tax haven, providing several tax advantages to companies setting their primary establishment in the country.

The possibility for a company to move its seat from a Member State to another is granted by the European company law. In particular, paragraph 2 of Article 49 TFEU affirms the

[26] In Dutch, joint-stock company.
[27] These data are shown by Exor's 2022 First Half-year Report, which is available at www.exor.com
[28] This was one of Exor's operating subsidiaries. In 2021, Fiat-Chrysler Group and Peugeot S.A. merged in Stellantis.
[29] The Dutch commercial register.
[30] De Luca, *European Company Law*, 97, (2021).

freedom of primary establishment, according to which it is possible to form and manage an undertaking in any Member State under the same conditions laid down for its own nationals. Such freedom also implies the possibility to move the seat of the company for the purpose of changing the applicable law. Already in 2005, the European Court of Justice stated that the freedom of establishment can be exercised in several ways, including cross-border mergers[31], without having to incur in the liquidation of the company. The ECJ's jurisprudence was later implemented by the Cross-Border Merger Directive.

Compliant with the above legal framework, the cross-border merger between Exor S.p.A. and Exor Holding N.V. was approved by the extraordinary general meeting on the 3rd of September 2016 and completed on the 11th of December 2016. Shareholders who did non concur to the approval of the merger resolution were provided with the withdrawal right for a consideration of about 31€[32]. The shares for which the withdrawal right was exercised were offered at option to the other shareholders, pursuant to Article 2437-*quater* of the Italian Civil Code. Remaining shareholders were also provided with the pre-emptive right on un-opted shares.

As a result of the merger, each share of Exor S.p.A. was converted in a share of Exor N.V., each carrying one voting right. On the 5th of December 2016, Borsa Italiana approved Exor's listing request in Euronext Milan, and the shares commenced trading on the 12th of the same month.

In addition, as part of the general meeting's resolution approving the merger, Exor introduced a loyalty programme for historic shareholders. In particular, the voting rights associated to each share would be increased to 5 or 10 if the shares were held for a period longer than, respectively, 5 or 10 years. According to Exor, such mechanism was aimed at incentivizing long-term investments in the company.

Actually, it represented an opportunity for the major shareholder (the Agnelli family[33]) to consolidate their control on the company and to maximise their profits. The same results

[31] European Court of Justice, Grand Chamber, 13th of December 2005, C-411/03.
[32] According to Article 2437-*ter* of the Italian Civil Code, the withdrawal consideration shall be determined by reference to the average market value of the shares during the six months prior to the decision of the general meeting legitimating the withdrawal right.
[33] The Giovanni Agnelli B.V. exercises the 85,44% of voting rights in the general meeting, despite owning the 52,01% of Exor's share capital.

could not be achieved under Italian legislation: indeed, according to Article 2351 of the Italian Civil Code, it is not possible to attribute more than 3 votes to each share with multiple voting rights.

Finally, it shall be noted that the cross-border merger and Exor's exit from Italy determined the insurgence of a dispute with the *Agenzia delle Entrate*, which is the Italian Tax Authority. In particular, the dispute concerned the application of the "participation exemption" (or PEX), pursuant to Article 87 TUIR. This is a 95% exemption provided in favour of corporate participations that respect the conditions provided by the law.

At the time of the merger, Exor applied the PEX. However, in 2021 the Italian Tax Authority issued a principle of law[34], according to which Article 87 TUIR does not apply when a company moves its seat abroad without maintaining a permanent establishment in Italy. Despite declaring not to agree with the above principle of law, Exor settled with the *Agenzia delle Entrate*, by accepting to pay €746 million in order to avoid the costs and the lengthiness of judicial proceedings, and the issuance of any penalty.

3.3.2 Translisting process

On the 29th of July 2022, Exor announced that its Board of Directors approved the transfer of the listing of the company's shares to Euronext Amsterdam[35], subject to (i) the approval of the listing prospectus by the Dutch Authority for the Financial Markets, and (ii) the admission to trading by Euronext Amsterdam.

The listing on Euronext Amsterdam became effective starting from the 12th of August 2022. On the same day, Exor filed a request to delist its ordinary shares from Euronext Milan. Pursuant to Article 2.5.6 of the Market Regulation, the delisting process does not last less than 45 days. Meanwhile, Exor's ordinary shares were traded both on Euronext Amsterdam and Euronext Milan. The 45-days period is needed to ensure that investors are informed on the imminent delisting. In particular, 15 days prior to the effective delisting, the delisting company shall release an announcement to renew the disclosure of the ongoing transaction.

The dual listing in the meantime of the delisting process is also required by Article 2.5.6, according to which companies requesting to be delisted shall attach to the delisting

[34] Agenzia delle Entrate, Legal Principle n. 10/2021, published on 11th of May 2021.
[35] Exor N.V., Press release, 29th of July 2022.

request (i) the general meeting's resolution to delist the company, and (ii) a certificate of the admission to another Italian or European regulated market.

Finally, on the 27th of September 2022, the delisting from Euronext Milan became effective, as it was previously determined by Borsa Italiana. Consequently, the shares of the company continued to be traded solely on Euronext Amsterdam.

3.3.3 Rationales of the Stock Exchange migration

Exor declared that the migration to Euronext Amsterdam was performed to "*align the company's listing venue with its established legal structure*", resulting "*in the company being overseen by a single country regulatory authority*"[36].

As a matter of fact, prior to the migration Exor was subject to a double supervision, performed by both the CONSOB and the *Autoriteit Financiële Markten*[37] (also known as AFM). The delisting from Euronext Milan implied the termination of CONSOB's supervision on the company, resulting in an overall reduction of administrative burdens and costs.

It has to be noted that the powers entrusted to the AFM are not equal to the ones entrusted to the CONSOB. The Dutch legal system adopts the so called "twin peaks" model, based on which the regulatory and supervisory powers are exercised by two different entities, namely, respectively, *De Nederlandsche Bank*[38] and AFM. Therefore, the AFM cannot issue regulations, but it can only supervise undertakings' activities and their compliance with the applicable corporate law.

Other than the official reasons lying under Exor's translisting, we suggest that there may be others. Euronext Amsterdam is one of the most prestigious stock exchanges within the EU, "*which hosts some of Europe's leading corporations*", as it is stated in Exor's press release of the 29th of July 2022. Additionally, Exor aimed to be included in the AEX Index, and it actually succeeded in such objective[39] starting from the 19th of December 2022. The AEX Index includes the 25 largest companies listed in The Netherlands, having regard to the free float adjusted by market capitalization. We suggest that the higher

[36] Exor N.V., Press release, 29th of July 2022.
[37] The Dutch Authority for Financial Markets.
[38] The Dutch central bank.
[39] Exor N.V., Press release, 6th of December 2022.

visibility of Euronext Amsterdam and, in particular, of the AEX Index, in respect to Euronext Milan was an important driver of the decision to migrate.

The main implication of the above is that Exor hoped to increase the liquidity of its shares, given that Euronext Amsterdam – and, specifically, the AEX Index – is more attractive to investors than Euronext Milan. Consequently, also the price of the shares would be positively affected. At the time of writing, Exor's shares price effectively increased from the first listing day in Euronext Amsterdam.

3.3.4 Position of minority shareholders

The position of minority shareholders after the migration is unchanged. Given that The Netherlands is a European country providing the same level of protection to investors than Italy, shareholders did not enjoy a right of withdrawal from the company, pursuant to Article 133 TUF.

According to Exor, the migration can only benefit shareholders and has no downside effects. In fact, shareholders can take advantage of the improvements in the company's reputation and visibility. Moreover, the predicted increase of the shares value and liquidity is undoubtedly positive for shareholders.

3.4 Atlantia

Atlantia S.p.A. (hereafter, Atlantia) was an Italian incorporated company, having its primary establishment in Rome. On the 14th of March 2023, the extraordinary general meeting approved a resolution, based on which the company changed its name in Mundys S.p.A. (hereafter, Mundys).

The new brand is a Latin word, which reminds of the globe. The choice was not casual: after the performance of the PtP transaction, Mundys' shareholders are expected to invest huge financial resources in infrastructures and technology, so to become the most important group worldwide in the infrastructure sector.

3.4.1 Delisting process

On the 14th of April 2022, Schemaquarantatre S.p.A., later renamed as Schema Alfa S.p.A. (hereafter Schema Alfa, or BidCo), communicated its intention to acquire the totality of the shares of Atlantia[40], by means of a takeover bid, for the purpose of delisting the company from Euronext Milan. The offer was subject, among others, to the acquisition of an amount of shares higher than the 90% of Atlantia's share capital. As we repeatedly mentioned, the reduction of the free float below such minimum required threshold triggers Borsa Italiana to make the decision to delist a company.

BidCo's share capital is owned by Schemaquarantadue S.p.A. (hereafter, HoldCo), which is controlled by Sintonia S.p.A. (hereafter, Sintonia), BIP-V Hogan (LUX) SCSp, and BIP Hogan (LUX) SCSp, respectively holding the 65%, the 5,25%, and the 29,75% of HoldCo's share capital. The whole share capital of Sintonia is owned by Edizione S.p.A. (hereafter, Edizione), whereas both BIP-V Hogan (LUX) SCSp and BIP Hogan (LUX) SCSp are controlled by Blackstone Infrastructure Partners L.P. (hereafter, Blackstone). Edizione is a company owned by the Benetton family, which is Atlantia's historic shareholder. Such undertaking already controlled, through Sintonia, the 33,1% of Atlantia's share capital. Instead, Blackstone is an investor owning several investment funds and adopting the *buy-and-hold* strategy, which is based on purchasing a company, increasing its value in the long-term and gaining profits from annual cash flows in the short-term.

Blackstone, Edizione and their affiliates entered into an agreement named "*Investment and Partnership Agreement*", which aim was to prepare the launch of the takeover bid on Atlantia's share by BidCo. *Inter alia*, such agreement implied (i) an obligation for Sintonia to transfer its Atlantia's shares to HoldCo, (ii) an obligation for HoldCo to subsequently transfer the same shares to BidCo, so to trigger the minimum threshold required for the delisting, and (iii) an obligation for BidCo to launch a tender offer on the remaining 66,9% of Atlantia's share capital and proceed with the delisting of the target company.

Additionally, on the 19th of April 2022, HoldCo and BidCo entered into an agreement with Fondazione Cassa di Risparmio di Torino (hereafter, Fondazione CRT), which held the 4,537% of Atlantia's share capital. Based on such agreement, Fondazione CRT had an obligation to sell the 0,76% of its Atlantia's share to BidCo through accepting the tender offer, and a right to extend such amount to the maximum number of shares held[41]. At the

[40] Mundys, Press release, 14th of April 2022.
[41] Please note that, at the time of the agreement, Fondazione CRT's holdings represented the 4,537% of Atlantia's share capital. However, HoldCo and BidCo were aware that such holdings could be

same time, Fondazione CRT had to invest the profits obtained through the sale of Atlantia's share, by subscribing to new issued HoldCo's shares and become its shareholder. On the 22nd of April 2022, Fondazione CRT communicated its intention to extend the participation in the agreement to all the shares held in Atlantia[42].

The tender offer was finally launched on the 7th of October 2022, for a consideration of 23€ per share. Because of the shareholder meeting's resolution to distribute a dividend of 0,74€ per share, shareholders exiting the company earned a total 23,74€ per share. According to the bidder, such consideration was fair, given that the shares price on the last trading day before any delisting rumour was 18,49€. Thus, the prize for obtaining the control in the company was calculated in 24,4% and 28,4% in relation to, respectively, the consideration and the whole amount earned by the shareholders (which was composed by the consideration and the dividend).

The adhesions to the offer were intended to begin on the 10th of October and to conclude on the 11th of November 2022. On the same date, Schema Alfa issued a press release[43], announcing to have acquired the 54,249% of Atlantia's shares. Considering also the participation owned by Sintonia, the whole holding of the bidder was equal to the 87,35% of the share capital, thus below the 90% threshold set as condition for the efficacy of the tender offer. However, in the same press release Schema Alfa declared the waiver to such condition and the will to extend the bid adhesion period to the 25th of November.

On the 28th of November, Schema Alfa issued a new press release[44], announcing to have acquired an overall participation of 95,933% in Atlantia's share capital, and confirming the will to exercise the squeeze out and delist the company. Consequently, according to Article 2.5.1 of the Market Regulation, Borsa Italiana had to declare the definitive delisting of Atlantia, which became effective on the 9th of December 2022.

3.4.2 Merger with HoldCo and BidCo

After the delisting, on the 16th of January 2023, Atlantia's general meeting was called to decide on the new governance of the company. Among other issues, the two shareholders, namely HoldCo and BidCo, approved the issuance of a loan in favour of HoldCo, which

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reduced, as they indeed were, because of the exercise of call options by third parties. As a result, Fondazione CRT's overall participation in Atlantia was equal to the 4,39% of the share capital.
[42] Schemaquarantatre S.p.A., Press release, 22nd of April 2022.
[43] Schema Alfa S.p.A., Press release, 11th of November 2022.
[44] Schema Alfa S.p.A., Press release, 28th of November 2022.

enabled HoldCo to repay the debt used to finance BidCo's takeover bid. According to Atlantia, the above-mentioned loan had to be paid through the incorporation of HoldCo and BidCo in Atlantia.

The incorporation project was approved by Atlantia's board of directors on the 15th of February 2023 and was later approved by the extraordinary general meeting. As a consequence of the merger, (i) the shareholders of HoldCo became shareholders of Atlantia, according to the same proportion of shares held in HoldCo, and (ii) Atlantia adopted a new bylaw.

As it is evident from the above, we may conclude that Atlantia's delisting was performed by a transaction which resembles a leveraged buy-out. In fact, HoldCo formed a newco (BidCo) for the sole purpose of acquiring the target company. More importantly, the funds used to pay the loan for the takeover bid were provided by another loan issued by Atlantia. Later, the debt towards Atlantia was paid thanks to the merger. The main difference between the transaction at issue and the structure of a leveraged buy-out, which is depicted by Article 2501-*bis* of the Italian Civil Code[45], is that Atlantia's assets were used to repay the first loan before the merger, rather than subsequently.

3.4.3 Rationales

First of all, it shall be noticed that, on the 7th of April 2022, many newspapers reported the news that Florentino Perez, CEO of the Spanish group Actividades de Construcción y Servicios (hereafter, Acs), entered into an agreement with two major international investment funds, namely Global Infrastructure Partners and Brookfield Asset Management, in order to acquire a controlling stake in Atlantia by promoting a takeover bid.

In this light, it is not hard to believe that the Benetton family's partnership with Blackstone was devised in order to counteract Acs' takeover bid and maintain the control on Atlantia. Moreover, the will to delist the company may be the child of the intention to avoid any future assault on the controlling stake.

[45] According to Article 2501-*bis* of the Italian Civil Code, a leveraged buy-out is when, in the context of a merger between two companies, the former incurs a debt to acquire the control on the latter and, after the two companies merge, the assets of the latter are used as a guarantee for the debt or as a source to pay it. For further details, please see Paragraph 1.2.6.

Indeed, on the 14th of April, the President of Edizione, Alessandro Benetton, declared in a press release that the choice to launch a tender offer aimed at delisting Atlantia was driven also by the will to preserve the integrity and the Italian identity of the company. These words may be read as if the takeover bid promoted by Edizione intended to counteract the other possible takeover bid of Florentino Perez: on the one hand, Edizione's bid was aimed at preserving the Italian ownership of Atlantia; on the other hand, it avoided a break up of Atlantia's group, as it was planned by Acs.

Secondly, the cost of compliance of being listed also played a pivotal role in the delisting decision. In particular, we suggest that in Atlantia's case one of the major drivers of the PtP transaction was the opportunity cost of staying public. The delisting serves the purpose of making the company's governance more flexible, in order to ease investments and develop the business plan. Indeed, as it was pointed out in the takeover bid document, the status of private company reduces information duties, simplifies the decision-making process, and makes it possible to access long-term sources of capital.

Finally, another factor that may have contributed to the delisting decision is related to the incentive realignment hypothesis[46]. According to this theory, a GPT may have the objective to realign the interests of managers and shareholders by leading to a restructuring of the board.

As a matter of fact, after the delisting news, Atlantia and its CEO Carlo Bertazzo agreed to terminate his contract with the company at the end of the financial year 2022. Such decision shall be examined with reference to the new ownership structure. Indeed, the agreement between Edizione, Blackstone and Fondazione CRT implied a partial, but significant, renovation of Atlantia's shareholder base. It is possible that one of the main implications of such renovation resulted in the need to restructure the board and to appoint a new CEO. In this light, the new management of the company would be an expression of the new majority group, even if this partially coincided with the majority shareholder pre-delisting (Edizione).

[46] Please see also Paragraph 2.2.1

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